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The aim of the Mediterranean Human Rights Review is to delineate the nexus between the development of human rights and their evolving scenarios of application; sometimes exalting and sometimes compromising them in an overarching Mediterranean context in which the only certainty is represented by cultural diversity and by the ongoing interaction between ancient people and ethnicities. The Mediterranean Human Rights Review is an interdisciplinary platform, which draws on a broad academic landscape in order to foreground the human rights dimensions of national, transnational and supranational processes.

The Mediterranean Human Rights Review should appeal to all those who have an academic or practical interest in the development, promotion and enforcement of human rights in the Mediterranean region.

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## Contents

<b>Foreword</b>	<b>1</b>
Professor Kevin Aquilina	
<b>Editorial</b>	<b>2</b>
Ivan Mifsud & David Zammit	
<b>Articles</b>	<b>4</b>
<b>‘Nothing About Us Without Us’: Disabled People Determining their Human Rights through the UNCRPD</b>	<b>4</b>
Anne-Marie Callus & Amy Camilleri-Zahra	
<b>The Promotion of a Human Rights Culture in Malta through Adequate Implementation of Judgments of the European Court Of Human Rights</b>	<b>20</b>
Joseph Grech & Carl Grech	
<b>Lack of “Human Rights Culture” and Weakness of Institutional Protection of Human Rights in the South Caucasus</b>	<b>37</b>
Tamar Zurabishvili & Tinatin Zurabishvili	
<b>Creating National Human Rights Institution in Lithuania: Theoretical and Practical Lessons</b>	<b>47</b>
Aida Kišūnaitė	
<b>A Comparative Study of Existing Human Rights Bodies: an Examination of the South African, French, Scottish and English Bodies for Equality and Human Rights</b>	<b>61</b>
Kathleen Vella	
<b>Protecting and Promoting Human Rights in Italy: What has become of the Proposal of a National and Independent Commission for Human Rights?</b>	<b>75</b>
Isolde Quadranti	
<b>National Human Rights Institutions in the EU: Spanish and Portuguese Experiences</b>	<b>83</b>
Sofia Oliveira Pais	
<b>Promoting the Integration of Third-Country Nationals through the Labour Market: Combating Discrimination in Employment: the Case of Third-Country Nationals in Malta</b>	<b>98</b>
Robert Suban and Dr David E. Zammit	
<b>The Need for Stronger Awareness of Housing Rights in Malta</b>	<b>118</b>
Kurt Xerri	
<b>Reflections on Freedom of Religion and Conscience – Article 9 of the European Convention on Human Rights</b>	<b>128</b>
Vincent A. De Gaetano	
<b>The Legal Framework for the Protection of Minors under Spanish State Legislation</b>	<b>142</b>
Lydia Noriega Rodríguez	

<b>Towards a Robust Human Rights &amp; Equality Framework: Scoping Consultation</b> Evelyn Borg Costanzi	<b>159</b>
<b>Note to Contributors</b>	<b>179</b>
<b>Mediterranean Human Rights Review Style Sheet</b>	<b>179</b>

# Initial Issue of the Mediterranean Human Rights Review

Kevin Aquilina

The Faculty of Laws at the University of Malta has been publishing its own journal since 1996. It was in 2014 that we issued the last edition of the *Mediterranean Journal of Human Rights*. David E. Zammit, Head of Department of Civil Law, had served as its general editor throughout the period 1996 to 2014. This latter journal was published in print format. Now that we have discontinued its publication, the Faculty Board of Laws has decided to revamp its Faculty journal and publish instead a *Mediterranean Human Rights Review*. We still thought that the focus of the Faculty's journal should continue to remain Human Rights in the Mediterranean, though we are still receptive to contributions on human rights from other regions of the world as we aim to place human rights within a wider comparative context. With an open access electronic journal it is hoped to avoid the pitfalls of the previous journal – lack of visibility by the international community and a lack of foreign contributions. Naturally an online journal contributes to cutting down on costs and making the Review readily available for inspection and downloading by the whole international academic community with a keen interest in the evolution of human rights law in the Mediterranean region.

This first volume is as mixed as it can be, both as to the nature of the subject matters discussed as well as to the diversity of authors contributing their knowledge to posterity. As to the latter, the Review takes pride in having a sitting Judge of the European Court of Human Rights reflecting of Article 9 of the European Convention on Human Rights as well as, from a comparative perspective, writers penning articles on human rights in the South Caucasus (Tamar Zurabishvili and Tinatin Zurabishvili), Lithuania (Aida Kišūnaitė), Italy (Isolde Quadranti), Spain and Portugal (Sofia Oliveira Pais), and South Africa, France, Scotland and England (Kathleen Vella). Maltese authors are writing both on human rights in Malta (Evelyn Borg Costanzi), within Europe (Joseph Grech and Carl Grech) and on the international plane (Anne-Marie Callus and Amy Camilleri-Zahra). The topics range from domestic law, European Union Law, the European Convention on Human Rights and the United Nations Convention on the Rights of Persons with Disability. Moreover, the papers in this collection analyse human rights both from the point of view of the substantive rights as well as from the angle of their concrete and effective implementation in practice.

To publish such a Review is no mean feat. I thus would like to thank the Human Rights Programme at the Faculty of Laws for all the work involved in the establishment of the *Mediterranean Human Rights Review* and the Review's Editorial Board for having made this dream come through during the Review's inaugural launch on 10<sup>th</sup> December 2019. Sincere thanks are due to David E. Zammit, Head of Department of Civil Law, and Ivan Mifsud, Head of Department of Public Law who have co-authored the first issue of the Review. I cannot but not thank as well as the contributors to this inception edition who have made it possible for the Faculty of Laws to launch it for the benefit of academics and students desirous to research and study Human Rights Law.

Professor Kevin Aquilina  
Head of Department, Media, Communications and Technology Law  
University of Malta  
10<sup>th</sup> December 2019

# Editorial

Ivan Mifsud & David Zammit

For a long time there was a tendency within Maltese legal circles to regard the ratification by Malta of the European Convention of Human Rights, subsequently followed up by the granting of access to the Strasbourg Court to ordinary individuals in Malta, as representing the ultimate panacea for human rights protection. It was thought that human rights had been placed on extremely solid foundations, given the comprehensive coverage afforded by the Convention, particularly when read together with the Maltese Constitution and also when keeping in mind the eagle eyed scrutiny with which cases of potential human rights breaches would be scrutinised by a range of legal professionals with a view to opening and winning a case in Strasbourg.

In human rights, as in other fields of law, time does not stand still. The conference, the proceedings of which constitute the bulk of this first issue of the *Mediterranean Human Rights Review*, was based upon the insight that reliance upon supra-national protective systems is not *per se* sufficient to ensure an adequate and comprehensive protection of Human Rights. This is particularly the case in Malta, where a dualist understanding of the impact of International treaties upon domestic legislation, coupled with a Mixed legal system which combines linguistic/legal hybridity, an eclectic understanding of the sources of law and a rather compartmentalised understanding of the relationship between different legal sectors tends to complicate the process of accessing a human rights remedy. The complication can be readily understood if one keeps in mind that as a rule access to the (exceptional) human rights remedy – which in turn is understood mainly through a Common law lens given the British colonial origins of Maltese Public law- is only granted internally once proof is brought that no ordinary Private law remedy (under a Civil Code based on the Code Napoleon system) was available to the victim. When one throws into the mix the rule by which the Strasbourg Court proceeds, that it will not grant access to the Court if it is shown that an effective remedy exists under the domestic law of the State in question, it becomes evident that it remains important to examine the institutional structures which exist at sub-National and National levels and which aim to protect Human Rights within the Nation-State system itself.

Exploring the national systems for protecting human rights means keeping in mind not only the ever expanding international system for protecting and defining human rights, but also the increasingly diverse, globalised and multifaceted societies which we inhabit nowadays. For all the variety, for all the needs and requirements, we possess one common factor from cradle to grave: our Humanity.

Humanity brings with it an obligation which we all share, this being that we recognise that all of us are ultimately striving not only to exist, but to actually live and achieve, not least, personal fulfilment. This is where respect for Fundamental Human Rights for one and all come in. We are not talking mere tolerance, concessions to the ‘underprivileged’, creating the odd job for the disabled for example, but empowerment of such groups as co-authors Amy Camilleri Zahra and Ann Marie Callus advocate in their contribution to this Review. It could be disability, or poverty, or sexual orientation, or age, or religion, to name but a few, the vast array of vulnerable groups are endless; more sobering is the fact that sooner or later practically all of us join one or more of these groups, not least because if we are blessed enough to wake up every morning without fail and earn a comfortable living in a stable peaceful country, we find ourselves through the unstoppable passage of time among the senior citizens, themselves a fragile group who may feel left behind by society, unable to keep up with the fast pace, overwhelmed by technological advances and at risk of poverty as their pensions are challenged by inflation.

The solution is to create and sustain a human rights culture, among other things through awareness raising. At the forefront of awareness raising, one finds National Human Rights Institutions. In this Review, we learn from Dr Kathleen Vella and Aida Kisunaite that it is not enough to merely have an NHRI in one's country, but that these must be properly set up in accordance with the now firmly established Paris Principles, and given the tools with which to operate, if they are to function effectively and contribute towards the creation and sustaining of a human rights culture. Sofia Oliveria Pais gives the Ombudsmen in Spain and Portugal a vote of confidence, convinced that they are in a good position to raise awareness about human rights issues and respect for the rule of law, while co-authors Tamar Zurabishvili and Tinatin Zurabishvili analyse what is wrong in South Caucasus and Isolde Quadrante queries what is going on in Italy and why the long promised NHRIs remained unfulfilled promises. Italy is not alone in this regard: Dr Evelyn Borg Costanzi draws our attention not only to the absence of an NHRI locally, but also to a number of other shortcomings.

Judge Vincent De Gaetano explores the limits to freedom of conscience and religion in the Court of which he forms part, while Drs Joseph and Carl Grech very aptly point out that the NHRIs do not enjoy a monopoly in the raising of human rights awareness and in the fostering of a human rights culture. Apt observations indeed, making this first issue of the *Mediterranean Human Rights Review* a valid contribution in its own right, to the process of awareness raising, which a human rights culture requires.

Ivan Mifsud & David Zammit  
University of Malta  
10<sup>th</sup> December 2019

# ‘NOTHING ABOUT US WITHOUT US’: DISABLED PEOPLE DETERMINING THEIR HUMAN RIGHTS THROUGH THE UNCRPD

ANNE-MARIE CALLUS\* AND AMY CAMILLERI-ZAHRA\*\*

## Abstract

The human rights and fundamental freedoms of disabled persons are set out in the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). This paper firstly focuses on the importance of the involvement of disabled people at all levels of decision-making. The second part of the paper identifies those aspects of the UNCRPD that reflect the direct involvement of disabled people. Finally, it considers how human rights bodies can best build on this specific aspect of the UNCRPD in order to realize the potential of the Convention as a determining factor in affirming disabled people rights in an effective and meaningful manner.

## 1. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)<sup>1</sup> was adopted in 2006, opened for signatures in 2007 and came into force in 2008. The UNCRPD has to date been ratified by 173 countries. This Convention covers a wide range of areas and aspects of life that impinge on the rights of disabled persons, including the right to life through to the right to education, employment, health and rehabilitation, an adequate standard of living and social protection, family life, independent living, and participation in cultural and in political and public life. These are areas in which disabled persons have a right to equal opportunities and non-discrimination on the ground of disability. Crucially, the UNCRPD does not only determine the rights that disabled persons have in these areas. It also puts a lot of weight on the importance of disabled people’s autonomy, choice and control over their own lives, and participation in decision-making processes that affect them. It is their perspectives which matter most and it is they who must ultimately decide whether the implementation of the UNCRPD is translating into tangible positive changes in their lives.

In this paper we argue that any human rights body involved in the implementation of the UNCRPD needs to maintain close links with disabled people and to actively involve them and give primary importance to their perspective in its own work. We first focus on one of the many vitally important outcomes of the disabled people’s movement: the insistence on the involvement of disabled people at all levels of decision making, embodied in the slogan ‘Nothing about us

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<sup>1</sup> United Nations (2006) United Nations Convention on the Rights of Persons with Disabilities. Retrieved from: <http://www.un.org/disabilities/default.asp?id=150>



without us'. We also consider how this slogan informed the process by which the UNCRPD was formulated. Next, we identify those aspects of the UNCRPD that reflect this characteristic of the disabled people's movement, analyzing the relevant parts of the Preamble as well as specific articles and sub-articles. Finally, we consider how human rights bodies can best build on this specific aspect of the UNCRPD in order to realize the potential of the Convention as a determining factor in affirming disabled people rights in an effective and meaningful manner, which entails practical arrangements that ensure that impairment-related requirements are truly catered for.

## 2. 'Nothing About Us Without Us': The journey from powerlessness to control

Over the past five or six decades, disabled people and their allies have organized themselves into a political and social force to challenge the oppression and exclusion experienced by disabled people<sup>2</sup>. The disability rights movement is very often viewed as the last civil rights movement in a long series of liberation movements, namely the workers' movement, the Black-American civil rights movement and the women's movement. These movements all engaged in the long historical struggle for human and civil rights<sup>3</sup>. According to Driedger even in places where some groups of disabled people are considered to have organized themselves relatively early, such as Sweden, other groups mentioned above had already organized themselves before them. Ed Roberts, one of the leading pioneers of the international Disability Rights Movement claims that a number of lessons were learnt from previous movements particularly from the Black-Americans civil rights movement: "If we have learned one thing from the civil rights movement in the U.S., it's that when others speak for you, you lose"<sup>4</sup>. Furthermore, it is in this sense that slogans such as "Our bodies, ourselves" and "Power to the people" are often recognized as precedents to the slogan used by disabled people, "Nothing about us without us"<sup>5</sup>.

Disability has traditionally been widely viewed as a failing on the part of the individual, as a personal tragedy and as a burden on the rest of society. In Western industrialized societies, for a long time, disability has mostly been described in terms of medical or biological deficits, with a focus on abnormality, disorders and conditions and how these were the cause of functional limitation and 'disability'<sup>6</sup>. According to French and Swain<sup>7</sup>, these views of disability are based on the general assumption that the difficulties experienced by disabled people are a direct result of their physical, sensory or intellectual impairment. Such descriptions of disability only lead to the interpretation of disabled people as individuals who are helpless, dependent, and incapable of making their own decisions<sup>8</sup>. In addition, the opinions of disabled people on the subject of disability are often not awarded with the same credibility and validity as the opinions of 'experts',

<sup>2</sup> J. Campbell, & M. Oliver (1996) *Disability Politics: Understanding Our Past Changing Our Future*. London: Routledge.

J. Charlton (1998) *Nothing About Us Without Us: Disability Oppression and Empowerment*. Berkeley: University of California Press.

<sup>3</sup> D. Driedger (1989) *The Last Civil Rights Movement: Disabled People's International*. London: C. Hurst and Co. Limited.

<sup>4</sup> Ibid.

<sup>5</sup> J. Charlton (1998) *Nothing About Us Without Us: Disability Oppression and Empowerment*. Berkeley: University of California Press.

J. Vaughn Switzer (2003). *Disabled Rights: American Disability Policy and the Fight for Equality*. Washington, D.C.: Georgetown University Press.

<sup>6</sup> C. Barnes, Colin, & G. Mercer (2010) *Exploring Disability* (2<sup>nd</sup> ed.). Cambridge: Polity Press.

<sup>7</sup> S. French, & J. Swain (2008) *Understanding Disability: A Guide for Health Professionals*. Edinburgh: Elsevier.

<sup>8</sup> A. M. Duane (2014) "Volunteering as Tribute: Disability, Globalization and The Hunger Games," in M. Gill & C. J. Schlund-Vials, eds. *Disability, Human Rights and the Limits of Humanitarianism*. Surrey: Ashgate Publishing Limited.

A. Shearer (1981) *Disability - Whose Handicap?*. Blackwell: Basil.

particularly those of medical and health and social care professionals<sup>9</sup>. As a result of these views and assumptions, disabled people are often considered to be one of the most oppressed groups in society with non-disabled people and organisations, including professionals and charities, as being the cause of this oppression<sup>10</sup>.

As a result of the oppression experienced by disabled people in all aspects of their lives, a disability rights movement was formed. The movement stemmed from disabled people's realization that their needs were not being met and that they did not have access to the same rights as the rest of society. Disabled people also realized that societies were built without their input and active participation<sup>11</sup>. In addition, disabled people came to realize that civil rights, rather than charity or pity, is the answer to solving their problems. It was in the 1980s that disabled people all over the world took up the fight for equality and participation on an equal basis with others. A result of this realization was one of the biggest gatherings, of over four hundred disabled people, from fifty-three countries, in Singapore, in 1981 to form what is now known as Disabled People's International (DPI)<sup>12</sup>. According to Driedger<sup>13</sup>, disabled people gathered for one of the largest meetings with the aim "to proclaim they would no longer be silent" (p. 48). The formation of DPI came after a landmark event, the walking out of disabled people from the Rehabilitation International (RI) conference in Winnipeg, Canada in 1980. This was a historical move which saw disabled people standing up to and challenging the dominance of health professionals who till then tended to control the disability agenda<sup>14</sup>.

DPI's mandate is to be the direct voice of disabled people across the world. It is considered to be the first international organization which successfully brings together people of different impairments with the aim of creating a united voice. It firmly believes in and was set up on the premise that disabled people are to be included in all aspects of society and to participate with the same rights as everyone else. DPI is a holder of the belief that there is strength in numbers and that speaking unitedly disabled people's voices can have a greater impact than when speaking on their own<sup>15</sup>. DPI is an activist-oriented organisation and has since lobbied both governments and the United Nations and has more recently been largely instrumental in the drafting of the UNCRPD. However, the establishment of DPI has also led to other previous important events and initiatives which have certainly paved the way for the development of the UNCRPD, namely: the declaration by the UN of 1981 as the International Year of the Disabled Persons (IYPD); the World Programme of Action Concerning Disabled Persons; the proclamation by the UN of the Decade of Disabled Persons (1982-1992) which resulted in the drawing up of the Standard Rules on Equalisation of Opportunities for People with Disabilities; and the creation of a large number of disabled persons-led organisations<sup>16</sup>.

<sup>9</sup> S. Brisenden (1986) "Independent Living and the Medical Model of Disability," in T. Shakespeare, ed. *The Disability Studies Reader*. London: Continuum.

L. Swartz (2013) "Between Faith and Doubt: Training Members of Disabled People's Organisations in Southern Africa in Basic Research Skills," in J. Claassens, L. Swartz, & L. Hansen, eds. *Searching for Dignity: Conversations on Human Dignity, Theology and Disability*. California: SUN MeDIA.

<sup>10</sup> T. Shakespeare (2013) "The Social Model of Disability," in L. J. Davis, ed. *The Disability Studies Reader*. New York: Routledge.

<sup>11</sup> D. Driedger (1989) *The Last Civil Rights Movement: Disabled People's International*. London: C. Hurst and Co. Limited.

<sup>12</sup> Disabled People's International (DPI) (1982) *Disabled Peoples' International. Proceedings of the First World Congress, Singapore*. Singapore: DPI.

<sup>13</sup> D. Driedger (1989) *The Last Civil Rights Movement: Disabled People's International*. London: C. Hurst and Co. Limited.

<sup>14</sup> G. Mji, S. Gcaza, N. Melling-Williams, & M. MacLachlan (2009) "Networking in Disability for Development: Introducing the African Network for Evidence-to-Action on Disability (AfriNEAD)," in M. MacLachlan & L. Swartz, eds. *Disability and International Development: Toward Inclusive Global Health*. London: Springer.

<sup>15</sup> D. Driedger (1989) *The Last Civil Rights Movement: Disabled People's International*. London: C. Hurst and Co. Limited.

<sup>16</sup> C. Howell, S. Chalklen, & T. Alberts (2006) "A History of Disability Rights in South Africa," in B. Watermeyer, L.

### 3. The Birth of the Social Model

One of the most significant outcomes of the disability rights movement is the social model of disability. The model is known to have been primarily developed in Britain by the Union of the Physically Impaired Against Segregation (UPIAS) who in the 1970s published the paper titled ‘Fundamental Principles of Disability’<sup>17</sup>. The social model of disability was later also adopted by Disabled People’s International (DPI) during the World Congress held in Singapore in 1981<sup>18</sup>. The model has been critically important for the lives of disabled people and has been extremely influential both in Britain and internationally<sup>19</sup>. The social model of disability makes a very clear distinction between the definitions of impairment and disability. According to the social model of disability, impairment is taken to mean ‘the functional limitation within the individual caused by physical, mental or sensory impairment’<sup>20</sup>, whilst disability is taken to mean ‘the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical and social barriers’<sup>21</sup>. The development of the social model of disability shows the first signs of disabled people taking control of their own lives by putting forward a model of disability which is contrary to the medical model. It is a model which places responsibility on society, and not on the disabled individual, to remove the material obstacles and cultural barriers encountered by disabled people which prevent them from exercising their rights and being fully included in society<sup>22</sup>. Barnes and Mercer<sup>23</sup> assert that the social model of disability creates a break in the traditional causal link between impairment and disability. More importantly, the social model of disability has acted as a spur for political and social change and has inspired many new laws and policies, including the UNCRPD<sup>24</sup>.

Following more than two decades in the 1980s and 1990s of networking and relentless work by disabled people, and with the development of the social model of disability and the work by the disability rights movement, disabled people were able to tackle the years of discrimination and oppression they have experienced through international legislation. The fruit of this work is the development of the United Nations Convention on the Rights of Persons with Disabilities, which as of 2008 entered into international law<sup>25</sup>. The origin of the UNCRPD saw Mexico, in December 2001, propose in the UN’s General Assembly the establishment of an Ad Hoc Committee which would consider proposals for an international convention aimed at promoting and protecting the rights of disabled people. Two years later, in August 2003, a working group was set up whose task it was to draft a text. Three years later, in December 2006, the Ad Hoc Committee adopted the final draft of the Convention and the Optional Protocol (OP), with the UNCRPD and OP opening for signatures in March 2007<sup>26</sup>. Signing of the UNCRPD means that State Parties will refrain, in good faith, from acts that would defeat the objective and purpose of the Convention. Ratification means that State Parties are bound by international law to uphold and implement the 50 article of

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Swartz, T. Lorenzo, & M. Priestley, eds. *Disability and Social Change – A South African Agenda*. Cape Town: HSRC.

<sup>17</sup> M. Oliver (1996) *Understanding Disability: From Theory to Practice*. Basingstoke: Macmillan.

<sup>18</sup> C. Barnes, & G. Mercer (2010) *Exploring Disability* (2<sup>nd</sup> ed.). Cambridge: Polity Press.

<sup>19</sup> R. Traustadottir (2009) “Disability Studies, The Social Model and Legal Developments,” in O. M. Arnardottir & G. Quinn, eds. *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*. Leiden: Martinus Nijhoff Publishers.

<sup>20</sup> Disabled People’s International (DPI) (1982) *Disabled Peoples’ International. Proceedings of the First World Congress, Singapore*. Singapore: DPI.

<sup>21</sup> Ibid.

<sup>22</sup> A. Kanter (2013) “The Relationship Between Disability Studies and Law,” in A. S. Kanter & B. A. Ferri, eds. *Rights Educational Wrongs: Disability Studies in Education and Law*. New York: Syracuse University Press.

<sup>23</sup> C. Barnes & G. Mercer (2010) *Exploring Disability* (2<sup>nd</sup> ed.). Cambridge: Polity Press.

<sup>24</sup> J. Harris, & A. Roulstone (2011) *Disability, Policy and Professional Practice*. London: Sage Publications Limited.

<sup>25</sup> C. Howell, S. Chalklen, & T. Alberts (2006) “A History of Disability Rights in South Africa,” in B. Watermeyer, L. Swartz, T. Lorenzo, & M. Priestley, eds. *Disability and Social Change – A South African Agenda*. Cape Town: HSRC.

<sup>26</sup> United Nations (n.d.) *Timeline of Events*. Retrieved from: <http://www.un.org/disabilities/default.asp?id=153>

the UNCRPD<sup>27</sup>. According to Kanter<sup>28</sup>, “ratifications represent a new worldwide recognition of the rights of persons with disabilities that did not exist prior to the UNCRPD”. The UNCRPD aims to remove long-standing barriers and obstacles between non-disabled people and disabled people. In addition, the implementation of the UNCRPD will result in the formation of domestic laws which would not only offer equal opportunities to disabled people but also to other marginalized groups<sup>29</sup>.

One of the most significant aspects of the UNCRPD is that for the first time the people who were the target group of the Convention, that is disabled people, were directly involved in its drafting. Under the slogan ‘Nothing about us without us’, disabled people through their respective disabled people’s organisations, participated actively both in the drafting and in the negotiations on the text of the UNCRPD. According to de Beco and Hoefmans<sup>30</sup>, the adoption of this particular slogan during the negotiations of the UNCRPD does not only symbolize the participation and influence of disabled people at all the stages of drafting of the UNUNCRPD, including in the Ad Hoc Committee, but also represents one of the most fundamental principles incorporated in the Convention, that is, disabled people’s participation in decision making. In addition, the adoption of this slogan also symbolizes another principle which disabled people had been fighting for since their walking out of the Rehabilitation International conference in 1980 and the subsequent formation of DPI, that of control over the disability agenda and over their own lives. The slogan ‘Nothing about us without us’, makes very explicit the fear held by disabled people that unless they are involved in the decision-making processes their needs will never be truly met<sup>31</sup>.

The direct involvement of disabled people did not lie solely at the drafting stage but a number of articles of the UNCRPD also make reference to the obligation of State Parties to involve civil society and disabled people’s organizations (DPOs) in particular, in the implementation of the UNCRPD. In fact, influenced by the slogan ‘Nothing about us, without us’, the UNCRPD makes a particular emphasis on the involvement of disabled people’s organizations (DPOs)<sup>32</sup>. Unlike any other disability non-governmental organization, DPOs are organisations which are led by disabled people and are thus distinct from those organizations which are for disabled people and run by mainly non-disabled people. In addition, as a rule, DPOs aim to represent and support the needs that their disabled members themselves would have identified and defined<sup>33</sup>. ‘DPOs are to disability rights what NGOs are to human rights in general’<sup>34</sup>.

Furthermore, a particular issue which disabled people have been very vocal about since the formation of the disability rights movement and which is also enshrined in the UNCRPD is the definition of independence as understood by disabled people. The predominant meaning of independence by the general society, including professionals, is the ability to do things for oneself

<sup>27</sup> C. Howell, S. Chalklen, & T. Alberts (2006) “A History of Disability Rights in South Africa,” in B. Watermeyer, L. Swartz, T. Lorenzo, & M. Priestley, eds. *Disability and Social Change – A South African Agenda*. Cape Town: HSRC.

<sup>28</sup> A. Kanter (2013) “The Relationship Between Disability Studies and Law,” in A. S. Kanter & B. A. Ferri, eds. *Rights Educational Wrongs: Disability Studies in Education and Law*. New York: Syracuse University Press.

<sup>29</sup> Ibid.

<sup>30</sup> G. de Beco, & A. Hoefmans (2013) “National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities,” in G. De Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities*. Leiden: Martinus Nijhoff Publishers.

<sup>31</sup> Disability-Uganda Webmasters (2012, January 22) *Disability Rights in Uganda – Research blog* [Blogpost]. Retrieved from <http://disability-uganda.blogspot.com.mt/2012/01/nothing-about-us-without-us.html>

<sup>32</sup> G. de Beco, & A. Hoefmans (2013) “National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities,” in G. De Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities*. Leiden: Martinus Nijhoff Publishers.

<sup>33</sup> R. Mallett, & K. Runswick-Cole (2014) *Approaching Disability: Critical Issues Inand Perspectives*. London: Routledge.

<sup>34</sup> G. de Beco, & A. Hoefmans (2013) “National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities,” in G. De Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities*. Leiden: Martinus Nijhoff Publishers.

without anyone's help. However, this meaning of independence has been greatly challenged by disabled people. According to disabled people, independence is viewed in terms of 'self-determination, control and managing and organizing any assistance' that may be required<sup>35</sup>. Ryan and Holman<sup>36</sup> define independence as understood by disabled people as, 'not necessarily... what you can do for yourself, but rather what others can do for you, in ways that you want it done'. In the broadest sense, being independent does not only imply that disabled people have the right to make 'free and conscious choices' concerning their own lives, but it also means having the right to take an active part in society<sup>37</sup>. Indeed, the concept of independence is particularly enshrined in Article 19 of the UNCRPD whereby it is underlined that State Parties are to promote the empowerment of disabled people and to provide services which allow disabled people to exercise their right of independence<sup>38</sup>.

In the UNCRPD, it is not only Article 19 that asserts the right of disabled people to direct participation in decision-making processes that affect them. We therefore now turn our attention to the text of the Convention, highlighting how it promotes disabled people's autonomy and reinforces the demands encapsulated in the slogan 'Nothing about us without us'.

#### 4. Disabled People's Right to Participation in Decision-Making

As a human rights instrument, the UNCRPD is based, among other things, on the Universal Declaration of Human Rights and the International Covenants on Human Rights, which are mentioned in the Preamble paragraph (b). Significantly, these treaties link human rights clearly with fundamental freedoms which are indivisible, interdependent and interrelated, and which belong to all disabled people (Preamble paragraph (c)). The promotion and protection of these rights and freedoms for disabled people is stated as the General Purpose of the Convention (Article 1).

The safeguarding of disabled people's rights is therefore not simply about ensuring that they have access to education, employment, community-life, information, communication, and goods, services and facilities. It is also about ensuring that this access is provided in a way that respects disabled people's right to choose and make decisions about their own lives. The Preamble of the UNCRPD states this clearly:

*Recognizing the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices (UNCRPD Preamble (n) our emphasis)*

The Preamble also refers to the diversity of disabled people (paragraph j). This is directly related to a respect for disabled people's identity which is asserted in Article 30 (Participation in cultural life, recreation, leisure and sport).

Given the diversity of disabled people, it follows that for their human rights and fundamental freedoms to be respected, their individual needs have to be taken into account. And it is disabled people themselves, with support where necessary, who should determine what their own needs are.

<sup>35</sup> S. French, & J. Swain (2012) *Working with Disabled People in Policy and Practice: A Social Model*. Hampshire: Palgrave Macmillan.

<sup>36</sup> T. Ryan, & A. Holman (1998) *Able and Willing: Supporting People with Learning Difficulties to Use Direct Payments*. London: Values into Action.

<sup>37</sup> R. Forastiero (2014) "The Charter of Fundamental Rights and the Protection of Vulnerable Groups: Children, Elderly and Persons with Disabilities," in G. Palmisano, ed. *Making the Charter of Fundamental Rights a Living Instrument*. Leiden: Brill Nijhoff.

<sup>38</sup> *Ibid.*

This emerges clearly from the first of the General Principles of the UNCRPD (Article 3):

*(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons (our emphasis)*

This respect is in turn entrenched in the UNCRPD in Article 12 (Equal recognition before the law), which asserts that all disabled people have legal capacity and all have the right to be recognized as persons before the law. As the Committee for the Rights of Persons with Disabilities (REF) points out, legal and mental capacity should not be conflated. Therefore, the response to limitations in mental capacity should not be the removal of their legal capacity through substitute decision-making legislation, but the provision of support mechanisms and the enactment of supported decision-making legislation.

The exercise of legal capacity, with or without support, by disabled people takes place in everyday decisions as well as in potentially life-changing ones. The UNCRPD recognizes disabled people's rights to choose in specific areas. Article 19 (Living independently and being included in the community) is not simply about disabled people being physically in the community with non-disabled people and engaging in the same activities as them. It is also about the disabled person's right to choose what to do in the community, where to live and with whom. Even when it comes to the facilitation of personal mobility, Article 20 (Personal mobility) stipulates that this needs to happen 'in the manner and the time of their [disabled persons'] choice'.

Furthermore, the UNCRPD asserts disabled people's right to 'respect for his or her physical and mental integrity' (Article 17 Protecting the integrity of the person), their right not to be deprived of their liberty on the basis of their disability (Article 14 Liberty and security of the person) and the right to freedom of expression and opinion (Article 21 Freedom of expression and opinion, and access to information). Tied to the latter is the importance of access to information and the respect of different forms of communication.

The UNCRPD does not stop at asserting the right of disabled people to take decisions about their own lives, and the provision of opportunities and support for them to do so. It also places responsibilities on States Parties to involve disabled people in decision-making processes at a higher level too. There are three instances where this happens.

In the Preamble we find:

*Considering that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them, (UNCRPD Preamble (o) our emphasis)*

In Article 4 (General Obligations), States Parties are obliged to 'closely consult and actively involve persons with disabilities' in decisions related to the development and implementation of policies and legislation related to the UNCRPD itself (Article 4.3). Given that the UNCRPD covers all aspects of life, this effectively means that, once a country has ratified the UNCRPD, its government has to consult disabled people, including disabled children. This can be done through disabled people's organisations (DPOs). As seen earlier, DPOs have a crucial role to play within the disability movement which is distinct from that of non-governmental organisations (NGOs) which are run by non-disabled people. While DPOs may share aims, objectives and working methods with other NGOs, the fact that they are controlled by disabled people themselves make them more representative.

The obligation for States Parties to actively involve disabled people and their representative organisations is also found in Article 33 (National implementation and monitoring). Like most UN Conventions, this Article establishes a focal point for the UNCRPD in Subarticle 1. However,

unlike any other UN treaty to date, it also establishes an independent mechanism that is entrusted with the protection, promotion and monitoring of the implementation of the UNCRPD by States Parties in Subarticle 2. Additionally, both focal points and independent mechanisms must involve disabled people in their work. This requirement is specified in Article 33.3:

*Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.*

In the next section, we focus on some examples of how the requirements of these two sub-articles have been implemented in the EU.

## 5. Implementation of Article 33 in 3 EU Member States: Italy, United Kingdom and Spain

The European Union (EU) is the only “regional integration organization” which has signed and ratified the Convention. In addition, the Convention is the first Human Rights Treaty to which the EU is a party. To date, all EU Member States have signed the Convention. However, Finland, Ireland and the Netherlands have not yet ratified the Convention. Twenty- three EU Member States have also signed the Optional Protocol, with 21 EU Member States having also ratified it<sup>39</sup>.

Article 33.2 makes a direct reference to ‘the principles relating to the status and functioning of national institutions for protection and promotion of human rights’, known as the Paris Principles<sup>40</sup>. However, while these principles offered detailed guidance for national human rights institutions to maintain their autonomy, their implementation with regard to the requirements of Articles 33.2 and 33.3 is proving to be no straightforward matter. Even State Parties to the UNCRPD are still in the process of examining ways how to implement them. Concrete guidelines and examples are still lacking due to the unprecedented and innovative nature of the provision presented in this article<sup>41</sup>. For the purpose of this paper we are going to look at how Italy, the United Kingdom and Spain have embarked on this voyage towards making the necessary arrangements with the aim of bringing about change in the lives of persons with disability. These three countries were among the first EU member states to ratify the Convention and therefore presumably among those who have had the most time to record progress in the implementation of Article 33.

According to Ferri<sup>42</sup>, Italy signed the UNCRPD on 30<sup>th</sup> March 2007 and ratified it on 15<sup>th</sup> May 2009 through Law 18/2009. Italy commenced the implementation of Article 33 by designating the Directorate-General for Inclusion and the Directorate for Social Policies as focal point and coordination mechanism respectively. Like many other EU Member States, the focal point designated by Italy with the aim of implementing the Convention is within the internal structure of the Ministry of Labour and Social Policies. It is very probable that this was deemed the most appropriate focal point since it has traditionally been in charge of disability matters. In addition, in order to implement the provisions in Article 33.2 of the Convention, Italy set up the National

<sup>39</sup> Fundamental Rights Agency (FRA) (2015) *Implementing the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD): An Overview of Legal Reforms in EU Member States*. Vienna: European Union Agency for Fundamental Rights.

<sup>40</sup> Office of the High Commissioner for Human Rights (1993, December) *Principles Relating to the Status of National Institutions (The Paris Principles)*. Retrieved from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>

<sup>41</sup> G. de Beco (ed.) (2013) *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention*. Leiden: Martinus Nijhoff Publishers.

<sup>42</sup> D. Ferri (2013) “Implementation of Article 33 UNCRPD in Italy: Magna Pars est Profectus Velle Proficere,” in G. de Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention*. Leiden: Martinus Nijhoff Publishers.

Observatory on the Situation of Persons with Disabilities to act as independent mechanism to the Convention. The setting up of the Observatory was provided for in Article 3 of Law 18/2009. Ferri<sup>43</sup> notes that the Observatory started operating relatively quickly after its setting up, mainly due to the pressure placed by DPOs. It is important to point out that, notwithstanding the fact that the Observatory is newly set up, it is not compliant with the Paris Principles but is placed within the Ministry of Labour and Social Policies with financing and chairing of the Observatory both coming from the same Ministry. According to the Law 18/2009 the number of members forming the Observatory should not exceed 40 and must include equal numbers of men and women. Out of the 40 members making up the Observatory there are only fourteen representatives of organizations of persons with disabilities. According to Ferri<sup>44</sup>, in Italy there are a number of DPOs which are active both at national and local level. However, in relation to the provisions of Article 33.3, DPOs are not yet formally involved in the activities organized by the focal points. At the same time, it is worth noting that a number of representatives of DPOs sit on committees and on governmental bodies and thus still play a consultative role at a high level.

The United Kingdom also signed the UNCRPD on 30<sup>th</sup> March 2007. It ratified the Convention on 8<sup>th</sup> June 2009. The Office for Disability Issues (ODI) is the designated focal point and coordinating mechanism whilst the four equality and human rights commissions present in the UK are the designated independent mechanisms to the Convention. The ODI is within the internal structures of the Department for Work and Pensions (DWP) and its aim is to draft disability policies as well as to coordinate their implementation across different government departments. The ODI has taken the role of focal point formally but is also aware that there needs to be strong coordination from other government departments in order for the office to continue fulfilling this role responsibly. So far a considerable amount of work by the ODI has been directed towards the drafting of the State Report as required under Article 35 of the UNCRPD<sup>45</sup>. According to Murray and Johnson<sup>46</sup>, the decision to appoint the four commissions, that is, the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI), and the Scottish Human Rights Commission (SHRC) as independent mechanisms was taken with little discussion or consultation with civil society. Notwithstanding the fact that the EHRC has a strong history in relation to disability issues, Murray and Johnson<sup>47</sup> claim that recent restructuring as well as budgetary cuts to the organization will serve to undermine its existence. It is for this reason that Murray and Johnson insist that there should be greater awareness raising about the Convention by disabled people and their organizations. Furthermore, with regards to the provisions of Article 33.3, Murray and Johnson claim that there are concerns about the lack of leadership taken on by the equality and human rights commissions in involving and consulting with persons with disability on translating into actions the provisions in the Convention.

Like Italy and the United Kingdom, Spain was one of the first countries to sign the Convention and the Optional Protocol on 30<sup>th</sup> March 2007. Both instruments were also ratified in the same year on 3 December 2007, making Spain the first EU Member State to ratify the UNCRPD. In April 2008, the Convention was incorporated into Spain's domestic law, making the Convention stronger over other ordinary laws. The designated focal point of the UNCRPD in Spain is the Directorate-General on Policies to Support Disability within the Ministry of Health, Social Policy and Equality<sup>48</sup>.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> R. Murray, & K. Johnson (2013) "Implementation of Article 33 UNUNCRPD in the United Kingdom: The Need to Consolidate Civil Society Engagement," in G. de Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention*. Leiden: Martinus Nijhoff Publishers.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> F. Bariffi (2013) "Implementation of Article 33 UNCRPD in Spain: A Rather Erratic and Improvised Experience," in G. de Beco, ed. *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures*



Bariffi argues that the designated focal point might not have the adequate power to implement the Convention especially in relation to implementing decisions affecting other Ministries. In addition, Bariffi argues that the allocation of the focal point within the Ministry of Health is not a very good decision since it goes against the social model of disability which has clearly been the inspiration for the Convention. The role of the coordination mechanism has been entrusted to the National Disability Council (NDC), which is a collective inter-ministerial body with a consultative role and which is also within the Ministry of Health and Social Policy. With regards to the provisions in Article 33.2, the situation in Spain is known to have been problematic since it transpired that the role of independent mechanism was also entrusted to the NDC. As a result, the Ad Hoc Committee urged Spain to reconsider the appointment of a designated independent mechanism which is in line with the Paris Principles. Following this request, the Spanish government opted to designate the Spanish Committee of Representatives of Persons with Disabilities (CERMI) as the independent mechanism. This is considered to be a unique and positive decision since it recognizes the direct role of DPOs in the monitoring process. However, uncertainties regarding CERMI's independence and operational funding still prevail. As regards the provisions of Article 33.3, according to Bariffi, there is no record of the involvement of persons with disabilities in relation to the implementation of the Convention at governmental level. Whereas with regards to the NDC, which is the coordination mechanism, there seems to be a more active participation of persons with disabilities since the NDC is composed of 16 representatives of organizations of persons with disabilities with voting rights in the decision making process. In relation to the independent mechanism, compliance with Article 33.3 is covered since CERMI is in fact an umbrella organisation for DPOs.

## 6. Involving Disabled People in Article 33 in Practice

As can be seen from the experiences of Italy, Spain and the United Kingdom, involving disabled people and their representative organisations in the independent mechanism and in consultation processes is no easy task. Apart from the institutional and structural issues that are encountered, as seen above, this involvement also entails dealing with issues at the most practical levels. This is necessary in order to provide the reasonable accommodation demanded by the UNCRPD itself. In Article 2 (Definitions), the UNCRPD defines reasonable accommodation as follows:

*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*

Significantly, this Article also states that failure to provide reasonable accommodation is itself discriminatory. While our focus here is on the provision of reasonable accommodation by human rights bodies entrusted with the protecting, promotion and monitoring of the UNCRPD, the points raised are equally valid both for focal points and other entities entrusted with the actual implementation of the Convention and other organisations working in the field of human rights.

As seen above, disabling barriers are both cultural as well as material in nature. The provision of reasonable accommodation, aimed at removing material obstacles, means that practical arrangements need to be made to ensure accessibility. Article 9 (Accessibility) of the UNCRPD provides clear and detailed guidance as to the nature of accessibility. It means ensuring 'to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications' (Article 9.1). As seen below, these different aspects of accessibility are all relevant for the work of the independent mechanism.

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for the Implementation and Monitoring of the Convention. Leiden: Martinus Nijhoff Publishers.

Persons with disability are often spoken of as a group – this is in line with a rights-based approach that places the onus for change on society and not on the individual with disability. However, ensuring that each individual's rights are realized also means providing reasonable accommodation that attends to the requirements of individual persons with different physical or mental impairments. These requirements have implications for how and where meetings and other activities are held. Buildings must be accessible to all – both in terms of access to the buildings as well as circulation within the building and access to all facilities within it and access to all the information providing during the meeting. The Accessibility for All Standards (SM 3800: 2015)<sup>49</sup> are among the various documents that provide detailed guidance in this regard. The American Centre for Universal Design (2005) also provides useful guidance regarding physical access as well as in relation to different aspects of making meetings accessible, including ensuring access to communication and information for people with hearing impairment, with speech disabilities, those with visual impairments, as well as those who use augmentative and alternative means of communication. Issues regarding transport also need to be taken into consideration in the guidelines provided. Another area where accessibility is important is information and communication technology, including of course the Internet<sup>50</sup>.

Crucially, providing this type of access may mean making changes to the way that meetings are conducted. Just to give a few examples, sign language interpreting requires that speakers do not talk too fast and people using communication aids may need time to put their point across – time that has to be factored into the agenda of the meeting. Deaf persons and their interpreters need to sit facing each other, without the former being cut off from the rest of the meeting. A room which is well lit is very important for people with partial sight and those who lip-read, and for a person who is blind introductions are very important – they help the person orient themselves in the room. People who are on the autism spectrum need to be made to feel comfortable and secure. For wheelchair users, especially those who use power wheelchairs, there needs to be enough room to manoeuvre the wheelchair and to sit around a table. Other aspects of organization need to be factored in that are not typically taken into account. For example, providing information in different formats for those with print disabilities.

Furthermore, while the organisers of meetings or other activities usually simply inform the participants about the time and venue, in the case of some disabled people accessible transport may also need to be provided for them to be able to participate in the first place. This is especially the case for disabled people who do not drive and for whom the use of public transport is not possible. If transport is not provided for such disabled persons, they either have to incur considerable expense through the use of taxis, get someone (usually a family member) to take them to and from meetings, or stay away altogether. These various points may seem like minor, even trivial, details especially when spoken of in relation to the implementation and monitoring of a major international human rights treaty such as the UNCRPD. However, the micro- management of the different aspects of accessibility is extremely important and overlooking them can directly result in the disenfranchisement of certain disabled persons who are prevented from being involved not because of any lack of ability from their part, but because of a lack of accessibility.

One group of disabled persons for whom significantly different arrangements need to be made are people with intellectual disability. Organisations such as Allies in Self-Advocacy<sup>51</sup> and The Social Care Institute for Excellence<sup>52</sup> are among the many organisations that provide guidelines in this

<sup>49</sup> MCAA (2015) *SM 3008: 2015 Accessibility for All in the Built Environment*. Retrieved from <http://mccaa.org.mt/en/development-of-standards>.

<sup>50</sup> World Wide Web Consortium 2015. Retrieved from: <https://www.w3.org>

<sup>51</sup> Allies in Self-Advocacy (2014) *Accessible Meetings and Presentations*. Retrieved from <http://alliesinselfadvocacy.org/accessible-meetings-presentations/>

<sup>52</sup> The Social Care Institute for Excellence (2015, March 19) *Making Meetings Accessible for People with Learning Difficulties* (Easy read). Retrieved from <http://www.scie.org.uk/news/opinion/making-meetings-accessible-people->

regard. These arrangements include the provision of assistants to support persons with intellectual disability in various manners, including for example guiding them through a discussion, enabling them to make a contribution themselves, both during meetings and by providing written feedback, and making presentations in seminars and other fora. Furthermore, information must be presented in easy-to-read versions – this includes documents such as agendas, minutes, research and policy papers, and so on. It includes, of course, the UNCRPD itself. A look at an easy-to-read version of the Convention, such as the one produced by the UK Equality and Human Rights Commission<sup>53</sup> shows how different the content of the Articles looks. While the substance remains the same, the way it is presented is significantly different from the official version. Therefore, while it is important for people with intellectual disability to be included on committees and in meetings, there may also arise the need from time to time of holding meetings that are specifically designed for them in mind – such as an information session about the various Articles of the UNCRPD.

For a minority of disabled persons, meaningful participation in meetings and other activities may be very difficult to achieve. The small population of people who have profound intellectual disability which is often accompanied by additional physical and sensory disabilities can usually only express themselves in relation to their immediate environment and the activities they are directly engaged in – for example expressing preference for certain types of food or drink, or choosing whether to sleep, play or watch television. While in Article 12, the UNCRPD grants legal capacity to all disabled people, in some exceptional cases disabled people need a great deal of support to exercise that capacity. It is important also for the interests and wishes of this population group to be represented, whether it is done directly or through those people who live and work most closely with them.

Participation in decision-making processes is not an all-or-nothing affair. Just like anybody else, disabled people have different abilities and aptitudes. They also have the potential to develop their abilities and skills in participation in decision-making. Hart's<sup>54</sup> participation ladder, which was originally devised for the involvement of young people in decision-making, provides a very useful metaphor of how disabled people's participation can evolve from being passive to becoming increasingly more active. The same metaphor can be used to describe the way disabled people's participation skills can evolve from the most basic everyday decisions to higher order ones, from deciding what to wear to deciding what type of independent living services ought to be provided by the state and other service-providers. Very importantly, non-disabled people who are involved in the work carried out by the bodies appointed through Article 33 also need to climb the participation ladder, albeit following a progression that is in reverse order to that of disabled people. This is because they need to learn and to evolve the skills and disposition to enable disabled people's participation by providing reasonable accommodation in its various forms and guises, and by being willing to take a step back to allow disabled people's own views and perspectives to come to the fore. And, for this to happen, disabled people must be seen as being agents in their own lives, of being able to exercise their legal capacity, and of having the potential to develop further their autonomy regardless of the severity of their impairments. In this way, it is not only material but also cultural barriers that are removed.

The examples presented above in relation to catering for various impairment-related requirements are by no means comprehensive. They are meant to highlight the importance of attending to the practical aspects of implementing the principle of 'Nothing about us without us'. This is because the inclusion of DPOs in independent mechanisms, such as in the three examples presented in the

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with-learning-difficulties.asp

<sup>53</sup> Equality and Human Rights Commission (2010) *The United Nations Convention on the Rights of Persons with Disabilities. What Does It Mean For You?* (Easy read). UK: Equality and Human Rights Commission. Retrieved from [http://www.equalityhumanrights.com/sites/default/files/documents/publications/unUNCRPD\\_guide\\_easyread.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/publications/unUNCRPD_guide_easyread.pdf)

<sup>54</sup> P. McNeilly, G. Macdonald, & B. Kelly (2015) "The Participation of Disabled Children and Young People: A Social Justice Perspective," *Child Care in Practice*, Vol.21. No. 3., pp.266-286.

previous section, remains merely symbolic if these seemingly mundane arrangements are not in place.

A final point regarding practical arrangements regards the use of language. It is important that references to disabled persons are made in ways that do not cause offence. This is an area that can be fraught with difficulties. While the term ‘handicapped’ immediately jars on the ears of an English-speaking audience or readership, speaking and writing about ‘le handicap’ in French is perfectly acceptable. And should one say disabled people or persons with disability/disabilities? Is the term ‘special needs’ offensive, or isn’t it? Fortunately, there are documents that provide the necessary guidance, for example the Commission for the Rights of Persons with Disability’s publication titled *Rights Not Charity/Drittijiet Mhux Karita*<sup>55</sup> which provide guidance to acceptable and unacceptable terms in English and Maltese respectively, and terms whose acceptability is debatable.

## **7. Disabled People Monitoring the Implementation of the UNCRPD**

The best way of ensuring that the different aspects of reasonable accommodation and accessibility are properly taken into account is for disabled people to play an active role in human rights bodies, whatever their remit, but especially those which are specifically part of a country’s independent mechanism that has been entrusted with protecting, promoting and monitoring the implementation of the UNCRPD. This is in line with the disabled people’s movement’s rallying call of ‘nothing about us without us’, and in line with the active involvement of disabled people and DPOs in the drafting of the text of the UNCRPD. The presence of disabled people at all levels and stages of decision-making is also crucial for various reasons. At a practical level, it ensures that taking measures to ensure accessibility becomes an integral part of how the independent mechanism conducts its meetings and its work. It also ensures that it is disabled people’s perspectives that are given primary importance and that the independent mechanism shapes its agenda around what is important for disabled people themselves. Finally, and very importantly, it fosters a human rights culture within the independent mechanism itself, a culture which the human rights bodies involved can then strive to foster among legislators, decision-makers, service-providers, employers and in society in general.

<sup>55</sup> Commission for the Rights of Persons with Disability (2007) *Rights Not Charity/Drittijiet Mhux Karita*. Malta: Commission for the Rights of Persons with Disability.

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# THE PROMOTION OF A HUMAN RIGHTS CULTURE IN MALTA THROUGH ADEQUATE IMPLEMENTATION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

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## Abstract

The Council of Europe has for years insisted that all contracting parties to the Convention should have the right mechanisms in place to cultivate a human rights culture and to ensure the swift execution of judgments<sup>1</sup>.

The establishment of the Human Rights and Equality Commission as a National Human Rights Institution (NHRI) in Malta is essential for the promotion of a human rights culture. However the White Paper does not enable one to determine what implementation mechanisms, if any, will be entrusted with the NHRI. It is suggested that the setting-up of a parliamentary committee based on the Belgrade Principles can work in conjunction with the HREC to ensure maximum fulfillment of Malta's human rights protection obligations and more importantly serve as a base for the expansion of a human rights culture. It is proposed to enable the NHRI to effectively work towards the enforcement of judgments through the recommendation of legislative changes to the parliamentary committee.

The proposal is for the Human Rights Commission to retain its proposed objectives whilst having the added responsibility of liaising with a Human Rights Parliamentary Committee that could in turn ensure that the necessary legislative changes are brought to the attention of Parliament.

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<sup>1</sup> Recommendation CM/Rec(2008)2 "on efficient domestic capacity for rapid execution of judgments of the ECtHR" (Adopted on 6<sup>th</sup> February 2008). The Office of the Attorney General is currently responsible for the proposals for legislative changes that will be required for effective implementation of such of ECHR judgments. However this is the same body that is entrusted by Government to argue for the legislation, which is eventually found to be in breach of the Convention. Thus one could hardly describe the present situation as congruous.



## 1. Introduction

Embracing a human rights culture is imperative to better safeguard human rights. Thus, the creation of a National Human Rights Institution (NHRI) for Malta is a welcome initiative. If one had to analyse the legislation that is currently in place to protect human rights in Malta, one will find that there is more than adequate protection of human rights in this country. The problem persists however, with the actual implementation of human rights policies as determined by the various judgments of the European Court of Human Rights (ECtHR).

Malta can be said to have two levels of human rights protection, the first being the Constitution of Malta and the second being the European Convention Act. Malta joined the Council of Europe in 1965 and ratified the European Convention on Human Rights (ECHR) a few months later in January of 1967. Nevertheless the important milestones took place in 1987 with the coming into force of Act XIV of 1987 that transposed the ECHR into Maltese legislation, and with the introduction of the right to individual petition<sup>2</sup>. This latter event marked the start of a series of landmark judgments being handed down by the ECtHR as a result of which, a number of legislative amendments have had to be made in order to keep the country in line with the ECHR, and by virtue of which compensation was given to victims of human rights violations.

