

# *Id-Dritt*

VOLUME XIX



The Law Students' Society  
Għaqqda Studenti tal-Liġi

A Publication  
of the  
Law Students' Society  
of the  
University of Malta

2006

# **Id-Dritt**

## **2006**

**Volume XIX**

**A Publication of the Law Students'  
Society of the University of Malta**

First Printed in 2006

By '**Microcopy**' of Triq l-Imhalled Paolo Debono.

Msida – MSD 06

Tel: 21341383

Produced and Published by The Law Students' Society of the University of Malta (GhSI)

Correspondence relating to this publication should be forwarded to:

The Editor,

The Law Students' Society of the University of Malta (GhSI),

The University of Malta,

Msida MSD 06,

Malta.

Email: [jd-dritt@hotmail.com](mailto:jd-dritt@hotmail.com)

Typeset and paged on Times New Roman 11/12

© 'Id-Dritt' – **Ghaqda Studenti tal-Liġi** – 2006

Cover Design, Section Drawings

and Illustrations by **Claude Micallef-Grimaud**

Proof Reading by **The GhSL Editorial Board**

**International Standard Book Number:**

ISBN-13: 978-99932-0-473-2

ISBN-10: 99932-0-473-0

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise, or stored in any retrieval system of any nature without the written permission of the copyright holder and the publisher, application for which shall be made to the publisher.

Some articles have been modified for reasons of clarity and/or uniformity.

**Opinions expressed in Id-Dritt do not necessarily represent the views of the Editorial Board or of the Ghaqda Studenti tal-Liġi.**

**“Id-Dritt” Volume XIX**  
**Editorial Board (2005/2006):**

**Editor:**

Claude Micallef-Grimaud, B.A., Dip. Not. Pub.

**Vice Editors:**

Benjamin Valenzia, B.A., Dip. Not. Pub.  
 Jean Carl Debono, B.A., Dip. Not. Pub.

**Assistants:**

Fransina Abela, B.A., Dip. Not. Pub.  
 Caroline Farrugia, B.A., Dip. Not. Pub.

**Law Students’ Society of the University of Malta**  
**Għaqda Studenti tal-Liġi (GħSL)**  
**Executive Committee (2005/2006)**

Honorary Presidents:

HE Prof. Guido De Marco, B.A., LL.D.  
 Prof. Joseph M. Ganado, B.A., Ph.D. (Lond.), LL.D.  
 HE Prof. Sir Anthony J. Mamo, O.B.E., Q.C, B.A., LL.D.  
 Prof. Andrew Muscat, LL.D., LL.M (Lond.), M. Litt. (Oxon.), Ph.D. (Lond.)  
 Prof. Peter G. Xuereb, LL.D., LL.M, (Lond.), Ph.D. (Cantab.)

President:	Kenneth Abela, B.Com., B.A.
Secretary General:	Ann Marie Bugeja, B.A.
Id-Dritt Editor:	Claude Micallef-Grimaud, B.A., Dip. Not. Pub.
Treasurer:	Alessia Zammit
Publications Officer:	Rolan Borg, B.A., Dip. Not. Pub.
Academic Officer:	Alistair Schembri, B.A.
Non-Academic Officer:	Ramona Attard, B.A., Dip. Not. Pub.
International Officer:	Stephanie Darmanin
Public Relations Officer:	Andrew Bezzina, B.A., Dip. Not. Pub.
Web Site Officer:	Antoine Demicoli, B.A., Dip. Not. Pub.
Thesis Librarian:	Nadya Fiott, B.A.



## **GhSL President's Address**

By

**Kenneth Abela**, B.Com., B.A.

Four years have passed since the last publication of the law journal "Id-Dritt" and since then, the Editorial Board (which included a transitional board) has strived to get hold of some of the most remarkable articles available and are now ready to be presented in this edition.

Besides tracking down several authors, reviewing articles and actually editing the 2006 journal itself, the new board led by Claude Micallef-Grimaud has ventured in the task of locating all past editions since 1944. This was truly an arduous job given that no library in Malta had the whole, original collection of "Id-Dritt". It was more a task of building a large jigsaw puzzle - finding odd publications here and there - leading up to the present date. On this note, special thanks go to Fransina Abela who has sacrificed a lot of her spare time in order to help out.

Benjamin Valenzia and Jean Carl Debono were also the key to realise this edition. Without their determined support and great dedication in their work, such a task would have been impossible. Lastly I would like to express my gratitude towards the editor, Claude Micallef-Grimaud who in certain circumstances had a pivotal role and always ensured that this journal kept and even improved its high academic standard.

**Kenneth Abela**  
University of Malta  
September 2006



## **“Id-Dritt” Editorial Note**

By

**Claude Micallef-Grimaud, B.A., Dip. Not. Pub.**

The new Editorial Board (2005-2006) is pleased to unveil the latest edition of ‘Id-Dritt’ – an GhSL publication. Following the work of our predecessors, modifications were made to the appearance and structure of the journal in a bid to improve on what had already been achieved. ‘Id-Dritt’ now enjoys a new format and should in fact, sit neatly among other legal text books but stick out at the same time – being the only entirely student-produced publication of its kind. Eventually, this volume will also form part of a collection of similar publications dating back to 1944 which have also been re-vamped and are now being re-published in this new and improved format. Of course content-wise, this journal retains articles of the best quality, written by eminent figures in the legal profession - both local as well as foreign.

On this note may I draw your attention to the contribution made by Ms. Cherie Booth (Barrister and wife of the current British Prime Minister – Mr. Tony Blair) who gave us special permission to publish the paper she delivered in a lecture here in Malta. I was among those lucky enough to attend that day but I realize that there are many who would have liked to but did not have the opportunity to take in what she had to say. When I personally put forward this point to her she did not hesitate in giving her consent. The same can be said about Mr. Justice Christos Rozakis – the Vice President of the European Court of Human Rights as well as Mr. Chief Justice Luzius Wildhaber (the President of the European Court of Human Rights). These three prominent figures in fact, have

provided us with riveting papers relating to Human Rights – something we decided to focus on especially in this edition.

This volume is also of particular importance being the first following Malta's membership of the European Union and also other legislative and institutional innovations that have occurred since the last publication, among which we find the various radical amendments to the Maltese Civil Code. In this issue in fact, we have decided to give some of these amendments great importance because we realize that finding authoritative commentaries on such matters can be very vexing indeed. One will in fact, find three complementary articles dealing with these amendments in this edition including a great focus on the Law of Succession. There is also an article dealing with some controversial amendments to the Maltese Criminal Code.

Another area we decided to focus on is money laundering – a topic often given little attention to. In this issue, one will find two articles dealing with this topic; one from a local perspective dealing with some important very recent amendments and the other from a more international perspective written by the Maltese Attorney General himself.

The other articles range across a spectrum of subjects – from specific topics like *Renvoi* in Private International Law and Governmental Liability in Administrative Law to more general issues like Lawyer-Client Relations. All the material here is helpful both to the law student as well as to the legal practitioner, but it is also accessible material for the general public. Hopefully, 'Id-Dritt' will become an integral part of every lawyer's office in the near future and its ever growing popularity with non-legal professionals will also reach new heights.

On my part, I really must thank all the authors for their patience and support, the vice editors (Jean Carl Debono and Benjamin Valenzia), the GhSL President (Kenneth Abela) for his dedication and great enthusiasm towards this publication, the editorial

assistants and also the rest of the GhSL staff without whose help all this would not have been conceivable.

I also thank you, the reader, for constantly voicing your support and believing in this on-going project.

**Claude Micallef-Grimaud**  
University of Malta  
September 2006



## Contents

### Civil law:

**1. Dr. Phyllis Farrugia**..... 3

“The Institute of *Retratto Successorio* under Maltese Law”

Reforms in the Civil Code:

**2. Dr. Ruth Farrugia**.....25

“The Removal of Relative Incapacities of Children by Act XVIII of 2004”

**3. Dr. Paul Debono**..... 47

“The Law of Succession in Malta – A Reappraisal”

**4. Dr. Anthony Ellul** ..... 79

“The Civil Code Amendments of Act XVIII of 2004 – Community of Property Arising from Succession”

### Human Rights:

**5. Ms. Cherie Blair (Booth)**..... 95

“A Catholic Perspective on Human Rights”

**6. Mr. Justice Christos Rozakis**..... 115

“The Right to a Fair Trial in Civil Cases:  
(Article 6 Para. 1 of the ECHR)”

**7. Mr. Chief Justice Luzius Wildhaber..... 127**

“An Address Relating to the European  
Convention On Human Rights”

**Criminal law**

*Money Laundering:*

**8. Dr. Frank Chetcuti Dimech..... 153**

“ ‘*Lawyers as Policemen*’ – the Prevention  
of Money Laundering Regulations”

**9. Dr. Silvio Camilleri..... 163**

“Combating Money Laundering and Financing  
of Terrorism; One For All, All For One”

*Criminal Procedure:*

**10. Dr. Anglu Farrugia..... 179**

“Controversial Amendments to the Maltese Criminal Code”

**European law**

**11. Dr. Ivan Sammut..... 191**

“The Relationship between Maltese Law and EU Law”

**12. Dr. Peter Agius..... 211**

“Aspects of Interpretation of  
Multilingual *Acquis Communautaire*”

**13. Dr. Anthony Ellul..... 231**

“The Revision of the Working Time Directive”

**Commercial Law****14. Dr. David Fabri..... 251**

“The Single Unified Supervisory Authority for  
Financial Services – some Legal and Regulatory  
Issues in Malta and beyond”

**Administrative law:****15. Dr. Peter Grech.....285**

“Governmental Liability, Immunity and  
Article 6 of the ECHR”

**Maritime law****16. Dr. Ivan Vella.....303**

“Some Thoughts on the Special Maritime Privilege  
Under Maltese law and in a Comparative Context”

**Private International law**

**17. Dr. Patricia Cassar Torregiani..... 327**

“The *Renvoi* Debate”

**Philosophy of Law:**

**18. Dr. Alan Xuereb.....341**

“The Metaphysical Aspects of Philosophy of Law”

**General**

**19. Dr. David E. Zammit.....377**

“Lawyer-Client Relations:  
What Goes on and Who’s in Charge?”

**20. Dr. Alan Xuereb..... 397**

“*Just Problems?*”







**CIVIL LAW**



# The Institute Of *Retratto Successorio* Under Maltese Law

Dr. Phyllis Farrugia LL.D.

## 1. Origin and Purpose of *Retratto Successorio*

There was a time when society prioritized the preservation of an estate beyond time. Social mobility was imperceptible. Patrimony and ranking were strongly tied, and every effort was made to exclude persons extraneous to the family from its internal affairs. It is against this archaic setting that the institute of *retrato successorio* must be considered. Remnants of this cultural perception still survive, though it is understood that these traits are doomed to fade away. Is there still a place for the *retrato successorio* within the current framework of the law of succession? This question lies at the heart of the forthcoming discussion on the purpose and development of this institute.

Although different theories have been proposed to explain the origin of the *retrato successorio*, it is generally attributed a French origin<sup>1</sup>. Incidentally, our courts have always referred to the prevalent French doctrine in their judgments on this topic. This discussion will thus depart from a critical study of the historical understanding and development of this institute in French law, and then focus on its interpretation and application under Maltese law.

Baudry Lacantinerie et Wahl<sup>2</sup> report that the Parliament of Paris formally recognized the *retrato successorio* for the first time in 1521. It is thought that this recognition was triggered off by “*peculiarì circostanze poiche` gli autori la passano sotto silenzio*”.<sup>3</sup> Despite this initial interest, it was only through judicial

<sup>1</sup> Demolombe, Code Napoleon, Successions, Vol IV, n. 2 (“Cette institution est d’origine française; et elle a été introduite chez nous par la jurisprudence des parlements.”)

<sup>2</sup> Trattato Teorico Pratico di Diritto Civile, Delle Successioni (Vol III), Del Retratto Successorio, n. 2576

<sup>3</sup> *ibid.*

pronouncements that the French Parliament was prompted to legislate on this head on the 3<sup>rd</sup> April 1613. Indeed, both Pothier and Domat overlooked its salient characterisation as a right of redemption in their commentaries on the Code Napoleon.<sup>4</sup> They envisaged the *retrato successorio* as a peculiar remedy against the fraudulent act of the alienor. This early understanding traced the juridical origin of the institute in the Roman notions of *Par Diversas* and *Ab Anastasio*<sup>5</sup>. On the other hand, Demolombe argues that the French legislature's initiative consisted merely in extending the applicability of the right of redemption (attached to litigious rights) to succession law.<sup>7</sup> Other French authors, namely Planiol et Ripert<sup>8</sup> and Lebrun<sup>9</sup> concur in this view.

Lebrun traces the social motivation behind this development. He observes that “*d’ordinario vi e` vessazione o uno strano interesse da parte di un estraneo curioso di apprendere gli affari altrui.*”<sup>10</sup> The traditional order in which next of kins are (or permitted to be) called to succeed is rooted in the law's endeavour to assist in the preservation of the estate within the deceased's surviving family.

Clearly enough, this traditional spirit is no longer a *sine qua non* objective of succession law to the extent that the most recent amendments to Maltese succession law reflect a new undertaking of the legislator to ensure the consolidation and free transferability of private property.<sup>11</sup> Other continental jurists argue that “*La ragione di tale istituto sta nell’interesse degli altri dividendi di*

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid.*

<sup>7</sup> *op. cit.*

<sup>8</sup> *Traité Pratique de Droit Civil Français, Tome IV, Successions (Paris, 1956) – n. 341* (“Questa facolta` di riscattare un credito litigioso appellasi riscatto litigioso, i parlamenti l’estesero alla cessione di diritti successori, ancorche` nulla avessero di litigioso: cio` dicesi retratto successorio.”) These authors also cite Chabot (Raport, n. 59) who tallies with the view that this institute is in complete conformity with the above-cited Roman laws.

<sup>9</sup> *Des Successions, Libro IV, Cap. II, n. 66* as cited in Planiol M & Ripert G, *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> Act XVIII of 2004

*allontanare un estraneo che, in virtu' dell'acquisto della quota, s'intrometterebbe nei segreti familiari al posto dell'erede alienante.*"<sup>12</sup> Our courts have always identified this aspect of "escludere i non eredi dalla divisione"<sup>13</sup> as the salient object of the *retrato successorio*.

The general negative outlook<sup>14</sup> on this inroad to the free transferability of private property<sup>15</sup> did not suffice to eradicate this institute from French law. Baudry Lacantinerie et Wahl<sup>16</sup> report that despite its suppression by the legislator, and its formal repeal by a decree of the National Assembly towards the end of the eighteenth century, a procedural impropriety in the legislative process led to the survival of this institute. On a juridical level, the courts<sup>17</sup> continued to uphold the existence of the *retrato successorio* on the ground that its origin was not feudal in nature, and was not therefore within the ambit of the legislative policy to repeal all rights of redemption originating under the feudal regime.

The Code Napoleon contemplated this controversial institute in Article 841:

*"Toute personne, même parents du défunt, qui n'est pas son successible, et à laquelle un cohéritier aurait cédé son droit à la*

<sup>12</sup> Azzariti, Martinez & Azzariti, Successioni Per Causa di Morte e Donazioni (CEDAM, 7<sup>a</sup> Ed., 1979), n. 320; Baudry Lacantinerie et Wahl, op. cit., n. 2579 ("la tendenza di conservare i beni nella famiglia")

<sup>13</sup> Antonio Muscat et vs Can. Carnelo Sciberras, Commercial Court, 19.1.1882 cited in note of submissions for the appeal in Emanuel Schembri noe et vs Paul Camilleri et, Court of Appeal, 12.6.2001

<sup>14</sup> Demolombe, op. cit., n. 4 asserts that "l'opinion des jurisconsultes, qui paraissait bien exprimer le sentiment public, s'y montrait fort hostile."

<sup>15</sup> op. cit., n. 13. This view is fully embraced by Laurent, Droit Civil, Delle Successioni, Vol X, n. 551 ("le retrait successoral joue ainsi le role d'une veritable expropriation pour cause d'utilité privée.")

<sup>16</sup> op. cit., n. 2577; Demolombe, op. cit., n. 12 ("le retrait successoral se recommande comme un moyen de maintenir, au sein des familles, la bonne intelligence et la paix, si bien que la Court de Cassation a pu dire que:«Il importe à la morale et à l'ordre public que des speculateurs étrangers ne soient point associés aux affaires des cosuccessibles» [26 juin 1836, Thorel, D. 1836, I, 252]")

<sup>17</sup> e.g. Cour de Cassation, 20.3.1828, Delivet, D., 1828,I, 185 reported in Demolombe, op. cit., n. 5

<sup>19</sup> Article 831 at the time of this judgment

*succession, peut être écartée du partage, soit par les coéritiers, soit par un seul, en lui remboursant le prix de la cession.”*

The Cour de Cassation criticized this provision<sup>19</sup> as “*exceptionnelle et évidemment contraire au droit commun, en ce qu'elle tend à priver l'acquéreur de l'avantage d'un traité autorisé par la loi, pour en faire profiter, à son préjudice, un tiers, qui n'y a point été partie ...*”<sup>20</sup>. This right of redemption contrasts sharply with the theory of freedom of contract so prevalent among continental jurists at that time. In this respect, Planiol et Ripert<sup>22</sup> argue that:

*“Il retratto ostacola l'esercizio d'un diritto naturale; e` evidente che l'erede vendera` a condizioni svantaggiosissime, a causa dei rischi che corre il compratore d'essere privato dei benefizi del suo contratto ... Non vi e` materia piu` ingrata. E un diritto puramente arbitrario fondato su cattive ragioni; si e` sempre cercato di pronunziarsi compratore contro l'erede che voglia spogliarlo di un contratto vantaggioso.”*

Similar disfavour can be traced in the relevant commentaries of Baudry Lacantinerie et Wahl<sup>23</sup>. These writers highlight the difficulties encountered by an heir who decides to transfer his hereditary share, and remark that the *retrato successorio* can easily lead to fraudulent behaviour by one or more of the co-heirs and increasing litigation among them. They conclude that “*si dovro` forse deplorare che il legislatore abbia creduto di mantenere il retratto successorio che costituisce una eccezione a un principio fondamentale del nostro diritto*”, namely that private property can only be expropriated for a public purpose and upon payment of a fair compensation.<sup>24</sup> It was in this spirit that the French Parliament

<sup>20</sup> 21.4.1830, Thillaye, D., 1830, I, 214. This principle was confirmed by the same Court (12.12.1894) rep. Baudry Lacantineri et Wahl, op. cit., n. 2582

<sup>22</sup> op. cit., n. 341

<sup>23</sup> op. cit., n. 2579

<sup>24</sup> Under Maltese law, this right is entrenched as a fundamental human right in Article 37 (1) of Chapter IV of our Constitution

decided, in 1976, to repeal this institute from French law.<sup>25</sup> Notably, the relative repealing law saved all agreements, concluded prior to its enactment, and preserving co-ownership between co-heirs unless the co-heirs agreed to be regulated by the new regime.<sup>27</sup>

On the other hand, the relevant provision of our Civil Code (Article 912) still preserves its original drafting by Sir Adrian Dingli. “*hija tratta mill-Kodici Parmense, mill-Kodici Sardo u mill-Kodici Franciz (v. Nota ta’ Sir A. Dingli, art. 615) li huwa simili ghad-disposizzjoni ta’ l-art. 760 tal-Kodici tar-Regno delle Due Sicilie*”<sup>28</sup>.

**Assignee of portion of inheritance may be excluded from partition by co-heirs.**

912. (1) “*Where any of the co-heirs has, under an onerous title, assigned his rights over the inheritance to any person, not being a co-heir, the other co-heirs or any of them may, even if the assignee is a relation of the deceased, exclude him from the partition by reimbursing to him the price of the assignment, the expenses incurred on the occasion of such assignment, and the interest on the price as from the day on which such price shall have been paid to the assignor.*”

(2) “*The right competent to the co-heirs as aforesaid shall lapse at the expiration of one month from the day on which notice of the assignment shall have been given to the co-heirs, unless within that time they shall have declared their intention to exercise such right.*”

<sup>25</sup> Article 17 of Law 76/1286 enacted on the 31<sup>st</sup> December 1976 and coming into force on the 1<sup>st</sup> July of 1977

<sup>27</sup> Lucas A & Catala P, Code Civil, 1993-1994 (litec-Paris, 1993), p. 435

<sup>28</sup> Marianna Debono vs Avvocato Dr Antonio Caruana et noe, Court of Appeal, 23.2.1940, XXX.i.182; Emanuel Schembri noe et vs Paul Camilleri et, Court of Appeal, 12.6.2001

(3) *“Where any of the co-heirs shall have exercised such right, the other co-heirs may avail themselves thereof, provided they shall declare their intention to do so within fifteen days from the notice given to them.”*

(4) *“Any such notice or declaration shall be given or made by means of a judicial act.”*

## **2. Essential Requisites for the exercise of the *Retratto Successorio***

### **(i) Against whom may the *Retratto Successorio* be exercised?**

Article 912 lays down that this right may be exercised against *“any person, not being a co-heir ... even if [such person is] a relation of the deceased”*. This is a faithful reproduction of the old Article 841 which conferred the right against *“Toute personne, meme parente du defunt, qui n'est pas successible.”*

Various interpretations have been ascribed to the term ‘successible’. Baudry Lacantinerie et Wahl hold that *“La parola ‘successible’ viene usata in senso lato, al pari della parola ‘coerede’, e designa, conseguentemente, ogni persona che succeda al defunto in universum jus: in una parola ogni successore universale o a titolo universale.”*<sup>30</sup> Planiol et Ripert take a more pragmatic stance. They argue that *“per successibile bisogna intendere colui che succede al defunto, e che, a questo titolo, e chiamato alla divisione ... Si considera come estraneo colui che non concorre all’eredita’, come successore; egli e’ estraneo nel senso che non ha il diritto d’ingerirsi negli affari del defunto.”*<sup>31</sup> Demolombe confirms that *“toute cession qui n’a pas été faite par une cohéritier, c’est-à-dire par une personne appelée à prendre part à la succession à titre universel, est affranchie du retrait.”*<sup>32</sup> Laurent’s enunciation is perhaps the clearest. *“L’étranger se*

<sup>30</sup> op. cit., n. 2599

<sup>31</sup> op. cit., n. 344

<sup>32</sup> op. cit., n. 77

*definirà [comme] ... toute personne qui n'est pas appelée au partage en qualité de successeur universel, alors même qu'elle aurait à d'autres titres un droit de regard ou de participation dans les opérations de ce partage.*"<sup>33</sup>

In their analysis, these jurists embark on the wholistic exercise of deducing against which figures of succession law the right of redemption can be exercised. One such attempt is made by Planiol et Ripert<sup>34</sup> who take us to consider whether this right can be exercised against whoever acquires the hereditary rights of a person who has renounced to the relevant inheritance. Basing themselves on the decision of the Cour de Cassation of Pau, they state that "*colui il quale cede i suoi diritti successori fa atto d'erede*<sup>35</sup> *puro e semplice, dunque rimane successibile, e se il cedente e successibile, e impossibile che lo sia il cessionario.*" The situation would be different if the renouncing heir has subsequently acquired the hereditary rights of a co-heir. Here, he, "*può essere escluso dalla divisione, alla quale non ha più diritto di concorrere se non come cessionario.*"<sup>36</sup>

Laurent asks whether the *retrato successorio* can be exercised against a legatee who acquires the rights of a co-heir over the same estate benefiting him by singular title. As a legatee does not continue the personality of the deceased, and is not a co-heir, he can suffer the exercise of the *retrato successorio* on acquiring a share of the inheritance from a co-heir. Another difficulty envisaged by this jurist refers to a bequest by singular title of the usufruct of the estate, or part thereof, to a person who subsequently acquires the hereditary rights of a co-heir. Although the decisions of the Cour de Cassation have not been uniform on this point, Laurent concludes that "*la qualità de successeur en usufruit ne met pas obstacle au retrait, dont l'exercice isolerà le retrayé dans sa situation particulière de legataire de la jouissance, en assignant le*

<sup>33</sup> op. cit., n. 555

<sup>34</sup> op. cit., n. 344

<sup>35</sup> This principle was enunciated by the Court of Appeal in Ursolina Delicata vs John Doublesin noe, 25.6.1951, XXXV.i.129

<sup>36</sup> op. cit., n. 346; Demolombe concurs in this view.

*reste de la succession au groupe de ceux auxquels une transmission definitive est assurée par la loi ou le testament.*”<sup>37</sup>

Baudry Lacantinerie et Wahl<sup>38</sup> take us yet into another *scenario*. Where one of the co-heirs transfers his rights over the inheritance to a third party, and subsequently acquires them back, “[i]l successibile non è sottoposto al retratto se, dopo avere alienato i suoi diritti, li riacquista in seguito ad annullamento o risoluzione della cessione; o se ... il successibile rientra in possesso”<sup>39</sup> “in virtù di una retrocessione.”<sup>40</sup>

A further question still arising under our law is whether the *retrato successorio* can be exercised against the person entitled to the reserved portion over the deceased’s estate. In view of the general principle that “*il-legittimarju ma hux eredi ... huwa biss ghandu porzjoni mill-beni li halla d-decujus li hija rizervata lilu milligi.*”<sup>41</sup>, the person entitled to the reserved portion would not qualify as a ‘co-heir’ for the purpose of Article 912, and would notionally be subject to the exercise of the *retrato successorio* should he acquire by onerous title a share of the deceased’s inheritance.

## (ii) Who may Exercise the *Retrato Successorio*?

Like the old Article 841 of the Code Napoleon, our law confers this right upon “*the other co-heirs or any of them*”.

It is immediately clear that this is only a facultative right and the co-heirs can renounce to the exercise thereof. The ultimate choice lies in the hands of co-heirs. “*La giurisprudenza e la dottrina sono unanimi nell’ammettere che gli eredi possono rinunciare al diritto*

<sup>37</sup> op. cit., n. 555; Baudry Lacantinerie et Wahl, op. cit. n. 2600

<sup>38</sup> op. cit., n. 2607

<sup>39</sup> This view is also upheld by Demolombe

<sup>40</sup> Cour de Cassation de Orleans, 29.2.1832

<sup>41</sup> Carmela Farrugia noe et vs Concetta Mintoff et, Court of Appeal, 10.6.1949, XXXIII.i.472

<sup>44</sup> Planiol et Ripert, op. cit, n. 342; Laurent, op. cit., n. 556

*di retratto*”.<sup>44</sup> Nevertheless, there was a time when the Cour de Cassation attributed a public policy nature to this rule to the extent that we read in one of its rulings that “*Il retratto successorio riposa su dei motivi di ordine pubblico e nessuna convenzione fra cedente e cessionario puo’ sottrarre questi alla applicazione del medesimo.*”<sup>45</sup>

This right benefits “*tutti coloro i quali concorrono alla successione, non importa a qual titolo, come successori ab intestato, regolari od irregolari, o come legatari o donatari, possono esercitare il retratto.*”<sup>46</sup> Jurists have also sought to establish a link between the active and passive subjects of this right. In one such comparison, Laurent<sup>47</sup> comments that “*Les personnes en situation d’exercer le retrait sont justement celles qui n’auraient pas à le subir si elles étaient elles-mêmes cessionnaires des parts indivises ... ce sont d’une manière generale, et sous les restrictions indiquées plus haut, les successeurs universels, héritiers ou légataires. Il n’y a pas à distinguer s’ils ont accepté la succession purement et simplement ou sous benefice d’inventaire.*” This would imply that it cannot be exercised by the beneficiaries of bequests by singular title and “*in ispecial modo [il retratto successorio] non spetta al legatario dell’usufrutto di tutta o di una parte della successione.*”<sup>48</sup> It is still unclear whether this right is conferred to a co-heir who lacks sufficient resources to effect the relative payment, and needs to transfer the rights retrieved to be able to discharge his obligation. It is submitted that the right of redemption can still be exercised in these circumstances, given that all the requisites of Article 912 are satisfied, even if this scenario may not fit perfectly into the legislator’s design for the institute.

Another interesting question arises where the co-heir who transferred his hereditary rights is himself entitled to exercise the *retrato successorio* against his own assignee. He may well have

<sup>45</sup> 15.5.1844, rep. In Baudry Lacantinerie et Wahl, op. cit., n. 2626

<sup>46</sup> Planiol et Ripert, op. cit., n. 352

<sup>47</sup> op. cit., n. 556; This comparison is also drawn by Planiol et Ripert, op. cit., n. 352; Baudry Lacantinerie et Wahl, op. cit., n. 2621 (Demante, Marcadé, Chabot, Demolombe)

<sup>48</sup> Cour de Cassation, 24.11.1847, rep. in Baudry Lacantinerie et Wahl, op. cit., n. 2623

acquired another share of the inheritance *causa moritis* in the meantime. Laurent holds that such co-heir would no longer be able to redeem his own share.<sup>49</sup> Where, on the other hand, more than one co-heir have assigned their rights to a third party, it is held that any one of the co-heirs *“puo` esercitare il retratto contro i cessionari dei suoi coeredi. Egli non puo` pero` esercitare il retratto contro il proprio cessionario, poiche` disconoscerebbe, in tal modo, l'effetto obbligatorio delle sue convenzioni.”*<sup>50</sup>

Furthermore, our Courts have added that a co-heir can only redeem the share of the inheritance transferred to a third party so long as he possesses his own hereditary rights. This principle was established in a series of cases regarding the inheritance of Maria Rosa Degabriele. In **Carmela Bonnici vs Michele Massa et**<sup>51</sup>, the Court of Appeal held that *“Se alcuni dei coeredi cedono ad un terzo, in buona fide ed erroneamente, i loro diritto sulla eredita intera, gli altri coeredi non possono esercitare il retratto successorio contro il detto acquirente prima di aver esercitato l'azione di rivendica di tale loro quota ereditaria.”* Subsequently, in **Nicola Bonnici vs Antonia Formosa et**<sup>52</sup>, the Court clarified this point further:

*“La cedola per cui viene esercitato il retratto prima che il retraente ovesse ottenuto la rescissione della cessione della propria quota ereditaria, e quindi prima che il retraente fosse rientrato nel possesso della propria quota, e valida, quando posteriormente a quel retratto la cessione suddetta viene rescissa, perche il retraente si ritiene avere avuto il possesso insin dal tempo dell'esercizio del retratto, e cio (i) in virtu della continuazione del possesso fra autore ed erede, malgrado la temporanea usurpazione, devendosi distinguere tra il fatto del possesso ed il diritto del possesso; (ii) in virtu del principio che colui al quale spetti l'azione per recuperare una cosa si ritiene avere la cosa medesima.”*

<sup>49</sup> op. cit., n. 556; Baudry Lacantinerie et Wahl, op. cit., n. 2625

<sup>50</sup> Baudry Lacantinerie et Wahl, ibid. (supported by Demolombe and Aubry et Rau)

<sup>51</sup> 27.5.1907, XX.i.24

<sup>52</sup> 2.12.1921, XXIV.i.905

What if several persons in different lines and degrees are called to the inheritance<sup>53</sup> and only one of them<sup>54</sup> alienates his share of the inheritance? By whom would the *retrato successorio* be exercisable? Baudry Lacantinerie et Wahl<sup>55</sup> cite, and concur in, the view upheld by the Cour de Rouen<sup>56</sup> that “*Il retratto non puo` essere esercitato da un erede contro un altro erede di un altro erede di un altra linea, o ramo, che sia cessionario di un erede della prima.*”

It is submitted that this fragmented approach frustrates the very objective of the institute.. All heirs, whether succeeding in the same or different lines or degrees, continue collectively the personality of the deceased. In virtue of this principle, they should **all** (collectively or individually) be able to redeem the rights assigned to a third party by any of them. Not even a restrictive interpretation<sup>57</sup> of this right would justify such exclusion, especially in view of the fact that our law grants this right to “*the other co-heirs or any of them*”<sup>58</sup>, without further limitation or distinction. This reasoning was adopted by the Court of Appeal in **Marianna Debono vs Avv. Antonio Caruana et noe**<sup>59</sup> where it was stated that:

*“Ko-eredi huma anki dawk li jkunu dixxendenti minn linji diversi in relazzjoni ma’ xulxin fis-successjoni ta’ l-awtur li tieghu huma kollha eredi. Meta wiehed mill-eredi appartenenti ghal linja jittrasferixxi l-kwota tieghu lil wiehed ta’ linja ohra, ir-retratt successorju jista’ jigi ezercitat, jekk ic-cessjoni tkun saret wara d-divizjoni ta’ l-eredita’ bejn iz-zewg linji.”*

<sup>53</sup> e.g. by vulgar substitution in terms of Article 751 of Civil Code

<sup>54</sup> Article 805 of Civil Code

<sup>55</sup> op. cit., n. 2606. They also refer to Lebrun who concurs in this view.

<sup>56</sup> 21.7.1807 (rep. in n. 47 supra)

<sup>57</sup> Planiol et Ripert argue that in view of its exceptional nature, “si deve porre come regola di interpretazione che il retratto e un diritto eccezionale, e che a questo titolo devesi interpretare restrittivamente.” (op. cit., n. 343) confirmed by our Courts in *Mose Calleja vs Nicola Bonnici*, First Hall, 2.12.1926, XXVI.i.353

<sup>58</sup> Article 912 of Civil Code (cited above)

<sup>59</sup> 23.2.1940, XXX.i.481

### (iii) Nature of Transfer against which the *Retratto Successorio* can be exercised

#### (a) “Rights over the Inheritance”

This is another perfect shadow of Article 841 of the **Code Napoleon**.<sup>60</sup>

Article 585 of our Civil Code defines an *inheritance* as “*the estate of a person deceased*” comprising all his assets and liabilities. By a “disposition by universal title”, “*the testator bequeaths to one or more persons the whole of his property or a portion thereof.*”<sup>61</sup> It is immaterial, for our purposes, whether the assets so bequeathed are movable or immovable in nature. Article 912 makes it clear that this right can be exercised “*lorsqu’un cohéritier a cédé son droit entier à la succession et la totalité de ses droits successifs.*”<sup>62</sup>

What is less clear is whether, and in what circumstances, can this right of redemption be exercised if only specific inherited assets are assigned to a third party. It is generally agreed that “*la cession d’une quote-part du droit à la succession est passible du retrait, aussi bien que la cession du droit tout entier.*”<sup>63</sup> On the other hand, a judgment of the Cour de Cassation established that “*la cessione di diritti successori e quindi soggetta a retratto anche quando sia stata accompagnata dalla cessione di oggetti particolari, provenienti dalla successione.*”<sup>64</sup> How are we to distinguish between an assignment of rights over an inheritance and a transfer of particular inherited assets?

Our yardstick should be whether the transferee would participate in the partition of the inheritance. Incidentally, this criterion takes us

<sup>60</sup> “son droit à la succession”

<sup>61</sup> Article 590(1) of Civil Code. This is termed as “universalité partageable” by Demolombe, op. cit., n. 78

<sup>62</sup> Demolombe, op. cit., n. 79; Baudry Lacantinerie et Wahl, Op. Cit., n. 2586; Planiol et Ripert, op. cit., n. 363

<sup>63</sup> This was also upheld by Merlin, Chabot, Toullier, Marcade, Aubry et Rau – vide Demolombe, ibid.

<sup>64</sup> 3.5.1830, reported in Baudry-Lacantinerie et Wahl, op.cit., n. 2589

back to the very origin of the institute.<sup>65</sup> This rule is clearly articulated by Demolombe – “*la loi, en effet, a voulu permettre aux héritiers d’écarter du partage le cessionnaire étranger; et dès lors elle n’a voulu autoriser le retrait que contre le cessionnaire qui à le droit de figurer lui-même au partage.*”<sup>66</sup> If a co-heir transfers his share in one or more determinate assets pertaining to the deceased’s estate, he would still be holding to himself his remaining rights over the inheritance. In supporting this argument, Demolombe further emphasizes that the object of partition is “*l’universalité elle-même, le jus universum*” wherein the transferee would acquire no right whatsoever.<sup>67</sup>

This issue was recently discussed by the Court of Appeal in the judgment **Emanuel Schembri noe vs Paul Camilleri et**<sup>68</sup>. Giuseppe Dimech and his wife Giovanna Dimech were co-owners of an immovable property in Mosta. After the death of her first husband, Giovanna remarried Schembri. She had three children from her first marriage – Salvatore, Cornelia and Angela. A 5/12<sup>th</sup> undivided share of this immovable devolved upon Salvatore Dimech while a 2/12<sup>th</sup> undivided share thereof devolved upon Angela Dimech. Salvatore, a bachelor, died in 1980 and his share devolved upon Angela, who now held a 7/12<sup>th</sup> undivided share thereof. Some time before passing away, Angela entered into a promise of sale agreement of said share with defendants. She died in 1992 and was inherited by *Id-Dar tal-Providenza*, which some time later, executed the promise of sale agreement. The heirs of Giuseppe Dimech and Giovanna Schembri (plaintiffs) contended that they had validly redeemed the 7/12<sup>th</sup> share of this immovable thus transferred to defendants by virtue of a schedule of redemption and deposit filed in the Registry of the First Hall of the Civil Court. Plaintiffs asked the Court to order defendants to sanction the solemn transfer of this share into the estate of their predecessors. The Court rejected this demand on the ground that this transfer

<sup>65</sup> This was upheld by Duranton – vide Demolombe (op. cit., n. 80)

<sup>66</sup> Demolombe, op. cit., n. 83

<sup>67</sup> Ibid.

<sup>68</sup> App. Civ. 297/97, 12.6.2001

related wholly to the estate of Angela Dimech only and clarified that:

*“in realtà ... l-partijiet kontraenti kienu qeghdin jikkontemplaw semplici vendita ta’ sehem indiviz ta’ proprjeta’ determinata u specifika. Minn imkien ma jirrizulta li l-konvenuti ... kienu qeghdin jakkwistaw xi kwota ereditarja, intiza din bhala porzjoni ta’ unika attiva u passiva li tikkomponi l-eredita’ tal-mejta Angela Dimech.”*

This ruling was subsequently re-affirmed by the First Hall of the Civil Court in the judgment **Mario Micallef et vs Joseph Difesa et**<sup>69</sup>.

Continental jurists agree that this rule admits of no exceptions save in the case of fraud. In this regard, Planiol et Ripert<sup>70</sup> refer to a judgment by the Cour de Cassation<sup>71</sup> where, an estate comprised only one object. A contract of transfer of said object was drawn up bearing a later date. The contract was subsequently rescinded and replaced by another contract bearing a date preceding the actual date of partition. The Court authorized the exercise of the redemption by the other co-heirs on the ground that *fraus omnia corrumpit*.

#### (a) “Onerous Title”

The *retrato successorio* arises only with respect to an onerous transfer of the co-heir’s rights over the inheritance. This aspect has to be considered in the light of the fact that the co-heir/s exercising the *retrato successorio* must reimburse the transferee with “*the price of the assignment, the expenses incurred on the occasion of such assignment and the interest on the price as from the day on which such price shall have been paid to the assignor*”.<sup>72</sup>

<sup>69</sup> per Mr Justice Philip Sciberras, 2.2.2005

<sup>70</sup> op. cit., n. 366

<sup>71</sup> 4.11.1829 (Daloz, Succession, n. 189)

<sup>72</sup> Article 912(1) of Civil Code

Sale is the *onerous title par excellence* which seems to have been in the mind of the legislator in framing this provision. However, problems may arise in the event of simulation, where a contract of donation conceals an effective sale of hereditary rights to eliminate the possibility of redemption by any of the co-heirs. As already asserted in relation to fraudulent transactions, it is generally held that such transfer would be deemed to be onerous in nature and the right of redemption still exercisable.<sup>73</sup> In fact, it is generally agreed that “*Il retratto è possibile, in qualsiasi forma la vendita abbia avuto luogo*”<sup>74</sup>, whether it be made by a judicial sale by auction<sup>75</sup>, an exchange<sup>76</sup> or in consideration for a life or perpetual annuity<sup>77</sup>. However, if a co-heir gratuitously assigns his hereditary rights to a third party (possibly in favour of a member of his family), this right of redemption would be excluded.<sup>78</sup>

What if the rights over the inheritance so transferred are subsequently alienated again by the transferee? Is this right of redemption exercisable at this second stage? Against whom should it then be directed? It is generally agreed that if the transferee assigns his acquired hereditary rights to a third party, the right of redemption defined in Article 192 can be exercised “*contro i successori del cessionario.*”<sup>79</sup> Baudry Lacantinerie et Wahl hold that where the first transfer by the co-heir was onerous in nature, and the alienee subsequently assigns his rights to a third party by gratuitous title, the second alienee is still subject to the right of redemption by the co-heirs. On the basis of the general principle that no one can acquire more rights than those possessed by his

<sup>73</sup> Baudry-Lacantinerie et Wahl, op. cit., n. 2590; Planiol et Ripert, op. cit., n. 367

<sup>74</sup> Baudry-Lacantinerie et Wahl, op.cit., n. 2594

<sup>75</sup> Baudry-Lacantinerie et Wahl, ibid.; Planiol et Ripert, op. cit., n. 370

<sup>76</sup> Baudry-Lacantinerie et Wahl, ibid; Planiol et Ripert, Op. Cit., n. 366 (“Tutti gli autori in tanto si pronunciano pel retratto, e la Corte di Cassazione ha consacrata questa dottrina [19.10.1814] ... la permuta e' una specie di vendita ... Poco importa che non vi sia prezzo; il permutante sara' indennizzato dal retrattante, e tutto quello che possa domandare.”)

<sup>77</sup> Baudry-Lacantinerie et Wahl, ibid

<sup>78</sup> Planiol et Ripert, op. cit., n. 367 (this rule was confirmed by a judgment of the Court of Lyon, 17.6.1825)

<sup>79</sup> Baudry-Lacantinerie et Wahl, op. cit., n. 2608, n. 2633 (“L'azione, in caso di cessioni successive, va diretta contro l'ultimo cessionario, proprietario attuale dei diritti alienati, e non contro il primo.”)

predecessor, they conclude that “*Il cessionario a titolo gratuito, di un cessionario a titolo oneroso, e soggetto al retratto.*”<sup>80</sup>

#### (iv) Time for the exercise of the *Retratto Successorio*

An important distinction between Article 912 of the Civil Code and its French counterpart lies in the period within which the right of redemption may be exercised under our law. The law reserves only one month for the schedule of redemption and the price to be lodged in court. Such period runs from the day on which notice of the assignment shall have been given to the co-heirs by means of a judicial act, unless the co-heirs shall have declared their intention to exercise their right of redemption within such time. In default, the co-heirs forfeit their right of redemption conferred by this provision.

As already discussed, this right can be exercised by all co-heirs, whether jointly or separately. Where the redemption is exercised by only one of the co-heirs (by means of a schedule of redemption and deposit filed in the Registry of the First Hall of the Civil Court), the others may avail themselves thereof, provided they declare their intention to do so within fifteen days of the notice given to them. It is thus advisable that the co-heir availing himself of this right gives notice thereof, by judicial act, to the other co-heirs. This respects the principle that the *retrato successorio* “*appartiene a ciascuno erede individualmente; essi possono riunirsi per agire, ma ciascun d’essi puo richiedere altresì il retratto per suo conto.*”<sup>81</sup>

This interpretation was recently upheld by the First Hall of the Civil Court in **Frederick Testaferrata de Noto vs Emanuel Testaferrata de Noto**.<sup>82</sup> In this judgment, the Court held that:

<sup>80</sup> Op. cit., n. 2591, also supported by Merlin and Demolombe; Pothier, *Des Retraits*, n. 104: “Le rétrait, étant le droit de prendre le marché d’un autre, la donation, qui n’est pas un marché, n’en peut être susceptible.”

<sup>81</sup> Planiol et Ripert, op. cit., n. 372

<sup>82</sup> Citaz. 2779/1997, 6.4.2001

*“Il-jedd li l-art. 912(3) jaghti lill-ko-werriet huwa li jinghaqad mal-ko-werriet l-iehor fl-ezercizzju tal-jedd ta’ rkupru. Dan jista’ jaghmlu sakemm il-jedd ma tkunx lahaq gie akkwizit mill-ko-werriet l-iehor, ghax inkella l-ko-werriet li jfittex li jinghaqad fl-irkupru ma jkunx qieghed, filfatt, jinghaqad fl-irkupru izda jaghmel espropriazzjoni ta’ jedd ga akkwizit mill-ko-werriet l-iehor. Dan huwa wkoll it-taghlim ta’ l-awturi:*

*Si comprende tuttavia che l’uno dei coeredi non possa riservarsi il profitto tratto dal retratto se non quando il retratto stesso sia un fatto compiuto ..... [Baudry-Lacantinerie & Wahl, Delle Successioni, Vol III (Trattato Teorico-Pratico di Diritto Civile, Vol IX n. 2617)]*

*Ghalhekk il-jedd ta’ ko-werriet li jinghaqad ma’ ko-werriet iehor li jkun ga beda l-process ta’ l-irkupru jintemm jew fi zmien hmistax wara n-notifika li l-ko-werriet l-iehor ikun qed jezercita l-irkupru, jew meta l-ko-werriet l-iehor ikun finalment akkwista s-sehem tal-wirt minghand ic-cessjonarju, sakemm, f’dan it-tieni kaz, ikun ghadda wkoll iz-zmien ta’ xahar min-notifika, mhux ta’ l-irkupru, izda tac-cessjoni, ghax jekk l-irkupru jkun mitmum qabel ma jghaddi dak ix-xahar xorta ma jkunx jista’ jcahhad lill-ko-werrieta l-ohra mill-jedd taghhom that l-art. 912(1) u (2) illi, mhux jinghaqdu fl-irkupru mibdi minn ko-werriet iehor, izda li jezercitaw l-irkupru huma stess iure proprio.”*

It is likely that problems would arise in the absence of such notice being given to the other co-heirs. Such failure lies at the root of the judgment **Nicola Bonnici vs Antonio Formosa et**<sup>83</sup>, where the Court of Appeal held that *“Quando la cessione di una quota ereditaria non e’ notificata al coerede per atto giudiziario l’esercizio del retratto e’ ammissibile sino alla divisione.”*<sup>84</sup> Curiously enough, the Civil Court in **Giovanni Cassar vs Camillo Galea**<sup>85</sup> ruled that *“E’ valido il retratto esercitato da uno dei coeredi, anche quando l’eredita, in quanto a stabili, e liquidata, e*

<sup>83</sup> 2.12.1921, XXIV.i.905

<sup>84</sup> “Que le rétrait successoral ne puisse plus être écércé après que le partage est terminé, cela est d’evidence”, Demolombe, op. cit., n. 129

<sup>85</sup> per Onor. Giuseppe Gasan, 14.11.1890, XII.529

*quando la divisione e gia convenuta.*” It is submitted that such an extensive interpretation of the *retrato successorio* serves merely to pave the way to abuse. This decision has been overruled in the judgment **Marianna Debono vs Avv. Antonio Caruana et noe**<sup>86</sup>, where the Court of Appeal reaffirmed the established principle that *“Fil-kaz ta’ cessionjoni li tkun saret qabel id-divizjoni ... ma jistax jigi ezercitat kontra tieghu r-retratt successorju.”*

### 3. Effects of the *Retrato Successorio*

It is generally agreed that the redemption by co-heir/s is neither an assignment of rights, nor operates a re-assignment of the rights of the alienor to the inheritance of the deceased. Planiol et Ripert<sup>87</sup> refer to the teachings of the *Cour de Cassation* and conclude that:

*“Il retrattante prende il luogo del cessionario. Percio`, il contratto e` mantenuto; solamente il retrattante e` subrogato al compratore, quanto ai diritti ed oneri che risoltano dalle cessione. Il retratto non e` dunque una nuova vendita che il cessionario faccia al retrattante; non vi e` mutazione. Donde segue che non vi e` luogo a trascrivere la convenzione che interviene fra il retrattante e il cessionario ... basta percio` una semplice manifestazione di volonta` del retrattante; il consenso del cessionario non e` richiesto.”*<sup>88</sup>

Such redemption is only binding on the redeemptor and the original assignee. Some writers<sup>89</sup> argue that it does not have retroactive effects, but merely operates this consolidation prospectively from the moment of the redemption. On the other hand, *Demolombe* cites the teachings of *Fontmaur* and *Pothier* that *“Le rétrait donc ne consiste que dans la substitution d’une personne a une autre, de persona in personam.”* *Planiol et Ripert*<sup>90</sup> argue on the same lines

<sup>86</sup> 23.2.1940, XXX.i.481

<sup>87</sup> op. cit., n. 386

<sup>88</sup> This explains why it can be exercised by filing a schedule of redemption and deposit filed in the Court Registry

<sup>89</sup> op. cit., n. 139

<sup>90</sup> op. cit., n. 388

that “*il retrattato si considera come se non fosse stato mai compratore, e che il rettante si considera come se lo fosse stato sempre.*” While a third party acquiring rights on such share of the inheritance after the transfer (but prior to the redemption) can easily contemplate this possibility and protect his rights accordingly, such retroactive effect can seriously prejudice innocent third parties in good faith and should therefore be ruled out.

Our Courts have also had the opportunity of discussing the effects of the *retrato successorio* when it is exercised by one of the spouses bound by the community of acquests. In terms of Article 1334(1) of the Civil Code, all property devolving upon one of the spouses by title of succession is deemed to be paraphernal property and pertains exclusively to such spouse. In **Mose Calleja vs Nicola Bonnici**<sup>91</sup>, the First Hall of the Civil Court ruled that:

*“L’immobile acquistato coll’esercizio del retratto successorio da uno dei coniugi spetta all’asse particolare di tale coniuge e non alla comunione degli acquisti coniugali. La ragione di cio si basa sul motivo di diritto generali per cui non si ritiene incluso nella comunione degli acquisti coniugali l’immobile che sia stato retratto da uno dei coniugi in esercizio di un titolo speciale proprio ed esclusivo del coniuge retraente, non potendo secondo la legge il retratto esercitarsi per comodo e vantaggio, sia in tutto sia in parte, di altri, come ancora sul motivo di diritto speciale al retratto successorio.”*

It is submitted, however, that in terms of Article 1320(e) and Article 1321(2) of the Civil Code, the other spouse will be entitled (in the event of a liquidation of the community of acquests) to a reimbursement of one-half of the price and expenses paid on redemption

<sup>91</sup> 2.12.1926, XXV.ii.353

## Concluding Remarks

Although we often overlook the *retrato successorio* in our legal studies, this short analysis highlights its complementary nature within the wider framework of succession law. This institute is the only conventional right of redemption<sup>92</sup> that has been saved by the legislator when the Maltese Parliament opted to abrogate the regime of legal redemption formerly applicable to transfers *inter vivos*<sup>93</sup>

On the other hand, one can legitimately question the contemporary relevance of this institute at a time when the legislator is no longer intent on securing the exclusion of persons not called to the succession of the deceased (whether by law or by will) from the partition of the estate. The amendments to the law of succession carried into effect by Act XVIII of 2004 are primarily directed towards the consolidation of the property, and the ascertainment of the title of each individual co-owner (or co-heir). These developments were clearly intended to facilitate the free transfer of property. This spirit can be traced both in the new provisions regulating co-ownership<sup>94</sup> as well as the new authentic definition of the reserved portion<sup>95</sup> over the estate of the deceased.

