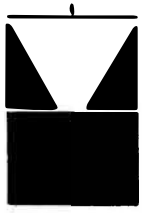

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Vol. XII AUTUMN 1984

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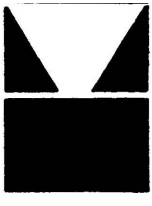

Organu uffiċjali ta' l-Għaqda Studenti Tal-Liġi
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# EDITORIAL POLICY

ID-DRITT Law Journal is an official publication of the Għaqda Studenti tal-Liġi (Għ.S.L. – Law Students Association – University of Malta) and as such it serves to help fulfil the aims expressed in Article 2 of the Għ.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 Għ.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.

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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.
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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.
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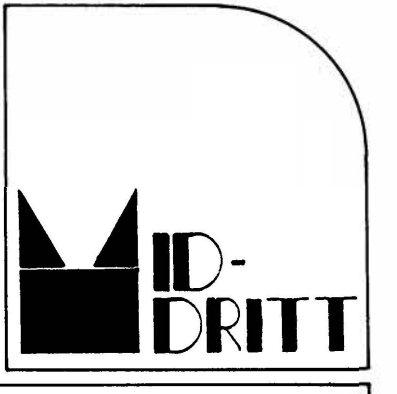
# EDITORIAL




In the legal world, comments on the activities and performance of the legislator and the judge provide much of the staple diet of columnists and readers alike. It is our undoubted duty to voice our concern over laws, judicial decisions and events which may serve to undermine the Rule of Law in Malta as well as abroad. As we go to press however, it becomes apparent that lack of space prevents us from here dwelling at length on the implications of the events of the past few months and that a proper discussion of the present predicament of the Rule of Law in Malta must be reserved to a future edition of our journal.

At the same time we remind our readers that ID-DRITT does not only serve as an outlet for academic research but also as a forum for different opinions. The Editorial Board has already been asked to introduce a regular slot for letters to the Editor and similar comments and while we are examining the most suitable ways to meet this request, we continue to invite articles and comments which stimulate opinion and provoke response. If this journal occasionally carries some controversial article, be it on freedom of the press, Marxism and Law or judicial review of administrative discretion, the aim is certainly not to annoy some readers and please others. Rather, when our readers turn authors and are tempted to put pen to paper and contribute articles and comments, the pages of our journal can only reflect their widely varying opinions. Reader-participation is indeed the lifeline of any periodical and without the contributions of lawyers and law students alike, our law journal will quickly disappear.

Punctuality in publication is, unfortunately, unusual in legal periodicals serving a small jurisdiction. While we trust that this shortcoming is forgiven, one should explain that funds, advertisements and sponsors remain increasingly hard to find, and since lawyers, notaries and law students are notoriously busy people, writing articles, editing and proof-reading tends to be a lengthy process. These factors notwithstanding, we hope that busy people will continue to take time off to prepare articles for publication, and that our journal's production standards will continue to improve at a par with its academic level. 1984 is the year in which the University of Malta Law Society's journal celebrates its fortieth birthday and while we believe that ID-DRITT has a continued function in serving the legal community in Malta, the advent of technological innovations such as 'electronic publishing' would certainly render a look ahead at the next forty years of our journal's life a presumptuous and futile exercise. Yet, whatever the future has in store for us, we cannot escape the reality that, in the legal sphere as in others, it is our *present* values, initiative and creativity that will fashion our future.

**J.A.C.**


# Articles

# RIGHTS OF THE ARRESTED PERSON IN ENGLAND AND THE POLICE AND CRIMINAL EVIDENCE ACT 1984*

*Antony Micallef*

Most writers[1] on criminal law invariably address, if not initiate, a discussion on the powers of the police to investigate crime, by asserting the necessity to strike a balance between those powers and the rights of the citizen. In other words any statute purporting to regulate the investigation of crimes should reflect a balance between the powers necessary for police officers to fulfill their duties and the protection of a person's civil and political rights.

The tendency shared by criminal law commentators to emphasise the importance of maintaining this balance, may perhaps be attributed to the knowledge that the statute book has not in the past been very convincing in its legislative efforts to strike a just and equitable balance. Regrettably, in practice, the path where the powers of the protectors and rights of the protected cross, reflects a grey area. Two schools of thought depict the situation. One school of thought calls for the stengthening and the enlargement of police powers necessary to deal with professional criminality as a means of curbing international narcotic circles, terrorism, homicides and other offences of a 'serious and grave nature'. Nevertheless, not all criminals deserve the notoriety enjoyed by the perpetrators of heinous offences, and therefore should not be treated in the same manner. Otherwise, wide ranging powers enjoyed by the police would, in all probability, have

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A. Micallef graduated LL.D. from the University of Malta in 1984.

* This article is based on a talk delivered at an intercollegiate seminar, during the Michaelmas Term, to research students at the Institute of Advanced Legal Studies in the University of London.

1 Among others see "Criminal Procedure" by C. Hampton 3rd ed. 1982; "Criminal Procedure" by J.B. Bishop 1st ed. 1983; "Police Interrogation in England and Wales" by Dr. P. Morris, 1978; "The Criminal Law in Canadian Society" published by the Canadian Government in 1982.

ill-fated effects and consequences not merely on the suspect and on the petty criminal, yet particularly in those cases where a person is fortuitously present in the wrong place at the wrong time. The main concern, therefore, of those who belong to the so-called libertarian school, comes as a direct result of the possibility that police officers may abuse of the powers they have been entrusted with. On the other hand, the authoritarian school calls for the reaffirmation of the suspects' rights, for the establishment of effective means for review, and for accountability of the already existing and far too strong powers entrusted to those officially involved in the maintaining of law and order.[2] As the Lord Chancellor succinctly points out, "there are the law and order boys (and girls) at one end of the pitch, and the human and civil rights lobby on the other".[3]

The main issue which confronts the harmonisation of the views propagated by the two schools of thought, is to seek the way in which the most appropriate form of compromise between their polar opinions can best be formulated. The necessary equation must reinforce the basic purpose of criminal law in regulating the acts of individual members of society with each other and in their relations with society as a whole. Furthermore it must protect the law abiding citizens from the transgressors of well defined and predetermined laws and the perpetrators of socially reprehensible acts. Above all, it should ascertain that the powers entrusted to those whose duty is to secure the detention of transgressors, are kept in check. The enforcement of criminal law provisions of necessity allow a certain degree of encroachment upon the freedoms of individuals. Nevertheless, the extent to which the basic rights may be encroached upon is not limitless and far from unqualified, particularly to trespassers who would like the public to think that they do so in the name of justice and the maintenance of law and order. Above all, the delineation of the confines within which police powers may be exercised in relation to the protection of citizens' rights, poses an added dimension to an already complex problem movinig in a vicious circle. It is not sufficient for a limit to be set, up to which certain behaviour of an inquisitorial nature is allowed. The absence of any limit may be intolerable, yet any ill-defined and obscure wide-ranging power, the exercise of which is left at the discretion of the executing officer is equally unacceptable. In defence of the exercise of such arbitrary powers one view put forward rather naively, is that it would be better to have enforceable wide powers rather than none at all. Again other views taken up, reaffirm the necessity principle, which apparently justifies the promulgation of statutorily controlled boundaries large enough to combat criminality on any level, high and low. However, what lies at the heart of the matter is the rather utopian quest to provide enough room for the police to go about their duty without violating the civil and political rights of the

2 Vide comments by Lord Hooson in the debate of the 2nd reading of the Police and Criminal Evidence Bill 1984 (No. 303), House of Lords Debates Weekly Hansard 4 June, 1984 cols. 415 – 421.

3 2nd reading, opening speech on the Police and Criminal Evidence Bill 1984 in the House of Lords Weekly Hansard 4 June, 1984 col. 405.

laymen and in the wake rekindle public confidence in the police force.

Regretably the last decade did not venture far in securing the ideal solution to the fight against crime in England. A decade largely dominated by the 11th Report of the English Criminal Law Revision Committee (1972),[4] which called for the abolition of the suspect's right of silence during police questioning. However, it also proposed a number of safeguards which did not seem to approach the equilibrium of power with apprehension and caution, but seemed to tip the balance in favour of the defence to the extent that hardened criminals could escape the accusatorial arm of the law with virtually little difficulty. Moreover the Confait case as commented upon in the Fisher Report[5] imparted clearly the picture that the police did not follow, perhaps were even ignorant of, the rules of regulating the investigation of crime. Dr. MacBarnet opines that the 11th Report did not succed to suggest the need for a criminal justice system tailored for providing decisive and categorical scope to investigatory powers. On the contrary, an image was portrayed, where due to the manipulation of those very same powers by police officers during questioning periods, crime suspects could be induced to confess to crimes that they had never committed.[6] Professor Leight confirms, that antagonistic and oppressive attitudes adopted by police officers during interrogations cannot always be brushed aside in the hope that their justification rests with "errors made in good faith rather than consciously overbearing conduct".[7]

The position regulating the questioning of criminal suspects by the police in England, prior to the rules laid down by the Police and Criminal Evidence Act 1984, could hardly have been called statutory, at the utmost administrative. The situation was regulated by a set of rules and directions issued by the Home Office to guide police officers in the conduct of their investigations.[8] They were devoid of any legal force or statutory power, their purpose was to serve as a guideline to the investigating officer when obtaining a statement from a detained person in connection with the commission or otherwise of an offence. In addition the evidence obtained therefrom may or may not have been admissable in a court of law at the discretion of the trial judge. Actually the admissibility of evidence is immune to a certain degree from the fact that it may or may not have been obtained in breach of the Judges' Rules.[9] Needless to say that the position could be described as permissive and in need of reform. Quoting Glanville Williams, Professor Leigh advocates the abolition of the rules.[10] One

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4 Command. 4991.
5 1977/78 H.C. 90.
6 Vide "Balance & Clarity; has the Royal Commission on Criminal Procedure achieved them" in C.L.R. (1981) 445.
7 Report on the Report of the R.C.C.P. – L.H. Leigh 44 Mod. L. Rev. (1981) at pp. 303.
8 Judges' Rules and Administrative directions to the Police H.O. Circular No. 89/1978.
9 For further reading vide "Police Powers in England and Wales" by L.H. Leigh 1975, at Chapter VIII pp 141 et seq.
10 VIde P. Morris on the Judges' Rules in "Police Interrogation in England and Wales" 1978 pp 29; vide also R.C.C.P. Research Study nos. 3 & 4 on Police Interrogation at pp. 31 – 32.

suggestion for reform, which seemed to be inevitable, and was to a certain extent always in the offing, concerned the desperate need to codify by statutory instrument the entire area dealing with the interrogation of suspects. In other words it was felt necessary to provide for the enactment of provisions categorically establishing the basic safeguards due to the detainee or the accused, and above all regulating the admissability of confessions made in police custody. Furthermore the compromise so much yearned for in striking that balance, between the rights of the suspect and the limits within which police officers could carry out their investigations, was lacking and very much necessary for the 1970's. A period described by Dr. MacBarnet to be "characterised by the rise of a powerful law and order lobby". [11]

A Royal Commission on Criminal Procedure was set up "with the unenviable task of seeking a balance". [12] In its Report [13] the Royal Commission makes that purpose clear. Its goals were admirabe, the research work carried out on various aspects of crime investigation novel, and of unprecedented value in an area which would not be unjustly described as to have been wanting. Nevertheless the end result attracted a fair amount of criticism despite the fact that it based the construction of its report on a triangular premiss of "fairness", "openess" and "workability". Whether or not the Royal Commission succeded in striking the balance it set out to obtain, cannot be answered in a categorical fashion. Admittedly certain aspects of the law on criminal investigation have been gathered with a view to be implemented and endowed with legislative force. On the other hand it is extremely doubtful whether any equilibrium at all has been preserved in the balance. Indeed, if at all, the balance seems to have been tipped in favour of alleviating the police from any obstacle they may meet in the course of their enquiries.

Some writers take the extreme view that the Royal Commission actually failed to achieve both tasks with which it was entrusted. Namely, in striking the balance between police powers and civil rights; and also in its attempt to clarify precisely those powers vis-a-vis the suspect. [14] Mr. S.P. Best has summed up the position by stating that "attempts at compromise, often well intended, frequently fail to achieve the desired end of pleasing everybody." He further adds that many of the Commission's features seemed to be the result of "woolly thinking and will" and if enacted would make a bad situation worse. [15]

However, to strike that proper balance, is not simply a question of finding the middle line between two poles. "The golden mean between efficiency in law enforcement and protection of the rights of accused persons in criminal cases is not easy to find, nor is it likely to have any

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11 op.cit. at fn. 6 pp. 446.
12 ibid.
13 "The Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure Vol." Command 8092 – 1, 1980.
14 vide MacBarnet op.cit. fn. 6 at p. 447.
15 "Compromise by the R.C.C.P." 125 Solicitor's Jnl. (1981)70.

permanent resting place". [16] The line of demarcation is elusive and very much determined by political and social values. [17] As the Lord Chancellor confirms "law and order must be on the menu of every political party". Indeed the noble Lord together with other colleagues in the House of Lords, emphasised almost to the point of rhetorical boredom, that the whole policy behind the Police and Criminal Evidence Bill was to strike a balance. [18] On the other hand some commentators have gone as far as to imply that the Police and Criminal Evidence Act hardly fulfilled, if at all, the purpose it was being enacted for. As opposed to epitomising the policy of fight against crime, adopted as an election issue by the Government of the day in proposing the Police and Criminal Evidence Act, it was claimed that the new law had nothing to do with the so-called war on crime. At best, its supporters could only consider it as an attempt, perhaps an abortive one at that too, to refurbish the present state of police law in relation to suspects' rights. [19] The ascertainment and the extent to which such a statement is true in relation to the rights of the arrested is the task that now lies ahead.

The Police and Criminal Evidence Act in essence reflects the adoption of a substantive part of the recommendations proposed by the Commission's Report. [20] It omits, however, the amendments proposed in the Report on the establishment of a new independent prosecution system. Nevertheless any hope would be alien to the notion of expecting the Act to succeed where the Report failed. Similar to the Commission's work, the Act's scope is to strike a balance between the powers, necessary for the maintenance of public order on the one side and the protection of citizens' rights on the other. In addition, it concerns itself with providing a codified framework with the, previously absent, power of legislative force to clarify and delineate once and for all the legal position on arrest, detention, search and seizure together with other related areas of crime detection. The Act is said to "redefine and adjust the law in respect of powers that are required by the police for the prevention and investigation of crime.... However, the exercise of these powers renders people, who may or may not be criminal, vulnerable to invasion of their liberty and abuse of their rights. A balance must be struck and it must permeate the whole structure from first principle to last detail". [21]

In fact as the proposed law approached the ultimate opportunity of undergoing any radical and official amendment in the House of Lords, Lord Elwyn-Jones pointed out that the Police and Criminal Evidence Bill's most vital failure was to secure the restoration of public confidence in the

16 Vide "The Rights of the Accused in Criminal Cases" by Linvingston Hall in 'Talks on American Law', Voice of America Forum Series, edited by Harold J. Berman, Washington, 1978.
17 Vide MacBarnet op.cit. fn. 6 pp. 53.
18 Vide Weekly Hansard 4/6/84 col. 405; vide also The Times Editorial comment of the 30/3/84.
19 Editorial comment in Vol. 133 N.L. Jnl. (1983) 429.
20 Command. 8092.
21 See The Times leading article 30/3/84.

police. The noble Lord rests his case by quoting from a leading paper "not famous for criticising a Tory government", which described the Bill at that stage as "an unlovely measure raising in almost every clause prickly questions about the balance between authority and liberty. Beyond.... dispute, it tilts the balance towards the police". Aware of the differing views espoused by most of its readers, the newspaper attempts to justify its comments by adding that the tilt of the balance of power is inevitably due to the ever increasing rate and change in the nature of crime. However, the newspaper could not help itself from drawing the conclusion that at that moment in time the Bill seemed to go too far in allowing the police to exercise powers whose only safeguard is based on trust.

The struggle between the authoritarian and the libertarian schools, like the two families of Verona, echoes incessantly, and haunted the Act in its entire route through the legislative process.

**Arrest and Detention**

The rights of the suspect begin where the powers of the investigating officer come into operation. The Police and Criminal Evidence Act mainly considers these rights in Parts IV and V relating to Detention and the Questioning and Treatment of Persons by Police. On the other hand, the Act's provisions concerning the powers entrusted to officers regulating their entry and search into the suspect's property, together with the added facility of seizing and retaining that property, manifest the wide gap which subsists in the suspect's protection from the discretionary exercise of investigative powers. An examination of the relevant clauses which purport to provide adequate safeguards to the suspect seeks to show that the legislator's intention was to envisage a situation where a person who could help police in their investigations would not be detained unnecessarily in police custody unless, of course, his presence there is further required. The contemplation of such a situation, however, begs the question as to what circumstances warrant an extended period of detention and if so, for how long and whether the suspect can be kept in ignorance of the reasons for which he is detained without being formally charged with having committed a particular offence. [23]

The starting point of what may be an unforgettable ordeal for the person concerned, lies with the moment of arrest. The position and the law of arrest as Lord Denning puts it, "is a hopeless muddle and in a confused state". [24] The Police and Criminal Evidence Act attempts to elucidate the complex state of affairs. At the outset it, however, regrettably fails to provide a clear definition of what constitutes or is meant by arrest. The established principle at common law is that arrest necessarily consists in the seizure or touching of the person's body with a view to his restraint. [25]

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22 Refer to the House of Lords Weekly Hansard 4 June, 1984 cols. 411 – 412.
23 Vide clauses 40 to 43.
24 Vide House of Lords Debates Hansard 4/6/84 col. 426.
25 Vide art. 99 on Arrest in Halsbury's Law of England 4th Ed. Vol. 11 at pp. 73.

Words to the effect that a person is under arrest do not necessarily amount to the actual arrest of that person unless uttered in a manner which in the circumstances are calculated to make quite clear to that person that he is under arrest and he so submits.[26] As early as 1704, the English courts laid down the principle that for a proper arrest to subsist, it is necessary that corporal seizure or physical contact of the suspect's body by the arresting officer actually takes place.[27] However it has also been held, that although words to the effect that a person has been placed under arrest, are not "per se" sufficient to constitute arrest, that person's consequent restraint is lawful as long as he submitted voluntarily to accompany the arresting officer as a direct result of the words addressed to him.

A more recent case[29] makes the position at law clearer in emphasising the point that a person is lawfully under arrest irrespective of how the words addressed to that person are formulated as long as they are explicit enough to make the addressee aware that he is not free to leave the officer's presence. If the words uttered by the arresting officer are not to that effect and fail to convey the message, arrest is considered not to have taken place. It is suggested that due care and effort is necessary to make the positiion quite clear to the person concerned particularly in cases where the suspect may be under the effect of intoxicants or alcohol.[30] In actual fact as Bishop sums it up "it all depends upon the circumstances of each case and whether it has been shown that a person has been arrested. It is not possible to speak of a magic formula".[31]

In its Report on the law of arrest, the Royal Commission on Criminal Procedure, omits any discussion on the definition of that concept. It seems to be rather more concerned with "the ultimate purpose of arrest i.e. in bringing a person to trial for committing or having been reasonably suspected of committing a criminal offence".[32] It in fact dwells on what standards should be applied in order to determine what amounts to reasonable suspicion, and as far as providing a definition as to what constitutes arrest there seem to be no comments made available by the Commission.

Nevertheless, it must be pointed out that mention is made of the right

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26 Vide L.H. Leigh on "Arrest in Police Powers in England and Wales" at pp 37; vide also R.W. Harding on "The Law of Arrest in Australia" in "The Australian Criminal Justice System" ed. by D. Chappell, and P. Wilson 2nd Ed. 1977 pp. 243 – 244.

(27) Vide *Genner v Sparks* (1704), 6 Mod. Rep. 173.

(28) *Russen v Lucas* (1824) 1 C & p 153, and in *Horner v Battyn* (1939) Bull. N.P. 61, the principle of defendant's submission to bailiff's authority was upheld.

(29) *Alderson v Booth* (1969) 2 All. E.R. 271.

(30) In *Wheatley v Lodge* (1971) 1 ALL E.R. 173, it was held that as long as the arresting officer does all in his power that a reasonable man is expected to do in the circumstances upon realising that the person in his custody was deaf even if that person could not lip-read or otherwise communicate with the officer.

31 J.B. Bishop "Criminal Procedure" 1st Ed. 1983 Chapter 2 at pp. 43; vide also *R v Inwood* on this particular point in 2 ALL E.R. (1973) 645 and L.W.L.R. (1973) 647.

(32) Report para 3.65 at pp. 40.

to be informed of the reasons for one's arrest.[33] Indeed, the Commission stresses the proposed restriction of the circumstances in which police can exercise the powers it entrusts to them. Nevertheless, it equally makes clear the point that it has no intention of doing that at the expense of hindering the police from fulfilling their functions.[34] Thus, despite the admission by the Commission that the law on arrest is "lacking clarity and found in an uneasy and confused mixture of common law and statutory powers.... the latter having grown piecemeal and without any consistent rationale",[35] it must be seen to what extent it has fallen short of precisely altering that situation. In this light the balance between powers and rights, about which so much ado has been made, would seem to incline towards the protectors rather than the protected.

The Police and Criminal Evidence Act, being the legislative image of the Commission's work, gives statutory expression to a rule established under English common law which comes in the form of a safeguard to the suspect. That safeguard, subject to certain exceptions, is the right to be informed of the reasons for arrest.[36] The principle has been well established by the leading case on this aspect in *Christie v Leachinsky*.[37]

The courts in *R v Weir*[38] again upheld the rule that a valid arrest consisted of two ingredients: (a) physical restaint and (b) a valid and true reason for the arrest. Where a person had been arrested on suspicion of one offence and although already under restraint, it is still absolutely necessary to inform him of any other reason if he is to be restrained on suspicion of having committed a different offence. Failure to inform him of a different reason for a different offence does not amount to arrest and would therefore not be entitled to be held in custody. As recent as the case *Pedro v Diss*[39] it was again upheld on the basis of *Inwood* (1973) 53 Cr. App. R. 529 and of *Christie v Leachinsky* (1947) A.C. 543, that a police officer could not detain a person without conveying to him that he was under arrest and the reasons for being so.

Yet as early as 1828, emerged the first ground where an exception to the general rule of being informed of the reasons for the offence, was allowed. *In re Howarth* had established, that if in the circumstances it is quite obvious, for a person to realise the reason for which he is or is about to be apprehended, any subsequent restraint shall be lawful and any resistance thereto illegal even if no words are actually said as to indicate why he is under control.[40] Although if *Howarth* was once right, it had been overshadowed by *Christie v Leachinsky*. In fact, Stanley Cohen writing on the "Investigation of

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33 Ibid para 3.69.
34 Report para 3.75.
35 Ibid para 3.68.
36 Vide clause 28 of the Act.
37 1 ALL E.R. (1947) 567.
38 (1972) 3 ALL E.R. 906.
39 1980 Q.B. & C.L.R. 1981 236 - 238.
40 In *R v Howarth* (1828) 1 Mood CC 207; vide also *Gellberg v Miller* (1961) 1 ALL E.R. 291.

