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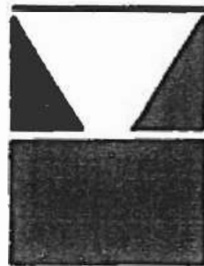

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ID-DRITT LAW JOURNAL

VOLUME XV **1990**

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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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EDITORIAL

Notwithstanding the difficulties of preparing such a publication containing articles of a high standard to serve, not only the legal community in Malta but also those beyond our shores **and** of financing its production, **this** Editorship's commitment to publish the Law Journal annually has been met once again. Indeed, I must thank **MID MED BANK LIMITED** for making this possible by sponsoring this edition of **ID-DRITT.**

And for 1991, besides the next volume of **ID-DIRTT,** the much needed **Index** of all the articles, assignments, notes, interviews, etc., which would have appeared in the **2nd Series** of this Law Journal, between **1971-1991,** will be published. One must in fact explain that what can be referred to as the 1st Series of Law Journals, had been published by students reading **law** at the University of Malta between the years 1945-1955. However, it is interesting to note that the first known legal publication in Malta similar to a law journal, entitled *'Foglio Legale di Malta',* dates back as early as 1846.

ID-DRITT has certainly established itself as one of the leading journals in the legal field. Indeed, it gives me great pleasure to mention that during the *First Meeting* of the **United Nations Environment Programme** *Group of Legal Experts,* held in **Malta** between the **13-15 December** of this year, to examine the implications of the 'common concern of Mankind' concept on global environmental issues, one of the foreign experts present, showing a copy of Volume **XIV** of this journal to the participants, recommended **ID-DRITT** to all legal libraries. The same legal expert, referring to the article on 'Global Climate' published in that edition, claimed that it was the *"best anthology ever published on the matter".*

Attracting Maltese as well as foreign authors of a certain calibre to contribute to this Law Journal is becoming increasingly hard. All are notoriously busy with their legal profession. But in such a situation, perseverance on our part, must play a key role. Indeed, as in previous editions, this volume of **ID-DRITT** carries articles written by authors who are certainly an authority in their respective fields. For example, one of the foreign authors, **Prof. Barry Spitz,** who has already been invited twice to lecture students of the Faculty of Law, at the University of Malta, was referred to by **International Time** magazine of September 10, 1990, as *"a tax lawyer who advises international corporations and several governments"* on Offshore Financial Centers.

And one must say that such expertise on Offshore is undisputably important for both Maltese law students and lawyers alike. **Malta** is an offshore centre in its infancy but according to **Christopher Ball,** Banking Controller, quoted in **Investment International** (May 1990), *"for the private investor, looking for private banking, we offer no more than Jersey, Guernsey or the Isle of Man. It is impossible to say that one has any advantage over the other, the interest rates will probably be the same. The main advantage that Malta offers is for those wishing to set up companies. In which case they should find that in Malta the cost is very reasonable."* And the prospects for **Malta** to become a highly competitive offshore financial centre where business can be carried out in a favourable environment, are very promising indeed!

The first interview which I held with a prominent person in the Maltese legal field and published in Volume **XIV,** has found a very favourable interest and it has been decided to continue with such interviews in the forthcoming editions of this Law Journal. In fact, this edition carries an interview with **His Honour Mr. Justice Prof. Wallace Ph. Gulia.**

20.XII.90 M.A.T.

Articles

THE MALTESE STATUTI E ORDINAMENTI OF 1533*

DR. WOLF-DIETER BARZ

The first code of laws enacted by the Order of St. John of Jerusalem for the new born state. An introduction with a translation and editorial notes.

The Order of St. John of Jerusalem, which had developed itself into a military power during the Crusades in the Near East, became once again master of the land or possessed the possibility to have similar power. Among its territories it had estates in the principality of Antioch and in the earldom of Tripoli. From the times of the Crusaders' states, no laws have been passed on to us that the Order issued for its domains.

A lot of reasons that are not going to be mentioned here speak in favour of the fact that no laws were made. Evidently only in the Order's state of Rhodes, which the Knights founded in the late Middle Ages and were able to hold till the early Modern Times did the Order engaged itself in enacting laws. We know also of similar activities that the Order did for parts of its provinces, where it was able to obtain relative rights and provincial jurisdiction.

Driven from Rhodes, the "Maltese" Order became the Ruler of Malta in 1530 when Charles V as King of Spain and a King of (the Two) Sicilies gave them the Maltese Islands as a fief. Here the Order undertook law-giving functions and within three years of taking power it proclaimed these *Statuti e Ordinamenti*. Before transcribing and translating the text one should mention some legal and historical observations concerning this law and its origin.

The Grand Master L'Isle Adam is not considered a great law giver in spite of this code of laws as for instance his successors Verdala, Lascaris, Manoel and De Rohan. Still two considerations appear worth mentioning, one is the fact that this was the first extensive law giving act of the new landlord that had introduced the end of Sicilian Law in Malta.

The other is the fact that this rather rudimentary law, which concerns principally the penal aspect remained remarkably long in force.

The following transcription proceeds from the so called Codice di Lascari the Pragmatichi of the Prince Grand Master Lascaris Castellar in 1640. There

* *Translated from the original text in German by Fr. John Sammut*

reference is made to the *Statuti e Ordinamenti* in the reproduction of the text and the confirmation of its continuing validity. Some time before the law of L'Isle Adam had been confirmed by the Grand Master Verdala in paragraph 120 of the Code of Verdala of 1598. Only in 1724, did the so called Code of Manoel, the great and the first to be printed Code of the Order in Malta, supercede the Code of L'Isle Adam. One must therefore concede that these six pregnant articles of the *Statuti e Ordinamenti* had a pillar-like function within the Old Maltese Lawgiving activity of the Order. In view of this they merit closer considerations. Up to now these have been mention by the (legal) historian de Bono (p.171 f), Pace (p.25-28), Viviani (p.141) and Waldstein-Wartenberg (p.203).

As mention before, the *Statuti e Ordinamenti* have been compiled in handwriting. This is no marvel because there were no printing press in Malta before 1642. The text of the laws was available only 118 years later in print. This had to do with the complicated press laws in Malta. The three supreme powers in the island, the Bishop, the Inquisitor and the Grand Master - of whom the Grand Master had presidence in the secular area but not exclusive supreme power - blocked each other for a long time regarding the printing privilege (censorship). Only the Papal protest in 1746 brought in a tolerable *modus vivendi* even if that, in no way, was a very practical arrangement. Therefore, - to shorten the procedure - printed material that was intended for Malta as a state of the Order was printed in Italy. For the publication of these Statutes,however, this possibility was not availed of.

In the preamble to the *Statuti e Ordinamenti* the law giver alludes to the striking brevity of the law which is really extraordinarily rudimentary. This could not be attributed to the lack of exercise in secular law-giving power on the part of the Order because it had collected experience, at the latest, with the capture of Rhodes (1306-1310). At the beginning of its rule there, the Order published the *Capitula Rodi* which had been passed on to us in fragmentary form and in 1509 the *Pragmatica Rhodiae* which are very wide ranging. Moreover the Order was active as law giver even outside its central states. Thus for instance in the Order's province of Aragon, published in 1319 the *Constitutions of Miravet* . These manifold experiences should have made it easy for the Order to compile in 1620 in Germany the so called *Heitersheimer Herrschaftsordnung.*

If in fact the Order did not set in force in its first years of sovrereignty in Malta any comprehensive law and issued only a very short one, then one must look for the background of all this. The situation was different in Rhodes because the Order took Malta as a regulated community life and confirmed the laws prevailing here. In doing so it resorted to the famous principle in the *Liber Augustalis* of Frederick II which is also known under the name of *Costitutions of Melfi* , the *Code of Frederick* or *the Suebian Code*. It remained in power in

the Kingdom of the Two Sicilies: in Naples till 1809 and in Sicily itself till 1819. It seems that the *Costitutions of Melfi* served longer in Malta as a subsidiary law. In fact Pace writes on page 16:

"In Nobile Formosa Montalto vs. Nobile Attard Montalto (1895) the Court held, that the Old Sicilian Laws continued to apply in so far as they were not revoked or changed by contrary legislation after the occupation of the Knights, since Malta was not conquered but donated ex munificentia.

It is to be observed that Malta constitutionally from the very beginning till the end of the Order's Sovereignty in 1798, was mostly a part of Sicily. So it is not astonishing when the Order following the *Constitutions of Melfi* set up its first Maltese Statutes in Latin and later changed over to Italian when it dropped the language of Provence. The Maltese people in general could not understand the language of the Kingdom of Sicily as the language spoken, then as now, is characterized by the Arab Magreb dialect. Only in these last fifty years has Maltese become an official language.

The Order therefore, took up the law then available and at first did not need to make out the legislative groundwork for its prosperous life in Malta. Even if these were not available to the given degree, a rudimentary Law for those times was not a penal "misfortune". A contemporary criminal code did not need to describe as fully as possible the objectionable criminal behaviour. The principle *nullum crimen sine lege* and *nulla poena sine lege* were known in content since ancient times in many places throughout the Middle Ages, but it was through Montesquieu and Feuerbach in the 18th and 19th centuries that these principles were given their full meaning. It was rather the principle - *ne crimina remanent impunita* - characterized by the theocratic spirit of the criminal law that held sway, independently whether the crime in concrete cases was conceived in the legal constitutive aspects of the secular law. Criminal Law was more the extension of the heavenly order. Whoever turned against it was to be punished, be it through the judge's decision or in consideration of the Roman Right, as for instance in the case of Article 129 the *Constitutions of Miravet*, where this is clearly expressed. A codification of the criminal law to constitute all the legal elements of an offence, was no concern of the lawgiver of the Middle Ages of of the Early Modern Times.

Several lines of thought are to be found in the recent German Law history, when in 1947 the Higher Regional Court of Cologne under the shock of the Nazi crimes and under the occupation forces formulated "from the nature of evil follows that it should receive its due in the area of civil punishment even without specifically codified punishments".

Once the reason is clear why the Grand Master L'Isle Adam did not address

his people with too many words one should now mention some peculiarities that accompany this law. Here one should not place these Rules in the context of a lawgiving Grandmaster of Rhodes or the jurisdiction of Malta before the Knights arrived here.

In the first paragraph the Order set up the Court of the Castellan in the Citadel (Borgo). Since the times when the Order was in Rhodes, the Castellan was the highest ranking person under the Grandmaster with responsabilities for the internal affairs of the Order as well as for the secular aspect of the Law in the Courts. There are many grounds for the fact that his competence was limited at first to the Borgo only. The Order had since its short lived exile in Cyprus at the turn of the 13th to the 14th century became a naval power and was interested principally for the great natural harbours around the Borgo in Malta. Here was its base, its fortress for attacking the Mohammedan world. The rest of the country had secondary importance. This is all the more so as the handing over of Malta to the Order offered highly polemical issues regarding its constitutional aspects (the priviliges of the Maltese people vis-a-vis the Sicilian Crown). There were corresponding reservations and considerations in view of a quick return to Rhodes where the Grandmaster had already prepared a putsch with the Regent of Rhodes against the Turkish overlords. So it is understandable that at first L'Isle Adam strove to have juridical power only in his direct surroundings and left untouched the other Maltese Institutions and their respective self management.

Under the word Borgo one should not understand just a small fortified area. Rather it is the fortified place Birgu or Borgo as it was then called, the present day Vittoriosa with Fort St. Angelo that was later heavily improved upon. The Order made this place the centre of its life up to the time when La Vallette built Valletta as the Capital City. All along Città Notabile or Città Vecchia or Mdina as it was called - with the Bishop's residence and the palaces of the Maltese Nobility - remained the Island's Metropolitan City. Mdina lost its importance after the foundation of La Valletta. Since 1090 the term Castellano was an important concept for the Maltese. Even earlier, the jurisdiction of the Castellano (later Fort St. Angelo) and its surroundings fell under this juridical officer.

For the second paragraph two points are worth mentioning. Under the term *Procurator Fisci* one should not understand simply a financial officer. He had also the duty - compared to our present day Public Prosecutor - in the penal and civic areas. Besides the *Procurator Fisci*, according to the last sentence of this paragraph there were also judges active with police and prosecution powers.

It is important however, to indicate the assertions in the penal procedure of this paragraph. In accordance to it, a legal process and a legal punishment could take place without a plaintiff. The accusation principle (a penal process on the instigation of a private plaintiff) is ruled out. Even in the late Middle Ages penal cases took the form of Civil Law cases. According to the latest expositions -such as those by Kuhn, Rössner and Jung - these were able to carry them out again under different circumstances. After a sequence of changing views regarding the purpose of legal punishment in the Middle Ages the penal law became more and more a matter reserved for the State. This was expressed also in the principle of prosecution in the inquisitorial proceedings. In the fourth paragraph one meets the idiom "guilty of public crime". This confirms once again the public-legal chatacter of the Maltese penal law during the Order's domination.

In the third paragraph two particularities stand out. First there is the term "receivers of stolen property". The receiving of stolen goods in the context of this paragraph covered more than we understand today, more comprehensive than our term "turnover of stolen goods". In Malta also those who offered shelter to a culprit or who did not hand him over to the state's prosecutive powers for money or who helped him in any way, were to be punished as well. The relative's privilege, whereby one was allowed not to testify against a relative, as is now found in Art.258, IV CS and GB of the German Penal Code was expressedly ruled out.[1]

The punishment for those who assisted the criminal after the crime was regulated according to the gravity of the offence done by the principal perpetrator. Here the designation of the penalty is referred to in the law under which the principal perpetrator falls. Hence it is clear that the *Statuti e Ordinamenti* were not understood as the unique law of the recently founded state of the Order, but as a law that complimented or changed particular items in specified cases.

The determination of the punishment for the offence is designated with reference to exceptions envisaged for perpetrators coming from "a higher status". Hence a two tier penal code was instituted that was literally expressed in Maltese "Il-Ligi mhix ghal kulhadd xorta" (The law is not equal for all). A question however remains open whether this would favour those coming from higher social levels for in these cases no relationship to the crime was considered but the perpetrator was exiled *eo ipso* from the Maltese Archipelago for ten

1 Accessory after the fact
1. Whoever, acting intentionally or knowingly, obstructs, either alltogether or partially, the imposition of criminal punishment or a measure... for an unlawful act, shall be punished by up to five years' imprisonment or by a fine.
6. Nor shall punishment be imposed on anyone who committed the offence for benefiting a relative.

years for infamy. So it remains unclear whether the new lordship wanted to hit harder or to privilege the Maltese Nobility, which met him with outright reservations, so as to offset the tensions current at that time. Exil remained in Malta for a very long time a deep anchored punishment. The last great Muninipial Law of the Order, the *Codice di Rohan* which survived the Order's sovereignty in Malta for a long time and was commented in 1848 by Micalleff, threatened them as well. This punishment was still in use in Malta when it became an English Colony. Exile was particularly hard when it was executed in North Africa, as this was all the time an enemy's territory. The Knights were duty bound to fight an incessant war against Islam. This meant practically a continuous state of war with the North African states. Only in 1810 did the Maltese population successfully turn to Britain to repeal the law on enforced exile.

The fourth paragraph with its reference to the public penal law has already been mentioned. The contents of the next paragraph, ie. the fifth paragraph, offers no special peculiarities. No eyelids will be raised that Malta, as a sea sailing nation, had slaves for rowing the galleys: these could not be obtained on a free willing basis. Slavery remained till the end of the Order's sovereignty in Malta. It was abolished by the retreating French occupation army in 1798. Under the subsequent British Rule, when the French decrees were repealed, this law would have been enforced again had not the English commander decided - as a precedent - to lift it up as it was an offence against human dignity.

For the sake of completeness one should now make reference to the meaning of the word *strappata*. De Bono (p.172) thought that its meaning was corporal punishment with a rope and referres to a parallel use of this term in *Bandi e Comandamenti* of the Grandmaster Claude de la Sengle in 1555:

"Che cosa fosse propriamente la strappata non consta; è probabile, però, che consistesse in battiture, dacchè posteriori costituzioni del de la Sengle si parla di *strappate* di corda".

This meaning however should not be given to the context here as it is still questionable. Through the syntactical connection with the participle *extensus* in the fifth paragraph one would rather think of a torture bank where the culprit is held bound perhaps by a rope. In the present day Italian *strappata* means a tearing apart or a jerk. Hence it indicates the punishment of being stretched rather than the blows from a rope.

The sixth paragraph deals with a whole complex of delinquencies in view of body injuries or attempts therefo. The concept of this crime was then still unknown. In those times one spoke e.g. of shooting or drawing swords against soneone else. Further items about self-defence are also set out in rudimentary form.

The terminology of this paragraph presents some puzzles. The term used is *telum* under which everything can be understood that could inflict harm to a person. As the choice of this term is rather arbitrary, it would comprehend objects which we today call firearms and other dangerous instruments as in Art 223a of the StGB.[2] In the Middle Ages another collective term was in use. This was *ferrum* , objects made of iron which use was considered so dangerous that an increased ammount of punishment was justified. In case of other objects for example a stone, though similarly dangerous, nothing of the sort was needed.

Under the impact of the *new* firing arms one could understand that the collective term *firearms* used here had replaced the collective term iron of the Middle Ages. But this could not be so uniquivocally asserted as in the last sentence the discourse is no longer about *"firearms"* but about "drawn swords".

So what is mentioned is just the drawing of a firearm or that of a sword but not always that of shooting a firearm or trusting a sword. What is sanctioned is the behaviour, what we today would define as an attempt to inflict dangerous bodily injuries. Here there is a connection between this lawgiver and the medieval case variations. He did not know how to express body injuries as a whole. The (specified) arms and the corresponding wound constituted each single crime. To protect in the best way the rule of law in general - which under the influence of the north Italian cities was considered the highest contribution of the law - its endangering must have acted as a counterthreat.

As an attempt could not necessarily be understood as a direct decision of the will to commit a crime, the lawgiver in this instance had to express the idea of an attempt at physical injuries in plastic popular vocabularly such as the drawing of an arm, the firearm or the sword. This form of an attempt may remind us today of the crimes that involve the endangering of others, particularly when the committed crime had preparatory actions beforehand in line with our present legal thinking. Today, as in the Middle Ages, an attempt at physical injury is comprehended apart. The Cuban penal code Art. 318 has this formulation regarding firearms: "the shooting of a firearm against a definite person will be punished with arrest, even when the victim is not injured".

As in the attempt clauses the lawgiver expressed case by case the notion of self-defence, which he was not able to express in the abstract, except for some modern exceptions, but through concrete cases. One can mention here the

2 Dangerous bodily harm
1. If bodily harm has been committed by means of a weapon, in particular a knife or another dangerous instrumentality, or by means of a sneak attack, or by several people acting in concert, or by a life endangering act, shall be punished by up to five years imprisonment or a fine shall be imposed.

Maltese period before the coming of the Knights. The *Constitutions of Melfi* were familiar with the right of self defence in general in the modern sense of the word (Lib. I, Tit. VIII, 2. Abs., Tit. XIV, 2. Abs.) But the lawgiver of those times was not familiar with abstract regulations that contradicted the scholastic-casuistic way of thinking and the corresponding way. In the above-mentioned constitutions the right to self-defence is mentioned as an addition with each single crime in the context of its respective legal elements that constitute the crime. This method of conceiving and expressing things is "physiologist" if one keeps in mind that "our capacity to think and speak has developed from single cases, particularly cases that shocked us". (Haft, p.45) The *Statuti e Ordinamenti* in this case fall quite in line with the legal tradition that the Middle Ages handed down but these did not improve upon the interest that the Sicillian rights had aroused.

Up to now only general observations regarding the points of view that strike the reader on his first contact with the *Statuti e Ordinamenti* have been published. But such a cursory view underestimates the importance that this first municipial law of L'Isle Adam had for Malta and for the Order of St. John. To weigh properly the achievement of this lawgiving exercise of the Order of St. John one must compare the *Statuti* with the *Pragmaticae Rhodiae* of 1509 already mentioned above. If one is to examine them with reference to the Maltese (Sicillian) legal tradition one has to fall on the *Constitutions of Melfi* of 1231. One has to keep in mind that in doubtful instances, one should not consider their date of origin as they were drawn up in a year's time by the Archbishop Jacobus of Capua and the Sicillian high court Judge Peter de Vinea. Their exceptionally quick compilation had as a consequence that very soon afterwards subsequent improvements were necessary and these were published as supplements by the Court of Foggia (1240) Grosseto (1244) and Barletto (1246). In 1247 a considerable number of amendments were published. After the death of Frederick II (1250) the Constitutions were given additonal supplements by other rulers. After 1268 ample annotations and commentaries were published. For a proper evaluation of the Maltese *Statuti* one has to bring into perspective the standards of lawgiving and law interpretation that were current in 1530 and/or 1533.

TEXT AND TRANSLATION OF THE STATUTI E ORDINAMENTI

The *Statuti e Ordinamenti of Grandmaster de L'Isle Adam of 3.9.1533 are found in the Pragmatichi of the Prince Grandmaster Lascaris Castellar of 1.3.1640, pages 24-27 of the handwritten pagination (Folio 24v-26r of the stàmped folios).*

The abbreviations which the writer has made recognisable through corresponding marks are the same rule for the abbreviations in this transcription. A solution is preposed in brackets wherever the writer has used no other abbreviation marks.

The punctuation and accents had been retained as the original so as to reproduce the flavour of the original.

The j and the i found with words and numbers have been transcribed as i whenever it was used as second last letter. The J and the i as initial characters are both reproduced as i

The translation is done consciously without any literary enbelishments so as to remain as close as possible to the Latin original.

(Statuti di MonSignore Lisleadamo siano osseruati Li statuti, et ordinationi della Castallania fatti dalla (...) di MonSignore Illustrissime Lisleadamo prima gran maestro di Malta son degni d'esser approuati, e confirmati si come l'approuiamo, e confermiamo, uolendo chesiano indifferente osseruati in tutti nosttri Tribunali, sicome fin adesso è stato nel presente uolume di parola in parola inserto.

Incipiunt statuta quaedam, et ordinationes Reverendissimi et Illustrissimi Domini fratris Philippi de Wilers Sacrae Domun Hospitalis Sancti Ioannis Hierosolimitani Magni Magistri).

Frater Philippius de Viliers Lisleadam Dei prouidentia Hierosolimitani Hospitalis Magister

Fra Philippe de Villiers L'Isle Adam by the Grace of God Master of the Hospital of Jerusalem.

Ea semper fuit in Republica instituenda legum latorum et Principum mens, ut antiquitatis, atque courrupta uiuendi consuetudo peruirsique hominum mores in populum male inuexerant illi aequa pro iniquis iusta pro iniustis, recta pro prauis bene reponerent, legesque temporablibus accomodarent, etuitam legibus. Quod nos animaduertentes has modò constitutiones edidimus, et promulgandas curauimus. Euerbisque quidem non admodum multis, sed uti speramus magna populi utilitate, quam uos harum diligenti custodia, obseruationeque sentietis. Uolumus itaque, et mandamus ut omnifide, totaque sedulitate, qualem Vt uos decet, et de uobis expectamus has nostras ioussiones inuiolabiliter sententiis, ac iudiciis uestris omnibus obseruetis cuntis obseruandas publicé tradatis ut uniuersis, prescripto earum manifestius cognito, inhibita declinent, et que praemissa sint, et quae licita testentur. Datum in Ciuitate nostra Melitae prima die 7bris anno Domini Mdxxxiii

It was always the intention of Law givers and Princes when establishing states to remedy injustices, once a loosing of discipline, corrupt customs and degenerated morals set in among the people. Thus they enact laws to correspond to the needs of the times and so redress injustice with justice, wrong with right. In view of this we have directed our attention to publish these statutes and took all pains to have them promulgated. Surely we did not do this in so many words, but - we hope - they will be carefully observed and be of great benefit to the people. Thus we want and ordain, that our commands be observed with all fidelity and alertness as it is fitting and as we expect from you. Thus after a thorough acknowledgement of the statutes you will abstain from what is prohibited and be confirmed in what is allowed.

Given in our Civic Community of Malta, the first day of September in the year of our Lord 1533.

De Iurisdictione Castellani, et Praefecti Ciuitatis Melitae

Qui Castellaniae Burgi praest, Ius dicere non debet extra territorium suum, quod dumtaxat nouis Burgimoenibus, continentibusque aedificiis determinamus, Reliquis Melitae Incolies ad Praefecti Ciuitatis Iurisdictionem pertinentibus, quod si qui se pacto aliquo subiacent alterutrius Iurisdictionis, et consentiant tunc protest eis, et aduersus eos Ius dici ab eo, cuius Tribunal communi consensu elegerint

Concerning the jurisdiction of the Castellan and the Prefect of the Civic Community in Malta.

