law journal

Vol X Autumn 1983

# ID-DRITT

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# introduction

When, back in 1978, educational reforms hit the Law course at the University of Malta, many were convinced that the death-knell of student extra-curricular activity had been sounded. Sure enough, ID-DRITT Law Journal, which by then enjoyed an established readership among the Maltese law student-body and legal professions, quickly disappeared from the scene. Soon after, the Maltese Law Students Association (Ghaqda Studenti tal-Ligi) quietly faded into obscurity, and for three years the law students were in a state of virtual inactivity.

This state of affairs was, however, not destined to be permanent. In 1982 the Ghaqda Studenti tal-Ligi was revived with renewed energy and vigour, organising seminars, proposing structural reforms in the law course and representing law students before the authorities whenever the need arose. The re-emergence of ID-DRITT, the Law Students Association's official publication, was but a natural consequence of the Gh.S.L.'s revival. It has been decided however, to add a new dimension to the Journal, since Maltese law students, in conjunction with the Maltese Chamber of Advocates, are now also involved in the publication of a new journal, 'De Jure'.

ID-DRITT Law Journal, therefore, is back with a difference. It has been structured by the present Editorial Board to serve better the needs of law students. It is also hoped that the Journal will eventually develop into an inter-university journal, bringing together through its pages, law students from different universities. Some might dismiss this as presumptuous, but it must be acknowledged that the time has come to build an international student community, and such a journal is but a step in pursuance of this goal. The task ahead of us is indeed a difficult one, but with your support and our continued efforts, we are more than confident that ID-DRITT Law Journal will establish itself both in Malta and abroad as a medium for communication and the exchange of ideas.

Tonio Fenech
Chairman - Editorial Board

## EDITORIAL POLICY

ID-DRITT Law Journal is an official publication of the Ghaqda Studenti tal-Ligi (Gh.S.L. - Law Students Association - University of Malta) and as such it serves to help fulfil the aims expressed in Article 2 of the Gh.S.L.'s Statute:

i. to promote all forms of legal studies.
ii. to facilitate the exchange of ideas between local students and their fellow-students abroad.
iii. to serve as a link between the Gh.S.L.'s members, the Faculty of Law and the legal professions.

ID-DRITT has a dual function: as a **Student** Law Journal, it provides an outlet for academic research and criticism, considering the implications and problems presented by Law, legal systems, legal theory, judicial decisions etc. As a **Law Student** Journal, it is the policy of ID-DRITT to encourage the fundamental discussion of issues in legal education and to question received opinion. This is not to say that ID-DRITT has set views on every policy question or that it represents propoganda for a particular point of view. Its attitude to legal education however, is one of enquiry and criticism. It is a further aim of the Journal to provide a forum wherein students from different countries can exchange ideas and information. This orientation of ID-DRITT Law Journal as an inter-university publication will thus help fulfil a need felt by law students both in Malta and abroad.

## NOTES FOR CONTRIBUTORS

1. Major articles should generally be of between 5,000 and 10,000 words. Notes which have the character of signed editorials/short communications are to be between 1,000 and 2,500 words long.

2. Articles for ID-DRITT should be soundly based on research, but it is not the practice of ID-DRITT to publish articles which simply **report** research findings. (This may be condensed into the **REPORTS** section.) Authors should preferably address themselves to the formulation and solution of problems and to testing these solutions.

3. Articles should carry a statement of between 20 and 30 words outlining their subject matter, together with a short designation of the author.

4. It is assumed that articles for publication have not been published elsewhere. If an article is being submitted elsewhere simultaneously, the author should say so. Authors who wish re jected manuscripts to be returned, should inform the Editor at the time of submission.

5. Contributions should be typed in double spacing on one side **only** of A4 paper. References and footnotes should be numbered consecutively throughout articles and typed seperately at the end of the article. References to books should include the full title and author or authors, publisher and date. References to articles should also include the full name of the journal, the volume and year. Titles of books and journals are italicised or printed in bold print (underlined in typescript). Titles of articles are placed within single inverted commas.

6. All contributions, subscriptions, enquiries, correspondence and books for review should be addressed to:

**The Editor**
**ID-DRITT Law Journal**
**Faculty of Law**
**University of Malta**
**Tal-Qroqq**
**MALTA**

# editorial


## ON LEGAL JOURNALISM

> "La pubblicazione di periodici locali che trattino esclusivamente del Diritto e dei Tribunali deve dirsi rarissima e di assai breve durata" (1)

When thus assessing a lamentable yet outstanding characteristic of legal publishing in Malta, Sir Arturo Mercieca was, in 1955, directing his attention to the fate of a 'Law Journal' "di cent'anni fa", the **'Foglio Legale di Malta'** of 1846. What is indeed unfortunate however, is that the above observation may be as valid in 1983 as it was thirty odd years ago, for, looking back over the years, a certain pattern is easily discernible in the life cycle of Maltese legal periodicals. Initial enthusiasm would suffice (more often than not thanks to individual initiative) to ensure publication of a number of issues which would then peter out in direct proportion to the waning interest on both the part of the publisher and that of the market.

The 'Foglio Legale di Malta', mentioned above, was a weekly publication, first issued, as a result of the efforts of "alcuni membri volonterosi della classe legale"[2], on the 4th September 1846[3]. It focussed its attention on local judicial decisions, important trials and also reproduced translations of articles which had appeared in foreign journals. The 'Foglio' however does not seem to have survived beyond the fourteenth issue[4].

The next noteworthy effort was a direct result of initiative on the part of Maltese law students in the mid-1940's. The newly founded **Law Society** of the University of Malta commenced publication of the **'Law**

**Journal'**, which enjoyed the longest life-span to date of any legal periodical known to be published in Malta. During the years 1945 to 1955, the 'Law Journal', consisting on average of between fifty and seventy pages, was at first issued twice a year until the end of 1950, then once a year, while the gap between the penultimate and the final number was one of nearly three years[5]. Leafing through the pages of the collection of three volumes that comprises the 1945-1955 issues of the 'Law Journal', one cannot but admire the spirit of our predecessors: law students who, with the last gunfire of the Second World War still echoing in their ears, filled their time with lectures, Papers, debates and mock court sessions and were able to leave their **alma mater** describing their university days as "perhaps, the happiest..."[6] of their lives. The vitality that leaps forth from the Editorial pages, the academic level evident in the student contributions published in the 'Law Journal', ought to serve as an inspiration to those who have followed them.

The candle of the Law Society's life was evidently flickering ominously when, as early as 1955 one finds the Editorial of the last 'Law Journal' to be published in the original series, appealing to the University authorities and law students to ensure that the "Journal is not allowed to die a slow death"[7]. This plea apparently went unheeded for the Melitensia collection of the University of Malta Library then registers a gap of sixteen years until the 'Law Journal' re-appeared on the market, again published by the University Law Society.

One of the factors that may not have stimulated the continued publication of the 'Law Journal', after January 1955, was the inception of a new legal review, **'Rostrum'**, published by the Camera degli Avvocati[8]. Conceived as a "pubblicazione trimestrale", 'Rostrum' made its debut with the March-June issue of 1955, but the impetus required to produce the journal every quarter lasted for little more than a year. From the April-June number of 1956, it was published on a six-monthly basis between No.6 of July-December 1956 until No.10 of July-December 1958, after which it only re-appeared twice: once in 1959 (No.11) and finally in 1960 (No.12). The standards set and the functions served by 'Rostrum' are a tribute to Edoardo Magri and other individuals who

must have invested much time and effort in the project - that it was allowed to suffer the same fate as the 'Law Journal' does little credit to the scholarly inclinations of our legal professions, and even less to a Chamber of Advocates on whom its ultimate survival depended.

It was not until the revival of what had by then become a "defunct"[9] Law Society at the University of Malta that a neat twenty-page booklet, written exclusively by law students, was published in May 1971 under the title of **'Law Journal Volume 1'**. The 'Law Journal' made an annual appearance in 1972 and 1973 as volumes 2 and 3 respectively, until its name was changed to **'ID-DRITT'** in 1974. In spite of the name-change and a new cover design (which was to be retained until volume IX), a form of continuity was maintained by designating this first issue of 'ID-DRITT' as volume IV and the subsequent issues as volumes V, VI, VII and so on. Under the helm of editors of the ilk of Charles De Battista and Alec Mizzi, 'ID-DRITT' went from strength to strength until it had grown to become what is undoubtedly the most substantial law journal ever published in Malta. Running to an average 130-150 pages, 'ID-DRITT' not only attracted contributions from law students and eminent members of the Maltese legal professions, as 'Law Journal' and 'Rostrum' had done before it, but also foreign authors of the calibre of Owen Hood Phillips, G. Schwarzenberger, C.R. Halpern, Fritz Fabricius and others. The success story ended abruptly in December 1978 - in the midst of the reforms that were radically changing the structure of University education, ID-DRITT Vol.IX was printed but forgotten. For the second time within twenty five years the Maltese students' law journal had again ground to a halt.

Thus, when the law-student community of the University of Malta re-organised itself and effectively revived the Ghaqda Studenti tal-Ligi[10] in the latter half of 1982, it was perhaps only natural that the students would think twice before resuming the publication of ID-DRITT. Whereas, prior to 1978, ID-DRITT had established itself as the only law journal published in Malta, its four-year absence had witnessed an unprecedented and commendable development. ID-DRITT's parent body, the Ghaqda Studenti tal-Ligi began participating, together with the Maltese Chamber

of Advocates, in the production of a new law journal, **'De Jure'**, two numbers of which have been published since late 1982. Any contemplation of a revival of tradition of student initiative such as ID-DRITT, therefore carried a number of serious implications. The market for legal publications in Malta being very limited one had to confront a very **real** question: can Malta afford **two** law journals, since, market apart, such publications require considerable effort[11] to produce?

Thus, the role, the very 'raison d'etre' of ID-DRITT, had to be re-evaluated and gradually a new set of concepts was developed.

A journal is, by its very nature, a dynamic publication keeping abreast of developments in the field within which it specialises, primarily to provide a service to persons who operate in that same field or in closely related sectors. When thus defined the concept of **'law** journal' takes on special significance when related to university law students who are as interested in Legal Education as they are in Law. As a student publication, ID-DRITT cannot but reflect the interests, needs and concerns of the law student community that it serves.

Since one of the principal aims of the Ghaqda Studenti tal-Ligi is to stimulate initiative, creativity and research in the legal field, especially amongst law students, it was deemed important to reserve a considerable part of the journal for academic articles, in order that scholarly research and criticism should find an added outlet to that provided by 'De Jure'. In this sense, the original scope of the pre-1978 ID-DRITT was retained.

After the creation of a new section, **ASSIGNMENT** in order to provide an incentive for the publication of the results of student projects, the emphasis shifts to legal education. A true dedication to the cause of progressive legal education encourages participation in an international community of law students and thus the concept of an inter-university journal was born. In this role of **Law Student** Journal, ID-DRITT serves as a forum wherein law students, from different universities in different countries, can exchange ideas and information as well as news of trends and developments in their respective universi-

ties and/or legal systems. In this way, the **OUTLOOK** section was conceived, in each issue examining the situation, problems existent and opportunities available in various universities outside Malta. Since this not only added a new dimension to the Journal but also involved a good deal of activity on the international level, an **INTERNATIONAL SECRETARIAT** has been set up to look after overseas readers, subscribers and correspondents. In fact, contacts have, to date, been made with over four hundred universities in the United States, the United Kingdom, West Germany and Italy.

The **REPORTS** Section reflects the need for space for a number of short contributions as well as various news. The latter would especially feature Gh.S.L. activities although one must express the cautious hope that the educational situation will improve enough not to warrant the publication of lengthy **working-papers** in future editions of ID-DRITT.

Volume X is but a small start to the implementation of editorial policy as formulated above, and matters are still very much at an experimental stage. It is hoped that, in spite of financial and technical difficulties, ID-DRITT will in future expand to a projected 128 pages from the present 96, thus increasing the amount of space available, especially in the sections devoted to academic **ARTICLES** and **OUTLOOK.**

In other words we look forward to the future. As a law journal and especially as an inter-university Law Student Journal, we believe that ID-DRITT has great **potential.** But is our optimism sufficient to ensure the **survival** of ID-DRITT and 'De Jure' side by side, or will they also, like their predecessors, find their way to an early grave? Legal journalism in Malta certainly faces problems peculiar to the intrinsic nature of our islands. Sir Arturo Mercieca opined that:

> 'Data la scarsezza degli abbonati in un ambiente limitato quale offre la nostra breve isola, circoscritta inoltre dal fatto che il periodico (12) interessa prevalentemente il ceto legale, e' difficile che simili pubblicazioni possano attecchire e fruire di una lunga esistenza, ammenocche' non si trovino sussidiati dallo Stato, a beneficio che deve ritenersi comune." (13)

Whilst no doubt welcoming financial aid from the State, it would be failing our duty not to seriously consider and likewise create the means

necessary to assure the longevity of worthwhile projects such as ID-DRITT and 'De Jure'. The lessons from the past are sufficiently clear to suggest certain broad principles. While it is imperative that every law student, lawyer, notary and legal procurator should actively support the continued existence of legal periodicals, it is finally up to the organised and constituted bodies, such as the Ghaqda Studenti tal-Ligi and the Chamber of Advocates, to motivate and co-ordinate the efforts of their members in order to invest in the scholarship inherent in serious legal publications. Ultimate responsibility for the success or otherwise of journals like 'De Jure' and ID-DRITT lies with these associations, whose function and duty it is to work for the best interests of their members, and who have the necessary structure and resources to ensure continuity of publication. In this way, one would avoid the dangers inherent in the historical tendency to rely on individual, rather than collective effort.

In the light of the above, 'De Jure' ought to flourish, once it enjoys the backing of the Maltese legal professions in general and the 'Camera' in particular. On the other hand, interest and motivation apart, the future life of ID-DRITT depends largely on whether law students will continue to be admitted to the University of Malta - and that is a different matter altogether!

J.A.C.

**NOTES**

1. Mercieca Sir Arturo Kt., M.A., LL.D., **Un 'Law Journal' di cent' anni fa** in **Law Journal** Vol.III No.3, Malta, 1955, p.198.
2. **ibid.**, no formal trace seems to have remained of the identity of these 'membri volonterosi...di cui ne rincresce di non essere conservati i nomi." (ibid. at p.198)
3. **ibid.**, p.198. This is also confirmed by the findings of A.F. Sapienza in **A Checklist of Maltese Periodicals**, Malta University Press, Malta, 1977, (hereinafter cited as **AFS/COMP - Ref.** etc.), Ref.311
4. **ibid.**, p.200. See also **AFS/COMP - Ref. 311**
5. Vol.III No.2 was published in February 1952 while Vol.III No.3 bears a publication date of January 1955.
6. Editorial, **Law Journal**, Law Society, Malta, 1946, Vol.I No.4, p.5

7. Editorial, **Law Journal**, Law Society, Malta, 1955, Vol.III No.3, p.158.
8. 'Camera degli Avvocati' is the name retained by the Maltese Chamber of Advocates.
9. Editorial, **Law Journal**, (2nd Series), Law Society, Malta, May 1971, Vol.I, p.2.
10. Ghaqda Studenti tal-Ligi (Law Students Association) is the Maltese designation (after a statutory name-change effected in the early 1970's) of what was formerly known as 'The Law Society'.
11. especially vis-a-vis Malta's limited resources and with particular reference to the scarcity of finances and contributors.
12. Sir Arturo Mercieca is here referring to the 'Foglio Legale di Malta'.
13. **Un 'Law Journal' di cent' anni fa, op. cit.**, p.200

**Further References**

Readers interested in the **historical** aspect of Maltese legal journalism may refer to the following publications which appeared between 1846 and 1944. Many are not stricly legalistic in content and at least one (Bertoldinu etc.) has been included for interest's sake, since the title may be a misnomer. The **AFS/COMP - Ref. No.** is given as a useful reference aid.

| AFS/COMP - Ref. No. | Publication |
|---|---|
| 311 | Foglio Legale di Malta, 1846 |
| 368 | Giornale dei tribunali; foglio politico forense. nos.1-31, 1854-1855; new series, nos.1-6 1856. |
| 482 | Indipendente; foglio politico, forense, patrio 1856-1857. |
| 483 | Independente; giornale politico forense, 1859-1860? |
| 367 | Giornale dei tribunali; foglio forense Maltese 1862-? |
| 31 | Appello al tribunale infallibile della pubblica opinione; giornale politico, giuridico, legale, patrio, nos.1-109, 1867-1870. |
| 132 | Cassazione, ossia, ricorso al tribunale supremo della pubblica opinione; periodico giuridico, politico, locale. 1870 - ? |
| 509 | Journal de Malte et des etats barbaresques; commerce, industrie, exploration, marine, jurisprudence. 1881 - ? |
| 946 | Rivista giudiziaria, scientifica e letteraria. 1910-1911. |
| 80 | Bertoldinu student tal-ligi u 'l medicina; foljett zuffjettus u varju. 1916 - ? |

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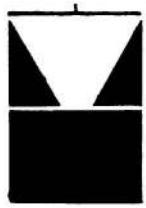

ID-
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# articles

# CALLEJA v. BALZAN: REFLECTIONS ON PUBLIC ORDER

**VINCENT A. DE GAETANO**

## INTRODUCTION

Some years ago Lord Denning wrote on the role of the police:

> In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well-led, well-trained and well-disciplined force of police whom it can trust: and enough of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the accused to justice. The police, of course, must act properly. They must obey the rules of right conduct. They must not extort confessions by threats or promises. They must not search a man's house without authority. They must not use more force than the occasion warrants. But, so long as they act honourably and properly, all honest citizens should support them to the uttermost.[1]

Very often the line of demarcation between proper and improper police conduct is a very thin one indeed, requiring legal skill for its appreciation and judicial interpretation and application for the observance of proper conduct. Until recently, for instance, it was considered to be proper police conduct to release a detainee, for the purpose of safeguarding the rule against detention in excess of forty-eight hours, by simply allowing him to step outside his place of detention and re-arresting him after walking a few feet. The Court of Magistrates of Judicial Police has now set a higher and more exacting standard of police conduct by requiring "manifest and effective" release[2].

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This paper seeks to highlight one other vast area characterised by considerable uncertainty as to what are the limits of proper police conduct and of police powers, namely that of the maintenance of public order. No attempt will be made to exhaust the subject: that would be presumptuous. The aim is simply to put forward some arguments. The paper is largely based on a lecture delivered at the invitation of the Commissioner of Police to Gazetted Officers of the Malta Police Force on the 8th January 1981. The case **Calleja v. Balzan**[3] has been included in the title of this paper, and will be discussed at some length, for two reasons. In the first place, although issues of public order are not necessarily tied to situations of public meetings, processions, and public demonstrations and manifestations, it is obvious that these situations often present a greater risk of concentrated public disorder. Secondly, the judgements in **Calleja v. Balzan**, that is the judgement of the court of first instance and that of the Constitutional Court, touch upon a number of legal principles which are of considerable importance in the context of any discussion on public order.

## MOSTA: 10TH AUGUST 1975

Early in 1975 the Government introduced in Parliament a Bill which, in effect, for the first time since the decree **Tametsi** of the Council of Trent was published in Malta by Bishop Domenico Cubelles -- the exact date of publication is not certain[4] -- proposed a civil law for regulating marriage. The law of marriage has been a vexed question in Malta since the advent of British colonial rule[5]. Although as early as 1831 the Colonial Government had expressed its intention to introduce a Marriage Act, nothing of the sort was ever done, the Governor, Sir Frederick Ponsonby, limiting himself to a proclamation punishing clandestine marriages[6]. From 1844, when the problem of mixed marriages in Malta was mooted by the Anglican Bishop of Gibraltar, right down to 1898 when Sigismondo Savona attempted to raise the issue of mixed marriages and the **Tametsi** decree in the Council of Government, the question of the law of marriage in Malta was a hotly debated political issue on which political parties and the clergy took sides[7]. The issue reared its head again in the late nineteen fifties and early sixties[8]. So it was expected that the Marriage Bill of 1975 would cause a storm of protests.

In August of 1975 the people of Mosta decided to crown the titular painting of the Blessed Virgin, after obtaining the necessary approval from the Eccle-

siastical authorities. The ceremony was to be held in the open in the main square of Mosta and was to be preceded by a procession along the main street of the village. Church and civil dignitaries were to share a common platform during the ceremony and were also to participate in the procession. The Rev. Monsignor Philip Calleja and a number of people of like mind thought that the procession and the ensuing ceremony would provide a unique opportunity to express publicly their disapproval of the law which had received the President's assent on the 5th August. Posters, in different colours, expressing disapproval and condemnation of the said law were printed; these were distributed prior to the procession with instructions to hold them in such a way as to be clearly visible to the participants in the procession.