Offences and Police Powers" lays down the principle that "in theory an arrest consists of the actual seizure or touching of a person's body with a view, to detention", and confirms that "it may in fact entail far less than this. So long as there is submission to the process the mere pronouncing of words by the arresting officer will suffice".[41] However sub-section 4 of clause 28 in the Police and Criminal Evidence Act amends the whole position radically. It makes it quite clear that a person shall be informed of the reasons for his arrest irrespective as to whether the fact of the arrest is in itself quite obvious. Such amendments are commendable and in fact Section 28 extends the obligation of the police officer to inform the person that he is under arrest dispite the fact that he may have realised it or that the circumstances may have so indicated.[42]

In essence a detainee's right to know that he is under arrest and the reasons therefor, have been upheld by the Act. It is further stipulated that where the detainee escapes from police custody before the arresting officer had opportunity to inform him of his rights, the offender should not later, if apprehended, invoke that ommission as amounting to a violation of this right.[43] What is rather disappointing, in an otherwise reformed state of the law, is that both rights of the detainee shall be made known to him as soon as practicable after his arrest and thus leaving a certain amount of discretion in the hands of the police officers in determining what may or may not be practicable. As the Royal Commission rightly admits, the lack of a definition of such a term allows for flexibility but produces uncertainty for both police and suspect.[44] On the whole, however, clause 28 has been enacted including certain welcome changes, in line with the main principles enunciated in *Christie v Leachinsky*,[45] having somewhat taken into consideration also the Commission's proposals of eliminating a "helping the police with their inquiries" situation.

As a matter of fact clause 29 of the Act allows for clarification of the position of a person who voluntarily attends at a police station or at any other place in the presence of a constable without having been formally arrested. The principle it seeks to establish is to make categorically certain that any person who voluntarily presents himself at a police station or at another place to assist the Police in the investigation of an offence, is free to leave at any time and without any restriction. In its Report the Royal Commission makes it clear that its intention was to do away with the grey area of having a half-way house between liberty and arrest. It would be desirious to establish a situation where a person is either under arrest or he is not. Referring to the judgment delivered by the Canadian Supreme Court in *Reg. v. Whitfield*,[46] Cohen adds that "there is no room for sub-division of the concept of 'arrest' into 'custodial' arrest and 'symbolical' or

41 Op.cit. 13 Ottawa L. Rev. (1981) 549 at 559.
42 Vide clause 28 sub-section 2.
43 Section 28 sub-section 5.
44 Report para. 3.98.
45 (1947) A.C. 578 – 579.
46 (1970) S.C.R. 46, (1970) 1. C.C.C. 129, 7 D.L.R. (3d) 97 (1969).

'technical' arrest. An accused is either arrested or he is not''.[47] In the case where a person accompanies a police officer of his own volition, he should be free to leave unless there exist grounds on the basis of which he will be, at least temporarily, deprived of the enjoyment of his right to freedom of movement.[48] The Commission also called for the introduction of a novel scheme used (generally) in Canada by the Ontario Police which simply involves a so called "appearance notice." It would allow the police to obtain appearance of the person at the station without actually arresting him. The Commission further recommended, that failure of appearance should be met with the same predicament that befalls any one who fails to answer to bail without the prior need of arrest.[49] Regrettably such a measure was not taken up. Rather the Act limited itself to asserting a person's possibility of leaving police custody unless he is technically put under arrest and informed as such at once.[50]

Actually, Section 29 can be seen as to impart a totally different picture altogether in practice. The police can ask a person down to the police station for a short conversation, and on going to the station willingly, under the impression that it is a short visit, the person concerned may still be there in 'conversation' for an unlimited period of time answering questions without being formally arrested or charged. Section 29 may, therefore, in practice undermine the whole scope of the Act to regulate the period of a suspect's detention in police custody.

Once again the legislator fills in a lacuna by doing away with what was a precarious situation but at the same stroke omits to provide any safeguard from any possible abuse by the investigating officers. As Professor Zander indicates, generally speaking a suspect would not know of his right to leave the station unless he is formally placed under arrest. In practice, therefore, a suspect will not take advantage of that right and by the time he is placed under arrest he may have prejudiced his position gravely. The learned writer suggests that the suspect should be told that despite his accompanying an officer to the station, this does not in any way imply that he is under arrest.

The Royal Commission recommends that upon arrest the person concerned should be taken to the police station immediately.[52] Section 30 of the Act caters for the implementation of such a proposal and indeed it marks the first occasion under the provisions of the new law whereby an arrested person is held in police detention. The section stipulates that a person on arrest must be taken to the station as soon as practicable. The station to which the arrested person is taken, must be a designated one and in cases where a person is not taken to such a designated police station he

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47 Vide 13 Ottawa L. Rev. (1981) 559.
48 Report para. 3.97.
49 Ibid para 3.80.
50 Clause 29 paras. (a) & (b).
51 Vide M. Zander on "P.C.E.B. – III: Arrest" in a series of articles explaining the various provisions of the Police and Criminal Evidence Bill at 133 N.L. Jnl. (1983) 246.
52 Report para 3.102.

shall be taken to one not more than six hours after his arrival to the first station. However, if the person is arrested by a constable not attached to a designated station, he may take the arrested person to any other "unless it appears to the constable that it may be necessary to keep the arrested person in police detention for more than six hours". [53] The act seems to take up the Commission's proposal of ensuring the possibility that arrested pesons should be taken to police stations where the enquiry is to be undertaken [54] by the selection of certain designated stations. [55] However, it fails at such an early stage in the process of arrest to provide any safeguards or to impart some sort of explanation for the legislature's choice of a six-hour time limit. The only readily acceptable explanation, upon a first impression, is that it reflects the time limit proposed by the Royal Commission after the lapse of which and in cases where no charge is made, an officer not connected with the investigation of the particular case and preferably holding the rank of inspector should look into the case to satisfy himself whether the grounds for arrest still exist. [56] As far as section 30 is concerned one last point which deserves mention is the case where a constable sees fit to delay taking the arrested person to a police station if the latter's presence is required for investigation purposes at any other place. [57] This sub-clause undermines the immediacy of proceeding to a police station in the first place. It enables the police to take, what Professor Zander describes as "the scenic route to the police station". [58]

Part IV of the Police and Criminal Evidence Act contains the main provisions purporting to codify the law on detention after the arrest of a person has taken place. As Lord Hutchinson of Lullington remarked, this segment of the new law represents "the very centre and kernel of the Bill". [59] It lays down the principle that no person may be detained for an offence except insofar as the conditions stipulated are met with. It primarily provides for the appointment of custody officers at designated police stations as suggested in paragraph 3.112 of the Commission's Report, whose duty is the overall responsibility for the detention and the treatment of detainees as specified in the various provisions of the Act on detention. A detainee is entitled to be released if the grounds for his detention do not require his continued detention. If,however,it appears to the custody officer that there is need for further investigation of the offence in connection with which the person was detained, or that proceedings may be taken against that person then he shall be released only on bail unless it happens that he was seen to be unlawfully at large when first arrested, in which case he shall not be released at all. [60]

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53 Section 30 (3).
54 Report para. 3.102.
55 Section 35 of the Act defines what is intended by 'designated police stations'.
56 Report para. 3.104.
57 Section 30 (10).
58 N.L. Jnl. 1983 at pp. 246.
59 Vide House of Lords Debates Hansard 4/6/84 col. 465.
60 Vide Section 34 (4).

Prior to the enactment of the new Act, as with other aspects of the criminal process such as arrest, the legal situation concerning persons in police detention was, to quote C. Munro, "... in the absence of authority, for long notoriously unclear". Nevertheless, the general principle was that a person in police custody could not be kept in detention for questioning, whether in the street or at the police station, unless arrested and brought before a Magistrates' Court within 24 hours from his detention in custody. Before the new provisions contained in the Police and Criminal Evidence Act 1984, the two main sources of law regulating a detainee's length of duration were, (i) rule 'B' of the Judges' Rules which laid down that "police officers, otherwise than by arrest, cannot compel any person against his will to come or to remain in a police station". [62] The other provision by virtue of which a person could be detained is found in section 43 of the Magistrates' Court Act 1980. It caters for the case where a person is taken into custody without a warrant and on being taken to the police station, is to be brought before a Magistrates' Court within 24 hours from the time when he was taken into custody unless an officer, at least holding the rank of an inspector or the officer in charge of the station to which he has been brought, shall inquire into the case and release him on bail if the offence is not a serious one, that is if it was not practicable to bring the person in custody before a Magistrate within 24 hours from the moment he was taken into custody. If, however, the person is retained in custody he must be taken before a Magistrates' Court as soon as practicable. Of course, this provision has now been abolished, and although a critical examination of its effects is indicative of the pitfalls and inadequacies of its practical application, it is only meant to represent the legal position as it stood prior to the 1984 Act.

The main defects with such a provision are, that firstly it fails to define what is or may be considered a "serious offence" and secondly allows any decision to be taken, on the nature which the offence assumes, up to police discretion. Furthermore detention in cases of serious offences was open-ended. As Munro adds, "where section 43 sub-section 1 of the Magistrates' Court Act does not cater for an unqualfied 24 hour limit, the tendency is to turn to sub-section 4 of that section and seek refuge in the application of a rule open to general interpretation, that arrested persons are to be brought before a court as soon as practicable". [63] The courts interpreted the latter phrase as to denote a period of not more than 48 hours duration. The same author implies that the English courts may have deduced such a time-limit from the same period of time stipulated under the Prevention of Terrorism (Temporary Provisions) Act 1976. [64] Munro further adds that the time-limit was a misconstruction produced by reading sub-sections 1 and 4 of section 43 of the Magistrates' Court Act in conjunction. Quoting from a

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61 Vide note by Munro on 'Police Detention' in Public Law (1982) at 210.
62 Vide App. A of the H.O. Circular No. 89/1978.
63 Op.cit. at pp. 211.
64 Vide ***Houghton v Franciosy*** (1978) 68 Cr. App. R. 197; ***R v Hudson*** (1981) 72 Cr. App. R. 163 and in ***Re Sherman and Apps*** (1981) 72 Cr. App. R. 266, 271.

recent case the writer points out that Lord Lane sitting in the Court of Appeal confirms, "that the particular section of the Magistrates' Court Act does not only not speak of 48 hours, yet there is no mention of 48 hours at all". [65]

By way of comparison, a 'peace officer' in Canada may arrest a person without warrant only if he has reasonable and probable grounds to believe that the suspect may have been or was about to commit an indictable offence. [66] Nevertheless, the arresting officer is required to bring the person arrested with or without a warrant, within 24 hours after the arrest before a judge and if a judge is not available, than as soon as practicable after that. [67] The flaw in this situation is that Canadian officers tend to take the arrested person to Court irrespective as to whether or not they have gathered enough evidence to secure a conviction. This gives rise to a high proportion of persons being detained unnecessarily. Consequently, it was suggested that the arrested person should be released from police custody if further investigation failed to produce enough evidence to justify his continued detention without the need to be brought capriciously before a judge. [68]

In the light of that Canadian proposal, the Police and Criminal Evidence Act seeks to provide, having taken into consideration the Commission's comments on the issue, for a period of detention where police interrogation can be carried out after arrest has taken place, yet before any charge of an offence has been made against the arrested person. [69] The detention scheme in the Act embodies the necessity principle which in practical terms allows the investigating officer to proceed to the continued detention of the arrested where it is expedient to do so in order to secure the evidence required for the charge of that person with an offence. However, as Professor Leigh notes in his report on the Royal Commission's work, the situation envisaged is to end abuses in a delicate area "by institutionalising the practice under controls". [70]

On arrival of the arrested person at the police station, the custody officer will see whether sufficient evidence is already available at that time to charge him with the offence for which he was arrested. If that evidence is lacking he may be kept for a period long enough to enable the investigating officer to secure that evidence. [71] The custody officer is to release the arrested person without bail if no evidence is available. On the other hand he may again order the detention without charge of the detainee, if he has reasonable grounds for believing that his detention without charge is necessary to obtain or preserve the evidence, through further questioning

65 In *Molcherek and Steel* (1981) 73 Cr. App. R. 187.
66 cf. Section 435 of the Canadian Criminal Code, 1982.
67 Ibid. Section 438.
68 Vide the Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections, at pp.55 – 57, Information Canada, 1972.
69 Prof. L.H. Leigh in his Memorandum on Evidence to the R.C.C.P. at p. 23.
70 44 Mod. L.Rev. (1981) 300.
71 Clause 37(1).

connected with the offence for which the detainee is arrested. [72] The Act at this stage, does not mention a time-limit for detaining a person. It only provides for the custody record to be kept wherein the grounds for the detainee's further detention is noted, and even then, this is only carried out as soon as practicable. The detainee, if it is any consolation, has the right to be present when the record of his detention is noted down and he is also to be informed of the grounds for his detention. However, if he is incapable of understanding the custody officer, or is violent or likely to so become, or in urgent need of medical attention, his right to be told of the reasons for his detention shall not apply. It may seem, therefore that one's rights are done away with as easily as they were granted in the first place. Unfortunately the Act fails to provide a sub-clasue by virtue of which it would be possible for these rights to be merely suspended and brought back later into operation once the condition of the detainee improves. Nevertheless, at a certain point in time a person must be charged or released with or without bail. [73] If he is released without charge and at the time of his release a decision was not taken as to his prosecution on an offence for which he finds himself detained, he has a right to be so informed. The Act here carries out to the letter what the Royal Commission suggested. It does away with the half-way house situation, of determining whether or not a person is charged.

The Police and Criminal Evidence Act is the pointer on the law reform scale which marks, on the one hand, the precise point which previously reflected a totally chaotic situation of the law, very much in need of clarification, relating to the period of time spent by a suspect in police detention without charge. On the other hand, it reflects the statutory version of this detention period in the statute book; however, practice will show that the scope and effort made by the Act for its codification have failed to strike the intended balance. One consolatory remark is, however, provided by Professor Leigh. He states that proper statutory control of the period of arrest without charge is necessary in order to curb possible abuses of police powers. However, the quest for coming up with the ideal proposed structure whereby the police officers are given the minimum possibility of reasonably and adequately obtaining information from the public, yet at the same time securing the citizens' rights from what the learned writer terms "overbearing conduct", is, to say the least, utopian. [74]

Commenting on 'Modern Trends in the American Law of Arrest', Leon Radzinowicz and Cecil Turner, explain that a police officer is entitled to stop a person in the early hours of the morning, at a place where the latter's presence may within reason amount to implication in criminal involvement, without arresting or infringing that person's freedom of movement. The officer is entitled to follow such a suspect and ask him to explain his business abroad. [75] The Model Code of Pre-Arraignment

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72 Ibid. para. (2).

73 A person at the most can only be detained up to 24 hours, unless detention is further reviewed as provided by clauses 42 and 43.

74 Memorandum on Evidence to the R.C. at p. 17.

75 Vide op.cit. Vol. 20 Canadian Bar Review (1943) 205.

Procedure proposed by the American Law Institute in 1966 suggested a brief on the spot detention of persons found in suspicious circumstances or reasonably suspected of having committed or being about to commit a serious offence. [76] Detention of the suspect would be authorised only if it is necessary: (i) to obtain that person's identification; (ii) to verify that identification; (iii) to provide an alibi for his presence at the time of commission of the offence and (iv) to request that person to furnish information or co-operate with the investigation of the offence. A limit of twenty minutes was proposed, after which the suspect cannot be compelled to stay in or near the place of the crime. Thereafter he is free to leave unless arrested. The Australian Law Reform Commission on Criminal Investigation proposed a similar measure which would enable the police to ask for a person's name and address if they reasonably believe that the person would be able to help them in their inquiries into the commission of an offence. [77]

The whole scope of these proposals for reform is to cut down as much as possible on long periods of detention in police custody and to avoid if possible police harassment of questioned persons. As attractive as much measures seem to be on first impression, they are far from watertight. [78] One preoccupying factor which undermines the whole aim behind the measures, is that to a large extent they depend on the application of the "reasonable" test. "Reasonable cause is a nebulous standard; it depends on what the suspect is seen or reported to have done, taken without the relevant circumstances, but in a doubtful case weight, perhaps undue weight, may be given to circumstances which are not particular to the suspect". [79]

In blissful ignorance of, and with little apprehension to the pitfalls of the 'reasonable cause' standard, clause 38 of the Act provides that a person who is arrested other than by a warrant endorsed for bail and not being a juvenile shall not be released if:

1. his name or address could not be ascertained or where the custody officer has reasonable doubts in believing whether the particulars given by him were true.

2. his continued detention is necessary where the custody officer has reasonable grounds for believing it to be safer for the detainee's self-protection or for preventing him from causing harm or damage to property.

3. the custody officer has reasonable grounds to believe that the arrested person will fail to answer to bail or his detention will stop him from interfering with witnesses or the course of justice.

If, on the other hand, the arrested person is a juvenile, it shall be sufficient if any one of the above three requirements is satisfied or further still if the officer again has reasonable grounds for believing the juvenile to be better off, "for his own interests", in police custody. The detained person kept in custody by virtue of this clause has the same rights as when he first arrived

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76 Vide Section 2.02 of the proposed Code.
77 Report (Interim) 1975 para. 80.
78 Vide Professor Leigh's discussion at pp. 17 – 24 of his Memo. on Evidence.
79 L.H. Leight at p. 299 Vol. 44 Mod. L. Rev. 1981.

at the police station, namely, to be informed of his continued detention and the reasons therefor, together with the custody officer's duty to make note of them in the custody record in the detainee's presence. The situation is, however, far from satisfactory. The questions that follow are: by what standards is the custody officer to determine the significance of the detainee's "own interests" or his protection? How should the truth or falsity of one's own particulars be determined? And how will the criteria for a prolonged detention, necessary for the prevention of any tampering with the administration of justice, be tailored? Above all, decisions affecting a person's restriction of liberty are left up to a custody officer, without any mention whatsoever of judicial intervention. [80]

The relevant section of the Act which most affects the initial stages of a detainee's liberty is section 40, concerning itself with the reviews of detention periods while in police custody. The Royal Commission, on the basis of research evidence, undertaken on its behalf and relating to police practice, concludes that 6 and 24 hour review periods are likely to be satisfactory to supervise internal and external conduct of police discretion in the detention of a suspect. [81] The Act faithfully follows the Commission's proposals, and it does clarify the situation in certain respects. However, it negatives its own merits in the sense that, in its attempt to provide clarity it has enacted rather discretionary grounds on which prolonged detention of the arrested person is asserted. Clause 40, first of all clarifies the previous position of detention without charge as it equally applies to an arrested and charged person, and to a person arrested though not yet charged, by an officer of at least the rank of an inspector. The first review of detention comes after the first 6 hours spent in detention and then detention is reviewed again 9 hours later and subsequently at 9 hour intervals. However, not all reform is a step in the right direction.

The Act, typically conveys the impression of giving rights and curtailing, if not abrogating them with a stroke of the same pen. Sub-section 4 of this section allows postponement of a review on extremely flexible and discretionary grounds. The latter are: (i) if it is not practicable to carry out the review at the particular time when the review is due; (ii) where the review officer at that time considers harmful the interruption of questioning by the investigating officer for the purposes of review as it may prejudice the entire investigation; finally, (iii) the review will also be postponed "if no review officer is readily available". [82] As Geraldine Van Bueren opines, such grounds for allowing postponement of detention reviews would appear to deprive individuals of their liberty for the purposes of administrative convenience. [83]

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80 Vide comments made by the H.O. Briefing Guide on the Police and Criminal Evidence Bill published in 1983 at pp. 35 – 38.

81 Report para. 3.105.

82 Section 40 sub-section (4b ii).

83 "Once more unto Strasbourg" L.A.G. Bulletin 1983 at p. 10.

Such grounds for postponement beg the question. What is the purpose of establishing review periods in the first place? It may not seem to be altogether difficult to appreciate Lord Morris's comment in the House of Lords debate on the Police and Criminal Evidence Bill, when he remarked "whenever a Bill grants a power to an individual or group of people and it also contains safeguards against the abuse of that power then the fundamental question we must eternally be asking ourselves is, 'is that power as it is designed in the Bill absolutely necessary?' If there have to be safeguards against that power one must ask oneself, why have the power in the first place?" [84] Nevertheless, the Police and Criminal Evidence Act does introduce a fundamental safeguard which will play a vital role when the new law is applied in practice. It expressly engraved into the statute book that, before a person's continued detention is authorised by the review officer, the detainee or his solicitor may make representations relating to the detention. These representations may be made orally or in writing, athough they may be refused in the former form if it is considered by the review officer that the suspsect is unfit to do them, due to his condition or behaviour. The Act therefore, does give statutory status to the period of questioning by police officers of a suspect in their custody without charge. Nevertheless, it must be borne in mind that "overbearing conduct is not necessarily a function either of powers or of lack of powers". [85] Therefore, the presence of a solicitor during such a period is more than welcome. [86]

The 24 hours detention limit proposed by the Commission was also taken up by the Act's legislators and clause 41 limits any officer in withholding a suspect in detention for more than 24 hours without charge. The Commission was rather cautious in indicating which moments in time should mark the beginning and the end of a detention period. Problems would arise where arrests take place outside police stations, but the Commission decided in favour of the point where the arrested person arrives at a police station as being the start of his proper detention and from which the 24 hours are to be calculated. Section 41 further stipulates that a person's detention period is to start either from the moment he arrives at the station or from the lapse of 24 hours after arrest whichever is the earlier, and as such does not allow for a period to develop where the person is although arrested yet not detained and consquently the suspect may spend far more than 24 hours before being charged. The Act further dismisses any time spent by the accused travelling to hospital, if in need of medical treatment; during his stay in hospital and on his way back to the police station as being part of the 24 hour limit, unless he was being questioned by the police during that time. This provision is not altogether unreasonable. It

84 House of Lords Debates Weekly Hansard 4/6/84 col. 440.

85 Leigh Memo. on Evidence at pp. 22.

86 Prior to the Police and Criminal Evidence Act a detainee's contact with a solicitor was by means of a telephone call, and only where no hindrance was reasonably likely to be caused to the processes of investigation or the administration of justice. Vide App. B. on Administrative Directions on Interrogation and the Taking of Statements in H.O. Circular No. 89/1978.

can be considered as a corollary of the principle that a person is questioned during detention without charge, a corollary which although seems logical but may equally be disagreeable. In fact it may show the Act to be in the critical light viewed by Mr. S. Best. The writer urged that the provisions of the Bill on detention were "nothing more than an endorsement of the long standing claim by the police to detain persons for up to 24 hours without charge and without having the sanction of the Courts as they de facto do at present". [87] The author adds that the suspect's rights would be further eroded on the applications sought by the police to extend the 24 hour period without charge and without much preoccupation given by the Magistrates' official rubber-stamping of those applications.