A reconsideration of the *retrato successorio* in the light of this spirit would easily converge with the stance, taken by the French legislature decades ago, that the protection of the right of ownership and the enhancement of the free transferability of private property tip the balance in favour of the total abrogation of this institute.

**Phyllis Farrugia**

April 2006

<sup>92</sup> Saving the right of redemption of perpetual emphytheusis (vide Article 1501 of Civil Code)

<sup>93</sup> Vide Act IV of 1961

<sup>94</sup> see Articles 495 and 495A of Civil Code (added by Articles 45 and 46 of Act XVIII of 2004)

<sup>95</sup> Article 615(2) of Civil Code (added by Article 58 of Act XVIII of 2004)

24.



## Reforms in the Maltese Civil Code

### **The Removal of Relative Incapacities of Children in the Amendments of Act XVIII of 2004**

**Dr. Ruth Farrugia**

LL.D., M.Phil., Dip.Trib.Eccle.Melit.<sup>96</sup>

The amendments to the Civil Code which came into force through Act XVIII of 2004 affect a large number of sections spread throughout the Code. They include the removal of the term “illegitimate”, the introduction of the rights subsequent to this removal, a number of other amendments within the law of succession, co-ownership and acts of status. My brief in this article is to highlight the removal of relative incapacities of children<sup>97</sup>.

#### **1. Background**

##### **1.1 Roman Law**

Very briefly, in Roman Law, illegitimate children did not belong to any particular family. They were subject to no paterfamilias and were not legally related to their brothers and/or sisters. Up until the time of the Republic they had no hope of inheriting. Hadrian removed the Lex Minicia whereby a child was given the least possible status and the presumption in favour of Roman status was applied. Justinian introduced legitimation *per subsequens matrimonium*.<sup>98</sup>

<sup>96</sup> Advocate and Senior Lecturer, Faculty of Laws University of Malta

<sup>97</sup> This article is based on a paper presented at a Seminar organised by the Chamber of Advocates, Notarial Council and Gh.S.L. on the 16<sup>th</sup> April 2005 and deals principally with the Amendments to the Civil Code brought about by Act XVIII.2004

<sup>98</sup> Gardner J., *Family and Familia in Roman Law and Life*, 1998, p.252-261

In this respect, Maltese law is based on Roman Law as amended by the Code de Rohan, the Code Napoleon, the amendments of 1965, 1973, 1993<sup>99</sup> and the present amendments under scrutiny of 2004.

## 1.2. International Law

The main sources of reference at international law are the:

- Universal Declaration of Human Rights Articles 2 + 25(2);
- European Convention on Human Rights Articles 8 + 14;
- European Convention on the Legal Status of Children Born outside Marriage
- Resolution (70)15 relating to the Social Protection of Unmarried Mothers and their Children (Council of Europe);
- UN Article 2: prohibition of discrimination on the basis of “social origin, birth or other status” and
- Article 25(2) “*All children born in wedlock or outside wedlock shall enjoy the same social protection*”.

This sentence was added at the recommendation of Yugoslavia and Norway who drew attention to the discrimination practised against children born out of wedlock which brought about the lack of observance of their fundamental human rights.<sup>100</sup>

This Declaration however fails to make any mention of legal rights and it is readily apparent that social and legal rights are not the same.

<sup>99</sup> Farrugia R., Parentage and Civil Status Matters, Council of Europe, 1999, p115-126

<sup>100</sup> Van Beuren G., The International Law on the Rights of Children, 1998 p.41 et seq

Within the Covenant on Civil and Political Rights, Poland suggested the inclusion of: “Birth outside marriage should not restrict the rights of children” and Yugoslavia agreed to second the proposal, however Saudi Arabia objected and was joined by other states who felt this inclusion offended the sentiments of Muslim principles. The compromise clause proposed: “State parties to this convention agree to take steps to better the legal status of children born outside marriage” but even this was deemed unacceptable as a number of countries felt that the distinction in matters of succession was positive to safeguard the family.<sup>101</sup>

When the United Nations Convention on the Rights of the Child was being discussed, China proposed that children born out of wedlock should benefit from all the rights listed under the convention and Australia proposed that children should have the right to establish both maternal and paternal filiation but both proposals were rejected.

The Convention on the Legal Status of Children born out of Wedlock 1975 has two main aims: 1. to provide child born outside wedlock with a status equal to children born within wedlock and 2. The harmonisation of laws relating to filiation within Council of Europe States. Because of the large differences between legislations of different states, the adoption of this convention was made possible on the proviso that states would have time to amend their local laws slowly. For instance Article 9 makes specific reference to the rights of all children, whether born in or outside wedlock, to inherit equally from father, mother and all family members of the father and mother.<sup>102</sup>

Notwithstanding this rather sad background, within the international judicial scenario, case law from Strasbourg is much clearer and coherent.

<sup>101</sup> Van Beuren op cit + UN/Doc A/C.3/SR 1263

<sup>102</sup> Boucaud A, The Council of Europe and Child Welfare, Strasbourg 1989, p14-16  
 Resoluzzjoni dwar protezzjoni soċjali ta' ommijiet mhux mizzewga u uliedhom jittratta t-tnehhija ta' terminologija li jista' jiddiskrimina kontra t-tfal.

Article 8 refers to the universal right to respect for family life. This has been interpreted as meaning that no discrimination is permissible between legitimate and illegitimate children.

## 2. Selected Article 8 Cases <sup>103</sup>

**2.1. Johnston v Ireland:** respect for family life includes children of parents who are not married. This case is about a man who was unable to marry his daughter's mother because he was legally separated from his wife and unable to marry the daughter's mother because of Irish law prohibiting divorce. Ireland introduced the Status of Children Act in 1987 as a response to this decision. The result was not to give married and unmarried couples analogous rights but to ensure respect for family life interpreted to mean that both couples should have the right to establish legal ties between those family members.<sup>104</sup>

**2.2. Marckx v Belgium** treated the issue under Belgian law whereby an unmarried mother had to adopt her own child in order to establish legal status of motherhood. The Court found that respect for family life requires the State to act in such a way as to permit the relationship between family members develop in a normal way, adding that this should be possible by recognition of the relationship between mother (unmarried or not) and child from the moment of birth. Belgium immediately amended its law. A year later the Committee of Ministers of the Council of Europe adopted the European Convention about the Legal Status of Children Born out of Wedlock, 15 Oct 1975 [vide also the Brussels Convention on the Establishment of Maternal Affiliation of Natural Children].

**2.3. Kroon v Netherlands** has more specific relevance to the local problem. A child was born to an unmarried couple where the mother was still married to another man. She could not trace her

<sup>103</sup> Swindells H. et al, Family Law and the Human Rights Act 1998, 2000, case summaries 303-362

<sup>104</sup> O'Donovan K., Family Definitions and Human Rights, Family Law and Family Policy in the New Europe, 1997, p 27-42

husband in order to seek a divorce from him and entries in the public registry showed that he had not married anyone else. According to the Courts in the Netherlands, the child's father could not acknowledge the child as his own until such time as the wife's husband had repudiated the child.

**2.4. Inze v Austria** deals with a case under Austrian law whereby a child born in wedlock received preferential treatment vis a vis a child born outside wedlock by acknowledging the child born in wedlock as the principal heir. In this case, the son born out of wedlock stood to lose a farm which he should have inherited from his mother along with another son born in wedlock. Austria argued that the rural population believed that birth in wedlock was an important criteria in establishing succession rights. The Court decided that Austria had breached Article 14 of the European Convention of Human Rights and Article 1 of Protocol 1. In 1980 Austria had also ratified the Convention on the Legal Status of Children born out of Wedlock.

### 3. Local Case Law

**3.1. Ronald Apap v Ruby Ritchie proprio et nomine** – This was a case about a child born outside marriage whose mother gave him up in adoption to third parties. Subsequently the father of the child contested the placement and the Court decided to give the child to his illegitimate father making the following remarks:

*“L-emendi li saru fl-1973 kellhom l-ghan ewlieni li jinewtralizzaw kemm jista' jkun id-distinzjoni u d-differenzi bejn il-wild illegittimu u dak legittimu. Dan b'mod partikolari f'dawk li huma relazzjonijiet personali bejn it-tfal u l-genituri li jirrikonoxxuhom bhala uliedhom*

*Dan ghaliex il-ligi riedet tekwi para kemm jista' jkun il-vantagg li jkun anke hu sottomess ghas-setgha u d-direzzjoni ta' missieru. Sa mill-emendi ta' l-1973 wiehed allura jista' jghid li l-ligi bdiet tirrikonoxxi n-nukleju familjari illegittimu li fih ir-relazzjoni bejn il-genituri u l-ulied, avolja barra l-vinkolu taz-zwieg beda, fl-*

*interest tal-minuri, jigu regolati kwazi bl-istess mod ghal dawk gia' familjari fiz-zwieg...”*

*Rough translation: The amendments which took place in 1973 had the principal aim of neutralising, as far as possible, the distinction and difference between legitimate and illegitimate children. This was done with particular reference to personal relationships between children and parents who acknowledge them as their children.*

*This is because the law wished to balance, as far as possible, the advantage of being subject to the authority and direction of the father. Since the amendments of 1973 one can therefore say that the law started to acknowledge the illegitimate nuclear family wherein the relationship between parents and children, albeit outside the bond of marriage, started, in the interests of the child, to be regulated in the same way as those already familiar in marriage.*

Locally, various vox pops highlighted popular sentiment as being in favour of the abolition of discrimination between children born in and outside wedlock. This is hardly the place to enter into a debate as to whether society shapes the law or the law shapes society but it is apparent that the term “illegitimate” is no longer viewed as politically correct..

There are a number of reservations to the practical outcomes to this judgement; however it is being cited to show how the Court affirmed the fact that the time for discrimination between legitimate and illegitimate children should be viewed as long gone.

### **3.2. Buttigieg v AG et<sup>105</sup>**

<sup>105</sup> Mario Buttigieg f'ismu proprju u bhala kuratur ad litem ta' ibnu minuri Keith Buttigieg versus l-Avukat Generali u jekk jidhirlu li ghandu interest l-Onorevoli Prim Ministru Deciza 17 Jannar 1997, Rik. Kost 544/96AJM ( Mario Buttigieg in his own name and as curator ad litem of his minor son Keith Buttigieg versus the Attorney general and for any possible interest the Honourable Prime Minister decided on the 17 January 1997, Constitutional Application 544/96AJM)

Buttigieg had two children, one born in marriage and the other outside wedlock. He wished to leave them equal shares in his will but was advised that the law did not permit this. He decided to go to court and instituted proceedings on the basis of articles 37 and 45 of the Constitution and Articles 8 and 14 of the European Convention of Human Rights and the First Protocol<sup>106</sup>.

Buttigieg made reference to articles 602, 640, 822 and all the articles between 614-646 and 817-824 and requested that changes be directed in order to eliminate the existing discrimination. Mr Justice Alberto Magri found for Mr Buttigieg and declared a number of the articles cited under succession law to be null and to go against the Constitution and the European Convention on Human Rights and ordered that a copy of the judgement be served on the House of Representatives.

The Attorney General failed to appeal the decision and it is interesting to note that the last official act of outgoing President Mifsud Bonnici in 1998 was to remind the House of Representatives that the said articles were still awaiting amendment.<sup>107</sup> Today, 8 years after the judgement on this case the amendments have finally gone through.

*“Illi fil-meritu jidher li t-talba tar-rikorrenti hija gustifikata inkwantu l-provvedimenti tal-Kodici Civili aktar il fuq imsemmija jiddiskriminaw bejn genituri legittimi u illegittimi u bejn tfal legittimi u illegittimi, liema diskriminazzjoni tincidi b’mod negattiv fuq it-tgawdija tal-hajja familjari protetta bl-artikoli fuq imsemmija jammontaw ghal indhil minn l-awtorita’ pubblika dwar l-ezercizzju ta’ dan id-dritt minghajr ma jikkonkorru r-rekwiziti imsemmija fis-sub inciz (2) tal-Artikolu 8 ta’ l-Ewwel Skeda tal-Att XIV tal-1987. Daqstant l-artikoli fuq imsemmija jincidu b’mod negattiv fuq id-dritt ghat- tgawdija pacifika tal-propjeta’”*

<sup>106</sup> Malta has had the right to individual petition since 1987

<sup>107</sup>Farrugia R., as reported in the International Survey of Family Law 2001, pp 258-289

*Rough translation : As to the merits it would appear that the request of the applicant is justified insofar as the provisions of the Civil Code mentioned above discriminate between legitimate and illegitimate parents and legitimate and illegitimate children, which discrimination negatively affects the enjoyment of family life protected by the aforementioned articles and which amount to interference by a public authority in the exercise of this right without being in line with the requisites mentioned in Article 8(2) of the First Schedule to Act XIV of 1987. In a similar way the article aforementioned negatively impacts on the right to peaceful enjoyment of property.*

## **4. The Amendments**

### **4.1. Definitions**

The first amendment to be discussed is (inevitably) the definition.

Legitimate children are termed children conceived or born in wedlock. The word illegitimate has been eliminated and the word legitimate is used interchangeably with being conceived or born in wedlock.

Article 68 remains the same:

*“A child born not before one hundred and eighty days from the celebration of the marriage, nor after three hundred days from the dissolution or annulment of the marriage, shall be deemed to have been conceived in wedlock.”*

Under the heading “Filiation of children conceived or born in wedlock”

Article 67 remains:

*“A child conceived in wedlock is held to be the child of the mother’s husband”.*

The reasons for repudiation of children (as in an action for *denegata paternita*) have also remained the same. The only changes in Articles 76 and 77 substitute the word legitimate with the word filiation but are not substantive changes to this right to repudiation. Similarly in the second subtitle regarding the proof of filiation of children conceived or born in wedlock, Articles 78-85 are amended solely to substitute the word "conceived or born in wedlock" for legitimate.

Subtitle III refers to Filiation of children conceived and born out of wedlock and the presumption that a person was conceived or born in wedlock.

The first real change comes in the provisos to Article 86:

*Provided further that the acknowledgement of a child born out of wedlock by a person claiming to be the father of the child, made separately from the mother, shall not have effect and shall not be registered unless the mother of such child, or her heirs if she is dead, and the child himself if he is of age, shall have been served with a judicial letter by any person interested stating that such person intends to apply for the registration of such acknowledgement and the mother or her heirs as the case may be, and the child, shall not have within a period of two months from such service, by a note filed in the acts of the said judicial letter, agreed to such registration, in which case the said judicial letter and agreement note showing agreement shall be served upon the Director of the Public Registry who shall register the said acknowledgement in the relative acts of civil status;*

*Provided further that where the mother or the child where he is of age does not as aforesaid agree to such registration, any person interested may proceed by application before the competent court against the person or persons who shall not have so agreed, for the court to declare that the person making the acknowledgement is the father of the child and to order the registration of such acknowledgement in the relative acts of civil status;*

*Where the acknowledgement of a child born out of wedlock is made by a man who claims to be the father and this acknowledgment is carried out separately from the mother, legal procedures are required for such acknowledgment to take effect.*

This article retains the premise that a father who is still not of the age of majority cannot acknowledge his child. Although he may marry and enter into full time employment at the age of sixteen he may not acknowledge his child before he attains the age of eighteen. This may be explained on the basis of parental authority which places all minors until the age of eighteen under the authority of their parents. However, in the case of minor females the distinction does not seem to matter and the parents of a minor daughter must assume responsibility for her child and she automatically acknowledges the child at birth. In fact, should the minor girl wish not to acknowledge the child, this is not possible under our law.<sup>108</sup>

The first article with any real impact on children comes at article 86 when an innovative and detailed proviso introduces amendments relating to notification and procedure.

## **4.2. Judicial Letter**

A judicial letter must be sent by the person wishing to acknowledge the child and be notified to:

1. The mother of the child or her heirs if she is deceased; and
2. The child him/herself if s/he is of age.

### **There are two Possible Responses:**

#### **Response 1 – Agreement**

Within two months from the date of notification of the official

<sup>108</sup> Unlike the articles in neighbouring civil law countries on the continent where anonymous birth is possible since recent amendments whereby both mother and father may choose not to automatically acknowledge their offspring. ( so called accouchement sous “x”)

letter, the mother or her heirs and the child according to the case must file a note in the acts of the official letter indicating their assent to the registration. The official letter and the note are then notified to the Director of the Public Registry who registers this information in the relative act of civil status.

The problem relating to the child's right to know his/her father remains. Is it possible for a man who does not wish to acknowledge his child to refuse to undergo a DNA test? The issue centres round the right of the individual over his bodily integrity as opposed to the right of the child to establish his/her origins.<sup>109</sup> According to the United Nations Convention on the Rights of the Child which Malta ratified in 1990, article 7(1) states:

*“A child shall have the right to be registered immediately upon birth and shall have the right from birth to a name. Insofar as is possible s/he shall have the right to know and be cared for by his/her parents.”*

## **Response 2 – Lack of Agreement**

Within two months from the date of notification:

Where the mother or the child have not signified their consent or have not replied whosoever has an interest may proceed by application before the competent court against the person who has disagreed so that the court may order the acknowledgment of the father and the relative registration.

## **What happens when only one party agrees or disagrees?**

Take the case of a child who has attained majority disagreeing with the acknowledgment while the mother is in agreement. It would appear that the opposition of only one party is sufficient. Will the Court listen to the parties prior to making its decision and confirm

<sup>109</sup> Frank R., Compulsory Physical Examinations for Establishing Parentage, *International Journal of Law, Policy and the Family*.10(1996) p. 205 et seq

the application of the applicant? The motivation for this amendment lies in the procedure which used to give the father the automatic right to acknowledge a child by having his name inserted on the act of civil status without the need to inform the child or the mother.

This new procedure ensures the need for notification but also seems to introduce the right to oppose such acknowledgement. Otherwise there would only have been the need for notification by the Director of the Public Registry on his/her registration of the acknowledgment in the act of civil status. Our law has persistently done all it can to ensure that a child is considered to be born or conceived in wedlock and this amendment seems to give the opportunity to oppose such status.

This new system resembles that pertaining in Belgium, Germany, Italy, the Netherlands, Portugal and Spain. In Germany, however, if the child opposes the acknowledgement the Court may still override the opposition by means of a decree. In Belgium the consent of the mother and the child who has attained the age of fifteen years or the consent of the child who has attained the age of eighteen as the mother's consent is no longer required at that stage. Spain expects the Court to decide in those cases where there is opposition but leaves a period of one year within which the father may notify the child by means of legal documents. In Italy, the mother's consent is required where the child has not yet attained the age of sixteen and where the child opposes the acknowledgement.

In the Netherlands, the mother's consent is only required where there is a minor and once that minor attains the age of twelve years his/ her consent is also necessary. Portugal does not require the consent of the mother. France, Luxembourg, Austria and Switzerland, for example, have a system which resembles ours prior to the amendments although there are a number of exceptions to the rule. France, for instance, gives power/authority to the Notary to accept a declaration of filiation in secrecy which means

that although an annotation is made to the child's certificate this remains confidential until the death of the father.<sup>110</sup>

### **4.3. Choice of Surname**

Article 92 has added a proviso making reference to Article 292A which is a completely new addition.

#### **Article 92**

*“Provided that when the child born out of wedlock has been acknowledged jointly by both the father and the mother on the Act of Birth, the surname by which that child shall be known shall be determined in terms of article 292A.”*

#### **Article 292A**

*“The person giving notice of the birth shall also deliver a declaration by the parents of the child indicating the surname to be used by the child in terms of article 4(3) or of article 92, and such surname shall be registered in the column under the heading “Name or names by which the child is to be called” in the act of birth immediately after such name or names. Where no such declaration is made in the case of a child conceived and born in wedlock the father's surname shall be presumed to have been so declared and in the case of a child conceived and born out of wedlock the maiden surname of the mother shall be presumed to be the surname so declared.”*

When this does not happen and the child is conceived and born in wedlock the presumption is that the father's name has been declared. Where the child is conceived and born outside wedlock, the presumption is that the child shall bear the maiden name of the mother. The debate relating to surnames has been going since the amendments enacted in 1993. At the time it was suggested that all

<sup>110</sup> Granet F., International Commission on Civil Status, Legal Problems relating to Parentage, Council of Europe, 1987

children should take their mother's surname and in this way discrimination against children born outside wedlock would be diminished as they would not be so easily identifiable.

This is the case in Germany (Abs 1617BGB) and Austria (Abs165ABGB), for instance. In Greece children take the surname of their mother and may add the surname of the father. Spain and Greece have a rather interesting option related to the lack of an entry under father's name and the possibility of listing the name as unknown. In Spain the registrar sets down a fictitious name simply to conceal the fact in the register and this may be removed by the child when s/he comes of age (Art 191 RRC). In Greece the mother may request the entry of a fictitious name under the entry for father's name but contrary to the process in Spain, the child has no right to remove this entry at any time. (N2307/1995 Art 9 (9))<sup>111</sup>

#### **4.4. Retention of Surname**

Article 92 is complemented by the notion in subarticle (6) so that a person whose surname is to change in virtue of the procedure of filiation, notification or application relating to the presumption may request the competent Court by means of an application against the Director of Public Registry to be permitted to use another surname.

Where the Court decides that such use would not prejudice the rights of third parties and in the case of minor, where it is shown that this would be in the best interests of the minor, the application shall be acceded to and the Director shall be ordered to annotate the decision on the relative Act of Birth.

Similarly in Article 110, the child shall take the surname of the parent who shall have claimed acknowledgement of the child so that where the presumption is made by the father and the mother the child shall take the surname of the father.

<sup>111</sup> Granet F.,op.cit. , p.59-81

#### **4.5. Obligations of the Children**

According to Article 93;

*“Without prejudice to the provisions of article 89, parents of children conceived and born out of wedlock shall have in respect to such children and their descendants the same duty to maintain and educate them as they have with regard to children born or conceived in wedlock, and such children shall have in respect of their ascendants and other relatives the same rights and duties as children born or conceived in wedlock.”*

It is interesting that the obligation of parents subsists in a personal way between them and the child and his/her descendants while the obligation of the child extends towards “other relatives” with no indication of the level of proximity of such relationship.

#### **4.6. Parental Responsibilities**

Articles 94 and 95 have been deleted and Article 93 has been amended so that it is unequivocal that parents of a child conceived and born outside wedlock shall have the same duties to maintain and educate that child as they would a child conceived or born within marriage. This obligation extends to the descendants of the children.

However some sort of discrimination continues to apply where Articles 96 and 97 have remained *in vigore*. These articles declare that a parent may *“deny maintenance to the child, if such child refuses, without just cause, to follow the directions of the parent in regard to his conduct and education and / or if such child refuses to live in the house which the parent for just cause and with the approval of the court has appointed for his habitation, as also in any other case in which according to law it is competent to a parent to refuse maintenance to a child conceived or born in wedlock.”*

It should be noted that the articles dealing with parental authority (articles 131-156) make no such mention of this treatment to children conceived or born in wedlock. It is a shame that this vestige of discrimination continues in the care and support given to children conceived or born outside wedlock.

#### **4.7. Presumption that a person was conceived or born in wedlock**

Article 101 now reads:

*“Where parents of children conceived and born out of wedlock subsequently marry, or where the court of voluntary jurisdiction so decrees, such children shall be deemed iuris et de iure to have always been conceived or born in wedlock.”*

The words legitimation have been deleted and substituted with the words *“presumption that a person was conceived or born in wedlock”*. The difference from the article prior to the amendment lies mainly in the fact that what used to be known as legitimation is now automatic although the declaration of the parents in an act of marriage or declaration by court decree is still necessary according to article 102.

This presumption continues to extend to children who predeceased and therefore the presumption operates in favour of the descendants of those children whether conceived or born in wedlock. (Article 105)

#### **Effects of Presumption**

But it should be kept in mind that there is the old presumption which operates between the father and mother of the child born and conceived in wedlock that the child is a product of the marriage. This is so fundamental that Article 111(2) has remained constant and states that:

*Such child shall not acquire any other right deriving from consanguinity.*

*Pater is est quem nuptia demonstrant*

## **5. Acts of Birth**

### **5.1. Father Unknown**

According to Article 279:

*(1) In the case of a child conceived and born out of wedlock, the name of the father shall not be stated in the act, except at the request of the person acknowledging himself before the officer drawing up the act to be the father of such child.*

*(2) Where the child is not acknowledged jointly by both the father and the mother, the provisions of article 86 shall apply.*

*(3) Where no such request is made, there shall be stated in the proper place in the act that the father of the child is unknown.*

### **5.2. Documents**

A request for annotation by the Director of the Public Registry in the case of adoption or conception or birth in wedlock as well as such a request in relation to paternity or maternity must be accompanied by an authenticated copy of the public deed, court judgement or in the case of marriage the reference to the date of registration or document proving the celebration of the marriage.

#### **Article 291:**

*“(1) The party making the request for any entry as provided in the last two preceding articles shall deliver to the Director an authentic copy of the public deed, judgment or decree, relating to the judicial declaration of paternity or maternity, or presumption in virtue of articles 101 to 112.*

*(2) In the case of a presumption arising out of subsequent marriage, which has been duly registered, a reference to such registration shall be made in the note: where the marriage has not been registered, the entry shall not be made unless the party making the request for the entry shall deliver to the Director a document attesting the celebration of the marriage.”*

## **6. Reserved Portion**

### **Article 616:**

*“(1) The reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more.*

*(2) The reserved portion is divided in equal shares among the children who participate in it.*

*(3) Where there is only one child, he shall receive the whole of the aforesaid third part.”*

Now substituting the term legitim the law uses the term reserved portion and where the law previously made a distinction there is now clarification that this portion shall apply to those children who were conceived or born in wedlock or conceived or born outside wedlock or adopted.

## **7. Equal children?**

However the situation is not as equal as it might first appear. If one takes a look at Article 809:

*“Where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants.”*

Then at Article 811(1);

*“...children or other descendants succeed to their father and mother or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of the same or of different marriages.”*

Prior to Act XVIII this article provided a definition for legitimate children however today it is said that all children are to be treated in the same way, without any discrimination. For this purpose any distinctions between children of the first and subsequent marriage were also eliminated together with remaining discrimination against adopted children who were precluded from inheriting more than the least portion of a legitimate child.

### **The Surprise Comes at Art. 815:**

*“Where a person conceived and born out of wedlock succeeds ab intestato with adoptive children of the deceased or other children of the deceased who are not so conceived or born or descendants of such children, or with the surviving spouse of the deceased, the person conceived and born out of wedlock shall receive only three quarters of the share to which he would have been entitled if all the heirs of the deceased, including such person, had been conceived or born in wedlock, and the remaining quarter of the share to which he would have been so entitled shall devolve on the other heirs of the deceased to the exclusion of any of such heirs who is conceived and born out of wedlock as if it were a separate estate”.*

Children conceived or born outside marriage who compete with other children, or with the surviving spouse, stand to lose out where the parent failed to make a will in their favour. The rules of intestate succession maintain that this child may only inherit three quarters of what would have been his due had there been a will. It is interesting that the remaining quarter does not go to the children conceived or born in wedlock – it would appear that the surviving spouse is the beneficiary although the position of the adoptee is also unclear.

This distinction and emphasis on the remaining quarter being considered as a separate estate may be a sop towards those who criticise this measure as discriminatory. Whatever the analysis of the issue, the final account shows clearly that the child conceived or born outside wedlock does not receive the same share as the child conceived or born in wedlock – the question is how long will it take for another court case to be instituted to remedy this?

**Ruth Farrugia**  
March 2006





## The Law of Succession in Malta – A Reappraisal

**Dr. Paul DeBono**  
M. Jur. (Int. Law), LL.D.<sup>112</sup>

This article is only intended to serve as an outline, a brief explanation of the salient principles and the most significant changes introduced to the Law of Succession.<sup>113</sup> It is hoped that it will serve to tickle the reader into a more profound study and examination of the institutes and principles involved and the interplay between them.

### Background

Discussions at a political level had been going on since the early 1990's when the Permanent Law Reform Commission was set up with the task of recommending legal reforms or at any rate with stimulating discussion where reforms are called for or desirable.<sup>114</sup>

The Commission had been working on a report and draft bill to introduce long awaited reforms since the early 1990's. It prepared a report on the Law of Succession and a draft Bill way back in December 1994 and discussions, both at a political as well as at the appropriate legal levels had been going on since then. The political momentum then generated was cut short with the 1996 elections and change in administration which, at that time was faced with more important priorities.

<sup>112</sup> Advocate, Lecturer at the University of Malta, Faculty of Laws and Head, Legal and Compliance Office at Lombard Bank Malta p.l.c.

<sup>113</sup> Mostly concentrated in Act XVIII of 2004 which, amongst others and for the purposes of this paper, has amended the Civil Code - Book Second, Of Things, Part II Title III - Of Successions. Chapter 16 of the Laws of Malta. These have come into force by Legal Notice 37 (Articles 110,113 and 115 – as from 04 February 2005) and by Legal Notice 48 of 2005 (all other Articles – as from 01 March 2005).

<sup>114</sup> To date this Commission has published 2 reports, the first in December 1991 and the second in May 1992. Law Relating to Legal Aid (Report No. 1) and Law Relating to Foundations (Report No. 2). 1992, Malta University Services Ltd. No other reports have since been published and this notwithstanding the continued pro-active approach of the Commission.

When the dust had settled, concentration and energies could be directed at these reports, but then came the sudden 1998 elections which witnessed another change in administration with European Union membership being the top priority. These reports were left gathering dust since then until 2003 with the publication of the first Bill and its culmination in these much awaited reforms.<sup>115</sup> It is probable that another factor which contributed to these amendments was that after the 2002 elections, two of the leading lawyers who were clamoring for these much awaited reforms were appointed Minister of Justice and Permanent Secretary respectively within the same Ministry.<sup>116</sup>

Having given a short background to the events preceding these amendments I will now proceed to indicate the major amendments at play.

## **1. Forms of Wills**

### **1.1. Disposing of Property in a Life Insurance otherwise than by Will**

This amendment solves a long outstanding issue with respect to beneficiaries of contracts of life insurance policies. The Civil Code did not allow dispositions of property after death otherwise than by a will. This was problematic on insurances and the naming of a beneficiary in a life insurance as this was tantamount to a disposition otherwise than by a will and was therefore null due to lack of form.<sup>117</sup>

<sup>115</sup> Bill 15 of the 17. 10. 2003 – An Act further to amend the Civil Code, Cap.16 was read the First time at the Sitting of the House of Representatives at the Sitting of the 21 July, 2003. This culminated in Act No. XVIII of 2004 which was passed by the House of Representatives at its sitting No. 215 of 17 December, 2004.

<sup>116</sup> The Hon. Dr. Tonio Borg and The Hon. Dr. Carmelo Mifsud Bonnici, respectively.

<sup>117</sup> The applicability of this rule must also be seen within the context of our Courts' reluctance when called upon to interpret contents of a will within the confines of this article and articles 683, 692 and 693 concerning the inadmissibility of evidence to show that the words of the will are contrary to the intention of the testator and the prohibition of fiduciary dispositions. The general trend has consistently been that where a will is clear there is no room for interpretation as this would be tantamount to the disposal of property otherwise

Insurance companies used to advise that it was best to make a will in accordance with the form required by law confirming the named beneficiary in the policy of insurance rather than run the risk of nullity due to lack of form. The strict rule that no one can dispose of one's property except by will has today been tempered.<sup>118</sup>

## 1.2. Joint Will Unica Charta

Under Maltese law joint wills are only permissible between husband and wife.<sup>119</sup> They partake both of the will element and of the contract element in that besides being regarded as two wills in one instrument, they also partake of a bilateral contract.<sup>120</sup>

Two amendments to article 592, more of form than of substance, mainly concern Notaries on whom, certain drafting obligations were imposed.<sup>121</sup> They are intended to render life easier in procuring copies of joint wills particularly when only one of the spouses has died. Before, unless the other spouse consents for his will to be shown to third parties, any person who requires the will

than by will. In other words, the Court would be substituting its interpretation to that expressed by the testator in the will. See amongst others, *Attard vs Borg*, 21/03/1941 - Vol. XXXI.i.49 and *Vella vs Borg et*, 15/12/1994 - Vol. LXXVIII.ii.419.

<sup>118</sup> One must also consider that wills recognised under Maltese law extend beyond those made in Malta that is ordinary public wills, ordinary secret wills and privileged wills. Other forms of wills are recognized by virtue of the rule of private international law contained in article 682 which compliments the extension namely: "A will made outside Malta, shall have effect in Malta, provided it is made in the form prescribed by the law of the place in which the will is made."

<sup>119</sup> Article 592(1) "A will made by husband and wife in one and the same instrument, or, as is commonly known, *unica charta*, is valid". Article 595 "It shall not be lawful for any two or more persons, other than a husband and wife, to make a will in one and the same instrument, whether for the benefit of any third party or for mutual benefit..." This is an exceptional situation uncommon in most legal systems although exceptions do exist for joint or mutual wills under the German Civil Code and in Spain in certain Provinces such as Navarra and Aragon.

<sup>120</sup> See amongst others, *M. Bianchi v J. A Galizia noe* – Court Of Appeal, 19/04/1937 - Vol.XXIX.i.991

<sup>121</sup> 592(3) A will *unica charta* shall be drawn up in a manner that the provisions with regard to the estate of one of the testators are drawn up in a part separate from those containing the provisions of the other spouse. 592(4) The non-observance of the provisions of subarticle (3) of this article shall not cause the nullity of any provision of the will if it is otherwise intelligible but the notary drawing up the will shall be liable to a fine of one hundred liri to be imposed by the Court of Revision of Notarial Acts.

of a pre-deceased spouse had to file an application in the Second Hall of the Civil Court to ask for an extract, a difficult and time consuming exercise.

The more far-reaching amendments concern the contract element of joint wills and to their effects, that is where there exists reciprocity of bequests between the spouses. Before the amendments, reciprocity existed where spouses bequeath to each other all or the greater part of their property in full ownership or in usufruct. Its effect gave rise to forfeiture of all that the spouse would have received from the pre-deceased spouse in case of either express or tacit revocation, unless otherwise ordained.

Conditional upon there being reciprocity, and in the silence of the parties through their will, there would be forfeiture with wide ranging consequences. After the decease of one of the spouses a change in circumstances may necessitate changes by the surviving spouse of his/her joint will or a tacit change thereto. They would probably have forgotten all about their old will and this often created problems very similar to the verification of a resolutive condition in the law of obligations.<sup>122</sup>

Two changes were introduced; the removal of usufruct as a condition for reciprocity between bequests (and therefore usufruct is no longer part of the contractual element of reciprocity) and forfeiture now, only operates where the spouses specifically so provide. Today the rule has been whittled down to reciprocal bequest in ownership and it is actually inverted. Whereas before, the silence of the parties was tantamount to forfeiture, now they must specifically provide for such forfeiture.<sup>123</sup>

<sup>122</sup> 593(1) Where, by a will *unica charta*, the testators shall have bequeathed to each other the ownership of all their property or the greater part thereof with the express and specific condition that if one of the testators revokes such bequest he shall forfeit any right in his favour from such joint will, the survivor, who shall revoke the will with regard to such bequest, shall forfeit all rights which he or she may have had in virtue of such will on the estate of the predeceased spouse.

593(2) The forfeiture mentioned in sub-article (1) can also be ordained in the case where, by his or her act, the said bequest cannot be effectual with regard to his or her estate.

<sup>123</sup> Our Courts devised innovative rules of interpretation to whittle down the drastic hardship which a forfeiture created upon the innocent surviving spouse. See *M. Caruana et. v G.*

Notaries publishing a joint will have an obligation of warning the spouses of its effects and must write this warning in the will.<sup>124</sup> In addition, the spouse who would have incurred forfeiture would still retain the usufruct over the property so forfeited.<sup>125</sup>

**To conclude, in a nutshell, the major amendments were the following:**

(i) The retention of one instrument as a form but the will or the provisions of one spouse must be separate from that of the other spouse;

(ii) A change in the reciprocity clause and its contractual effects through the removal of reciprocal usufruct which also operated as a forfeiture;

(iii) Where before, there was automatic forfeiture unless the spouses provided otherwise, today forfeiture must be specifically expressed in the will;

(iv) Previously, the forfeiture operated in its totality while today the spouse who forfeits retains the usufruct over the property forfeited;<sup>126</sup>

Ainsworth et. – First Hall Civil Court, 18/02/2005 Subject to Appeal – Unpublished (concerning wills which have had their full effects and therefore not subject to a revocation); Dr L. Galea noe v J. A Galizia – Court of Appeal, 28/04/1935 - Vol. XXIX.i.149 & C. Aquilina et. v C. Bugeja et. – Court of Appeal, 24/01/1930 - Vol. XXVII.i.419 (concerning bequest of legacies and remuneratory legacies by the surviving spouse)

<sup>124</sup> 593(3) The notary drawing up a will unica charta is bound on pain of a fine of one hundred liri to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will unica charta the meaning and effect of this article and of article 594, and enter in the will a declaration to that effect”.

<sup>125</sup> 594 “In the cases referred to in subarticles (1) and (2) of article 593 the ownership of the property bequeathed to the spouse incurring the forfeiture, shall, unless otherwise ordained by the other spouse, vest in the heirs instituted by such other spouse, or if no heirs are so instituted his heirs-at-law. The spouse who has forfeited the property as aforesaid shall, however, retain the usufruct over such property”.

<sup>126</sup> It is debated whether spouses can provide also for specific forfeiture of the usufruct. It should not be impossible to impose partial forfeiture once full forfeiture can be imposed.

(v) Today, the Notary has a legal obligation to explain the implications of the joint will and a declaration to that effect must be written down in the will.

### 1.3. Legato de Residuo

This so called legacy of the residue has traditionally been interpreted to mean the nomination of a substitute heir. By virtue of this bequest, a testator can nominate a beneficiary, whether by universal and / or by singular title, for all or part or even a particular item of his property with the addition that whatever remains of this property or item after the death of the beneficiary will go to someone else.

Although, strictly speaking, it is not a form of will, I have included it under forms of wills due to the potential far-reaching effects which it may and will have in the future on the innocent third party in the sphere in which it has been introduced.<sup>127</sup>

Although reasonably common in wills, it has been established that this clause only comes into force unless the nominated heir or legatee in the first degree provides otherwise, either by act inter vivos or by act causa mortis. He is the heir or legatee in the fullness of ownership - the property is his and it will come into force only if he does not provide otherwise.

The introduction of this new rule solely between spouses has put the traditional meaning as explained above on top of its head.<sup>128</sup>

<sup>127</sup> This rule must also be read in conjunction with and in the context of the amendments introduced to joint wills between spouses together with the removal of the relative incapacity against surviving spouses who were unable, before the amendments, to receive more than a certain percentage of the estate of the predeceased spouses when they were in competition with the descendants.

<sup>128</sup> 758(3) "It shall also be lawful for a spouse to make in favour of the surviving spouse a bequest by universal or by singular title, substituting for him or her another beneficiary in the residue still existing at the time of the demise of the surviving spouse. In such case the surviving spouse shall only be restrained from disposing of any thing contained in the disposition, by will or by title of donation."

758(4) "For the purpose of this article "residue" means and includes only - (a) immovable property, whether immovable by its nature or by reason of the object to which it refers and

We are now faced with the new rule applicable exclusively to bequests to or between spouses and the traditional rule applicable for all bequests other than those to or between spouses.

When faced with such bequests, spouses and third parties must beware because they can neither dispose of whatever has been left to them by will nor by title of donation but they can dispose by onerous title.

Indeed, it will now not be uncommon for spouses to resort to simulation and declare that a transfer is onerous rather than gratuitous in order to avoid the tentacles of this article, namely potential nullity.<sup>129</sup>

#### **1.4. Privileged Wills and Secret Wills**

A privileged will is an exceptional and provisional form of will contemplated by Maltese law which may be resorted to solely in circumstances of interruption of communications by order of the public authority and when made on the high seas on board ships registered in Malta. Certain formalities and procedural rules are relaxed due to the exceptional circumstances in which these wills may be resorted to.<sup>130</sup>

The only amendment concerns the removal of a clause with respect to the capacity of witnesses on a privileged will made at sea which discriminated against the female sex. Henceforth, all persons of age are now competent witnesses.<sup>131</sup>

(b) all certain and determinate movable property which can be identified, excluding liquid cash and things identified only by their species.”

<sup>129</sup> 758(5) “An action contesting any disposal made by the surviving spouse in contravention of subarticle (3) may be instituted during the lifetime of the surviving spouse, and shall be barred by the lapse of five years from the opening of succession of the surviving spouse.”

758(6) “A disposal made by the surviving spouse in contravention of subarticle (3) shall in the case of immovables be null. In the case of movable property nullity shall ensue only if the beneficiary was in bad faith. In any other case action shall only lie for damages against the surviving spouse or his or her estate.”

<sup>130</sup> See Articles 673 to 681 of the Civil Code.

<sup>131</sup> See Article 676(3) which removed the word “Male”.

A secret will is that type of will which is deposited in the registry of the Court of voluntary jurisdiction and whose existence is, (unlike a public will which is registered in the public registry), not known to anyone except for the testator himself (or after the death of the testator). The only possibility of ascertaining the existence or otherwise of a secret will is that one can only order a search for secret wills against presentation of the death certificate of the deceased person.

There was one amendment of form which has clarified the rule that a secret will need not be written out but may be printed, type-written or written in ink.<sup>132</sup>

## 2. The Legitim / Reserved Portion

### 2.1. Nature of the Right

The reserved portion or the *legitim* as it was known, is that portion of the estate of a deceased person which the law reserves in favour of certain categories of individuals due to the close affinity which the latter have with the deceased.<sup>133</sup>

The law distinguished (and still does) between the disposable and the non-disposable portion of the estate of a deceased person.<sup>134</sup> However, there existed legal confusion on the nature of the non-disposable portion, most probably due to the cumulative effect of the old articles 614, 615 and 620 of the Civil Code and a number of Court judgments. This notwithstanding, it appears to have been settled that the beneficiary of the non-disposable portion of an estate, although due in full ownership was neither an heir nor a creditor of the estate but a *special* form of creditor.

<sup>132</sup> Article 656(1) “A secret will may be printed, type-written or written in ink either by the testator himself or by a third person.”

<sup>133</sup> Article 615(1) defines “The reserved portion is the right on the estate of the deceased reserved by law in favour of the descendants and the surviving spouse of the deceased.”

<sup>134</sup> See article 614.

Strictures of space do not allow me to delve deeper however it was thought and strongly argued by some lawyers that as the legitim, today the reserved portion, was due in full ownership and was the non-disposable portion of an estate, it was due on each and every item of the estate. In reality this gave rise to abuse and notwithstanding a number of judgments on the matter, it still gave rise to confusion.<sup>135</sup>

Today, the word legitim throughout the Civil Code has been replaced by the Reserved Portion. Article 615 is being replaced by confirming what had long been established that the reserved portion is a *right of credit* over the estate of the deceased person.<sup>136</sup> The amendments will hopefully solve this long outstanding legal issue as to the nature of the reserved portion and its implications when it comes to a partition or a sale by the heirs and the rights of those persons in whose favour the law has awarded a reserved portion.

Furthermore, Article 620 (5) introduced a new concept in testate succession, albeit not without future problems of interpretation.<sup>137</sup> Before the legislative intervention to the definition of the nature of the legitim, the practice was that due to what I consider to be an erroneous interpretation of the nature of the legitim, practitioners used to advise clients to renounce to everything left to them in a will and reserve all rights to the legitim. The idea was that as the legitim was a right pertaining on each and every item of the assets

<sup>135</sup> See C. Giuliano noe. et. v Dr. J. Buttigieg noe. - Court of Appeal, 07/10/1991, unpublished; Farrugia v Mintoff – Court of Appeal, 10/06/1949 – Vol.XXXIII.i.472; C. Meli v M. Pace Decesare et. – First Hall Civil Court, 24/05/2002, unpublished; J. Vella v A. Bezzina et. – Court of Appeal, 20/11/1998, unpublished and E. Mifsud et. v E. Mizzi et. – Court of Appeal, 14/12/1973, unpublished.

<sup>136</sup> Article 615(2) states: “The said right is a credit of the value of the reserved portion against the estate of the deceased. Interests at the rate established in article 1139 shall accrue to such credit from the date of the opening of succession if the reserved portion is claimed within 2 years or from the date of service of a judicial act if the claim is made after the expiration of the said period of 2 years.”

<sup>137</sup> Article 620(5) states “The person claiming the reserved portion shall impute to his share any property bequeathed to him by will and cannot renounce any testamentary disposition in his favour and claim the reserved portion, unless such testamentary disposition is made in usufruct or consists in the right of use or habitation, or consists of a life annuity or an annuity for a limited time.”

within the estate, it would work in such a way as to coerce the heirs into submission and put them at the mercy of the legitimaries for at least 10 years -being the applicable prescriptive period.<sup>138</sup>

Today this is no longer the case. The testator's choice and wish expressed in the will must be respected and a legal right of credit on his estate is converted into a right to the asset specified in the will.

Some problems of interpretation and application are already being encountered. For example, does this amount to a tacit acceptance of an inheritance? What happens when a father decides to partition his estate in virtue of his will and in so doing discriminates between his children to the extent of leaving one or some of them the reserved portion without his saying so in his will?<sup>139</sup> Does it imply that they must accept what is lawfully theirs without a fight, including the action for abatement?

The logical interpretation may be that the wishes of the testator will be respected so long as it is established that what has been left by will is enough to satisfy the dictates of the reserved portion. If it is equal to or more than the claimant would have to succumb to the wishes of the testator. If it is less, what is left by will should be considered as having been left on account of the value. We shall have to wait and see this type of will withstand the test of time.

## **2.2. The Beneficiaries of the Reserved Portion**

The reserved portion is due solely to the descendants and to the surviving spouse. Article 619 with respect to the reserved portion in favour of ascendants has been repealed as have articles 640 to

<sup>138</sup> See Parliamentary Debates and Article 845(1) "The action for demanding an inheritance, or a legacy, or the reserved portion, whether in testate or in intestate successions, shall lapse on the expiration of ten years from the day of the opening of the succession."

<sup>139</sup> In terms of Article 953 "It shall be lawful for the father, the mother, or any other ascendant to divide and distribute his or her property among his or her children and descendants, including in such partition even the non-disposable portion."

646 which concerned the parameters of the reserved portion due to the illegitimate child - this distinction having also been removed.<sup>140</sup>

All rights of legitim reserved in favour of the ascendants of the deceased have now been removed as a result of the repeal of article 619. Previously, there existed a right to the legitim in their favour in the absence of a surviving spouse, and in the absence of legitimate and illegitimate children.

### **2.3. Extent and Quantity of the Reserved Portion**

#### **2.3.1. Descendants**

In accordance with article 616, the amount is one-third of the value of the estate if there are 4 children or less and one-half if there are 5 or more children. The difference is that there is now no distinction between any descendants whether born in or out of wedlock or whether adopted or of different marriages.<sup>141</sup>

In virtue of article 646, today repealed, it is no longer necessary to state that the reserved portion of the surviving spouse and of the illegitimate child shall be a charge on the disposable portion. Today it has become superfluous and the only reserved portion pertains to the descendants and to the surviving spouse.

Article 618 (3) has been amended to clarify the point that a descendant who has been instituted heir shall get the disposable

<sup>140</sup> In fact this has necessitated the requirement to define the disposable and the non-disposable portion accordingly. Article 614(1) "Where the testator has no descendants or spouse, he may dispose by universal or singular title of the whole of his estate in favour of any person capable of receiving under a will". 614(2) "Where the testator has descendants or a spouse, the disposable portion of his estate shall be that which remains after deducting such share as is due to the said descendants or spouse under any of the provisions of articles 615 to 653".

<sup>141</sup> Article 616 states (1) "The reserved portion due to all children whether conceived or born in wedlock or conceived and born out of wedlock or adopted shall be one-third of the value of the estate if such children are not more than four in number or one-half of such value if they are five or more." (2) "The reserved portion is divided in equal shares among the children who participate in it". (3) "Where there is only one child, he shall receive the whole of the aforesaid third part".

portion together with a share of the non-disposable portion which would otherwise have been due had the descendant not been instituted an heir.<sup>142</sup>

### **2.3.2. Surviving Spouse<sup>143</sup>**

The surviving spouse is today entitled as a minimum to one fourth of the value of the estate of the predeceased spouse in full ownership where there in competition with children or other descendants of the pre-deceased spouse, and to one third of the value of the estate in full ownership if there are no children or other descendants.<sup>144</sup>

Furthermore, the surviving spouse has a right of habitation over the matrimonial home and is also entitled to the right of use over any of the furniture in the matrimonial home belonging to the deceased spouse and this without the obligation of providing security and of making up the inventory as would otherwise be the case where it concerns rights of usufruct, use and / or habitation.<sup>145</sup>

These rights go a long way in improving the plight of surviving spouses and tend to rectify a long outstanding notion that a blood relationship prevailed over that based on affinity.<sup>146</sup> Indeed, the law goes further to the extent that rights of the surviving spouse prevail over those of descendants and do not apply solely in such

<sup>142</sup> Article 618(3) states “A child or other descendant who has been instituted heir, who had he not been so instituted would have been entitled to share the reserved portion, shall also be entitled to share therein notwithstanding that he was so instituted”.

<sup>143</sup> See also articles 603 and 604 relative to the removal of the relative incapacities against the surviving spouse including those of the surviving spouse of a second or subsequent marriage.

<sup>144</sup> See Articles 631 and 632. Before the amendments, where there were children, the surviving spouse was entitled to a usufruct over one-half part of the estate of the predeceased spouse and to one-fourth in full ownership if there were no children.

<sup>145</sup> See Articles 633, 635, 636 and 637.

<sup>146</sup> This trend extends to the rights granted under intestate succession in Part 4 of this paper. Before the amendments, the surviving spouse was only entitled to the reserved portion when in competition with legitimate descendants and to one-fourth of the estate in their absence. These rights were identical also to those existing under intestate succession under applicable articles, now repealed and / or replaced.

circumstances as personal separation, disinheritance and unworthiness.<sup>147</sup>

As a balancing factor, both the heirs and the surviving spouse have the added benefit or obligation that in any partition, the matrimonial home subject to the right of habitation be assigned to the surviving spouse. This is only fair as the heirs should not be lumped with the bare ownership of an immovable property. On the other hand it is also an incentive in favour of the surviving spouse to consolidate property.<sup>148</sup>

### **3. Active Capacity and Passive Incapacity**

#### **3.1. Capacity to make a Will**

##### **3.1.1. Age**

Under Maltese law the rule remains that an individual acquires full capacity to assume obligations and to give valid consent upon attaining eighteen years of age. This is applied less rigidly in wills with limited capacity upon reaching the age of sixteen. This must be viewed as an exception which is limited to remuneratory dispositions and is nevertheless subject to overview by the courts regard being had to the means of the testator and to the services rendered which are being rewarded by such a disposition.<sup>149</sup>

##### **3.1.2. Understanding and Volition**

<sup>147</sup> Article 633(5) states that the right of habitation shall subsist even where such right has the effect of reducing, during the lifetime of the surviving spouses, the reserved portion due to any other person. Those do not apply in those circumstances contemplated by article 638.