Now, among the people responsible for maintaining law and order in Mosta on that day was Mr. Denis Balzan, then an Inspector of Police. He had been promoted from the ranks only a few months before. At one point while the procession was already moving along Eucharistic Congress Road on its way to the main square, Inspector Balzan was informed by a number of people, including the Archpriest of Mosta, that trouble might erupt as a result of Mgr. Calleja's poster protest; some people even approached Inspector Balzan threatening that unless he intervened to remove the posters they would take the law into their hands. Inspector Balzan warned them not to do anything of the sort but to leave the matter to be dealt with by the police. Inspector Balzan, accompanied by a police sergeant, approached Mgr. Calleja (who by now had entered the main square at the end of the procession itself) and politely asked him to remove the posters (presumably the posters the Monsignor was holding and the posters held by those in the immediate vicinity) adding that that was not the appropriate occasion for a poster protest. The Monsignor refused. At that moment, a woman approached the Monsignor from behind, grabbed the poster he was holding, and threw it on the ground. Undaunted, Monsignor Calleja obtained another poster. The Inspector this time ordered him to remove the poster. Mgr. Calleja again refused, whereupon the Inspector removed the poster from the hands of the Monsignor (the Monsignor, in his evidence, maintained that the Inspector "grabbed" the poster). Mgr. Calleja managed to get yet another poster. This time Inspector Balzan, no doubt exasperated at the behaviour of the reverend gentleman, threatened to arrest Mgr. Calleja. The Monsignor invited the Inspector to note down his particulars and arrest him. Meanwhile, however, the religious ceremony had commenced in the main square, so Mgr. Calleja folded the poster and placed it in his breviary, and the Inspector

left. There was no further incident between the two. During the chanting of the Creed as well as at the very end of the ceremony many of those who had posters, including Mgr. Calleja, held them up high above their heads, but there were no incidents. The encounter between the Monsignor and the Inspector lasted from ten to fifteen minutes. It must be emphasized that throughout that encounter Inspector Balzan acted with due politeness and civility, a fact which was acknowledged both by the First Hall and by the Constitutional Court[9]: paragraph 8(c) of the First Schedule to the Malta Police Ordinance, 1961[10] must have been foremost in Inspector Balzan's mind that day.

Mgr. Calleja had apparently not had enough. He filed an application in the First Hall of the Civil Court alleging that the Inspector's behaviour amounted to a violation and infringement of his fundamental rights and freedoms guaranteed by the Constitution, more precisely of the rights and freedoms guaranteed by sections 41, 42 and 43 of the Constitution; later he restricted his claim to violation of section 42[11], that is, violation of his freedom of expression. The relevant parts of this section are subsections 1 and 2.

> S.42(1): Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

If one were to stop at subsection 1, it is clear that Inspector Balzan **was** interfering with the Monsignor's freedom to communicate ideas and information (about the new law on marriage) to the participants in the procession and to those gathered in the main square of Mosta, if not to the public generally. The Monsignor was not **prevented** from expressing his ideas, but he was **hindered**[12]. It will be observed that in our Constitution freedom of expression embraces and connotes the broad **freedom to communicate** and is not restricted to mere freedom of speech. It is a freedom to which every person in Malta -- not only a Maltese citizen in Malta -- is entitled[13], subject, however, to such possible limitations and restrictions as are authorised by s.46(7) of the Constitution; but whereas a person is entitled to this freedom while **in** Malta, the reception and communication of "ideas and information" is not limited to the territory of Malta[14] (article 10(1) of the European Convention on Human Rights is more explicit on this point: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and **regardless of frontiers.** This Article shall not prevent States from requiring

the licensing of broadcasting, television and cinema enterprises", emphasis added[15]). Interference with freedom of expression may be in the form of previous restraint or of post-expression consequences. In the words of one American author:

> It is vital to recognise at the outset that the freedom of expression extends not only to speech and press but also to areas of **conduct** laced or tinged with expression, such as those of press, assembly, petition, association, lawful picketing and other demonstrative protests.[16]

In a sense even the right to silence is a facet of the right to freedom of expression[17]. It should also be noted that s.42(1) of the present Constitution seems to embrace a slightly wider concept of freedom of expression than the corresponding s.14(1) of the 1961 Constitution. S.14(1) of the Malta (Constitution) Order in Council, 1961 provided that "except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, **that is to say**, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence", emphasis added. However, in **Borg Olivier et. v. Buttigieg** the words "that is to say" were in effect held by the Privy Council to mean "including"[18].

But subsection 2 of section 42 provides:

> S.42(2): Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision --
>
> (a) that is reasonably required --
>
> (i) in the interests of defence, public safety, public order, public morality or decency or public health; or
>
> (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, protecting the privileges of Parliament, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) that imposes restrictions upon public officers and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

All these limitations to the substantive right, taken together, amount to the "respect for the rights and freedoms of others" and respect for "the public interest" mentioned in s.33 of the Constitution[19].

So there are, as it were, three stages. First, it must be established, as a fact

and independently of other juridical considerations, that there was an interference with freedom of expression or that there is or is likely to be[20] such interference, for example, if a particular law were to be given effect. Secondly, by way of a substantive plea, it may be claimed that the interference was or is being effected or is planned in consequence or under the authority of a law, which law, or particular provision thereof, was "reasonably required in the interests of.....public order", and therefore the interference itself was reasonably required in the interests of[21] public order. Thirdly, even though a law makes provision that is reasonably required in the interests of public order, that provision of law, or the thing done under the authority of that provision of law, may nevertheless be shown not to be reasonably justifiable in a democratic society and therefore unconstitutional. If the provision of law is not reasonably justifiable in a democratic society then, **a fortiori**, the thing done under the authority thereof would likewise not be reasonably justifiable.

## PROCLAMATION III OF 1964

Now, admittedly, it is difficult to imagine a law which makes provision that is reasonably required in the interests of public order but which **at the same time** is not reasonably justifiable in a democratic society. After all it is the court which is going to decide what is and what is not **reasonable;** the court is hardly likely to hold that a particular provision of law is reasonable in the context of public order but not reasonable against the yardstick of the requirements of a democratic society, as if the reasonable requirements of public order can be assessed in a vacuum and apart from the society in which the maintenance of public order is sought[21]. Difficult to imagine it may be; totally inconceivable certainly it is not. Indeed, the legislator himself, in another section of the Constitution, has expressly specified one instance where, although a particular provision of law may be reasonably required in the interests of, among other things, public order, that provision **must** be regarded as not being reasonably justifiable in a democratic society and therefore unconstitutional. S.43 deals with freedom of assembly and association. Subsection 3 of that section provides:

> S.43(3): For the purpose of this section, any provision in any law prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages shall be held to be a provision which is not reasonably justifiable in a democratic society.[23]

By definition (s.126(1) of the Constitution) the word "law" includes "any instrument having the force of law" and therefore includes regulations, notices or proclamations made in virtue of an enabling law. Thus, if for the sake of argument, the people of Luqa were in a state of agitation because of band club rivalries and the state of agitation were such that it would be reasonable in the interests of public order to prohibit all public meetings (whether open air or otherwise) and demonstrations in Luqa until the agitation subsided, any proclamation to this effect made by the President in terms of ss.19(2) and 21 of the Public Meetings Ordinance would be unconstitutional[24] -- unless s.43(3) of the Constitution is to be interpreted as referring solely to a "law" prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages **for an indefinite period of time**, an interpretation not warranted either by the wording of the subsection in question or of s.43 in general. If in order to deal with the threat to public order at Luqa the President were to prohibit all public meetings and demonstrations all over Malta and Gozo, that proclamation would then be unconstitutional for a different reason, namely that the prohibition in other localities would not be reasonably required in the interests of public order in those other localities.

One such blanket prohibition was decreed by Proclamation III of 1964. On the insistence of the Police, the Governor prohibited "from the 16th day to the 24th day of September 1964, both days inclusive, the holding of all public meetings in the Island of Malta and its Dependencies and of all demonstrations in any place open to the public in the Island of Malta and its Dependencies, other than such as form part of the official Independence Celebrations". The Proclamation was challenged in court as being **ultra vires** the enabling law and as being unconstitutional[25]. The Constitutional Court held that the Proclamation was "intra vires" and that it did not infringe any fundamental right or freedom guaranteed by the 1961 Constitution. In the context of public order, demonstrations, which by definition are always held in the open[26], seem to pose greater problems than public meetings. Under s.19(1) of the Public Meetings Ordinance, the Police Commissioner may, with the approval of the Minister responsible for the Police, and for reasons of public order, prohibit the holding of any public meeting in respect of which notice has been given to him in terms of the Ordinance. Such a prohibition against the holding of a specific public meeting would not fall foul of subsection 3 of section 43 of the Constitution. But no previous notice or permission is required for

the holding of a demonstration[27]. Short of a proclamation, therefore, the Commissioner of Police would have to order the dispersion of every demonstration in progress or about to commence in the streets or open spaces of Luqa in order to maintain public order among the agitated villagers[28].

A law that is reasonably required in the interests of public order in Malta is **prima facie** reasonably justifiable in a democratic society. This equation, however, should not be applied **a priori** when what is being impugned or challenged as unconstitutional is not a provision of law, but a **thing** or **act** done **under the authority** of a provision of law. Moreover the equation cannot have any logical application whatsoever when the thing or act is not even a thing or act done under the authority of a law, as for example was the Department of Health circular 42/62 in **Borg Olivier et. v. Buttigieg**[29]. A law may make provision that is reasonably required in the interests of public order, but because that law allows a certain margin of administrative discretion in its application, the way that discretion is used (that is the act or thing done under the authority of that law) may not be reasonably justifiable in a democratic society, that is, it would amount to an abuse of administrative discretion by the standards of a democratic society and therefore by the standards of the Constitution. In **Il-Pulizija v. Ganni Camilleri et.**[30] the First Hall of Her Majesty's Civil Court held that

> ....anke kieku l-Proklama ma kinetx ligi, imma semplici att tar-ram ezekuttiv, jibqa dejjem li hija att li, salva l-kwistjoni tal-validita' taghha, tidher maghmula "taht jew skond l-awtorita' tal-ligi", u l-Qorti hija obbligata tirresisti s-suggeriment li biex ic-cittadini jkunu jistghu jimpunjaw att "purporting" li sar taht ligi jridu bilfors jimpunjaw il-ligi. Dana mhux biss kuntrarju ghall-kliem cari tad-disposizzjonijiet sotto ezami[31] imma jista' jkun fomiti ta' tentativi superfluwi ta' mpunjazzjoni ta' ligijiet perfettament tajbin kull darba li xi ufficjal tal-Gvern jirfes riglejn xi hadd u jigi mharrek taht id-disposizzjonijiet dwar il-"human rights".[32]

Her Majesty's Constitutional Court did not disagree with or challenge this statement[33]. More recently, however, that same court -- now styled Constitutional Court -- has held that

> ....biex att amministrattiv, maghmul in konformita' ma' provvediment ta' ligi, u kwindi awtorizzat b'dik il-ligi, jigi dikjarat null u bla effett, ikkunsidrat fih innifsu, ghax jikser l-artikolu 42 tal-Kostituzzjoni, irid jigi wkoll necessarjament dikjarat li l-provvediment li jawtorizza dak l-att jikser l-istess artikolu 42, ghax l-illegalita' ta' l-azzjoni amministrattiva hija l-effett ta' l-inkostituzzjonalita' tal-provvediment legislattiv, li hija kawza; f'kaz bhal dan, ghalhekk, kull azzjoni diretta ghall-impunjazzjoni ta' l-att amministrattiv ma tistax f'dan il-kontest tigi kkunsidrata isolatament u indipendentement mill-provvediment legislattiv li tahtu jkun sar dak l-istess att, ghax l-illegalita' tal-att hija necessarjament il-konsegwenza ta' l-illegalita' tal-ligi, b'mod li biex tigi stabbilita wahda trid tkun qabel giet stabbilita l-ohra. 34

The court went to considerable pains to emphasize that not every administrative act purporting to be done under the authority of a law was exempt from challenge on the grounds of unconstitutionality:

> Biex azzjoni amministrattiva, pero', allegatament maghmula in forza ta' ligi partikolari tista' tigi dikjarata nulla u bla ebda effett bla ma tkun giet fl-istess hin impunjata l-istess ligi (dejjem indipendentement minn impunjazzjoni fuq bazi ta' diskriminazzjoni) ovvjament jinhtieg li dik l-azzjoni fiha nnifisha tkun vizzjata, b'mod li allura ssir illegali u ma jkunx jista' jinghad aktar li dik l-azzjoni giet maghmula validament in konformita' mal-ligi. 35

It has been said that this judgement in practice rules out the possibility of judicial redress in most cases of violation of human rights[36]. This criticism, however, does not seem totally justified. The Constitutional Court was limited in its judgement by the very facts of the case, and even more limited by applicants' own submissions and by the judgement of the first court. Applicants maintained that the **written** order made by the Minister of Public Works in terms of s.13 of the Aesthetic Buildings Ordinance (Cap.135) ordering them to remove an electronic broadcaster from atop the Nationalist Party Club in Valletta violated their fundamental rights and freedoms guaranteed by ss.42 and 46 of the Constitution. S.13 itself of the Ordinance was never put in issue. Moreover applicants agreed that the order was made under the authority of the said s.13 and in conformity thereto. The first court held that the Minister's order (not the enabling s.13) was not reasonably required in the interests of public order because the purpose of the enabling Ordinance was not the preservation or maintenance of public order. And the first court stopped there. S.46 was not considered. The question of whether the order was reasonably justifiable in a democratic society was not considered; nor was the question considered of whether the (written) order was itself a "law". Hence the Constitutional Court:

> Il-ligi in kwistjoni m'hijiex wahda minn dawk protetti fl-Ewwel Skeda tal-Kostituzzjoni, imma b'dana kollu qatt ma giet in diskussjoni, u huwa appena necessarju jinghad li l-Qorti tiddecidi biss dwar il-kwistjoni li jkollha quddiemha, fuq il-kawzali dedotti fit-talba li ssir quddiemha, u ghalhekk ma tistax tiddikjara null u bla effett dak li l-legalita' u l-validita' tieghu mhuwiex in diskussjoni, jew inkella tiddikjara null xi att partikolari fuq kawzali ta' nullita' ta' xi haga ohra meta din il-kawzali ma tkunx giet dedotta. 37

However in at least one case since **Galea noe. et. v. Il-Kummissarju tal-Pulizija et.** and **Galea noe. et. v. Salvu Sant noe.** were decided, the First Hall of the Civil Court **appears** to have refused to follow those judgements. In **Il-Pulizija v. Dr. Louis Galea et.**[38] the court held:

> Fit-trattazzjoni orali, il-konsulent legali tal-Pulizija, issottometta illi r-rifjut imsemmi sar "skond l-awtorita' ta' ligi" li ma gietx attakkata mill-imputati bil-konsegwenza

> li l-imputati ma jistghux jattakkaw ir-rifjut ga la darba ma kienux, qabel, jattakkaw il-ligi. Din is-sottomissjoni mhix legalment korretta; fil-fehma tal-Qorti, kull att, **salv s'intendi l-kwistjoni tal-validita' o meno tieghu**, jista' jigi attakkat mill-individwu li jinvoka favur tieghu id-disposizzjoni tal-Artikolu 42 tal-Kostituzzjoni minghajr il-bzonn li l-individwu jimpunja wkoll il-ligi li tahtha u skondtha dak l-att **jigi allegat** li sar....altrimenti jigri li att ta' xi ufficjal, abusiv kemm hu abusiv, ma jkun jista' qatt jigi impunjat in forza tad-disposizzjoni li tiggarantixxi dan id-dritt fundamentali f'kaz li **jigi allegat** li dak l-att ikun sar taht l-awtorita' ta' xi ligi, li wiehed ghandu jahseb tkun, bhala regola, perfettament tajba[39] (emphasis added).

It is submitted that on this point this judgement is in reality perfectly reconcileable with the two "electronic broadcaster" judgements and with previous case-law. The Police have appealed from the judgement and the case is now pending before the Constitutional Court.

We must now turn back to **Calleja v. Balzan.**

## PRESERVING PUBLIC ORDER AND PEACE

Before the First Hall of the Civil Court respondent Balzan pleaded that he had only acted in execution of his duty to preserve public order[40]. No serious attempt appears to have been made by respondent to plead subsection 7 of section 48 of the Constitution, namely that the provisions of the Criminal Code were protected from unconstitutionality by the same Constitution, that he had acted in terms of, and in conformity with, the Criminal Code, and that therefore his behaviour could not possibly be in violation of the Constitution (although there is a passing reference to this subsection in the first court's judgement[41]). This line of argument had been upheld by Her Majesty's Constitutional Court in **Il-Pulizija v. Francesco Certo et.**[42] decided in 1968 -- and in numerous cases since -- although in the Certo case the legal issue involved was one of criminal procedure rather than substantive criminal law. Why did Balzan not invoke the notorious s.48(7) as a main plea? One possible reason is that respondent's counsel as well as the first court may have entertained the view that the term "public order" as used in the Constitution has exactly the same meaning as the phrase "public order and peace" in s.358(1) and "public good order or the public peace" in s.352(bb) of the Criminal Code (and possibly also the same meaning as "the public peace" in ss.395(1) and 396 -- the "binding over" sections of our Criminal Code). If that were so, it would obviously have been superfluous to invoke s.48(7); if the Inspector's behaviour was necessary to preserve public order and peace in line with his duty under the Criminal

Code, then it was also reasonably required in the interests of public order under the Constitution[43]; if it was not necessary to preserve public order and peace, it went outside the ambit of s.358(1), outside the ambit of the Criminal Code, and was therefore not done under the authority of the said Code and consequently was not covered by s.48(7). To add to the difficulty of this convoluted argument the first court said:

> Kif gie rilevat sewwa fin-nota ta' l-osservazzjonijiet tar-rikorrent il-kwistjoni (li intant, pero', xorta wahda tibqa spinuza) tirrisolvi ruhha filli jigi determinat safejn il-liberta' ta' l-espressjoni ta' l-individwu tista' tigi cirkoskritta mill-esigenzi tal-ordni pubbliku -- f'liema limiti biss l-ordnijiet imsemmija fil-precitati artikoli 352(cc) u 361 tal-Kodici Kriminali jistghu jitqiesu **legittimi** 44.

Let me attempt to paraphrase. S.352(cc) of the Criminal Code provides that whoever disobeys the lawful orders of any authority or of any person entrusted with a public service is guilty of a contravention. S.361 provides that every police officer may proceed to the arrest of any person who knowingly, or after due warning, disobeys his lawful orders. Now the first court, in the paragraph just quoted, seems to be saying that an order is lawful, at least when that order as a matter of fact amounts to an interference with the freedom of expression, **only** if it is reasonably required in the interests of public order. It is submitted that whereas this is correct as regards the arrest under s.361 -- any other interpretation would mean that virtually no arrest by the police can ever be illegal because the police would simply preface the arrest with any **prima facie** lawful order which they know will not be obeyed -- the same cannot be said with regards to s.352(cc).

## LAWFUL POLICE ORDERS

In protecting the provisions of the Criminal Code from unconstitutionality, s.48(7) also protects the interpretation given to those provisions prior to the coming into force of the Constitution. After all, the interpretation of a provision of law is nothing more than an explanation or exposition of the true purport of that provision (usually by reference to the presumed intention of the legislator) and must be held to be an integral part of that provision of law. Our courts, long before the coming into force of the Constitution, had interpreted the meaning of "lawful police orders" in s.352(cc) of the Criminal Code and the advent of the Constitution did not change that interpretation.