He who presides over the Castellania of the Borgo should not administer

the law outside his sphere of office which we limit to the new fortress and its adjacent buildings. The rest of the inhabitants of Malta fall under the jurisdiction of the prefect of the community. Those who through some kind of contract subject themselves to another jurisdiction and consent to it, they could then be judged by the latter tribunal which they have chosen through mutual agreement.

Judex ex officio Delinquentes persequitir, et punit

Judicia omnia, in quibis delictum, et crimen uertitur publica esse uolumus, et ad nostri fisci Procuratoris solicitudinem, prosequtionemque pertinere, ut Maiestatis plagii peculatus iudicia, Item de Adulteriis, deSicariis, de Patricidiis, de ui publica, de ui priuata, quae omnia cum impunita esse maleficia non oporteat a Iudicibus nostris citra solemnia accusationum perpendi, damnarique legibus sine accusatore mandamus, sacri legos igitur latrones, plagiarios fures, malosque homines solliciti inquirant, et proùt quisque deliquit contra eum animaduertant

The judge shall prosecute and punish delinquents by the power of his own office.

We want that all juridical (cross-)examinations were a crime or a breach of law is dealt with, be conducted in public and dealt with by the *Procurator Fisci* who should bring to justice such crimes as lese majesty as well as trials concerning adultery, kidnapping and patricides. In order that crimes in the areas of public and private violence do not remain unpunished, we ordain that they be prosecuted and condemned by our judges without formal accusation (and this) on the grounds of the laws without accuser. The judges should also persue carefully reprobate thieves, kidnappers, burglars and the rabble and be punished in accordance to the evil committed.

Receptorum poenae

Quia receptatores non minùs delinquunt quam hi, qui sunt criminis obnocii in pari causa habendos bene uerum legibus sanctio est; plaquit itaque utqui sciens hominem facinorosum dolo malo etiam cognatum, uel affinem receptauerit, claeauerit, quoue alio modo iuuerit in ea causa sit, ac si lege, qua de tali delicto lata (....) est reus fuerit, Qui uerò delinquentem prendere potuerit et pecuniae, seù gratia ductus non appraehendit pro receptatore habeatur, his tamen casibus honestiori loco nati extra insulas nostrae dictionis decem annis cum infamia perpetua relegentur

The punishments of those who receive stolen goods.

As those who receive stolen goods are in no lesser fault than those who are guilty of infringing the law, the same punishment must be applied in similar cases in according to the terms of the law. Hence he who knowingly takes up, hides or helps a criminal - even if he is an acquaintance or relative - is guilty of the same crime and should be presecuted under the same law that considers such crimes. He who could have caught a criminal but on account of money or favours did not seize him, should also fall under this category. In the case of one born in the upper classes he should be banned from the islands under our jurisdiction for a term of 10 years and be under perpetual infamy.

Reus publici(s) criminis non est remittendus fideiussoribus

Qui ex legibus publicorum iudiciorum in ius uocatus est ex quibus Euro mors, aut exilium aut in corpus aliqua coercio, aut relegatio poena est ut membri mutilatio, fustigatio, uel quid simile quamius adsit, qui ius eeius sistendi fiat, partesque eius defendat priùs tamen nulla fide iussione, nullaue cautione dimittendus est, quam innocenti Rei legittimis purgetur argumentis

Those who are accused of public crimes should not be freed on pledge.

He who in the legal procedure is brought to court in view of laws concerning death, exile, bodily punishments, banishment, mutilation of the organs, flogging or whatever else is contemplated by way of punishment, should maintain his civil rights and defend his case. But he may not be released on bail or pledge until his innocence from the accusation is cleared by legitimate proofs.

Serui arma non ferant

Seruus, qui extra Domini comitatum pubes cum telo aut armis in publico fuerit depraehensus praeter usum prolixioris itineris, uenationis, aut nauigationis cum Domino, rerumque dominicarum gratia, terad malam mansionem extensus, quam strappatam uulgò uocant, seuera animaduersione castigari iubemus, qui rursus depraehensus, ad remos annis tribùs damnetur semper praefecto Ciuitatis armis uendiicandis

Slaves should not carry arms.

An adult slave who is not accompanied by his master and is caught in public carrying a gun or a weapon except for travelling, hunting or sailing purposes along with his master or for his master's needs, shall be chastisied with strict

punishment, he should namely be stretched three times on the torture bench, the *strappata*, as it is commonly known. If caught for a second time he shall be condemned for a three year service in the galleys. In both cases the weapons shall be confiscated by the Prefect of the Civic Community.

De his, qui telo feriunt, uel telo cuipiam minantur

Qui telum in alium strinxerit, nisi tutandae suae salutis gratia, et eo percusserit, uel alias quem uerberauerit uncias quatuor fisco inferat, alteram insùper Praefecto Ciuitatis, eiusque apparitoribus enumeret, nisi uulneris atrocitas seueriorem exsecutionem suaserit, quae publicam habeat animaduersionem saluis semper suis parti laese actionibus, telum hic accipimus quicquid est quò homines singuli nocere possunt uerberare etiam dicitur, qui pugnis alium ceciderit, qui uerò gladium tantum strinxerit in publico nec percusserit unciam unam fisco, unciae dimidium Praefecto Ciutatis eiusque Officiariis protinùs

Concerning those who strike with a gun or threaten someone with a gun.

Except in the case of defending one's health he who has fired a shot against another and wounded him with the gun shall pay the Treasury four *oncie* and another *oncia* to the Prefect of the civic community and the servants of the Court - unless the seriousness of the wound does not allow for a stricter fine - saving that of the injured party - which should be given public attention and persual. By a missile we mean that whereby damage could be inflicted to individuals. With a blow we mean that when someone has knocked down another with a knock of the fist. However, he who in public has drawn the sword only and did not wound anybody, should pay the Treasury and half an *oncia* to the Prefect and the officials.

Capitaneo Ciutatis Melitensis Omnibus officialibus

Placuit Illustrissimo ac Reuerendissimo Domino d(ic)ti Ordinis, et Melitiae Hierosolimitane Magistro utsuspectae constitutiones per Uos subditis, et Uassallis nostris omnibus solemni forma, ac solito modo promulgentur, ut Uniuersis prescripto earum manifestiùs cognito inhibita declinent, benè ualete. Datum in Ciuitate Melitensi tertio die septembris MD.xxxiii.

To the Captain of the Maltese Civic Community and to all the public officials.

The most illustrious and reverend gentlemen and the Master of the Order of Malta and Jerusalem would like that these decrees be promolgated through

you in a solemn form and in the usual manner to our subjects and vassals, so that they may know what is prescribed and avoid that which is forbidden.

Live well.

Given in the Civic Community of Malta, on the 3rd day of September, 1533.

De mandato Illustrissimi eiusdem ac Reverendissemi Domini Magni Magistri, Quintinius Auditore

Die tertio septembris vii indicationis 1533 fuerunt sup(radi)ctae constitutiones, et ordinationes promulgatae in locis publicis, debitis, et consuetis Ciuititatis Melitensi per Siluium Spataro secretarium(?) de mandato Illustrissimi, et Reverendissemi Domini Magni Magistri stantibus meis Officialibus pro Tripunali Hieronymus Cumbus!

(Drawn up) by the mandate of the most illustrious and reverend gentleman and Grandmaster to the auditor Quintinius.

On the 3rd day of September, on the 7th indication 1533 the above mentioned Constitutions were promolgated and the Statutes published in the prescribed usual places in the Civic Community of Malta. (Made) by the secretary, Silvius Spataro on the order of the most illustrious and reverend gentleman and Grandmaster, in the presence of my officials at the Palace of Justice. Jerome Cumbus.

(Notorial credentials - by another hand - for the present copy of the *Pragmatichi* of the Prince Grandmaster Lascaris at the end of the text of the Laws, p.161 of the handwritten pagination Folio 97r of the stamped pages.)

(Ex uolumine Pragmaticarum Magistralium publicatarum de anno 1640 regnante Serenissimo Domino fratre Johanne Paulo Lascaris Castellar in Curia Capitaneali (?) Notabilis Ciuitatis et Insulae Melitae extracta est praesens Copia per me Notarium Saluatorem Chetcuti Curiae praedictae(?) magistrum Notarium collatione facta (signature of the notary).

BIBLIOGRAPHY

Capitula Rodi around 1310. Published by P. Ewald. "Eine Reise nach Spanien". *Neues Archiv der Gesellschaft für ältere Deutsche Geschichte.* Hannover, 1881. *p. 265 - 270.*

Manuscript. Biblioteca del Monasterio de San Lorenzo El Real El Escorial (Madrid). Signature number: II, 7. 172 - 17

"Codice di Lascari" . Pragmatichi Publicati in Insula l'anno 1640 per Comando del Ser(enissi)mo Principe Fra Giovanni Paulo Lascaris Castellar. Manuscript. National Library, Valletta. Signature number: L 148.

"Codice di Manoel". Leggi e Costituzioni Prammaticali. Rinuovate, riformate, ed ampliate dal Serenissimo, ed Ementissimo Signor Fra D. Antonio Manoel de Vilhena de Conti di Villaflor: Gran Maestro della Sacra Religione Gerosolimitana, e dell'Ordine Militare del S. Sepolcro, Prencipe di Malta, e Gozo, & c: Colle Pandette, ed Indice de Titoli, e delle Materie. Malta, 1725.

"Codice di Rohan". Del dritto municipale di Malta nuova compilazione con diverse altre costituzioni. Malta, 1784.

"Codice di Verdala" . 1593. Manuscript National Library, Valletta. Signature number: L 704, p. 96-150 (handwritten pagination).

Colin, Clair. *The spread of printing. Eastern hemisphere: Malta*. Amsterdam/London/New York, 1969.

"Constitutions of Melfi" , 1231. Published and translated by H. Conrad, T. von der Liech-Buyken and W. Wagner. Die Kodifikationen Friedrichs II. von Hohenstaufen für sein Königreich Sizilien . Köln, 1973.

"Constitutions of Miravet" , 1319. Published by G. Sanchez. *Constituciones Baiulie Mirabeti* . Madrid 1915.

Dahm, G. *Das Strafrecht Italiens im ausgehenden Mittelalter. Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, namentlich im XIV. Jahrhundert* Berlin/Leipzig, *1931.*

De DONO, P. *Sommario della Soria della legislazione in Malta.* Malta, 1897

Haft, F. *Strukturdenken . München, 1985.*

"Heitersheimer Herrschaftsordnung" , 1620. Manuscript. Generallandesarchiv zu Karlsruhe. Signature number: G.L.A. 89 No. 57.

His, R. *Das Strafrecht des deutschen Mittelalters* , 2. Bde. Leipzig, 1920; Weimar 1935.

Jung, H. "Compensation order. Ein Modell der Schadenswiedergutmachung." *Zeitschrift für die gesamte Strafrechtswissenschaft* , *1987.* p.497-535.

Das Kubanische Strafgesetzbuch vom 1. März 1979 (Gesetz Nr. 21) . Translated by H. M. Semon. Berlin/New York, 1983.

Kuhn, A. and D. Rössner "Konstruktive Tatverarbeitung im Jugendstrafrecht: Handschlag statt Urteil ". *Zeitschrift für Rechtspolitik* , 1987. p.267-270.

[Michaleff, A.] *Dritto municipale di Malta compilato sotto de Rohan G. M. or nuovamente corredato di Annotazioni* . 2 Vol. Malta, 1843.

Pace, J. R. *The position and general organisation of the legal profession in the Maltese Islands throughout the domination of the Knights of St. John and up to the third decade of British Rule* . Malta, Diss. jur. 1961.

Pragmaticae Rhodiae F. Emerici Damboyse magni magistri sacrae religionis Hierosolymitanae. 1509, Manuscript National Library, Valletta. Signature number: L 153

"Statuti e Ordinamenti", 1533. Manuscipt. National Library Valletta. Signature number: L 148 (part of "*Codice di Lascari*" , p. 22-28 (handwritten pagination).

Urteil des Oberlandesgerichts Köln, StS, vom 14.10.1947, Az.: Ss 81/47. *Neue Juristische Wochenschrift , 1947/48, p. 70 f.*

Viviani, L. *Storia di Malta* , Vol. I. Roma, 1934.

Waldstein-Wartenberg, B. *Rechtsgeschichte des Malteser-Ordens* . Wien/München, 1969.

Dr. Wolf-Dieter Barz born in 1953 in Siegburg (Northrhine - Westphalia) was brought up in Germany and Denmark.
Between 1973-1980 he studied Law in Münster (Westphalia), another six months in Malta and later on scientific librarianship in Hesse (1982-1984). He had several commitments in the libraries of Hesse (1985-1986). From 1986 he is a scientific Law librarian at the Federal Costitutional Court of Germany in Karlsruhe (Baden-Würtenberg). In 1988 he proceeded to a Doctor's degree by a legal historical thesis about the Order of St. John in Rhodes and in Malta.
He has other publications about library matters, Law and Military History regarding the Order of St. John as well as translations from English to German.

TAX HAVENS AND HOW THEY WORK

PROFESSOR BARRY SPITZ

"DOIN' RIGHT"

It's a wellknown fact that people who squawk about their taxes may be divided into two classes. They are: men and women.

Over a span of three generations the Schmidt family had built up a mighty cosmetics empire and still managed to keep the stock tightly in the family's hands. The Schmidts had only one problem: none of them could afford to die. German inheritance tax would have forced a sale of stock worth more than many national budgets. An answer had to be found.

First I moved the Schmidts physically to tax havens -- Elke and her children to the Mediterranean, Walter and his family to the Caribbean, and Andrea who was a living advertisement for seventy years of using the family beauty products went to England, the best tax haven of them all. Then we moved the technology offshore. Not to Liechtenstein where the rights might not have been recognized in other countries, but to the Bahamas where a token factory could be set up. Finally we dealt with the children's and grandchildren's future tax problems through offshore trusts in Jersey. Now everyone could afford to die, but they still decided not to.

As it has been so elegantly phrased by the American Judge Learned Hand, "There is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right."

And so: welcome to the tax haven -- everyone's natural place of shelter from the blast of onshore taxation.

WHAT'S A TAX HAVEN?

It's a place where you pay no tax at all or much less tax than you would pay somewhere else. So nearly any country can be your tax haven. I have clients living more than ten months of the year in high-tax countries where they are legally designated as non-residents for tax purposes; others who are deemed residents in havens of convenience and who barely spend more than a couple of days there from time to time. Sometimes one spouse is a resident and the other not; though technically *separated* they manage to live together happily ever after.

An old adage proclaims that "the law is an ass". If so, tax law is an even bigger ass. With so much confusion, such inconsistencies, so many exceptions and special rules, it's no wonder that nearly anyone who knows the game well can turn the world into his tax haven. And most players don't even need to move and inch to do so.

We were setting up a Bermuda captive insurance company for a group of US heart surgeons to protect them against professional negligence suits, when one of them received a call giving him the exciting opportunity of putting through a sale in Florence of a master painting to a Japanese collector. If he had so done in his own name he'd have been subject to full US tax, but an

offshore company taking offshore commissions isn't liable to tax at all. Half of our work was involved in setting up the deal; the other half was to make sure that he wasn't personally liable to tax in the US on the profits of his offshore company (which was what the Americans unaffectionately call a controlled foreign corporation) and that he could repatriate the bulk of the profits to the US. By structuring the commission so that it was in the right class of income and that the money he wanted back in the US came through a loan against the stock of the offshore company, the surgeon got his heart's delight.

The number of tax havens and the variety of types of tax havens and offshore situations are multiplying all the time. This is a fascinating and proliferating species. The term "offshore" was used originally to refer to the tax havens off the shores of the United Kingdom and the United States and by extension to any company or trust located in a tax haven or a country where tax can be kept low.

The classical tax havens generally have a common denominator of: no taxes on income and capital, bank and commercial secrecy, no exchange controls -- at least for offshore, an active banking sector, good communications, an appearance of political and economic stability, a favourable disposition towards foreign capital, and adequate professional advisers. The best havens of this type are the Bahamas, Bermuda and the Cayman Islands.

But because the tax haven business generates such big revenue, many other little countries, like the Channel Islands, Liechtenstein and the Netherlands Antilles, have staked claims to the tax haven industry by offering special tax incentives and privileges. And you can add to these again half of the islands in the Caribbean and a good representation of tropical paradises from the South Pacific and the Indian Ocean.

There's such a lot of offshore business around! So it's not particularly surprising that the major countries don't want to waste it all on the palm-tree economies, and are making a strong bid for their share of the action. Many of them offer very tempting packages. Like the British government giving Delorean some £80 million to set up his gull-wing car factory in Northern Ireland. If there's one thing better than paying no tax, it's paying negative tax: the government actually pays you. You only need to look at the fabulous tax deal you can get by putting your shipping operations in the US where the combination of credits and funds can give you below zero tax. The US has beaten Panama and Liberia at their own game.

There are probably as many tax haven possibilities as there are countries. High in the tax havens league you will find some very improbable candidates, like the United States, the United Kingdom, the Netherlands, Singapore, Switzerland. Their offshore products have unusual features, and they prefer to style themselves *finance centres* rather than tax havens. Though a rose by any other name...

IT'S GOOD TO BE A STAR

Bjorn Borg and Anthony Burgess weren't the first, and Boris Becker and Ringo Starr won't be the last. Monaco is full of musical, literary and sporting stars -- many of them earning very big bucks. And so are the other residential havens.

But it's not always good enough to put yourself in a country with no personal tax if the bulk of your earnings come from high tax countries.

François de Villiers didn't like paying Canadian tax on the profits from his recordings. So he moved his home to London and put his royalties in a Dutch company. The Dutch agreed to take a turn of barely 2% tax in exchange for letting him use their tax treaties. In this way his company pays no withholding taxes in the US, the UK, Germany, France or some 40 other countries. He pays the Dutch a bit of tax on the spread, and then moves the money straight out of Amsterdam to his account in Switzerland. Though he lives in London, he has no UK tax problems because of a quirk in the law. As long as he has at the back his mind the intention to go back to Canada someday, he's not considered *domiciled* in the UK, even if he lives there 365 days in the year. On this basis he doesn't pay any UK tax on his foreign income kept abroad.

François may have decided to emigrate, but a lot of stars don't. They just stay right where they are and treat their own countries like tax havens, often by turning their income into a capital appreciation in their own companies. This technique can work so well that companies have even been floated on the London Stock Exchange based on book earnings generated from the performances of their stars. Masters of this game were Tom Jones and the Beatles. And who could ask for better?

A lot of stars use an offshore company to employ them. The company makes the profits and pays them a salary spread over the years. But this ploy doesn't always work. Take what happened to Ingemar Johannson, the Swedish prize fighter. He had incorporated a Swiss company of which he was the sole employee and source of revenue; he was entitled to receive 70 percent of the company's gross income plus a pension fund. He then fought in the United States for the heavyweight boxing championship of the world, and was hit for taxes by the IRS. He claimed tax exemption under the Swiss-US Tax Treaty on the grounds that he and the company were really Swiss residents. That was one fight he well and truly lost. But for every loser there are a lot of winners.

WHAT DO THE TAX HAVENS OFFER?

The principal products stocked by the tax haven supermarkets are companies and trusts. Offshore companies usually hold investments and may get involved in trading. Offshore trusts protect the ownership of assets and frequently of the companies themselves. The true holders are usually individuals residing in high tax countries.

Offshore companies and trusts hold every imaginable kind of assets: real estate, art collections, jewellery, stocks and bonds, insurance policies, contingent claims, in fact anything at all.

Nor is offshore only for the very wealthy and the multinationals. Depending on what you want and which haven you use, an offshore company and trust don't need to cost all that much. A few thousand dollars initial outlay can usually take care of both.

OFFSHORE TRUSTS

The wonder product is the offshore trust.

The way the trust works is for the settlor to transfer assets to trustees who control the fund. This means that the trustees decide on the way in which the trust assets are invested and also on how the trust assets should be made available to the beneficiaries.

Carlos Davant hadn't come to the Caymans for a tan. He could get that at home. He came for an offshore trust and nearly took the first plane out when he learnt that he not only had to give his assets to the trust but that he also had to give some discretionary powers to the Cayman trustees. Carlos had made his fortune through property -- the true Eldorado of the investment world -- and he was absolutely clear in his mind that he wanted to have the benefits of a discretionary trust but still remain firmly in the driver's seat. Eventually, he relaxed when we explained to him that he only had to tell the trustees what he wanted and they would do just that. So he wrote the trustees a little letter of wishes asking them to follow all his instructions during his lifetime. He went away happy in the knowledge that he could modify his instructions whenever he wanted.

And we could then attend to the serious business of getting him an Irish passport and a Swiss residence permit. Carlos was especially happy to learn that many good residence possibilities and even second passports are available to those who know the law and procedure.

There are of course different sorts of trusts, and it's perfectly possible to have a settlement where all the income is paid as of right to the settlor and the trustees also have the power to give him the capital. Equally it is possible to have trusts where the settlor has no rights at all to any income and no rights at all to the capital. This is a very useful sort of trust for anyone planning to emigrate to the US.

Since its earliest origins in Medieval England the trust has been used to get around inconvenient rules of law. In those days when a knight died and left his property to his minor son, the lord of the manor would be entitled to use the heir's land for his own benefit until the youngster turned 21. The knights found an answer to this problem, and so: Enter the trust! On his deathbed wily Sir Edgar would convey the land to his friend, Sir Robert, to hold *to the use* of his son, Ethelred. In this way Ethelred would not become the legal owner, and the lord would be deprived of his feudal rights. Of course, Sir Edgar had to have confidence that Sir Robert would hand over the land when Ethelred turned 21. The point is that the trust lets one person be the legal owner and another the equitable owner.

This old-fashioned bit of tax avoidance worked so effectively that by the end of the last century the trust was well and truly in position to fulfil its prime vocation of income tax and estate tax avoidance. It has steadily maintained its place as the favoured tax game of the rich.

Inevitably, the trust became a target of British and American anti-avoidance measures. But since the moves to restrict the free operation of tax avoidance games were domestic, the wealthy had an easy riposte. They duly set up their trusts offshore: in the Channel Islands, Bermuda and the Carribean

islands where the British Empire had carried the English law of trusts but not the British tax system. It was a long time before the high tax countries counterattacked offshore.

For the most part, it's the Anglo-Saxons that have the monopoly of the offshore trust business. But there's one contender which has done extraordinarily well with its own inventivity and marketing skills. That's of course Liechtenstein.

The most common and best known of the Liechtenstein entities is the anstalt, an establishment which is very easy to set up and administer. Its particular interest lies in the feature that the supreme authority of an anstalt is the holder of the founder's rights. These founder's rights are evidenced by a certificate which is often transferred from one person to another in blank. If Joe Flaum holds this certificate he has the approximate equivalent of a bearer share certificate for all of the shares of a company. He can simply change the anstalt's directors and the beneficiaries at will.

OFFSHORE COMPANIES

No-one can count the number of tax haven companies. They are put there for a very good reason: an offshore company can be used for any purpose for which a company in a high tax country can be used, and it doesn't pay tax. The bulk of offshore companies simply collect income consisting of dividends, loan interest or patent royalties and licence fees. But many are also used for business purposes. Handled correctly, the offshore company plays a turntable role using tax-exempt income to make more tax-exempt income.

Apart from tax, an offshore company can be used for other purposes such as privacy and freedom from exchange control, or to protect assets against future developments in the home country. History has played strange tricks on some of the greatest fortunes ever amassed.

Though companies in most tax havens offer basic similarities, there are useful differences. For example, what information must be contained in the bylaws, can the true promoters and beneficial owners be kept entirely out of the picture? What are the costs of incorporation, and time involved and can it be accelerated? Are there limits on the powers of the company? Is there any limitation of liability? Can there be bearer shares, no par value shares, preference shares, redeemable shares, shares with special rights?

Lee Han lives in Singapore and holds his US shares through a Guernsey company. A company doesn't die and so there'll be no US estate tax ever paid on those shares -- and there'll be no US probate either. For the same reason Johann van Heerden bought his Marbella villa through a Cayman company and not in his own name.

OFFSHORE BANKING

A huge volume of international banking takes place offshore. Indeed it is extremely very easy for an individual or a company to open a bank account offshore, and even numbered accounts are not complicated.