This being said, a number of pertinent issues remain outstanding and further progress is required in order to truly achieve a human rights culture where the State can swiftly and promptly implement measures to execute an ECtHR judgment without delay.

## 2. The current procedure: from obtaining a judgment to enforcing it

When a person feels that any of his rights enshrined by articles 33 to 45 of the Constitution<sup>3</sup> have been or are likely to be violated, he can apply for redress to the First Hall of the Civil Court, which has original jurisdiction to hear and determine any applications filed before it.

Any appeals arising from the judgments handed down by the First Hall would then be heard by the Constitutional Court<sup>4</sup>.

Following the introduction of the right to individual petition, an aggrieved person may file a fresh application before the ECtHR. It is important to keep in mind that the ECtHR is not an appellate court and therefore the application filed before it has no ties with the case filed in. Once the ECtHR has heard a case, a procedure established by the Rules of the Court<sup>5</sup> and the ECHR itself kick in.

The first hurdle that an application has to overcome is its compliance to the admissibility criteria found in article 35 of the ECHR. The two most important admissibility criteria are the need to have exhausted all domestic remedies before referring the case to the ECtHR and the second is that the application must be filed within 6 months from when the domestic Court would have handed down the judgment (Protocol 15 will further reduce this time limit to 4 months)<sup>6</sup>. Another admissibility criterion relates to whether the merits of the case are similar to pilot judgments that would have already been handed down by the ECtHR. If an application is found to be inadmissible, the ECtHR will refrain from taking cognizance of the application. In 2014, of 40 applications concerning

<sup>2</sup> M Sammut, P Cuiquet, D Borg, *Malta at the European Court of Human Rights* (1<sup>st</sup>, Progress Press, Malta 2012) p. 21-22

<sup>3</sup> Constitution of Malta 1964 s. 46

<sup>4</sup> Constitution of Malta 1964 s. 46(4)

<sup>5</sup> Rules of the Court (as last amended on 1<sup>st</sup> July 2014)

<sup>6</sup> Protocol 15, ECHR (opened for signature on 24<sup>th</sup> June 2013)

Malta in 2014, 32 were declared to be inadmissible<sup>7</sup>.

The Committee is entrusted with ensuring that judgments of the ECtHR are executed as quickly as possible. The Committee has established a two-tier monitoring system<sup>8</sup>. The Committee may place cases under its enhanced-supervision procedure to allow more liberty for the Committee to explore how best to help a State put measures in place to comply with the judgment in question. Alternatively, the Committee may place cases under the standard-supervision procedure, where the Committee will simply analyse the case and await feedback from the State on how the execution is progressing.

The body responsible on behalf of the State varies from one State to the other. In Malta, the Office of the Attorney General, is entrusted with the drafting of the necessary action plans and reports and which must take into considerations measures to execute ECtHR judgments, make follow-ups with government departments on measures being taken and update the Committee accordingly.

### 3. Implementation of ECtHR judgments

An ECtHR judgment can be executed through the payment of just satisfaction, the adoption of individual measures and the adoption of general measures. The payment of just satisfaction is the most straightforward means of execution. This is the only measure that the ECtHR can directly order a State to comply with<sup>9</sup>. The ECtHR has, over time, established a respected practice of quantifying the damages due and the State will typically pay the liquidated amount to the victims. It has been argued on more than one occasion that it should be the States themselves who should decide what the amount due should be<sup>10</sup>, but as things stand today, it is still the ECtHR, which has the ultimate say on such matters.

Once the case file is transferred to the Committee of Ministers, the latter will invite the State in question to present an ‘action plan’ on what individual and general measures it is planning on taking in order to ensure that it is in line with the judgment handed down by the ECtHR.

Such individual measures may include the reopening of proceedings on a domestic level. A State is encouraged to try and put the victim in the position he was in before the violation took place, albeit this not always being possible.

In fact, the Committee of Ministers has given instructions to states to ensure that these have the right procedures in place that enable the possibility of reopening proceedings on cases that would have already become *res judicata*<sup>11</sup>.

The final stage before execution is deemed to be complete is the implementation of general measures as these would be required in order to reduce the incidence of similar violations. This is typically the most problematic stage of the execution. The most common general measure taken by a state is the amendment of legislation. On more than one occasion the ECtHR has pointed at particular pieces of legislation and indirectly suggested that that legislation should be amended.

<sup>7</sup> Coeint, ” (Coeint,) <[http://www.echr.coe.int/Documents/CP\\_Malta\\_ENG.pdf](http://www.echr.coe.int/Documents/CP_Malta_ENG.pdf)> accessed 7<sup>th</sup> November 2015

<sup>8</sup> The process was developed as a result of “High Level Conference on the Future of the European Court of Human Rights” – Interlaken Declaration (19<sup>th</sup> February 2010)

<sup>9</sup> E Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (2<sup>nd</sup>, Council of Europe, Strasbourg 2008) pg. 13

<sup>10</sup> Report of the Group of Wise Men to the Committee of Ministers, 979bis Meeting, 15<sup>th</sup> November 2006

<sup>11</sup> Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.

Many states comply and present action plans detailing out the amendments that are planned on being implemented. Nevertheless, the implementation of general measures has been the cause of controversies and debates within the Council of Europe for many years. Once execution is completed, the State will present an action report to the Committee of Ministers explaining the changes made as a result of the ECtHR judgment.

#### 4. The difficulties in implementing general measures

General measures introduced by a State following an ECtHR judgment may not always go down well with the general public or with the government then in power.

The execution of judgments depends primarily on the State's political willingness to truly recognize the importance of the judgment and on complying with the ECHR rules<sup>12</sup>. The technical complexity posed by the breaches identified in a particular judgment may be another hindrance to the implementation of such judgments<sup>13</sup>.

Adopting general measures is not always an easy and direct procedure but may involve extensive legislative reform, especially since laws are interrelated. On the basis of this, it is sometimes a long process before the necessary change can be affected.

In addition to this, a State could also be faced with legitimate doubts on how best to proceed with the implementation of general measures. A judgment of the ECtHR will focus on the merits of the case. Consequently this may give rise to substantive impediments to the implementation of the same as the judgment does not make it sufficiently clear as to how best a State should proceed<sup>14</sup>. As the Committee of Ministers is aware of this problem, it has sought to rectify it by creating specialized supervision. Amongst many options available to a State, there exists the possibility of having round- table discussions to find a way forward which all involved parties agree to.

Having said that, the underlying problem remains; there is only so much that the Committee of Ministers can do to ensure that judgments are adhered to. One option is to issue an interim resolution<sup>15</sup> through which the Committee of Ministers can express their opinion on the measures, or lack thereof, being taken by the State in question. On more than one occasion, the Committee has resorted to this method in order to exert pressure on a State to proceed with execution. The Committee has used different approaches depending on the State in question, the reasons for not executing a judgment and on whether the State has actually tried to implement the necessary measures.

In the case of *Ben Yaacoub vs Belgium*<sup>16</sup>, the Committee applauded Belgium for its effort in closing off the case and remarked that its supervisory role shall continue in the following Committee meeting<sup>17</sup>. This approach can be described as being quite soft, but enough to warn the State that the Committee has its eyes on it and therefore more efforts should be made to implement measures quicker.

Interim resolutions can also be quite tough and the Committee has had to use strong words in a few exceptional cases, which required it to hold its ground and ensure compliance from Member

<sup>12</sup> "CDDH Report on whether more effective measures are needed in respect of states that fail to implement court judgments in a timely manner" (Adopted on 29<sup>th</sup> November 2013) Section I (3)

<sup>13</sup> Ibid. Section II (6)(ii)

<sup>14</sup> Ibid. Section II (6)(iii)

<sup>15</sup> Rule 3 of the Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2 of the European Convention on Human Rights. (adopted 10th January 2001)

<sup>16</sup> *Ben Yaacoub v. Belgium*, 9976/82, ECHR 27 Nov 1987

<sup>17</sup> Interim Resolution DH (88) 13 of 29<sup>th</sup> September 1988.

States. In the case of *Loizidou vs Turkey*<sup>18</sup> the Turkish government completely disregarded the ECtHR's findings, which ultimately led to four interim resolutions being issued over a span of four years by the Committee of Ministers in which increasingly tough words were used. The Committee described the Turkish government's lack of action as being "unprecedented"<sup>19</sup>.

In the separate case of *Ilaşcu and Others vs The Republic of Moldova and the Russian Federation*<sup>20</sup>, the Committee of Ministers was again required to take a tough stance against the Member States involved. In fact it went as far as to highlight the fact that compliance with ECtHR judgments is a fundamental aspect of being a member of the Council of Europe. By so doing, the Committee suggested that failure to comply with ECtHR judgments could lead to the expulsion from the Council in terms of Article 8 of the Statute of the Council of Europe<sup>21</sup>.

The second option available to the Committee of Ministers is making use of Article 8 of the Statute of the Council of Europe<sup>22</sup>. As mentioned above, the Committee has the authority to dismiss a State from holding a seat in the Council. Having said that, the Committee never even went close to considering this option despite hinting towards its existence in the abovementioned cases. The use of this article would be a highly criticized action as it would mean that the Committee has failed in enforcing a judgment of the ECtHR, has failed in its negotiations with the State. Should the Committee resort to this action, the end result will still mean that the victim, and perhaps others in a similar situation, will continue to suffer the consequences of the violation taking place. Thus one can see the justification in this clause never actually being applied and one would hope that it never would be.

## 5. Defying the European Court of Human Rights

There have been a number of occasions in which the authority of the ECtHR and the Committee of Ministers has been tested to its limit. One such ongoing dispute involves the blanket ban on prisoner voting rights in the United Kingdom. The *Hirst vs U.K (No. 2)*<sup>23</sup> judgment delivered in 2005 stated that the U.K was in violation of the Convention when applying a blanket ban on prisoner voting rights in accordance with the Representation of the People Act<sup>24</sup>. The ECtHR, whilst accepting the possibility of some prisoners being barred from voting, refused to accept the blanket ban imposed by the U.K arguing that it was disproportionate.

In the years that followed, over 2,500 applications were filed before the ECtHR concerning similar issues<sup>25</sup>, and in fact the in *Greens and MT vs U.K* judgment, the ECtHR noted that the situation was becoming a "threat to the future effectiveness of the Convention"<sup>26</sup>. The debate in the U.K raged on, and a bill even made it to parliament to amend and ultimately remove the blanket ban and allow prisoners serving less severe sentences to vote. The bill was however heavily defeated in the House of Commons. Back in 2012 the current Prime Minister stated that "prisoners are not getting the vote under this government"<sup>27</sup>.

<sup>18</sup> *Loizidou v. Turkey*, 40/1993/435/514, ECHR, 23 February 1995

<sup>19</sup> Interim Resolution ResDH (99) 680 of 6 October 1999, Interim Resolution DH (2000) 105 of 24 July 2000, Interim Resolution ResDH(2001) 80 of 26 June 2001 and Interim Resolution ResDh(2003) 174 of 12 November 2003, concerning the judgment of the European Court of Human Rights of 28 July 1998 in the case of LOIZIDOU against Turkey.

<sup>20</sup> *Case Of Ilaşcu And Others V. Moldova And Russia*, 48787/99, ECHR 8 July 2004

<sup>21</sup> Interim Resolution ResDH(2006)26 of 10 May 2006

<sup>22</sup> Statute of the Council of Europe (5<sup>th</sup> May 1949, London)

<sup>23</sup> *Hirst vs U.K (No. 2)* (App No. 74025/01) ECHR 2005-IX

<sup>24</sup> Representation of the People Act 1983

<sup>25</sup> *Greens and M.T vs U.K* (App. No. 60041/08, 60054/08) ECHR 2010 s.111

<sup>26</sup> *Ibid.*

<sup>27</sup> UK House of Commons Parliamentary Questions on 24<sup>th</sup> October 2012, Volume No. 551, Part No. 55, Column 923

Throughout this saga, the Committee of Ministers issued an interim measure expressing disappointment in the lack of progress being made by the U.K authorities<sup>28</sup>, and in a communication sent to the Committee of Ministers by UNLOCK, a non- governmental organization, they argued that it was clear that the government had no intention of legislating on the matter<sup>29</sup>.

In Malta there were also a number of cases, which have been placed under the enhanced supervision procedure of the ECtHR, which as explained above, allows the Committee of Ministers to directly supervise the execution of a judgment through a number of resources. One group of cases that was placed under enhanced supervision, and as a result of which, changes and developments are still ongoing, is that related to violations of Article 5 of the ECHR in relation to the treatment of migrants.

In a number of separate cases, such as the leading case of Suso Musa vs Malta<sup>30</sup> the ECtHR found a number of problems in Malta's immigration policy. As discussed in a number of action plans presented by Malta to the Committee of Ministers during the ongoing supervision of the execution of judgments, Malta is currently going through a number of changes to its policies and practices. Much has been improved over the past few years including the upgrading of the facilities used for housing and holding of migrants, as explained by the updated action plan sent by Malta to the Committee in June 2015<sup>31</sup>.

Nevertheless, the amendments to the Immigration Act still haven't taken place despite having been in the pipeline for over a year. One such amendment is that of article 25A of the Immigration Act that addresses the release from detention of migrants when this is not required and when there is no prospect of return. Additionally, there is also the deletion of article 25A(11) barring the release of persons whose identity cannot be verified, something that Malta had been criticized for by both the ECtHR<sup>32</sup> and the Committee of Ministers<sup>33</sup>.

Another set of violations, which have been consistently flagged by the ECtHR are the violations to article 1 of protocol 1 of the ECHR. In the landmark judgment of Amato Gauci vs Malta<sup>34</sup>, the ECtHR found that Malta had failed to strike a fair balance between the rights of property owners and the right of the state to put into effect housing policies to ensure a fair distribution of houses and the protection of tenants.

The case revolved around Act XXIII of 1979, which allowed for temporary emphyteusis to be converted into leases upon the expiration of the said emphyteutical concession. This situation ultimately led to the tenant being allowed the continued enjoyment of the property at the expense of the owner who was forced to enter into a lease agreement.

In an action plan submitted to the Committee of Ministers the Maltese state made reference to Act X of 2009 and argued that this made significant amendment to legislation concerning leases. Nevertheless, this legislation fails to address those unilateral cases created as a result of the 1979 Act. The Maltese State argued that it is working on a plan to ensure that over the coming years, the situation is remedied and eventually these forced-leases should come to be in line with Act X of 2009. The government has stated that it is currently holding a 'social impact assessment' to study

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(www.parliament.uk) <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121024/debindx/121024-x.htm>

<sup>28</sup> Interim Resolution CM/ResDH (2009) 160 (3<sup>rd</sup> December 2009)

<sup>29</sup> DH – DD(2010) 113 (2<sup>nd</sup> February 2010)

<sup>30</sup> Suso Musa vs Malta, 42337/12, ECHR 2013

<sup>31</sup> DH-DD(2015)707

<sup>32</sup> Louled Massoud vs Malta (App. No. 24340/08) ECHR 2010 s.44

<sup>33</sup> Times of Malta, <<http://www.timesofmalta.com/articles/view/20141205/local/council-of-europe-committee-wants-malta-to-reconsider-immigration-act.546992>> accessed 10 November 2015

<sup>34</sup> Amato Gauci vs Malta, 47045/06, ECHR 2009 s. 63

what the effects will be on the general population once rents are increased to be in line with the ECtHR judgments handed down in this regard<sup>35</sup>. That said, the Maltese authorities haven't updated their action plan for the past eighteen months<sup>36</sup>.

It is in light of such situations that one poses the question of how a State can put the execution of ECtHR judgments on the forefront of its agenda. Locally, the Office of the Attorney General is responsible for the execution of judgments. This is the same office which must also represent Malta and the Maltese government in Strasbourg.

This gives rise to a discordant state of affairs as the same entity that is tasked with arguing for Malta's position before the ECtHR must then draft changes to legislation and put in place measures to execute a judgment where the court would have determined that Malta's position would be constituting a breach of human rights.

## **6. White paper proposed by the Government of Malta**

The Government of Malta presented a white paper in December 2014 with the aim to continue to reinforce and put Malta as a global player when it comes to the protections and freedoms enjoyed under established international human rights standards.

The Government's proposal is twofold: to enact robust human rights and equality legislation and an equally strong authority that enforces such legislation in conformity with the Paris Principles and the Belgrade Principles and the EU equality directives<sup>37</sup>. The foremost proposal of the white paper is for the setting up of an independent National Human Rights Institution (NHRI) in accordance with the Paris Principles which has the mandate, resources and authority to act as Malta's focal point on human rights issues.

The White Paper notes that the Universal Periodic Review, an arm of the UN Human Rights Council recommended that Malta should establish a National Human Rights Institution in full conformity with the Paris Principles. This recommendation was echoed, almost verbatim by the International Covenant on Civil and Political Rights (ICCPR) Periodic Report.

## **7. The Paris Principles**

The Principles relating to the Status of National Institutions adopted by the United Nations General Assembly resolution 48/134 of 20 December 1993 (The Paris Principles), clearly state that a national institution ought to be given as broad a mandate as possible, having an advisory responsibility towards the legislative that is exercised, at its' own prerogative, through opinions, recommendations, proposals and reports concerning human rights issues.

Significantly, the Paris Principle task the NHRI with the examination of legislation and administrative provisions that are in force, as well as legislative proposals, and with making the requisite recommendations to ensure that all such instruments conform to the fundamental principles of human rights.

Amongst the recommendations made by the Paris Principles one notes that NHRIs should advise governments on human rights compliance, promotion and protection.

<sup>35</sup> Reply to P.G 13523 (Leg. No. XII) on 14<sup>th</sup> January 2015

<sup>36</sup> DH-DD(2014)789

<sup>37</sup> Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, Toward the Establishment of the Human Rights and Equality Commission (White Paper, p.7)

More pertinently, the NHRIs are tasked with the effective implementation of the international human rights instruments to which a State is a party. This aim can be achieved through recommendations to the competent authorities and proposals for legal reforms and administrative practices. Moreover, the Paris Principles recommend that the national institution maintain consultation with other bodies that are responsible for the promotion and protection of human rights.

Significantly the Principles note that the effectiveness of NHRIs is intrinsically linked to both what it would otherwise be empowered to do, and the perceptions which such NHRIs enjoy from their individual stakeholders.

## 8. The Belgrade Principles

The Belgrade Principles outline the needs for independence and accountability in the establishment of a National Human Rights Institution, in compliance with the Paris Principles. In addition to this, the Belgrade Principles note that NHRIs should report directly to parliament, and should submit an annual report thereto. These principles task parliaments with taking cognizance of such reports, and debating the priorities of NHRI through a principled framework that respects the NHRI's independence.

The Belgrade Principles expressly state that Parliaments should hold open discussions on the recommendations issued by NHRIs<sup>38</sup>. As to the forms of co-operation that could be adoperated between Parliaments and NHRIs, the Belgrade Principles specifically state that NHRIs and Parliaments should establish formal frameworks to discuss human rights issues that may be of common interest.

Pertinently, the Belgrade Principles state that:

*20) NHRIs and Parliaments should agree the basis for cooperation, including by establishing a formal framework to discuss human rights issues of common interest.*

*21) Parliaments should identify or establish an appropriate parliamentary committee which will be the NHRI's main point of contact within Parliament.*

The Belgrade Principles go on to state that where necessary, a memorandum of understanding should be undertaken by a Parliamentary Committee and the NHRI to develop formalized relationships relevant to their work. The recommendation is for the members of the specialized parliamentary committee to maintain a constant dialogue with the NHRI, both as a means to facilitate the exchange of information, and to enable the NHRI to adequately perform its advisory role, particularly with reference to human rights obligations, and to allow for the exercise of its oversight and scrutiny functions<sup>39</sup>.

The Belgrade Principles recommended that NHRIs be consulted by parliaments in the enactment of new legislation and in other legislative processes as a means to ensure human rights compatibility. This function can be performed by the NHRI through the proposals for amendments that ensure harmonization with national and international human rights standards through the implementation of human rights obligations arising out of treaties and human rights judgments of courts. Additionally, parliaments can peruse of the technical capacity held by NHRIs to ensure compliance of legislation with international human rights obligations.

Another function that is highlighted by the Belgrade Principles is that both parliaments as well

<sup>38</sup> Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments (2012, s. 18)

<sup>39</sup> Ibid. (s. 25 – 26)

as NHRIs ought to monitor government's response to judgments of the courts, including therefore not only local courts, but also international ones, concerning human rights.

The Belgrade Principles specifically state that NHRIs should have the function to review judgments that are delivered against the state, concerning human rights, by both national and international courts, and make the requisite suggestions to Parliament, that ought to give proper attention to any such proposals, in order to ensure expeditious and effective compliance with any such judgments.

## 9. Proposed legislative initiative

The White Paper envisages the enactment of the Human Rights and Equality Commission Act that will establish the Human Rights and Equality Commission that will effectively perform the role of NHRI.

In line with the Paris Principles, the essential requirements for the NHRI were listed as being a broad mandate, formal and functional independence from government (including its budget spending), a transparent selection and appointment process for its members and adequate resources to carry out its mandate. In addition to this, the white paper suggests that the NHRI should be accredited by the International Co-ordinating Committee (ICC) of National Institutions for the Promotion and Protection of Human Rights.

The White Paper notes that the Commission will be directly answerable to parliament, and will enjoy financial and political independence that are guaranteed by law. The approval of the Members of the Commission will be a prerogative of Parliament. Additionally, it shall be empowered to issue opinions on human rights and equality matters, make legislative and policy proposals, and where necessary criticise the government or its entities.

The HREC will be given investigative powers and the power to issue binding opinions. The White Paper notes that it is envisaged that the Commission will also serve to monitor the implementation of the human rights provisions found in Maltese law and international human rights treaties ratified by Malta, and issue reports, opinions and propose legislative changes as it deems fit. Additionally, the White Paper notes that the Commission will be tasked with addressing human rights issues and with monitoring potential or systemic violations of human rights.

The White Paper notes that the HREC should have a clearly defined role that should be independent of governmental influence; a recommendation that is in line with most international treaties. Additionally, the White Paper recommends the adoption of a programme-led approach, whilst encouraging consultation and participation, and retaining adequately qualified members of staff.

The enforcement mechanisms that the White Paper makes note of includes the provision of a uniform and efficient complaints mechanism and the provision of legal aid to complainants. The White Paper also makes provision for the NHRI to provide technical input to Government in the context of law or policy-making.

The White Paper takes cognisance of the problem with the lack of a rights based approach in public discourse and recognizes that the HREC should raise awareness to encourage national discourse which is respectful of core human rights values. Moreover, the White Paper lists the public awareness of all rights, and human rights education to address this gap<sup>40</sup>.

<sup>40</sup> *The HREC needs to look at developing intersectional frameworks with alternative approaches to legislation and policy change, thus allowing the HREC to approach human rights and equality from beyond the human rights discourse and the legal approach. Such approach would make the HREC a responsibility-sharing entity with*



Crucially however, whilst the recommendations of the White Paper reflect, to a large extent, the pre-requisites set out by the Paris Principles, and a number of subsequent resolutions adopted by the Parliamentary assembly of the Council of Europe, these recommendations fall short of establishing a mechanism that would play a direct role in the enforcement of judgments delivered by the ECtHR.

One of the outcomes of the consultation submissions listed in the White paper includes the setting up of a Human Rights Parliamentary Committee that would be tasked with reviewing future legislation to ensure its conformity with international human rights treaties and specifically to monitor judgments of the ECtHR that may have an impact on Maltese legislation. This submission was however not reflected through the proposal for the legislative initiatives proposed by the Government of Malta.

Furthermore the proposed legislation fails to address the problem that is caused by the fact that the Office of the Attorney General is also tasked with executing judgments of the ECtHR where a breach of human rights would have been identified. Despite having two bills in the pipeline, questions regarding execution of judgments have remained unanswered, and unless a proper framework is established whereby judgments can be executed through pre-established channels and regulations, it is likely that the effectiveness of the proposed measures will remain hindered.

## 10. The relationship between NHRIs and Parliaments

Reference is made to the resolution adopted unanimously by the Committee on Equality and non-Discrimination of the Council of Europe on the 5<sup>th</sup> March 2014<sup>41</sup> that called upon national parliaments of the Member States to set up a parliamentary committee responsible for human rights and non-discrimination issues. The resolution also calls for parliaments to establish formal co-operation channels with NHRI's whilst respecting their independence.

The functions of a NHRI are such that these serve as a check and balance on the legislative, the executive and the judicial branches of the State in relation to human rights issues. Thus better engagement of the NHRIs in parliament serves to facilitate the creation of a human rights culture.

Additionally, the resolution called upon parliaments to seek advice from NHRIs in the preparation of draft legislation to ensure compliance with international human rights treaties and decisions of supervisory bodies, including specifically judgments of the European Court of Human Rights. Additionally, NHRIs can contribute towards the work of parliamentarians by providing independent advice, facilitate training, increase accountability and advise on human rights implications<sup>42, 43</sup>.

Moreover, the resolution also called upon the NHRIs found in Member States of the Council of Europe to report on an annual basis on issues relating to equality, human rights and non-discrimination, and to request a discussion on those key issues that would have been identified.

The Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth NHRIs, which were adopted in 2004 call for the development of a working relationship

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*value-added actions when it comes to bringing about social justice in Malta, and such model could take a larger role in geopolitical matters to challenge one-dimensional views about Malta.*

<sup>41</sup> K. Zappone (2014) Parliamentary Assembly of the Council of Europe, 'Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues.'

<sup>42</sup> Commonwealth Nations (2004), The Abuja Guidelines On The Relationship Between Parliaments, Parliamentarians And Commonwealth National Human Rights Institutions, (2004, Abuja)

<sup>43</sup> C. Pougourides (2010) Parliamentary Assembly of the Council of Europe, 'Report on the implementation of judgments of the European Court of Human Rights', p. 39

between both NHRIs and parliaments. The main thrust of these guidelines is to allow for the exchange of resources and for the establishment of a forum where the data that is generated by the NHRI can be debated, and formally presented to the legislative.

Reference is also made to the Brighton Declaration that states that States should enhance the monitoring of execution of judgments of the European Court of Human Rights by developing domestic mechanisms that ensure rapid execution and by setting up the requisite action plans.

Different structures have been adopted in different countries in order to formalise the relationship between NHRIs and parliaments. A member of the parliamentary committee on human rights sits on the board of trustees of the German NHRI. Most NHRIs make their reports available to parliament<sup>44</sup>. In Denmark, the NHRI is mandated directly by parliament to comment on governmental reports, draft laws and ministerial directives<sup>45</sup>.

A common feature that is outlined in the relationship between NHRIs and Parliaments is also the provision of the NHRIs annual report to parliament. This serves to create accountability, particularly surrounding issues of enforcement and allows both stakeholder to closely monitor any progress that is made. The report generally also serves to formalise recommendations by the NHRI to parliament. Such a report can be used to foster parliamentary debate on human rights issues, which in turn could serve to allow for increased prominence to be given to such issues.

The relationship between parliament and NHRIs could also be used to foster engagement by parliamentarians on human rights, equality and non-discrimination issues. A formalized structure such as a parliamentary committee can serve in good stead to ensure that frequent systematic debates are held on such issues.

The resources available to NHRIs can also facilitate a proper follow-up procedure for the recommendations that are given by international monitoring bodies and treaty bodies.

More pertinently, the NHRIs could play a fundamental role with informing parliamentarians about judgments delivered by local courts and the European Court of Human Rights as a means to ensure effective compliance by facilitating the harmonization of existing and proposed legislation to any such judgments. NHRIs will have the requisite resources to prepare human rights impact assessments of draft legislation<sup>46</sup>.

## **11. Proposal for engagement of Parliament and the NHRI in the Maltese context**

It is submitted that parliament ought to establish a specific committee that deals specifically with equality, human rights and non-discrimination issues. Such a committee could work in tandem with the NHRI to increase awareness on such issues namely by taking cognizance of any reports issued by the NHRI and by reviewing legislation to ensure compliance with the national and international human rights obligations as well as to take cognizance of decisions given by international human rights bodies, including the Committee on Equality and non-Discrimination of the Council of Europe, as well as judgments delivered by local courts and the European Court of Human rights against Malta or against other States.

<sup>44</sup> Fundamental Rights Agency, (2010) 'Report on National Human Rights Institutions in the EU Member States – Strengthening the fundamental rights architecture in the EU', p. 28 ,32

<sup>45</sup> Danish Institute for Human Rights, (2012) 'Annual Report' 2012,

<sup>46</sup> K. Zappone (2014) Parliamentary Assembly of the Council of Europe, 'Improving co-operation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues (Sec. B)

Additionally, it is proposed to have a liaison officer, which would ideally be the chairperson of the HREC that would be tasked with maintaining the co-operation with parliament by preparing the necessary briefings, reporting on systemic issues and attending the sittings of the parliamentary committee.

Safeguards must be made in the legislative instrument through which the NHRI is set up to ensure that the views of the NHRI are not politicized so as to remove perceptions of political bias.

A number of models could be considered for the creation of such a committee. The first model could be one where the committee could be given the remit across all areas, which could allow for the prioritization of human rights in parliamentary business. This could however result in differing standards being applied to different pieces of legislation.

Another model would be for the committee to specifically focus on human rights issues. Such a model could foster accountability, but could result in marginalization of such issues, and thus ineffectiveness, due to a weaker political mandate.

That being said, in order to achieve any level of accountability, it is vital for there to be the political will for effective oversight. This needs to be followed up with the requisite hearings of the committee, hearings in the parliamentary plenary, questions and inquiries where necessary<sup>47</sup>.

It is suggested that if the State were to seek to better enforce the judgments being delivered by the European Court of Human Rights, provided that the requisite political will is present to ensure the continued work of the committee, a single-focus parliamentary committee ought to be implemented.

It is suggested that one of the over-arching goals for the parliamentary committee, which would be established with a view to afford better safeguarding of human rights, would be the scope of creating national discourse with regards to judgements delivered by the ECtHR against the State of Malta, where a breach of the rights enshrined by the Convention is determined, with a view of proposing legislative amendments necessitated by such judgments.

Article 46(1) of the European Convention on Human Rights dictates that member states have an obligation to comply with judgments of the European Courts, which are binding on such Member States<sup>48</sup>. The effectiveness of such judgments depends on the implementation thereof by the State.

Reference is also made to Recommendation 2008(2) to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights which states that Member States ought to designate a coordinator of execution of judgments at a national level that would have the requisite powers and authority to 'acquire relevant information; liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and if need be, take or initiate relevant measures to accelerate the execution process'. It is suggested that a parliamentary committee on human rights would be the appropriate forum within which the implementation of judgments of the European Court as it enjoys the audience of those with the necessary authority to execute and implement such judgments.

<sup>47</sup> R. Pelizzo, R Stapenhurst, D Olson (2006) World Bank Institute, Parliamentary Oversight for Government Accountability,

<sup>48</sup> D Harris et al, (nd ed., Oxford University Press, 2009) Law of the European Convention on Human Rights p.30.

## 12. Effective parliamentary oversight

It is suggested that effective parliamentary oversight of human rights ought to have a goal-based approach that sets expectations for both members and stakeholders and allows for the review of effectiveness.

Thus it is recommended that the NHRI should seek to ensure the increased compliance with human rights through the assessment of human rights deficits that have been acknowledged by the ECtHR, and it should be empowered to call upon government to account for the failures to protect the rights of people within the country.

The relevant factors in determining whether the NHRI is effective, one ought to consider the resources that are made available to it, political support and its powers<sup>49</sup>.

Amongst the challenges to parliamentary oversight one can list the political realities of the country, shifting national discourse and interests, the various interests of different stakeholders, lack of resources and availability of human rights expertise.

It is suggested that in order to ensure that such a committee is effective, a number of goals are set for it by its stakeholders for the committee, would include the NHRI, parliament, as well as any other NGOs working in the sector. These stakeholders could define the priority areas for the committee and determine the aims that it ought to achieve. Such a process would also serve to strengthen the mandate of the committee and would also allow it to obtain legitimacy through the support of the stakeholders<sup>50</sup>.

The specificity of the goals will also enable the committee to overcome issues related to the willingness of the committee to discuss sensitive human rights issues. Thus, the committee ought to have specific goals that are definable and achievable. That being said, the choice of such goals should not be such as to limit the mandate of the committee. Thus it is suggested that the committee ought to have the aim of implementing policy and legislation and increasing accountability on human rights practices which are found to be unlawful.

## 13. Risks of the parliamentary committee system

The proposal for enforcement of judgments of the European Court of Human Rights through a parliamentary committee is subject to a number of risks. Principally amongst which is the fact that the issues being brought before the committee, and the discourse that arises therefrom may be subject to political whims of the members of the committee. The engagement of the members of the committee could be directly proportional to the effectiveness thereof.

Similarly, particularly in the Maltese scenario of a dual-party system, partisanship could be particularly problematic. Creating a political bias on any human rights issue would create difficulties in achieving proper and just remedies for any human rights breaches. That being said, it could also be argued that the politicization of any issue could result in increased accountability on the executive; a process that would allow for increased effectiveness in the implementation of judgments of the European Courts of Human Rights.

Another risk that could be faced by the parliamentary committee could be the focus of single-mandate committees that would result in certain issues not being brought to the attention of

<sup>49</sup> P. Webb, K. Roberts, (Dickson Poon School of Law, King's College, 2014) *Effective Parliamentary Oversight of Human Rights, A Framework for Designing and Determining Effectiveness*, p. 9

<sup>50</sup> D. Deephouse, M. Suchman, *Legitimacy in Organizational Institutionalism*, in R. Greenwood, C. Oliver, R. Suddaby, K. Sahlin (Eds.), *The SAGE handbook of organizational institutionalism*, London: SAGE (2008).

parliament or not being appropriately prioritized<sup>51</sup>.

It is however suggested that the benefits of having a parliamentary committee, greatly outweigh the risks that are mentioned herein.

## 14. UK Joint Committee on Human Rights

Reference is made to the UK Joint Committee on Human Rights ('Joint Committee'), which was established by virtue of HC Standing Order No. 152B<sup>52</sup>, and which is composed of members from both the House of Lords and the House of Commons. This committee is tasked with scrutinizing every Government Bill for compatibility with matters relating to human rights arising from the European Convention on Human Rights and other international obligations. The

Committee also reviews the executive's response to court judgments on human rights issues and is empowered to conduct inquiries on topics chosen at its own discretion.

It is apt to note that the standing order allows for a very wide remit to be granted to the committee, which is tasked with considering matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)<sup>53</sup>. It is suggested, that the parliamentary committee for Human Rights in the Maltese Parliament ought to be closely modelled on the UK Joint Committee on Human Rights, with particular reference to the enforcement mechanisms that are adopted by this committee.

## 15. Conclusion

The Office of the Attorney General is currently tasked with overseeing the execution of judgments of the ECtHR, drafting action plans to the Committee of Ministers and the overall implementation of general measures. The Office of the

Attorney General is also Malta's representative at the ECtHR and protects the interests of the State in this regard. This dual role played by the Office of the Attorney General is clearly conflicting.

It is therefore suggested that a single-focus parliamentary committee on human rights issues is set up and granted extensive terms of reference that would include the evaluation of information submitted by the Committee of Ministers on the level of execution of ECtHR judgments, the monitoring of judgments delivered by the ECtHR and the local courts, and the preparation of opinions, recommendations and draft legislative proposals for the implementation of general measures. As a result of this, the role and responsibilities currently held by the Attorney General would be shifted to this parliamentary committee working in conjunction with the NHRI. It is therefore being submitted that once the Maltese State is notified of the judgment handed by the ECtHR, the NHRI will set to work in researching how best to execute a judgment through the implementation of effective general measures. This information would then be handed over to the parliamentary committee to further decide on concrete methods of execution.

It is through the creation of formalised channels for the effective execution of the judgments delivered by the ECtHR that the aim of creating a human rights culture can truly be achieved.

<sup>51</sup> P. Webb, K. Roberts, (Dickson Poon School of Law, King's College, 2014) *Effective Parliamentary Oversight of Human Rights, A Framework for Designing and Determining Effectiveness*, p.4

<sup>52</sup> Standing Orders of the House of Commons - Public Business 2002(2) No. 152B

<sup>53</sup> Ibid. (2)(a)

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# LACK OF “HUMAN RIGHTS CULTURE” AND WEAKNESS OF INSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN THE SOUTH CAUCASUS

TAMAR ZURABISHVILI\* AND TINATIN ZURABISHVILI\*\*

## Abstract

The main focus of this paper is the analysis of reported level of (dis)trust towards the Ombudsmen in Armenia, Azerbaijan and Georgia, based on the findings of CRRC’s Caucasus Barometer survey. During the period from 2008 to 2013, trust towards the respective country’s Ombudsman declined in all three countries. Both bivariate and regression analysis suggest that the nature of (dis)trust towards the Ombudsmen is different in each country, but in all cases it is positively correlated with reported trust towards major governing bodies. Although the respective Laws are clear that this is an independent institution, our finding suggests that, in public perception, Public Defenders represent the government – and this perception may hinder efficiency of this institution to serve as promoters of “human rights culture” in their countries.

## 1. Introduction

In the countries of the South Caucasus (Armenia, Azerbaijan and Georgia), the awareness about human rights and the mechanisms of their protection have historically been rather low, hence, “human rights culture” is still far from strong in these societies. Although institutions of Public Defenders (or Ombudsmen) have been established in all these countries after the breakup of the Soviet Union, and respective legal mechanisms have been created, this did not yet lead to major changes in public knowledge, perceptions and attitudes. Just under a third of the population of the South Caucasus countries reported in CRRC’s 2013 Caucasus Barometer survey<sup>1</sup> trust towards the Ombudsman of the respective country, with 20% to 30% answering “Don’t know” to this question. Although the establishment and very existence of the institutions of Public Defenders represent important steps forward towards ensuring chances of protection of human rights in these

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<sup>1</sup> <http://www.caucasusbarometer.org/en/>

post-Soviet countries, the data suggest these institutions have not yet proven to be as efficient as democratic reformers were hoping they would.

The main focus of this paper is, however, not a detailed account of the activities of the Ombudsmen and their offices in the South Caucasus countries, but, rather, analysis of public attitudes towards Public Defenders – primarily, level of (dis)trust towards the Ombudsmen in Armenia, Azerbaijan and Georgia. The paper will analyze how similar, or how different is it in each of these countries, and how it correlates with the population’s major demographic characteristics and democratic attitudes. Detailed background information about the institution will be presented based on the Georgian case. General information about functions and performance of the Public Defender (PD) of Georgia and his Office will be provided in the first part of the paper, followed by description of methodology of data collection and analysis, and findings for each of the countries.

## 2. The Public Defender (Ombudsman) of Georgia: Functions and Performance

1996 Organic Law on Public Defender of Georgia provided the necessary legal basis for the establishment of this institution. Importantly, by 1996, post-Soviet Georgia already had some experience of institutional defense of human rights: in 1992, very soon after this former Soviet republic has proclaimed its independence, a governmental Committee on Interethnic Relations and Protection of Human Rights was established. This Committee served as the basis for the establishment of the institution of Public Defender in 1996. Compared to the mandate of the Committee, though, the rights and possibilities of the Public Defender are much broader.

*In the period between 1997 and 2015, Georgia had five Public Defenders. The main function of the Public Defender, commonly referred to as the Ombudsman, in Georgia is to oversee the observance of human rights in the country. This includes providing assistance to the citizens who report violation of their human rights; analysis of the country’s legislation, ensuring its compliance with international standards; and advice to the government on the steps to be taken to protect human rights. According to the official information, “The Public Defender of Georgia exercises the functions of the National Preventive Mechanism, envisaged by the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Ombudsman of Georgia undertakes educational activities in the field of human rights and freedoms, and lodges complaints in the Constitutional Court of Georgia in case the human rights and freedoms envisaged in the chapter II of the Georgian constitution are violated by a normative act. The Public Defender is further authorized to exercise the Amicus Curiae function in Common Courts and the Constitutional Court of Georgia. Powers and functions of the Office of Public Defender (PDO) are defined in the Organic Law on Public Defender of Georgia of 1996”<sup>2</sup>.*

Importantly, the Public Defender represents an independent institution, and is bound only by the Constitution of Georgia and relevant national and international legislation. The Ombudsman cannot be a member of any political party, or be involved in any type of political activity. The PD is elected by the Parliament of Georgia and both him/her and his/her office are funded by the state budget. The Ombudsman him/herself enjoys personal immunity. Any attempt to interfere with or influence the Public Defender’s work is a crime.<sup>3</sup>

The Law requires the Ombudsman both to react on the cases of violation of human rights and to be proactive in monitoring how human rights are protected in the country. The number of

<sup>2</sup> <http://ombudsman.ge/en/public-defender/mandati>

<sup>3</sup> <http://ombudsman.ge/uploads/other/2/2058.pdf>

applications received by the Ombudsman in 2014 is reported to be 7272,<sup>4</sup> an impressive increase compared to 5457 applications registered by the Office in 2013.

All services provided by the Public Defender to the citizens are free. In order to make its services more accessible to the population, the institution has seven regional offices in different regions of Georgia<sup>5</sup> (see Map 1).



Map 1: Locations of the Public Defender's Regional Offices, Georgia (2015)

The institution strives to be actively involved in international collaboration, and is a member of a number of associations active in the field. Since 2013, PD's International Advisory Board has been created in order to strengthen the protection of human rights in Georgia. The members of the Board are to share their knowledge and experience in the field, and assist the Public Defender's Office in institutional development. Also in 2013, the Office underwent Accreditation under the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

Hence, in Georgia, the institution of the Public Defender has a solid legal basis, with a mandate and resources allowing it to protect human rights and help strengthen the "human rights culture" in the country. The following sections of this paper will demonstrate how this institution is viewed by the population.

### 3. Methodology

Annual Caucasus Barometer (CB) surveys have been conducted by CRRC offices<sup>6</sup> in Armenia, Azerbaijan and Georgia since 2004<sup>7</sup>, as part of a larger project funded by the Carnegie Corporation of New York. Findings for the period from 2008 through 2013 are used in this paper, with major focus on the 2013 findings.<sup>8</sup>

Caucasus Barometer is the only survey regularly conducted across the region employing the same survey instrument and a comparable methodology. The questions focus on major issues of

<sup>4</sup> <http://ombudsman.ge/en/public-defender/mandati> (p. 6)

<sup>5</sup> This overview covers the period until 2015. Two more regional offices were established after that, in Ozurgeti in November 2016 and in Mestia in July 2017.

<sup>6</sup> <http://www.crrccenters.org/20122/Documentation>

<sup>7</sup> The surveys were not nationally representative until 2006.

<sup>8</sup> The survey was not conducted in 2014 and 2016. In 2015 and 2017, the survey was conducted in Armenia and Georgia, but not in Azerbaijan.

social and political transformation of the countries of the South Caucasus, including development of democratic values and level of trust towards major social and political institutions.

Caucasus Barometer surveys adult (18+) population of Armenia, Azerbaijan and Georgia, excluding population living in conflict regions (Nagorno Karabakh, Nakhichevan, South Ossetia and Abkhazia). The interviews are conducted in Armenian in Armenia; in Azerbaijani in Azerbaijan; and in Georgian, Armenian and Azerbaijani in Georgia<sup>9</sup>. Through 2013, PAPI (Paper-and-Pencil) face-to-face interviewing was employed; CRRC introduced CAPI (Computer Assisted Personal Interviewing) in 2014.

Multistage cluster sampling with preliminary stratification is employed for Caucasus Barometer surveys. Around 2200 interviews are completed per country annually; fieldwork takes place in Fall (October-November). The results of the surveys are representative for the entire population of each country, excluding territories affected by military conflicts, and are also representative at the levels of for the population of the capitals, other urban settlements and rural settlements.

The 2013 wave of the Caucasus Barometer survey took place between the 3<sup>rd</sup> and 27<sup>th</sup> of October in Georgia, between the 26<sup>th</sup> of October and the 15<sup>th</sup> of November 15 in Armenia, and between the 1<sup>st</sup> of November and the 16<sup>th</sup> of December 16 in Azerbaijan. 2133 respondents were interviewed in Georgia, 1832 – in Armenia and 1988 – in Azerbaijan, with response rates being, respectively, 69%, 65% and 82%. The data was weighted for the analysis performed for this paper.

Important to note, the Caucasus Barometer surveys are in open access at CRRC's online data analysis platform<sup>10</sup> Datasets in SPSS and STATA formats, as well as survey documentation (questionnaires, fieldwork reports) can be downloaded and analyzed by all interested researchers.

In the Findings section below, results of bivariate analysis are presented first, mostly analyzing the correlation between the variables of interest, followed by logistic regression models run separately for each country in order to understand the predictors of trust towards Ombudsmen of the respective countries.

## 4. Findings

During the period from 2008 to 2013, reported trust<sup>11</sup> towards the respective country's Ombudsman declined from 58% to 28% in Georgia; from 49% to 31% in Armenia, and from 45% to 19% in Azerbaijan. Interestingly, reported distrust has remained rather stable in each country through this period, at around 8% in Georgia and around 22% in Armenia and Azerbaijan. A detailed look at the demographic profile of those trusting and distrusting the Ombudsman is the first step to understand what explains declining trust towards this institution<sup>12</sup>.

### 4.1. Georgia

In Georgia, the share of those who report trusting the Ombudsman is almost three times bigger than share of those who report distrusting him (28% and 10%, respectively), while the majority report indifference (41% "neither trusting nor distrusting" the Ombudsman, and another 20% answering "Don't know"). Reported trust towards the Ombudsman does not differ by the population's major demographic characteristics, such as gender, marital status, type of settlement

<sup>9</sup> In Georgia, the respondents living in multiethnic primary sampling units can choose the language of the interview.

<sup>10</sup> <http://www.caucasusbarometer.org/en/>

<sup>11</sup> The Caucasus Barometer surveys measure trust towards major social and political institutions using a 5-point scale. Answer options "Fully trust" and "Trust" are combined here.

<sup>12</sup> The rest of the paper is based on CB 2013 findings.

the person lives in, his/her employment status or household's economic condition. Compared with representatives of younger age groups, the level of trust, however, tends to decrease among those who are older, but the strengths of correlation is rather weak (Pearson's  $R = -0.110$ )<sup>13</sup>. Correlation between the level of trust towards the Ombudsman and the highest level of education achieved by individuals is slightly stronger (Spearman's correlation = 0.165), suggesting that those with higher levels of education tend to report a higher level of trust towards the Ombudsman.

More obvious differences are observed among those who have positive vs. negative opinions about the political developments in the country. Those who assess these developments positively (i.e. think that the politics is definitely or mainly going in the right direction) tend to report higher levels of trust towards the Ombudsman. Among those who think that politics in Georgia is going "mainly in the right direction," 38% report trusting the Ombudsman, while 6% report distrusting him.

Similarly, those who think that people in Georgia are treated fairly by the government tend to report higher trust towards the Ombudsman. This suggests that trust towards the Ombudsman in Georgia is strongly correlated with support for the way the country is developing – and, most probably, with support for the current government. Indeed, rather high positive correlations are observed between the variable measuring trust towards the Ombudsman, on the one hand, and variables measuring trust towards the Parliament and the Executive government (Cabinet of Ministers) of the country (Spearman's correlations being, respectively, .358 and .320). Interestingly though, correlation with the variable measuring trust towards the President is much weaker, with Spearman's correlation = .109. This is not entirely unexpected, as the President currently has less executive power in the country, while the relationship of the current President and his administration with the Cabinet of Ministers and the Parliament are often problematic.

More importantly, though, the correlation of the variable measuring trust towards the Ombudsman in Georgia with the variables measuring democratic attitudes in general is much weaker. A relatively strong correlation is observed with the variable measuring support for the statement whether it is important or not for a good citizen to be critical towards the government (Spearman's correlation = .210). It may be the case that the public opinion does not necessarily see the Ombudsman's office as one of the major democratic institutions.

In order to understand how, if at all, the discussed variables influence the population's trust towards the Ombudsman, logistic regression was run. Of the demographic variables in the equation (age, gender, settlement type, marital status, employment, and highest level of education achieved), all were statistically significant, but the impact on reported trust towards the Ombudsman was not very big – with the exception of settlement type. The rural population was 1.5 times more likely to report trust towards the Ombudsman.

Of the variables measuring attitudes to democracy<sup>14</sup>, all were, again, significant, and had stronger effect on reported trust towards the Ombudsman. Those reporting that "democracy is preferable to any other kind of government" were 1.6 times more likely to report trust towards the Ombudsman, as were those who believed that politics in Georgia was developing in the right direction. Those who stated that Georgia is currently a democracy were 1.3 times more likely to report trust towards the Ombudsman. The latter finding suggests the answers may be influenced by social desirability bias, and this risk is further enhanced by the fact that those who actually share democratic beliefs (in case of this particular model – those who believe that it is important for a good citizen to be critical towards the government) do not seem to differ in their reported trust towards the Ombudsman in

<sup>13</sup> In cases of all tables presented in this paper, correlations between the variables are significant.

<sup>14</sup> There were four such variables in the model: importance for a good citizen to be critical towards the government; assessment of the way political processes develop in the country ("right" direction vs "wrong" direction); attitudes towards democracy as a political system; and assessment of level of democratization of Georgia.

comparison to the rest of the population (Table 1).

## 4.2. Armenia

The reported level of trust towards the Ombudsman has been relatively stable in Armenia after 2009. In 2013, 31% of the population reported trusting the Ombudsman (with only 9% reporting “fully trusting” him), while 24% reported distrusting him. The share of those who answered “Don’t know” fluctuated between 15% and 22% in the period between 2009 and 2013, with the smallest share (15%) recorded in 2013.

In 2013, a relatively weak correlation (Spearman correlation =.121) between reported trust towards the Ombudsman and age can be observed in Armenia, while no differences are observed by other major demographic characteristics – including settlement type, which is an unexpected finding. The correlation between trust towards the Ombudsman and level of education is weaker in Armenia, when compared to the same correlation in Azerbaijan and Georgia, which is also a rather unexpected finding. Overall, it is more difficult to describe the demographic characteristics of those trusting (or distrusting) the Ombudsman in Armenia, than it is in Azerbaijan and Georgia.

In Armenia, reported trust towards the Ombudsman is correlated with trust towards other major governing bodies (the President, Parliament and the Executive government), though the strength of correlation is moderate (Spearman correlations are .261, .257 and .246, respectively). There is a very strong correlation between trust towards the Ombudsman and trust towards the European Union (Spearman correlation =.522), suggesting that the institution of the Ombudsman (and, possibly, the very concept of human rights’ protection) is perceived to be part of European values and/or way of life.

Those Armenians who believe that people are treated fairly by the government tend to have highest trust towards the Ombudsman, and vice versa; however, the correlation between the variables is not very strong (Spearman correlation =.189). Trust towards the Ombudsman in Armenia does not seem to differ by variables measuring democratic attitudes.

The same regression model run based on the Armenian data leads to rather different findings. First of all, education is no longer significant in this model (Table 2). Of the demographic variables, gender and employment status seem to have the biggest impact to reported trust towards the Ombudsman: men are 1.3 times more likely than women to report trust towards the Ombudsman, and so are those who are employed. The variables measuring attitudes to democracy, although statistically significant, do not seem to affect trust towards the Ombudsman, except the variable measuring opinions regarding whether politics in Armenia is developing in the right or wrong direction. Those who think that the politics in Armenia is developing in the right direction are much less likely to report trust towards the Ombudsman.

## 4.3. Azerbaijan

In Azerbaijan, the share of the population reporting trust towards the Ombudsman is almost equal to the share of those who report distrusting him (19% and 21%, respectively). This finding is relatively constant for the period from 2009 to 2013. The share of those who answered “Don’t know” in 2013 was, however, the highest of the three countries at 29%, with a further 2% refusing to answer this question. Hence, almost a third of the population either could not or would not answer this question.

In Azerbaijan, reported trust towards the Ombudsman does not seem to have been influenced by major demographic characteristics of the population. The only exceptions are differences by settlement type and, to slightly lesser extent, level of education. People living in the capital, on

the one hand, report trusting the Ombudsman twice less often compared to the national average (14% vs 28%), and the population of rural settlements, on the other hand, trusts the Ombudsman more compared to the urban population (Spearman correlation =.190). Similarly to the Georgian findings, those with higher levels of education tend to report higher trust towards the Ombudsman.

Although the 2013 Azerbaijani data does not show differences in trust towards the country's Ombudsman based on positive vs. negative opinions about the political developments in the country, the correlation between answers to the question about trust towards the Ombudsman and assessments whether people are or are not treated fairly by the government is rather strong (Spearman correlation =.224). Those who disagree with the opinion that people in Azerbaijan are treated fairly by the government tend not to trust the Ombudsman, while those who agree with this opinion report a higher level of trust towards him.

Interestingly, the strength of the correlation between trust towards the Ombudsman, on the one hand, and other major governing bodies (the President, Parliament and the Executive government), on the other hand, is weaker in Azerbaijan compared to Georgia. Of these three governing bodies, trust towards the executive government is most strongly correlated with the trust towards the Ombudsman (Spearman correlation =.219). Similar to the finding in Georgia, trust towards the Ombudsman in Azerbaijan is most weakly correlated with trust towards the President (Spearman correlation =.100), but reasons for this findings are not entirely clear, given the strength of this institution in Azerbaijan.

Trust towards the Ombudsman in Azerbaijan is not highly correlated with variables measuring democratic attitudes, which suggests that different relationship between attitudes towards the Ombudsman and democratic attitudes may be in place in Azerbaijan and Georgia.

Of the demographic variables in the logistic regression model run based on the Azerbaijani data, education and gender have the biggest impact on reported trust towards the Ombudsman. Quite similar to the Armenian finding, men are 1.2 times more likely than women to report trust towards the Ombudsman. Azerbaijan is the only of the South Caucasus countries where impact of the education is evident: those having secondary education are 1.6 times more likely to report trust towards the Ombudsman.