One of the earliest reported "lawful orders" cases dates back to 1908[45]. Thirty-one bandsmen tunefully playing in Casal Qormi were ordered by the police to stop playing their instruments. They refused to stop playing. From the law report it is not clear why the police gave the order or what was the occasion or event at which the bandsmen were playing. The court found them guilty of failing to obey the lawful orders of the police. They appealed since they maintained that the police order was not lawful and that they were therefore not bound to obey it, but the appellate court upheld the conviction; the court held that even if the order was not lawful, provided it was an order within the competence of the police and regular in form, the bandsmen had to obey it and then seek redress elsewhere. The court also held that the competence of the police to give a particular order must be presumed by the person to whom the order is directed. It is worth quoting the relevant part of this judgement:

> Atteso che ammessa pure per ipotesi l'illegittimita' di quello ordine, essendo esso stesso di competenza della Polizia e regolare nella forma, i citati nelle circostanze indicate nei motivi premessi alla sentenza appellata, pur sentendone l'ingiustizia, dovevano ubbidire salvo il ricorso contro l'intrinsica ingiustizia. Cosi' Silvio Longhi della resistenza legittima agli atti dell'Autorita' p.106-137 ove cita il Romagnosi e distingue il diritto di resistenza da quello di rifiutare ubbidienza, Cap.V,112-113; vedasi pure il Viazzi delle contravvenzioni p.90, il quale sotto la rubrica "legalita' dell'ordine" dice, l'ordine "dev'essere dato legalmente". Giova tuttavia notare che qualunque ordine dato dall'autorita' (e la competenza si deve sempre presuppore) per ragione (e non per pretesti) di giustizia e di pubblica sicurezza, e' un ordine dato legalmente. 46

This interpretation of what constitutes a "lawful order" was upheld by the Court of Criminal Appeal in the case **Il-Pulizija v. Carmelo Bonello** decided in 1942[47], and in 1959 by Mr. Justice Harding in **Il-Pulizija v. Eugenio Sciberras**[48]. In this last mentioned case, the court, after quoting with approval the dictum that "quando un ordine della Polizia e' di competenza della stessa e regolare nella forma, deve essere ubbidito, salvo il ricorso contro l'intrinsica (in)giustizia", added:

> Izda, apparti dan il-principju, din il-Qorti ma hix affattu inklinata li tghid li kien hemm xi haga illegittima, jew arbitrarja, fl-ordni moghti mis-surgent Micallef. Il-kumpless tal-provi pjuttost juri li z-zewg drivers kienu qeghdin jinkaponixxu ruhhom, ghad-dannu tad-disbrig normali tat-traffiku, u juri wkoll li dak l-ordni kien l-aktar soluzzjoni prattika ghall-evenjenza ta' dak il-mument; tant li, b'manuvra facli u spedita, it-traffiku gie distrikat. 49

There is one apparently conflicting judgement, **La Polizia v. Nobile Conte Francesco Palermo Navarra Bonici**[50]. This judgement is however reconcileable with **Formosa, Bonello** and **Sciberras** on the basis that in the **Bonici** case the

court went for the intrinsic lawfulness of the order, and did not limit itself to its **prima facie** lawfulness. It held that the order was intrinsically lawful because it was given "dall'autorita' per ragione di giustizia e di pubblica sicurezza". Of course, if apart from reasons of public safety the police are expressly authorised by a particular provision of law to give certain specific type of orders, those orders would likewise be intrinsically, as opposed to merely **prima facie**, lawful[51].

The two requisites, therefore, for a "lawful police order" giving rise to the corresponding duty of obedience to that order are (A) that it should be an order within the competence of the police -- and there is a presumption that every order is within the competence of the police. This presumption may of course be rebutted if the order is manifestly illegal and therefore could not possibly be within the competence of the police -- for instance an order to beat up somebody or to run stark naked in the street. The second requisite (B) is that the order must be "regular in form", that is delivered in a normal and regular manner. An order accompanied by blows or punches or with the use of threatening or obscene words would obviously not be regular in form. So also if the order is given in ambiguous terms or in unintelligible language. Even if the order is intrinsically illegitimate or unlawful, that is, not warranted by law, it would still be **prima facie** lawful for the purpose of s.352(cc) if "within the competence of the police" and "regular in form". Thus, for instance, I decide to go and stand next to a ruinous and dangerous portico; a police constable, fearing for my safety, orders me to move along. I refuse. He may arrest me and the court will no doubt convict me under s.352(cc). But the police have no general duty to look after my individual safety in such circumstances, my **personal** or **individual** safety hardly qualifying as the **public** safety. Nor would injury to myself cause, under normal circumstances, public disorder. S.4 of the Malta Police Ordinance, 1961, provides that the Police Force **shall be used, inter alia,** for the protection of life and property, but that section does not impose a **duty**, much less confer a **power**, with regard to my individual safety. I could therefore repay the thoughtful constable by bringing an action for illegal arrest. Likewise it would seem that there is no positive duty on the police to prevent a person from committing suicide if in the process there is no danger to the life, health or property of the public and no danger of public disorder.

Now, from the evidence tendered in **Calleja v. Balzan** there is nothing to indi-

cate that the Inspector's orders to Monsignor Calleja to remove the posters were not **prima facie** lawful as above described. They were intrinsically unlawful for another reason (which shall be examined shortlv) but **prima facie** they were lawful. The Monsignor could have been charged under s.352(cc). But what if the Inspector had proceeded to arrest the Monsignor? Would the arrest have been illegal? It is submitted that if the Inspector's orders were not necessary to preserve public order and peace in terms of s.358(1) of the Criminal Code or were not dictated by sound reasons of public safety (**pubblica sicurezza**) then the arrest would have been illegal under the Criminal Code and consequently under the Constitution. But in this case there was no arrest -- whether out of indecision, out of respect for the cloth or out of knowledge of the subtle legal issues involved -- but only the removal or the grabbing of the posters.

It is further submitted that the correct analytical approach to the legal issue raised in **Calleja v. Balzan** should have been the following:

> A. Were Inspector Balzan's actions (the order to remove, and the removal of, the posters) amounting to interference with freedom of expression necessary to preserve public order and peace and to prevent the commission of any offence as was incumbent on him in terms of s.358(1) of the Criminal Code?
> B. If in the affirmative, then what he did was done under the authority of the Criminal Code and was not unconstitutional in view of s.48(7) of the Constitution;
> C. If in the negative, then Inspector Balzan was not acting under the authority of the Code; it would then be necessary to examine whether he was acting under the authority of some other law or provision of law reasonably required in the interests of public order and, finally, whether that other provision of law and the Inspector's behaviour in conformity thereto were reasonably justifiable in a democratic society.

Inspector Balzan, however, did not attempt to justify his actions other than under the Criminal Code.

The words "public order" have a popular, apart from a legal, meaning. In lay language they simply mean the absence of disorder, and are therefore almost synonymous with orderly and more or less predictable way of life - essential services functioning, motor traffic flowing along, people going about their day to day affairs without undue rush, and when many people have to make use of the same service, be it a bus or the public convenience, they queue up like good Englishmen, even if under the sweltering Maltese sun - in short the absence of confusion and pandemonium. As a phrase, "public order" is never used in contradistinction to "private order". Unlike "public interest" or "public niusance", the element of publicity in "public order" is subsumed in the term itself. English courts have occasionally attempted to determine the element of publicity in other phrases, but never, it would seem

in the phrase "public order". Thus in **R.v. Sussex Confirming Authority, ex p. Tamplin & Sons' Brewery (Brighton), Ltd.**[52] the court held:

> It is fallacious to say that a condition (attached to a justices' licence) is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it.(53)

Or take the case of public niusance in English law. How many people must be inconvenienced before the **public** can be said to be inconvenienced? Lord Denning:

> ....I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public niusance is a niusance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large. 54

In **R. v. Madden**[55] the Court of Criminal Appeal held that in order to prove the offence of public niusance (by making a bogus telephone call falsely giving information about a bomb) it had to be shown that the public, that is to say, a considerable number of persons, or a section of the public, as distinct from individual persons, **had actually been effected;** and one of the reasons for allowing the appeal and quashing the conviction was precisely because there was no evidence that a considerable number of persons had been affected: it was not possible for a jury, properly directed, to have arrived at the conclusion that a considerable number of persons were affected by the action of the appellant. More recently, in **R. v. Norbury**, the Norwich Crown Court upheld an indictment for public niusance against a person who on more than six hundred occasions made obscene telephone calls to over four hundred women "intending to cause offence and alarm and resulting in such offence and alarm" to them[56].

But when it comes to "public order", English judges and lawyers have steered clear of any definition. The English attitude is simply to enumerate the various nominate offences -- usually characterised by the quantitative element of more than one person and the qualitative element of violence -- which the particular author considers to be crimes against public order[57]. Likewise our Criminal Code enumerates, under the general subtitle of "Contraventions Affecting Public Order" a host of acts or omissions, many of which, however, are not attended with either numbers or violence: for example, cutting grass in a fortification[58], or refusing to receive at the established value money lawfully current[59], or wearing a mask in a public place[60], or leading an idle and vagrant life[61].

On the other hand some of the "Contraventions Against the Person" entail a certain quantum of violence: for instance, the contravention of pushing any person in the street with the object of hurting or insulting him[62].

One of the contraventions against public order consists in disturbing the public good order or the public peace in any manner not otherwise provided for in the Criminal Code -- s.352(bb), already referred to. Here the phrases "public good order" and "public peace" are used interchangeably, and appear to have a peculiar and very specific meaning.

## THE BISHOP BESIEGED

One of the oldest reported cases which gives an explanation of the words "public good order (and) public peace" (il buon ordine (e) la tranquillita' pubblica) is **Ispettore Raffaele Calleja v. Paolo Bugeja et.**[63] decided in 1890 by Sir Adrian Dingli. The facts of the case were the following:

> ....una gran folla capitanata da Paolo Bugeja, Paolo Azzopardi, e Luigi Bugeja (appellanti) mosse dal Rabato della Notabile a quella Citta', e si fermo' innanzi al Palazzo Vescovile, mentre il Vescovo si preparava a partire per la Valletta...veduta quella folla, Giovanni Mallia, domestico del Vescovo, tento' di chiudere la porta, ma fu impedito principalmente dal detto Luigi Bugeja e da Gaetano Vella (altro appellante), i quali dicevano di volere entrare per parlare al Vescovo...in un istante, lo spazio tra il portone del palazzo e l'antiporta si empi' di gente che faceva pressa verso l'interno ove era la carrozza in aspettazione del Vescovo...si gridava "Vogliamo sapere perche' il Vescovo ha licenziato i Santesi"; "Vogliamo soddisfazione"; "Non uscirete di qui, non uscirete prima di darci risposta". In quel punto si presento' il Vicario, il quale scendeva le scale accompagnando il Vescovo, e il detto Paolo Bugeja gli disse: "Noi vi abbiamo fatto ricco, noi vi abbiamo fatto rispettabile (nies), il Vescovo e' un....." usando qui schifosissime parole accompagnate con una bestemmia...la folla intanto spingeva innanzi, malgrado gli sforzi dello Ispettore Raffaele Calleja per impedirla; i detti Luigi Bugeja e Gaetano Vella e Paolo Azzopardi (altro appellante) continuavano ad avanzare nonostante il divieto del Vescovo, gridando: "In S. Paolo non entri nessuno, perche' noi commandiano, la chiesa e' nostra" e battendo colle mani sullo sportello della carrozza ove il Vescovo era gia entrato...il Vicario sgrido' la folla, chiedendo nello stesso tempo allo Ispettore di prendere nota dei nomi dei caporioni per citarli... accordato poi il permesso a quattro individui di parlare al Vescovo, e, data indi dal Vicario informazione alla folla, che i Santesi sarebbero rimasti ai loro posti fino a nuovo ordine, i clamore cessarono, a suggerimento del Vicario medesimo, si domando' scusa al Vescovo, e la folla usci' dal Palazzo, gridando e battendo le mani. 64

Neither the Bishop nor the Vicar or the domestic were in any way injured or physically assaulted. Sir Adrian held that there was a disturbance of public good order and the public peace, because every act which induces apprehension for the safety of the public in general or of individuals in particular is an act done in breach of public order and the public peace "indipendentemente della

perpetrazione di altro reato". Safety must here be understood as absence of injury from violent behaviour. It does not take much to see the similarity between this exposition of our law and the notion of "breach of the peace" in English law.

The term "breach of the peace" is one of the most elusive terms in English criminal law. A breach of the peace is not (in England) a substantive offence but confers certain common law powers of arrest. Professor Glanville Williams considers that the general meaning of the concept of "breach of the peace" is **an act involving danger to the person**[65]. In so far as it means "a breach of the Queen's peace" it should, strictly speaking, include every crime. The concept of breach of the peace in England has a related yet somewhat distinct branch dealing with instances of **public violence**, that is, acts **in terrorem populi,** such as the common law offences of affray, unlawful assembly and riot: offences which in our Criminal Code are found in the title dealing with crimes against the public peace. Indeed, the crimes dealt with in sections 63 to 82A of our Criminal Code constitute, for the most part, also a disturbance of public good order and the public peace, s.352(bb) apparently being left to deal with such disturbances of a less serious nature which do not fall specifically under any of these or any other sections. Going armed in public is not **of itself** a breach of the peace in English law, although the circumstances may be such as to create a reasonable apprehension of danger on the part of others and therefore constitute a breach of the peace or even possibly an unlawful assembly. A degree of disturbance which might result from disorderly conduct, abusive language, excessive noise and so on will not necessarily constitute a breach of the peace unless there is reasonable cause for apprehending a threat or use of force. Conduct which is annoying but which involves neither menace, violence, the threat of violence or any element of incitement to violence does not constitute a breach of the peace. So also disorder which is superficial or self-contained and which contains no real danger to others does not amount to a breach of the peace. An English case, **Wooding v. Oxley**[66], decided in 1839, would seem to hold that heckling at a public meeting is not, per se, conduct which would justify an arrest for breach of the peace -- possibly because heckling is a time-honoured practice at public meetings in England. In the case **Amabile Schembri v. Giuseppe Bartolo**[67] heckling at public meetings was also held to be a legitimate practice in Malta, provided that the signs and sounds of approval or disapproval of what the speaker is saying do not degenerate into personal violence "o minaccia all'ordine pubblico". And in this parti-

cular case Mr. Justice (later Sir) Arturo Mercieca went on to say that the hiring of a large number of persons from lower and violent classes for the purpose of disturbing the speakers, not by counter argument, questions or mere heckling, but by shouting, squawking (schiamazzi) and threatening violence such as to induce fear in the speaker and his audience, amounted to a disturbance of public order.

Shouting loudly in the street or blowing a horn do not amount to a breach of the peace at English common law. This point was taken up in **Il-Pulizija v. Paul Montebello**[68] where the court drew a sharp distinction between the contravention contemplated in s.352(m) (disturbing at night time the repose of the inhabitants by rowdiness, bawling or in any other manner) and that contemplated in s.352(bb).

Repeated pestering of a young woman does not constitute a breach of the peace in English law unless the woman goes about in fear of personal violence by reason of the threats made by the person complained of: there must be, in other words, an element of threat or menace, whether by words, gestures or conduct[69]. It must be noted that in Scotland, where breach of the peace is a substantive offence, the notion is wider than in England because it also includes, apart from threats against personal safety, also breaches of public decorum. Thus in the Scots case **Raffaeli v. Heatly**[70] the activity of a "peeping Tom" was held to amount to a breach of the peace in the absence of any threats of violence or menace; and more recently, in 1977, a case was reported in **The Guardian**[71] where a youth was found guilty by a Sheriff's Court in Glasgow of breach of the peace for persistently following and staring at girl students over a period of fourteen months.

The latest, and perhaps most authoritative, definition of what amounts to a breach of the peace in English law was laid down in **R. v. Howell**[72]:

> We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance. 73

The equation of "disturbance of public good order or the public peace" in s.352 (bb) with "breach of the peace" as understood in English law seems to-day to be settled law: the point was made quite clear in 1954 in the case **Il-Pulizija v. Carmela Scinto et.**[74]. It is further supported by a number of cases[75], decided in 1958 and 1959, which dealt with s.6(1)(b) of the Preservation of Public Order

Emergency Ordinance, 1958[76]. The relevant part of this section read:

> Any person who....conducts himself in a manner likely to cause a breach of the peace, shall be guilty of an offence.

The words "breach of the peace" in this section were given the same interpretation as "disturbing the public good order or the public peace" by our courts. But the Emergency Ordinance had the additional words "likely to cause". In other words it was sufficient, as was held in **Il-Pulizija v. William Allen**[77] that there was a "probability" (which the court equated with "reasonable anticipation") of a breach of the peace: even if the breach of the peace had not actually occurred, there was nonetheless a substantive offence under this section of the Emergency Ordinance if the individual's behaviour was likely, in the circumstances, to lead to a breach of the peace. A thing is likely to happen when there are reasonable probabilities that it will happen[78]. But "likely" can also mean "such as might well happen". In a New Zealand case it was held that "the meaning to be given to the word 'likely' where it is used in a statute or regulation will depend upon the statute or regulation and the context in which the word is used"[79]. On the other hand s.352(bb) requires an actual breach of the peace, although for an actual breach of the peace it is sufficient that there be reasonable apprehension of danger to the safety of one or more individuals or of his or their property, the danger arising, as has already been said, from violence or threats of violence.

## THE TEST OF REASONABLENESS

The words "public peace" as used in ss.395(1) and 396 of the Criminal Code have been given a slightly wider interpretation than "public good order or the public peace" in s.352(bb). In **La Polizia v. Emmanuela Vella**[80] it was held that

> .....le due disposizioni (395(1) and 396) hanno per fine principale quello di impedire la vicina ripetizione di reati che attaccano la sicurezza individuale ed il buon ordine pubblico, avuto riguardo alle particolari circostanze del caso ed alla condotta dell' imputato. 81

But Vella had been bound over to keep the peace not because of any violent behaviour or disposition on her part but because she had been found guilty of holding lotteries without police permission. The appellate court held:

> Attesocche' le lotterie al primo estratto senza permesso della Polizia e quindi senza controllo sono divenute molto estese e frequenti e spesso sono occasioni di frodi e causa di litigi domestici e di rovina di famiglie povere, onde, anche se la condotta

della imputata non fosse essa stessa un motivo che avesse determinato la prima corte a dare il detto provvedimento in aggiunta all'ammenda, lo stesso sarebbe stato giustificato. 82

Our courts have also had occasion to interpret the phrase "offence affecting public order" in s.537(d) and in the provisos to ss.538 and 385 of the Criminal Code. Unfortunately all the reported cases are instances of defilement of minors, rape or violent indecent assault committed in a public place or in a place accessible to the public, and it is precisely this place of commission of the principal offence which has been held to be the criterion determining the additional offence ("accompanying" offence) affecting public order[83].

To sum up, therefore, it would seem that broadly speaking the term "public order and peace" as used in the Criminal Code[84] means the absence of danger to the safety of individuals or to the safety of property as well as the absence of reasonable apprehension of such danger, the danger arising from violence, or from threats of violence, or from some other disturbance or state of facts. Now s.358(1) imposes upon the police the duty to preserve public order and peace (in effect to prevent a breach of the peace before it is committed) as well as to prevent the commission of all other offences, whether crimes or contraventions. But such preventive action must, in the light of all the circumstances, including the behaviour complained of, be reasonable by the standards of the Criminal Code. And what is reasonable is what is **objectively** reasonable, not what the police officer on the spot, subjectively, and on the spur of the moment may think is reasonable. This concept is fundamental to a proper understanding of police powers, particularly the power of arrest; it is also a fundamental concept in any free society. Thus, s.359 authorises the police to arrest a person who is suspected of having committed a crime punishable with imprisonment. Properly understood that section should read "who is **reasonably** suspected of having committed a crime punishable with imprisonment" (with the exception of crimes punishable under the Press Act, 1974). And what is reasonable is not necessarily what the policeman on the spot may think is reasonable; his conclusion may be the result of excitement, fear, inexperience or an exceptionally fertile imagination. The policeman's judgement is always subject to review by the court[85] which must apply objective standards:

> What is wanted is that the circumstances of the case be such that a reasonable man acting without passion or prejudice would fairly have suspected the person of having committed the offence. It is important that hasty or ill advised police action should be avoided. If, on the other hand, the police hesitate too long to arrest a person

> when they have a proper and sufficient ground of suspicion against him, they may loose the opportunity of arresting him or enable him to destroy evidence. 86

And this was the fundamental mistake in the first court's judgement in **Calleja v. Balzan**, that is in giving preference to the subjective assessment of the situation made by Inspector Balzan over the objective assessment resulting from the evidence. The Constitutional Court, on the other hand, went for objective reasonableness.

Now, did the Monsignor's actions in displaying the posters amount to a breach of the peace? Certainly not: his actions were neither violent or menacing, nor could they, per se, inspire fear for one's personal safety or the safety of property[87].