In most countries one of the terms of the relationship between banker and

customer is that the banker will keep the customer's affairs secret. In tax havens this rule is sometimes widened and made a marketing feature, for instance the elaborate bank secrecy regulations in the Bahamas and the Cayman Islands. The funny side of these regulations is that they are so complicated that a lot of banks and trust companies require all clients to sign form waivers.

On the other hand, Switzerland, which has traditionally been the world's guardian of bank secrecy, is slowly moving towards greater openness. But this has been very good for banking business in Austria.

SOME OTHER TAX HAVEN SPECIALITIES

Other products on the shelves of the offshore supermarkets are: finance subsidiaries, captive banks, captive insurance companies, shipping and transhipment companies, licensing companies, headquarters companies, management services companies, manufacturing and export bases, and tax shelters.

Sven Thordsen thought he had found paradise on earth when he came to Costa Rica and invested the savings of his stockbroking career in a lobster farm on the Mexican Gulf. The Costa Ricans welcomed him as an immigré with a lifetime tax exemption and gave the same treatment to his lobsters. They all prospered, and Sven built up a crustacean empire to the gastronomic delight of Northern Europe and Japan. Soon he diversified and moved into the multinational game. The structure of his group began to look like a scrabble board of companies and operations. Like all multinationals, he needed a finance subsidiary and I put this in the Cayman Islands, only one hour away. For the shipping and container company we looked at Panama which was near but we didn't feel secure with its politics; so we went for Liberia. Sven was specially pleased to be able to run the Liberian operations out of New York and not Liberia. For his headquarters company I chose Paris where the French gave him as good a tax deal as any tax haven could, as well as a classy address and image. International sales were handled through a number of tax haven branches of a Swiss company. Licensing flowed smoothly through a Dutch company taking advantage of the worldwide tax treaty network. The total tax bill on worldwide profits of the group came to under 4 percent.

With split salaries and payrolls, and by transplanting pension and stock option schemes, even the onshore executives and sales staff enjoyed offshore tax treatment.

Psst! Who was it again that said it was against the religion of multinationals to pay tax?

Prof. Barry Spitz is an international tax consultant on Offshore Financial Centers.

SMALL CLAIMS ADJUDICATION: AN ALTERNATIVE MODE OF DISPUTE RESOLUTION

DR. PAUL E. MICALLEF

THE EXISTING SITUATION IN MALTA

A complaint often aired about litigation in Malta, is that cases involving small contested amounts prolong out of proportion, both to the importance of the issues and to the amounts involved. It is after all ridiculous to have a case involving a hundred Maltese Liri take over a year to be concluded. Ideally such a case should not take more than one to two sittings to be decided. Unfortunately reality dictates otherwise, and small claims can take years to be disposed of under the existing procedure. The blame for this state of affairs should not be laid exclusively upon the present system of court procedure. A multitude of factors have throughf the years contributed negatively to the present quandary.

Until a few years ago, the situation if anything was even worse. Then all claims exceeding fifty Maltese Liri fell within the competence of the Superior Courts. The result was that these claims were dealt with under a procedure ill-suited to dispose expeditiously of such petty litigation. This unsalutary situation was somewhat rectified following an increase in the civil competence of the Inferior Courts. The competence of the Inferior Court was increased to include claims of up to two hundred and fifty Maltese Liri. This measure had two positive results, first it alleviated the existing backlog of pending litigation before the Superior Courts, and second the more expeditious procedure which characterizes contested cases before the Inferior Courts was now applicable to a wider section of litigation.

Article 215 of the Code of Organization and Civil Procedure provides that the Inferior Court is to: "...proceed summarily and with the upmost despatch consistent with the due administration of justice...". At first glance this article seems to provide for a rapid disposal of civil litigation by the Inferior Courts. However the Law itself fails to elaborate further. Though the Law does use the term "summarily", the true import of this term is undefined, and hence open to conflicting interpretations.

Admittedly the situation has improved following the increase in the civil competence of the Inferior Courts. This however does not mean that the existing situation is beyond reproach. Civil cases can still take a considerable amount of time to be concluded. The Inferior Courts are, despite article 215, saddled with practically the same procedure used before the Superior Courts. The inordinate number of pending cases coupled with the litigious nature of the Maltese does not help to alleviate the situation. The mode of dealing with civil cases before the Inferior Courts remains essentially identical to that before the Superior Courts. The system of adjourning the case from one month to another (and occasionally even longer intervals), rather than in one continuous session applies also before the Inferior Courts. This despite the fact that article 195 (4) clearly states that a case may be adjourned only in exceptional circumstances, with the added precondition that the court must be satisfied that such

'exceptional circumstances' do exist and warrant an adjournment of the case.

The Magistrate when dealing with a contested suit, normally has two options open before him, either to hear all evidence directly or else nominate a legal or technical referee (or both) to hear all the evidence and present a report to the Court. Whatever method is utilized for hearing the evidence, the case is destined to take a long time. Even if the presiding Magistrate does decide to hear all the evidence himself, the case after the first hearing, in all probability, will be adjourned to another date. The problem is that the Court is itself hard-pressed to allocate sufficient time to be able to hear all the evidence. The end-result is that even a relatively straight-forward contested case can take months to be decided. This situation is not unique to the Maltese Civil Justice system, and other systems are faced with similar problems. What is however lacking under Maltese Law is a mode of adjudication to deal expressly with such small claims.

THE INTRODUCTION OF SMALL CLAIMS IN OTHER COUNTRIES

Many countries faced with prolonged delay in contested litigation have, in recent years been actively examining the feasibility of introducing a simplified system of court proceedings to deal with small claims. Scotland, for example in 1988 decided to impliment such a system of procedure in the Sheriff Court, the Scottish counter-part to the Inferior Courts of Civil Competence in Malta, having initially successfully tested the system on a voluntary basis in the Dundee jurisdiction. Similarly in some of the Canadian provinces such as British Columbia and Ontario there exists an efficient system of Small Claims Courts, where the litigant can present his own case simply and effectively.

The use of such procedure has not been limited to countries influenced by the Anglo-Saxon legal tradition. The Dutch parliament is currently considering a simplification of the existing procedure before the 'Kantonrechter' (the Dutch equivalent to an inferior court of civil jurisdiction) in an effort to eliminate expense and waste of precious judicial time, facilitating a rapid disposal of small claims. Similarly the procedure used before the Amtsgericht in the Federal Republic of Germany in relation to such claims is moulded in such a manner as to allow the litigant to defend his case whilst minimizing the undue prolongation of court proceedings.

In England this procedure has already proven its worth, to such an extent that the Review Body on Civil Justice in its report to the Lord Chancellor recommended that the competence of the tribunals administering the 'Small Claims Arbitration' scheme be increased from £500 to £1000. Following the recent recommendations made by the RBCJ, it would appear that more innovations will be implimented in the present system of 'Small Claims Arbitration' in England and Wales.

The English Court administrators must be considered as being among the most successful in having implimented a relatively novel system of adjudication which initially was viewed with considerable sceptism.

Until some years ago the English Courts were confronted with a situation where cases involving relatively small amounts could drag indefinitively.

involving legal and court expenses which were often disapportionate to the contested amounts. There was considerable public disillusion with the existing court mechanism. As a result many potential litigants were deterred by the prospect of proceeding before the competent Court for a redress of their rights, however well-founded were their claims. Serious doubts were raised as to the fairness of the then existing system of adjudication in relation to small claims, a system which was supposed to provide an easy access to Justice.

The English legislator confronted with this situation started to consider seriously the feasibility of introducing a mode of court adjudication tailor made to deal purposely with small claims. Eventually in 1973 a scheme was introduced on a voluntary basis to deal with small claims. This scheme was built upon existing statutory power whereby a County Court Judge could refer such claims to arbitration provided the litigants approved of such a measure. This explains why the English legislator included the term 'Arbitration' in the nomenclature 'Small Claims Arbitration'. Later this mode of adjudication became automatically applicable for most disputed claims under five hundred sterling. In reality the continued inclusion of the term 'Arbitration' is today somewhat of a misnomer, once most contested cases under £500 are dealt with under this scheme.

THE RAISON D'ETRE OF 'SMALL CLAIMS PROCEDURE'

The raison d'etre behind small claims procedure is to avail the litigant of a procedural system which is cheap, simple to comprehend, speedy, informal and efficient. Obviously it is impossible to have a flawless procedural system and undoubtedly small claims procedure, like any other procedural system does have its shortcomings. These however must be evaluated in the light of the basic premise that the Courts of Justice are there to provide an important, indeed vital service to the country, that of administering justice, a fact which some unfortunately seem to forget. It was precisely with this in mind that small claims procedure has been introduced in various countries.

One of the principle characteristics of small claims procedure in England is the relative cheapness of the system. Previously an obstacle for most litigants was the prohibitive expense of going to court over disputed small claims. One of the factors which does contribute towards a substantial diminution of expenses is that the litigant can, if he so desires, defend his own case without having to incur the expenses of the services of a soliciter. This however begs the question, as to whether the unassisted litigant is then at a disadvantage with regard to the other legally assisted litigant. This apparent inbalance has been overcome by two measures. First the winning litigant is in most cases not entitled to recover from the other side the expenses paid for legal assistance. This obviously encourages potential litigants to defend their own cases. Second, the adjudicator, normally the District Registrar in the case of the English County Courts, plays an 'interventionist' role in the course of the hearing.

The District Registrar assumes a role similar to his counterparts on the Continent, asking questions directly to the litigants, dispensing if necessary with the formal rules of evidence and procedure.

The District Registrar is duty bound to ensure that the unassisted litigant is not at a disadvantage, and is able to present his case adequately. One of the cardinal points raised by Review Body on Civil Justice was the need for a set of self-contained norms emphasising the role of the adjudicator, in particular his power to dispense with the formal rules of evidence and assume the questioning of the parties and their witnesses, if he considers that the circumstances of the case do so require. One criticism levelled by the RBCJ was in fact that the 'District Registrars' were not uniform in administering justice under this system and some were rarely intervening to direct the questioning.

The necessity that the adjudicator assumes an active role during the conduct of a hearing is also a salient feature of small claims proceedings under Scottish Law. Scotland like England and other Anglo-Saxon countries has traditionally always adhered to an adversarial system of court procedure and hence the requirment that the court assumes an active or 'interventionist' role is somewhat of a novelty. This notwithstanding the very structure of small claims implicitly necessitates an active role by the adjudicator, otherwise the system then will not be fulfilling its proper purpose. It is precisely this consideration which has motivated both the RBCJ and the Scottish Court Administrators to emphasise the interventionist role of the District Registrar and Sheriff respectively.

A PLACE FOR 'SMALL CLAIMS PROCEDURE' IN MALTESE LAW?

Is there any need for small claims procedure within the ambit of Maltese Civil Justice?

Considering that other countries have already successfully implimented this system there is no reason why some form of small claims tribunal should not also be introduced in Malta. There are various issues to be considered before this system can be truly integrated as part of Maltese Civil Justice. One probable consideration, would be whether these proceedings should be handled by the Magistrates' Court in addition to the existing cases of civil competence currently dealt with by this Court, or alternatively should a court officer distinct from the Magistrates be created to deal expressly with small claims? If the Magistrates' Court is to be conferred with the function of deciding such claims, then ideally a magistrate or magistrates should be expressly appointed to deal exclusively with this type of litigation to the exclusion of other judicial responsibilities. The aforesaid judicial officer would hence acquire a certain expertise in dealing with this sort of litigation, moreso since the procedure to be applied would in certain respects be dissimilar from that employed in ordinary civil litigation.

Additionally there is the remote danger that if small claims proceedings were to be integrated with the existing system, these would gradually follow the same procedural fate currently reserved for pending civil litigation.

If on the other hand an entirely new 'class' of court officers were to be trained to deal expressly with this type of litigation then such a system would have a much better chance of succeeding, if only because there would be a

specialized group of individuals to supervise over the proper adjudication of such claims.

Another important issue is whether the litigant should be allowed to defend his own case. Many seem to forget that under Maltese Law the litigant in Commercial cases can sign the written pleadings himself and technically can even defend himself with the court's consent (vide articles 178, 204 and 205 COCP). There should not after all really be any difficulties in extending this norm to a category of litigation which involves relatively small disputed amounts of money. The litigant must however always have the faculty to engage a lawyer if he so deems fit, a rule which has been retained even in those systems which in implimentating 'small claims procedure' have been moulded in such a manner as to encourage the litigant to defend himself.

The obstacles are of course manifold, some apparently insurmontable. The success of the system depends on how this will be implimented. It is imperative that an efficient advisory bureau is created to assist all those who decide to commence litigation under this system. In Scotland considerable effort was made in assisting the litigants, not only by providing detailed but simple manuals but also by providing an advisory service in conjunction with the various consumer socities. Ideally this system should first be experimented on a voluntary basis during an initial period of trial. This will give the competent authorities the opportunity of evaluating the feasibility of introducing such a system. If implimented correctly this system can provide the country with an inexpensive and yet efficient mode of adjudication and at the same time ease some of the pressure on the existing edifice of Civil Justice.

REFERENCES:

Capalletti M. & Garth B. : "Access to Justice" Vol. II (1978);
Civil Justice Review: "A Report of the Review Body on Civil Justice" (1988)
Ervine W.C.E. : "Small Claims: Recent Developments in Scotland" (1986)
Scottish Courts Administration: "A Guide to Small Claims in the Sheriff Court" (1988).
Ministry of the Attorney General - British Columbia "Your Small Claim Court Trial" (1988)

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IMMATURITY AND THE JURIDICAL ABILITY TO CONTRACT MARRIAGE IN TERMS OF CANON 1095 OF THE CODE OF CANON LAW

REV. JOSEPH BAJADA

By far the most common grounds that are brought forward in Ecclesiastical Tribunals nowadays to prove the nullity of a marriage are those of lack of due discretion and inability to assume and fulfil marital obligations [1]. Often enough, the motive to sustain such a claim is that either or both parties were not sufficiently mature to contract marriage at the time of their wedding.

But what exactly are the canonical implications of this? What amount of maturity does canonical jurisprudence require of a person to be considered capable of contracting a valid marriage?

The following is a reproduction of The Law Section in a recent Decision of the First Instance Ecclesiastical Tribunal, before Fr. Joseph Bajada, Judge and Relator. The Nullity of the marriage in case was alleged on the grounds of lack of sufficient discretion of judgement and / or inability to assume marital obligations because of immaturity in one of the parties.

THE LAW

3. In line with c. 1055 ‡ 1, marriage can be described as a "covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children". This covenant and partnership has been raised "to the dignity of a sacrament" between the baptised [2] and has as its essential properties unity and indissolubility [3]. In other words, marriage can be described as a partnership between a man and a woman which is exclusive, indissoluble, and sacramental. The goals of this partnership are the well-being of the parties and the procreation and upbringing of children.

4. According to c. 1057 ‡ 1, "a marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power". Consent then is the efficient cause of marriage; it is consent which brings a marriage into being; if that consent is lacking or if it is in some way gravely defective, then there is something radically defective about the marriage contracted. The Code supplies a definition of consent in c. 1057 ‡ 2: "Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage".

5. While this definition, which has its roots firmly fixed in scholastic philosophy and theology, distinguishes between the various functions of the human psyche, e.g. intellect and will, it must be stressed that in reality the human psyche cannot be divided up into little pieces. On the contrary is acts as a unit. Thus canonists have stressed that consent is not simply and solely an act of the will. Says L. ORSY: "everything in a human psyche contributes to it in varying degrees" [4].

Indeed, it was St. THOMAS himself who taught that man "differs from

non-intelligent creatures in this, that he is the master of what he does ... Now he is master through his mind and will, which is why his free decision is referred to as an ability of reason and will. Therefore those acts alone are properly called human which are of his own deliberate willing'' [5].

Jurisprudence, in turn, has stressed that such distinctions between intellect and will are not actual divisions: "Actus itaque liber minime habendus est ut constans duobus actibus independentibus ac perfectis, intellectus scilicet et voluntatis ... Prior est unitas. Haec unitas in agendo fundatur in unitate subiecti, in quo utraque facultas radicatur et exprimit mutuam obiectorum formalium implicationem atque identitatem realem. Quidquid ergo, funditus vel graviter laedit hanc mutuam obiectorum formalium implicationem atque identitatem realem, quidquid funditus vel graviter laedit hanc mutuam causalitatem intellectus et voluntatis in deliberatione de tali matrimonio contrahendo et in volitione elicienda, consensum matrimonialem irritat'' [6]. For this reason when investigating the alleged nullity of marriage because of a defect of consent, one cannot simply focus on problems associated with the will. On the contrary, all the aspects of the person's personality and experience must be examined, as far as possible and this to consider how any aspect of it may have adversely affected the act of consent.

6. According to c. 1095, "the following are incapable of contracting marriage: 1. those who lack sufficient use of reason; 2. those who suffer from a grave lack of discretion of judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted; 3. those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage."

The second and third of the grounds in the canon, are the ones which are relevant to this particular case, namely lack of discretion of judgement and inability to assume the marital obligations.

A. LACK OF REQUIRED DISCRETION OF JUDGEMENT

7. "In brief, 'discretion' means 'maturity' and 'judgement' means 'decision'. In other words, 'discretion of judgement' means a 'mature decision' which presupposes the presence of adequate knowledge about all the essential elements which constitute marriage including the very persons of the contractants, and internal freedom to deliberate and choose marriage without any interference. Rotal Jurisprudence has isolated some of the elements of this 'decision', that is marriage consent.

The first element is "adequate knowledge" of the subjects and of the object of matrimonial consent. This knowledge should be not merely speculative or abstract, but appreciative (evaluative) as well.

The second element is the ability for critical reflection which consists in putting judgements together in order to arrive at a new judgement or decision.

The third element is internal freedom not only for critical reflection but also for making the final decision (election) concerning the object'' [7].

We read in a decision before SABATTANI: "Unica mensura sufficientis consensus est discretio iudicii matrimonio proportionata. Quando deficit

huiusmodi maturitas iudicii sufficiens ad matrimonium intelligendum vel eliciendum, sive id proveniat ex habituali alienatione animi, sive ex exturbatione transeunti, sive ex psichica debilitate, habetur amentia in sensu contractuali... nec sufficit facultas cognoscitiva, quae sistit in apprehensione simplici veri, sed requiritur facultas critica, quae est vis iudicandi et ratiocinandi, et iudicia una componendi ut novum iudicium inde logice deducatur (cfr. SRR c. Felici, diei 3*12*57; c. Lamas, diei 21*10*59). Matrimonium tunc tantum valet, quando per hanc criticam facultatem homo potuit deliberationes efformare et libere voluntatis excitare actus" [8].

8. According to the Code of Canon Law, a grave lack of discretion of judgement concerning the essential matrimonial rights and obligations renders a person incapable of marriage and thereby renders any marriage contracted by such a person invalid.

This faculty is something which is possessed by the majority of human beings. It is not unreasonable to presume that this discretion of judgement, this critical, evaluative faculty is present in all persons who have attained a certain age. The basic reason behind this conclusion is that marriage is a natural state and all humans are presumed capable of contracting marriage unless the contrary has been proved.

"Sed lege ecclesiali haud requiritur immodicus quidem capacitatis psychicae gradus, quia ad valide contrahendum sufficit ut vir decimum sextum aetatis annum expleat, mulier vero decimum quartum item completum habeat (c. 1083 ‡ 1). Tunc enim praesumitur in contrahentibus sufficiens gradus discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda ... Qui igitur legitimam aetatem ad matrimonium attingit, sufficientem discretionem ad sese obligandum habere censetur ita ut in matrimonium valide consentire possit (c. 1058)" [9].

"Nullibi requiritur altissimum intelligentiae acumen, plenave psychologica aut affectiva maturitas nec perfecta obligationum coniugalium communionisve vitae intellectio" [10].

In other words, the law presumes that sufficient maturity of judgement to validly contract marriage is present in a fourteen year old girl. This means that a fourteen year old, who is as mature as a fourteen year old in her culture would be expected to be, and in that respect at least, has the capacity for marriage.

9. It must be concluded therefore that, although it does occur, a lack of discretion of judgement proportionate to marriage is something exceptional. It does happen occasionally that a person is not able to weigh up all that he or she knows about marriage, about his or her situation, about his or her partner in such a way that a valid consent to marriage is given. But allegations to the effect that "he wasn't mature enough for marriage" ... "she was too young" ... "only a child" ... "didn't know what he was doing" ... "hadn't a notion" ... "knew nothing", etc., are not enough to declare a marriage null. To declare a person as "immature" does not in itself permit one to draw any immediate conclusion as to the person's ability to consent to marriage. Just as in the case of other psychological disturbances, including those in which a diagnostic tag can be applied with certainty, each case must be judged on its own merits,

on the basis of the evidence presented in the Acts, and, on the evidence of the expert witnesses [11]. Phrases like those mentioned further up in this paragraph can easily be expressions of sympathy with the person whose marriage has failed, or in retrospect from the vantage of experience. However, the lay witness may not mean what a judicial mind might take it to mean. What is required is to identify a *cause*, some reason why he or she was not able to do what most other persons in that situation are able to do.

10. Precisely because of this, in cases of alleged nullity for reasons of *immaturity*, special attention is called for since this term "is an umbrella-term which covers many conditions, involving various degrees of seriousness, duration, and incapacitating consequences" [12]. It is clear therefore that such a term can mean almost anything. Yet it does have value in marriage nullity cases -- as the frequent references to it in ecclesiastical Jurisprudence clearly shows.

W.J. DEVLIN has described psychological or emotional immaturity as "meeting adult situations with infantile patterns of behaviour" [13]. "Immaturity can be seen, therefore, as a defect of personality or character development, the seriousness of which can vary according to the degree to which the balance between the various aspects of the person's psychic make-up is disturbed" [14].

11. In the just-quoted work, McAREAVEY indicated four sources of emotional immaturity [15] :

a. immaturity connected with adolescence, which is also referred to as "prematurity" or "immaturité dc passage" [16]. It is distinguished from an immaturity which is deeply rooted in the structure of the personality and is generally overcome with experience of life. This immaturity is of a transient nature and can be considered as a lack of experience of life rather than a radical personality or character defect. Youthful immaturity is not per se a bar to marriage.

b. immaturity found in adults. In these persons, immature character traits have endured into adulthood so that although they have reached chronological adulthood, they have not reached a corresponding degree of psychological maturity. Such persons are described as being "arrested in growth of character, intellect and emotions, ... characterised by weakness of will, vacillating opinion and convictions, infantile attitudes and viewpoints, and a lack of emotional control" [17].

c. immaturity as a sympton of personality disorder: in this case persons who suffer from a specific personality disorder manifest immature behaviour as a characteristic symptom. In this category, N. CAMERON also speaks of the *inadequate personality* [18].

The term "inadequate personality" includes those personalities whose response to the ordinary demands of life -- intellectual, emotional, social and physical -- are generally ineffectual. Such persons are "inept in life, show poor judgement continually, are usually improvident and lacking in a normal sense of responsibility" [19]. In spite of normal or above average intelligence,

the inadequate personality pursues immediate pleasure like a child, unable to postpone it in the interest of the reality principle. Cameron notes that for some reasons this personality is "unable to carry through a normal maturing process that would lead to a responsible adulthood" [20].

d. immaturity which emerges in the context of mental retardation [21]. The characteristic traits of this emotional immaturity are: an exaggerated fixation on parental images, the need of protection, lack of independence, the focusing of the person's interest on himself or on his own activities, and an egoism which is expressed in touchiness, vanity and stubborness [22].

12. In marriage nullity cases it is not sufficient to allege or even to prove that someone was "immature"" or "showed immature traits" in his or her behaviour, no matter what the source of the immaturity. One needs to examine the known facts about the person's behaviour before and during marriage and see how these reflect the person's alleged immaturity. In addition, careful consideration should be given to other important decisions made by the person around the time of marriage, to see what effect, if any, his immaturity had. But what must always be kept in mind is the necessity to show the influence of alleged immaturity on the decision to marry, to show from the evidence how this condition adversely affected the person's judgement and rendered him or her incapable of contracting marriage.