Much like the Georgian case, those Azerbaijanis who report that “democracy is preferable to any other kind of government” are 1.3 times more likely to report trust towards the Ombudsman. On the contrary, those who think that Azerbaijan is currently a democracy are much less likely to report trust towards the Ombudsman (Table 3).

## 5. Conclusions

As the Caucasus Barometer data show, protection of human rights (minority rights comprised) is not named by the population of the South Caucasus countries as one of the major issues facing their countries; quite often, people know almost nothing about human rights. In this situation, the Public Defenders have the possibility – both legally and culturally – to become crucial agents for change and to contribute to the democratic development of their countries.

Although survey data suggest similar levels and dynamics of trust towards Public Defenders in Georgia, Armenia, and Azerbaijan, more detailed analysis shows that nature of trust towards Ombudsmen is different in these countries. Quite alarmingly, the population's trust towards Ombudsmen has declined in Georgia, Armenia and Azerbaijan after 2009, in spite of the development of this institution which, at least in Georgia, has at its disposal all possible legal means to efficiently serve as a mechanism for the protection of human rights and to contribute to the strengthening of the “human rights culture” in their countries. Importantly, trust towards Ombudsmen is positively

correlated with reported trust towards major governing bodies, such as Parliaments and Cabinets of Ministers, which suggests that, to a certain extent, the population perceives Public Defenders to be representatives of the government – even though the respective legislation is clear that this is not the case. Better knowledge of Public Defenders’ independence from the government, as well as the missions and the resources of this institution by the public will help strengthen the protection of human rights and, eventually, develop human rights culture in these societies.

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Step 1 <sup>15</sup>	B	S.E.	Wald	df	Sig.	Exp(B)	95% C.I.for EXP(B)	
							Lower	Upper
RESPAGE	-.002	.000	477.498	1	.000	.998	.998	.998
RESPSEXreg(1)	.095	.003	1286.329	1	.000	1.100	1.094	1.106
STRATUMreg(1)	-.420	.003	25281.894	1	.000	.657	.654	.660
RESPMARreg(1)	.106	.003	1540.618	1	.000	1.111	1.105	1.117
RESPEMPLreg(1)	-.036	.003	176.612	1	.000	.965	.960	.970
RESPAGE	-.002	.000	477.498	1	.000	.998	.998	.998
RESPSEXreg(1)	.095	.003	1286.329	1	.000	1.100	1.094	1.106
STRATUMreg(1)	-.420	.003	25281.894	1	.000	.657	.654	.660
RESPMARreg(1)	.106	.003	1540.618	1	.000	1.111	1.105	1.117
RESPEMPLreg(1)	-.036	.003	176.612	1	.000	.965	.960	.970
RESPEDUreg(1)	.221	.003	5741.080	1	.000	1.248	1.240	1.255
becriticalreg(1)	-.081	.003	962.616	1	.000	.922	.918	.927
POLDIRNreg(1)	-.474	.003	31966.690	1	.000	.622	.619	.626
ASSESSDEMreg(1)	-.279	.003	10417.644	1	.000	.756	.752	.760
ATTDEMreg(1)	-.494	.003	29627.261	1	.000	.610	.607	.614
Constant	.142	.005	745.563	1	.000	1.153		

Table 0.1: Variables in the Equation (Georgia).



Step 1 <sup>15</sup>	B	S.E.	Wald	df	Sig.	Exp(B)	95% C.I.for EXP(B)	
							Lower	Upper
RESPAGE	-.008	.000	7558.986	1	.000	.992	.992	.992
RESPSEXreg(1)	.227	.003	5247.981	1	.000	1.255	1.247	1.262
STRATUMreg(1)	-.027	.003	72.685	1	.000	.973	.967	.979
RESPMARreg(1)	.090	.003	805.335	1	.000	1.094	1.087	1.101
RESPEMPLreg(1)	.274	.003	7317.242	1	.000	1.315	1.307	1.323
RESPEDUreg(1)	.004	.003	1.199	1	.274	1.004	.997	1.010
becriticalreg(1)	.040	.003	160.134	1	.000	1.041	1.035	1.047
POLDIRNreg(1)	-1.338	.005	62728.182	1	.000	.262	.260	.265
ASSESSDEMreg(1)	-.352	.004	8238.279	1	.000	.704	.698	.709
ATTDEMreg(1)	.101	.003	1114.786	1	.000	1.106	1.100	1.113
Constant	.915	.008	14145.548	1	.000	2.498		

Table 0.2: Variables in the Equation (Armenia).

Step 1 <sup>15</sup>	B	S.E.	Wald	df	Sig.	Exp(B)	95% C.I.for EXP(B)	
							Lower	Upper
RESPAGE	.001	.000	336.842	1	.000	1.001	1.001	1.002
RESPSEXreg(1)	.222	.002	8272.908	1	.000	1.249	1.243	1.255
STRATUMreg(1)	-.762	.002	110531.771	1	.000	.467	.465	.469
RESPMARreg(1)	-.005	.003	3.779	1	.052	.995	.990	1.000
RESPEMPLreg(1)	-.350	.003	18939.325	1	.000	.705	.701	.708
RESPEDUreg(1)	.446	.002	36781.935	1	.000	1.562	1.554	1.569
becriticalreg(1)	-.130	.004	1273.911	1	.000	.878	.872	.885
POLDIRNreg(1)	.086	.002	1241.880	1	.000	1.090	1.084	1.095
ASSESSDEMreg(1)	-.958	.003	144194.281	1	.000	.384	.382	.386
ATTDEMreg(1)	.297	.002	15615.741	1	.000	1.346	1.340	1.352
Constant	-.399	.005	5505.679	1	.000	.671		

Table 0.3: Variables in the Equation (Azerbaijan).

<sup>15</sup> Variable(s) entered on step 1: RESPAGE, RESPSEXreg, STRATUMreg, RESPMARreg, RESPEMPLreg, RESPEDUreg, becriticalreg, POLDIRNreg, ASSESSDEMreg, ATTDEMreg.

RESPAGE	Respondent's age, measured on a ratio scale.
RESPSEXreg(1)	Respondent's sex, measured on a dichotomous scale.
STRATUMreg(1)	Settlement type, originally a nominal variable with three categories: capital, other urban settlements and rural settlements.
RESPMARreg(1)	Respondent's marital status, originally a nominal variable measured by question A7_R of the questionnaire. xviii
RESPEMPLreg(1)	Respondent's employment status, originally a nominal variable measured by question J1 of the questionnaire.
RESPEDUreg(1)	Highest level of education obtained by the respondent; originally a nominal variable measured by question D4 of the questionnaire.
becriticalreg(1)	Assessment of importance for a good citizen to be critical towards the government, originally an ordinal variable measured by question P16_7 of the questionnaire.
POLDIRNreg(1)	Assessment of which direction the respective country's politics is developing towards; originally a nominal variable measured by question P1 of the questionnaire.
ASSESSDEMreg(1)	Assessment of democratic development of the country; originally a nominal variable measured by question P17 of the questionnaire.
ATTDEMreg(1)	Attitudes towards democratic vs. non-democratic rule; originally a nominal variable measured by question P18 of the questionnaire.

Table 0.4: Variables in the regression models.

# CREATING NATIONAL HUMAN RIGHTS INSTITUTION IN LITHUANIA: THEORETICAL AND PRACTICAL LESSONS

AIDA KIŠŪNAITĖ\*

## Abstract

In 2011 Lithuanian government decided to reform the Seimas Ombudsmen's Office by expanding its mandate in the field of human rights. In this paper I aim to overview the ongoing reform and to discuss main driving forces and obstacles for its enforcement. I apply an interdisciplinary approach combining legal and political science research methods. The findings suggest that the proposed reform raises serious doubts about its full compliance to Paris Principles. It also leaves unresolved issues of overlapping mandates, financial resources and thus has a risk to fail in establishing an effective national human rights institution.

## 1. Introduction

It has been more than two decades since the adoption of the Paris Principles by the United Nations General Assembly in 1993. The Paris Principles are recognized as the most authoritative guidelines on the structure and the role of national human rights institutions (NHRIs). There is an extensive literature, based on theory and practice that overview and discuss a variety of questions regarding NHRIs' establishment and their performance worldwide. The most recent discussions on NHRIs focus around several topics.

The first area of discussion among political scientists and legal scholars concerns institutional design and its impact on NHRIs' effectiveness. One of the basic features that differentiates the discussion on NHRIs' design and their effectiveness from other discussions on institutional reforms is that '(...) Unlike other regulatory and market reforms, human rights institutions do not privilege the interest of the authorizing principles, but rather the individuals at risk of abuse by those same principles'<sup>1</sup>. This specific mandate to promote and protect human rights has important implications on the linkage between institutional design and its effectiveness because often NHRIs' establishment is based on conflicting rationales among institutional architects<sup>2</sup>.

Secondly, the role of NHRIs' has been continuously developing. Despite the fact that NHRIs are bodies established by domestic law, some scholars envisage NHRIs as links to the international human rights regime in terms of an assigned mandate that is derived from international rather than national standards. The scholars argue<sup>3</sup> that in practice, this function is obtained in two ways: either by an explicit NHRI's mandate to protect and promote internationally guaranteed human rights (common for Eastern Europe) or by an additional function to promote the ratification of treaties or

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<sup>1</sup> Katerina Linos and Tom Pegram, (2015) *Interrogating Form and Function: Designing Effective National Human rights Institutions*. Danish Institute for Human rights 5.

<sup>2</sup> Ibid 5, 10.

<sup>3</sup> Richard Carver, (2010) "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" *10 Human Rights Law Review* 1, 6-9.

the incorporation of treaty rights in national law.

Thirdly, the potential role of NHRIs in strengthening the promotion and protection of human rights in the EU internal and external policies has recently received more attention from an academic community<sup>4</sup>. As it is expressed in the report of the European Union Agency for Fundamental Rights (FRA)<sup>5</sup>, the EU's cooperation with NHRIs is highly important because efficient protection and promotion of fundamental rights at the national level, is coupled with European and international mechanisms. However NHRIs are not structurally integrated into the European human rights working culture yet, even if the various EU institutions and bodies working in the field of human rights expressed support for NHRIs and do cooperate to some extent with these institutions<sup>6</sup>.

Currently 71 NHRIs are accredited as A-status (full compliance with Paris Principles) NHRIs by the International Coordinating Committee for National Human Rights Institutions (ICC). B-status (partial compliance with Paris Principles) is granted to 25 NHRIs, and C- status (non-compliance with Paris Principles) is granted to 10 NHRIs. Among 71 A-status NHRIs 12 of them are established in the EU member states and 2 are established in the candidate countries. B-status is granted to 7 NHRIs that are established in the EU member states and 1 NHRI, which is established in a candidate country. Only 1 NHRI has C-status in the EU member states<sup>7</sup>.

Lithuania belongs to a group of EU member states together with Cyprus, the Czech Republic, Estonia, Finland, Italy, Latvia, and Malta, which does not have a Paris Principles compliant accredited NHRI yet<sup>8</sup>. However Lithuania, as the other EU member states, has some form of monitoring bodies with a human rights remit. Currently in Lithuania five independent public institutions have some fragmental mandates in the field of human rights: the Seimas (Parliament) Ombudsmen's Office, Office of the Equal Opportunities Ombudsperson, Office of the Ombudsperson for Children Rights, the Office of the Inspector of Journalist Ethics and State data protection Inspectorate. In addition to that a number of governmental, municipal and non-governmental bodies work in the field of human rights protection.

The UN periodically urges Lithuania to establish a national human rights institution with a broad human rights mandate, and provide it with adequate financial and human resources, in line with the Paris Principles. In 2011 it was proposed to set up a coordinating Human Rights Council of Lithuania as part of the Ombudspersons' institution trying to ensure systematic monitoring of human rights while not diminishing the role of specialized bodies in the protection of human rights<sup>9</sup>. The same year the Board of the Parliament set up a working group to draft the necessary legal acts to ensure compliance of the Parliamentary Ombudspersons' Institution with the Paris Principles.

In this paper I aim to present and evaluate the Seimas Ombudsmen's reform and to discuss main driving forces and obstacles for its enforcement. I argue that the Seimas Ombudsmen's Office as NHRI might be effective in promoting and protecting human rights only within certain limits that

<sup>4</sup> Jan Wouters et al., (2013) "The European Union and National Human Rights Institutions" Working paper No.112 Leuven Centre for Global Governance Studies <<http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP112-Wouters-Meuwissen-Barros%281%29.pdf>> accessed 3<sup>rd</sup> November 2015.

<sup>5</sup> FRA (European Union Agency for Fundamental Rights), (2010) *National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Architecture in the EU*. Vienna, Publication Office of the European Union.

<sup>6</sup> Wouters et al. (n 4).

<sup>7</sup> ICC (the International Coordinating Committee for National Human Rights Institutions), (2014) "Chart of the status of national institutions accredited by the international coordinating committee of national institutions for the promotion and protection of human rights", Accreditation status as of May 2014, <http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs-%20%2823%20May%202014%29.pdf>

<sup>8</sup> Ibid.

<sup>9</sup> UNHRC, (2011) "Universal Periodic Review Report of the Working Group on the Universal Periodic Review, Lithuania" UN Doc A/HRC/19/15.

are imposed by a domestic context. My argumentation is based on an interdisciplinary approach combining legal and political science research methods.

This paper is divided into two main parts. In the first part I analyse the main pre-conditions set by theory and practice for the effective functioning of NHRIs, and from this perspective evaluate the Seimas Ombudsmen's reform. In the second part, I evaluate national contextual framework of human rights and priority areas of protection and identify main obstacles that may hinder smooth reform process. In addition to that I analyse the views of non-governmental sector, which plays an important role in Lithuanian human rights protection system, about the proposed reform and its direction.

## 2. Effectiveness of NHRIs: the determining factors

The question of effectiveness of NHRIs falls within the same scope of political theories on institutional performance. Rational choice school advocates that institutional effects will follow design choices meanwhile other schools of thought regard strictly rational choice model as over-determined and suggest to look at social conditions too<sup>10</sup>. In this context such questions of when and why formal design will affect the outcomes of institutional performance become important and the literature provide several answers to it. The classic answer would include resources, interest groups, constituencies, leadership and adaptive capacity among main variables that determine the outcomes of institutional performance meanwhile the recent research also draws attention to such factors as coherence, political implications, capacity and capability<sup>11</sup>.

Studies on NHRIs provide contrasting evidence on the existence of the causal linkage between institutional design and outcomes. Some studies show that the formal structure of NHRIs did not determine their performance: many NHRIs that formally respected the Paris Principles were not particularly effective in guaranteeing human rights, meanwhile the others, even if they failed to meet Paris Principles to their whole extent, still achieved significant results<sup>12</sup>. Similar claims have been made in relation to those NHRIs that respected Paris principles. Typically four main models of NHRIs are distinguished: commissions, advisory commissions/committees, institutes and ombudsmen<sup>13</sup>. The research shows that the NHRI's model selected by a state has no direct effect on either its potential for accreditation or its effectiveness as an NHRI<sup>14</sup>.

However there have been attempts to prove the assumption that institutional design features of NHRIs matter, especially if they promote greater capability and independence<sup>15</sup>. In addition to that the scholars claim that the effectiveness of NHRI cannot be isolated from domestic political and economic context. Thus, for instance, the strong power of NHRI cannot derive from international pressure but has to be driven by domestic political will to improve human rights standards<sup>16</sup>. According to FRA research<sup>17</sup>, the lack of political support for NHRIs is still present in European countries and leads to NHRIs' insufficient independence or effectiveness.

Despite little agreement on the impact of institutional design on the effectiveness of NHRIs,

<sup>10</sup> Linos and Pegram (n 1) 8.

<sup>11</sup> Ibid 8.

<sup>12</sup> International Council on Human Rights Policy, (2005) *Assessing the Effectiveness of National Human Rights Institutions* 7.

<sup>13</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 24.

<sup>14</sup> FRA, (2012) *Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union*. Luxembourg: Publications Office of the European Union. 19.

<sup>15</sup> Linos and Pegram (n 1) 10.

<sup>16</sup> Sarah Spencer and Colin Harvey, (2014) "Context, institution or accountability? Exploring the factors that shape the performance of national human rights and equality bodies", *Policy & Politics*, Vol. 42.

<sup>17</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 18.

a state establishing a NHRI has to make a choice about the form of its NHRI, having in mind strong and weak points of each model suggested by theory. In addition to that, according to the recent research<sup>18</sup>, *scope of the mandate and institutional independence* are the other two the most significant questions that might determine NHRIs effectiveness.

## 2.1. Models of NHRIs

Commissions and advisory commissions are multi-member bodies however it is recognized that only commissions correspond most closely to the model articulated in the Paris Principles<sup>19</sup>. Commissions are usually granted advisory, monitoring, educational and quasi-judicial functions in the field of human rights. Currently in the EU member states there are five commissions having A-status of this type: Ireland, Northern Ireland, Great Britain, Greece and Scotland<sup>20</sup>. In the EU currently there are only two states: France and Luxemburg that follow *advisory commission/committee model*<sup>21</sup>. The main feature of this model is assistance to the government through expert advice and consultations.

Human rights institute's model is the closest to the advisory commission's model due to their focus on human rights education, information, research and documentation rather than complains investigation and monitoring. The characteristics of their role predetermine that human rights institutes are more suitable for the states where human rights culture already functions well<sup>22</sup>. Human rights institutes as NHRIs having A-status exist in Denmark and in Germany<sup>23</sup>. Since 2014 Netherlands Institute for Human Rights also received A- status<sup>24</sup>.

Human rights ombudsman is a hybrid form of the ombudsman institution however as the classic ombudsman is a single-member body. The latter causes some difficulties in meeting the pluralism requirement, in the strict sense of the word, in the make-up of the body set by the Paris Principles. However in practice the principle of pluralism is interpreted in a more creative way, for example, through its application to governing bodies or the election system<sup>25</sup>. The spectrum of human rights ombudsman mandate makes it the closest to the commission's model, because typically it is granted strong investigative (quasi-judicial) and monitoring powers<sup>26</sup>. However the main difference is that normally human rights ombudsman institution's mandate is limited to the cases where public administration has been involved<sup>27</sup>. UN began to accept human rights ombudsmen as NHRIs later in the 1990s and the support for human rights ombudsman model is also expressed by regional organizations such as Council of Europe<sup>28</sup>. Currently fully accredited ombudsperson institutions exist in Poland, Portugal and Spain<sup>29</sup>.

The choice of NHRI's model depends exclusively on a national context. However any choice should ensure both: promotion and protection of human rights. The studies note<sup>30</sup> that the promo-

<sup>18</sup> Linos and Pegram (n 1).

<sup>19</sup> Shubhankar Dam, (2007) "Lessons from National Human Rights Institutions Around the World for State and Local Human Rights Commissions in the United States" Executive Session Papers: Human Rights Commissions and the Criminal Justice System, Harvard University 5.

<sup>20</sup> ICC (n 7).

<sup>21</sup> Ibid.

<sup>22</sup> Dam (n 19) 6.

<sup>23</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 6.

<sup>24</sup> ICC (n 7).

<sup>25</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 28.

<sup>26</sup> Dam (n 19) 6.

<sup>27</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 36.

<sup>28</sup> Linda C. Reif, (2011) "Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman" 31 *Boston College Third World Law Journal*, Vol. 31, No. 2, 269, 291.

<sup>29</sup> FRA, *Handbook on the establishment and accreditation of National Human Rights Institutions* (n 14) 20.

<sup>30</sup> FRA, *Handbook on the establishment and accreditation of National Human Rights Institutions* (n 14) 22.

tion is mainly about advising the government/the parliament and awareness-raising, meanwhile the protection of human rights includes the monitoring of human rights violations, making recommendations and can also include the power to receive, investigate and resolve complaints. The practice shows that ‘(...) the absence of a clear mandate to engage in promotional activities would commonly apply to ombudsmen whereas the lack of a mandate to engage in protection activities is typical for institutes and commissions with an advisory role’<sup>31</sup>.

## 2.2. Scope of the mandate of NHRI

The Paris Principles state that the NHRI’s mandate should be as broad as possible. Amnesty International emphasizes that ‘(...) the mandate should not be defined solely in terms of those rights that are specifically provided for in the country’s constitution – particularly as some constitutions do not contain key rights such as the right to life. Rather NHRIs should take as their frame of reference the definitions of human rights as set out in international human rights instruments and standards, whether or not the state has ratified the relevant treaties’<sup>32</sup>.

The studies show that the broad legal mandate, covering civil, cultural, economic, political and social rights, is one of the preconditions for the effectiveness of NHRI together with a broad jurisdiction, covering also military and special security forces<sup>33</sup>. However the scholars note that a broad range of powers can create expectations that, given resource constraints, cannot be met<sup>34</sup>.

The broad legal mandate and financial resources are not the only determinatives of the influence a NHRI can make. Such factor, as willingness to change, plays a significant role. The examples of operating NHRIs show that the power to make recommendations on draft legislation has not proved highly effective in securing amendments, despite the quality of the analysis<sup>35</sup>.

The Paris Principles do not require NHRIs to have a “quasi-judicial” function – that is, to handle complaints or petitions from people whose human rights are alleged to have been violated<sup>36</sup>. However complaint-handling power of NHRI is one of a few the most debatable issues in the literature on NHRI<sup>37</sup>. Amnesty International strongly advises that NHRI would be given the mandate to handle individual complains and an investigation power, even to investigate on its own initiative<sup>38</sup>. In the literature it is possible to find a strong statement that complains handling is actually one of the least effective ways of addressing human rights issues meanwhile the most effective mean has to be based on a systematic approach to the most important human rights problems<sup>39</sup>. It is suggested that systematic approach to human rights problems should include:

- (i) the identification of priority human rights issues in a country;
- (ii) the allocation of resources to work on priority issues;
- (iii) progress monitoring;
- (iv) legal amendments;
- (v) training of officials working in priority areas.

<sup>31</sup> FRA, *National Human Rights Institutions in the EU Member States* (n 5) 13.

<sup>32</sup> Amnesty International, (2001) “National human rights institutions: Amnesty International’s recommendations for effective protection and promotion of human rights” 5.

<sup>33</sup> International Council on Human Rights Policy (n 12) 8.

<sup>34</sup> Spencer and Harvey (n 16) 11.

<sup>35</sup> Ibid.

<sup>36</sup> International Council on Human Rights Policy (n 12) 7.

<sup>37</sup> Linos and Pegram (n 1) 29.

<sup>38</sup> Amnesty International (n 32) 10-11.

<sup>39</sup> Richard Carver, (2011) “National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law”, in Ryan Goodman, Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press,) 202.

However these remarks do not intend to suggest excluding investigative function from NHRIs' mandate. On the contrary, according to the recent studies complaint-handling power is one of the determinants of NHRI's effectiveness on the condition of favourable contextual setting<sup>40</sup>.

### 2.3. Independence of NHRI

Independence of NHRIs is a broad concept, which can be described by some sub-institutional features. Some scholars suggest to measure independence by three means: (i) budgetary arrangements; (ii) the method of appointment/termination of NHRI's officials; (iii) relationship with government on operational matters<sup>41</sup>. Meanwhile the others<sup>42</sup> supplement this concept by such factors as statutory basis, criteria for membership, conflict of interest provisions, remuneration and immunities. The recent research has proved that constitutional or legislative status is one of the most significant safeguard of independence because it grants NHRI higher stability and recognition than an executive enactment<sup>43</sup>.

The question of independence is always related to the question of accountability and the practice shows that NHRI can be accountable to legislative or executive body. It is widely agreed that NHRI's insulation from presidential oversight is desirable<sup>44</sup>. The scholars note that the advantage of direct accountability to the legislator is perceived as having a greater autonomy and may increase the legitimacy of the NHRI in the eyes of elected representatives and the public, meanwhile direct access to an executive branch can, where the relationship is constructive, offer much-needed leverage on policy matters<sup>45</sup>.

## 3. Road to NHRI in Lithuania

### 3.1. General trends on human rights situation in Lithuania

The UN Human Rights Committee in its concluding observations in 2012<sup>46</sup> on human rights situation in Lithuania noted that domestic violence against women, corporal punishment in institutional settings, trafficking in persons, discrimination on the basis of sexual orientation or gender identity, discrimination against Roma are among the most serious problematic issues in Lithuania. All those concerns were repeated in 2014 observations by the UN Committee on Economic, Social and Cultural Rights, which also noted serious problems in relation to the social rights, the right to health/healthcare, the right to education and violence against children.

Since 2009 Human Rights Watch issued several letters to Lithuanian government<sup>47</sup> and most of them concerned issues that are related to discrimination. In its letters Human Rights Watch expressed its concern about 'Law on the Protection of Minors against the Detrimental Effect of Public Information, which was designed to censor information available to children and should ban materials that 'agitate for homosexual, bisexual and polygamous relations' from schools or public places where they could be seen by youth, on the grounds that they would have a 'detrimental effect' on the development of minors. In the most recent letter Human Rights Watch expressed its concern

<sup>40</sup> Linos and Pegram (n 1) 16.

<sup>41</sup> Spencer and Harvey (n 16) 3.

<sup>42</sup> Linos and Pegram, (n 1) 11, *citing* Richar Carver, (2014) "Measuring the Impact and Development Effectiveness of National Human rights Institutions: A Proposed Framework for Evaluation, Bratislava Regional Centre".

<sup>43</sup> *Ibid* 21-22.

<sup>44</sup> *Ibid* 26.

<sup>45</sup> Spencer and Harvey (n 16) 12.

<sup>46</sup> UN Human rights Committee (2012) "Concluding observations: Lithuania" UN Doc CCPR/C/LTU/CO/3.

<sup>47</sup> Human Rights Watch, (2015) "Lithuania" <<https://www.hrw.org/europe/central-asia/lithuania>> accessed 9 November 2015.



about the remarks stated by the Minister of Justice of the Republic of Lithuania in relation to a legislative proposal allowing a gender-neutral partnership registration in Lithuania. The problem of discrimination and the rights of lesbian, gay, bisexual, transgender and intersex people in Lithuania was also addressed by Amnesty International in its 2014/2015 report<sup>48</sup>.

The rights of the most vulnerable groups such as children are often called one of the most problematic areas in Lithuania due to the lasting stagnation and regress, which have been observed during last decade and especially since the onset of crisis in 2008<sup>49</sup>. The UN Human Rights Committee<sup>50</sup> expressed its particular concern about continuous existence of trafficking in children under 18 years of age, in particular that adolescent girls living in boarding schools, special child-education and care homes, governmental and non-governmental child-care homes, and those in risk families, very often become victims of trafficking. The recent data shows that despite some actions taken by the government to improve well-being of children and youth at risk, the level of child poverty remains high – around 35%<sup>51</sup>. The UN Committee on the Rights of the Child in its concluding observations of 2013<sup>52</sup> urged Lithuania to take measures to formulate a comprehensive policy on children's rights that would guide the development of programmes and projects that are needed and establish systems to monitor and evaluate them.

These fragmental examples on human rights situation in Lithuania suggest that Lithuania still faces great difficulties in respect to a variety of human rights issues, and some of them directly concern the attitudes of Lithuanian government. The studies on human rights situation in Lithuania identify several factors that hinder progress in this field. One of them is that “human rights failed to appear on political agenda of the Parliament and the Government, except in a few notorious cases that red-flagged the anti-human rights tendencies”<sup>53</sup>. Consequently, there has been a lack of systematic approach to human rights in Lithuania<sup>54</sup>.

### 3.2. *The Seimas Ombudsmen's reform*

Discussion on the establishment of a NHRI in Lithuania started in 2008 among some academics<sup>55</sup> however only in 2011 Lithuania began official discussions in the Seimas Committee on Human Rights. The contextual analysis shows that the main driving forces for the beginning of this reform were international incentives coming from the UN bodies. Human rights experts<sup>56</sup> share this observation stating that discussions on the establishment of NHRI in Lithuania were perceived as a duty by the legislator rather than was driven by its will. In addition to that there is an opinion

<sup>48</sup> Amnesty International, (2015) *Report 2014/2015. The State of the World's Human rights* 38, 235 <[http://www.amnestyusa.org/pdfs/AIR15\\_English.PDF](http://www.amnestyusa.org/pdfs/AIR15_English.PDF)> accessed 9 November 2015.

<sup>49</sup> Human Rights Monitoring Institute et al. (2012) *Rights of the Child in Lithuania: NGO Report for the UN Committee on the Rights of the Child On the 3<sup>rd</sup> and 4<sup>th</sup> periodic reports by the Government of Lithuania. 62<sup>nd</sup>-63<sup>rd</sup> pre-sessional working group*, <[https://www.hrmi.lt/uploaded/PDF%20dokai/-CRC\\_Alternative\\_Report\\_Lithuania\\_NGO\\_Group\\_20120816\\_1.pdf](https://www.hrmi.lt/uploaded/PDF%20dokai/-CRC_Alternative_Report_Lithuania_NGO_Group_20120816_1.pdf)> accessed 9 November 2015.

<sup>50</sup> UN Human Rights Committee, 105th session (n 46).

<sup>51</sup> European Platform for Investing in Children, (2015) “Lithuania: developing the childcare system” <[http://europa.eu/epic/countries/lithuania/index\\_en.htm](http://europa.eu/epic/countries/lithuania/index_en.htm)> accessed 9 November 2015.

<sup>52</sup> UN Committee on the Rights of the Child, (2013) “Concluding observations on the combined third and fourth periodic reports of Lithuania” UN Doc CRC/C/LTU/CO/3-4.

<sup>53</sup> Human Rights Monitoring Institute et al. (n 49).

<sup>54</sup> Human Rights Monitoring Institute et al. (2011) “Joint UPR Submission: Lithuania”. <<http://lib.ohchr.org/HRBodies/UPR/Documents/session12/LT/JS1-JointSubmission1-eng.pdf>> accessed 9 November 2015.

<sup>55</sup> Edita Žiobienė, (2008) „Nacionalinės Žmogaus teisių Institucijos Perspektyvos Lietuvoje“ 9(111) *Jurisprudencija*, Vol. 9. No 11., 86.

<sup>56</sup> Interview with Karolis Liutkevičius, Legal Officer, Human Rights Monitoring Institute (HRMI) (Vilnius, Lithuania, 28 October 2015). Karolis Liutkevičius is a member of working group for the Seimas Ombudsmen Office's reform becoming NHRI.

that political branches of government understand the protection of human rights in a quite narrow sense: this protection is usually associated with the operation of the legal system, law enforcement institutions, and the courts in reinstating infringed rights<sup>57</sup>.

At the very beginning of the reform process three alternatives were considered (i) establishment of new body; (ii) merging three Lithuanian ombudsmen institutions and broadening their mandate according to Paris Principles; (iii) reforming the Seimas Ombudsmen's Office by broadening its mandate according to Paris principles. According to the member of the working group<sup>58</sup> establishment of a new body was considered only as an idealistic model because it was perceived as the project, which requires bigger financial resources than other alternatives. Moreover in 2012 the consequences of the economic crisis were still strongly felt in Lithuania and thus the establishment of a new body was eliminated from the discussions. However, there were no real calculations of the financial resources that would be needed for the establishment and the functioning of this new institution, which might suggest that the financial argument was used just to mask the real political will.

The second option - merging three Lithuanian ombudsmen institutions into one new institution, was also neglected by using the argumentation that the Seimas Ombudsmen's Office is established on a constitutional basis thus the merger of this institution might be incompatible with the norms of the Constitution of the Republic of Lithuania<sup>59</sup>. The literature points out that the mergers proved difficult, creating tensions internally and in external relations and cause competition to retain the features of the previous bodies<sup>60</sup>. In addition to that difficulties might be caused by little prior experience of joint working, different institutional cultures, working practices and staff profiles. The British experience by merging equality and human rights protection in one entity (Equality and Human Rights Commission) faced some challenges coming from different approaches to promoting equality and human rights and an asymmetry in powers<sup>61</sup>. Moreover there is a fear that the reform, merging different institutions working in the field of human rights into one central human rights institution, would cause the marginalization of issues in relation to certain group of rights and thus a loss of expertise in this area<sup>62</sup>.

The third option – the reform of the Seimas Ombudsmen's Office by broadening its mandate according to Paris Principles, has become the working option for the preparation of the draft legislation.

Some scholars argue that constitutional provision on the Seimas Ombudsmen's establishes so called Scandinavian or classic ombudsman, which is a mechanism that investigates the activities of the executive branch and its agencies and thus monitors the conduct of public administration to ensure that it is carried out legally and fairly<sup>63</sup>. Due to this human rights ombudsmen model, which is a hybrid form of ombudsmen institutions and is popular in Central and Eastern European countries<sup>64</sup>, is not envisaged in the Constitution of the Republic of Lithuania<sup>65</sup>. It must be mentioned that ombudsman institutions with human rights mandate typically differ from country to country but there are two major trends in Europe. Except for Spain and Portugal, most Western European human rights ombudsman institutions more closely reflect the classical ombudsman model of

<sup>57</sup> Human Rights Monitoring Institute et al. Development (n 54).

<sup>58</sup> Interview with Karolis Liutkevičius (n 56).

<sup>59</sup> Adopted 10/25/1992.

<sup>60</sup> Spencer and Harvey (n 16) 8.

<sup>61</sup> Ibid 9.

<sup>62</sup> Eilíonóir Flynn, (2015) *Disabled Justice?: Access to Justice and the UN Convention on the Rights of Persons with Disabilities*. Ashgate Publishing, Ltd., 79.

<sup>63</sup> Žiobienė (n 55) 88.

<sup>64</sup> Human rights ombudsmen were established in Poland (1987); Croatia (1992); Slovenia (1995); Hungary (1995).

<sup>65</sup> Žiobienė (n 55) 88.

investigation, recommendation, and reporting. Meanwhile human rights ombudsman institutions in Central and Eastern Europe typically have more extensive powers<sup>66</sup>.

Lithuania established the Seimas Ombudsmen's Office on the basis of its constitutional provision (Article 73) stating that complaints of citizens about the abuse of authority and bureaucratic intransigence by state and municipal officials (with the exception of judges) shall be examined by the Seimas ombudsmen. They shall have the right to submit a proposal before a court for dismissing the guilty officials from office. The same article declares that the powers of the Seimas ombudsmen shall be established by law.

The Law on the Seimas Ombudsmen was adopted in 1998<sup>67</sup>. Article 3 of the Law on the Seimas Ombudsmen states that the purpose of activities of the Seimas Ombudsmen is to protect a person's right to good public administration securing human rights and freedoms, to supervise fulfilment by state authorities of their duty to properly serve the people. In 2014 this article was amended by an additional purpose stating that "The Seimas Ombudsmen shall also carry out the national prevention of torture in places of detention in compliance with the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment".

Although the Seimas Ombudsmen's Office is an independent institution, which is accountable to the Seimas, the scholars argue that assignation of NHRI's powers to the Seimas Ombudsmen, would require essential amendments regarding its structure, composition, relations with government and may not correspond to its initial constitutional mandate<sup>68</sup>.

The discussions about constitutional obstacles for the Seimas Ombudsman's Office to become NHRI were followed by asking review of Law on the Seimas Ombudsmen in terms of compatibility to Paris principles and recommendations from OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). In its opinion ODIHR stated that the Seimas Ombudsmen are *inter alia* responsible for protecting human rights and freedoms and investigating complaints of abuse of authority of officials and this brings the Seimas Ombudsmen to fall within the scope of Paris principles<sup>69</sup>.

Despite the legal question whether the Seimas Ombudsman is the classic or hybrid ombudsman, the choice of the model of NHRI had also political motives<sup>70</sup> and the first draft on the reform of the Seimas Ombudsmen's Office into NHRI was prepared in 2012. It received a lot of criticism due to its incompleteness<sup>71</sup> and currently the working group drafts a new proposal on the Law on the Seimas Ombudsmen. According to the member of the working group the main disagreements are related to the scope of the mandate, the operationalization of concrete functions, composition of staff and the implementation of the principle of pluralism<sup>72</sup>. It must be mentioned that UN Committee against Torture, is already concerned as to whether the Seimas Ombudsmen will have sufficient financial and staffing resources to carry out both the mandate of the national human rights institution and that of the national preventive mechanism under the Optional Protocol to the Convention<sup>73</sup>. As it was mentioned in the previous chapter budgetary arrangements are one

<sup>66</sup> Reif (n 28) 299.

<sup>67</sup> The Law on the Seimas Ombudsmen. 1998, No. VIII-950.

<sup>68</sup> Žiobienė (n 55) 88.

<sup>69</sup> OSCE/ODIHR, (2011), "Opinion on the Law of the Republic of Lithuania on the Seimas Ombudsmen" NHRI-LT/187/2011 (AT).

<sup>70</sup> There is an argument that there was no will from political parties for a new body having mandate of NHRI (Interview with Karolis Liutkevičius (n 56).

<sup>71</sup> ŽTK (Žmogaus teisių komitetas), (2013) "Pranešimas: Škotijos žmogaus teisių komisijos pirmininko nuomone Lietuvai reikalinga JT kriterijus atitinkanti žmogaus teisių institucija" <[http://www3.lrs.lt/pls/inter/w5\\_show?p\\_r=4463&p\\_k=1&p\\_d=134281](http://www3.lrs.lt/pls/inter/w5_show?p_r=4463&p_k=1&p_d=134281)> accessed 9 November 2015.

<sup>72</sup> Interview with Karolis Liutkevičius (n 56).

<sup>73</sup> UN Committee against Torture, (2014) "Concluding observations on the third periodic report of Lithuania" Un Doc

of the preconditions of effectiveness and independence of NHRI. However this can be one of the most difficult tasks for Lithuania to achieve because the mismatch between delegated functions and assigned resources were already observed by the UN not only in the case of the Seimas Ombudsmen. Insufficient financial and human resources were one of the major problems in the cases of the Office of the Children's Rights Ombudsman<sup>74</sup> and the Office of the Ombudsman for Equal Opportunities<sup>75</sup>.

### 3.3. *Civil society organisations' (CSOs) views on the Seimas Ombudsmen's reform*

The role of CSOs in establishment of NHRI has particular importance because 'NHRI adoption has been characterized less by elite-driven governmental deliberation than vocal mobilization on the part of third party actors'<sup>76</sup>. Human rights monitoring institute (HRMI), as one of the Lithuanian CSOs working in the field of human rights, in its initial proposal advocated for the establishment of a new body to become NHRI. The main argument for this proposal was that the new institution will not have inherited priority areas of competence, working traditions, established relations with the government and thus more closely will correspond to the Paris Principles.

One of the major concerns in the Seimas Ombudsmen's reform expressed by CSOs, is the possibility to achieve balance between complains-handling and human rights mandate. The studies on the ombudsman institutions in Central and Eastern Europe have raised the question whether making complains-handling the top priority, maybe to ignore the most serious human rights issues and to neglect the ombudsman's functions in relation to international law<sup>77</sup>. The results of the studies<sup>78</sup> do not confirm the latter hypothesis by showing that the ombudsman institutions have effectively implemented international law obligations in several ways. Firstly, they have increasingly referred directly to internationally guaranteed human rights, rather than just constitutional rights, in their complaint-handling; Secondly, the EU's human rights conditionality speeded up the internationalisation of human rights protection.

The other key concerns coming from CSO are closely related to the principle of pluralism and the requirement for independence. The Seimas Ombudsmen's Office is governed by two ombudsmen who are appointed by the Seimas following the nomination by the Seimas Speaker. As it is expressed in ODIHR recommendation<sup>79</sup> the Ombudsmen appear to be strongly linked to the Seimas, as their recruitment and appointment procedures are very Seimas-driven, which does not respect neither principle of independence not pluralism requirement. HRMI emphasizes<sup>80</sup> that discussions on the forms of CSOs and other stakeholders' inclusion in the appointment and activities of the Seimas Ombudsmen are one of the major issues in the ongoing deliberations. For instance, HRMI argues for the inclusion of representatives of several religious groups meanwhile other members of the working groups support just the representatives of the Catholic Church<sup>81</sup>. It is interesting to note that, according to recent research, civil society representation in the NHRI is not a widely recognised safeguard of its independence<sup>82</sup>. In other words this observation suggests that CSOs representation in NHRI and their impact on NHRI's effectiveness in promoting and protecting human right might be very context-dependent and have significant impact just in certain

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CAT/C/LTU/CO/3.

<sup>74</sup> UN Committee on the Rights of the Child (n 52).

<sup>75</sup> UN Committee on the Elimination of Discrimination against Women, (2014) "Concluding observations on the fifth periodic report of Lithuania" Un Doc CEDAW/C/LTU/CO/5.

<sup>76</sup> Linos and Pegram (n 1) 10.

<sup>77</sup> Carver, 'National Human Rights Institutions in Central and Eastern Europe (n 39) 182.

<sup>78</sup> Ibid 192.

<sup>79</sup> OSCE/ODIHR (n 69).

<sup>80</sup> Interview with Karolis Liutkevičius (n 56).

<sup>81</sup> Ibid.

<sup>82</sup> Linos and Pegram (n 1) 16.

countries. The studies are silent about the factors, which might influence CSOs influence on NHRIs' effectiveness and open up a new venue for future research.

However the recent scholarship cautions that the relations with civil society should be balanced. This means that NHRI '(...) needs to work constructively with civil society but not be captured by it; nor should civil society be so close that it cannot act as a constructive critic'<sup>83</sup>. Moreover CSOs and their activities can also fall under the scrutiny of NHRI. The balanced interorganisational relations are of particular importance in such small countries as Lithuania, where there is relatively small number of CSO working in the field of human rights.

CSOs effective inclusion in the activities of NHRI is one of the most important aspects for Lithuania because reforming the Seimas Ombudsmen's institution, which is based on complaints-handling, into NHRI, predetermines less active tradition of working with CSOs. In addition to that Lithuanian civil society tradition belongs to so called postcommunist civil society tradition, which is characterised not only by relatively low levels of organizational membership<sup>84</sup>, but also by weak collaborative relations between government and CSOs. Thus collaborative governance approach in the field of human rights may only benefit both parties. On the one hand Lithuanian CSOs should overcome a perception of the state bodies as negatively motivated entities that are overcautious in responses to human rights violations. On the other hand Lithuanian government should change its view about CSOs as being just formal consultants rather than knowledgeable experts and partners in policy making and monitoring processes.

#### 4. Conclusions

Effectiveness of NHRI is determined by many factors however, some of them such as political will and ability to prioritize the most problematic areas in the field of human rights (if the case of a narrow mandate of NHRI) are significant determinants even before the establishment of NHRI. Analysis of Lithuanian case shows low speed and the intensity of the ongoing reform on NHRI and suggests that this reform is driven more by an international incentive rather than strong domestic political will to ensuring effective protection and promotion of human rights. This observation is also supported by the perceived unwillingness on a side of the government to have a new established body with the NHRI's mandate. Instead, attempts are made to reform one of the three ombudsmen offices with tradition of dependence on the Seimas. Although the human rights ombudsmen's model is one of the acceptable models by the ICC, the human rights ombudsman has narrower mandate than a human rights commission due to the limitation of its investigative powers to the cases where public administration is involved.

Observations on human rights situation in Lithuania show that current problematic issues cover variety of human rights, which call for a broad mandate and jurisdiction of NHRI. In particular, international community, academics and CSO express serious concerns about discrimination and children's rights situation in Lithuania. Therefore the reform of the Seimas Ombudsmen's into NHRI should fully explore the possibility of consolidating the work and functions of the Equal Opportunity Ombudsperson and the Children's Ombudsperson and clearly address interinstitutional relations with them. Unless Lithuania establishes broadly mandated NHRI, there is less likelihood to become A-status institution and a higher risk to be problematic in terms of its effectiveness.

Legal analysis shows that the Seimas Ombudsmen's reform into NHRI will be based on legislative enactment and thus will meet one of the preconditions of effectiveness set by theory. However

<sup>83</sup> Spencer and Harvey (n 16) 13.

<sup>84</sup> Marc Morjé Howard, (2003) *The Weakness of Civil Society in Post-Communist Europe*. Cambridge University Press, 158.

the mismatch between institutional mandate and assigned resources was a common problem in the previous work of Lithuanian Ombudsmen institutions. Due to this there is a great danger that NHRI will also operate with limited financial resources that might have a negative impact on its effectiveness.

CSOs role in creating NHRI has particular importance not only due to human rights governance particularities but especially due to Lithuanian post communist tradition with relatively weak civil society and its involvement in policy making processes. Although CSOs claim for an establishment of a new independent body acting as NHRI, which seems to be not an option for a legislature, a new platform for deliberation in the field of human rights may not only contribute to shaping new working tradition but also building partnership relations for future work. Balanced relations between NHRI and CSOs might be one of the preconditions for effectiveness in promoting and protecting human rights in some countries, and there is no evidence yet that Lithuania does not belong to this group.

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# A COMPARATIVE STUDY OF EXISTING HUMAN RIGHTS BODIES: AN EXAMINATION OF THE SOUTH AFRICAN, FRENCH, SCOTTISH AND ENGLISH BODIES FOR EQUALITY AND HUMAN RIGHTS

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## Abstract

In light of the flexibility granted by the Paris Principles, national human rights institutions are not required to have a rigid structure and therefore a number of human rights bodies in South Africa, France, Scotland and England are examined in order to establish the points of convergence and divergence between the said bodies. By extracting the most salient features, this paper aims to determine what structure the potential Maltese Human Rights and Equality Commission should have.

## 1. Introduction

The last half a century has attested to an ever-increasing interest in committing States to safeguard and protect human rights, and amongst other means, this has also presented itself in the evolvement of national institutions tasked with the promotion and protection of human rights. If one looks at States worldwide, one would notice that while a number of States have an A-Status institution in place, some are still working towards bettering their already existing ones; however, there are other States such as Malta, which do not have such a recognised institution at all. Nevertheless, establishing an A-status institution is not sufficient, since the said institution is to have the requisite support, independence and finances that are necessary for the smooth running of such an institution. Problems can also arise if one State has more than one human rights institution with overlapping mandates since it may become somewhat blurry as to which institution is responsible for what. What is even more detrimental is if a State has more than one institution each focussing on a specific area, but still leaving gaps with respect to a particular group<sup>1</sup>.

This paper will focus on the English, Scottish, French and South African institutions in particular due to the fact they have proven to be quite efficient in the respective States and are perceived to be pioneers when it comes to human rights institutions. While possessing certain common features, they also differ on certain aspects not only in terms of composition but also in terms of mandate and functions. However, reference to other NHRIs will also be made throughout the paper. The reason behind the flexibility and variation in structure owes itself to the general structure of the Paris Principles which do not explicitly mention the structure which should be adopted since this is dependent on the legal system and customs of the respective States and which are to be ‘best suited

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<sup>1</sup> Colin Harvey & Sarah Spencer (2012) “Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland” *The Political Quarterly* 79:1 p 1615.

to [the States'] particular needs at the national level'<sup>2</sup>. Thus, this paper will draw out a comparison of the most salient features of an effective national human rights institution, mainly in terms of structure, roles and functions and this will be done through a brief examination of the types of institutions that can be adopted, that is, by delving into ombudsmen and hybrid institutions, but by focussing mostly on human rights commissions.

## 2. The Role of Equality and Non-Discrimination in the 21<sup>st</sup> Century

Whereas in the past, equality and non-discrimination were limited to the area of constitutional law, we have now moved beyond this sphere and thus one is no longer limited to mere equality before the law, since additional and stricter tests are applicable mainly in terms of reasonableness and justification. This has in turn led to a rise in complaints with regard to the lack of clarity of some grounds due to the numerous provisions and instruments addressing equality and non-discrimination. Thus, for the sake of coherence, there is a higher than ever need for a common understanding of what equality is and for the codification of equality laws<sup>3</sup>. For instance, the United Kingdom's Equality Act 2010 is to be applauded for codifying the otherwise complicated and scattered Acts and Regulations.

Although very often courts appear to be capable of implementing a standard level of equality and non-discrimination in individual situations, it appears that at times courts find themselves 'poorly equipped to implement a group-based concept of equality and to tackle more complex and structural aspects of discrimination'<sup>4</sup>. This has advertently led to the rise of a new mode of governance in addressing equality- a system which is characterised by the collection of data; monitoring and observation by setting reachable targets; and at times by carrying out investigations and inquiries. Mabbett even suggested that such an approach has led to a situation which not only establishes 'legal prohibitions on discrimination' but also creates a 'duty to promote equality'<sup>5</sup>. This modern approach seeks to promote equality by raising awareness rather than adhering to the traditional 'box-checking approach' which has been criticised for merely adopting a set of procedures without substantive content<sup>6</sup>.

Questions also arise as to whether there is a requirement of explicitly highlighting the ground on which there has been discrimination prior to the examination of facts, or whether the mere establishment that there has been discrimination is sufficient. Therefore, with this principle in mind, we are now moving closer to a situation in which merely ascertaining that there has been discrimination is sufficient, and away from the strict distinction between discrimination in terms of one ground and another<sup>7</sup>. This is because the scenario wherein the starting point is the delineation of which ground is applicable prior to the determination of which laws on equality and discrimination are applicable, if any at all, can render justice less accessible in cases where there is no such clear demarcation. In light of this, human rights institutions should follow a somewhat reversed approach of first determining the role that discrimination played in the relevant situation, and then establishing the specific ground that is leading to such discrimination.

<sup>2</sup> United Nations General Assembly Resolution number 48/134 on National institutions for the promotion and protection of human rights presented at the 85th plenary meeting on 20 December 1993 <http://www.un.org/documents/ga/res/48/a48r134.htm> accessed 28 October 2015.

<sup>3</sup> Deborah Mabbett (2008) "Aspirational Legalism and the Role of the Equality and Human Rights Commission in Equality Policy" *The Political Quarterly* 79:1 p 45.

<sup>4</sup> *Ibid*, p 46.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

## 2.1. The ‘Duty to Act’

There might also be the imposition of an additional ‘duty to act’ on public bodies which implies that the latter should not merely refrain from doing something which goes against the principles of equality and non-discrimination, but have a duty to carry out positive actions which prevent such discrimination from taking place. In addressing the ‘duty to act’, the Irish Human Rights and Equality Commission (IHREC) is to be analysed since it is thought to be the ‘first combined equality and human rights public sector duty to be introduced in domestic legislation in an EU Member State’<sup>8</sup>. This enables public bodies to handle equality and human rights challenges in a cohesive manner by applying and following tools of guidance developed by the said Commission. In doing this, the IHREC attempts to follow the reversed approach of rather than waiting for one to complain that there has been discrimination in one’s regard, public bodies first adopt proactive measures which not only promote human rights and equality, but which set up policies and mechanisms with which to combat discrimination. This thus requires the said bodies to determine a priori how their actions and policies would affect individuals. Such a reversed approach would be means of addressing the concerns of many human rights bodies that the lack of reporting in discrimination and inequality cases hinders the effectiveness and efficiency of human rights and equality bodies. Moreover, through the regular procedures, outcomes tend to be only applicable to the individual bringing forth the complaint and not to society at large, and thus the outcome would have an individualistic effect rather than a systemic one. In other words, this would be a preventive measure and public bodies would have the obligation to fulfil this duty at three main stages: at the stage of policy-making and development of early procedures; during implementation and delivery of the said policy; and in evaluating, reviewing and monitoring implementation.

## 3. The Role of National Human Rights Institutions

The roles of National Human Rights Institutions (NHRIs) are wide since not only do they play a significant part in safeguarding human rights in the domestic scenario, but they also assist in enhancing the already existing link between the national protection of human rights and international bodies such as the European Union or United Nations. In other words, in having a national institution responsible for the protection of equality and human rights, one would be granting individuals an additional remedy as one moves away from the mistaken notion of ‘go to court or do nothing’. However, in order to do this, the public would have to be informed of the legal and non-legal remedies which are available, and the extent to which they could deal with complaints in line with human rights principles<sup>9</sup>.

A concern that an NHRI should address is that resulting from a scattered system where an individual has to go through a number of bodies in order to determine who or which institution is competent to hear his case or answer his query. This bureaucratic approach would not only discourage individuals from seeking redress but would also hinder the overall effectiveness. An NHRI can act as a body which is not only responsible for carrying out research and raising awareness but for also initiating discussion and giving advice on certain matters. The issue here would be to reconcile the two-fold role of such an institution, that is, the role of a regulatory body

<sup>8</sup> Equality and Rights Alliance ‘A New Public Sector Equality & Human Rights Duty March 2015’ Part 3 of Series on ‘Setting Standards for the Irish Equality March 2015 and Human Rights Infrastructure.’ <http://www.eracampaign.org/uploads/A%20New%20Public%20Sector%20Duty%20March%202015.pdf> accessed 31 October 2015.

<sup>9</sup> Alice Donald, Jenny Watson and Niamh McClean & Philip Leach and Jörn Eschment (2009) ‘Equality and Human Rights Commission Research Report 28: Human Rights in Britain since the Human Rights Act 1998: A Critical Review’ [http://www.equalityhumanrights.com/sites/default/files/documents/human\\_rights\\_in\\_britain\\_since\\_the\\_human\\_rights\\_act\\_1998\\_-\\_a\\_critical\\_review.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf) accessed 30 October 2015.’

with that of a lobbying body without overstepping the functions of other institutions which might be specifically tasked with safeguarding or investigating certain violations.

In establishing such an institution, one is to determine the extent to which one can state that in adopting a human rights approach, one would be rendering such bodies more effective. This is because such an approach would render the institution's work more inclusive and accessible to its users by placing the needs of the individuals at the top of the agendas<sup>10</sup>. It could also be demonstrated by drawing up guidelines or codes of practices which would enable bodies to carry out duties in a balanced and proportionate manner in accordance with human rights principles. This approach could also manifest itself through the monitoring, regulation and handling of complaints in a transparent and objective manner in line with established standards.