Was Inspector Balzan's interference (the orders to remove the posters, and the removal of the poster from the Monsignor's hands) reasonable by the standards of the Criminal Code? In other words, were his actions reasonably necessary to prevent a breach of the peace or the commission of some other offence? The answer again is in the negative. If a breach of the peace was reasonably expected, the **remote** cause was the Monsignor's behaviour but the **immediate** cause was the threatening behaviour of those people who wanted to stop the Monsignor from expressing his view. To hold otherwise would be tantamount to saying that any peaceful and essentially lawful activity may be suppressed because somebody else decides to behave violently or unlawfully in respect of that activity thereby creating a breach of the peace. Clearly this would amount to a gross subversion of the basic principle of freedom upon which the Criminal Code itself is founded. A peaceful and lawful activity does not become unlawful or merit suppression because of the violent and unlawful activity of others; if at all, it is those others which must be restrained, and the activity of those others which must be suppressed. Needless to say, it is conceivable, in extremis, that the police, **having done their utmost to prevent those others from disrupting a lawful activity**, find that the situation has gone out of hand and that the only way of preventing the commission of more serious offences, is to suppress also the lawful activity. But Inspector Balzan was in no way faced with a hopeless or out of hand situation. It does not seem that he had used all the authority at his disposal -- such as summoning more policemen to be stationed near the Monsignor -- to prevent a breach of the peace or the commission of more serious offences by those who, it was clear, did not share the Monsignor's views. Instead he took the short cut, and attemp-

ted to stop the Monsignor. This was unreasonable by the standards of the Criminal Code, was therefore not done under the authority of that law and consequently was unconstitutional.

The unenviable situation in which Inspector Balzan found himself was, of course, not novel. Way back in 1882 the Salvation Army, which preached temperance, met at Weston-super-Mare, England, with the knowledge that they would be opposed by the Skeleton Army, an organisation financed partly by brewery owners and who had made it a habit of disrupting the meetings of the Salvation Army. The magistrates put out a notice forbidding the Salvation Army's meeting. The Salvationists, however, assembled, were met by the police and told to obey the notice. One of the members declined to obey and was arrested. He was subsequently, with others, convicted by the magistrates of taking part in an unlawful assembly. It was an undoubted fact that the meeting of the Salvation Army was likely to lead to an attack by the Skeleton Army and in this sense cause a breach of the peace. The conviction by the magistrates was quashed on appeal to the Queen's Bench Division:

> What has happened here is that an unlawful organisation (the Skeleton Army) has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition. 88

The principle expressed in this case was taken up in an Irish case, **R. v. Justices of Londonderry**[89]:

> Much has been said on both sides in the course of the argument about the case of **Beatty v. Gillbanks.** I am not sure that I would have taken the same view of the facts of that case as was adopted by the Court that decided it; but I agree with both the law as laid down by the Judges, and their application of it to the facts as they understood them. The principle underlying the decision seems to me to be that an act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying of a business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way. 90

And another judge, in the same case, observed:

> If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights. 91

## NOTES

1. Denning A.T., **The Due Process of Law,** Butterworths (London), 1980, p.102.

2. **Re: Galea and Borg** (1981) 7 C.L.B. 932; **Re: Dingli, Attard and Vassallo** (1983) 9 C.L.B. 110.

3. **Decizjonijiet Kostituzzjonali 1964-1978,** Ghaqda Studenti tal-Ligi (Malta), 1979, Vol.II, p.465.

4. Borg A.J., **The Reform of the Council of Trent in Malta and Gozo,** (Malta), 1975, pp.11, 50-51; as for laws regulating the civil effects of marriage, **ibid.** p.53. See also, Bonnici A., **History of the Church in Malta,** Vol.II, (Malta), 1968, pp.54-55 and 140-141.

5. As for the French period see generally Denaro V.F., **The French in Malta,** (Malta), 1963?, pp.46-54.

6. Proclamation VII of 1831. See, Harding H.W., **Maltese Legal History under British Rule 1801-1836,** (Malta), 1968, pp.238 **et seq.**

7. Bonnici A., **History of the Church in Malta,** Vol.III, (Malta), 1975, pp.246-255; Frendo H., **Party Politics in a Fortress Colony,** Midsea Books (Malta), 1979, pp.70-89; Vassallo E.P., **Strickland,** Progress Press (Malta), 1932, pp.23-26; Laferla A.V., **British Malta,** Vol.I, A.C. Aquilina & Co. (Malta), 1946, pp.189-190 and 270-271, and by the same author, **British Malta,** Vol.II, A.C. Aquilina & Co. (Malta), 1947, p.105-108 and 125-129.

8. Ganado H., **Rajt Malta Tinbidel,** Vol.IV, (Malta), 1977, pp.342-343 and 390-391; **Mintoff: Dak li ta Hinu u Hiltu ghal Malta,** Ghaqda Zghazagh Socjalisti (Malta), 1972?, pp.56-66; Mintoff D. (ed.), **Malta: Church, State, Labour - Documents recording negotiations between the Vatican Authorities and the Labour Party 1964-1965,** Malta Labour Party (Malta), 1966, pp.45, 57, 61-62, 65.

9. **Deciz. Kost., op. cit.,** pp.469, 475 and 480.

10. Offences against discipline: para. 8(c): "Unlawful or unnecessary exercise of authority, that is to say, if a member of the Force without good and sufficient cause....is uncivil to any member of the public".

11. **Deciz. Kost., op. cit.,** p.467.

12. See also, **Borg Olivier et. v. Buttigieg, Deciz. Kost.,** Vol.I, p.138 / p.156.

13. S.33 of the Constitution; compare with s.46(1), (4)(b) and (6). See also article 4 of the U.N. Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they live, (1981) 7 C.L.B. 321 at 326.

14. ss.1(2) and 126(1) of the Constitution; see also the Territorial Waters and Contiguous Zone Act, 1971.

15. See also, European Agreement for the Prevention of Broadcasts transmitted from Stations outside National Territories - Strasbourg, 22 January, 1965.

The Parliamentary Assembly of the Council of Europe has for some time now been considering the legal questions raised by direct satellite broadcasts.

16. Abraham H.J., **Freedom and the Court**, O.U.P. 1982, p.153.

17. Tornaritis C.G., **The Right of Silence**, in (1981) 7 C.L.B. 1616.

18. **Deciz. Kost.**, Vol.I, **op. cit.**, at pp.154-158.

19. See also s.5 of the 1961 Constitution.

20. S.47(1) of the Constitution.

21. In **Ramji Lal v. State of Uttar Pradesh** [1957] A.I.R. SC 620, the Indian Supreme Court held the phrase "in the interests of" to be wider than "for the maintenance of" so as to cover restrictions on statements or utterances tending to cause public disorder, though they may not actually lead to a breach. The point was quickly taken up by the first court in **Calleja v. Balzan, Deciz. Kost.**, Vol.II, **op. cit.**, at p.473-474. The difference between the two phrases, however, is not all that clear.

22. See, for instance, **Il-Pulizija v. Ganni Camilleri et., Deciz. Kost.**, Vol.I, p.1 at pp.48-51. Also, European Commission of Human Rights Application 7805/77, **Pastor X and the Church of Scientology v. Sweden**, declared inadmissible on the 5/5/1979 in 22 **Yearbook** pp.244 **et.seq.**, esp. p.252; **Handyside Case**, decided by the European Court of Human Rights on the 7/12/1976 in 19 **Yearbook** p.506 **et. seq.**, esp. pp.508 and 510; and the Report of the Commission on the same case in **European Court of Human Rights** (Series B), Vol.22, Handyside Case, (Strasbourg), 1979, esp. pp.44-45.

23. This subsection was introduced by Act LVIII of 1974. Under s.10 (now repealed) of the Public Meetings Ordinance (Cap.108) public open air meetings could not be held in Valletta or Floriana. As orginally enacted in 1931, s.10 read as follows: "No public open air meeting may be held within the limits of Valletta or Floriana and no such meeting may be continued after sunset". By Act XXX of 1955, the prohibition was limited to the Treasury Square, Palace Square, Kingsway and Merchants Street in Valletta. Then by Ordinance XX of 1959, the entire section was substituted to read as follows: "No public open air meeting shall be held within the limits of Valletta or Floriana". S.10 was eventually repealed by Act XXII of 1971, s.3.

24. S.19(2): "The Governor may, by Proclamation, for reasons of public order, prohibit the holding of all public meetings for a specified period not exceeding three months. Such prohibition may be renewed for further periods each of which, however, shall not exceed three months". S.21 provides: "The Governor may, by Proclamation, prohibit the holding of all demonstrations in any place open to the public on any particular occasion or for a specified period not exceeding three months. Such prohibition may be renewed for further periods each of which, however, shall not exceed three months". What if the Presidential Proclamation under s.21 were to prohibit all demonstrations in any, i.e., in every place open to the public in Luqa on a particular occasion, for example, on the occasion of the feast of the patron saint of the village? Would such a prohibition fall foul of s.43(3) of the Constitution? However, it is submitted, if the prohibition were limited to one or more specific places open to the public at Luqa, e.g.

the two streets where the rival band clubs are situated, the Proclamation would definitely not be unconstitutional. See also s.65(1) of the Electoral (Polling) Ordinance (Cap.163).

25. **Il-Pulizija v. Ganni Camilleri et., Deciz. Kost.,** Vol.I, p.1.

26. S.2 of Cap.108. It is submitted that the words "open space" in this section must be interpreted **ejusdem generis** with "public street" and "square" and therefore to mean "public open space" or "open space accessible to the public".

27. But such a demonstration would be subject to such police orders as may be given in terms of s.31(1)(f) of the Code of Police Laws (Cap.13). Nor, it would seem, is previous notice or permission required for the holding of a procession, other than a procession to or from a public meeting (s.9, Public Meetings Ordinance). However a police permit is required for the holding of a band march, Police Licences Regulations, 1949 (G.N. 846/49), First Schedule, item 29. See also, **Il-Pulizija v. George Agius,** Ct. of Mag. of Ju. Pol., 3/8/1982.

28. Public Meetings Ordinance: s.20: "It shall be lawful for the Commissioner of Police for reasons of public order to disperse any demonstration".

29. **Deciz. Kost.,** Vol.I, p.138. The circular is quoted at pp.151, 152.

30. **ibid.,** p.1.

31. ss.14 and 15 of the 1961 Constitution.

32. **Deciz. Kost.,** Vol.I, p.15. See also s.743(6) of the Code of Organisation and Civil Procedure (Cap.15).
(Translation of quotation) "....even if the Proclamation was not law, but a simple act of the executive branch, it always remains an act which, besides the question of its validity, is made 'under and according to the authority of the law', and the Court is obliged to resist the suggestion that for the citizens to be able to impute an act purporting to be done under the authority of a law they have by force to impute the law. This is not only contrary to the clear words of the dispositions under examination but may be the result of superfluous attempts to impute perfectly good laws every time that a government official steps on somebody's toes and is brought to court under the 'human rights' dispositions."

33. **Deciz. Kost.,** Vol.I, p.25.

34. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et.,** Constitutional Court, 20/1/82. On the same day another case was decided by the Constitutional Court on exactly the same grounds, **Dr. Louis Galea noe. et. v. Salvu Sant noe.**
(Translation of quotation) "....for an administrative act, made in conformity with a provision of the law, and therefore authorised by that law, to be declared null and without effect, considered in itself, because it is in breach of Art.42 of the Constitution, it must also necessarily be declared that the provision which authorizes that act is also in breach of Article 42, because the illegality of the administrative act is the unconstitutionality of the legislative provision, which is the cause; in such a case, therefore, every action directed to impute the administrative act cannot in this context be considered in isolation and independently of the legislative provi-

sion, under which that same act would have been made, because the illegality of the act is necessarily the consequence of the illegality of the law, in such a manner that before the one is established, the other must have already been established."

35. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et., supra.**
(Translation of quotation) "....However, for an administrative act allegedly made under the authority of a particular law to be declared null and without effect, without imputing at the same time the law itself (always independently of imputing it on the basis of discrimination) obviously requires that the action in itself is vitiated, in such a manner that it becomes illegal and one cannot any longer say that the action was validly made in conformity to the law."

36. **Reflections on 20 years of human rights in Malta**, in **De Jure**, Crest Publishing (Malta), no.1, 1982, p.3 at p.12.

37. **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et., supra.**
(Translation of quotation) "The law in question is not one of those protected in the First Schedule of the Constitution, but all the same it was never brought up, and it is therefore necessary for the Court to decide only the question brought before it on the basis of the plea before it, and therefore cannot declare null and without effect something the validity and the legality of which is not at issue, or else declare null any particular act on the basis of nullity of something else when such basis would not have been deduced."

38. Civil Court, First Hall, 28/6/1983.

39. **ibid.**
(Translation of quotation) "In the oral proceedings, counsel to the Police submitted that the mentioned refusal took place 'under the authority of the law' which was not attacked by the plaintiffs and as a consequence plaintiffs cannot attack the refusal if they had not before attacked the law. This submission is not legally correct; in the Court's opinion, every act, except of course the question of its validity or otherwise, can be attacked by the individual who invokes in his favour the disposition of Article 42 of the Constitution, it not being necessary for the individual to impute also the law under which and according to which the act is alleged to have been made...otherwise the act of an official however abusive it may be, may never be imputed by way of a disposition which guarantees the fundamental right in cases where it is alleged that that act was made under the authority of some law, which law as a rule, one usually assumes to be perfectly good."

40. **Deciz. Kost.**, Vol.II, at p.472.

41. **ibid.**

42. **Deciz. Kost.**, Vol.I, p.216.

43. That is, apart from the fact of that behaviour being safeguarded by s.48(7). It should be clear however that the phrases "necessary to preserve public order" and "reasonably required in the interests of public order" may not be absolutely identical in their import. See also n.21, **supra.**

44. **Deciz. Kost.**, Vol.II, p.472.

(Translation of quotation) "As was rightly noted by the applicant in his note of observations the question (which remains a thorny one) resolves itself in the determination of up to what extent the freedom of expression of the individual may be circumscribed by the exigencies of public order - up to what limits may the orders mentioned in the above-quoted articles 352(cc) and 361 of the Criminal Code, be regarded as legitimate."

45. **La Polizia (Ispettore Paolo Mamo) v. Paolo Formosa et., Deciz.** Vol.XX.IV.28.

46. **ibid.**, at 29.
(Translation of quotation) "If one were to admit as a hypothesis that the order was illegitimate, yet coming within the competence of the Police to issue, and regular in form, defendants must in the circumstances indicated in the motives for the appealed sentence, although aware of the injustice must obey, reserving their right to take steps against the intrinsic injustice. Thus Silvio Longhi in his 'Legitimate resistance to the acts of the Authority' pp.106-137 quotes Romagnosi and distinguishes the right to resistance from that of refusing obedience, chapter V pp.112-113, vide also Viazzi on contraventions p.90, who under the heading 'Legality of the order' says that the order 'must be given legally'. One must above all notice that any order given by the authority (and the competence must always be presupposed) for reasons (and not pretexts) of justice and public security, is an order legally given."

47. **Deciz.** Vol.XXXI.IV.472.

48. **Deciz.** Vol.XLIII.IV.1075.

49. **ibid.** at 1076.
(Translation of quotation) "However, besides this principle, this Court is not at all inclined to say that there is something illegitimate, or arbitrary, in the order given by Sergeant Micallef. The evidence overall rather shows that the two drivers were interrupting the regular flow of traffic through their actions and also shows that the order was the most practical solution under the circumstances; so much so, that with an easy and expedite manoeuvre, the normal flow of traffic was resumed."

50. **Deciz.** Vol.XXVII.IV.662, quoted with approval in **Il-Pulizija v. Enrico Guidi et.**, Ct. of Crim. App., 23/11/1982. See also, **Il-Pulizija v. Ganni Gauci, Deciz.** Vol.XXXIII.IV.866.

51. See **Il-Pulizija v. Domenic Mintoff**, H.M. Ct. of Crim. App., 9/4/1960, reported in Gulia O., **Appelli Kriminali**, A.C. Aquilina & Co. (Malta), 1966, p.28; **Il-Pulizija v. Carmelo Cassar, Deciz.** Vol.XXXVIII.IV.809; **Il-Pulizija v. Pietru Azzopardi, Deciz.** Vol.XXXIX.IV.1029.

52. [1937] 4 All E.R. 106.

53. **ibid.** at 112.

54. **A.-G. v. P.Y.A. Quarries Ltd.** [1957] 1 All E.R. 894 at 908.

55. [1975] 3 All E.R. 155.

56. [1978] Crim.L.R. 435.

57. See for example, The Law Commission, **Offences Against Public Order**, Working paper no.82, H.M.S.O., 1982.

58. S.352(a).

59. S.352(k).

60. S.352(n).

61. S.352(w).

62. S.353(1)(L).

63. **Deciz.** Vol.XII.472.

64. **ibid.** at p.473, 474.
(Translation of quotation) "A large crowd led by Paolo Bugeja, Paolo Azzopardi, and Luigi Bugeja (appellants) moved from Rabat to Mdina and stopped in front of the Bishop's Palace, as the Bishop was preparing to leave for Valletta...on seeing such a crowd, Giovanni Mallia, one of the Bishop's servants, tried to close the door, but was prevented from doing so mainly by Luigi Bugeja and Gaetano Vella (another appellant) who said they wanted to enter to talk to the Bishop...suddenly, the space between the main door of the Palace and the portal became full of people who were pressing towards the interior where a carriage was waiting for the Bishop...they shouted 'We want to know why the Bishop has dismissed the Santesi', 'We want satisfaction', 'You shall not get out of here, you shall not get out of here before giving us an answer'. At that moment the Vicar appeared descending the stairs accompanying the Bishop, and the afore-mentioned Paolo Bugeja told him 'We have made you rich, we have made you respectable (nies), the Bishop is a .....' using here disgusting words accompanied by a swear-word...the crowd in the meantime pushed forward, despite the efforts of Inspector Raffaele Calleja to prevent it, the said Luigi Bugeja and Gaetano Vella and Paolo Azzopardi (another appellant) continued to advance despite the prohibition of the Bishop, shouting: 'In St. Paul's nobody enters because we command, the Church is ours' and beating their hands on the door of the carriage where the Bishop had already entered... the Vicar shouted at the crowd, at the same time asking the Inspector to take a note of the names of the ring-leaders in order to arraign them ...then gave permission to four individuals to talk to the Bishop, and the Vicar having informed the crowd that the Santesi would remain in their posts until further orders, the rumpus ceased, at the Vicar's own suggestion pardon was asked from the Bishop, and the crowd went out of the Palace shouting and clapping their hands."

65. Glanville Williams [1954] Crim.L.R. 578.

66. (1839) 9 C. & P. 1

67. **Deciz.** Vol.XXV.II.66.

68. **Deciz.** Vol.XLI.IV.1361.

69. **R. v. Dunn** (1840) 12 Ad. & El. 599.

70. (1949) S.L.T. 284.

71. Dec. 8, 1977.

72. [1981] 3 All E.R. 383.

73. **ibid.** at 398.

74. **Deciz.** Vol.XXXVIII.IV.802.

75. e.g. **Il-Pulizija v. Edgar Grixti, Deciz.** Vol.XLIII.IV.1004; and see also **Il-Pulizija v. Mary Simiana, Deciz.** Vol.XXXVIII.IV.818; **Il-Pulizija v. Lewis Taliana, Deciz.** Vol.XL.IV.1237; **Il-Pulizija v. Anglu Scicluna, Deciz.** Vol.XLI. iV.1470.

76. Repealed by Act VIII of 1963.

77. **Deciz.** Vol.XLIII.IV.1017.

78. **Dowling v. South Canterbury Electric Power Board** [1966] N.Z.L.R. 676 at 678.

79. **Transport Ministry v. Simmonds** [1973] 1 N.Z.L.R. 359 at 362.

80. **Deciz.** Vol.XXV.IV.889.

81. **ibid.** at p.890.
(Translation of quotation) "...the two dispositions (395(1) and 396) have as their main aim the prevention of close repetition of crimes which attack individual security and public good order, having regard to all the particular circumstances of the case and to the conduct of the accused."

82. **ibid.**
(Translation of quotation) "Seeing that the lotteries, without police permission and therefore without control, had become very widespread and frequent and are often the cause of frauds, domestic quarrels and the ruin of poor families, even if the conduct of the accused was not itself the reason that determined the First Court to give the said precaution in addition to the small fine, the same would have been justified."