"There is a risk too of confusing the canonical category of "maturity" with the psychological category of "maturity". In psychology, maturity is understood to be the "end-point" of human development: ... In Canon Law, however, "maturity" is the minimal "starting-point" necessary and sufficient for a person both to intend and to implement the object of matrimonial consent, even when difficulties and obstacles creat conditions of distress because of bad will, or even if there are unconscious conflicts in the parties" [23]. What the Judge must look for in cases of nullity for alleged immaturity "is that minimum "discretion of judgement" and "use of reason" which prepares someone to enter marriage and then continues to grow and develop. When we use the term "immaturity", we can confuse it if we are looking for the situation in which a person experiences an almost eschatological integration of himself or herself, at which point everything is simply in order" [24]. "Matrimonium non est maturitatis acquisitae culmen, sed phasis evolutiva in processu marioria maturitatis acquirendae" [25].

B. INABILITY TO ASSUME MARITAL OBLIGATIONS

13. In a case where a lack of due discretion is claimed on the basis of a deep-rooted psychological disorder, the question of a person's ability / inability to assume the essential obligations of marriage may also arise, regardless of whether or not a lack of due discretion is proved.

The distinction between these two grounds is clear in principle, even if it is not easy in application. The ground of lack of due discretion refers to an ability to posit a true act of consent. Where the powers of reason and will are so disordered or undeveloped at the time of the wedding that the object of consent cannot be sufficiently understood in its practical and relational

implications, then no true consent can be given. On the other hand the ground of inability to assume relates not to the act of cons nt but to its object. One cannot validly consent to deliver an object n t within one s power: "the obligation has no value if someone obliges him elf to give or do something of which he is incapable". "Psichica incapacitate adsumendi onera matrimonialia essentialia laborat qui, ob gravem anomaliam psychicam, haud se obligare ad constituendam vitae consortium perpetuum et exclusivum, ex sua natura ordinatum ad coniugum bonum et ad prolem generandam atque aducandam" [26].

14. The object we are speaking about here is not every aspect of marriage needed to make it happy, but those elements which are constitutive of marriage, understood as a whole life partnership ordered to the well-being of the spouses and the procreation and upbringing of children. It involves the essential properties of unity and indissolubility and, for the baptised, sacramentality. Where causes of a psychological nature render impossible one or more of these elements, or the "consoritum vitae", then the marriage would be null.

Given the nature of the case under examination, the Tribunal deems it important to make a number of observations.

15. In the first place it must be noted that the conjugal relationship we have referred to above "non est ita cum exito suo confundenda ut coniuges qui nequeunt certum quemdam gradum felicitatis connubialis vel 'perfectionis' propriae vel 'satisfactionis' mutuae assequi, statim exsistimentur oporteat inhabiles ad ipsam relationem valide constituendam" [27].

16. In cases which come under this heading of nullity, what is in question is a disorder which is of its nature destructive of a marriage relationship. It is not alone the non-existence of a marriage relationship which is relevant. It is only if this non-existence is due to genuine incapacity arising from a personality disorder that a plea of nullity can be entertained on this particular ground. Therefore in the method of proof, it is necessary to demonstrate a direct relationship between the absence of any of the obligations of marriage, including the community of life and the personality structure of one of the parties. One must be cautious lest, as Mgr. DI FELICE pointed out, incapacity be confused with an unwillingness to fulfil the duties assumed in matrimonial consent [28]. Of course, not all personality disorders are incapacitating. While psychic defects can render the creation of a marital relationship *difficult*, it is only the very serious and relatively rare disorders which render a marriage *impossible*. A valid marriage cannot be beyond the attainment of the "average person", who is equipped with both good and bad personality characteristics. For this reason one must distinguish between what is *desirable* for marriage and what is *essential*. The pastors and counsellors of the Church have a duty of promoting the desirable and even the ideal. Judges in nullity cases are confined to a consideration of the minimum required for validity. This minimum does not depend on the subjective expectations of any individual.

With regards to the case under examination, it is never too much to stress how dangerous it is to use the term *immaturity* in a vague, general sense as constituting an incapacity to sustain an interpersonal relationship [29]. As another decision before PINTO pointed out, although it is only in the final

stage of adolescence (between the age of sixteen and nineteen) that the capacity for true oblative love developes in men, such degree of maturity is not necessary to be present for valid consent [30]. And he adds: "With regard to immaturity and the lack of equilibrium, it must be remembered that not just every defect is sufficient to warrant a declaration of nullity. Rather a defect must be so serious as to render the person either incapable of free consent or incapable of assuming the essential responsibilities of marriage, i.e. with regard to children, fidelity and indissolubility" [31].

17. In assessing the degree of severity of the psychic disorder in case, the Court considers the long-term pattern of a person's behaviour, taking into account whether or not it was significantly deviant from what might be considered normal and pre-dated the wedding. Indeed, pre-marital indications are vital in order that the severity of the illness can be determined at the time of the wedding. If the personality defect is to be shown to have impinged on the act of consent, it must therefore be shown to have existed at the time consent was given, as distinct from something which developed subsequently. This will be clear from the continuity of a behaviour pattern from prior to the marriage. Although one's capacity for marriage is not put to the test until after the parties have begun to cohabit, deductions can be legimtimately made about pre-marriage behaviour in the context of what is known about the married life. One who has been proved to have been incapable of the obligations of marriage will, most likely, have also been incapable of other relationships and other responsibilities.

18. Also to be considered are possible causes of the behaviour other than a severely disturbed personality, e.g. illness after marriage, extraneous factors such as inadequate accomodation or third party interference - anything which might have prevented the person from putting his / her capacity to the test.

"Quibus principiis attentis, perpendi potest, utrum res peractae a coniugibus post matrimonium demonstrent vitia gravia psychologica antenuptialia, quibus iidem prohibeantur onera coniugalia adimplere, an potius meras violationes onerum susceptorum, responsabiliter, seu scienter et volenter, positas. Non autem licet pravas violationes onerum coniugalium, ab iisdem patratas, semper tribuere vitiis psychosexualibus vel psychologicis et denegare eorumdem responsabilitatem. Ita non omnes mulieres adulterae, quae etiam pluers amasios habuerunt, sunt nymphomanes. Neque adulteria, perdurante vita coniugali, patrata, semper demonstrant grava vitia psychologica, quae auferant responsabilitatem ac possibilitatem adimplendi onera suscepta. Humana enim fragilitas ad obligationes matrimoniales assumptas scienter et volenter non servandas saepe inducit, cum voluntas susceptis bonis consiliis ac propositis constanter non haereat. Quod magis tenendum est, si qui incapacitate psychologica adimplendi onera coniugalia affecti dicuntur, nullo vitio corporis et nervorum laborant" [32].

The efforts made by the parties to create a good marriage and resolve difficulties are not irrelevant. It is always difficult to discern genuine incapacity if there is no evidence of effort, however misdirected those efforts might have been. It is true that some marriages fail due to a lack of effort, but this would not reflect in any way an "inability to fulfil". There are disordered personalities

who find it *difficult* to adjust to a marital relationship, but who, by patience and counselling, manage to overcome their difficulties and perhaps even to come to terms with incompatibility of temperament. In such cases the degree of severity of the disorder is not incapacitating. The fact that a partner proves to be a difficult person for the other partner to live with is not indicative that the former is incapable of marriage - in the correct judicial sense. When Courts are confronted with cases where there is reasonable doubt as to whether the line between difficulty and impossibility has been crossed, in such cases the decision must according to law, be in favour of the upholding of the validity of marriage [33].

19. In assessing the degree of severity of a psychic disorder the opinions of psychiatric and / or psychological experts are always valuable and often indispensable in the interpretation of the facts presented by the non-professional witnesses. "Attendendo ... est ad conclusiones peritorum *dummodo* eaedem sint suffultae solidis argumentis ex aegroti exploratione et ex actorum consideratione collectis" [34]. "Iudicis erit investigare utrum periti in constabiliendo morbo recte in factis certis institerint, testimoniorum veritati adhaeserint, rerum adiuncta matrimonium antecedentia, concomitantia ac consequentia consideraverint, omnia nempe congesserint atque aestimaverint ad sententiam adstruendam, an vero praeiudicatis opinionibus indulserint" [35]

NOTES

1. Cfr. Code of Canon Law, c. 1095, nn.2,3.
2. Canon 1055 § 2.
3. Canon 1056.
4. *Marriage in Canon Law,* Wilmingtion, Delaware 1986, p.63.
5. *Summa Theologica,* I-II, q.1, art.1.
6. Coram BEJAN, 25*10*72, *SRRD.* vol. 64, p.611; coram COLAGIOVANNI, 18*10*86, in *MONITOR ECCLESIASTICUS,* 112 (1987)228, n.8; coram STANKIEWICZ, 22*3*84, in *ME,* 111(1986)263-264, n.5.
7. A. MENDONCA, *The effects of personality disorders on matrimonial consent,* in *Studia Canonica,* 21(1987/1), p.86.
8. Decision of the 24*2*61, in *SRRD,* vol. 53, p.118.
9. Coram STANKIEWICZ, dec. cit., loc. cit., p.262, n.3; coram PINTO, 23*11*79, in *ME,* 105(1980/IV)390, n.3.
10. Coram HUOT, 7*12*82, *SRRD* vol. 74(1982)578, n.5; cfr. coram POZZI, *SRRD,* vol. 64(1972)142.
11. Cfr. C. LEFEBVRE, *L'evolution actuelle de la jurisprudence matrimoniale,* in *Revue de Droit Canonique,* 24(1974)p.352.
12. J. McAREAVEY, *Emotional Immaturity and Marriage,* Rome 1978, p.89.
13. *Psychodynamics of personality development,* New York 1964, p.230.
14. J. McAREAVEY, op. cit., p.90.
15. Cfr. also the sentence before STANKIEWICZ, 11*7*85, in *Me,* 111(1986/II) 165-166, n.6, in which the Auditor very heavily relied on McAreavey's work, pp.88-89.
16. Cfr. L. WRENN, *Annulments,* 1972, pp.50-51; N. PICARD, *l'immaturitè et le consentement matrimonial,* in *Studia Canonica,* 9(1975)37-56.

17. A.H. CLEMENS, *Design for successful marriage,* New Jersey 1973, p.319.
18. N. CAMERON, *Personality development and psychopathology,* Boston 1963. The court-appointed Expert had concluded that one of the parties in case was suffering from a personality disorder which he classified as inadequate personality disorder.
19. CAMERON, op. cit., p.649.
20. Ibid.
21. Cfr. H.EY - P. BERNARD - Ch. BRISSET, *Manuel de psychiatrie,* Paris 1963, p.649.
22. Cfr. Ibid.
23. G. VERSALDI, *The dialogue between psychological science and canon law,* in *Incapacity for Marriage: Jurisprudence and interpretation.* Acts of the III Gregorian Colloquium, R. Sable (ed), Rome 1987, p.62.
24. R. BURKE, *Canon 1095, 1 and 2,* in *Incapacity for Marriage,* cit., p.118.
25. Coram PINTO, 8*7*74, n.5.
26. Coram PINTO, 12*2*72, in *ME,* 1982, pp.448-449.
27. Coram EGAN, 9*12*82, in *ME,* 108(1983)237, 239, n.4.
28. Cfr. decision of the 8*3*73, in *ME,* 101(1976)86, n.3; 17*1*76, in *EIC,* 32(1976)285, n.4; coram SERRANO, 5*4*73, in *REDC,* 30(1974)118, n.15.
29. Cfr. coram LEFEBVRE, 31*1*76, in *(EIC),* 32(1976)286, n.3.
30. Decision of the 8*7*74 in *ME,* 100(1975)498, n.3.
31. Ibid., p.501, n.5.
32. Decision of the 12*1*74, *SRRD,* vol. 66, pp.3-4, n.4.
33. Cfr. canon 1060.
34. coram DE JORIO, *SRRD,* vol. 66, pp. 3-4, n.4.
35. Coram POZZI, *SRRD,* vol. 65(1973)21-22.

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MALTESE LEGISLATION ON THE PREVENTION, REDUCTION AND CONTROL OF MARINE POLLUTION : A CRITICAL STUDY *

DR. KEVIN AQUILINA

SECTION 1 : INTRODUCTION

The scope of this essay is limited to an examination of Maltese Maritime Law relating to the prevention, reduction and control of marine pollution. Indeed, this essay does not embrace the protection of the marine environment in its totality as this would include appraising other provisions of the Maltese legal system, such as those relating to the establishment and management of marine nature reserves, fishing zones, illegal methods of fishing, exploitation of the natural resources of the sea, emission of dark smoke from vessles, etc. Such a study, commendable as it may be, does not fall within the ambit of this essay and can easily be dealt with in other seperate studies without in any way adversely affecting the subject matter of this essay.

SECTION 2 : MALTESE LEGISLATION ON THE PREVENTION, REDUCTION AND CONTROL OF MARINE POLLUTION

In Annex I to this eassy, I have listed Maltese laws and regulations concerning the prevention, reduction and control of marine pollution. In this section, I intend to analyse the provisions of our legislation on the subject-matter under discussion.

A. THE CODE OF POLICE LAWS

Part XX of the Code of Police Laws (Chapter 10 of the Laws of Malta) is entitled *Of Territorial Waters, Harbours And Wharves*. It contains eleven sections in all, of which only five can be said to relate to a certain extent to the prevention, reduction and control of marine pollution.

Although the Code of Police Laws does not afford us with a definition of the term "Territorial Waters", regard should be had to section 1(2) of the Constitution of Malta [1] and, in particular, to Chapter 226 of the Laws of Malta [2]. Nor do we have a definition of a wharf in our law. This word may however be safely defined as a platform beside which a vessel may be moored for the purpose of loading and / or unloading. On the other hand, the Code of Police Laws [3] defines the term "Harbour" as "any harbour, port, bay, cove, creek or seashore". The first part of the definition of the term "Harbour" (that is to say that "Harbour" means, inter alia, a harbour) tends to be rather tautological.

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Section 224 of the Code of Police Laws has two sub-sections. Sub-section 1 thereof provides that :

"It shall not be lawful to leave in any harbour or any wharf anything which might impede the free navigation or obstruct the passage, embarkation or disembarkation of persons, merchandise or other things, or leave therein any unserviceable vessel, abandoned or sunk; or throw therein anything which might cause any deposit of mud; or in any other manner render the bottom of the harbour in a different condition from its ordinary state, or obstruct the mouth of any public sewer discharging into the sea".

Viewed from the perspective of the subject-matter of this essay, section 224(1) has an indirect relevance to marine pollution. Indeed, it not only contemplates marine pollution from vessels but also, to a certain extent, it also contemplates pollution from land-based sources [4]. However, this subsection is mainly intended to guarantee that Maltese harbours are always navigable and, consequently, no mud should be deposited in the harbours for precisely this purpose. Nevertheless, it seems that this section is supporting more the Port Authority's role in providing navigable harbours rather than aiming at preserving, reducing or controlling the contamination of Maltese harbours.

Indeed, this sub-section does not prohibit the discharge of pollutants into the inland waters once an action cannot effect the bottom of the harbour (as opposed to sinking any unserviceable vessel therein) or obstruct the mouth of any public sewer discharging into the sea. Again, it should be noted that with regard to the latter aspect, there are no regulations which control the discharge of sewage within the territorial waters; in fact, this sub-section considers inland waters as a convenient place for the discharging of sewage therein. Of course, this has to be contrasted to the discharge of petroleum in our harbours [5].

Section 224(2) does not remedy this defect. This sub-section provides that :

> "No ballast, stones, mud, debris, refuse, or any other solid matter shall be discharged from any vessel [6] or dredger, within such area, outside any harbour, as shall be fixed by the Minister responsible for ports by notice in the Government Gazette or in contravention of any regulations made from time to time by the Minister responsible for ports published in the Government Gazette respecting the conveyance and discharge outside the harbours of the materials or things above mentioned."

This sub-section applies to:

(i) Ballast,
(ii) Stones,
(iii) Mud,
(iv) Debris,
(v) Refuse, and
(vi) Any other solid matter.

Ballast is the water which is introduced into a ship's tank to secure stability. [7]

The above six elements of section 224(2) do not seem to include the following

(i) oil,
(ii) any other pollutant (other than oil),
(iii) any mixture of oil, and
(iv) any mixture of other pollitants (other than oil),
because it appears that these four elements cannot fall under the category of "ballast" or "any other solid matter" due to their liquid form. Moreover, they do not seem to constitute "stone", "mud", "debris" or "refuse" because stone is something solid, debris is usually used in conjunction with building material, mud - although it is in a liquid form - applies more to rubbish, and refuse is usually solid material.

Section 224(2) has to be construed in conjunction with subsection (1) of the same section in the sense that whilst subsection (1) prohibits the obstruction of navigation in the harbours, subsection (2) prohibits the obstruction of navigation outside (albeit adjacent to) the harbours.

A problem however arises as to the correct construction of the exact limit outside the harbour once section 224(2) is silent on the matter. Of course, one can indirectly infer that such a distance is fairly close to the harbours but one cannot arrive at reckoning the exact distance simply through an implied inference. According to the said subsection, such an area outside the harbours has to be established by the Minister responsible for ports. This was, in fact, determined by the said Minister through Government Notice 24 of 1905 which provides that :

> "No vessel or dredger shall discharge materials outside the harbours, except at a distance of not less than one mile and a half form the coast line, and in a depth not less than 50 fathoms."

Moreover, the said Notice defines the word "materials" as including ballast, stones, mud, debris, refuse and any other solid matter, utilizing the same six elements of section 224(2) of the Code of Police Laws. Note, however, the ill-drafting of this interpretation provision. The Government Notice states that the term "material" includes (and not means) the said six elements. In other words, it is not restricting itself to only the six elements mentioned in the parent act but it is going beyond such elements. Indeed, section 224(2) specifically empowers the Minister responsible for ports to make regulations regarding "the materials or things above mentioned", i.e. the six elements of section 224(2). so the 1905 Regulation gives the impression of being ultra vires the powers granted by the parent act (when the term "material" is interpreted to include other materials which do not fall under the parametres of the said six elements, e.g. the release of toxic substances). This dilemma could easily be avoided if the illustrative term "includes" is substituted by the comprehensive term "means".

Another provision which has to be considered with regard to marine pollution is section 232 of the Code of Police Laws which states that :

"It shall not be lawful to load, carry, or discharge any ballast without the permission of, or in any other place than that appointed for the purpose by the Director of Ports."

According to this section, the discharge of ballast can only be undertaken when permission has been granted by the Director of Ports even though such

discharge takes place in any place appointed for that purpose by the Director of Ports. If, however, it is intended to discharge ballast in any other place other then that appointed by the Director, the Director of Port's permission has to be sought in order to discharge in such other place.

The next provision which has to be analysed is section 227 of the Code of Police Laws dealing with the throwing of noxious things in the harbours:

"No person shall leave in any harbour or on any wharf anything which may cause injury to public health, or a nuisance; or throw into the waters of any harbour or into any part of the internal waters or of the territorial waters of Malta any rubbish or dirty liquid which may cause a nuisance."

What does the law understand by the vague term "nuisance"? Pollution in our harbours would surely constitute a nuisance to the flora and fauna which inhabit these waters. But I do not think that this is what the legislator had in mind when this provision was enacted. Nuisance, in this context, has to be interpreted in conjunction to the term "injury", and it seems that "nuisance" is a degree less than "injury": it is something which annoyes or inconveniences (presumably somebody) but does not cause an injury.

Again, it seems that "public health" should be interpreted in a narrow way and should not be extended to imply harm to the marine environment even though the latter may, in turn, produce injury to public health.

Indeed, the term "nuisance" when used in the context of marine pollution is not common only to Malta. In the United Kingdom, this term is applied in two cases: nuisance can be either private or public. Private nuisance is a wrongful interference with a person's use or enjoyment of his land or some right connected with it. Hence it must be a prerequisite to success in a claim that the claimant shows that he has a proprietory interest in the land [8]. But this first type of nuisance is of no use to us in construing section 227 of the Code of Police Laws because:

a. the term "nuisance" is linked to "harbour", "wharf", "internal waters" and "territorial waters" and the law is more interested in the sea (whether it is internal waters or territorial waters) rather than in the land proximate to these waters;
b. if section 227 is contravened, the result would be a criminal offence and not a civil wrong. Indeed, the Code of Police Laws is of a regulatory nature and the sanction attached to a transgression of one of its provisions is usually penal (as the term "Police" after all suggests);
c. the scope of section 227 is not inspired by civil law but by public law and so this section is not interested in protecting wrongful interference with an individual's use or enjoyment of his land or some right connected with it.

On the other hand, "public nuisance" in the United Kingdom is also a civil wrong. However, the tort of public nuisance must effect a sufficient number of persons to justify the description "public". In Attorney-General v. P Y A Quarries Ltd. it was held that:

"... any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The

> sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case." [9]

Section 227 of the Code of Police Laws does not require the nuisance to be directed against the public or against one member of the public. Indeed, whilst the term "injury" is qualified by the words "to public health", the term "nuisance" is used by itself so much so that we do not know to whom must this nuisance be directed (e.g. the public, the Port Authority, vessels using Maltese harbours, internal waters, wharves, ect.)

I think that the term "nuisance" has to be given a wide interpretation in the sense that the nuisance may be directed not only to one or more members or the public who happens to be land [10] but also to any person who may happen to be on board a ship whilst the ship is passing through the said waters.

Another problem which this section poses relates to the construction of the term "dirty liquid" which is reminiscent of the term "mud" in section 224 of the Code of Police Laws. In this connection it is pertinent to ask what are the criteria which qualify a liquid as being "dirty"? Is it simply its colour: that is to say, if the liquid is light coloured it is clean? In my opinion, "dirt" means unclean matter that soils, usually in the form of wet mud. However, is heavy crude oil considered to be dirty under this section? If it is so considered, what about refined oil?

The "dirty liquid" criterion adopted by our law seems to be rather vague in this day and age of scientific and technological progress. In order to, perhaps, arrive at a definition, "dirty liquid" has to be interpreted in conjunction to the other ingredient of this section - "rubbish". Rubbish is usually in solid form and this is reminiscent of the term "refuse" in section 224 of the Code of Police Laws. So "dirty liquid" seems to be that rubbish which is in a liquid (rather that a solid) form. Of course, this nomenclature is hardly suitable to include today's various kinds of substances which - though "clean" - still contaminate the marine environment.

Perhaps the most important provision presently obtaining in Maltese law regarding marine pollution is section 228 of the Colde of Police Laws. Subsection (1) thereof provides as follows:

> "If any petroleum or other oil or any mixture containing petroleum or other oil is discharged, leaks or runs into the waters of any harbour or into any part of the internal waters or of the territorial waters of Malta from any vessel or any place afloat, or from any place on land, or from any apparatus used for transferring petroleum or other oils from or to any vessel (whether to or from a place on land or afloat), then -
>
> a. if the discharge, leakage or running is from a vessel, the owner or master of the vessel, or
>
> b. if the discharge, leakage or running is from an apparatus used for transferring petroleum or other oils from or to a vessel, or takes place while petroleum, or other oils are being so transferred, the owner or person in charge of the apparatus, or

c. if the discharge, leakage or running is from any other place, the occupier or other person in charge of such place,
shall be guilty of an offence against theis section and shall be liable, on conviction, to a fine (multa) of not less than one hundred liri and not more than two thousand liri, or to imprisonment form one to six months, or to both such fine and imprisonment.''

The interpretation section of the Code of Police Laws affords us with a definition of the term ''master'' [11]. However, the law is silent on what it means by the following terms -

a. petroleum,
b. oil,
c. mixture containing petroleum or oil, and
d. place afloat.

First and foremost, what does the term ''petroleum'' mean? As there is not definition given in the Code of Police Laws of the said term, recourse has to be had to other definitions in Maltese law hoping that such definitions may be applied to this section. In fact, a definition of petroleum may be found in the following enactments;

a. Petroleum (Importation, Storage and Sale) Ordinance (Chapter 25 of the Laws of Malta);
b. Income Tax Act (Chapter 123 of the Laws of Malta);
c. Petroleum (Production) Act (Chapter 156 of the Laws of Malta); and
d. Continental Shelf Act (Chapter 194 of the Laws of Malta).

For the intents and purposes of Chapter 25 of the Laws of Malta [12], petroleum means ''all natural hydrocarbons whether in liquid or gaseous form, including crude oil and natural gas, and whether in a crude or natural state or in a processed or refined form''.

Chapter 156 of the Laws of Malta [13] defines petroleum in a slightly different manner as being ''all natural hydrocarbons liquid or gaseous including crude oil, natural gas, asphalt, ozokerite and cognate substances and natural gasoline.''

Chapters 123 [14] and 194 [15] adopt the definition of ''petroleum'' as defined in Chapter 156 which, prima facie, appears to give a wider definition of ''petroleum'' than that given in Chapter 25. Indeed, the latter definition of petroleum does not expressly mention asphalt, ozokerite and cognate substances and natural gasoline.