The Commission, in fact, did recommend an extension of the 24 hour time-limit upon recourse by application to the Magistrates' Court. However, it suggested that this period should be limited in its use only in cases of grave and serious offences. To the same effect, Professor Leigh contends that although police interrogation is relatively infrequent, yet it is found necessary in cases of great complexity, or cases involving organised crime where a number of suspects are involved and there is danger of violence being caused to witnesses or the destruction of evidence. [88] In its Report the Commission had in mind a complex situation where statements or information given by the detainee have to be checked in the light of forensic findings. A task in itself which takes quite some time to verify. [89]

The Act, however, goes much further than the Commission's proposals regarding the extension of the 24 hour period for questioning. If a police officer holding the rank of superintendent or above, who is responsible for the station where the arrested person is detained, has reasonable grounds to believe that:

(i) that person's detention without charge is necesary to secure or preserve evidence relating to the offence for which he is kept under arrest or to obtain that evidence by questioning him;

(ii) if the offence for which he is arrested is a serious arrestable offence;

(iii) if the investigation is being conducted diligently and expeditiously, that officer has the authority to order the continued detention of a suspect for a period expiring at or before 36 hours from the beginning of the detention. If, however, he authorises it for less than 36 hours, he may again authorise a further period, expiring not more than 36 hours after the relevant time and as long as the same three grounds still subsist. [90] Therefore, the situation contemplated by the Commission, where a suspect is brought before a Magistrate after 24 hours, has been modified by making it quite possible if the conditions subsist, for a suspect to be kept in detention

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87 Vid Vol. 125 Solicitors' Jnl. 1981 at pp. 71.

88 Professor Leigh's comments were made prior to the report issued by the R.C.C.P., further still, prior to the enactment of the Act and to that extent should be considered in that light. Vide his Memo. on Evidence at pp. 24 – 25.

89 Report para. 3.06.

90 Clause 42 of the Police and Criminal Evidence Act.

for up to 36 hours without charge. Once again the Act leaves it up to police officers to determine, on applying their powers of reasonableness, whether further interrogation is necessary to secure evidence or whether the continued detention is necessary where the investigation is being conducted diligently and expeditiously. Although, it does seem to be rather awkward to reconcile the need felt, on reasonable grounds, to prolong a person's detention period where the reason for his presence in that situation is being dealt with expeditiously. However, with regard to serious arrestable offences, the Act only provides clarification by way of enumeration rather than by way of definition. It lists a number of crimes in schedule 5 to the law; a number of offences mentioned in the Prevention of Terrorism (Temporary Provisions) Act, 1984, and includes any act or threat, if it had to be carried out, which leads or is likely to lead to any of the following consequences: (1) serious harm to the security of the State or to public order; (2) serious interference with the administration of justice or with the investigation of offences or of a particular offence; (3) the death of any person; (4) serious injury to any person; (5) substantial financial gain to any person; and (6) serious financial loss to any person. The Act goes on to explain that loss is serious if it is serious to the person who suffers it, an explanation which does not take us very far in determining what degree of seriousness it really is. [91]

The Act does on the whole, put in some effort to strike a balance in order to safeguard the detainee's right during his second stage of further detention. Section 42 goes on to state that he may not be subject to further detention on the expiry of the first 24 hours nor at least before the second review of the first phase of the detention. He also has the right to be informed of the grounds for his continued detention. More important, once again, is his right to make representations about the detention. At this point a solicitor is once again available and the detainee has also the right to inform a third party about his detention. However comforting these rights may be, there is more here than meets the eye. The detainee may have spent up to 36 hours without being charged; may have seen a lawyer when it was too late; and his position may already have been gravely prejudiced. In addition his rights to legal advice and to inform a third party may be refused by the officer who authorised his continued detention up to 36 hours from the moment of detention at the station. In this light, it would be frivolous to claim that the suspect's position is safeguarded [92] by the fact that the

91 Cf. clause 116(7) of the Act.

92 Professor Leigh confirms the scepticism which the exercise of the arrested person's right to seek legal advice and the right to inform a third party, attract when they are considered in the circumstances explained. He writes "... vu de cet angle, la législation anglaise est fortement critiquable. Il est vrai qu'elle donne au suspect le droit de contacter sa famille et à l'assistance d'un juriste. Mais il est vrai aussi que la police peut, pendent une période de 36 heures, le tenir incommunicado si elle l'estime nécéssaire pour les besoins de l'enquête." vide Leigh's article, entitled "Observations sur une reforme fondamentale a la procédure penale anglaise: Police and Criminal Evidence Act 1984", to appear in 1985 in the Revue de Droit Penal et de Criminologie.

authorising officer is duty bound to take note of the decision and the grounds therefor, in the custody record. Furthermore, the fact that the detainee must be released with or without bail not later than 36 hours since the beginning of his detention, i.e. unless he is either charged with an offence or detained up to the maximum period of 96 hours, does not, to say the least, seem to be very assuring.

'Detention-time' does not stop here. On an application substantiated with information and made on oath by a constable before a Magistrate's Court, a warrant of further detention may be issued by the Court if it believes that there exists reasonable grounds warranting that extended detention. Although an element of judicial review finally creeps into the process of police investigation, it is certainly not the classical case of better being late than never. The grounds upon which further detention is to be granted, are identical to those where the suspect may be detained up to 36 hours from the relevant time. The indication is quite clear that the legislator puts on the same footing an authorisation for further detention by a senior police officer as that to be made by a judicial officer, presumably under the long overdue guise of bringing the detainee before a court of law as recommended by the Commission. The information submitted in the application must state:

(1) the nature of the offence for which the person's extended detention is sought;

(2) the general nature of the evidence on which that person was arrested;

(3) the inquiries made and proposed to be made by the police relating to the offence; and

(4) the reasons for believing the continued detention to be necessary.

The application may be made either before the 36 hour period expires, or during a period of the first 6 hours after the expiry of the 36 hours, where the Magistrates' Court could only sit during those 6 hours if it was not practicable for the Court to sit immediately upon the expiry of the 36 hours from the relevant time. If, however, the application is made beyond the 36 hour period the court may refuse to issue the warrant if it reasonably believes that it could have been filed earlier. In such a case the detainee is still to be kept in detention during adjournment and the custody officer shall have to report the continued detention and the reason therefor, until the application is heard. If, on the other hand, the application is granted, the warrant shall state the time of its issue, authorise the continued detention and shall not be for a period exceeding 36 hours. In practical terms this means that, it is quite possible for a detainee to spend up to 72 hours without being charged and so held incommunicado, possibly without the right to see his solicitor until his appearance in court and [94] without

93 Sub-section 10 of section 42.

94 Section 43(2) and (3), however, allow the arrested person to be present in court and legally represented and furnished with a copy of the information relating to the application for his extended detention.

informing any relatives or friends of his whereabouts and state of health. [95] In this respect it is hard to appreciate the conviction with which the Lord Chancellor claims that the whole philosophy of the Act is to provide clarity, workability and above all, balance, in the interest of freedom under the law. [96]

Furthermore if the Magistrate's Court is not satisfied with the existence of the conditions necessary for extending the period, it has the option of either dismissing the application or adjourning the hearing of the application for a period not longer than 36 hours after the relevant time. Rather than catering for an outright dismissal of the application, the Act allows for the detainee to be kept up to the end of the 36 hours after the relevant time as sub-section 9 of section 43 points out, "that during the adjournment the arrested person may be kept in police detention." If, on the other hand, the application were to be dismissed, the detainee's right to immediate release with or without bail unless charged, is not a foregone conclusion. If the arrested person was detained for a period of less than 36 hours after the relevant time or in any other case the application under Section 43 is made before the expiry of 24 hours after the relevant time, he shall not be released **even if the application was dismissed**. The end to a person's detention without charge is far from near. It is possible for a constable to file a new application supported with information to ask a Magistrates' Court to extend once again the detention period now possibly in its 72nd hour for an extra 24 hour period of detention, which cannot, therefore, end later than 96 hours since the person first arrived at the police station. [97]

In the light of these provisions, the equilibrium between the conduct and behaviour of two entities within a larger one, namely society, as a community, is hardly visible let alone maintained. Safeguards will receive legislative force with pyrrhic effect when translated into practice and are far from adequate. In addition to an already unsatisfactory state of affairs, the Act refrains from any mention of the suspect's right to remain silent during questioning, a right absolutely necessary once the law seek to elevate the concept of detention without charge to the statute book.

**'Right to Silence'**

The right to remain silent during police questioning did not receive any consideration by the Criminal Law Revision Committee's Eleventh Report on evidence in criminal cases. [98] However, it did come under the critical lens

95 Section 42 (9) stipulates that if a detainee is held up to 36 hours after the relevant time and at the time of the extension of his detention, he had not exercised his right to see his solicitor and to inform a third party, the officer authorising the extension of his detention may refuse him these rights. Vide sections 56 and 58 for the conditions on which the authorising officer may refuse these rights.

96 Vide House of Lords Debates of the 4/6/1984.

97 Cf. Section 44.

98 Command 4991 (1972) for an extensive discussion vide "The Right of Silence in the

of the Royal Commission on Criminal Procedure. [99] Nevertheless, it is unfortunate that the legislators of the Police and Criminal Evidence Act chose on this occasion to follow in the footsteps of the Criminal Law Revision Committee and consequently the right against self-incrimination finds no statutory provision in the new law. It is only therefore, the Report of the Royal Commission on Criminal Procedure which concerns itself with the question as to whether the detainee should be told during interrogation of his rights not to answer any questions put to him and if he chooses to do so of his own volition, they may be brought as evidence in court. The Royal Commission was faced with the difficulty of reconciling two different views that emanated as a result of the debatable recommendations of the Criminal Law Revision Committee which suggested a substantial alteration of the legal implications involved in the right to silence. The two sides to the issue, reflecting the everlasting debate on the balance of powers, advocated the preservation of the principles of presumption of innocence and onus of proof on the one hand and on the other, the administration of justice as being a means to an end in bringing the guilty to trial.

The common law position on the right to silence is epitomised by Lord Devlin's dictum that a person's duty to assist the police is a social and moral one but not a legal duty. The whole basis of the common law is the right of the individual to refuse to answer any questions at all put to him by persons in authority. [100] However, the position radically changes once the suspect is arrested and taken into detention. The detainee must be submitted to questioning (particularly in the light of the provisions of the Police and Criminal Evidence Act) although he may still remain silent. However, as Professor Leigh observes "the real issue is whether and to what extent inferences can be drawn against him from his silence". [101] The Commission indicates that during interrogation no inference could be drawn as to the guilt or innocence of the accused from his silence. However, it was found that juries would draw inferences in suspicious circumstances where the arrested refused to explain or answer certain questions. With this in mind the Commission came to the conclusion that it would not suggest that an inference should be made from a detainee's silence as it would not change the position in practice and therefore decided to leave the legal situation as it stands at present. [102]

The Commission felt, that the legal position was therefore satisfactory and that the caution enunciated in Rule III of the Judges' Rules was sufficient, except for a few changes that were necessary. First of all it proposed that the suspect should be cautioned at a moment much earlier in time than when he is usually cautioned in practice. The implication is that police wait until they have evidence which gives rise to reasonable grounds

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Police Station and the Caution" by M. Zander in "Reshaping the Criminal Law" Ed. by P.R. Glazebrook, (1978).

99 Command 8092 (1980).

100 *Rice v Conolly* (1966) 2 Q.B. 414.

101 Memo. on Evidence to R.C. at p. 63.

102 Report para. 4.48.

for suspecting that person of committing an offence. The caution should tell the suspect that he is going to be questioned and that he has no need to reply but if he decides to and is later prosecuted, anything he may have said will be reported in Court. [103] This, in a nutshell, is the proposal which the Commission recommended for reform. Actually the report, although it deals considerably with the topic, had a negative effect. It found other proposals for reform to be unconvincing and came to the conclusion that the situation as it stood was acceptable. The Commission could in this regard only be guilty of an omission rather than of having committed a wrong, an accusation which equally may very well be directed to the legislators of the Police and Criminal Evidence Act. Similarly unconvincing are Lord Elton's comments during the opening debate of the second reading of the Police and Criminal Evidence Bill in the House of Lords. His Lordship held that the Bill reinforces the right to silence substantiated solely by the introduction of certain codes of practice intended to ensure that detained persons are made aware of their safeguards and rights under the new law. [104] As emphatically put by Lord Hooson in that same debate, "it would be a bad day for the country if the boy in the famous painting was under a legal obligation to reply to the infamous question", 'when did you last see your father?' and could be made, by one means or the other to answer. On that kind of issue there can be no compromise. It is not a question of balance then; it is a question of fundamental principle". [105]

**Admissibility of Confessions**

One area of law regulating crime investigation, which has had an effective impact on securing that "fundamental principle" of the right to silence has been the admissibility of confessions or statements made by the accused during custody. The classic exposition of the rules governing the admissibility of statements is found in *Ibrahim v R.* [106] Lord Sumner held that "it has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or of hope of advantage exercised or held out by a person in authority". [107] Hence, the development in English common law of the voluntary rule, subsequently confirmed by principle 'e' in the preamble to the Judges' Rules [108] and a string of judicial decisions. However, the Judges' Rules

103 Report para. 4.57.

104 House of Lords Hansard 4/6/1984 col. 476.

105 House of Lords Hansard 4/6/1984 col. 416.

106 (1914) A.C. 599.

107 For an historical survey of the development of the rule as applied to persons prior to and after detention in police custody – vide Leigh "Police Powers in England and Wales" 1975 at p. 143 et seq.

108 H.O. Circular No. 89/1978 states "That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that

introduced the new notion of 'oppression', which added a new dimension to the issue, in the sense that it was questioned whether 'voluntariness' and 'oppression' were synonymous. The cases of *Collis v Gunn* [109] and *R v Praeger* [110] confirmed that there was no distinction between the two concepts. The most recent authoritative case on the subject is *D.P.P. v Ping Lin.* [111] The House of Lords confirmed that the issue whether a statement was voluntary or not was basically one of fact. *R v Hudson* [112] reaffirmed the notion of oppression as amounting to an involuntary statement was to be proved beyond reasonable doubt by the prosecution. Furthermore *Wong Kam-Ming v The Queen* [113] and again in *R v Brophy* [114] the House of Lords held that a detainee in custody had the right to enjoy a total freedom in giving evidence during the 'voire' dire' without affecting in any way his right to silence during the substantive trial. However, the latest judicial decision, *R v Rennie* [115] is seen at the beginning of a development sending to restrict the interpretation of the voluntary rule by the courts. The case was decided in the Court of Appeal where the appellant was convicted on obtaining pecuniary gain by deception, alleged that his confession was made in the hope that by giving in to police questioning they would not implicate his relatives by taking steps against them. The Court held, per Lord Lane, that often the motives of an accused person are mixed and include a hope that an early decision may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. The essence as Professor Leigh points out, is that the 'root question in every case is whether the admission was voluntary'. [116]

With a view of ascertaining precisely whether the underlying rationale of the principle of voluntariness is whether to control interrogation practices, protect the legitimate interests of the accused, provide reliable evidence, or any combination of these justifications, particularly in the light of the decision by the Court of Appeal in *R v Rennie.* Mr. Smith claims the impossibility of predicting on which basis the admissibility of confessional statements will in future be determined by the courts and hence advocates swift clarificatory action. [117]

The Royal Commission does not categorically and specifically deal

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person to a question put by a police officer and of any statement made by that person, that is shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression."

109 (1964) 1 Q.B. 495.
110 (1972) 1 All. E.R. 114 & 45 Mod. L.R. (1982) 575.
111 (1976) A.C. 574.
112 (1981) 72 Cr. App. R. 163 and (1981) C.L.R. 107.
113 (1980) A.C. 247, 261.
114 (1981) C.L.R. 831 & in 45 Jn. of Criminal Law 1981, 211.
115 (1982) 1 All E.R. 385 & 1 W.L.R. 64.
116 "Police Powers in England and Wales" at p. 145.
117 45 Mod. L. Rev. (1982) 577.

with the admissibility of confessions under a separate heading. It advised against the existing framework of the Judges' Rules if "the maximum possible reliance for evidential purposes can be placed upon suspects' statements." It also recommended instead, that proposals of reform should be on the lines of police training schemes dealing with interviewing. Furthermore in the eventual implementation of such schemes the Commission took one bold step by recommending that the reliability of the confessional evidence should be left to be determined by the jury and Magistrates, upon the facts presented to them. [118] It may be worthwile to point out in this regard that whereas the position in England, by virtue of the Judges' Rules the discretion of the admissibility or otherwise of confessional statements lies at the judicial level, [119] the position in Scotland [120] shifted from judicial to jury discretion with the case of *Chalmers* [121] in 1954 to a more liberal acceptance of statements in *Miln v Cullen* [122] and *Murphy v H.M. Advocate.* [123]

The implementation of the guidelines mentioned by the Commission comes in the form of a Draft Code of Practice, issued by the Home Office on the Detention, Treatment, Questioning and Identification of persons by the Police and for Searching of Premises and Seizure of Property. The Code suggests amendments to the taking down of statements as laid down in the Judges' Rules [124] and takes up the Commission's ideas on improving note-taking practice. [125] The latter reform is worded very subjectively and above all reflects the tedious burden of having to make notes in custody records. Nevertheless, even this practice may be stopped if it appears to the interviewing officer that such a measure could interfere with the conduct of the interview. This provsion transfers discretionary power into the hands of the police and according to Mirfield "even in such remote circumstances, the court would be unlikely to exercise its discretion to exclude incriminating statements by virtue of section 76(3) of the Act. [126] In addition to a situation permeated with discretion, apprehension is also directed to the accuracy of

118 Report para. 4.75.

119 Vide Leigh on "Police Powers in England and Wales" at p. 142; vide also the case of *Dansie v Kelly: ExParte Dansie* (1981) Qd. Rl. where the Supreme Court of Queensland dealt with judge's discretion is exerciseable in regard to the question of fact whether the confessional statement was voluntary or otherwise. Vide also Vol. 56 Australian Law Jnl. (1982) 247. For a succinct review of Australian Law on confessional statements vide paper presented by Mr. Johnston to the A.B.A. in Vol 54 Australian Law Jnl. (1980) 466.

120 Vide "The Admissibility of Answers to Police Questioning in Scotland" by G.H. Gordon an essay in "Reshaping the Criminal Law" ed. by P.R. Glazebrook, 1978.

121 J.C. 66.

122 1967 J.C. 21.

123 1975 S.L.T. 17.

124 See paras. 13.5 (d) and 13.6 of the H.O. Draft Code.

125 Report of Commission paras. 4.12 to 4.15.

126 vide "The Future of the Law of Confessions" C.L.R. 1984 at 64. However, it is interesting to point out that a new provision which will have novel effects when put to practice, has been inserted in the Police and Criminal Evidence Act, 1984. Section 78 will ease the apprehension foreseen by Dr. Mirfield with respect to the judicil reluctance in exercising discretionary powers to exclude inadmissible statements. It is a provision

the record to be kept by the Police.[127] The Commission having been aware of such growing concern[128] considers the feasibility of tape-recording interviews, which the Act actually takes up in Section 60 and goes to the extent of burdening the Secretary of State with a duty to issue a Code of practice on tape-recording interviews. This innovation goes to show that the advantages in its implementation would seem to outweigh its disadvantages. The Commission also went as far as to consider the feasibility of introducing video-recordings of police questioning, a measure which undoubtedly would go a long way to help ascertain the voluntariness of a statement and would also have an immense deterring effect on police conduct during detention periods. Nevertheless, financial questions overshadow any possibilities of this proposal's implementation in the immediate future.[130]

With reference to the voluntariness rule, the Commission went as far as to suggest its total dismissal. It based its conclusion in the light of the conflicting case-law as to what constitutes a violation of the voluntary nature of a statement. The Commission also based its decisions on the results of a research study carried out by B. Irving[131] which suggested that in psychological terms custody in itself and questioning in custody develop forces upon many suspects which so affect their minds that their wills crumble and they speak when otherwise they would have stayed silent.[132] On the basis of the findings, the Commission, although aware of the need to exercise control on police interrogation, opted for the view that it would be better to concentrate on the behaviour of the police rather than to purpose "the vain attempt to distinguish between voluntary and involuntary confession". This is why it proposed the introduction of police interrogation guidelines mentioned earlier. The Act does not concur with the Royal Commission on the abolition of the voluntary rule,[134] and rightly so, although it does give the Secretary of State power to make delegated legislation; that is the draft codes of practice recommended by the Commission. Therefore, if a confession made by an accused is tendered in court by the prosecution, it shall be dismissed if it is shown to the court that it was obtained (i) by oppression or (ii) in consequence of anything said or done which in the circumstances,

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which goes beyond the exclusion of irregularly obtained statements. Section 78 purports to empower the Court to exclude all evidence which considering all the circumstances, including those in which the evidence was obtained, would have an adverse effect on the fairness of the proceedings. A section which seems to undermine the rules regulating the admissibility of confessions and will give defence counsels the opportunity to make a lot of mileage in support of their.casue.

127 "The Future of the Law of Confessions" C.L.R. 1984 at 64.

128 Report paras. 4.2. to 4.11.

129 Report paras. 4.16 to 4.30 and vide problems posed by Leigh in Memo. on Evidence to R.C.C.P. at pp. 68.

130 Report para. 4.31.

131 "Police Interrogation: A Case Study of Current Practice" R.C. Research Study No. 2, 1980.

132 Report para. 4.73.

133 M. Zander in N.L. Jnl. 133 (1983) 367.

134 Clause 76 (2).

was likely to render it unreliable.