83. See for example, **R. v. Gio Maria Fenech et., Deciz.** Vol.XXII.IV.15; **R. v. Giuseppe Busuttil, Deciz.** Vol.XXIV.IV.884; **Il-Pulizija v. Joseph Scicluna, Deciz.** Vol.XL.IV.1119. Also, Cremona G., **Raccolta della Giurisprudenza sul Codice Penale**, (Malta), 1935, pp.585-589. As for the word "accompanied" in the provisos to ss.538 and 385, see **Il-Pulizija v. Karmenu Cassar, Deciz.** Vol.XXXII.IV.895.

84. The words "public order" as used in the Constitution may have a wider meaning. In this connection see the judgement of the Civil Court, First Hall, delivered on the 22/10/1981 in **Dr. Louis Galea noe. et. v. Il-Kummissarju tal-Pulizija et.** See also, the majority judgement in **Romesh Thappar v. The State of Madras** (1950) S.C.R. 594; and generally, Basu D.D., **Commentary on the Constitution of India,** Vol.I, Sarkar & Sons (Calcutta), 1961, pp.544-548 and 623-624.

85. Leigh L.H., **Police Powers in England and Wales,** Butterworths (London), 1975, pp.62-63.

86. **ibid.** p.64.

87. The posters certainly did not contain anything defamatory, as was the case in **Il-Pulizija v. Norman Lowell**, Ct. of Mag. of Ju. Pol., 26/5/1980; Ct. of Crim. App., 4/9/1980.

88. **Beatty v. Gillbanks** (1882) 9 Q.B.D. 308 at 314.

89. (1891) 28 L.R. Ir. 440.

90. **ibid.** at 461, 462.

91. **ibid.** at 450.


# assignment

In January 1983, a team from ID-DRITT[1] set out to gauge the progress made in the legal applications of computer technology outside Malta as well as to investigate the extent of local developments in this field by collecting various data and suggestions and testing opinions. The aim of the project was to evaluate the practicality of widespread use of computers by law students, lawyers, notaries, the judiciary, etc. in a Maltese context. Other than research and interviewing many lawyers, students and local importers of computers on the subject, this involved analysing 3 different questionnaires sent to 3 different categories of people, wherein an effort was made to include **all** the computer firms, lawyers and law students in Malta. As part of the practical tests, the questionnaire returns were even analysed by computer. Some of the results of this project are published in this article[2] which has been sponsored by **PANTA COMPUTER CO. LTD.**

We are grateful to the following for their co-operation:
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Dr. Michael Frendo LL.D.

# COMPUTER APPLICATIONS AND THE MALTESE LEGAL PROFESSIONS

**JOSEPH A. CANNATACI**

> "As a society we're heading into the computer age.
> Courtrooms have to do the same thing." (3)

Samuel Gardner is not a computer salesman. He is Chief Judge of Detroit's Recorder's Court, the city's criminal court which handles 12,000 felony cases a year. It is hardly surprising however that he should have been the source of the above comment. Within four feet of his bench, Gardner has, like each of the court's 29 judges, a terminal which gives access to an IBM System 38 Computer. Available at the touch of a button are appointment details for any lawyer or judge which are consulted in order to avoid scheduling conflicts and unnecessary adjournments, as well as information on 72,000 cases heard during the last six years. Not only has the computer helped to dispense with a backlog, which in 1977 stood at 7,000 cases, but the docket management system that it provides ensures that half the court's cases are disposed of within 30 days. Defendants charged with a non capital crime can expect a trial in 60 days and those charged with crimes such as murder or rape usually go to trial within 90 days. No wonder that Gardner claims that "It would be impossible to manage the court without it".[4]

Docket management is but one facet of the application of computers by legal professions outside Malta. It falls, in fact, within the second of two main categories of application, the local development of which will form a basis for dis-

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cussion in this paper: **Legal Information Retrieval (LIR)** and **Administrative/ Management Automation (AMA).** Before considering the computer's utility in these two fields however, a basic question must be examined: Can a lawyer or law student afford to indulge in computer illiteracy?

## THE COMPUTER AGE - EDUCATIONAL REQUIREMENTS & LEGAL IMPLICATIONS

In a 1970 publication of the American Association of Junior Colleges, one recommendation was that "computer literacy should be required of all college students and of all high school students too, whatever their field of work might be." **All educated persons**, the report continued, should have a knowledge of (1) the development of information processing, (2) the basic concepts of computer hardware and software, (3) the social impact of computer usage and (4) the ways in which computers are applied.[5]

Whilst doubtless hoping that the powers-that-be will bear the above in mind when embarking on the next round of educational reform, those of us who have not had the benefit of such an education would do well to try and catch up with developments in the computer world. Lawyers and law students simply cannot afford to be ignorant in computer basics, especially since computerisation may have many legal implications. To consider but three:
Clients and opponents will be using computers to process records, and these records may be entered as evidence in court cases. How reliable are they? Have they been tampered with? In the same way that one requires expert testimony from medical doctors, architects and engineers, one may have to call computer experts to testify to the validity of computer-produced evidence. Lawyers have to learn enough about computers to communicate with, or at least understand, the experts testifying for or against their clients. Professor Vaughn C. Ball put the point admirably: "The expert on computer-controlled production comes in, and you ask him 'How did the program and the machine work to produce this result?' If all he will say is 'This program califlams the whingdrop and reticulates the residual glob', it is perfectly clear that you are going to have to study up somewhat, in order to make up your mind about what went on."[6]

Lawyers may increasingly be involved in cases concerning computer-related theft or fraud. The classic example is that of the 1972 case in Oakland, Califor-

nia where "a computer expert was charged with stealing industrial secrets by telephone from a computer memory bank. The expert was accused of using a special code and account number to obtain a computer program worth $25,000... from an Oakland organisation."[7]

One might equally witness a Maltese version of the controversy that has raged in America since the mid-1960's, over the threat posed by computers to what the Americans view as legitimate rights to privacy. The ability of the computer to collect, process, store and retrieve data more rapidly than any human, coupled with the ever increasing number of computerised data banks, makes it possible for private industry and government agencies to compile sizable information files on individual citizens. The misuse of such information may make the computer's potential for harm infinite. The controversy had gained momentum when in late 1966, after eleven months of study, a special government Task Force on the Storage of and Access to Government Statistics recommended to the Bureau of the Budget that a National Data Center be established. This center would consolidate all data compiled by about twenty U.S. federal agencies. This data would naturally be invaluable to private and public planners and decision makers. It was contended however that although the government may have legitimate reasons for collecting information about individuals, "if knowledge is power, this encyclopedic knowledge gives government the raw materials of tyranny".[8] Congressional debate and increased public criticism prevented the formal setting up of such a centre, although in reality various goveernment agencies can still share their computerised data. Donald H. Sanders has defined American concern thus: "The creation of a federal government superbank with a complete computer-based dossier on every individual would give considerable power to those in charge of the bank, and the development might be the beginning of a drift towards the 'big brother' state created by George Orwell in his book **1984**."[9]

Before examining a Maltese hypothesis, the question must naturally be understood in its American context. By **1967**, 48 percent of U.S. government records were computerised. The files contained more than 27 billion names, more than 2 billion current and past addresses, 264.5 million police histories, 916.4 million records on alcoholism and drug addiction, and at least 1.2 billion income tax records.[10]

In the late 1960's therefore, it was already perfectly natural for the average

American to contemplate the feasibility of having one's C.V. compiled, checked (against arbitrarily pre-determined criteria) and perhaps even singled out for inspection by a computer, in much the same way as their income tax returns were analysed by the computers of the U.S. Internal Revenue Service. Fear of the advent of 'big brother' is evident in the following extracts from the proceedings of the U.S. Senate Sub-Committee on Constitutional Rights in 1971:

> "Whether he knows it or not, each time a citizen files a tax return, applies for life insurance or a credit card, seeks government benefits, or interviews for a job, a dossier is opened under his name and an informational profile on him is sketched. It has now reached the point at which whenever we travel on a commercial airline, reserve a room at one of the national hotel chains, or rent a car we are likely to leave distinctive electronic tracks in the memory of a computer - tracks that can tell a great deal about our activities, habits and associations when collated and analysed. Few people seem to appreciate the fact that modern technology is capable of monitoring, centralising and evaluating these electronic entries - no matter how numerous they may be - thereby making credible the fear that many Americans have of a womb-to-tomb dossier on each of us." (11)
> (Professor Arthur R. Miller - Univ. of Michigan Law School)

> "However much we try to rationalise decisions through the use of machines, there is one factor that the machine can never allow for. That is the insatiable curiosity of government to know everything about those it governs. Nor can it predict the ingenuity applied by government officials to find out what they think they must know to achieve their ends.
> It is this curiosity, combined with the technological and electronic means of satisfying it, which has recently intensified government surveillance and official inquiries that I believe infringe on the Constitutional rights of individuals." (12)
> (Senator Sam J. Ervin Jr. - Chairman, Constitutional Rights Sub-Comm.)

The Americans have not yet found a satisfactory legal remedy to what is, in essence, an aspect of the perennial and all-too familiar conflict between individual rights and public interest that haunts any serious study of Law. The issue was again given prominence in a four-page spread which opened the **LawScope** feature of the American Bar Assoication Journal of May 1983, and seems to have been re-thrust into the limelight by the publication of a 489-page report by the California Commission on Personal Privacy. Underlying concern is evident in **LawScope** headings like **PRIVACY IN PERIL: technology and government erode protections**[13] and **BIG BROTHER? Does IRS know too much?**[14]

The legal twists and turns of the issue may be summarised thus: There is no mention of the word 'privacy' in the U.S. Constitution although some rights of privacy are guaranteed by the restrictions against illegal search and seizure in the Bill of Rights. (The Maltese Constitution is very similar in this respect especially in Section 39 although the explicit uses of the words 'private' and 'privacy' in our Constitution merit much serious study.) Yet, in 1974 Congress

enacted the Federal Privacy Act declaring that informational privacy "is a personal and fundamental right protected by the Constitution." "At times," writes Vicki Quade in LawScope, "that personal right takes a back seat to the public's right to know, as protected in the Freedom of Information Act. Just how far privacy can be carried is a delicate question."[15]

Here in Malta, widespread use of computers by the government might only appear to be a remote possibility. The legal implications would therefore seem to be equally remote. Yet, the financial status of persons banking with Barclays, (now Mid-Med and government-controlled) has long been monitored by computer; the two most powerful institutions on the island have both turned to computers for help: the government has set up its own computer centre at Dingli (and not much concern has been voiced about its future uses being potentially threatening to privacy) and the Catholic Church has invested in computers to ensure that its administration functions efficiently. Like many commerical and industrial concerns certain government departments and parastatal organisations are bound to go computer within the next ten or fifteen years. Likely candidates are the Department of Inland Revenue, the Department of Social Services, the Public Registry, Police Immigration and Criminal Records, Air Malta, Enemalta and Telemalta.

In a socialist state with a tendency towards nationalisation, little breathing space is left if one were to collate all the information held on the individual by the above departments and organisations alone. If centralised, the data would permit an entire c.v. to be printed out in a matter of seconds to anybody having access to the computer. On the credit side however, the Archbishop's Curia has only introduced the computer into its administrative set-up and not into the confessional! In any case, which law will protect the individual from (1) inaccurate entries in his dossier? (2) tampered electronic evidence tendered in legal proceedings against him? (3) misuse of his dossier? (4) an invasion of his privacy?

Although perhaps not immediately, the Maltese legal professions will have to face the issue of privacy. At the Constitutional level the curious nature of **Section 33** will again be highlighted. At first glance this section seems to be a resume of the fundamental rights and freedoms of the individual that are then entrenched in further detail in the sections that follow it. In this sense, tne legal draughtsman responsible for the Constitution seems to have systema-

tically expanded upon sub-sections (a) and (b) of section 33, throughout sections 34 to 46. Yet, in the same way that one encounters no other mention of protection from discrimination on grounds of sex in the Constitution apart from the opening sentence of section 33, there is no further elaboration on the provisions of 33 (c) **"respect for private and family life"**. In fact the privacy protected in section 39 is included within the general notion of the protection of "the enjoyment of property" first outlined in sub-section (a) of section 33. "Respect for private and family life" is not enunciated as a fundamental right **'per se'** other than in 33(c). To confound the issue, although it is entrenched as strongly as sections 34 to 49, being shielded from amendment by the requirements of section 67, section 33 is not explicitly enforceable in terms of section 47 of the same Chapter IV of the Constitution.

At the legislative level new laws are required to protect our individual rights in an electronic age. The American experience has shown that the most recurrent suggestions for legislative reform centre around guaranteeing the individual's right to have access to his dossier and to have the subsequent opportunity of clearing his file of false or adverse information. Alan J. Westin, professor of public law and government at Columbia University in New York and a long-standing American authority on privacy has made a very important contribution on this point that may well be implemented in future Maltese legal reform. The proposed protection of personal privacy by giving people the right to know what their computerised records contain, has been termed by Professor Westin as a writ of **'habeas data'**, under which the individual could challenge the accuracy of information compiled about him. He reasons, "The Great Writ of English Constitutional History helped bring kings under the rule of law; perhaps a new Great Writ will help us do the same with uses of computers." "Someday," Westin has said, "there might be a button the citizen could push to produce for his own inspection and verification a giant print-out of all the information held about him by the government."[16]

The case of **computer vs. privacy** calls not only for serious study but also for a general awareness of the issues involved. While very much a matter of public concern the legal professions would ignore the implications of computerisation at the peril of the society they are supposed to protect. In a democratic state lawyers have a vital role in the running battle between individual rights and public interest. Malta is no exception.

## ARE YOU BEING SERVED, SIR?

In spite of the fact that computer technology and law are occasionally uneasy bedfellows, the wiser members of the legal professions are in the process of exploiting the very characteristics that make the computer potentially dangerous. This is true of the situation in the developed countries of the Western world especially the United States, where lawyers are busy taking advantage of the computer's ability to store and process vast amounts of data in looking up case-law, court administration, client records, accounts/billing, word processing in standard legal documents etc. Maltese interest in this respect does not seem to be very high. This may have been one of the main factors behind the very low returns in a survey carried out in conjunction with research for this article. The July 1983 questionnaire sent to 187 lawyers, the 149 undergraduate law students registered with the University of Malta and the dozen-odd computer firms on the island yielded the following result: only 33.3% of the computer firms, 12.8% of the lawyers and 9.4% of the students returned the questionnaire completed. The poor response notwithstanding, more than 95% of those who **did** send in the questionnaire were interested in using a computer in their day-to-day work. It was apparent however, that many lacked a clear idea of what the computer has to offer to the legal profession.

### Legal Information Retrieval (LIR)

In his introduction to the proceedings[17] of an eight-day Advanced Workshop on Computer Science and Law held in Swansea in 1979, Bryan Niblett[18] described the study of the use of computers to search legal documents as a 'well-worn subject'[19]. It is true that he was speaking mostly in the context of the scientist who **designs** the machine rather than the lawyer who **uses** it. Yet, he concluded that "It is fair to say that the computer science aspects of these machines, the techniques of storing large volumes of legal data, the design of suitable interrogation languages, are, in large part solved"[20], only after evaluating the practical success of LIR: "As a recent survey[21] has recorded there are now in the U.S.A. a variety of computer-based legal retrieval systems which are used in everyday practice by lawyers. Experience shows that by and large these systems meet successfully the objectives set for them: they are able to find, quickly and comprehensively the relevant legislation and the opposite precedent."[22]

The above is in essence a basic definition of LIR. A large and sophisticated computer is capable of storing enormous amounts of information and of rapidly scanning this information, searching for given words or word-patterns. The concept of LIR has utilised fully these two characteristics and thus the computer serves as an electronic library with a compact capability for storing vast amounts of legal information (such as statute law, case-law, subsidiary legislation, indexes, etc.) It is especially useful where conventional printed publications are either rare or unavailable. The extent of such a reference library is further enhanced by the computer's ability to search, locate and retrieve desired legal information with unmatchable speed, ease and accuracy, particularly where the system incorporates full-text storage and permits full-text search.[23]

The prerequisites of successful LIR are logically therefore:

1. The building-up of as comprehensive a legal data-bank as possible. This implies the often monumental task of feeding the computer with the full text of the law, the case law for a considerable number of years, etc. This initial effort, requiring hundreds of thousands of man-hours, must be complemented by the creation of a system wherein the data-bank is kept up-to-date.

2. Computer hardware large (and expensive) enough to cope with the immense volume of legal data that it will be required to handle.

It is immediately evident that the time and volume of work required to set up the system, as well as the expense of the hardware puts the realisation of LIR beyond the resources of individual lawyers. Indeed many of the LIR services existent outside Malta are operated by commercial companies that function as 'electronic' legal publishers. The major LIR systems such as EUROLEX, LEXIS and WESTLAW, offer great ease of access to their 'electronic libraries' (put more technically: their legal data bases). The individual lawyer conducts research from his own office using a keyboard to relay research instructions and a VDU[24] and/or printer to receive information. These are connected, using a special device known as a modem[25], via the ordinary telephone lines, to the organisation's 'main frame' computer which stores, controls and outputs the legal data.

Nobody has disputed the utility of such a system in Malta. As to the necessary investment in terms of time and finance, a variety of suggestions have been

put forward:

1. That it be financed by one or a combination of the following: the Law Courts; the Camera degli Avvocati; the Attorney General; the University of Malta and/or a private commercial company.

2. Economic viability is important but not essential. Such an incentive to research ought perhaps to be aided by public and/or private funds in the interest of organisation and scholarship.

3. A national legal data centre would preferably be administered by an independent non-governmental agency. A further suggestion has been that this autonomous agency would include representatives from the Law Courts, the Camera degli Avvocati, the Attorney General and the University of Malta. (This, of course, would depend on who finances the project.)

4. That it might form an integral part of a court administration/docket management system as illustrated in the opening part of this paper.

5. That it offers the same ease of service to the individual lawyer as comparable systems abroad, i.e. with terminal facilities in one's office and in the Law Courts etc. Law students at the University of Malta, (as well as research students in other disciplines) ought to be given special facilities for research.

6. That it be linked to international systems through facilities such as the EURONET network.

Whatever the form that Maltese LIR will take, its realisation depends largely on the constructive and imaginative approach required on the part of the interested parties, namely the Camera degli Avvocati, the Law Courts and the government. Since the government pulls the financial strings, the participation of the Attorney-General and the University of Malta is as conditional as that of the Law Courts.

**Administrative/Management Automation (AMA)**

Imagine entering a dentist's clinic consisting of a room bare save for a stout chair at one end and a rope dangling through a pulley attached to the wall at the other end. That this, today, is an absurd proposition, is a sign that the dental profession has moved with the times and constantly adapted technological

innovations to serve its needs better. A plea of toothache is now faced with an impressive display of drills, electronically controlled multi-position couches, X-ray equipment, special lighting, hygienic fittings, glittering stainless steel impedimenta etc.

The computer assumes very much the same position vis-a-vis the legal professions. Progress has put at our disposal, a powerful tool which ought to ensure a faster, cheaper and less tiring way of rendering service to clients. Yet, office equipment has apparently never ranked high on the list of the Maltese lawyer's priorities and the local tendency towards a continuation of spartan traditions in this respect does not seem to have been dented by the advent of computerisation.

Except for the use of Court Administration/Docket management as illustrated in the Detroit example which opened this paper, legal AMA is very much a matter of individual initiative. If a lawyer or law firm wish to upgrade their capabilities the likelihood is that they will invest in a computer to help run the legal office. As an item of office equipment, the size and type of the computer would naturally depend on the size of the legal office that it is to serve. Thus for the sake of convenience one would normally have a VDU and keyboard for each regular user of the computer. In a partnership this would mean one for each partner and/or associate as well as one for the secretary. Regardless of the size of the legal office the uses of the computer remain pretty much the same:

1. **Word Processing** - Any legal document that is reasonably formulaic may be usefully prepared by computer. In this function a standard form of the letter or document required is recalled from the computer's memory and displayed on the screen. The lawyer or notary simply changes or inserts words, phrases etc. where necessary. A touch of a button and the prepared document is printed out ready for use. As many hard copies as required may be printed while the new document drafted may be stored in the appropriate client's file where these are also electronically stored. Word processing is invaluable in the preparation of standard letters and documents such as certain contracts, leases, wills, bills and even court pleadings.

2. **Accounts** - This falls into two parts: office accounts and clients' accounts. In the latter case postage and copying fees, telephone calls,

Registry fees, in fact every disbursement on behalf of a client are entered together with 'professional fees due for services rendered' and are available instantly. In conjunction with word-processing, this facilitates billing immensely.

3. **Clients' Records/Case Histories** - Details of every case handled by the legal office including pleas, documentary evidence, judicial decisions, dates of hearings, client office appointments may all be held in storage by the computer.