With regard to the construction of the term ''petroleum'' in the sub-section under review, one has to ponder the following question. Which definition of ''petroleum'', if any, should be adopted for the purposes of section 228 (1) of the Code of Police Laws - that given in Chapter 25 or that mentioned in Chapter 156?

The Marine Pollution (Prevention And Control) Act, 1977 avoids using the term ''petroleum or other oil''. It opts for a wider definition, namely that of ''oil or other pollutant'' so much so that the term ''oil'' as used in the Marine Pollution (Prevention And Control) Act, 1977 includes what section 228 (1) of the Code Of Police Laws refers to as ''petroleum or other oil''.

Section 228 (1), once again, fails to define the term "oil". The Marine Pollution (Prevention And Control) Act, 1977 states that this nomenclature means "oil of any description and includes spirit produced from oil of any description and includes coal tar." This quite a generic definition which includes not only every single substance which may be classified as oil but also spirit (i.e. gas) produced from oil. This definition cannot, however, be used for the purposes of section 228 (1) as "oil" in the Marine Pollution (Prevention And Control) Act, 1977 has to be construed in conjunction to the other term "pollutant" and the latter term includes other substances which cannot be classified under the category of petroleum or oil [16]. Such would be the case with regard to radioactive wastes, mercury and mercury compounds, cadmium and cadmium products, etc.

The same problem of establishing the correct interpretation of certain terms applies with regard to the term "any mixture containing petroleum or other oil" once the terms "petroleum" and "other oil" do not seem to be very clear.

Once different laws are using the same terms in different senses the end result seems to be confusion!

Section 228 (1) encompasses three types of prohibited activities:

a. a discharge,

b. a leakage, and

c. a run off.

What is the exact difference in meaning, if any, between these three terms? The Marine Pollution (Prevention And Control) Act, 1977 contemplates only a discharge of oil or other pollutant (modelling itself on the definition of a discharge given in the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 [17]) and includes all the possible meanings which can be given to the said three terms of the subsection under examination.

Discharge seems to imply the deliberate act of unloading of petroleum or other oil or any mixture containing petroleum or other oil by any of the classes of persons specified in paragraphs (a), (b) and (c) of section 228 (1). In other words, the persons mentioned in these paragraphs have knowledge of such an act of discharge and have the necessary criminal intent when discharging the said substances.

Leakage gives the impression that the discharge of the said substances was more due to the negligent act of the persons mentioned in paragraphs (a), (b) and (c) of section 228 (1) rather than due to the mental element of the said persons: in other words, the mens rea is lacking in the case of a leakage.

Running off suggests an escape of the said three substances but such escape cannot be said to be the direct result of a criminal intention or of negligence on the part of the persons mentioned in paragraph (a), (b) and (c) of the subsection under analysis. So running off would apply when petroleum or other oil or any mixture containing petroleum or other oil finishes up in the places mentioned by the law irrespective of whether such act was the result of criminal intent or criminal negligence. It is the consequences of the criminal act (i.e. the running off) which is culpable rather than the conduct itself of the persons mentioned in paragraphs (a), (b), or (c) of section 228 (1) which is the cause of the running off of petroleum or oil or any mixture containing petroleum

or other oil. The law is here looking at the material effect rather than at the formal element of the offence contemplated in the subsection under study.

Another problem which emerges when trying to comprehend this section is that relating to what constitutes a "place afloat". There is only one Maltese law which defines the term "place afloat" and this is the Marine Pollution (Prevention And Control) Art, 1977. But the problem tends to complicate itself further owing to the fact that Marine Pollution (Prevention And Control) Act, 1977 has never been brought into force since its enactment and so doubts arise whether this enactment can be used as a source for interpreting an existing law. However, I think that the definition given by the said Act suits the purpose of the subsection under review due to the fact that both section 228 of the Code of Police Laws and the Marine Pollution (Prevention And Control) Act, 1977 are both modelled on U.K. marine pollution legislation. A place afloat can, thus, be defined as "including anything afloat (other than a vessel [18]) if it is anchored or attached to the bed dor shore of the sea or of the territorial waters of Malta, and includes anything resting on the bed and shore of the sea or of the territorial waters of Malta." [19]

Note that the pecuniary fine of a minimum of one hundred liri and a maximum of two thousand liri is in dire contrast to that of section 4 of the Marine Pollution (Prevention And Control) Act, 1977 which latter section provides for a minimum of two hundred and fifty liri (which, by today's standards is still very low) and a (reasonable) maximum of fifty thousand Maltese liri [20].

Section 228 (1) is quite reminiscent of section 4 of the Marine Pollution (Prevention and Control) Act, 1977 621) and is basically concerned with criminal liability. Section 228 62) then contemplates civil liability:

> "Any person found guilty of an offence under this section shall be liable for all damages caused and all costs occasioned by the facts constituting the offence, and the court shall, at the demand of the prosecution made at any time of the proceedings prior to final judgement, order in the same judgement the offender to make good and pay to the Director of Ports all such damages and costs as shall be executable in the same manner as if it had been given in a civil action duly instituted by the Director of Ports against the offender:
>
> Provided that nothing in this subsection shall affect the right of third parties to institute any civil action against the offender for any damage suffered dby them."

This subsection makes provision for a more expeditious process by means of which civil penalties may be collected by the Director of Ports without the need of instituting civil proceedings once the offender has been found guilty of the criminal offence contemplated in the first subsection of the same section. Of course, if the offender is acquitted from the criminal offence enshrined in section 228 (1), the Director of Ports may still institute civil proceedings in order to satisfy his claim because the burden of proof in a civil case is one which requires solely a balance of probabilities rather than proof beyond reasonable doubt as in criminal matters.

B. THE CONTINENTAL SHELF ACT

Section 7 of the Continental Shelf Act (Chapter 194 of the Laws of Malta) relates to the discharge of oil:

"(1) if any oil or any mixture containing not less than one hundred parts of an oil in a million parts of the mixture is discharged or escapes into any part of the sea -

a. from a pipeline, or
b. as a result of any operations for the exploration of the sea bed and subsoil or the exploitation of their natural resources in a designated area,

the owner of the pipeline or, as the case may be, the person carrying on the operations shall be guilty of an offence unless he proves, in the case of a discharge from a place in his occupation, that he took reasonable care to prevent it and that as soon as practicable after it was discovered all reasonable steps were taken for stopping or reducing it.

(2) A person guilty of an offence under this section shall be liable, on summary conviction, to a fine (multa) not exceeding one thousand liri."

This section has been lifted from section 5 of the U.K. Continental Shelf Act 1964 whose marginal note also bears the heading "Discharge of oil".

Unfortunately, even this section poses some problems as to its proper construction. The first problem relates to the term "oil". The U.K. Legislator, admittedly, did not define the said term in section 5 of the U.K. Continental Shelf Act 1964 but, wisely enough, referred to another U.K. enactment which provides such a definition [22]. On the contrary, the Maltese Legislator did not reproduce the definition of the term "oil" as contained in section 1 (2) of the U.K. Oil In Navigable Waters Act 1955 which applies :

a. to crude oil, fuel oil and lubricating oil; and
b. to heavy diesel oil, as defined by regulations made under this section by the Secretary of State;

and shall also apply to any other description of oil which may be specified by regulations made by the Secretary of State, having regard to the provisions of any Convention accepted by Her Majesty's Government in the United Kingdom in so far as it relates to the prevention of pollution of the sea by oil, or having regard to the persistent character of oil of that description and the likelihood that it would cause pollution if discharged from a ship into any part of the sea outside the territorial waters of the United Kingdom."

It must be pointed out that although the U.K. Oil In Navigable Waters Act 1955 was repealed by section 33 of the U.K. Prevention of Pollution Act 1971, the latter Act does, nevertheless, retain in section 1 (2) thereof the same provision contained in section 1 (2) of the U.K. Oil In Navigable Waters Act 1955. Thus, in U.K. legislation, a wide interpretation has to be given to the term "oil" once regulations are made under section 1 (2) of the U.K. Prevention of Pollution Act 1971 by the Secretary of State to provide for any other description of oil not expressly mentioned in section 1 (2) (a) of the said Act.

Furthermore, section 5 of the U.K. Continental Shelf Act 1964 has been repealed by section 33 of the U.K. Prevention of Oil Pollution Act 1971 but its contents have been faithfully reproduced in section 3 of the U.K. Prevention

of Oil Pollution Act 1971. This is thus the position in the U.K. but not the position in Malta where section 7 of Chapter 194 remains in effect as contained in the said Chapter and not as contained in section 5 of the Marine Pollution (Prevention And Control) Act, 1977, which, in turn, is modelled on section 5 of the U.K. Prevention of Oil Pollution Act 1971.

Another important aspect with regard to the meaning of the term "oil" mentioned in section 7 of Cap. 194 is the term "petroleum" used in section 3 of the same Chapter. Indeed, section 3 of Chapter 194 extends the application of subsection (2) of section 3 [23]; section 4 [24] and section 5 [25] of the Petroleum (Production) Act [26] to the rights exercisable by Malta [27] with respect to the exploration and exploitation of the continental shelf [28] and its natural resources [29]. So the legislator is here distinguishing between the term "oil" and the term "petroleum".

If one were to analyse the said definitions of "petroleum", one will observe that the wording of the definition of the said term in Chapter 156 though similar to that of Chapter 25 is not identical to it: although both definitions use the comprehensive term "means" (and not the illustrative term "includes"), the definition of Chapter 156 includes the following types of petroleum which are not expressly mentioned in the definition of "petroleum" given in Chapter 25 as being particular kinds of petroleum, namely -
(i) asphalt,
(ii) ozokerite, and
(iii) cognate substances,
but, contrary to Chapter 25, no mention is made whether the natural hydrocarbons (liquid or gaseous) may be in a crude or natural state or in a processed or refined form.

I think that although the law is prima facie using different wording for the definitions given in Chapter 25 and Chapter 156 of the term "petroleum", both definitions, essentially, contain the same constituent elements. I do not see any reason why the particular kinds of natural hydrocarbons liquid or gaseous referred to as "asphalt, ozokerite and cognate substances" ought not to fall under the wider and comprehensive definition of "all natural hydrocarbons liquid or gaseous" used in the definition of "petroleum" in Chapter 25. The examples given by the legislator differ from one law to another precisely for the simple reason that Chapter 25 is concerned only with the importation, storage and sale of petroleum, and singles out those kinds of petroleum which fall within the purview of its principal scope, whilst Chapter 156 has singled other kinds of petroleum because its scope is different from that of Chapter 25 as it relates to the production of petroleum in Malta and, therefore, the legislator wanted to make it quite clear to what kinds of natural hydrocarbons this Chapter applies to.

But for the purposes of the Maltese Continental Shelf Act regard should be made to the definition of petroleum given in Chapter 156 which, as above stated [30], is more illustrative than that given in Chapter 25. Again, it should be observed that Chapter 156 is modelled on British legislation and, in particular, on the Petroleum (Production) Act 1934. However, the definition given in section 1 (2) of the latter Act runs as follows :

"For the purpose of this Act the expression "petroleum" includes any mineral or relative hydrocarbon and natural gas existing in its natural condition in strata, but does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation."

Different definitions of petroleum exist in U.K. legislation [31]. Notable amongst these is that given in section 16 (1) of the U.K. Petroleum And Submarine Pipe-Lines Act 1975 :

" "Petroleum" means any of the following:

a. mineral oil, natural gas and bituminous shales;
b. deposits not mentioned in the preceding paragraph from which oil can be extracted by destructive distillation; and
c. hydrocarbons which are related to mineral oil, and are not mentioned in the preceding paragraphs."

A leading U.K. case [32] in the field of petroleum law has held that the word "petroleum" is not a definite term in U.K. law and its construction depends on the particular context in which it is used.

Chapter 194 defines petroleum (by applying the definition given in Chapter 156) so as to include crude oil, the latter being considered as being one form of liquid natural hydrocarbon. It seems that the term "natural hydrocarbons" comprises all types of substances, be they in liquid or in gaseous form, which scientifically speaking can be classified under the general heading of "oil". It must however be noted that the definition of Chapter 156 goes further than this as it also includes other types of natural hydrocarbons, whether in liquid form or in gaseous form. On the other hand, it appears that the term "oil" in section 7 has to be interpreted in a generic way due to the fact that no specific definition is given of this term and that the meaning assigned to it by section 1 (2) of the U.K. Oil in Navigable Waters Act 1955 has been deliberately excluded by its non-inclusion by our legislator in section 7 of Chapter 194.

Another point which has to be considered with regard to section 7 of Chapter 194 is what constitutes a discharge or an escape. First and foremost, it has to be noted that the terminology here used is different from that used in section 228 (1) of the Code Of Police Laws [34], namely that of a discharge, leakage or running off. Instead of the latter two terms, the section under review opts for the term "escape". So whilst the meaning of "discharge" appears to be the same as that given above with regard to section 228 (1) of the Code of Police Laws, an escape may apply in both the case of a leakage and of a running out of oil or any mixture containing oil. Thus, an act of God which provokes an escape of oil would constitute an escape (even though it does not constitute the crime mentioned in section 7 (1) due to the fact that the defence of due diligence may be pleaded in this case). Another instance of an escape would be when an oil tanker is accidentally hit by, say, a missile from a naval vessel. There seems to be a trend in international marine pollution law to lump together a discharge, an escape, a leakage or a run off under one heading - that of a discharge [35].

The discharge or escape of oil or any mixture containing oil has to take place, according to section 7 (1) of Chapter 194, into any part of the sea -

"a. from a pipeline, or
b. as a result of any operations for the exploration of the sea bed and subsoil or the exploitation of their natural resources in a designated area.....".

What does seciton 7 (1) mean by the term "any part of the sea"? Again, paragraph (a) relates to the discharge or escape of oil or an oil mixture as defined in section 7 (1) into any part of the sea from a pipeline. Two questions have to be posed in this regard. First, what is a pipeline? Second, where is the pipeline situate when the said discharge or escpae materialises?

With regard to the proper construction of the term "pipeline" Maltese law does not afford us with any definition. Reference may be had to British legislation which may shed some light on the subject under discussion. The U.K. Pipe-Lines Act 1962 defines the term under review in section 65 but, it is submitted, this definition ought to be discarded as it is very comprehensive in scope and applies to various uses of a pipeline which are beyond the socpe of Chapter 194. However, the definition given by section 33 (1) of the Petroleum and Submarine Pipe-Lines Act 1975 seems to suit our purposes. A pipe-line is said to be a piepe pipe or a system of pipes, excluding a drain or sewer, for the conveyance of any thing, together with apparatus and works associated with such a pipe or system. However, under the latter Act, only the following apparatuses and works are to be treated as associated with such a pipe or system:

a. any apparatus for inducing or facilitating the flow of any thing through, or through a part of, the pipe or system;
b. valves, valve chambers and similar works which are annexed to, or incorporated in the course of, the pipe or system;
c. apparatus for supplying energy for the operation of any such apparatus or works as are mentioned in paragraphs (a) and (b) above;
d. apparatus for the transmission of information for the operation of the pipe or system;
e. apparatus for the cathodic protection of the pipe or system; or
f. a structure used or to be used solely for the support of a part of the pipe or system.

With regard to the second query, from the wording of section 7 (1), the term "any part of the sea" should be construed as meaning the High Seas due to the fact that the continental shelf is beyond the territorial sea. But it must be borne in mind that Malta has also declared a twenty-four nautical mile Contiguous Zone so that the term "sea" should also include the sea falling within the Contiguous Zone. In other words, section 7 (1) applies to the sea within the Contiguous Zone of Malta as well as to the superjacent waters of the High Seas above the Continental Shelf of Malta. However, the Exclusive Economic Zone cannot at the present moment in time be considered to form part of "any part of the sea" because Malta has not yet declared an Exclusive Economic Zone.

Should the pipeline be situated in the territorial waters of Malta or should it be situated outside territorial waters? It must be borne in mind that Chapter 194 is limited only to the exploration and exploitation of the Continental Shelf of Malta together with its natural resources and that both the continental shelf

and its natural resources, according to section 2 thereof, have to be situated outside the territorial waters of Malta. In other words, if an oil rig is extracting petroleum in Maltese territorial waters and oil or any oily mixture as defined in section 7 (1) is discharged or escapes from a pipeline into such waters, section 7 (1) of Chapter 194 does not apply, although section 228 of the Code of Police Laws or any regulation made under section 5 of Chapter 226 would apply due to the fact that Malta has sovereignty in the said waters and does not need a Continental Shelf regime to enforce its powers. On the other hand, section 7 (1) extends Malta's jurisdiction to the superjacent waters above the continental shelf granting it only sovereign rights for the purpose of exploiting and exploring its continental shelf and its natural resources and for preventing marine pollution through such activities.

The Contiguous Zone is adjacent to the territorial sea of Malta but the State of Malta does not exercise sovereignty therein. It is true that Malta can, in virtue of section 4 of Chapter 226 exercise control to prevent and punish infringements of its laws within the contiguous zone but such infringements have to take place within the territory and the territorial waters of Malta and not within its Contiguous Zone. Thus, although Malta is given certain sovereign rights in the superjacent waters above the continental shelf with regard to the discharge of oil in such waters, Malta can enforce these right through its continental shelf regime and not through the contiguous zome regime as the latter does not regulate the discharge or escape of oil in the superjacent waters above the continental shelf as provided in section 7 of Chapter 194.

With regard to paragraph 7 (1) (b), the term "designated area" is defined by section 3 (3) of Chapter 194. The latter empowers the Prime Minister, from time to time, to designate any area as an area where Malta can exercise certain rights therein, these rights being defined in section 3 (1) thereof as those "exercisable by Malta with respect to the continental shelf and its natural resources". Marine pollution will undoubdetly kill the living resources of the shelf and hamper the Maltese state from exercising such right. Thus, international and municipal law both empower the Maltese State to take the necessary action to safeguard its right to exploit the living resources of the continental shelf.

C. THE TERRITORIAL WATERS AND CONTIGUOUS ZONE ACT (CAP 226)

Chapter 226 of the Laws of Malta relates to the territorial waters and to the contiguous zone of Malta. Within the territorial waters Malta has sovereignty whilst within the contiguous zone Malta has certain sovereign rights under both international law and under domestic law.

According to section 3 of Chapter 226, the territorial waters [36] of Malta [37] are all parts of the open sea within twelve nautical miles of the coast of Malta measured from low-water mark on the method of straight baselines joining appropriate points. However, for the purposes of the Fish Industry Act [38] and of any other law relating to fishery, the territorial waters of Malta extend to all parts of the open sea within twenty-five nautical miles from the baselines from which the breadth of the territorial waters is measured. On the

other hand, the contiguous zone [39] extends up to twenty-four nautical miles from the baselines from which the breadth of the territorial waters is measured.

Section 4 (1) of Chapter 226 provides that in the contiguous zone, the State of Malta:

> "shall have such jurisdiction and powers as are recognized in respect of such zone by international law and in particular may exercise therein the control necessary
>
> a. to prevent any contravention [40] of any law [41]relating to customs, fiscal matters, immigration and sanitation, including pollution, and
>
> b. to punish offences against any such law committed within Malta or in the territorial waters of Malta ..."

Section 4 is in conformity with Article 23 of the 1982 United Nations Convention on the Law of the Sea which provides that the breadth of the contiguous zone may not extend beyond twenty-four nautical miles from which the breadth of the territorial sea is measured. But it must be observed that the 1982 U.N. Convention is not yet in force and that Malta has not yet ratified it. Furthermore, Malta is still bound - at least with regard to the other contracting parties to the 1958 Geneva Convention on the Territorial Sea and The Contiguous Zone [42] - by the limits of the contiguous zone as established in Article 24 (2) of the 1958 Geneva Convention on the Territorial Waters and the Contiguous Zone [43].

There is one significant difference in section 4 of Chapter 226 when contrasted to both the said 1958 Convention and the 1982 Convention relating to those purposes for which a coastal state is entitled to exercise its control. I am here refering to the term "sanitation" which, for the purposes of Maltese law, is deemed to include pollution [44]. In other words, our legislator thought it fit to include pollution under the heading of "sanitation" even though no explicit mention is made of pollution in either Convention. Indeed, the 1958 Convention deals only with "sanitary regulations" whilst the 1982 convention talks about "sanitary laws and regulations" but no explicit reference is made to pollution. Nor is the term "sanitation" defined in either Convention.

Thus, in the case of infringements of pollution regulations committed within the territory of Malta or in the Maltese territorial sea, the State of Malta is empowered under Maltese law to exercise the control necessary in the contiguous zone to prevent and punish such infringements [45]. Sanitary measures generally deal with public health rules and pollution can be controlled in a contiguous zone when it forms a health risk. It is not clear, however, in Public International Law whether pollution which does not form a health risk is also included in the term "sanitation". It seems that the Maltese legislator has decided to give a wide meaning to the said term so as to include also pollution which does not form a health risk [46].

Another provision of relevance to this study is section 5 of Chapter 226 which was added in 1981 [47]. It empowers the Prime Minister to make regulations to control and regulate the passage of ships through the territorial waters of Malta. The territorial waters of Malta are considered to be

> "... all parts of the open sea within twelve nautical miles of the coast of Malta [48] measured from low-water mark on the method of straight

baselines joining appropriate points." [49].

Furthermore, in virtue of section 5 (1) of Chapter 226, the Prime Minister may make regulations to control and regulate the passage of ships through territorial waters on, inter alia, the conservation of the living resources of the sea; the preservation of the environment and the prevention, reduction and control of pollution thereof; and the prevention of infringement of any customs, fiscal, immigration or sanitary laws or regulations.

Section 5 (1) is modelled on Article 21 of the 1982 U.N. Convention on the Law of the Sea [50]. The said Article and section 5 of Chapter 226 distinguish between pollution on the one hand and sanitary laws and regulations on the other. Indeed, Article 21 (1) (f) of the 1982 U.N. Convention on the Law of the Sea and section 5 (1) of Chapter 226 expressly contemplate the coastal state's right to make regulations relating to "the prevention, reduction and control of pollution". However, Article 21 (1) (h) of the 1982 U.N. Convention and section 5 (1) of Chapter 226 also empower the coastal state to make regulations in respect of the "prevention of infringement of ... sanitary laws and regulations," So it seems that both Article 21 (1) of the 1982 U.N. Convention and section 5 (1) of Chapter 226 do not consider an infringement of pollution regulations as falling under sanitary regulations once specific provision is made therein for pollution regulations as distinct from sanitary regulations. This means that the term "including pollution" in section 4 (1) (a) of Chapter 226 seems to have been given a wider interpretation by the Maltese legislator than that intended by the contiguous zone provisions of international conventional law. Indeed, the contiguous zone forms part of the High Seas and the four controls exercised therein by a coastal state curtail the freedom of the High Seas as contemplated in the Geneva Convention on the High Seas, 1958 and in customary international law.

No subsidiary legislation has been made under section 5 of the Territorial Waters and Contiguous Zone Act.

For the intents and purposes of section 4 relating to the contiguous zone and section 5 relating to the territorial waters, Chapter 226 speaks of "pollution", i.e. it does not limit itself to marine pollution but applies to all types of pollution, e.g. marine pollution, noise pollution, workplace pollution [51]. However, the provisions of the Food, Drugs and Drinking Water Act relating to the contamination of drinking water, or the provisions of L.N. 52 of 1986 relating to occupational safety already apply to the territorial waters of Malta. But the provisions of the Clean Air Act relating to air pollution do not extend to the territorial waters of Malta. So the provisions of this latter Act can be extended under section 5 of Chapter 226 to apply also to the territorial sea.

An interesting aspect which has to be noted with regard to pollution of the territorial waters of Malta is the resolution adopted by the House of Representatives on Thursday, 23rd June 1988:

"That this House reaffirms that nuclear armaments should not be allowed on the territory of the Republic of Malta.

For this reason, the House expects that those countries the warships of which were given diplomatic clearance to visit the Island would respect such

a decision.

The House resolves that the Minister of Foreign Affairs should notify this resolution to the Government requesting diplomatic clearance allowing their vessels to enter Maltese harbours and that the House considers that diplomatic clearance so given would be a sufficient guarantee that no nuclear weapons are being carried on such vessels entering the Island." [52]

This Resolution although it has an indirect effect on the prevention of marine pollution from nuclear vessels is more interested in safeguarding the territorial integrity and independence of the State of Malta.