The extent of the powers afforded to NHRIs determines the degree to which such institutions would be able to carry out their functions. For instance, although there might not be anything which explicitly prohibits an NHRI from working with other bodies which can carry out certain functions which it cannot do, the process of such collaboration might take longer and valuable time and resources can be 'wasted' along the way. Moreover, the difficulties that the presence of a number of institutions can give rise to can be depicted by the Scottish scenario wherein the numerous institutions were criticised because 'nobody is sure what their remit is'<sup>11</sup>. The issue with overlapping mandates is not limited to whether a body is regulatory or advisory but also extends to the confusion that an individual might be faced with, since such an overlap can blur an individual's path when it comes to looking for support. In addition, such an overlap might in turn lead to an ineffective and limited inquiry if a case concerns a matter which falls within the mandate of more than one institution, so as not to impede on another institution's area of expertise.

### *3.1. The Relationship of National Human Rights Institutions with Civil Society*

Civil society is perceived as the foundational basis of the overall productivity and efficiency of an NHRI and this is because the most salient conflicts stem from civil society itself and thus the agenda of such bodies can be moulded accordingly. One should not merely state that such a body should seek to formulate its agenda depending on the demands of civil society since this could lead to the encouragement of civil society to come together in the face of a particular cause, support a legislative or policy proposal or reform and then the NHRI finds itself unable to fulfil expectations. In order to reconcile this, one must ensure that nothing hinders the institution's ability to work closely with a number of stakeholders which would be able to offer expert advice or opinion on certain matters. Thus, there should be an institution which is capable of understanding what civil society wants and which is capable of delivering.

The role of civil society in the work of human rights commission was highlighted by Brand and Liebenberg in their criticism of the lack of involvement of civil society during the compilation of information for a report<sup>12</sup>. This was so because, in their opinion, the South African Human Rights Commission (SAHRC) only asked for minimal comments and input of a small number of NGOs on the draft protocols, and the monitoring reports were not made available before being produced in the actual report. Brand and Liebenberg argued that this 'deprived the Commission of valuable independent analysis and input that would lead to a fuller assessment', and also damaged the

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<sup>10</sup> Ibid.

<sup>11</sup> Colin Harvey & Sarah Spencer (2012) "Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland" *The Political Quarterly* 79:1 p 1615.

<sup>12</sup> Brand Daniel & Liebenberg Sandra (2000) "The Second Economic and Social Rights Report" 2 ESR Rev. 4, available at [www.communitylawcentre.org.za/ser/esr2000](http://www.communitylawcentre.org.za/ser/esr2000) as quoted in Jonathan Klaaren, 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' 27:2 *Human Rights Quarterly* p 539.

SAHRC's overall perception as a national human rights body<sup>13</sup>. However, what is quite worrisome is the SAHRC's power to issue subpoenas so as to demand government bodies to provide it with any information that it so demands. Although this ability to take such strong measures in order to ensure compliance with the necessary monitoring requirements can enhance the SAHRC's effectiveness, one must be careful not to resort to extreme measures which can hinder constructive dialogue. This somewhat confrontational approach would not be in line with the general principles of a human rights institution which seeks to promote education and healthy dialogue<sup>14</sup>.

## 4. The Varying Structures of National Human Rights Institutions

### 4.1. Models

Owing to the lack of specificity in the Paris Principles, States have a certain degree of manoeuvring in establishing their form of NHRI. One would have to determine what would have the most desirable and effective outcome in the specific context, and decide whether to set up a larger institution, with many representatives from different sectors of civil society, or a smaller institution which is made up of a single individual or a small number of individuals who are considered to be experts and who are more knowledgeable on human rights. The most common structures are commissions, ombudsmen, hybrid institutions or bodies which are set up with the sole mandate to focus on a particular right or the rights of a specific group. The actual composition of the body is of particular importance especially in terms of continuous efficiency and standard. For instance, shorter terms of appointment would guarantee that no commissioner or ombudsman would abuse his power, but it would also mean that there would be a regular turnover of staff and priorities. One might argue that the fact that the 'head' of the office 'changes does not mean that the whole body of staff also has to change; however, this could lead to a situation where a new 'head' would overrule work that the staff would have previously carried out. On the other hand, having a single commissioner or ombudsman might give the false impression that the role and powers would be clearer, but in reality this would require an extremely high-level of expertise in numerous areas.

## 5. Ombudsmen

Prior to the rise of the NHRIs, the office of the ombudsman used to play the role of a human rights institution in many States and over the years, many ombudsmen strived to be recognised as an NHRI; however for some, this was to no avail. The Office of the Ombudsman in Malta had also made a proposal to be recognised as Malta's NHRI since it was argued that rather than establishing a new institution to safeguard human rights and 'to act as a watchdog', the said office could be assigned the role of an NHRI since this would enable it to identify any potential violations from an early stage<sup>15</sup>. However, this proposal was not accepted.

Despite not being recognised as an NHRI, the French ombudsman assumes the role of the 'Defender of Rights' and his duty is to oversee the overall protection of rights and freedoms within France while ensuring greater access to rights. The French office is highly interesting since the office of the 'Defenseur des Droits' merged a number of institutions such as the French Mediator, the Children's Ombudsman, the Authority for Equality and Anti-discrimination and the National Commission on Security Ethics, into one institution<sup>16</sup>. Any person or association

<sup>13</sup> 13 Ibid.

<sup>14</sup> 14 Ibid.

<sup>15</sup> 'The Setting Up of a National Human Rights Institution: A Proposal by The Office of the Parliamentary Ombudsman', October 2013 <http://www.ombudsman.org.mt/wp-content/uploads/2014/01/The-setting-up-of-a-National-Human-Rights-Institution.pdf> accessed 27 October 2015.

<sup>16</sup> Le Defenseur des Droits <http://www.defenseurdesdroits.fr/> accessed 30 October 2015.

can bring a complaint before the *Defenseur*, and the latter has the power of investigation, and is also able to work to resolve conflict by mutual agreement or even impose more binding decisions. Just like other institutions, the *Defenseur* may also propose reforms and raise awareness while encouraging best practices. He may also conduct inquiries and in carrying out such a function, may request information, conduct interviews and carry out on-site verifications. When it comes to cases of misconduct, he can also request disciplinary action against officers, request observations or recommend sanctions<sup>17</sup>.

Similarly, the South African ombudsman assumes the role of a Public Protector and his aim is to strengthen the constitutional democracy through the investigation and redress of improper and prejudicial conduct by public bodies and authorities; and to rectify maladministration and abuse of power. In fulfilling its mandate, the office of the Public Protector may carry out investigations into state affairs or public administration in general; however, it may not investigate specific court decisions<sup>18</sup>. The role of the Public Protector is worth noting since it is neither an advocate for the complainant nor for the public authority and thus his role is merely restricted to ascertaining facts and to help reach impartial and independent conclusions. Thus, rather than having the same inquisitive role as the French '*Defenseur des Droits*' does, the South African Public Protector is empowered to assist in establishing and maintaining efficient and proper public administration. However, the Public Protector can also conduct investigations and may direct anyone to appear before it and request public officers to assist him in the fulfilment of his duties and propose remedial actions.

## 6. Hybrid Institutions

Another institution that some States resort to is what is termed as 'hybrid institution' which is characterised by multiple mandates. The latter not only encompasses institutions related to human rights but even extend further so as to incorporate anti-corruption action, for instance<sup>19</sup>. This kind of institution is usually state-funded and thus the same amount of resources that would usually be allocated to a similar single-member institution is awarded in spite of a wider mandate. This could also lead to issues with donors since the latter would be interested in donating to a particular area as in the case of human rights rather than to the broader mandate. This wider mandate can easily lead to an overburden which in turn results in the non-fulfilment of duties<sup>20</sup>. What is beneficial in such an institution is the promotion of the concept of a 'one-stop-service' whereby individuals would merely go to this institution to get the relevant information of how to address violations rather than be directed from one place to another in order to determine who has the requisite competence to hear the case. Having said that, very often the functions or powers of such hybrid institutions are limited to recommendations and no actual powers of inquiry or investigation are present<sup>21</sup>. One would applaud the fact that this would appear to remove bureaucracy and expedite accessibility and effectiveness; however, this should not be at the cost of quality of decisions and work carried out.

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<sup>17</sup> Ibid.

<sup>18</sup> Article 7, Public Protector Act, Act 23 of 1994.

<sup>19</sup> UNDP-OHCHR, 'UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions' <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> accessed 28 October 2015.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

## 7. Equality and Human Rights Commissions: A Closer Look at CNCDH, SAHRC, SHRC and EHRC

### 7.1. Composition

If one looks at a number of Equality and Human Rights Commissions, one would witness a variety in composition. For instance, in France, the large Commission Nationale Consultative des Droits de l'Homme (CNCDH) appears to be satisfactory in fulfilling the element of 'pluralistic representation' as found in the Paris Principles. This is because the members of the CNCDH encompass the most significant representatives of French human rights bodies, that is, NGOs which specialize in the field of human rights, international humanitarian law and humanitarian action; individuals who are experts and who serve in international organizations also in the field of human rights; representatives of the main trade unions; the French Defender of Rights; a deputy and a senator; and a member of the Economic, Social and Environmental Council nominated by the respective council<sup>22</sup>. In addition to this, there are then a number of sub-committees which are responsible for specific areas<sup>23</sup>. The structure of the CNCDH allows its members to be divided into five sub-commissions with varying mandates and this enables each sub-commission to be fully focussed on the respective spheres whilst offering expert work. For example, sub-commission A determines questions which are related to society, ethics and education on human rights whereas sub-commission B encompasses questions on racism, anti-Semitism and xenophobia, and discrimination in general. Furthermore, sub-commission C deals with national questions particularly migration, penal and institutional spheres, while sub-commission D encompasses questions on Europe and the international forum. Ultimately, sub-commission E is responsible for international human rights and humanitarian action<sup>24</sup>.

The SAHRC was set up because it was felt that legislation and measures could only be in line with the content of the Bill of Rights if there was the establishment of a Human Rights Commission. It was thus set up in virtue of Section 184 of Chapter 9 of the South African Constitution and it is an independent organ which is granted a general mandate to safeguard and strengthen the constitutional democracy in South Africa. The SAHRC also assumed an additional role as an assistant to NGOs, lawyers or activists who were previously burdened with investigation, reporting and legal assistance<sup>25</sup>. The SAHRC is answerable and accountable to the National Assembly and has a duty to report to the said Assembly at least once annually. It is also expected to monitor and assess the overall human rights situation in South Africa. In addition to the standard provisions on the right to equality before the law and to equal protection of the law, the South African Constitution goes even further than most constitutions since it contains a clause explicitly dedicated to non-discrimination and which caters for affirmative measures in line with the abovementioned 'duty to act'<sup>26</sup>. In contrast with the CNCDH, the SAHRC is composed of eight commissioners and the latter are to be South African citizens who 'have a record of commitment to the promotion of respect for human rights and a culture of human rights' and who are 'persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission'<sup>27</sup>. Thus, the choice of commissioners is based upon knowledge and expertise rather than on their representation of a specific group of people or organisation as in the CNCDH. The term of mandate is fixed and is

<sup>22</sup> Article 1, Loi n°2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme (1)

<sup>23</sup> Article 11, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

<sup>24</sup> CNCDH 'Rapport d'Activité 2014: La dignité au cœur de la protection et de la promotion des droits de l'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 28 October 2015.

<sup>25</sup> Anton J Steenkemp (1995) "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms" *Human Rights Quarterly* 17:1 p 101.

<sup>26</sup> Ibid.

<sup>27</sup> Article 5, South African Human Rights Commission Act, Act 40 of 2013.

to be determined by the National Assembly at the time of appointment but which should not exceed seven years. Upon expiration, the commissioners would be eligible for an additional term.

The Equality Act of 2006 set up the Equality and Human Rights Commission (EHRC) in the United Kingdom and Schedule 1 of the said Act establishes its composition<sup>28</sup>. The Secretary of State is to appoint between ten to fifteen individuals as commissioners and the chief executive will be the Commissioner ex officio. When it comes to the choice of the appointees, similar criteria to the ones established for the SAHRC are adopted since in appointing such individuals, the Secretary of State is to appoint individuals who have ‘experience or knowledge relating to a relevant matter’ (which were later defined as referring in particular to discrimination on grounds of age, disability, gender, gender reassignment, race, religion or belief, sexual orientation, and human rights) or are ‘suitable for appointment for some other special reason’, and ‘have regard to the desirability of the Commissioners together having experience and knowledge relating to the relevant matters’<sup>29</sup>. The duration of the term in office would also be specified upon appointment for a period which should not be less than two years and not more than five years, and commissioners may be subject to re-appointment<sup>30</sup>. If one looks at the initial stages of the setting up of the EHRC, one would witness that the proposal received a positive response from those for whom there was no statutory body, but a somewhat wary response from existing Commissions, such as the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission. The latter were suspicious of this proposal due to the fear that their agendas and bodies would be marginalised in a Commission with a broader mandate to promote ‘an inclusive human rights culture which builds on the diversity of British society’<sup>31</sup>. The disadvantage of such a merger is that the responsibilities and functions that were previously the sole responsibility of a single body are now consumed by an all-encompassing body. Having said that, what is the most problematic in such a merger is that it might lead to a ‘dilution of the good work of a predecessor body’<sup>32</sup>. The Scottish Parliament is duty bound to comply with the principles and individual rights laid down in the European Convention on Human Rights, and as a consequence, any laws which are passed which are incompatible with the provisions of the said Convention have no legal effect whatsoever<sup>33</sup>. As per the Scottish Commission for Human Rights Act 2006, the Scottish Human Rights Commission (SHRC) is made up of a member who acts as a Chairperson and not more than four additional members<sup>34</sup>. The said Chairperson is to be appointed by Her Majesty acting on the nomination of the Scottish Parliament and the rest of the members are appointed by the Parliamentary Corporation<sup>35</sup>. With regard to independence, the SHRC is independent from any Member of Parliament, any member of the Scottish Executive or Parliamentary Corporation<sup>36</sup>. Similarly to the EHRC and SAHRC, each term is to be decided at the time of appointment but it should not exceed five years. The said members are eligible to a further reappointment irrespective of whether this is for a consecutive period or otherwise<sup>37</sup>.

One has already raised the question as to whom such bodies should be accountable to and it has been suggested that ideally it would be accountable to the legislature and not to the relevant government. Such institution can also be answerable to a parliamentary committee or working

<sup>28</sup> Schedule 1, Equality Act 2006.

<sup>29</sup> Schedule 1, Part 1, Section 2(1), Equality Act 2006.

<sup>30</sup> Schedule 1, Part 1, Section 3(2), Equality Act 2006.

<sup>31</sup> As stated by Baroness Amos House of Lords, 24 November 1997, prior to Baroness Amos becoming a government minister.

<sup>32</sup> Colin Harvey & Sarah Spencer (2012) “Advancing Human Rights and Equality: Assessing the Role of Commissions in the United Kingdom and Ireland” *The Political Quarterly* 79:1 p 1615.

<sup>33</sup> Section 29 (2)(d), Scotland Act 1998.

<sup>34</sup> Schedule 1, Section 1, Scottish Commission for Human Rights Act 2006.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, Schedule 1, Section 3.

<sup>37</sup> Ibid, Schedule 1, Section 5.



group which could play a double faceted role of on the one hand enabling one to question the working and findings of the said body, while on the other hand, acting as a limit to the influence that the government could exert on the said body.

## 7.2. *Duties and Functions*

The functions of an NHRI can be solely consultative or advisory which are limited to awareness raising and provision of recommendations as in France, Greece and Luxembourg; or they can go beyond mere advisory services and permit NHRIs to investigate and even participate or initiate legal proceedings such as in South African and England, and Scotland to a certain degree. There are then States such as Denmark and Germany whose NHRIs focus on advising the government on policies and legislation, on monitoring and on providing general human rights education.

### 7.2.1. *General Duties*

The United Kingdom's Equality Act of 2006 establishes a general duty for the EHRC to encourage and support the development of British society wherein prejudice and discrimination do not hinder individuals' potential and every individual's human rights, dignity and worth are respected and protected. It also aspires to confirm that there is an equal opportunity for everyone to participate in society, and the existence of 'mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights'<sup>38</sup>. The Equality Act of 2006 delves into the duties in terms of equality, diversity and non-discrimination by enlisting a number of duties such as the promotion of the importance of the notions of equality and diversity; the encouragement of good practices; the promotion of awareness and understanding of rights; the enforcement of equality enactments; and the elimination of unlawful discrimination and harassment<sup>39</sup>. The Equality Act 2006 also establishes the powers conferred onto the EHRC in terms of promotion and safeguarding human rights in general and in encouraging 'public authorities to comply with Section 6 of the Human Rights Act 1998'<sup>40</sup> which states that public authorities are to act in a manner which is compatible with the European Convention on Human Rights, and doing otherwise would be unlawful<sup>41</sup>. The said Act also confers a duty on the EHRC to 'promote understanding of importance of good relations'<sup>42</sup> between different groups and encourage good practices in this regard. It also establishes a duty to 'work towards the elimination of prejudice against, hatred of and hostility towards members of groups'<sup>43</sup>.

The Scottish Commission for Human Rights Act 2006 follows more or less the same approach in establishing a provision with the general duties of the SHRC. As per Article 2, this general duty is to 'promote human rights and, in particular, to encourage best practice in relation to human rights' which refer to the Convention rights within Section 1 of the Human Rights Act 1998, and other human rights found within other international conventions or treaties as ratified by the UK<sup>44</sup>. This general duty is then tied to the SHRC's ability to publish or disseminate information and ideas, to provide advice or guidance, to carry out research and to provide the requisite training<sup>45</sup>. In addition, the SHRC can also review and make recommendations to Scottish law and policies or practices of public bodies. In light of the content of Section 6 of the Human Rights Act, the office of Amnesty International in Scotland carried out a review encompassing a number of authorities and requested information and documentation on what was being done in compliance with the said

<sup>38</sup> Section 3, Equality Act 2006.

<sup>39</sup> Section 8, Equality Act 2006.

<sup>40</sup> Section 9, Equality Act 2006.

<sup>41</sup> Section 6, Human Rights Act 1998.

<sup>42</sup> Section 10, Equality Act 2006.

<sup>43</sup> Section 10, Equality Act 2006.

<sup>44</sup> Section 2, Scottish Commission for Human Rights Act 2006.

<sup>45</sup> Section 3, Scottish Commission for Human Rights Act 2006.

section. However, it resulted that a number of authorities confused their duties under the Human Rights Act with those found within the Equal Opportunities Act. The survey also outlined a number of other concerns which were mainly related to the closure of the Scottish Human Rights Centre which many perceived as rendering Scotland without an awareness raising and monitoring body<sup>46</sup>.

The South African Constitution but more specifically the South African Human Rights Commission Act encompasses more or less the same duties mentioned above, that is, the promotion of respect for human rights and human rights culture; and the promotion of the protection and development of human rights. However, they also establish a general duty of monitoring and assessing the overall observance of human rights in South Africa<sup>47</sup>, and confer upon the SAHRC the ability to demand an annual report from State organs on any information on measures that they have adopted in order to realise the rights inherent the Bill of Rights<sup>48</sup>.

The legal text that establishes the CNCDH takes a somewhat different approach since it merely states that it possesses an advisory role which has the ability to assist the Prime Minister and the respective Ministers in opinions on general matters which fall within its jurisdiction and which are related to both the domestic and the international fora. It may also, on its own initiative, request the attention of Parliament or of the relevant government bodies on matters which the CNCDH considers to be related to the protection and promotion of human rights<sup>49</sup>. Although there is no duty to draw up reports, the CNCDH may produce thematic reports. All of the documents drawn up by the CNCDH are discussed and heard before the Plenary Assembly, which is the decision-making body, and such documents are adopted by a majority vote. 50 Individuals who have special competence in the field of human rights can also be heard before the said Plenary and sub-commissions; however, they would not actively participate in the deliberations<sup>50</sup>. Although the CNCDH may assist with any requests from the Prime Minister or members of Government, the former has the ability, on its own initiative, to take measures which are related to the negotiations on human rights; the ratification of international instruments and compliance of national laws with the said instruments; and the implementation of action programmes especially those related to education and research. It may also draw up opinions on humanitarian assistance in crises and examine those measures which are to be adopted to ensure effective application of international humanitarian law<sup>51</sup>. With regards to its mandate, the CNCDH assists the Prime Minister and the respective ministers by giving advice on questions which are relevant to its competence and it is also capable of demanding the attention of Government and public bodies when the latter requires assistance in tackling matters related to equality and non- discrimination<sup>52</sup>.

### 7.2.2. *Information and Awareness-Raising*

The Equality Act of 2006 establishes that in order to fulfil its duties, the EHRC may produce publications and disseminate information; may undertake research; provide training; and offer advice or guidance. It may also issue certain codes of practice which are related to specific

<sup>46</sup> Alice Donald, Jenny Watson and Niamh McClean & Philip Leach and Jörn Eschment (2009) 'Equality and Human Rights Commission Research Report 28: Human Rights in Britain since the Human Rights Act 1998: A Critical Review' [http://www.equalityhumanrights.com/sites/default/files/documents/human\\_rights\\_in\\_britain\\_since\\_the\\_human\\_rights\\_act\\_1998\\_-\\_a\\_critical\\_review.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf) accessed 30 October 2015.

<sup>47</sup> Section 2, South African Human Rights Commission Act, Act 40 of 2013.

<sup>48</sup> Preamble, South African Human Rights Commission Act, Act 40 of 2013.

<sup>49</sup> Article 1, Loi n°2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme.

<sup>50</sup> Article 12, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

<sup>51</sup> Article 2, Décret n°2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

<sup>52</sup> CNCDH 'Rapport d'Activité 2014: La dignité au cœur de la protection et de la promotion des droits de l'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 28 October 2015.

matters as provided for in Article 14<sup>53</sup>. The duty of the SHRC in terms of awareness- raising and dissemination of information<sup>54</sup> is somewhat identical to that found in the Equality Act of 2006. This objective of developing or managing information and educational programmes is also found within the South African Human Rights Commission Act<sup>55</sup> and the aim is to ‘foster public understanding and awareness’ on the content of the Constitution and of the general roles and activities of the SAHRC. What is worth noting is that the same duty is also found in the CNCDH; however, this falls more within the competence of sub- commission A which is responsible for general human rights education and awareness- raising.

### 7.2.3. *Investigation and Inquiries*

In virtue of Article 16 of the Equality Act, the EHRC may carry out an inquiry into a matter which is related to the EHRC’s duties. However, it is bound to publish the relevant terms of reference in a manner which would bring the said inquiry to the attention of the individuals it concerns or of interested parties and give notice of the terms of reference to any individuals specified. On the other hand, the EHRC may investigate whether an individual has committed an unlawful act, whether the said individual has complied with a requirement imposed by an unlawful act notice, or whether such an individual has complied with an undertaking given in virtue of Section 23<sup>56</sup>. However, the EHRC may only conduct such an investigation if it suspects that such an unlawful act has been committed. Prior to such an investigation, the EHRC should prepare any terms of reference establishing who the individual to be investigated is and the nature of the unlawful act which is suspected to have been committed. It should also give the individual a notice of the proposed terms of reference and grant such an individual the opportunity to make representations.

On the other hand, the SHRC is able to conduct inquiries into the general or specific practices or policies of Scottish public authorities. As has been established in the Equality Act 2006, the Scottish Commission for Human Rights Act also establishes a number of criteria that the SHRC has to abide to, such as special documents that are to be drawn up, the notices that are to be given and what is to be made public. However, the SHRC is not allowed to question or conduct an inquiry into the practices or policies of such public authorities with respect to a particular case<sup>57</sup>. Upon completion, a report on the inquiry is to be laid before Parliament<sup>58</sup>.

The method and approach implemented in certain inquiries and investigations by the SAHRC have been somewhat criticised over the years mainly due to the ‘authoritarian’ methods that were adopted in issuing subpoenas to force individuals to appear before it and the existent penalties that one might incur on failure to do so<sup>59</sup>. This adversarial approach is often criticised since the fact that failure to cooperate with the SAHRC might amount to a heavy fine or even imprisonment for a six-month period or seizure of relevant documents seems to give the wrong impression of what the role of the SAHRC truly is. This can be exemplified through a case-study of one of the inquiries on discrimination in the South African media carried out by the SAHRC wherein the issuing of subpoenas was heavily criticised. The point of disagreement was not the mode of action adopted, but the fact that it was so adopted by the SAHRC when the latter has the role to monitor and ensure the respect and safeguarding of human rights and equality<sup>60</sup>. On this point, Glaser argued that

<sup>53</sup> Section 14, Equality Act 2006.

<sup>54</sup> Section 3, Scottish Commission for Human Rights Act 2006.

<sup>55</sup> Section 13(1)(b)(i), South African Human Rights Commission Act, Act 40 of 2013.

<sup>56</sup> Section 20, Equality Act 2006.

<sup>57</sup> Sections 8 & 9, Scottish Commission for Human Rights Act.

<sup>58</sup> Section 12, Scottish Commission for Human Rights Act.

<sup>59</sup> Sections 15, 16 and 22, South African Human Rights Commission Act, Act 40 of 2013.

<sup>60</sup> Glaser, Daryl (2000) “The Media Inquiry Reports of the South African Human Rights Commission: A Critique” African Affairs 99:396 p 373.

although the outcomes of the inquiry did not provide anything scarier than education, the gatherers of information resorted to what he termed as ‘authoritarian’ measures<sup>61</sup>.

#### 7.2.4. *Role in Legal Proceedings*

Since the CNCDH’s mandate is limited to advisory functions, it cannot handle complaints or participate in legal proceedings. Similarly, Section 6 of the Scottish Commission for Human Rights Act establishes that the SHRC has no power to assist individuals in claims or legal proceedings; however, it has the power to intervene in civil proceedings, excluding children’s hearings, and which may, after getting the leave of the court, or after being so invited by the court, intervene in such proceedings so as to make submissions on a particular issue<sup>62</sup>. However, in order to intervene in such a manner, the matter which calls for such an intervention should be relevant to its general duties, and also raises a matter which is of general public interest<sup>63</sup>.

The SAHRC can investigate, on its own initiative or following a complaint, any alleged violations of human rights and if after due investigation it transpires that there is substance in the complaint which was made, then it has the power to assist such an individual and any such individuals who would be affected in securing redress, or to direct the individual to the correct forum. In other cases it may also initiate proceedings in the competent court, either in its own name or on behalf of such individual or class of persons<sup>64</sup>.

The Equality Act of 2006 establishes that the EHRC may assist an individual in legal proceedings if the said proceedings are related to the content of an equality enactment, or if such an individual alleges that there has been behaviour which runs contrary to the provisions of such equality enactments in his regard<sup>65</sup>. This ‘assistance’ may encompass legal advice, representation, and facilities for dispute settlement. When reference is made to ‘equality enactments’, this relates to discrimination on grounds of sex (including gender reassignment), racial origin, ethnic origin, religion, belief, disability, age or sexual orientation, and any provision which confers rights to individuals. If these proceedings relate partly to a matter falling within the provisions of the equality enactment and partly related to another matter, then assistance might be given with regard to any aspect of proceedings as long as they relate to a matter associated with equality enactments; however, if the proceedings cease to be connected to an equality enactment then assistance would not be allowed to continue<sup>66</sup>. The EHRC may also institute and intervene in legal proceedings if the EHRC believes that proceedings are related to its function<sup>67</sup>. During judicial review proceedings, the EHRC is not required to have a complainant of an unlawful act, and may act only if there would be one or more victims of the said unlawful act; however, in awarding damages, no such award shall be granted to the Commission.

#### 7.2.5. *Monitoring*

The Equality Act 2006 states that the ‘Commission shall monitor the effectiveness of the equality and human rights enactments.’ In fulfilling this duty, the EHRC can advise the Government on the effectiveness of certain enactments which are related to equality and human rights, and may also make recommendations on any amendments which should be made to related law. In light of its expertise, the EHRC may also advise the government and the relevant ministries on the effects that a proposed change in law would likely have<sup>68</sup>. In fulfilling its monitoring duties, the EHRC

<sup>61</sup> Ibid.

<sup>62</sup> Section 14, Scottish Commission for Human Rights Act 2006.

<sup>63</sup> Ibid.

<sup>64</sup> Section 13(3)(3)(a)/(b), South African Human Rights Commission Act, Act 40 of 2013.

<sup>65</sup> Section 28, Equality Act 2006.

<sup>66</sup> Section 28(6), Equality Act 2006.

<sup>67</sup> Section 30, Equality Act 2006.

<sup>68</sup> Section 11, Equality Act 2006.

is to identify any changes within society which have occurred or which are likely, and which fall within its jurisdiction. In doing so, and in determining the indicators and outcomes that are to be taken into account, the EHRC may consult anyone who possesses the relevant knowledge or experience. In addition, it may also monitor the progress being made in terms of a particular sector and is to publish a report in this regard<sup>69</sup>. Similarly, the SHRC may also review and make the necessary recommendations with respect to any aspect of Scottish law or any policies or practices of Scottish public authorities. However, with regard to reviewing Scottish law, it must do so only after consultation with the Scottish Law Commission<sup>70</sup>. Like the other Commissions under examination, the SAHRC is also tasked with monitoring the implementation of and the compliance with international treaties and conventions<sup>71</sup>.

The CNCDH can intervene at every stage of the legislative procedure, that is, it can propose and comment on any proposed law or policy at any stage. Its work is debated at plenary assemblies, and after being voted upon, they are presented to the relevant ministries. Apart from its monitoring role, the CNCDH is also competent in evaluating, from an independent point of view, any public policy related to racism, anti-Semitism and xenophobia, and to the fight against treatment and exploitation of humans. This is done in line with the international instruments that France has signed and ratified<sup>72</sup>.

## 8. Conclusion

One of the main problems with respect to human rights in Malta is the piecemeal approach that seems prevalent in Maltese legislation- that is, the fact that one has to go through different legal instruments in order to determine which provisions are applicable in a particular situation since the relevant provisions are usually scattered in different legal texts. One hopes that this scattered system will be rectified through the introduction of the Equality Act and through the work of the Maltese Human Rights and Equality Commission since such system often hinders the effectiveness of justice. The scope of this paper was to extract the points of convergence and divergence of a number of human rights commissions, the same factors on which the Maltese Human Rights and Equality Commission will be based on. Most of what has been discussed appears to be in line with what is being proposed for the Maltese context, that is, a Commission which will replace the current National Commission for the Promotion of Equality having a wider mandate<sup>73</sup>. It appears that the new Commission would not only be able to deal with and investigate complaints, but would also be able to draft reports, propose legislation and policy, and monitor the overall situation vis-à-vis human rights in Malta. Like a number of national human rights institutions, the Commission would also be answerable to Parliament.

<sup>69</sup> Schedule 1, Part 2, Section 32, Equality Act 2006.

<sup>70</sup> Section 4, Scottish Commission for Human Rights Act 2006.

<sup>71</sup> Section 13(1)(b)(vi), Scottish Commission for Human Rights Act 2006.

<sup>72</sup> CNCDH 'Rapport d'Activite 2014: La dignité au cœur de la protection et de la promotion des droits del'homme' <http://www.cncdh.fr/fr/publications/rapport-dactivites-2014> accessed 31 October 2015.

<sup>73</sup> Government of Malta, Towards the Establishment of the Human Rights and Equality Commission – White Paper Submissions Report, February 2015 [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/L-8-2015-%20-%20Consumer-%20Alternative%20Dispute%20Resolution%20Regulations%202015/Final%20Report%20-%20Towards-%20the%20Establishment%20of%20the%20Human%20Rights%20and%20Equality%20Commission%20%E2%80-%2093%20White%20Paper.pdf](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/L-8-2015-%20-%20Consumer-%20Alternative%20Dispute%20Resolution%20Regulations%202015/Final%20Report%20-%20Towards-%20the%20Establishment%20of%20the%20Human%20Rights%20and%20Equality%20Commission%20%E2%80-%2093%20White%20Paper.pdf) accessed 2 November 2015.

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# PROTECTING AND PROMOTING HUMAN RIGHTS IN ITALY: WHAT HAS BECOME OF THE PROPOSAL OF A NATIONAL AND INDEPENDENT COMMISSION FOR HUMAN RIGHTS?

ISOLDE QUADRANTI\*

## Proposals

‘The Setting Up of a National Human Rights Institution: A Proposal by The Office of the Parliamentary Ombudsman’ <http://www.ombudsman.org.mt/wp-content/uploads/2014/01/The-setting-up-of-a-National-Human-Rights-Institution.pdf>

## Abstract

On 20 December 1993, the General Assembly of the United Nations reaffirmed the importance of developing effective national institutions for the promotion and protection of human rights. The resolution is merely exhortative. However, in view of the Italian candidature to the Human Rights Council for the term 2007-2010, the Permanent Representative of Italy in the UN referred to the commitment to establish an independent national Agency. On 20 July 2011, the Senate approved a draft law in accordance with the resolution 48/134. The text grants the Agency not only advisory and initiative powers, but also monitoring tasks and quasi-judicial powers.

At the moment, the establishment of this Agency is only contained in a draft law although it seemed as if 2015 brought positive signals of recovery. For instance, a conference promoted by the interdepartmental Committee for Human Rights relaunched the project in July 2015, in a period when Europe was, as it still is, divided on the topic of priorities concerning human rights, especially for issues concerning immigration and asylum.

## 1. Introduction

National human rights institutions (NHRIs)<sup>1</sup> are relatively new actors on the human rights scenario. On 20 December 1993, the General Assembly of the United Nations formally recognised the «importance of developing, in accordance with national legislation, effective national institutions for the promotion and protection of human rights»<sup>2</sup>. The resolution of the General Assembly is merely exhortative. However, in the past twenty years, the number of National Human Rights Institutions (NHRIs) has significantly grown.

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<sup>1</sup> This article is a first draft of a work in progress about the creation in Italy of an independent institution for human rights. There are very few bibliographical references on the establishment in Italy of an independent HR institution. I would like to thank the Inter-Ministerial Committee on Human Rights (within the Ministry of Foreign Affairs and International Cooperation), especially the President, Min. Gianludivico De Martino, for providing statements and reports on conferences promoted about the subject mentioned in the article.

<sup>2</sup> General Assembly, Resolution 48/134, on National Institutions for the Promotion and Protection of Human Rights, 20 December 1993, A/RES/48/134, <<http://www.un.org/documents/ga/res/48/a48r134.htm>>.

Not only did resolution 48/134 encourage Member States to establish or strengthen these independent institutions, but it also provided actual guidelines relating to their status. The resolution endorsed the Paris Principles<sup>3</sup>, which represent the minimum standards applicable to NHRIs entrusted with a mandate to protect and promote human rights. NHRIs must comply with the Paris Principles in order to be considered credible both by other similar institutions and within the UN system. In 2005, the Commission of Human Rights reaffirmed by resolution 2005/74 «the importance of establishing and strengthening independent, pluralistic» NHRIs consistent with the Paris Principles and of improving cooperation among them.

The level of compliance with those principles is reflected by the accreditation status accorded to NHRIs. “Status A” means a state is fully compliant with the Paris Principles<sup>4</sup>, while “status B” corresponds to a state of partial compliance, and finally, “status C” corresponds to a state of non-compliance. The Paris Principles recommend that States establish independent national institutions to (i) promote human rights, (ii) advise governments on human rights protection, (iii) review human rights legislation<sup>5</sup>, (iv) prepare human rights reports<sup>6</sup>, and (v) receive and investigate complaints from individuals and civil society’s organisations.

Requiring that NHRIs be entrusted with «as broad a mandate as possible» to enable them to assume their dual responsibility for protecting and promoting human rights, the Paris Principles distinguish NHRIs from other institutions with similar goals (e.g. ombudsmen) but which are mandated only to protect human rights and not to establish structured relations with other civil society organisations. Furthermore, the accreditation by international standards guarantees the independence and accountability of NHRIs. According to the Vienna Declaration<sup>7</sup>, NHRIs may take many forms depending on the regions in which they are established, on the legal traditions according to which they are regulated and on the purposes for which they are formed. Examples of such entities are: the institution of ombudsman, human rights institutes or centres, the office of the public defender, human rights committees, and commissioners for human rights<sup>8</sup>. The model selected and the level of accreditation are not correlated. What is pivotal is that an appropriate institutional structure be in place. The Office of the High Commissioner for Human Rights (OHCHR) stresses that «distinctions between these models are becoming blurred» and that what is «relevant more than the label attached to an institution is the fact that its mandate, functions and powers accord

<sup>3</sup> Principles agreed in 1991 at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights convened in Paris by the UN Commission on Human Rights (see Gauthier De Beco and Rachael Murray (2014), *Commentary on the Paris Principles on National Human Rights Institutions*. Cambridge: Cambridge University Press).

<sup>4</sup> By June 2010, 67 NHRIs were accredited with “A-status” by the International Coordinating Committee (see Office of the United Nations High Commissioner of Human Rights (2010), *National Human Rights Institutions. History, Principles, Roles and Responsibilities*. New York and Geneva: United Nations, <[http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf)>).

<sup>5</sup> In countries with “A-status” NHRIs (such as Denmark, Greece, Germany), mechanisms of systematic screening of legislative proposals are provided by such NHRIs to ensure compliance with rights standards.

<sup>6</sup> «The Human Rights Council welcomes the important role played by national human rights institutions in the Human Rights Council, including its universal periodic review mechanism, in both preparation and follow-up, and the special procedures, as well as in the human rights treaty bodies . . . , and encourages national human rights institutions to continue to participate in and contribute to these mechanisms, including by continuing to engage with the treaty bodies by, inter alia, providing parallel reports and other information» (Human Rights Council, Resolution 27/18, National Institutions for the Promotion and Protection of Human Rights, 7 October 2014, <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/27/18&Lang=E>>).

<sup>7</sup> The Vienna Declaration and Programme of Action, adopted on 25 June 1993 at the World Conference on Human Rights, reaffirmed the right of each State to choose the framework for national institutions for the promotion and protection of human rights. The model adopted takes into consideration particular needs at a national level in order to facilitate promotion of human rights in accordance with international human rights obligations and commitments.

<sup>8</sup> A comparative overview of NHRI models in Europe has been outlined by the Union Agency for Fundamental Rights (2012) *Handbook on the Establishment and Accreditation of National Human Rights Institutions in the European Union*. Luxembourg: Publications Office of the European Union, <[http://fra.europa.eu/sites/default/files/fra-2012\\_nhri-handbook\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook_en.pdf)>.



with the letter and spirit of the Paris Principles»<sup>9</sup>.

Despite the differences, from a wider perspective, it can be said that NHRIs are «autonomous quasi-governmental or statutory institutions with human rights in their mandate»<sup>10</sup>. All human rights institutions are expected to be set forth in a constitutional or legislative text; to operate independently of the government; to have a broad mandate based on universal human rights standards; to implement its mandate «by acting as “guardians”, “experts” and “teachers” of human rights»<sup>11</sup>; to have autonomous and adequate funding and budget, and, finally, to represent the pluralistic composition of civil society.

In general, the most successful NHRIs appear to be those which «operate well at several levels»<sup>12</sup>. These in particular «are perceived to be legitimate, make themselves accessible, and build good working links with relevant institutions in civil society and government»<sup>13</sup>. As independent institutions, although established by governments, NHRIs are particularly well adapted for forging links between civil society and national authorities playing an effective role in the implementation of international human right norms<sup>14</sup>.

NHRIs act, not only at national level collaborating with national institutions but also at regional and international levels. The UNDP (United Nations Development Programme) and the OHCHR have become increasingly involved in the establishment and strengthening of NHRIs<sup>15</sup>. Such NHRIs are now actively participating in the UN human rights infrastructure, a development that has been positively acknowledged<sup>16</sup>. At the same time, recent studies suggest that acceleration of this integrative process has raised the profile of NHRIs and led to their full participation in UN human rights activities<sup>17</sup>. NHRIs have already achieved full cooperation with the Council of Europe. In particular, NHRIs have the status of permanent observers and are kept apprised of relevant activities concerning the promotion and protection of human rights within the framework of the Council of Europe<sup>18</sup>. The cooperation and the interaction with the European Court of Human Rights has been considered extremely useful in order to make «European human rights more effective and the Court’s judgements more legitimate»<sup>19</sup>.

<sup>9</sup> Office of the United Nations High Commissioner of Human Rights, *op. cit.*, p. 28.

<sup>10</sup> See International Council on Human Rights Policy (2004) *National Human Rights Institutions: Effectiveness and Legitimacy*. 2<sup>nd</sup> edn. Versoix: International Council on Human Rights Policy, <[http://www.ichrp.org/files/reports/17/102\\_report\\_en.pdf](http://www.ichrp.org/files/reports/17/102_report_en.pdf)>.

<sup>11</sup> Anna Elina Pohjola (2006) *The Evolution of National Human Rights Institutions. The Role of the United Nations*. Copenhagen: The Danish Institute for Human Rights, p. 1, <[http://nhri.net/pdf/Evolution\\_of\\_NHRIs.pdf](http://nhri.net/pdf/Evolution_of_NHRIs.pdf)>.

<sup>12</sup> According to a research project realised by the Council on Human Rights Policy to examine how successfully such institutions promote and protect human rights in their societies (International Council on Human Rights Policy, *op. cit.*).

<sup>13</sup> *Ibid.*

<sup>14</sup> Their increasing involvement in the «domestication of international human rights law has been highlighted by Andrew Wolman (2015) *Sub-National Human Rights Institutions and the Domestication of International Human Rights Norms, Netherlands Quarterly of Human Rights*, Vol. 33, No. 2, pp. 224-250.

<sup>15</sup> Office of the United Nations High Commissioner of Human Rights, *op. cit.*, p. 9

<sup>16</sup> On 7 October 2014, the Human Rights Council welcomed the important role played by national human rights institutions in the universal periodic review mechanism for the preparation and follow-up, in the special procedures, as well as in the human rights treaty bodies (Human Rights Council, *op. cit.*). In the same resolution, the Human Rights Council noted the increased engagement between special procedures and national human rights institutions, an observation which was reinforced by country follow-up visits and thematic report, and, following the presentation of country mission reports to the Human Rights Council, encouraged the strengthening of such engagement, also through the participation of national human rights institutions.

<sup>17</sup> See Andrew Wolman (2014) *Welcoming a New International Human Rights Actor? The Participation of Subnational Human Right Institutions at the UN, Global Governance*, Vol. 20, No. 3, pp. 437-457.

<sup>18</sup> Committee of Ministers, Resolution (97)11 on Cooperation between National Human Rights Institutions of Member States and between them and the Council of Europe, <<http://nhri.ohchr.org/EN/Regional/Europe/PageDocum/Resolution%20no%2011%20%281997%29.pdf>>.

<sup>19</sup> See: Buyse, Antoine (2013) *The Court’s Ears and Arms: National Human Rights Institutions and the European*

At EU level, the European Network of National Human Rights (ENNHRI)<sup>20</sup> and the European Union Agency for Fundamental Rights (FRA) work collaboratively to facilitate the transfer of knowledge on legal and human rights issues from the national to the European level. Above all, NHRIs with “A-status” are considered key players in connecting national, EU and international, human rights systems<sup>21</sup>.

## 2. The proposal for an Italian NHRI

Italy has not yet established an independent NHRI. Nowadays, also due to the cuts in public expenditure, the framework of this Commission is contained only in a draft law approved by the Senate on 20 July<sup>22</sup>. How have we arrived here? What has been done before? In this regard, we wish to stress two elements that are relevant, not only in the case of Italy, but also globally, and which have produced an impetus towards better protection of human rights. The first was the debate and consultation within civil society. Since early 2000, civil society representatives have pushed for an independent human rights body. In 2002, a group of legal experts under the newly established Committee for the Promotion and Protection of Human Rights (*Comitato per la Promozione e Protezione dei Diritti Umani*) – an umbrella organisation for 86 Italian human-rights related NGOs – drafted the first proposal for a law establishing an NHRI<sup>23</sup>.

The second element was international and European calls to Italy to create an independent institution for human rights. Since 2003, all the UN Treaty Bodies that had reviewed Italy for human rights protection, «recommended its establishment without further delay». In the same way, during the Universal Periodic Review - II cycle (from 27 October to 7 November 2014), Italy received 23 recommendations from other UN States calling for the early establishment of a human rights institution according to the Paris Principles<sup>24</sup>. In its response in March 2015, the Italian Government advised that the recommendations were not only acceptable but actually in the course of implementation.

In May 2015, after the official follow-up visit to Italy from 2 to 6 December 2014, the Special Rapporteur on the Human Rights of Migrants, François Crepeau, recommended that the Government establish «a national human rights institution in line with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)». Moreover, it ensures that «it is both functionally and financially independent from the Government and vested with the authority to investigate all issues relating to human rights, including those of migrants, regardless of their administrative status»<sup>25</sup>.

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*Court of Human Rights, in Wouters, Jan, Meuwissen, Katrien (2013) National human rights institutions in Europe: comparative, European and international perspectives. Cambridge, Antwerp, Portland, Intersentia, pp. 173-186, pp.185-186.*

<sup>20</sup> European Network of National Human Rights Institutions (ENNHRI) comprises National Human Rights Institutions (NHRIs) across Europe and is part of the International Coordinating Committee of NHRIs (ICC).

<sup>21</sup> Union Agency for Fundamental Rights (2012) *Annex to the Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union. The path to A-Status. Contribution from selected EU Member States*. Luxembourg: Publications Office of the European Union, <[http://fra.europa.eu/sites/default/files/fra-2012\\_nhri-handbook-annex\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2012_nhri-handbook-annex_en.pdf)>.

<sup>22</sup> The draft law is the result of the unification of the drafts No. 1223, 1431 and 2720. See:<<http://leg16.camera.it/126?PDL=4534&leg=16&tab=6>>.

<sup>23</sup> *Ibid.*, pp. 12-14.

<sup>24</sup> The recommendations Nos. 26 to 48 were presented by the following States: Malaysian, Bulgaria, Uruguay, France, Ireland, India, Chad, Indonesia, Bahram, Chile, Morocco, Congo, Todo, Senegal, Costa Rica, Uruguay, Azerbaijan, Peru, Kenya, Egypt, Guatemala, Denmark, Pakistan, Portugal. The recommendations were very similar and strict. Portugal and Ireland added that human rights institutions should have a very broad human rights mandate and India underlined the importance of functional and financial independence.

<sup>25</sup> Report of the Special Rapporteur on the human rights of migrants, François Crépeau, Follow-up mission to Italy (2-6 December 2014) - Addendum, A/HRC/29/36/Add.2, <<http://www.ohchr.org/>-

It is anticipated that such international calls will provide new impetus for the development of a project for an independent NHRI. From 2005 to 2011, various political interests submitted four different bills providing for the creation of a National Commission for the Promotion and Protection of Human Rights in line with the Paris Principles and UN General Assembly Resolution 48/134. However, despite the UN Treaty Bodies' recommendations and pressure from civil society, the legal drafts languished in the Chamber of Deputies. Furthermore, even though the final draft bill was not only adopted by the Senate Standing Committee on Constitutional Affairs on 20 January 2010, but also subsequently approved by the Senate on 20 July 2011, and, further, transmitted to the second chamber for approval, it did not progress any further through the parliamentary procedure.

### 3. Requirements and answers

In spite of the twenty-year long debate on the Italian NHRI, all four bills were drafted without consulting civil society organisations, thus, disregarding the Paris Principles, in particular with respect to the basic imperative of pluralist representation.

In the following sections, we propose to examine the content of the final draft bill and to compare it with the proposals put forward during the workshop, *Crossover Rights*<sup>26</sup>, which was organised on 10 November 2014 by the combined efforts of the Inter-Ministerial Committee for Human Rights, the Department for European Affairs and designated non profit organisations to discuss the challenges of, and possibilities for, an "A-status" Italian NHRI". Members of civil society, academic and institutional experts, representatives from European and international institutions, were invited to participate in this discussion.

As mentioned previously, the Paris Principles provide for minimum standards without, at the same time, imposing any particular model on new NHRIs. Therefore, the final structure chosen for each NHRI depends on the legal and political traditions of the governing State. What is essential is that its mandate and functions effectively comply with the Paris Principles. The NHRI mandate is required to be clearly set forth in a constitutional or legislative text to ensure its permanence, independence and transparency. According to the Sub-Committee on Accreditation, executive instruments do not comply with the Paris Principles. In the Italian case, the NHRI is to have a legislative basis. How does the draft bill translate the requirements of the Paris Principles into institutional reality? The legislative proposal provides for a human right Commission consisting of a President and two members nominated by the Senate and the Chamber of Deputies and envisages that the Commission work in tandem with a Council for human rights and fundamental freedoms to be composed of institutional and independent experts in human rights, representatives of NGOs and trade union associations (art. 7 ff.). This will ensure the representation of all sections of society within the NHRI membership in order to achieve the requirements of pluralism, independence and impartiality required from the Paris Principles.

The majority of participants in the workshop *CrossOverRights* organised in November 2014 agreed that the preferred solution for an Italian NHRI would be a small number of members (three or four) - selected from a shortlist created by a public selection and elected by a joint committee of independent experts - and representatives of civil society organisation elected by a conference of NGOs. It is worth observing that this joint committee could also serve as a forum for dialogue between the NHRI and civil society organisations. On the other hand, some proposals suggested replacing the Commission with the Ombudsperson model. In this case, an Ombudsperson, or a

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EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx>.

<sup>26</sup> Workshop «Towards a Coherent EU framework for Fundamental Rights and an Independent HR Institution in Italy» organised on 10 November 2014 by the Open Society Foundation and Parsec, in collaboration with the Inter-Ministerial Committee for Human Rights and the Department for European Affairs.

board of diverse ombudspersons, would work in close relationship with a civil platform providing for the ongoing involvement of NGOs. This model, due to its simplicity, seems better than the alternative model proposed, and could pave the way out of the impasse regarding the creation of an NHRI in Italy.

The draft law fulfills the requirement of formal and functional independence that is considered the «cornerstone» of the NHRI system. The functional independence dictates that the NHRI should listen to all stakeholders without being unduly influenced by any one of them. The formal independence from the government is ensured not only at decisional level, but also in relation to financing issues, by means with an autonomous funding system and an adequate budget. It is however to be underlined that even though the autonomous funding guarantees the independence of the NHRIs, in times of austerity it does not necessarily ensure to reach the adequate budget to realise its mandate. It can be argued, nonetheless, that, in periods of economic crisis, a sufficient investment in a NHRI is essential because such crisis often brings with it «more human rights violations»<sup>27</sup>. Independence is connected to reporting and accountability obligations. The NHRIs are required to both report to State by preparing annual and special reports and to keep the public informed of their work.

The mandates of NHRIs should be «as broad as possible» including the promotion and protection of all categories of human rights. Not all NHRI mandates cover practical implementation of economic, social and cultural rights because protecting such rights presents particular difficulties<sup>28</sup>. On the basis of Article 2 of the draft bill, the Italian NHRI would have a competence extending beyond all fundamental rights recognised in the Constitution and in international agreements to which Italy has become a party. The draft bill refers explicitly in Article 3 to many promotional and protective functions. The former envisages a number of measures including: collaboration with schools and universities; human rights education and training; the launching of public awareness initiatives; and, powers to give advice and make recommendations to governments, parliamentarians and public bodies on the monitoring, investigation of, and reporting on, human rights issues.

Many human rights commissions are empowered to receive individual complaints in order to fulfil their protective functions. Notwithstanding the fact that the Paris Principles do not require such a specific facility, resolution 48/134 grafts additional principles on commissions with «quasi-judisdictional competence». Also, in the Italian case, the draft law grants the Commission, not only advisory and initiative powers, but also monitoring and quasi-judicial competences. In fact, according to its proponents, the institution should be authorised to hear and consider complaints by individuals, following the model of the Human Rights Commissions of Ireland and the UK. The proposal acknowledges furthermore inspections and controls of the Commission in the places where the violation should have happened (article 7). The proposals submitted during the *CrossOverRights* workshop on this point were very different. Some argued that the Italian NHRI should not include the power to receive individual petitions, because this would entail a substantial amount of work to the detriment of its intended power to hold its own inquiries and it would, moreover, raise problems of achieving coordination with the judiciary. Other commentators, however, underlined how such a

<sup>27</sup> Presentation by D. Kohner for the Conference «Protecting and Promoting Human Rights. Establishing National Independent Institutions» organised on 22 July 2015 by the Inter-ministerial Committee for Human Rights and the Department for European Affairs, <<http://www.cidu.esteri.it/ComitatoDirittiUmani>>.

<sup>28</sup> Office of the United Nations High Commissioner of Human Rights, *op. cit.*, p. 26. On the role that NHRIs play in protecting and promoting these rights, see Committee on Economic, Social and Cultural Rights, *General Comment No. 10*, 10 December 1998, E/C.12/1998/25, <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx)>. If there is no reason why NHRIs should not have economic, social and cultural rights in their mandates, «there rights still seem to be of secondary importance for NHRIs, despite some positive signals» (Brems, Eva, De Beco, Gauthier and Vandenhole, Wouter eds. (2013) *National Human Rights Institutions and Economic, Social and Cultural Rights*, Cambridge-Antwerp-Portland: Intersentia, p. 29).

competence could, in times of economic crisis, lead governments to reduce public spending for the judicial system, promoting the prevention of violations and applications to courts. It is interesting to remember what the OHCHR said about this particular function: «the power to investigate human rights issues and /or individual complaints is obviously central to addressing human rights concerns in a meaningful manner. At the same time, commissions whose decisions or investigations are subject to judicial review in the courts tend to be very cautious in their investigations, which can lead to delays and formalistic approaches»<sup>29</sup>.