4. **Diary** - From clients' records the computer can easily make out a diary of court and office appointments, lists of cases pending etc.

5. **Case-Law** - Many lawyers specialise to varying degrees in a particular branch of law. Important precedents in that field stored in the computer make a valuable addition to the lawyer's own case records.

6. **LIR** - The same equipment used above would, by means of a modem, allow the lawyer access to a large legal data base via the telephone lines. Research could thus be carried out from the lawyer's own office.

The volume of work thus handled would reduce the amount of secretarial and clerical time required to run the office. At the same time the lawyer has instant access to anything that he may require in the course of his work.

The successful development of the Maltese application of computers in the legal office also requires the availability of certain facilities: (1) a consultancy service to assist individual lawyers and partnerships in the selection of the suitable hardware and software; (2) custom software tailor-made for Maltese legal documents, client accounts and records etc. In the meantime, while the lawyers slowly realise that computers are useful **and** affordable, scientists are busy designing machines capable of giving legal advice. Is it possible to write a computer program that can match the performance of experts? According to Bryan Niblett, a well-bred electronic colleague "will be designed so that it can combine and assimilate the experience of many legal advisors acting seperately. This is the most exciting feature of a consultation system. A law machine can be a more judicious advisor than any single lawyer because it can incorporate the seperate understandings and the seperate experiences of individual advisors. Every new problem presented to the system improves its knowledge base."[26] A Maltese lawyer has already prepared his first request for legal advice: "Who would the client sue for professional negligence?"

## NOTES

1. This included Christian Farrugia, Tonio Fenech and the author, all three law students at the University of Malta.
2. **PANTA COMPUTER CO. LTD.** of Msida, Malta have been mostly engaged in the provision of computer hardware to the public sector in Malta. They have already assisted various academic projects assessing and promoting knowledge of computer technology.
3. Samuel Gardner, Chief Judge, Detroit Recorder's Court as quoted in **NO BACKLOG: Computer keeps court rolling**, American Bar Association Journal, U.S.A., March 1983 Volume 69 p.266.
4. Condensed from **NO BACKLOG: Computer keeps court rolling, op.cit.**
5. **The Computer and the Junior College: Curriculum**, American Association of Junior Colleges, Washington, 1970 p.6. (Donald H. Sanders, **Computers in Society**, U.S.A. 1973 p.xi.)
6. Vaughn C. Ball, **"The Impact of Data-processing Technology on the Legal Profession"**, Computers and Automation, April 1968 p.44. **(Computers in Society, op.cit.** at p.288)
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8. Senator Charles McC.Mathias (testimony U.S. Senate Sub-committee on Constitutional Rights) as quoted in **The Computer - How it's changing our lives**, Washington 1972 p.131.
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14. **ibid.** at p.566.
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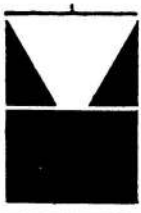
16. **The Computer - How it's changing our lives op.cit.** at p.134.
17. **Computer Science and Law**, ed. Bryan Niblett, C.U.P., USA, 1980 viii + pp.238.
18. Bryan Niblett is Professor of Computer Science, Univ. Coll. of Swansea, U.K.
19. Bryan Niblett, **Computer Science and Law op.cit.** p.3.
20. **ibid.** at p.7.
21. Bing J. & Harvold T. **Legal Decisions and Information Systems,** Universitets-forlaget, Oslo, 1977.
22. **Computer Science and Law op.cit.** at p.7.
23. For a survey of computerised legal research and full-text search see Michael Frendo, **Why should lawyers get mixed up in Computerised Research?,** DE JURE, Malta, June 1983 Vol I No.2 pp.66-73.
24. Acronym for **V**isual **D**isplay **U**nit (screen for displaying information).
25. **mo**dulator/**dem**odulator
26. Bryan Niblett, **Computer Science and Law op.cit.** at p.17.



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# outlook

# BAYREUTH: DEVELOPMENT AND TRENDS IN A NEW UNIVERSITY

**DORIS MANNWEILER**

## BAYREUTH - A UNIVERSITY TOWN?

Most people associate the city of Bayreuth with Richard Wagner, who lived there from 1872 until his death in 1883. It is, in fact, thanks to the annual Wagner festival, which has been held there since 1876, that Bayreuth became known throughout the world. Wagner apart, the city is the capital of the province of Upper Franconia in Bavaria. Situated about 40 miles north-north east of Nurnberg, it's a two hour drive from Munich, and has a population of roughly 70,000 inhabitants.

The University occupies a very modern and still-growing campus on the outskirts of the town. The location of the campus is an indicator to the fact that the University of Bayreuth is very much a brand-new university,[1] opened in the mid-seventies with the object of creating a new cultural centre. Siting the university in this part of Bavaria was indeed part of an effort to counter disadvantages inherent in Upper Franconia's regionalism.

Being so newly-established, the University of Bayreuth, with a population of only 3000 students, is one of the smallest in Germany. This, however, is not without its advantages: smaller numbers of students make for more manageable lecture and study-groups and thus facilitate increased individual attention.

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Since one is not so exposed to the anonymity of mass lectures in overcrowded lecture-theatres, first-year students, fresh from the extremely structuralised and organised German secondary school system, find it easier to orientate into university life.

It is easy to understand, on the other hand, that one cannot quite describe Bayreuth as a typical university town. Student life that has established roots and traditions over hundreds of years in towns like Heidelberg and Gottingen has yet to develop. Rather than deter prospective under-graduates keen on university life, this ought however to encourage students to make the most of initiative and creativity and help build up another university centre. Student attitudes, individual and collective, constitute the prime factor that determines the success or otherwise of university life and will be examined in greater detail further along in the article.

## ADMISSION TO AND STRUCTURE OF THE UNIVERSITY

Over the 'sixties and 'seventies more and more people availed themselves of growing opportunities to take up university studies. This led to such a swelling of the German university population that it became desirable to regulate and distribute student intake on a national, as opposed to a regional or local level. In this way, universities all over Germany would establish the number of vacancies in any given course of study, if the places available in the university of the student's choice would be filled, the student would still be able to study the same subject in another university which would still have openings in that field of study. This necessitated the setting up of the 'ZVS', a central establishment charged with the allocation of students to universities throughout the Federal Republic. When submitting an application to the ZVS, one has to list at least two preferences of university to be attended, otherwise the allocation of university may be made rather arbitrarily.

Once again the fact that the University of Bayreuth is still very young comes into play; since it has not yet reached the planned student population level of c.5000, one may apply directly[2] to the University of Bayreuth. In addition to this, the intake and population level of Law and Economics courses have increased enormously over the past years and therefore Bayreuth gets its fair share of students from 'ZVS' allocations.

Before focussing discussion on to the Law Course, it is worth mentioning that the University of Bayreuth offers the following facilities[3]:

1. Faculty of Mathematics and Physics
2. Faculty of Biology, Chemistry and Geoecology
3. Faculty of Law and Economics
4. Faculty of Languages and Literature
5. Faculty of Culture
6. Africanology
7. General courses for auditors

Students follow an academic year which is divided into two terms: the summer term lasting from May to August and the winter term from November to March.

## THE LAW COURSE

To enter a law course at the University of Bayreuth, one must have obtained at least pass standard in the final High School examinations[4] (=Abitur - roughly equivalent to British General Certificate of Education Advanced Level). It is hitherto unnecessary to be over-concerned about the grades obtained at 'A' Level (as long as these grades constitute at least a pass), since no 'numerus clausus' as yet exists to restrict entry into law courses. The increasing number of law students however, will almost certainly lead to the introduction of such a 'numerus clausus', as is already the case with prospective medical students.[5]

The law course first opened in the winter term of 1977/78 and a peculiarity of the Bayreuth Law faculty is that an additional Economics course is integrated into the Law course.

In Bayreuth, as in most German universities, law can be studied in two different ways: the single phase system or alternatively the two-phase system. The first four terms are common to students following both systems but from then onwards the systems differ considerably. In the single phase system the two and a half years of attending the Courts required for qualification for the post of probationer/law clerk are integrated into university studies. The two-phase system, on the other hand, follows the traditional pattern wherein the students first complete four years of university studies and take their first State examinations. They then spend two and a half years at the Courts after which they take their

second and final State Examination. Either way the law course is at least six and a half years long.

The single-phase system was introduced in German universities around ten years ago, after repeated complaints from lawyers and judges, that law students newly graduated from university, were unable to cope with the reality of a lawyer's life since this was a far cry from the realm of theory which they had so recently left. The single phase system still has to prove its worth however, since only a few students have so far opted for this method of education. Although both systems are approved of, in public, there is a tendency towards preference of **two-phase** lawyers when it comes to post-graduate employment.

To qualify as a lawyer one must pass the Final State Examination. To be admitted to these Final Examinations, it is necessary to prove proficiency in certain basic aspects of law as well as some optional field of study. (Minimum requirements include two certificates in each of Civil, Penal (Criminal) and Constitutional Law.) The subjects covered in the Law Course would include:

1. Civil Law/Civil Procedure
2. Penal Law/Criminal Procedure
3. Constitutional Law/Constitutional Procedure
4. Administrative Law/Administrative Procedure
5. Commercial and Labour (Industrial Relations) Law
6. History of Legislation and Constitution
7. Philosophy of Law
8. International Civil Law
9. European Law
10. Economics/Accountancy
11. Financial and Tax Law

The popularity of the Law Course is quite understandable on realisation that graduation may open the doors to the following occupations:

Legal : Judge; prosecutor; barrister; solicitor; notary;

Others[6]: Business Management

Civil Service: international administration; public commercial interests/corporations; tax and financial authorities; banking;

Chartered accountants; tax consultants;

## STUDENT LIFE

As a preliminary to examining the attitudes and trends amongst law students, one must consider two important factors that fashion the atmosphere of student life: the student's financial resources and the reason for entering the law course.

As a rule, students are either maintained by their parents or else receive financial aid from the State when the parents' inability to finance their children's studies is adequately proved. Financial resources are of great importance not only because of expenditure on books, clothes etc. but also because many students do not live with their families (especially when the University is not in one's home town) but in student lodgings, small apartments close to the University campus. This entails further expenses due to rent, transport, food etc. Thus, when not working throughout the summer or winter holidays (and many students take up such work), money is usually received from the parents. In the many cases where families cannot afford to maintain a son or daughter at University, one may apply to the agency of Educational Furtherance in order to receive a study grant. According to the law regulating this Institute, the students'/parents' financial situation is investigated through a form of 'means test' and a decision is reached as to the monthly amount of financial aid, if any thay may be granted. At present the maximum amount of financial aid that one may receive is the equivalent of LM115 per month.

The present Christian Democrat-led Government is in the process of changing the extent and nature of financial aid received by students. These reforms are two-pronged - on the one hand the criteria which determine who receives aid and how much, have been changed in a way that may qualify less students for such aid; on the other hand the aid given will no longer take. the form of a grant but rather a loan, which will be paid back to the Government after completing one's studies. These reforms are understandably at present the source of considerable controversy within the student community.

Financial aid sometimes comes in the form of scholarships from state governments: during the final term in grammar schools some of the more able students are chosen to sit for a test set by the State Culture Bureau. Candidates who attain a certain level are awarded a scholarship. Once at university, students may also apply for scholarships which enable them to study in a foreign country for six months or even a year.

Most of the law students at Bayreuth University begin their university studies immediately after having passed their High School examinations or after having completed the prescribed term of military service in the Federal Defence: the average age of course entry thus lying between 19 to 22. Few people enter university after having already served an apprenticeship. It is only exceptionally that one finds older people taking up a law course after having already worked in a profession for some time. At this stage, other than considerations of age, it is also interesting to note that when a course starts off, males and females are more or less equal in number. There apparently exists however, a greater tendency to drop out amongst female students than among their male counterparts. This is evinced by the predominance of male students amongst the candidates who take the final examinations.

It is difficult to determine the reasons why people choose to study law. It has been suggested that most law students are undeniably attracted by that which the Romans would have politely termed **lucrum**. This ought not of course to discourage those who are interested in reputation and power, and who believe that becoming a lawyer is a suitable means to these ends. An ever-decreasing number of students combine their studies with the idealistic hope of being able to improve a legal system which has always been - and still is - described as "lagging behind" the social and political efforts to achieve progress and better living conditions. At least **some** law students take up law because they wouldn't know what to study otherwise but at the same time still wish to further their education. An added attraction is that since no restrictive 'numerus clausus' as yet exists, the Law Course is still relatively easy to enter into.

Whatever the reason that prompted entry into the law course in the first place, it is quite amazing to note the number of law students whose outlook and conduct (even within the first term) earn them the label of 'typical lawyer'. Early, inclinations towards elements of conduct that constitute part of the popular image of the 'typical lawyer' do nothing to enhance the reputation and standing of law students amongst the students of other faculties. This is not only the case in Bayreuth but also in many other German universities.

In spite of a growing student community, social life in Bayreuth does not follow patterns established by hundreds of years of tradition as in other older German universities. There are a number of factors which may have hindered the growth of the camaraderie, the vitality of academic inquisitiveness, the sporting rivalry

that are the shining lights of university life.

When discussing entrance to University, reference was made to the fact that many law students end up studying in Bayreuth as a result of 'ZVS' allocation. These students, who would come from home towns distant from Bayreuth, sometimes describe themselves as "victims of ZVS". They usually live in small apartments or students' residences[7], depending on their financial means. Although this would certainly provide the opportunity to lead a free and self-determined student life, these people either tend to stick to their studies, rather uneager to help build up a social community within the students; or else leave Bayreuth as often as possible to be with family and friends. Their contribution towards 'student life' may therefore be quite negligible.

An even larger number of students come from Bayreuth or surrounding areas. They therefore, do not have to change their way of life while at university, since they are able to stay with their families and keep their old friends.

In spite of the yet under-developed social aspect of university life, politics and student politics are as evident in the University of Bayreuth as in other German universities. Bayreuth comes under the jurisdiction of the Bavarian State Government and is deep in Christian Democrat heartland. It is therefore hardly surprising that student activities depend to a great extent on RCDS, an association of Christian Democratic students which is sponsored by the Bavarian political party CSU[8]. The RCDS is at present the one and only organisation which promotes student activities such as special lectures, festivals and excursions. When the general elections for students' representatives to the assembly and senate take place every July, the RCDS obtains nearly all the votes; the few other existing parties have not yet been able to break ground. All organized political and social activity depends on RCDS, the inherent political nature of which, does not appear to lend itself to the creation of a more unified and enlivened student community, however great the support that it enjoys amongst students.

This short paper is only intended to provide an insight into the day-to-day life of law students in a modern German university, rather than an in depth study of German legal education. The latter subject requires an evaluation of the concepts behind such education as well as the techniques adopted in their imple-

mentation on a national and regional level. There are however many factors, economical, political, sociological, geographical etc. that motivate and in turn affect the successful implementation of the fundamental concepts of legal education. The practical experience gained from day-to-day student life as outlined above, serves to identify such factors and highlight their importance. Certain aspects and problems mentioned in this paper are peculiar to Bayreuth, others are fairly representative of the situation prevalent in universities throughout Germany. One may however draw certain basic conclusions. Every specialised field of education poses its own particular difficulties and Law is no exception. Yet, broadly speaking, the problems of law students may not always be isolated from those of the rest of the student community, especially with regard to financial aid, self-determination and social life.

Large universities and small universities have limitations and advantages dictated by their very size. On the existence or otherwise of long-established traditions of university life depends the extent to which the disadvantages imposed by size may be compensated for, if at all. In either case, in order that law students be able to help each other to improve the current situation, it is imperative that they form part of a serious association within their own faculty that is linked to similar associations in other universities. In this way, an effective exchange of ideas and information would co-ordinate the efforts of different student communities. An important step in the right direction would also be to increase the number of student exchanges on the international level. An increased presence of foreign students[9] on the Bayreuth campus, in the midst of a better organised student community, may help realise the goal of creating a new cultural centre in Upper Franconia.

## NOTES

1. General background information on the University of Bayreuth:

   **1969** The committee of the University Foundation Council chooses Bayreuth from amongst other cities, when considering the siting of a proposed new university.

   **1970** The Bavarian **Diet** (State Parliament) meets to decide on the choice of Bayreuth as the site where the next regional university is to be built.

   **1972** The Law establishing the University of Bayreuth, passed by the Bavarian Diet in 1971, comes into operation.

   **1974** The Bavarian Prime Minister lays the foundation stone.

**1975** Minister of State for Education opens the university.

**1977** The first meeting of the University's Assembly. Diet's decree on the setting up of the "Students' Association Upper Franconia" in Bayreuth.

**1981** Opening of Africa Centre.

2. An exception is the course of studies in Biology in which case applications have to be addressed to the ZVS.

3. The following are some statistics for the winter term 1982/83:

| Course of Study | Total | Male | Female | Foreign Students |
|---|---|---|---|---|
| Mathematics | | | | |
| 1 | 69 | 49 | 20 | 3 |
| 2 | 8 | 7 | 1 | 2 |
| 3 | 30 | 12 | 18 | - |
| 4 | 104 | 67 | 37 | - |
| Physics | | | | |
| 1 | 164 | 149 | 15 | 4 |
| 2 | 5 | 4 | 1 | - |
| 3 | 3 | 3 | - | - |
| 4 | 50 | 41 | 9 | - |
| Biology | | | | |
| 1 | 186 | 113 | 73 | 5 |
| 2 | 23 | 13 | 10 | 2 |
| 3 | 92 | 18 | 74 | - |
| 4 | 81 | 24 | 57 | - |
| Chemistry | | | | |
| 1 | 163 | 127 | 36 | 1 |
| 2 | 17 | 14 | 3 | 1 |
| 3 | 6 | 3 | 3 | - |
| 4 | 54 | 16 | 38 | - |
| Geography | | | | |
| 1 | 113 | 75 | 38 | - |
| 2 | 7 | 4 | 3 | - |
| 3 | 63 | 23 | 40 | 1 |
| 4 | 95 | 52 | 43 | 1 |
| Geoecology | | | | |
| 1 | 139 | 100 | 39 | 1 |
| Economics | | | | |
| 1 | 503 | 362 | 141 | 5 |
| 2 | 10 | 10 | - | - |

| Course of Study | Total | Male | Female | Foreign Students |
|---|---|---|---|---|
| Law | | | | |
| 2 | 7 | 5 | 2 | 1 |
| 6 | 771 | 509 | 262 | 2 |
| 7 | 112 | 82 | 30 | - |
| Africanology | | | | |
| 2 | 2 | 2 | - | 1 |
| 5 | 3 | - | 3 | - |
| 8 | 10 | 7 | 3 | 3 |
| English | | | | |
| 2 | 1 | 1 | - | 1 |
| 5 | 17 | 5 | 12 | 3 |
| German | | | | |
| 2 | 6 | 4 | 2 | 3 |
| 3 | 124 | 26 | 98 | - |
| 4 | 38 | 25 | 13 | 7 |
| 5 | 32 | 15 | 17 | 11 |
| History | | | | |
| 2 | 3 | 3 | - | - |
| Sports | | | | |
| 3 | 13 | 6 | 7 | - |
| 4 | 150 | 71 | 79 | 1 |
| Music | | | | |
| 2 | 1 | - | 1 | 1 |
| 3 | 17 | 5 | 12 | 1 |
| 4 | 39 | 17 | 22 | 11 |
| Philosophy | | | | |
| 5 | 11 | 8 | 3 | 1 |
| Political Science | | | | |
| 2 | 1 | 1 | - | 1 |

Key:
1 = Diploma
2 = Degree/Graduation
3 = Certificate course - Primary School Teacher
4 = Certificate course - Secondary School Teacher
5 = Master's Degree
6 = Final State Examination (one-phase system)
7 = Final State Examination (two-phase system)
8 : Post-graduate studies

4. People who do not take the final High School examinations but who later wish to study at university, may do so through a "second course of education", which is mostly carried out in evening courses or night schools.

5. The 'numerus clausus' operates on the criteria of overall performance by the student in the final High School examination, i.e. the **Abitur.** The performance in Abitur is graded 1,2,3,4,5 and so on, with 1 being the highest grade attainable. The present average Abitur grading for prospective medical students (calculated as an average of the grades obtained in different subjects), which is good enough to ensure entry into the course stands at a very high 1.2.