In addition, regard must be had to section 5 (2) of Chapter 226 which states as follows:

> "In the application of any regulations made under subsection (1) of this section to warships or to nuclear powered ships or to ships carrying nuclear or other inherently dangerous or noxious substances, their passage through territorial waters may, by any such regulation, be made subject to the prior consent of, or prior notification to, such authority as may be specified therein."

This subsection is modelled on Article 23 of the 1982 United Nations Convention on the Law of the Sea [53]. Contrary to the Resolution of the House of Representatives, it applies to -

a. the territorial waters (and not only to "Maltese harbours");
b. the Maltese Arcipelago (and not only to the Island of Malta):
c. the following categories of vessels -
   (i) warships (whether possessing nuclear armaments or otherwise);
   (ii) nuclear powered ships;
   (iii) ships carrying nuclear substances;
   (iv) ships carrying dangerous substances;
   (v) ships carrying noxious substances.

Although section 5 (2) of Chapter 226 is modelled on Article 23 of the U.N. 1982 Convention, this Article does not in any way run counter to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone [54].

Again, section 5 of Chapter 226 has to be contrasted with section 234 of the Code of Police Laws. Under the latter provision the Minister responsible for ports is enabled "to make regulations for the preservation of good order in any part of the territorial waters of Malta and for any other purpose in respect thereof." Viewed from the purview of section 234 of Chapter 10, section 5 of Chapter 226 seems to be already comprised under the Code of Police Laws as the said enabling section of the Code of Police Laws is wide enough to include all the purposes for which the Prime Minister is empowered by section 5 of Chapter 226 to make regulations. Again, even the provisions of section 5 (2) of Chapter 226 can be made under section 234 of the Code of Police Laws.

D. THE PORTS REGULATIONS, 1966

The Ports Ordinance, Chapter 170 of the Laws of Malta, authorises the Minister responsible for ports to make regulations relating to the maintenance, control and management of any port or the approaches to any port and for

the maintenance of good order therein [55]. This section, thus, empowers, the Minister to make regulations for the maintenance of good order within the ports [56] whilst section 234 of the Code of Police Laws makes a similar provision but it extends such power of making regulations for the purpose of preservation "of good order in any part of the territorial waters of Malta" (the ports being, quite naturally, included in the said territorial waters). This implies that the Minister responsible for ports may exercise his right to make regulations relating to the maintenance of good order in the ports under both section 12 of the Ports Ordinance and under section 234 of the Code of Police Laws. As things stand, the Minister may create the same offence under both enabling provisions.

The Ports Regulations, 1966 [57], were made by the Minister responsible for ports in exercise of the powers conferred upon him by section 12 of the Ports Ordinance. Regulation 130 confirms the conclusion reached in the previous paragraph when it provides that

> "The provisions of these regulations are in addition to and not in derogation of the provisions of any law or regulations."
>
> Again, regulation 31 (1) provides that -
>
> "Subject to any other enactment or regulations, no person shall discharge or allow to escape into a port from any ship or any installation any oil of any descritpion and the master of a ship shall be responsible for any damage caused or expenses which may be occasioned by the flow of oil from a ship for any reason whatsoever into the waters of a port."

This regulation has to be applied subject to any other enactment or regulations. At present, this section has to be interpreted subject to section 228 of the Code of Police Laws and subject to regulation 42 of Legal Notice 53 of 1965 [58]. Of course, one must bear in mind that although no regulations on the matter contemplated by regulation 31 (1) of the Ports Regulations, 1966, have been made under section 5 of the Territorial Waters And Contiguous Zone Act, there still exists the possibility that some time in the future the Prime Minister will make such similar provisions.

The provision of section 228 of the Code of Police Laws seems to encompass the provision of regulation 31 (1) of the Ports Regulations, 1966. Although regulation 31 (1) of the Ports Regulations, 1966 covers a discharge or an escape of oil from a ship or any installation, both sources are covered in section 228 (1) of the Code of Police Laws as the latter subsection applies to a discharge of oil from any vessel, any place afloat, any place on land as well as any apparatus used for transferring oil from or to any vessel.

As to a regulation which which makes a similar provision to that contained in regulation 31 (1) of the Ports Regulations, 1966, regard must be had to regulation 42 of Legal Notice 53 of 1965 which provides that -

> "No petroleum shall be discharged or allowed to escape into the waters of a port."

In the latter regulation, the term "port" means Grand Harbour, Marsamxett Harbour, Marsaxlokk Harbour and St. Paul's Bay [59]. So regulation 42 of Legal Notice 53 of 1965 does not apply - contrary to regulation 31 (1) of the Ports Regulations, 1966 - to:

a. the landing places at Ramla-il-Bir and iċ-Ċirkewwa;

b. Mġarr, Gozo;

c. Santa Marija Bay and San Niklaw Bay in Comino.

Again, regulation 42 of the said Legal Notice speaks of "petroleum" (as defined in section 2 of Chapter 25) and not of "any oil of any description" as contemplated in regulation 31 (1) of the Ports Regulations, 1966. Indeed, although neither the Ports Ordinance nor the Ports Regulations, 1966, define what constitutes "oil", such definition does not seem to be necessary once the term "oil" is qualified by the words "of any description", i.e. in the case, "oil" does include the contents of the definition of "petroleum" given in Chapter 25.

When the provisions of the aforesaid enactment and regulation do not cover the situation contemplated in regulation 31 (1) of the Ports Regulations, 1966, then the latter regulation applies. However, as seen above, section 228 (1) of the Code of Police Laws already covedrs the field which is being regulated by regulation 31 (1) of the Ports Regulations, 1966 and, thus, regulation 31 (1) is superfluous.

E. THE PETROLEUM SHIPS ENTRY AND DISCHARGE OF PETROLEUM IN HARBOURS REGULATIONS, 1936

Government Notice 397 of 1936 relates to the entry and discharge of petroleum in Maltese harbours. These regulations were made under section 5 of Chapter 25 and are more or less of a regulatory nature. They do not contemplate the instance where petroleum is discharged into inland waters but are more interested in establishing certain measures and safeguards which have to be adopted by petroleum ships.

What is important, however, for our purposes is that these Regulations have a definition of what constitutes a "harbour":

> " "Harbour" means Grand Harbour, Marsamxett Harbour and Marsaxlokk Harbour." [60]

Again, according to these Regulations, petroleum (as defined in Chapter 25) can be either ordinary [61] or dangerous [62]. Indeed, according to Regulation 12, no dangerous petroleum is to be landed or loaded in the Grand Harbour or Marsamxett Harbour. The only Harbour where dangerous petroleum can be landed or loaded is, by inference, Marsaxlokk Harbour. Does this imply that any petroleum ship [63] which lands or loads dangerous petroleum in any landing place, in a bay or in the middle of our internal waters is not covered by these Regulations?

Indeed, according to Regulation 16, ordinary petroleum may be landed or loaded in the Grand Harbour and the Marsamxett Harbour if permission is granted in writing by the Director of Ports. If ordinary petroleum is landed or loaded in Marsaxlokk Harbour no such permission in writing is required. But what happens if ordinary petroleum is discharged in any loading place other than the above-mentioned three Harbours, e.g., in a bay or in the middle of Maltese internal waters?

The term "discharge" as used in the definition of a "petroleum ship" and int he rest of the Regulations is given quite a different meaning than that which we are today ordinarily accustomed to in, say, the International

Convention for the Prevention of Pollution of the Sea by Oil, 1954 or the International Convention for the Prevention of Pollution from Ships 1973 / 78 etc. In fact, the term "discharge" - as can be seen quite clearly from Regulation 12 (4) - is equated to the term "landed". In other words, "discharge" in these Regulations does not mean the discharge of petroleum into inland waters but the unloading of the petroleum carried in the petroleum ship on land.

These Regulations are rather archaic. They were last amended in 1937 and since then have prevailed notwithstanding the progress achieved in the ship industry and commerce relating, for example, to ship construction, ship safety, the evolution of super oil tankers and several other developments which have taken place since World War II. Nor do these regulations contemplate the transfer of petroleum to ships outside Maltese harbours. Indeed the Mediterranean Offshore Bunkering Company provides bunkers to vessels outside harbours and, at present, there are four designated areas for bunkering purposes outside Maltese harbours [64]. So they do not conform to present day needs of modern navigation. Concepts such as, for instance, segregated ballast tanks, bilge oil, reception facilities, etc., which are regulated by the International Convention for the Prevention of Pollution from Ships 1973 / 78 and the International Convention For The Safety Of Life At Sea 1974 are not catered for in these Regulations.

F. THE MARINE POLLUTION (PREVENTION AND CONTROL) ACT, 1977

This is the best drafted legislation on the subject under review. The Marine Pollution (Prevention And Control) Act, 1977 (Act XII of 1977) however has one main defect - it has not yet been brought into force by the Minister responsible for shipping. Although it was enacted twelve years ago, the pertinent Legal Notice required to bring it into force has not yet been published in the Government Gazzette. Nor have any regulations been made under this Act.

The 1977 Act is divided into seven Parts and contains 37 sections in all. It implements into domestic law the following international and regional instruments:

INTERNATIONAL INSTRUMENTS

1. The International Convention for the Prevention of Pollution of the Sea by Oil of the 12th May, 1954;
2. The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties of hte 29th November 1969 and the 2nd November 1973 Protocol relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil;
3. The Convention on the Prevention of Pollution of the Sea by Oil of the 12th May, 1954; and
4. The International Convention for the Prevention of Pollution from Ships, 1973 and the protocol of 17th February, 1978.

REGIONAL INSTRUMENTS

1. The Convention for the Protection of the Mediterranean Sea against Pollution of 16th February, 1976;
2. The Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft of the 16th February, 1976.

The sources used in drafting this law, apart from the said instruments, are the following British laws:

1. The Prevention of Oil Pollution Act, 1971;
2. The Merchant Shipping (Oil Pollution) Act, 1971;
3. The Merchant Shipping Act, 1974;
4. The Dumping At Sea Act, 1974.

Part II of the 1977 Act deals with criminal liability for pollution. Basically, according to this Part, pollution can be of two types: pollution from oil or other pollutant. Note that in the U.K. model, the Prevention of Oil Pollution Act 1971, the terms "other pollutant" [65] were not used as the legislator was regulating only oil pollution. But the Maltese Legislator felt the need to add the words "other pollutant" so as to cover pollution from substances other than oil. Although I am in complete agreement with this approach, the problem lies in the fact that the definition given of "pollutant" is so wide that it covers also oil pollution. So once oil pollution is not being excluded from the definition of "pollutant" there is no need to distinguish between oil pollution on the one hand and pollution from other substances other than oil on the other. The Maltese legislator was using United Kingdom legislation as his model, adding to the said model other provisions which cater for the International Convention on the Prevention of Pollution from Ships 1973 / 78 (MARPOL 73 / 78) and the 1973 Protocol relating to intervention on the High Seas in Cases of Marine Pollution by substances other than Oil. But the legislator must have forgotten that oil is one type of pollutant, if not the most harmful pollutant resulting from shipping activities.

Moreover, whilst the United Kingdom has incorporated the International Convention on Civil Liability for Oil Pollution Damage, 1969 (C.L.C. 1969) into its, domestic law through the Merchant Shipping (Oil Pollution) Act 1971, our legislator preferred to do away completely with the said 1969 Convention. Again, the U.K. has also incorporated the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (Fund 1971) by means of the Merchant Shipping Act 1974 but, again, the Maltese legislator did not include it in his 1977 Act. So if Malta decides to ratify the above-mentioned 1969 and 1971 Conventions, the 1977 Act will have to be thoroughly amended so as to bring it in line with the said Conventions.

In this essay, it is not intended to analyse the provisions of the 1977 Act because this task has already been done in another study [66]. However, when viewed from the international viewpoint, this Act needs to be enhanced so that better provision be made for the implementation in Maltese Law of MARPOL 73 / 78 [67] and for the introduction in our law of the C.L.C. 1969 and the Fund 1971 Convention. Indeed, if the latter two Conventions are to be implemented into domestic legislation, then Part III of the 1977 Act has to be substituted

by new provisions which will be in line with the said international instruments. Even the provisions relating to dumping of wastes at sea can be ameliorated.

Again, it must be noted that section B (4) of the 1977 Act [68] provides a radical departure from the Merchant Shipping Act in the sense that the principle of limitation of the shipowner's liability is done away with completely except as provided in section 9 of the 1977 Act [69]. On the other hand, the ratification of the C.L.C. 1969 implies that Maltese Marine Pollution Law must encompass the principle of limitation of liability of the shipowner in case of oil pollution damage as well as the incorporation into Maltese internal legislation of a scheme for compensation for such damage based on the principle of strict (and not absolute) liability.

G. THE MERCHANT SHIPPING (DANGEROUS GOODS) RULES, 1974

The Merchant Shipping (Dangerous Goods) Rules, 1974 were made under the enabling provision contained in section 285 of the Merchant Shipping Act. It should be noted that sections 284 to 291 of the Merchant Shipping Act deal with the carriage of dangerous goods and are intended to implement .into Maltese domestic law the provisions of the International Convention for the Safety of Life at Sea 1960.

The Merchant Shipping (Dangerous Goods) Rules, 1974 [70] are also intended to implent into Maltese Law the said 1960 Convention. What is however important to note is that in 1974 a new International Convention for the Safety of Life at Sea was adopted and that Malta has ratified the 1974 Convention in 1986 [71]. This notwithstanding, Malta has not updated its Merchant Shipping Act as well as the regulations and rules made thereunder dealing with safety of life at sea to conform to the 1974 Convention.

Thus, for example, section 284 of the Merchant Shipping Act affords us with a definition of what constitutes dangerous goods [72].

Note that this definition is not an exhaustive one and that the Minister has, in Legal Notice 90 of 1974, following the International Convention for the Safety of Life at Sea 1960, categorized dangerous goods into nine different types of classes. What is however to be borne in mind is that according to section 284, "petroleum" is considered to be a dangerous good. No distinction is however made between "ordinary petroleum" and "dangerous petroleum" as is the case under Government Notice 397 of 1936 because, for the intents and purposes of the 1960 Convention, petroleum is always dangerous irrespective of its flash point.

Furthermore, although Legal Notice 90 of 1974 classifies dangerous goods into nine categories, it does not make any dierct reference to the International Maritme Dangerous goods Code adopted by the International Maritime Organisation, a specialized agency of the United Nations.

Moreover, in 1983, regulations concerning substances carried in bulk in purpose-built ships were introduced. Indeed, the amendments made in 1983 to the International Convention for the safety of Life at Sea (SOLAS) 1974 extended the application of Chapter VII [73] of SOLAS to chemical tankers and liquefied gas carriers by making reference to two new Codes which have been

developed by the International Maritime Organisation, these Codes being, the International Bulk Chemical Code and the International Gas Carrier Code which both relate to ships built on or after the 1st of July, 1986.

With regard to the carriage of dangerous goods by sea, it should be pointed out that Maltese law does regulate this type of carriage in other laws and regulations. Confer in this respect Annex II to this to this essay.

H. THE PROPOSED DRAFT ENVIRONMENT PROTECTION ACT

In January, 1990, the Minister responsible for the environment issued a White Paper on the protection of the environment which also contained a proposed draft Environment Protection Act [74]. Part V of the said draft contains only five sections in all which relate to the discharge into the sea of any substance. This Part of the draft bill proposes to implement the provisions of the Convention on the Prevention of Marine Pollution by Dumping of wastes and other Matter, 1972.

These five sections do not cover - apart from the said 1972 Convention - the other international and regional instruments which Malta has ratified and accepted to implement in its domestic legislation. Indeed, these five sections are by far worse than the Marine Polluction (Prevention And Control) Act, 1977 which - albeit its deficiencies - at least honours Malta's international and regional obligations assumed under the various Conventions ratified or acceded to by Malta as above-mentioned. On the other hand, the proposed draft Environment Protection Act does not even cover the instruments which Malta has ratified and are at the present moment in time enacted in the Marine Pollution (Prevention And Control) Act, 1977 [75]

SECTION 3 : CONCLUSION

By way of conclusion it should be observed that the only enactment which attempts to prevent, reduce and control marine pollution - apart from the carriage of dangerous goods by sea - is the Marine Pollution (Prevention And Control) Act, 1977. However, this Act is not yet in force whilst the other provisions of Maltese internal law on the subject under review are archaic and need a major overhaul. As I have attempted to show in this essay, the latter legislation gives rise to a considerable amount of difficulty as to its proper construction so much so that there is quite an amount of overlap and confusion in these provisions. On the other hand, the proposed draft Environment Protection Act fails to remedy this situation.

I am of the opinion that the Marine Pollution (Prevention And Control) Act, 1977 should be revised with a view to include the provisions of the C.L.C. 1969 and the Fund 1971 Convention. Regulations should also be prepared so as to cover the MARPOL 73 / 78 Annexes. Moreover, the Merchant Shipping Act and the subsidiary regulations made thereunder should also be reviewed with the aim of providing for the implementation into Maltese law of the International Maritime Dangerous Goods Code and the innovations introduced by the International Convention for the Safey of Life at Sea, 1974.

NOTES

1. Cfr. Volume I of the Revised Edition of the Laws of Malta, 1984.
2. Infra, p. 18.
3. Section 2.
4. For example, mud, deposit and sewage.
5. Infra. pp. 6 - 10.
6. Section 2 of Chapter 10 defines "vessel" as "any ship or boat or any other description of vessel used in navigation". The term "boat" is, in turn, defined as "any craft not intended for navigation to places outside the limits of Malta, used for the purpose of carrying on any trade or calling, and includes pleasure boat."
7. The International Convention For the Prevention Of Pollution From Ships 1973 / 78 (MARPOL 73 / 78) defines "clean ballast" and "segregated ballast" in Annexes I and II thereof.
8. Cfr. Christopher Hill, *Maritime Law* (London: Lloyd's of London Press Ltd., 1989) at p. 284; David W. Abecassis, *The Law And Practice Relating To Oil Pollution From Ships* (London: Butterworths, 1978) at pp. 120 - 121.
9. (1957) 2 Q.B. 169, CA.
10. Contrary to the U.K. doctrine of private nuisance, the nuisance contemplated in section 224 of the Code of Police Laws covers nuisance both on land as well as in Malta's harbours, internal and territorial waters.
11. Master means any person having the command, charge or custody of any vessel.
12. Section 2.
13. Section 2.
14. Section 2 (1).
15. Section 3 (4).
16. Cfr. the definition given of "pollutant" in section 2 of Act XII of 1977.
17. Discharge means "any discharge or escape however caused."
18. The definition of "vessel" in Chapter 10 and the Marine Pollution (Prevention And Control) Act, 1977 is identical.
19. Section 2 of the Marine Pollution (Prevention and Control) Act, 1977.
20. The Marine Pollution (Prevention and Control) Act, 1977, does not provide for the punishment of imprisonment, contrary to section 228 of Chapter 10.
21. Cfr. section 4 of the Marine Pollution (Prevention And Control) Act, 1977.
22. Section 5 (1) of the U.K. Continental Shelf Act 1964 provides that "If any oil to which section 1 of the Oil in Navigable Waters Act 1955 applies ...".
23. This section prohibits any person from searching or boring for or getting petroleum without a licence.
24. This section relates to the granting of licences to search and bore for, and get, petroleum.
25. This section relates to the making of regulations with respect to the exploration, prospecting and mining for petroleum.
26. Chapter 156 of the Laws of Malta.
27. According to the interpretation section, Malta has the same meaning as is assigned to it by section 124 of the Constitution of Malta, that is to say, "the island of Malta, the island of Gozo and the other islands of the Maltese Archipelago, including the territorial waters thereof."
28. Cfr. section 2 of Chapter 194 for the definition of the "continental shelf".
29. Ibid. re. defintiion of "natural resources".
30. Supra. p. 12.
31. Cfr., e.g. section 1 (1) of the Ministry of Fuel and Power Act 1945, section 9 (1) of the Oil Taxation Act 1975, section 5 of the Energy Act 1976.
32. Borys v. Canadian Pacific Rly Co (1953) AC 217 at 223.
33. Section 2 of the Marine Pollution (Prevention and Control) Act, 1977.
34. Supra, p. 9.
35. Thus, in the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 "discharge in relation to oil or to an oily mixture means any discharge or escape howsoever caused."

MARPOL 73 / 78 has followed suit. On the other hand, the International Convention on Civil Liability for Oil Pollution Damage 1969 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 retain the distinction between a discharge and an escape.

36. This includes both the inland waters and the territorial sea.
37. According to the interpretation section (section 2 of Chapter 226), Malta means the island of Malta, the island of Gozo and the other islands of the Maltese Archipelago.
38. Chapter 138 of the Laws of Malta.
39. The contiguous zone is the zone of the open sea contiguous to the territorial waters of Malta.
40. "Contravention" includes, according to section 3 of the Interpretation Act, 1975 (Act VII of 1975), a failure to comply with.
41. "Law" according to the interpretation section, includes any instrument having the force of law.
42. However, some of the contracting parties to the said 1958 Convention, like Malta, have revised their contiguous zone limits to bring them in conformity with the 1982 U.N. Convention on the law of the Sea. Cfr. R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, 1988) at pp. 343 - 359.
43. "The contiguous zone may not extend beyond twelve miles from the baseline from which the breath of the territorial sea is measured."
44. Cfr. Section 4 (1) (a) of Chapter 226.
45. The law in section 3 (2) uses the following words: "... jurisdiction shall extend accordingly." In other words, the same jurisdiction of the Maltese State as on land extends also to the territorial waters of Malta.
46. Cfr. Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1979).
47. Added by section 3 of Act XXVIII of 1981.
48. Cfr. the definition of "Malta" given in section 2.
49. Section 3 (1) of Chapter 226.
50. Op. cit. at pp. 7 - 8.
51. Workplace pollution is contemplated in L.N. 52 of 1986.
52. Cfr. The Times, 24th June, 1988.
53. Op. cit. at p. 8.
54. R.R. Churchill and A.V. Lowe, op. cit. at Pp. 74 - 76.
55. Section 12 of Chapter 170.
56. As defined by section 4 of Chapter 170 and L.N. 96 of 1982.
57. L.N. 43 of 1966.
58. The Petroleum Ships Regulations, 1965.
59. Regulation 2 of L.N. 53 of 1965.
60. Regulation 1 of G.N. 397 of 1936.
61. "Ordinary petroleum means petroleum having a flash point from 73 degress F to 150 degrees F inclusive."
62. "Dangerous petroleum" means petroleum having a flash point below 73 degrees F."
63. "Petroleum ship means any ship, vessel, lighter or hulk having on board petroleum as cargo or any ship or vessel from which petroleum has been discharged, and which has not been freed from petroleum vapour to the satisfaction of the Superintendent of the Ports" (i.e. the Director of Ports).
64. Cfr. *Maritime Malta,* Office of the Parliamentary Secretary for Offshore Activities and Maritime Affairs, in particular, the sheet entitled "Bunkering Facilities."
65. Cfr. section 2 of the Marine Pollution (Prevention And Control) Act, 1977.
66. Cfr. Dr. William Azzopardi, "The Protection of the Environment (A Comparative Analysis), University of Malta, LL.D. thesis, 1988, at pp. 93 - 101.
67. No mention is made in the Marine Pollution (Prevention and Control) Act, 1977 that it was enacted with a view to implement the provisions of MARPOL 73 / 78. However, section 27 empowers the Minister responsible for shipping to make regulations covering the matters regulated by MARPOL 73 / 78.
68. Section 8 (4) of the Marine Pollution (Prevention And Control) Act, 1977 provides that - "Where the owner of a vessel incurs a liability under this section by reason of a discharge, sections 349 and 350 of the Merchant Shipping Act, 1973 shall not apply in relation to that liability."

69. Cfr. section 9 of the Marine Pollution (Prevention And Control) Act, 1977.
70. Legal Notice 90 of 1974.
71. Act XXV of 1986, the International Convention for the Safety of Life at Sea (Ratification) Act, 1986, empowered the Government of Malta to accede to SOLAS 1974 and its Protocol of 17th February, 1978. However, section 21 of Act XXIV of 1986 had already amended section 213 of the Merchant Shipping Act by substituting the reference to the 1960 SOLAS Convention by reference to the 1974 SOLAS Convention and the 1978 SOLAS Protocol. What is to be borne in mind, nevertheless, is that although both the Merchant Shipping Act and Act XXV of 1986 do not expressly menttion the amendments made to SOLAS 1974 and its Protocal of 1978 in 1981 and in 1983, these amendments also form part of Maltese Law once there were made according to the provisions of the siad International Convention, and when Malta acceded to this Convention it had done so when these amendments were already part and parcel of the 1974 SOLAS Convention.
72. Note that no reference is made to the International Maritime Dangerous Goods Code of the International Maritime Organization.
73. This is entitled "Carriage of Dangerous Goods". Chapter 8 of SOLAS deals with Nuclear Ships but no provision is made with regard to nuclear ships in the Merchant Shipping Act. One should however bear in mind section 5 of Chapter 226 (supra at p. 20).
74. "Proposed Draft Bill On Environment Protection". Valletta: Department of Information, January, 1990.
75. Cfr. Supra pp. 24 - 25.