Although under ground (i) there is an echo of the notion of oppression introduced by the Judges' Rules, the Act adds to it by defining the notion as to include "torture, inhuman or degrading treatment and the use of threat of violence whether or not amounting to torture". [135] Clearly this is a case of phraseology borrowed from article 3 of the European Convention on Human Rights which stipulates that "no one shall be subject to torture or inhuman or degrading treatment or punishment." As Mirfield observes [136] it is presumed that English courts will interpret "the provision in the light of the European Convention, although they would not be bound to do so". [137]

The second ground which the Act provides for the inadmissibility of a confession is the "test of reliability". A standard of proof, was set out in clause 2(2) (b) of the Draft Bill proposed by the 11th Report of the Criminal Law Revision Committee. Yet, in the latter draft clause an added ingredient is found in the words ".... in the consequence of any threat or inducement of a sort likely....," which is omitted in the Police and Criminal Evidence Act, 1984. In Mirfield's view this ommission is a revolutionary measure which expands the width of the 'reliability test' so much that it would prejudice any consideration as to whether a confession is reliably obtained, particularly in the light of Irving's research for the Commission on the rigorous techniques of police investigation. This uncertainty would most likely necessitate frequent judicial intervention. [138] Therefore, if on the basis of the law as stipulated in the Act, the judge were now to address himself to the question of reliability, the question to be asked is not whether the confession is unreliable, but whether it may be so in consequence of anything said or done during detention by the police, which in the circumstances, was likely to render it inadmissible. Furthermore, this would lead to situations where, if the judge would come to a decision that a confession obtained in those circumstances was actually unreliable, then it shall be dismissed outrightly even if it were true, unless, of course, the prosecution succeeds to prove the contrary beyond reasonable doubt. Nevertheless, it is stipulated in the Act that the dismissal in part or in whole of a statement shall not prejudice the admission of any facts discovered by virtue of that statement nor where it is demonstrative of particular mannerisms or individual characteristics of the accused. In addition evidence as to how these facts were discovered must be adduced either by the accused himself or on his behalf.

Two important rights of the arrested which may help minimise the effect of police interrogation provoking dubious and unreliable statements,

135 Clause 76 (8).

136 Op.cit. from fn 125 at pp. 69.

137 It is pointed out however by G. Van Bueren that in so far as section 55 is concerned, the Police and Criminal Evidence Bill (No. 303) goes against England's commitment to international obligations and violates article 3 of the European Convention on Human Rights; Vide L.A.G. Bulletin 1983, 10; vide however also *Tyer v U.K.* in Vol. 2 Eur. Rep. 9 – 12, *& Ireland v U.K.* Vol. 2 Eur. H.R. Rep. 25, 73 – 85.

138 Vide op.cit. at fn. 125 at pp. 70.

are dealt with in Part V of the Act on the Questioning and Treatment of Persons by the Police. They refer to the right to have someone informed of the suspect's arrest [139] and the right to have access to legal advice. [140]

**Right to Inform a Third Party**

Prior to Section 56 of the Act, the basis upon which the right to have someone informed was founded on (i) administrative direction no. 7 (a) of the Judges' Rules which allows an arrested person in custody to telephone his friends as long as no hindrance is likely to be caused to the process of investigation, (ii) the second basis from which is derived the right to have someone informed of one's detention under English Law, is Section 62 of the Criminal Law Act, 1977. This section provides that a person under arrest has the right to inform one person, named by him, without delay unless delay is necessary as not to interfere with the investigation or prosecution of crime. The Commission recommended the confirmation of section 62 together with the retention of the guidelines set out in administrative rule No. 7a of the Judges' Rules. The Act follows suit by providing that an arrested person is entitled upon his own request to have someone told of his detention. In this respect, the Act improves the position by expanding on the notion of a friend or relative or other person known or likely to take an interest in the welfare of the detainee. Such right should be exercised as soon as practicable except on grounds where delay is allowed. The Draft Code of Questioning also makes provision for the detainee to nominate two alternative persons in case the first one cannot be contacted. [141] A similar provision is found in the American Law Institute's Proposed Draft Code of Pre-Arraignment Procedure where an arrested person shall be given reasonable opportunity from time to time to consult with a relative or friend. It must be pointed out, however, that this provision is directed more towards the situation where a friend substitutes for a solicitor. [142]

Delay in granting the request to inform a third party arises in the case of a person arrested for a serious arrestable offence and if a superintendent authorises it. The reasons for the delay, as the Commission observed, [143] are to prevent any harm done or interference with evidence connected with the serious offences; to prevent the detainee from alerting his associates and providing them with the opportunity to destroy, conceal or distort evidence; cause harassment to witnesses and, most important of all, escape prosecution.[(144)] In any case once the particular ground warranting delay ceases to exist the right shall be applicable afresh. Above all the detainee has the

139 Section 56.
140 Section 58.
141 Draft Code of Questioning para. 4.1.
142 Op.cit. Section 5.07 at p. 47.
143 Report para. 4.80.
(144) It is of particular interest to note the apprehension which Prof. Leigh employs in his comments with respect to the justifications given by the Commission, for the grounds allowing for a delay in the exercise of a suspect's right to seek legal advice and to inform a third party of his arrest. Prof. Leigh writes, "La police nous donne à penser que parmi les juristes, certains peuvent être de connivence avec le suspect, et donc avec le milieu de

right to be told of the reason for the delay and such reason shall be recorded in the custody record. This right is renewable every time the arrested person is transferred from one police station to another. The right, however, must be exercised before the expiry of 36 hours from when his period of detention commences. However, in the case of persons detained under the Prevention of Terrorism (Temporary Provisions) Act, 1984, the delay may be extended up to 48 hours where it is considered that the use of this right will

(i) lead to interference with the gathering of information about the commission, preparation or instigation of a terrorist act or,

(2) lead to alerting persons who will prevent the investigation of terrorist acts or worse still proceed to their execution. Nevertheless, in the case of children or young offenders, as the Commission proposed,[145] a parent or guardian is to be informed of the arrest, the reason for it and the place where the juvenile is being detained.

The Act makes it quite clear that these rights are additional to those afforded to other offenders by the law itself.[146] In addition, the Draft Code on Questioning entitles Commonwealth citizens or aliens to benefit from this right by communicating without delay with their High Commission, Embassy or Consulate. The Draft Code, however, distinguishes between foreigners in three ways. In the case of a national of a country which is bound by a Consular Convention binding as well on England, the appropriate consulate shall be informed as soon as practicable; where the detainee is any other foreigner he shall be informed of his rights without delay; and in the case of Commonwealth citizens they shall be told that if they wish the police will inform their High Commission of the detention together with brief details of the reasons thereof. They shall be told of such a right, however, after they have been detained for more than 24 hours. The procedure of communication is curiously far from uniform and leaves the present writer uncomfortable with the state of affairs, particularly as regards the third category of foreigners.

The position, prior to the proposed statutory inclusion in the Police and Criminal Evidence Act, of the right to seek access to legal advice during police detention, was devoid of any legislative force. There was no statutory rule guaranteeing that right except under the Scottish Criminal Procedure Act 1975, although this was restricted to cases when the suspect was already charged. Apart from that Act, the position in England and Wales was restricted to point (c) in the preamble to the Judges' Rules and reinforced by Administrative Direction No. 7a(I) of the same rules. However, despite the

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crime organisé, afin en toute probabilité de notifier l'arrestation du suspect à ses complices. Le gouvernement, devantage circonspect nie ce motif; il constte que cell-ci est, plutôt, même un juriste, puisse, par malchance, avertir un complice. Gouvernement nevrosé, ou malhonnête? Nous ne savons pas, mais nous pensons qu'une société libre n'accepte qu'a à contrecoeur et seulement en cas d'extrème nécéssité (tel que le terrorisme auquel une législation particulière s'applique), l'incommunicado. vide op. cit at fn. 92.

145 Report para. 4.78.

146 Section 57 sub-section 9.

fact that the right could be exercised also when the suspect in custody but not necessarily charged, it was only allowed if no hindrance or unreasonable delay was likely to be caused to the processes of investigation or the administration of justice. Furthermore there is the implication that police officers only have a duty in bringing these rights to detainees' knowledge by simply having signs and notices of them set up in conspicuous and convenient places in police stations, [147] a state of affairs rightly, described by Professor Leigh as being monstrous. [148]

The other statutory sources to be found in English law regulating this right in section 62 of the Criminal law Act 1977, a provision that seems to consolidate the exercise of two rights into one. Section 62 of that Act only caters for the intimation of one person reasonably named by the detainee, to be informed of his arrest and custody in police detention. To this extent the Police and the Criminal Evidence Act clearly provides for the separate facility of having someone informed of the arrest and the right to ask for legal advice. Furthermore, the previous sources of rules regulating both rights had two main weaknesses as pointed out by the Home Office in its Memorandum [149] to the Royal Commission on Criminal Procedure.

The first point is that the rights they advocate are restricted only to persons arrested and in custody but not during questioning. Professor Leigh adds that "the directions do not purport to impose any obligation on the part of the police to allow the suspect's solicitor to be present during interrogation or even to allow the suspect access to a solicitor before interrogation. [150] A second flaw is that the right as it stands presently is hampered in its effective use by provisions based largely on the 'nebulous standard' of reasonableness. In addition there is one overall weakness, particularly insofar as the Judges' Rules are concerned as Professor Zander points out, that "the courts seem never to have given authoritative guidance as to what constitutes circumstances that justify the police in refusing a suspect the right to speak to his lawyer."

In the *People (D.P.P.) v Madden and Ors*, the Irish Court of Criminal Appeal held that a person has a right of reasonable access to his legal advisers when held by the Gardái. The judge added that "in this context the word 'reasonable' must be construed as having regard to all the circumstances of each individual case and, in particular, as to the time at which access is requested and the availability of the legal adviser sought". [151] Professor Zander expressed concern that in the absence of judicial guidance in this respect, abuse is most likely to occur, if at least by the police taking upon themselves the broad interpretation of the rules in their favour. [152]

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147 H.O. Circular No. 89/1978.

148 Leigh Memo. on Evidence at pp. 65.

149 Memo. No. IV on the Law and Procedure relating to the Questioning of Persons in the Investigation of Crime.

150 "Police Powers in England and Wales" at pp. 155.

151 (1977) I.R. 366 at 355.

152 A suspicion which was confirmed by Professor Zander through a number of research studies carried out with a view to discover (i) the extent to which suspects were allowed to

One proposal for reform put forward by the Australian Criminal Investigation Bill 1977 and supported by Professor Leigh, is in virtue of clause 20 of that Bill. It obliges the officer to provide reasonable facilities for the detainee to communicate with a lawyer if the latter so requests and to make possible the presence of that lawyer during any investigative action taken against the suspect. However attractive such a proposal may seem, it is unlikely to be welcomed by the police authorities in view of the great possibility of impeding investigation. [153] It is worthwile to point out that similar obstacles are encountered by New York Policemen in which State, exist very wide measures catering for the protection of detainees, by virtue of both the 6th Amendment to the U.S. Constitution as well as para. 6 of the New York State Constitution which allows a counsel to assist the suspect at every stage of the legal proceedings. [154] In sharp contrast to such proposals are Lord Widgery's views put forward to the American Bar Association in 1971. He was quoted as saying that: "any rule requiring the presence of the suspect's lawyer during interrogation is quite unacceptable". [155] However, his Lordship did further add to the possibility of having an independent third party during questioning time so as to be able to testify later in court as to what had taken place. The implication clearly is that a lawyer is far from considered to be an independent third party during questioning. This view was considered though rejected as a proposal by the Royal Commission. [156] As far as the presence of a third party is concerned the Home Office Memorandum on Crime Investigation and the Questioning of Persons [157] deals extensively with the advantages and difficulties involved with the implementation of such a proposal. The Commission swiftly dismissed the proposal on the basis of organisational problems rather than on the substantive issue of attempting to improve a situation so much in need of a compromise to strike the balance of power in the suspect's direction. [158]

The Home Office Memorandum sees three initial difficulties which such a proposition may involve. These are: (i) the possible view that suspects in police detention may not want the presence of a friend or relative as a third party, (ii) third parties who have no connection whatsoever with the case, usually tend to be unwilling to act as witnesses during police interrogation. The reason mainly being that such sessions seem to enjoy a certain notoriety particularly with regard to police behaviour towards members of local communities; (iii) finally, security problems may be caused which add to the interruption of questioning. One further problem is envisaged by the Home Office. Undoubtedly the presence of any person foreign to the whole

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consult a solicitor and (ii) to find out how far the police went to provide facilities for consultations with solicitors, and for actually informing suspects of their rights; vide "Access to a solicitor in a Police Station" C.L.R. 1972 at pp. 342.

153 Vide Leigh Memo. on Evidence at pp. 67.

154 Vide "The Expanding Right to Counsel in N.Y." by D.M. Zverins in 10 Fordham Urban Law Jnl. 1982 351 – 353.

155 Vide op.cit. by Zander in C.L.R. 1972 at 347.

156 Report para. 4.99.

157 Memo. No. V.

158 Vide fn. 155 at para 4.100.

incident, will definitely have an effect not solely upon the interview but particularly on the interviewee especially if that person is related to the third party which would make him feel all the more uncomfortable and consequently prolong the interview by making it that much more difficult for the police to get at the facts. As the Memorandum puts it "the presence of a familiar face in unfamiliar surroundings can have a supportive effect on the suspect, which is likely to make him less inclined to answer police questions".[159] On the other hand, it is possible to envisage one advantage at least from the presence of a third party, that is he may be the only safeguard in the circumstances against gross misconduct on behalf of the police. Regrettably, however, the Memorandum, as with the Commission, does not go as far as to conclude that such a person would in practice prove his purpose namely to be an independent party at the trial. [160]

As far as young offenders and mentally handicapped people are concerned, both the Home Office Memorandum and the Report of the Commission take a more sympathetic, if not an understanding attitude, towards the presence of a parent, guardian or other person responsible for the offender in question. Administrative direction No. 4 of the Judges' Rules provides for the presence of that party during questioning of offenders under the age of parent/guardian to be of the same sex as the detainee; and the second the same sex as the detainee, other than a police officer, will be allowed as a substitute and in addition it is recommended that if possible arrest should not take place at school. If such a measure cannot be prevented from taking place, the interview at school will be held only with the consent and in the presence of the head teacher or his nominee. However, there is one problem with these safeguards, namely, that they are to be executed only insofar as they are practicable. The Royal Commission in fact proposes only two changes to the existing provision. Apart from the Home Office's suggestion to reduce the age-limit from 17 to 16 which the Commission did not take up, it proposed the following changes: the first proposal is to do away with the unnecessary obligation of requiring the person substituting for the parent/guardian to be out of the same sex as the detainee; and the second proposal which states that the proposed safeguards can only be executed where practicable, needs clarification. As regards the first point, it is preferable that the person present during interrogation should be someone known to and who enjoys the confidence of the young interviewee, and he should always be present when the interview commences. Therefore, the proviso "as far as practicable" should be limited only to cases in which waiting for the arrival of an adult will involve a risk of harm being caused to persons or serious damage to property. [161]

As regards mentally handicapped persons undergoing questioning by policemen, the Commission could not come forward with such easily available solutions as are available with young offenders. Administrative

159 Op.cit. No. V issued by the H.O. on Law and Procedure of the Questioning of Persons at p. 136.

160 Vide fn. 157.

161 For discussion of the consideration vide report paras. 4.102 – 4.104.

direction 4A(a) of the Judges' Rules burdens the officer with the unenviable responsibility of determining how to deal with persons suffering from mental handicap, particularly in how to treat their answers when considering the possible gullible nature of such persons and their susceptibility to suggestion. For this reason the Commission suggests the presence of a medical doctor. In addition a social worker should also be called in, "in loco parentis", unless, of course, it would be more appropriate for the parents or guardian to be there instead. [162]

Nevertheless, these reform proposals, if ever transformed into safeguards for the interviewee, should be made available in addition to the overriding and more effective right to seek legal advice. If at all, Judges' Rules far from being abolished or restricted in providing access to a solicitor, should be re-defined and enforced so as to give some practical effect to the policy that a man should be entitled to legal advice when facing the police. [163]

## Right of Legal Advice

The Home Office reaffirms the principle that if a person in custody wishes to consult a solicitor, he shall be granted the opportunity, although administrative and financial issues may cause problems. The Commission set out to settle such interrelated problems and in attempting to follow suit the Police and Criminal Evidence Act provides the statutory framework for that settlement.

On the conclusions reached by the Commission, [164] the Act stipulates that a solicitor may be consulted by a detainee privately [165] and "at any time". However this Act does not, at any point mention the fact as suggested by the Commission that the suspect should be formally notified of his right and for that notification to be recorded. What the Act provides is for the request to be made by the suspect and for that request to be notified. Rather than making it illegal for any questions to be put to the suspect before legal advice can be sought, the Act provides that the right should be carried out as soon as practicable, unless of course a total suspension of the right altogether is issued.

A case recently decided by the Ohio Supreme Court in the *State v Strickler*, reaffirmed that the right to counsel under the U.S. Constitution arises upon the initiation of a formal indictment. Therefore, "when one is advised and thus presumed to be aware of his right to counsel and does not exercise that known right, but instead submits to a line-up prior to formal

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162 Vide Report paras. 4.105 to 4.108.

163 M. Zander "Access to a Solicitor in a Police Station" 1972 C.L.R. 347.

164 Report paras. 4.81 to 4.93.

165 Byrne, Hogan and Macdermott in "Prisoners' rights – A Study in Irish Prison Law" 1981 at pp. 14, refer to the case of *The State (Harrington) v Garda Commissioner*, where it was held that "having regard ... to the extreme importance of this right and to the major inroad on the liberty of the individual which its denial or restriction would involve ... a detained person is entitled to access to his legal adviser, this must be achieved in privacty and out of the hearing of any member of the Gardia Siochana".

charges being lodged against him, he cannot be said to have been deprived of his constitutional right to counsel". [166]

The position in American Law, by virtue of the outstanding cases of *DiBiasi* [167] and *Donavan-* [168] *Arthur* [169] which stipulated that the right to counsel should be exercised at the arraignment stage rather than at the indictment stage of the proceedings, is now interpreted as to signify that any line of police questioning attempting to extricate a statement or to induce the suspect to waiver his rights in the absence of a counsel, should not be allowed. The landmarks in U.S. jurisprudence therefore extend constitutional protections of the suspect, reaffirm the Miranda warnings and by virtue of *People v Hobson* [170] expands the Miranda principles by not allowing a person to waive his rights without the presence of a lawyer. In fact, Mr. Kamisar in his essay "The Right to be Informed of Legal Rights: The Miranda Warnings", observed that the U.S. Supreme Court "was in the process of re-shaping 'a novel right not to confess except knowingly and with the tactical assistance of counsel' ". [172]

Section 5.07 of the Model Code on Pre-Arraignment Procedure, drafted by the American Law Institute, provides an acceptable compromise as to the debate at which point or for how long during police questioning should a lawyer be allowed to make his entrance. The proposed article calls for "prompt access" to a legal adviser by the detainee, and counsel is not to be prevented from staying at any place where the detainee is kept. The latter shall also be given reasonable opportunity from time to time to consult in private with his counsel. The Institute's main intention by the introduction of such a provision was not solely related to ensuring that the suspect is not held incommunicado, but concern was also forthcoming in order to prevent any exercise of abuse or coercion being made upon the detainee. However, this condition of having a counsel present is not absolute nor is it applicable during the first four hours of initial questioning as proposed in article 4 of the same Draft Code. [173]

It is only fair to point out that the Draft Codes of Practice for Detention, Treatment, Questioning, and Identification of Persons by the Police and for the Searching of Premises and Seizure of Property, issued by the Home Office provide a set of rules very similar to the rule applied in American Law. Paragraph 5.3 of the Draft Codes of Practice clearly shows a detained person not to be inteviewed by an officer until he receives legal advice where he so requested it and this was granted to him. It would, of course, be naively presumptuous to assume that such a rule is unqualified, particularly in relation to the Police and Criminal Evidence Act which

166 63 Ohio st. 2d 47 406 N.E. 2d 1110.
167 7 N.Y. 2d 544, 166 N.E. 2d 825, 200 N.Y.S. 2d 21 (1960).
168 13 N.Y. 2d 148, 193 N.E. 2d 628, 243 N.Y.S. 2d 841 (1963).
169 22 N.Y. 2d 325, 239 N.E. 2d 537, 292 N.Y.S. 2d 663 (1968).
170 39 N.Y. 2d 479, 348 N.E. 2d 849, 384 N.Y.S. 2d 419 (1976).
171 Vide also 10 Fordham Urban L.Jnl. (1982) at 359 et seq.
172 Vide "The Supreme Court and Human Rights", Edited by Burke Marshall. Forum Series, 1982.
173 Vide op.cit. at pp. 184 – 187.

epitomises the use and function of provisos. Therefore, where an officer (at least holding the rank of a superintendent) has reasonable grounds to believe,

(i) that delay in questioning would mean running a risk to harm persons or cause serious loss or damage to property; or

(ii) waiting for a solicitor will disturb the process of investigation; or finally,

(iii) if the detainee consents in writing to commence the interview, the right to see his solicitor shall not apply. However, although the solicitor may attend the interview, if the superintendent or a higher ranking officer considers his behaviour to be of an obstacle to the questioning he shall be asked to leave.

A relaxation of the right to have a solicitor present during questioning is also found in the Police and Criminal Evidence Act, although with graver consequences, on two separate grounds which allow for the suspension of the right under discussion. These two grounds found in Section 58(6), which allow a delay in fulfilling the detainee's right to seek legal advice, are (i) where the suspect is in detention for a serious arrestable offence, and (ii) where a superintendent authorises it. In the words of the Commission, these grounds are dictated by limited and exceptional circumstances where the interests of the suspect have to be subordinated to those of other individuals who may be at risk, and in favour of the wider interests of society.[174] It would not seem difficult to appreciate that such a statement justifies the criticism directed against the Commission's Report, accusing it of tipping the balance in favour of the police. The reasons for the two grounds warranting a delay to grant the right, were tailored presumably to clothe the same apprehensions involved with the similar right under the Act to have someone informed of one's arrest. Nevertheless, it is strongly suggested, that where basic human rights are concerned, no matter how heinous or grave certain offences are, as Lord Hooson reminded us, it is not a question of balance or equilibrium but a matter of fundamental principles of dignity and humane treatment. The grounds for authorising a delay in the exercise of the right to seek legal advice are once again identical to those reasons which under the Act deny the suspect his right to have someone informed of the arrest. Also identical is the time limit of 36 hours from the relevant time after which the right to seek counsel must be carried out.

However, the Act's provisions regulating persons in detention suspected of having committed terrorist acts leave much to be desired. The time limit of 36 hours within which the right to legal access should be exercised is extended up to 48 hours. Furthermore, where a suspect is detained under terrorism provisions which may give rise to the grounds upon which his rights may be delayed, he will only be allowed to speak to his solicitor in the sight and hearing of an officer who has nothing to do with the case and at least holds the rank of an inspector.