<sup>148</sup> Article 634 states “Where the matrimonial home belongs in part to the surviving spouse, in any partition between the heirs of the deceased and the surviving spouse, the surviving spouse, or the said heirs, may demand that the property subject to the right of habitation be assigned to the surviving spouse upon a valuation which is to take account of such right of habitation over the property.”

<sup>149</sup> Article 597(a) has increased this from 14 years but it remains circumscribed by the power of the court within the stated parameters. This is in line with the age requirement to emancipate minors to trade. It is now also being mooted that age 16 be introduced for voting in local councils.

Article 597(b) has removed the incapacity of congenital deaf-mutes who do not know how to write from making a will. This has been replaced by lack of capacity on the basis of a general principle based on notions of consent, a move in line with modern advances in medicine where today most deaf-mutes know how to write and read. Incidentally, the law only refers to public wills and certain obligations of Notaries due to the presence of the Notary and an interpreter.<sup>150</sup>

### 3.2. Total Capacity to Receive by Will

This must be understood within a historical context of the powers of the Roman Catholic Church in Malta. Members of monastic orders or of religious corporations of regulars are legally incapacitated from receiving property except small life pensions. Testamentary dispositions in their favour are suspended and only become effective if they renounce or are released from their vows or else such dispositions are ineffectual if the beneficiary dies while still a member.<sup>151</sup>

These, together with the Mortmain Act,<sup>152</sup> were introduced more out of a political expedient to reduce the powers of the Church. In terms of Canon Law and / or the Statutes of these orders, property received by their members used to pass on to the Orders. As a result the Church became a large land owner with obvious corollary powers. The 1992 Church–State agreement<sup>153</sup> saw changes and this incapacity against the Church removed. Most of the Church property not required for its pastoral mission was

<sup>150</sup> Article 597(b) “those, who, even if not interdicted are not capable of understanding and volition, or who, because of some defect or injury, are incapable even through interpreters of expressing their will:

Provided that a will can only be made through an interpreter if it is a public will and the notary receiving the will is satisfied after giving an oath to the interpreter that such interpreter can interpret the wishes of the testator correctly.”

<sup>151</sup> Article 611(2) states “Nor can such persons receive under a will except small life pensions, saving any other prohibition laid down by the rules of the order or corporation to which they belong.” See also article 611(3).

<sup>152</sup> Chapter 201 of the Laws of Malta.

<sup>153</sup> Act IV of 1992 – Chapter 358 of the Laws of Malta – Ecclesiastical Entities (Properties) Act, 1992.

passed on to the State against compensation and a Joint Office was established to administer property which now vested in the State.

The rule has been relaxed and appears to be a lapsus on the part of the legislator who repealed the rule under intestate succession but forgot to repeal the counterpart existing rules under testate succession!<sup>154</sup> Another consequential amendment is a modification to article 596 where the reference to the Mortmain Act, 1967 was removed for reasons already stated and indicated above.

### **3.3. Partial Capacity to Receive by Will**

Certain categories of individuals were incapable from receiving beyond a certain percentage from the estate of a particular individual when in competition with other individuals. In other words, they were fully capable of receiving property by will from any individual except one. These included illegitimate children, adopted children, children of second marriages, surviving spouses and second spouses from other marriages. In the greater part, the removal of these incapacities were triggered by the repeal of Articles 602, 603 and 604.

#### **3.3.1. Children Born out of Wedlock and Removal of the Status of Illegitimacy**

When in competition with legitimate descendants, Article 602 stated that illegitimate descendants, whether in their own name or through intermediaries, were incapable of receiving from their parents more than the reserved portion and this as a result of a rigid rule of public policy.<sup>155</sup> To quote a small example on how miserly

<sup>154</sup> In fact Articles 800 and 835 were repealed. The first stated "With regard to members of monastic orders or religious corporations of regulars, their capacity or incapacity to succeed ab intestato shall be governed by the same rules laid down in regard to testamentary successions." The second stated "Succession also opens on the taking of vows in a monastic order, or in a religious corporation of regulars." Ultimately these vows were tantamount to and equivalent to a civil death!

<sup>155</sup> Article 602 stated "Where the testator leaves legitimate children or descendants, or children or descendants legitimated by a subsequent marriage, or adopted children or their descendants, legitimate or legitimated as aforesaid, any illegitimate children, even though

the law was, when in competition with say 3 legitimate descendants, the maximum an illegitimate child was entitled to was 1/27 share of the estate of his parents! Indeed, it suited a father not to acknowledge his descendant since being a complete stranger, he could dispose of his estate without any limitations and restrictions.

The removal of this incapacity comes as a natural consequence, albeit subject to two exceptions, in the removal of the status of illegitimacy.<sup>156</sup> All references to illegitimate status throughout the Civil Code were replaced by children conceived and / or born in or out of wedlock as the case may be. This thinking applies both where it concerns the law of persons and also where it concerns the law relating to property particularly the law of succession. This turning point was necessitated also by a number of court judgements which declared certain provisions contrary to certain Human Rights provisions.<sup>157</sup>

The build up for the removal of this partial, relative incapacity of illegitimate children from receiving under a will from certain persons, are the new articles 596(2) and 602 under the title “Of the Capacity of Disposing and of Receiving by Will”.<sup>158</sup> Subject to the

acknowledged, or legitimated by decree of court, cannot receive by will more than that to which they are entitled under paragraph (a) of subsection (1) of section 640.”

In general, Article 640(1) stated that illegitimate children were entitled to one-third of the legitime to which they would have been entitled if they had been legitimate children and in default of any such children or descendants, the portion of the illegitimate children shall be one-half of the said legitime.

<sup>156</sup> Article 815 which diminishes the share of a child born out of wedlock when there is no will, as better explained in Part 4 of this paper and article 839 explained hereunder. For a more profound study of the various issues relating to this particular topic, I invite the reader to refer to another paper presented by Dr. Ruth Farrugia, a lecturer in the Faculty of Laws which is printed in this publication.

<sup>157</sup> Mario Buttigieg pro. et noe v Attorney General et., delivered by the First Hall Civil Court in its Constitutional Jurisdiction on 17 January 1997. This is a res judicata against the State and has taken on board the legal position adopted by judgments delivered by the European Court of Human Rights concerning the interpretation of Articles 8 and 14 and Article 1 to the First Protocol. Amongst others, these include *Marckx v Belgium* - Ser. A No 31 - 13 June 1979; *Inze v Austria* - Ser. A No 126 – 28 October 1987 and *Johnston v Ireland* – 18 December 1986. The European Convention on Human Rights is also part of Maltese Municipal Law under Chapter 319 of the Laws of Malta.

<sup>158</sup> Articles 596(2) and 602 respectively state “All children and descendants without any distinction are capable of receiving by will from the estate of their parents and other ascendants to the extent established by law.” and “All the children of the testator whether

stated exception under intestate succession, today the legal position of children born out of wedlock is at a par with all other children. This because nobody should be made to suffer discrimination as a result of the actions of one's parents.

The other exception is article 839 which concerns a non preemptory mode of procedure where a child born out of wedlock can be subjected to discrimination if in competition with children born in wedlock and / or with the surviving spouse. One understands that the motivation behind this rule is to avoid disruption and internal bickering, particularly where such child was not integrated within the family of the deceased or indeed turned up out of the blue. Although common to both testate and intestate succession, this rule can be opposed by the child, is subject to Court intervention and is also facultative.<sup>159</sup> This notwithstanding, it remains superfluous because it fails to address the situation where the testator appoints a complete stranger as co-heir!

### 3.3.2. Surviving Spouse

In terms of the repealed article 603,<sup>160</sup> the surviving spouse was incapable of receiving more than one fourth in full ownership from the estate of the predeceased spouse when there were legitimate children. This caused hardship even more so in the light of limitations already existing with the reserved portion which consisted of only one-half in usufruct. This was mitigated by our

born in wedlock, out of wedlock or adopted or whether or not the presumption referred to in articles 102 to 112 applies to them may receive by will from the testator."

<sup>159</sup> Article 839 provides "Where under testate or intestate succession a person conceived and born out of wedlock succeeds with adoptive children of the deceased or other children of the deceased who are not so conceived and born or descendants of such children, or with the surviving wife (should be spouse?? my emphasis) of the deceased, the other heirs of the deceased shall be entitled to pay the share due to the person conceived and born out of wedlock, either in cash or in movable or immovable property of the estate, if the latter does not object; and in case of opposition by the latter, the Civil Court – Voluntary Jurisdiction shall, following an application to that effect by any of the other heirs of the deceased, decide whether to allow such payment or assignment, after taking into account personal considerations and those relating to property."

<sup>160</sup> This stated "Where the testator leaves children or descendants as stated in the last preceding section, the surviving spouse cannot receive, in ownership, more than one-fourth of the deceased's property."

courts which decided that the rest of the estate of the pre-deceased spouse, namely three-fourths, could be left also in usufruct.<sup>161</sup>

This incapacity has been repealed and no limitations to receive exist so long as it pertains to the disposable portion, in other words everything except the reserved portion, where due. The necessary consequence is that the surviving spouse can also be appointed sole heir. This must be seen also in the light of the progressive trend throughout the legislative reform in upgrading the status of the surviving spouse; in particular the increased doses in the reserved portion and rights under intestate succession.<sup>162</sup>

### 3.3.3. Second or Subsequent Spouse

The general positive trend to improve the legal status of a surviving spouse extends in this area in favour of remarriage. The previous legal position created unfairness, probably more through ignorance of the law rather than any other consideration. The legal position was that a spouse who had legitimate children from a previous marriage could not bequeath to his second or subsequent spouse, more than the least favoured of the children of any such former marriage.<sup>163</sup>

This incapacity has today also been repealed as has article 637.<sup>164</sup> Again, this used to be a real trap for the unwary widow or widower, who was caught between two stools. If there were children, either

<sup>161</sup> See amongst others - Caruana et v Micallef – Court of Appeal, 14/12/1891, Vol. XIII.72 and Serra v Serra – Court of Appeal – Vol. XXV.ii.447

<sup>162</sup> See Parts 1.2., 1.3. Forms of Wills; Parts 2.2, 2.3.2. - Reserved Portion; Part 4 - Intestate Succession.

<sup>163</sup> Article 604(1) “Where a spouse having children or descendants as stated in section 602, has contracted a second or subsequent marriage, such spouse cannot bequeath to his last wife or her last husband, more than that which the least favoured of the children of any former marriage will receive.”

<sup>164</sup> “Where the surviving spouse has entered into a second or subsequent marriage, and at the time of such marriage, there are still children or descendants of the predeceased spouse, as stated in section 631, the surviving spouse shall forfeit the ownership of all things which he or she may have received under a gratuitous title from the predeceased spouse, including donations in contemplation of marriage, and shall only retain the usufruct thereof, unless the predeceased spouse has otherwise ordained. In such case the ownership shall vest in the said children or descendants of the predeceased spouse.”

perpetual widowhood whilst living in sin, or else the joys of remarriage but accompanied by a forfeiture of all that was received from the predeceased spouse by gratuitous title and its being converted into usufruct, all unless otherwise ordained by the predeceased spouse!

This notwithstanding, our law is still somewhat suspicious of second or subsequent marriages. One still notices traces of social attitudes where old habits seem to die hard with shreds of principles against modern day trends. This can be seen through the retention of the rule under conditional dispositions which still allows a condition in restraint of remarriage between spouses.<sup>165</sup> This extends to the forfeiture of the right of habitation and the right of use of the furniture as part of the reserved portion of the surviving spouse in case of remarriage.<sup>166</sup> Today's social trends call for further reforms to our Civil Code in favour of full freedom without any shackles.

### **3.3.4. Children of a Second or Subsequent Marriage and Adopted Children**

The arguments put forward with respect to the second or subsequent spouse extend to this area. Here, the legislative reforms appear to have been intended to remove all traces of discrimination between children of different marriages and adopted children. The prevailing legal position was that children of a second or subsequent marriage were incapable of receiving more than the least favoured of the children of a prior marriage.<sup>167</sup>

<sup>165</sup> Article 712(1) "A condition prohibiting a first or a subsequent marriage shall be considered as if it had not been attached." 712 (3) "A condition in restraint of remarriage, attached to a testamentary disposition by one of the spouses in favour of the other, shall be valid."

<sup>166</sup> Article 633(8) "The right of habitation conferred in this article shall cease on the remarriage of the surviving spouse." This forfeiture extends to the right of use over the furniture. Article 637 states "The provisions of article 633(8) shall mutatis mutandis apply to the right of use granted by article 635."

<sup>167</sup> Article 604(1) stated "Where a spouse having children or descendants as stated in section 602, has contracted a second or subsequent marriage, such spouse cannot bequeath to any of the children of the second or subsequent marriage, more than that which the least favoured of the children of any former marriage will receive."

The same legal position applied with equal force for adopted children with the difference that there was no requirement for remarriage.<sup>168</sup> Indeed, it is not unheard of or uncommon for a couple to adopt a child and eventually have natural children. In terms of other provisions of the Civil Code, adopted children were considered as legitimate and at a par with brothers and sisters if any, but not where it concerned patrimonial rights under the law of succession.<sup>169</sup>

Both were positive moves endeavored to remove discrimination. They created unnecessary tensions within the family and were a source of trouble. The truth is that these principles were generally forgotten and the testator would unconsciously and inadvertently punish his children from a second marriage or his adopted child by leaving a child of a former marriage or a natural child, as the case may be, the legitim.

The only trace which has been retained, probably more as a result of its being forgotten rather than consciously, is article 909 concerning certain rules of partition and the presumption against children of second and subsequent marriages.<sup>170</sup>

### **3.4. Removal of other Relative Incapacities**

The repeal of the above rules relative to the partial incapacities under the old articles 602, 603 and 634 necessitated other ancillary amendments, particularly a number of cross references to persons

<sup>168</sup> Article 604(2) provided “Where the testator leaves legitimate children or descendants, or children or descendants legitimated by a subsequent marriage, or adopted children or their descendants, legitimate or legitimated as aforesaid, he cannot bequeath to the adopted children or their descendants aforesaid more than that which the least favoured of the legitimate children or descendants or children or descendants legitimated by a subsequent marriage will receive.”

<sup>169</sup> Civil Code - Book First, Of Persons - Title III - Of Adoption - Articles 113 to 130A

<sup>170</sup> This states “Any property which, at the time of the opening of the succession of a person leaving children or other descendants from two or more marriages, is found in the estate of such person, shall be presumed, in the interest of the children or descendants of the previous marriage, to have existed therein before the celebration of the subsequent marriage, unless the contrary is made to appear either by means of an inventory made prior to such subsequent marriage in the manner laid down by the Code of Organization and Civil Procedure, or by any other means.”

who were then considered as intermediaries in order not to be used as vehicles to circumvent the old rules of total or partial incapacity. These are the father, the mother, the descendants, and the husband or wife of the person under any such incapacity, as the case may be.

The general rule remains that testamentary dispositions in favour of persons incapable of receiving are void even if made through intermediaries. In their absence one could very well avoid the rule and bequeath to the mother of an illegitimate child in order to not be seen as in violation of a rule of public policy.

#### **4. Intestate Succession**

The Law used to distinguish between two categories of successions, regular (which were based on the bond of blood), and irregular (mostly based on the bond of affinity). Regular successors were preferred in the following order, descendants, ascendants and brothers and sisters and their descendants, with other collateral relatives coming last. Next, the irregular successors being the surviving spouse and the illegitimate children.

This distinction has been repealed and, subject to one exception, comes as a necessary consequence of the removal of the partial relative incapacities of the surviving spouse and of the illegitimate children and the odious distinction between legitimate and illegitimate children.<sup>171</sup> Before the reforms, when in competition with legitimate children and their descendants, the law was particularly miserly as the surviving spouse and the illegitimate child were only entitled to the reserved portion.<sup>172</sup>

<sup>171</sup> See Part 3.3. of this paper. Article 811 states “Saving the provisions of article 815, children or other descendants succeed to their father and mother or other ascendants without distinction of sex, and whether they are born or conceived in marriage or otherwise and whether they are of the same or of different marriages.” Article 815 is the exception which shall be examined later on.

<sup>172</sup> See articles 817 to 829, today all repealed and Parts 2.3.1.; 2.3.2.; 3.2.1.; 3.2.2. of this Paper.

The repeal of the distinction between legitimate and illegitimate children - today children born in or out of wedlock as the case may be - and the removal of their partial incapacities has brought about equality and descendants of the deceased all receive in equal portions subject to one exception. If they compete with the spouse of the deceased, they share one half between them. If there is no spouse, they get the lot.<sup>173</sup>

The surviving spouse is entitled to one-half of the property of the predeceased spouse in full ownership and, subject to the right of habitation and right of use of the furniture in the matrimonial home, the other half is inherited by the children and their descendants in their own right or by right of representation as the case may be. In the absence of any such children, the surviving spouse inherits the whole estate.<sup>174</sup>

These rules reveal a clear direction in favour of the surviving spouse against other collateral relatives of the deceased, particularly the ascendants. Previously, where there were no children and descendants, the surviving spouse was only entitled to one-half of the estate, with the other half being shared between the closest ascendant or ascendants and the collateral relatives of the predeceased spouse.<sup>175</sup>

Today, the remnant of past social stigma to discriminate stems from article 815; an unfortunate and conscious legislative effort to counter balance its own provisions and reconcile competing claims and interests of children born in wedlock, the surviving spouse and

<sup>173</sup> Article 808(1) “Where the deceased has left children or their descendants and a spouse, the succession devolves as to one moiety upon the children and other descendants and as to the other moiety upon the spouse. (2) The provisions of subarticle (1) shall be without prejudice to the right of the surviving spouse under articles 633, 634 and 635.” Article 809 “Where the deceased has left children or other descendants but no spouse, the succession devolves upon the children and other descendants.”

<sup>174</sup> Article 810 states “Where the deceased has left no children or other descendants but is survived by a spouse the succession devolves on the spouse.”

<sup>175</sup> Ascendants are no longer entitled to a reserved portion over the estate of their predeceased children in the particular instances contemplated under article 619, today repealed. See also articles 825 to 829, today repealed.

children born out of wedlock!<sup>176</sup> In my opinion this will not pass the test of time. It oozes discrimination and runs foul of the European Convention on Human Rights. It is hoped that it will not be long before this is attacked and struck off the statute book for failure to pass the tests of proportionality and legitimate aims pursued.

In so far as ascendants and collaterals are concerned, the main amendment was that they only have rights in the absence of a surviving spouse and children of the deceased.<sup>177</sup> Perhaps as a counter-balance, one notices an improvement with the ascendants. Before, the ascendants and the direct collaterals shared between them whilst today the closest ascendant or ascendants are entitled to one-half of the estate with the other half being shared with the other direct collaterals.<sup>178</sup>

## 5. Miscellaneous Amendments

<sup>176</sup> Article 815 provides “Where a person conceived and born out of wedlock succeeds ab intestato with adoptive children of the deceased or other children of the deceased who are not so conceived or born or descendants of such children, or with the surviving spouse of the deceased, the person conceived and born out of wedlock shall receive only three quarters of the share to which he would have been entitled if all the heirs of the deceased, including such person, had been conceived or born in wedlock, and the remaining quarter of the share to which he would have been so entitled shall devolve on the other heirs of the deceased to the exclusion of any of such heirs who is conceived and born out of wedlock as if it were a separate estate.”

<sup>177</sup> Article 812 states “Where the deceased has left no children or other descendants, nor a spouse, the succession shall devolve: (a) if there be an ascendant or ascendants and no direct collaterals: to the nearest ascendant or ascendants; (b) if there be an ascendant or ascendants and direct collaterals: one moiety to the nearest ascendant or ascendants and the other moiety to the direct collaterals; (c) if there be no ascendant or ascendants but there be direct collaterals: to the direct collaterals; and (d) if there be neither ascendant or ascendants nor direct collaterals: to the nearest collateral in whatever line such collateral may be.”

Article 813(1) defines direct collaterals as “.... brothers and sisters, whether of the half or full blood or adopted and the descendants of predeceased brothers and sisters, of the half or full blood or adopted.”

<sup>178</sup> This was regulated by the old article 813 which stated “Where brothers or sisters of the deceased, or descendants of predeceased brothers or sisters, whether of the half or full blood, compete with the father and the mother, or with the one of them surviving, or in default of both parents, with the ascendants, or the nearest ascendant, in any such case the parents, the ascendants, the brothers and sisters shall succeed per capita, and in equal portions; and the descendants of brothers or sisters, whether of the half or full blood, shall succeed by right of representation, per stirpes.”

## 5.1. Unworthiness and Disherison

A person is presumed capable to inherit either by will and / or by operation of law. However, the law imposes a number of grounds considered so serious such that the beneficiary does not deserve to inherit and is therefore disabled from the capacity to receive from someone. There are grounds of unworthiness which constitute reasons of total incapacity to receive from a particular person imposed by law. This should not be confused with disinheritance; reasons of total incapacity to receive which a testator must rely upon to disinherit someone by stating such a reason/s in his will.

In line with the general positive trend favouring the spouse, the law has extended two of the more serious grounds of unworthiness to include the spouse of the testator and / or the deceased, as the case may be.<sup>179</sup> The reform has introduced some other minor amendments, more of form rather than substance, necessitated by the redefinition of descendants and due to the removal of certain rights of ascendants.<sup>180</sup>

## 5.2. Abatement

The action for abatement is intended to protect the reserved portion. It consists in the reduction of testamentary dispositions where these exceed the disposable portion of the estate of the deceased. The will is attacked not on the basis of invalidity but for the inefficacy of certain dispositions due to the reserved portion.

The major amendment, in line with that adopted for collation is with respect to the rules for the valuation of property donated

<sup>179</sup> Section 605(1) states “Where any person has - (a) wilfully killed or attempted to kill the testator, or his or her spouse; or (b) charged the testator, or the spouse, before a competent authority with a crime punishable with imprisonment, of which he knew the testator, or the spouse, to be innocent; or..... he shall he considered as unworthy, and, as such, shall be incapable of receiving property under a will.”

This provision extends to intestate succession. Article 796 states “Persons who are incapable or unworthy of receiving under a will, for the causes stated in this Code, are also incapable or unworthy of succeeding ab intestato.”

<sup>180</sup> See article 623 (f) and (g) and the old article 624, now repealed as it was rendered obsolete.

throughout the lifetime of the deceased. Today, the rule to establish the value of donated property is standard - that at the time of donation. Previously, different rules applied as the law distinguished between movable and immovable property. Valuation of immovable property involved a two fold cumulative test, its condition at the time of donation and its value at the time of death. This caused confusion and created unnecessary complications.

Another minor amendment also in line with that adopted for collation is the repeal of the rule that donations which perished without the fault of the donee before the death of the donor are not taken into account for the purposes of this action.<sup>181</sup>

### **5.3. Bequests by Singular Title**

These are widely defined as legacies or dispositions by singular title. As a general rule, they are obligations of the inheritance and, unless otherwise ordained, heirs who have legal possession of the estate, are liable and burdened with their delivery.<sup>182</sup> The necessary consequence of heirs having the legal possession of the estate is that they are bound to deliver and put the legatees in the material possession of the thing bequeathed by singular title.

There existed confusion on the requirement of a public deed in the case of immovable property and as to who had to foot the bill. Heirs had no interest, they dragged their feet and were reluctant to go into added expenses. The rule has now been clarified and the legatee has a right to demand that he be put into possession of an immovable by public deed but at his expense.<sup>183</sup>

<sup>181</sup> See article 648 as amended for the rules determining the abatement and article 649 now repealed.

<sup>182</sup> See amongst others, articles 589, 590, 591, 733, 734, 836 and 838.

<sup>183</sup> This is the cumulative effect of articles 721 and 726. Article 726(2) provides "In the case of immovable property the legatee may demand the grant of such possession be made by means of a public deed." 726(3) "Unless the testator shall have otherwise provided the expenses relative to the deed shall be borne by the legatee."

#### **5.4. Preterition and Omission of Children and other Descendants**

Previous legislation was quite biased in favour of the descendants. Testamentary dispositions by one who, at the time of his will, had no children and who did not provide for such a contingency, were *ipso jure* revoked.<sup>184</sup> This sometimes proved quite costly with far reaching effects, particularly in those instances where young married couples, as yet childless, made wills nominating each other universal heirs.

Their estate ended up being regulated by intestate succession, an institute which, before the reform, was quite miserly in respect of the surviving spouse. The eventual birth of children, normally a happy occasion, operated as the verification of a resolute condition which nullified their will, more often than not, due to ignorance of the law, improper advice and drafting problems.

Another rule was again based on the presumed intention that a testator did not intend to discriminate between his descendants. Where one made a will and only provided for children already born, without any reservation for the future birth of children, the law held that those who were omitted were entitled to as much as the least favoured of those mentioned in the will upon a proportional abatement of their share.<sup>185</sup>

If the testator nominated his children heirs, then any future children probably as yet unborn, would all inherit equally. Unfortunately this was a double edged sword because the reverse also held true. Where, for some reason or other, the testator only left the legitim to one of his children, then those omitted from a will, probably due to

<sup>184</sup> See old articles 747(1) and 748, today repealed

<sup>185</sup> Article 749 provided “Where at the time of the making of the will, the testator has one or more children or descendants, legitimate or legitimated by subsequent marriage, or adoptive, and thereafter other children or descendants are born or adopted, each of the latter shall be entitled to a share of the estate equal to that which, upon the proportional abatement of all the shares left to the former, is found to be due to the child or descendant least favoured in the will.”

forgetfulness rather than intentionally, were only entitled to the legitim.

Whereas the first rule caused an injustice to the unwary, at least the second rule favoured all the children and more often than not, proved to be beneficial to children not mentioned in the will through no fault of theirs as they were not yet born. This has now changed and the rule is in favour of the supremacy of the will of the testator with the removal of all legal presumptions in this area.

Today, the legal position is the same in all instances and the will of the testator is supreme. If one omits the children, whether in whole or in part, they are only entitled to the reserved portion, the presumption and reasoning being, particularly at the parliamentary debate stage, that if parents intend to leave all their children as heirs then they should be on the look out and modify their will.<sup>186</sup>

The only outstanding defect appears to be that unless properly advised, parents would fail to come to grips with the consequences of an omission from their will of a standard clause which mentions their children whether born and yet to be born. Unfortunately, this is a mistake which cannot be corrected and can be the source of future trouble after the death of the parents.

### **5.5. Presumptions of Survivorship**

This area of law operated in those instances where persons who are called to each other's succession, whether due to their will or by intestate succession, perish in a common calamity. There existed a number of artificial legal presumptions as to who died first. These were largely based on artificial criteria which differentiated between sex and age and which probably discriminated against the female sex.

One can mention a practical case to illustrate the legal issue. A young married couple makes a will reciprocally nominating each

<sup>186</sup> See articles 747 and 748 which replaced the old articles 747 to 750 of the Civil Code.

other as heirs where the wife was previously donated substantial properties by her parents. In case of a simultaneous death, in terms of previous rules, if they were in the age bracket of fourteen but not over thirty-five, the male is presumed to have survived. The conclusion is fairly self-evident; the family of the wife gets nothing whilst the family of the husband get the lot.<sup>187</sup>

The old rule was open to criticism. In case of a simultaneous death and with no evidence as to who died first, the presumption should be the other way round, all died together with the necessary consequence that they should not inherit each other. Today the rule is based on common sense, all artificial criteria have been removed and in the absence proof as to who died first, then, they do not inherit each other because they died together. This also did away with old fashioned discriminatory ideas that males are stronger than females.

## 5.6. Collation

There is a *juris tantum* presumption at law that the deceased did not intend to prefer any of his children and descendants. Any inequalities during his lifetime as a result of certain circumstances are therefore corrected after death by the system of collation. This is defined as the contribution made by a descendant of all that which was received directly or indirectly from the deceased by gratuitous title.

There is the augmentation of the inheritance, the bringing back into the estate of all that was received. This was made either in kind or by imputation. In the mode of collation, the law used to distinguish between immovables, movables and money. Today the law no longer makes such distinctions and collation is today always made

<sup>187</sup> See old articles 832 to 834, today repealed and replaced by one simple rule under article 832 which states “Where several persons die in a common calamity and it is impossible to determine who survived the other, they shall, where any one of them is called to the succession of the other, be presumed to have died at the same time.”

by imputation, taking less out of the inheritance by the fictitious addition of all that had been received from the deceased by title of donation.<sup>188</sup>

This has necessitated also changes to the rules of valuation of all that was received. The law used to distinguish between the valuation of immovables, movables and money. For the purposes of imputation, the value of the thing is now that at the time of the opening of succession if this still exists. If it was sold, the value is the higher between that received by the donee or actual value of the thing at time of alienation.

There are some other minor, but related, amendments concerning partition and certain exceptions which are beyond the scope of this paper.

## **6. Rules Regulating Co-Ownership**

The general principle is that co-owners can/may be obliged to remain in a state of community for periods of no longer than five years. This applies also to inheritances.<sup>189</sup> The reforms have brought about certain changes which favour partition, consolidation of property rather than fragmentation, and which are intended to avoid unnecessary delays particularly in the case of multiple inheritances.

In terms of the new sub-article 495(3), when heirs in an inheritance who have continued to hold or still hold property in common with other heirs deriving from an inheritance for more than 10 years, and where no action has as yet been filed for a partition, each co-owner shall be deemed to be co-owner of each and every item of property so held and article 912 shall not be applicable.

<sup>188</sup> This has necessitated amendments to the whole sub-title IV Of Collation. The articles include 910, 913, 917, 919, 927, 931, 933, 935, 936 and 937.

<sup>189</sup> Article 906(3) – It shall also be lawful, by a will, to suspend the partition for a time not exceeding five years, even though no one of the heirs is a minor. Any disposition suspending the partition for a longer time, shall not be operative in regard to the time exceeding five years.

After ten years from the opening of succession, the implication and necessary corollary seems to be that the right of redemption or buy-back (irkupru) exercisable under the law of succession by the other co-heirs is not applicable in the circumstances in which such right exists, (provided always within the current parameters).

We have witnessed also the introduction of a new principle of majority rule very similar to that existing rule under The Condominium Act where, after co-ownership of ten years or more, no partition has as yet been requested.<sup>190</sup> The Court will proceed with the wishes of the majority provided there exists no serious prejudice of dissident co-owners. The law under article 495A(6) gives certain examples of what may be considered as serious prejudice by the dissenting co-owners. The request has to be filed by means of a court application and the law stipulates certain formalities.

One may also notice certain spill-over effects in the law of succession particularly article 634 concerning the matrimonial home which is subject to the right of habitation in favour of the surviving spouse and the right or obligation of first refusal as the case may be and depending on who demands it.<sup>191</sup>

## **Conclusion**

These reforms go a long way to address social inequality and improve the status of certain categories of individuals, particularly the surviving spouse. Whether or not or to what extent the legislator has succeeded still remains to be seen - particularly in the area concerning competing claims between children of different marriages and illegitimate children.

<sup>190</sup> See Article 495A of the reform which stipulates and establishes the parameters explained.

<sup>191</sup> This legislation has introduced and modified certain principles of co-ownership and rights emerging therefrom which are beyond the scope of this paper. For a more in depth study of issues relating to this particular aspect, I invite the reader to refer to another paper being presented by Dr. Anthony Ellul, a colleague of mine in the legal profession, which is being printed elsewhere.

This notwithstanding, they are a huge step in the right direction and should serve as an impetus towards further change. We shall have to wait for the test of time to see the extent to which certain inequalities will remain or whether legal and social developments will induce further changes.

**Paul Debono**  
September 2006



## **The Civil Code Amendments of Act XVIII of 2004 Community of Property Arising from Succession**

**Dr. Anthony Ellul LL.D.**

What follows is an analysis of Articles 45 and 46 of Act XVIII of 2004, which act continues to amend the Civil Code and which came into force on the first of March 2005 through Legal Notice 48 of 2005. Although the focus of this paper is the area of *Community of Property arising from Succession*, the amendments introduced in the Civil Code deal also with the issue of community of property which does not arise from succession, in that article 46 provides for an innovative procedure allowing co-owners of a determinate thing to alienate the thing co-owned despite the opposition of other co-owner(s). In this context one should keep in mind the following general principles:-

- a) Co-owners have a right to their share in things co-owned;
- b) A division should lead to an equal partition;
- c) Licitation is an extraordinary and an exceptional remedy which is resorted to when the division cannot take place comfortably and without damage to the co-owners.<sup>192</sup>
- d) In an inheritance scenario the patrimony is one, and consists not just of the assets and liabilities of the estate existant at the testator's death, but also of any acquisition made after, of any fruits which are collected, of improvements and of any expenses made by the co-heirs.

One of the aims of Legal Notice number 15 of 2003 is "*li jitratta wkoll dwar il-qasma ta' beni in komuni u jintroduci regoli li fil-prattika ghandhom isolvu ghadd ta' problemi li joriginaw mill-proprjeta' li tkun fil-komun*". In the sitting of the House of

<sup>192</sup> [see judgments of the First Hall of the Civil Court given in the case M. Deguara vs R. Calleja et [Cit. no. 1637/1995PS] decided on the 3<sup>rd</sup> October 2003 and V. Camilleri et vs H. Pavia [Cit. no. 2238/2000TM] decided on the 20<sup>th</sup> March 2003].

Representatives of the 10<sup>th</sup> November 2003 [sitting number 53], Onor. Ministru Dr. Tonio Borg declared that:-

*“Kemm hawn kawzi fil-qorti li ghadhom pendenti minhabba li l-wirt ma jkunx jista’ jinqasam jew ghax hemm hafna nies jew inkella ghax ghalkemm hemm fiit nies, dawn ma jkunux iridu jirrangaw. Ghalhekk qed nghidu li meta jghaddi certu zmien u l-eredi ma jkunux qasmu, se jkun possibbli li kwalunkwe wiehed mill-eredi jbigħ is-sehem tiegħu indiviz minn xi oggett tal-wirt meta l-wirt ikun għadu ma nqasamx”.*

Also in this sense, in a press declaration made that year it was said that Act XVIII was introducing new fundamental measures *“sabiex tiffacilita il-qsim tal-wirt meta jkun għadda certu zmien u l-eredi jew il-ko-proprjetarji ma jkunux fteħmu kif se jaqsmu l-proprjeta’, allura f’dawk ic-cirkostanzi:-*

*a) fil-kaz ta’ wirt, kull eredi ikun jista’ jbiegħ sehmu indiviz minn proprjeta’ partikolari tal-wirt, mingħajr il-htiega tal-qsim tal-wirt”.*

Article 495 of the Civil Code provides that:-

*(1) Each co-owner has the full ownership of his share and of the profits or fruits thereof.*

*(2) He may freely alienate, assign, or hypothecate such share, and may also, subject to the provisions of article 912, substitute for himself another person in the enjoyment thereof, unless personal rights are concerned:*

*Provided that the effect of any alienation or hypothecation shall be restricted to that portion which may come to the co-owner on a partition.*

Before the coming into force of these recent amendments, in an inheritance scenario, the only certainty was that an heir could freely dispose of an undivided share appertaining to him from the

inheritance. In such eventuality, the other heirs had the option to exercise the right of ‘*l-irkupru successorju*’. This right terminated upon the expiration of one month from the notification to the heirs of that transfer. If within such period they fail to declare their will to exercise such right [article 912 of the Civil Code]. It should be noted that although in the Bill it was being proposed that article 912 should cease to be applicable in the scenario contemplated in article 46 of the Act, this proposal was thereafter not included in Act XVIII.

There is diverging jurisprudence as to the validity of a sale of an undivided share made by an heir regarding particular property forming part of an inheritance which has not yet been liquidated and divided between the heirs.

a) In a partial judgement given by the First Hall of the Civil Court on the 18<sup>th</sup> of June of 2004 in the case **Maria Assunta Casha et vs Joseph Mary Cutajar et** [Cit. no. 874/02JA] (which hasn’t as yet been appealed), the Court unequivocally declared that any transfer of an undivided share regarding various properties forming part of an inheritance not yet divided, is null. The Court argued that where an inheritance is still held in common, “*wiehed qatt ma jista’ jkun cert li se jmissu mill-wirt parti minn dik il-proprjeta’ immobiljari*” of which he transferred his share. In the case of **Giuseppe Chircop et vs George Portanier et**<sup>193</sup>, dealing with a request to the Court to annul a sale of an undivided share of property forming part of the community of acquests which after the death of the wife hadn’t been as yet liquidated and divided, the Court observed that article 495 of the Civil Code gave the right to a co-owner to transfer “*l-kwota ntelleltwali tieghu fil-komunjoni imma mhux id-dritt li jiddisponi minn haga determinata li tappartieni lill-patrimonju komuni, u dana billi huwa ncert qabel id-divizjoni, lil min dik il-haga tista’ tigi fid-divizjoni*”. The Court concluded that the sale of a share of a tenement forming part of a common patrimony is null “*ghaliex maghmulha kontra l-ligi, billi dina, kif*

<sup>193</sup> [Cit. no. 597/43] decided by the Civil Court on the 24<sup>th</sup> of January 1944

*intqal, ma taghtix id-dritt lill-konsorti li jiddisponi minn haga determinata li tappartjeni lil-patrimonju komuni”.*

In other judgements the Court was of the opinion that the validity of a sale depended on whether the thing [or the transferred share of the particular immovable] was eventually transferred to the vendor. This implied that the sale was being made under the condition that the thing which was the subject of the sale was eventually transferred to the vendor when the division is made. In the case **Carmelo Sultana noe vs Nobbli Guido Sant Fournier et noe**<sup>194</sup>, it was declared that:- *“Jekk imbaghad il-haga mibjugha tibqa’ fil-kwota tal-bejgiegh, il-bejgh hu pienament effikaci; jekk tigi assenjata lill-kondivident iehor, il-bejgh ikun ineffkaci u l-kondivident li lulu tkun misset ikun jista’ jirrevendikaha minghand ix-xerrej. Billi l-effett tad-divizjoni hu li l-kwota ideali tikkonkretizza ruha fil-kwota reali li tohrog mill-istess divizjoni, il-kondivident jitqies bhallikieku kien proprjetarju ta’ din il-kwota reali sa mill-bidu tal-komunjoni u d-divizjoni ‘serve a dare forma concreta e tangibile al diritto che (il condomino) aveva prima’”.*

The case **Avukat Dr. Joseph Vella noe vs Teresa Bonnici et**<sup>195</sup> dealt with a demand by plaintiff that the defendants be ordered to appear for the publication of a deed of sale of a tenement after a promise of sale of the tenement had been concluded. It should be pointed out that third parties who weren’t signatories to the preliminary agreement also had a share in the tenement that the tenement formed part of the community of acquests existing between the defendant and her deceased husband, and the preliminary agreement was signed by the wife and by one of the husband’s heirs. In this particular case the Court refrained from declaring that the sale could not be concluded, but postponed the proceedings *sine die* until the action for the liquidation and division of the community of acquests was made. Reference was made to comments made by Italian authors<sup>196</sup> who are of the view that no distinction should be made between the alienation of an intellectual

<sup>194</sup> [Cit. Nru: 758/60] pronounced by the Court of Appeal on the 17<sup>th</sup> of March 1969

<sup>195</sup> [Cit. nru: 552/65] decided on the 14<sup>th</sup> of June 1967 by the First Hall of the Civil Court,

<sup>196</sup> [article 495 of the Civil Code is identical to article 679 of the Italian Civil Code of 1865]

share and that of a share of a determinate thing which is included in a common patrimony. The sale would be made under the implicit condition that the share was being assigned to the buyer when the division is made. This means that the sale would be ineffectual only if, when the division is made the object alienated is assigned to another co-owner. The position under the current Italian law is regulated by article 757, according to which *“ogni coerede e’ reputato fin dall’apertura della successione solo e immediate successore nei beni della sua porzione, ed e’ come se non avesse mai avuto diritti sugli altri beni ereditari. Alla natura dichiarativa e’ connessa pertanto la retroattivit  degli effetti della divisione: tutti gli atti di disposizione compiuti da un coerede sopra beni che sono finite in mano d’altri rimangono inefficaci, e corrispondentemente ciascun coerede riceve I beni liberi da pesi eventualmente imposti da altri coeredi”* (Istituzioni di Diritto Civile, Alberto Trabucchi, Cedam, 1992, page 840).

In the case **Giuseppe Chircop et vs George Portanier et**<sup>197</sup>, the Court ordered the suspension of proceedings until the action for the liquidation and division of the community of acquests was completed, and thus revoked the judgement of the Court of First Instance [above quoted] which had declared the sale null. Professor Caruana Galizia seems to favour this thesis in that in his notes (page 20) he states that a co-owner can dispose independently of the other co-owners’ share:- *“all this he can do independently of the other co-owners, but as no one can transfer a right which is greater than that which pertains to him, the acquirer succeeds in the same rights which the alienating co-owner had. The material effect of alienation is to be reduced to what the right of the alienating co-owner would be, had he not alienated it. In the text of Art.495 the effect of alienation is limited to that portion which may come to the co-owner on a partition”*.

As illustrated above, whatever thesis one chooses to apply, the problem remains that of uncertainty, in that everything is dependant upon the eventual division. With the introduction of

<sup>197</sup> Decided by the Court of Appeal on the 17<sup>th</sup> of April 1944 (Vol. XXXII.i.38)

article 45 and 46, the heirs have now the right to alienate particular property which forms part of the inheritance without the need to file an action for the division of the inheritance even if there lacks the consent of all the heirs.

Article 496 of the Civil Code has been amended by article 45 of Act XVIII which added sub-article 3 to the article. This sub-article provides that:-

*“(3) Where the heirs in an inheritance continue to hold in common, property deriving from the succession for more than ten years and no action has been instituted before a court or other tribunal for the partition of the property within ten years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common”.*

This sub-article goes against what is provided in article 946 of the Civil Code. According to article 946:-

*“Each co-heir is deemed to have succeeded alone and directly to all the property comprised in his share, or come to him by licitation, and never to have had the ownership of the other hereditary property.”*

The practical effect of this article is that every co-owner is deemed to be a co-owner of everything comprised in that community and can resort to article 495A of the Civil Code [introduced by Act XVIII of 2004] so that a determinate thing can be sold without needing to liquidate and divide the inheritance, and would then receive his share from the price. This provision however is applicable only where:-

(A) The property originates from an inheritance;

(B) The property has been held in common between the heirs for a period longer than ten years and within ten years from the opening

of succession no procedures before the Court or Tribunal for the liquidation and division of the inheritance has been instituted. According to article 831 of the Civil Code, “A succession opens at the time of death...”

(C) The heirs’ share in the inheritance has to be equal on all the assets. Interestingly, this condition was not included in the Bill.

Notwithstanding, the legislator provided in addition that this article does not apply where:-

[A] The common property is subject to a right of habitation, use or usufruct, until such right continues to exist;

[B] The property is of such nature that it must necessarily be kept undivided, such as a passage common between the heirs;

[C] The heirs otherwise agree;

Where the circumstance contemplated in article 45 of Act XVIII exist and therefore every heir is considered to be a co-owner of everything forming part of the inheritance, a demand may be made to the Court according to article 46 for the authorisation of the sale of particular property which forms part of the inheritance in the event that the co-owners cannot agree on the sale of the property. The practical effect of this article is the possibility in certain cases to have the partial division of the inheritance notwithstanding the opposition of any one of the heirs. The general principle is that property deriving from an inheritance cannot be partially divided, whilst if the property does not derive from the inheritance “*l-azzjoni tkun biss actio de communi dividendo u l-atturi jistghu jitolbu li l-art tinqasam bla ma jinqasmu wkoll beni ohra*” **(Emanuel Ellul et vs John Ellul et.)**<sup>198</sup>

<sup>198</sup> (Cit. Nru: 262/95GCD) decided by the First Hall of the Civil Court on the 30 of January 1997).

The amendments therefore seem to be changing this rule in that local jurisprudence confirms that one cannot partially divide except with the consent of all the heirs [see for instance **Emanuel Ellul et vs John Ellul et**<sup>199</sup>; **Terza Farrugia et vs Giuseppe Camilleri et**<sup>200</sup>; **Marianna Micallef et vs Vincenzo Borg noe et**<sup>201</sup>. In addition, the amendments gave authority to the Court to order, in case the demand to sell the property according to the procedure established in article 46 of the Act has been refused “*order the sale by licitation of the property in accordance with the provisions of articles 521 and 522 of the Code.*” Such order can be given even where more than one co-owner opposes the sale.

In the Bill it was even being proposed that where more than one co-owner is opposing the sale, the Court compulsorily had to order the sale by licitation. One cannot forget that the general principle that to remove the community a division necessarily had to be made. Licitation is an extraordinary remedy, and the principle is that it cannot be resorted to where the property can easily be divided between the co-owners. It seems that with the introduction of article 495(A)(9) the legislator chose to depart from this fundamental rule.

The law seems to favour the will of the majority so long as the Court is satisfied that the objecting co-owner/s would not be “seriously prejudiced”. The procedure contemplated by the law regarding the sale of property which forms part of an inheritance is the following:-

(A) The request to the court shall be made by application [Art. 495A(2) of the Civil Code];

(B) The application must be accompanied by [Art. 495A(2) of the Civil Code];-

<sup>199</sup> (Cit. nru: 262/95GCD) decided on the 30<sup>th</sup> of January 1997

<sup>200</sup> (App. nru: 722/2001) decided by the Court of Appeal (Inferior/Sede Inferjuri) on the 10<sup>th</sup> of March 2004

<sup>201</sup> decided by the First Hall of the Civil Court on the 17 November 1878 (Vol. VI.662)]

- (i) a declaration of the owners who agree to the sale;
- (ii) a prospectus showing the number and value of the shares held by each of them;
- (iii) the terms and conditions under which the sale is to take place
- (iv) the date on which the co-ownership arose and the circumstances thereof;

(C) A copy of the application is to be published in the Gazette and in one daily newspaper. [Art. 495A(3) of the Civil Code];

(D) The application must be served on the co-owners who do not agree with the sale as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. These may within twenty days from service upon them of the application oppose the sale stating the **serious prejudice** that they or the co-owners represented by them may suffer because of the sale. [Art. 495A(5) of the Civil Code].

The Court must weigh before it the value of the property in question, the selling price, as well as any other relevant factor when it is deciding whether one of the co-owners will suffer **severe prejudice**. In such case the Court has the power to appoint an expert so that an estimate of the property can be made [Art. 495 (A) (7)].

In my opinion these amendments may give rise to certain questions and other aspects that need to be clarified, among these:-

(a) The law does not stipulate under which Court the application for the authorisation of the sale should be done. In one of the sittings by the Permanent Committee for the Consideration of Draft Bills whilst the draft Bill was being discussed by Honourable Dr. Carmelo Mifsud Bonnici stated that such procedures should take place in front of the First Hall of the Civil Court.

(b) The law does not mention anything on whether there is a right of appeal against a decision by the Court regarding the plea of authorisation for the sale to be possible. Nonetheless it must be noted that once the Court's decision is final regarding the merit, it is subject to appeal - (Court of Appeal 31<sup>st</sup> January 2003-**George Grixti vs Josephine Micallef et proprio** [App. No. 320/99] (Interlocutory Decrees) )- which dealt with an appeal on an interlocutory decree regarding Art. 258 Ch. 12.

(c) Since according to the amendments our law considers the heirs as co-owners in everything, it stands to reason that the amount resulting from a sale should be divided among the heirs according to their share. A situation may arise where one of the spouses receives money to which he or she is not entitled when a division takes place. This may arise for instance when such a person would have received a donation during the life of the deceased which is not exempt from collation.

(d) There is no definition of what constitutes '**severely prejudiced**'. Though it stands to reason that the Court may have discretion because of the varying circumstances of the case, the only factors mentioned which the Court should consider in every case in its decision are: the value of the property and the price proposed. A thorough reading of the law though suggests that the Court should not only consider such factors only. Should the fact that a property can be easily petitioned be reason enough for the Court to discuss a plea for the sale of property?

(e) In the case of immovable property the parties normally have to enter a promise of sale agreement before the publishing of the contract of sale is possible. In the amendments there is no reference to what can happen at this point.

(f) Can one of the co-owners offer to buy the common property himself or does the transfer always have to be with third parties who have no share in the property?

(g) Is it possible that the new system may lead to a situation where one of the co-owners may be deprived of the opportunity to participate in the dealings that take place with the buyer before a sale is affected?

(h) Articles 45 and 46 are applicable in the case where one of the spouses dies and the need for the liquidation of the Community of Acquests arises between the surviving spouse and the children who are the heirs of the deceased spouse?

(i) Would it not be fairer if the law would give a right of first preference to co-owners to buy common property before third parties when a demand is made to authorise the sale of common property?

(j) Article 46 stipulates that the sale should be authorised in accordance to the wishes of the majority. What should the course of action be in the case where those in favour and those against are equal in number? It seems that in this case the only course for the Court is to order a judicial sale by auction.

(k) Article 45 presumes that the heirs would have accepted the inheritance at least tacitly. What is to happen though in the case where one of the heirs has not yet accepted the inheritance?

I also have some doubts about the right the Court has to order a judicial sale by auction of a particular property rather than the sale. This arises mostly from the common knowledge that the judicial sale does not always work fairly and the rights of people can be violated in the local situation if the property sold does not recover its market value which in a country like Malta is dominated by land speculation. Nonetheless, this criticism can be mitigated because the amendment provides that all judicial sales by auction have to take place according to Article 521 of the Civil Code... *“it shall be carried out according to the rules laid down for judicial sales by auction, ..., unless the court deems it more beneficial for the parties interested that it should be carried out otherwise”*.

For the sake of equity it would have been better if an ad hoc system had been created to ensure that each co-owner would receive the fair share for his property.

I would like to stress once more the observation mentioned previously to the general rule that judicial sale by auction should only be resorted to where 'common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value', (Article 515 of the Civil Code).

There is no reference of this provision in sub-section 9 of Article 495A of the Civil Code, which gives the Court the right to order a judicial sale by auction.

The last point that I would briefly like to raise are the transitory dispositions found in Article 116(7) and (8) of the Act:-

(A) Article 45 applies only with regard to those successions that have opened way before 1<sup>st</sup> March 2005:-

(1) nine (9) years or more-one year after the coming into force of this Act (1<sup>st</sup> March 2006).

(2) Less than nine (9) years- Article 45 applies instantly.

(B) Article 46 only applies as regards that property which from 1<sup>st</sup> March 2005 was common:-

(1) a year after 1<sup>st</sup> March 2005 where that community has existed for nine (9) years or more.