BIBLIOGRAPHY

Abecassis, David William. *Oil Pollution From Ships: International, U.K. and U.S.A. Law and Practice.*
London: Stevens & Sons, 1985 (Second Edition).
Azzopardi, William. *The Protection of the Environment - A Comparative Analysis.*
Malta: University of Malta, LL.D. Thesis, July, 1988.
Ballenger, Jacques. *La Pollution en Droit International - La Responsabilitè Pour Les Dommages Causes par la Pollution Transfrontiere.*
Geneva: Librairie Droz, 1975.
Barston, R.P. & Birnie, Patricia (Ed.s). *The Maritime Dimension.*
London: George Allen & Unwin, 1980.
Bates, John H. *United Kingdom Marine Pollution Law.*
London: Lloyd's of London Press, 1985.
Brown, E.D. *The Legal Regime of Hydrospace.*
London: Stevens & Sons, 1971.
__________ *The Areas Within National Jurisdiction.*
London: Graham & Trotman Ltd., 1984.
Brownlie, Ian. *Principles of Public International Law.*
Oxford: Clarendon Press, 1979.
Churchill, R.R. and Lowe, A.V. *The Law of the Sea.*
Manchester: Manchester University Press, 1988.
Cusine, Douglas J. & Grant, John P. (Ed.s). *The Impact of Marine Pollution.*
London: Croom Helm, 1980.
Daintith, Terence & Willoughby, Geoffrey. *Manual of United Kingdom Oil and Gas Law.*
London: Sweet & Maxwell, 1984.
Gaskell, NJJ, Debattista, C, and Swatton, R.J. *Chorley & Giles' Shipping Law.*
London: Pitman, 1987.
Hawkins, Keith. *Environment and Enforcement.*
Oxford: Clarendon Press, 1984.
Hill, Christopher. *Maritime Law.*
London: Lloyd's of London Press, 1989.
Hughes, David. Environmental Law.
London: Butterworth & Co. (Publishers) Ltd., 1986.
Leanza, Umberto. "The Regional System of Protection of the Mediterranean Against Pollution." in Leanza, Umberto (Ed.) *The International Legal Regime of the Mediterranean Sea.*
Milan: Dott. A. Giuffrè Editore, 1987.
O'Connell, D.P. *The International Law of the Sea.*
Oxford: Clarendon Press, 1984.
Soni, Ramaneal. *Control of Marine Pollution in International Law.*
Cape Town: Juta & Co. Ltd., 1985.
Springer, Allen L. *The International Law of Pollution.*
London: Quorum Books, 1983.
Vukas, Budislav. "The Protection of the Mediterranean Sea Against Pollution." in Leanza, Umberto (Ed.) *The International Legal Regime of the Mediterranean Sea.*
Milan: Dott. A. Giuffrè Editore, 1987.

ANNEX I

MALTESE LEGISLATION RELATING TO THE PREVENTION, REDUCTION AND CONTROL OR MARINE POLLUTION.

Maltese legislation relating to the prevention, reduction and control of marine pollution is twofold:-

1. Maltese Legisaltion, and
2. International Instruments.

1 MALTESE LEGISLATION

Maltese Legislation is, in turn, sub-divided into two categories:

A. Primary Legislation, and
B. Secondary Legislation.

1. A. MALTESE PRIMARY LEGISLATION

The primary legislation which regulates the prevention, reduction and control of Marine Pollution is the following:

a. Code of Police Laws (Chapter 10).
b. Petroleum (Importation, Storage and Sale) Ordinance (Chapter 25).
c. The Expolosives Ordinance (Chapter 33).
d. Factories Ordinance (Chapter 107).
e. Ports Ordinance (Chapter 170).
f. Continental Shelf Act (Chapter 194).
g. Clean Air Act (Chapter 200).
h. Territorial Waters and Contiguous Zone Act (Chapter 226).
i. Merchant Shipping Act (Chapter 234).
j. Marine Pollution (Prevention and Control) Act, 1977 (Act XII of 1977).
k. International Convention For The Safety Of Life At Sea (Ratification) Act, 1986 (Act XXV of 1986).

1. B. MALTESE SUBSIDIARY LEGISLATION

a. Material Discharge Outside Harbours Regulations, 1905 (G.N. 24 of 1905).
b. Petroleum Ships Entry And Discharge Of Petroleum In Harbours, 1936 (G.N. 397 of 1936).
c. Port Regulations, 1966 (L.N. 43 of 1966).
d. Merchant Shipping (Dangerous Goods) Rules, 1974 (L.N. 90 of 1974).

2. INTERNATIONAL INSTRUMENTS

This is subdivided into two categories:-

A. Global Instruments, and
B. Regional Instruments.

2. A. GLOBAL INSTRUMENTS

a. The International Convention For The Prevention Of Pollution Of The Sea By Oil, 1954.
b. The Geneva Convention On The Territorial Sea And The Contiguous Zone, 1958.
c. The Geneva Convention On the Continental Shelf, 1958.
d. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963.
e. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof, 1971.
f. The Convention on the Prevention of Marine Pollution by Dumping of Wastes And Other Matter of the 13th November, 1972, as amended on 12th October, 1978 and 11th March, 1981.
g. The International Convention For The Safety Of Life At Sea of 1st November 1974 and its Protocol of 17th February, 1978.

2. B. REGIONAL INSTRUMENTS

a. The Convention For The Protection Of The Mediterranean Sea Against Pollution, 1976.
b. Protocol For The Prevention Of Pollution Of The Mediterranean Sea By Dumping From Ships And Aircraft, 1976.
c. Protocol Concerning Co-Operation In Combating Pollution Of The Mediterranean Sea By Oil And Other Harmful Substances In Cases of Emergency, 1976.
d. Protocol Concerning Mediterranean Specially Protected Areas, 1982.

ANNEX II

PROVISIONS OF MALTESE LAW WHICH ALSO REGULATE DANGEROUS GOODS

PRIMARY LEGISLATION

1. The Code of Police Laws (Chapter 10) : Sections 237, 238, 240(2), 241.
2. The Petroleum (Importation, Storage and Sale) Ordinance (Chapter 25) : Section 12.
3. The Explosives Ordinance (Chapter 33) : Section 3.
4. The Factories Ordinance (Chapter 107) : Section 3(2) (ii).
5. The Ports Ordinance (Chapter 170) : Section 12(m).
6. The Territorial waters and Contiguous Zone Act (Chapter 226) : Section 5(1) (2).

SUBSIDIARY LEGISLATION

1. The Ports Regulations, 1966 (L.N. 43 of 1966) : Regulations 33, 88, 89A, 98 to 126 and the First Schedule thereof.
2. Petroleum Ships Entry and Discharge of Petroleum in Harbours Regulations, 1936 (G.N. 397 of 1936).
3. Factories (Health, Safety and Welfare) Regulations, 1986 (L.N. 52 of 1986) : Regulations 18, 19, 38 to 44.

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Notes

THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS AND FREEDOMS: RECENT EFFORTS IN MALTA

DR. ANTON MICALLEF

On 10th September 1990 the Government of Malta deposited instruments of ratification with the United Nations Secretary General for four multilateral treaties concerned with the international protection of human rights. These are: **The International Covenant on Economic, Social and Cultural Rights** (hereafter referred to as Economic, Social and Cultural Rights Covenant); **The International Covenant on Civil and Political Rights** (hereafter referred to as International Covenant); **The Optional Protocol to the International Covenant on Civil and Political Rights** (hereafter referred to as Optional Protocol), all three adopted by the United Nations General Assembly in 1966, [1] and the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (hereafter referred to as the UN Convention on Torture) adopted by the General Assembly in 1984 [2].

All four treaties serve one common purpose: the protection of fundamental human rights and liberties through international legal regulation. But each instrument engenders a separate series of obligations for States in international law and the effect of the implementation of these undertakings by Malta, as a State Party, on our laws will be varied and revolutionary.

The present outline is offered as a succinct record of the principal features incorporated in these instruments and of the contribution made by these texts to the formation of an ever developing comprehensive regime concerning international human rights protection that will become operative under our law.

Collective Rights

In addition to the provisions defining the traditional rights of individuals found in the Universal Declaration of Human Rights, the European Convention on Human Rights [3] the 1966 International Covenants introduce, and they are innovative in this respect, the concept of so-called collective rights. Part I, which is common to and worded in indentical terms in both Covenants, provides for the exercise by peoples of their right to self-determination and of exclusive control over their natural wealth and resources. The remedial process provided for in the Covenants in respect of breach of such collective rights, may not be invoked by subjects of rights other than States and collective entities. This is the interpretation offered by the UN Human Rights Committee established under the International Covenant.

The Economic, Social and Cultural Rights Covenant

The 1961 European Social Charter, to which Malta is also a Party, is supplemented by the Economic, Social and Cultural Rights Covenant. In addition, to the comprehensive coverage of various aspects involved in the right

to work offered by the European Social Charter, the Economic, Social and Cultural Rights Covenant includes:

(i) the right to adequate standard of living for individuals and families·
(ii) the right to freedom from hunger;
(iii) the right to enjoyment of physical and mental health;
(iv) the right to education;
(v) the right to participate in cultural life and to enjoy the benefits of scientific progress; and,
(vi) the right to pursue scientific research.

States Parties to the Economic, Social and Cultural Rights Covenant are obliged, *inter alia,* to submit periodic reports to the United Nations Economic and Social Council recording the measures undertaken to ensure protection of the rights defined therein. These reports may, in turn, be transmitted by the Economic and Social Council to the General Assembly and other UN specialised agencies which may either report back on the performance of States Partie's fulfillment of their obligations under the Covenant and / or make recommendations on how a State Party ought to improve its efforts in order to satisfy its contractural obligations under the Covenant.

The International Covenant

States Parties to the International Covenant are also obliged to submit reports to the Human Rights Committee indicating factors and difficulties incurred in the implementation of the Covenant. On its own initiative the Human Rights Committee may also request States Parties to submit reports which, upon their consideration, may elect to exercise one or more of the following options:

(a) it may report back with its comments and recommendations to the reporting State Party concerned;
(b) it may advise the UN Secretary-General to send copies or parts of State Parties' reports to a specialised UN body within whose field of competence that report may fall;
and,
(c) it may transmit copies of the reports together with its comments to the UN Economic and Social Council.

States Parties may also lodge with the Human Rights Committee complaints indicating that other States Parties are not fulfilling their obligations under the International Covenant. It is necessary for States Parties to declare their acceptance of the Committee's competance to receive and consider such complaints before they may submit representations. The Government of Malta has recognised the competence of the Human Rights Committee in its instruments of ratification.

Where matters which form the basis of such complaints are not resolved satisfactorily between the States Parties concerned, it may be agreed for an

ad hoc committee known as Conciliation Commission to be established by the Human Rights Committee in order that the Commission will use its good offices to reach a settlement. Where no agreement is reached the Commission shall report its findings on *questions of fact,* including its views on the possibilities of reaching an amicable solution to the Human Rights Committee. This report shall also record written and oral submissions delivered by States Parties before the Commission. Within three months from receipt of their copy of the report, the States Parties concerned must indicate to the Human Rights Committee whether or not they accept its contents.

Optional Protocol

The *casus foederis* of the Optional Protocol broadens *ratione personae* the remedial process for human rights violations operative under the International Covenant. Desirious to further secure the international protection of human rights, the Optional Protocol was drafted and adopted to permit individuals to submit communications to the Human Rights Committee informing it of alleged breaches of their rights by States Parties. Communications may only be submitted by individuals subject to the jurisdiction of a State Party to the Protocol. Accordingly, the invocation of the process of accountability under the Optional Protocol is not exclusive to nationals of States Parties. Thus, it will be permissable for aliens present in Maltese territory to inform the Human Rights Committee of any failure of the Government of Malta either in securing the exercise of fundamental liberties provided for in the International Covenant or for failure to provide a remedy where breach of fundamental rights has occurred. As a State Party to the Optional Protocol, Malta has accorded its nationals, residents and even its most temporary visitors access to a global rather than a regional forum dedicated to prevent and to remedy human rights violations.

Communications will not be considered by the Human Rights Committee if: (a) they are anonymous, (b) remedies under national law are not previously exhausted, (this rule also applies to the complaints procedure operative under the International Covenant) and (c) the matter concerned is simultaneously under review by another procedure of international investigation or settlement. However, when ratifying the Optional Protocol, Malta submitted its interpretation of this third requirement and restricted the application of the rule by including matters that had already formed the subject matter of a previous inquiry. There is no "appeal", therefore, to the Human Rights Committee from the decisions of the European Human Rights Commission. A person seeking a remedy against the Malta Government, after exhausting all remedies under national law, will have to choose between New York and Strasbourg.

The reporting process and the filling of complaints and individual communications under the Economic, Social and Cultural Rights Covenant, the International Covenant and the Optional Protocol respectively, may not, either singly or jointly, represent an effective international machinery capable of providing remedial action as that operative under the European Convention on Human Rights. However, alongside the "Strasbourg machinery", Maltese

nationals and persons present in Malta will have access to an additional / alternative international body designed to ensure the protection of fundamental rights and liberties by States Parties which, failing to fulfill their international obligations, would risk becoming subjects of scrutiny and exposure before the international community.

Overall, these instruments (including the 1969 OAS Convention on Human Rights [4] and the 1981 OAU Charter on Human Rights [5]) are standard-setting in the international law on human rights. Since the end of the Second World War, they feature among the major international agreements which have: (a) substantially contributed to the formation of a very specific *corpus* of peremptory rules in international law; (b) increased State accountability in the international community; and, more radically, (c) participated in the development of an international legal regime which now provides individual punishment for human rights violations considered to be criminal offences under international law. The UN Convention on Torture is an excellent illustration of these developments.

Torture

The UN Convention on Torture differs significantly from the other three human rights instruments ratified by Malta in that the remedies it provides lie principally in the criminal law. The landmark achievements of the 1984 treaty on torture are the following.

A. Unlike the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human Rights, the UN Convention on Torture not only prohibits the practice of torture but it provides, for the first time within the framework of an internationally binding legal instrument, (i) a definition of the concept and (ii) proscribes it as a criminal offence.

Torture is defined as acts of severe pain or suffering (physical or mental) intentionally inflicted by or at the instigation of a public official or other person acting in an official capacity for one or more of the following purposes (i) obtaining from a person or third party information or a confession; (ii) punishing a crime committed or suspected of having been committed, by a person or third party; (iii) intimidating or coercing a person or third party; and, (iv) for any other reason based on discrimination. This definition is largely taken from article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by consensus by the UN General Assembly in 1975 [6]. That definition also served as a useful working basis for the definition now appearing in the *International American Convention To Prevent and Punish Torture* adopted in 1985 by the Organisation of American States [7].

States Parties to the UN Convention on Torture are obliged to take all necessary measures, and that includes legislation, to ensure that torture is rendered a criminal offence under their laws. This obligation, now binding

upon Malta, would result in the addition of torture as a separate crime under our Criminal Code. Currently, there is no definition of the crime of torture as such under our law. It would be a weak and conspicuously evasive approach by the Maltese legislator to argue that torture is adequately covered by the provisions concerning the crimes of bodily harm under the Criminal Code in an attempt to refrain from inserting necessary amendments thereto. Should such an approach form the basis of legal advice offered by government lawyers, it would seriously question Malta's fulfillment of its international obligations contracted under the Convention. To argue that the practice of torture is adequately covered by the provisions regulating bodily harm under the Code, is tantamount to total disregard for the particular nature and specific intent required by the definition of torture under the UN Convention.

Prima facie weaknesses in the definition of torture under the UN Convention include: (i) the qualification *ratione personae* of candidate offenders. This is restricted to public officials or persons acting in an official capacity. The legislator in Malta may wish to broaden this category to all individuals including those acting in a private capacity. The law would cater for all circumstances such as in a terrorist situation where torture may be practiced by hijackers (who do not usually occupy a public office) to obtain information from members of the crew or airline passengers. Such legislation would not run counter to the UN Convention on Torture because it permits national legislation to be of wider application *ratione personae* than that provided for in its definition of the crime of torture.

B. Following the pattern of other standard-setting treaties, such as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the 1973 UN Convention on the Prevention and Punishment of Crimes Committed Against Internationally Protected Persons Including Diplomats; and the 1979 UN Convention Against the Taking of Hostages, the UN Convention on Torture incorporates a series of measures which have transformed the criminal law content of international law and, when implemented by Malta as State Party, will have a similar impact upon our criminal law. These measures are listed below and will engender the following consequences.

(i) Criminal Jurisdiction.

The Convention provides for the exercise of jurisdiction by States Parties on four separate bases. These are:

(a) the territorial principle including crimes committed on board vessels and aircraft registered in the flag state.
(b) the active personality principle, i.e. where the perpetrator of the crime is a national of the State Party;
(c) the passive personality principle, i.e. where the victim of the offence is a national of the State Party;
and

(d) the universality principle, i.e. when the offender is merely present in the territory of a State Party.

The territoriality principle provided for under the Convention is in conformity with our provisions on jurisdiction in the Criminal Code (Section 5.a., b., & c.) and its implementation would not necessitate any amendment. However, in view of Malta's obligation under the UN Convention on Torture to take necessary measures to establish its jurisdiction in respect of the offence of torture, legislation is required to ensure that the active, passive and universality principles of jurisdiction stated above would form part of our law. Thus, in addition to the crimes defined in Section 5.d. of the Criminal Code, in respect of which the active personality principle applies, there shall be added the crime of torture. The passive personality principle does not feature in Section 5 of the Code and this will be a new ground by virtue of which torture may become justiciable before our courts even if committed outside Maltese territory. Finally, if the circumstances so present themselves, proceedings would have to be instituted in Malta if the presence of the alleged torturer is secured in Maltese territory and he is not extradited. His presence in Malta may well be the only juridical basis on which criminal proceedings are instituted: the offender and the victim may both be non-Maltese nationals and the offences may have taken place in the territory of a third State. This involves the application of the so-called principle of universal jurisdiction which in Section 5 of the Criminal Code applies in respect of commercial fraud and forgery. When appropriate legislation is enacted, it will also become applicable vis-a-vis torture.

(ii) Aut Dedere Aut Punire

The application of the universal principle of jurisdiction in respect of torture by States Parties under the UN Convention is circumscribed by the so-called *aut dedere aut punire* principle. In other words a State Party would exercise universal jurisdiction only where either no request for extradition is submitted, or, if such request is made, it is refused. The State Party which has presence of the offender is then obliged to institute criminal proceedings before its own competent tribunals. This is the essence of the either extradite or prosecute principle. The obligation is not on extradition but on institution of criminal proceedings. That the proceedings must result in a conviction is not obligatory under the UN Convention on Torture. It is sufficient that the case is brought before the competent national authorities for the purposes of prosecution.

The essence of these provisions is to ensure the application of the "no safe haven" approach which is the *casus foederis* of the UN Convention on Torture and other treaties concerned with the international proscription of criminal offences. Th torturer, like the pirate before him, is now considered candidate for that "exclusive club" of outlaws in international law known as "enemies of mankind". However, State representatives involved in the drafting of the treaty would only accept an exception to the sacrosant principle of territorial jurisdiction if it formed part and parcel of the *aut dedere aut punire* principle.

(iii) Superior Orders

The fact that a person committed torture because he was following "superior orders", is not an acceptable defence for a charge of the criminal offence of torture. This is provided for in the Convention and owes its presence to two factors: (a) the crime of torture is almost invariably committed in the execution of orders from a superior. Indeed, the definition of torture in the Convention includes reference to individual responsibility for whomsoever instigates, consents or acquiesces that the crime of torture may be perpetrated; and, (b) the non-applicability of the defence of "superior orders" dates from the Charter of the International Military Tribunal annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. One of the Nuremberg legacies is the principle that the perpetrators of acts considered to be criminal offences under international law may not escape punishment by arguing that criminal responsibility is not incurred because they were merely following orders. This rule now applies to torturers. There is no provision contemplating this specific ground of defence under our law and legislation would be necessary, again, in view of Malta's general undertaking to ensure that torture is rendered a crime punishable under its law.

(iv) Extradition

States Parties to the UN Convention on Torture are obliged to include torture in all prospective extradition agreements concluded with other States Parties. In addition, torture is deemed to be included as an extraditable offence in extradition agreements already existing between States Parties, even if it is not specified therein. Further, States Parties, like Malta, which consider extradition to be conditional on the existence of an extradition treaty, *may* (there is no obligation here) consider the UN Convention on Torture as the appropriate legal basis for the purpose of entertaining an extradition request by other States Parties.

C. The processes of State accountability and reporting operative under the UN Convenants and Optional Protocol are also to be found in the provisions of the UN Convention of Torture. A Committee Against Torture has been established and it receives reports from State Parties on the measures taken in view of their obligations under the Convention. The submission of reports by States Parties is obligatory. The first report is to be submitted within the first year since the entry into force of the Convention for the State Party concerned, thereafter reports are submitted periodically (every four years). An exchange of comments and observations between the Committee and the reporting State Party normally follows the reporting stages.

The Committee is empowered to take the following steps where it receives information from States Parties that torture is being systematically practiced in the territory of a State Party:

(i) it will call upon the State Party concerned to present its own information and observations on the matter raised; and,

(ii) it may appoint one of its members to conduct a prompt and confidential inquiry which could include visits to the territory of the State Party concerned if this is permitted by same State Party.

On the conclusion of the inquiry, the Committee will transmit the findings together with any comments or suggestions that it may deem proper to make to the State Party. The Committee may also include a summary account of the matter raised in its annual report to States Parties and to the UN General Assembly.

The procedure by which State complaints and individual communications are lodged with the UN Human Rights Committee also operates under the UN Convention on Torture. However, State Parties must first declare their acceptance of the competence of the Committee Against Torture to receive and to consider complaints and communications before they may participate in the review procedure administered by the Committee. The competence of the Committee has been recognised by Malta in its instrument of ratification.

The Committee Against Torture differs in one important respect from the Human Rights Committee when considering communications from individuals subject to the jurisdiction of States Parties claiming to be victims of torture. Thus, whereas the Human Rights Committee will not entertain individual communications which form, simultaneously, the basis of consideration by a separate international investigation or settlement, the Committee Against Torture, in addition will not entertain communications that *have already been* considered under an alternative procedure of inquiry. However, in view of Malta's interpretation of the competence of the Human Rights Committee as being identical, in this respect, to that of the Committee Against Torture, the distinction between the two becomes academic in so far as Maltese nationals and others present in Malta may benefit under these instruments.

Accordingly, the review mechanisms of the Committee Against Torture run along lines similar to those of the Human Rights Committee. Indeed the UN Convention on Torture recommends that States Parties ought to consider members of the Human Rights Committee as candidates most suitable for nomination to the Committee Against Torture.

However, the Committee Against Torture represents the reaffirmation of a process that has developed in international practice whereby the supervision of human rights protection has progressed, initially, from being administered by international fora whose terms *ratione materiae* covered a broad range of fundamental rights and freedoms (e.g. the Human Rights Committee and the European Commission of Human Rights) to specialised bodies entrusted with ensuring respect for very specific human rights. Thus the Committee established under the UN Convention on Torture rather than creates duplicity projects continuity and is squarely consistent with previous practice evidenced, *inter alia*, by the establishment of the Committee of Racial Discrimination under the 1966 UN International Convention on the Elimination of All Forms of Racial Discrimination and the Special Committee on Apartheid referred to in the 1973 UN Convention on the Suppression and Punishment of the Crime of Apartheid.

CONCLUDING OBSERVATIONS

As State Party to these landmark treaties, Malta has made an unequivocal declaration of its commitment to respect and to safeguard individual and (now) collective rights and liberties. Recognition of the competence of the Human Rights Committee and of the Committee Against Torture to receive State Party complaints and individual communications, alone, constitutes sufficient evidence for this commitment to be now considered entrenched in Malta's foreign policy considerations.