In essence, the Police and Criminal Evidence Act has three veins, all running like a silver thread through most, if not all, of its main clauses. The

174 Report para, 4.90.

first, touches upon the unreliable standard of reasonableness usually left at the discretion of police officers to decide whatever the provisions may mean. A second point relates, mainly to decisions being taken by officers in higher ranks. Third, the decisions and acts taken by police officers must be recorded in a custody record. All three purport to guise, if not to minimise, the real effect of the large, discretionary powers entrusted to the police by the new law. These three points were observed by Lord Scarman in the debate of the second reading of the Police and Criminal Evidence Bill in the House of Lords. [175] His Lordship pointed them out with the hope to meet what he aptly described "a historical challenge for the House to exercise its revising skills on the Bill." If, however, there is any reason as to why the skills of revision were not put to test, they do not certainly lie with the various extra-parliamentary voices of admonition and perhaps neither with the Royal Commission on Criminal Procedure, although the mills of commission authorities usually grind slowly. However, the challenge will only be affronted gradually, as the "Blindfolded Lady" is very old and the proces of face lifting is therefore of necessity slow and gentle. Other rheumatic pains and wrinkles of age remain. Only successive legislatures may help the Act in easing an ache here and smoothing a wrinkle there. [176]

175 Vide Debates in House of Lords Weekly Handsar, 4th June, 1984 col. 433 – 434.

176 M. Belli "The Belli Files", Prentice-Hall, Inc., New Jersey, 1983.

# PROPRIETARY RIGHTS IN COMPUTER PROGRAMS: COPYRIGHT PROTECTION AND MALTA*

*Joseph A. Cannataci*

Interest in the relationship between law and technology has been growing steadily (albeit slowly) over recent years. This is perhaps inevitable in a society which is increasingly dependent on novel and constantly evolving technologies which are absorbed at an incredibly fast rate into our every-day life.

Although relatively a fledgeling field, 'Law and Technology' already contains many branches of specialisation and in most cases each branch's importance in the legal field grows in direct proportion to the increasing importance of the relevant technology in day-to-day life. Thus, if a new technology is particularly important economically the need for adequate legal regulation grows correspondingly. Hence the growing interest in protecting computer programs. Programs or 'software'[1] (the terms may, for our purposes, here be used interchangeably) are at the foundations of one of the largest growth industries of the last decade. The computer software industry is today measured in several billion dollars and the upward trend on the graph looks as if it's going to remain that way for quite some time to come. If we are to believe those who predict that our society is rapidly moving towards the age where every home, school and office will have a computer, the continuing strength of the computer software industry is easy to comprehend. The chief problem with software from the legal point of view is that a computer program is very difficult and expensive to

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1. *For the non-technical reader:* A computer is a mechanical or electrical device for processing information. Modern computer technology, although increasingly electronically sophisticated, is divided into what are popularly known as "hardware" and "software". "Hardware" refers to the actual machine comprising the electronic circuitry, keyboard, Visual Display Unit or monitor, printer, etc., while "software" refers to the sets of instructions which enables the machine to process information. As indicated above, "software" and "program" may, for simplicity's sake, be used interchangeably. Thus, in a computer, the machine's circuitry, technically referred to as a Central Processing Unit (CPU) executes programs in order to process information. In plain English, the CPU does the work it is instructed to do. These instructions are contained on computer programs.

create but very easy and cheap to copy. It takes hundreds and thousands of man-hours to write and finalise a program, meaning that programs take several weeks and months to develop but they may be copied in minutes, often with the same ease that one records a phonograph record onto a tape-recorder. What therefore must the law provide in order to adequately protect the author/owner's proprietary rights vis-a-vis computer programs?

In researching legal protection of computer software, one is likely to encounter hundreds, indeed thousands of pages of literature written recently on the subject. One can scarcely hope to present a truly comprehensive analysis of this topic in less than a hundred pages of print, and such an analysis is therefore necessarily beyond the scope of this brief article. The aim here therefore is to increase awareness of the need for legal remedies for problems presented by the widespread sale and use of computer programs especially with regard to the protection afforded by copyright law. The relevant Maltese statutes will be briefly examined and suitable reform considered from a comprehensive point-of-view. Again, although a strong case may be made for discussing the protection of proprietary interests in *both* 'hardware' and software *together*, this paper is restricted to an examination of legal safeguards of software only.

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In the leading U.S. case *Apple Computer Inc. v. Franklin Computer Corp.*, Judge Sloviter neatly summarised a basic knowledge of computer programs as follows: "There are three levels of computer language in which computer programs may be written. High level languages, such as the commonly used BASIC or FORTRAN, uses English words and symbols and is relatively easy to learn and understand (e.g. "GO TO 40" tells the computer to skip intervening steps and go to the step at line 40.) A somewhat lower level language is assembly language, which consists of alphanumeric labels (e.g. "ADC" means "add with carry"). Statements in high level language and apparently also statements in assembly language, are referred to as written in "source code". The third, or lowest level computer language, is machine language, a binary language using two symbols, 0 and 1, to indicate an open or closed switch (e.g. 01101001 means to the Apple (Computer) add two numbers and save the result). Statements in machine language are referred to as writen in "object code".

The CPU can only follow instructions written in object code. However programs are usually written in source code which is more intelligible to humans. Programs written in source code can be converted or translated by a "compiler" program into object code for use by the computer. Programs are generally distributed only in their object code version stored on a memory device.

A computer program can be stored or fixed on a variety of memory devices, ... The ROM (Read Only Memory) is an internal permanent memory device consisting of a semiconductor "chip" which is incorporated into the circuitry of the computer. A program in object code is embedded on a ROM before it is incorporated in the computer. Information stored on a ROM can only be read, not erased or rewritten.... The other device used for storing the programs ... is a diskette or "floppy disk", a auxiliary memory device consisting of a flexible magnetic disk resembling a phonograph record, which can be inserted into the computer and from which data or instructions can be read. (Instead of "disks" some machines use magnetic tapes similar to those used for sound recordings.)

Computer programs can be categorized by function as either application programs or operating system programs. Application programs usually perform a specific task for the computer user, such as word processing, checkbook balancing or playing a game. In contrast, operating system programs generally manage the internal functions of the computer or facilitate use of application programs." 714 F.2d 1240 (1983) U.S.A.

## THE CASE FOR COPYRIGHT

Practice and analysis have shown that various types of computer programs may be protected to different degrees under different parts of the Commercial Law. Indeed, had it been the intention here to embark on a comprehensive analysis[2] of the subject, one would have had to examine the varying extents of protection afforded by the Law on Patent, Copyright, Trade Secrets, Trade Mark Unfair Competition etc., but as indicated previously the following discussion is largely limited to one of the most important and widely applicable forms of protection: copyright.

The importance of copyright is largely due to the fact that as far as computer programs are concerned its usefulness is not as restricted as that of other major forms of protection such as Patent or Trade Secret. This is in turn due to the intrinsic nature of a program. Although the author of a program may invest enough original effort in composing the notational sequence for the work to qualify for copyright protection, the effort involved is really the author's individual expression; the logic and design may be original, but the underlying principles of the methods used are well established in computer science. The element of novelty essential for patentability to exist is rarely found in programs, especially in the programs mass-produced for the micro-computer market, which is economically (and therefore, to a certain extent, legally) the most important sector which infringement of proprietary rights may affect. In his authoritative work[3], Duncan M. Davidson points out that "Only a minute number of programs (perhaps less than 1 percent) are inventive enough to be patented... Many programs have short product lifespans due to rapid technological advances. Patenting is simply not useful for their protection."[4]

Although inconsistent at times, the recent trend in Europe and in the United States, is for Patent Offices and the Courts to deny patent protection to programs. On the continent this trend may be traced back to

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2. For detailed analysis of the protection of computer programs under Patent, Copyright, Trade Secrets, Trade Mark, Unfair Competition *vide:*
Duncan M. Davidson, *Protecting Computer Software: A Comprehensive Analysis*, Jurimetrics Journal, ed. Summer 1983, U.S.A. 1983 pp. 337 – 425;
Morton D. Goldberg, *Copyright and Computer Software – Protection, Preemption and Practice*, Software Protection: The Computer/Copyright Interface, Law and Business Inc., Washington D.C. U.S.A. 1984;
Peter M. North, *Breach of Confidence: proposals for reform*, 'Data Processing and the Law', ed. C. Campbell, Sweet & Maxwell, London 1984 pp. 171 – 193;
James A. Sprowl, *Towards a unified theory of proprietary protection for digital information systems*, 'Data Processing etc.' *op.cit.* pp. 221 *et.seq.*;
Schmidt, *Legal Proprietary interests in Computer Programs: The American Experience*, Jurimetrics Journal 21, U.S.A. 1981;
M.C. Jacobs, *Proprietary Protection of Software, Hardware and Data*, Computers and the Law 202, (3rd. ed. 1981) U.S.A.;
R.C. Lawlor, *Infringement of Program Copyrights*, Computer and the Law 208, (3rd. ed. 1981) U.S.A..

3. Duncan M. Davidson, *Protecting Computer Software* etc., *op.cit.*

4. *ibid.* at p.357.

as early as 1968 when new legislation in France excluded software,[5] and within five years neutral Austria and Switzerland, the Netherlands and Denmark in the EEC and even Poland in the COMECON sphere, followed the French example.[6] The 1973 European convention[7] excludes software "as such" from patent protection and this exclusion "as such" was introduced in a quasi-identical fashion in the United Kingdom in 1977.[8] The Germans followed close on Britain's heels and in a 1978 amendment, excluded "programs for data processing installations" from protection under Patent Law.[9] Meanwhile, in the United States, the Patent Office has, since 1966, been rather consistent in not granting patent protection to computer software although the Reagan administration brought with it promises of improved processing of patent applications at the Patent Office. The American Congress has done little to clarify the matters at issue in spite of being constantly urged to do so by the Courts. The latter have in three leading cases denied patent protection to the program *in litis* but have in no way decreed a total incompatibility between patent and program.[10] Indeed, two recent decisions of the U.S. Supreme Court indicate that in limited instances patents incorporating a computer program (as part of a larger process or apparatus which is patentable) may be upheld.[11] Notwithstanding all these developments however the real obstacle to the development of Patent Law as the major source of legal protection for computer programs is not legislative carelessness or judicial prejudice but rather the intrinsically unpatentable nature of most programs developed. While it is true that both patent and copyright are concerned with protecting *originality* the basic difference between the two concepts becomes all important: the former exists to protect *original ideas* (i.e. new inventions/discoveries) while copyright is intended to protect *original expression*. Thus, one is inclined to agree with Bryan Niblett's conclusion that since "It is a small minority of commercially valuable programs that contain novel and non-obvious inventive matter ... the patent system is in no way a satisfactory answer to the software industry's call for legal protection."[12]

Limited protection is also possible under Trade Secret/Breach of Confidence Law but again this is not practical in protecting the majority of progams since: a) trade secrets are most useful in the relatively small market catering for the larger computers, (main-frames and minis) where large and complex programs (often tailor-made) are licensed to a comparatively very small and restricted class of users, whereas in economic terms the need for

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5. FRANCE, 1968 Patent Law, art.7.
6. Soltysinski, Computer Programs and Patent Law: A Comparative Study, 3 RUTG. J. COMPU. & L. 1 (1973).
7. Munich Convention 1973, art.52 (2) (c), art.53.
8. U.K. Patents Act 1977 S.1(2) HMSO.
9. BRD Patent Act S.1(2) No.3.
10. *Gottschalk v. Benson*, 409 U.S. 63 (1972); *Dann v. Johnson*, 425 U.S. 219 (1976); *Parker v. Flook*, 437 U.S. 584 (1978).
11. *Diamond v. Diehr*, 450 U.S. 175 (1981); *Diamond v. Bradley*, 450 U.S. 381 (1981).
12. Bryan Niblett, *Copyright Protection of Computer Programs* in 'Data Processing etc., *op.cit.* p.197.

protection is more important in the world-wide mass market catering for the micro-computers which are invading homes, schools and small businesses; b) remedies against third parties in good faith (i.e. who are unaware of the confidential nature of the program) are limited in most cases; c) there exists difficulties in enforcing Trade Secret laws at the trans-national level, especially with regard to procedural differences between Civil Law and Common Law countries. In real terms therefore, while not excluding the use of Trade Secret Laws where practical and applicable, software industries require a simpler and cheaper method better adapted to protecting thousands and millions of programs which are marketed (and therefore potentially copied) world-wide, such as the programs used in home and business micro-computers.

This brief, and by no means exhaustive, consideration of the relevance of Patent and Trade Secret laws, leaves us with Copyright as the primary (though not the exclusive) means of protecting proprietary interests in computer programs. The next stage of the discussion will therefore centre around where exactly one can find protection in Copyright Law and which are the problem areas of the subject.

The almost universal trend has been to accept a program (or at least the source code) as qualifying as a *'literary work'* and this has even found its way into the standard text books,[13] as well as into some statutes and the case law of many countries. The reason for this is that the copyright laws of most countries contain a fairly wide definition of what constitutes a literary work. The U.K. Copyright Act 1956 as amended, to which the Malta Copyright Act, 1967 may trace the inspiration and origin of a good deal of its sections and concepts, does not make any specific inclusion of computer programs under the definition of 'literary work'. At the same time however, as in most other legal systems (including our own) the U.K. Act does not require any evaluation of the literary merit or quality of the work. What is important for a work to qualify for copyright is that it is 'original' and published in a tangible form (usually printed or written). When computer programs are published, they are not normally made available to the public in printed or written form, but are usually recorded on a memory device such as a disk or cassette. This however does not alter the fact that the program was originally written by the programmer in some form of notation. As such therefore, under many systems of law, regardless of the form of embodiment (be it disk, tape, or even on silicon chip) but provided that it is fixed in a tangible medium, a computer program can be said to qualify for copyright as a 'literary work' if it fulfils the other criteria required by copyright i.e. the logic and design involved independent skill and effort in its composition and that the work is not of trivial length.

When compared to the position obtaining in many advanced legal systems, the Maltese attempt at defining a 'literary work'[14] is clumsy,

13. Copinger and Skone James, *Copyright* (12th ed.) p.154; Laddie, Prescott & Vitoria, *The Modern Law of Copyright* 2.136, 2.10–11.

14. S.2: "literary work" in Malta Copyright Act 1967, Act No. VI, 1967; "literary work" means, irrespective of literary quality, any of the following, or works similar thereto 1

unimaginative and by no means comprehensive. In fact it does not define a 'literary work' at all but rather it simply lists those works which the legislator wished to consider as copyrightable. A further handicap is that the Act uses the word 'means'[15] rather than 'includes' when referring to the list of items recognised as literary works. Although, at first glance, this would seem to hinder any extension of the notion of literary work to new types such as computer programs this need not be necessarily so.

If the Courts were ever to be faced with a case *before* the law is suitably reformed they may resort to a liberal interpretation of what constitutes a literary work by taking into consideration the following criteria: a) although not *specifically included* in the list of S.2, computer programs are not *explicitly excluded* from the notion of a literary work, unlike "any written law, law report or judicial decision" which *are* specifically excluded;[16] b) the phrase: "literary work means, irrespective of literary quality, any of the following *or works similar thereto.*"[17] As indicated above, a computer program is a work *notionally similar* to more conventional literary works. The legal doctrine on which copyright is based is the intention to protect the proprietary interests of an author who has invested independent skill and effort in the *expression* of ideas which are embodied in some material form. Thus, the author of a book writes the book in his own individual style (though not necessarily disclosing any inventive processes) and this expression is fixed in hand-written, typed or printed form. The material embodiment of a film director's talent is celluloid whilst that of a musician or singer would be tape or disc. In the same way, a computer programmer writes a program in a special notation very much like the musician would use bass and treble clefs and other symbols when composing a musical score. Since S.2 does not in any real sense *define* a literary work, but rather gives examples, Maltese courts would be free to examine the doctrinal notion of a literary work within the concept of copyright and then decide as to whether a computer program would fall within such a notion, using the modern criteria developed by jurists, judges and legislators world-wide. Our judges should therefore have little difficulty in following the example set by foreign courts in finding computer programs copyrightable as literary works.

When turning to the position in the U.K. on whose 1956 Copyright Act, our own 1967 Act is loosely modelled, one finds that it has been generally accepted that, when reduced to writing, a computer program constitutes a literary work. Indeed the 1956 Act extends the definition of

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(a) novels, stories and poetical works,
(b) plays, stage directions, choreographic works or entertainments in dumb show, film scenarios and broadcasting scripts,
(c) textbooks, treatises, histories, biographies, essays and articles,
(d) encyclopaedias and dictionaries,
(e) letters, reports and memoranda,
(f) lectures, addresses and sermons,
but does not include any written law, law report or judicial decisions;"

15. *ibid.*
16. *ibid.*
17. *ibid.*

literary work to include any written table or compilation, which is of great interest when discussing the copyright-ability of computer data-bases, which may be, in effect, original compilations of data. Until 1982, U.K. case-law had not yet produced any clear specific decisions on the copyright-ability or otherwise of computer programs,[18] although many leading common law authorities on the subject were happily citing *Northern Office Micro-Computers (Pty) and others v. Rosenstein*,[19] wherein the South African Supreme Court found for a medical applications program source code in written and machine-readable form as being copyrightable under the 1978 South African Copyright Act which is similar in many respects to the U.K. 1956 Act and therefore perhaps some form of cousin of our own 1967 Act in Malta. Should this decision prove to have any 'persuasive value' in the U.K. as well as in Malta this would be an added pointer to the increasing trend towards standardisation in the legal outlook of many countries in the field of law and technology.

Since the World Intellectual Property Organisation (WIPO) came out with its Report[20] discussing the pros and cons of patent and copyright as the most suitable form of protection for software and concluded that a copyright-oriented scheme would be most suitable, the courts of the major developed nations seemed to have adopted a similar attitude. The nature of computer software as a literary work, for example, was highlighted in *Visicorp v. Basis Software GmbH*[21] in the German Federal Republic where a 'VisiCalc' program was held to be copyrightable as a "linguistic work of a literary nature" under S.2 of the BRD's Copyright Act. Davidson quotes recent decisions in France and Japan which held software to be copyright-able under those countries' respective copyright laws.[22]

While anticipating that courts world-wide will continue to find that computer programs qualify for copyright protection, it is undeniable that the judges' job would be made much easier by clarifying relevant statutory provisions through legislative reform aimed at introducing explicit and adequate reference to programs as copyrightable works. In the U.K. the

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18. There have been however a number of out-of-court settlements accepting infringement of copyright of computer programs. Davidson also quotes the following decisions available on LEXIS:
*Systematics Ltd. v. London Computer Centre Ltd.* (1982);
*Formal Comm. Mfg. Ltd. v. ITT (U.K.) Ltd.* (1982);
*Sega Ent. Ltd. v. Alca Elec. Ltd.* (1981);
*Gates v. Swift* (1982).

9. *Northern Office Micro Computers (Pty) Ltd. and others v. Rosenstein* (1982), F.S.R., 124 (S.C. of S.A.). See for example, Peter Prescott, *Copyright and Computers*, 'Data Processing etc.' *op.cit.* at p.211; Bryan Niblett, *Copyright Protection of Computer Programs*, 'Data Processing etc.' *op.cit.* at p.200.

20. "Model Provisions on the Protection of Computer Software", *International Bureau of the World Intellectual Property Organisation*, Geneva (1978).

21. *VisiCorp v. Basis Software GmbH*, 1st Mun. Dist. Ct. Dec. 21, 1982 as reported at 9 Comp. L. & Tax Rep. No 8, at 4 (March 1983).

22. *P. v. BMV*, (Paris Ct. App., Dec. 1982); *Tatto v. I.N.G. Enterprise* (Tokyo Dist. Ct., Dec. 6, 1982); Duncan M. Davidson, *Protecting Computer Software* etc. *op.cit.* at p.414.

Whitford Committee[23] and, more recently, the Thatcher Government's Consultative Document[24] on the matter both point towards British intentions of amending the Copyright Act 1956 through new legislation explicitly providing that computer programs attract copyright protection under the same conditions as literary works, in whatever form the program may be expressed. Although enacted more recently than the U.K. 1956 Act, the Malta Copyright Act 1967 too, as indicated above, is crying out for reform, especially with regard to clarification and improvement of definitions. In reforming our statutes we can doubtless learn a good deal from the American experience. The United States has for a long time maintained its leading position in the field of computers, technologically as well as in the extent of applications, and this has also been reflected in the legal field. The 1980 Computer Software Copyright Act is the relevant recent amendment of the U.S. 1976 Copyright Act and is a commendable attempt at bringing the law in line with the requirements of a consumer-based society which has well and truly entered into the 'technological' and "information" age. Other than the clear definition of the subject matter of copyright in general[25] and of a 'literary work',[26] U.S. Copyright law now explicitly defines a 'computer program' as *"a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."*[27] Of direct interest, as Goldberg points out, is the U.S. House Report which establishes the view that "The term 'literary works' does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories and similar factual reference or instructional works and compilations of data. *It also includes computer data bases and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves."*[28] The growing ubiquity of the computer in advanced societies will, over the next decade or so, lead to the introduction of specific provisions (similar to the ones enacted in the United States outlined above) in copyright laws world-wide, with the U.K. and Maltese Copyright Acts as prime candidates for review.

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23. *Report of the (Whitford) Committee to consider the law on Copyright and Designs*, (Cmnd. 6732, HMSO 1977).

24. *Reform of the Law relating to Copyright, Designs and Performers' Protection: A Consultative Document*, (Cmnd. 8302, HMSO 1981).

25. U.S. Copyright Act 1976, 17. U.S.C. S.102 "Subject matter of copyright: In general (a) Copyright protection subsists in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works."

26. U.S. Copyright Act 1976, 17 U.S.C. S.101:
"Literary works" are works, other than audiovisual works, expressed in words, numbers or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks or cards in which they are embodied."

27. *ibid.* at S.101.

28. Morton D. Goldberg, *Copyright and Computer Software* etc. *op.cit.* at p.246 (emphasis added).

## PROBLEM AREAS

Until now, the discussion in this paper has chiefly centred around the suitability or otherwise of copyright as a means of protection, the trends in the case-law of some of the more advanced nations and the subsequent need for reforming existing statutes in a way so as to improve definitions as well as formally and specifically recognising computer programs as works entitled to protection under the legal noton of copyright. The next step would be to consider the main areas where problems may and *are* being encountered by authors/owners attempting to use copyright law to protect their proprietary interests.

### *A. PUBLICATION*

For copyright to subsist under many systems of law the work must be 'published'. Publication under the Maltese 1967 Copyright Act, for example, means that the work must be "made available to the public in sufficient manner as to render the work accessible to it."[29] Our 1967 Act however makes a distinction between copyright "conferred, by virtue of nationality or domicile"[30] and copyright conferred by "reference to country of origin."[31] Thus, as the law stands today, if the author is a citizen of, domiciled in, or (in the case of limited liability companies) registered in Malta, it seems that publication is *not* required for copyright to attach to a work, but all other works must first be published in order to qualify for protection. This distinction follows that made explicitly in the 1911 Act in the United Kingdom, and in similar provisions of the U.K. 1956 Copyright Act.