In sitting no. 36 of the 10<sup>th</sup> December 2004 by the Permanent Committee for the Consideration of Draft Bills, Honourable Dr. Carmelo Mifsud Bonnici stated:-

*'We are providing for this year so that anyone who thinks that this applies to him has one year within which to proceed judicially'.*

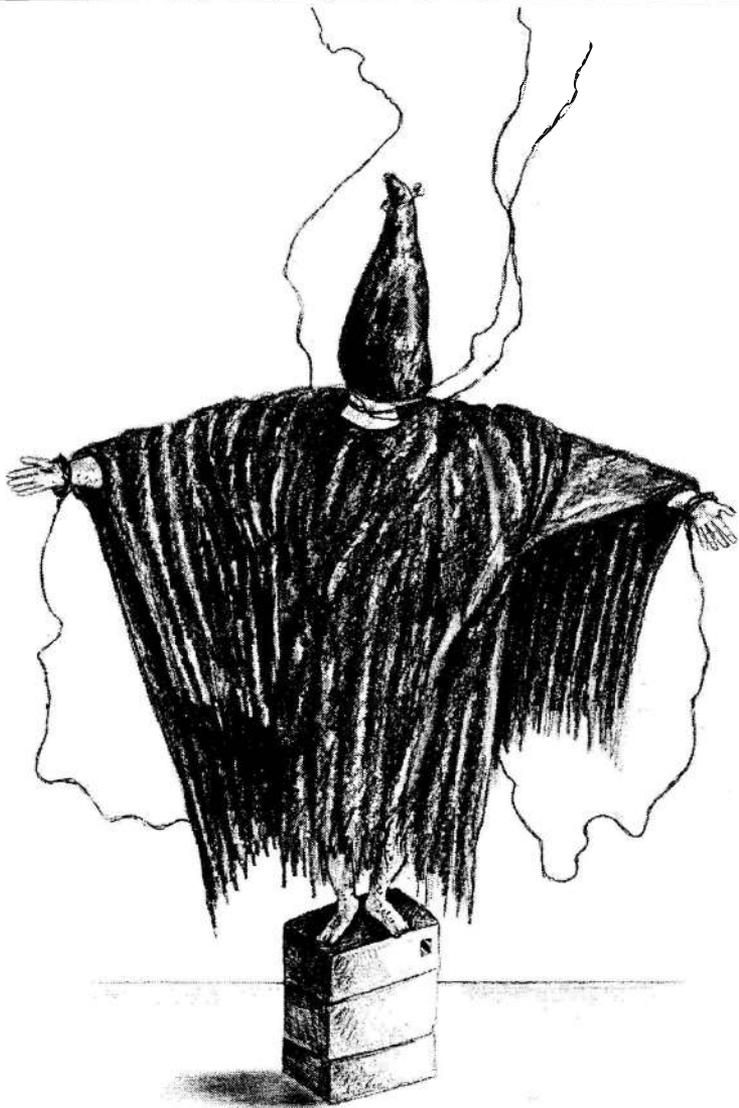
(2) Immediately where the community is less than nine (9) years.

**Anthony Ellul**

April 2005

(Translated from Maltese to English by the 'Id-Dritt' Editorial Board - June 2006)





**HUMAN RIGHTS**



## A Catholic Perspective on Human Rights

Ms. Cherie Blair (Booth) QC

*The following is a transcript of the lecture titled "Human Rights – a Catholic Perspective" delivered on the 15th of October, 2004, by Ms. Cherie Booth. The event was organized by the European Law Student's Association (ELSA Malta), in collaboration with the British High Commission and International Law Department of the University of Malta, who we thank for their hard work and for the great interest they have shown in 'Id-Dritt' over the years.*

*Whilst giving special thanks to Ms. Booth for her unhesitant cooperation and support, I would like to remind you that the 'Id-Dritt' Editorial Board was given special permission by her to publish this article and that she wishes the following not to be reproduced further and also, that she retains full copyright of all the material. The same applies for the other two papers in this section.*

### The Editor

*"I am not the evangeliser of democracy, I am the evangeliser of the Gospel. To the Gospel message, of course, belongs all the problems of human rights, and if democracy means human rights then it also belongs to the message of the Church."*<sup>202</sup>

I am delighted to speak to you today about the topic of human rights, its evolution and indeed revolution in the Catholic faith. I am conscious that I am speaking in a country with an overwhelmingly Catholic population and one whose roots in the Catholic Church go back to St Paul. Against the background of the quote from Pope John Paul, I want to look at the Church's attitude to the concept of human rights in terms of words and actions. I will look in particular at the impact of Pope John XXIII's legacy,

<sup>202</sup> Pope John Paul II quoted in Roberto Suro, "Pope, on Latin Trip, Attacks Pinochet Regime", New York Times, April 1, 1987, pp. A1 at A10.

especially the encyclical *Pacem in Terris* written more than 40 years ago. I will ask if it is still relevant today. And if so, how.

Today, the term ‘human rights’ is widely accepted. National and international leaders talk the language of rights – its importance to the state and society. They speak about their commitment to it and the importance of promoting and upholding human rights across the world. Few dissent. But speaking is easy; acting more difficult. But action is the true measure of commitment. We, like many of the leaders mentioned above, are all too quick to deplore human rights violations by others, but shamefully slow to take personal responsibility for our own actions.

We just have to look at the work of international Aid agencies like CAFOD in the developing world or international human rights organisations like Amnesty International to realise that in the 21st Century many people are still denied their basic human rights; whether civil and political rights such as the right to participate in free elections, the right not to be discriminated against and the right not to be tortured or the social and economic rights such as the right to education, housing, basic health care, etc. We take such rights for granted. But in many countries, even fundamental freedoms are compromised with people facing torture, intimidation and ethnic cleansing.

Progress has occurred in the last fifty years. Today when we speak about Human Rights, tyrants do not need a dictionary, They know what we mean. Consciences have been awakened. The discourse is alive. The establishment of the United Nations put human rights firmly at the centre of global politics. The Universal Declaration on Human Rights in 1948 was as clear a statement as one can get of peace and justice. Europe followed and in 1950 enacted the Convention for the Protection of Human Rights and Fundamental Freedoms. The UK was closely involved in the drafting the Convention and was one of the first countries to ratify it. However, it was not directly enshrined into UK law until the Human Rights Act 1998 came into force on 2nd October 2000. Malta of course

signed the convention in 1967 shortly after independence and directly incorporated the Convention in 1987.

At this juncture we could step back and feel proud. We could point to the other's violations. We could seek solace in perfection. But earlier I spoke about words and actions. The former being easier; the latter more difficult. Before we settle into our smugness – cast our minds back to Bosnia and what we allowed to go on our continent – 250,000 dead and that was only nine years ago. Or Rwanda or Burundi – 700,000 dead in 90 days. Did we know or did we not want to know?

Actions not words. That's the true measure of commitment. Or closer to home, when we live in countries where children can be neglected and murdered in their own home as happened recently in the UK with the tragedy of Victoria Climbié, or where elderly people are deprived of their dignity in care homes or where there are still people whose lives are blighted by poverty. Where does our commitment to human rights and human dignity fit here?

The origins of the concept of human rights is open to debate. For some, the debate is as old as civilisation, for others it was a by-product of the Second World War. While we can debate endlessly about the historical definitions and origins of human rights, we cannot debate about who qualifies for human rights.

Human rights are the BASIC dignity of every human person. They are UNIVERSAL. They are rights held simply by virtue of being a human person. They are integral to the integrity and dignity of the human being. They are rights; not concessions. They cannot be withdrawn or undermined or watered down by any domestic or international legal system. If they are our whole system suffers. We ultimately suffer. Nor can rights depend on our status as citizens, they extend to the stranger, the other, the non-citizen, because it is they who are most at the mercy of our State. The injunction in Leviticus " Don't oppress the stranger because you were once a stranger in the land of Egypt. yourself." has particular resonance at Christmas. Human rights if they mean anything have to be for the

marginalised, the poor, the disregarded - the words of the Magnificat come to mind - *"He fills the hungry with good things, and the rich are sent empty away, He casts the mighty from their thrones and raises the lowly"*

Certain human rights are fundamental to human nature. But at the same time, the ongoing progress of human nature allows for the development of future rights. Over time, those rights can also come to be regarded as essential to living a decent human life for example the right to decent housing, the right to a decent wage, the right to basic health care, and the right to decent education irrespective of wealth.

Historically, the real threat to human rights came when individuals or groups opposed the will of the ruler, or the religion, or the morals of the community. Often when the dominant define rights, the definitions are often self-serving. In these cases the rules and norms often protect positions of strength and privilege and do little to enable and protect the weak, the different, the marginalised, and the poor. So even words about human rights, albeit more prominent in our discourse than ever before, are not enough. Human Rights must enable change. They must serve the dignity of all and not just reinforce entrenched privilege or dominant positions of power and strength. They must enable real change not disable the quest for justice.

And so what about our actions? What about our actions in the Church – the people of God? Today, few doubt the Catholic Church's commitment to human rights. Pope John Paul II highlights the importance of human rights in his Encyclicals, Apostolic letters and speeches. He emphasises that Human Rights are central to the work of the Church today.

The Church has long recognised the rights of an individual. Nearly three thousand years ago the Ten Commandments recognised that each individual had fundamental rights: the right to life, to have a family, to be told the truth and to worship God. At the Last Supper, Jesus when washing the feet of the disciples, told them 'love one

another as I have loved you' emphasising the importance of everyone being treated equally. However, the Church has not always been at the forefront of the human rights debate. Just as others have doubted the purpose and context of human rights over time, so too has the Church even though the answer to the third question of the old Catechism was "*God made me in his own image and likeness*".

Sandie Cornish, writing for the Australian Catholic Social Justice Council described the Church's thinking on Human Rights as being 'from rejection to proclamation'. And a brief historical tour illustrates just how true a description that was.

*The Declaration of the Rights of Man and the Citizen* was rejected by Pius IX. He seemed more suspicious of its origin than its content and that it was enthusiastically endorsed by the same anti-Christian, anti-religious movement which produced the Charter in 1789. For the Church, the conception of *liberty* outlined in the Charter went too far as it was seen as promoting a freedom from God, the laws of God and the requirements of social responsibility and of the common good as seen by the Church. This argument became further mired in 19<sup>th</sup> Century politics and the Church's difficulty with human rights reached its height under the Pope Gregory XVI. In *Mirari Vos* 1832 he described the separation of State and Church and freedom of opinion as 'crazed absurdity'. In the Syllabus of Errors 1864 Pope Pius IX opposed the need for the rights of free speech and freedom of religion. The Syllabus denied "*that every man is free to embrace and profess the religion he shall believe true, guided by the light of reason.*"

Historical empathy is very important here. The Church's justification for the rejection of these human rights at that time was part historical, part theological and part fear of the unknown.

Towards the end of the 19th Century, Leo XIII moved the debate on. He realised that the Church should be an advocate of the social and economic rights of the person. In Leo's Encyclical *Rerum Novarum* rights entered the discourse for the first time, especially

when talking about the family, work, marriage and equal participation. Leo stated that “*Rights indeed, by whomsoever possessed, must be religiously protected.*”

Pius XI built on Leo’s work. In *Non Abbiamo Bisogno* he spoke in favour of the liberty of conscience and against fascism and in *Mit Brennender Sorge* he criticised Nazism and emphasised the right to profess one’s faith and live according to it. Pius XI rejected communism because its aim was “*to upset the social order and undermine the very foundations of Christian civilization*”.

During the Second World War, the much-criticised Pius XII did not speak out strongly enough on human rights. A Vatican diplomat by training, he preferred subtlety and discreet channels of communication to express disquiet. The circumstances of the time demanded strong and forceful language. Europe needed a strong moral voice to speak out. Diplomacy is often a good characteristic in a Pope, but during war, it can have its limitations. Some messages need to be put with great moral force and authority. They need to arrest people’s complacency – to remind them of the transcendent. Pius XII didn’t do that strongly enough – he was more of a diplomat than a Pope. John XXIII, also a Vatican diplomat, recognised that.

The gradual acceptance of human rights ideas within the Church accelerated under the pontificate of John XXIII. This was a significant turning point for the Church’s thinking on human rights. The promotion and defence of human rights now became a distinct part of the Church’s mission. John, as part of his wider reform, initiated a dialogue between the Church and the international community on human rights.

Pope John believed that the defence and promotion of human rights was necessary for peace, and without this, real peace would not be achieved. The publication of *Pacem in Terris* on Maundy Thursday in 1963 was a watershed for the Church. It was the closest thing we have to the Church’s own declaration on human rights - a stark change to previous Papal attitudes.

Unlike previous encyclicals, which were written to Catholic Bishops, *Pacem in Terris* was the first encyclical addressed to all people of goodwill, not only reaching out to the Catholic laity, but to all people of goodwill. Significantly, Pope John praised the Universal Declaration on Human Rights in 1948, which Pius XII had greeted with silence. John wrote “the genuine recognition and complete observance of all the rights and freedoms outlined in the declaration is a goal to be sought by all peoples and all nations.” John’s endorsement was not surprising. He, as Nuncio in Paris, had worked on the drafting of the Universal Declaration. The true significance of *Pacem in Terris* was its relevance. The fifty years had seen two World Wars, the rise of Nazi’s, the erection of the Berlin Wall, the continuing threat of Communism, the Cuban Missile Crisis and the nuclear arms race which threatened the world with devastation. It had been Europe’s half century of hell.

*Pacem in Terris* broke the Church’s rejectionist and hostile view of human rights. At the time of its publication, some on the extreme Right in the Church did not accept it. Some Catholic journals were openly critical of John’s work. They saw it as backing world government (one of Communism’s aims). Others believed John was abusing his position. Such criticism was not unexpected as his work represented a significant shift from previous thinking.

John recognised the important role and crucial contribution of the United Nations in the pursuit of peace and the need for a common universal approach. His *Pacem in Terris* encyclical is dominated by the term ‘universal’. His ideas are based on:

- (1) The equal dignity of every human being
- (2) The universal common good and
- (3) The defence and promotion of basic human rights for everyone.

John believed that good relations between humans are essential to achieve what God wanted. He set out a series of basic human rights at the beginning of *Pacem in Terris*. Rights which derive from nature. He spoke about the right to live; the right for the development of life highlighting, food, clothing, shelter, medical

care, rest, and necessary social services. The natural right to be respected, to share the benefits of culture, through general education, the right to meet and associate, freedom of movement and to participate in public life.

Most significantly, John places the right to freedom of religion at the heart of his: *'among man's rights is that of being able to worship God in accordance with the right dictates of his own conscience, and to profess his religion both in private and in public.'*

This last right was revolutionary for the Church. It was far removed from the views of Pius X, who in his letter to French Bishops in 1910 condemned French Catholics for working with non-Catholics when trying to bring reconciliation between the Church and the ideals of the Revolution.

John believed that all humans had rights to protect their natural dignity and in having such rights there were also duties. He gave the examples of *"the right to live involves the duty to preserve one's life; the right to a decent standard of living, the duty to live in a becoming fashion; the right to be free to seek out the truth, the duty to devote oneself to an ever deeper and wider search for it."*

Each right had its respective duty and without the upholding of both, nothing would be gained. Here John seems to have been ahead of his time and it has taken us quite some time to come to terms with the Rights and Responsibilities argument. John states that *"to claim one's rights and ignore one's duties, or only half fulfil them, is like building a house with one hand and tearing it down with the other."* He records that *"These rights and duties are universal and inviolable, and therefore altogether inalienable."*

When referring to rights and duties, he is not only referring to individuals in a state, but also states in the international community. States have rights and duties towards each other. John saw the purpose of the state as ensuring that the *"inviolable rights*

*of the human person are observed and that there is adequate scope for the performance of duties.”*

John's continued emphasis on the 'universal common good' in *Pacem in Terris* was also a significant development. Previous Popes had not defined that as being beyond those who believed in the Catholic faith. John did.

John believed that if the Church's mission of peace and justice was to be achieved then the Papacy had an international role; one that could not be isolated from the United Nations. He was not advocating a one world government. He believed that peace could only be achieved through a 'world-wide community of nations' that reached beyond the boundaries of Christianity as he said *“involving extensive co-operation between Catholics and those Christians who are separated from this Apostolic See... cooperation of Catholics with men who may not be Christians but nevertheless are reasonable men, and men of natural moral integrity.”*

Achieving this could only be done through an international body, established by consensus with the objective of *“recognition, respect, safeguarding and promotion of the rights of the human person.”*

Previous Pontiffs had often claimed that in times of disorder that this could be resolved by obedience to the Church. However, John saw the observance of human rights as paramount for peace and justice, bringing together different cultures and religions.

An important theme in John's publication is that all are equal in natural dignity. This is linked to his belief in the universal common good and for there to be peace, the primary objective should be the binding together of individuals, states and the world-wide community toward a common goal. Linked to equality of natural dignity he also paid particular attention to the increasing role played by women in domestic and public life. As well as speaking out against any form of racial discrimination, he highlighted the

rights of refugees, saying that they cannot lose their rights purely because they are deprived of citizenship of their own States.

John's commitment to human rights has continued with Pope John Paul II. In his Message for the Celebration of the World Day of Peace on 1 January 1998, he specifically endorsed the 1948 Universal Declaration of Human Rights in the following terms:

*“Fifty years ago, after a war characterized by the denial for certain peoples of the right even to exist, the General Assembly of the United Nations promulgated the Universal Declaration of Human Rights. That was a solemn act, arrived at after the sad experience of war, and motivated by the desire formally to recognize that the same rights belong to every individual and to all peoples. ... That document must be observed integrally in both its spirit and its letter.”*

And in his Address in October 1995 to the Fiftieth General Assembly of the United Nations Organization, Pope John Paul emphasised the natural law and fundamental moral status of human rights when he observed as follows:

*“It is a matter for serious concern that some people today deny the universality of human rights, just as they deny that there is a human nature shared by everyone. To be sure, there is no single model for organizing the politics and economics of human freedom; different cultures and different historical experiences give rise to different institutional forms of public life in a free and responsible society. But it is one thing to affirm a legitimate plurality of ‘forms of freedom’ and another to deny any universality or intelligibility to the nature of man or to the human experience.”*

It is significant that it is the development of human rights after World War II that has received the specific endorsement of the Church. But at the outset, we talked about words and actions. Now I want to return to this by addressing the question what does this commitment to human rights mean in the Church today?

It comes back to words and actions. Despite the progress there are still many challenges that we face. Challenges that are different from the time of *Pacem in Terris*, but challenges that are relevant to John's encyclical.

Today's disorder does not stem from the Cold War, but the threat of international terrorism its consequences and causes. The tragic events of September 11th, the subsequent attacks in Saudi Arabia, Bali, Istanbul and Iraq illustrate one facet of the challenge. One other is posed by the states, which sponsor terrorism or spread nuclear, chemical and biological weapons across the world. Other faces can be found in poverty and hardship and the great inequalities of wealth (at home and abroad) that have come to dominate our modern way of life. From the world and also from a society that allows the unfettered pursuit of material gain at the expense of the less fortunate, the defenceless and the environment.

We could speak at length about the challenges ahead and that might not leave us with much hope for the future. If these challenges are to be overcome, the Church is the forum where we have to find hope. Albeit a hope founded in the reality in which we find ourselves. That is part of our faith and our social mission, and our desire to live our lives according to the Gospel values. So where do we find hope in today's world?

In the UK we can look on our doorstep. In Northern Ireland, the Good Friday Agreement is based on the mutual respect for different traditions. A respect that has led to the longest period of sustained peace in many decades. And at times, though it looks fraught, we cannot give up hope. Hope and the search for that elusive peace cannot be tireless, like all our efforts it might end in failure, but trying and failing is far better than never trying. Equally in Europe, with the historic enlargement this May when Malta along with nine other states, all but two of them from the states behind the Iron Curtain just a few decades ago. Who would have predicted that the old power realities would be replaced with a new found hope? If we had we would have been dismissed by the professional pundits as 'barmy'. If we had said that peace could

one day come to Northern Ireland, we too would have had our sanity questioned. But hope did triumph over realpolitik. Reality was changed for the better.

And whatever one's views of the legality of the recent events in Iraq it is surely a remarkable fact that here we have a former leader of his people not killed but rather preparing for trial for the crimes against humanity he has committed when in office.

Equally, John's vision for peace is not utopian or barmy. It is a challenge. True the world is very different from the time of John. 1963 is a long time ago and for some of too long ago. However, *Pacem in Terris*. John's insistence that peace requires a multi-dimensional effort remains as valid today as it was the day it was printed. *Pacem in Terris* reflected the obstacles to peace facing the world in 1963, he wrote about the need for disarmament, human rights, economic development and sensitivity to the dignity of weaker nations. Forty years on, these still need to be acted on. Writing today, John might expand his list to include concerns about poverty, terrorism, proliferation of weapons of mass destruction and the environment.

In 1963, Pope John insisted on having a universal public authority, the United Nations, to strengthen peace between nations by promoting the universal common good. After this past year that call is as urgent and valid today as ever. It needs to be reheard, embraced and lived by each generation. We should not need a devastating World War in each generation to convince us of the case for international law and order.

In 1963, John XXIII saw the United Nations as the world-wide public authority. Today we face questions about the UN's legitimacy. Some of them from within the Catholic family. Catholics, before criticising the UN and decrying its international order, should examine John's reasoning. John XXIII believed that the UN's authority was built on two foundations:

1) Legitimacy through the virtual universal consensus of national states for the powers it holds

2) And the necessary efficacy in the pursuit of its objectives. In this sense *Pacem in Terris* could not be more relevant today.

Now the challenge. How can we, those who have inherited *Pacem in Terris*, apply it today? What is our generational response? I advocate four areas that are still wanting in our age.

1) We have a responsibility to reaffirm and renew the role of the United Nations. We don't need War and slaughter to convince us over and over again of the UN's relevance and necessity in the world. The world needs a single entity such as the UN rather than the alternative tangled web of inter-governmental bodies and coalitions based on different values and rights. But the UN is far from perfect. Recent events have exposed its weaknesses. There needs to be a new debate about what we mean by international law in the 21st century. When the UN was first established classic international law was based on the idea of sovereign states. The state was defined in terms that were simply a function of power – control, *by whatever means*, over a population within a territory. Today, international lawyers largely accept that legitimacy affects sovereignty, and that increasingly governments are expected to be democratic if they are legitimately to exercise sovereign power.

We need to go further than that and assert that the international community is entitled to demand that sovereign states also respect human rights and the rule of law. The right to democratic governance should not be allowed to obscure the substantive moral content of a truly democratic political regime, one which is required to protect and proclaim the value of human life, and to provide the conditions for each individual's flourishing, even in the case where a majority of the electorate may favour the deprivation or attenuation of rights for unpopular minorities – whether that be present day asylum seekers in the more developed countries of the world or Jews in the Germany of the early 1930s. It is the duty of the State authorities therefore – and this is *especially* the case in

democratic systems - to stand up for and protect fundamental rights, often against majority opinion.

In trying times, such as those currently faced by governments post-September 11 where States face a threat to their internal security, that duty demands that a proper balance be struck between a response to terrorism and continued respect for civil liberties. As Pope John Paul II noted in his 1991 encyclical *Centesimus Annus*, ‘a democracy without values easily turns into open or thinly-disguised totalitarianism’.<sup>203</sup>

2) The culture of death. John said that “man has the right to live”. For the Church the right to live is the foundational right and all other human rights stem from that right. Article 2 of the European Convention on Human Rights explicitly asserts the Right to Life. Many countries today maintain the death penalty. Pope John Paul II in 1999, called on world leaders to “reach an international consensus on the abolition of the death penalty”. However, today 83 countries still retain it. According to Amnesty International, in 2002, at least 1,526 prisoners were executed in 31 countries and 3,248 people were sentenced to death in 67 countries. 81% of all known executions took place in China, Iran and the USA. In the Philippines, a predominantly Catholic country, at least 7 child offenders are currently under sentence of death.

The United Kingdom, having ratified Protocol 6 of the European Convention on Human Rights in 1998, has agreed to abolish the death penalty in peacetime. Malta too abolished the death penalty for ordinary crimes in 1971 and for all crimes in 2000. However, it is worrying that a recent opinion poll found that 62% of people favoured the re-introduction of the death penalty in Britain. The late Cardinal Bernadin of Chicago said that human rights are a seamless robe – meaning people cannot pick and choose.

<sup>203</sup> His Holiness Pope John Paul II *Centesimus Annus* (1991) , 46.

3) Development. *Pacem in Terris*, written at the time when many African countries were gaining independence, pays particular attention to the needs and rights of less developed countries and the duties upon wealthier states. John talks of the importance of those living in less developed countries being able to live in conditions to maintain their human dignity. He called on advanced nations “to make a greater contribution to the common cause of social progress”. This theme also sits unresolved today. The extent of poverty in the developing world is a blemish on the entire international community, but particularly for us in the West. Many people – especially children - are still denied basic human rights.

A quarter of the world’s population, 1.3 billion people, live in severe poverty – managing on less than \$1 a day. 800 million people do not get enough food. 840 million adults are illiterate - 540 million of them women – and 1.2 billion people live without access to safe drinking water.

Shamefully, over the last 20 years many developed countries have reduced their aid contributions to the developing world. We haven’t and for that we can be proud. Public pressure such as the Jubilee 2000 campaign has increased pressure for action. People power was also instrumental in persuading policy makers both at home and abroad to eliminate the crippling debt on developing world states. I am proud that the British presidency of the G8 is highlighting the issue of Africa.

The Church also makes its own direct contribution to assisting in the development of less advanced countries through organisations such as CAFOD working to give people the basic rights of dignity and respect. Just as Pope John highlighted the duty to assist less economically advanced countries, Pope John Paul II reaffirmed this call in his Millennium address when he appealed to national policy makers to address the debt burden that the poorest countries faced - urging a substantial reduction or the outright cancellation of external debt of certain countries.

4) Racism. *Pacem in Terris* also raised another area that was politically hot in the early 60s – race. Today we could sit back and thank God that apartheid is dead in South Africa. But John’s writing did not speak about the macro alone; he also spoke about the micro. It was a call for the outright rejection of racial discrimination.

Whilst John’s statement may not hold the same impact today, this does not mean that we have realised John’s call for an ‘outright rejection of racial discrimination’ regardless of race. There is widespread condemnation of racism, but one only has to look at the recent growth in popularity of extreme right wing political parties across Europe, not to mention the British National Party in the United Kingdom to see that it has not gone away. Tackling racism requires our constant vigilance. After all it was only ten years ago that a talented young British man was attacked and killed on our streets for no reason other than his colour, the lessons of the tragic death of Stephen Lawrence remain valid today.

Equality matters to everyone –it is not a minority concern. Most of the articles of the ECHR begin with the word “everyone” and are inherently based upon the notion of the equal worth and dignity of every individual, in a society, which strongly respects diversity. True human rights are not about imposing uniformity. Instead they requires us to accept diversity and to enable all members of all groups to participate positively in, and benefit equally from, our society.

## **The Church**

But John’s message is also a message to the Church. Forty years on can we really say that the Church has lived up to his ideals of equality and respect for all? Eleanor Roosevelt, one of the authors of the Universal Declaration of Human Rights stated that human rights begin “in small places, close to home” and that “*Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning*”

*anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world”.*

I would suggest that there is still a way to go before the Church lives up to these ideals particularly in relation to the role of women in the Church. In 1988 Pope John Paul II set out a new perspective on the role of women in the Church in his Apostolic Letter *Mulieris Dignitate*. In his Letter to Women in 1995 he apologised for those members of the Church who had contributed to the marginalisation of women and talked about the importance of achieving ‘*real equality* in every area’ and the ‘universal recognition of the dignity of women’.

Progress has been made in opening the doors to greater female participation and we are now seeing more women taking roles in the Church not just as Eucharistic ministers, readers or servers, but as religious Chancellors and Canon Lawyers. However, there is still much work to be done. The Vatican Curia needs to learn from the many Diocesan Curias throughout the world and open its doors to female participation. I welcome the recent announcement that Mary Ann Glendon, who teaches law at Harvard University has become the first female president of the Pontifical Academy of Social Sciences, and thus the highest ranking lay women in the Vatican. There is little reason why half of all Vatican curial positions could not be filled by women. It should be a main priority of the Church at all levels to breakdown the barriers to female participation. Throughout the Church women must be thought of as ‘thinkers’ as well as ‘workers’. And whilst I welcome the Vatican’s recent recognition in its letter “On the Collaboration of Men and Women” of 31st July this year, that men and women are both different and equal, it does not provide any answers for one of the most pressing questions today which is how to respond to women’s legitimate aspirations for full participation in social and political life, without harm to families, children and the common good.

It comes back to Pope John’s rights and duties. How can we expect others to fulfil their duties or responsibilities if we are not clearly

seen to be meeting our own? What value is our word if we say one thing and do another? There are signs of hope however, and I predict that in this area we will see greater progress as the 21st century proceeds.

### **Progress Made.**

Tonight as we muse on what John XXIII meant some forty years on, let's not forget one central thing the quest for peace cannot be divorced from respect for human dignity and human rights. Let us think about words and actions because respect for human rights comes from living them. Living the Rights on a daily basis. That is the hard part. Intellectual acceptance is easy. Rights are ours, but they cannot be divorced from the responsibilities that are placed upon us. We are quite far, some forty years on, from realising our responsibilities towards our fellow humanity.

John XXIII called *Pacem in Terris* an 'immense' task. That it is and let's hope that those of us that might be back here for the 80th Anniversary of *Pacem in Terris* can say that we have taken it further. That we have further realised the goals set for us in 1963. *Pacem in Terris* was our call to action. It is a timeless call to help realise the Kingdom of God on Earth. We as Christians are asked to try, just try. We are not promised success. And sometimes our efforts might end in failure. But the real test is to get up and start over and over again: start again with Pope John's requirements of peace – truth, justice, love and freedom.

John left us *Pacem in Terris* in the year that he died. It is one of the most topical and revolutionary Papal Encyclicals ever published. John XXIII has left us an immense legacy and a great task. Being faithful to that task is not easy, but auditing our progress some forty years on is both a sobering and frightening experience. To steal a phrase; 'much has been done – there is much left to do.

**Cherie Blair**  
October 2004





## **The Right to a Fair Trial in Civil Cases: Article 6 Para. 1 of the ECHR**

Mr. Justice **Christos Rozakis**<sup>204</sup>

*The following is a transcript of an address given by Christos Rozakis at a seminar held in Malta on the 15<sup>th</sup> of December 2001 titled: “The European Convention on Human Rights: A Southern Perspective” – organised by The Law Students’ Society.*

### **1. Introductory Remarks**

The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights and it represents one of the most fundamental guarantees for the respect of democracy and the rule of law on the European continent. Indeed, the concept of fair trial is a basic component of the wider notion of the separation of powers: it attributes to the judiciary - one of the three powers of the State - its distinct character from the other two, by determining which qualities - independence and impartiality - and which procedures make it an element of protection and security for those who are under the omnipotent jurisdiction of the State. The obligations, therefore, for the State under this Article go far beyond the protection afforded by some other articles of the Convention, as they are positive obligations by their nature, and hence require from the State and its authorities not only a mere abstention from acts which may be detrimental to an individual, but also, and above all, the taking of initiatives to ensure good administration of justice within the State. In sum, Article 6, while it encompasses the protection of individuals before the courts, at the same time identifies the basic features of the judiciary which distinguish it from the other two State powers.

<sup>204</sup> Dr. Christos Rozakis is the vice president of the European Court of Human Rights.

The right to a fair trial refers both to criminal and civil cases and the corresponding proceedings. The first paragraph of Article 6 applies equally to the two categories of cases, while the two remaining paragraphs 2 and 3 are designed to apply, by and large, to criminal proceedings. We say "by and large" because, although the intention of the legislator was to limit the applicability of these two paragraphs to penal cases, the Strasbourg organs have widely construed the obligations appearing on paragraphs 2 and 3, which has led to their application by analogy in civil cases, whenever feasible.<sup>1</sup>

It should also be pointed out, from the outset, that the Strasbourg case-law has led to the creation of new guarantees which are not specifically mentioned in the letter of the article as such, but which have emerged as a consequence of the development of this case-law. These judge-made guarantees have been considered as natural corollaries of the written guarantees of Article 6 or, better, as guarantees which emanate from its very spirit of protection: the right of access to a court, the right to legal aid, or the equality of arms are three guarantees, now well-embedded in the judicial conscience, that all come from an extensive interpretation of Article 6. At the same time, and as a result of this extensive interpretation of Article 6, notions which were designed, by the European legislator, to have a more limited purview, have grown, through the case-law, to dimensions expanding the limits of protection of Article 6 in areas far wider than anticipated by its founding fathers. A classic example of this expansionist trend of the case-law is the creation of the autonomous notion of "civil rights and obligations" and of "criminal charge", which now covers categories of cases and proceedings which cannot be considered necessarily to have been anticipated by the drafters of the Convention.

The task of this brief article is not, of course, to carry out a comprehensive analysis covering all the possible aspects of the first paragraph of Article 6, when it applies to civil cases. As we have already said, Article 6, in its first paragraph, does not make any distinction, as far as the guarantees contained therein are

concerned, between the civil or the criminal nature of judicial proceedings. And the case-law of Strasbourg has never isolated any of the guarantees as exclusively belonging to civil or criminal procedures. In these circumstances, we shall attempt to draw a distinction, somewhat artificially, by dealing in this introduction with guarantees that are not necessarily destined for civil cases, but which have been implemented by the Court, so far, mainly in civil proceedings, or have been implemented in a manner which treats in a different way civil and criminal proceedings. Our proposal is, therefore, to deal in this introduction with two aspects of paragraph 1, the question of the access to court, which has mainly matured as a legal concept in civil cases, and the question of the fairness of the proceedings, seen from the angle of civil proceedings.

## 2. Access to a Court

We start with the notion of access to a court. If we make the distinction between the institutional aspects of Article 6 and the procedural ones, institutional being e.g. the independence and impartiality of a tribunal, procedural being the fairness of a hearing, then the access question is, of course, one fundamental institutional aspect. As we have already mentioned, it is a judge-made concept appearing for the first time in the judgment of **Golder v. U.K.**<sup>2</sup> In that 1975 case a prisoner was refused permission by the Home Secretary to write to a solicitor asking him to institute civil proceedings against a prison officer for libel. The Court held that Article 6 had been violated in the circumstances because its paragraph 1 concerned not only the conduct of the proceedings once they have been instituted, but also the right to institute them in the first place. Any other interpretation of Article 6, according to the Court, would contradict a universally recognised principle of law and would allow a State to close its courts without infringing the Convention. With the lapse of time, the notion of a right of access to a court, or the equivalent wider notion of a right to a tribunal, has developed into one of the fundamental guarantees of Article 6, both in civil - par excellence - and, sometimes, in criminal cases. The constitutive elements of this

novel concept, namely its specific components which have been set out in the case-law are the following:

First, the right of access concerns both the factual circumstances of a case and its legal substratum. In other words, a person within the jurisdiction of a State-party to the Convention must have effective access to a court to settle his grievances on arguable civil claims. The Court does not make a distinction between impediments to this right deriving from factual difficulties and those stemming from legal regulations. Furthermore, as far as effectiveness is concerned, a person must have the facilities to vindicate his right before the courts and be able to enforce a decision determining that right. The case of **Airey v. Ireland** where an indigent woman was refused legal aid in very complex proceedings, where there was a need to examine expert witnesses, and where the Court found that refusal of legal aid equated to refusal of access, is a good example of this second requirement.<sup>3</sup> The Court, however, made a distinction in that case between criminal and civil proceedings by stating that legal aid is required in civil cases, under the notion of access, only in situations where a person cannot plead his case effectively.

Second, the right of access concerns also the right to a proper preparation of a civil case in that the authorities must keep people duly informed of measures taken concerning their civil rights, allowing them time to institute civil proceedings against these measures if they interfere with their rights. The *locus classicus* in this respect was the **De la Pradelle v. France**<sup>4</sup> case where the administration had not properly informed interested persons, affected by the repercussions that a law decree had upon their real property.

Third, the right of access is not an absolute right. The Court accepts that limitations may apply, as this right "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals" (**Golder**). However, although a State-party enjoys a certain "margin of appreciation", a limitation must not be such that "the very essence of the right is impaired" (**Ashingdane v. the**

**U.K.**).<sup>5</sup> As with most of the limitations which are permissible under the Convention, a restriction to the right of access must, in addition, have a legitimate aim, and comply with the proportionality test, in that there must exist "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (**Ashingdane**).

The case-law of the Strasbourg organs has given an answer as to what can be considered acceptable limitations of a right to access. Specific categories of litigants may legitimately be prevented from instituting proceedings or participating in them: minors, prisoners, vexatious litigants. Equally, reasonable time-limits for instituting proceedings may be imposed; formal requirements must be respected, and reasonable fees to be paid by litigants may also be acceptable.<sup>6</sup> An interesting aspect of these restrictions is to be found in a series of cases whose State of origin is the United Kingdom and concerning jurisdictional bar on access based on an immunity or defence that may be invoked by a defendant in order to avoid adjudication of a case against him. The case of **Fayed v. the U.K.**<sup>7</sup> is the first important case in this family, where the Court held that a defence of privilege available in an action for defamation brought by the owners of a company concerning allegations of fraud in a government inspector's report on the company was a permissible restriction on access. Its legitimate aim was to facilitate the investigation of public companies in the public interest and there was proportionality in the light of the State's margin of appreciation. That case was followed by **Osman v. the U.K.**<sup>8</sup> where the Court found that there was violation of the right of access because the applicants were prevented from suing the police on the basis of an absolute, blanket immunity protecting policemen from being sued in civil proceedings for negligence in the course of their duties. The blanket immunity was considered by the Court to be an unacceptable restriction because of its absolute and unqualified character, going beyond the permissible limits afforded to a State by its margin of appreciation. Strangely enough, the Court has recently overturned the **Osman** case-law, in a very similar case, concerning blanket immunity of local authorities in children's care matters, on the basis of reasoning which

unjustifiably, to my mind, attempts to distinguish that case from **Osman**.<sup>9</sup>

Finally, it should be underlined that a right of access may be subject to a legitimate waiver, provided that the waiver may be established on the basis of unequivocal conduct on the part of the person concerned.<sup>10</sup>

### **3. The Right to a Fair Hearing**

The right to a "fair hearing" is the other generic notion which applies to civil cases in a way which marginally differs from its application to criminal cases. As the Court has said "the contracting States have a greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases" (**Dombo Beheer Bovo v. the Netherlands**).<sup>11</sup> As it has been pertinently stated by the doctrine:

*"... although certain of the guarantees listed in Article 6 (3) (e.g. the right to legal assistance or to examine or cross examine witnesses) may in principle be inherent in a "fair hearing" in civil as well as in criminal cases, they may not apply with quite the same rigour or in precisely the same way in civil proceedings as they do in criminal ones. The same is true of such rights as the right to be present at the trial and to 'equality of arms' that flow exclusively from Article 6 (1) in both criminal and civil cases".*<sup>12</sup>

We therefore propose to have a close look at certain instances of the Strasbourg case-law in order to delineate the limits of protection afforded by the organ(s) of the Convention in civil cases on the issue of "fair hearing".

a. With regard to the presence of a party to a hearing, the case-law demonstrates that, unlike in criminal cases, in civil cases, the presence of a party is not absolutely necessary, and that it may be limited to specific circumstances, for instance in cases where assessment of the party's personality is required. In most cases the presence of a lawyer suffices to satisfy the requirement of fairness.

It goes without saying that an unequivocal waiver of the right to be present is also accepted by the case-law.

b. With regard to the notion of "equality of arms", i.e. the premise that "everyone who is a party to ... proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him at substantial disadvantage vis-à-vis his opponent" (**Kaufman v. Belgium**),<sup>13</sup> the Court has developed a rich case-law in civil matters. In the **Ruiz Mateos v. Spain**<sup>14</sup> case, the Court found a violation of the principle because the applicants were not allowed to reply to written submissions made by the Counsel for the State before the domestic appeal court. In the **Stran-Andreadis v. Greece** case, the Court stated that the "principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute".<sup>15</sup> The legislative interference may be seen, of course, as an issue of equality of arms, but also as a problem of infringement of a right to a tribunal, even as a problem of independence of the courts (see also recent case-law on the participation of the Commissaire du Gouvernement in administrative proceedings, in **Kress v. France**).<sup>16</sup>

c. With regard to the evidence in civil cases, the constant position of the Court is that domestic courts are not required to follow particular rules on evidence. It is within the margin of appreciation of the States-parties to the Convention and their courts to determine such rules provided, of course, that they do not infringe the fundamental procedural guarantees provided for by Article 6.

A similar problem to that of evidence, is the invocation by applicants of errors on the facts or the law allegedly committed by national courts in their assessment of the facts and in their interpretation of the law. The traditional approach of the European Court on this matter is that Article 6, incorporating procedural guarantees, is not designed to be the legal basis for a review of the facts and of the substantive law upon which the national judge decided the case. The European Court is not a "fourth instance"

court, called upon to re-examine, under Article 6, the merits of a case or the interpretation of the applicable domestic law. The Court only reviews errors which are relevant to the procedure followed, errors *in procedendo*, not errors *in judicando*.

In the recent case-law of the Court this principle has been reinstated. Yet, in some instances the Court has reached a threshold of the "fourth instance". This happened for instance in the case of **Dulaurans v. France**.<sup>17</sup> In this case, the applicant complained that the Court of Cassation declared inadmissible the only complaint she made before it because it considered that that complaint had been raised for the first time at the stage of cassation; while, in reality, the complaint had already been raised in the submissions at the appeal stage. The European Court remarked that the right to a fair hearing required that the observations of the parties must really be heard and duly examined by the domestic tribunals. According to that principle, a court has the obligation to proceed to an effective examination of the complaints, argument and evidence offered by the parties in order to assess their pertinence. In examining the judgment of the Appeal Court, in the circumstances of the case, the European Court reached the conclusion that the approach taken by the Court of Appeal in its operative part was an answer to an allegation of the applicant raised at the appeal stage and, hence, the Court of Cassation was not right to say that this complaint was a new one raised at the cassation stage. Here we are confronted with a situation where the European Court enters into the merits of a case and scrutinises a judicial decision to find whether a procedural error was committed by a court.

An interesting aspect of errors committed by national courts concerns the non-respect of formalities provided for by national legislation. In the case of **Leoni v. Italy**<sup>18</sup>, the applicant's appeal to the Court of Cassation was rejected by that court because the appeal deposited at the Registry of the Appeal Court was not transferred to the Registry of the Court of Cassation in time. The European Court found that that error was an error of the authorities and that an applicant cannot be penalised for the non-respect of formalities by the Appeal Court. In the same vein, in a Greek case,

**Platakou**,<sup>19</sup> the European Court found a violation by the Greek State because of a delay in transmitting an appeal to a court, which was attributable to the "huissier de justice", and which led to a loss of opportunity for the applicant to lodge her appeal. As in the previous case, the European Court attributed responsibility to the State whose organ was responsible for the delay.

#### **4. Some Concluding Remarks**

As we have already said, it is impossible in the limited space of this article to deal exhaustively with all the issues which have been raised by the case-law of the Court and concern civil proceedings. Let us then stop here, and allow ourselves some lines to deal succinctly with the core problem of this discussion which we have left till last, although in reality it is the first consideration, namely what is considered by the Court to be a "civil case" worthy of protection by Article 6.

It is well-known, of course, that neither the Convention when referring in Article 6 to "civil rights and obligations" nor the Court's case-law have provided a general definition of the term. Although it seems that the drafters, when preparing the Convention, were in favour of a rather restrictive approach to the notion, the Strasbourg organs have expanded the purview of the term - as they have done with regard to the term "criminal charge" to cover proceedings which do not necessarily belong to the purely civil sphere. The Court has held on several occasions that Article 6 applies to proceedings whose outcome has a direct bearing on the determination and/or substantive content of a private right or obligation. Applying the criterion "decisive for private rights or obligations", referring to the applicability of Article 6, "the Strasbourg organs declared that the Article applies to several categories of what would often be considered as public law disputes...".<sup>20</sup> Many of the cases concern administrative proceedings affecting contracts for the sale or expropriation of land, nationalisation of property, environmental protection, practice of professions, regulation of licence to conduct certain economic

activities. There have also been cases concerning social benefits, including sometimes cases of unjust dismissal.

In all these categories of cases, the prevailing element which has led the Court to identify them as civil cases, was an element of an economic interest for an individual, or a private interest at stake (such as reputation, well-being, quality of life), considered to be of such importance as to override the public-law character of a case. In any event the Court seems to have adopted in these instances an approach which implicitly accepts that a public law character of a case is not necessarily affected, in regard to the core issue of the discretion of a State, by the mere fact that, if proceedings exist to control it, these proceedings must comply with the procedural guarantees offered by Article 6.

In these circumstances, the only categories of cases, bearing a public-law element, which resist the control of the Court - because the Court so decides - are mainly immigration and asylum proceedings as well as tax proceedings. The exclusion of the latter was challenged in a recent case, the case of **Ferrazzini v. Italy**.<sup>21</sup> The majority (rather numerically reduced if compared to previous cases on the same issue) of the Court decided to uphold its constant case-law on the basis of the argument that taxation still belongs to the "hard core of public authority prerogatives, with the public nature of the relationship between the tax-payers and the tax authority remaining predominant". The position of the dissenters is expressed in an opinion written by Judge Lorenzen:

*"the finding that Article 6 § 1 ... is applicable to tax cases does not in any way restrict the States' power to place whatever fiscal obligations on the individuals and companies they may wish. Nor does such a finding restrict the States' freedom to enforce such laws as they deem necessary in order to secure the payment of taxes... Article 6 ... is a procedural guarantee that grants primarily the right of access to a court and the right to have court proceedings determined fairly within a reasonable time".* This *dictum* may, of course, equally apply to all other categories of cases which still remain outside the purview of Article's 6 control.

The last words of the quotation from the dissenting opinion brings us to the issue of the length of proceedings as a ground for violation of Article 6. Length of proceedings in civil cases represents today, statistically, the most frequently invoked violation of Article 6. For many European States it is the most typical violation stemming from their domestic proceedings. This is extremely serious, on the one hand, because length of proceedings may have adverse consequences for the good administration of justice. But it may also be seen, on the other hand, as a positive element in the long adventure towards compliance of European States with the guarantees of the Convention: if in today's Europe the great bulk of cases are length of proceedings cases, this phenomenon demonstrates a tendency of compliance of States with the Convention's precepts on other, more hard core guarantees. Let this optimistic statement be the last words of this small contribution.

### **Christos Rozakis**

15<sup>th</sup> December 2001

<sup>1</sup> This observation concerns more paragraph 3 than 2 of Article 6.

<sup>2</sup> Judgment of 21 February 1975, in Judgments and Decisions, vol. 18 (1975). See, mainly paragraphs 28 et seq. of the judgment.

<sup>3</sup> loc. cit., vol. 32 (1979)

<sup>4</sup> loc. cit., vol. 253 (1992)

<sup>5</sup> loc. cit., vol. 93 (1985)

<sup>6</sup> See Harris, D.J., Boyle, M.O., Warbrick, C., *Law of the European Convention on Human Rights* (London: Buttersworth, 1995), pp. 199 et seq.

<sup>7</sup> loc. cit., vol. 294-8 (1994).

<sup>8</sup> loc. cit. (1998-VIII).

<sup>9</sup> Case of Z and others v. the U.K. (10 May 2001).

<sup>10</sup> See Harris and others (op. cit., note 6), pp. 201 et seq.

<sup>11</sup> loc. cit., vol. 274 (1993).

<sup>12</sup> Harris and others (op. cit.)

<sup>13</sup> Decisions and Reports of the European Commission of Human Rights (1986) at p. 115.

<sup>14</sup> loc. cit., vol. 202 (1993).

<sup>15</sup> A 301-8, paras 46 and 49.

<sup>16</sup> Judgment of 7 June 2001.

<sup>17</sup> Judgment of 21 March 2000.

<sup>18</sup> Judgment of 26 October 2000.

<sup>19</sup> Judgment of 11 January 2001.

<sup>20</sup> See Harris and others (op. cit., note 6), pp. 189 et seq.

<sup>21</sup> Judgment of 12 July 2001.



## **An Address Relating to the European Convention on Human Rights**

**Mr. Chief Justice Luzius Wildhaber<sup>205</sup>**

*The following is a transcript of an address given by Luzius Wildhaber at the Old University, Aula Magna, Valletta, Malta 16 January 2003.*

The principal and overriding aim of the system set up by the European Convention on Human Rights is to bring about a situation in which in each and every Contracting State the right and freedoms are effectively protected, that is primarily that the relevant structures and procedures are in place to allow individual citizens to vindicate those rights and to assert those freedoms in the national courts. This the first level at which Convention protection should operate, but it is not the only one. The quantum leap achieved by the Convention was the recognition of the individual as a subject of international law and the offering of international protection to individuals. At the heart of this system are the notions of human dignity, of democracy and the rule of law. These aims come together in that it is through individual applications that structural or systemic weaknesses are identified.

The Convention system is a subsidiary one: it falls firstly to the national authorities to secure the protection sought. This is why the Convention has a strong procedural bias. Clearly this is the case for the due process provisions which are essentially aimed at securing procedural safeguards in relation to detention and the conduct of judicial proceedings under Articles 5 and 6 of the Convention. However, it is also true of the other substantive provisions of the Convention. In a number of cases<sup>206</sup> involving alleged breaches of

<sup>205</sup> Dr. Wildhaber is the President of the European Court of Human Rights.

<sup>206</sup> *Kaya v. Turkey*, 19.2.1998, Reports 1998-I, p. 329, § 105; *Tanrikulu v. Turkey*, 8.7.2000, § 101.

the right to life guaranteed by Article 2 of the Convention where it has been unable to establish to the required standard of proof the substantive violation, the Court has found a “procedural” violation on account of the lack of an effective investigation or effective judicial proceedings at national level capable of establishing the true facts at the origin of the allegation. The Court has also held<sup>207</sup> that where an individual makes a credible assertion that he has suffered treatment infringing Article 3 (which prohibits torture and inhuman or degrading treatment) at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State’s general duty under Article 1 of the Convention, likewise requires by implication that there should be an effective official investigation. As with the duty to carry out an investigation under Article 2, such investigation should be capable of leading to the identification and punishment of those responsible.

In the context of Article 8 the Court will have regard to whether there are adequate procedural safeguards in place to protect the Article 8 interest<sup>208</sup>. In the recent case of *P., C. and S v. the United Kingdom* involving the removal into care of a baby shortly after birth and where the parents were not legally represented either in the care proceedings or the subsequent freeing for adoption proceedings, the Court stressed the importance of the procedural obligations inherent in Article 8<sup>209</sup>. In these difficult and sensitive cases it is often hardly possible for the Court to make an assessment of the substantive issues before the national courts, for instance whether or not the care decision was justified. It can however consider whether the parents were properly involved in the decision-making process to a degree sufficient to provide them with the requisite protection of their interests under Article 8 of the Convention. This approach is entirely consistent with the Court’s longstanding jurisprudence that it is not to be seen as a “fourth instance”, in other words that it does not rehear cases as to their facts and law on appeal, as it were, from national courts. It is, as

<sup>207</sup> See for example, *Assenov v. Bulgaria*, 28.10.1998, Reports 1998-VIII, p. 3290, § 102; *Labita v. Italy*, 6.4.2000, § 131; *Veznedaroglu v. Turkey*, 11.4.2000, §32.

<sup>208</sup> *Chapman v. the United Kingdom*, 18.1.2001, ECHR 2001, § 114.

<sup>209</sup> *P., C. and S. v. the United Kingdom*, 16.7.2002.

has been frequently pointed out, not a court of last instance, but a court of last resort.

It follows that practically all the Convention guarantees contain at least an implied positive obligation to set up and render effective procedures making it possible to vindicate the right concerned at national level. This is of course confirmed by the requirement of exhaustion of domestic remedies under Article 35 of the Convention and the obligation to afford an effective remedy under Article 13. This must indeed be so if the system is to function as a subsidiary one. As the Court has recently emphasised, “the object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of “subsidiarity”<sup>210</sup>. This was confirmed in the context of Article 13 when the Court held that the obligation to provide a remedy extended also to problems of length of proceedings in breach of Article 6. As the Court noted in the case of **Kudła v. Poland**, “the rule in Article 35 § 1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual’s Convention rights. In that way, Article 13, giving direct expression to the States’ obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires*<sup>211</sup>, is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court”<sup>212</sup>.