#### **4. Conclusions: Why is it important to establish an NHRI in Italy?**

If all aforementioned key requirements are fulfilled, an NHRI could be accredited with “A-status” by the International Coordinating Committee (ICC). It is only in circumstances where the institution is in compliance with the Paris Principles that it may participate in the decision making of the ICC as well as in the different human rights monitoring mechanisms of the United Nations. The European Network of NHRIs (ENNHRI) provides support for the accreditation of NHRIs and facilitates NHRIs’ engagements with agencies and committees for human rights of the European Union, the Council of Europe and the OSCE.

Presently, the establishment of an Italian NHRI is only represented by a draft law that remains blocked in the national procedures for too long time.

A conference promoted by the Inter-ministerial Committee for Human Rights relaunched the project in July 2015, without any tangible achievements though<sup>30</sup>. Consequently, in March 2017, the Human Rights Committee recommended in the concluding observations of the sixth periodic report of Italy that the State party «expeditiously» established a national human rights institution. Therefore the Committee required that The Italian Government provided information one year after the adoption of the observations on the implementation of this specific recommendation, in addition to those regarding migrants, asylum seekers and unaccompanied minors<sup>31</sup>.

This remark emphasizes once again that in a period Europe is divided on priorities concerning human rights, on the top of all immigration and asylum, a national human rights institution, that ensures a strong independent nature and quasi-judicial powers, is expected to play an important role in promoting and protecting the human rights culture.

<sup>29</sup> Office of the United Nations High Commissioner of Human Rights, *op. cit.*, p. 16.

<sup>30</sup> Consequently, the Inter-ministerial Committee referred to the future competences of the Commission in the national action plan 2016-2021 regarding the enterprises and human rights presented at the end of 2016 in accordance with the Guiding Principles on Business and Human Rights. See: <[www.cidu.esteri.it/ComitatoDirittiUmani/it/ambasciata/news](http://www.cidu.esteri.it/ComitatoDirittiUmani/it/ambasciata/news)>.

<sup>31</sup> Human Rights Committee, Concluding observations on the sixth periodic report of Italy, 6-29 March 2017 (119<sup>th</sup> Session), <<http://www.ohchr.org>>.

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# NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE EU: SPANISH AND PORTUGUESE EXPERIENCES

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## Abstract

The multilevel protection of human rights, through national Constitutions, European and International Conventions, is nowadays a fundamental goal at national and transnational levels. To achieve that goal, strengthening the role of the National Human Rights Institutions (NHRIs) is a priority. This article will focus a particular type of NHRIs – the Ombudsman – and will assess the Portuguese and Spanish experience in that domain, taking into account their advantages and the problems that have emerged in the national contexts.

## 1. Introduction

The protection of Human Rights is a fundamental goal at national and transnational levels. In fact, the core of the Constitutions of the majority of the States, at least in the western world, are the provisions concerning the promotion and protection of human rights; and the same solutions are followed at the European level. In fact, in the European Union the protection of human rights is receiving increasing attention as one of the central aims of this sui generis entity. The the legally binding nature of the Charter of the Fundamental Rights of the EU, since 2009, and the fact that the EU must accede to the European Convention of Human Rights clearly show the relevance of this fundamental goal.

On the other hand, the implementation of these legal provisions requires the creation of specific organs with certain competences in order to assure the effectiveness of human rights laws. In fact, besides the promotion and protection of human rights by national, European and international courts and by the national and European administration, other organs have been created both at European level – like the European Union Agency for the Fundamental Rights<sup>1</sup>, the High Representative of the European Union for Foreign Affairs and Security Policy, and a Commissioner responsible for Fundamental Rights – and national levels, such as the “National Human Rights Institution”, broadly described as “an independent body established by a national government for the specific purpose of advancing and defending human rights at the domestic level”, cooperating with national and international bodies and acting as “guardians, experts or teachers of human rights”<sup>2</sup>.

Strengthening the NHRIs is nowadays considered fundamental, namely by the United Nations,

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<sup>1</sup> Even if it is not, as rightly pointed by Wouters and others, “the EU’s NHRI”, as it doesn’t fulfill the Paris principles concerning a comprehensive mandate or pluralistic and independent position – see Jan Wouters, Katrien Meuwissen, Ana Sofia de Barros, “The European Union and national human rights institutions”, KU Leuven, *Leuven Centre for Global Governance Studies, Working Paper No. 112* – July 2013, p 7. Concerning the Paris principles, they are considered the minimum international requirements for national institutions, laying their status, mandate, composition and modus operandi; in other words, they must be State officially funded bodies, with independence, pluralism, and with broad competences.

<sup>2</sup> Anna-Elina Phjolainen, *The evolution of national human rights institutions: The role of the United Nations*, The Danish Institute of Human Rights, 2006, p. 1.

to improve human rights protection in emerging democracies and to reinforce its protection in democratic States. This view may explain the increasing number of NHRIs. In fact, the number of national institutions complying international standards rose from 8 in 1990 to 55 in 2002, presenting different profiles<sup>3</sup>, such as: (1) Human Rights Commission (the Commonwealth model, followed for instance in UK, Canada) – it is defined as collegiate bodies focused mainly on the implementation of anti-discrimination and equality laws, with “proactive and preventive” tasks, like advising and monitoring public entities and developing training activities; (2) Advisory Committee (the French model, because it is based on the example of the National Consultative Commission of Human Rights of France) – it doesn’t usually receive complaints, it just assists and advises the government and conducts studies in this area, and its composition brings together not only academics, but also practitioners as NGO human rights experts and government officials; (3) Human Rights Institute (the Danish Centre for Human Rights) – it has been presented as a “potentially interesting model for democratic states, in particular those which have already relatively well-functioning human rights structures, such as ombudsmen institutions or parliamentary complaints bodies, and do not therefore have any immediate functional need to put additional and possibly overlapping structures in place”; it doesn’t usually investigate complaints, but focuses on education, information and research activities<sup>4</sup>; (4) Ombudsman (the Swedish model, followed namely in Portugal and Spain) – it traditionally acted as an “administrative watchdog” monitoring the legality of public administration, but nowadays may take other tasks like promoting the protection of human rights and educational ones; nevertheless, this institution usually investigates complaints, monitors the activity of the state, can make recommendations and issues opinions on public policies; in addition, it is worth mentioning that “ombudsmen are by definition single-persons bodies, which means that the Paris principles initial requirement of pluralistic composition cannot [apparently] be fulfilled”<sup>5</sup> (although, there is a relevant evolution concerning this topic). In other words, there are so many shadows in the profile of the Ombudsman in the Member States – at European, national, regional and local levels<sup>6</sup> – that it is difficult to identify the main features. Nevertheless, it is pointed out that this organ, inspired by the profiles of the Swedish “Justice Counsellor”, then “Ombudsman”<sup>7</sup>, and developed after the Second World War (when the need to monitor public authorities activities increased and the powers of the courts, with costly and long lasting procedures, and of the Parliament, with lack of time and resources, were insufficient to do that control) must be independent (from the government), his decisions are informal and not binding, and he can receive complaints from citizens without restrictions<sup>8</sup>.

Nowadays, the NHRIs should comply with the Paris Principles, which were adopted unanimously in a Resolution by the UN Human Rights Committee in 1993 and in the final documents of the

<sup>3</sup> In this article we will follow the classification suggested by Anna-Elina Pjoleinen, cf. *op.cit.*, pp. 16 ff.

<sup>4</sup> *Op.cit.*, p. 19.

<sup>5</sup> *Op. cit., loc. cit.* Nevertheless, this requirement will be relaxed in the future. It is also worth mentioning that nowadays the majority of models are hybrid and convergent.

<sup>6</sup> Cf. Alvaro Gil Robles, “Pluralidade e singularidade do Ombudsman na comparação de experiências europeias”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça – Divisão de Documentação, 2007, pp. 34, 36, refers as an example of local Ombudsman the Swiss model and sustains, in a convincing way, in my view, that the best model is the national model, as it is an organ that should protect citizens (his mission should not be to provide “general services”); regional and local Ombudsmen compromise, according to Gil Robles, the role of the national Ombudsman and the role of Parliament regarding citizens. Pointing in a similar direction, explaining that the existence of multiple Ombudsmen in a State (which can, in addition, be created for specific matters) increases the risk of the Ombudsman losing his independence towards the public authorities that must be monitored, cf. José Manuel Menéres Pimentel, “A pluralidade do Ombudsman: vantagens e inconvenientes para a Administração Pública”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça/Divisão de Documentação, 2002, p. 82.

<sup>7</sup> Álvaro Gil Robles, “Pluralidade e singularidade do Ombudsman na comparação de experiências europeias”, in *O cidadão, o provedor de justiça e as entidades administrativas independentes*, cit., p. 31.

<sup>8</sup> Filipe Boa Baptista, “O modelo de unidade e criação de instituições afins do ombudsman: uma tensão recorrente na experiência parlamentar”, in *O cidadão o provedor de justiça e as entidades administrativas independentes*, Lisboa, Provedoria de Justiça – Divisão de Documentação, 2002, pp. 15-16.



human rights conference of 1993, and are considered the fundamental criteria for human rights institutions. They require national human rights institutions to be created under a constitutional or legislative provision, which sets the competences, tasks, and composition of the institution. In addition, the institutions must have an autonomous and independent status not only formally, but also financially and administratively and must cooperate with other human rights actors.

The Paris Principles do not advocate any particular institutional model, allowing States to develop flexible solutions, which will take into account their specificities. In other words, the Paris Principles mechanisms encompass human rights commissions, ombudsmen and specialized agencies and allow, therefore, a flexible framework of reference for the establishment of national human rights structures which can and will interact with correspondent European and international institutions.

Still, as Katrien Meuwissen<sup>9</sup> explained, although the Paris principles did not prescribe a particular standard structure for NHRIs, there was, nevertheless, “a ‘commission-bias’” in the standards, which has been criticized in literature. In fact, in the beginning, the Paris Principles methods of operation suggested that some bodies – including ombudsmen – were to be considered “bodies other than NHRIs” and it is only in the mid-nineties that human rights commissions and ombudsmen have become recognized as the most important types of NHRIs<sup>10</sup>, and now UN bodies recommend the States to follow those principles whenever establishing NHRIs<sup>11</sup>.

This article will focus on a particular type of NHRIs – the Ombudsman – and will address the Portuguese and Spanish experience in that domain. It will evaluate the structure, composition, organization and role of the Portuguese and Spanish institutions, the advantages of creating these institutions and the problems that have emerged in the national contexts.

## 2. The Portuguese Ombudsman – Provedor de Justiça

### 2.1. Statute

The establishment of the Ombudsman in the Portuguese legal order is prior to the 1976 Constitution of the Portuguese Republic. In fact, the institution<sup>12</sup> was created by the Decree-Law No. 212/75, 21 April. The following year, in 1976, the Constitution of the Portuguese Republic created in its Article 24 (now Article 23), the Ombudsman Institution. Nowadays, in addition to Article 23

<sup>9</sup> Cf. Katrien Meuwissen, “The Paris principles and national human right institutions: lost in translation?”, KU Leuven, *Leuven Centre for Global Governance Studies, Institute for International Law, Working Paper No. 163*, September 2015, p. 9. After the 1991 meeting, the United Nations Centre for Human Rights adopted “A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights” (1995). Another “point of criticism”, according to Katrien, cf. *op. cit.*, p. 9, is the integration of a complaints-handling function as “additional” in the Paris Principles, although Article 2 of the Paris Principles requires the mandate of NHRIs to be “as broad as possible”; this apparently might be explained as a compromise between the most influential national commissions drafting the Paris Principles (French and Australian). Nowadays the “Paris Principles’ most prominent contemporary interpretation is provided by NHRIs themselves” through the General Observations of the Sub-Committee on Accreditation (SCA) of the International Coordinating Committee (ICC) of NHRIs; the ICC Statute provides that only one NHRI per Member State of the United Nations shall be eligible to be a voting member, and that it is a voluntary process, cf. *op. cit., loc. cit.*

<sup>10</sup> Cf. *op. cit., loc. cit.*

<sup>11</sup> Cf. Jan Wouters, Katrien Meuwissen, Ana Sofia de Barros, “The European Union and national human rights institutions”, KU Leuven, *Leuven Centre for Global Governance Studies, Working Paper No. 112* – July 2013, pp. 3-4. Concerning the Charter, see Sofia Oliveira Pais, “A proteção dos direitos fundamentais na União Europeia”, in *Estudos de direito da União Europeia*, Almedina, 2014, p. 137.

<sup>12</sup> The minimum is to decide freely and obtain the necessary information; and the national institutions should develop close cooperation with other actors. Concerning the budget of the Ombudsman’s Office, it shall be contained in the budget of Parliament (Article 43). A similar solution is followed in Spain – Article 37 Organic Act.

of the Constitution of the Portuguese Republic, the Ombudsman's statute is legally enshrined in Law No. 9/91, 9 April, which was later reviewed by Law No. 52-A/2005, 10 October, and by Law No. 17/2013, 18 February.

According to Article 23 (3) of the Constitution of the Portuguese Republic and Articles 1 (No. 1 and 4) and 7 of Law No. 9/91, 9 April, the Ombudsman is an independent institution of the Portuguese State and his holder is irremovable and elected by the Parliament by a qualified majority of the house (Article 163, paragraph h), of the Constitution of the Portuguese Republic and Articles 5 (1) and 15 of the Law No. 9/91, 9 April).

The Ombudsman's office holder is always elected for a term of four years and can only be re-elected once<sup>13</sup>. His duties can only cease before these four years either in the case of death permanent physical disability, loss of the requirements for being elected a Member of Parliament, or supervening incompatibility; or resignation, and these ground are verified by the Parliament<sup>14</sup>.

The Ombudsman is also an independent institution, meaning that he is not subject to the authority or supervision of another institution of the Portuguese State and, while exercising his powers; the Ombudsman shall enjoy political and criminal immunity. However, criminal immunity cannot be claimed when the Ombudsman is found in the act of committing a criminal offence punishable by three or more years in prison. Moreover, if the Ombudsman is officially accused of having committed a crime, the Parliament may choose to waive the criminal immunity<sup>15</sup>.

Finally, it is worth mentioning that in a study conducted concerning the profile of the Portuguese Ombudsman (PO), the conclusions were that Portuguese citizens considered the PO impartial and effective. The most favoured citizens also mentioned the trust in the institution, while the less favoured ones referred that it is a solution of last resort (there are no other alternatives). Either way, it is the high expectations towards this organ that are highlighted<sup>16</sup>.

In addition to the PO, the Decree-Law 158/96, September 3, created the "defender of the taxpayer" (Defensor do Contribuinte) to provide an additional guarantee to the rights and freedoms of taxpayers without compromising the powers of the Portuguese Ombudsman. This solution was criticized by the certain Portuguese authors<sup>17</sup>, because it would undermine the powers of the Portuguese Ombudsman; that body was extinguished in 2002

## 2.2. *Competences and powers*

The main duties of the Portuguese Ombudsman, according to Article 20. of Law No. 9/91, shall be:

(1) To defend and to promote the rights, freedoms, guarantees and legitimate interests of the citizens and to raise awareness of the powers of the Portuguese Ombudsman;

(2) To ensure, through informal means, that public authorities act fairly and in compliance with the law, addressing recommendations to the competent bodies with a view to correct illegal or unfair acts of public authorities or to improve their services and the administrative procedures followed by those services (and the recommendations addressed to the Parliament and to the Legislative

<sup>13</sup> Article 6 (1) of the Law No. 9/91, 9 April.

<sup>14</sup> Article 15 of the same Law.

<sup>15</sup> Article 8 of the same Law.

<sup>16</sup> Manuel Meirinho Martins; Jorge de Sá, *O exercício do direito de queixa como forma de participação política – O caso do provedor de justiça (1992-2004)*, Lisboa, Provedoria de Justiça, 2005, pp. 132-133.

<sup>17</sup> Jorge Miranda, "O Provedor de Justiça: garantia constitucional de uma instituição ou garantia de uma função?", in *O Cidadão...*, cit., 2002, pp. 50-51.

Assemblies of the Autonomous Regions shall be published in their respective official journals);

(3) To point out shortcomings in legislation, to issue recommendations (which will be forwarded to the competent public authority) concerning its interpretation, amendment or revocation, or to suggest the drafting of new legislation;

(4) To issue opinions, upon request of the Parliament, on any matter related to its activity and every year he shall send a report to the Parliament on his activities;

(5) To intervene, in accordance with the applicable law, in the protection of collective or diffuse interests, whenever public authorities or companies and services of general interest, regardless of their legal status, are involved;

(6) The Ombudsman may request the Constitutional Court to declare the unconstitutionality or illegality of any legal provisions, in accordance with Article 281, paragraph 1 and paragraph 2, sub-paragraph (d), of the Constitution; in addition, the Ombudsman may request the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission, in accordance with Article 283, paragraph 1, of the Constitution. In other words, citizens may complain to the PO, which will have a discretionary power to decide whether to continue the procedure or not, according to the principle of opportunity<sup>18</sup>.

This mechanism has not been used frequently as it is considered a solution of “last resort”. Between 1976 and 2006 the PO requested the Constitutional Court to rule on cases of unconstitutionality due to a legislative omission seven times (two of them were approved by the Portuguese Constitutional Court, concerning namely the need to adopt laws regarding the criminal liability of those holding political office, one was rejected and the others were dismissed because a proposal was adopted) and several times (among the more than 170 requests) has the PO invoked the unconstitutionality of the Portuguese laws (for instance, in the Seventies the PO argued that the laws that excluded certain women from certain professions –as the law providing that only single women or widows could be directors in a public institute- were unconstitutional)<sup>19</sup>;

(7) Furthermore, the Ombudsman may also be appointed to supervise the enforcement of international conventions and treaties on human rights and should guarantee the cooperation with other equivalent foreign institutions as well as with the European Union and international institutions<sup>20</sup>.

In order to perform his powers, the Ombudsman can make inquiries and inspection visits. In other words, he has the power to conduct with or without prior notice inspection visits to every single sector of activity of the central, regional or local Public Administration, namely public services, military or civil prisons, undertakings and companies offering services of general interest, independently of their legal nature, or any other entities subject to the control of the Ombudsman. He has the power to listen to the respective bodies and agents and to ask for informations, as well as the documents considered relevant; to proceed with any investigations and inquiries considered needed or convenient, having the possibility to adopt, in the context of production of evidences, any reasonable proceedings regarding the respect for citizens’ fundamental rights and liberties; he has to power to search, in collaboration with other competent bodies and services, the most adequate solutions for safeguarding citizens’ legitimate interests and improving the administrative action. He shall not, however, have the power to annul, revoke or amend decisions of public authorities and sovereign bodies, and the government bodies of the Autonomous Regions shall not be subject

<sup>18</sup> Maria Eduarda Ferraz, *O provedor de justiça na defesa da Constituição*, Lisboa, Provedoria de Justiça, 2008, pp. 54-55.

<sup>19</sup> Maria Eduarda, *op.cit.*, p. 190, note 254.

<sup>20</sup> Article 1 (2 and 3) of Law No. 9/91, 9 April.

to the Ombudsman's inspection and supervision<sup>21</sup>.

### 2.3. *Complaints and procedure*

Every citizen, but also any legal person<sup>22</sup>, can submit an oral or written complaint to the Ombudsman against acts and/or omissions by the public authorities in order to promote and protect the rights and liberties recognized by the Portuguese constitutional order<sup>23</sup>. Nevertheless, the Ombudsman is not constitutionally or legally bound by the submission of complaints, since he can act by his own motion whenever aware of a situation that requires and justifies his intervention<sup>24</sup>. The complaints depend neither on the complainant's direct, personal and legitimate interest nor on any time limits, and the confidentiality about the complainant identity is guaranteed, whenever requested and if justified for security reasons<sup>25</sup>. In addition, procedures before the Ombudsman shall be exempt from costs and stamps and do not require the intervention of a lawyer<sup>26</sup>.

The Portuguese solution that does not establish a time limit for the complainant to present a complaint has been discussed in the Portuguese literature<sup>27</sup>, which sustains that it is the best option as it is a flexible and informal mechanism that promotes the protection of fundamental rights; in addition, the decisions of the PO are not binding and, therefore, do not usually affect the legal act that already produced its effects (in other words, legal certainty is not compromised).

The Portuguese Ombudsman shall assess the complaints without the power to take decisions and shall send the competent bodies the necessary recommendations in order to correct illegal or unfair acts of public authorities.

The scope of the Ombudsman's powers is extensive and far-reaching, for the Constitution of the Portuguese Republic does not draw any limit to his powers and tasks. Notwithstanding, it is clear that the scope of the powers and tasks of the Ombudsman does not cover the acts and decisions of the Courts. Besides, the Ombudsman does not have the competence to investigate and to supervise the public (sovereign) bodies and the regional Governments<sup>28</sup>.

Although it is true that the powers of the Portuguese Ombudsman are broad and vast, it is also true that the natural field of the Portuguese Ombudsman intervention is related with the acts and/or omissions of the Public Administration, namely the central, regional or local Public Administration, the Armed Forces, the public institutes, the public companies, the "public service concessionaires", the independent administrative authorities and the public associations, like the bar association (Article 2 (1) of Law No. 9/91, 9 April). Additionally, the Ombudsman can also act in the context of private legal relationships, in which there is a relationship of control between the parties with the purpose of safeguarding the recognized constitutional rights and liberties (Article 2 (2) of Law No. 9/91, 9 April).

Under Article 23 (4) of the Constitution of the Portuguese Republic, it is established that all authorities and institutions of the Public Administration must cooperate with the Ombudsman,

<sup>21</sup> Articles 21, 22 and 23 Law n.º 9/91. In addition, according to Articles 142, paragraph d), of the Constitution of the Portuguese Republic and 20 (3) of Law No. 9/91, 9 April, the Ombudsman has a seat at the Council of State.

<sup>22</sup> Articles 12, 13 and 15 of the Constitution of the Portuguese Republic

<sup>23</sup> This right to complain to the Ombudsman represents a particular exercise of a right to petition (Article 52 (1) of the Constitution of the Portuguese Republic).

<sup>24</sup> Article 23, of the Constitution of the Portuguese Republic and Articles 3, 4, 24 and 25 of Law No. 9/91, 9 April

<sup>25</sup> Articles 24 and 25, Law No. 9/91.

<sup>26</sup> Article 39, Law No. 9/91.

<sup>27</sup> José Lucas Cardoso, "Os pressupostos de admissibilidade de queixas pelo provedor. Abertura ou restrição do acesso dos cidadãos a um órgão de defesa dos seus direitos fundamentais", *Revista de Direito Público*, n.º 2, 2009, 91-132, at 116.

<sup>28</sup> Articles 203 and 205 of the Constitution of the Portuguese Republic and Article 22 (3) of Law No. 9/91, 9 April.

providing the information and clarifications requested. The non-justified breach of the duty to cooperate is considered a crime of disobedience, notwithstanding the applicable disciplinary proceedings. The Ombudsman may also request statements or information from any citizen whenever necessary, and unjustified absence or refusal to make a statement shall constitute a qualified crime of disobedience<sup>29</sup>.

To sum up, in the Portuguese legal order, the Ombudsman has mainly the power to address recommendations to all public authorities and institutions (including the Parliament and the Government), but cannot in any circumstances give orders or exercise by his own right the powers and tasks that are recognized to the other public authorities and institutions (Article 23 (1) of the Constitution of the Portuguese Republic and Articles 20 (1) and 22 (1) of Law No. 9/91, 9 April).

The Ombudsman's recommendations are addressed to the competent bodies in order to rectify the illegal or unfair act or irregular situation. The addressed bodies must notify the Ombudsman of their positions on the matter in 60 days time and the non-compliance of the Ombudsman's recommendations must be explained. If the recommendations of the Ombudsman are not attended or if the required collaboration was not provided, the Ombudsman may report to the hierarchical superior or to the competent Minister. Finally, if the recommendations of the Ombudsman are not respected or if the required collaboration was not provided by the Public Administration, the Ombudsman shall inform Parliament<sup>30</sup>.

In less serious cases, the Ombudsman may simply address a critical remark to the body or the services involved or dismiss the case upon receiving explanations. On the other cases, he shall inform the complainant of the judicial (or administrative) remedies available<sup>31</sup>.

In addition, if sufficient evidence of criminal or disciplinary offences arises in the course of the proceeding, the Ombudsman shall inform either the Public Prosecutor or the hierarchical superior to start disciplinary proceedings and he may decide to issue statements or to publish information concerning the conclusions reached in the proceedings<sup>32</sup>.

Complaints with no possibility of identification of the complainant, manifestly unfounded and outside the Ombudsman competence, or when the invoked illegality or unfairness have already been remedied, shall be dismissed<sup>33</sup>.

### **3. The Spanish Ombudsman (Defender of the People / Defensor del Pueblo)**

#### *3.1. Statute*

The Ombudsman was firstly established by the 1978 Spanish Constitution and followed the Portuguese model<sup>34</sup>. Article 54 of the Spanish Constitution states that an organic act shall regulate the institution of the Ombudsman as High Commissioner of the Parliament (Las Cortes Generales)<sup>35</sup>, appointed by it to defend the rights contained in Part I of the Constitution; for this purpose, the Ombudsman may supervise the activity of the Administration and report thereon to the Parliament. Currently, the Ombudsman's statute is legally enshrined in Organic Act No. 3/1981, April 6, which was later modified by Organic Act No. 2/1992, March 5. In this context, Autonomic Ombudsmen

<sup>29</sup> Articles 29 and 30 of the Law No. 9/91.

<sup>30</sup> Article 38 Law No. 9/91.

<sup>31</sup> Articles 32 and 33 Law N<sup>o</sup>.9/91.

<sup>32</sup> Article 35 Law N<sup>o</sup>. 9/91.

<sup>33</sup> Article 27 Law N<sup>o</sup>- 9/91.

<sup>34</sup> As stated by Alvaro Gil Robles, cf. Pluralidade..., cit., p. 33.

<sup>35</sup> The name of the Spanish Parliament is "Las Cortes Generales" (the General Assembly).

were also created. The first of them began his work in 1984<sup>36, 37</sup>.

According to Article 2 (1) of the Organic Act No. 3/1981, the Ombudsman is elected by the Parliament for a term of five years whenever necessary. Article 3 of Organic Act No. 3/1981 lays down that any Spanish citizen who has attained legal majority and enjoys full civil and political rights may be elected Ombudsman. In addition, according to Article 5 (1) of Organic Act No. 3/1981, the Ombudsman shall only be relieved of his duties in any of the following cases: resignation, expiry of term of office, death or unexpected incapacity, flagrant negligence in fulfilling the obligations and duties of his office non-appealable criminal conviction. The post shall be declared vacant by the Speaker of Congress in the event of death, resignation or expiry of the term of office (Article 5 (2), first part, of Organic Act No. 3/1981). However, in all other cases it shall be decided by a three-fifths majority of the Members of each House, following debate and the granting of an audience to the person concerned (Article 5 (2), second part, of Organic Act No. 3/1981).

Article 6 (1) of Organic Act No. 3/1981 states that the Ombudsman shall not be subject to any binding terms of reference whatsoever, he shall not receive instructions from any authority and he shall perform his duties independently and according to his own criteria. Moreover, the Ombudsman shall enjoy immunity. Consequently, he may not be arrested, subjected to disciplinary proceeding, fined, prosecuted or judged on account of opinions he may express or acts he may commit in performing the duties of the office. In all other circumstances, and while he continues to perform his duties, the Ombudsman may not be arrested or held in custody except in the event of being found in the act of committing an offence<sup>38</sup>. Furthermore, the post of Ombudsman is incompatible with any elected office, with any political position or activities involving political propaganda, with remaining in active service in any Public Administration, with belonging to a political party or performing management duties in a political party or in a trade union, association or foundation or employment in the service thereof, with practising the professions of judge or prosecutor, and with any liberal profession or business or working activity (Article 7 (1) of Organic Act No. 3/1981).

The Ombudsman is assisted by two deputies nominated by the parliamentary groups. This solution has been particularly criticized not only because it compromises the independence of his body, but also because it can hamper the functioning of the institution if there is a “clash of ideological backgrounds” between the DP and the assistants<sup>39</sup>.

### 3.2. Competences and powers

The main powers of the Ombudsman shall be:

(1) To pursue, ex officio or in response to a request from the party concerned, any investigation in order to clarify the actions or decisions of the Public Administration and its agents regarding citizens, and the protection of their rights, as established in the provisions of Article 103 (1)<sup>40</sup> of the Spanish Constitution. As a consequence, the Ombudsman has the authority to investigate the activities of Ministers, administrative authorities, civil servants and any person acting in the service

<sup>36</sup> Laura Diez Bueso, “Spain’s parliamentary Ombudsman scheme”, in *Righting wrongs, The Ombudsman in six continents*, ed. Roy Gregory – Philip Janes Gidding, International Institute of Administrative Sciences, Amsterdam – IOS Press, 2000, p. 325.

<sup>37</sup> Laura Diez Bueso, “Spain’s parliamentary Ombudsman scheme”, *op. cit.*, loc.cit.

<sup>38</sup> In decisions regarding his accusation, imprisonment, prosecution and trial, the Criminal Division of the High Court has exclusive jurisdiction (Article 6 (3), second part, of Organic Act No. 3/1981).

<sup>39</sup> Laura Diez Bueso, *op. cit.* p. 325.

<sup>40</sup> Article 103 (1) of the Spanish Constitution provides that the Public Administration shall serve the general interest in a spirit of objectivity and shall act in accordance with the principles of efficiency, hierarchy, decentralization, deconcentration and coordination, and in full subordination to the law.

of the Public. In addition, the Ombudsman may in all cases, again whether ex officio or at the request of a party concerned, supervise the activities of the Autonomous Communities, within the scope of his competence<sup>41</sup>.

(2) Whenever the Ombudsman receives complaints regarding the functioning of the Administration of Justice, he must refer them to the Public Prosecutor, who will investigate and take appropriate legal action, or else refer them to the General Council of the Judiciary, according to the type of complaint involved, independently of any reference that he may make to the matter in his annual report to the Parliament (Article 13 of Organic Act No. 3/1981).

(3) The Ombudsman shall also protect the rights proclaimed in Part I of the Spanish Constitution in the field of Military Administration, without however causing any interference in the command of National Defence.

(4) The Ombudsman is not empowered to modify or overrule the acts and decisions of the Public Administration, but may suggest modifications in the criteria employed in their production. Moreover, if as a result of the investigations the Ombudsman should reach the conclusion that rigorous compliance with a regulation could lead to situations that are unfair or harmful to those persons thereby affected, he should suggest to the competent legislative body or the Administration that it be modified. If action has been taken in connection with services rendered by private individuals with due administrative authorization, the Ombudsman may urge the competent administrative authorities to exercise their powers of inspection and sanction (Article 28 of Organic Act No. 3/1981).

(5) Additionally, the Ombudsman has legal standing to present appeals arguing unconstitutionality and individual appeals for relief, as provided by the Constitution and the Organic Act Regarding the Constitutional Court (Article 29 of Organic Act No. 3/1981).

(6) Furthermore, the Ombudsman may, in the course of the investigations, give advice and make recommendations to authorities and officials in the Public Administration, remind them of their legal duties and make suggestions regarding the adoption of new measures (Article 30 (1), first part, of Organic Act No. 3/1981).

(7) Finally, the Ombudsman shall inform the Parliament every year of the action that he has taken in an annual report (Article 32 (1) of Organic Act No. 3/1981).

In order to pursue these goals the Ombudsman has broad powers of investigation, such as the power to request all kinds of information and documentation from public authorities, to visit public departments, make interviews and ask for classified documents, if necessary.

Within the various competences of the Ombudsman, the one that has been raising certain doubts in literature concerns the granting of legal standing to the Spanish Ombudsman to appeal on grounds of unconstitutionality against law and norms of the State or the Autonomous Communities, as it may interfere with the legislative activity (even if the appeal does not suspend the law).

Certain authors consider this solution very positive as it proves the independence of the Spanish Ombudsman from the Parliament, increases the legitimacy of the Ombudsman and “opens a more neutral channel to urge the control of constitutionality of laws outside the more directly political attitudes of other legitimate individuals like the Members of Parliament and public institutions”<sup>42</sup>.

<sup>41</sup> Articles 9 and 13 of the Organic Act No. 3/1981.

<sup>42</sup> Juan Vintó Castells, “The Ombudsman and the parliamentary committees on human rights in Spain”, in *Human rights commissions and ombudsman offices: national experiences*, ed. Kamal Hussein, L. F. M. Besslink, H. S. G. Selassie, E. Volker, Kluwer Law International, The Netherlands, 2000, p. 411.

On the other hand, it is invoked the “risk of politicization of the institution”, which can only be avoided with a cautious attitude by the Ombudsman<sup>43</sup>.

Finally, it has been argued<sup>44</sup> that some of the weakest aspects of the Ombudsman are the lack of information of the average citizens (particularly those less favoured) concerning the powers of the Ombudsman and the length of the procedure, although there has been a significant evolution concerning this last aspect<sup>45</sup>.

### 3.3. *Complaints and procedure*

Any individual or legal entity, who invokes a legitimate interest, may address to the Ombudsman without any restrictions whatsoever (Article 10 (1), first part, of Organic Act No. 3/1981). In other words, there are no legal impediments on the grounds of nationality, residence, gender, legal minority, legal incapacity, confinement in a prison or, in general, any special relationship of subordination to or dependence on a Public Administration or authority (Article 10 (1), second part, of Organic Act No. 3/1981). Additionally, individual Deputies and Senators, investigatory Committees or those connected with the general or partial defence of public rights and liberties and especially those established in Parliament, may, in writing and stating their grounds, request the intervention of the Ombudsman to investigate or clarify any actions, decisions or specific conducts of the Public Administration which may affect an individual citizen or group of citizens and which fall within his competence (Article 10 (2) of Organic Act No. 3/1981). Nevertheless, no administrative authority may submit complaints to the Ombudsman regarding affairs within its own competence (Article 10 (3) of Organic Act No. 3/1981) and he shall not investigate individually any complaints that are pending judicial resolution (article 17).

According to Article 15 (1) of Organic Act No. 3/1981, all complaints submitted must be signed by the party concerned, giving his name and address in a document stating the ground for the complaint, on ordinary paper and within a maximum of one year from the time of becoming acquainted with the matters giving rise to it. All action by the Ombudsman shall be free of charge for the party concerned, and the assistance of a solicitor or barrister shall not be compulsory.

Concerning the time limit to present the complaint, it must be pointed out that after one year the citizen may still ask the deputy or directly the Ombudsman to initiate the procedure on his own initiative<sup>46</sup>.

Once a complaint has been accepted, the Ombudsman shall begin appropriate summary informal investigations to clarify the allegations contained therein (Article 18 (1), first part, of Organic Act No. 3/1981). In all cases, he shall report the substance of the complaint to the pertinent administrative agency or office for the purpose of ensuring that a written report be submitted within fifteen days by its director (Article 18 (1), second part, of Organic Act No. 3/1981)<sup>47</sup>.

Article 17 No. 4 provides: “The Ombudsman shall reject anonymous complaints and may reject

<sup>43</sup> *op. cit., loc. cit.* The Ombudsman has used this mechanism with caution concerning, among other matters, asylum, trade union freedom and military service. The same caution was used concerning his power to present “recurso de amparo” (appeal for protection). See Laura Diez Bueso, *op. cit. loc. cit.*

<sup>44</sup> Laura Diez Bueso, *op. cit.*, p. 335.

<sup>45</sup> See *infra* the *praxis* in the Spanish context.

<sup>46</sup> Sustaining this solution, see Alvaro Gil Robles, *El defensor del pueblo – Comentarios en torno a una proposición de Ley Organica*, Madrid, Editorial Civitas, 1979, p. 95.

<sup>47</sup> Article 18 (2), first part, of the Organic Act No. 3/1981 states that the refusal or failure on the part of the civil servant or his superiors responsible for sending the initial report requested may be considered by the Ombudsman as a hostile act which obstructs to his functions. Therefore, he shall immediately make such an act public and draw attention to it in his annual or special report, as the case may be, to Parliament (Article 18 (2), second part, of Organic Act No. 3/1981).



those in which he perceives bad faith, lack of grounds or an unfounded claim, and in addition those whose investigation might infringe the legitimate rights of a third party. His decisions may not be appealed”.

The Ombudsman is assisted by a First Deputy and a Second Deputy to whom he may delegate his duties and who shall replace him, in hierarchical order, in their fulfilment, in the event of his temporary incapacity or his dismissal (Article 8 (1) of Organic Act No. 3/1981)<sup>48</sup>. Besides this organic assistance, all public authorities must give preferential and urgent assistance to the Ombudsman in his investigations and inspections (Article 19 (1) of Organic Act No. 3/1981). Should the complaint to be investigated concern the conduct of persons in the service of the Administration in connection with the duties they perform, the Ombudsman shall so inform them, as well as the immediate superior or body to which the former are attached (Article 20 (1) of Organic Act No. 3/1981). The persons concerned shall reply in writing, supplying whatever documents and supporting evidence they might consider appropriate, and the Ombudsman may verify the veracity of such documents and propose to the civil servant concerned that he be interviewed, in order to furnish further details (Article 20 (2 and 3) of Organic Act No. 3/1981)<sup>49</sup>.

Concerning the request of documents, the Ombudsman may request the public authorities to furnish all the documents he considers necessary for the performance of duties, including those classified as confidential. If the investigations conducted reveal that the complaint was presumably the result of abuse, arbitrariness, discrimination, error, negligence or omission on the part of a civil servant, the Ombudsman may request the person concerned to state his views on the matter<sup>50</sup>. The persistence in a hostile attitude or the hindering of the work of the Ombudsman by civil servants, officials or persons in the service of the Public Administration, may be the subject of a special report (it is a public statement of lack of collaboration), in addition to being stressed in the appropriate section of his annual report<sup>51</sup>. Furthermore, a civil servant who obstructs an investigation by the Ombudsman by either refusing to send the reports he requests or to facilitate his access to the administrative records or documents necessary for the investigation, or is negligent in so doing, shall be guilty of an offence of disobedience (Article 502 of the Penal Code)<sup>52</sup>. Finally, if in the performance of the duties of his office, the Ombudsman should obtain knowledge of presumably criminal acts or behaviour, he must immediately notify the Attorney-General<sup>53</sup>. The Ombudsman may also, *ex officio*, bring actions for liability against all authorities, civil servants and governmental or administrative agents, including local agents, without needing under any circumstances to previously submit a written claim<sup>54</sup>.

The Ombudsman shall inform the party concerned (or the public authority involved) of his decision as a result of his investigations and actions taken<sup>55</sup> and about the most appropriate channels to take action<sup>56</sup>. However, his decision has not coercive powers (like judicial bodies). He only has the “power of direction” to give warnings, reminders, recommendations and suggestions<sup>57</sup>. In other words, the Ombudsman may, in the course of the investigations, give advice and make

<sup>48</sup> The Ombudsman shall appoint and dismiss his Deputies, following approval by both Houses (Article 8 (2) of Organic Act No. 3/1981).

<sup>49</sup> Article 20 (4) of the Organic Act No. 3/1981 provides that the information a civil servant may furnish through personal testimony in the course of an investigation shall be treated as confidential.

<sup>50</sup> Articles 22 and 23 (1) of Organic Act No. 3/1981.

<sup>51</sup> Article 24 of Organic Act No. 3/1981.

<sup>52</sup> The penalty is a fine from 3 to 12 months and the prohibition to hold a public post (between 6 and 12 months).

<sup>53</sup> Article 25 of Organic Act No. 3/1981.

<sup>54</sup> Article 26 of Organic Act No. 3/1981

<sup>55</sup> Article 31.

<sup>56</sup> Article 17.

<sup>57</sup> As already explained (see Laura Diez Bueso, *op. cit.*, *loc. cit.*), usually, a warning is a remark on behaviour or to stop a particular behaviour; a reminder refers to cases in which the administration infringes the law; and recommendations and suggestions are adopted in order to propose a change of an act or judgement.

recommendations to authorities and officials in the Public Administration, remind them of their legal duties and make suggestions regarding the adoption of new measures . In all cases such authorities and officials shall be obliged to reply in writing within a maximum period of one month<sup>58</sup>. If within a reasonable period of time after such recommendations are made appropriate steps are not taken to implement them by the administrative authority concerned, or if the latter fails to inform the Ombudsman of its reasons for non-compliance, he may inform the Minister of the Department concerned, or the highest authority of the Administration concerned, of the particulars of the case and the recommendations made.

## 4. The praxis of the Ombudsman

### 4.1. In Portugal

Every year the Portuguese Ombudsman's presents a report to Parliament regarding his activity. We will focus on the last Report available concerning 2014 and presented in 2015 and refer mainly to the Ombudsman activity in the complaints procedures and in the international relations<sup>59</sup>.

Concerning the first topic – Ombudsman's activity in the complaints procedures – the Report refers that in 2014, 8526 cases were opened, which means that in the year under review the number of new cases remained in roughly equal value compared to 2013, with a slight increase of 5. Of the total cases mentioned, 8518 resulted in complaints to the Ombudsman, the majority of them by individuals over 50 years old (almost 60%); in addition, the comparison of complainants by gender is close to parity<sup>60</sup>; and only 8 procedures were opened on the Ombudsman's initiative.

According to the Report, 8114 cases were closed. In 3179 procedures, there was an agreement with the object of the complaint or a fair solution was achieved according to the complainant's claim (corresponding to 39.2% of the total cases that are closed). The proportion of cases where the complaint was dismissed or considered useless to conduct any other diligence also increased from 2724 (in 2013) to 3134 closed cases (which corresponds to 38.6% of closed cases). In 13 procedures, the cases were closed by issuing a recommendation (8 recommendations); the same applies to 6 cases in which the intervention of the Constitutional Court was requested (4 requests made)<sup>61</sup>. The remaining closed cases were divided between referral to another entity or most appropriate ways (590 cases); by issuing a remark to the addressed entity (in 260 cases); or simply were subject to a summary decision (492 cases); or there was explicit or implied withdrawal of the complaint.

Concerning the duration of the cases closed in 2014: 26% were closed within the first thirty days after their opening (corresponding to 2115 cases), 56% in the first three months (corresponding to 4568 cases) and 76% in first six months (corresponding to 6164 cases); considering the full year of 2014, the proportion of closed cases before twelve months after their opening registered a value of 91%<sup>62</sup>.

In 2014, the four most discussed issues presented to the Ombudsman – representing 55% of a total universe of 8606 – were social security, public employment, taxation and administration of Justice and the issues with a greater increase were consumer rights, land planning, urban planning and housing and administration of Justice.

<sup>58</sup> Article 30 of Organic Act No. 3/1981.

<sup>59</sup> Cf. <http://www.provedor-jus.pt/?idc=16&idi=15658> (last visited 30 .11.2015).

<sup>60</sup> Report of the Portuguese Ombudsman, 2014, p. 7.

<sup>61</sup> Report cit., p. 21.

<sup>62</sup> Report, cit. p. 22.

Excluding the complaints filed by employees in the public sector, there has been an increase in the proportion of complaints in which the targeted entity is the Ministry of Solidarity, Employment and Social Security (from 37% overall complaints concerning Central Administration to 43%) and the Ministry of Finance (from 22% overall complaints regarding Central Administration to 25%). As expected, given the high number of workers, the Ministries of Education and Science and Health show more significant changes in reverse (respectively, from 12% to 5% and from 8% to 6%).

Concerning the promotion and protection of human rights, it is worth mentioning the complaints requesting the Ombudsman to recommend the partial repeal or amendment of certain laws, namely laws concerning new urban lease regime and tax law. The majority of the laws followed the Ombudsman's suggestions.

In the international context, the recognition of the Portuguese Ombudsman as a National Human Rights Institution, accredited with A-status by the International Coordinating Committee of National Human Rights Institutions (ICC), involves a wide range of actions in order to maintain that status. Therefore, in 2014, the Ombudsman met and cooperated with several homologous institutions, as well as with other entities with whom he shares a similar mandate in the defense and promotion of human rights, namely the Regional Representative for Europe of the Office of the High Commissioner for Human Rights, the Defensor del Pueblo in Madrid, the Municipal Secretary for Human Rights and Citizenship of the City of São Paulo, Brazil, and the Ombudsman of Angola.

#### 4.2. *In Spain*

In 2014, the Spanish Ombudsman launched a transparency portal that allows access to the developed activity (which has received more than 400 000 visits) and where complainants can follow the status of their complaints online. In addition, "for the first time", the report mentions the average times of the Spanish Ombudsman in replying to the citizens. According to the report, the complaint was usually admitted in 36 days and the decision adopted in 57 days (after the answer of the public authorities)<sup>63</sup>.

Concerning the number of complaints, in 2014, the Ombudsman received 23.186 complaints (mainly by post -9026; and only 489 were ex officio) and the issues concerned social welfare (minimex), taxes and delays in the decisions of the public authorities<sup>64</sup>. The closed cases were 8103 and the dismissed ones 8 565. The Ombudsman adopted 467 recommendations (217 were followed), namely concerning tax laws and failing firm law. He also analyzed the appeals on unconstitutionality: 287 were rejected, one presented and 2 are being studied. The number of appeals on the grounds of unconstitutionality has, therefore, dropped considerably compared to previous years, in which many civil servants whose bonus pay had been eliminated requested the filing of appeals.

To prevent torture and/or protect human rights, the Spanish Ombudsman office visited prisons and centers of detention. Finally, an international project involving France and Spain was created in order to help the creation of Ombudsmen in other countries together with a Prize to be awarded to ONG and entities that contribute to the activity of the Spanish Ombudsman.

Lastly, the relations with the Autonomous Community Ombudsmen have also been ones of cooperation and respect in their respective fields of authority, and attempts have been made to avoid duplicating measures.

<sup>63</sup> Cf <https://www.defensordelpueblo.es/en/> (last visited 30.11.2015). Report 2014, p. 20.

<sup>64</sup> Report, cit., p. 7. In addition, the Ombudsman conducted many studies in telecommunications, health, etc.

### *4.3. Preliminary conclusions*

Although there are some differences between the Portuguese and Spanish Ombudsmen's status and practices, the reports confirm that there are many similarities between them. In addition, the difficult economic situations experienced in Portugal and Spain has drawn attention to the role of Ombudsman, which is reflected in the number of complaints, in their subject matter, as well as in the requests for appeals on the grounds of unconstitutionality. On the other hand, we noticed that the majority of complaints are dismissed; those approved are decided within one year. Concerning the recommendations adopted we also confirmed that the majority of them are taken into account by the legislative bodies and that both Ombudsmen have developed relevant activities at the international level.

## **5. Conclusion**

Ombudsman institutions, such as the Portuguese and Spanish ones, which comply with the Paris Principles, can play an important role in advancing the rule of law and protecting human rights at the national level. In fact, in Portugal and Spain, the Ombudsman is inspired by the traditional Swedish model. Therefore, both the Portuguese Ombudsman and the Spanish Ombudsman are established in the Constitution; they are not dependent from ordinary laws, which can change rapidly. They are nominated by Parliament, which assures their independence and they have consistent powers in order to fulfill a double function: monitor public authorities and protect human rights. In this context, both Portuguese Ombudsman and Spanish Ombudsman may serve as good examples of NHRIs that can contribute to the promotion of democracy, Rule of Law and Human Rights.

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# PROMOTING THE INTEGRATION OF THIRD-COUNTRY NATIONALS THROUGH THE LABOUR MARKET: COMBATING DISCRIMINATION IN EMPLOYMENT: THE CASE OF THIRD-COUNTRY NATIONALS IN MALTA

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## Abstract

The paper identifies a series of obstacles to the integration of Third Country Nationals as a category within the Maltese labour market, including: TCNs' lack of knowledge about the procedures for obtaining a work permit; institutionalised discrimination against them as a category in allowing their entry into the labour market; opaque, dilatory and discretionary procedures for obtaining and renewing work permits and for recognising TCNs' qualifications; poor knowledge by managers about handling workplace diversity and intercultural issues, abuse of employers' leverage powers as regards wages and other conditions of employment, linguistic problems, overlapping and poorly defined political responsibilities for integration, lack of cooperation between institutional stakeholders and pervasive discrimination against foreigners in relation to utility rates and other areas of social life.<sup>1</sup>

## 1. Introduction

Over the last few years, Eurostat statistics clearly show that the net increase in the EU's total population was due to immigration. The EU's Europe 2020 Strategy and the EU's Stockholm Programme recognise that legal migration can help European countries address the challenges of demographic change, including ageing population, longer life expectancies and a declining working-age population. Suban and Zammit (2010) argued that Malta is also affected by similar demographic trends and that legal migration could be a solution for Malta. However, successful migration and subsequent integration require that the host country has a labour market that guarantees migrants a treatment that is as much as possible similar to the native population. This study investigates this

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<sup>1</sup> The research on which this paper is based was conducted in 2013. Since then there have been significant changes in the Maltese labor market and legislation which regulates it. This paper is being published as much for its historical value as for any sociological insights that may emerge from an during trends.

question in the context of third country nationals (TCNs) in Malta. This paper is the outcome of a research project commissioned by the Malta office of the International Organisation for Migration (IOM) undertaken as part of the European Union's Integration Fund programme IF 2001-08: "Pan-European Conference – Work: a Tool for inclusion or a Reason for Exclusion?".

### *1.1. Objectives of the Study*

The principal objective of the project is to provide support to all Maltese stakeholders involved in the development and/or implementation of labour market or integration policies of TCNs. The study will first focus on policy areas where the current Maltese situation leads to discrimination/unfavourable treatment<sup>2</sup> of TCNs. Then, the study will suggest how these situations of discrimination/unfavourable treatment could be reduced or eliminated by outlining successful policies and practices developed and implemented in other EU countries. The study will also discuss the best possible way to import and adapt these EU wide best practices by taking into account the particular Maltese context.

### *1.2. Methodological Note*

The project was based on three stages. During the first stage, the Malta office of the IOM sent an assessment questionnaire<sup>3</sup> to all potentially relevant Maltese stakeholders. These were identified as stakeholders who are active in the area of immigration and the labour market. The first stage of the project was concluded in November 2012 by a meeting between the authors and the relevant stakeholders whereby the former could comment and ask clarifications on the assessment questionnaires responses and the authors also outlined some ideas that could be explored in the subsequent stages of the project. During the second stage, the authors drafted the research paper to be submitted to the final pan-European conference. The third stage will consist of revising and amending the research paper by taking into account the feedback of both the stakeholders and other experts during the final pan-European conference which will be held in April 2013.

In preparing the research paper, we used the answers to the assessment questionnaires and other ideas discussed during the November 2012 experts meeting. The input provided during the first stage of the project served to limit the scope of our research to shortcomings currently present in Malta and only identifying best practices for those shortcomings. This was complemented by additional research. First, we undertook a wide desk research by reviewing the annual reports and other literature produced by all relevant stakeholders. We also consulted previous academic studies relevant to our area of research. Secondly, we also entered into direct contact with certain stakeholders in order to ask for additional information or clarifications regarding certain aspects of their work, notably the policy setting function and the implementation of policies falling under their remit. Thirdly, we consulted documents and websites of other organisations within the European Union in order to identify those best practices which we could implement in Malta in order to improve the situation and/or remedy to the shortcomings identified in the first two stages of the project.

### *1.3. Definitions*

#### *1.3.1. Third-Country National (TCN)*

For the purpose of our study, a third-country national (TCN) is any person that is not a citizen of the European Union as per the meaning of Article 20(1) of the Treaty on the Functioning of the

<sup>2</sup> See section 1.3.2. for a discussion of the distinction between discrimination and unfavourable treatment.

<sup>3</sup> A copy of the assessment questionnaire is available on request from the authors.

European Union and who does not enjoy the Union right to freedom of movement as defined in Article 2(5) of the Schengen Borders Code.

We acknowledge that there are different categories of TCNs and that the rights and thus situations that they experience will be different. Other categories of TCNs include those who would be EU Blue Card holders as per Council Directive 2009/50/EC<sup>4</sup>, TCNs who are researchers, TCNs who would have acquired long-term resident status as per Council Directive 2003/109/EC<sup>5</sup>, and TCNs who are married to a Maltese or EU National. However, currently, most statistics and previous research in Malta do not make a distinction between all these categories of TCNs though anecdotal evidence suggests that the vast majority of TCNs would not belong to these sub-categories.

As a result, the paper will be referring to the situations experienced by most TCNs in Malta and exclude TCNs who are researchers, EU Blue Card holders, Long-term resident status holders and those married to Maltese or EU nationals. Overall, with regards to employment, all these sub-categories would be treated in a more favourable way compared to other TCNs. TCNs who are married to a Maltese or EU national are even supposed to be treated like Maltese nationals although anecdotal evidence suggests that it is not always the case in practice.

### *1.3.2. Discrimination/Unfavourable Treatment*

For the purpose of this study, we make a distinction between situations when TCNs experience an unfavourable treatment and when TCNs experience discrimination. On the one hand, we will refer and use the expression “unfavourable treatment” in situations when the Maltese Government is allowed by law to treat differently Maltese and TCNs. On the other hand, we will refer and use the word discrimination when a different treatment between Maltese and TCNs is not allowed by law.

### *1.4. Limits of the study*

The paper focuses on investigating the situation of TCNs legally residing in Malta and stakeholders dealing directly or indirectly with TCNs in Malta. Although large parts of the findings of this study would also reflect the situation that other migrants experience in Malta, there are differences between the three main economic migrant groups: nationals of EU countries, of European Economic Area (EEA) countries and of Switzerland; third-country nationals; and nationals seeking asylum in Malta. Most of the previous immigration related research which has studied the situation in Malta has focused on the situation of nationals seeking asylum in Malta (Pisani (2011); Gauci (2011); Suban (2012); Rizzo (2012); Pace (2012); Debono (2012); Lutterbeck (2012).