Is a computer program protected under copyright before publication? This is not a problem peculiar to computer programs but to all copyrightable works, and the present position in Malta and the U.K. is regulated in the manner just described above. Yet, the moment in time when copyright attaches is a vexed question receiving much attention world-wide. There is today a growing tendency to place less emphasis on publication and attach more importance to the basic *'raison d'être'* of copyright: it exists to protect the independent skill and effort invested by the author in his work. In this light the author/owner is entitled to have his work protected as soon as it is embodied in a form which may be copied or stolen. The United States has thrown the element of publication overboard and as from the coming into force of the U.S. 1976 Copyright Act, copyright attaches as soon as a copyrighted work is fixed in a tangible medium of expression for more than a brief moment.[32] In spite of disagreement over details, American jurists are more or less insistent on the importance of computer programs carrying some form of copyright notice, whether published or not. In due course

29. Malta Copyright Act, 1967 S.2(2).
30. *ibid.* S.4.
31. *ibid.* S.5.
32. U.S. Copyright Act 1976, 17 U.S.C. S.101.

more and more legislators (our own included, one hopes) will make the complete break from the concept of publication as a prerequisite for copyright to subsist and do away with the distinctions between 'home-spun' works and works of foreign nationals, such as those existing in Malta and in the U.K. Copyright infringement is very much akin to theft, and theft is theft wherever it occurs, and whether the work is published or not. Such distinctions are artificial and have no basis in a growingly internationalised legal doctrine.

At the international level however, the Universal Copyright Convention (UCC) of which Malta is a member, appears to extend protection only on publication, and this is highlighted in the emphasis made upon the necessity of having the copyright notice placed upon works *first published* in visually perceptible form.[33] The main problem here is that such an international convention is much more difficult to revise and amend than a municipal law and it therefore seems that trans-border protection of unpublished works will remain a doubtful matter for some time to come.

## *B. LIMITATIONS ON COPYRIGHT AND 'PRIVATE USE'*

An interesting feature of the Malta 1967 Copyright Act is that copies made for 'private use' are not an infringement of copyright.[34] Here we differ from the U.K., where until recently it was believed that "To record on a tape recorder, for instance, a gramophone record, even for one's own private use, will be an infringement."[35] In contrast, the 1980 amendments in the U.S.A. were quite specific in determining the extent of limitations on copyright with respect to computer programs: one is only permitted to make copies of a program by way of archival or 'back-up' copies or if the copy is an 'essential step in the utilization of the computer program in conjunction with a machine and *that it is used in no other manner*. These restrictive provisions imposed an obligation of destruction of all archival copies "in the event the continued possession of the program should cease to be rightful" as well as requiring authorization of the copyright owner for transfer of rights over the copy, which in any case may *only* take place as part of the transfer of rights over the copy from which such copies were prepared.[36] In comparison to the detailed nature of the U.S. provisions, our chief problem in Malta is again one of lack of definition. Our statute does not elaborate on the limitations or otherwise of 'private use' of any kind of copyrighted work, let alone newcomers such as computer programs.

At first, the problem may not appear to be that great, especially from a practical point of view. Software manufacturers are not overconcerned with the many enthusiasts who make copies of programs on their home computer for their 'private use' as it were, since this anyway presents enormous problems of enforcement were it to constitute a categoric infringement of copyright. What they are worried about is large-scale commercial piracy,

33. Universal Copyright Convention, art. VI.
34. Malta Copyright Act, 1967 S.7 (1)a.
35. *Leaper on Copyright*, Stevens, London at p.101.
36. U.S. Copyright Act 1976, 17 U.S.C. S.117.

where there product is copied and sold without authorization in direct competition with the original product. These considerations need not however deter a certain amount of speculation on the exact nature of 'private use' in the law of copyright.

Our local 'private use' seems to lend itself to wider interpretation than the American provisions regulating copying of computer programs. An emerging problem is that posed by the phenomenon of computer clubs blossoming all over the place, with Malta being no exception. One of the useful fringe benefits of these clubs is that members get to know of other enthusiasts with whom they can exchange programs with the sole purpose of mutual copying. This usually goes something like "I'll lend you my *Space Invaders* if you'll let me have your *Galactic Battleships*." Mild enough perhaps, but more enterprising computer club members have been known to make dozens of copies which are eagerly gobbled up by their fellow members (at a modest profit of course!) All lost sales as far as the rightful copyright owner is concerned! Computer clubs are usually encouraged by the hardware manufacturers but many software houses quickly realized that these clubs may not necessarily result in an increase of their program sales.

Are computer clubs covered by 'private use' or is copyright being continuously infringed, albeit on a relatively small scale when using a commercial yardstick? Again, like the question of publication this problem is not peculiar to computer programs. The much-celebrated recent U.S. Supreme Court decision in the *Sony*[37] case upheld the legality of the sale of video-recorders which may be used to make copies of audio-visual works. Private, and especially home users heaved a sigh of relief. Can the same attitude be adopted vis-a-vis computer programs? When the legislator inserted the term 'private use' in the Malta 1967 Act did he intend it to be interpreted as 'domestic use' as Prof. Micallef has suggested,[38] or every use which is non-commercial? Does the Maltese connotation of 'private use' mean that private individuals may make copies of commercially marketed computer programs for his private enjoyment or may he make a copy only to protect the investment he makes when he purchases the program from its authorised manufacturer/copyright owner, as in the underlying intention of S.117 of the U.S. Copyright Act referred to earlier? If they wish to clarify the position, our policy-makers will have to take this decision when our Act next comes up for review.

## C. *OBJECT CODES AND SOURCE CODES*

This aspect of the subject has given rise to a good deal of argument and debate and it has been better-explained if slightly over-argued elsewhere. The *radix malorum* lies in the realisation (by whom, has been lost somewhere back along the years of wrangling over the issue) that the object

37. *Sony Corp. of America v. Universal City Studios Inc.*, Docket N. 81 – 1687 U.S.S.C. January 17, 1984.

38. Prof. J.A. Micallef, *Copyright Law in Malta*, p.4 Cases and Materials on the Trader, Malta 1984.

code 1) does not *formally* resemble the source code from which it is derived and 2) it is merely a set of instructions to a machine, neither intended to be nor practically capable of being understood by a human being, especially since programs are usually marketed in disks or tapes and not in written or printed form The foregoing have been raised as objections to the copyrightability of computer programs in object code form. (Computers cannot understand source code, which has to be translated into the binary language called the object code for the program's instructions to be converted into the electrical impulses necessary for the machine to operate. Therefore since most programs are distributed in object code, lack of copyright protection would be a serious problem.)

Few people dispute that a computer program is written by its author in source code, in very much the same way than any other 'literary work' is written. The only difference is that instead of writing in English, French or whatever, programmers use a computer language such as BASIC or FORTRAN. So why make any distinctions between the copyrightability of source code on the one hand and object code on the other? 1) Although formally different, object code is a precise translation of the source code and as a translation or derivative the program embodied in the object code is entitled to the same degree of copyright protection as the source code. This is because the *expression*, the logic and design of the program which is, after all, the real subjet of copyright, remains identical whether embodied in *source code* or whether translated into a different embodiment, the *object code*. 2) As will be stressed further on in this paper, intelligibility to human beings is irrelevant to the notion of copyright. In any case it is untrue that object code is indecipherable to human beings. A traned programmer can decipher binary objet code in the same way that a trained musician can read a music score. The fact that not all human beings can read binary or music does not detract from copyrightability.
from copyrightability.

Thus, slavish copying as well as laborious decompilation of object code to get at the original source code is a clear infringement of program copyright. On the other hand it is abundantly clear that an independently written program which performs the same *functions* as another copyright work is no infringement. One must not conufse *expression* (the proper subject of copyright) with *functions*. Everybody is entitled to achieve the same result using original effort and independent means. This is very true of computer programs. A program may be written in many ways, each programmer having a highly individual style; there are many routes to the same result and just about as many copyrightable individual expressions.

The principle of the copyrightability of *both* object code and source code is winning universal acceptance and has been confirmed by several recent decisions in the U.S.A.[39] as well as in *Northern Office Micro-*

39. *Apple Computer Inc. v. Franklin Computer Corp.*, Appl. Ct. 3rd Circuit (1983) 714 F.2d 1240 (1983).
*Apple Computer Inc. v. Formula International Inc.*, 562 F. Supp. 775, 218 U.S.P.Q. 47 (1983)

*Computers (Pty) v. Rosenstein*[40] in South Africa. Indeed one gets the feeling that arguments about object codes not being copyrightable will soon be as relevant as red flags and 4 mph limits are to 'horse-less carriages'.

## *D. ROMS*

As in other problem areas, the major drawbacks of Maltese copyright law in this topic are the lack of clear or real definitions of the subject matter of copyright in general and 'literary works' in particular.

A program may be embodied in a number of different mediums of expression: i.e. written or typed in source code on paper, recorded magnetically in object code on tapes or diskettes and even on a ROM. ROM stands for Read Only Memory and this means that the program is stored as a pattern of electrical charges on the surfaces of a silicon 'chip'. This component is connected permanently in the internal circuitry of the computer and may only be accessed to via the computer's controls but may not be reprogrammed by the ordinary user. The arguments against the copyrightability of ROMS are connected to those against copyrightability of object codes in general, namely, a progam embedded in ROM 1) forms an integral part of the machine and 2) it is not an exact derivative of the program written in source code; 3) it is not directly intelligible to the human user.

These arguments are invalid since:

a) the program, (i.e. the logic and design which is the subject of copyright) embedded in a ROM is identical to the same program when recorded on tape or written on paper. It is simply embodied in a different medium.

b) intelligibility to human beings is not a prerequisite of copyright. This has been accepted at law in a number of ways: i) e.g. in this context, Prescott quotes the telegraph code cases in the U.K. in which it was held that a mere collection of 5-letter groups, purposely meaningless in any known language, was entitled to protection as a literary work.[41] ii) today sound recordings and films are almost everywhere afforded copyright protection, yet phonograph records, magnetic tapes and celluloid film strip are not intelligible to human users without a record-player, tape-machine or film projector to go with them. The analogy to the program and computer is very close: programs are either available on tapes or diskettes in a way that one can run different programs on the same computer by the simple expedient of changing the tape or diskette (just as one changes phonograph records or magnetic tapes when one wishes to hear a different tune) or else the program may be embodied in a component, the ROM inside the machine.

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*Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741, 219 U.S.P.Q. 42, (1983)
*G.C.A. Corp v. Chance*, U.S.P.Q. 718, (1982)

40. *Northern Office Micro Computers (Pty) v. Rosenstein* (1982) F.S.R., 124 (S.C. of S.A.).

41. *Graves v. Pocket Publications*, 54 T.L.R., 952 (1936 – 45)
*Eanco v. Mandops*, (1980) R.P.C. 213, C.A.
*Ravenscroft v. Herbert* (1980) R.P.C. 193
Peter Prescott, *Copyright and Microcomputers*, Data Processing etc., *op.cit.* at p.214.

which means that the program is installed internally on a permanent basis, instead of being introduced from the exterior.

The main trend today is for copyright to be extended to programs in *whatever form they may be embodied.* The Americans have already arrived at this stage through a liberal interpretation of the requirement of 'fixation'[42] laid down in the U.S. Copyright Act, in a string of leading cases, namely *Williams Electronics Inc. v. Arctic International Inc.*,[43] *Apple Computer Inc. v. Franklin Computer Corp.*,[44] *Apple Computer Inc. v. Formula International Inc.*,[45] *Midway Mfg. Co. v. Strohon.*[46] The British too are moving in this direction as may be seen from the recent U.K. Government Consultative Document,[47] and one hopes that this aspect would find its place in a Maltese legislator's scheme for amending our Copyright Act.

## *E. COPYRIGHTABILITY OF OPERATING SYSTEMS PROGRAMS*

In his analysis,[48] Davidson discusses at some length the implications of any distinction which may be made between a program's function in communicating to the human user and that of manipulating the internal operations of a computer. His concern arose chiefly from arguments to this effect raised in the hearing of the leading case referred to already, *Apple Computer Inc. v. Franklin Computer Corp.* The practical difficulty lies in that many programs combine both functions to varying degrees, and as to whether operating systems programs are protectable under patent or copyright.[49] Davidson was writing when the *Apple* case was still pending before the U.S. 3rd Circuit's Court of Appeals but he was quick to point out the fruitless nature of making such distinctions when discussing copyrightability: "The fallacy in the 'communication argument' is that it presumes that the copyrightable work in question is the *functioning* of the program and not the *writing* of it ... a program need not produce any output to be protectable; it is sufficient that the original written program is found to consist of authorship, for that authorship is readable in the same way other literary works are readable."[50]

At around the same time that Davidson's article was published, the Appeal Court decided *Apple* very much in line with Davidson's own

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42. U.S. Copyright Act 1976, 17 U.S.C. S.102.
43. 685 F.2d 870, 215 U.S.P.Q. 405, (1982).
44. 714 F.2d 1240, 219 U.S.P.Q. 113 (1983).
45. 562 F.Supp. 775, 218 U.S.P.Q. 47 (1983).
46. 564 F.Supp. 741, 219 U.S.P.Q. 42 (1983).
47. *Vide* Notes 23 & 24 *supra.*
48. Duncan M. Davidson, *Protecting Computer Software* etc. *op.cit.*
49. At this stage, it is worth noting that under Maltese Copyright Law patentability of a work does not exclude copyrightability of the same work. This is implicit in S.3(3) of the Malta Copyright Act, 1967: "A design or model of manufacture *eligible for copyright under this Act* shall not, by registration under the Industrial Property (Protection) Ordinance acquire a term of copyright beyond that specified under subsection (2) of section 4 of this Act."
50. Duncan M. Davidson, *Protecting Computer Software* etc. *op.cit.* at p. 373.

inclinations holding clearly that "Apple does not seek to copyright the method which instructs the computer to perform its operating functions but only the instructions themselves. The method would be protected, if at all, by the patent law, an issue as yet unresolved."[51] In delivering the Court's opinion, Judge Sloviter quotd the CONTU report (on which amendments to the U.S. Copyright Act had been based) in that "The copyright status of the written rules for a game or a system for the operation of a machine is unaffected by the fact that these rules direct the actions of those who play the game or carry out the process."[52]

The importance of clear definitions in statute laws is highlighted by the U.S. Appeal Court's reliance on the wording of the law: "Perhaps the most convincing item leading us to reject Franklin's argument is that the statutory definition of a computer program as 'a set of instructions to be used in a computer in order to bring about a certain result,' makes no distinction between application programs and operating programs."[53]

If such a problem were to arise locally, whether at the legislative or the judicial level, it would not be unwise to consider adapting the basic criteria applied by the U.S. Appeal Court in *Apple* to our own needs. Since the legal concept of copyright is concerned with *expression*, a program would be copyrightable if it meets all other normal requirements of copyright, regardless of its function.

## *F. COMPUTERS AS AUTHORS*

The nature of copyright is to a certain extent inextricably linked to the author of a work, indeed in cases of 'literary works' the duration of copyright protection is usually calculated with reference to the life (and death) of the author. If one were to advocate the acceptance of a computer program as a literary work, then one is compelled to discuss, albeit briefly, who is the copyright owner of a work partially or totally produced by a computer. In turn this question can only be solved by determining who the author is.

In a world where CAD (Computer Aided Design) is being increasingly used in advertising to attract potential customers, denoting the extent of research that backs a product being marketed, computers can and *are* used in producing original works as diverse as drawings, symphonise and, commonly enough, computer programs. This problem has been mentioned in some text-books and examined in the U.K. both by the Whitford Committee and the Government Consultative Document.[54] The Whitford Committee considered three possible candidates for the authorship: 1) the author of the program used in the computer to produce the new original work; 2) the compiler of the data used with the program who is operating the

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51. *Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 219 U.S.P.Q. 113 (1983) at p.1251.
52. *ibid* at p.1252.
53. *ibid.*
54. *Vide* Notes 23 & 24 *supra.*

computer; 3) Both 1) and 2) as joint authors.

Even if one assumes that the computer is nothing more than a sophisticated tool, it would perhaps be logical to conclude that the new original work would not have seen the light of day had it not been for ***both*** elements: i.e. the program used and the data processed using the program's instructions. Both program and data were indispensable to the creation of the new work.

In considering who should be recognised as the author, Bryan Niblett disagrees with the Consultative document's suggestion that the author of a computer-generated work is the person responsible for running the data through the programmed machine. Niblett stresses that "The author of an original work is the person who supplies the originality and this is either the programmer or the compiler of the data – or both."[55] This conclusion is in agreement with the Whitford Committee's views on the matter.

Basing themselves on the fact that the concept of the term of copyright of literary works is tied to the life of the author, the mainstream British attitude appears to be that only a human being is capable of being an author and that therefore a computer can never be considered as an author. If one accepts this premise one has to return to the considerations of the Whitford Committee, the Consultative Document and Niblett outlined above. In this case, Laddie, Prescott and Vitoria in what has become a standard text[56] come up with yet another alternative. Rejecting the notion that copyright ownership of a computer-generated work should vest in either the programmer or the compiler of the data, they suggest that this should vest in "the owner or hirer of the computer who has expended the capital in setting up and operating the system."[57] The big snag foreseen by the proponents of this theory is where such 'author' is a body corporate since then copyright protection could exist in principle, in perpetuity. What they recommend is a *sui generis* solution by way of legislation providing "a fixed period of copyright independent of any human life"[58] as is the case with photographs or sound recordings. Niblett would doubtless object to this proposal on the grounds that the owner/hirer may not have in effect, contributed any 'originality' as normally required of authors. Despite Niblett's objections, this latter proposal may be tenable if qualified in the following way: 1) where computers and programs are simply used in conjunction to produce a translation of another work (as in the case of 'compiler' programs used to convert a program in original source code to machine-readable object code), this would clearly constitute an infringement of the copyright of the translated work; 2) where the new computer-generated product is manifestly or proven to be not really attributable to the investment and effort of the owner/hirer, then copyright ownership may be determined at the discretion of the court on principles of

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55. Bryan Niblett, *Copyright Protection of Computer Programs*, 'Data Processing and the Law', *op.cit.* at p.204.

56. Laddie, Prescott & Vitoria, *The Modern Law of Copyright*.

57. *ibid.* at 2.140.

58. *ibid.*

equity. It must be stressed that the *entire* topic of authorship of machine-produced work requires legislative attention.

## CONCLUSION

### *A. SUMMARY*

In this analysis the following points have been examined:
1) The need for legal protection of computer software and the possibility of protecting programs through a liberal and doctrinal interpretation of the term *'literary works ...* and *works similar thereto'* under the Malta Copyright Act 1967 as in force at the time of writing.
2) Amendment of Malta's Copyright Act, 1967 with a view to:
a) properly defining the subject matter of copyright in general
b) properly defining 'literary works'
c) clearly and explicitly recognising a computer program as a 'literary work' entitled to copyright protection, regardless of i) the nature of the medium in which the program is embodied and ii) the nature of the program's function
d) introducing an adequate definition of 'computer program'
e) doing away with the distinction between copyright conferred 'by reference to country of origin' and 'by virtue of nationality or domicile', insofar as this adversely affects the protection of works prior to publication
f) clarifying the notion of 'private use'
g) introducing provisions determining who is the copyright owner of computer-generated work and what is the term of copyright duration in such cases.

Although not specifically relevant to 'computer programs', which is the subject of this paper, one must make brief mention at this stage of the importance of ensuring copyright protection of computer data bases. A proper definition of 'literary works' which would clearly be extended to include "any original compilation of data" would clarify any doubts about the protection of the enormous effort invested in the compilation of computer data bases. This alone however would not suffice to stop up the *lacuna* which would exist in the case of *legal* data bases since, as the law stands today, written laws, law reports or judicial decisions are *explicitly excluded from copyright protection as literary works*. The legislator would do well to qualify this proviso by a clear indication that this inability to be copyrighted would not exist where such laws, law reports or judicial decisions are incorporated in an original compilation such as a computer data base.

### *B. INTERNATIONAL ASPECTS*

While not ruling out the emergence of a local software industry, the international aspects of this subject are, at present, of greatest interest to foreign software houses and their local representatives in search of legal

remedies to copyright infringement in Malta. The following discussion is concerned with the protection afforded in Malta to copyrighted computer programs *not published* in Malta. ('Foreign works' are granted copyright protection as soon as they are *first published in Malta* under S.5 of the Copyright Act, 1967.) This type of protection is possible under the major international copyright conventions: Malta is a member of the Universal Copyright Convention (UCC) and it continues to adhere to the 1928 Rome text of the Berne Convention. Under both conventions Malta is bound to apply the principle of national treatment, i.e. it affords the same protection to the copyrighted works of foreign nationals as that enjoyed by Maltese nationals under the Malta Copyright Act 1967.

Before settling down to tackle the problems presented by Maltese copyright law discussed in this paper, a foreign copyright owner will have to consider certain provisions of the international copyright conventions to which Malta subscribes. Here, it must be pointed out at the outset that, although Malta is a member of the International Copyright Union or the Berne Convention as it is more commonly called, it adheres to the Rome text of 1928, not having been able to accept the Brussels revision of 1948, the Stockholm revision of 1967 and the Paris revision of 1971, due to the fact that our 1967 Copyright Act has opted for a standard copyright term of 25 years which is below the 50 year minimum term now required by the Berne Convention as amended. In this respect Malta follows the standards set by the UCC and Maltese judges may be inclined to take this apparent preference for the UCC into consideration if ever called upon to decide a case. Since, however, Malta remains, to a certain extent a member of both conventions it may be useful to examine the salient points of both the UCC and the Berne Convention which may be relevant to the protection of computer programs. The definitions of literary works in both conventions are sufficiently wide to be extendable to include computer programs, but some problems may be encountered by copyright owners seeking remedies under the UCC. The Berne Convention as amended, affords protection to a work whatever the mode or form of its expression and therefore computer programs embodied in object code/machine-readable form would seem to be covered. The UCC, on the other hand, as already indicated earlier on in this paper, defines publication as the "reproduction in tangible form and the distribution to the public of copies of a work *from which it can be read or otherwise visually perceived.*[59] Since computer programs are for the most part available to the public embodied in object code on diskettes, tapes or ROMS and can therefore *not* be *visually perceived* (i.e. in such cases it is the embodiment which may be visually perceived but not the program which is, of course, the real subject of copyright), this may raise doubts as to their copyrightability in the terms of the UCC provisions. Since Malta's adherence to the Berne Convention has been rather qualified in the past it would not be unwise perhaps for copyright owners to examine Niblett's proposal aimed at satisfying the UCC's requirements: "As a matter of prudence, it should be carefully considered whether the sale or licence of a

59. Universal Copyright Convention art. VI (emphasis added).

published computer program in a country which is a member of the UCC and not of Berne should be accompanied by the provision of a tangible copy which may be perceived visually."[60]

A second aspect to be considered is the question of formalities required by both Conventions for copyright to subsist. Whereas the Berne Convention requires no formalities, the UCC prescribes that signatories will consider domestic formalities to be satisfied if the copyrighted work clearly bears the three elements of copyright notice namely: the symbol , the name of the copyright proprietor, and the year of the first publication. All three must appear on a computer program whatever its embodiment be it paper, diskette, tape or ROM 'chip' for copyright to attach under the UCC.