<sup>210</sup> *Z. and Others v. the United Kingdom*, 10.5.2001, ECHR 2001-V, § 103.

<sup>211</sup> See the Collected Edition of the “*Travaux Préparatoires*” of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651.

<sup>212</sup> *Kudła v. Poland*, 26.10.2000, ECHR 2000-XI, § 152.

This must work both ways. In other words, where there are no or insufficient procedural safeguards protecting the right in question, there may well be a violation of the right in both its substantive and procedural aspects and of Article 13. On the other hand, where such safeguards are in place a significant part of the Contracting State's obligations has been fulfilled. That does not mean that the Court in exercising its supervisory review is precluded from finding a violation, since, clearly, substantive issues will also arise, but it does make it possible for that review to be carried out from the right distance, from the right perspective. If in addition the national authorities are in a position to apply Convention case-law to the questions before it, then much, if not all, of the Strasbourg Court's work is done. This is ultimately, as I have said, the objective underlying the system: to ensure that individual citizens throughout the Convention community are able fully to assert their Convention rights within their own domestic legal system.

Another way of putting this is that fulfilment of the procedural obligation leaves room for the operation of what we call the margin of appreciation. This area of discretion is a necessary element inherent in the nature of international jurisdiction when applied to democratic States that respect the rule of law. It reflects on the one hand the practical matter of the proximity to events of national authorities and the sheer physical impossibility for an international court, whose jurisdiction covers 44 States with a population of some 800 million inhabitants, to operate as a tribunal of fact. The Court has observed that it must be cautious in taking on the role of first instance tribunal of fact. Nor is it, as we have seen under the "fourth instance" doctrine, the Court's task to substitute its own assessment of the facts for that of the domestic courts. Though the Court is not bound by the findings of domestic courts, it requires cogent findings of fact to depart from findings of fact reached by those courts<sup>213</sup>.

But the margin of appreciation also embraces an element of deference to decisions taken by democratic institutions, a deference

<sup>213</sup> Tanli v. Turkey, 10.4. 2001, at § 110.

deriving from the primordial place of democracy within the Convention system. It is thus not the role of the European Court systematically to second-guess democratic legislatures. What it has to do is to exercise an international supervision in specific cases to ensure that the solutions found do not impose an excessive or unacceptable burden on one sector of society or individuals. The democratically elected legislature must be free to take measures in the general interest even where they interfere with a given category of individual interests. The balancing exercise between such competing interests is most appropriately carried out by the national authorities. There must however be a balancing exercise, and this implies the existence of procedures which make such an exercise possible. Moreover the result must be that the measure taken in the general interest bears a reasonable relationship of proportionality both to the aim pursued and the effect on the individual interest concerned. In that sense the area of discretion accorded to States, the margin of appreciation, will never be unlimited and the rights of individuals will ultimately be protected against the excesses of majority rule. The margin of appreciation recognises that where appropriate procedures are in place a range of solutions compatible with human rights may be available to the national authorities. The Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide a Europe-wide framework for domestic human rights protection.

The search for a balance between competing interests may be relevant even to the due process guarantees. Thus for instance in respect of detention there may be a conflict between an individual's right to procedural guarantees and ultimately his or her freedom and the need to protect the community at large. The Court has found that in connection with the lawful detention of persons of unsound mind under Article 5 § 1 (e) the "interests of the protection of the public" may "prevail over the individual's right to liberty to the extent justifying an emergency confinement in the

absence of the usual guarantees<sup>214</sup>. Again it has accepted, in the context of Article 5 of the Convention aimed at prohibiting arbitrary detention, that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding an arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity<sup>215</sup>. Liberty even in its narrowest sense is subject to the constraints of living in and protecting society. Taking another example, the right to a court, which the Court has read into the Article 6 fair trial guarantee in a pure exercise of rule of law logic, is not absolute<sup>216</sup>. It may be subject to legitimate restrictions, such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind. Where the individual's access is limited either by operation of law or in fact, the Court will examine whether the limitation imposed impaired the essence of the right and in particular whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved<sup>217</sup>. In other words there is a need to strike a balance between public policy interests militating in favour of any such restriction and the individual's access to a court which may be frustrated thereby.

Freedoms such as those of expression and association are subject to express restrictions in so far as such restrictions are necessary in a democratic society. In connection with the freedom of association under Article 11 of the Convention, in the case of **Refah Partisi and Others v. Turkey**<sup>218</sup> a Chamber of the Court concluded that the grounds cited by the Turkish Constitutional Court to justify the dissolution of Refah, an Islamic party, were relevant and sufficient and that the interference complained of was necessary in a democratic society. Refah had, so the Court found, declared their intention of

<sup>214</sup> X v the United Kingdom, 5.11.1980, Series A no. 46, § 45.

<sup>215</sup> Fox, Campbell and Hartley v. the United Kingdom, 30.8.1990, Series A no. 182, §§ 32 and 34.

<sup>216</sup> Golder v. the United Kingdom, 21.2.1975, Series A no. 18, § 35.

<sup>217</sup> Z and Others v. the United Kingdom, 10.5.2001, ECHR 2001-V, § 93.

<sup>218</sup> Judgment of 31.8.2001.

setting up a plurality of legal systems and introducing Islamic law (the sharia) and had adopted an ambiguous stance with regard to the use of force to gain power and retain it. The majority in the seven-Judge Chamber was 4-3. The dissent within the Chamber was, however, based more on the strength of the evidence that Refah's aims were anti-democratic, than any disagreement about the general principles applicable. These were in particular that there can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious and that, as it is a function of written law to establish distinctions on the basis of relevant differences, the rule of law cannot be sustained over a long period of time if persons governed by the same laws do not have the last word on the subject of their content and implementation.

The Court accepted that a political party might campaign for a change in the law or the legal and constitutional basis of the State on two conditions: first that the means used to that end must in every respect be legal and democratic and, second, that the change proposed must itself be compatible with fundamental democratic principles. It followed that a party whose leaders incited recourse to violence or proposed a policy that did not comply with one or more of the rules of democracy or was aimed at the destruction of democracy and at infringement of the rights and freedoms granted under democracy could not lay claim to the protection of the Convention. The case is now pending before the Court's Grand Chamber of seventeen Judges and we must wait for its judgment to see whether the Chamber's ruling is confirmed.

If one of the main roles of human rights law is to maintain balance in a democratic society, that clearly includes striking the right balance between, on the one hand, appropriate measures to protect democratic society against genuine threats and, on the other, disproportionate repression. The current debate on terrorism focuses on this problem. Terrorism, as indeed violence in general, raises two fundamental issues which human rights law must address. Firstly, it strikes directly at democracy and the rule of law,

the two central pillars of the European Convention on Human Rights. It must therefore be possible for democratic States governed by the rule of law to protect themselves effectively against terrorism; human rights law must be able to accommodate this need. The European Convention should not be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law. Moreover, as the European Court of Human Rights has held, Convention States have a duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within their jurisdiction<sup>219</sup>. Some compromise may then be necessary, as the Court has recognised, between the requirements for defending democratic society and individual rights<sup>220</sup>. It would run counter to the fundamental object and purpose of the Convention, for national authorities to be prevented from making a proportionate response to such threats in the interests of safety of the community as a whole.

But the second way in which terrorism and violence challenge democracy and human rights law is by inciting States to take repressive measures, thereby insidiously undermining the foundations of democratic society. Our response to terrorism has accordingly to strike a balance between the need to take protective measures and the need to preserve those rights and freedoms without which there is no democracy. At the same time and from a wider perspective, it is precisely situations in which there is a lack of respect for human dignity, a lack of effective human rights protection, which breed terrorism. Efforts to prevent the spread of international terrorism should therefore embrace the aims of international human rights law. Limitations must moreover never be so broad as to impair the very essence of the right in question; they must, in Strasbourg terms, also pursue a legitimate aim and bear a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. Looking at the question of balance in this context one needs to ask whether there are

<sup>219</sup> See most recently, *Pretty v the United Kingdom*, 29.4.2002, ECHR-2002, § 38.

<sup>220</sup> *Klass and Others v. Germany*, see note 3 above, § 59.

techniques which can be employed which accommodate legitimate security concerns and yet accord the individual a substantial measure of procedural justice<sup>221</sup>. It should not in any event be possible for the national authorities to free themselves from effective control by the domestic courts, or ultimately international jurisdiction, simply by asserting that national security and terrorism are involved. As the Court has recently confirmed in **Al-Nashif v. Bulgaria**, “even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence<sup>222</sup>. An individual must be able to challenge the executive’s assertion that national authority is at stake<sup>223</sup>. On the other hand, the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism<sup>224</sup> .

One well-known principle of the Strasbourg case-law is that the European Convention on Human Rights is a “living instrument”, that is to say that it is interpreted “in the light of present day conditions”, that it evolves, through the interpretation of the European Court of Human Rights (and formerly the Commission of Human Rights), to take account of changes in social and moral attitudes and technological developments. Convention terms have not remained frozen in the meaning which might most obviously have been attributed to them in 1950; had they done the Convention would have lost a part of its relevance. If this principle of dynamic interpretation was first enounced in relation to corporal punishment following criminal proceedings<sup>225</sup>, in the **Tyrer** case, it has received its most frequent expression in relation to Article 8. This is hardly surprising not only because of the breadth of the

<sup>221</sup> See for example *Chahal v. the United Kingdom*, 15.11.1996, Reports 1996-V, § 131.

<sup>222</sup> *Al-Nashif v. Bulgaria*, 20.6.2002, § 123.

<sup>223</sup> *Ibid.*, § 124.

<sup>224</sup> *Fox, Campbell and Hartley, v. the United Kingdom*, cited above note 3, § 34.

<sup>225</sup> *Tyrer v. the United Kingdom*, 25.4.1978, Series A no. 26, § 31

interests covered by Article 8, that is private and family life, correspondence and home, but also because it is precisely those interests which are most likely to be affected by changes in society. In a dynamic instrument, Article 8 had proved to be the most elastic provision. Thus it has embraced such matters as the taking of children into care, nuisance caused by a waste treatment plant, planning issues, aircraft noise, transsexuals' rights, corporal punishment in schools, data protection, access to confidential documents relating to an applicant's past in the care of the public authorities, the choice of a child's first name, application of immigration rules, disclosure of medical records and I could go on; the list is a long one.

The breadth of the potential scope of the interests protected by Article 8 has thus been an advantage in allowing the development of the Court's case-law in this area to keep pace with the modern world. It is, however, something of a disadvantage when Governments are seeking to establish exactly what is expected of them under the Convention. This is all the more so, because in one of its earliest judgments concerning Article 8<sup>226</sup> in the famous case of **Marckx v. Belgium**, the Court made it clear that in addition to the obligation to abstain from arbitrary interference with the protected interests, the State authorities could be under a positive obligation to ensure effective "respect" for those interests. In the context of that case, which concerned the status of a child born out of wedlock, the Court noted that respect for family life implied in particular "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his [or her] family". Moreover, such positive obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves<sup>227</sup>.

Whether the obligation imposed on the State is primarily negative or positive, the right to respect is not absolute. In common with the

<sup>226</sup> *Marckx v. Belgium*, 13.6.1979, Series A no. 31, § 31.

<sup>227</sup> *X and Y v the Netherlands*, 26.3.2000, Series A no. 91, § 23.

other Articles of the Convention dealing with “the freedoms”, Articles 9, 10 and 11, the Convention accepts that under paragraph 8 § 2 restrictions may be imposed on the exercise of these rights. Thus, in regard to the negative obligation, in order to satisfy the requirements of Article 8 § 2, interference by a public authority must be “in accordance with the law”, must pursue one of the legitimate aims set out in the paragraph and must be “necessary in a democratic society”. In determining what is necessary in a democratic society in this field, as in others, Contracting States enjoy a margin of appreciation, or area of discretion, whose justification is, as I have suggested, both practical and theoretical.

As with Articles 9 to 11 of the Convention the margin of appreciation will vary according to the context. Thus for example, with respect to family life, the Court recognises that national authorities enjoy a wide margin of appreciation in assessing the necessity of taking children into care, but calls for stricter scrutiny in respect of any further limitations such as restrictions on parental rights and access. As regards respect for the home the Court again accepts that national authorities in principle enjoy a wide margin of appreciation in the implementation of planning decisions. The scope of the margin of appreciation depends on such factors as the nature of the Convention right in issue, its importance for the individual and the nature of the activities concerned.

Whether at national level or in Strasbourg, the assessment of whether a measure is necessary in a democratic society is essentially a question of balancing the individual’s interest against that of the community. Where what is in issue is the existence of a positive obligation, much the same balancing exercise has to be carried out. As the Court has pointed out, in determining whether or not a positive obligation exists “regard must be had to the fair balance that must be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention.”<sup>228</sup> The Court has indeed made clear that the boundaries between the States’

<sup>228</sup> *Cossey v. the United Kingdom*, 27.9.1990, Series A no. 148, § 37.

positive and negative obligations do not always lend themselves to precise definition. In both cases regard has to be had to the competing interests of the individual and the community as a whole, and in both cases the State enjoys a certain margin of appreciation<sup>229</sup>.

A line of cases on transsexuals' rights are interesting in that they shed light on the evolutive process of interpretation of the Convention. The essence of the applicants' complaints has been that the respondent States in question have failed to take positive steps to modify a system which operates to their detriment, the system being that of birth registration. Carrying out its usual exercise of seeking a fair balance between the general interest and the interests of the individual, the Court had until last year, by a small and dwindling majority and with one exception distinguished on the facts<sup>230</sup>, found that there was no positive obligation for the respondent State to modify its system of birth registration so as to have the register of births updated or annotated to record changed sexual identity<sup>231</sup>.

However, the Court never closed the door on the possibility of requiring legal recognition of new sexual identity. It has reiterated the need for Contracting States to keep the question under review. In a case decided in 1998, it acknowledged the increased social acceptance of transsexualism and increased recognition of the problems which post-operative transsexuals encounter. In order to determine whether it should revise its case-law, the Court has looked at two aspects: scientific developments and legal developments. As to scientific developments, it confirmed its view that there remained uncertainty as to the essential nature of transsexualism and observed that the legitimacy of surgical intervention was sometimes questioned. There had not been any findings in the area of medical science which settled conclusively

<sup>229</sup> X, Y and Z v. the United Kingdom, 22.4.1997, Reports 1997-II, § 41.

<sup>230</sup> B v. France, 25.3.1992, Series A no 232-C.

<sup>231</sup> Rees v. United Kingdom, 17.10.1986, Series A no. 106; Cossey v. the United Kingdom, 27.9.1990, Series A no. 184; Sheffield and Horsham v. the United Kingdom, 30.7.1998, Reports 1998-V.

the doubts concerning the causes of the condition of transsexualism. The non-acceptance by the respondent State of the sex of the brain as being the crucial determinant of gender could not be criticised as unreasonable<sup>232</sup>.

Looking at the legal development, the Court examined the comparative study that had been submitted by a human rights organisation. It was not satisfied that this established the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular there was no common approach as to how to address the repercussions which such recognition might entail for other areas of law such as marriage, filiation, privacy or data protection.

In the case of **Goodwin v. the United Kingdom**<sup>233</sup> decided last year however, the Court finally reached the conclusion that the fair balance now tilted in favour of legal recognition of transsexuals. It recalled that it had to have regard to the changing conditions within the respondent State and within Contracting States generally and to respond to any evolving convergence as to standards to be achieved. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. In this case the Court attached less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed by transsexualism than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals, but of legal recognition of the new sexual identity of post-operative transsexuals. No concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from the changes to the status of transsexuals. Society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with sexual identity chosen by them at great personal cost.

<sup>232</sup> Sheffield and Horsham, § 55.

<sup>233</sup> Goodwin v. the United Kingdom, 11.7.2002.

The Court is understandably wary of extending its case-law on positive obligations. It has first to be convinced not only that there has been a clear evolution of morals, but that this evolution, where appropriate substantiated by an accompanying evolution of scientific knowledge, is reflected in the law and practice of the majority of the Contracting States. The Court will then interpret the terms of the Convention in the light of that evolution. It is not, I would say, the Court's role to engineer changes in society or to impose moral choices.

Another, rather different example, of the living instrument approach can be seen in the case of **Stafford v. the United Kingdom**<sup>234</sup>, where the Court revised its earlier finding that mandatory life sentences for murder in the UK constituted punishment for life. The applicant had been convicted of murder and released on licence after completing the punitive element or tariff of his sentence. He was subsequently convicted and sentenced for an unconnected, non-violent offence. His continued detention after completing the second sentence under the first mandatory life sentence was found to be in breach of Article 5 § 1. Although the Court found that there was no material distinction on the facts between Stafford and the earlier case<sup>235</sup>, having regard to the significant developments in the domestic sphere, it proposed to re-assess "in the light of present-day conditions" what was now the appropriate interpretation and application of the Convention. This was necessary to render the Convention rights practical and effective, not theoretical and illusory. Thus the Court had regard to the changing conditions and any emerging consensus discernible within the domestic legal order of the respondent Contracting State. It found that there was not a sufficient causal connection between the applicant's continued detention and his original sentence for murder. The Court also held that there had been a breach of Article 5 § 4 in that the power of decision concerning the applicant's release lay with a member of the executive, the Home Secretary, who could reject the parole board's recommendation. In other

<sup>234</sup> *Stafford v. the United Kingdom*, 28.5.2002, ECHR 2002-IV.

<sup>235</sup> *Wynne v. the United Kingdom*, 18.7.1994, Series A no. 294-A.

words the lawfulness of the applicant's continued detention was not reviewed by a body with a power to order his release or with a procedure containing the necessary judicial safeguards.

The Court drew attention to another aspect namely the separation of powers and the difficulty of reconciling the power of a member of executive to fix the punitive element of a prison sentence and to decide on a prisoner's release with that notion, which had assumed a growing importance in the case-law of the Court. In another British case, concerning the release of persons detained in a mental hospital<sup>236</sup> the power to order release lay with the Secretary of State. The decision to release would therefore be taken by a member of the executive and not by the competent tribunal. This was not a matter of form but impinged on the fundamental principle of separation of powers and detracted from a necessary guarantee against the possibility of abuse.

The question of the separation of powers or more specifically the independence of the judiciary has arisen in other contexts. Last year the Court found a violation of the fair trial guarantee in the Ukrainian case of **Sovtransavto Holding** in which there had been in the domestic proceedings numerous interventions of the Ukrainian authorities at the highest level. Such interventions disclosed a lack of respect for the very function of the judiciary<sup>237</sup>. The Strasbourg Court has itself had on occasion to remind Governments of the special character of its judicial function, which should command the same respect owed to a national judiciary and to which the doctrine of the separation of powers also applies *mutatis mutandis*.

Another recurring theme in the Court's case-law is the notion of human dignity which lies at the heart of many of the Convention guarantees. So the Court held last year in **Kalashnikov v. Russia** that a State must ensure that a person is detained in prison in conditions which are compatible with respect for his human

<sup>236</sup> Benjamin and Wilson v. the United Kingdom, 26.9.2002.

<sup>237</sup> **Sovtransavto Holding v. Ukraine**, 25.7.2002.

dignity. The manner and execution of the measure should not subject him to distress and hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. Moreover the absence of any positive intention to humiliate or debase the detainee, although a factor to be taken into account, could not exclude a finding of inhuman and degrading treatment prohibited by Article 3 of the Convention<sup>238</sup>.

Human dignity was at issue in other cases in 2002. Early in the year a Chamber of the Court had a particularly poignant case to decide in which human dignity was in issue.<sup>239</sup> The applicant, Mrs Pretty, a British national in the terminal stages of motor neurone disease, had sought an undertaking from the Director of Public Prosecutions that her husband would not be prosecuted if he assisted her to commit suicide. The applicant claimed that this refusal infringed, among other things, her right to life under Article 2 of the Convention, the prohibition of inhuman or degrading treatment under Article 3 and the right to respect for private life under Article 8.

The Court was not persuaded that “the right to life” guaranteed in Article 2 could be interpreted as involving a negative aspect. Article 2 was, the Court held, unconcerned with issues to do with the quality of living or what a person chose to do with his or her life. Article 2 could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

The Court accordingly found that no right to die, whether at the hands of a third person or with the assistance of a public authority, could be derived from Article 2 of the Convention.

<sup>238</sup> Kalashnikov v. Russia, 15.7.2002.

<sup>239</sup> Pretty v. the United Kingdom, 29.4.2002, ECHR 2002, § 38.

Looking at Article 3 the Court considered that it could be described in general terms as imposing a primarily negative obligation on States to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise. Thus for example the suffering which flowed from naturally occurring illness, physical or mental, might be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible<sup>240</sup>.

In the case before the Court, it was beyond dispute that the respondent Government had not, themselves, inflicted any ill-treatment on the applicant. Nor was there any complaint that the applicant was not receiving adequate care from the State medical authorities. The applicant claimed rather that the refusal of the authorities to give an undertaking not to prosecute her husband disclosed inhuman and degrading treatment for which the State was responsible. This sought to place a new and extended construction on the concept of treatment, which went beyond the ordinary meaning of the word. Article 3 had to be construed in harmony with Article 2, which hitherto had been associated with it as reflecting basic values respected by democratic societies. As the Court had already held, Article 2 of the Convention was first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being and did not confer any claim on an individual to require a State to permit or facilitate his or her death. The positive obligation on the part of the State which was invoked would require that the State sanction actions intended to terminate life, an obligation that could not be derived from Article 3 of the Convention.

The Court nevertheless noted, in its consideration of the complaint under Article 8, that the very essence of the Convention was respect for human dignity and human freedom. In an era of

<sup>240</sup> See for example *D. v. the United Kingdom*, 2.5.1997, Reports 1997-III.

growing medical sophistication combined with longer life expectancies, many people were concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with strongly held ideas of self and personal identity. The Court was not prepared to exclude that the circumstances of the case could give rise to an interference with the right to respect for private life.

This meant that that under the second paragraph of Article 8 the Court had to determine the necessity of such interference. It found that States were entitled to regulate through the operation of the general criminal law activities which were detrimental to the life and safety of other individuals. The law in issue was designed to safeguard life by protecting the weak and vulnerable and especially those who were not in a condition to take informed decisions against acts intended to end life or to assist in ending life. It was primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. The contested measure could be justified as “necessary in a democratic society”.

This sensitive and difficult case provides a further example of the Court’s cautious approach to the living instrument doctrine in areas which are still the matter of intense legal, moral and scientific debate. It also reminds us that there are areas of action within which States must retain a degree of discretion both as the local authorities best placed to carry out certain assessments and also in accordance with the principles of a democratic society.

Dignity in the context of personal autonomy also played a part in the Court’s reasoning in the British transsexual case, Christine Goodwin, to which I have already referred. In that case the Court repeated its statement that respect for human dignity and human freedom was the very essence of the Convention. Protection was given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.

I have concentrated briefly on three aspects of the Court's case-load in 2002, evolutive interpretation, separation of powers and human dignity. It goes without saying that this is a mere glimpse of the Court's recent activity, even if the themes are recurring and fundamental ones. The sheer volume of the Court's case-load brings with it its own problems.

This brings me to some figures. The Court has currently some 30,000 applications pending before its decision bodies. An audit carried out in 2001 by the Council of Europe Internal Auditor predicted over 20,000 applications annually by 2005. Our own figures suggest an even steeper rise. In 2001 we registered some 14,000 applications. Applications have increased by around 130% since the present Court took office in November 1998, by about 1,400% since 1988. The potential for growth is almost unlimited as a result of the expansion of the Council of Europe over the last decade and this situation will be compounded when new member States ratify. Moreover, the evolution of case-load is not merely quantitative. The nature of the cases coming before the Court inevitably reflects the changed composition of the Council of Europe with a significant number of States which are still in many respects, and particularly with regard to their judicial systems, in transition, even if considerable progress has been made in some of them. In such States there are likely to be structural problems, which cannot be resolved overnight.

I am now more than ever convinced that, only just over four years after the radical reform of the Convention mechanism implemented by Protocol No. 11, replacing the two original institutions by a single judicial body, the system is in further need of a major overhaul.

That is why we should now be looking for a mechanism not only for the expeditious and cheap disposal of applications which do not satisfy the admissibility requirements, but also to relieve the Court of routine, manifestly well-founded cases and indeed beyond that cases which do not raise an issue in the sense that the issue of principle has already been resolved. If the obligation for a respondent State arising from a finding of a violation of the Convention is the elimination of the causes of the violation to

prevent its repetition, then subsequent applications whose complaint derives from the same circumstances should be seen as problem of execution. This is particularly true of violations of a “structural” nature<sup>241</sup>.

Once the Court has established the existence of a structural violation or an administrative practice, is the general purpose of raising the level of human rights protection in the State concerned really served by continuing to issue judgments establishing the same violation? Here we see the conflict between general interest and individual relief at its clearest. If individual relief is the primary objective of the Convention system then of course in the situation described the Court must continue to give judgments so as to be able to award compensation to the individual victim. Yet if we look at the scheme for just satisfaction set up by the Convention under Article 41, we can see that it hardly supports the individual relief theory. To begin with it is discretionary as the Court is to award satisfaction “if necessary”. The Court’s case-law shows that it is indeed not the automatic consequence of a finding of violation. Hence the Court’s well-established practice of holding in appropriate cases that a finding of a violation is in itself sufficient just satisfaction<sup>242</sup>. This is surely also an indication of the “public-policy” nature of the system.

But let us take a concrete example. The Court found as I have said a violation of Article 3 prohibiting inhuman and degrading treatment in respect of prison conditions in Russia and the evidence adduced by the Government itself indicated that this was a widespread situation throughout the State concerned. It has to be asked whether there would be a great deal of sense in the Court’s processing the potentially tens of thousands of applications brought by detainees in similar conditions? Would the award of the no doubt quite substantial compensation on an individual basis, always supposing that the Court was able to deal with the cases concerned, hasten the resolution of the problem, contribute to the elimination

<sup>241</sup> See *Botazzi v. Italy*, 28.7.1999, ECHR 1999-V.

<sup>242</sup> The first time this formula was used was in *Golder v. the United Kingdom*, 21.2.1975, Series A no. 1975.

of the causes of the original violation? Very probably not and particularly if it is considered that one of the causes may well be a lack of funding. At the same time it would undermine the credibility of the Court for it to continue to issue findings of violations with no apparent effect.

The inflow of thousands of same issue cases would clog up the system almost irremediably. This might lead to judgments delivered five, six years or more after the lodging of the application. Not only is this sort of delay unacceptable, it also complicates the execution process because Governments can claim that the situation represented in the judgment no longer reflects the reality. I cite prison conditions, but the same problem could, indeed undoubtedly will, arise in relation to structural dysfunction in the operation of legal systems in some contracting States. We have already a foretaste of this with length of proceedings in Italy. We now realise that about half the Contracting States have problems with the length of judicial proceedings; we also know that there are in many of them grave difficulties with regard to the non-execution of final and binding judicial decisions.

It does therefore seem to me that the way forward is to make it possible for the Court to concentrate its efforts on decisions of “principle”, decisions which create jurisprudence. This would also be the best means of ensuring that the common minimum standards are maintained across Europe. The lowering of standards is often cited in European Union circles as a potential consequence of the enlargement of the Council of Europe. Examination of the cases decided over the last three years belies this fear. Yet there is a risk in the longer term, a risk that can be avoided if the Court adheres to a more “constitutional” role as I have advocated.

With many thousands of applications being brought annually the right of individual application will in practice be in any event seriously circumscribed by the material impossibility of processing them in anything like a reasonable time. Will we really be able to claim that with say 30,000 cases a year, full, effective access can be guaranteed? Is it not better to take a more realistic approach to the

problem and preserve the essence of the system, in conformity with its fundamental objective, with the individual application being seen as a means to an end, rather than an end in itself, as the magnifying glass which reveals the imperfections in national legal systems, as the thermometer which tests the democratic temperature of the States? Is it not better for there to be far fewer judgments, but promptly delivered and extensively reasoned ones which establish the jurisprudential principles with a compelling clarity that will render them *de facto* binding *erga omnes*, while at the same time revealing the structural problems which undermine democracy and the rule of law in parts of Europe?

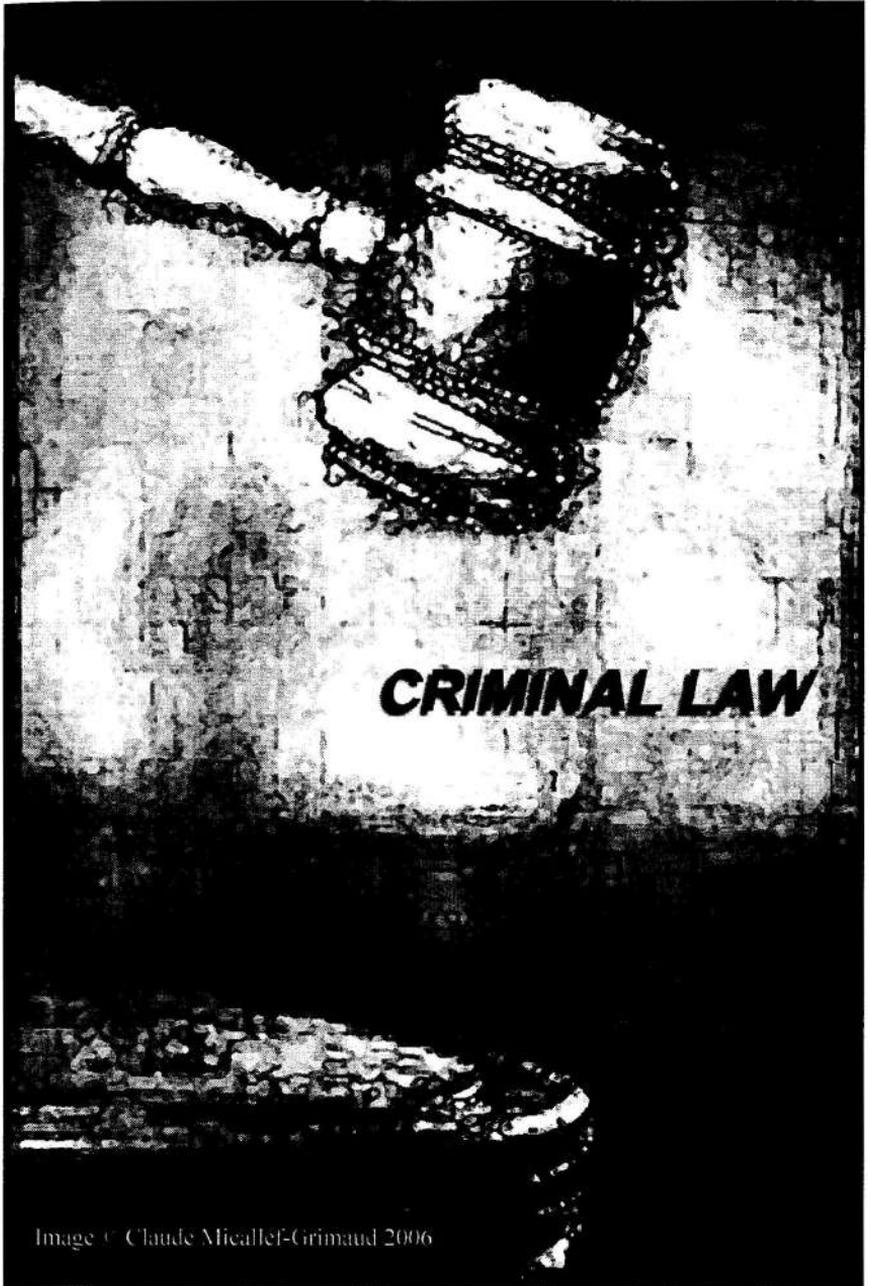
This brings me back to my opening comment about the fundamental goal of the Convention system. That system will never provide an adequate substitute for effective human rights protection at national level; it has to be complementary to such protection. It should come into play where the national protection breaks down, but it cannot wholly replace national protection or even one area of national protection. Apart from anything else, although the Convention is about individuals, it is not only about the tiny proportion of individuals who bring their cases to Strasbourg, and it will never be more than a tiny proportion.

As long as we remain too wedded to the idea of purely individual justice, we actually make it more difficult for the system to protect a greater number. At the same time I keep in my mind two images from last year: a dying woman in a wheelchair whose first and last trip abroad was to the hearing of her case in Strasbourg, whose own dignity and courage provoked universal admiration. The second image was also that of a woman, but one who had been born a man and whose suffering over many years although on a different level it is difficult for most of us to imagine. She came, with her adult children, to the public delivery of the Court's judgment and again impressed by her quiet dignity and apparent serenity.

**Luzius Wildhaber**  
16 January 2003







***CRIMINAL LAW***

Image © Claude Micallet-Grimaud 2006



## Money Laundering

### **Lawyers as Policemen – the Prevention of Money Laundering Regulations**

**Dr. Frank Chetcuti Dimech**

M.A. (Fin. Serv.), LL.D.<sup>243</sup>

I have heard that the first person to be convicted of money laundering in Malta was the drug dealer who, upon being gently interrogated by the Police about the provenance of reasonably large amounts of cash deposited in a safe custody box with a bank, answered “Sir, where else could I have safely concealed all the money I made from selling drugs?”. Now that was an easy case – for the prosecution of course. Unfortunately however, money laundering activities are usually much more complex and yes, it has been acknowledged by the most authoritative international voice on money laundering – the Financial Action Task Force – that lawyers too may be “gatekeepers for money laundering”.

From 1 December 1994, when money laundering became a criminal offence, up to the entry into force of Legal Notice 199 of 2003 on 12 August 2003, if a lawyer had to be concerned about money laundering it was usually because he was either an adviser to a financial organisation or else required to defend his client – hopefully not as gullible as the one referred to previously - before the criminal courts. The Prevention of Money Laundering Regulations 2003, which substitute the 1994 Regulations, classified lawyers and other independent legal professionals such as legal procurators, as “subject persons” for the purposes of the Regulations. Lawyers were joined in the 2003 list by auditors, external accountants, tax advisors, notaries, nominee companies and licensed nominees, casinos, real estate agents and dealers in precious stones or metals or works of art or similar goods and

<sup>243</sup> CDF Advocates ([www.cdf.com.mt](http://www.cdf.com.mt))

auctioneers when the payment is made in cash in an amount of Lm5,000 or more. All these professions or activities, together with the “traditional” subject persons such as banks, stockbrokers and insurance intermediaries, have significant onerous duties in the law’s conception of the fight against money laundering.

We should however be thankful that the catchment area of the regulations does not affect all our work as lawyers. In fact in the case of notaries, lawyers and other legal professionals, the Regulations only apply in relation to assisting in the planning or execution of transactions for their clients concerning the (i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act, (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of trusts, companies or similar structures; or (vi) by acting on behalf of and for their client in any financial or real estate transaction. Furthermore lawyers who have the status of employees in an undertaking that is not in the business of providing legal advice to third parties are not caught by the Regulations.

If you are a lawyer operating within the Regulations’ net there are several things you should be doing. The first is of course to know what money laundering is exactly. The offence of money laundering is linked to an underlying criminal activity, the proceeds of which are being passed into the financial system. Before the amendments introduced by Legal Notice 176 of 2005 and Act VI of 2005, the underlying criminal activity needed to amount to a specific crime,<sup>244</sup> but since those amendments, intended to align

<sup>244</sup> A crime specified in Article 3(1)(a) of the Vienna Convention (namely drug dealing) or else a crime which was listed in the Second Schedule to the Act, namely drugs, illegal dealing in arms and armaments, trafficking in humans, piracy, illegal arrest, wilful homicide and grievous bodily harm, blackmail, crime affecting public trust, theft, fraud, a crime against the Customs Ordinance, the Official Secrets Act, the Arms Ordinance, the Central Bank of Malta Act, the Exchange Control Act or a crime which constitutes a “corrupt practice” in terms of Chapter 326.

Maltese law with the provisions of the European Union's Third Money Laundering Directive, "any criminal offence" is sufficient for the purposes of the definition of underlying criminal activity.

Legal Notice 42 of 2006 which came into force on 21 February 2006 (hereinafter referred to as the "2006 amendments") further extended the 2003 Regulations. It incorporated into Maltese law some of the principles contained in a number of international reference documents such as the revised Recommendations and Special Recommendations of the Financial Action Task Force and the Basle Committee papers on Customer Due Diligence.

The main thrust of the 2006 amendments was a widening of the scope of the legislation. The Regulations have been specifically extended also to cover the "funding of terrorism". Hence the funding of terrorism is covered by the law irrespective of whether there is actual money laundering involved. The title of the Regulations has been amended to reflect this as have been a number of other sections throughout the Regulations. The funding of terrorism has been defined by reference to the Criminal Code specifically the conduct referred to in Sections 328F to 328I both inclusive.

The Regulations impose four distinct duties on lawyers as "subject persons", namely: identification, internal record keeping, reporting and training.

### **Identification**

Identification of the client, or the "applicant for business", is generally always required unless the applicant for business is itself a subject person or is introduced by a subject person who can give assurance that he has identification records, but in the latter cases identification must still be effected if there is any suspicion of money laundering. Identification must be carried out as soon as is reasonably practical after contact is first made with client. It is obligatory to keep a copy of the identification document on file. Furthermore the Regulations require a subject person to be able to

establish the business profile of an applicant for business. The identification process must be repeated if doubts have arisen or changes have occurred during the business relationship. The Regulations also oblige subject persons to examine with special attention any complex or large transactions and any transactions which are particularly likely, by their very nature, to be related to money laundering.

The process of verification of identity was embedded into the Regulations by virtue of the 2006 amendments. This increases the need for investing in specialised software which enables subject persons to easily conduct searches on the profile of prospective investors. Such software, although not cheap to buy, is nevertheless becoming nearly indispensable to conduct a suitable verification and customer due diligence process, especially for lawyers whose business has a substantial international dimension.

If the client is acting on behalf of a third party, both the client and the third party must be identified. If the client is a body corporate, identification must be obtained for all the directors and all shareholders holding more than 25% (10% prior to the 2006 amendments). The need for identification of shareholders and/or beneficial owners is not necessary in the case of a company listed on a recognised stock exchange, a domestic public authority, a state corporation, or any other category of customers where such customers present a low risk of money laundering or the funding of terrorism as may be determined by the FIAU.

If the shareholding is held under a trust, nominee or other fiduciary arrangement, identification of the underlying beneficial owners is also required. In fact nominees or trustees are now required to disclose the underlying beneficiary's identity to a subject person. The old Regulation 7(5), which allowed a nominee to merely assure identification was removed in 2003. Insurance policies with respect to a pension scheme are exempt from the identification requirements provided the policy does not contain a surrender clause and may not be used as collateral for a loan.

In 2006 the concept of acting as a fiduciary has been widened so as to cover also any applicant for business who is acting on behalf of a body corporate, a body of persons, trust or any other form of legal entity or arrangement in which there is a qualifying interest of 25% held by a fiduciary.

The 2006 amendments have further reinforced the duties associated with identification, by integrating it into what is known as “customer due diligence”. Special attention must be given to business relationships and transactions with persons, companies and undertakings, including those carrying out relevant financial business or a relevant activity, from a non-reputable jurisdiction. A jurisdiction is classified as being reputable not only if it has legislative measures to combat money laundering but also to combat terrorism funding.

Regulation 5B, added in 2006, imposes a new duty on subject persons which was based on a recommendation of the Basle Committee which was also endorsed by the FATF. Subject persons are now bound to develop and establish effective customer acceptance policies and procedures that are not restrictive in allowing the provision of financial and other services to the public in general but that, as a minimum, include:

- (a) a description of the type of customer that is likely to pose higher than average risk;
- (b) the identification of risk indicators such as the customer background, country of origin, business activities, linked accounts or activities and public or other high profile positions; and
- (c) the requirement for an enhanced customer due diligence for higher risk customers.

This process, known as the “risk-based approach”, is particularly onerous and hence the legislator has allowed for the FIAU to determine that certain subject persons may apply simplified measures where the risk of money laundering or terrorism funding

appears low and where adequate check and controls are applied. However such simplified measures may not be utilised in cases of suspicion.

The 2006 amendments also introduced Regulation 5C which puts a special focus on Politically Exposed Persons (PEPs) namely “natural persons who are or have been entrusted with prominent public functions and shall include their immediate family members or persons known to be close associates of such persons, but shall not include middle ranking or more junior officials”.

The adoption of a Customer Acceptance Policy must enable subject persons to be able to establish whether an applicant for business is in effect a politically exposed person. When a PEP residing in another country applies for business with a subject person approval of this must be given by the senior management of the organization. Moreover the subject person must conduct ‘ongoing monitoring’ of the relationship with such a PEP so as to establish the source of wealth and funds that are involved in his transactions.

### **Record keeping**

Records of identity and records of details of transactions must be maintained for a period of five years. The identification requirements of the Regulations only apply to business relationships formed after their coming into force. However if a doubt has arisen or there have been changes in the established business relationship, the identification process must be carried out in accordance with the new Regulations.

All subject persons are to ensure that all customer identification, due diligence records and transaction records and information are made available on a timely basis to the FIAU and to other relevant competent authorities, for the purposes of the prevention of money laundering and the funding of terrorism.

## **Reporting**

Every law firm or sole practitioner must designate a reporting officer who is to exercise judgement as to whether facts reported to him do give rise to a suspicion of money laundering. The reporting officer can be (but in virtue of a clarification introduced in 2006 need not be) an employee and not necessarily a lawyer himself. This so called Money Laundering Reporting Officer (MLRO) is obliged to report to the Financial Intelligence Analysis Unit (FIAU) when he is of the “opinion that the information indicates that any person has or may have been engaged in money laundering”. Any information so disclosed can only be used in connection with investigations of money laundering activities. This however does not mean that the information will be used only to investigate the particular report itself, and it will most certainly be retained by the FIAU for other and future money laundering investigations.

This radical change for the legal profession has therefore also shaken the lawyer-client privilege of secrecy. Whilst any reporting made pursuant to the Regulations is covered by a statutory exemption from breach of professional secrecy, reporting is also not required if the information which indicates that a client has or may have been engaged in money laundering is received or obtained by the lawyer in the course of ascertaining the legal position for the client or defending or representing the client in or concerning judicial proceedings, including advice on instituting or avoiding proceedings.

Disclosure to the FIAU in case of suspicion is to be effected by not later than 3 working days from when the suspicion first arose. A time frame has also been established for subject persons to disclose information requested by the FIAU. Upon a demand of the FIAU subject person have to submit such information by not later than 5 working days from when the demand was first made. A request to extend such time is at the discretion of the FIAU.

## **Training**

The fourth obligation involves providing employees from time to time with training in the recognition and handling of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering.

## **Breach of the Regulations**

Getting caught unprepared for these obligations is not an easy ride. Failure to comply with the money laundering regulations is a criminal offence punishable on conviction with a fine not exceeding Lm20,000 and/or imprisonment not exceeding 2 years. The same music is faced by committing the offence of “tipping-off” namely disclosing that a reporting has been raised or that an investigation is being carried out to any person except the internal MLRO or the FIAU.

In determining whether a subject person is complying with the Regulations, it is mandatory (as from the 2003 amendments, before which it was merely optional) for a court to consider any guidance given by the Financial Intelligence Analysis Unit (FIAU) with the concurrence of a supervisory authority, and failing such guidance, any other guidance issued by a body which regulates, or is representative of any trade, profession, business or employment carried on by that subject person. Indeed a new regulation gives the FIAU the power to issue procedures for any subject person and such procedures are binding as the law itself.

By virtue of the 2006 amendments, the non-observance of the time frames for the submission of information to the FIAU discussed above now can lead to an administrative penalty of not less than Lm100 and not more than Lm1000 which may be imposed by the FIAU, without recourse to a court hearing and either as a one-time penalty or on a daily basis, however not accumulating to more than Lm5,000.

## **Conclusion**

While complying with the Regulations is no easy task, it is also fair to state that lawyers are reasonably equipped, by virtue of their training and the nature of their profession, to know their customer very well. The Know Your Customer or KYC concept is possibly the most important concept underpinning compliance with prevention of money laundering obligations. If you know your customer well enough you will more easily detect suspicious activity. Once you have the suspicion, and it remains lingering inside your head, there is only one thing left to do – report it. Yes, lawyers have become policemen!

**Frank Chetcuti Dimech**  
19<sup>th</sup> June 2006



## **Combating Money Laundering and Financing of Terrorism; *One for All, All for One.***

**Dr. Silvio Camilleri**  
M.O.M., LL.D.<sup>245</sup>

### **Introduction**

#### **The Phenomena of Money Laundering and Financing of Terrorism**

Until a few years ago no one had heard of money laundering. This does not mean that what today is known as money laundering did not exist at the time. It did exist; because whenever crime generated substantial cash proceeds, the criminal needed to deflect attention from himself as the possible offender and therefore he could not suddenly go around dispensing largesse and spending money for which he could not provide a plausible, lawful explanation. He needed to conceal the origin of his wealth and to give apparent legitimacy to it. In other words he needed to launder his money to make it look clean.

Terrorist acts, especially those having the capability of inflicting mass destruction as that of September 11 2001, in New York, 2002 in Bali, 2003 in Casablanca, March 11 2004 in Spain and that of July 7 2005, in London and the recently uncovered plans in the UK<sup>246</sup>, need to be financed. The techniques to finance terrorism have to date been found not to be very different from the techniques to launder criminal proceeds. The perspective is different. In money laundering, the techniques used are intended to conceal the origin of funds of a criminal source. In the financing of terrorism the same techniques are used to conceal the destination of what could very well be funds of lawful origin.

<sup>245</sup> The current Maltese Attorney General and senior lecturer at the University of Malta.

<sup>246</sup> August 2006

## **Evolution of Measures to Combat Money Laundering and Financing of Terrorism**

The initial analysis of the phenomenon of money laundering revealed that the money launderer made extensive use of the confidentiality and speed of the financial system (and of banks in particular) by depositing considerable amounts of cash which are then wired all around the globe in seconds until all traces of their original illicit source are buried under an intricate web of layers upon layers of complex transactions. As a result - to start with - the measures which were recommended to combat money laundering, targeted banks and non-banking financial institutions.

As these measures took hold however, the danger grew that the money launderer would move away from banks and non-bank financial institutions into other non-financial businesses which could equally serve his purpose such as real estate, dealings in precious metals, antiques, and casinos. Consequently, as shown by the second EU directive, the trend today is to ensure that anti-money laundering measures cover also these businesses as well as persons, who have come to be known as gatekeepers, whose services the money launderer seeks to utilise such as accountants, auditors, lawyers, notaries, company formation agents, etc.

### **Globalization**

Globalization is today the buzz word: not only for trade and the economy, but also for crime and therefore, necessarily, for law enforcement. International co-operation has become indispensable. Crime generates financial assets. Financial assets, however, are also needed to generate the kind of cross-border crime to which the modern world is a witness. Cross-border crime requires a cross-border response.

### **One for all, all for One**

As a result of the cross-border nature of modern crime - in particular of money laundering and terrorist finance - whatever the

measures that may be put in place domestically, it is today generally acknowledged that money laundering and terrorist finance cannot be fought effectively unless each State is at the service of all other States and all States are at the service of each State; *one for all and all for one*. There is no other way. The techniques used for money laundering and terrorist finance are transnational in nature where the delinquent makes use of a plurality of jurisdictions to confound the law enforcement agencies in order to frustrate their attempts to trace the trail of the funds and in that way not only embargo or recover the funds but also identify the beneficiary of the funds and therefore the individual or group of individuals who unlawfully generated those funds or to whom the funds were destined. Each State therefore needs the co-operation of other states in order to succeed in its efforts to trace the various destinations travelled by the laundered funds in transit around the globe. Likewise, each State must be ready to co-operate with other States not only for the sake of reciprocity but also in its own interest not to expose itself to the destabilisation impact on its financial system which the infiltration of criminal assets brings along with it.

## **I. Anti-Money Laundering Tools**

Today the phrase money laundering has almost become a household word. Over these last years, what started as skirmishes against money laundering has developed into a global assault. As a closer analysis contributed to a greater understanding of the phenomenon, this gave rise to a sharpened insight into the nature of the new tools needed to fight it. Among these there are Cash Transaction Reporting, Suspicious Transaction Reporting, Customer Identification and Record Keeping.

### **Cash reporting, Suspicious Transaction Reporting, Customer Identification and Record Keeping**

The above tools are today well known and established. Cash reporting and/or suspicious transaction reporting are today the means which are used by persons or entities bound by the anti-

money laundering regime to trigger the necessary inquiries, investigations and eventual prosecution of suspected money launderers. The relevant report is made to the domestic disclosure receiving agency which is universally known as the *financial intelligence unit* which evaluates the report in the context of its own intelligence resources and decides whether or not further police investigations are justified.

Customer identification and record keeping are meant to ensure that a paper trail of the transaction is maintained so as to ensure the viability of any eventual investigations. It is not of much use to report a cash or suspicious transaction, if the investigating authorities are then confronted with a situation where they are deprived of any means to confirm or exclude the suspicion.

Besides the above internationally established measures, states have also tended to develop and design their own specific measures in consonance with their own legal system to give the investigating and prosecution authorities that arsenal of measures necessary to deprive the offender of the fruit of his criminal endeavour. In Malta these are the investigation, attachment and freezing orders meant to preserve the suspected tainted assets with a view to their confiscation following a successful prosecution.

### **Financial Intelligence Units**

Among the most effective tools that have been developed over the years in order to enable the public authorities to timely detect and investigate suspected money laundering activities, is the financial intelligence unit. This is a specialised unit which embraces within it the required multidisciplinary expertise with a focus on financial dealings to analyse speedily and knowledgeably complex financial transactions. Financial intelligence units have mushroomed prodigiously and at a fast rate worldwide, and the setting up of such a unit on the national level has itself become an international standard.

The financial intelligence unit is today almost universally acknowledged as an indispensable tool to combat money laundering effectively. With a disclosure obligation, an appropriate disclosure receiving agency had to be identified. With growing awareness of the complexity of the devices which were resorted to by criminals in their efforts to launder their proceeds, often with the help of specialised and professional money launderers, the conviction also grew that only a specialised disclosure agency with the necessary financial expertise and access to domestic and international financial intelligence could hope to untangle the web of complex transactions skilfully put in place. A specialised unit would not only be in a better position to analyse transactions. It would also at the same time be in a position to identify methodologies and trends which would help it to propose to interested institutions, indicators and other aids which would help those institutions put in place proper procedures and enhance their capacity to identify money laundering operations. In that way they would be able to respond more effectively to their reporting obligations.

A better understanding of the appropriate features which these disclosure agencies should have was gained in the course of time. Today, it is generally accepted that for the disclosure agency to be effective it should be:

- (i) A central, national agency;
- (ii) Should be responsible for receiving, requesting, analysing and disseminating to competent authorities disclosures of financial information
- (iii) Concerning suspected proceeds of crime as required by national legislation or regulation,
- (iv) With the purpose of combating money laundering.