### *1.5. Outline of rest of study*

Section 2 discusses the main issues raised by the stakeholders who answered the assessment questionnaires. Section 3 analyses the instances of discrimination/unfavourable treatment that TCNs currently experience in Malta prior to accessing work. Section 4 focuses on Maltese legislative safeguards against discrimination, highlighting certain loopholes which make this protection less comprehensive than it might initially appear to be. Section 5 describes and discusses situations of discrimination/unfavourable treatment that TCNs currently experience in Malta once they are employed. Section 6 discusses other sources of discrimination which impact the everyday life of TCNs in Malta. Section 7 summarizes certain general features of the Maltese context which

<sup>4</sup> This directive was transposed in Malta in November 2011 through legal notice 433 of 2011 (Conditions of entry and residence of third-country nationals for the purpose of highly qualified employment regulations).

<sup>5</sup> This directive was transposed in Malta in November 2006 through legal notice 278 of 2006 (Status of long-term residents (third-country nationals) regulations).



should be kept in mind when developing models of best practices in this field and finally section 8 will conclude the study with recommendations, based on examples of best practices in European Union countries, on reducing or eliminating discrimination vis-a-vis TCNs inside and outside the workplace.

## 2. Feedback from the assessment questionnaires

The assessment questionnaire was distributed by the Maltese IOM office to all the stakeholders identified as relevant to the research project. The stakeholders could be grouped under three categories: namely government departments and agencies; stakeholders, such as trade unions, employers associations and local councils; and the last category representing non-governmental organisations (NGOs) operating in the field of immigration.

The IOM received answers<sup>6</sup> from four government departments or agencies, namely the Employment and Training Corporation (ETC), the Department of Industrial and Employment Relations (DIER), the Department of Citizenship and Expatriates Affairs (DCEA), and the National Commission for the Promotion of Equality (NCPE). From the second category, the IOM received answers from one trade union (General Workers Union) and two local councils (St Paul's Bay and Gzira). With regards to the NGOs, the IOM received answers from three of them, namely, Aditus Foundation, Solidarity Overseas Service Malta, and the People for Change Foundation.

### 2.1. Themes emerging from the assessment questionnaires

#### 2.1.1. No feedback from employers

First of all, one must say that it would have been useful to get feedback from employers as they are an essential part of combating labour related discrimination. Given that it is extremely difficult to get feedback from individual employers, the project should, at least, try to not only get feedback from the Malta's Employers Association (MEA) which represent all employers but also get feedback from the General Retailers Trade Union (GRTU) as the latter represents small businesses, in particular shop owners where a large number of foreigners find employment<sup>7</sup>.

#### 2.1.2. Lack of information regarding work permits

All the stakeholders commented on the fact that not enough information is provided on the recruitment procedures; work permit applications are processed differently according to the nationality of applicant. Furthermore, respondents have the impression that the processing of work permit applications is not transparent, takes too much time, and outcomes are discretionary. This sentiment is shared by both prospective TCNs and Maltese employers. We recognise that a great deal of information exists and is relatively accessible but this perception reflects the fact that for the average employer, the information is not easily accessible and not presented in a user friendly way. One way to reduce this perception gap is by improving the accessibility of information and making the latter as simple and understandable as possible. Best practices from other countries should be pursued in this area.

<sup>6</sup> We are including answers of the assessment questionnaires or feedback provided during the November 2012 experts' meeting.

<sup>7</sup> According to the European Commission (2012) 99.9 of Maltese enterprises are SMEs and 95.8% are micro enterprises (entities employing less than 10 persons).

### *2.1.3. Enforcement of anti-discrimination laws*

Several stakeholders mentioned that although Malta had adopted anti-discrimination legislation, one had to ensure that such legislation had to be adhered to in practice and that cases of breaches should be enforced and remedied to.

### *2.1.4. Increasing awareness about rights and obligations, means of redress in case of discrimination, and living and working conditions in Malta*

Several stakeholders mentioned that foreign workers were not aware of their rights and obligations once employed in Malta. As a result, they would not be in a position to find out whether they were being discriminated. Furthermore, foreign workers did not know have adequate knowledge on how and where to go to seek redress when their rights were being breached.

### *2.1.5. Intercultural training at the place of work*

As the number of foreigners working in Malta continues to increase, it is important that both employers and employees get trained in managing diversity and multicultural issues at the workplace. This is particularly important given that most enterprises are SMEs which will usually not have a formal Human Resources department trained in these issues which can in turn organise such training. In this regard, over the past few years, several initiatives and projects have been implemented, notably by the National Commission for the Promotion of Equality (NCPE), to remedy this situation. However, such programmes and training need to be provided on a regular basis rather as one-off projects given that the flow of foreign workers is constant, increasing and spreading over all the sectors of the economy.

### *2.1.6. Provision of language and cultural training*

In order to improve the employability and integration of foreign workers, several stakeholders suggested providing language tuition and basic tuition about Maltese culture, history and lifestyle. Programmes of this type have already been organised in the past but these need to be made available on a regular basis. TCNs, wishing to get the long-term resident status, have to attend similar courses. One could think of extending these programmes to all TCNs and use them as a form of induction before they start their employment as a way to facilitate their integration at the workplace.

### *2.1.7. Need for continuous initiatives rather than one-off projects*

One must acknowledge and commend the ability and speed of the relevant agencies, government departments, NGOs and other stakeholders to take initiatives and projects aimed at addressing some of the problems identified throughout the years. One must particularly praise the ability of all actors in tapping EU funding without which most of these initiatives would not have been possible. However, some of these initiatives, such as language and cultural training should not be implemented as one-off projects but should be provided on an ongoing basis as there is a continuous flow of migrants entering the Maltese labour market. This is a major issue given the limited resources available to the agencies and NGOs working in the field. Best practices ought to put forward ways how to ensure that this type of training and initiatives are provided on a regular basis.

### *2.1.8. Lack of cooperation between stakeholders*

Given that the remit of some policy areas falls under the remit of various agencies and government departments, one gets the impression that there are synergies which could be developed in order to reach and serve better their customers. Let us illustrate this point by taking the example of work permits and conditions of work. The former falls under the responsibility of the Employment and Training Corporation (ETC) while the latter falls under the responsibility of the Department

of Industrial and Employment Relations (DIER). These two entities are separate. As a result, when employers or foreign workers pick up work permits, no information<sup>8</sup> is provided to them on conditions of work, discrimination at the workplace and what entities and procedures to follow to seek redress in case of breaches.

### 3. Unfavourable treatment of TCNs prior to accessing work

This section will analyse the present situation in Malta vis-a-vis TCNs access to work. It will describe how the treatment of TCNs is unfavourable compared to that of other migrant groups, such as nationals from EU, EEA, or Switzerland or asylum seekers. This section will also outline the reasons for the different treatment and the impact that it has on TCNs' prospects for access to work.

#### 3.1. Reasons for difference in treatment between TCNs and other migrants

As per the Immigration Act (Chapter 217 of the Laws of Malta), all foreigners who wish to work in Malta must hold a work permit<sup>9</sup>. With regards to access to work, the difference in treatment between TCNs and other migrants is the direct result of the rules and implementation of the work permit system. The Employment and Training Corporation (ETC) is the government agency which administers the work permit system. In the case of EU, EEA and Swiss nationals<sup>10</sup>, the way that the current work permit system is implemented is the result of EU legislation and EU case law. As a result, all EU workers are virtually treated like Maltese workers which mean that they are granted work permits on an automatic basis. Furthermore, given the principle of community preference, workers from other countries cannot be given a more favourable treatment than EU nationals thus all other foreign workers are bound to be treated at least on a par or at worse less favourably.

However, when comparing the other two remaining groups of migrants, i.e. TCNs and asylum seekers, we notice that TCNs are even treated less favourably compared to asylum seekers. One can easily explain and understand this policy. Part of the explanation lays in international treaties and United Nations conventions which regulate the treatment of asylum seekers and the automatic rights to access the labour market that recognised asylum seekers get. The other reason is that, given that asylum seekers are already in Malta, it makes sense both for the authorities and for employers to encourage making use of labour already in Malta to fill up labour shortages rather than importing additional TCNs from other countries. As a result, the ETC can only adopt a full discretionary policy with regards to granting access to work for TCNs. The ETC makes use of this full discretion by only allowing access to Malta's labour market those TCNs that the ETC is convinced have skills which cannot be sourced from the two other sources of migrants (Suban and Zammit (2010)).

#### 3.2. Sources of unfavourable treatment between TCNs and other migrants vis-a-vis access to work

Table 8.1 lists all the sources of unfavourable treatment that TCNs are faced with when trying to access the Maltese labour market.

The first source of unfavourable treatment is related to police clearance. Indeed, work permit

<sup>8</sup> There is a link provided from the ETC website to the DIER website but no extensive or formal presentation of conditions of work is provided when work permits are delivered.

<sup>9</sup> The Immigration act uses the term employment licence instead of work permit. We have decided to use the term work permit throughout our paper.

<sup>10</sup> Given that EU, EEA and Swiss nationals are treated in the same way, from now on the use of EU workers will comprise all these categories.

applications from TCN workers, unlike applications from other categories of migrants, must undergo police clearance. The police have no time limit to submit a reply to the ETC. One must say that most applications are granted police clearance. It is only refused in a minority of cases (less than 1% of applications).

<b>Work permit application</b>	<b>EU, EEA, Swiss, REF, THP, AS</b>	<b>TCNs</b>
Subject to police clearance	No	Yes
Subject to labour market test	No	Yes
Work permit fee	Lower	Higher
Can have access to self-employment	Yes	No
Automatic renewal	Yes	No
Limited number of renewals	No	Not anymore
Can submit application while in Malta	Yes	Not always
Amount of documentation to be provided	Lower	Higher
Time to process application	Automatic to a few days	No time-limit
Level of uncertainty about outcome	Non-existent	High
Access to vacancies	Yes (EURES portal)	Limited
Access to work for partners	Yes	Subject to LMT
Recognition of Qualifications	Automatic for certain professions	Process can be very long

Table 0.5: Sources of Unfavourable Treatment of TCNs vis-a-vis Access to Work. Source: Own workings based on legislation and ETC policy implementation.

Secondly, work permit applications of TCNs are subject to a higher application fee compared to the other migrant groups. The reason for the higher fee is that the assessment of work permit applications of TCNs involves more administrative work compared to the other migrant groups. The higher fee can act as a deterrent for employers to select a TCN worker. There is also anecdotal evidence which suggests that the employer deducts these fees from the workers' wages.

Thirdly, all applications submitted by TCNs are subject to a labour market test. The latter consists of the ETC enquiring and collecting proof from the employer that every effort has been taken to try to fill the post from workers already in Malta or from the other migrant groups. This mainly consists of checking that the vacancy has been advertised on the ETC and EURES portals and that it has been advertised in the local newspapers. The ETC also requires employers to hold interviews with potential candidates that would have either applied online for the post or that the ETC would have recommended through its matching system. The reason why the labour market test is used is a direct result of the government's policy, as explained in section 2.1, of only granting access to work to TCNs once a high degree of assurance has been obtained that the skills requested are not already available in the Maltese labour market. This also means that applications submitted by TCNs require more information about the vacancy and thus a greater amount of documentation needs to be submitted at time of application. As a direct result of the labour market test whose

outcome is uncertain, TCNs' perceive that the outcome of a work permit application has a high level of uncertainty whereas there is no uncertainty in the case of other group of migrants. Zammit (2012) also mentions that TCNs perceive that the outcome of the labour market test is seen as a discretionary process.

Fourthly, unlike other groups of migrants who have access to both employed and self-employed type of employment, TCNs, unless they are doing a substantial capital investment, do not have the possibility to work as self-employed.

Fifthly, while all work permits are granted on an annual basis, they are renewed automatically for EU, EEA, Swiss and asylum seekers, but they are not automatically renewed for TCNs as these will be subject to a labour market test. In practice, it is very rare for a work permit of a TCN not to be renewed once it has been issued. Furthermore, renewals were limited to a maximum number of three times up to a year ago. This provision has been removed since the entry into force of the language and culture requirements needed to obtain the long-term resident status.

TCNs are also subject to other conditions which are less favourable when compared to other groups of migrants. Indeed, most of the time, TCNs need to submit the application before their arrival in Malta. This is mainly the result of implementing the Schengen provisions and is not something specific to the Maltese authorities. Furthermore, the partners of TCNs are not automatically granted a work permit once a TCN is already in Malta, though the ETC tends to take into account that fact when considering an application from the partner and thus improves their employability.

Another source of unfavourable treatment is that there is no formal deadline for processing work permit applications when it is automatic or only take a few days for the other group of migrants. One must say that the ETC tries to process work permit applications as quickly as possible. However, it is not always possible to even guarantee a turnover time given that the ETC relies on other agencies, such as police. One must also add that over the years, the ETC has, at its own initiative or as a result of feedback from employers/stakeholders, shortened the process. For example, one such initiative consisted of the ETC informing employers/TCNs of refusal or acceptance of work permit applications prior to getting police clearance.

Another source of unfavourable treatment, particularly in the case of regulated professions, is related to the issue of recognition of qualifications. In the case of EU workers who obtained their qualifications in an EU country the process can be fairly quick. However, for TCN workers who have a qualification from a non-EU country, the process can be very long, especially for regulated professions. Indeed, the bodies in charge of recognising these qualifications are run on a part-time basis by practitioners in the field which present clear issues of possible conflicts of interest.

Finally, EU, EEA, Swiss and asylum seekers have a full access to the ETC/EURES portals. This means that they can create a profile and access vacancies and get contacted directly by EU employers. TCNs do not have full access to the portal and can only browse the vacancies but cannot register with their details so that employers can contact them.

### *3.3. Impact of unfavourable treatment on TCNs employment prospects*

Table 8.2 lists the impact that the unfavourable treatment that TCNs get has on their employment prospects.

The impact of the differences in treatment granted to work permit applications submitted by TCNs versus other migrant groups can be grouped under five factors. The first factor is financial as it is more expensive to submit a work permit application for a TCN migrant. The second factor

is the administrative burden resulting from having to submit more paperwork and submitting the application while TCN is still in country of origin. The third factor is the delay in processing the application and the impossibility of knowing at submission time by when the work permit will be granted. The fourth factor is that there is an element of uncertainty inherent in TCN work permit applications given that one cannot know the outcome of the process with certainty before application. The fifth and final factor is a direct result of the other factors in the sense that applications for TCN work permits are unattractive from both the perspectives of the employer and to a certain extent the TCN themselves. We are referring here mostly to TCNs who could have skills in demand not only in Malta but in other countries which would have a more attractive work permit regime. These factors could induce TCNs to think that applying for a work permit in another country is more attractive. We have also tried to list to what extent the impact of each of these differences in treatment is low or high.

<b>Work permit application</b>	<b>Type of Impact</b>	<b>Level of Impact</b>
Subject to police clearance	Delay	Medium
Subject to labour market test	Uncertainty	High
Work permit fee	Financial	Medium
No access to self-employment	Attractiveness	Low
No Automatic renewal	Uncertainty	Low
Not able to submit application while in Malta	Administrative burden	Low
Higher amount of documentation to be provided	Administrative Burden	Low
Time to process application	Delay	High
Level of uncertainty about outcome	Uncertainty	High
Limited Access to vacancies	Attractiveness	Low
Access to work for partners	Attractiveness and financial	Medium to High

Table 0.6: Impact of Unfavourable Treatment on TCNs Access to Work. Source: Own workings based on legislation and ETC policy implementation.

### *3.4. Assessment and conclusion on differences in treatment vis-a-vis access to work*

It emerges from section 3.3. that it is clear that work permit applications of TCNs are treated unfavourably compared to those submitted by other migrant groups. This clearly makes such work permit applications less attractive for employers. It also makes it harder for Malta, compared to other countries, to attract TCNs. The overall impact for the country is not so high as long as Malta can afford not to attract workers with skills that can be found in other migrant groups. But, if TCNs have skills that cannot be sourced elsewhere then it is not a good policy. The latter point is even more evident when we consider that Malta might already be at a disadvantage compared to other countries labour markets, given that our wages are lower compared to mainland Europe, our labour market is also smaller thus prospects for career progression are limited. Our country might also be less attractive given that there might not be large communities for all TCN nationalities, etc. Although, compared to other mainland European countries we also have some advantages, such as the weather, the security, and a more favourable tax system, especially for highly skilled workers.

Section 3.2. also showed that the sources of less favourable treatment granted to TCNs are a result of legislation/conventions and thus cannot be altered at will or even completely eliminated. The margin of changes is not completely discretionary. One must also add that the system might also appear to be overly cumbersome for TCNs but the authorities are fairly flexible. Indeed, in case of large labour shortages for certain professions<sup>11</sup> or, even, related to certain projects<sup>12</sup>, the employers can quickly relay their needs and problems in recruiting to the politicians/relevant authorities and these can, in turn, relax the rules. In that case, the authorities can decide to open a sector/profession and thus remove the need for a labour market test, grant automatic renewals, remove the uncertainty regarding the outcome of the work permit application and reduce the time needed to process the application and also allow for applications to submitted when workers are already in Malta.

Having said that, we can still identify some areas where the system could be improved and look in other EU countries for examples of best practices. First the system could make use of better IT technology. For example, one could have a system whereby documents are submitted electronically which would remove the need for physically having to go to the ETC offices. One could also have a portal whereby one could check online the status of the work permit application. The ETC could also post online and update regularly the information on sectors which are open and closed in order to reduce the uncertainty about work permit applications' outcomes. One could also list the type of work permits which have been approved on a regular basis<sup>13</sup> so that employers and TCNs can get a feel of what is being accepted and not. The latter would contribute to reduce both the level of uncertainty and impression of discretion, and improve transparency.

#### 4. Legal safeguards against discrimination

Maltese legislation has developed various safeguards against discrimination both in the workplace and in social life in general. However one should note that a characteristic feature of many of these laws is that they do not protect against discrimination on grounds of nationality, thus automatically excluding third country nationals from invoking them on this basis. This approach was already evident in the Constitution of 1964, article 45 of which enshrines the principle of non-discrimination, defining discrimination in Article 45(3) as:

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex, 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.”

By contrast the European Convention of Human Rights, which was incorporated into Maltese law in 1987, does protect against discrimination on the basis of nationality in relation to the equal enjoyment of the fundamental rights and freedoms guaranteed in the Convention. Thus, Article 14 states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,

<sup>11</sup> This was the case for construction workers during the construction boom of the late 2000s or for IT workers or for nurses.

<sup>12</sup> This was the case with regards to the construction of Mater Dei hospital whereby all applications for work permits submitted by companies working on the hospital construction project were automatically approved. This practice was also used by the Malta Shipyards whenever they would bring workers related to a new contract.

<sup>13</sup> One would have to make sure not to breach data protection but one could list professions being granted/refused work permits.

national or social origin, association with a national minority, property, birth or other status.”

While this provision gives TCNs significant protection against discrimination on the basis of their nationality if such discrimination cannot be justified on objective and reasonable grounds, one should note that this protection is qualified insofar as: (1) it only protects against discrimination in the enjoyment of the human rights found in the Convention, (2) an expensive and time-consuming court case would probably have to be opened in order to secure this protection and (3) as human rights are an exceptional remedy one would first have to show that one has exhausted any other local remedies in order to obtain protection on this basis.

The legal framework which implements the EU’s Anti-Discrimination Directives in Malta is also unhelpful in this regard, because it specifically excludes nationality from the prohibited grounds of discrimination. In fact, the Equal Treatment in Employment Regulations of 2004 state in Regulation 1(5)(a) that it:

“does not apply to any differences 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.”

Similarly, the Equal Treatment of Persons Order, 2007, which protects against discrimination in other, non-employment related, areas of social life, provides that it:

“shall not apply to any differences of treatment based on nationality and is without prejudice to laws and conditions relating to the entry into and residence of third 157 country nationals and stateless persons in Malta and to any treatment which arises from the legal status of these individuals concerned.”

From a legal standpoint, it seems that the Maltese legal framework is somewhat problematic insofar as it is not clear to what extent it protects against discrimination against Third Country Nationals, whether in employment or in other areas of social life, on grounds of nationality<sup>14</sup>. It would appear that in all but the most blatant cases the law does not provide a clear and easily accessible remedy against discrimination on this basis. The law does, however, protect against discrimination, whether direct or indirect, which is based on racial or ethnic origin and has now implemented the EU Anti-Discrimination Directives *in toto*, by protecting against harassment, shifting the burden of proof and providing two alternative avenues of complaint and redress for discrimination either through the National Commission for the Promotion of Equality or through the Department of Employment and Industrial Relations, which allows the complainant to sue for redress before the Industrial Tribunal. One could moreover argue that the laws do protect TCNs against discrimination quite well as in most cases nationality-based discrimination would be a camouflage for what is really ethnic or racially motivated discrimination<sup>15</sup>. However, given this

<sup>14</sup> Thus a report on European Union Anti-Discrimination Policy found on the European Parliament web-site affirms: “This is potentially the most controversial question surrounding an anti-discrimination directive. In many Member States, but most notably Germany and Austria, it is not regarded as racially discriminatory to draw a clear distinction between EU nationals and non-EU nationals, including permanently resident third country nationals. In other Member States, such as the UK and the Netherlands, there is less differentiation on grounds of nationality. The differences in approach are manifested in issues such as access to employment in the public sector. In those states which permit discrimination against non-EU nationals, access to public sector employment is often subject to serious restrictions based on nationality. . . Dummett highlights how for many Member States it seems only natural and wholly justified to distinguish between citizens and non-citizens, but for others, such as the UK, these measures are regarded as barely concealed examples of overt discrimination.” See: [http://www.europarl.europa.eu/workingpapers/libe/102/text2\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text2_en.htm)

<sup>15</sup> Thus the European Parliament Report which has just been cited states: “All states distinguish to some extent between citizens and non-citizens, and these distinctions are not inherently racially discriminatory, because they apply to all non-citizens, irrespective of ethnic origin. However, such distinctions clearly affect a disproportionate



lacuna in the prohibited grounds of discrimination, it is also possible that what is really racially motivated discrimination may be justified on the grounds of nationality. It is clear that this lacuna does not promote sensitivity to cases of discrimination against TCNs which occur when they are already in employment and which can be justified on the basis of nationality and also indirect in nature.

## 5. Discrimination vis-a-vis TCNs at the workplace

In this section, we will analyse the situation at the workplace and assess to what extent TCNs are treated differently and possibly discriminated against, when compared to Maltese workers. It will explore whether foreign workers are really treated like Maltese in practice.

### 5.1. Role of employers

This sub-section will analyse the attitude of employers and its possible impact on the treatment of foreign workers at the workplace.

#### 5.1.1. Lack of diversity awareness and diversity training

Over the last few years, Malta has witnessed not only an increase in the number of immigrants but also an increased diversification in the countries of origin of immigrants and thus an increase in differences in cultures of immigrants. As a result, Malta is slowly transiting towards becoming a multicultural society. However, aspects of diversified cultures and managing diversity have not seeped through all layers of society and employers, especially SMEs and micro-enterprises, might lack awareness and training in managing diversity. Consequently, it is possible that employers, even unintentionally, adopts practices and policies which make it more difficult for workers from diverse countries to integrate into the workforce. This aspect is expected to affect more TCNs as these originate from countries outside the EU whose cultural distance is higher compared to Maltese culture. The NCPE conscious of this reality has tried to remedy this situation by implementing a number of projects and initiatives over the last few years, notably the publication of a diversity manual that was made available to all employers. Training regarding cultural diversity as well as media campaigns on cultural diversity were also implemented.

#### 5.1.2. Use and abuse of employers' leverage

The Maltese newspapers have reported on various occasions cases of Maltese employers which exploited foreign workers. These abuses ranged from paying lower wages than the legal minimum wage, not paying them at all, not paying all the hours worked, employing asylum seekers in “degrading” jobs, etc. However, most of the cases reported in the newspapers refer to workers who are asylum seekers. One can say that even TCNs with a valid work permit could be abused by their employers in the form of being offered conditions of work which are not as attractive as those offered to Maltese workers and having the TCNs workers accepting these conditions. The employers derive their power to impose less attractive conditions as a result of work permits having to be renewed on an annual basis following a request from the employer. As long as the work

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number of resident ethnic minorities, at least two-thirds of resident non-EU citizens being visible minorities. Therefore, in some cases, discrimination on the basis of nationality, may be regarded as a form of indirect racial discrimination. This is especially true in those Member States where there are few opportunities for naturalisation. In these states, nearly all ethnic minorities resident in the state, irrespective of the length of residence, will be non-EU citizens, thus, any measures which discriminate between citizens and non-citizens will have a particularly negative impact on ethnic minorities. Ironically, those states where rights are most contingent on citizenship are often also those states where it is least possible for resident non-EU nationals to acquire citizenship.” See: [http://www.europarl.europa.eu/workingpapers/libe/102/text2\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text2_en.htm)

permit has not been renewed, the TCN is at the mercy of the employer's whims. Furthermore, TCNs cannot easily shift employers in search of better conditions of work given a certain degree of uncertainty associated with applying for a new work permit. Employers also used<sup>16</sup> to exert pressure on ETC not to grant work permits to TCNs who would apply with a new employer unless agreed to by last employer as this would lead to poaching.

## *5.2. Who is responsible for ensuring anti-discrimination and how is anti-discrimination legislation enforced ?*

Sub-section 5.1.2. shows that the balance of power is clearly tilted towards the employer and the latter could use it to discriminate against TCN workers. Therefore, the only way that equality between Maltese and TCN workers can be achieved at the workplace in practice is if three conditions are fulfilled. First, the anti-discrimination redress system must be efficient so that it acts as a deterrent for employers to discriminate. Secondly, alleged discriminated workers must be confident that any complaints will be solved in a speedy manner and that their future employment prospects will not be jeopardised by having submitted a case. Last but not least, workers must be well aware of the anti-redress system and must be able to easily access it easily and cheaply. The rest of section 3 will assess the anti-discrimination redress system in Malta along these three criteria.

### *5.2.1. Government agencies responsible for ensuring equality at the workplace*

There are two government agencies which have the responsibility for ensuring equality at the workplace.

### *5.2.2. National Commission for the Promotion of Equality (NCPE)*

The NCPE was set up in 2004 to promote and raise awareness about equality. The NCPE is also responsible for investigating complaints related to discrimination based on national legislation and the EU equality directives. The NCPE is responsible for the six grounds of discrimination, namely gender, age, disability, race and ethnic origin, religion, and sexual orientation. NCPE's remit is much broader than equality at the workplace as they are concerned with equality vis-a-vis goods and services. It should be clear that discrimination on the basis of race and ethnic origin is only part of NCPE's vast remit. To a lower extent, NCPE is also responsible for carrying research in the area of discrimination in order to use it as an input in policy making.

Since inception, most of NCPE's work has focused on raising awareness about equality to both the general public and to enterprises and human resources personnel. To this date, the NCPE has a very limited budget and has a small core skeleton staff which limits the overall reach and impact of its action. In spite of this, the NCPE has been able to very effectively mobilise additional staff and resources by successfully applying for EU funded projects. As a result, they have managed to do numerous projects. Throughout the years the projects have reflected the national priorities and realities of Malta's society. Indeed, the earlier projects focused on gender related issues in order to promote higher female rates (Living Equality project; Unlocking the female potential project; Gender mainstreaming – in practice). Then, as NCPE's remit got wider, it consisted of presenting the six grounds of discrimination (Strengthening equality beyond legislation; Voice for all; Think Equal project; Underreporting of discriminatory incidents in Malta). In the last few years, the projects have taken a more multicultural aspect reflecting the reality of today's Maltese society (Racial and Ethnic Origin Equality Manual toolkit; Think Equal project; I'm not racist, but...).

NCPE has an enforcement arm but it is very limited. Indeed, when a complaint is submitted it

<sup>16</sup> The authors could not confirm whether this practice was still in place.

will investigate it with the relevant entity and try to resolve the dispute amicably. If it still doesn't manage it can decide to open a court case or suggest the complainant to open up a court case. If it is related to employment, it can suggest the complainant to open a case at the Industrial Tribunal. Table 8.3 shows that the number of alleged cases of discrimination referred to NCPE has been negligible. One can also notice that the nature of the cases referred to NCPE in any given year are directly linked to the discrimination grounds on which NCPE would have raised awareness on during that year or the previous year. However, as soon as awareness about a discrimination ground ceases to be raised, the number of alleged cases of discrimination submitted in that ground drops. This suggests that it is not sufficient to raise awareness through a one-time campaign but the NCPE needs to keep on raising awareness on a regular basis. NCPE also lists the alleged cases of discrimination submitted based on ethnic origin as the legislation has been extended to this ground in 2007. However, one can still notice that the number of complaints related to this ground is still negligible.

<b>Type of alleged discrimination cases received</b>	<b>Total 2011</b>	<b>Total 2010</b>	<b>Total 2009</b>
Alleged gender discrimination in employment/training	6	10	25
Alleged gender discrimination in access and supply of goods and services	4	1	1
Alleged racial discrimination in access and supply of goods and services	4	2	1
Complaints referred to relevant entities/not falling within NCPE's remit	2	2	8

Table 0.7: Alleged cases of discrimination submitted to NCPE. Source: NCPE Annual Reports (2011, 2010, 2009).

#### 5.2.2.1. Underreporting of discrimination incidents in Malta

Given that the number of alleged cases of discrimination reported was very low, the NCPE commissioned a research study to investigate the reasons which inhibited people from reporting cases of discrimination. The study also investigated whether persons were aware of their rights and whether they realised whenever they were being discriminated. The study interviewed various persons, who were alleged victims of discrimination, for each of the six grounds of discrimination. The results confirmed that some cases of alleged discrimination are not reported because of lack of knowledge about how to report cases. Furthermore, most people do not report cases due to the fact that they felt that nothing would come out of the report and because they felt powerless, at increased fear of being exposed and lacked faith in the reporting bodies, inter alia (NCPE 2010: 171). The study also revealed that increasing media attention and public awareness together with staff training in discrimination issues would encourage people to report more cases of discrimination.

#### 5.2.3. The Department of Industrial and Employment Relations (DIER)

In addition to the NCPE, the DIER is another government department which has an active role in combating discrimination at the workplace. Indeed, as per the provisions of the Employment and Industrial Relations Act 2002 (Chapter 452 of the Laws of Malta) and its subsidiary legislation, the DIER is responsible for regulating, checking and enforcing conditions of work and industrial relations. One of the functions of the department is to advise employers and employees on labour

related legislation and industrial relations. The Department is also responsible for investigating and solving any potential breaches of legislation and also tries to avert and/or resolve potential industrial relations disputes. Whenever, disputes are not solved through the intervention of the department's officials, these can be referred to the Industrial Tribunal which formally investigates and decides on labour related disputes.

#### *5.2.3.1. Remit of DIER with regards to employment disputes*

As per Maltese legislation, once workers are employed, there should not be any distinction in treatment between Maltese and foreign workers. In fact, when complaints are referred to the DIER, the department, in investigating the case, does not make any distinction between cases of Maltese and foreign workers. In fact, the department does not even ask the workers about their nationality though they would eventually get to know through their identification card number. In fact, the department does not produce any statistics on a nationality basis. The remit of the department concerns all issues related to conditions of work and to termination of work. In fact, discrimination in employment and discrimination in conditions of work between Maltese and foreign workers is only part of their remit.

However, the only statistics that the department produces relate to totals and refer to number of trade disputes resolved, number of strikes, number of inspections carried and irregularities found, number of enquiries submitted to the department, number of cases solved through their intervention and the monetary values these cases represent. A further breakdown of these statistics would facilitate research and enable researchers to derive trends in the evolution of conditions of work.

The only way to obtain detailed statistics is to refer to cases directly submitted to the Industrial Tribunal. However, the number of cases actually submitted, on a yearly basis (around 100), represent less than 1% of cases compared to the number of inspections or enquiries that the department carries out every year (more than 15000). This could be explained by several factors. First of all, it is possible that employees after enquiring with the department realise that they do not have a case and decide not to file it. Secondly, it is reasonable to think that that the intervention of the department enables cases to be solved amicably and do not require further legal action or a formal complaint to the industrial tribunal.

#### *5.2.3.2. Industrial Tribunal*

Table 8.4 presents the number of cases submitted on a yearly basis to the industrial tribunal. One can notice that the number of submissions has been regular at around 100 per year over the period 2006-2011<sup>17</sup>. One can also notice that the number of solved cases is also around 100 per year. In fact, when one looks at the number of pending cases, it is stable at around 500 which mean that there is a five-year backlog in cases. In reality it is lower than that given that around three hundred cases of this backlog refer to the former Malta Shipyards<sup>18</sup>.

<sup>17</sup> The only exception was in 2003 when around 300 workers of the former shipyards submitted a case. However, one can consider that it is the same case for several hundred workers.

<sup>18</sup> This is in fact the same case submitted by three hundred different ex-Malta Shipyards workers. One can reasonably assume that the ruling of this case would be the same for all workers. Having said that this case dates back to more than five years so one can find it difficult to understand why it has not yet been solved.

Year		2011	2010	2009	2008	2007	2006
<b>New cases</b>	Alleged unfair dismissal	89	105	87	84	92	90
	Alleged discrimination/ harassment/ victimisation	19	5	2	5	8	4
<b>Solved cases during year</b>	Alleged unfair dismissal	88	86	101	57	82	73
	Alleged discrimination/ harassment/ victimisation	6	4	4	1	4	17
<b>Pending cases as at end of year</b>	Alleged unfair dismissal	473	472	453	478	496 out of which 314 refer to the alleged unfair dismissal of dry dock workers	482 out of which 315 of shipyards
	Alleged discrimination/ harassment/ victimisation	68	52	44	51		

Table 0.8: Cases submitted to the Industrial Tribunal. Source: DIER Annual reports (2011, 2010, 2009, 2008, 2007, 2006).

However, the Industrial Tribunal should consider increasing its capacity to solve a higher number of cases every year in order to reduce this backlog as it could be a factor which discourages persons to submit a new case. The legislation regulating the Industrial Tribunal clearly stipulates some timeframe in order to solve cases but it is rarely adhered to given that sittings have to be postponed or the hearings of all witnesses takes longer than expected. One can also notice that the majority of cases (more than 85% refer to unfair dismissals) and only less than 15% refer to alleged discrimination/harassment and victimisation, though the number of cases in this category has increased in percentage terms over the period 2006-2011.

If one analyses the individual cases, one can notice that a number of cases are referred by foreigners both in terms of unfair dismissal or discrimination/harassment and victimisation. One notices that cases of discrimination/harassment and victimisation, whether submitted by Maltese or foreign workers, tend to be settled out of court.

Overall, there are a number of barriers that workers have to overcome in submitting a case to the Industrial Tribunal. Needless to say that some of these are too daunting, especially when you consider TCN workers. First, besides the uncertainty of the outcome, most cases take around one year to be solved which is far too long. Second, workers have to bear a cost as they are represented by a lawyer that has to be paid regardless of the outcome of the case. Furthermore, the Industrial Tribunal's secretariat does not provide any assistance in filing up the paperwork related to opening up a case<sup>19</sup>. Finally, there is also an indirect cost which is related to the future prospects in the labour market. Indeed, employees submitting cases at the Industrial Tribunal can be deemed to be "troublesome" employees to avoid when recruiting.

<sup>19</sup> This help is usually provided by a lawyer which will then go on appearing for them during hearings.

## 6. Other sources of discrimination

Although not directly related to employment, we are also discussing some other sources of discrimination as these contribute to render Malta more or less attractive and welcoming to prospective TCNs wishing to settle in Malta. The items outlined below are not exhaustive but we decided to include these as these have emerged from various other research studies (Zammit (2012); NCPE (2012)) to be areas where foreigners complain most about.

### 6.1. Attitude of Maltese population

We have already mentioned that Malta has started to become a multicultural society fairly recently. The 2012 Eurobarometer survey on discrimination in the EU<sup>20</sup> provided evidence that Malta ranks above the EU27 average with regards to discrimination on the basis of ethnic origin outside the workplace. On a positive note, one must say that, since the last version of this Eurobarometer study (2009), Malta has witnessed the largest improvement in the EU as the proportion thinking that ethnic discrimination is rare or non-existent has increased by 23 percentage points to 41%. It seems that the efforts and initiatives of the NCPE in raising awareness and encouraging diversity have paid off.

### 6.2. Provision of Accommodation

The NCPE commissioned a research study in 2012 as part of the project (I'm not racist, but...) on the topic of immigrant and ethnic minority groups and housing in Malta. The study sought to determine whether these groups were subject to discrimination when trying to access accommodation services. The study made a survey amongst persons coming from these minority groups. The study also sought the views of landlords and estate agents. The study also tried to measure discrimination by asking tenants through telephone or e-mails whether they would consider renting a place or not based on the characteristics of the persons. The outcome clearly showed that ethnic and minority groups are being discriminated for several reasons.

### 6.3. Discrimination vis-a-vis basic services

There is also tariff discrimination between residents and non-residents in the provision of basic services such as utilities like water and electricity or public transport. Persons who are residents have access to a cheaper tariff with regards to these services. The price difference can be quite substantial (almost 50%). One can have access to this cheaper tariff by producing a Maltese identification card, a registration certificate or residence card and a long-term residence permit for TCNs. To have access to one of these documents, one needs to be a resident in Malta for at least six months. Lately there has also been a delay in issuing such documents even for residents who have been in Malta for more than six months. The situation for TCNs is even worse given that the long-term resident status can only be reached, if one qualifies, after five years. Therefore one will be able to access the cheaper tariffs only after five years.

## 7. General characteristics of the Maltese administrative/legal context:

A recent report commissioned by IOM-Malta on facilitating the integration of TCNs in Maltese society has concluded that:

“Third Country nationals experience the administrative rules and processes through which their

<sup>20</sup> Eurobarometer special survey 393 of 2012 on Discrimination in the EU.

legal status is negotiated and defined as obscure, arbitrary, complex and discretionary. This reflects real features of the system, which appears initially to be transparently simple but actually has various inbuilt features which can be employed to restrict access to the benefits of citizenship and long term status to a deserving few. At the same time, these same features often seem to frame their experience of Maltese society, blending seamlessly with hostile and quasi-racist attitudes of rejection expressed by the grass-roots”<sup>21</sup>.

This brings out the relationship between the administrative/legal context of integration and the subjective experience of discrimination on the part of certain TCNs. While not necessarily equivalent to objective discrimination, subjective experiences are an important component of discrimination. In this spirit, other aspects of the Maltese administrative legal context must be highlighted. These are:

(a) The absence of a clearly identifiable entity with political responsibility for TCN integration.

(b) The multiplication of entities having responsibility for different aspects of integration and the lack of coordination between them. An example is the duplication of competencies as regards the hearing and processing of accusations of discrimination between the NCPE, the DIER and the courts.

(c) The general lack of clarity, simplicity and transparency in the relevant laws and policies. The legislative failure to clearly indicate that discrimination against TCNs in employment on grounds of nationality is prohibited is a case in point.

(d) The slow, opaque and culturally insensitive nature of the processes by which work permits are processed, qualifications are recognised and legal assistance is granted to TCNs.

(e) Significant “information gaps” between TCNs and civil servants as regards applicable rules

## 8. Recommendations based on European Best Practices:

An important recommendation which emerges from this analysis and which would set the stage for the development of better policies regarding discrimination against TCNs in Malta is that the Constitution should be changed to make clear that discrimination against TCNs while in employment on grounds of nationality conflicts with constitutionally protected rights. While such a change would not necessarily affect existing practices regarding access to employment, it would send a strong signal to employers and civil society generally that discriminatory practices during employment are prohibited and eliminate the possibility that racial discrimination during employment is camouflaged as discrimination on grounds of nationality<sup>22</sup>. The importance of strengthening the legal framework in this way clearly emerges when one considers that the main reasons for under-reporting of discrimination listed in section 5.2.2.1 of this report included that respondents felt that nothing would come out of the report and because they felt powerless, at

<sup>21</sup> David Zammit, 2012, “Consultative assessment of Integration of Third Country Nationals” Project: <http://integration-iom.com/wp-content/uploads/2012/11/IOM-Report-DZ-Definitive-2.pdf>, pp.69-70

<sup>22</sup> Wrench concludes that in many Member States addressing the differential treatment of foreign nationals is a prerequisite to combating racial discrimination in general:

German and Austrian legal and administrative barriers to the equal treatment of migrant workers are perhaps the most visible and extreme examples of a more general point which is applicable to many other countries. Where rules exist which make it difficult for migrants - including ‘second generation’ migrants - to be regarded as equal in the labour market, then these legal discriminations would need to be removed before other anti-discrimination measures become fully effective. European Foundation (1996) “*Preventing racism at the workplace - a report on 16 European countries*” at 151, quoted in report on European Union Anti-Discrimination Policy found on the European Parliament web-site: [http://www.europarl.europa.eu/workingpapers/libe/102/text2\\_en.htm](http://www.europarl.europa.eu/workingpapers/libe/102/text2_en.htm)

increased fear of being exposed due to reporting and lacked faith in the reporting bodies.

Another feature of the obtaining Maltese position indicated in the preceding section, is that there is often a lack of coordination between the various governmental and non-governmental agencies, associations and bodies that have a stake in migrant integration. This can become particularly problematic when combined with the facts that the existing system does not provide sufficient incentives to local actors to promote the integration of TCNs and that it is unclear who has the political responsibility to promote this agenda. In this light it is suggested to develop a National Plan to promote TCN Integration in the Maltese Labour Market; following the approach successfully adopted by the Dept of Work and Social Economy in Flanders of a long-term plan with a timespan of at least two years and which is developed and promoted by a National Coordinating Committee on which all the local actors, whether governmental or not, are represented. In this way incentives to migrant integration will be introduced and tackled in a unified manner. One of the preconditions of such a plan is that the Maltese Constitution should be amended as recommended above. This would provide a solid basis from which such a plan could be launched.

Another salient feature of the Maltese system is that TCN's are sometimes kept waiting for long periods until their work permit is processed. In this light it is suggested that the German model of subsidised internships may prove to be a good practice to emulate, insofar as such internships provide the possibility for prospective employees to gain the necessary experience to perform well in their work and also allow employers to try out and test prospective employees beforehand. The accommodation and meals of these interns could be compensated by their employer without disrupting the voluntary character of this arrangement.

The various gaps in information which TCNs need in order to integrate could be accommodated by developing a website which integrates all the information which TCNs need to have, coming from various sources. This web-site should be multi-lingual and easy to access and as in the German model (compare the web-site: 'Make it in Germany'), it should be possible for a TCN to log in and after answering a few easy questions be provided with integrated information concerning the kind of status he can aspire to and the possibilities it provides.

In cases where TCNs experience discrimination, the Maltese procedures for reporting and processing these claims are somewhat complicated and opaque. Moreover it would seem that few such cases of discrimination are actually reported. In this context, there are clear advantages to be derived from following the Irish example, where legal aid is made more accessible by recognizing more clearly the role that Legal Assistance NGOs can play in this setting. It is therefore recommended that free legal aid provisions be made more responsive to TCNs in relation to discrimination claims and that simultaneously the position of Legal Assistance NGOs be officially recognized and supported.

The role of cultural mediators, including trade unions, in relation to TCNs needs to be better reinforced and supported. Here it is suggested that we follow the Belgian example, where the National Plan on TCN Integration creates incentives for firms not only to employ TCNs, but also for management to consult regularly with TCN workers and their representatives in the conduct of the firm's daily business. Incentives should be created so that employers will insert clauses to that effect into the Articles of Association of their companies and to create "Diversity Plans" for their organizations.

Integration training should be offered to all TCNs, ideally following the Belgian model, where all TCNs are offered a free "integration course". Similarly more use should be made of Role Models as in the Irish "Ambassador for Change" programme.

Recognition of Qualifications: Here it is important to develop a flexible modular system, as in Flanders, whereby employees are allowed to work at a lower grade than they are qualified for and



simultaneously to pursue recognition; also by making sure that the work they undertake will count towards obtaining increased recognition.

## **9. Conclusion**

The paper identifies a series of obstacles to the integration of Third Country Nationals as a category within the Maltese labour market, including: TCNs' lack of knowledge about the procedures for obtaining a work permit; institutionalised discrimination against them as a category in allowing their entry into the labour market; opaque, dilatory and discretionary procedures for obtaining and renewing work permits and for recognising TCNs' qualifications; poor knowledge by managers about handling workplace diversity and intercultural issues, abuse of employers' leverage powers as regards wages and other conditions of employment, linguistic problems, overlapping and poorly defined political responsibilities for integration, lack of cooperation between institutional stakeholders and pervasive discrimination against foreigners in relation to utility rates and other areas of social life.

Specifically in regard to discrimination against individual TCNs, the paper focused on the absence of nationality from the list of prohibited grounds for discrimination both in the Constitution and in the laws implementing the EU Anti-Discrimination Directives. While this is permitted in terms of EU law, this lacuna combines with (a) the generalised lack of information and transparency in this field, as well as (b) the institutionalised discrimination against TCN's as a category in regard to access to employment, to create a worrying scenario where the mechanisms for remedying discrimination through the National Equality Commission and the Department of Industrial and Employment Relations are poorly understood and utilised. In this context the possibility of significant levels of unreported discrimination against TCNs based on racial grounds but camouflaged as nationality-based, as well as discrimination of an indirect kind, should not be ignored.

The paper also tried to bring out the impact on TCNs of particular instances of discrimination or unfavourable treatment and drew upon the experience of other European states to, identify best practices in relation to the above-charted fields of integration.

# THE NEED FOR STRONGER AWARENESS OF HOUSING RIGHTS IN MALTA

KURT XERRI\*

## Abstract

Housing rights have undergone a very significant evolution both under the ECHR as well as under other international statutes such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter. On the contrary, they remain a rather vague concept under the Maltese legal order. The best justification is perhaps offered by Mifsud Bonnici (2003) who suggests that the notion of the right to housing reached Malta at a moment when public opinion was convinced that local administrative structures had already seen effectively to this need. A rapidly changing housing scenario seems, however, to be warranting a stronger rights-based approach capable of ensuring the respect of every individual's right to adequate.

## 1. Introduction

The notion of housing as a right has hardly taken root in Malta. Although the absence of any formal provision within the domestic legal order which seeks to guarantee adequate housing conditions for those living in Malta is conspicuous, housing matters have constantly been treated with importance, at varying degrees, by successive governments. The figure of up to 62% of owner-occupied households without a mortgage and 5% in social housing (see Figure 1 below) do bear testament to the continued effort of the Maltese government in promoting home ownership amongst the generality of citizens and whilst seeing to the need of the most vulnerable. The picture illustrated by the most recent Census (2011) was, in fact, one of steady equilibrium where up to three-fourths of the Maltese owned their household, 9% rented their properties at significantly below-market rents, 6% relied on the liberalised i.e post-1995 private rented sector and as mentioned above, 5% lived in government-owned units. This state of affairs led government to take a softer approach on housing by, inter alia, halting its home ownership- facilitation schemes as well as the construction of social housing units.

This situation was a lull before the storm. In 2016, Malta recorded the second-highest growth rate in the EU (5%) thus establishing itself as the strongest growing EU Member State in the 2006-2016 period (average growth of 3.7% per annum)<sup>1</sup>. The skills-gap present amongst local workers as well as the numerical shortage inevitably attracted a considerable foreign workforce which rose up to 37,000 in 2017 (in 2010 this figure was less than 10,000)<sup>2</sup> which, in turn, had a drastic effect

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<sup>1</sup> Eurostat, *National Accounts and GDP*. Accessed online on 14 December 2017 on: [http://ec.europa.eu/eurostat/statistics-explained/index.php/National\\_accounts\\_and\\_GDP](http://ec.europa.eu/eurostat/statistics-explained/index.php/National_accounts_and_GDP).

<sup>2</sup> J. Bonnici, "37,000 foreign workers in Malta: a necessary figure to sustain country's economic growth", *The Independent*, 7 November 2017. Accessed online on 14 December 2017 on: <http://www.independent.com.mt/articles/2017->

on both rental and property prices<sup>3</sup>. This affordability crisis, to which the government did not have any sudden measures of response, highlighted the insufficiency of administrative structures to respond to housing needs in such a quickly-changing economic environment. Moreover, the emergence of new housing distress is gradually bringing out the concept that rather than a mere political concession, the protection of housing rights should constitute a duty to which the State is formally bound.

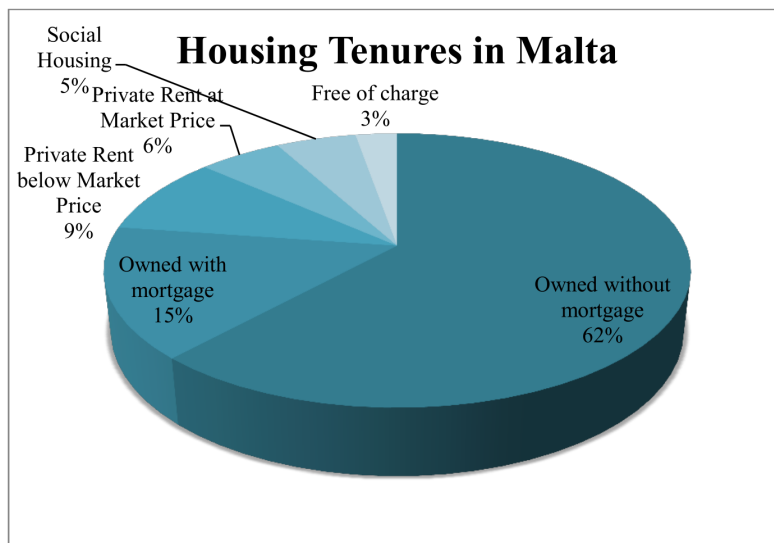


Figure 0.1: Proportion of Housing Tenures in Malta (Source: National Statistics Office)

## 2. The assessment of Maltese Housing Policy

The aim of this paper is to establish whether there exists the need for a formally protected right to housing in Malta. In order to do this one must first of all understand the implications of such a right in order to eventually assess what new remedies it might present. The justification for which there exists no Right to Housing in Malta was provided by Mifsud Bonnici who proffers the view that despite not being bound by the Constitution, the State had still effectively seen to the needs of the population:

*Given the history of housing laws in Malta, [the notion of a Constitutional right to housing] has not arrived in a period of denial or of challenge of these rights, but at a moment when public opinion is convinced and not entirely as a result of complacency, that there already exist adequate legal and administrative structures to satisfy this need<sup>4</sup>.*

At the beginning of the 2000s this statement was certainly a valid one. Property prices were indeed stable and affordable whilst government was still active in promoting access to home

11-07/local-news/37-000-foreign-workers-in-Malta-a-necessary-figure-to-sustain-country-s-economic-growth-6736181151.

<sup>3</sup> "Malta's property prices among the highest in the EU", *The Independent*, 15 April 2015. Accessed online on 14 December 2017 on: <http://www.independent.com.mt/articles/2015-04-15/local-news/Malta-s-property-prices-among-the-highest-in-the-EU-6736133854>. In the second quarter of 2016, the index of advertised prices for residential property went up by 8.7% compared with the corresponding quarter of 2015 (Central Bank of Malta, *Quarterly Review 2016:2*); H. Grech, "Malta average rental prices increases by 47% between 2013-2016, signs of 'overheating'", *The Independent*, 30 November 2017. Accessed online on 14 December 2017 on: <http://www.independent.com.mt/articles/2017-11-30/local-news/Malta-average-rental-prices-increase-by-47-between-2013-2016-signs-of-overheating-6736182097>.

<sup>4</sup> U. Mifsud Bonnici, "Housing Rights in Malta", in *National Perspectives on Human Rights*, edited by S. Leckie, The Hague: Nijhoff, 2003, p. 256.

ownership especially for young couples, whilst maintaining its efforts in the construction of new social housing units. Malta's accession into the European Union did, send ripple effects down the housing market, particularly through the government's decision to allow Maltese citizens to repatriate undeclared funds held overseas at a nominal penalty rate which were, in turn, reinvested in property<sup>5</sup>. The sudden property price boost created an artificial demand which challenged prospective home buyers by no insignificant measure. Foreign analysts who assessed the conditions of the Maltese housing market were, therefore, far less impressed with Malta's housing policy. Vakili-Zad was amongst the earliest to underline how housing policy in Malta was always driven by the political considerations of the two dominant political parties together with the influence of the Catholic Church rather than by any logic of industrialization or economic laws. This, in turn, explains how whilst in the 1990s countries were rethinking their housing policies, Malta:

*... merely revised rent regulation, yet left the majority of privately-rented accommodations trapped in outdated rent regulation, kept building dwellings and sold them at a discount and left the management of social housing in the hands of central government bureaucrats and professionals<sup>6</sup>.*

This less optimistic outlook revealed amongst some of the deepest-lying problems in the Maltese system. First of all the absence of a properly regulated private rented sector which either leaned disproportionately in favour of the tenant (pre-1995<sup>7</sup>) or else left the tenant without the least guarantee regarding minimum contractual duration or stability of rents (post-1995). Secondly, the significant degree of bureaucracy and clientelism present in the allocation procedures of social accommodation.

It is mostly these latter problems that are currently manifesting themselves in the market: the inadequacy of rent regimes for either their disproportionate rigour or their excessive liberality and the record numbers of social housing applicants<sup>8</sup> caused simultaneously by the rapid decline in rental affordability and the absence of new construction of social housing units during the recent years<sup>9</sup>. It is in this light that the various international statutes under which the Maltese State is bound will be analysed in more detail.

### 3. Housing Rights under the Maltese Legal Order

Malta's principal obligations in the sphere of housing are, in fact, constituted by the number of international instruments that it has ratified over the years. First amongst which, there is the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>10</sup> that requires the necessary standard of the housing conditions to be 'adequate' (Article 11). Malta has also

<sup>5</sup> L. Bianco, "Malta: Housing and Real Estate 1980-2005", *Architectural Design* 76 (2006): 3.