6. Entry into these other professions is greatly aided by the additional studies in Economics.

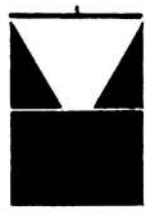
7. A student residence is usually accomodation provided by local governmental authorities. A typical example comprising a small bed cum study room with a shower closet and toilet would cost about LM25.00 a month.

8. Christian Social Union - Right-wing Christian Democrat party.

9. Opportunities Available to Foreign Students
The University of Bayreuth is a member of the following associations, which help enhance its international contacts.
   - Conference of vice-chancellors and vice-presidents of European universities (CRE)
   - International Association of Universities
   - German Academic Exchange Union (DAAD)
   - German Research Association (DFG)

   Foreign students who wish to study at the University of Bayreuth (and other German universities) have to apply directly to the university. Every university supplies extra facilities for foreign students who wish to enroll. If the course applied for is overcrowded, the student's qualifications may determine his/her admission or otherwise.
   Average requirements are:
   - certificate(s) that entitles the student to study at college/university including grades e.g. Abitur; 'A' Levels etc.
   - certificates/qualifications previously obtained in other universities/colleges, where applicable.
   - proof of knowledge of the German language.

   Foreign students may not, as a rule, rely on scholarships/bursaries given by German universities. To a limited extent, the DAAD does distribute scholarships that may only be applied for outside Germany, or through the representatives of foreign countries within Germany. As a rule however, it is usually up to the students themselves to finance their studies. It is very difficult, not to say impossible, to find a job. Information as to scholarships offered/tuition fees where applicable is available at embassies of the Federal Republic of Germany throughout the world.




# reports

# THE IMMATURE PERSONALITY AND THE LAW

**PAUL CASSAR**

## COMPONENTS OF HUMAN BEHAVIOUR

Human behaviour is the resultant of two components of the PERSONALITY:

A. The ANATOMICAL Component is the brain and other parts of the nervous system through which MIND manifests itself. Thus defects in the structure of the nervous system give rise to an abnormal mind such as mental or intellectual deficiency or subnormality (backwardness, feeblemindedness).

B. The MENTAL or PSYCHOLOGICAL Component consisting of:
   a. The INSTINCTS and their attendant emotions.
   b. The SELF or mediator or rational agent.
   c. The INTERNAL INHIBITORY or restraining system.

In this paper I propose to deal only with the MENTAL or PSYCHOLOGICAL Component.

The INSTINCTS are inborn or inherited ways of FEELING and ACTING in a fixed manner; however, training and experience may modify their behavioural expression though not their basic emotions. They vary from one individual

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to another in their intensity and in their power of adaptation to training and experience.

The SELF is that component which deals directly with the external environment (through the senses, thinking and memory) and with the instincts which it endeavours to modify and control into socially and morally acceptable channels.

The INTERNAL INHIBITORY or RESTRAINING SYSTEM. Man is not born with a ready-made notion of right and wrong. This notion is acquired gradually by the child as he grows up and is a copy of the notions of right and wrong held by his parents, his social, his cultural and his religious milieu. This process takes place through imitation, precept and examples of parents, teachers, members of society, etc. The result of these influences is the formation of an internal control system which regulates our thoughts, feelings and actions and makes us conform to socially and morally approved standards.

In our early years this internal control system is reinforced by the fear of detection, by expressions of disapproval and by punishment. As we grow up and mature psychologically and morally, the system is further strengthened by the development of the distressing feelings of guilt and remorse or CONSCIENCE.

It must be noted that socially acceptable behaviour and moral standards differ from one society to another and also within the same society from one social stratum to another and from time to time; but the psychological basis of all social and moral behaviour is always the result of the interrelationship between:

The INSTINCTS = What I really am = ID = the bad man or sinner = Devil
The SELF = What I believe I am = EGO = the rational being = Christian
The INHIBITORY SYSTEM = What I aspire to become = SUPEREGO = Conscience = Saint.

A crude analogy is the car:

The ID = the engine (driving force)
The EGO = the steering mechanism (guiding force)
The SUPEREGO = the brakes (restraining force)

## CONFLICT - PSYCHOLOGICAL

The human mind is in a continual state of CONFLICT within itself because the ID and the SUPEREGO are in perpetual confrontation or struggle in their efforts to induce the EGO to satisfy their mutually antagonistic drives and demands. ST PAUL very aptly describes this conflict as experienced by him: "For I delight in the law of God after this inward man (Superego); but I see a different law in my members (of the body) (Id) warring against the law of my mind (Ego)" (Epistle to the Romans, Chapter 7, v.v. 22 & 23).

If the EGO sides with or surrenders to the ID, it has to face the censure of the SUPEREGO in the form of guilt, remorse, self-reproach and perhaps also material punishment; if the EGO obeys the SUPEREGO, it suffers from feelings of frustration, disappointment and self-depreciation. The EGO, therefore, tries to compromise between the demands of the ID and the censorship of the SUPEREGO, i.e. between the demands of instinctual pressures and the restraints of morality and law, by adopting the least painful and the safest course of action as dictated by past experience.

## CONFLICT - SOCIAL

The instincts that tend to bring us into conflict with the LAW, if the SUPER-EGO and the EGO do not succeed in subduing them, are:

1. The Acquisitive Instinct i.e. the quest for material gain and wealth.
2. The Self-assertive Instinct i.e. the urge for power or superiority in any form such as leadership in political, commercial, religious groups.
3. The Sex Instinct which may seek satisfaction in promiscuity, rape, incest.

Each of these instincts may harness to itself another very powerful instinct in order to overcome opposition. This is the FIGHTING or AGGRESSIVE in-stinct which when thus combined with the other instincts adds the element of violence to the antisocial manifestations of the other instincts.

**IMBALANCE between the ID, EGO and SUPEREGO**

If these instincts are not unduly strong and if the SUPEREGO is strict in its censorship and if the EGO or SELF is well developed, we succeed in mastering the instincts referred to above and in avoiding clashes with the law. But if our instincts are too STRONG and the Superego and the Ego are not well developed, then we do not succeed in controlling our instincts and we are bound to come into conflict with the law because our inhibitory or restraining forces are incapable of counteracting the intensity of our instincts.

This IMBALANCE between ID, EGO and SUPEREGO may be due to:

A. The temporary immaturity of the EGO and SUPEREGO in adolescence and youth.
B. The permanent immaturity of the EGO in the adult.
C. The permanent immaturity of the SUPEREGO in the adult.

A. The temporary immaturity of the EGO and SUPEREGO in adolescence and youth.

This gives rise to law-breaking owing to:

i. The adventurous spirit and recklessness of this early age.
ii. The non-realisation by the adolescent of the seriousness and consequences of his acts.
iii. The suggestibility obtaining at this age from imitation of grown-ups and from the influence of a subcultural antisocial environment in which the adolescent has been brought up.

This type of law-breaking is not a great problem since the personality of the individual is NORMAL though as yet not adequately developed. In fact seperation from an undesirable environment, sympathetic handling and the maturing process in the intellectual and ethical spheres will, with advancing years, provide adequate means to strengthen the EGO and SUPEREGO to restrain the ID or instincts.

B. The permanent immaturity of the SELF or EGO in the adult.

This defect prevents the adequate development of the faculty of self-criticism and judgement and therefore, of the ability to ponder upon and to choose the best course of action which is in harmony with the requirements

of the situation, with one's own social and moral standards and with past experience.

C. The permanent immaturity of the SUPEREGO or CONSCIENCE in the adult. This defect prevents the individual from exercising the necessary inhibitory control over one's actions because there is no proper and adequate development of the Superego or Conscience or Ethical faculty.

This permanent immaturity of either the Ego or of the Superego or of both is characteristic of the so-called PSYCHOPATHIC STATES or PERSONALITIES or MORAL DEFICIENTS (old nomenclature).

## THE PSYCHOPATHIC STATE OR PERSONALITY

This may be defined as a psychologically immature personality possessing a normal intelligence but showing life-long inability to cope with the everyday requirements and difficulties of life and to adapt itself and conform to the prevailing moral and social attitudes and **mores** of the community.

The characteristic features are:

1. Lack of moral or ethical sentiments.
2. Lack of sense of responsibility; hence they are cheaters, thieves, etc.
3. Impulsive acts i.e. reacting to temptation or circumstances on the spur of the moment.
4. Inability to foresee or weigh consequences of their acts.
5. Aggression on the least provocation or without any apparent reason (vandalism).
6. Sexual deviations - promiscuity, sadism, masochism.
7. Addiction to alcohol and drugs.
8. Unresponsiveness to persuasion, awards, punishments; hence recidivists.
9. Sometimes they band together under a leader as a group in opposition to other groups or to society in general with their own codes of loyalties and ideas of heroism.

Not all PSYCHOPATHS will show all these features as there are various gradations and shadings of this type of personality. In fact while some characters

are common to all psychopaths - such as impulsiveness, inability to weigh consequences and unresponsiveness to punishment - one trait such as aggressiveness or sexual deviations or addiction may be so pronounced as to dominate the picture and overshadow the other features of the personality.

## CONCLUSION

The foregoing brief survey of human behaviour brings to the fore the importance of the study of the personality of the offender BEFORE SENTENCE IS DELIVERED by the Court to unravel those features in its structure that have led him into conflict with the law. Our patterns of behaving and reacting are pretty constant throughout life and by studying the personality of an individual, we can predict the trends of his future behaviour and apply those remedies that are best suited to correct it. In so doing, we must keep in mind that:

a. The Internal Inhibitory or Restraining System may be capable of being strengthened by the maturity that comes with advance in age, by training and by the pressures of our social and ethical environment upon the EGO and the SUPEREGO.

b. Instincts and their accompanying emotions cannot be eradicated; they may only be capable of being moulded into socially approved channels.

# INDUSTRIAL RELATIONS –

# WORKER PARTICIPATION

The legal implications of worker participation may be better understood by considering the many viewpoints on the issue. Below is a personal approach to the subject by **Michael J. Mallia** as presented in his contribution as a panel member in the Forum on the Development of Worker Participation organised by the Department of Commercial Law of the University of Malta. The Forum was held at the Aula Magna, Old University Buildings, Valletta on Thursday, April 14th 1983.*

## THE DEVELOPMENT OF WORKER PARTICIPATION IN MALTA

**Michael J. Mallia**

Being here on a personal basis, I wish to express straightaway my genuine pleasure at having been invited to form part of a panel in a forum that in reality is dealing with the shape of industrial relations and activity in Malta.

I say this, for a particular personal reason. Today I happen to be President of Malta's Employers Association, a union of employers that I strongly believe in.

Not so long ago, I was an active member of a trade union. I feel therefore, that in a small way, I may perhaps be able to contribute towards the development of industrial relations in our island.

This forum is considering a topic which is a very complex one. On the international level the forms of participation under consideration range from the concept of self-ownership and management to the other concept of considering collective bargaining as the maximum realisation of worker involvement at the workplace. A number of areas can be considered within the participation concept, such as :- **technical questions** relating to production, organisation, equipment, work methods and performance; **personnel questions** concerning the individual at work

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**Michael J. Mallia**, a former trade unionist, is today President of the Employers' Association in Malta.

and in some cases outside work; **economic and financial policies** (including the distribution of profits); questions of over-all policy, such as appointment of managers, partial or total closure, and other reorganisation measures.

The overall problem of "concept" definition, has, however, continued to be a foremost one. I believe, in fact, that it is generally agreed that it is not possible to arrive at an internationally agreed definition of participation, as this is interpreted **differently** by **different** categories of people in **different** countries and at **different** times. I am therefore deliberately avoiding specific discussion of any one particular model at this point in time.

I would now like to go into the Malta situation. The general local background has already been covered in studies that have been carried out; I also **presume** that the existing data is also being well-digested by the Worker Participation Development Centre which is part of the University. I say 'presume', because to date my own Association has been unable to participate in this centre, despite its standing request for inclusion.

As an employer in industry, with a trade-union background, I feel that the aspects that were raised in the past in Malta regarding worker-participation are still operative to this day:-

(a) **Education**

The process of producing national awareness of what participation is or can mean is still generally lacking. The WPDC, despite employer exclusion, is a good step in this direction.

Personally, I feel that if there is to be any meaningful form of participation it has to follow on from a very broad process of "education" in its proper sense. This should not only encompass workers and their unions; it must definitely include employers and their unions. It is also vital that Malta's managers and administrators are "educated", that they may be able not only to comprehend what is going on but also to implement it, and, more important still innovate on it.

Another problem area that has to be the target of intensive reorientation in Malta is the middle management area, as this level of management is the one that is often the worst-affected initially and the one that feels most threatened, where processes of participation have been introduced.

The process of education must also include careful consideration of the results obtained elsewhere through the various methods adopted and a clear awareness of the prevailing circumstances in Malta. We cannot expect to bring about, overnight, situations that have taken other countries a very long period of time to evolve; at the same time we have to be careful not to copy blindly. We have to modify concepts to our particular political, social, economic and geographical realities.

(b) **Principles**

Following closely on the heels of an "education" process, we must categorically make our national choices or, if you like, choose our principles for the future. We cannot operate forever in a state of uncertainty; my own definition is that we must have an "ideological settlement", that is a clear guideline as to where our politicians wish to go.

Both our political parties have endorsed participation in principle, but where do we go from here? On our side as employers, we are constantly seeking clear-cut definitions of principle. To us, the principle of private enterprise is a basic one; so is the profit motive; so is our belief that it is private enterprise, working in harmony with the state, can create the economic benefits out of which social development can occur. It is therefore evident, that we cannot endorse concepts of self-management which would in effect exclude private ownership; at the same time we find no objection to any group of persons owning and operating their own enterprise, where this has been freely handed over by the owner. Nor are we against producers' cooperatives, where the members of such cooperatives are simultaneously workers, owners and directors of an undertaking managed by a committee and staff elected or appointed by them.

In principle, I also believe that the imposition of any system of participation by legislation would be counter-productive.

The development of the concept in Malta requires lengthy and un-imposed experimentation. The role that can best be played by the State, once it endorses participation, is:- to encourage employers to evolve it within their enterprises; to develop and maintain it within its own administrative structures, and in public enterprises; and to evolve machinery for National investigation, monitoring and updating of developments, locally and abroad. In short, to ensure a co-operative effort all-round for the successful development of the concept.

(c) **Profit Sharing**

Another aspect that is often debated as part of the process of participation is profit sharing. To me, this would appear as the least problematic of all, even as regards the mechanics of its implementation. Several enterprises had already adopted a system of special bonuses prior to the statutory introduction of an annual bonus to all employees; even today, a number of enterprises have paid extra bonuses beyond the statutory ones, where the performance of their particular enterprise enabled them to do so. In the current economic situation, however, several enterprises are in a precarious state where losses rather than profits are in evidence.

(d) **Information and Influence on Decision Making**

Personally, I feel that information sharing is an aspect of participation that can be adopted without any major problems or side-effects, provided that workers display maturity in the way they handle the information made available. The dissemination of information at the workplace can take place in several ways; once it is an established practice it should not be difficult to evolve it into a mechanism whereby workers can and do influence the taking of management decisions.

I feel I have touched on a few major points involving participation. It was not my idea to indulge in detailed study or analysis, but it is my hope that I have said enough to stimulate debate within, and without, this gathering.

Before I conclude, I wish to stress once more that I have mainly expressed personal viewpoints. The latest official viewpoint from the Employers Association of which I am president, was published in 1981 and I would like to read out the Association's latest views on participation:-

> Participation..."is endorsed in principle by both political parties and its development is not obstructed by employers. We must, however, make it clear that we cannot immediately arrive at those points that have taken other countries several years to evolve. We must also be conscious that we must fashion ideas to our particular circumstances. It is therefore the duty of the state to 'educate' our society first as to the meaning and impact of participation or co-determination. On our side, as employers, we are definitely against certain extreme forms, already circulated in our Island, such as full worker takeover of private enterprise, the so-called worker self-management idea. Nor are we for very narrow definitions which merely lead to profit-sharing schemes. This does not mean that we are against any group of persons owning and working their own enterprise, such as the Drydocks case where the enterprise was voluntarily handed over to the employees by the owner, that is Government. (Even this in itself, is a dynamic operation which needs careful monitoring and guidance).
>
> In the immediate term what we seek is for the State to evolve machinery for a thorough investigation of the options available before any particular idea is embarked upon. Such machinery should be very broadly based and devoid of political pressures.

## THE GH.S.L. AND 1983

**Joseph Ellis**

The Ghaqda Studenti tal-Ligi, (Gh.S.L. or as it is known in some circles, the Law Society), has for decades formed an integral part of university life in Malta. The Law Society has contributed over the years through the organisation of extra-curricular activities, the publication of journals such as **ID-DRITT** and through its function as a law students' union. Several lawyers who are now leading members of the legal profession on the island, had worked hard in the Law Society and in the process acquired valuable experience. Indeed, the present committee's policy of keeping the student body sensitive to key issues, should be of help to students in finding their own way when they are absorbed into the profession.

It was therefore undoubtedly welcome news that the Gh.S.L. had been injected with new vigour and resumed its functions as the Law Student Association of the University of Malta, after a period of inactivity. Thus, in the latter half of 1982, after encouragement by Dr.Austin Bencini, Secretary of the Chamber of Advocates, an Extraordinary General Meeting was held, a number of amendments to the Statute considered and an Electoral Commissioner chosen. The present committee was subsequently installed.

A cornerstone of the committee's policy has been the organisation of seminars. the results of which have been satisfactory. The Gh.S.L. made such organisation one of its priorities for several reasons: firstly, in order to try and fill some of the intellectual void which is presently to be found at University; second, to make law students aware of key issues which tend to get ignored in the lecture room; and thirdly, to offer law students the opportunity to acquire organisational skills. Attendance of these seminars has always been satisfactory but it is indeed a pity that several law students do not appreciate the need of participating whole-heartedly and limit themselves to text-books and lecture-notes. These seminars should serve to get students out of the cocoon mentality which unfortunately our study load apparently tends to reinforce.

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**Joseph Ellis** studies Law at the University of Malta and is Vice-President of the Ghaqda Studenti tal-Ligi (Law Students Association - University of Malta).

The first of these seminars was held on January 15th 1983 on the theme of 'The Legal, Social and Moral Implications of Divorce'. The panel was composed of a law student, a lawyer, a representative of the Council of Women and a Jesuit priest. This seminar, which was chaired by the Head of the Department of Civil Law, Professor J.M. Ganado, attracted not only law students and the lecture theatre was nearly filled to capacity. Other than shedding new light on different aspects of this complex subject, the seminar also provided an opportunity to consider the legal aspects which shroud this delicate area of Family Law.

On the 16th April, another seminar was held, this time on 'The Rights of Arrested Persons and Prisoners in Malta'. The Dean of the Faculty of Law, Professor Edwin Busuttil chaired a panel composed of the Attorney-General of the Republic, a leading defence counsel, a social worker and the Director of Prisons. The discussion which followed the exposition of the rights (or the lack of them) of imprisoned and arrested persons by the panelists, was highly interesting. A number of ex-inmates present complained strongly of lack of facilities and ill treatment of prisoners at the Malta Prisons. The interest generated in this problem was high and it also filtered to the public through the media.

The next seminar was held on May 19th and a heated discussion this time centred on 'Law and Morals'. Professor Peter Serracino Inglott chaired a panel composed of a law student, the Lecturers in Philosophy of both the Faculty of Law and the Faculty of Education as well as the Head of the Department of Civil Law.

Conscious of the immediacy with which prison reform ought to be implemented, especially after the seminar of April 16th, the Gh.S.L. organised another seminar to deal with 'Alternative forms of Penal Treatment' on September 24th. The panel this time, was made up of a law student, two lawyers and an ex-inmate. Again the contributions were important: the need for reform was emphasized; prison regulations need to be updated and the concept of rehabilitation firmly embedded in the minds of the authorities. The discussion which followed also dealt at length with the thorny question of the 48-hour detention period.

Seminars apart, the Gh.S.L. assisted in no small way in the organisation of the visit of Professor Fritz Fabricius of Ruhr University in Malta. Professor Fabricius was invited by Professor Micallef, Head of the Department of Commer-

cial Law to deliver several talks on Workers' Participation as evolving in Germany. The Gh.S.L., with the cooperation of the Workers' Participation Development Centre of the University of Malta hosted Professor Fabricius to a reception during which a memento to mark his visit to Malta was presented to Professor and Mrs. Fabricius.

The Gh.S.L. is striving hard to bring foreign guest lecturers to our university and though no details can be announced yet, it appears probable that such a visit will materialize January next. It might not be too inopportune to take this occasion to invite any of the foreign readers of this Journal, who might be interested in lecturing Maltese students, to contact the Secretary of the Gh.S.L. at the Faculty of Law.