This is essentially the original definition given by the EGMONT Group of a financial intelligence unit (FIU). The EGMONT Group was formed in 1995 and it informally brings together the disclosure

receiving agencies from all over the world. In response to the 11 September events and the insight obtained on the link between money laundering and the financing of terrorism the EGMONT Group has revised its definition of an FIU in order to extend its remit also to combating the financing of terrorism.

Malta could not fail to set up its own FIU and a law setting up the Financial Intelligence Analysis Unit (FIAU) was enacted in 2001. A Board of governors was appointed and the unit is today fully operational and kept busy evaluating suspicious transaction reports made to it by the subject persons which according to law fall under its remit. It has established itself well not only on the domestic front, but also among the international fraternity of financial intelligence units which quietly and without fuss are daily exchanging intelligence to help each other in their mission of preventing and detecting money laundering. In line with international standards, domestic legislation has continued to expand the scope of the FIAU's operations and consequently the FIAU's remit has today been broadened to include financing of terrorism and as a result has been aligned with the new EGMONT definition of an FIU. It is therefore inevitable that the FIAU will also have to expand logistically by increasing its staff complement and office space in order to discharge effectively its new responsibilities

Again, the legal provisions setting up the FIAU are an eloquent acknowledgement of the fact that fighting money laundering and now also financing of terrorism, must at all times remain a collective, global effort. In fact the FIAU is not merely the designated disclosure receiving agency but the law also provides for extensive possibilities of co-operation and exchange of information between the Maltese FIAU and foreign units having similar powers and functions. This is all a perfect implementation of the requirements of the European Council Directive on co-operation between FIU's of October, 2000 (which requirements were kept in mind when the law was being drafted).

## II. International Standard Setters

### The Financial Action Task Force (FATF)

It was not co-incidental, therefore, that it was as a result of a joint co-operative initiative of a number of states, collectively known as the G7, that the anti-money laundering effort took on a new lease of life with the birth of the *Financial Action Task Force* or FATF which today numbers amongst its members some 31 countries, the European Commission and the Gulf Cooperation Council which represents its members consisting of 6 Arab States of the Gulf. China and the Republic of Korea have observer status while an increasing number of so called FATF-Style regional bodies (i.e bodies having the same mission as FATF to combat money laundering and adopt the same methodologies as FATF) also attend FATF plenaries as observers. These, together, seek to develop international standards to be followed by states in their joint mission to combat money laundering and continue to give guidance to states on ways and means by which money laundering operations can be identified and countered. In 1990 the FATF produced the now-famous 40 recommendations which have gradually assumed the character of an international manifesto against money-laundering with a fully fledged programme of action proposing<sup>247</sup>

- To criminalise money laundering,
- To lay down rules providing for customer identification, record keeping and reporting obligations,
- The lifting of bank secrecy,
- The taking of provisional measures pending investigation,
- The confiscation of the proceeds of money laundering,
- International co-operation,
- Other measures.

<sup>247</sup> These recommendations were revised and expanded in 1996 and again in 2003.

The FATF also pioneered a ground breaking method to harness the resources of the international community in order to ensure, through peer pressure and a process of mutual evaluation, that the anti-money laundering regime of individual states be brought up to scratch. The process proved effective and produced results and really made out of the anti-money laundering effort a co-ordinated and collective enterprise with clear goals and definite benchmarks to be pursued.

Moreover, in October 2001, following the infamous and tragic events of September 11, the FATF quickly and urgently came together in an effort to cut off funds to terrorist activities. It soon emerged that the methods used to conceal the criminal destination of terrorist funds were often similar to those used to conceal the criminal origin of unlawful proceeds and therefore 8 special recommendations on terrorist financing were added to the 40 FATF recommendations. Subsequently, another special recommendation requiring states to have measures in place to detect the cross-border transportation of currency and bearer negotiable instruments was added so that today we have 9 such special recommendations.

### **Other Regional FATF Style Bodies**

But FATF alone could not continue the mutual evaluation process widely enough and quickly enough with the urgency and scope that the extent of transnational crime required. The collective effort had to be enhanced by enrolling the help of other organisational resources. Regional groupings were therefore formed. Today we have the CFATF (the Caribbean FATF), the APG (the Asia/Pacific Group on Money Laundering), the Eurasia Group (EAG), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), we have GAFISUD (the South America grouping), there is also GIABA (the Intergovernmental Group of [West African States] on Anti-Money Laundering in Africa), the Middle East and North Africa Financial Action Task Force (MENAFATF) and there could be others I may have missed. That, however, is certainly an already quite impressive list of organisations and groupings. I listed them to illustrate the global reach which the

anti-money laundering network has today: a network having the mission to help states all over the world to improve their respective anti-money laundering systems.

One regional group I have kept for last is a group of which I am particularly proud and this is not because I have been its Chairman for two consecutive terms, although, of course, there is just the slightest of possibilities that that might have something to do with it. This is:

**The Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (PC-R-EV/MONEYVAL)**

The Select Committee of Experts on the Evaluation of Anti Money Laundering Measures which used to be known by its acronym PC-R-EV but which today is better known as MONEYVAL. The Committee was set up by the Committee of Ministers of the Council of Europe in September 1997 with the primary purpose of conducting self and mutual evaluations of the anti-money laundering systems in Council of Europe states which are not members of the FATF using international standards as a benchmark. Malta was a founding member of the committee.

The evaluation process has proved to be a very effective peer pressure exercise which produces substantial and concrete results. The process involves an element of self-assessment where states are required to reply to questionnaires which seek to focus the attention of state authorities on all aspects which together make up a viable anti-money laundering system. It also entails a very demanding mutual evaluation procedure where a team of legal, financial and law enforcement experts from countries members of MONEYVAL visits another member country and has several hectic face to face meetings with the authorities and institutions of the country to be evaluated and which have a role in the drawing up of legislation, in the supervision of financial and other relevant institutions, and in the investigation, prosecution and adjudication of money laundering offences. The local authorities are subjected to detailed and probing questioning in an effort to obtain a clear

picture of the anti-money laundering situation in the country so that the team will be in a position to draw up conclusions and make recommendations on ways and means to improve the overall regime.

The evaluation team then draws up its report with its recommendations. The country evaluated has an opportunity to rebut or comment on the report which is then exhaustively debated in plenary which approves the report subject to any amendments that may be made.

Members of the Maltese delegation to MONEYVAL have taken part in several such evaluations as part of the evaluation team. The on-site visits are no picnic and they entail a lot of preparation before the visit itself, a lot of alertness and attention to detail during the visit, and long hours of deliberation and perspiration in the drawing up of the final report.

MONEYVAL has also introduced a report-back procedure where the evaluated country will, one year after the report, inform the plenary on the progress registered since the drawing up of the report. Most member countries have reported remarkable progress in implementing the advice given and the recommendations made in the report which they have often found invaluable as assistance to help them improve their anti-money laundering effort.

The first round of evaluations started in April 1998 and was concluded in December 2000. In a relatively brief span of slightly more than two years no less than 22 countries were evaluated and as many comprehensive and very detailed reports drawn up.

The international standards against which countries were evaluated in the first round were those laid down in the following documents:

- The 40 FATF Recommendations;
- The 1988 UN Convention on Illicit Traffic in Narcotic Drugs and Psychotropic Substances;

- The 1991 European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering (91/308/EEC);
- The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (hereafter “the Strasbourg Convention”).

A second round of evaluations was concluded at the end of 2003 and Malta was among the first to be evaluated in that round. Yet, a third round of evaluations is under way and the visit to Malta by the MONEYVAL delegation has already taken place. The relative report is due to be discussed in plenary in October this year (2006). Malta has always had overall positive reports. For the third round a new comprehensive Anti-Money Laundering/Financing Terrorism Methodology is being used. It is very specific and detailed, but perhaps too mechanical, in an effort to be as objective as possible and cover all existing international standards.

Additional standards have to be taken up as these emerge in the course of time and as the understanding of the money laundering phenomenon grows. New standards are continuously being developed in response to changing trends and patterns as criminals seek to evade the measures which states put up to frustrate the laundering of their proceeds.

MONEYVAL, for its second round of evaluations, took on board *the Non-Cooperative Countries and Territories criteria* (or as they are known the NCCT criteria) which were adopted by FATF in an exercise to identify what were referred to as ‘un-cooperative jurisdictions’.

Moreover, in December 2001 the European Union came out with its *second anti-money laundering directive* which, among other things and in line with emerging international standards, extended the scope of application of existing anti-money laundering measures by widening the spectrum of persons and professionals

who were obliged to apply those measures. Among other things, the directive required member states to ensure that the anti-money laundering obligations are extended to:

- Auditors, external accountants and tax advisors;
- Notaries and other independent legal professionals when acting as financial intermediaries;
- Dealers in high-value goods, such as precious stones or metals, or works of art, auctioneers, whenever payment is made in cash, and in an amount of EUR 15,000 or more; and
- Casinos.

EU member states had till the 15<sup>th</sup> of June, 2003 to bring into force those laws, regulations and administrative provisions necessary to comply with the Directive. Maltese legislation has fully implemented the requirements of this directive.

In addition to this, MONEYVAL took on board the FATF 8+1 *Special Recommendations on Terrorist Financing* aimed at the detection, prevention and suppression of the financing of terrorism and terrorist acts. Since the financing of terrorism and money laundering are closely linked, MONEYVAL has had its terms of reference extended to financing of terrorism as well. It has already carried out a first self-assessment exercise of its member countries in this respect on the basis of a questionnaire prepared by FATF, and monitoring compliance with anti-terrorist financing standards has become a regular feature of the mutual evaluations carried out by MONEYVAL.

In line with these developments, MONEYVAL has extended its list of reference documents and benchmark standards against which the anti-money laundering and anti-terrorist finance regimes of member states are assessed during evaluation rounds.

In October 2005 a third EU Anti-Money Laundering Directive has been adopted and this directive consolidates the two previous ones and regulates more comprehensively and in greater detail the subject matter in conformity with existing international standards.

Moreover, in the same year the Council of Europe opened for signature the 2005 Convention on Laundering, Search and Confiscation of the Proceeds of Crime and on the Financing of Terrorism which is intended to supersede the 1990 Convention. The 2005 Convention took on board the development in international standards since the adoption of the 1990 Convention, extended the scope of the original 1990 Convention to terrorist financing and, besides other innovative features, for the first time in an international instrument, contains extensive provisions creating a systematic legal framework for the role and functions of FIUs in the prevention and detection of money laundering.

### **The International Monetary Fund**

The International Monetary Fund (IMF) was created in 1945 to help promote the health of the world economy and has its headquarters in Washington DC. It is governed by and is accountable to the governments of the 184 countries that make up its near-global membership.

In April 2001 the IMF reached the conclusion that money laundering posed a threat to the integrity of the financial system and following the September 11 events, in October 2002 it started a programme of assessments of anti-money laundering and combating of financing of terrorism measures in member states. Its assessments are based on a comprehensive AML/CFT methodology which it developed in agreement with FATF.

### **The EGMONT Group**

This group was informally set up in 1995 so as to provide a forum for FIUs to discuss FIU issues, stimulate co-operation between them, and exchange information, training and expertise. Before an FIU could be admitted as a member of the group it had to satisfy the elements of the definition of an FIU as set down by the EGMONT Group. The network has expanded rapidly and today has 101 FIUs worldwide among its members. Being an informal grouping, the group did not have a formal governing body or a

permanent secretariat. The prodigious growth of the group, however, is starting to raise questions whether its present informal set-up is sustainable any longer and whether the time has come to set up the group on a more formal basis with a permanent secretariat.

Among the documents elaborated by EGMONT there are the Statement of Purpose laying down the objectives of the group, a document on Principles of Information Exchange by which FIUs members of EGMONT are to be guided, the Definition of an FIU with an Interpretative Note which constitutes the EGMONT definition with which FIUs wishing to secure membership must comply and an Interpretative Note on the Countering of Terrorist Finance on account of the extension of the definition of an FIU to include the combating of terrorist finance. Other documents which address different aspects of the role of an FIU have also been prepared such as an EGMONT information paper on FIUs and the EGMONT group, a paper on Best Practices for the exchange of information between FIUs, and a paper on 100 Sanitized Cases which illustrate a number of successes of FIUs members of EGMONT and lessons which can be learned by all. The EGMONT Group is today the acknowledged international standard setter where it comes to FIU issues and has very quickly managed to construct a formidable network of financial intelligence units which can exchange information and developments very fast over the internet via the EGMONT Secure Web.

### **All for One, One for All**

And this brings me back full circle. The fight against money laundering and financing of terrorism must necessarily be a collective effort where all are at the service of one while the one is at the service of all. It is of the utmost importance that law enforcement authorities and auxiliary agencies share between themselves any information on potential money laundering and terrorist finance so as to be able to allow appropriate and effective action in good time. It is equally important that persons and entities subject to anti-money laundering and financing of terrorism

regimes should be on the alert to, and share among themselves, any trends or techniques which they may uncover in the course of their business activities so as to protect one another not only from falling foul of the law but also in order to secure the good health and stability of their enterprises.

**Silvio Camilleri**

August 2006



## Criminal Procedure

### **Controversial Amendments to the Maltese Criminal Code**

**Dr. Angelo (Anglu) Farrugia**

LL.D., M. Juris (International Law) Magna Cum Laude, M.P.<sup>248</sup>

On writing this paper I was still debating (in the Committee for the Consideration of Bills in the Maltese Parliament) amendments to the Bill to amend the Criminal Code (Chapter 9 of the laws of Malta), in particular the revolutionary provisions that are going to cause procedural earthquakes in Criminal Proceedings. I may sound extreme - however, the debate in parliament about the various amendments drew concerns from both sides of the House. It is true that at present the Maltese Parliament has quite a handful of Criminal lawyers as members and this in itself is healthy when debating the Criminal Code, and this doesn't occur often in the Maltese Parliament. In fact, one may safely say that except for some cosmetic amendments in the last few years the Criminal Code has remained quite a conservative piece of legislation for a number of years, except for recent amendments<sup>249</sup>.

The Bill's main objectives were based primarily on implementing measures which according to the present government should *“ensure a better and more expeditious administration of justice as outlined in the January 2005 Government White Paper, such as introducing restrictions to the immediate granting of bail to repeat offenders, the payment in criminal proceedings of judicial costs to the State and of damages to the crime victim; the removal of the mandatory requirement of corroboration of the evidence of an accomplice; the elimination of the punishment of imprisonment in*

<sup>248</sup> The Author is a practicing Criminal lawyer, the main spokesman for Opposition on Justice, and a member of the Committee for Consideration of Bills in Parliament.

<sup>249</sup> The Criminal code since 1996 was amended by the following acts; XXXII of 1997, II and X of 1998, VII of 1999, X of 2000, III and VI of 2001, III, XIII, XXIV and XXXI of 2002, IX of 2003, III of 2004, and I, V, VI, XIII, XX and XXII of 2005.

*criminal libel actions under the Press Act; and the removal of mandatory imprisonment in cases of sharing in drug offences”.* Truly enough, some of the measures were consensually agreed by both parties in Parliament. A case in point is the amendment to the Medical and Kindred Professions Ordinance (Chapter 31) where the proposed amendment focused on particular procedural injustices that were reflected in court judgments when the consumer of drugs was punished because he somehow shared his consumption. The definition of “sharing” within this Ordinance is still considered as trafficking and it was high time that the Social Committee within the House of Representatives came out with the proposal where there are special circumstances (such as the offender being person of ‘good character’) where he will benefit from the amendment and in the judgment will *not* be given an effective prison sentence. The amendment reads as follows; The Medical and Kindred Professions Ordinance, hereinafter in this article referred to as “the Ordinance”, shall be amended as follows:

*(a) in sub-article (7) of article 120A thereof, for the words ‘or (b)(i).’ There shall be substituted the words ‘or (b)(i):’ and immediately thereafter there shall be inserted the following new provisos:*

*“Provided that where, in respect of any offence mentioned in this sub-article, after considering all the circumstances of the case including the amount and nature of the drug involved, the character of the person concerned, the number and nature of any previous convictions, including convictions in respect of which an order was made under the Probation Act, the court is of the opinion that the offender intended to consume the drug on the spot with others, the court may decide not to apply the provisions of this sub-article:*

*Provided further that an offender may only benefit once from the provisions of the above proviso”; and*

*(b) in sub-article (11) of article 121E thereof, for the words “receives a request made by a judicial or prosecuting authority”*

*there shall be substituted the words “receives, or is informed about, a request made by or on behalf of a judicial, prosecuting, law enforcement or other competent authority”.*

This amendment was accepted without question but with the provision that - as clearly indicated in the amendment the offender can only benefit once from such offence.

However, the amendments that caused havoc were mainly three and for the purpose of this paper I am listing them one by one. The first is the amendment to article 546(4) of the Criminal Code. In the first draft amendment, the new sub-article reads as follows: “(4A) *Where a report, information or complaint is made to a Magistrate under this article by a person other than the Attorney General or a police officer, the Magistrate shall hold the inquest only after having obtained the authority of the Chief Justice who shall give his authority after having established that the necessary pre-requisites for the holding of such an inquest exist*”. This amendment is very strange as for the first time in such procedure of an inquiry to be held by a magistrate, the magistrate is first to seek authority from the Chief Justice which sounds as if the magistrate is not able enough to decide the parameters of the working of article 546 of the Criminal Code which treat the established procedure for years relating to the “*in genere*”. The only two main principles that the magistrate on receipt of the report is to consider when deciding whether or not to hold an inquest are; that the alleged offence is liable to the punishment of imprisonment exceeding three years and if the crime is not one of breaking in i.e. theft<sup>250</sup>. The decision of the magistrate not to hold an inquest, will not preclude the person who originally filed the report to press for criminal proceedings to take place.

<sup>250</sup> Vide. Article 564(2) of Chapter 9 where “the holding of an inquest may be dispensed with by the magistrate to whom the report, information or complaint referred to in the last preceding sub-article is made, if the fact to be investigated is breaking for the purpose of article 263(a) as defined in the first paragraph of article 264(1) and if the theft to which the breaking relates or may relate, is in respect of things whose value does not exceed ten liri, although it may be aggravated as mentioned in article 261(a),(b),(d),(e),(f) and (g), or any amongst them, even if the fact is likely to constitute an offence liable to the punishment of imprisonment exceeding three years”.

So the strangeness to this amendment is twofold. One is that a magistrate is capable as an independent judge to decide the criteria under article 546 on whether or not to hold an inquest and the other questioning his capability which directly addresses his independence. The other alternative reason is simply lack of trust on the present collegiate of magistrates. The Chief Justice under the present amendment is more than a watchdog but is also the decision-maker for the usual decisions that are supposed to be taken by others<sup>251</sup>.

During the writing of this article when this amendment was being debated in the Parliamentary Committee for the Considerations of Bills, after this amendment was heavily criticized, (in the part of the amendment where the magistrate will hold the inquest after having obtained the authority of the Chief Justice), another amendment was introduced where the magistrate responsible for the inquest will be the one *“who conducts the inquiry {and} shall be chosen by lot from among all the magistrates and shall hold the inquest”*. There is nothing wrong that this latter amendment be made to Article 546(4) of Chapter 9 as the independence of the judiciary should also be respected and any possible forum shopping eliminated. Still the best way to respect the intention of the legislator in assuring both the right of any person to file directly a report to the magistrate and also the right of any alleged person under a possible enquiry be both entertained is to leave the right of the magistrate to decide alone whether or not to hold an inquest and to give the right of the alleged person or persons under an inquiry to appeal to a judge sitting in the Criminal Court to decide whether the procedure established under Article 546 of Chapter 9 has been followed for such persons to sit under such inquiry. This will solve the shadow of doubt that could have been put on the magistrate by putting them under the thumb of the Chief Justice in their usual role of duty.

<sup>251</sup> The magistrates.

The other controversial amendment is that of 575A of the Criminal Code which is an addition to Article 575 of the Criminal Code<sup>252</sup>. According to this new amendment the person charged, who applies for bail from custody, who is charged with a scheduled offence, and who within the period of ten years immediately preceding the date of the offence charged, and who is shown to the satisfaction of the court to have been convicted of a scheduled offence, cannot be bailed. The only special circumstances where he can be released prior to the three months mandatory arrest after arraignment is upon an application to the Criminal Court where the presiding judge may bail the person charged if he is satisfied that there are grave and exceptional reasons which warrant the person's release.

There are two particular reasons for objecting to this amendment. First, when a person is charged there is the presumption of innocence and hence the arbitrary refusal of bail for a period of three months is in itself a breach to the right of the accused where a presumed innocent person is already convicted for three months detention. The other reason is the way that the magistrate is treated yet again in this amendment - as if he is not capable of seeing what a judge in the Criminal Court can consider as being exceptional and grave reasons for bailing a person charged.

Incidentally this amendment has been re-amended once again as presented before the Parliamentary Committee for the Consideration of Bills and currently, it reads as follows: *575A. (1) Saving the provisions of sub-article (6) of article 574A but notwithstanding any other provision of this Code or of any other law, where the Court of Magistrates at any time orders the temporary release from custody of a person who*

<sup>252</sup> Article 575 of the Criminal Code is a lengthy Article having eleven sub-articles where the procedure is established with regards to crimes for which bail is granted or not, including when the bail may be refused and when the Attorney General may also appeal to the granting of bail by the magistrates as indicated in Article 575(4A) which reads "Where the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, grants bail to the person in custody or subsequently amends the bail conditions, the decision of the court to that effect shall be served on the Attorney General by not alter than the next working ay and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates".

*(a) is charged with a scheduled offence and with being a recidivist in terms of articles 50 and 51; and*

*(b) has been previously found guilty of a scheduled offence by means of a judgement which has become res judicata,*

*the order of the Court shall be given in open court on a date previously notified to the prosecution and the person charged and shall be served on the Attorney General by not later than the next working day.*

*(2) The Attorney General may, not later than the next working day following the date of service of the order of the Court of Magistrates, apply to the Criminal Court for the revocation or amendment of the order and the Criminal Court shall appoint the application for hearing not later than two working days from the filing of the application. The Criminal Court shall give its decision on the application with urgency.*

*(3) the execution of the order of the Court of Magistrates ordering the temporary release of the person charged shall be suspended during the period allowed to the Attorney General to apply to the Criminal Court under this article and, following such application, until the Criminal Court gives its decision thereon.*

*(4) the provisions of sub-article (1) of article 575 shall apply also in the case of a person charged with a scheduled offence.*

*(5) For the purposes of this article “scheduled offence” means any offence listed in the Schedule D to this Code”.*

This latter amendment offers greater relief than the previous amendment to Article 575 of the Criminal Code as at least the accused, technically, still enjoys the right to be bailed by the Court of Magistrates without the three month delay period, and the Attorney General can exercise the power of appeal as already

enjoyed under 575(4A)<sup>253</sup> and the present amendment, 575A(2) which is more or less the same procedure adopted. In fact the Attorney General may appeal from such granting of bail by the Court of Magistrates the next working day before the Criminal Court, where the latter shall appoint the hearing not later than two working days from the filing of the application. Until the writing<sup>254</sup> of this article this amendment was still before the committee for the consideration of Bills in the House of Representatives. Interesting is the reaction of Chamber of Advocates (Malta) to the amendments under Article 575A which concentrated mainly on the abolition of the three months automatic detention and the first right of the magistrate to decide the bail<sup>255</sup>.

The remaining controversial amendment was that addressed to Article 639 of the Code where in its sub-article 3, it is till now

<sup>253</sup> The recent decision under such application was given by the Criminal Court as per Hon. Chief Justice Vincent DeGaetano in the case *Police vs. Steven John Lewis Marsden* where following a case of an English resident in Malta who was charged with the importation of drugs and was released on bail on arraignment which decree was revoked by the Court of Appeal and the re-arrest and continued detention of the accused was ordered. In this judgement the Court said that “the procedure under subsection (4A) of Section 575 of the Criminal Code whereby the Attorney General applies to this Court for the re-arrest and continued detention of the person released on bail by the inferior Courts, was not intended so that invariably and in every case where bail is granted to see whether it (i.e. this Court) agreed with it or not, and if it did not agree with it, revoke that decree granting bail. Upon a proper construction of this granting bail. Upon a proper construction of this subsection, the procedure was introduced so that where the Inferior Court exercises its discretion in a manner which is manifestly wrong, the position can be rectified by a Superior Court upon an application filed by the Attorney general (The Attorney General having, under our system, a general supervisory role in matters concerning bail). The same is, of course, true in respect of the procedure under subsection (9) of Section 574A (the provision which is being invoked in the instant case)”.

<sup>254</sup> This amendment was approved during one of the sittings of the committee for the consideration of bills after the writing of this article late in July 2006.

<sup>255</sup> In their report the special committee of the Chamber of Advocates namely “Il-pozizzjoni tal-Kamra ta’ l-Avukati dwar abbozz ta’ ligi imsejjaħ “Att biex jemenda l-Kodici Kriminali””, the following observation was made which is being quoted verbatim in the language of the report “Artiolu 11 – Il-Kamra tqis din l-emenda suggerita fid-dawl ta’ sentenza ġia mogħtija kemm mill-Qrati tagħna kif ukoll minn Qrati barranin fir-rigward tal-limitazzjonijiet imqeda fuq l-ghoti tal-helsien mill-arrest u f’dan il-kuntest thoss illi tali emenda twassal għal sitwazzjoni simili għal dawk ġejn ġia fie dikjarat vjolazzjoni tad-dritt tal-helsien mill-arrest. Il-Kamra tistaqsi ukoll għaliex l-istess Magistrat li qed jigi mitlub jiddeciedi fuq il-mertu tal-akkuzi m’ghandux ikollu ukoll, fl-ewwel tlett xhur jekk mhux ukoll f’kull waqt tal-proceduri il-kompetenza li jezercita d-diskrezzjoni tieghu fi zmien tlett xhur f’kull waqt tal-proceduri jiddeciedi dwar l-ghoti jew meno tal-helsien mill-arrest?”

imperative that if the only witness is an accomplice, and the evidence is not corroborated with any circumstances then the Court can never rely on such sole witness. The amendment is abolishing completely this important principle of corroboration and is in short saying that even if the only witness is an accomplice the Court may still direct the jury to convict the accused. The original amendment to article 639(3) during the second reading in the House of Representative a few months ago read as follows: *“Where the only witness against the accused for any offence in any trial by jury is an accomplice, it shall be in the discretion of the Court, after taking into account the character and demeanour of the witness, the nature of the offence and its circumstances and any improper motive which the witness might have which could induce him not to tell the truth, to give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused”*. This was criticized practically by both sides of the House of representatives mainly by myself, members of the opposition and also particular back-benchers from the Government side<sup>256</sup> and also from the same Chamber of Advocates which insisted that it would be much better that this amendment will be retracted<sup>257</sup>.

In fact, this amendment was redrafted once again and a new amendment was presented before the Committee for the Consideration of Bills in Parliament. It now reads, *“Where the only witness against the accuses for any offence in any trial by jury is an accomplice, the Court shall give a direction to the jury to approach the evidence of the witness with caution before relying on it in order to convict the accused”*. Still this amendment is in complete clash with the principle of corroboration of the evidence of the

<sup>256</sup> Hon. Jason Azzopardi and Hon. Mario Demarco

<sup>257</sup> Ibid. report by Chamber of Advocates, “F’dan ir-rigward il-Kamra filwaqt illi segwit id-diversi interventi maghmulin fil-Kamra tar-Rapprezentanti matul it-Tieni Qorti ta’ dan l-Abbozz, il-Kamra ta’ l-Avukati hija mhassba dwar il-mod mgħagħel li permezz tiegħu qed titressaq l-emenda f’dan ir-rigward. L-emenda proposta fir-rigward tal-korrobrazzjoni hija tali li ser taffettwa prattikament il-proceduri gudizzjarji kollha fil-kamp penali. Għalhekk il-Kamra tahseb li jkun ferm aħjar li din l-emenda tigi irtirata sabiex isir studju dettaljat minn kummissjoni ad hoc dwar il-htiega o meno tagħha u dwar il-konsegwenzi li tali emenda ggib fil-process gudizzjarju”.

accomplice. The abolition of corroboration of the evidence of an accomplice is dangerous as it presumes the guilt of the accused rather than the innocence. This in itself will certainly give rise to injustices and could be the reason for possible future frame-ups. Both amendments - irrespective of the mildness in the second amendment - go against the established principle of innocence as after all claimed by various jurists including the famous Beccaria<sup>258</sup>.

The same line of thought was followed in the Human Rights case delivered in Strasbourg 1988 in the case **Barbera, Messegue and Jabardo vs. Spain** where the Court in its judgement stated that *“When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused...”*.

The principle of corroboration of an accomplice is the only protection that the accused may have when the prosecution is to rely on such evidence. This is in line with the principle of *audi alteram partem* which is protected under the doctrine of the Rule of Law that is, the prosecution should have the same weight as the defence in any proceedings. This amendment is a clear sign that a political minister is strengthening the prosecution’s weight to the extent that the dividing line of correctness in any criminal procedure may bend towards a police state.

I hope that when you read this article a clear reflection will prevail and this amendment to section 639(3) will not come into force...<sup>259</sup>.

**Anglu Farrugia**  
September 2006

<sup>258</sup> Dei Diritti e Delle Pene – P. Calamandrei – Firenze 1945 – page 213, “un uomo non puo chiamarsi reo prima della sentenza del giudice, ne’ la societa’ puo’ toglierli la pubblica protezione, se non quando sia deciso ch’ gli abbia violato I patti, co qualigli fu accordata”.

<sup>259</sup>omissis.





# ***EU LAW***



# The Relationship between Maltese Law and European Union Law

Dr. Ivan Sammut LL.D.<sup>260</sup>

## 1. The EU Legal Order

National law derives its validity from the fact that the State that enacts it, is sovereign and is capable of enforcing it in its national territory. It is independent from any other national or international system. A sovereign country is free to sign international treaties. Treaty obligations must be respected but this merely means that the state could not invoke national law as an excuse for failing to perform its treaty obligations towards other contracting parties. States are left to their own devices for finding the most appropriate domestic arrangements for fulfilling their international obligations. So one can say there is *internal supremacy* as opposed to *international supremacy* of treaties and other aspects of their domestic status are a matter of national law.<sup>261</sup> As a result, two theories evolved to demonstrate the relationship between domestic law and international treaties. The monist view – as expressed for instance, by Kelsen – is that national legal orders are ‘creatures’ of international law. The dualist views, as exposed by Triepel<sup>262</sup> and Anzilotti<sup>263</sup> are rather more convincing where they show that national legal orders were separate legal orders, able to resist the penetration of international norms.

Monism and dualism become alternative doctrines when taken in a narrow sense of comparing the actual attitude taken towards international law within each constitutional system. Dualist countries are those countries where the attitude taken is that

<sup>260</sup> Assistant lecturer, Faculty of Laws, University of Malta

<sup>261</sup> See Jacobs F. G. & Roberts S. (eds) *The Effect of Treaties in Domestic Law*, Sweet & Maxwell, 1987.

<sup>262</sup> Triepel H., *Les rapports entre le droit interne et le droit international* (1923) *Hague Recueil* 77;

<sup>263</sup> Anzilotti D. *Il diritto internazionale nei giudizi interni* (1905).

international treaties cannot, as such, display legal effects in the municipal sphere. This means that their norms must be ‘transplanted’ into national law before they become operational there. Malta and the United Kingdom are such countries. A good example is the transposition of the European Convention on Human Rights into Maltese Law. For it to be enforceable in the Maltese Courts, Parliament had to enact the European Convention Act and therefore one can plead the provisions of the said Convention as part of Maltese law.<sup>264</sup> Monist countries then, are those where the view prevails that international norms are, upon their ratification and publication, ‘received’ within the national legal orders while preserving their nature of international law.

What are now, the consequences of these two different worlds vis-à-vis European Law? Is European Union law a branch of International law? It makes sense to answer first the latter question as opposed to the former. The answer is not found in the Treaties but in the landmark judgment of the European Court of Justice (ECJ) of **Van Gen en Loos**.<sup>265</sup> The Court said:

*“The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is the direct concern to the interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states . . . It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights ...”*

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

The ECJ explained that EU law is a separate legal order from that of the Member States. Also, EU law is derived from international

<sup>264</sup> Act XIV of 1987.

<sup>265</sup> Case 26/62 NV Algemene Transportem Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR I.

law. In this case the relevant international law is found in the form of the EC Treaty and following Maastricht also in the form of the EU Treaty. From this and subsequent judgements of the ECJ, the doctrines of **direct effect** and **supremacy of EC law** have developed.

Direct effect can be defined as the capacity of a norm of Community law to be applied in domestic court proceedings. Supremacy or primacy of EU law implies the capacity of that norm of Community law to overrule inconsistent norms of national law in domestic court proceedings. These two principles are closely linked and could be considered as in conjunction with each other. However it could be argued that the principle of supremacy has much wider implications than direct effect as it could mean the setting aside of national laws to give way to EU law.

Back to the first question posed earlier on, with regards to countries adhering to a monist doctrine, the above does not pose any major problems. As far as the attitude of the dualist doctrine is concerned, it is likely to be more problematic towards EU law particularly with the issue of supremacy. The relationship between a norm of international origin and a purely national norm becomes through the transformation of the former, a matter pertaining to the internal cohesion of the domestic legal order, and conflicts are to be solved according to the ordinary conflict rules applying within that order. Treaties, in order to take preference over national administrative practices, have to be transformed by an act of the legislator and in case of conflict the *lex posterior derogat priori* rule would prevail.

The position as to the extent the application and not the interpretation of the EC Treaty is a matter for the ECJ to deal with and not a national court has been an issue of controversy especially in the early years of European Union law. In fact this was the main reason why the Governments of Belgium and the Netherlands intervened in the **Van Gend en Loos** proceedings in front of the ECJ.<sup>266</sup> In their view, the State Parties to the EEC Treaty had not

<sup>266</sup> See footnote 265.

intended to lay down any obligations concerning the domestic effect of its provisions, so that this matter was left for determination by national authorities and courts according to their respective constitutional rules or judicial traditions. The Advocate General concurred with the three governments and advised the Court to declare the question inadmissible. However, in spite of the impressive barrage of opinions, the ECJ decided that this matter could not be left to the national legal systems themselves but that the EC Treaty had direct effect and is therefore applicable in the national courts.

The novelty of this case is not the discovery that European law could have direct effect. This is because in the case of regulation, as an example, it is stated in Article 249EC that this legal instrument is capable of having direct effect. As for the provisions of the EC Treaty itself, they could be perfectly suitable for judicial enforcement in the same way as other international agreements. The crucial contribution of the judgement was rather; the question if specific provisions of the Treaty (and later also secondary legislation) had direct effect and was to be decided centrally by the ECJ, rather than by the various national courts each in their own way and style. The result of this judgement is that the EEC Treaty, now renamed the EC Treaty, is capable of conferring rights upon individuals who become part of their legal heritage and therefore they would be able to be raised in domestic proceedings before the domestic court.

In spite of the very close link between direct effect and supremacy, the issue was not dealt with in **Van Gend en Loos** as the issue was not raised up by the referring Dutch Court. The close link has been examined in a subsequent judgement of the ECJ in **Costa v ENEL**.<sup>267</sup> In the Netherlands, whose juridical system is more monist than dualist, under Dutch Constitutional law, an International Treaty is self-executing and it would prevail over conflicting national law, thus the issue of supremacy was less

<sup>267</sup> Case 6/64 Faminio Costa v ENEL [1964] ECR 585,593.

problematic than that of direct effect.<sup>268</sup> The second occasion for the ECJ to reaffirm the principle of supremacy of Community law came from a Member State that adopts the dualistic approach vis-à-vis international law – Italy. The case concerned the payment of electricity bills to the state company ENEL that has been nationalised contrary to the provisions of the EC Treaty. The national court was asked to set aside a national law (that nationalised the electricity company) as a result of breaching the EC Treaty. The Italian Government intervened in front of the ECJ arguing that the reference by the national court was ‘absolutely inadmissible’, as the national court which made the reference had no power under EEC law and under national law to set aside the Italian municipal law. The Government argued that a question on interpretation could not serve a valid purpose.

The ECJ’s task in the latter case is much more delicate than the former. Whereas the definition of the conditions of direct effect may easily be considered, under the canons of international law, as an inherent part of the interpretational function of the ECJ, the same cannot be said about supremacy. It is true that it is an established principle of international law that international treaties prevail over domestic law when it is applied to relations between powers.<sup>269</sup> However the issue in **Costa v ENEL** is about internal supremacy of EU law. It is the duty of national courts to enforce an international treaty when it conflicts with national legislation. Such a duty has never been considered as part of international law, although the failure of international courts could be a contributory factor in the establishment of State responsibility under international law. Wyatt D. in the *European Law Review* explains that in **Costa** the preliminary reference mechanism allowed the ECJ to ‘stop the clock’.<sup>270</sup> Instead of letting national judges commit what would be a breach of EU law, to be sanctioned under Article 226 of the EC Treaty, the ECJ seized the opportunity

<sup>268</sup> Article 66 of the Dutch Constitution. Following a renumbering this Article is now Article 94.

<sup>269</sup> See the case of Greek and Bulgarian Communities, of the International Court of Justice, PCIJ. Series B, No. 17.32.

<sup>270</sup> Wyatt D, ‘New Legal Order, or Old?’ (1982) ELRev. 147, 153.

provided by Article 234 of the EC Treaty and decided to make Community law prevail over conflicting national norms. The special feature of the EC Treaty under Article 234 is that it, unlike other treaties, provided for the ingenious judicial mechanism which allowed the ECJ to state its supreme doctrine and to request national courts to follow suit. In the ECJ's own words:<sup>271</sup>

*“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.*

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.’

Therefore, European law is a separate legal order which has to be distinguished from international law and from national law. However unlike a national legal order, it does not exist independently but its existence is complement to a national legal order that is the national legal order of each particular Member State for its enforcement.

## **2. The doctrine of supremacy and of direct effect as viewed from Maltese law.**

The acceptance of the above vis-à-vis Maltese law could appear to be problematic. First of all because Malta adopts the dualistic approach and secondly, more important than this for Malta, is the issue of supranationality of its Constitution. Article 6 of the Maltese Constitution provides that:

<sup>271</sup> See footnote 267.

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

One can get the impression that as a result of this clause, the doctrine of supremacy as explained in *Costa* could prove to be problematic. If an EU Treaty or an EU regulation or directive were to conflict with ordinary Maltese law it could somehow be accepted but what if it conflicts with the Constitution?

Malta was not alone in facing such problems at the time of Accession. The acceptance of supremacy in the United Kingdom has been even more problematic. Since the British Constitution is largely unwritten it is even more difficult to conceive amending the Constitution. The main problem is that Parliament is deemed to be supreme. This means that Parliament has the power to do anything except bind itself in the future. Such a position clearly would make it difficult to transfer power on a permanent basis to the European Union, as is the spirit in *Costa*. The UK also adopts the dualistic approach.

The UK, after signing and ratifying its Accession Treaty in 1972, decided to give internal legal effect to Community Law by means of an Act of Parliament - the European Community Act 1972. Malta followed the UK example by enacting the European Union Act<sup>272</sup> which came into force on accession on 1<sup>st</sup> May 2004. The aim of this Act is that it incorporates into Maltese law, the *acquis communautaire* which is the body of laws of the European Union. This means that by the power of the Act the *acquis* would have the power of law as British and Maltese law respectively. This solves the dualistic approach. In fact as far as Maltese law is concerned, a similar instance occurred in 1987 when the European Convention on Human Rights of the Council of Europe which has been signed and ratified before by Malta was incorporated into Maltese law by means of Act XIV of 1987.

<sup>272</sup> Chapter 460 of the Laws of Malta.

As far as supremacy is concerned the issue remains more problematic. In the UK, Parliament is sovereign and the traditional constitutional principle is that it could never be bound by previous law. This means that if Westminster were to enact a legislation which conflicts with the EC Treaty after 1972, that law would prevail in terms of British law. According to the doctrine of **implied repeal**, the courts would be obliged to give effect to the latest expression of Parliament's legislative will and to treat the earlier act as having been implicitly repealed. As far as Malta is concerned, the problem would appear to be similar though more limited to the provisions of the Constitution.

So what happens if a British Act of Parliament or the Maltese Constitution were to conflict with European Union law?

When the UK and Malta signed their accession Treaty, they have accepted an international obligation to comply with EU law. If national legislation were to conflict with EU law, this would mean that the respective Member State would be in breach of the Treaty obligations. If this were to happen sanctions could range from a simple Article 226 EC procedure to political sanctions and to eventual exclusion from the Union. However such a conflict is unlikely ever to happen in good faith. Membership of the Union is voluntary and although not contemplated in the present Treaties as it is in the draft Constitution, a country could in theory withdraw from the Union.<sup>273</sup> The draft European Constitution contemplates for such potential withdrawal.<sup>274</sup>

In practice it is highly unlikely that a Member State would ever be in a position where its basic law would conflict with the principles enshrined in EC law. In fact in **Hauer v. Land Rheinland-Pfatz**, the European Court of Justice argued that there is no rule of law that a particular right will be accepted as fundamental by the European Court if it is protected in the constitutions of some of the

<sup>273</sup> Greenland which became part of the then EEC as part of Denmark in 1973 withdrew from the Community in 1985 after obtaining autonomy from Denmark and negotiated a withdrawal.

<sup>274</sup> Article 1-60 of the Draft Constitutional Treaty.

Member States, or even a majority of them.<sup>275</sup> If the right in question would be generally accepted throughout the Union and does not prejudice fundamental Community aims, it is probable that the ECJ would, as a matter of policy, accept it as a fundamental right under European Union law, even if it is constitutionally protected in one Member State. If the right would be a controversial one, it would probably be unlikely that the ECJ would seek to impose the will of the majority on those Member States who would consider such a right to be fundamental.

Going back to the European Union Act the main provision, article 4(1) provides that:

*“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaty, and all such remedies and procedures from time to time provided for by or under the Treaty, that in accordance with the Treaty are without further enactment to be given legal effect or used in Malta, shall be recognised and available in Law, and be enforced, allowed and followed accordingly.”*

This is merely a reproduction of article 2(1) of the British European Community Act which proves that Malta attempts to adopt the British approach as regards the legal framework of the adoption of the *acquis*. Article 2(2) of the British Act provides for the implementation of Community obligations even when they are intended to replace national legislation and Acts of Parliament by means of Order in Council or statutory instrument rather than by primary legislation.

The Maltese Act in Section 3 provides that from 1<sup>st</sup> May 2004, the Treaty and existing and future acts adopted by the European Union shall be binding in Malta and shall be part of the domestic law thereof under the conditions laid down in the Treaty. Any provision of any law which from the said date is incompatible with Malta's obligations under the Treaty or which derogates from any

<sup>275</sup> Case 44/79, [1979] ECR 3727.

right given to any person by or under the Treaty shall to the extent that such law is incompatible with such obligations or to the extent that it derogates from such rights be without effect and unenforceable. From here it emerges that the supremacy of EU law over Maltese law emanated from Section 3 of the said Act. To what extent this would apply if there is a potential conflict with the provisions of the Constitution is debatable. Parallelism can be drawn to the theoretical<sup>276</sup> scenario of having the European Convention of Human Right as enacted were to conflict with the Maltese Constitution. The same weight afforded to the European Convention by the Maltese court would probably be afforded to the European Union Act. However, given the unique nature of EU law and the rights and obligations that it entails, the fact that Malta voluntarily accepted to join the club should be enough to convince any Maltese Court that should this theoretical scenario happen in reality, as long as Malta wants to be part of the Union, EU law is supreme and should prevail even if there were to be a conflict with the Constitution. The sharing of sovereignty is voluntary and unlike a federation, if a country feels that it should no longer share its sovereignty with other Member States, then legally speaking, either opt-outs or a withdrawal from the Union should be negotiated. Unlike a federation, the EU does not compel Member States to stay in the union by force and in theory a Member State does not give up any sovereignty but simply shares it with the rest of the Member States.

In order to give effect to the provisions of Section 3 of the European Union Act, the Prime Minister or, and, any designated Minister or Authority may by order, provide for the implementation of any obligation of Malta, or enable any such obligations to be implemented, and any rights enjoyed or to be enjoyed by Malta under or by virtue of the Treaty to be exercised. The same authorities shall also provide to implement any legislation necessary for the purpose of dealing with matters arising out of or related to any such obligation or right or the coming into force, or the operation from time to time.

<sup>276</sup> Theoretical because in practice this is difficult if not impossible to happen.

Section 4(1) of the European Union Act aims to make the concept of direct effect part of the Maltese legal system. It deems law which under the EC Treaties is to be given immediate legal effect to be directly enforceable in Malta. Accordingly, Maltese courts, which on the orthodox domestic approach to international law may not directly enforce a provision of an international treaty or a measure passed there under, are directed by this Article to enforce any directly effective EC measures. There is no need for a fresh act of incorporation to enable Malta to enforce each EC Treaty provision, regulation or directive which according to EC law has direct effect. Just as in the cases of France, Germany and Italy, the supremacy of EC law is recognized in Malta by virtue of a domestic legal process and legal theory – by means of an Act of Parliament.

The European Union Act also provides for any international treaty concluded by the European Union through its external relations powers. The procedure laid down in Section 4 provides that with regard to treaties and international conventions which Malta may accede to as Member State of the European Union, and treaties and international conventions which Malta is bound to ratify in its own name or on behalf of the European Community by virtue of its membership within the European Union, these shall come into force one month following their being submitted in order to be discussed by the Standing Committee on Foreign and European Affairs. Also, any financial obligations arising out of the Treaty obligations are to be a charge against the consolidated fund.

As for the relationship between the Maltese Courts and those of the European Union, the European Union Act provides that for the purposes of any proceedings before any court or other adjudicating authority in Malta, any question as to the meaning or effect of the Treaty, or as to the validity, meaning or effect of any instruments arising there from or there under, shall be treated as a question of law and if not referred to the Court of Justice of the European Communities, be for determination as such in accordance with the principles laid down by, and any relevant decision of the Court of Justice of the European Communities or any court attached thereto.

This makes possible the preliminary reference procedure under Article 234 EC from the point of view of Maltese law. As for the judgments handed down by the EC Courts, judicial notice is taken of the Treaty, of the Official Journal of the European Union and of any decision of, or expression of, opinion by, the Court of Justice of the European Communities or any court attached thereto on any such question as aforesaid, and the Official Journal shall be admissible as evidence of any instrument or any other act thereby communicated by any of the Communities or by any institution of the European Union.

Maltese courts have not yet had enough opportunities to rule on how the EU legal order has been incorporated into the Maltese legal order. However a look at some British cases could offer some hints as to how the Maltese courts should view the above. Initially British courts were hesitant in applying the above principles.<sup>277</sup> However Lord Denning in **Shields v E Coomes (Holdings) Ltd** seemed willing to accept the principle of supremacy of Community law, declaring that Parliament clearly intended, when it enacted the European Community Act on 1972, to abide by the principles of direct effect and supremacy.<sup>278</sup> As a consequence, in his view, national courts should resolve any ambiguity or inconsistency with EU law in national statutes so as to give primacy to EU law. He avoided the problem of implied repeal by giving such weight to the 1972 Act, and to Parliament's presumed intention in enacting it. He argued that a UK court should not enforce a later conflicting act of Parliament if the domestic statute is ambiguous or if it is inconsistent with EU law. However he did not expressly state that EC law should be given primacy. In Lord Denning's own words:

*"In construing our statute, we are entitled to look to the EC Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by*

<sup>277</sup> See *Felixstowe Dock and Railway Company v British Transport and Docks Board* [1976] 2 CMLR 655.

<sup>278</sup> *Shields v E Coomes (Holdings) Ltd*. [1979] 1 ALL ER 456, 461.

*some oversight of our draftsmen then it is our bounded duty to give priority to Community law ... ”*

Thus far, I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should think that it would be the duty of our courts to follow the statute of our Parliament.<sup>279</sup>

Here one can see the judicial reconciliation of Parliamentary sovereignty with supremacy of EU law. If a domestic provision of law appears to contravene the EU Treaty or any EU subsidiary legislation, this is presumed to be an accidental contravention and in such circumstances the national courts should give effect to the doctrine of direct effect of EU law if it is the case and so, EU law would prevail over conflicting domestic law. Such overriding is to be viewed as fulfilment of a true parliamentary intention; that the European Community Act should prevail in case of conflicting legislation. If it is clear that a domestic law should prevail, then it must do so.<sup>280</sup>

Lord Denning’s overview gives a good idea of how EC law became accepted as a legal order working side by side the English legal order. While his explanation is far from being harmoniously interpreted and there are several arguments that one can visit, Lord Denning’s explanation explains the position in a nutshell and any further analysis on this point is beyond the scope of this article.<sup>281</sup>

Naturally Lord Denning’s explanation can be extended to the Maltese legal order. If one were to apply his explanation to the Maltese system, it would mean as follows. If Parliament enacts any law that happens to conflict with the EU obligations, Maltese

<sup>279</sup> [1979] 23 All ER 325, 329.

<sup>280</sup> For a more detailed debate on this issue see Allan T., ‘Parliamentary Sovereignty: Lord Denning’s Dexterous Revolution’ (1983) 3 OJLS 22.

<sup>281</sup> Allan T. op cites p. 22.

courts should ensure that the EC Treaties would prevail. However given the fact that the ECJ has developed the doctrine of supremacy and of direct effect even further and it has been now Community practice for some time, I would dare to interpret European Union Act as prevailing over any Maltese legislation and the Maltese Constitution for two important reasons. The Act itself provides for the ECJ's judgments to prevail in case of conflict. This would also mean that if the ECJ says that its ruling should prevail over the Constitution then that will be the case. Secondly, as long as there is the intention to remain in the Union, there is no place for any domestic legislation to conflict with the *acquis*. If a Maltese Act of Parliament were to be enacted with the intention of conflicting with the *acquis* then that cannot prevail as long as we are in the Union. Once a Community obligation has been legally implemented in terms of the *acquis* and Malta did not negotiate any derogations or opt-outs then the EU is not *à la carte*, and so EU law prevails over any Maltese law. Does this mean that Malta has lost its sovereignty? No, it has not. It is sharing sovereignty with other States and in theory there is always the choice; take all measures to be implemented or withdraw from the Union. Malta has pooled some of its sovereignty and as long as it remains pooled, sovereignty is limited.

Could it be argued that the European Union Act amended the Constitution?

The answer is no. First of all nothing in the *acquis* is presumed to conflict with the Constitution. Secondly the Treaties and also the draft Constitutional Treaty do not provide for any requirement whatsoever in the organisation of the state. A Member State is free to choose and maintain whatever form of government or legal system it prefers. Thirdly as far as fundamental rights are concerned, the ECJ has said that it will also draw its inspiration from the constitutions of the Member States.<sup>282</sup> Thus the European Union Act by making EU law supreme over Maltese law is in no way contravening the provisions of the Maltese Constitution. Any

<sup>282</sup> See footnote 275.

new human rights legislation is likely to be further protection rather than a threat to the basic rights as enshrined in our Constitution.