Provisions for new fundamental rights and freedoms, proscription of new criminal offences and extension of the traditional reach of State criminal jurisdiction, are a fairly loaded brief for any government legal officer and no doubt the Attorney General's Office will relish the opportunity to advise Government on such matters. However, it is the obligation to legislate, *per se,* and the form which that legislation takes that will determine whether or not Malta detracts force from this admirable, though overdue, endorsement of a global scheme designed for the protection of human rights.

Notes:

1. Texts at: Brownlie, *Basic Documents on Human Rights,* 1981 (2nd edn.), pp.118, 128, 146.
2. G.A. Resolution 39 / 46, 1984. Text also at: 23 *ILM* 1027.
3. Cf. European Convention Act, 1987.
4. Text at: 9 *ILM* 673.
5. Text at: 21 *ILM* 59.
6. See G.A. Resolution 3452 (XXX), 9th December, 1975. Text at: Brownlie, *Basic Documents on Human Rights,* p. 35.
7. See OAS, G.A. Res. 783 (XV - 0 / 85), 9th December, 1985. Text at: 25 *ILM* (1986) 519.

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THE PEOPLE'S REPUBLIC OF CHINA ADMINISTRATIVE PROCEDURE LAW

DR. CLIFFORD BORG - MARKS

The Administrative Procedure Law adopted some eighteen months ago by the National People's Congress became effective on October 1, 1990, the 41st anniversary of the founding of the PRC. The Law provides substance to Article 41 of the Constitution of the PRC (1982) which granted citizens "the right to criticize and make suggestions regarding any state organ or functionary" and to make complaints or charges against state organs and their personnel for violation of the law or dereliction of duty.

The Law establishes detailed procedures for challenges of administrative actions in the People's Courts but not of the administrative rules under which such actions were taken. Citizens, legal persons or other organizations may initiate proceedings in the courts. The Law is of special interest to foreigners and foreign businesses in that Chapter 10, 'Administrative Litigation Involving Foreign Entities', in Article 71, states that "foreigners, stateless persons and foreign organizations .... shall have litigation rights and obligations equal to those of citizens and organizations of the PRC".

Article 11 lists eight specific administrative acts within the scope of acceptance of cases. Some of these could be of interest to the foreign business enterprise in China e.g., when an administrative agency is considered to have infringed upon the statutory autonomy of a business organization, or when applications for permits or licences are rejected or left unanswered when the applicant feels that legal requirements have been satisfied. Several recent press reports have concentrated on the prospect of foreign businesses and individuals suing government departments and officials. The Vice Minister of Foreign Economic Relations and Trade, Li Langing, recently urged foreign trade officials to familiarize themselves with the Law's provisions. MOFERT is apparently reviewing a Foreign Trade Law, under consideration since 1983, to complement the Administrative Procedure Law.

Administrative acts which are excluded from the scope of the Law include "state acts" such as those related to diplomacy and defense, "administrative laws, regulations or rules, or universally binding decisions or orders formulated and promulgated by an administrative agency", internal personnel decisions of an administrative agency and specific acts for which the law provides an administrative agency with "final adjudication" powers. These exclusions are rather vague and certainly terms such as "state acts" and "universally binding decisions" are very much open to interpretation.

The Law provides that hearings shall be held in public except where state secrets or the private affairs of individuals are concerned. The Court will be made up of an odd number of judges with a minimum of three. Mediation shall not be applied in administrative cases except in proceedings for damages arising from a tort. The burden of proof shall be borne by the respondent with

respect to its administrative actions and to supporting documentation.

Article 53 states that courts shall refer to administrative rules and regulations. The courts do not have the power to review the validity of such rules though in cases where rules are seen to be inconsistent with State Council regulations, The Supreme People's Court shall submit the matter to the State Council for interpretation or a ruling.

The Law establishes a right to one appeal to a higher court within ten days of the original ruling.

The ability of foreign individuals and businesses to initiate a suit is subject to reciprocity, that is, if the courts in the country of nationality of the plaintiff restrict the administrative litigation rights of PRC citizens and organizations, the same restrictions will apply. Foreigners wishing to appoint a lawyer as agent ad litem have to appoint a lawyer from a Chinese law firm.

While the Administrative Procedure Law certainly amounts to an improvement in basic litigation rights in China, it remains to be seen how effective it is going to be. Despite the ongoing campaign throughout China to spread knowledge of this Law, legal awareness remains low and scepticism runs high among the citizenry. Although the Law clearly states that "parties to administrative proceedings shall be equal before the law"(article 7), individuals may be reluctant to act against powerful government organs. In the coming months we can expect to read about specific cases brought against administrative agencies that will receive China-wide publicity. Such cases will be followed closely by citizens, enterprises and legal observers.

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Interview

Mr. Justice Professor

Wallace PH. Gulia, B.A., B.SC., Ph.C., D.P.A., M.A. (Admin.), LL.D.

Interview with Mr. Justice Professor Wallace PH. Gulia, B.A., B.SC., Ph.C., D.P.A., M.A. (Admin.), LL.D.

by Christopher Spiteri

Your honour, what can you tell us about your childhood experiences.
My childhood was concurrent with the years leading up to the second world war. I was not the adventurous type and so there was nothing really outstanding except a voyage abroad with my family.

Your teenage years coincided with the second world war. Have you got any particular recollections of those momentuous days?
I had to live through those days like everybody else. There were days when one enjoyed seeing the flares which the German bombers used to let loose to light up the Island, so as to see which part of the country they were going to bomb. My father decided to go over to Zebbug, immediately before the hostilities broke out and this was timely since our house was razed to the ground on the very first day of the war. I sat for my Malta matriculation in the cloisture of St. Dominic's priory at Rabat, instead of in Valletta. Like everybody else, I had to study by candlelight in the shelter.

Did any of these events effectively change your outlook towards life?
One gets one's outlook from one's day to day experiences and there was nothing which was so significant that it forced me to take one course of action instead of another, I studied like everybody else and then I took my chances in life as and how they come along.

You happen to be one of the very few members of the legal profession who have followed advanced studies in the sciences. How do you account for this unusual albeit fascinating combination of two such diverse fields of studies, and, what prompted you to undertake your legal studies?
Within my family, we were two boys and since childhood, one of us was destined for law and the other for medicine. I was destined for medicine, I started my studies in the faculty of medicine, but in my third year, I decided to change over to Law, since I thought it was better to waste three years in my life in order to be able to change over to an area which I had started to consider as far more interesting. When I ultimately discussed the issue with my father, he was most understanding but he laid down one condition. He wanted me to finish my third year and get my degree in Pharmacy and Science. Originally, I concentrated on my science subjects since I had decided to give up my pharmacy subjects, but ultimately, I decided to attempt my pharmacy examinations too. I did some cramming in the very last days and managed to pass those examinations. However, I never worked as a pharmacist, even though it would have been a useful and rather lucrative part-time employment, particularly during my time as a law student.

You spent 27 years of your career working at the Attorney General's office. What attracted you most to the work of Crown Counsel; and retrospectively, do you feel that you have fulfilled your aspirations in that post?

Certainly, one thing which did not attract me in the legal profession was that one had to deal with one's clients in order to get paid. Thus, I considered that if I had a regular employment, I would not have to issue bills to my clients, who might not want to pay. So, I decided that if I was selected, I would take a job in that office. Then, in my studies, I had also specialized in the law of the Administration, and I thought that working in the administration and facing the day to day problems of the government would be very much climbing up the tree I had climbed in my research work. The problems which one had to solve were very much the problems for which I had prepared myself in my administrative studies.

You have furthered your legal studies in the United Kingdom and in Italy. What kind of research work had you undertaken in these countries?

In Manchester, I took a Master's Degree in Administration. Possibly, a matter of interest is how I came to choose that degree. When I changed over from science to arts, I managed to obtain an exemption in English, Maltese and Philosophy, and so I remained with just two subjects in my first year, Latin and History. Consequently, my father suggested I should try to obtain the Diploma in Public Administration of the University of London. Later I managed to obtain a travelling scholarship from the University of Malta. When I joined the University, the Statute of the University provided that the student who came first in his B.A. with honours, would be awarded a sum of money. However, within three years, a new university statute provided for a travelling scholarship for the student who was first with honours. Further, the new statute also provided for a free diploma to the students who were second and third in the course of laws. The students who were second and third in the course of laws, took the university to court for not giving them a free diploma and won the case. Consequently, I applied to the university, claiming that I should have been given a travelling scholarship, instead of a prize of money. The university granted me this shcolarship, which was concurrent with my last year in the law course. The Senate granted me permission to sit for my exams in the September session, without having to attend a single lecture. When I came to choose a British University, where to further my studies, I decided to build up on my diploma in public administration. Therefore, I chose Manchester, since this university was one of the two which awarded an M.A. (Admin.). During my first year, I read Administrative Law, Local Government Law, Current Political Theory, Government I (Public Administration) and Government III (Public Corporations). During my second year, I carried out research in Administrative Law proper, especially in the field of administrative justice. My dissertation dealt with rent tribunals in Britian, Malta and Northern Ireland. Rent tribunals in Britian had just been established and professional attitude was against them since they were not considered as proper courts of law but as administrative tribunals. I arrived at the conclusion that these rent

tribunals were not in any way inferior to a court of law. My research work in Italy was the result of a scholarship obtained through the Italo-Maltese Cultural Agreement which followed Independence in 1964. In my research work in Britain, I had already shown an interest in the Conseil d'Etat. So, when I applied for the Italian Scholarship, I proposed to carry out research regarding the Consiglio di Stato, which is the Italian counterpart to the French Conseil d'Etat. I obtained this bursary, and I concentrated on the doctrine of Governmental Liability. I found out that the Italian situation was not as we had always imagined, identical to our position. The Italians distinguished between actions jure imperii and jure gestionis to find out which court had jurisdiction and not to deny jurisdiction, as had happened in Malta.

As a lecturer in Administrative Law, and a prolific writer on this subject, do you think that our law deals equitably with a citizen who sues the government?
It depends very much on the convictions of the judge who happens to be deciding the case. If you have a judge who still believes in the dual personality of the state and who will immediately rule something against the citizen just because it is carried out in terms of the political authority of the state, then the citizen would be at a disadvantage. However, if the case comes up in front of a judge who feels that there should be no distinction between the government and the citizen in terms of law, then of course, the citizen is on an equal footing with the state. We have had some judges who turned a blind eye to the notion of the dual personality of the state, especially Judge Pullicino at the turn of the century and Judge Magri in the middle of the century. They both agreed that in a case of damages, civil law applies independently of the notion of the dual personality of the state. Later, other judges, in particular Judge Caruana Curran stated that the dual personality of the state simply does not exist any more. I hope you will pardon me, if I say, that in some of my judgments I have followed these predecessors.

To what extent should the judiciary be allowed to review administrative action?
The law had said hardly anything on this subject, and thus it was left to the judiciary to debate this subject. However, our law was amended by Act VIII of 1981, which tended to avoid judicial review. However, our courts in recent years, through some outstanding judgements, have not exactly accepted the position created by Act VIII. Thus, we should be optimistic since our courts have managed to go round Act VIII, in proper cases and there should not be any reasons why future courts should not be able to do so certainly to the same extent.

You have lectured at our university for a long number of years, which aspects of this experience do you consider as the most positive?
From the point of view of the lecturer himself, I would say it is the mental contact with young people, because since he is dealing with young minds, his mental outlook would have to remain young. This is a very positive feature

because we are always getting older and one should not lose one's mental flexibility. Objectively speaking, a positive aspect of university lecturing is research work itself. In fact, when you have to lecture over a full subject, you have to look at the corners which usually one tends to shut out of one's consideration in the course of one's work. Thus, frequently, a lecturer would have to carry out research in order to adjourn his knowledge and to keep up with progress which has been made in a particular area.

Over the years, university life has changed considerably. Indeed, do you see any similarities between the students and the university life of today and those of your student days?
Similarities there are, but there are also dissimilarities. The attitude towards reading and studying has remained very much the same. The student has to work at his subjects and try to master them. What has been unfortunately lost in the process over the years, is the chance for the student to be able to broaden his outlook to other points of view, instead of merely limiting his attitude to the subjects which he is studying. When I was a student, the university was full of movements, literary societies, dramatic societies, and other societies which tended to broaden one's personality and not limit one's outlook to one's studies. Since there has been too much insistence on examinations, the student no longer has enough time to devote to these organisations, which during my student days forged out the personality much more than anything else. In my time, I was president of the Students Representative Council, Vice-President of the Għaqda tal-Malti, Editor of the 'Sundial', the journal of the English Literary Society, a member of the Medical Students Association and later a member of the Law Students Society. Of course, in my time we did not have any university campus. We merely had the old building in St. Paul's Street, Valletta, with the students' union in front of it, which served for all sort of things. Today, the students have much more convenient accommodation at University house, yet I doubt whether they are making full use of these facilities. Unfortunately, today students have lost the Newman mentality of the University being the place where one met with one's confreres and thus evolved a personality which had a universal point of view and not limited to one's profession.

You were elevated to the Bench in 1982. Which do you think are the most difficult aspects of a judge's work? Which are the right personal attributes and dispositions that enable a judge to overcome such difficulties?
A limitation which immediately comes to mind is the fact that one does not find one's law very easily. Unless the judge had maintained his personal copy of the laws up to date as amended by Parliament, one does not find a copy of the law which is suitably amended. So, the judge does not merely have to decide the dispute but must ensure that his copy of the law is suitably updated.

The personal attribute which is necessary in my work is the ability to listen to both sides, because when a judge listens to both sides, he tends to get the feel of the situation much better than by trying to exhaust his mental energies thinking for himself. The solution is very frequently to be found in the middle of the way.

To what extent, if at all, should judges give weight to public opinion and criticism in their judgement?

The judge is there to apply the law and not what the people say in the street. The judge is there to interpret the law and if he disagrees with the law he has no right to say so. The law is superior to the judge and not the other way round. The judiciary has got to apply the law whether it likes it or not. The law is there and has to be applied in the manner in which Parlimanet intended. Thus, the judge should disregard public opinion and all criticism which is being levied against him.

Do you think that religious beliefs and moral values are an asset or a drawback for the legal practitioner?

I believe they are an asset for the simple reason that moral values very often tend to run parallel with the law and the principles of justice. This century, we have come to insist on the Fundamental Human Rights which historically evolved as idealistic concepts and originally as moral issues. Then religious beliefs cannot be ignored for the simple reason that a judge is tied down, in his dealings, by the oath of office in terms of which he swears to do his work properly and justly. If a person has no sound religious convictions, this oath is of no value whatsoever.

What are your views on the quality of the services given by the clerical staff of the law courts?

As everywhere else, it depends on the personality of the person in question; there are some men and women who are outstanding in their work and there are others who leave much to be desired. In fact, however, a judge does not really depend much on the clerical staff, because his decisions are decisions which he must reach himself and no one can really help him or guide him there. However, if a judge makes use of the people who are available, as he should make use of them, he is bound to find that they are helpful. I have already mentioned the difficulty of obtaining an amended version of the law. That is something which I have found my staff may do very easily for me, far more easily sometimes than had I done it myself. Furthermore, if you have men who are experienced at their work, one is bound to find them very useful. At the moment, I am very much involved in Criminal Law and I am glad to say that the Deputy Registrars I have had, have been men of experience, who can quickly come up with a precedent which can throw light on the problem at issue which one is dealing with at the moment.

Do you agree with the suggestion that the clerical staff at the Law Courts should be given special training and that the Law Courts should become a closed department?

My answer to both these questions is in the affirmative. The law is very much based on the details of the law itself and proceedings tend to be repetitive. These repetitive issues can be very easily dealt with by trained personnel.

Furthermore, the possibility that the Courts would become a closed department

is also a desirable option because once a person has become used to court work, it is not desirable that his expertise be lost by his transfer to another department. However, a consideration which would be averse to all this is the fact that people who join the civil service join with the idea of promotions which tend to come their way over the years. If the law courts are turned into a closed department, one would have to forgo the job opportunities which a civil servant has. Thus, while the idea of a closed department seems to be a good thing, one should also try to do something in order to ensure that the people who have remained in the department are not going to lose their opportunities in life just because they have remained in a closed department. At the same time it is clear that experience in Court work, does not really help the Civil Servant to become accustomed to the evolution of policy work, which is and should be the proper task of the higher echolens of the Civil Service.

In our recent legal history, we have witnessed a large number of acquittals in trials by jury. Do you believe that the jury system gives an undue advantage to the accused? Should the jury system be abolished?
I believe in the jury system. I believe that one should be tried by one's peers for the offences which one has allegedly committed. If one's peers agree that one has committed a wrong, then one should be punished for it, but if one's peers agree that one has not committed any fault, then one should be set free. It may be that there have been a number of acquittals, but this only shows that the jury has been persuaded that the man should be acquitted. If that is the case, that is the 'raison d'être' of the jury system, that the decisions as to guilt or innocence is to be reached by one's peers. If the evidence has been such as to convince the jury that a person should be acquitted, no one should assert that one should have not been acquitted. Nine men, deliberating among themselves, excogitaing the pros and cons, should between them be able to see the truth much better then just one individual, whether judge, prosecutor or ordinary citizen; when one is faced with a decision of fact one cannot pretend that one is placed in any superior position than nine ordinary men discussing among themselves as to the innocence or guilt of the accused provided they carry out their work to the best of their abilities and in terms of their oath of office, as observed acquittals there may have been, but no one has ever alleged that any jury failed to carry out its duties in terms of Law. Trial by jury is not trial by the opinion of the man in the street, it is the opinion of nine loyal men who are going to look into the facts of the case and reach an opinion in terms of law.

You have been for some time the chairman of the Malta society for the blind. What did your contribution to this organisation consist of?
I was chairman of this society for a period of about twenty years. I was one of the founder members of that organisation. In fact, the Government of the day, in the fifties had evolved a number of services for blind people and there was a time where the various departments felt that it was desirable to evolve something which would act as a focal and coordinating point for the various services which were being provided. The Government had obtained the services of the chairman of the Royal Society of the Blind of Great Britain and Northern

Ireland and he had been invited to come to Malta and to propose the setting up of a society which would look after the interests of blind people. The government had appointed a committee to draft a statute for this organisation. I was appointed chairman of this committee. The recommendations were drafted in a short time and immediately after the proposed organisation came into being and I was appointed its first chairman. In fact, between the drafting of the recommendations and the appointment of the committe, I had suffered a stroke and I thought that this committee would not come my way because I was now a handicapped person myself. Nevertheless, the people concerned waited for me to come back and appointerd me chairman of the organisation when I had returned to government service and was recuperating and hoping to come out of the ordeal I had suffered. My task was to see that this organisation functioned properly. We set up the administrative organisation for the society and we provided a number of services which were needed and had not yet been provided. We tried to find suitable employment for blind persons and as time went on, the conviction grew that we had more or less found suitable employment for all the blind people who needed employment. One of the major issues we tackled was that in the course of time, we had managed to build up funds for the society and there was a strong insistence made on the committee that it should spend all the funds which had been earned in the course of a particular year. However, the committee decided to make only the necessary expenses and to keep the remaining funds for any future needs which at that moment could not be identified. Finally, in the year dedicated to the Handicapped, we took all the blind people of Malta for a trip to Sicily free of any charge. This was the biggest treat which many of these people had had in their lives especially because we had enough funds to allow every blind person to get with him his usual guide free of any costs. Indeed, serving suffering humanity is a very satisfying work and one should aim at doing it independently of one's job.

A field in which you have had constant success is that of poetry. Could you tell us something about your works?

How successful I was I cannot really say since this depends on the reader himself. However, I have published a number of works from time to time. The first work was a 1947 booklet entitled "*L-ewwel Għana*", which were the first verses written by a very young man. Over the years, I kept writing my verses and these have always tended to be the reactions of an emotionally charged person. I have always been struck by Wordsworth's definition of poetry "emotion recollected in tranquility", and I believe that many of my poems have been exactly that. In 1974, I made a collection of all the poems I had published between 1947 and 1974, and this was my major work. In 1984 there was a collection of my poems written about the Blessed Virgin, published under the title of Marjana. This year I published what I consider my 'magnum opus'. It is a poem made up of a of 119 sonnets all about one theme, that God manifested himself to man. This is a collection of those incidents in which I believe that one can see not the hand of man or the hand of accident, but the hand of the supernatural, like Moses striking water out of the desert and many other experiences from the Old and the New Testament, the Acts of the Apostles

and what seemed to be other features in later days as well. This work I dedicated personally to Pope John Paul II and this year I was lucky enough, during a visit to the Vatican, to have the privilege of presenting it to him personally in his hands.

A poem in which I believe I had some success is "*Il-ballata ta' Taj Mahal*". The circumstances in which it was written are of some interest. In 1967, I was invited to a conference on Public Administration in New Delhi. The organisers of the conference had reserved a day to take us to see the temple of the Taj Mahal which is one of the seyen wonders of the world. In the morning we visited the Red Fort, which was the residence of their counterpart to the Prince of Wales, who had lived an idyllic life with his wife. Before passing away, his wife had made him promise that should she die he would build a monument which would make her always remembered by all humanity. On her death, he decided to build her an incomparable monument. This memorial is the Taj Mahal. At a later stage, the prince's thirteen children waged war against each other until only one remained alive. This survivor imprisoned his father in the Red Fort and allowed him a daily exercise to a balcony from where he could look at the Taj Mahal.

When I left India, I decided to write this story because it is a lovely story which is relatively unknown in the west. In this way, this poem came about and I was all the time feeling that I was writing something beautiful, not because I was writing it, but because the story in itself is beautiful and it is worthwhile knowing.

Soon, you will be retiring from the bench. What are your plans for the future?

On the 4th of March, of this year, I shall be 65, and the Constitution says that at 65, the term of office of a judge comes to an end. I have not decided what I shall be doing once my retiring age has overcome me. I intend to leave all the avenues open and I would have to look at things as and how they may evolve indenpendently of what I want to do now. Obviously, I know that my interests in life have been so varied that I am bound to keep myself occupied, one way or another, through reading, listening to music and especially through finalizing the various plans one has made over one's life and which one has not had time enough to lead to a proper conclusion. Again one may never know, something new may come my way and if I have sufficient energies, as I believe I have up to now, I may be able to look into it. I am leaving all my avenues open, whatever comes my way, I will look at, and I will try to enjoy it to the full whenever and however I find myself. "Tomorrow, to fresh woods and pastures new". I intend to try to follow this maxim. Whatever comes my way, I will look at, whatever does not come, I do not intend to run after. I intend to live the little or long time which the good Lord allows me as and how it comes.

Info Report

INFO REPORT

* Last September, the Island of **Malta** was honoured with the election of **Maltese** Deputy Prime Minister and Minister for Foreign Affairs and Justice, **Professor Guido De Marco,** to the *Presidency* of the *45th General Assembly of the United Nations.*

* **Professor Giuseppe Mifsud Bonnici,** for several years lecturer in Philosophy of Law in the Faculty of Law, University of Malta, has been appointed **Chief Justice** of our courts after the retirement of **Professor Hugh W. Harding.**

* **Welcome** to **Professor Renè Cremona** as Dean of the Faculty of Law, University of Malta. The new Dean, currently also the President of the Chamber of Advocates in Malta, succeeds **Professor J. M. Ganado** who merits more than just our sincere **thanks** for the work he accomplished during the years he served as Dean of the Faculty of Law.

* The **U.N.E.P. Group of Legal Experts** to examine the Issues held its first Meeting in **Malta,** on **13-15 December 1990.** The Meeting was organized jointly by the **United Nations Environment Programme (U.N.E.P.),** the **Ministry of Foreign Affairs and Justice** of **Malta** and the **University of Malta.** The Group of Experts consisted of the following participants: Dr. Mostafa K. Tolba *(U.N.E.P. Executive Director and Chairman of the Group),* Judge Manfred Lachs (*International Court of Justice*), Ambassador Julio Barboza (*Argentina*), Professor Antonio A. Cançado Trindade (*Brazil*), Mr. Tang Cheng Yun (*China*), Mr. Franck X. Njenga (*Kenya*), Mr. Patrick Szell (*United Kingdom*), Mr. Ajai Malhotra (*India*), Professor David Attard (*Malta*), Dr. N. Hassan Wirajuda (*Indonesia*), Dr. Iwona Rummel-Bulska (U.N.E.P.), Dr. Alexandre Timoshenko (*U.S.S.R. and Consultant to U.N.E.P.*) and Mr. Lal Kurukulasuriya (*Sri Lanka and Consultant to U.N.E.P.*).