Another important activity has been the preparation of a Memorandum in which proposals were made with a view towards reform in the Law course. Firstly, a working commission formulated this memorandum, then it was approved by the Committee over several sittings and finally, it was approved by the student body in an Extraordinary General Meeting on the 19th April. Since then it has been presented to the then Minister of Education, Dr. Philip Muscat who promised further discussion. It has also been discussed by the Advisory Committee for the Advancement of Legal Education in Malta which should present a report to the Rector. Several key suggestions found in the working-paper have been minuted but it is apparent that more lobbying needs to be done in this respect by the Gh.S.L.

The Gh.S.L. has also striven to act as a students' union and several student problems have been or are in the process of being considered by the authorities upon representation by the society. The Gh.S.L. has also published several study-notes, especially on Civil and Commercial Law, for sale to students. Although extremely useful, these notes require considerable effort to produce and point to the need of better work-coordination and the setting up of a Publications sub-committee.

An Editorial Board was appointed in order to continue the publication of ID-DRITT Law Journal. Obviously, the present volume would be a fitting tribute to the hard-working members of the Board. With the publication of Volume X of ID-DRITT, the wheel has turned a full circle and law students have again found their identity and become one of the most active student communities

in our university. Yet, we should not stop except for reflection on our past mistakes. The interlude, which witnessed the cessation of activity by the Gh.S.L. and the disappearance of ID-DRITT, should not be allowed to re-occur since the consequences would again be disastrous. What is needed is that more students shrug off their apathy and start contributing to student life. The things to be done are myriad but no one should be afraid to come forward since honest contributions eventually pay. The ball is definitely in our court.

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## GHAQDA STUDENTI TAL-LIGI - COMMITTEE 1983

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# REFORMS IN LEGAL EDUCATION?

This is a translation of the original text in Maltese of a **Working-Paper** proposing reforms in the course of Laws at the University of Malta, approved by law students in an Extraordinary General Meeting of the Gh.S.L. on the 19th April 1983.

The Law Students Association (Gh.S.L.) recognises the goodwill shown and the initiative taken by the Minister of Education together with the University authorities, to consult with the law students as a positive step in the right direction, since law students have for a long period of time been expressing their preoccupation with the many problems existing within their course. The Law Society therefore submits this working-paper on the subject, work on which was commenced in December 1982.

**Requisite Qualifications for Entry into the Course**

It is obvious that for an individual to get through the course successfully, he must be well prepared both academically and intellectually even before commencing his studies of the various branches and aspects of the Law. It is thus necessary that reforms be effected at secondary school level.

It must be said at the outset, that the G.C.E. examinations as obtaining nowadays do not enable students attending Secondary schools to attain such an academic standard as would befit a University which has been traditionally renowned for a level of learning, high enough to lend prestige both to its graduates and to the nation as a whole. It is thus suggested that a matriculation system of a higher level than the present be given importance by students intending to enter the University. Students who reach the fifth year level at Secondary schools should be made to sit for matriculation examinations in the following eight subjects:

a. Mathematics;
b. Four language examinations with their respective literatures i.e. English, Maltese, Italian as compulsory subjects and one subject chosen from French, Latin or Arabic (if possible including literature of the same).
c. Another three subjects to be chosen from the following: Religion, History, Geography, Accounts, Physics, Chemistry, Biology and Economics.

In this way, a student emerging from secondary education would possess a superior academic background to that attained by today's students and would be better prepared to receive a tertiary education.

Having completed his secondary schooling and having passed his matriculation exams, a student would be confronted with an equivalent of the present New Lyceum, where he would embark on a course of advanced studies in three subjects spread over a period of 2 years, which subjects would be chosen from the following classifications:

a. in the first class, Maltese would stand alone as a compulsory subject.
b. in the second class, students would be able to choose 2 subjects from the following: English, Italian, French, Arabic, Philosophy, Economics and Political Sciences.

After two years of preparation and at an average age of 18 years, students would sit for three advanced matriculation examinations in the subjects of their choice.

As the academic standard expected from students should be high, a student in order to be eligible to join the course should acquire at least a grade C in every one of the three examinations sat for. In spite of this, a student who attempted more than three examinations would still be eligible to enter the course even though his grades would stand at two C's and two D's.

A very positive step would be the re-introduction of the "maturity clause" whereby individuals possessing a degree of diploma from a University recognised by the Faculty Board would be entitled to enter the course. It would also be at the discretion of the Faculty Board to accept individuals over 25 years of age who do not have the required academic qualifications. Such discretion shall be exercised on the basis of such pre-established criteria as the Board deems necessary. It is suggested that the Board subjects such individuals to a test which assesses not solely the individual's inclination towards the study of Law but also his maturity.

From all that has been said so far, it appears crystal clear that whosoever obtains the necessary qualifications is endowed with an inalienable right of entry into the Law course and therefore, this right should under no circumstance be fettered by any form of 'numerus clausus'. The only acceptable means of control of the amount of students in the Law course should be based on

purely academic criteria: if the Law student, during his years of study, fails to reach the required standard expected of him and his fellow students, he may be compelled to retire from the Course.

**The Law Course**

Upon obtaining the necessary qualifications for entry into the Law course, a student should not have to find himself in the same situation in which law students presently find themselves.

1. To begin with, the duration of the course should be set at 5 years with the present system of 6 months work and 6 months study periods being done away with completely. Law students require a minimum academic period of 8 months for effective study. The remaining non-academic part of the year should be divided into a 3 month work phase based on a roster system and a one month holiday period.

2. During the course itself, all law students would receive an adequate monthly stipend by the Government and any Gozitan or foreign students requiring accomodation in Malta would be given a special allowance.
   Within the first ten years after having graduated, a student would be obliged to afford a period of one year's service as a lawyer in the employment of Government or in that of his private sponsor in consideration of financial aid given during his academic course. If a graduate is unwilling to render such service, he will be subject to a fine.

All this would ultimatelty result in the student having a sufficient period of time to dedicate to his studies and simultaneously being given a form of financial assistance by Government or by a private sponsor. Besides this, the University should re-open the roads to communication and cooperation with foreign universities in order that the student/professor exchange project may be resumed.

From what has been stated above, it is clear that the sponsorship scheme is, in principle, a good one. However, its application must be more flexible in order to allow entry into the Law course even to those students who fail to acquire sponsorship. If any firm, industry or Government department wishes to provide sponsorships, it must be permitted to do so.

**Subjects**

The Law Society proposes the following subject division spread over the five year study period.

1st year:
- Prolegomena
- Constitutional Law
- Criminal Law I
- History of Legislation

and at least one of the following subjects:
- Sociology
- Psychology
- Philosophy
- Economics
- Accounts

2nd year:
- Civil/Roman Law I - a comparative study
- Criminal Law II
- Commercial Law I
- Public International Law

3rd year:
- Civil/Roman Law II
- Commercial Law II
- Administrative Law
- Industrial/Fiscal Legislation

4th year:
- Private International Law
- Civil/Roman Law III
- Forensic Medicine/Notarial Legislation

5th year:
- Criminal Procedure
- Civil Procedure
- Commercial Procedure and Bankruptcy Law
- Philosophy of Law

An LL.M. degree is being proposed to substitute the present Dip.Not.Public degree. Adequate importance will however be given to the subject of Notarial Legislation as indicated above. A student would be able to choose whether to follow a notary's or a lawyer's profession. It would also be of great benefit to the students to include such subjects as EEC Law, Aviation Law etc. in the syllabus. Whenever possible, lectures should preferably be delivered in

Maltese but students should be able to choose either Maltese or English as the language to be used for examination purposes and for the drawing up of the thesis. As regards the thesis, the Faculty Board is to appoint a tutor to assist a student in his work after taking into consideration the subject chosen by the latter. The Board of Examiners must examine the thesis presented and must communicate the results of such examination to the Faculty Board. Thus, after five successful years of study and a final presentation of a thesis, a student may graduate and receive his LL.D. degree.

Finally, the possibility of opening an evening course in LL.B. should not be excluded. Such a course of legal studies would be of untold value to those desiring to acquire a further knowledge of the Law and may therefore assist the future lawyer in his work or may enable students to work as legal procurators if they wish to do so.

The academic capabilities of students should be assessed by means of assignments and/or tutorials in every subject. Such would constitute 40% of the final marks in the subject. The written final examination at the end of each academic year would make up another 40% and the oral exam, 20% of the marks achievable.

The oral examination should not operate on merely a question and answer basis. A form of discussion on certain points arising from the examination paper and on other issues of interest to the student himself should be encouraged. Three selected examiners should sit on the Board of Examiners and should examine all students. At the end of the academic year, the final result of every student should be published by the Faculty on a grade basis and every student should have a right to inquire privately into the seperate result achieved in every individual subject.

At every examination session held during the 5 years, a student must obtain at least 50% of the maximum marks in all subjects in order to pass. Nevertheless, if a student does not obtain 50% of the maximum marks in one subject, the marks achieved in other subjects would compensate for the individual failure, provided these marks are over 50%. The subjects, the marks of which may compensate for loss of marks in a subject are:

1st year: Constitutional Law; Criminal Law I.

2nd year: Criminal Law; Civil/Roman Law.

3rd year: Commercial Law; Civil/Roman Law.

4th & 5th year: all subjects compensate.

The marks obtained in the above subjects may compensate for those lost in other subjects with a below 50% mark. If however, a student fails to obtain at least 40% of the maximum marks in any of the above-mentioned subjects, such student would have failed and no other subject may compensate for such failure. Let's take an example. If a first year student obtains 40% of the maximum marks in Constitutional Law, only those marks achieved in Criminal Law may compensate for the loss of marks in the former subject. If however, a student obtains less than 40% of the maximum marks in Constitutional Law, then such student would have failed and no compensation of marks may operate. The reason for this is that Constitutional Law and Criminal Law are generally considered to be more important than the other subjects met with in the first year.

It must be observed that a fundamental difference distinguishes the first year of the Law course from the following years. During the 1st year, a student is expected to choose at least one of the "secondary" subjects available in addition to the compulsory subjects of Constitutional Law, Criminal Law and History of Legislation. Even if a student were to choose all subjects offered, he would be expected to obtain in every one of these, only 50% of the maximum marks of one subject. This would serve to encourage a student to study as many subjects as possible.

If a student were to fail in an examination in any one year, he should be given the right to resit for such examination in that particular subject or subjects. These supplementary sittings would be held in the form of a written and oral examination and should offer a student the chance of retaining his place in the course.

Other important points worth mentioning are:

1. The need to engage substitute lectures as a means of substituting the main lectures whenever the necessity arises.
2. The importance of granting a larger amount of scholarships for post-graduate studies so as to enable lawyers to specialise in a particular subject. This would ultimately be conducive to a growth in the amount of lecturers available in the Faculty of Law. The Faculty of Law should organise post-gra-

duate courses as well as offer a more varied choice in the course and confer more specialized grades. Mention must be made to the greater importance that must be attached to the doctoral thesis prepared by the student prior to graduation. This should provide an opportunity to encourage law students to carry out more extensive research in a particular legal field. The value of this to the student-body and legal professions cannot be estimated.

No academic faculty may survive without an adequate library service. The need is felt to expand the Law section in the Library and to update the collection of textbooks available therein.

An analysis of what has been proposed in this paper reveals that the much needed improvements in the present Law course would bring about an improvement of the academic level of Law students, who would also benefit from the experience acquired during their work phase. The final result being a more efficient course attended by better students, who in turn would certainly develop into better lawyers for the well-being of the country.

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## SEMINAR - THE LEGAL, SOCIAL AND MORAL IMPLICATIONS OF DIVORCE

**Anna Mallia and Ann Bonnici**

The panel invited to discuss the above theme on the 15th January 1983 was chaired by Professor J.M. Ganado, Head of Department of Civil Law of the University of Malta and included Mr. Mario D'Amato, a law student, Fr. Soler S.J., Mrs. Mary Rose Zahra, representative of the Council of Women and a lawyer, Dr.Anthony Farrugia.

The subject was introduced by Professor Ganado, who made it clear that the aim of the seminar was not to ascertain who was in favour or against divorce, but to create a forum for an objective discussion of the possible effects and implications of divorce in Malta, were divorce to be included in our Civil Law.

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**Anna Mallia and Ann Bonnici** study Law at the University of Malta and are both members of the Editorial Board - ID-DRITT.

Mr. D'Amato, however, stressed that, in fact, divorce already existed in Malta and this as a privilege of certain people only, because it was only those who in one way or another obtained a divorce decree overseas, (provided that the necessary conditions as stipulated by the Marriage Act of 1975, Article 21 were met with) as subsequently recognised by our courts, could in fact benefit from divorce. This, he said, was unfair, as in his opinion, everyone had the right to divorce. Mr. D'Amato proceeded to cite certain cases in order to support his argument: a Maltese woman, being seperated from her husband, wished to emigrate. However, she was informed that she could not do so without her husband's permission because she still bore his name. According to Mr. D'Amato, the only way out for this woman would be divorce, more so, since she had a 5-year old daughter and also due to the social stigma, she found it very hard to simply live with another man whom she had grown to love.

By way of conclusion, Mr. D'Amato stressed that divorce is a solution to a number of unfortunate and 'pathetic' cases, where the parties concerned suffer principally because they cannot break previous ties.

According to Dr. Farrugia, divorce is a serious problem, which dissolves the important institutional social contract of marriage. The speaker proceeded by saying that as divorce is a human problem, it is necessary to see how it fits in our daily life; how it can affect our institutions, old and yet sacred; how it can lead us to wordly happiness; how it is to be considered in the light of the Catholic faith.

Divorce has a catastrophic effect on the family and its members. The family is the basic unit of society and any attack made on the family will also affect the state - the society which we co-habit. Dr. Farrugia goes so far as to consider it as harmful and dangerous, "a cancer in those societies which have accepted and adopted it".

According to this same speaker, out of necessity, one has to look into the legal implications which divorce would bring to our legal system, as a result of which most of the Law of Marriage, namely the law relating to Rights and Obligations, Community of Acquests, Succession etc. would have to be repealed or amended. The basic concept of a Catholic marriage which permeates our Civil Code in all the sections relative to indissoluable contracts between husband and wife will be blasted out of its very existence by divorce.

Other legal implications brought about by divorce were mentioned by Dr. Farrugia among which were:

1. Divorce incinerates the principle of 'bona fede' in contracts because the parties will know 'a priori' that in case of divergence of opinions or in case one party wants to free himself from the bond, the contract can be dissolved.

2. Once marriage is dissolved and the obligations of co-habitation, fidelity and assistance are ended, what will become of maintenance? Will the innocent party remain without maintenance? How will the law be affected, regarding maintenance of in-laws? What about half-brothers or sisters?

3. Who will have paternal authority? The fundamental interests of the child should remain the guiding point for the courts as regards the care and custody of the children. All that occurs in cases of seperation is based on the fact that the effects of marriage are not terminated. The changes that occur between the parties after the divorce will seriously affect the arrangements that the court would have made in the best interests of the children.
   The impracticability of allocating the children six months in one home and six months in another, is also a valid argument.

4. How will the Community of Acquests be divided after divorce?

5. Will the dowry remain under the husband's administration?

6. What about a 'unica carta' will? Will this terminate upon the existence of a second marriage?

Dr. Farrugia concluded by saying that "divorce is immoral and what **was** immoral can never **become** politically right".

The third speaker on the panel to address the audience in a science lecture theatre full to capacity was Fr. Soler S.J., who said that he believed that marriage is an indissoluable union as stated in the Vatican Council II and that divorce should be avoided rather than be introduced in society. According to Fr.Soler, Man in his nature has been created to communicate: this trend of thought is not one simply pertaining to Catholics but also Marx and all Socialist thinkers believe in the basic relationship between one man and another - Man therefore achieves his peak when he establishes a full and lasting relation-

ship with another person. Fr. Soler also believes that a society has a law prohibiting divorce; it is also necessary for it to have educational institutions which emphasize the value of fidelity and communication. According to the speaker our legislator cannot justify itself when it creates situations which promote the breakdown of relationships. Divorce he says, is a remedy, **not** a right because a right emanates from Man's nature - if Man in his nature was created to communicate, it is a contradiction to assume that Man has a right to disrupt that communication. Those favouring divorce, he says, want to introduce it on humanitarian grounds, however, sociologists insist that divorce promotes greater problems.

The last speaker was Mrs. Zahra, representative of the Council of Women. She said that the phenomenon of divorce was unsettling to many people, who hold close to heart Christian principles. Mrs.Zahra asked herself however, "What is the difference between seperation and divorce?" In seperation cases, husband and wife may subsequently return to married life, after the crisis has ended. On the other hand, divorce dissolves marriage irreversibly. Unfortunately one may easily acquire a divorce in certain countries. In America it is estimated that out of every 3 marriages, two end in divorce.

Mrs.Zahra was of the opinion that when a couple faces matrimonial problems, the possibility of divorce will put them in a mental state where they will continue to avoid finding a solution instead of making up, in the interests of the children, themselves and society. Thus, she concludes, divorce, instead of being a solution, is the cause of greater failures.

The discussion that followed was exceedingly interesting with many Law students, as well as other persons present in the audience, bringing forward many arguments for and against the introduction of divorce in Malta. The various valid (and not so valid) legal and humanitarian reasons which were used to back up these points of view further helped stimulate the morning's proceedings.

## SEMINAR - THE RIGHTS OF ARRESTED AND IMPRISONED PERSONS

**Ivan Fenech**

The Dean of the Faculty of Law of the University of Malta, Professor Edwin Busuttil, who presided over this seminar held on the 16th April 1983, introduced the following members of the panel: Dr. Victor Borg Costanzi, Attorney General of the Republic, Dr. Guido De Marco, a leading defence counsel, Miss Moira Ferry, a voluntary social worker and Mr. Ronald C. Theuma, Director of Prisons. After a brief analysis in which he divided the period of detention into three stages, the first being the actual arrest, the second the investigation and trial and the third, the prison sentence, Professor Busuttil invited Dr. Borg Costanzi to further elaborate on the rights and guarantees in question.

Dr. Borg Costanzi began by stating that the individual's fundamental rights, which begin to exist even before the moment of one's birth, remain in force throughout his life, even during the period of custody or arrest. The local authorities' habit of random arrest of all possible suspects to a crime and the frequent violation or meddling with the 48-hour limit to custody, despite all the constitutional remedies, still offer an infringement to one's fundamental rights and it is such abuse, Dr. Borg Costanzi added, that leads to society's disrespect for police officials. Dr. Borg Costanzi insisted that it is the authorities' duty to investigate all matters of crime but displayed concern over police interrogations. An individual undergoing a phase of strain and anxiety should not be interrogated on matters affecting his future individual rights.

Dr. Guido De Marco opened by questioning if, despite all constitutional remedies and the Commissioner's Rules (the Maltese equivalent to England's Judges' Rules), the individual's rights are in reality respected. He complained about the frequent and unfounded arrests of individuals and the extreme measures used by police officials to obtain the aptly named "Prova Regina" - a confession to the crime. "What proof," Dr. De Marco asked, "do we have that such confessions obtained during unwitnessed interrogations are really voluntary?" Dr. De Marco objected to the fact that matters concerning the individual's fundamental right to personal freedom are being left to the discretion of particular

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individuals, mainly police inspectors.

Mr. Theuma, Director of Prisons and the third member of the panel, then enunciated various rights of the prisoners which include the right to complain to the Board of Visitors in privacy, the right to personal privacy, education, correspondence, visitors and medical facilities. He went on to describe the present facilities provided for the prisoners and added that he had no intention of turning the place into a holiday complex.

Miss Moira Ferry, the fourth and last speaker on this panel and also a voluntary social worker, began by objecting to the fact that since November 1982, neither social workers nor members of the Resettlement Society were allowed to enter the prison. She also showed her concern for the various shortcomings of the Board of Visitors, which is appointed yearly to look into the prisoner's ailments. "What effective supervision and control," she asked, "does this exert on the prison officials?" Miss Ferry then showed her approval of such seminars and suggested that in future, ex-prisoners should be invited to voice their opinions and experience.

When the discussion was opened to the floor, the debate was dominated by the question of treatment of detainees, especially with regard to conditions inside the Malta Prisons. References were made to particular incidents alleged to have occurred in the prison. Interest heightened when ex-inmates present in the audience, made their personal contributions and several accusations were directed towards the Director of Prisons, causing the seminar to end on a rather heated note.

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