Foreseeable problems could be envisaged if ‘new human rights’ are introduced at European level which could conflict with principles of the majority of the Maltese; such as the right for abortion or the right to divorce. As for the first case, this could never affect Malta against its will as it is provided for in the Accession Treaty.<sup>283</sup> As for the latter it is not a constitutional right in Malta so if it was introduced as a right, Malta may be bound. However if Malta were to provide against such a right in its Constitution, it is likely that European law would not force such right upon Malta as it is a general principle of EU law not to conflict with the basic rights enshrined in the Constitution of its Member States.<sup>284</sup> Thus conflict between the European Union Act and the Maltese Constitution is unlikely to exist both in theory and in practice.

Naturally Malta can amend its Constitution in a way to conflict with EU law. In this case the Maltese courts should rule that EU law would prevail as long as the political intention is to stay within the Union. Malta can get back its full sovereignty if it chooses to withdraw from the EU.

### **3. EU Law in Maltese Legal Practice**

Malta has started aligning itself with the *acquis* years before actual accession took place. However following Accession and therefore the coming into force of the European Union Act, Maltese law is supposed to be in line with EU obligations. EU Regulations and Directives are the most important legal instruments which would have to be examined to see the effect of EC law on Maltese law. Article 249EC provides as follows:

*“In order to carry out their task and in accordance with the provisions of the Treaty, the European Parliament acting jointly*

<sup>283</sup> See Article 62 of the Protocol to the Draft Constitutional Treaty.

<sup>284</sup> See case SPUC v. Grogan C-159/90, [1991] ECR I-4685.

*with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.*

*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

*A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.”*

Regulations are binding upon all Member States and are directly applicable within all such States. On accession all EU regulations became binding in Malta unless they are covered by a transitory provision or derogation in the Accession Treaty. Basically this means that EC Regulations are to be considered as primary law, and they should not be transposed. They are the law. Member States may need to modify their own law in order to comply with a regulation. This may be the case were a regulation has implications for different parts of national law. However this does not alter the fact that the regulation itself has legal effect in the Member States independently of any national law, and that the Member States should not pass measures that conceal the nature of Community regulation. In case national law is not amended the regulation would prevail. In the **Variola** case,<sup>285</sup> the ECJ was asked by a national court whether the provisions of a regulation could be introduced into the legal order of a Member State in such a way that the subject-matter is brought under national law. The ECJ explained that by virtue of the obligations arising from the Treaty and assumed on ratification, Member States are under a duty not to

<sup>285</sup> See Case 34/73, Variola v Amministrazione delle Finanze [1973] ECR 981.

obstruct the direct applicability inherent in Regulations and other rules of Community law.<sup>286</sup> The ECJ explains:

*“.... Member States are under an obligation not to introduce any measure which might affect the jurisdiction of the Court to pronounce on any question involving the interpretation of Community law or the validity of an act of the institutions of the Community, which means that no procedure is permissible whereby the Community nature of a legal rule is concealed from those subject to it.”*<sup>287</sup>

This means that Malta should not attempt to introduce any EC regulations into Maltese legislation but should only amend existing legislation if it conflicts with EC regulations.

Directives differ from regulations in two important ways. They do not have to be addressed to all Member States and they are binding as to the end to be achieved while leaving some choice as to form and method open to the Member States. Directives are particularly useful when the aim is to harmonise the laws within a certain area or to introduce complex legislative changes. This is because the Member States have certain discretion to choose the way that a Directive is to be implemented. The Directive itself may also offer discretion on the actual substantive contents. Member States are free to act within the parameters of the Directive if it provides so. The force of Directives has been increased by the ECJ decisions. The Court held that directives have direct effect, enabling individuals to rely on them, at least in actions against the State.<sup>288</sup> This means if the state fails to transpose a right given by a directive to its citizens, then an individual can seek to enforce it in the national court. On the contrary if the Government has failed to transpose an obligation on the citizen in national law than the former cannot claim a right.<sup>289</sup> Thus for example the VAT

<sup>286</sup> See paragraph 10 of the judgement.

<sup>287</sup> See paragraph 11 of the judgement.

<sup>288</sup> See Marleasing Case C-106/89 , [1990] ECR I4135 and Von Colson and Kamann Case C-14/83, [1984] ECR 1891.

<sup>289</sup> See Marshall Case 152/84, [1986] ECR723.

Department cannot enforce VAT legislation unless the specific provision of the VAT directive has been properly transposed in the Maltese VAT Act.<sup>290</sup> If a government fails to implement EU law properly, then thanks to the doctrine of state liability, the state could be liable for damages.<sup>291</sup>

The majority of Directives are transposed into Maltese law by means of a Legal Notice. This provides an efficient and fast way of introducing new rules. Typical examples are the labour law directives that have been transposed by means of several legal notices.<sup>292</sup> Other directives are transposed by means of an Act of Parliament. A Legal notice is a more preferable way of transposing EU legislation where either there is little room for discretion or the discretion is of a technical nature. In reality there is no need for Parliament to hold lengthy debates on the subject matter of the directives as Malta's powers are limited by the parameters of the directives.

As from the litigation point of view, Maltese Courts now have all the power to make preliminary references if they are necessary. Maltese lawyers and judges have still to get more accustomed to the litigious channels provided for by the Treaties. While the cognisance of European law is improving, recourse to the preliminary reference procedure has been much lower than what one would expect and to date no preliminary reference has yet reached the ECJ.

The same can be said for direct litigation at the ECJ. However it is worth mentioning that although a Maltese citizen has yet to make use of the Article 230EC procedure, the possibility of having an Article 226EC infringement proceeding is very real and probably around the corner. There has been the commencement of infringement proceedings concerning various chapters of the *acquis*. While some have been publicised such as the case of

<sup>290</sup> Chapter 406 of the Laws of Malta.

<sup>291</sup> See *Francovich v Italy* Cases C-6, 9/90, [1991] ECR I-5357.

<sup>292</sup> See *Employment and Industrial Relations Act*, Chapter 452 of the Laws of Malta and subsequent regulations enacted by means of a Legal Notice under the authority of the Act.

spring hunting, others have not. However all of the infringement proceedings against Malta are in the administrative stage and we may have to wait a few more months before the Commission opts to take the first case against Malta to the ECJ.

On the whole Malta is doing a good job in the process of integrating the EU legal order with the Maltese one. The fact that there are a number of infringement proceedings against Malta is not necessarily a bad sign. On the contrary this could be a sign that Malta knows how to make use of EU law to its advantage. Enforcement actions are common against other countries and one should examine the legal and political context of each individual action before coming to a conclusion that Malta is doing badly with the integration of the EU legal order. However not everything is plain sailing. Much more needs to be done from the educational point of view. While generally speaking most professionals in the legal profession dealing with EU issues are adequately prepared, much more needs to be done in the civil service, particularly in those services that deal directly with EU matters such as Customs and VAT. Very often the main problem is not human resources as such, but the bureaucratic structure in which the departments are set up hinders the best use of the available resources. If this is addressed, Malta stands to be a good example of how EU law is integrated in the national legal system.

**Ivan Sammut**  
15<sup>th</sup> August 2006



## **Aspects of Interpretation of Multilingual *Acquis Communautaire***

Dr. Peter Agius LL.D.<sup>293</sup>

### **Introduction**

EU legislation is enacted in twenty different, equally authentic, language versions<sup>294</sup>. As from the 1st of May 2004 Maltese has become an official language of the EU this meaning, *inter alia*, that the *acquis communautaire* is available in an authentic Maltese version which can be used by Maltese courts in their application and interpretation of EU law. In this paper we shall look at the implications of the Union's multilingual regime as arising from the interpretations of the European Court of Justice (ECJ) and how this affects national jurisdictions in their interpretation and application of EU and national law.

### **Background**

Article 290 of the EC Treaty gives the Council the power to determine, by unanimity, the rules governing the languages of the institutions of the Community except for the ECJ which can define its own language regime. Council Regulation Nr 1 of 1958<sup>295</sup> establishes 20<sup>296</sup> official and working languages.

<sup>293</sup> Peter Agius is a Legal Linguistic Expert within the Legal Service of the Council of the European Union. The author is not representing the position of the Council of the European Union but expressing his personal views.

<sup>294</sup> The principle of 'equal authenticity' derives from Article 314 of the EC Treaty reading: 'This Treaty, drawn up in a single original in the Dutch, French, German, and Italian languages, all four texts being equally authentic...'. With each accession, this Article has been amended to include the new official languages.

<sup>295</sup> EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community  
OJ B 017, 06/10/1958 p. 385.

<sup>296</sup> Initially 4 (Dutch, French, German and Italian), then increased to 6 in 1973 (English and Danish), 7 in 1981 (Greek), 9 in 1986 (Spanish and Portuguese), 11 in 1995 (Finnish and Swedish) and 20 in 2004 (Hungarian, Slovak, Slovene, Polish, Lithuanian, Estonian, Latvian, Czech and Maltese).

The distinction between official and working languages has never been formally defined, however it is generally accepted that 'official' languages are those which institutions are bound to use in their relations with their subjects of law while 'working' languages are those used internally by the various institutions in their daily work. In practice, each institution limits the use of working languages within its own structure to one or more languages while still remaining bound to communicate with the external world in all the official languages.<sup>297</sup>

EU legislation normally starts from a proposal drafted in one language version (normally one of the working languages of the Commission - English, French and German) which is then translated into all the other official languages. At this stage the translator has the task of faithfully reproducing the word and the spirit of the draft in his/her own mother tongue. Amendments to the draft at any stage are followed simultaneously in all the languages and all the legal instruments to be published pass through the scrutiny of a group of legal linguistic experts for each language<sup>298</sup>. Therefore, texts which started as translations are worked upon and become original drafts which are then presented for signature to the relevant legislative authorities in all the language versions simultaneously.

In view of the above, it could be said that the translators and linguists producing the various language versions are actually entrusted with a role at par with that of a drafter of legislation even though they are not assumed to be as conversant with the intention of the legislator as a drafter is meant to be<sup>299</sup>.

<sup>297</sup> For an overview of language regimes within European institutions see S. Moratinos Johnston 'Multilingualism and EU Enlargement' *Terminologie et Traduction* (2000) n3. 5.

<sup>298</sup> J. Morgan. 'Multilingual Legal Drafting in the EEC and the Work of Jurist/Linguists' *Multilingua* (1982) 109.

<sup>299</sup> While a proposal for legislation in the 'original' language is prepared from a specialised Directorate General, the translation of that proposal is entrusted to a central translation unit catering for the translation needs of all the policy areas of the same institution.

## Problems in Practice

The authentic nature of each official language version means that the word of law in a given version gives rise to defined rights and obligations. These rights and obligations as arising in one language version must in principle be the same as the rights and obligations as arising from each and every one of the other 19 official languages. But this contemplated uniformity must first overcome multiple difficulties at the pre-legislative stage of document production as well as at the post-legislative stage of interpretation.

At the pre-legislative stage we find problems related with the fact that legal terminology differs from one legal tradition to another<sup>300</sup> and from one jurisdiction to another<sup>301</sup>. A degree of discrepancy can also be the result of different, sometimes totally unrelated, linguistic families (e.g.: Finnish with French, Hungarian with English), different languages can only with difficulty render one uniform meaning to sometimes alien or supra-national legal concepts<sup>302</sup>. Another problematic element lies in the nature of EU law itself, this being often the subject of hard-fought negotiations and multiple compromises, thereby producing Treaties, Regulations and Directives which are packed with unclear, yet very sensitive, expressions of political commitment (or the lack of it)<sup>303</sup>. These characteristics combined with the fact that translators are

<sup>300</sup> Notably between common law and civil law systems.

<sup>301</sup> e.g. In the choice of legal terminology for the Dutch and French versions of Community law, legal/linguistic experts for these languages are sometimes presented with choices arising from the fact that different national jurisdictions (France and the Walloon region of Belgium for French and the Netherlands and the Flemish region of Belgium for Dutch ) appertaining to the same system of civil law, assign different meanings to the same terminology or develop different terminology for the same legal concept.

<sup>302</sup> see R. Sacco 'L'interprète et la règle de droit européenne' *L'interprétation des textes juridiques rédigés dans plus d'une langue* (L'Harmattan Torino 2002) 233,234.

<sup>303</sup> An illustrative example is found in Article 39 of the EC Treaty - 'Freedom of movement for workers shall be secured within the Community' The word 'workers' is not defined and after forty years the Court is still deciding on how long a person can remain within a territory of a member state looking for work still falling within the 'worker' definition e.g. Case C-292/89 *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* [1991] ECR I-745.

human and consequently are predisposed to error and inaccuracy<sup>304</sup> means that in practice a literal and comparative interpretation of the same Community legislation in various language versions reveals various discrepancies of varying degrees.

At the post-legislative stage of interpretation, the problematic characteristics of the pre-legislative stage are accentuated with the fact that it is the different national courts that are entrusted with the day to day application of the *acquis* in the national territories. National courts coming from different legal traditions and schools of thought, possibly capable of referring to three or four official languages, but certainly more predisposed to rely on their national official language, cannot be said to sum up a homogeneous group capable of ensuring a uniform interpretation and application of the *acquis communautaire*.

Faced with these hurdles capable of jeopardising the uniform interpretation and application of Community law, the ECJ established a number of inter-related guiding principles of interpretation which shed light on the nature of the Community's multilingual regime and impose a number of implied duties on national courts.

### **Interpretation in the Light of all Language Versions**

Given that each version is authentic, one could expect to rely solely on the interpretation of a single language version, however this reasoning falls short of considering the full importance of the qualification of 'equally' authentic, a qualification which, apart from establishing a principle of equality of languages is also intended to convey the meaning that each language version, even though having the full authority of the word of law, must be read in the full awareness that it forms part of a multilingual regime with 19 other language versions having the same force of law and with a

<sup>304</sup> Morgan (n 6) 110 'Occasional differences in the different versions of the Treaty are not normally the result of different meanings put on the Treaty by negotiators for different countries, but rather accidents due to the haste in which the various translations were prepared'.

full awareness of the fact that there is only one interpretation for the 20 language versions. Advocate General Lagrange put this very concisely in **De Geus**; *'As you know, all four languages are authentic, which means that no single one of them is authentic'*<sup>305</sup>. This view is confirmed in **Stauder** where the Court pointed out that the necessity of uniform interpretation and application *'makes it impossible to consider one version of the text in isolation but requires that it be interpreted ... in the light in particular of the versions in all four languages'*<sup>306</sup>.

This view was restated in **Koschniske**<sup>307</sup> where the validity of withholding payments from pension rights on the ground that the persons' husband was receiving income in another member state was challenged on the grounds that the Dutch version of Regulation 574/72 referred to 'diens echtgenote' (his wife), therefore excluding the case of a female, whose 'husband' is receiving income, from the application of the withholding payment provision. It was perfectly clear that all other language versions referred to 'spouse', the Dutch court making the reference asked the ECJ whether 'diens echtgenote' has to be interpreted as including spouses of both sexes. The ECJ replied that:

*'the need for a uniform interpretation of Community regulations makes it impossible for that passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages'* with the result that 'his wife' was to include 'her husband.'

The same rule is applied in **Ferriere** where an undertaking argued that the Commission was obliged to demonstrate both the object as well as the effect on competition of an agreement breaching Article 81 TEC as the Italian version held 'per oggetto e per effetto' instead of 'object or effect'.

<sup>305</sup> Case 13/62 De Geus v Bosch [1962] ECR I-45.

<sup>306</sup> Case 29-69 Erich Stauder v City of Ulm - Sozialamt [1969] ECR I-419 par 3.

<sup>307</sup> Case 9/79 Marianne Wörsdorfer, née Koschniske, v Raad van Arbeid [1979] ECR I-2717. see also Case C-236/97 Skatteministeriet v Aktieselskabet Forsikringselskabet Codan [1998] ECR I-8679.

The Court dismissed the undertaking's argument holding that: 'That version cannot prevail by itself against all the other language versions, which, by using the term "or", clearly show that the condition in question is not cumulative but alternative'<sup>308</sup>.

### **The General Scheme Prevails over literal Interpretation**

In **North Kerry**<sup>309</sup>, an undertaking applying for Community aid was to receive different amounts of Community aid depending on the interpretation of the relevant time, when the aid became due, in a Directive. The English version held '*the time when a transaction is carried out shall be considered as being the date... in which the amount involved in the transaction becomes due and payable*'<sup>310</sup> while the French version held '*est considérée comme moment de réalisation de l'opération, la date à laquelle intervient le fait générateur de la créance*'<sup>311</sup>. This led to a dispute between the undertaking relying on the English version (becomes due and payable) and therefore holding that the relevant date was that of the marketing of the relevant product and the Commission relying on the French and other language versions, holding that the relevant date was that of manufacture (*le fait generateur*). The Commission pointed out that the phrase as expressed in the English version was contrary to all the other language versions and that therefore the English version had to be interpreted in line with the other language versions.

The Court, confronted with this obvious discrepancy between various language versions, and with an implied majority rule by the Commission held:

<sup>308</sup> Case T-143/89 Ferriere Nord SpA v Commission [1995] ECR II-00917 par 31.

<sup>309</sup> Case 80-76 North Kerry Milk Products Ltd. v Minister for Agriculture and Fisheries [1977] ECR 425.

<sup>310</sup> Regulation No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of regulation no 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy OJ L 188 1 English Special Edition 1968 ( II ) 396.

<sup>311</sup> *ibid.*

*the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the concern for legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words. Consequently, it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved*<sup>312</sup>

The Court suggests that for the sake of legal certainty, one should not adopt a semantic interpretation approach to the different language versions because this will inevitably reveal discrepancies and therefore differing interpretations. The Court's solution to this is exploring the possibilities of solving the discrepancies without recurring to any literal interpretation but deriving the interpretation from the wider context. Although this approach is to be regarded as the most practical and reasonable one in the circumstances, one still has difficulties in understanding how the requirement of legal certainty is safeguarded through the proposed solution. This latter concern is emphasised when one considers that certain legal systems do not look favourably at teleological methods of interpretation as proposed by the ECJ but attach great importance to the literal interpretation of the word of law<sup>313</sup>. The question arises as to how can legal certainty be said to be safeguarded if the literal interpretation of the written word of law, in legal systems where this is the rule, can no longer be regarded as definitive testimony of the legal position.

The ECJ did finally find out an acceptable solution to the language discrepancy in the case at issue. By referring to other provisions of the same Regulation and to the practice of the Commission in granting the aid the Court pointed out that aid was paid out only after marketing and that without marketing it was also difficult or impossible to quantify the relevant amount. Therefore, the relevant date was that of marketing. The Court still manages to indirectly

<sup>312</sup> North Kerry (n 17) par 11.

<sup>313</sup> R. Bellis 'Implementation of EU Legislation - An independent study for the Foreign & Commonwealth office' (Nov 2003) 20. <<http://www.fco.gov.uk/Files/kfile/EUBellis.pdf>> (June 2004).

safeguard the interpretation as arising from the French and other language versions by holding that, in view of the interpretation of the other provisions of the same Regulation '*le fait générateur de la créance*' could not but refer to the marketing of the relevant product considering that in practice no aid was paid until this took place. Apparent linguistic discrepancies were therefore reconciled by reference to the broader contextual interpretation rather than through a majority rule or the choice of a superior language version.

The position in **North Kerry** is consolidated in **Bouchereau**<sup>314</sup>. In this case an English Court made a preliminary reference to the ECJ asking whether the term 'measure' in Directive no 64/221/EEC includes a recommendation by a judicial authority. The UK government pointed out that the use of 'measures' in both Articles 2 and 3 of the English version shows that it is intended to have the same meaning in each case and that it emerges from the first recital in the preamble to the Directive that when used in Article 2 the expression only refers to '*provisions laid down by law, regulation or administrative action*', to the exclusion of actions of the judiciary. The Court observed that with the exception of Italian, all the other language versions used two different words in the two articles '*with the result that no legal consequences can be based on the terminology used*'. The Court went further to clarify the position expressed in **North Kerry** by holding that '*the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part*'. This reaffirms the view in **North Kerry** that, in the case of diverging language versions, there is no scope for a literal comparative interpretation - the existence of a single diverging language version gives the court a free hand at teleological interpretation.

<sup>314</sup> Case 30-77 Régina v Pierre Bouchereau [1977] ECR 1999.

Referring to the general scheme, and that is to the scope of the Directive of protecting nationals from any usurpation of their right of free movement not based on a good enough reason to justify an exception from this basic principle, the ECJ held that this protection is intended to cover all the stages of decision making, including that of the judiciary, and therefore the term 'measure' was to be interpreted in a wide sense to cover the decision at issue. The broad scope of a Community measure has been used on several other occasions as an indication of the general scheme favouring the least restrictive interpretation possible<sup>315</sup>.

The importance of the reference to the 'purpose and general scheme' as the only solution to linguistic discrepancies was reiterated in **Commission v UK and Northern Ireland**<sup>316</sup>. In this case the Commission and the UK Government made an extensive semantic analysis of the different language versions, the UK was holding that 'taken out from the sea' and '*extraits de la mer*' as mentioned in Article 4 of Regulation No 802/68 referred to the action by which fish in a net are landed on a fishing vessel, the Commission disagreed holding that the term referred to the action by which fish are entrapped even though remaining in the sea. The interpretation of the term was crucial because it decided whether fish netted by Polish vessels but landed by British vessels would qualify as goods from a third country or goods from a member state with the evident discrepancy of treatment. Apart from a semantic analysis, the parties, evidently aware of the precedent of **North Kerry and Bouchereau** cases, proposed their arguments basing themselves on the 'general scheme'. In particular the UK argued that from an overview of Community legislation related with the issue it was clear that the term was to be interpreted as the action by which the fish are landed on board the vessel. The Commissions' arguments were less extensive and were centred on the argument that the base Regulation did not even consider the

<sup>315</sup> e.g. Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, Case C-236/97 *Skatteministeriet v Aktieselskabet Forsikringselskabet Codan* [1998] ECR I-8679.

<sup>316</sup> Case 100/84 *Commission v United Kingdom of Great Britain and Northern Ireland* [1985] ECR 1169.

case at issue with two vessels with different flags involved in two distinct phases of the fishing operation.

The ECJ pointed out that the phrase at issue can be interpreted differently in each of the Greek, French, Italian and Dutch versions of the Regulation. It referred to the **Bouchereau** case and the 'general scheme' and continued by favouring the Commissions' arguments based on the lack of foresight or scope of the base Regulation. The Court's sequence of thought does not clearly justify the conclusion that the location and entrapment of fish in a net was to be considered as the '*essential part of the operation of catching fish*'<sup>317</sup> and that therefore the vessel which did this part was to condition the origin of the goods themselves. In my view this case shows the difficulty of the Court in giving clear indications of the 'general scheme' by concrete references to other Community legislation or principles and highlights therefore the risk that the 'general scheme' method of interpretation as established in **North Kerry and Bouchereau** serves as a tool to interpret legal text against its literal meaning without giving a clearly visible and appropriate justification. The reliance on the 'general scheme' presents also difficulties when it comes to the day-to-day application of *acquis communautaire* in national courts who cannot reasonably be expected to reach the same conclusions in the interpretation of the general scheme therefore prejudicing the legal certainty mentioned as a reason for departing from a literal interpretation in **North Kerry**.

The above shows that in the case of conflict between two or more authentic legal texts the Court will go beyond the apparent meaning of any language version to analyse the legislators' intention. The existence of 20 equally authentic language versions of the same legal instrument must not mislead us into believing that we have 20 potentially different legal interpretations but rather one interpretation conveyed in 20 different languages whose interaction is only meant to contribute to a better understanding of the

<sup>317</sup> *ibid* par 21.

legislators intention in the particular legal instrument. This does not exclude however that the semantic interpretation of one or more conflicting language version may possibly offer a challenge, through a reference to the interpretation of the legislators' intent by the Court, of the apparently clear word of the law in one or more language versions.

The emphasis on the refusal of a comparative semantic analysis in **North Kerry, Bouchereau and Commission v UK and Northern Ireland** contrasts with the simple comparison of language versions, excluding the odd one out, undertaken in **Koschniske** and **Ferriere**, however, it is submitted that this contrast arises only due to the evidently erroneous nature of the Dutch and Italian versions in the last mentioned cases where the Court was more predisposed to treat the diverging version as evidently subject to a translation error<sup>318</sup>. There seems to be no indicator of the distinction of cases of translation errors from those where the differing language versions are all faithful indicators of the general scheme, however, one may point out the overt contradiction to the principle of non-discrimination on grounds of sex in **Koschniske** and the long established line of case-law to the contrary of the undertakings' claim in **Ferriere** as indicative of when a diverging language is more likely to be interpreted as a translation error.

### **No Majority Rule, No Superior Language Version**

In **North Kerry**, the Commission proposed a majority rule to solve apparent conflicts of interpretation of different language versions of the same Community provision. It argued that given that the phrase as expressed in the English version was contrary to all the other language versions, the English version had to be interpreted in line with the other language versions. The Court dismissed this approach as this would mean that “*one or more of the texts*

<sup>318</sup> see 'Correction ex officio' in G. Van Calster. 'The EU's Tower of Babel : The Interpretation by The European Court of Justice of Equally Authentic Texts Drafted in More Than One Official Language' Yearbook of European Law 1997, n. 17, 385.

*involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words*<sup>319</sup>.

The approach of the Court in this case shows considerable caution and respect to the authentic nature of each language version. With this in mind, the court does not dare to proclaim a linguistic version as prevailing over another in any particular case but must always find a more indirect reason for favouring one interpretation for another giving the impression that it is actually favouring none of the language versions.

In **EMU Tabac**<sup>320</sup> the Court analysed whether purchase through an agent fell within Council Directive 92/12/EEC. The applicants held that agents were covered by the Directive and that although the Greek and Danish versions of the Community law in question preclude the involvement of an agent,

*“Those versions are not consistent with the other versions [and so] they are to be disregarded, on the ground that, at the time when the Directive was adopted, those two Member States represented in total only 5% of the population of the 12 Member States and their languages are not easily understood by the nationals of the other Member States.”*<sup>321</sup>

The Court dismissed these arguments outright by reference to established case law holding that Community law has to be interpreted in the light of all language versions and added that *“all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question”*<sup>322</sup>.

<sup>319</sup> North Kerry (n 17) par 11.

<sup>320</sup> Case C-296/95 The Queen v Commissioners of Customs and Excise, ex parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham [1998] ECR I-1605.

<sup>321</sup> *ibid* par 34.

<sup>322</sup> *ibid* par 36.

The position above subsists even where the particular legislation in question was conceived to cater for mainly one member state. In **Cricket St. Thomas**<sup>323</sup>, in the interpretation of the English version in conflict with a number of other Community languages, the Court held that even though the particular Community legislation in question was drawn up in order to take account of the special situation of the Milk Marketing Boards in the United Kingdom. *“The English version ...cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in this regard”*<sup>324</sup>

This principle translates itself into a duty on national authorities dealing with the implementation of Community rules to consult various language versions of a particular Community law. In **Konservenfabrik**<sup>325</sup> the German version of a Regulation referred to **Suesskirschen** (sweet cherries) instead of **Sauerkirschen** (sour cherries). The Regulation's application to sour cherries before the entry into force of a corrigendum was contested. The ECJ held: *“since that version mentioned the CN codes applicable to sour cherries, that ambiguity could perfectly well have been resolved by reference to the other language versions of the regulation.”*<sup>326</sup>. In this case the Commission had warned the national authorities beforehand of the evident mistake in the Regulation in question, thereby taking away any good faith which the national authorities could have claimed in their reliance on the misleading German version. It is however not clear whether, in a case where a subject of law shows that it was relying in all good faith on a misleading language version, the court would be ready to give that party some advantage based on legitimate expectations, benefit of the doubt or any other ground.

<sup>323</sup> Case C-372/88 Milk Marketing Board of England and Wales v Cricket St. Thomas Estate [1990] ECR I-0134.

<sup>324</sup> *ibid* par 18.

<sup>325</sup> Case C-64/95 Konservenfabrik Lubella Friedrich Büber GmbH & Co. KG v Hauptzollamt Cottbus [1996] ECR I-05105.

<sup>326</sup> *ibid* par 18.

## **Notions of National law should not interfere with the Interpretation of EU law - Community law has a 'Community meaning'**

In **Rockfon**<sup>327</sup> the ECJ was confronted with important questions as to whether provisions of national law of a member state can be used to aid the interpretation of a phrase in Community law. The case concerned Council Directive 75/129/EEC relating to collective redundancies. The Directive imposed specific obligations on 'establishments' but did not define the term. The Danish law transposing the Directive provided for the possibility of ministerial orders on the definition of 'establishment'. Such an order was passed and specified that an establishment "*shall be a unit ...which has a management which can independently affect large-scale dismissals*"<sup>328</sup>. **Rockfon** was being sued for dismissing 24 employees and held that it did not fall under the definition of the term 'establishment' as it did not have a management which can 'independently effect large-scale dismissals'. The Danish district court analysed whether **Rockfon** was able to 'independently effect large-scale dismissals' according to the ministerial order and decided that it was actually capable of doing so. The preliminary reference was made on appeal. The ECJ started by pointing out that the term is not defined in the Directive and continued by holding that "*the term "establishment", as used in the Directive, is a term of Community law and cannot be defined by reference to the laws of the Member States*"<sup>329</sup>.

This declaration holding that the interpretation of Community law cannot rely on reference to the laws of the member states sheds an important light on the very nature of the language of Community legislation. The case at issue is not so stark to enable us to derive

<sup>327</sup> Case C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] ECR I-4291.

<sup>328</sup> Order No 755 of 12 November 1990.

<sup>329</sup> *Rockfon* (n 35) par 25, see also preceding Case 64/81 *Nicolaus Corman & Fils SA v Hauptzollamt Gronau* [1982] ECR 13 par 8 where the Court held that the definition of 'edible ice cubes' in a Regulation is to be based on CCT and other Community acts 'which do not refer to legal systems of the Member States in determining their meaning and scope ; the Community legal order does not in fact aim in principle to define its concepts on the basis of one or more national legal systems'.

general conclusions, given that this is also a clear case of unlawful limitation of a Directive's scope, however, one cannot exclude that the Court here suggests that Community legislation gives rise to a 'Community meaning' which is to be interpreted free from any influence of interpretation deriving from the legal tradition and meaning of national law.

The above view is confirmed in **Cilfit**<sup>330</sup> where the ECJ was asked to give a preliminary reference ruling on whether national courts have any discretion in making an 'obligatory' preliminary reference under paragraph 3 of Article 234 TEC. The Court conceded that national courts have the discretion not to make a preliminary reference if they are sure that the interpretation of the Community provision in question was beyond doubt in all the language versions of the Community law in question bearing in mind that:

*“Even where the different language versions are entirely in accord with one another ... Community law uses terminology which is peculiar to it ... it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.”*<sup>331</sup>

### **National Reactions**

National courts of different member states have differing reactions to the above guiding principles established by the ECJ and to its rulings in general. It has been suggested that national courts should cooperate better in their implementation of Community law and that some system of facilitated access and reference to decisions of courts of other member states is set in place thereby creating at

<sup>330</sup> Case 283/81 Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health [1982] ECR 3415.

<sup>331</sup> *ibid* par 19. A good example of the peculiar 'Community meaning' which terminology used in Community law acquires is illustrated in the words 'Regulation' and 'Directive', which are given various different meanings when used within national legislations certainly diverging from the precise denomination that the words have in Community law.

least an awareness of the decisions taken in parallel courts, in other member states, in the interpretation of Community law<sup>332</sup>.

With the Treaties setting only a loose framework of preliminary reference, the relationship between the ECJ and national courts is set to depend largely on cooperation<sup>333</sup> and mutual trust. This cooperation relationship has lately been reinterpreted in **Köbler**<sup>334</sup> where the ECJ extended the principle of state liability for infringement of Community law to decisions of supreme courts in the member states possibly including a decision not to refer for a preliminary ruling. However, this latter development does not modify the reality whereby the factual interpretation and implementation of Community law depends ultimately on the National courts.

As earlier indicated, uniformity of application of Community law has to counter problems related with different legal traditions. The main resistance in this regard is presented by systems of common law which cannot but find difficulties in following the ECJ's recommendations on teleological interpretation, on the importance of the general scheme and the necessity of not getting lost in too much literal analysis. For a court within a common law system, the test of interpretation of a legal provision is what would an average man in the street, and not what the European Court of Justice with one judge from every capital city of the European Union, would understand by the provision in question. However, in spite of inherent difficulties, UK courts seem to be going through a process of transition whereby the literal interpretation is giving way to the teleological interpretation when it comes to National law deriving from Community law<sup>335</sup>. In *H.P. Bulmer*, the Master of the Rolls, learned Lord Denning declared:

<sup>332</sup> T. Lundmark 'Soft stare decisis and harmonisation' *L'interprétation des textes juridiques rédigés dans plus d'une langue* (L'Harmattan Torino 2002) 143.

<sup>333</sup> Acknowledged also in *Cilfit* (n 38) par 7.

<sup>334</sup> Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR.

<sup>335</sup> It has been suggested that this process is also effecting the method of interpretation in purely national law related cases - House of Lords, *Regina v Secretary of State for Health* [2003] in R. Bellis 'Implementation of EU Legislation - An independent study for the Foreign & Commonwealth office' (Nov 2003) 20

*“...English courts dealing with a problem of interpretation must follow the European pattern. No longer must they examine the words in meticulous detail nor argue about precise grammatical sense. They must look at the purpose or intent. In the words of the European Court, ‘they must deduce from the wording and the spirit of the Treaty the meaning of community rules’. They must consider, if need be, all the authentic texts in eight languages. The Judges must divine the spirit of the Treaty and gain inspiration from it.”<sup>336</sup>*

### **Maltese Law**

Section 74 of The Constitution of Malta holds: *“Save as otherwise provided by Parliament, every law shall be enacted in both the Maltese and English languages and, if there is any conflict between the Maltese and the English texts of any law, the Maltese text shall prevail.”*

Section 3 of the European Union Act<sup>337</sup> provides an umbrella provision holding that national law shall be invalid insofar as in conflict with Community law while declaring existing and future Community legislation as part of the national law of Malta. Section 5 of the said act provides for an obligation on national courts to refer to the case-law of the ECJ.

In view of the guiding principles of interpretation outlined in this paper, section 74 of the Constitution of Malta needs to be re-interpreted in the light of the obligations arising from Malta's accession to the EU as transposed in the European Union Act provisions cited above. Section 74 is an expression of national identity and sovereignty that now finds its rational application only in the interpretation of national law clearly falling outside the scope of Community competence.

<<http://www.fco.gov.uk/Files/kfile/EUBellis.pdf>> (June 2004).

<sup>336</sup> H.P. Bulmer Ltd. and Showerings Ltd. v. F. Bollinger S.A. and Champagne Lanson Père et Fils 23 May 1974 The Times (London).

<sup>337</sup> Chapter 460 Revised Edition of the Laws of Malta.

Its application to national law deriving from Community law as well as to all national law in areas where transposition of Community law is due<sup>338</sup> could be interpreted as too sovereignty-friendly and certainly contravening the principle of equality of languages and the importance of interpretation in the light of all language versions as proposed by the ECJ.

## Conclusions

In practice, the reliance of Maltese courts on the constitutional provision above seems to be a rare occurrence<sup>339</sup>. But as we have seen, the duties on national courts arising from the Union's multilingual regime extend well beyond the lack of preference for one language version. National courts are in fact expected to refer to the various language versions of Community legislation, interpret them while taking full cognisance of the general scheme of the Community provisions in question and exclude any pre-conditioning from notions of national law keeping in mind that Community law has a 'Community meaning'.

The European Court of Justice in *Cilfit*<sup>340</sup>, in conceding that national courts have the discretion not to make a preliminary reference to the ECJ when the point of law in question is beyond doubt, held that, in deciding that the point is beyond doubt, its interpretation is to be beyond doubt in all the language versions of the Community legislation in question. In this case, as in most of the other cases analysed above, the message from the ECJ is that of highlighting the difficulties of interpreting Community law in a uniform manner and pointing out the limitations of this being done by the numerous national, regional or local courts. One could also be tempted to say that the European Court, through the setting of

<sup>338</sup> In Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I par 8 the ECJ held 'in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it'.

<sup>339</sup> One of the very few cases in which this provision is expressly referred to is *Lawrence Borg v Wilfred Miggiani et al* 10 October 1986 Commercial Appeals.

<sup>340</sup> *Cilfit* (n 38).

hard-to-reach requirements (for instance, expecting Maltese courts to make an analysis of Community provisions in Lithuanian, Greek, Finnish and all the other Community languages), is actually giving the message that national courts, in the interpretation of Community law, need not take much trouble but just make a simple preliminary reference, which may delay procedures by a year or two, but which will ensure that Community law is applied uniformly in all the European Union.

In this paper we have seen that the Union's multilingual character has a considerable effect on the interpretation of the *acquis communautaire*. Considering the overriding necessity for uniformity in a Union which strives to guarantee the same rights to all its citizens spread around 25 countries, the existence of 20 different language versions of the same normative force could be seen as an added hurdle to achieving this already difficult task. However, this linguistic diversity enhances the communication abilities of a Union which is committed to ensure a better access to its workings - to all its citizens. The various language versions can finally ensure that Community law is reproduced through the different lenses and expressions which inevitably precondition the use of different languages, thereby ensuring that a combined interpretation of all the language versions gives the most comprehensive interpretation possible of the legal provision in question.

Finally, putting the Union's multilingual regime within the traditional tensions between an inter-governmental and a supra-national system, one can point out that while the authentic nature of each language version is in line with an inter-governmental approach, the focus on the general scheme and on one implied interpretation which overrides the literal interpretation of the several language versions is in line with a supra-national line of thought. In conclusion we observe that this solution is a hybrid one, just as hybrid as one could expect from a hybrid entity like the EU.

**Peter Agius**  
August 2005



## **The Revision of the Working Time Directive.**

**Dr. Anthony Ellul LL.D.**

### **1.1. The Working Time Directive**

EU Directive 93/104/EC aimed to ensure a better level of safety and health protection for workers, with the main provisions being:-

1. A minimum rest period of 11 consecutive hours for each 24-hour period (Article 3);
2. A rest break where the working day is longer than six hours (Article 4);
3. A minimum rest period of one day per week (Article 5);
4. Maximum weekly working hours of 48 hours on average, including overtime, over a reference period not exceeding four months (Article 6);
5. Four weeks of paid annual leave (Article 7); and
6. An average of no more than eight hours of work at night in any 24 hour period (Article 8).

The Directive as amended by Directive 2000/34/EC was repealed and consolidated into Directive 2003/88 which entered into force on the 2<sup>nd</sup> August 2004.

The original Directive provides that two of its provisions had to be reviewed before 23 November 2003. These are:-

1. Article 17 which includes derogations from the four month reference period for the application of Article 6 of the Directive (i.e. the maximum 48 hour working week). For many firms it is

important to organise working time flexibly in order to respond to seasonal or demand fluctuations. The option to derogate from such reference period granted by the Directive, may not result in the establishment of a reference period exceeding six (6) months. However, for objective or technical purposes, Member States have the option to allow, collective agreements or agreements concluded between the two sides of industry to set a reference period that does not exceed twelve (12) months.

2. The option for Member States of not applying Article 6 if the individual worker consents to this (i.e the 'opt out' from the 48 hour maximum working week) (Article 18).

Two very important rulings by the European Court of Justice regarding the definition of working time as to on-call working, were the **Simap** case<sup>341</sup> and the **Jaeger** case<sup>342</sup>.

In the **Simap** case, the Court was requested to state whether time spent by Spanish doctors "on call", either at the medical centre or away from it, was to be considered as "working time"<sup>343</sup>. The Directive does not define time spent "on call", whereas rest-time is defined as "*any period which is not working time*". The Court declared that when doctors are obliged by their employer to be present at the workplace, they are to be regarded as carrying out a duty. The Court adopted the theory that the three features of working time are cumulative. Therefore, time spent on-call in the workplace is regarded as working time. On the other hand, where doctors are to be capable of being contacted when on call, only time linked to the actual provision of medical emergency services is to be regarded as working time<sup>344</sup>. The court considered that such

<sup>341</sup> 3<sup>rd</sup> October 2000.

<sup>342</sup> 9<sup>th</sup> October 2003.

<sup>343</sup> Working time is deemed to be "any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national laws and/or practice" (Article 2).

<sup>344</sup> "time spent on call by doctors in primary health care teams must be regarded in its entirety as working time, if they are required to be at the health centre. If they must merely be contactable at all times when on call, only time linked to the actual provision of primary health care services must be regarded as working time".

an interpretation was in line with the objective of the Directive, i.e. to ensure the safety and health of workers.

In the **Jaeger** case, the Court followed the reasoning adopted in the **Simap** judgement. The Court concluded that a doctor required to be available at a place determined by the employer, is subject to greater constraints than a doctor on stand-by and not required to be on the hospital premises. Therefore, on call-working should be considered in its entirety to be working time, even if the doctor in question is permitted to rest and sleep during periods of inactivity, and such periods cannot be taken into account in calculating the 11 hour rest period imposed by the Directive. The Court concluded that the German law which treats as periods of rest periods of on-call duty where an employee is not carrying out any professional activity, and which provides for compensatory arrangements only in respect of periods of actual activity, is contrary to Community law.

Likewise, in cases C-397/01 to C-403/01<sup>345</sup> where emergency medical workers filed proceedings against the German Red Cross, the ECJ confirmed:-

1. The Working Time Directive applies to the activities of emergency workers in attendance in ambulances as part of a rescue service;
2. Any extensions of the 48-hour period of maximum weekly working time requires each worker individually to give his consent, expressly and freely;
3. In calculation of the maximum period of daily and weekly working time, periods of duty time must be taken into account in their totality. Therefore, the average weekly duty time of emergency workers, during which they have to make themselves available to their employer at the place of employment and remain

<sup>345</sup> Bernhard Pfeiffer and Others vs Deutsches Rotes Kreuz, Kreisverband Waldshut e. V, 5<sup>th</sup> October 2004.

continuously attentive in order to be able to act immediately should the need arise, cannot exceed the 48-hour limit.

4. The directive, so far as the 48-hour maximum period of weekly working time is concerned, has direct effect.

### **1.2 Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions.**

On the 5<sup>th</sup> January 2004 the European Commission issued a Communication concerning the re-examination of the Directive under discussion and the launching of a wide ranging consultation process which would be capable of bringing about an amendment to the Directive. The study consisted of a ten-year review of the Working Time Directive.

The report had three main aims:-

1. To evaluate and review two aspects of the Directive earmarked for review seven years after:-

- (a) The option of 'opt-out' from the forty-eight hour weekly limit on average working time; and
- (b) Derogations from the four-month reference periods for the calculation of the average weekly working time of forty-eight (48) hours;

2. To analyse:-

- (a) The impact of the **Simap** and **Jaeger** judgements in the area of the definition of working time and the status of on-call working;
- (b) The possibility of introducing measures to reconcile work and family life;

3. To consult the European Parliament, the Council of Ministers, the European Economic Social Committee, the Committee of Regions and the EU social partners on a possible revision of the

text. The EU level social partner organisations, were also invited to give their opinion on the need to amend the Directive as regards the scope for individual opt-outs and derogations from the reference period in respect of the 48-hour working week.

In the first part, the report:-

- (a) Outlined the legal provisions under review;
- (b) Assessed the situation prevailing at the time within the Member States;
- (c) Considered the definition of working time and rest period;
- (d) Analyzed the judgements delivered in the **Simap** and **Jaeger** cases and their impact. The Commission expressed its pre-occupation that the effect of the said judgements would be that some Member States will have recourse to derogations or exceptions, in order to limit their influence. The Commission confirmed that this was the situation in some Member States and would continue in the future. It also envisaged that Member States might be tempted to resort to alternative arrangements offering less protection, example engaging self-employed doctors, to whom the Directive does not apply.
- (e) Encouraged greater flexibility between work and family life to ensure the *“growing needs of workers, particularly those with dependent children or elderly relatives, as well as the interests of companies, which need to be able to respond to user and customer demand for extended operating hours or to adapt rapidly to sharp fluctuations in demand”*.

In the second part, the Commission outlined the options available and indicated the criteria to be met for any future proposal in relation to working time:

- (a) Ensure a high standard of protection of workers’ health and safety with regard to working time;

- (b) Give companies and Member States greater flexibility in managing working time;
- (c) Allow greater compatibility between work and family life;
- (d) Avoid imposing unreasonable constraints on companies, with particular reference to SMEs.

In this part of the report, the Commission also indicated the main issues that had to be addressed.

The Commission invited all interested organizations to send their comments and suggestions, after which the Commission would conduct a detailed assessment of the contributions and subsequently draw the necessary conclusions.

### **1.3 Proposal for a Directive issued by the European Commission, September 2004**

The Commission consulted the two sides of the industry (i.e. the social partners) on the need to revise the existing directive and requested them to negotiate an agreement on amendments to it, as required to do in terms of Article 138. Unfortunately the social partners (i.e. the European employer's Federation and the European Trade Union Confederation) failed to find sufficient common ground to start negotiations and they declined the Commission's invitation to enter negotiations in this field, and asked the Commission to adopt a proposal of a Directive.

In September, 2004 the Commission adopted a proposal for a modification to the existing Directive concerning certain aspects of the organisation of working time. Employment and Social Affairs Commissioner Stavros Dimas, commented on the proposal adopted by the European Commission:- *“This proposal will address shortcomings in the present system, demonstrated in the course of its application. It is a balanced package of measures that protect the health and safety of workers whilst introducing greater flexibility and preserving competitiveness”*.

The areas where changes were proposed are the following:-

1. To keep the individual opt-out however tightening the conditions for its application when there is no collective agreement in force or no such agreement can be concluded;
2. To grant Member States the possibility to extend the reference periods to not more than 12 months, subject merely to consultation of the social partners concerned;
3. To correct the definitions of working time, so that the inactive part of on-call time is not considered as working time.

### **1.3.1 The Opt Out.**

Article 22 (in 18 in Directive 93/104) of the current directive gives Member States the option not to apply Article 6 which provides for the maximum 48 hour working week.

The conditions applicable for the application of the opt-out are:-

1. The employer must obtain the worker's consent to work more than 48 hours per week;
2. No worker must suffer any disadvantage if he does not agree to opt-out;
3. The employer must keep up-to-date records of all workers who opt-out;
4. The records must be available to the competent authorities, which can ban or restrict hours worked in excess of the 48 hour limit if necessary for health and safety reasons.

The U.K. has been the only Member State to apply the opt-out on a general basis. Following enlargement, Cyprus and Malta applied it on a general basis. Other countries, such as Luxembourg apply it to certain sectors. Example Luxembourg has applied it to its

restaurant and catering sector; following the **Simap** and **Jaeger** judgements, France, Spain and Germany applied the opt-out to their health sectors.

In its first report, the Commission commented that the possibility to work more than 48 hours per week, *“could put at risk the Directive’s aim of protecting workers’ safety and health”*. Evidence has shown the systematic abuse of the opt-out clause, for example where employees are persistently asked to sign the opt-out agreements at the same time as the contract of employment, thereby placing pressure to agree to such a clause and undermining the employee’s freedom of choice.

Under the new proposal, which the Commission considered to permit better compatibility between work and family life:-

(a) The conditions attached to the worker’s individual consent are tightened:-

- It cannot be given during a probation period or at the time when the contract of employment is signed;
- It has to be in writing;
- It is valid for a maximum period of one (1) year (can be renewed);
- No worker can work more than 65 hours a week. This is however not a mandatory maximum and opt-outs will be possible by employer-worker agreements or collective agreements.
- Employers are obliged to keep records that have to be accessible to the competent authorities, if required.

These conditions are aimed at preventing abuses and ensure that the choice of the worker is entirely free and no coercion is exerted by the employer.

(b) The opt-out may be applied if:-

- Expressly allowed under a collective agreement or an agreement between the social partners; and
- The individual consents;

However only individual consent is required where there is no collective agreement in force and where there is no workers' representation within the undertaking or the business that is entitled to conclude a collective agreement or an agreement between the two sides of the industry<sup>346</sup>

### 1.3.2 On-call time

The proposal introduces a new category, “on call time” which is defined as the “*period during which the worker has the obligation to be available at the workplace to intervene, at the employer’s request, to carry out his activity or duties*”. Similarly, the proposal defines “*inactive part of on-call time*” as the “*period during which the worker is on call but is not required by his employer to carry out his activity or duties*”<sup>347</sup>.

The Commission proposed that, “*the inactive part of on-call time shall not be regarded as working time, unless national law or, in accordance with national law and/or practices, a collective agreement or an agreement between the two sides of industry decides otherwise.*”

*The period during which the worker carries out his activity or duties during on-call time shall always be regarded as working time”.*

This clause has been proposed following the judgements delivered in the **Simap** and **Jaeger** cases. The Commission has declared

<sup>346</sup> This is essentially aimed at small enterprises.

<sup>347</sup> The current position is that any period can be considered to be only working time or a rest period, and the two concepts are mutually exclusive.

that such a proposal aims to ensure an appropriate balance between the protection of workers' health and safety, on the one hand, and the need for flexibility for companies, on the other hand. The inactive part of on-call time was deemed as not requiring the same protection as the active periods. Therefore, the proposal establishes that the inactive part of on-call time is not working time within the meaning of the Directive. In other words, time spent resting at home and the place of employment would be treated in the same way.

Opponents to this proposal have claimed that it violates international labour standards as laid down by the International Labour Organization as far back as 1930. ILO Hours of Work Convention No. 30 provides that "*the term hours of work means the time during which the persons employed are at the disposal of the employer*".

### **1.3.3. Implementation of the Reference Periods**

According to Article 16 of the Directive (93/104/EC), the reference period for calculating the average working week is established at four months. However, it is possible to extend to six months, and by collective agreement or agreements concluded by the social partners, it may be extended to twelve months. The six month reference period has been removed.

The changes proposed by the Commission are the following:-

- (a) Member States could extend the period up to one year, following consultation of concerned social partners and to the encouragement of social dialogue in this matter;
- (b) Duration of the reference period can under no circumstance exceed the duration of the employment contract.

This proposal aims at allowing employers to deal with more or less regular fluctuations in demand, and simplify the management of the employee's working time.

### **1.3.5. Time Limits for Compensatory Rest**

Article 3 (daily rest) - workers shall be entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period;

Article 5 (weekly rest periods) – each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours.

In terms of Article 17, it is possible to derogate from these provisions, for certain groups of workers (e.g. shift workers, cleaning staff), and thereby take the rest period later. In such cases, workers must, in principle be granted an equivalent period of compensatory rest. The Commission's proposal is in the sense that this period of compensatory rest is to be granted within a reasonable time and, in all cases, within a time limit that does not exceed 72 hours. Of interest is that the ECJ in the **Simap** and **Jaeger** judgements interpreted the existing Directive to mean that compensatory leave had to be taken immediately.

### **1.3.6. Work-life balance**

The Commission considered its proposals (especially the ones relating to opt-out) as affording a better compatibility between work and family life. In terms of its proposals, the Commission referred the issue to Member States, stating that it is for Member States to encourage social partners to conclude agreements to ensure better compatibility between work and family life. This has been considered not to take the needs of workers and their families seriously.