<sup>6</sup> C. Vakili-Zad, "Housing Policy in Malta: A Welfare State Regime Approach", *The FEMA Research Bulletin*, 2006:1(2), 64.

<sup>7</sup> As regulated by Chapters 69, 116 and 158 of the Laws of Malta.

<sup>8</sup> In November 2017 the total number of applicants for social accommodation was that of 3,271 (Hon. Michael Falzon, Minister for Family, Children's Rights and Social Solidarity, PQ no. 2080, Legislature XIII, 29 November 2017).

<sup>9</sup> Between the 2010 and 2017 only 14 new units were erected (the last one was erected in 2014). In 2017 Government announced a number of new projects that should house up to 683 households (Hon. Michael Falzon, Minister for Family, Children's Rights and Social Solidarity, PQ no. 1456, Legislature XIII, 2 October 2017).

<sup>10</sup> Malta signed the International Covenant on Economic, Social and Cultural Rights on the 22 October 1968 and subsequently ratified it on 13 September 1990. It entered into force on 13 December 1990 [United Nations Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Initial reports submitted by States parties under articles 16 and 17 of the Covenant*, Addendum, MALTA, 7 February 2003]. Malta, however, has not signed the Optional Protocol that allows the Committee to hear complaints from individuals.

accepted housing rights deriving from the European Social Charter besides other relevant provisions contained in the European Convention on Human Rights as well as the European Union treaties and regulations.

### 3.1. ICESCR

This universal right to “adequate” housing conditions, as contained in the ICESCR, places a significant obligation on the part of the State to ensure the provision of adequate accommodation to its citizens. This does not mean that the Covenant imposes onto States the obligation to eliminate homelessness immediately<sup>11</sup>, however, the State must show that the measures being taken are “sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources”<sup>12</sup>.

The Committee on Economic, Social and Cultural Rights has itself recognised that housing rights are infinitely more complex than the commonly cited ‘right to a roof over one’s head’ and it entails additional concerns such as security of tenure, non-discrimination and affordability<sup>13</sup>. The norm is the right to a place to live in security, peace and dignity<sup>14</sup>.

The practical implications of this right were explained by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment no. 4. The main concepts include:

i) *Legal security of tenure*

The object of this law is not so much that of prolonging leases as much as that of ensuring that evictions only occur in strictly defined circumstances (the legality of an eviction would be initially determined by reference to domestic law)<sup>15</sup>.

ii) *Availability of services, materials, facilities and infrastructure*

The State must ensure that homes contain the necessary facilities for one’s health, security, comfort and nutrition, and there should be sustainable access to resources such as water and energy supplies, sanitation, washing facilities, food storage, refuse disposal, site drainage and emergency services.

iii) *Affordability*

This is one of the most important elements as this requires States to ensure that elevated housing costs do not threaten or compromise the fulfilment of other basic needs as well as ensure that these remain commensurate with income levels. Hence, the State’s obligations are those of ensuring enough low-cost housing to cater for the needs of the population, particularly the more economically disadvantaged categories<sup>16</sup>. In respect to tenants the Committee specifically lays down that: “. . . tenants should be protected by appropriate means against unreasonable rent levels or rent increases”. Therefore, States are expected to exercise some control over rent levels in the private sector<sup>17</sup> at least where these become a threat to social inclusion.

iv) *Accessibility*

<sup>11</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford Monographs in International Law (Oxford: Clarendon Press, 1995), 330.

<sup>12</sup> *CESCR General Comment no. 5*, para. 14.

<sup>13</sup> S. Leckie, “The Justiciability of Housing Rights” in *SIM Special No. 18 Proceedings of the Conference on an Optional Protocol to the Covenant on Economic, Social and Cultural Rights*, Netherlands Institute for Human Rights, Utrecht.

<sup>14</sup> Office of the United Nations High Commissioner for Human Rights, *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, UN Doc. E/1992/23, 13 December 1991, para. 7.

<sup>15</sup> *Ibid. Craven*, 339, 344.

<sup>16</sup> *Ibid. Craven*, 338.

<sup>17</sup> *Ibid. Craven*, 338.

Housing must be available to all and it must, most of all, be accessible to the more disadvantaged groups such as the elderly, children, the ill or physically disabled, victims of natural disasters and people living in disaster-prone areas.

Malta signed the ICESCR in 1968 and eventually became a State Party to the Covenant in 1990<sup>18</sup>. Nevertheless, Malta runs a dualist system<sup>19</sup> and since it was never transposed, the ICESCR does not have any direct applicability in the domestic sphere. In its concluding observations on the initial report submitted by Malta on the implementation of the ICESCR, the Committee noted that the level of protection afforded to economic, social and cultural rights in Malta was overall high and that the State was continuing to improve the protection of these rights<sup>20</sup>. However, it expressed its regret at the fact that the Covenant had not been incorporated into domestic law and that it could not therefore be invoked before the domestic courts<sup>21</sup>.

### 3.2. *European Social Charter (ESC)*

The ESC is particularly relevant in sphere of housing rights since it is the only international instrument to lay down in unequivocal terms the general principle that “[e]veryone has a right to housing” (Article 31)<sup>22</sup>. This provision aims to bind State parties to take measures in order to progressively eliminate homelessness and to promote access to housing of an adequate standard<sup>23</sup>. Malta both signed and ratified the Revised Charter on the 27 July 2005, however, it did neither accept Article 31 nor the abovementioned Collective Complaints procedure that enables the lodging of complaints about Charter violations with the European Committee of Social Rights (ECSR)<sup>24</sup>. Its commitment was therefore limited to ensuring the right of every family to appropriate social, legal and economic protection, including the provision of housing, in order to ensure its full development (according to Article 16)<sup>25</sup>.

The full implications of Article 16 have also been explained in the case *European Roma Rights Centre (ERRC) v. Greece*<sup>26</sup>:

*The committee recalls its previous case law to the effect that in order to satisfy Article 16 states must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The committee has stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore the obligation to promote and provide housing extends to security from unlawful eviction<sup>27</sup>.*

This interpretation means that there can be far-reaching obligations for Malta under Article 16 and that Malta is effectively bound to respect the families’ right to housing. The ECSR has recently

<sup>18</sup> UN Human Rights, Office of the High Commissioner for Human Rights: <http://indicators.ohchr.org/>.

<sup>19</sup> A ‘dualist’ system, as opposed to a ‘monist’ one, requires that international obligations be incorporated into domestic law before becoming part of national legislation.

<sup>20</sup> UN Economic and Social Council, E/C.12/1/Add.101, 14 December 2004, Thirty-third session, 8-26 November 2004

<sup>21</sup> *Ibid.* para 10.

<sup>22</sup> European Social Charter, *Part I*.

<sup>23</sup> *Ibid.*, para. 118.

<sup>24</sup> Council of Europe: [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp).

<sup>25</sup> [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2015\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2015_en.pdf) Malta has also failed to accept Article 30 that guarantees everyone a right to protection and social exclusion.

<sup>26</sup> Complaint no. 15/2003.

<sup>27</sup> *Ibid. ERRC v. Greece*, §16.

pronounced itself on Malta's compliance with the latter article following its assessment of the state of conformity of the domestic regime in respect of those obligations that it had undertaken in the field of children, families and migrants<sup>28</sup>. In its conclusions, the Committee clarified that Articles 16 and 31 overlap in several areas relating to the right of families to housing and the former had been constantly interpreted as including a guarantee for housing rights. In reiterating the States Parties' obligations the Committee held that:

*Under Article 16, States Parties must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and size considering the composition of the family in question, and include essential services (such as heating and electricity)<sup>29</sup>.*

On the whole the Committee found that the situation in Malta was not in conformity with Article 16 of the Charter since the Maltese report had not provided sufficient information for the Committee to establish that the State implemented a comprehensive policy to ensure the social, legal and economic protection of the family<sup>30</sup>.

### 3.3. European Convention on Human Rights (ECHR)

Under the ECHR, new inroads in the protection of social rights have mostly been made through the utilisation of article 8, which binds State parties to respect the individual's "home". This article is, however, primarily of interest to those who already have a home and therefore it merely seeks, at least on the outset, to protect existing occupiers rather than to create an entitlement to a house *per se*<sup>31</sup>.

The principles that emanate from this provision have been summarised in the two recent cases of *Yordanova and Others v. Bulgaria*<sup>32</sup> and *Winterstein and Others v. France*<sup>33</sup>. Article 8(2) binds State parties to interfere with this right lawfully, in pursuance of a legitimate aim and so long as it is deemed "necessary in a democratic society" in the interest of the five grounds mentioned in the article. As regards the verification or assessment of this necessity, the ECtHR has reserved to itself the final evaluation of the decision, although it has also acknowledged that due to the State organs' direct and continuous contact with their countries they would generally be better placed to evaluate local needs and conditions;<sup>34</sup> the ECtHR would therefore only intervene in cases of manifest errors of assessment<sup>35</sup>.

This margin of appreciation afforded to States would, however, narrow down in proportion to the extent of the intrusion into the applicant's private sphere and in determining whether the State would have remained within this margin, the Court attaches particular importance to the procedural safeguards put in place to enable any affected individuals to contest the decision. From this reasoning it follows that since the loss of one's home is considered to be the most extreme form of interference to the rights protected by Article 8, any person risking eviction should in all cases have the possibility of questioning the proportionality and reasonableness of the measure taken

<sup>28</sup> ECSR, *Conclusions 2011 (MALTA): Article 7, 8, 16, 17 and 27 of the Revised Charter*, January 2012.

<sup>29</sup> *Ibid.*, 14.

<sup>30</sup> *Ibid.*, 17.

<sup>31</sup> I.E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, International Studies in Human Rights (Leiden: Martinus Nijhoff Publishers, 2009:101), 113; H. Simón Moreno, *La Jurisprudencia del Tribunal Europeo de Derechos Humanos sobre la Vivienda en Relación al Derecho Español*, Teoría & Derecho, 2014: 16, 163.

<sup>32</sup> App. no. 25446/06, 24 April 2012.

<sup>33</sup> App. no. 27013/07, 17 October 2013.

<sup>34</sup> *Ibid.* *Yordanova* §§117-118.

<sup>35</sup> *Ibid.* *Winterstein* §76(α).

against him before of an independent tribunal. Moreover, this would apply regardless of whether, under domestic law, the applicant would have any right to occupy the premises or not<sup>36</sup>. These guarantees for the tenant against eviction have been identified by Schmid et al (2013) as one of the main topics covering tenancy law issues within the ECtHR jurisprudence<sup>37</sup>.

The ECHR differs from the aforementioned international instruments since it was transposed into Maltese law by virtue of the European Convention Act<sup>38</sup>. Infringements of the European Convention have been claimed in at least two eviction cases that were referred to the Maltese Constitutional Court. Although the major cases concerning tenants had claimed the protection of Article 8 of the Convention, Maltese applicants have managed to secure their rights through the utilisation of Article 6(1). Both cases concerned a specific article contained in the Land (Compulsory Eviction) Act<sup>39</sup> that entitled the Commissioner of Lands to proceed with the eviction of any illegal occupants of government property.

The first case was *Emanuel Camilleri et v. Kummissarju tal-Artijiet et*<sup>40</sup> where the allegedly adverse occupants of a government-owned property, which they were using as their sole residence, were unceremoniously ordered by the Commissioner of Lands to evict the premises within a period of three days. The Constitutional Court underlined that the mere three- day notice period in which the tenant was expected to resort to judicial means in order to halt his eviction was “manifestly derisive” and thus proceeded to declare the nullity of the Commissioner’s order since it ran contrary to the applicants’ rights as protected by Article 6(1) of the Convention.

In *Carmel Camenzuli et v. Kummissarju tal-Artijiet et*<sup>41</sup> the Commissioner ordered the eviction of a household that was precariously occupying government-owned property due to the imminent initiation of a public project. The First Hall decided the case along the same lines of the Constitutional Court judgment delivered in *Camilleri v. Kummissarju tal-Artijiet* and despite upholding the validity of the law, it annulled the eviction order which had only allocated seven days for their departure from the property. The novelty in this case was that the First Hall established the minimum period of notice at 20 days<sup>42</sup> although once again it only seemed to take Article 6(1) into consideration.

### 3.4. EU Legislation

Schmid & Dinse assert that “tenancy law remains nearly a blank space in the landscape of European private and comparative law” although EU Regulation and policy in certain specific fields may be said to have exerted significant effects on the various local tenancy systems<sup>43</sup>. In any case, it remains clear that housing rights and housing policy have only been affected tangentially by the bulk of EU legislation, which was decidedly more concerned about the creation of a single

<sup>36</sup> Ibid. *Yordanova* §118. Although in *Winterstein* (§76(€)) the Court elaborated that if the establishment of the home would be unlawful, the position of the individual would be much weaker.

<sup>37</sup> C.U. Schmid & J.R. Dinse, *Towards a Common Core of Residential Tenancy Law in Europe*, The Impact of the European Court of Human Rights on Tenancy Law, ZERP-Working Paper 1/2013 (Bremen: Zentrum für Europäische Rechtspolitik, 2013), 6.

<sup>38</sup> Cap. 319 of the Laws of Malta.

<sup>39</sup> Chapter 228 of the Laws of Malta

<sup>40</sup> Constitutional Court, 11 April 2006, App. Civ. Nr. 5/2005/1.

<sup>41</sup> Civil First Hall (Constitutional Jurisdiction), 23 March 2007, Rik. 33/2005.

<sup>42</sup> Once again, however, the Civil Court followed the strict guidance of the previous Constitutional decision that had cited the decision of *Joseph Busuttil v. Prim Ministru* (Constitutional Court, 20 July 1994, Vol. LXXVIII.I.175). The latter judgment had found an article prohibiting the opposition to the execution of a warrant of seizure as running contrary to Article 6(1) of the Convention. Subsequent amendments had eventually set a period of twenty days for the debtor to challenge the basis of the executive warrant. The same period is available for a defendant to file a reply to a sworn application or for any party to present an appeal following a first hall decision.

<sup>43</sup> Ibid. Schmid et al, *Towards a Common Core of Residential Tenancy Law*, 3-4.



market in goods and services<sup>44</sup>.

Consumer law is certainly the instrument through which EU law has had the most telling impact on housing rights across the respective Member States. The treatment of home loans, any attached securities as well as certain private leases as business-to-consumer contracts inevitably meant their regulation by European standards. In this respect, the most instrumental body of rules have been the ones contained in the EU Directive on Unfair Terms in Consumer Contracts<sup>45</sup> which has recently led to a series of key CJEU decisions on the rights relating to prospective evictees.

The CJEU's most significant statement in relation to housing rights was certainly pronounced in *Monika Kušionová v. SMART Capital a.s.*<sup>46</sup> where it underlined that “[u]nder EU Law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13”<sup>47</sup>. In this case, the applicant had secured a €10,000 loan with her family home. Although Slovak law was found to be in line with the EU provisions, since unlike its Spanish counterpart it allowed the national court to suspend or terminate the enforcement proceedings, it underlined that “[t]he loss of a family home is not only such as to seriously undermine consumer rights . . . but it also places the family of the consumer concerned in a particular vulnerable position”<sup>48</sup>. The CJEU thus elevated the level of protection afforded to homes to a higher degree than that of other ordinary consumer goods.

The same Directive, has been found to apply to tenancy agreements. This point was confirmed by the CJEU which held that contracts of letting and hiring concerning residential premises, which were concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting on a non-commercial basis, came in an equal manner under the scope of the Directive<sup>49</sup>. Tenants were deserving of the protection reserved to weaker parties due to the fact that, on the one hand, the amount that the tenant would be taking out on rent would usually represent a significant fraction of his income, whilst on the other, the rules governing this contract were typically too complex for an individual to acquire proper information on them.

Another relevant piece of EU legislation is the Status of Long-Term Residents (Third Country Nationals) Regulations<sup>50</sup> which aim to ensure equal treatment in respect of third country nationals who are granted long-term residence status in Malta also in regard to “procedures for obtaining housing”<sup>51</sup>. Studies have confirmed that third country nationals, especially those who hail from Africa and the Middle East are largely unaware of these rights and remedies that are made available to them and that in most cases the stakeholders of the housing market themselves -such as owners and estate agents- would be equally poorly informed of their legal obligations, particularly those emanating from the Racial Equality Directive.

Regardless of the legislation that was put in place, flagrant abuses in this respect have been revealed by a recent survey conducted amongst immigrant and ethnic minority groups which, inter alia, found out that estate agents have been colluding with property owners in discriminating against

<sup>44</sup> P. Kenna, *Housing Law, Rights and Policy*, (Dublin: Clarus Press, 2011), 562.

<sup>45</sup> Directive 1993/93/13/EEC.

<sup>46</sup> Case C-34/13 (Third Chamber), 10 September 2014.

<sup>47</sup> Ibid. *Kušionová*, §65.

<sup>48</sup> Ibid. *Kušionová*, §63.

<sup>49</sup> Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v. Jahani BV, Preliminary ruling by the CJEU (First Chamber) decided on the 30 May 2013, C-488/11.

<sup>50</sup> Subsidiary Legislation 217.05. The purpose of these regulations is to implement the provisions of Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents. The Regulations determine (a) the terms for conferring and withdrawing long-term resident status granted in relation to third country nationals legally residing in Malta and the rights pertaining thereto and; (b) the terms of residence in Malta of a third country national who was conferred the status of long-term resident in another Member State.

<sup>51</sup> Article 11(1)(g).

certain ethnic groups. This discrimination goes to the extent that estate agents have been described as “gatekeepers in maintaining certain neighbourhoods as ‘white/non Muslim’” whilst they have also been found to steer certain categories into depressed areas<sup>52</sup>. Similar conclusions emerged from a separate research that once again identified discrimination as “one of the key obstacles in finding rented accommodation in the community”. A pilot project, conducted by the same NGO that drew up the report, which aimed at assisting residents of one particular Open Centre with finding places for rent was also reported to have been met with resistance by local landlords<sup>53</sup>.

This misconduct on the part of legislators is, however, already foreseen by local legislation. The *Equal Treatment of Persons Order*<sup>54</sup> expressly prohibits discrimination in relation to access to housing and any discriminatory act, including any instruction to discriminate against any person, would be exposing the offender to a *multa* of up to €2,239.37 and to any term of imprisonment inferior to six months.

#### 4. State duties under Housing Rights

The above analysis may shed more light on the scope of the right housing as protected under the various instruments to which Malta is a state party. The ICESCR and ESC (even simply under Article 16) are the treaties that assert this right in the clearest terms although, despite having ratified and accepted the relevant provisions, Malta has not transposed their contents into domestic legislation. The ICESCR and the ESC are the two instruments that could guarantee the full development of the right to housing in Malta since rather than binding a State to provide a home for every household, it obliges it to take concrete policy measures, commensurate with economic resources at its disposal, in favour of segments of the population, particularly the most vulnerable ones, who would face the inevitable prospect, or the risk, of homelessness. The State would also be bound to oversee the housing standards and take the necessary steps to ensure that essential services (such as heating and electricity) are available to all.

The ECHR and EU Legislation protect the right to housing in a more indirect manner, however, being already transposed into Maltese law they can already guarantee certain remedies. As regards the ECHR, one has to underline the procedural guarantees that it requires, particularly in the process of depriving someone of one’s home. Specifically, that of allowing an occupant to question the proportionality and reasonableness of the measure being taken against him before an independent tribunal, irrespective of whether he would have a valid title or otherwise. EU Law may primarily be availed of in order to guarantee the fairness of rental agreements where the tenant/consumer would have contracted with a business or a professional entity and to curtail discriminatory practices that limit access to housing for racial or ethnic minorities.

#### 5. Conclusion

The recent economic realities have exposed the peril of having the housing rights of segments of the population depend entirely on the political discretion of the public administration. The juridical advancements in the conception of housing rights both at a European as well as at a global level should serve as the basis on which to start a local discussion on the usefulness of such a formal safeguard within the local context. In today’s society, housing rights have become key to both an effective welfare policy as well as a guarantee of Malta’s fulfilment of its human rights

<sup>52</sup> National Commission for the Promotion of Equality (NCPE), *I’m Not Racist, But...: Immigrant & Ethnic Minority Groups and Housing in Malta*, 2012, 15.

<sup>53</sup> *Ibid.* no. 72, 37-38.

<sup>54</sup> Subsidiary Legislation 460.15.

commitment.

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# REFLECTIONS ON FREEDOM OF RELIGION AND CONSCIENCE – ARTICLE 9 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS\*

VINCENT A. DE GAETANO\*\*

## Abstract

In this article Judge De Gaetano contributes towards a better understanding of article 9 ECHR (freedom of conscience and religion). The article covers judgments dealing with matters of conscience regarding head-scarves and wearing apparel, as well as conscientious objections to military service and the conflict between secularism and the freedom to outwardly manifest one's religious beliefs.

The article deals with matters which have resulted in dismissal of employees because of their adherence to religious belief or lack of it. Issues dealt with include whether an organist in a Catholic church can be dismissed if he conducts an extra marital affair and whether such dismissal is proportionate when it refers to the main communications officer of the Mormon society; whether a British Airways desk officer can wear a cross in necklace and to what extent states are allowed a wide margin of appreciation in such matters; and whether a marriage registrar can be forced to celebrate civilly a union between persons of the same sex.

## 1. Introduction

While in many European countries the formal practice of religion – at least of the Christian religion as manifested through the various Churches and other ecclesial communities – is in decline, the same cannot be said about the interest in the concept, and in the actual manifestation, of freedom of thought, of conscience and of religion. Indeed in a number of recent high profile cases, whether decided at domestic level or at the level of the European Court of Human Rights, the principle issue has been the contrast or the alleged conflict between freedom of thought, conscience and/or religion on the one hand, and other equally fundamental rights – foremost those of respect for private life, freedom of expression and the prohibition against discrimination – on the other. The purpose of this short paper is to shed some light on the complexities and intricacies of the issues that the European Court of Human Rights has had to rule on, including the alleged – I would prefer to call it apparent – conflict between freedom of religion and conscience of the one hand, and other rights and freedoms on the other. As one author has stated, “[t]he particular context of many of the cases provides an insight into the rich tapestry of European. . . religious, historical and cultural

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\* Please note that this is an updated and modified version of a talk delivered by Judge Vincent A. De Gaetano in October 2013 at the Palazzo dei Normanni, Palermo and which was published in Italian in “I Quaderni Europei”, of February 2014.

\*\* Born on 17 August, 1952, Judge Vincent A. De Gaetano was called to the bar in 1976. In 1979 he was appointed Senior Counsel for the Republic and in 1988 Assistant Attorney General in the Attorney-General's Office. Between 1989 and 1994 he served as Deputy Attorney General. In 1994 Dr De Gaetano was appointed as a Judge of the Superior Courts. Dr De Gaetano was appointed Chief Justice in October 2002. Chief Justice de Gaetano was elected a judge of the European Court of Human Rights on 22<sup>nd</sup> June 2010.

diversity”<sup>\*</sup>.

To be sure, cases coming before the European Court of Human Rights (ECtHR) alleging a breach of Article 9 are not as numerous as cases dealing with other provisions of the Convention. The first judgment finding a violation under Article 9 was only delivered in 1993 in the names *Kokkinakis v. Greece*<sup>\*</sup>. According to the Annual Report for 2013 (published in 2014), from 1959 to 2013 the total number of judgments finding a violation of Article 9 is 52, which is a puny figure when compared to, for instance, the finding of a violation of Article 2 (961 judgments), Article 3 (1,989), Article 6 (9,552) or Article 10 (544). The only other articles of the Convention (and excluding the Protocols) with lesser violations are Article 4 (5 judgments), Article 7 (38), and Article 12 (8).

## 2. Thought, conscience and religion

The structure of Article 9 is what one could call the classical structure. The first paragraph reiterates in a general way the nature of the right guaranteed or protected – “freedom of thought, conscience and religion” – and also give some non-exhaustive examples of what falls within the general formulation. This right, we are told in the first paragraph, includes the “freedom to change [one’s] religion or belief and [the] freedom, either alone or in community with others and in public or private, to manifest [one’s] religion or belief, in worship, teaching, practice and observance.” The second paragraph of the article goes on to identify the situations when the right in question can be restricted. It is clear from the wording of the provision that only the external manifestation of religion and beliefs can be restricted, and for such a restriction to comply with the convention it must satisfy the three (again classical) criteria adopted in respect of other provisions of the Convention: the limitation of (or interference with) the right must (i) have a basis in law (which according to standard case law must be a law which is adequately accessible as well as a clear law, that is one which allows a person to foresee with reasonable certainty the possibility of such a limitation); the limitation (ii) must also pursue one of the “legitimate” aims specified in the article, that is to say public safety, or the protection of public order, health or morals, or the protection of the rights and freedoms of others; and finally (iii) the limitation of or interference with the right must be “necessary in a democratic society”, which implies that there must be a pressing social need for the limitation or interference and that the means adopted so to limit or interfere must be proportionate to the legitimate aim pursued.

## 3. Scope of the protection

Principal object of the protection of Article 9, therefore, is thought and belief, both of which are basically private and personal matters, but which can be manifested and exercised also collectively. It must be made clear, however, that not all “practices” which one chooses to associate with one’s belief or one’s religion fall within the ambit of the protection of Article 9. In a decision of the former Commission, dating to 1978<sup>\*</sup>, in a case brought to Strasbourg by the indefatigable peace activist Mrs Pat Arrowsmith, it was held that “pacifism” was a form of thought or belief which fell within the general ambit of Article 9, but that the distribution of fliers to British soldiers to incite them not to participate in military operations in the then troubled Northern Ireland (a form of instigation to disaffection or to mutiny) was not a practice necessarily linked to such a belief, and was therefore not a practice which merited the protection of Article 9. Similarly, the refusal of a

<sup>\*</sup> Murdoch, J., *Protecting the right to freedom of thought, conscience and religion under the European Convention of Human Rights*, Council of Europe (Strasbourg) 2012, p. 8.

<sup>\*</sup> Decided on 25 May 1993.

<sup>\*</sup> *Arrowsmith v. the United Kingdom*, 12 October 1978.

Quaker, also a pacifist, to pay taxes because he was not given an assurance by the tax authorities of the United Kingdom that his fiscal contributions to the exchequer would not be used for military purposes, could not be considered a “religious practice”\*. Therefore his conviction by the domestic courts for failing to pay taxes was not in breach of Article 9.

The case law of the ECtHR on the subject of freedom of thought, conscience and religion was very well summed up by the Fourth Section of the Court in *Eweida and Others v. the United Kingdom* \*:

“81. The right to freedom of thought, conscience and religion denotes views that attain a certain level of cogency, seriousness, cohesion and importance . . . . Provided this is satisfied, the State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. . .

“82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 (see *Skugar and Others v. Russia (dec.)*, no. 40010/04, 3 December 2009 and, for example, *Arrowsmith v. the United Kingdom*, Commission’s report of 12 October 1978, *Decisions and Reports* 19, p. 5; *C. v. the United Kingdom*, Commission decision of 15 December 1983, DR 37, p. 142;). . . . In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question....”.

*Skugar and Others v. Russia*, mentioned in the above excerpt, is a rather bizarre case. The applicants, who claimed to be members of the Russian Orthodox Church, had objected to the fact that they had been assigned a fiscal number which, according to them, was a combination of the numbers which indicated the Antichrist in the Apocalypse of St. John. At domestic level the matter went right up to the Russian Constitutional Court. The ECtHR, in its decision declaring the application inadmissible, went so far as to refer to a declaration of the Synod of the Russian Orthodox Church which had referred to this “belief” – which appears to have been prevalent in some quarters at the time – as mere superstition. The ECtHR reiterated that acts or omissions that did not directly express a particular belief or religious faith, or which were only remotely linked to a precept of faith, did not fall within the protection of Article 9. On the contrary, therefore, an act which is intimately linked to a religion or to a particular faith would be a “manifestation” within the meaning of Article 9. In this sense one can think of, for example, liturgical or devotional acts which are generally recognised as forming an important part of a particular religion or faith – to give an example with a Catholic background, the celebration of the Eucharist (Mass), or the procession with the Eucharist on the feast of Corpus Christi.

\* *C. v. the United Kingdom*, 15 December 1983.

\* 15 January 2013.

#### 4. The case of Leyla Şahin

However, the “manifestation” of a religion or a belief, to which Article 9 refers, does not require that the particular act be mandated as part of the doctrine (or dogma) of that religion or faith. For instance, the use of the head scarf to cover the head – a practice followed by millions of Muslim women but which is not a doctrinal precept or an essential requisite to be a Muslim\* – is a manifestation of one’s belief within the meaning of Article 9, and was so held to be by the ECtHR in the case of *Leyla Şahin v. Turkey*\*. The facts of that case – which, to my mind, was wrongly decided by the Grand Chamber when it concluded that there had not been a violation of the applicant’s right under the article in question – can be summarised as follows: the applicant was a medical student at the University of Bursa, in Turkey, and had for four years been wearing the head scarf without encountering any problem. She then moved to another university, that of Istanbul. At this new university, the Vice-Rector issued, in February 1998, a circular which, while invoking the Turkish Constitution and various decisions of the Supreme Administrative Court of Turkey, prohibited all female students to cover their head within the confines of the university, and also prohibited all male students from wearing the beard. On the basis of this prohibition, the applicant was, in March of that same year, prohibited from sitting for the examination in oncology. The Grand Chamber put to itself a number of questions. Was there an interference with the applicants’ right to manifest her religion? The GC’s answer was in the affirmative. Was the interference based on a law – “prescribed by law”? Again the GC said yes: the circular of the Vice-Rector of the university could be regarded as a law since it invoked for its very justification a provision of the Turkish Constitution and several judgments of the Supreme Administrative Court. Nevertheless, reading the judgment, it is clear that the law which had, as it were, inspired the circular (a law dated 9 April 1991) had been passed after a judgment of the Turkish Constitutional Court which had propounded a form of historic and aggressive secularism which is absent in almost all European States (even in the highly secularised France). Did the interference have a legitimate aim? Yes, said the GC: referring in particular to the aforementioned judgment of the Turkish Constitutional Court which had found that the use of the headscarf “could not be reconciled with the principle of sexual equality implicit, inter alia, in republican and revolutionary values”\*, the GC held, in one of the shortest and tersest paragraphs of the entire judgment, that the interference with the applicant “pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, a point which is not in dispute between the parties”\*. Finally, and more crucially, was the restriction “necessary in a democratic society”? Was there an element of proportionality between the aim and the means used to achieve that aim? Again, and quite surprisingly in my view, the GC said yes: the principles of secularism and equality, and the wish of the authorities to preserve the secular nature of state institutions, justified the measure in question.

Which brings me to ask myself a number of questions. Does secularism necessitate the concealment or, indeed, the suppression of every reference to religion in public places? Does secularism, directly or indirectly, confuse freedom of religion with freedom from religion (this was, to a certain extent, the problem that the GC faced in *Lautsi and Others v. Italy*\*, even though the main issue there was Article 2 of Protocol no. 1)? Would not freedom from religion amount to an inversion of liberty and become in effect an imposition on the pretext of protecting freedom of thought? And, finally, can conflicts, or presumed conflicts, between religious beliefs and their manifestation on the one hand, and the State’s duty and obligation of neutrality in religious matters on the other, not be resolved by application of the principle of “reasonable accommodation”?

\* And which is not to be confused with the *burqa* or the *niqab*.

\* 10 November 2005.

\* Para. 39.

\* Para. 99.

\* 18 March 2011.

## 5. Reasonable accommodation

The principle of “reasonable accommodation” is found, for instance, enshrined in the United States Civil Rights Act of 1964 in the context of the hiring, firing and other terms and conditions of employment (organisations whose purpose or character are primarily religious are, however, exempted from the requirement of applying this principle). It works by requiring the parties to seek to balance conflicting interests. The principle has been adopted and applied in Canada in cases involving freedom of religion. One of the first cases requiring religious accommodation in Canada\* involved a woman who objected to working from Friday evening to Saturday evening when she became a Seventh Day Adventist, as her religion required her to respect this day as a day of rest from work. Her position, however, required her to work at some point in that period to remain a full-time employee. The Supreme Court of Canada\* concluded that the Ontario Human Rights Code implicitly required the employer to demonstrate that it had tried to accommodate her to the point of undue hardship (for the said employer), something which the employer had not done. “The Court essentially integrated the concept of reasonable accommodation, then found only in academic writing and American cases, into Canadian law because the Code was silent on the matter”\*. In 1990, a group of Royal Canadian Mounted Police veterans sought a court order to stop accommodating the wearing of turbans and other religious requirements for Sikh officers. The veterans were of the view that allowing officers to wear turbans and other religious symbols would affect their appearance of neutrality. The Federal Court of Canada, however, held\* that the wearing of the turban did not create a situation of coercion or compulsion to participate in the officers’ religion or concern about bias and did not violate the rights of members of the public and other officers.

The principle of reasonable accommodation was also applied by the Supreme Court of Canada in the case *Multani v. Commission scolaire Marguerite-Bourgeoys*\*. A school board had refused to allow a student to wear a kirpan to school. The Supreme Court concluded that the student’s freedom of religion, protected under section 2(a) of the Canadian Human Rights Charter, had been violated. The next step was to balance the competing values in question under section 1 of the Charter\*, and the Supreme Court chose to use a duty to accommodate analysis as an analogy to assist in this balancing. “In the schoolyard context, the Court found that a complete ban on kirpans was not a reasonable option considering the low risk a kirpan posed to school security if certain conditions were put in place, such as ensuring that it be sewn into the boy’s clothes at all times. In addition the Court noted the other items regularly available at schools that could be used as weapons, such as scissors, pencils or baseball bats. Thus, the school board’s rule impaired the student’s right beyond the minimal extent permitted under section 1 of the Charter, and the board’s decision was reversed”\*.

As can be seen from the above, the principle of reasonable accommodation bears certain similarities to the proportionality test adopted by the ECtHR. Was either the test of proportionality or that of reasonable accommodation applied in the *Leyla Şahin* case? In my view, not really. The ECtHR seems to have preferred to defer to the views of the domestic authorities by applying

\* This and other Canadian cases referred to are taken from the background paper *An Examination of the Duty to Accommodate in the Canadian Human Rights Context* (by Laura Barnett and others) Library of Parliament (10 January 2012) Legal and Legislative Affairs Division, Parliamentary Information and Research Service, Publication no. 2012-01-E.

\* *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536.

\* *Op.cit.* p. 7.

\* *Grant v. Canada (Attorney General)* (1995), 120 D.L.R. (4<sup>th</sup>) 556 (F.C.A.).

\* [2006] S.C.J. No. 6

\* Section 1 reads as follows: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

\* *An Examination of the Duty to Accommodate in the Canadian Human Rights Context, op. cit.*, p. 8.



the principle of the “margin of appreciation”<sup>\*</sup>, a principle that can, as is known, be extended and contracted to suit the conclusion that the Court wants to reach. I can do no better than refer to Judge Tulkens’ dissenting opinion on this score:

*“4. On what grounds was the interference with the applicant’s right to freedom of religion through the ban on wearing the headscarf based? In the present case, relying exclusively on the reasons cited by the national authorities and courts, the majority put forward, in general and abstract terms, two main arguments: secularism and equality. While I fully and totally subscribe to each of these principles, I disagree with the manner in which they were applied here and to the way they were interpreted in relation to the practice of wearing the headscarf. In a democratic society, I believe that it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other.*

*“5. As regards, firstly, secularism, I would reiterate that I consider it an essential principle and one which, as the Constitutional Court stated in its judgment of 7 March 1989, is undoubtedly necessary for the protection of the democratic system in Turkey. Religious freedom is, however, also a founding principle of democratic societies. Accordingly, the fact that the Grand Chamber recognised the force of the principle of secularism did not release it from its obligation to establish that the ban on wearing the Islamic headscarf to which the applicant was subject was necessary to secure compliance with that principle and, therefore, met a “pressing social need”. Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention. Moreover, where there has been interference with a fundamental right, the Court’s case-law clearly establishes that mere affirmations do not suffice: they must be supported by concrete examples (see *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI). Such examples do not appear to have been forthcoming in the present case.”*

There have been two other important cases which have dealt with the question of religious dress in public places as a form of manifestation of one’s religious belief, and these have come to different conclusions. The first case is *Ahmet Arslan and Others v. Turkey*, decided by the Second Section of the Court on 23 February 2010. In this case, the members of a particular religious sect had the practice of going about in public dressed in a peculiar way denoting membership of the sect. This included – at least for men – a turban, wide pantaloons and a black tunic, and holding a staff in their hand (ostensibly in imitation of the Prophets). The ECtHR held that the applicants’ conviction for having worn the clothing in question clearly fell within the ambit of Article 9 since the applicants were members of a religious group and considered that their religion required them to dress in that manner. Accordingly, the Turkish courts’ decisions had amounted to interference with the applicants’ freedom of conscience and religion, the legal basis for which was not contested (the law on the wearing of headgear and regulations on the wearing of certain garments in public). As in the case of *Leyla Şahin*, the Court held that it could be accepted, particularly given the importance of the principle of secularism for the democratic system in Turkey, that this interference pursued the legitimate aims of protection of public safety, prevention of disorder and protection of the rights and freedoms of others. However the Court noted that the sole reason given by the Turkish courts to justify the interference had consisted in a mere reference to the legal provisions and, on appeal, to a finding that the disputed conviction was in conformity with the law. The Court further emphasised that this case concerned punishment for the wearing of particular dress in public areas that were open to all, and not, as in other cases that it had had to judge, the regulation of the wearing of religious symbols in public establishments, where religious neutrality might take precedence over the right to manifest one’s religion. The Court found that there was no evidence that the

<sup>\*</sup> “122. In the light of the foregoing and having regard to the Contracting States’ margin of appreciation in this sphere, the Court finds that the interference in issue was justified in principle and proportionate to the aim pursued.”

applicants represented a threat to public order or that they had been involved in proselytism by exerting inappropriate pressure on passers-by during their gatherings in the public open spaces. In the opinion of the Religious Affairs Organisation, their movement was limited in size and amounted to “a curiosity”, and the clothing worn by them did not represent any religious power or authority that was recognised by the State. Accordingly, the Court considered that the necessity for the disputed restriction had not been convincingly established by the Turkish Government, and held that the interference with the applicants’ right of freedom to manifest their convictions had not been based on sufficient reasons. It held, by six votes to one, that there had been a violation of Article 9.

## 6. Full face covering

Compare this case with the more high profile – and more recent – one of *S.A.S. v. France*, decided by the GC on 1 July 2014. In issue here was a prohibition under French law to cover one’s face in public and therefore a prohibition which includes the use of the *burqa* and the *nijab*. The Press Release issued by the Registrar of the Court on the same day of the publication of the judgment accurately sums up the issues and the findings of the Court. In its judgment the GC accepted that the interference pursued two of the legitimate aims listed in Articles 8 and 9: “public safety” and the “protection of the rights and freedoms of others”. As regards the aim of “public safety”, the Court noted that the French legislature had sought, by passing the Law in question, to satisfy the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. It considered, however, that the ban was not “necessary in a democratic society” in order to fulfil that aim. In the Court’s opinion, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal one’s face could be regarded as proportionate only in a context where there was a general threat to public safety. The Government had not shown that the ban introduced by the Law of 11 October 2010 fell into such a context. As to the women concerned, they were thus obliged to give up completely an element of their identity that they considered important, together with their chosen manner of manifesting their religion or beliefs, whereas the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property was established, or where particular circumstances prompted a suspicion of identity fraud.

As to the “protection of the rights and freedoms of others”, the French Government referred to the need to ensure “respect for the minimum set of values of an open democratic society”, listing three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (the notion of “living together”). While dismissing the arguments relating to the first two of those values, the Court accepted that the barrier raised against others by a veil concealing the face in public could undermine the notion of “living together”. In that connection, it indicated that it took into account the State’s submission that the face played a significant role in social interaction. The Court was also able to understand the view that individuals might not wish to see, in places open to all, practices or attitudes which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, formed an indispensable element of community life within the society in question. The Court was therefore able to accept that the barrier raised against others by a veil concealing the face was perceived by the respondent State as breaching the right of others to live in a space of socialisation which made living together easier. It added, however, that in view of the flexibility of the notion of “living together” and the resulting risk of abuse, it had to engage in a careful examination of the necessity of the measure at issue.

Proceeding with that examination, the Court had to ascertain, in particular, whether the ban was proportionate to the aim pursued. It admitted that it might appear excessive, in view of the small number of women concerned, to opt for a blanket ban. It further noted that the ban had a significant

negative impact on the situation of women who chose to wear the full-face veil for reasons related to their beliefs, and that many national and international human rights bodies regarded a blanket ban as disproportionate. The Court also stated that it was very concerned by indications that the debate which preceded the adoption of the Law of 11 October 2010 had been marked by certain Islamophobic remarks. It emphasised in this connection that a State which entered into a legislative process of this kind took the risk of contributing to the consolidation of the stereotypes which affected specific groups of people and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance. The Court reiterated that remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the Convention's underlying values of tolerance, social peace and non-discrimination and did not fall within the right to freedom of expression that it protected.

While the Court was aware that the disputed ban mainly affected certain Muslim women, it nevertheless noted that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face and that the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face. In addition, the sanctions provided for by the Law were among the lightest that could have been envisaged: a fine of 150 euros maximum and the possible obligation to follow a citizenship course, in addition to or instead of the fine. Furthermore, as the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society, France had a wide margin of appreciation. In such circumstances, the Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review led it to assess a balance that had been struck by means of a democratic process within the society in question. In the Court's view, the lack of common ground between the member States of the Council of Europe as to the question of the wearing of the full-face veil in public places supported its finding that the State had a wide margin of appreciation. The ban complained of could therefore be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together". The Court held that there had not been a violation of either Article 8 or Article 9 of the Convention. One wonders whether it was even necessary in this case to invoke the margin of appreciation of the State.

## 7. Proselytism

The right of a religious community to manage its own affairs has never really been put in doubt by the ECtHR\*. Likewise the Strasbourg Court has accepted that a State may, for historical or social reasons, have a special relationship with a particular church, as, for instance is the case in the United Kingdom where the Queen is the head of the Church of England, or in some Nordic countries which have a form of State church\*. In such special circumstances the court has recognised that the state may confer certain benefits or particular privileges, especially in fiscal matters\*, to these churches, provided that the benefit or privilege in question did not violate other people's rights. In *Kokkinakis v. Greece*, already referred to, the ECtHR noted that the "privilege" granted to the autocephalous Greek Church consisted in a provision in the Greek Constitution and in a particular law which, together, prohibited any proselytism to the detriment of the said Church. The applicant, born in 1936 into an Orthodox family, had become a Jehovah Witness and had been prosecuted and sent to prison several times for openly trying to convert people to his particular faith. The Strasbourg Court found that there had been a breach of Article 9 because the Greek courts, in condemning the applicant according to the existing domestic laws, had never attempted to verify whether there existed a pressing social need to prevent his proselytising activities and nor had the

\* See, for instance, *Sindicatul "PĂSTORUL CEL BUN" v. Romania* 9 July 2013.

\* See, for instance, the opinion of the European Commission of Human Rights of 23 October 1990 in *Darby v. Sweden*.

\* *Ásatrúarfélagið v. Iceland* (dec.), 18 September 2012.

respondent Greek government shown that there existed any such need. The measure was, therefore, disproportionate. More specifically, the ECtHR in *Kokkinakis* affirmed that “bearing Christian witness” was an essential mission and a responsibility of every Christian and of every church, provided that such proselytism did not degenerate into an improper form of proselytism, which could be restrained by the state:

*“31. As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.*

*“While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.*

*“According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.” (emphasis added)*

And in para. 48 it added:

*“48. First of all, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and a responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.*

*“Scrutiny of section 4 of Law no. 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism, which the Court does not have to define in the abstract in the present case.”*

Compare and contrast the abovementioned case with another case against Greece, *Larissis and Others v. Greece* decided five years later\*, where in a case also involving acts of proselytism the Court – quite correctly in my view – was of the view that there had been no violation of Article 9. The case stemmed from a judgment of a Greek military tribunal which had sentenced to imprisonment senior military officers of the Greek Air Force to periods of imprisonment for having attempted to convert men who were their subordinates to the Pentecostal faith. The ECtHR took into account two particular circumstances: the first was military hierarchy, in the sense that a person who was in a subordinate military relationship to a senior officer or officers would feel constrained to say “yes” to his superior officers out of fear of possible later repercussions. In fact evidence had shown that persons approached by the applicants had felt so pressured. In a military context, such advances by superior officers could easily become a form of harassment. The second particular

\* 24 February 1998.

circumstance was that in this case the domestic tribunals – the military courts – had weighed in the balance the competing rights, that is the right of the applicants to manifest their own faith on the one hand and the right of their subordinates not to be molested on the other, and in their judgments had advanced relevant and sufficient reasons justifying the interference with the applicants' Article 9 rights.

## 8. *Obst v. Schüth*

The importance of the way the domestic courts handle and justify their decisions is highlighted by two judgments delivered on the same day – 23 September 2010 – by the Fifth Section of the ECtHR. Although dealing primarily with Article 8 of the Convention, they both have a religious or church related background. These are the cases of *Obst v. Germany* and *Schüth v. Germany*. In a nutshell, in both cases we have the right of a religious community to manage its own affairs on the one hand, and an employee's right to respect for his private life on the other.

Mr Obst was a senior member (an elder) of the Mormon Church in Germany and was employed by that church as director of public relations for Europe. At some point in time he drew the attention of his immediate superior that his matrimonial life was in crisis, and that he had committed adultery. A few days later he was sacked without notice. He was subsequently also excommunicated by his church. He applied to the German labour courts and these, in essence, held that his dismissal had been justified because, through his behaviour, he had failed to observe the contractual obligations he had assumed when signing the contract, foremost being his duty of loyalty to the Mormon community. The domestic courts also held that his dismissal was necessary to maintain the credibility of the church, in view of the fact that he occupied a senior post (director of public relations for Europe), and was also an elder of the church and therefore knew very well what the consequences would be in the event of an extra-conjugal affair. Consequently no warning or notice was necessary for his dismissal.

Mr Schüth, on the other hand was a Catholic and had been organist and maestro di cappella for the Catholic Parish of St Lambert in Essen since 1980. In 1994 he separated from his wife and a year later began to cohabit with a lady friend. One of his sons, who attended a nursery school, revealed to his class friends that his father was soon going to have another baby boy, and from here the information made its way to the parish priest. Mr Schüth was summoned by the dean of the parish, and after a meeting of the parish council, he was dismissed from his post. After an interminable series of referrals from one labour court to another, the German Federal Constitutional Court in July 2002 confirmed the judgment of the Federal Labour Court to the effect that the dismissal was justified.

Both the Mormon and the Catholic applied to the ECtHR. At face value, one might have assumed that the outcome in Strasbourg would have been the same in both cases. But it was not. Why did the Fifth Section find a violation of Article 8 in the case of Mr Schüth but not in the case of Mr Obst? The reason is quite simple and perfectly legitimate. In the case of *Obst* the German Labour Courts had examined in great detail all the circumstances of the case, including the contrasting rights of the Mormon community on the one hand and of the applicant on the other. They had, as already noted, given particular weight to Mr Obst's high profile and delicate role in that community. In the case of Mr. Schüth, on the other hand, the domestic tribunals – probably exhausted by the numerous referrals on procedural matters from one court to another – had, on the merits, limited themselves to noting that the applicant had not adhered to his contract of work in respect of an obligation of a general nature. They never examined or took into consideration the fact that Schüth was not employed in a catechetical role, or as a counsellor, or in some other role intimately linked with the faith of the parish. Nor did they consider the effect that his dismissal would have on his family, nor the fact that throughout the fourteen years in which he had served as organist and

choir master he had never challenged or criticised the church's teaching on marriage. Reading the judgment in the case of *Schiith* the almost inescapable conclusion is that had the domestic courts taken into consideration and weighed all these factors, a decision on their part that the dismissal had been justified would in all probability been upheld by the ECtHR and the finding of the latter Court would also have been of non-violation of Article 8.

## 9. The dictates of conscience

Conscience is not something that is necessarily tied to a particular religion or a particular faith. Conscience is what enjoins a person, at the appropriate moment, to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. This rational judgment of what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and persons with no particular religious beliefs or affiliations make such judgments constantly in their daily lives. Just as there is a difference between conscience and religion, there is also a difference between the prescriptions of conscience and religious prescription. The latter type of prescriptions – not to eat certain food\*, or certain food on certain days; the wearing of the turban or the veil; attendance at religious services on certain days – these may be subject to limitations in the manner and subject to the conditions laid down in the second paragraph of Article 9. But can the same be said with regard to prescriptions of conscience? In my view\* when a genuine and serious case of conscientious objection is established, a State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector) and negatively (by refraining from actions which punish the objector or discriminate against him or her).

If the number of cases coming up before the ECtHR and invoking Article 9 is relatively small, the number of cases in which specifically freedom of conscience had been examined is even smaller. I will here limit myself to two cases: *Bayatyan v. Armenia*, decided by the GC on 7 July 2011, and the aforementioned *Eweida and Others v. the United Kingdom*.

In *Bayatyan* the ECtHR recognised in clear terms for the first time the right to conscientious objection to compulsory military service. The applicant, a Jehovah Witness, was sentenced to thirty months imprisonment for having refused to perform military service. In the course of his trial he had repeatedly expressed his wish and readiness to perform alternative civil service, but at the time domestic law did not provide for such an alternative (even though the Armenian Government had already declared its intention to legislate in that respect). The *locus classicus* of this judgment are paragraphs 110 and 111:

*“110. In this respect, the Court notes that Article 9 does not explicitly refer to a right to conscientious objection. However, it considers that opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9 . . . . Whether and to what extent objection to military service falls within the ambit of that provision must be assessed in the light of the particular circumstances of the case.*

\* See *Jakoski v. Poland* 7 December 2010, where the Fourth Section of the ECtHR found a violation of Article 9 when Polish prison authorities persistently refused, for no valid reason, to supply a simple meat-free diet to a prisoner who adhered to the Mahayana Buddhist faith.

\* I have already expressed this view, together with Judge Vučinić, in the joint partly dissenting opinion in *Eweida and Others v. the United Kingdom* (see f.n. 5 *supra*).

*“111. The applicant in the present case is a member of the Jehovah’s Witnesses, a religious group whose beliefs include the conviction that service, even unarmed, within the military is to be opposed. The Court therefore has no reason to doubt that the applicant’s objection to military service was motivated by his religious beliefs, which were genuinely held and were in serious and insurmountable conflict with his obligation to perform military service. In this sense, and contrary to the Government’s claim. . . the applicant’s situation must be distinguished from a situation that concerns an obligation which has no specific conscientious implications in itself, such as a general tax obligation. . . . Accordingly, Article 9 is applicable to the applicant’s case.” (emphasis added)*

## 10. Eweida and Others

A serious and insurmountable conflict between her conscience and a less important or vital form of public service – that of marriage registrar – was also experienced by Ms Ladele, one of the four applicants in the *Eweida* case, but in her respect the court preferred to wash its hands in the principle of the “wide margin of appreciation” that States enjoy in how to resolve conflicting rights\*. The *Eweida* case concerned four applicants, and perhaps the first mistake that the ECtHR made was to group the four applications together, as this, in my view, prevented the Court from dealing in depth with the two applications concerning conscientious objection. Two of the applicants – Eweida and Chaplin – complained that they were not being allowed to manifest their religious beliefs in view of the prohibition to wear a small cross or crucifix on a chain round the neck. Eweida was employed with British Airways and worked at a check-in desk. Chaplin was a nurse. The restriction upon Eweida, allegedly based solely upon the company’s corporate image (the company had already made allowances in respect of the wearing of the turban by Sikhs) was clearly disproportionate (and discriminatory). In fact, while Eweida’s case was being heard by the English courts, British Airways did change its “policy” on the wearing of a cross such as the one she wanted to wear, but the English courts, basing themselves upon domestic law, refused to recognise that there had been any lack of proportionality in the whole affair. The ECtHR found (by five votes to two) a violation of Article 9 in respect of Eweida, and moreover that it was not necessary in the circumstances to examine the case under Article 14. The Court found unanimously that there was no violation in respect of Ms Chaplin. Ms Chaplin, in a totally irrational and unreasonable way, kept insisting that the cross should be held by a chain round her neck, even though such a chain could present a danger in handling her hospital patients. She was offered the possibility of having the manifestation of her religious belief – the cross – sewn into her clothes, or attached to them by Velcro, but she refused. She was, in effect, refusing a very reasonable accommodation. It is difficult to see how the Court could have come to a different conclusion.

The other two applications concerned in reality not a manifestation of a religious belief but an issue of conscience. Mr McFarlane considered homosexual relations as amounting to a sin. This notwithstanding, he opted to take up employment with a private organisation which was in the business of giving advice of a psycho-sexual nature to its clients. Already at the start of his employment he had exhibited some hesitation to give advice to same-sex couples, but he seems to have eventually overcome this hesitation. Some years later, while still employed, he undertook a special course in psycho-sexual therapy. His hesitations re-emerged, and after several meetings with officials of the organisation, it became clear that he was not prepared to advise same-sex couples. He was dismissed from the organisation. Even here the ECtHR was of the view that there was no violation of Article 9, a primary consideration being the fact that when he decided to take up employment with the organisation it was evident that he would be called upon to advise same-sex couples as well as different sex couples. Mr McFarlane could not, therefore, invoke his conscientious objection after taking up the employment – in much the same way as a person who

\* See in particular paras. 105 and 106 of the *Eweida* judgment.

voluntarily enlists as a soldier cannot later invoke his conscience to avoid participating in lawful military operations and combat.