If Maltese Courts were to hold that Malta's adherence to the 1928 text of the Berne Convention constitutes grounds enough for computer programs to be copyrightable regardless of the form in which they are embodied or non-compliance with the copyright notice required by the UCC, then there would appear to be little cause for concern. The foregoing arguments however remain relevant to a discussion of computer programs in a Maltese context. Malta's lack of natural resources need not deter the growth of a flourishing Maltese software industry since success in this field depends to a very large extent on human ingenuity rather than on an abundance of raw materials. And like other exporters abroad, any Maltese who would wish to tap a lucrative market such as the United States in order to sell programs whether in the form of diskettes, tapes or silicon chips, would do well to remember that the United States is a UCC member but not a Berne country and take the necessary precautions.

## *C. THE LOCAL SCENE*

Despite the fact that Malta, with a population of only 320,000 is a relatively small market, damages resultant from unauthorised copying may still be counted in millions. For a long time now, anyone who cares to enter our capital city, Valletta, is assaulted by commercial piracy at every turn. Starting from the Bus Terminus, proceeding through City Gate and passing through the open-air market in St. John's Square one is astounded by the roaring trade that exists in pirated music cassettes. The main culprits here are street hawkers who set up their stalls or open their van doors or kiosks at strategic points as the case may be, though certain music shops have not been above dipping a finger (or more) in the piracy pie either. Over the past two years or so we have had two relative newcomers arrive on the piracy scene: video tapes and computer programs. In both instances the copyright owners abroad are becoming increasingly anxious.

Piracy of computer programs is increasing at an alarming rate since Maltese ingenuity knows little bounds whether as a cottage industry or on a more organised basis. In the present computer boom enthusiasts may perhaps be forgiven if, in trying to save every cent possible on program purchases, they do not worry unduly about buying unauthorised copies

60. Bryan Niblett, *Copyright Protection* etc. *op.cit.* at p.205.

(unlike music cassettes or phonograph records, the quality of a copy of a computer program does not suffer as much when compared to the original). Saving an average of two to four pounds on every program (sometimes more) means that one can build up a software library cheaper and faster. But if and when a copyright owner will seek to uphold his proprietary rights, from 'Space Invaders' on T.V. screens or monitors to 'Program Pirates' in our court-rooms the time lapse may be counted in months rather than in years.

## *D. REFORM*

In the same way that the study of the evolution of law is an indirect study of the evolution of human society, it inevitably turns out to be a study of the legal system's attempts to *catch up* with developments in society. Indeed, there is a growing tendency today to measure the efficacy of a legal system by the speed of its adaptability to change and innovation in society whilst still preserving the desired standards of justice and social order.

In the light of the above, what in the early years of study of criminal law, was a source of amusement, e.g. the penalties imposed by S. 352 (3) of our Criminal Code on anyone who "drives animals (whether of burden or riding animals) over a drawbridge, with or without a vehicle, otherwise than at an amble", today, on reflection becomes a sad reminder of the tendency of statutes to remain static while life becomes more and more complex. Likewise it took more than half a century for the law to catch up on the copyright implications born with the invention of sound recordings and cinematography. (The relevant provisions were first introduced in the Copyright Act of 1956 in the U.K. and in the Copyright Act of 1967 in Malta.) In the field of computer programs millions may be lost as a result of the infringement of proprietary rights by unauthorised copying. One trusts therefore that the review of existing statutes and the introduction of the amendments as considered in this paper would help facilitate the administration of justice when the issue inevitably ends up in our Commercial Courts.

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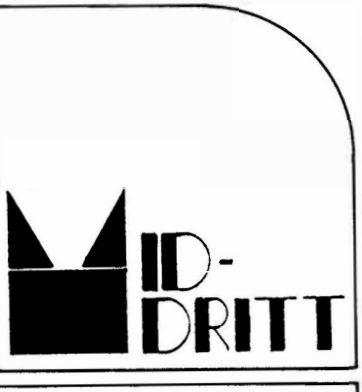


# Notes & Comments

# AN 'ITER' THROUGH MALTESE CRIMINAL PROCEEDINGS

*Tonio Azzopardi*

**Arraignment & Inquiry**

Under the Maltese legal system, an arrested person must be arraigned before the Magistrates' Courts not later than forty-eight hours after his arrest, otherwise he must be released (section 365, Criminal Code). Upon arraignment, the Court must explain to the accused the nature of the charge preferred against him and inform him that he is not bound to answer any question nor to incriminate himself. The Court shall also inform the accused that he may, if he so desires, be assisted by an Advocate or a legal Procurator and that whatever he says may be received in evidence against him (section 404, Criminal Code). It shall be the duty of the Courts of Criminal Justice to see to the adequate defence of the parties charged or accused (section 512, Criminal Code). The Advocate for Legal Aid shall gratuitously undertake the defence of any accused who has briefed no other Advocate (section 564, Criminal Code).

Any accused person who is in custody for any crime or contravention may, on application, be granted temporary release from custody, upon giving sufficient security to appear at the proceedings at the appointed time and place (section 568, Criminal Code). Thus, bail is intended to secure appearance upon every Court's order, otherwise bail is forfeited (section 573, Criminal Code).

On the conclusion of the inquiry, incorporating the evidence in support of the Police report, the Court shall decide whether there are or are not sufficient grounds for committing the accused for trial on indictment. In the first case, the Court shall commit the accused for trial by the Criminal Court, and, in the second case, it shall order his discharge (Section 413, Criminal Code).

By virtue of Act XIII of 1980, in certain cases, the Magistrates' Courts are empowered to ask the accused whether he has any objection for the case to be tried by that Court, and if there is no objection on the part of the accused, the Court shall proceed to determine the case itself as a Court of Criminal Judicature.

Where the accused is committed for trial, upon receipt of the records of the inquiry by the Attorney-General, the Attorney-General shall be allowed the term of one month for the filing of the indictment (sectlon 444, Criminal Code as amended by Act XIII of 1980).

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**Proceedings before the Criminal Court**

In virtue of S. 450 as amended by Act LIII 1981, when the indictment is filed, an official copy thereof, together with an official copy of the Note indicating the names of the witnesses, etc. whom the Attorney-General intends to produce at the trial, shall be served on the party accused. The accused shall, by means of a Note filed in the Registry of the Criminal Court not later than fifteen working days from the date of service: (i) give notice of any preliminary pleas (e.g. plea of nullity or of defect in the indictment), or pleas as to the admissibility of evidence, (ii) indicate the witnesses and produce the documents and objects which he intends to avail himself of during the trial. Upon receipt of a copy of the Note filed by the accused, the Attorney-General shall, within five days from such service, give notice of any plea as to the admissibility of the evidence which the accused intends to produce. The case is then appointed for the hearing of submissions regarding the preliminary pleas and the determination thereof, before the accused answers the questions whether he is guilty of the offence charged in the indictment (S. 462, Criminal Code). At the start of the sitting the Registrar shall read out the indictment (S. 460, Criminal Code).

An appeal shall lie from the decision of the Criminal Court regarding the pleas raised by the accused and/or the Attorney-General, to the Court of Criminal Appeal (Section 5088, Criminal Code).

If no pleas are raised or after the determination of such pleas in a definitive manner, the Criminal Court shall ask the accused through the Registrar whether he is guilty of the offence charged in the indictment (S. 462, Criminal Code) and if he answers 'not guilty', it shall then establish the date of the trial proper. The accused shall be allowed a term of at least ten days to prepare his defence; such period starts to run after a notice of the date fixed for the trial, is served on the party accused.

If the accused, in answer to the question whether he is guilty as charged, states that he is guilty of the offence, the Court shall in the most solemn manner warn him of the legal consequences of such statement, and shall allow him a short time to retract it; but if the accused persists in his statement, such statement shall be recorded and the Court shall proceed to press on the accused such sentence as would, according to law, be passed on an accused convicted of the offence. Nevertheless, if there is good reason to doubt whether the offence has really taken place at all, or whether the accused is guilty of the offence, the Court shall, notwithstanding the confession of the accused, order the trial of the case to be proceeded with as if the accused had not pleaded guilty (section 465, Criminal Code).

Where the Court wishes to know more about the social background of the offender, it is customary for the Court to appoint a probation officer to prepare a social enquiry report under Section 13 of the Probation of Offenders Act, 1957. This procedure is exceptionally adopted by the

Maltese Courts, whereas in the United States and in most other countries the presentence report is an integral part of the sentencing process.

**Trial by Jury**

The Criminal Court shall consist of a Judge sitting with a jury. The jury shall decide on any matter touching the issue as to whether the accused is guilty or not guilty (S. 448, Criminal Code) and on the issue of insanity (section 414, Criminal Code); and the Court shall decide on the application of the law to the fact as declared by the jury, as well as on all other points relative to the proceedings (section 448, Criminal Code). It is the trial judge who decides which evidence is relevant to the issue and which questions are to be allowed.

In the absence, or after the determination of any plea against the admissibility of evidence, the Court shall impanel the jury and proceed with the trial, provided no appeal has been filed. The jury consists of a foreman and eight common jurors (S. 604) The procedure known as "jury vetting" does not exist under Maltese law. Nevertheless, challenges are contemplated by our legal system. Challenges may be either peremptory of for cause. Challenges are peremptory when made without reason assigned, and their effect shall be that the person challenged shall be excluded from serving as a juror at the trial. Challenges are for cause when made by assigning a reason, and their effect shall be that, if such reason is approved by the Court, the challenge shall be allowed and the person shall be excluded; but if the reason assigned is not so approved, the challenge shall be disallowed and the person admitted. The number of peremptory challenges allowed to the Attorney-General and to each of the accused is three; but, where the accused in one trial are more than three, each of them has a right to two peremptory challenges only (Section 605, Criminal Code).

After the jury is selected, the Attorney-General shall then address the jury on the facts constituting the offence preferred in the indictment and the evidence which he proposes to produce in support of those facts. (S. 468, Criminal Code). The Attorney-General shall call his witnesses examining them 'viva voce' and shall produce any other evidence he may have to offer (S. 469). When the case for the prosecution is concluded, the accused may, only if he so wishes, give evidence on oath; provided that the failure of the party charged to give evidence shall not be made the subject of adverse comment by the prosecution (S. 630). If the accused is admitted to give evidence at his own request, he may be cross-examined by the prosecution, notwithstanding that such cross-examination would tend to incriminate him as to the offence charged; otherwise, it shall not be lawful for the Court, the Attorney-General or the jury, during the trial, to put any other question to the accused with regard to the facts with which he is charged. (S. 466(7), Criminal Code). This is the priviledge that protects a person from self-

incrimination.

After the evidence of the accused or when the case for the prosecution is concluded, the accused shall have the right to make his defence, either personally or by any Advocate, and to call and examine his witnesses and to produce any other evidence he may have to offer (S. 470).

After the close of the defence, the Attorney-General shall be allowed to reply if he so desires; but in such case, the accused shall have the right to a rejoinder (S. 475, C.C.)

After the conclusion of the case for the prosecution and for the defence, the Judge shall address the jury, explaining to them the nature and the ingredients of the offence preferred in the indictment, as well as any other point of law which in the particular case, may be connected with the functions of the jury, summing up, in such manner as he may think necessary, the evidence of the witnesses and other concurrent evidence, acquainting them with the powers which the jury may exercise in the particular case, and making all such other remarks as may tend to direct and instruct the jury for the proper discharge of their duties (S. 476, Criminal Code).

For every verdict of the jury, whether in favour of, or against the accused, there shall be necessary the concurrence of at least six votes (S. 479, Criminal Code).

Where on the reading out in Court of any verdict, the absence of the concurrence of at least six votes in support of such verdict is made to appear to the Court by a number of jurors sufficient to show such defect, the Court shall require the jury to retire for further deliberation under the direction of the foreman of the jury (section 494, Criminal Code). If this absence of concurrence persists, the jury is discharged and another date is set for a new trial before another jury.

Where the law by reason of any previous conviction prescribes an increase of punishment for a subsequent offence, the trial shall proceed as if the previous conviction and sentence of the accused had not been alleged in the indictment; and the allegation of any such previous conviction and sentence shall not be submitted to the jury until after and if the jury shall have declared the accused guilty of such subsequent offence: provided however, that, if upon the trial in respect of such subsequent offence or relapse, evidence is adduced as to the good character of the accused, it shall be lawful for the Attorney-General, in answer thereto, to read out the indictment and to prove the conviction of, and sentence passed on, the accused for previous offence, even before the jury shall have found the accused guilty (S. 501, Criminal Code).

**Appeal Proceedings**

There are two types of appeal: (1) appeals from decisions regarding

preliminary pleas and pleas against the admissibility of evidence and from interlocutory decrees, and (2) appeals against conviction or sentence.

(1)(a) An appeal shall lie to the Court of Criminal Appeal at the instance of the Attorney-General or of the accused from any decision given after the reading out of the indictment and before the accused pleads to the general issue of guilty or not guilty, on any of the following pleas: plea to the jurisdiction of the Court, plea of nullity or defect in the indictment and any other preliminary plea of which notice had been given according to law; and also from any decision given after the accused pleads not guilty, on the plea against the admissibility of evidence. (b) An appeal shall also lie at the instance of the accused from any decision given on an application of the Attorney-General regarding the issue of insanity or from any decision given before the accused pleads to the general issue of guilty or not guilty, on any of the following pleas: plea of extinguishment of action, plea of 'autrefois convict' or 'autrefois acquit' plea of insanity of the accused at the time of the trial and plea relating to any other point of fact in consequence of which the trial should not take place at the time or at any future time. Where the Attorney-General or the accused desires to enter an appeal as stated above, he must give **notice of appeal** by means of a note immediately after the decision of the Court is pronounced, and thereupon the Court, if the case so requires, shall stay further proceedings until the expiration of the time allowed for the appeal, that is, **three** working days from the date of the decision appealed from, or, if an appeal is entered, until the determination thereof by the Court of Criminal Appeal (Section 508B)

(2) A person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction in all cases or against the sentence passed on his conviction. The accused may appeal on the basis that he has been wrongly convicted on the facts of the case, or that there has been an irregularity during the proceedings, or a wrong interpretation or application of the law, which could have had a bearing on the verdict, provided that there was indeed a miscarriage of justice (S. 508D, Criminal Code). The Court of Criminal Appeal has certain powers which it may exercise in special cases, including the power to substitute one verdict for another (S. 508E, Criminal Code).

Appeals against conviction or sentences must be filled within **fifteen** working days from the date of the decision appealed from (S. 508H, Criminal Code).

In certain specified cases and only if it appears to the Court that the interests of Justice so require, the Court of Criminal Appeal may order the appellant to be retried (S. 508L, Criminal Code).


# Assignment

# A REVIEW OF ACT VIII OF 1981: LEGAL IMPLICATIONS AND REPERCUSSIONS

*Marco Burlo, Louis De Gabriele and Henri Mizzi*

## A. INTRODUCTION

Section 1 of Act VIII of 1981 says that "This Act may be cited as the Code of Organization and Civil Procedure (Amendment) Act 1981 ...". The authors wish to point out at the outset that any reference to Act VIII is a specific reference to Section 7 of the said Act, since it is this section which, affects most substantially the doctrine of Governmental Accountability as it had evolved up to 1981.

## B. HISTORICAL EVOLUTION OF GOVERNMENTAL ACCOUNTABILITY PRIOR TO 1981

Before 1981, the Maltese Parliament had not legislated upon the matter of governmental accountability vis-a-vis violations of the rights of individual citizens. In the absence of any statutory provisions aimed at regulating these matters and in view of the ensuing need for some rules to be followed, the judiciary assumed responsibility and developed not only a number of skeleton rules, but borrowed from foreign systems and imported Continental and British principles of public law in order to supplement its own deficiency.

The introduction of such principles by way of court decisions did not solve the problem; on the contrary, in attempting to better the situation it rendered the issue more complex and uncertain. In fact the result has been a number of conflicting judgements which in their turn, gave rise to the uncertain development of this field of Maltese Administrative Law. This is a result of: a) the fact that unlike the practice prevalent in the U.K., Malta's courts do not adhere to the doctrine of precedent and consequently judicial decisions do not have the force of the law but may prove to have varying degrees merely of persuasive value on later judgements; b) the fact that, in importing foreign doctrines into our system of law, our courts seem to have closed a Nelson's eye as to the applicability or otherwise of such doctrines to our system.

One of the earliest principles of governmental liability introduced by our courts was the doctrine of the dual personality of the State. The doctrine in question drew a distinction between acts "Jure Imperii" and acts "Jure Gestionis". This doctrine provided that in its first capacity the

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State would be acting in terms of its political sovereignty and consequently the jurisdiction of the courts would be excluded as soon as it was ascertained that the state had in fact acted in such capacity. In its second capacity, the State was considered to act "juri gestionis" in the administration of its own patrimony; in this case the State was considered in duty bound to act as a bonus "pater familias" would, and as such enjoyed no privileges over the individual citizen. This is how the doctrine of the dual personality of the State was interpreted in the landmark case *Busuttil vs La Primaudye, 1984.*

It is evident that this notion is not of Maltese origin but had been extracted from the writings of well-known Italian Jurists, among whom Bonasi and Gabba were the most influential. However, it seems that our courts misunderstood the function of this doctrine. The doctrine, as applied in Italy, was procedural in nature. It was aimed at establishing the respective jurisdictions of the ordinary courts and the "Consiglio di Stato". In Malta however, the doctrine was unfortunately applied in a manner which granted substantial advantage to the state vis-a-vis the individual citizen. The judgement which introduced this doctrine into this sphere of Maltese Administrative Law was reaffirmed on appeal; this paved the way for subsequent court decisions to embrace these criteria as a means of avoiding embarassing and difficult situations involving governmental interests.

The applicability of this doctrine of the dual personality of the state was well and truly dented when the civil court, presided by Mr. Justice Pullicino, held, in the case *Camilleri vs Gatt* (1902), that government should be held liable for damages according to the civil law. Here Mr. Justice Pullicino completely ignored the doctrine of the dual personality of the state and decided the case exclusively on private law principles. The court of appeal later confirmed the validity of this judgement in the case *Camilleri vs Micallef* (1947).

Subsequently Mr. Justice Alberto Magri, in the case *Xuereb vs. Micallef* (1953), decided that Government should be held liable for damages on the grounds that section 1074 of the civil code, in establishing liability for damages, does not distinguish between the government and the individual citizen.

This evolution of Administrative law in Malta created an unhappy state of affairs, since the absence of specific legislation and the non-adherence to the doctrine of precedent by Maltese Courts enabled each judge to decide similar cases involving the government as a party, on conflicting and unrelated criteria. However in 1972, Mr. Justice Caruana Curran, in the case *Lowell vs. Caruana* reasserted a maxim first propounded in the case *Cassar Desain vs. Forbes* (1935) – (a case which, it is submitted, was decided on an erroneous and mistaken conception of an act of state) – which maxim said that British public law is the public law of Malta where the latter has a lacuna. In this context the British system of Judicial review of executive discretion was introduced. This was the last stage of development in this area of administrative law before the enactment of Act VIII of 1981. One must point out however that between 1972 and the enactment of

the said law, all cases relating to governmental accountability were decided on the basis of the British system of judicial review of executive discretion, which had become the established system of governmental accountability at the time, even though nothing could have stopped the courts from reverting to any other system in deciding a case in this field of administrative law. In fact the *Lowell vs. Caruana* decision was followed by two other judgements which affirmed the applicability of the principles of judicial review of executive discretion introduced in 1972. The two cases in question are *Sciberras vs. Housing Secretary* (1973) and *P.M. vs. Sister Luigi Duncan* (1980). In 1981 the legislature intervened for the first time and laid down in statute, rules regulating the courts' jurisdiction.

Before considering the implications of the new law on the matter, one should take a look at the system of judicial review of executive discretion as it functions in the U.K., so as to be in a position to compare our systems with that obtaining in Britain. In this context it would also prove useful to take a look at the continental system of governmental accountability, a system which, although substantially different from its British counterpart, is just as efficient, and which had an influential bearing upon the mechanism employed in Act VIII of 1981.

## C. THE BRITISH SYSTEM

The system of Judicial review of Administrative discretion as applied in the U.K. is a highly developed branch of British Public Law. The bare outlines of the subject will be dealt with in this paper in order to furnish the reader with a general background to the matters at issue.

In considering the control of administrative discretion one must primarily consider the meaning of the term "discretion". "Discretion" implies the power to choose between alternative courses of action. However it is important to point out from the outset that such power to choose is not absolute – it is limited by the law. Discretionary powers in the hands of the administration, even when such powers are wide, are today no longer considered to be incompatible with the Rule of Law as understood in the light of the Delhi Declaration of 1959. In fact the said document lays more stress on efficiency in administration rather than on the legality of the acts of the Administration. It is not to be inferred however, that control of administrative acts is not given proper consideration in the said declaration. In fact, clause 4 provides that "a citizen who suffers injury at the hands of the executive shall have an adequate remedy...". What should be emphasised here is that although adequate and complete forms of control against abuse of power by the executive are necessary, emphasis must equally be laid on the need for executive acts to be performed efficiently and effectively in view of the political purpose advanced by the Government in power. For this reason Wade says "What the rule of law demands is not that wide discretionary powers be eliminated, but that the law should be able to control its exercise".

Wide discretionary powers are accepted as necessary and desireable in order to meet the day to day exigencies of today's world. On the other hand, efficient legal safeguards are also accepted as necessary in order to ensure that the administration does not abuse of the powers granted to it by law. Thus it is established at the outset that all powers must be subject to legal control. When a country's legal system is based on the rule of law, any notion of unfettered discretion is unacceptable and, as Prof. Wade says "a contradiction in terms". In the opinion of Prof. Wade the courts are the most suitable organ of government to draw the legal limits of discretionary power in a manner which strikes the most suitable balance between executive efficiency and the legal protection of the citizen.

It is a fact that the courts in the U.K. have exercised their function in the most laudable of manners, especially when one considers the many ways in which parliament attempted, more often than not in vain, to oust their jurisdiction. How far-reaching the courts' control is shall be considered at a later stage.

In reviewing administrative action the courts apply the doctrine of "Ultra Vires". "Offending acts are condemned simply for the reason that they are unauthorised". The courts in the U.K. have adopted a system whereby they impute intentions to parliament. Lord Russell's words shed much light on the attitude of the English courts: "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires". In other words the courts, in controlling administrative action, apply general legal limitations which they consider to be implied in the law. The courts have said (Griffiths LJ) "Parliament can never be taken to have intended to give away any statutory power to a body to act in bad faith or to abuse of such powers. When the court says it will intervene if the particular body acted in bad faith, it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by parliament. Of course, it is often a difficult matter to determine the precise extent of the power given by the statute particularly when it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war."