Ms Ladele's case was, however, totally different. She started working with the London Borough of Islington in 1992. When in 2002 she became a marriage registrar, her duties did not include officiating at same-sex partnerships. In 2002 there was nothing which indicated or suggested that marriage registrars would in future have to officiate at these partnerships. Moreover when the Bill proposing same-sex partnerships became law in 2004, local authorities were only required to provide a "sufficient number" of registrars for the purpose, and in fact many local authorities decided to assign the task to those officials who had no objection to so officiating. But the Borough of Islington, succumbing to a political correctness clearly at variance with the principles and values of the Convention, decided to appoint all its marriage registrars as officials for same-sex partnerships. At first Ms Ladele managed to make informal arrangements whereby she would swap her same-sex partnership duties with those of other registrars who had no problems of conscience in this regard. However some of her colleagues objected to this, and the Borough insisted that Ms Ladele sign an undertaking that she would in future not have any objection to officiating at same-sex marriages. She refused, insisting – in my view, and in the view of the Judge Vučinić who joined me in the dissenting opinion, correctly – that the Borough could very easily accommodate her conscientious objection without in any way affecting the services which it provided. The Borough dug in its heels, and after fifteen years of impeccable and loyal service she was fired.

Only the first instance Employment Tribunal in the U.K. found in favour of Ms Ladele, holding that the local authority had "placed a greater value on the rights of the lesbian, gay, bisexual and transsexual community than it placed on the rights of [Ms Ladele] as one holding an orthodox Christian belief".\* The Employment Appeal Tribunal and the Court of Appeal, however, found for the Borough – clearly the principle of reasonable accommodation had not yet filtered through to the Palace of Westminster and the House of Lords. As has already been indicated, the ECtHR, although finding that Ms Ladele's conscientious objections was a serious one shared by millions of others – in the Courts words, she held an "orthodox Christian view" on the matter – it preferred to invoke the margin of appreciation principle:

*"The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights. . . In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them. . . ."*\*

## 11. Tentative conclusions

From the state of the current case law one may draw the following conclusions on the matter of freedom of conscience and conscientious objection: (i) Conscientious objection to military service seems to be more important, in the context of the Convention, than an equally serious and genuine conscientious objection to intimate homosexual relations; (ii) a public employee (and possibly even a private employee) may possibly be sacked for refusing to provide a service to which that employee has a genuine, serious and well-founded objection on grounds of conscience; and (iii) and perhaps more worryingly, the concrete right to freedom of conscience protected by Article 9 seems somehow to be hierarchically subordinate to third party abstract rights to equality of treatment. It should be recalled that Ms Ladele had never refused to provide a service to any person on the grounds of the sexual orientation of that person, nor had she attempted to obstruct such a service

\* See para. 28 of the *Eweida* judgment.

\* Para. 106.



provided by others, nor had she spoken out against the service or against people participating in it – she had only tried to adhere to her conscience which dictated to her in a cogent, serious, coherent and impelling way that direct participation by her in same-sex ceremonies was an evil to be avoided.

# THE LEGAL FRAMEWORK FOR THE PROTECTION OF MINORS UNDER SPANISH STATE LEGISLATION

LYDIA NORIEGA RODRÍGUEZ\*

## Abstract

The current article aims to explain the different protective measures for minors immersed in social and familial conflict situations regulated by the Spanish communal territorial statute law. Public administrative organisms assume competencies in this matter by authorising the taking of different measures depending on the specific circumstances of each case. Undoubtedly, it can be confirmed that the current legal framework has achieved the integrated protection of those children and youngsters whose parents or tutors do not meet, or do so faultily, the duties associated with parental custody. However, its application in practice has also shown the problems and deficiencies this normative framework suffers from.

## 1. Introduction

The protection system for minors is regulated by the Spanish legal system. This is a constitutional imperative since in chapter III, Title I of the Spanish Constitution of 1978, the responsibility is codified of public powers to ensure the social, economical and legal protection of the family, and within it, specifically the protection of minors, as is stipulated in article 39. The performance of this constitutional mandate obliges the legislature to promulgate precise regulations to redress the lack of legal protection of minors.

Therefore, Law 21/1978, 11<sup>th</sup> November, was promulgated to modify the Civil Code and the Civil Procedure Rules in the matter of fostering and other ways of protection of minors\*, delivering a meaningful renewal of their protection regulations until then. Later, the endorsement of Organic Law 1/1996, 15<sup>th</sup> January, for Legal Protection of the Minor and the partial modification of the Civil Code and Civil Procedure Rules\* currently in force, underpinned this change in the laws; rectifying certain deficiencies of the previous law. Legislation on minors at state level has been reformed by Organic Law 8/2015, 22<sup>nd</sup> July on adolescence and childhood protection system modification\* and by its homonym, Law 26/2015, 28<sup>th</sup> July\* which updated this legislation, modifying some protective institutions and proceeding to create new protection figures. In this study, we will analyze the current regulations after modifications taken place by this last regulation, the content of which is fundamentally found in the Civil Code (from now on; C.c.) and in the named Organic Law 1/1996 (from now on; O. L. 1/1996).

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\* B.O.E. (State Official Report) 17<sup>th</sup> November 1987, number 275.

\* B.O.E. (State Official Report) 17<sup>th</sup> January 1996, number 15.

\* B.O.E. (State Official Report) 29<sup>th</sup> July 2015, number 180.

\* B.O.E. (State Official Report) 29<sup>th</sup> July 2015, number 180.

## 2. Minors “at Risk”

This figure was not regulated by Law 21/1987, 11 th November; but by Organic Law 1/1996, 15<sup>th</sup> January. Modifications carried out by Law 26/2015 in the O.L. 1/1996 related to defining risky situations have the purpose of developing a detailed regulation of this category of minors. Thus, the legislator attempts to comprehensively regulate this situation as well as the procedure for defining it.

It is in article 17 where the risky situation is precisely regulated; which has modified in a relevant way the previous content of this precept of the O.L. 1/1996\*. As already commented, the legislator proceeds to a more detailed regulation which includes, among others, such aspects as its conceptualization, the programme of administrative intervention, the procedure for defining it, situations of possible prenatal risk. . . Likewise, it is worth mentioning the prominence given to municipal social services and their importance, together with health and education services in the detection, reception and analysis in cases of children lacking protection. In addition, the necessary collaboration among the different participant organizations is required.

Concerning its definition, it is established that “(...) *it will be considered risk situation the one in which, because of circumstances, shortcomings or family, social or educational conflicts, the minor is harmed in its personal, familiar, social or educational development, in its well-being or in its rights; so that, without reaching the entity, intensity or persistence which would substantiate a declaration of a situation of abandonment and the assumption of guardianship by the ministry of the law, the intervention of the competent public administration is needed to eliminate, reduce or compensate for the difficulties or maladjustments that affect it and avoid its abandonment and social exclusion without being separated from its family environment (...)*”\*.

At this point, the following aspects can be noted. The reform undertaken has not overcome the problem of the lack of specificity about the circumstances producing a risky situation that afflicted the previous version of the aforementioned article\*. While it is true that it established as a risk indicator, “(...) *among others, having a sibling declared in such a situation unless the family circumstances have changed remarkably (...)*”, the generalizations are maintained which, as legal commentators point out, create significant difficulties of interpretation; granting the public entity a wide margin of discretion in the assessment of a hypothetical risk situation\*. In an attempt to limit this conceptual generality, jurisprudence has been establishing the trigger causes of this situation\*. However, it should be noted that the reform has reduced the negative effects that situations of labour or economic precariousness could provoke in the family and which

\* I.E. LÁZARO (2015) “The reform of the protection system for children and adolescents”, *Family and Successions: legal notebook*, N° 111., pp. 20 and followings ss., emphasizes that with the new regulation (...) the risk situation significantly improves its regulation (...), given that the previous wording, although it contemplated the existence of the risk situation and differentiated it from that of abandonment, did not apply to its definition (...).

\* The conceptualization made by the legislator is in line with what was previously established by the civil commentators. As an example, L.ALLUEVA (2011) “Situations of risk and abandonment in the protection of minors”, *Journal for the analysis of Law*, InDret, N°. 4., p.10.

\* In the opinion of P. BENAVENTE (2011) “Risk, abandonment and foster care of minors. Performance of the Administration and interests at stake”, *Yearbook of the Faculty of Law of the Autonomous University of Madrid*, N°. 15., p. 20 *et seq.*, in the study carried out before the reform “(...) Organic Law 1/1996, of January 15, on the Legal Protection of Minors, (...) does not define or detail (...) risk situations (...)

\* A. GULLÓN (1996) “On Law 1/1996 on the Legal Protection of Minors”. *The Law*, N° 1., p. 1693, understands that in the risk statements, there is a “(...) all-embracing discretion of the Administration (...)”, circumstance, we understand, not remedied after the new regulation.

\* In this way, Judgment of Territorial Court of Lérida, 25<sup>th</sup> October 2011, reader POCINO, J.M., *J.U.R.*2005, marg. 7910, determines in a specific way those situations considered as “high risk level”, quoting verbatim (...) the lack of health and hygiene measures (both of the mother and the minor), partly derived from the lack of proper domicile, the lack of economic support, the destructuring of the family nucleus, and other derivatives (...), lack of encouragement of the minor (...).

commentators had previously highlighted\*, when it is arranged that “(...) *the concurrence of circumstances or material deficiencies will be considered a risk indicator but it can never lead to separation from the family environment (...)*”.

Due to the continuing ambiguity of the legal provisions, it appears that a judicial interpretation remains necessary of the state’s standard list of causes which can lead to a declaration that the minor is “at risk”\*; in order to avoid possible arbitrary administrative decisions, since the legislator missed an opportunity on the occasion of this reform of the legislation for the protection of minors.

On the other hand, the reform provides important evidence that the legislator, like the provisions before the reform, still considers that the risky situation does not per se reach sufficient gravity to justify proceeding, with the separation of the minor from his family nucleus; something which does happen when the declaration of abandonment take place, given its greater gravity\*.

In relation to family interventions by the competent public administrative institutions, the law requires that the rights of the minor are guaranteed and such interventions must aim at the reduction of the “(...) *risk indicators and difficulty which influence the personal, familiar and social situation in which it is (...)*”\*. The rule stipulates that this programme of intervention must be carried out in coordination with schools, social and health services and, where appropriate, with the competent collaborating entities or with other public organisms.

### 3. Abandonment

In reference to its conceptualization, the definition existing before the reform is kept when pointing the articles 18 O.L. 1/1996 and 172 C.c. that it will be considered “(...) *situation of abandonment the one produced as a consequence of the non-fulfilment on the impossibility of or inadequate exercise of the protection duties established by the laws for the guardianship of minors, when they (minors) are deprived of the necessary moral or material assistance (...)*”.

However, and contrary to the situation of risk, in the aforementioned section 2 of article 18 of the above mentioned rules, there are established, in an embryonic way in a state-level regulation, the circumstances which determine the declaration of abandonment; being considered one of the greatest novelties of the aforementioned reform\* and addressing one of the observations made by the Committee on the Rights of the Child to Spain\*. The legislator has considered the declaration

\* C.NÚÑEZ (1996) "Some considerations on the Organic Law 1/1996 15<sup>th</sup> January, on the Legal Protection of Minors", *The Law*, N<sup>o</sup>. 1., p. 1487. The author, in her commentary on the wording of the Organic Law prior to the reform, states that sometimes there is a declaration of risk or even of abandonment, when there are situations of job or economic precariousness in the family that do not imply neglect or important prejudice for the minor. A consideration that, in our opinion, the new regulation has managed to overcome.

\* As it is collected, for example, in art. 49 of Law 3/2011, 30<sup>th</sup> June, of support for the coexistence of the family in Galicia, B.O.E. 30<sup>th</sup> July 2011, n<sup>o</sup>. 182.

\* Highlighted by the doctrine, among others L. ALLUEVA (2011) "Situations of risk and abandonment ..." *op. cit.*, pp. 17 *et seq.*, "(...) the situations of risk do not reach the entity, intensity or persistence sufficient to advise the separation of the child from the family nucleus. On the other hand, the situations of helplessness, when facing a greater gravity, do advise such separation. Therefore, the legal consequence that derives is different, that is, the measures in order to mitigate the risk or abandonment will be different, given that the need for protection of departure has different scope (...)"

\* In their study, N. CAPARRÓS CIVERA & I., JIMÉNEZ-AYBAR (2001) *Familiar foster care. Legal and social aspects*. Madrid: Rialp, pp. 150-151, develop the content of these administrative assistance interventions.

\* As it is established in the Preamble of Law 26/2015, the clarification and unification of criteria for its declaration is thus sought.

\* The requirement for the State to adopt all the necessary measures to ensure that the legislation and administrative regulations in all the Autonomous Communities are completely in accordance with the principles and provisions of the Convention and with its two Optional Protocols.

of abandonment as appropriate in those cases in which the seriousness of existing circumstances endangers the physical and/or moral stability of the minor; thus, among others, when there is abandonment, mistreatment, sexual abuse, gross negligence in compliance with nutritional and health obligations, inducement to begging, delinquency or prostitution, absence of schooling or repeated and not adequately justified lack of assistance to the educational service. . .

In this sense, and to temper the harmful consequences of such a declaration, the Constitutional Court itself\* has repeatedly held that the declaration of abandonment must always be utilised in a restrictive way; being only appropriate when it is satisfactorily proved that the minimum standards in the exercise of custody over minors have not been reached. Thus although the best interest of the children is a basic priority\*, so is the right of the parents to have the minor live with them, as well as the right of the minor himself to grow up in his family of origin. We understand that following the approval of the aforementioned reform, this constitutional interpretation remains fully valid.

As pointed out, article 172.1 C.c. decrees that if the minor is declared abandoned, it is the duty of the relevant public institution to assume the *ope legis* guardianship and to put into action protective measures for his assistance. An abandonment situation is considered a “situation resulting from non-fulfillment (of parental duties). . .”

From the definition given in the Civil Code, it is implied that once a causal relationship is established between (a) the non-fulfillment or inappropriate implementation of the legal duties concerning the protection of minors and (b) the loss of moral or material assistance suffered by the minor, one must proceed to declare their abandonment\*.

In relation to the first criterion, it is worth pointing out that the legal framework in force does not specify which legal protective measures are the ones, the non-fulfilment of which may cause a declaration of abandonment. However, most scholars opine that it those protective measures that relate to the personal parental custody or guardianship\*, meaning those duties concerning safeguarding, feeding, accompanying and providing a comprehensive education to the minor.

On the other hand, it is absolutely required that the abandonment declaration is made in relation to a real situation of need. It is essential that the minor is morally or materially neglected. Therefore, it will not be made, if someone carries out those duties, even if the biological parents do not meet their responsibilities or do them negligently\*.

#### 4. *Ex lege* guardianship

*Ex lege* guardianship is a protective measure for the minor in social and familial conflict, introduced by Law 21 / 1987, 21<sup>st</sup> November, and regulated at present by Law 1 / 1996, 15<sup>th</sup> January, that has modified, among others, articles 172 C.c. and following. *Ex lege* guardianship becomes official automatically when the minor is declared abandoned. As is disposed in article 172.1 paragraph 3 C.c. “*The assumption of guardianship by the public institution produces the*

\* Judgment of Supreme Court 28<sup>th</sup> February, reader ASUA, A., R.T.C. 2001, marg. 11; Judgment of Supreme Court 26<sup>th</sup> September 1990, reader LEGUINA P., R.T.C. 1990, marg. 143; Judgment of Supreme Court 18<sup>th</sup> October, reader CRUZ, C., R.T.C. 1993, marg. 298.

\* Judgment of Supreme Court 28<sup>th</sup> February, reader ASUA, A., R.T.C. 2001, marg. 11; Judgment of Supreme Court 26<sup>th</sup> September 1990, reader LEGUINA P., R.T.C. 1990, marg. 143; Judgment of Supreme Court 18<sup>th</sup> October, reader CRUZ, C., R.T.C. 1993, marg. 298.

\* I. RAVETLLAT (2007) "Protection of minors. Special emphasis on child abuse (General part)", *Review of Law UNED*, N<sup>o</sup>. 2., pp. 77-94. M. SERRANO (2007) *Minors in protection*. Madrid: Legal diffusion and current affairs.

\* J.I. IGLESIAS (1996) *Custody guardianship ex lege and foster care of minors*. Barcelona: Cedecs., p. 169.

\* R. DE ROMÁN (1999) "*Guardianship, custody and conservatorship of minors*". *Protective institutions of minors. (Special reference to the regulations of Castilla-León)*. Burgos: University of Burgos.,p. 104.

*suspension of parental or ordinary custody. However those acts related to patrimonial matters which are beneficial to the minor and which are realized by their parents or tutors in their representation will be accepted*", this means, the title of *ex lege* guardianship is theoretically compatible with the parental or ordinary custody, but not in practice.

As disposed in article 172 ter.1. C.c., its implementation, will be carried out through familial or sheltering foster care. The resulting responsibilities of safeguarding the minors (looking after them, feeding them, and providing them with a comprehensive education) will be carried out by the people responsible to exercise guardianship; either the principal of the shelter or the person/people fostering the minor. The relevant public institution will manage the patrimony of the minors, that being the case, and will legally represent them, except in those acts where minors can represent themselves.

The involvement of the public institution must lead to the creation of *ex lege* guardianship which is regulated in article 172.1 C.c. Once it has declared the abandonment of the minor and assumed the automatic guardianship, the administrative institution will have to communicate the decision it has taken to the public Prosecutor and parents, fosters or guardians and the minor himself if he has enough judgment and in any case, if he is twelve years old or over and this within a maximum time period of 48 hours. Whenever possible, this will be communicated in a face-to-face and understandable way which focuses on the causes which originated this situation as well as its effects.

*Ex lege* guardianship is a protective measure intended only for those minors who are in a situation of abandonment. Besides, it has a provisional or temporary nature, as it is applied only until the originating causes last. It is not, therefore, a definitive protective measure, but a prior step to other, more stable, legal solutions; family reunification if the abandonment situation is overcome, or integration into a different family from that of birth, with a provisional (fostering), or definitive (adoption)\* nature.

## 5. Administrative custody

The modifications implemented in the custody field by the new normative framework can be summarized as follows: the creation of a new modality - temporary custody, the modification of certain aspects of the voluntary custody of minors, such as its duration, and the introduction of important variations in its exercise.

### 5.1. Temporary custody

A new mode of custody is created and codified by article 172.4 C.c. which provides for its formalization by means of an administrative resolution when it is necessary to provide immediate assistance to the minor without having to proceed with his declaration of abandonment. It caters for situations of urgency, while proceeding, as both precepts dictate, "(...) *to practice the precise diligence needed to identify the minor, investigate its circumstances and verify, in its case, the real situation of helplessness (...)*". For reasons of legal security it must be subject to temporal limitations. However, the standard only demands that the term be as short as possible.

As indicated in the aforementioned article of the Civil Code, during this time, proceedings must commence either for a declaration of the minor's abandonment and the consequent assumption of the guardianship *ex lege* by the public institution or for the promotion of the appropriate protection

\* E. HIJAS (1995) "Guardianship, custody and foster care in Act 21/1987 (substantive and procedural aspects)", *Civil News*, N<sup>o</sup>. 1., pp. 36 and following.

measure. The legislator specifies that if there are suitable people to act as guardians of the minor, the procedure is proposed for the constitution of ordinary guardianship. As a guarantor of the compliance of these obligations of the public entity, the Fiscal Ministry is selected; which must promote the actions to adopt the appropriate protection measures if the public entity would not have formalized the guardianship or adopted another resolution within the prescribed period\*.

## 5.2. Administrative or voluntary custody

Assistential custody is a protective measure regulated in the State Law; in particular, in 1<sup>st</sup> point of article 172 bis C.c., which claims "(...) *Whenever parents or tutors, due to serious causes, are not able to look after the minor, they could request the public institution to assume the custody of the minor during the time needed (...) Additionally, the custody will be assumed by the public institution, when it is stipulated by the Judge when it is legally provided (...)*".

In the mentioned article the legislator has established two types of custody. The first is called voluntary custody, which would translate into an administrative custody; given that it would be established without judicial intervention. The main characteristic of this custody would be its request from parents or tutors. The second type of custody refers to the judicial custody. Its establishment is dependent on the decision of the Judge in the cases in which such a decision is legally required.

In relation to the first type of custody, it is worth pointing out that the State Law allows those parents and tutors who, for justifiable causes, are temporarily unable to look after their child, to request the public authority to assume the custody for the time needed. These are the three requirements to request it\*:

The causes which make it impossible for parents or tutors to look after the minor must be beyond their control. This means that lack of concern, disinterest or carelessness are absent from the attitude of parents or tutors (for example, due to health problems, emigration, loss of freedom, ...)

The circumstances which make impossible the fulfillment of duties concerning the care of the minor must be temporary and transitory.

An express request must be made from parents or tutor/s.

One of the novelties introduced by Law 26/2015, refers to its maximum duration which must not exceed two years, as is provided in articles 172 bis ap. 1 C.c.\* and 19.2 O.L. 1/1996, unless exceptionally its extension is considered convenient in the minor's interest or "(...) *for the foreseeable family reintegration in a short period of time (...)*", as stated in the mentioned articles respectively. The last ground adds that in these cases, the family must commit to submit to the professional intervention determined by the public entity.

As the legislator warns in the Preamble of the Law 26/2015, 28<sup>th</sup> July, the purpose of this time limitation is to avoid chronic situations concerning the custody of a minor which prevent him from developing permanent and stable family situations\*. After this period of time, the minor will have

\* In our opinion, despite the absence of a legal term for this measure, the reference in the aforementioned precept "(...) to the indicated period (...)" can be interpreted in that it must be determined in the administrative decision declaring the provisional custody.

\* J.I. IGLESIAS (1996), *Custody, ex lege guardianship and foster care of minors, op. cit.*, pp. 97 and following.

\* Fortunately, the indeterminacy of the duration of this figure present in the wording of art. 172 bis ap. 1 C.c. of the Preliminary Draft has been modified when it stipulated "(...) that it will not be able to surpass the one foreseen by the law as the maximum period of temporary care of the minor (...)", although it is true that art. 19 .O.L of the aforementioned Draft Bill expressly stated the maximum duration of two years.

\* Circumstance revealed prior to the reform by jurisprudential doctrine. Judgment of Territorial Court of Zaragoza

to return with his family or be declared in abandonment, according to the procedure established in the mentioned precept of the Civil Code\*.

### 5.3. *Judicial custody*

The indeterminacy of the legislator about the particular legal grounds on the basis of which the Judge must award the custody, has contributed to the existence of opposite doctrinal interpretations about this aspect of custody. On the one hand, it is argued that it is only applicable in those cases stated in the Civil Code; on the other hand, and from a less restrictive standpoint, it is asserted that judicial custody must be awarded whenever parents or tutor/s cannot provide the needed assistance to the minor, whatever the cause.

The majority doctrine\* seems to limit judicial intervention to the cases covered by the Civil Code that could be listed as follows:

Firstly, it would be applicable in the case covered by the second paragraph, first point of article 103 C.C.\*, in which temporary measures in the nullity demand are envisaged, when it is determined "(...) *Exceptionally, children can be trusted to grandparents, relatives or other people who agree to, and if not possible, to a relevant institution/organism, conferring the exercise of the guardianship that will execute under the judge authority (...)*". Besides, its application would take place when the Judge must pronounce the orders/regulations he considers appropriate in order to keep the minor from danger or prejudice "(...) *in the cases there is a change of holder of the custody (...)*", as established in article 158.2 C.c.

However, another school of thought\* disagrees with the previous proposal and claims it is not only relevant as regards those specifically described cases related to a specific process, but also as regards any other case in which the judicial authority, due to diverse circumstances, deems appropriate to award custody over the minor. In the author's opinion, the purpose of the legislator is to provide an overall protection of the minor; so it does not appear correct to limit the protective actions only to those cases described in the Civil Code, and this protection/support should be extended to all cases where the minor is in an environment which makes it vulnerable.

The practice of administrative custody will be carried out through familial or residential foster care. But in contrast to the cases when a public entity assumes the *ex lege* guardianship of the minor, in these particular cases there is no suspension of the inherent exercise of the parental custody or guardianship, so parents or tutor/s remain responsible for their child or ward.

21<sup>st</sup> July 2004, reader SOLCHAGA, *J.U.R.* 2004, marg. 217648. Also, different authors had influenced this issue; J.I. IGLESIAS (1996), by noting that the expression "(...) for as long as necessary (...)" alludes to the necessary requirement of the temporality of the measure, *Custody, guardianship ex lege and foster care of minors, op. cit.*, p. 137.

\* Despite not being explicitly included in the previous wording of the regulation, it was not uncommon for public entities, endorsed on numerous occasions by the judicial organisms, to agree the declaration of abandonment after the exercise of custody or even detect a situation of helplessness after requesting the guardianship by their parents or guardians. For illustrative purpose, *vid.*, Judgment of Territorial Court of Toledo 13<sup>th</sup> December 2001, reader DE LA CRUZ, A.C. 2002, marg. 378; Judgment of Territorial Court of Madrid 23<sup>th</sup> May 2002, reader HERNÁNDEZ, R., A.C. 2002, marg. 1351; Judgment of Territorial Court of Valencia 30<sup>th</sup> April 2002, reader MANZANA, M.P., *J.U.R.* 2002 marg. 185690; Judgment of Territorial Court of Gerona 12<sup>th</sup> July 2002, reader FERNÁNDEZ, J.M., A.C. 2002, marg. 1156.

\* F.BENITO (1997) "Proceedings against risk situations and abandonment of minors, guardianship by Ministry of law and custody in voluntary jurisdiction", *The Law*, pp. 1742 and following; B.GONZALEZ (1997) *The voluntary jurisdiction. Doctrine and forms*. Pamplona: Aranzadi., p. 823

\* That article was repealed by law 42/2003, 21<sup>st</sup> November (*B.O.E.* n<sup>o</sup>. 280, on 22<sup>nd</sup> November 2003), amendment of the Civil Code and the Civil Procedure Law on family relations of grandchildren with grandparents.

\* B.VARGAS (1994) *The protection of minors in the legal system: adoption, abandonment, automatic guardianship and minor's custody. Doctrine, jurisprudence and legislation regional and international*. Granada: Comares., p. 66.



## 5.4. *The exercise of custody and automatic guardianship*

Regarding this aspect of both institutions, the legislator has introduced important developments that required a specific regulation that, on the whole, appears to be a positive development, although it should have been deepened in greater detail as regards certain issues, as we explain below.

### 5.4.1. *Prioritization of familial versus residential foster-care*

In relation to the exercise of custody, art. 172 ter C.c. states that it will be carried out through family foster care or in case this is not possible or convenient in the minor's interest, by residential care. In the same sense, art. 11.b O.L. 1/1996 establishes that when maintenance in their family environment is not possible, "(...) *the adoption of family and stable protection measures will be guaranteed, prioritizing, in these cases, family foster care as opposed to institutional (...)*"\*.

In the author's opinion, the formal prioritization of familial vis-à-vis residential foster-care, is extremely positive because it allows the child to integrate into a family instead of a care center, which undoubtedly will bring it significant emotional benefits\*. However, in homage to the child's supreme interest, the legislator has also established the possibility of prioritizing the choice of residential foster-care when circumstances so dictate\*. Finally, it should be noted that this method is not only considered subsidiary with respect to familial foster care, but also in relation to other protection measures.

### 5.4.2. *The principle of familial reintegration*

One of the issues on which the reform has a special impact is that relating to family reunification. It is in art. 11 O.L. 1/1996 that the guiding principles in this matter are contained, which were already contemplated in the previous wording of the aforementioned precept, among which the supremacy of the best interest of the minor stands out and insofar as it is not incompatible with it, "(...) *maintenance in his family of origin (...)*"\*. In harmony with this, the 2<sup>nd</sup> paragraph of art. 172 ter C.c., determines that the supreme interest of the minor will be pursued and priority will also be laid, insofar as it is not contrary to it, on: "(...) *its reintegration into the family itself and that the custody of the brothers is entrusted to the same institution or person so that they remain united (...)*". In addition, a review is required every six months at least, of the visitation regime and any other form of communication between the minor and his family.

In this regard, a new art. 19 bis in the O.L. 1/1996 entitled 'provisions common to custody and guardianship' has been introduced. In it, the obligation of the public entity to prepare an individualized plan of protection for each child in its custody or guardianship is established in which the objectives, forecast and term of the measures to be adopted will be established "(...) *included, in its case, the family reintegration program (...)*"\*.

\* This premise was not contemplated in the Preliminary Draft, so its inclusion in the final drafting of Law 26/2015 clearly determines the legislator's intention of influencing the preference of familiar versus residential care.

\* In this line of principle, *vid.*, A.NÚÑEZ (2008) "The system in the protection of minors", in *Current aspects of the legal protection of minors*. Navarra: ed. Aranzadi., p. 208, who understands that the modality of familiar foster care versus residential is much more beneficial because it is in the family "(...) where there is greater stimulation, continuity in care, more intense relationships and more individualized and personal treatment, and therefore, it is in this context that the physical and, above all, emotional needs of children are covered in a more effective and healthy way (...)".

\* In relation to the criteria defended by the jurisprudence and the scientific doctrine on the assumptions in which it is preferable the constitution of the residential shelter in front of the family, prior to the reform, *vid.*, L. NORIEGA (2010) *Familiar foster care of minors. Its regulation in the Civil Code and the Civil law of Galicia*. Madrid: ed. Colegio Registradores de la Propiedad, pp. 239 and following.

\* See, E.CORRAL (2001) "The interest of the child and the right of parents not to be separated from their children", *General Law Review*, N<sup>o</sup>. 682., pp. 6709 and following.

\* Not included in the previous wording, but indicated by the scientific and jurisprudential doctrine. *Vid.*, M.A. PÉREZ

Likewise, it is indicated that when a minor presents some type of disability, any support that he has been receiving must be maintained and if not in receipt of support the adoption of those measures that are adequate for his needs must be made. This legislative amendment seems very commendable for two reasons; the first of them, because one of the biggest problems that the previous regulation suffered from was the relative lack of a specific project for each child, which in practice caused the lack of definition of their situation. And the second, because there was no express mention of the family reunification program. This section affects paragraph 2 of the aforementioned precept by stating that "(...) *when the prognosis is derived from the possibility of returning to the family of origin, the public entity will apply the family reintegration program (...)*". In addition, when the public entity decrees family reunification, it must carry out a subsequent follow-up of support to the minor's family.

Another pending issue in the previous regulatory framework was related to the conditions that the family had to fulfill in order to permit family reunification. In fact, the problem was to determine when the obstacles to such were to be deemed irreversible\*. In the author's opinion and without pretending to be exhaustive, what could be cited as disqualifying causes for the exercise of parental authority which are extremely serious and difficult to solve include: the physical or psychological abuse inflicted on the child continuously, sexual abuse, serious and irreversible mental illnesses of the parents, the chronic problems of drug dependence or alcoholism...

At present, the law itself, without actually stipulating the cases in which the family reintegration of the abandoned child is feasible, which it would have been desirable to do, has taken an important step when establishing in section 3 of the aforementioned art. 19 O.L. 1/1996 that for a decision to be taken in this sense "(...) *it will be essential that a positive evolution of the same [family] has been verified, objectively sufficient to re-establish the family coexistence, that the links have been maintained, that the purpose of carrying out the parental responsibilities adequately is evident and it should be noted that the return with it must not involve significant risks for the child as confirmed through the corresponding technical report (...)*".

## 6. Familial foster care

This is a protective measure for the minor immersed in a familial conflictual situation. When it is not possible for the parents, whatever their circumstances, to exercise correctly their functions, the minor will be separated from its original family environment through an abandonment declaration and will be integrated into another family core. Familial foster care is an essentially private protective measure. People who foster minors temporarily fulfil all the duties related to guardianship; look after the minors, feed them, keep them accompanied and provide them with an overall education. There is in fact a considerable overlap with the content of the duties concerning parental custody described in article 154 C.c., although only as to the personal aspect, since the foster careers do not assume any duties related to the representation or administration of the personal property of the

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(1997) "The social deprivation of the child: a general view on the matter of institutions for the protection of minors", in *The lack of social protection of minors and the institutions of protection regulated in the Organic Law for the Protection of Minors*. A Coruña : University of A Coruña., pp. 28-30. H.DÍEZ (2003) "The impossible return of the child who has been fostered to his family of origin?". *Private Law Review*, Nº 7., p. 176; LÓPEZ F., LÓPEZ, B., FUERTES J, SÁNCHEZ J.M. & MERINO J. (1995) *Childhood needs and child protection*). Madrid: Ministry of Social Affairs., p. 58. Likewise, there are numerous jurisprudential pronouncements issued in this sense; among others, Judgment of Territorial Court of Asturias 19<sup>th</sup> September 2005, reader RODRÍGUEZ-VIGIL, E., *J.U.R.* 2005, marg; Judgment of Territorial Court of Granada 23<sup>th</sup> February 2005, reader GALLO, A., *J.U.R.* 2005, marg. 135049

\* This is what H. DÍEZ, expresses, "The impossible return of the child who has been fostered to his family of origin?", *op. cit.*, pp. 180 and 181, when it considers that although it is true that it is very difficult to determine if the child will be able to return to his family, attention should be paid to the transitory of the situation of homelessness and the causes that caused it.

minor\*.

The Law is specific when it states that the sheltered must be underage minors. In relation to those who could take them in, although the normative framework is not clear enough, it has been concluded that heterosexual couples with kids are preferred, although the Law allows any adult with full ability to become a familial foster-carer. It is worth mentioning that, at present, single people and *more uxorio* couples – whatever their gender and whether they are registered or not in the appropriate Registers\*, are suitable foster-carers.

The most important changes introduced in this measure of protection, refer mainly to the establishment of the foster status in which the rights and obligations of these people, are set out in art. 20 bis O.L. 1/1996 as well as the rights of the foster child, art. 21 bis O.L. 1/1996.

On the other hand, the legislator has reformed the modalities of family foster care; it is preceded by the regulation of urgent family foster care. A maximum duration is laid down for the so-called temporary family foster care before simple family foster care is established and the pre-adoptive family foster care is abolished, which is considered a phase of adoption and is regulated by art. 176 bis C.c.

In another sense, article 173. bis C.c. indicates that familial foster care can take place in the minor's own extended family or in another's, and in this last case may be specialized "(...) *understanding as such the one that takes place in a family in which one of its members has qualification, experience and specific training to perform this function with respect to minors with special needs or circumstances with full availability and therefore receiving the corresponding financial compensation, without assuming in any case a working relationship*". The specialized reception could be professionalized when, meeting the aforementioned requirements of qualifications, experience and specific training and there is a working relationship of the foster carers with the Public Entity.

As commented, fostering could assume urgent, temporary or permanent modalities according to its objectives\*.

### 6.1. Urgent familial foster care

This is appropriate, mainly, for children under six years old, Its duration may not exceed six months, while the corresponding protection measure is decided, art. 173 bis.2 a) C.c.

The purpose of this modality of foster-care is twofold: on one hand, the institutionalization of the minor is avoided and on the other hand there is a deadline for an in-depth assessment of the individual, family and social circumstances that have led to the situation of lack of protection. In principle, its practical application is being restricted to children under six years old, although the doctrine advocates its extension to any minor who must be separated from his family urgently. Also, despite the silence of the legislator, it is intended that its execution is carried out by professional foster-carers who must make themselves available to receive a child in any circumstance and time. The maximum duration of this foster-care arrangement will be six months; a period in which

\* A.J. PÉREZ (1998) *Family law, adopción, foster care, guardianship and other institutions for the protección of minors. Opinions, legal text, case studies, case law and forms*. Valladolid: Lex nova, p. 328.

\* L.NORIEGA *The familial foster care of minors. Its regulation in the Civil Code and the Galician Civil law, op. cit., pp.71- 84 and following, collects the foundation of scientific doctrine on this issue.*

\* An analysis on the use of the institution throughout the years, vid., J. FERNÁNDEZ (2008) *Familial foster care in Spain: an assessment of results: research conducted by the research group on family and childhood (GIFI) of the University of Oviedo, through an agreement with the Ministry of Labour and Social Affairs*. Madrid: Ministry of Labour and Social Affairs.

competent professionals must effect the corresponding diagnosis\* in which the feasibility of the child's return to its family environment or the adoption of a more stable protection measure will be decided.

## 6.2. *Temporary familial foster care*

The Civil code stipulates that the formalization/execution of the temporary familial foster care will be obligatory in these two cases; when the reintegration of the minor back into their original familial environment is foreseen, or as a temporary measure while a more stable arrangement is adopted, since this measure fulfils the intrinsic role of familial fostering. This therefore highlights its temporary and transitory nature\*, as determined by art. 173 bis.2 b) C.c.

In this way, in the first hypothesis temporary familial foster-care will take place when the study of the familial and personal situation of the minor determines that family reunification is possible\*. It is considered convenient, whenever possible, that in these cases the familial fostering is authorised within the context of the minor's extended family (grandparents, uncles, aunts..., or any other relative who can assume this role) and to avoid, as much as possible, the assumption of a fostering role by individuals who are not connected to the original family environment\*.

In relation to the second hypothesis, its authorisation would proceed in those cases in which the reunification of the minor with its family is not possible, or when it would not be possible to select a more stable protective measure either; due to causes attributable to the minors themselves, or due to the lack of suitable people to assume these roles. It is considered appropriate to integrate the minor into a non-related family only for the strictly necessary time period, in order to avoid the creation of strong links between the minor and their foster-carers, which would make much more difficult the subsequent separation. It is essential that the foster-carers are aware of the temporary and transitory nature of this measure. During the fostering period, the public entity must start the relevant legal proceedings to make possible the adoption or guardianship of the minor.

In a novel way, the legislator establishes that the maximum duration of this type of foster care cannot exceed two years; unless an extension of the measure is advisable in the minor's interest.

## 6.3. *Permanent familial foster care*

This is provided for by article 173 bis 2<sup>nd</sup> c) of C.c. stating that the permanent familial foster care will take place when "(...) *at the end of the period of two years of temporary foster care and this because family reunification is not possible, or directly in cases of minors with special needs or when the circumstances of the minor and his family so require (...)*".

It is understood that this measure will only be resorted to when there is no possibility for the minor to return to his or her original family or when, due to other circumstances, adoption or guardianship are not viable options either, and it is advisable to integrate them in a stable and long-lasting way in the foster family, with no need to create parental links\*. Among the causes

\* P. AMORÓS & J. PALACIOS (2004) *Familiar foster care*. Madrid: Alianza., p. 198.

\* MM HERAS (2002) *The conventional foster care*. Madrid: Montecorvo., p. 227; M.LINACERO (2001) *Legal protection of the minor*. Madrid: Montecorvo., p. 312.

\* A.M.PADIAL (2007) "Protección of abandoned children youngster with social exclusion risk", in *Legal studies on the protection of childhood and adolescence*. Valencia: Tirnat lo Blanc., pp. 93-94. H. DÍEZ (2004) *Simple familiar foster care as one of way of exercising the custody of minors*. Madrid: Ministry of Labor and Social Affaris., pp. 460-461.

\* R.J. MOLERO (2006) *Foster care in large families: a study of the profile and needs*. Valencia: City Hall of Valencia.

\* M. LINACERO (2001) *Legal protection of the minor*, op. cit., p. 313; F. RODRÍGUEZ (1997) "The foster care of

which gave rise to the development of this measure, it is worth mentioning the presence of physical or psychological problems, including socially maladjusted behaviour. . . which complicate the possibility of adopting these minors. On the other hand, it is considered appropriate to authorize this measure when there are relatives or people close to the environment of the minor who cannot however adopt them, as they default on the legal requirements for doing so.

The Civil Code, in the mentioned article, decrees that only the relevant public organism will have the power to request the Judge to grant the permanent foster-carers the inherent faculties of guardianship for the execution of their responsibilities; mainly those referring to the representation of the minor and the management of their property.

## 7. Residential foster care

Residential foster care will take place when the public entity holding the administrative or ex lege guardianship of minors, determines to integrate them into a foster care shelter. Law 26/2015 has introduced important modifications in the regulation of this measure. Art. 21.1 of the O.L. 1/1996 establishes for the first time in a rule of state law, the basic obligations with respect to minors that must be fulfilled in the residential centers; pursuing, fundamentally their protection, integration as well as "(...) *the welfare of the minor, his physical, psychological, social and educational development within the framework of the individualized protection plan defined by the Public Entity (...)*".

On the other hand, one of the most important new features of this legislation is the express declaration of the subsidiarity of the measure of residential care in relation to familial foster care included in art. 21.3 of the O.L. 1/1996. It stipulates that this principle will apply to any minor, but especially to children under six years old. And the Law adds "(...) *Residential foster care for children under three years old will not be granted, except in cases of impossibility, duly verified, of adopting the foster care measure at that time or when this measure does not suit the best interests of the child. This limitation to agree on residential care will also apply to children under six years old in the shortest possible period of time. In any case, and in general, the residential foster care of these minors will not last more than three months (...)*". In our opinion, it is very praiseworthy that the legislator has set the priority of familial foster care as higher than the residential one and we also consider it of the utmost importance that children under three, except in cases where other measures are impossible, should not enter a center, following the jurisprudential and doctrinal principles governing this issue\*.

Finally, it should be noted that one of the main characteristics of this type of foster care is its temporary nature; since several scientific studies have proved that the confinement of the minor in these types of centers, and the subsequent absence of a familial environment where they can grow

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minors. *Aranzadi Civil*, N<sup>o</sup>. 3., p.141; P. AMORÓS & J. PALACIOS *Familiar foster care, op. cit.*, p. 84

\* Judgment of Territorial Court of Santa Cruz de Tenerife 14<sup>th</sup> July 2003, reader ARAGÓN, P., *J.U.R.* 2003, marg. 24600; Judgment of Territorial Court of Lérida 25<sup>th</sup> October 2004, reader POCINO, J.M., *J.U.R.* 2005, marg. 7910; Judgment of Territorial Court of Cuenca 9<sup>th</sup> December 1995, reader VESTEIRO, J., *A.C.* 1995, marg. 2416; Judgment of Territorial Court of Cantabria 4<sup>th</sup> February 2003, reader DE LA HOZ, J., *A.C.* 2003, marg. 1345; Judgment of Territorial Court of Castellón 18<sup>th</sup> October 2004, reader SOLAZ, E., *J.U.R.* 2004, marg. 313931; Judgment of Territorial Court of Zaragoza 29<sup>th</sup> October 2004, reader NAVARRO, E., *J.U.R.* 2004, marg. 297765; Judgment of Territorial Court of Navarra de 15<sup>th</sup> February 2005, reader GOYENA, F.J., *J.U.R.* 2005, marg. 85280; Judgment of Territorial Court of Asturias 19<sup>th</sup> September 2005, reader RODRÍGUEZ-VIGIL, E., *J.U.R.* 2005, marg. 236955; Judgment of Territorial Court of Cantabria 25<sup>th</sup> April 1997, reader DE LA HOZ, J., *A.C.* 1997, marg. 903; Judgment of Territorial Court of Cádiz 29<sup>th</sup> July 2004, reader SANABRIA, A.L., *A.C.* 2004, marg. 2020; Judgment of Territorial Court of Salamanca 25<sup>th</sup> May 1996, reader ANAYA, F., *A.C.* 1996, marg. 942; Judgment of Territorial Court of La Rioja 3<sup>rd</sup> February 2003, reader MOTA, J.F., *J.U.R.* 2003, marg. 93395; Judgment of Territorial Court of Málaga 16<sup>th</sup> May 2000, reader ANGITA, J., *J.U.R.* 2000, marg. 264224.

up, translates into a severe lack of emotional bonding, which is critical for their psychological and emotional development\*.

## 8. Conclusions

The reform of the child protection system has been achieved through the promulgation of two legal frameworks: Law 26/2015, 28<sup>th</sup> July and Organic Law 8/2015, 22<sup>nd</sup> July. Both laws have introduced changes in different regulations, including the Civil Code and the Organic Law 1/1996, 15<sup>th</sup> January. In general terms we can say that the changes brought about are significant; providing greater certainty to this legal regime than existed in the previous legislation. However these reforms do not amount to a real renewal of that system because they do not provide for new protective measures for the minor, with few exceptions. In any case, this legislation was necessary because the passage of time had left outdated or without practical application certain legal institutions contained in previous regulatory frameworks, in addition to suffering from known shortcomings and defects that the promulgation of the new legislation has tried -and in some cases- managed to overcome.

Regarding the situation of a minor 'at risk', the current regulatory framework seems to be successful. In particular, the author considers to be very positive for the legal certainty it provides, the regulation of the procedure for defining minors in this category, which was absent from the previous legislative text. However, in our opinion, greater concreteness is required in specifying the precise situations in which a declaration that a minor is at risk may be made; so as to avoid potentially excessive latitude for discretion in choosing whether to make such a statement. There is also a need for the legal stipulation of the measures to be administratively applied in these cases.

It should be noted that one of the most important innovations of the reform is the precise stipulation of the circumstances generating 'abandonment'. As discussed, it has helped alleviate the uncertainty that existed around this legal institute.

One of the few figures created *ex novo* by the new legislation is the referred to provisional custody for those cases in which it is necessary to provide immediate assistance to a minor and at the same time, allow a reasonable time to pass to study his family situation. As discussed, the author fully agrees with the legislator on the opportunity of its regulation, thus avoiding that in these cases the minor is immediately declared to be in a state of abandonment, without having sufficient elements on which to base such a decision. However, there is no clear reference to the maximum time duration of this measure, which in the writer's view it would be important to determine to avoid unnecessary lengthening of this mode of custody.

In relation to administrative or voluntary custody, it must be noted that the only change introduced, albeit one of unquestionable significance, is that relating to the provision of a maximum of two years duration, while preserving the other criteria in terms of its formalization and procedure.

Another success of the new regulation is that of having for the first time enunciated in the context of State legislation, the principle of the priority of familial foster care relative to residential care. On the other hand, the importance of the principle of family reunification has also been highlighted and, although the conditions that the family has to fulfill to allow the return of the child to its bosom have not been expressly specified, the legislator has established a series of conditions for this reunification to be effective.

In general, we can affirm that the practical implementation of the normative framework, especially after the reform, in regards to the protection of minors has proved its capability to protect all

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\* A. NÚÑEZ (2008) "The system for the protection of minors, in *Current aspects of the legal protection of minors*, op. cit., p. 208.

these minors, who, due to diverse circumstances, are in a risky or abandonment situation caused by the non-fulfilment or faulty fulfillment of the duties related to parental custody or guardianship. However, this process also reveals, in the opinion of the author, certain problems that will be briefly exposed.

In the first place, the scarcity of administrative human and financial resources generates a number of problems in the implementation of the various legal protective measures for the minor. So after the 'at risk' declaration it is not possible to develop and execute a protocol which prevents the minor from leaving their environment. Besides, it is worth pointing out that the practice of administrative custody is usually executed by transferring the minor into a residential care-home and not to a family, thus leaving unfulfilled the legal principle which gives priority to the provision of familial foster care instead of the residential one.

On the other hand, it is worth mentioning the system is excessively strict and severe. It is the public authority which determines the choice of the protective measures and of the people who will foster the minor. It is not possible therefore to have the constitution of a familial foster care managed by the biological parents without the intervention of the public entity; although it is true that these parents may propose to the public institution that they act as the potential fosters for their children, although their proposal is not binding.

One of the main requirements of the protection of minors is to define their situation as quickly as possible. Thus, the legislator points out, it is essential that the public body, after studying the personal and familial circumstances of minors entering the protection system, makes a diagnosis in which it is determined whether family reunification is possible or whether more permanent measures must be resorted to, such as adoption or guardianship. The reform of the regulations has had a specific impact on this aspect, establishing the legal criteria to determine when family re-immersion is possible.

Without expressly establishing the circumstances that should promote family reunification, which must be analyzed in each specific case, the legislator has established the generic criteria that must meet for its operation. Thus it is required that the family has been rehabilitated according to objective criteria, that the family links have been maintained, that the family is able to look after the minor adequately and that it is found that the return does not involve significant risks to the minor through the corresponding technical report. In the cases in which the minor is in familial foster care, the time spent with his foster family and the links established with them must also be taken into account.

Finally, it is worth pointing out a problem that unfortunately occurs in our country. The author refers to the significant current difficulties encountered when adopting an underage minor (the greater this difficulty the younger the minor is), although there is a large number of people who want to adopt children. We can mention some reasons to explain this situation; among them the very complicated process for obtaining the definitive privation of parental custody – an essential requirement for the adoption of minors – as regards those biological parents who have demonstrably not fulfilled their parental duties and have provoked severe physical and emotional harm to their children and this based on their right to keep their children with them. It is still assumed, on some occasions, that children are their parents' property.

Prior to the reform, another of the causes that had an impact on this problem was the excessive duration of the protection measures. As we have stated, the legislator has chosen to establish maximum periods of duration for the measures, to avoid the prolongation of situations that are *ipso facto* considered temporary and provisional.

However, the author cannot ignore the fact that the establishment of the legal criteria for family reunification, especially those related to familial foster care exposed above, legally allow a situation

that occurred in practice prior to the enactment of Law 26/2015 and that was the following one. In the cases in which the public entity decided upon the termination of the familial foster care measure, the foster-carers would often request authorization from the relevant Court not to give effect to the decision to terminate the foster-care arrangement; referring to the strong bonds between them and the minor and the harm the resulting separation would cause. The Court would usually rule in their favour, based on the importance of protecting: “the security of the minors within their foster families.” Thus it would impede the possibility that the minor would be adopted or returned to its original family; and this without taking into account that the foster care measure can only last until the minor reaches its legal age, since it is excluded from the protective system after that time.

Currently, it is the law itself that establishes as a priority the existence of affective bonds with the caregivers and their environment, by prioritizing the maintenance of familial foster care to the detriment of family reunification.

In spite of the problems previously exposed, the author acknowledges that since the present legislation has come into force, the protection of underage minors with social or familial disabilities has been enhanced; permitting the separation of the minor from its family through an abandonment declaration should the minor suffer from any physical, psychological or emotional damage or prejudice. Furthermore, a more appropriate regulation of the different protective measures has contributed to a greater degree of efficiency when putting them into practice. One of the greatest achievements of the legislator has been the establishment of the legal priorities for officially recognizing familial foster care as opposed to residential care; giving priority to the minor’s right to live in a familial environment by following the ruling legal procedures in our neighboring countries.



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

EVELYN BORG COSTANZI\*

## 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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\* Report prepared by Dr Evelyn Borg Costanzi LLD and the Human Rights Platform of the University of Malta for the Government of Malta Scoping Consultati

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 Cuignet & 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 Caignet & 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.

\* 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.

## Mediterranean Human Rights Review Style Sheet

*Note to Contributors.* Articles submitted to the Journal should be original and must not be under consideration for any other publication at the same time. The journal retains the ownership of any articles it publishes. Manuscripts should be submitted for review in duplicate, using A4 paper, 1.5 spaced and should not exceed 8,000 words in length (including notes). The word-count should be shown at the top of the manuscript. Articles should be submitted in electronic format in Microsoft Word for Windows (PC) format using font Times New Roman 12. Articles should be written in English or French.

Typescripts should conform to the *Journal Style* outlined below:

1. *Abstracts & Biographical Information.* Manuscripts should include an abstract in English and not longer than 100 words. Four or five lines of biographical information should also be included.
2. *Page Format.* All pages should be numbered consecutively. There should be an empty line before each new paragraph, the first line of which should be indented by 0.5cm from the margin on the left. Words or phrases that the author means to emphasize should be in italics. Headings should be in bold and sub-headings in italics. Both headings and sub-headings should be numbered consecutively.
3. *Quotations.* Long quotations should be separated from the text of the article by leaving an empty line before and after. The text of the quotation should be in font Times New Roman 10, single-spaced, and indented by 0.5cm from the margin on each side. Short quotations should be incorporated in the text within inverted commas.
4. *Footnotes.* Marginal comments and bibliographical references in the manuscript, including references with comments and case references, should take the form of footnotes. These should be consecutively indicated throughout the article by raised numerals. The text of each note should be indented by 0.5cm from the number on the left. The initial references to a book or article in the footnotes should follow the same style as indicated in point 5 (below), with the sole difference that the author's forename or initials should precede the surname in the case of footnotes. Subsequent references should use *ibid.* and *op.cit.* where appropriate.
5. *Bibliography.* A list of references should appear at the end of the manuscript. It should contain all the works referred to in the text, listed alphabetically by the author's surname, single-spaced and with a hanging indent of 0.5cm. The bibliography should use this format:
  - i) **BOOK:** Should give the author's surname, the forename or initials, the date of publication in brackets, the title of the book in italics, the place of publication and the publisher. *Example:* Cohen, Stanley (2001) *States of Denial*. Cambridge, UK: Polity Press.
  - ii) **ARTICLE IN JOURNAL OR PERIODICAL:** Should give the author's surname, the forename or initials, the date of publication in brackets, the title of the article in inverted commas, the title of the journal in italics, the number of the volume and issue, and the page numbers. *Example:* O'Barr, William (1991) "Discourse and Power in an American Legal Office," *Law and Society Review*, Vol.5. No. 3., pp.342-357
  - iii) **CHAPTER IN EDITED VOLUME:** Should give the author's surname, the forename or initials, the date of publication in brackets, the title of the chapter in inverted commas, the names of the editors of the volume, the title of the book in italics, the place of publication and the publisher. *Example:* Rose, Nikolas (1996) "Governing 'Advanced' Liberal Democracies," in A. Barry et al., eds. *Foucault and Political Reason: Liberalism, Neo-Liberalism and rationalities of Government*. Chicago: Univ. of Chicago Press.
6. *References to Legal Statutes and Judgments.* Any references to legal statutes or judgements must follow the latest version of the O.S.C.O.L.A. style-sheet.