One notes therefore that the basis of judicial review is the illegality of the act of the executive. A more important point is that the courts are to establish which acts are legal and which acts are illegal not only in terms of the wording of the empowering act but also in terms of general legal limitations. However the limitations must be legal. It might seem at this point that this is logically obvious, however, it is necessary to analyse the term "legal limitation" more closely. These limitations are usually intentions imputed to parliament and are expressed in a variety of ways, as by saying that discretion must be exercised reasonably and in good faith, that there must be no malversation of any kind, or that relevant considerations only must be taken into account. Such limitations are considered to be valid legal limitations in the U.K.; however the courts in the U.K. are careful not to substitute their discretion for that vested in the executive. The

court is only empowered to control the legality of the acts and not to assess whether they have been exercised prudently or imprudently.

In these cases, when the courts review administrative action on grounds other than legal grounds, the courts would be acting beyond the scope of their jurisdiction.

## (ii) ENGLISH CASE LAW

A study of English case-law on the matter would inevitably lead to recognition of the fact that discretion is limited by the concept of reasonableness. It has been said that where discretion is used unreasonably then the action is contrary to law (*Roberts vs Hopwood* 1925). On analysis, one may consider Lord Wendury's dictum in the afore-mentioned case as indicative of the attitude of the English courts; in fact the learned judge remarked:

"A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes because he is intended to do so – he must, in the exercise of his discretion, do not what he likes but what he ought. In other words, he must by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably".

The principle of reasonableness as applied in England is based on the fact that a public authority "possesses powers solely in order that it may use them for the public good"; therefore the unreasonable use of discretion is not considered to be in the public good and needs to be checked.

In the case of *Padfield vs Minister of Agriculture, Fisheries and Food*, the English courts managed to win the battle against clauses which do not directly oust their jurisdiction but which "repose arbitrary power in a named authority" (Sachs J – Wade pg 398). However English courts have also fought against clauses which directly purported to oust their jurisdiction and the most important of these cases is *Anisminic Limited vs Foreign Compensation Commission*. It is very important to consider the implications of this decision and of the decisions that came after it in this context.... The Anisminic judgement involved the interpretation of the words found in the Foreign Compensation Act 1950, namely that a determination of the Commission "shall not be called in question in any court of law". However notwithstanding this clause, a determination of the commission was questioned for five consecutive years, and was eventually quashed by the House of Lords. The House of Lords decided that the ouster clause did not protect a determination which was outside jurisdiction, and that the commission had based its decision on a ground which they had no right to take into account, and to impose another condition not warranted by the order.

This shows clearly the determination of British courts to uphold their policy of resisting attempts by parliament to disarm them by the employment of provisions, which, if literally interpreted, would confer uncontrollable power to subordinate tribunals.

## D. THE CONTINENTAL SYSTEM

After having considered the problem of governmental accountability and abuse of discretion on the one hand, and the protection of the individual citizen from such abuse on the other hand from the British perspective, one should also consider a system based on a stricter interpretation of the doctrine of the separation of powers; a system therefore, which has a different point of departure from the English one. In such sytems it is not the ordinary courts which have the task of reviewing administrative discretion but specialized administrative courts and tribunals, only marginally less institutionalized than the ordinary courts. The underlying concept behind their existence, however, does not differ. The manner in which such tribunals work in practice may best be examined by a review of the French administrative system.

The French have established a judicial structure which comprises three distinct court systems, namely, Criminal, Civil, and Administrative the latter being centred in the "Conseil d'Etat". This three-layered judicial structure has its roots in French political history. Prior to 1789 all power was centralised in the hands of the king and the royalist state alone expressed the general interest and ensured that it prevailed. Unhappy with the situation, the pioneers of the 1789 revolution sought to establish an isolation rather than a separation of powers as understood in Britain. Indeed by a law of August 1790, it was decreed that "Les fonctiones Judicieres sont distinctes et amoreront separes des fonctiones Amministratifs. Les Juges ne pourront a peine de forfaiture troubler de quelque maniere que ce soit les operations des corps amministratifs, ni citer devant eux les Amministratures en paison des leurs fonctiones".

From the above it soon emerges that the French consider not a system of checks and balances but rather a system of isolation of powers, with the executive not only independent from the judiciary, but where the latter has no jurisdiction over the former in any situation. This hardly means that the French Administration has a free hand in the administration of public policy, because its actions are still reviewable, not by the ordinary courts, but by a specialized body of Administrative tribunals.

Thus, control over the legality or otherwise of administrative actions is exercised by a network of specialized administrative courts and the administrative tribunals under the council of state.

The distinguishable feature of these administrative tribunals is that unlike administrative courts, their decision is not final, but there is a right of appeal to the conseil d'etat. One such tribunal is the CONSEIL GENERAL DE BATIMENTS DE FRANCE, which deals with the control and adjudication of property transactions within public contracts. Another tribunal existent in the French Administrative system, is the TRIBUNAL DE CONFLITS. This tribunal deals with matters of jurisdiction in the sense that it establishes whether jurisdiction on a particular disputed case, should vest in the ordinary or in the administrative courts.

Coming now to the Conseil d'Etat, it may be said that its functions are twofold:

(i) to advise on the constitutionality of proposed legislation,
(ii) to adjudicate on complaints lodged against the administration by individual citizens.

We are here directly concerned with the second function of this council. However, if one had to stop here a moment and attempt to analyse these functions from an English perspective, it becomes evident that such a system is inconceiveable, due to the fact that the same administrative organ here is both advising the executive on proposed legislation and adjudicating in matters where the same administration is concerned. Notwithstanding the fact that prima facie, the system seems to be objectionable by English standards, on a deeper analysis it results that the above mentioned two functions are exercised by two separate and distinct bodies within the Conseil d'Etat and even English text-writers on the subject have recognised this fact.

Originally the council of state was given jurisdiction of first instance over all complaints against the administration; however time proved this system to be inefficient, cumbersome and self-defeating. Indeed one of the reasons behind the existence of the administrative tribunals and the council of state was to speed up the process of administrative justice; much to the contrary however the council was faced with a significant backlog of work. As a result 20 regional tribunals were constituted; these are now the courts of first instance while the Conseil d'Etat serves as an appelate body.

In granting redress to the individual citizen, the council of state may annull the enabling law under which the administrative act was done or annull the act itself without impeaching the parent law itself. The conseil d'etat may declare acts as invalid on the following grounds:

(i) ULTRA VIRES: where the legal powers of administration granted to it by the parent act have been exceeded.
(ii) Correct procedure has not been followed.
(iii) "DETOURNEMENT DE POUVOIR": where administrative powers have been used for purposes for which they were not intended.

This last possibility allows the council of state to investigate those administrative acts which apparently respect the letter of the law, but which prove to be contrary to the spirit of law in general. Besides, the council of state may also provide pecuniary redress and although a "restitutio in integrum" cannot be demanded from the state, the latter may be held liable in damages. It should however be made clear that damages should be capable of being estimated in money terms as no compensation is awarded for any moral damages.

The power to review and possibly annull government decisions is not unlimited; however, the French make a clear distinction between "ACTES D'AMMINISTRATION" and "ACTES DE GOUVERNEMENT". The former fall, as we have seen, within the jurisdiction of the council of state, whilst the latter being are beyond the reach of the council and are therefore unchallengeable. Their scope is however, both limited and well-defined. In

conclusion one may also mention other acts that are not reviewable by the conseil d'etat, namely, Acts of state, Judicial acts and legislative acts.

## E. ACT VIII OF 1981: INTERPRETATION

The cases *Lowell vs Caruana* (1972), *Sciberras vs Housing Secretary* (1973) and *P.M. vs Sister Luigi Duncan*, seemed to have established a definite adoption of the British system of Judicial review of Administrative discretion; finally therefore, it seemed that a stand had been taken by the courts and that the turbulent evolution of a system of governmental accountability was brought to a halt. In fact all cases regarding governmental accountability after the *Lowell vs Caruana* judgement were decided on the same criteria pronounced in the said judgement.

However in 1981 Parliament thought fit to enact a law in order to establish a set of rules regulating the instances wherein the courts would have the power to review administrative discretion. Thus "prima facie" one may say that by the enactment of this law parliament had, for the first time, statutorily recognised a system of governmental accountability devised in the *Lowell vs Caruana* decision of 1972. However it must here be noted that the emphasis must be laid on the words "prima facie", as on further deliberation it soon emerges that there are substantial differences between the law and the court decision in the case of *Lowell vs Caruana*. This decision, as already observed, introduced into Malta the English system of judicial review of administrative discretion, lock stock and barrel. The courts' jurisdiction extended to all those circumstances in which a British court would take cognisance of a case, including cases of alleged abuse of power on part of the administration and a Maltese court could also annull an adminstrative act on such grounds. The enactment of Act VIII of 1981 seems to have ousted the jurisdiction of the courts on the above mentioned grounds. One cannot therefore say that Act VIII has adopted, in statute form, the same system of judicial review of executive discretion as advocated in the *Lowell vs Caruana* judgement.

If one now comes to the position arrived at through the enactment of the law, it seems that one may take two different approaches:- for convenience's sake these approahces shall be referred to as "Literal" and "Liberal".

At a close inspection of the wording of the law, it would seem that the courts shall have no jurisdiction to enquire into the validity of an act or thing done by a minister, or by any authority established by the constitution, or by a public officer in the exercise of their functions. This is the first rule laid down by the law, which contemplates that in the above mentioned circumstances, the court shall have no jurisdiction, save for the following exceptions:-

(a) where the act is Ultra Vires
(b) where such act is clearly in violation of a written law
(c) where the due form and procedure have not been followed in a material respect and substantial prejudice ensues from such non-observance.

The law also provides us with a revised definition of what is meant by "Ultra Vires". An administrative act is ultra vires if it is clearly and explicitly prohibited or excluded by a written law. On the basis of what has been said, it soon emerges that although apparently Parliament adopted grounds for the annullment of administrative acts parallel to the system as it prevails in the U.K., in actual fact it has not provided for the material ground of abuse of power. If one were to persist with a literal interpretation, it would seem that the general rule is that the court has no jurisdiction to enquire into the validity or otherwise of administrative acts; furthermore the grounds provided are only exceptions to the rule, and appear to be quite restrictive, especially when one considers the meaning given to the term ultra vires. The law is clearly not in harmony with the continental system for two reasons, namely because of inexistence of administrative courts and secondly because institutions such as the Conseil d'Etat for example, are enabled to review administrative acts on the grounds of abuse of power (detournement de pouvoir). Furthermore, by adopting such a literal interpretation one cannot by any stretch of the imagination include the English concepts of unreasonableness and abuse of power as these are general legal principles, which are not found in any written law.

In view of the foregoing, it would seem that by tending to oust the jurisdiction of the courts in cases of abuse of power, this act has brought about a situation where the state enjoys substantial privilege vis-a-vis the private individual, a privilege that was not condoned in the *Lowell vs Caruana* decision.

Again, from a literal and strict interpretation of the law, one may say that in this law Parliament has manifested its intention in a very clear and explicit manner, such that a court which abides by the doctrine of the supremacy of Parliament has no other alternative but to respect Parliament's intention as manifested in the law. This would mean that the court would have to accept the fact that its jurisdiction is limited by Act VIII of 1981. However, this is a very strict and literal approach and the same doctrine of the supremacy of parliament affords us with a counter-argument to be dealt with at a later stage.

A "liberal" interpretation involves, in the opinion of the authors, a consideration of two aspects, namely:

(i) The unconstitutionality of the Law.
(ii) The inherent right of the courts to review administrative decision in the light of general legal principles.

(i) *Unconstitutionality of the Law*

The Maltese Constitution, in subsection 2 of section 40 affords to each individual citizen the right to a fair hearing, the fundamental components of which are mentioned in the said section. S 40(2) was formulated on the basis of Art. 6 of the European Convention on Human Rights, which also states that every citizen is entitled to a fair hearing. The point at issue here is whether this provision of the constitution contemplates only the case of a person who is already being duly prosecuted in court, or whether the section

40(2) incorporates the right to initiate proceedings in court. No Maltese court has as yet clarified this point, and there is no Maltese jurisprudence on the matter. However, the European Commission on Human Rights has pronounced itself very clearly on this issue in the *Knethcel Case* (better known as the *Golder* case) wherein it was held that Article 6 of the Convention does in fact contemplate a right to initiate proceedings in court. Furthermore in the *Ringaisen Case*, the European Commission of Human Rights decided that if Administrative acts impinge upon the rights of the individual, then such acts should fall within the purview of the courts. Thus, it seems that the right to a fair hearing under the European Convention of Human Rights may have some operational value in the administrative law field.

Access to the courts is a fundamental element of a fair hearing, a right that the Maltese constitution preserves in section 40(2); on the other hand, it appears that Act VIII of 1981, by ousting the jurisdiction of the courts is denying the individual his right to a fair hearing; hence this law may have tinges and shadows of unconstitutionality. Notwithstanding the possibility of such an interpretation, the probability of the Maltese courts annulling the relevant sections of the 1981 Act seems quite remote. Notwithstanding the existence of sound legal arguments as outlined above, such arguments are based on decisions of the European Commission of Human Rights, and although such decisions may have a certain degree of influence on decisions of our Courts, our Country may nevertheless adopt a very different attitude. Moreover, the isolated decisions of the Commission mentioned above should not alone lead us to any definite conclusions, since the principles therein reiterated have still to be concretely established and affirmed. Again, although it has been established in the *Ringaisen case* that the right to a fair hearing is to some extent also operative in the administrative law field, the precise limits of such operation have still to be drawn.

(ii) *Inherent right of the court to review administrative decisions*

Another approach stems from the alleged right of the courts to review acts of the administration based on discretion granted to it by acts of Parliament. If one were to analyse the very object of the existence of the Courts, it would transpire that one of their basic functions is to interpret laws as enacted by Parliament. By considering the written law as a means which Parliament uses to express its intention, the courts apply such law directly to the particular case before them, keeping in mind the general principles of law which guide them in the determination of the issues involved. The courts, when circumstances so demand, also impute intentions to Parliament in their interpretation of the law. This in order to clarify and elaborate upon certain aspects of the law, which parliament did not explain. In this way the courts do not merely look at the wording of the law but appropriately delve into the intention behind such law. According to clause I of the New Delhi Declaration of 1959: "His (the judge) duty is to interpret the law and the fundamental principles and assumptions that underlie it". Therefore when a court is to interpret a law, it does not confine itself to the wording of the law alone, but also considers other general legal

principles which, although unwritten, are of fundamental importance. Now, if one were to apply the foregoing argument to Act VIII of 1981, it would seem that the courts cannot decide on a simple literal interpretation of the wording of the law, but must interpret it in the light of the general principles of law relevant to the content of this law, and decide the case accordingly.

In so doing the court would consider what parliament had in mind when it enacts laws. In view of the above considerations, the courts may say that, Parliament, in enacting the legislation, never intended to empower the administration to make unreasonable use of its powers. The principle that every administration should act reasonably is a general legal principle, which cannot be derogated from; and even if a written law runs counter to this principle, the courts, having by time attained a certain mentality would still reassert the basic and fundamental principles of law which, if abrogated, would certainly result in the deterioration of the Rule of Law.

The power of judicial review is to be considered as an inherent right of the Courts, not because such a right has been so granted by any law, but because in a liberal democracy the doctrine of the supremacy of parliament requires the existence of a body to check the administration in its utilization of powers conferred upon it by Parliament. Thus the courts can be looked at as the guardians of the supremacy of parliament. The courts have the duty to check the executive whenever it makes improper use of any of its powers, and have to see that it utilizes its discretion reasonably. The judiciary has been entrusted with the difficult task of keeping the administration within the limits of the law; this in order to render the Rule of Law meaningful and effective. In fact one can say that the power of judicial review has been conferred upon the courts in order to enable them carry out this important tsk. As the Hon. P.N. Bhagwati, judge of the supreme court of India said, at the International Bar Association Conference of New Delhi – October 1982, "The judiciary stands between the citizen and the state as a bulwark against access and misuse or abuse of power by the executive and also transgressions of its constitutional limitations by the legislature". It therefore seems that in the very existence of the judiciary rests its function to act as a buffer between state and individual, a very significant task in all modern democracies. To be able to fulfill this task, the judiciary must necessarily be endowed with the effective weapon of judicial review, in its most complete form.

Thus by applying general legal principles, (and simultaneously fulfilling the role of protector of the doctrine of the supremacy of parliament), as well as by fulfilling its functions as a buffer between state and individual, the judiciary may adopt the attitude that notwithstanding Act VIII of 1981 it is still possible to review administrative discretion on grounds not mentioned in the act. Such was the attitude taken by the English courts in the case of *Anisminic vs Foreign Compensation Commission.*

If one were to consider the case and analyse the attitude taken by the House of Lords on that occasion, it would become evident that in adopting the same attitude towards Act VIII of 1981, our courts may still decide a case by avoiding the content of the act. A literal interpretation of Act VIII,

would in effect disarm the courts of a very effective weapon necessary for the fulfillment of their functions. However, if Maltese courts take the same determined attitude in interpreting this law as the House of Lords took in deciding the Anisminic case, it seems that Act VIII would not hinder the courts in their functions.

One must keep in mind that, as Wade put it, "Judicial control is a constitutional fundamental which even the sovereign parliament cannot abolish, at least without some special and exceptional form of words." Although Wade is here referring to the U.K., the same would apply to our system, because judicial control is a fundamental legal principle without which the Rule of Law cannot survive.

## F. CONCLUSION

A positive aspect of Act VIII of 1981 is definitely the fact that the legislature has finally assumed its responsability to legislate on the matter. The unsteady evolution of this sphere of Maltese Administration Law, can finally come to a halt. In this light Act VIII can be seen as a stepping stone towards a new era of development of a system of Governmental Accountability through legislation. However, although certain improvements have been attempted, we are still very far from having achieved a completely satisfactory system of Government Accountability.


# Outlook

# POSTGRADUATE LEGAL EDUCATION IN BRITAIN

*Sol Picciotto*

There are many advantages for a law graduate to pursuing a period of advanced study of legal problems and issues abroad. Colleges and Universities in other countries may be able to offer tuition or facilities in specialised topics, or may offer new approaches to legal issues, which can stimulate the student and enable him or her to return home with new ideas. Postgraduate legal education can therefore be very useful whether you are intending to become a law teacher yourself, or go into practice, or into government service.

The basic requirement for entry into postgraduate courses is a good honours degree from a University or College with an international standing, plus a good knowledge of English. It is vital for the student as well as the University to ensure that this necessary educational background has been achieved. Nothing is more disappointing than to embark on a course and find that you are badly prepared for it. You can waste a lot of time and money trying, sometimes too late, to remedy a deficiency in your basic education.

## LAW IN SOCIAL CONTEXT

A growing number of law school shave come to emphasise the study of law not merely as the memorisation of legal rules, but as the understanding of how law structures social conflict and social behaviour. This can be applied and developed in relation to a wide number of legal fields, including labour law, legal history, social welfare law, housing and property law – almost every branch.

Pioneers in this approach have been the newer Universities of Warwick and Kent, and others have also established strong reputations in this approach. Sheffield offers a Socio-Legal Studies programme, and similar studies are available at Universities such as Edinburgh and Cardiff and Polytechnics such as Middlesex, and South bank, both in London. Oxford has the Centre for Sicio-Legal Studies founded by the Social Science Research Council, which has specialised recently in law and economics research.

Whatever topic or approach you are interested in, you should make sure your information on the College or University of your choice is up-to-date. Courses can change, and people can move from one year to the next. Make sure you get an up-to-date staff list, find out what you can about the interests of the staff, and make sure they will be there when you go.

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## TAUGHT COURSES OR RESEARCH

Assuming you have the basic qualifications, you must then consider what combination of research and taught courses will best suit you, having regard to your own temperament as well as the field of study you have chosen. All graduate work involves the student doing individual research; but it is rare for a student to embark on a pure research thesis straight away. It is usually essential to follow some courses at postgraduate level. These can either be combined with a dissertation, or used as a basis to continue later with a larger thesis. Some taught postgraduate courses are also designed to provide a satisfying programme in themselves. Initial postgraduate law degrees, normally with a taught course element in them, are usually designated LL.M. (Master of Laws), although other designations are also used, such as M.Phil., or M.Sc. In addition, some Universities offer specialised Diplomas.

Most British Universities, and several Polytechnics, offer a graduate programme of some sort, although the form of teaching and the topics offered depend on the number of staff they have, and their specialisations. The biggest graduate programme is offered by the University of London, through its constituent Colleges. Its LL.M. programme requires a student to take 4 taught courses in 12 months. Since a student registered in any of the Colleges may take courses offered in all of them, this provides a very wide range of choice: currently some 90 courses are offered in the LL.M. However, this could involve you in a lot of travelling, so it is best to be based in the College which covers your main interests. The wide range of courses offered is to some extent offset by the large size of classes in some cases, and the relatively impersonal character of the tuition.

In contrast, most other Universities depend on the particular specialisms of their individual staff. In such cases, a course may be no more than a series of supervisions or tutorials, in which perhaps no more than two or three graduates may be involved with a single teacher. Where a Law Department or Faculty specialises, or offers a special programme, numbers may rise to 6 to 10 or 12.

If you have a special interest, it is a good idea for you to try to make sure that the particular member of staff who specialises in that area will be available in the year in which you wish to study. Next, you need to try to find out whether the Faculty you apply to covers that specialisation, and has adequate library facilities.

## SPECIALISATIONS

In some places specialisations are established around a Centre or Institute which groups staff and students. Thus the well-known Institute of Criminology at Cambridge University offers a demanding but interesting M.Phil., course in criminology, which includes social science aspects as well as law. Exeter has its Centre for European Legal Studies, and offers LL.M. courses in both European and Internatinal Business Legal Studies.

Several law faculties specialise in aspects of the law of the sea or marine resources. UWIST (University of Wales Institute of Science and Technology) offers courses on coastal zone management law and maritime law; Southampton on shipping and international commercial law, and Hull on maritime law. Dundee offers a Diploma in petroleum law, which covers the law relating to energy resources generally.

Some courses are specifically geared to the needs of students from developing countries and are taught by staff who come from such countries or have experience of their problems. The law department of the School of Oriental and African Studies (SOAS) offers a long-established programme in African law, as part of the London University structure. At the University of Warwick there is a Law in development programme, which covers both the general problems of law in relation to social and economic development, as well as specific courses in Public Enterprise law and Urban Law.

Many overseas students come to Britain to pursue courses in international law, or international economic law. Several universities specialise in the former, including the oldest, Oxford and Cambridge, as well as Manchester, Keele and others.