**1.4 Report by the European Parliament's Employment and Social Affairs Committee for a directive amending Directive 2003/88 concerning certain aspects of the organisation of working time and the European Parliament's Resolution adopted in May 2005.**

On the 7<sup>th</sup> March 2005, the rapporteur of the European Parliament's Employment and Social Affairs Committee (Alejandro Cercas) issued his proposals for the revision of the European Working Time Directive, based on the proposals made by the European Commission on the 22<sup>nd</sup> September 2004. This was followed by a European Parliament legislative resolution adopted at its May 2005 plenary session.

Essentially, the key areas of amendment are the following:-

1. **On-call time:-** the entire period, including the inactive part, should be regarded as working time unless law or collective agreement stipulate that the inactive on-call periods can be counted in a specific manner for purposes of calculating the average maximum weekly working time. Such a stand clearly indicates the European Parliament's disagreement to legislating against the case law of the Court of Justice, although it attempts to grant a solution in certain circumstances to remedy for staff shortages. The European Parliament clearly gave preference to the conventional method and favours the confining of the said measures to situations and persons who require it.
2. **Opt-out:-** this is to be repealed thirty six (36) months after the revised Directive comes into force<sup>348</sup>. As long as it remains in force, the agreement with the employee cannot exceed a period of six (6) months, which period can be renewed. Furthermore, any agreement made by workers under the Directive and still valid at the date of implementation of the new Directive, shall remain valid for a period not exceeding one year from that date.
3. **Compensatory rest:-** this is to be taken immediately, in accordance with the relevant law, collective agreement or other agreement between the two sides of industry;

<sup>348</sup> The report prepared by Cercas proposes to phase out the individual opt-out entirely by 2010.

4. **Reference Periods:-** Member States shall be allowed to extend such periods to twelve (12) where:-

(a) Workers are covered by collective agreements providing for a 12-month reference period; or

(b) There is no collective agreement, by means of law or regulation on condition as long as the Member State takes the necessary measures to ensure that the employer informs and consults with workers about the introduction of the new working time pattern, and the employer takes the necessary measures to prevent and/or remedy health and safety risks.

5. **Working Time:-** The European Parliament seeks to insert a new Article into the Directive, dealing with the calculation of working time. It states that where workers have more than one work contract, their working time shall be the sum of the periods of time worked under each of the contracts.

6. **Review of Directive:-** This is to take place every five (5) years.

The EP's resolution has been received with contrasting reactions. Thus for example the:-

- European Trade Union Confederation (ETUC) stated:- *“This vote sends out a clear signal to the Council and the European Commission that it is time for an end to the ‘opt-out’ clause. Today’s vote is important for a number of reasons. It demonstrates a commitment on the part of a large number of the political groups represented in Parliament to play a significant role in defending the European social model and fundamental rights against neo-liberal ideas. It is proof that a strong social Europe really exists”*.

- Employer Representatives:- they are strongly opposed to the amendments, claiming that they will restrict flexibility. They contend that the resolution is inconsistent and poses threats to the

objectives of enhancing growth and jobs in Europe. They claim that flexibility is essential for the competitiveness of undertakings, in particular SMEs. The removal of the opt-out clause will, according to this sector, undermine the EU's declared aim to become the most competitive economy in the world by 2010.

In Malta, the social partners agree that the abolition of the opt-out from the EU working time Directive's 48-hour limit on average weekly working hours, would harm the national economy. Although they acknowledge that the importance of maintaining a better work-life balance, they fear that the proposed amendment might lead to less business competitiveness and lower standards of living. Therefore, in the local scene the prevalent opinion is that Malta should retain flexibility in working hours.

The Commissioner for Employment, Social Affairs and Equal Opportunities<sup>349</sup>, has stated that the Commission cannot accept the European Parliament's amendment on the opt-out clause; *"I am aware that the opt-out is a political question and one of principle. In this context the Commission will continue intensive dialogue with the Parliament"*.

Following the opinion of Parliament, on the 31<sup>st</sup> May 2005 the Commission forwarded another proposal amending the directive on the organisation of working time. The main features are the following:-

- 1) **On call-time:-** The Commission took account of the EP's concern for the health and safety of workers who are regularly on call, and included a provision aiming to ensure that inactive periods of on-call time are not taken into account in calculating the rest periods laid down in Article 3 (daily rest period) and 5 (weekly rest period).
- 2) **Individual Opt-Out clause:-** the EP's proposal for the repeal of the opt out clause within 36 months after the entry into force of

<sup>349</sup> Vladimir Spidla.

the Directive, was declared as being unacceptable. However, the Commission confirmed that *“it is prepared to explore a possible compromise on this question which is dividing the co-legislators”*.

3) Certain proposals contained in the EP’s resolution were accepted by the Commission. The main one’s are:-

(a) Acceptance of the aggregation of hours in cases involving several employment contracts for the purpose of calculation of working times;

(b) The reference period. Therefore, the Commission deleted its original proposal whereby Member States would be able to extend the reference period for twelve month following consultation with the social partners concerned.

As to compensatory rest, the proposal removed the reference to the 72 hours limit and retained the words *“within a reasonable period”* as contained in the Commission’s proposal of September 2004.

The final proposal of the Commission, was studied during the Employment and Social Affairs Council, held in Luxembourg on 2<sup>nd</sup> June 2005 and chaired by Luxembourg’s Minister for Labour and Employment. Talks focused mainly on the main lines of the new proposal and particularly on the sensitive matter of possible opt-outs to the 48 hour limit on the working week. With respect to this issue, two views were evident within the Council; countries who supported the retention of the opt-out, and other countries that consider it no longer to be justified. The conclusion reached was that before a compromise is reached on the opt-out issue, two specific problems had to be solved:-

- Problems in the healthcare sector resulting from the Simap/Jaeger judgements;

- The tradition in certain countries permitting individuals to have more than one work contract at a given time.

Given the desire by all concerned to find a compromise, the Presidency called on 'Coreper' to restart work and keep the Council informed. Therefore, it is evident that the Commission's proposal is not definitive but a basis for future discussions. It is evident that this proposal has a long way to go prior to final adoption, where intense debate and lobbying will surely take place.

**Anthony Ellul**  
November 2005.







## **COMMERCIAL LAW**



## **A Single Unified Supervisory Authority for Financial Services in Malta and beyond - some Legal and Regulatory Issues<sup>350</sup>**

**Dr. David Fabri LL.D.<sup>351</sup>**

### **Preliminary**

During this past decade, many countries have addressed the question of how their financial services sector should be regulated. The UK has seen the creation of the Financial Services Authority and the demise of the self-regulatory system formerly organized under the Financial Services Act of 1986. In the wake of the recent Parmalat and Fazio scandals, Italy toyed with the notion of creating a “Super-Consob” and the curtailing of some of Banca D’Italia’s functions. In these past few years, single regulatory structures have been established in several countries in and outside the European Union. These have included Austria, Bahamas, Barbados, Belgium, Estonia, Germany, Hungary, Ireland, Japan, Mauritius, and the Canadian Provinces of Ontario and Quebec. Other countries or jurisdictions have been busy re-considering or reforming their regulatory arrangements.

This paper primarily seeks to trace the development of a single regulatory authority for financial services in Malta, recording a sequence of important decisions and events marking a process

<sup>350</sup> The original version of this paper had been completed for publication in this journal in August 2003. It had been loosely based on a talk, accompanied by a power-point presentation, on the subject “Setting up a single unified financial services authority – advantages and disadvantages, and developments in Malta and beyond”, given on the 3 October 2001 to participants at the Malta-Commonwealth Third Country Training Programme (organized jointly by the Islands and Small States Institute at the Foundation for International Studies and the Commonwealth Secretariat). Regrettably, due to transitional editorial boards, the journal has not been published since then. Having been dusted, revised and updated, it now attempts to show the position as at July 2006. The paper reflects the author’s personal views and does not represent any official policy.

<sup>351</sup> Senior Lecturer in the Commercial Law Department, University of Malta, mainly on financial services and consumer legislation, and Director for Legal and International Relations with the Malta Financial Services Authority.

launched in 1994 and only finalized in 2003. Upon completion of this project, Malta joined a then still relatively small number of jurisdictions where the supervision of the entire financial services sector was entrusted to one single agency. Indeed, the Malta Financial Services Authority<sup>352</sup> (MFSA) is now the single unified regulatory authority for the whole financial services sector in Malta. It exercises supervisory oversight in the three traditional areas of financial services activity, namely banking, insurance and securities.<sup>353</sup>

This brief paper does not tell the full story of how and why the original Malta International Business Authority<sup>354</sup> became the Malta Financial Services Centre (MFSC) and then, later, the MFSA. It is also the tale of how a smallish regulatory agency with an exclusively offshore mission found itself re-constituted and re-designed into a more substantial regulatory authority with consolidated supervisory responsibility for the entire domestic financial services sector. The Maltese experience offers an interesting case study within an international context that seems to be in perpetual flux.

This paper assumes agreement on the proposition that providers of financial services to the public should be properly supervised by specialized administrative agencies set up for that purpose. This shall allow it to focus attention on the administrative structures set up to undertake such supervision in Malta and in several other selected jurisdictions. Research shows that countries have devised different solutions as to how best to regulate their financial services industry. Some countries have established a single regulatory structure, whereas others, more numerous, continue to allocate different responsibilities to different agencies. Also interesting is

<sup>352</sup> Established by the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta.

<sup>353</sup> Securities business includes the financial markets, investment services and collective investments schemes.

<sup>354</sup> Established in 1989 under the Malta International Business Activities Act, the former Chapter 330 of the Laws of Malta.

the finding that the single regulator jurisdictions have actually adopted a variety of structures and models.

The point of departure for this discussion therefore is that countries are still allowed, indeed have, to make up their own minds as how best to organise their internal regulatory structures. This is still a matter to be decided by domestic national law. Neither the World Trade Organization (WTO) nor the older and more developed European Union (EU), both of which shall now be considered here, imposes or proposes any specific financial services administrative framework or regulatory model for their respective member states.

An introductory note on the international dimension

**(a) The World Trade Organization<sup>355</sup>**

Within the World Trade Organization framework, financial services regulation is governed by the General Agreement on Trade in Services (GATS).<sup>356</sup> The GATS does not prevent members from imposing authorization requirements provided these do not breach the country's obligations or commitments (especially on market access and national treatment). Article 2(a) of the GATS in fact states that:

*“ ...a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.”*

<sup>355</sup> See generally Opening markets in Financial Services, WTO Publications, 1997; Dobson W. and Jacquet P., Financial Services Liberalization in the WTO, Institute for International Economics, 1998.

<sup>356</sup>Annex 1B to the Final Act establishing the WTO signed in Marrakesh in 1994, which came into force on 1 January 1995.

Accordingly, prudential measures are not considered as limitations on market access and national treatment, and need not be listed in a country's schedule of specific commitments.

While the WTO Agreement does not require this, most countries would in fact have some form of state authorization mechanism for all or some of their financial services providers. The huge economic, legal and cultural differences that divide its member states<sup>357</sup> makes it difficult to achieve agreement on a common framework for financial services regulation. The WTO itself could not go further in this field as it has no competence to impose any particular regulatory system. This difficulty also suggests that at this stage no ideal universal model for financial regulation capable of application to every country, irrespective of its size or circumstances, can be envisaged.

#### **(b) The European Union**

Neither the European Commission nor the various EU financial services Directives stipulate how a member state's regulatory structures should be designed.<sup>358</sup> They do however broadly require that a member state be in a position to fulfil its Treaty obligations and to transpose and properly implement the various directives. As a more integrated and cohesive grouping than the WTO,<sup>359</sup> the European Union issues various sets of norms that every member state must follow, particularly with the aim of promoting the internal, or single, market and the harmonization of regulation in various fields. In the financial services field, recent EU Directives explicitly require member states to set up effective supervisory agencies with sufficient competence and power to implement the relevant rules. The EU single passport concept, for instance, broadly requires member states to establish an effective home

<sup>357</sup> These include some of the richest and most developed countries and some of the poorest and least developed nations.

<sup>358</sup> See generally, *Challenges to the Structure of Financial Supervision in the EU*, Centre for European Policy Studies, (ed. Green D.), July 2000.

<sup>359</sup> See generally, Farrel M., *EU and WTO Regulatory Frameworks: complementary or competition?*, London European Research Centre, European Dossier Series, Kogan Page Limited, 1999.

supervisory body able to evaluate licence applications, to apply the fit and proper test and to supervise its licence-holders. The home supervisory authority needs to be capable of supervising the operations carried out by its licensees both in its own territory and in other EU member states. It is also obliged to exchange information and to collaborate with equivalent regulators from other member states.

Nevertheless, the EU neither imposes nor suggests any particular model or design for financial services supervision in its member states. Indeed, the members of the EU have adopted a variety of supervisory arrangements. If one considers the area of securities business supervision, no particular model is spelt out and the EU financial services Directives do not dictate how a member state's securities regulator should be organized, what it should do and what juridical status it should enjoy. These matters remain within the internal competence and discretion of the member states. The Directives require the member states to set up a supervisory body enjoying powers that are adequate to perform the obligations arising under the various Directives. The recent Market Abuse Directive now requires each member state to designate one national agency responsible for all the obligations arising under this Directive.<sup>360</sup> The designated agency shall have to be able to exercise a number of specified powers, including the power to require information, to make compliance visits and to take a series of other listed measures.<sup>361</sup> The nomination of a single agency was deemed essential to ensure close and rapid exchange of information and assistance in cross-border investigations between the security regulators of the member states. Where a member state has two (or more) securities regulators,<sup>362</sup> it will have to nominate one of them to exclusively assume all the Directive obligations.<sup>363</sup>

<sup>360</sup> Directive 2003 /6 /EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). See recital 36 and article 11. This Directive was transposed into Maltese legislation through the Prevention of Financial Markets Abuse Act 2005 (PFMA), Act no. IV of 2005.

<sup>361</sup> The MFSA is the competent authority for all purposes of the PFMA, in terms of article 2.

<sup>362</sup> This was the case in Malta between 1994 and 2003 with the MSE and the MFSC sharing the task of supervising the financial markets and the provision of investment services. Until recently, France too had fragmented supervisory structures in place in the securities field.

**It is useful to quote recital 36 of this Directive on this point:**

*“A variety of competent authorities in Member States, having different responsibilities, may create confusion among economic actors. A single competent authority should be designated in each Member State to assume at least final responsibility for supervising compliance with the provisions adopted pursuant to this Directive, as well as international collaboration.”*

Beyond this obligation, each member state is still allowed to develop the system of regulation it considers most effective and appropriate within the realities of its economic, institutional and legislative circumstances. This approach appears to be also in line with the principle of subsidiarity introduced by the Maastricht Treaty. Although the European Union has achieved a significant degree of harmonisation of rules, member states still have very different regulatory arrangements. Some have moved towards a single unified regulator, while others have studiously avoided that approach.

Supervisory agencies in the different member states exercise different roles and functions, enjoying dissimilar legal and political status and operational autonomy. One finds significant disparities in the method of the appointment of their governing council, the term of their appointment, the financing of the agency, the rights of levying fines and of issuing binding regulations, the way they are audited and by whom, and their reporting obligations. Several EU accession countries still have a tripartite sharing of supervisory functions, more or less neatly divided into supervision of banking, insurance and securities business. These include

These were eventually merged in August 2003 with the establishment of the Autorite' des Marches Financier.

<sup>363</sup> A similar provision is now found in the MIFID – see article 48 paragraph 1. On the contrary, its predecessor, the ISD – Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, better known as the ISD, which is still in force but shall shortly be replaced – did not require a single designation but only required member states to “designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof indicating any division of those duties.” (Article 22).

Cyprus, the Czech Republic, Greece, Italy and Slovenia. Up till 2003, Poland still had four separate agencies, while Bulgaria at that stage remarkably had five separate supervisory bodies, which qualified it as one of the most fragmented regulatory structures in the world.<sup>364</sup> Since 2000, Hungary has had a single unified agency which consolidated the competence of three former regulatory agencies. Belgium has had a unified regulatory agency since 1 January 2004 when the Banking, Finance and Insurance Commission (CBFA)<sup>365</sup> was set up following the merger of the former Banking and Insurance Commission and the Insurance Supervisory Authority.

Denmark, Iceland, Norway and Sweden have all had an autonomous single unified regulatory authority for quite some time. Germany and Austria have these past few years replaced their former multiple regulator structures with a single unified regulatory agency combining the supervision of banking, insurance and securities business.

The Czech Republic and Slovakia are special cases. They have both recently consolidated the financial supervisory functions into a single regulatory structure. In each case, however, it is the national central bank that has been assigned the role. Slovakia passed legislation, the Financial Market Supervision Act, whereby the National Bank of Slovakia<sup>366</sup> became the single unified regulator for the entire sector in late 2005. The Czech Republic<sup>367</sup> implemented its single agency structure even more recently, in March 2006. They are the only two EU states which have supervision concentrated in their respective national central bank.

<sup>364</sup> Bulgaria has since re-shaped its regulatory structures in 2003 with the creation of the Bulgarian Financial Supervision Commission which merged three former bodies. The Commission supervises securities and insurance business. The Bulgarian National Bank has retained banking supervision.

<sup>365</sup> Commission Bancaire, Financiere et des Assurances.

<sup>366</sup> See [www.nbs.sk](http://www.nbs.sk)

<sup>367</sup> See [www.cnb.cz](http://www.cnb.cz)

(c) **Some other International Aspects**

Several countries have adopted or are moving towards a form of single unified regulatory structure. No identifiable common pattern is however apparent, and these countries have gone about the process in different ways and perhaps for different reasons. Most have set up a new organization separate and at arm's length from the national central bank. In a few countries, and exceptionally, the national central bank itself has been appointed the single unified authority for the entire financial services sector. This is the position in Singapore, The Gambia and now also Slovakia. Until recently, Mauritius too was moving in that direction, but following political and policy changes, the project has been curtailed. The Bank of Mauritius will be retaining its traditional banking supervision function, while a new Financial Services Commission was set up in 2001. This agency has been designed as a unitary financial regulator, with responsibility for all-non-banking financial activities, mainly insurance, securities and offshore companies.<sup>368</sup>

Most countries still assign bank supervision responsibilities to their national central banks. Some may assign to their central bank an additional supervisory responsibility, which means either insurance or securities business supervision.

A case in point is Switzerland which has two federal regulatory agencies, the Federal Banking Commission, which supervises banking and securities activities, and the Federal Office of Private Insurance. A major financial location, Switzerland seems to have recently succumbed to the charms of the single regulatory concept. The Financial Times reported on 19 April 2006 (*Swiss super-regulator begins to take shape*) that “*after almost a decade in the making*”, a new agency to be known as Finma would shortly consolidate the Federal Banking Commission with the insurance regulator and the money-laundering office. Japan, another major financial location, has had a single Financial Services Authority since 2000.

<sup>368</sup> see [www.bom.intnet.mm](http://www.bom.intnet.mm) and [www.fscmauritius.org](http://www.fscmauritius.org)

Many countries still retain what may be called the “classical” tripartite division of responsibilities. China, the Czech Republic and Italy, to take just three examples, still have three different regulators broadly mirroring the three traditional categories of financial services.

In broad terms, Italy distributes its regulatory competences between the Banca D'Italia for banking supervision, the Commissione Nazionale per le Società e la Borsa (CONSOB) for securities business supervision and the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (ISVAP) for insurance supervision.<sup>369</sup>

France and the USA are two countries with a very specialized and independent securities commission, totally separate from and unrelated to the banking supervisory body. Clearly, federal jurisdictions, such as the USA and Canada, which have to deal with the constitutional division of responsibilities and jurisdiction between the central federal government and the individual states or provinces may make the discussion slightly more complicated. At the federal level, Canada does not have a single regulator system, whereas the provinces of Ontario and Quebec have in recent years established a single regulatory agency.

What this investigation therefore suggests is that it is not advisable to copy another country's model or to follow perceived fashionable trends. A model that may function coherently in one country may prove less effective in another, where the prevailing conditions are dissimilar. In devising a regulatory structure, one should carefully assess the size, nature, depth and objectives of the financial services sector under consideration, the state of development of the financial system and of the economy in general, local politics and public expectations, the efficiency of the administrative systems, the quality of the legislation and human resources as well as other

<sup>369</sup> As already remarked earlier the regulatory architecture in Italy has recently come under severe criticism and scrutiny following the Cirio, Parmalat and Fazio incidents. The Banca D'Italia's former leading role in competition in the banking sector has now been reduced whereas the CONSOB's investigative powers have been strengthened.

national characteristics as the size of the country and of its population. In lesser-developed countries, it has often been found preferable to entrust the supervision of banking activity to the well-tried and respected national central bank, and not attempt to create novel untested administrative structures.

The idea or perception that a single unified regulator is an ideal arrangement for small jurisdictions is often repeated, but just as frequently challenged. Iceland, Estonia, Guernsey, Slovakia and Mauritius are just five of several relatively small jurisdictions which have, in their own peculiar way, implemented a single or unified regulatory structure.<sup>370</sup> On the other hand, the Financial Services Authority (FSA), the single regulator in the United Kingdom and the German BAFIN supervise a leading, substantial and well-developed financial sector. Size is therefore just one of a series of relevant factors, and is not, by itself, a conclusive factor. What may be appropriate for a big jurisdiction may be inappropriate for a smaller country, and vice versa. Supervisory arrangements which individual countries have put in place are usually the product of legal, political and historical events, and cannot be properly understood outside these contexts. A very brief reference to two very different jurisdictions which both adopted a single regulatory structure under legislation adopted in 2001 will serve as an introduction to the Maltese experience.

In the United Kingdom, the Financial Services and Markets Act 2001 and the Financial Services Authority can trace their origins to the well publicized inefficiencies and anomalies of the self-regulatory framework organized under the Financial Services Act of 1986 and to the increasing impact of EU Directives on the single passport in financial services. Another important factor was the election, in 1997, of a new Labour Government whose electoral platform included the radical reform of the UK regulatory framework and the termination of the reliance on self regulatory organizations.

<sup>370</sup> These models show substantial variances; but regrettably space does not permit a comprehensive comparison between the single regulatory models implemented in these small jurisdictions.

Estonia embraced the single regulator concept in 2002 following the passage of a 2001 law,<sup>371</sup> when a new agency, the Estonian Financial Supervision Authority, was created. This new agency is closely linked organizationally to the Estonian Central Bank on which it still largely relies for administrative and logistical support, including the sharing of the Bank's premises. To understand the reasons behind this particular arrangement, one may take into account Estonian political and administrative realities including the country's only fairly recent moves to a democratic status, market economy and de-centralisation of power.

### **The Particular case of Malta**

In 1993, supervision over financial services operations was greatly fragmented and shared between four different entities. The Central Bank of Malta<sup>372</sup> supervised banking activities and in practice acted as an overseer of the entire local financial system. The Malta Stock Exchange<sup>373</sup> licensed and supervised stockbrokers, and authorized listings on the single Exchange which it both operated and monitored. The Ministry of Finance still supervised the domestic insurance market in terms of the Insurance Business Act of 1981. The Malta International Business Authority (MIBA)<sup>374</sup> was the sole regulator of the entire offshore (financial and corporate) sector.<sup>375</sup>

In effect, the MIBA was the single specialized unified regulatory authority for the offshore business sector. This role extended to ordinary trading and holding companies, as well as to banks, insurance operations and securities business that could be set up under the special offshore legislation. The creation of the MIBA also meant that for some years Malta had two separate regulators

<sup>371</sup> The Financial Supervision Authority Act which entered into force on 1 June 2001.

<sup>372</sup> Established under the Central Bank of Malta Act 1967.

<sup>373</sup> Set up by the Malta Stock Exchange Act 1990.

<sup>374</sup> Established by the Malta International Business Activities Act.

<sup>375</sup> Actually, very few of the companies authorized by the MFSA actually carried out any financial services business. Most offshore companies were mostly small holding and trading companies. No offshore investment services operations were ever licensed and only five offshore banking licenses were issued. The legal framework for offshore business activities lapsed in 2004.

for banking, for insurance, and for securities business. This duplication led to some anomalies and raised concerns not only locally but also in the international sphere.

Originally announced to Parliament by the Minister of Finance in November 2003 in the budget speech for 1994, the single regulator objective was implemented in stages. Throughout 1994, the first legislative steps were adopted by Parliament. These included substantial amendments to existing legislation and the introduction of several important new laws, such as new laws on insider dealing, money-laundering, banking and investment services. 1994 was a crucial year and a turning point in financial services regulation in Malta: among other things, it launched and laid the foundations for the establishment of a single regulatory authority for financial services.

In 1994, four years after submitting its application for European Union membership, government decided it was time to bring some order to financial services legislation and supervision and to consolidate and upgrade it. It also decided to terminate the local offshore business activity. In this context, it may have been surprising that a policy decision was also to construct the new all-embracing regulatory system around the former offshore authority. Government decided against disbanding the young offshore authority,<sup>376</sup> and instead developed it into a more comprehensive administrative authority with even wider functions, responsibilities and powers. This twist in favour in MIBA's fortune was ironic in the light of Government's decision to abandon offshore. Offshore business was to be phased out but MIBA was to be retained and considerably strengthened. New offshore registrations were only allowed up till the end of December 1996 and all offshore activities had to cease by September 2004. Offshore business was to be phased out.<sup>377</sup>

<sup>376</sup> Which had started operations only five years previously.

<sup>377</sup> Offshore Business registration ended in December 1996 and the sector drew to a final conclusion in September 2003. See generally article by Fabri D. and Baldacchino G. in Hampton.

As part of the 1994 reforms, MIBA was re-constituted and re-named as the Malta Financial Services Centre (MFSC) and was assigned responsible for the supervision over insurance<sup>378</sup> and investment services activities.<sup>379</sup> The supervision of banks and other financial operators known collectively as financial institutions<sup>380</sup> remained, for the time being, entrusted to the CBM, and was only transferred a few years later.<sup>381</sup>

One of the policy cornerstones underlying the extensive 1994 reforms was the official identification of the MIBA, now newly-styled as the MFSC, as the future single unified regulator for the entire sector of financial services as an objective for medium term objective. This objective was not achieved overnight. At the end of 1994, despite the extensive legislative changes undertaken during that year, three separate regulators were still in operation: the Central Bank of Malta, the Malta Stock Exchange and the MFSC. It took almost an entire decade to complete the project for establishing the single unified regulator. Various factors explain why it took Malta several years to consolidate financial services regulation in one single body.<sup>382</sup> At a political level, consensus on the future role of the CBM was lacking and like Malta's EU membership application, the move towards a single agency was suspended for a few years during the short-lived Labour government 1996-8, and then re-activated in late 1998 following a change of government.

<sup>378</sup>Responsibility for supervision of the local insurance market had been transferred from the Ministry of Finance to the MFSA in December 1994 by means of a "Delegation of Authority", published as Government Notice 752 of 1994 on the 25<sup>th</sup> November 2004. The Minister of Finance delegated most of his powers under the 1981 Act to the MFSC. This delegation came into force on the 1 December 2004.

<sup>379</sup> Under the new Investment Services Act 1994.

<sup>380</sup> Under a new Act called the Financial Institutions Act which regulated several unconnected non-banking financial activities including foreign exchange dealing, lending, financial leasing and forfeiting.

<sup>381</sup> See below.

<sup>382</sup> Hardly, any local literature on this subject exists and this paper does not purport to fill the entire gap.

Indeed, following the extensive legislative reforms of 1994, little or no further progress was then achieved for a number of years. The change of government that followed the 1996 General Elections,<sup>383</sup> and the political differences that existed on the issue, curtailed further developments in this area. Then, late in 1998, following fresh General Elections, the Minister of Finance in the new Nationalist Party government, the same Minister who had originally launched the project in 1994, re-confirmed his government's official policy to pursue the single regulatory agency project to completion.

Mr J Dalli announced his plan to re-activate the single regulatory agency project in November 1998 during his Budget Speech for 1999. A year later, in a speech given to the second Asset Management Conference, in October 1999, he re-iterated his plan:

*“In the very near future, the regulation and supervision of banking and credit institutions will be moved to the Malta Financial Services Centre.”*<sup>384</sup>

The exercise was executed in a sequence of steps achieving completion between 2002 and early 2003, with the transfer of bank supervision and the assignment of the roles of Listing Authority with the duty to administer the Financial Markets Act to the

<sup>383</sup> When the Labour Party government replaced the then Nationalist Party in government.

<sup>384</sup> The Times report of the 22 October 1999 (“Central Bank governor against transfer of regulatory role”) recorded the negative (and surprised) reaction of the then out-going Governor of the Central Bank of Malta:

“Expressing surprise at the decision, he said that in small countries the regulatory aspect tended to be in the hands of central banks, which had the financial and human resources to carry out the role effectively.”

The Governor was also quoted as having said:

“I am not aware of any preparations made by government in this respect. So when Mr Dalli is saying that this is something which is expected to take place imminently, I don't know what he is referring to..... It's simple to make such a pronouncement but it's not that easy to put into effect because specialized human resources are not that available in the country.”

This particular problem was eventually resolved when the larger part of the bank supervisors at the CBM accepted new employment with the MFSA. This ensured continuity of supervision and the retention of information and experience. This issue also shows that the development of a single regulator may involve human resources and management problems.

MFSA.<sup>385</sup> Under that Act, the MFSA started overseeing the operations of the MSE, whose former regulatory role had ceased and now operating as an authorized investment exchange in terms of the re-styled Financial Markets Act.<sup>386</sup>

1994 saw the adoption of a brand new law on banking. Initially, the CBM was retained as “competent authority”, but it was government’s declared intention to eventually also transfer banking supervision from the CBM to the Centre.<sup>387</sup> In the next seven years between 1995 - 2001, nothing of much significance happened and consequently three separate financial services regulators, namely the CBM, the MFSC and the MSE continued to operate simultaneously. Indeed, the proposal to remove banking supervision from the Central Bank became an issue of political disagreement, with the Opposition suggesting that the CBM merited being kept as banking supervisor, indeed as the single financial regulatory agency, in view of its longer experience in financial supervision. Eventually, banking supervision passed to the MFSA in 2002.<sup>388</sup>

The concept of “competent authority” was central to the project of establishing a single regulator for financial services in Malta. Rather than expressly mentioning the MFSC, and later the MFSA, each of the laws provided for the appointment by the Minister of Finance, by means of a government notice in the official gazette, of a “competent authority” to administer the law and ensure compliance with its provisions. Incredibly, the MFSA still administers the insurance, investment services and banking laws under this extremely fragile administrative arrangement, which in

<sup>385</sup> Which was the new name given to the former Malta Stock Exchange Act.

<sup>386</sup> Legal Notices 1 and 2 of 2003 issued in terms of the FMA conferred on the MFSA the roles of Listing Authority and of Competent Authority, respectively, both effective from the 3 January 2003.

<sup>387</sup> This policy was stated in 1994, anticipating by a number of years the steps taken in the UK by the new Blair administration which ended the Bank of England’s role as banking regulator.

<sup>388</sup> Legal Notice 325 of 2001, issued under the Banking Act, provided for the appointment of the MFSA as competent authority for the purposes of that Act with effect from 1 January 2002.

theory means that its supervisory role in the sector may be terminated or changed by the mere publication of a ministerial order appointing some other body to replace it.<sup>389</sup> This had been devised as a convenient mechanism for the transition from one regulatory regime to another, for the eventual substitution of the “competent authority” in the sectors supervised by the CBM. Today, so many years later, the legal position remains the same. The same mechanism is still in operation. It is not only archaic but also untenable seeing that international obligations require the MFSA to have unambiguous competence, powers and autonomy of operations.<sup>390</sup>

Even the very recent Securitization Act<sup>391</sup> is due to be administered by a “*competent authority*” for which post the MFSA has been clearly already earmarked.<sup>392</sup>

Since 1 July 1997, Malta’s foremost financial services regulator started housing and incorporated the Registry of Companies. The office of the Registrar was largely modelled on the UK original and was founded in 1965 when the Commercial Partnerships Ordinance was passed. It was set up as a government department. In that month, the MFSC was assigned responsibility to administer the responsibilities of the Registrar under the new Companies Act, which in 1995 completely overhauled the Ordinance.<sup>393</sup> Most single regulatory agencies do not have a similar responsibility for companies.

<sup>389</sup> See article 2A of the Investment Services Act, and article 3 of the Banking Act, respectively Chapters 370 and 371 of the Laws of Malta

<sup>390</sup> In the writer’s view, this mechanism has lost its best by date and should now be scrapped and consigned to history. It gives an impression of lack of confidence as to whether the new regulatory structures revised and reshaped since 1994 are certain and definite or merely a temporary experiment of sorts.

<sup>391</sup> Published in April 2006 as Act V of 2006.

<sup>392</sup> This results from the Parliamentary debates on the relative Bill.

<sup>393</sup> The Companies Act 1995 (Chapter 386 of the Laws of Malta) came into force on 1 January 2006, replacing the Commercial Partnerships Ordinance 1962 (Chapter 168 of the Laws of Malta).

## **Consolidated Regulatory Structures in other Sectors in Malta**

It would be a mistake to assume that the concept of a single regulatory or administrative agency is exclusive to financial services. The question may arise in any area of business, especially when the sector has customarily been regulated on the strength of laws and structures developed on a piecemeal basis. The Malta Standards Authority now established under a separate law of 2000<sup>394</sup> merged all the functions formerly exercised separately by the Malta Board of Standards, the Food Standards Board and the Inspector of Weights and Measures, under different legislation dating from the sixties and even earlier.<sup>395</sup>

The Consumer Affairs Act of 1994,<sup>396</sup> as amended in 2000, was another deliberate attempt to place consumer protection under one oversight agency. The Director for Consumer Affairs now acts as the single focal point for monitoring such diverse subjects as the regulation of product safety and liability, misleading and comparative advertising, guarantees in consumer sales, consumer credit and distance selling. This approach achieved better coherence and cohesion and has recently been developed further by the administrative (but not statutory) merger of the functions of the Director for Consumer Affairs and the Director for Fair Competition into one single unit. These measures were intended to promote better synergy in the working of competition and consumer legislation.

A similar process has been carried out in the tourism sector. Piecemeal regulation of the sector had, since the sixties, led to the adoption of a number of different laws and a variety of different regulatory bodies. These authorities were assigned responsibilities covering various tourism-related operators and activities, such as travel agents, tour operators, hotels and restaurants, travel guides and beach-cleaning. Recently, government took the necessary steps to set up a separate new authority to consolidate all these

<sup>394</sup> The Malta Standards Authority Act, Chapter 419 of the Laws of Malta.

<sup>395</sup> The Weights and Measures Ordinance was adopted in 1910.

<sup>396</sup> Chapter 378 of the Laws of Malta.

various functions and to present to operators and other interested parties one single point of reference and one single authorisation agency for all tourism-related services. This consolidation exercise was also extended to the actual laws themselves, now conveniently replaced by one single consolidated legislation.<sup>397</sup> The Malta Tourism Authority established by the Malta Travel and Tourism Services Act 1999<sup>398</sup> has combined the functions formerly carried out by such disparate bodies as the Ministry of Tourism, the Hotels and Catering Establishments Board set up in the mid-sixties, and the National Tourism Organization (NTOM) formed in the seventies.<sup>399</sup>

Regrettably, there are indications that the process of change appears to have unduly favoured the interests of operators at the expense of consumer rights. What is peculiar here is the rather obtrusive participation of the private sector in the very heart of the governing Board of the Authority and executive structures. This participation is imbedded in the legislation itself. From strictly regulatory and consumer perspectives, it is arguable that the benefits of consolidation and streamlining in this case may have been outweighed by the increased influence that industry now exerts on the decisions and policies of the new tourism authority.<sup>400</sup>

<sup>397</sup> This is not the case with financial services laws which continue to regulate the different sectors separately.

<sup>398</sup> Chapter 409 of the Laws of Malta.

<sup>399</sup> See article 53 of the 1999 Act. The Act had been preceded by a White Paper published in 1997 with the title: White Paper proposing the setting up of a Malta Tourism Authority with powers to regulate tourism services and operations and for the promotion of Tourism to Malta under the Malta Tourism Services Act 1997. The Act as eventually re-named and adopted in 1999 broadly consolidated and replaced five different pieces of legislation adopted since the mid-sixties, namely the Tourist Guide Services Act 1995 (Chapter 190 of the Laws of Malta), the Hotel and Catering Establishments Act 1967 (Chapter 197), the Guest Houses and Holiday Furnished Premises Act 1975 (Chapter 240), the Travel Agencies and Hotel Services Act 1976 (Chapter 264), and the National Tourism Organization Act 1984 (Chapter 310). On the strength of this Act, the MTA became the sole licensing body for tourism-related activities, from travel agents and tour operators to hotels, and tourist guides and excursion operators.

<sup>400</sup> This view recently found support in a landmark decision by the Commission for Fair Trading which found that the composition of the MTA was unsound as it breached the laws and principles of fair competition. See *Bargain Holidays Limited et vs. Malta Tourism Authority* decided on 17 October 2005 (Complaint 1/2004).

Another recent consolidation exercise was the setting up of a new statutory corporation under the name of Malta Enterprise in 2003.<sup>401</sup> This new agency seeks to promote Malta as a suitable location for inward investment and assists in the setting up of enterprises. It merged the functions and roles of three former specialized bodies, namely the Malta Development Corporation (MDC), the Institute for the Promotion of Small Enterprise Limited (IPSE) and Malta External Trade Company Limited (METCO). During the Parliamentary debate on the Bill, the government side went to considerable lengths to emphasize the benefits of streamlining of procedures, better efficiency and coherence and economies of scale that should result from this development.

### **A single regulator – a few of the features, concerns, perceived advantages and disadvantages**

The legal form that a regulatory structure adopts defines its ability to act autonomously and its credibility as an effective force in society. There can be no doubt that a single regulatory body is a potentially powerful entity. In order to be effective in its role, it must achieve respectability, securing the respect and confidence of operators, the public as well as of other authorities, local and foreign. A single regulator needs to have the confidence and strength to resist unwarranted pressure and lobbying from political and business sources. Appropriate measures guaranteeing fairness, transparency and accountability should therefore be in place. It should also be seen to be using its considerable powers fairly and judiciously. The level of transparency, accountability and independence varies and each country needs to establish its own desirable and workable levels in tune with its political development and democratic evolution, as well as with consumer and public perceptions and expectations. Clearly, however, some systems are better structured and resourced to guarantee autonomy, transparency and fairness, than others. The greater the powers assigned to a regulatory agency, the stronger should be the

<sup>401</sup> The Malta Enterprise Corporation Act 2003, Chapter 463 of the Laws of Malta. See especially Parts V and VI.

institutional safeguards in favour of fair dealing, transparency and accountability.

More empirical studies would be required to assess whether a single unified regulatory structure is invariably more efficient and effective than a multiple agency structure. The disadvantages of having multiple regulators operating within one jurisdiction may include regulator-shopping, inefficient procedures, bureaucracy, higher costs, uncertain regulatory boundaries, overlaps and gaps, a potential for costly rivalry and misunderstandings, lack of accountability and consumer confusion. A multi-agency situation would necessitate the adoption of laws which describe fine and often artificial distinctions between various financial services and products, an exercise often motivated primarily by jurisdictional-territorial concerns. These laws would also likely attempt to resolve the allocation and determination of supervisory responsibility for hybrid products, a phenomenon which is on the increase.

The consolidation of supervisory duties within one agency should offer a number of benefits. Since regulation is always expensive to carry out and is never cost-neutral, the possible gains from economies of scale, particularly in smaller countries cannot be ignored. For a multi-service firm operating in more than one field of financial services, the single authority should secure certain advantages, such as lower fees and compliance costs, better streamlined and consistent procedures and expectations, reduction of paper-work, standardised application forms and returns, and generally greater consistency and harmonisation of standards across the industry. Additionally, where supervisory skills are scarce, the case for consolidating them in a single authority becomes stronger, particularly in smaller countries.

A single regulator should at the very least guarantee that operators, consumers of financial services and other interested parties would have only one very convenient single point of reference. The risk of operators and consumers being shunted from one agency to another would no longer arise. This advantage would also benefit

other national authorities such as the competition authorities, as well as foreign authorities and international organisations which would prefer to have dealings with a single organization. A single supervisory agency removes any doubts as to where responsibility lies and excludes the possibility of passing the buck.

On the other side, one has to balance these factors against the potential disadvantages. A single unified regulator is a potentially very powerful entity. Accordingly, the legal system would need to introduce sufficient counter-weight safeguards to ensure administrative correctness, adequate judicial redress and accountability and reporting obligations. In some cases, regulators are appointed by Parliament and have been made directly answerable to it. Adequate safeguards against administrative abuse and political interference would need to be introduced. Critics of the single regulatory structure might also point out that:

- (a) It might prove easier for lobbying groups and other interests to influence one entity than say three different bodies;
- (b) A single regulator might simply convert formerly external divisions into its internal structure by creating units or departments dealing separately and exclusively with banking, insurance and securities business (the so-called “silo” effect);
- (c) The establishment of a single regulator excludes potentially healthy competition between regulators to the detriment of consumers; and
- (d) It might foster unrealistic expectations from consumers (and possibly also operators) who may expect too much from the unified single regulator.

Additionally, some may prefer smaller supervisory agencies which are more focussed, more specialised and have more specific objectives, on the assumption that, despite the increasing concentration, the traditional distinctions between the different

areas of financial services will still broadly exist for the foreseeable future.

Whatever the case may be, the setting up of a single unified regulator needs to be supported by financial services legislation of a high quality; laws that do not create unrealistic distinctions between financial services and which are sufficiently flexible to allow periodic updating and efficient response to the ever-changing business environment. The laws should ensure firm and resolute regulation of financial firms, high levels of consumer protection, fair competition, as well as the punishment of bad and fraudulent operators. Equally important, the laws should impose standards of fairness, accountability and transparency on the supervisory agency itself.

No administrative structure can by itself guarantee good and effective regulation. Whatever administrative arrangements a country chooses to adopt, the two important elements of quality staff and quality legislation remain basic ingredients for effective regulation. Where established, a single regulator should be able to retain and draw on the skills and knowledge formerly developed and housed in the various regulators. An advantage of the single supervisory entity is to concentrate expertise deriving from different field of competence sharing experiences, techniques and knowledge. Supervisory personnel have to be sufficiently well remunerated and motivated in order to be able to match the expertise of the private sector. If these foundations are securely in place, a regulatory agency can start to achieve the credibility it shall require to operate efficiently and fairly.

The question whether a single regulatory system is more efficient than a multi-agency structure cannot be answered in abstract terms. One would have to first draw up the correct criteria and parameters for establishing what an efficient and effective regulatory authority means. Any claim that a particular supervisory arrangement is better than another is spurious in the absence of adequate objective

empirical evidence, which regrettably is not readily available.<sup>402</sup> Each country establishes the system best suited to its circumstances.

## **Conclusion**

The setting up of a single unified authority is never an end in itself, but is a means of achieving a higher objective. In the final analysis, an administrative agency is just a mechanism that can only be as good as the quality, commitment, reliability and expertise of its personnel and the quality of the laws it has to administer. The true objective must be to devise an effective, coherent, credible and efficient regulatory agency that could provide the best guarantees to operators, consumers and the general public.

A primary concern of this paper was to avoid any suggestion that having a single unified regulator or administrative agency is some miraculous solution to all the problems in financial services and other business sectors. It is not and cannot be. Sometimes, expectations from single regulators appear unduly optimistic, giving rise to what has frequently been termed “*moral hazard*”. Furthermore, unless properly planned and managed, the transition from a fragmented system to the establishment of a single regulatory agency may prove a disruptive and wasteful exercise, and ironically risk becoming itself a serious problem for the sector.

We have seen that Malta was certainly not unique or the first to undertake the single regulatory project. Several other countries, both in Europe and elsewhere, had implemented or were considering this regulatory framework. What is remarkable is that even in the various jurisdictions which have adopted it, the single agency structure has taken different shapes. Indeed, one finds difficulty in pointing out two jurisdictions with perfectly identical single agency structures. The reason may be that no standard *off the shelf* or *one-size-fits-all* model exists, whether within the strict

<sup>402</sup> Most data is usually furnished by the regulatory agencies themselves.

single regulator framework or outside it. Additionally, the concept is understood differently in different countries, revealing an unsuspected flexibility and elasticity in the concept and in its various applications.

The MFSA may be considered a rare breed among single regulators. Not quite a new entity, it is the legal successor to two former regulatory structures, whose roles it has continued and developed. This project was finally sealed by the important 2002 amendments to what was then the MFSC Act (now the MFSA Act). This Authority has in stages taken over the supervisory functions originally (and traditionally) vested in government or in other domestic regulatory agencies, including the Minister of Finance and the Registry of Companies. It would appear that the MFSA is the only public agency which has graduated from a small and exclusively offshore regulator into a comprehensive integrated financial services supervisor. In this respect, the Maltese experience may indeed be unique.

### **Some abbreviations used in this paper:**

MIBA - Malta International Business Authority

MFSC - Malta International Financial Centre

MFSA - Malta Financial Services Authority

CBM - Central Bank of Malta

MSE - Malta Stock Exchange

WTO - World Trade Organization

EU - European Union

### **Selective Sources and Materials**

#### **Local legislation**

Insurance Business Act 1981 (now repealed)

Malta Financial Services Authority Act 1988

Financial Markets Act 1990

*(formerly the Malta Stock Exchange Act 1990)*

Investment Services Act 1994  
Banking Act 1994  
Companies Act 1995  
Insurance Business Act 1998  
Prevention of Financial Markets Abuse Act 2005

Consumer Affairs Act 1994  
Malta Travel and Tourism Services Act 1999  
Malta Standards Authority Act 2000  
Malta Enterprise Corporation Act 2003

### **Foreign legislation**

Financial Services and Markets Act 2000 (UK)  
Financial Supervisory Authority Act 2001 (Estonia)  
The Central Bank of Ireland and Financial Services Authority Act 2002  
The Act on Supervision over the Financial Market 2004 (Slovakia)

### **EC Directives**

Directive 2003/6/EC of the European Parliament and of the Council on Insider Dealing and Market Manipulation (The Market Abuse Directive)

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (generally known as MIFID)

### **Books**

Cartwright P (ed), Consumer Protection in Financial Services, especially Chapter 6, Chin Sharon, *Financial Services Regulation: Can History teach us Anything?* Kluwer Law International, 1999

Davies H., (Former Chairman FSA), *Integrated Financial regulation : lessons from the UK's Financial Services Authority*, Centre for Financial Studies Seminar, Frankfurt, 5 December 2001

Fabri D. and Baldacchino G., *The Malta Financial Centre: A Study in Micro-State Dependency Management in Offshore Finance Centres and Tax Havens - the Rise of Global Capital*, ed. M P. Hampton and J.P. Abbott, Macmillan, 1999

Farrel M., *EU and WTO regulatory Frameworks: complementary or competition?*, London European Research Centre, European Dossier Series, Kogan Page Limited

Freshfields Bruckhaus Deringer, *How Countries Supervise their Banks, Insurers and Securities Markets*, Central Banking Publications, 1999 (in particular the Introduction by Prof D.T. Llewellyn D., *The Institutional Structure of Regulatory Agencies*)

Freshfields Bruckhaus Deringer, *How Countries Supervise their Banks, Insurers and Securities Markets*, Central Banking Publications, 2003

Freshfields Bruckhaus Deringer, *How Countries Supervise their Banks, Insurers and Securities Markets*, Central Banking Publications, 2006

Gillingham George P., *Regulating the Financial Services Sector*, Kluwer Law International, 1999

Maloney N., *EC Securities Regulation*, Oxford EC Law Library, 2002 (especially Part VII, *The Institutional Structure of EC Securities Regulation*)

Mwenda K. and Mvula J.M., (World Bank), *Unified Financial Services Supervision in Latvia, the United Kingdom and Scandinavian Countries*, E-Law- Murdoch University Electronic Journal, Vol.10, No 1(March 2003)

Mwenda K., *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator*, The World Bank, 2006

### **Reports and papers**

Briault C., *Revisiting the rationale for a single national financial services regulator*, Occasional Paper Series, Financial Services Authority, February 2002

Carmichael J., *How integrated regulators work*, The Financial Regulator, Vol. 6 No. 3 (December 2001)

Carver C., *A New Regulator for Qatar*, The Financial Regulator, Vol. 10, no 3, December 2005

Centre for European Policy Studies, (ed Green D.), *Challenges to the Structure of Financial Supervision in the EU*, July 2000

Fabri D., *From MIBA to MFSA : the first decade and beyond*, The Accountant, May 1999

Fabri D., *Recent amendments to Malta's financial services legislation - a review of some major aspects of Act no. XVII of 2002*, The Accountant, September 2002

Fabri D., *The New MFSA – Placing the recent changes in different contexts*, The Accountant, Autumn 2003.

*Financial Services and Financial Markets Bill: a Consultation Document*, HM Treasury, July 1998

Malta International Business Authority, Annual Reports 1989-1993

Malta Financial Services Centre, Annual Reports 1994-2002

Malta Financial Services Authority, Annual reports 2003- 2005

Malta, Ministry of Finance, Budget Speeches 1993/ 2003

Bank of Mauritius, Annual Report on Banking Supervision 2004, part 5

*Rationale for Integrated Supervision and the related Supervisory Issues*

*Report on New regulative Framework for the Financial Services sector in Mauritius*, submitted by a Steering Committee to the Government of Mauritius on 26<sup>th</sup> February 2001

Ministry of Finance of the Republic of Estonia and The World Bank Group, *Challenges for the Unified Financial Supervision in the New Millennium*, Tallinn 2001 (Collection of papers presented at Conference on *Challenges for the Unified Financial Supervision in the new Millennium*, 2- 4 July 2001, Tallinn, Estonia. See especially papers by Prof D. T. Llewellyn, Conference Chairman)

(UK) Department of Enterprise, Trade and Employment, *Report of the Implementation Advisory Group on a Single Regulatory Authority for Financial Services*, 19 May 1999

(UK) *Review of Financial Regulations in the Crown Dependencies, A Report Commissioned by the Home Secretary and prepared by Andrew Edwards in co-operation with the Island Authorities*, cmd 4109-1, October 1998 (In 4 volumes - see especially chapter 6 of Vol. 1, and chapter 5 of each of Vols. 2 to 4)

Trinidad & Tobago, *Regional Seminar on Integrated and Consolidated Supervision*. Opening remarks by E.S Williams, Governor of the Central Bank of Trinidad and Tobago, 18 October 2004

**University of Malta, Faculty of Law, theses**

Grech Vanessa, *Review of the Powers and Functions of the Regulatory Authorities in the Financial Services Sector*, University

of Malta, thesis submitted in part fulfilment of the LL.D. requirements, May 1999 (unpublished)

Mallia Danielle, *The Single Regulator for Financial Services*, chapter 1 in *Aspects of Financial Services Legislation in the light of Administrative Law and Human Rights*, University of Malta, thesis submitted in part fulfilment of the LL.D. requirements, June 2003 (unpublished)

Bugeja Joseph, *The Regulation of Financial Services as a Tool of Consumer Protection*, chapter 4 in the Protection of the Financial Services Consumer under Financial Services and Consumer legislation, University of Malta, thesis submitted in part fulfilment of the LL.D. requirements, June 2003 (unpublished)

### **Newspaper Articles and other Materials**

Bannister J.V., *A single focal point*, interview in The Times, Business Section, 4<sup>th</sup> October, 2002

Brincat L., *The Minister and the Fund*, article in The Sunday Times, 3<sup>rd</sup> January, 1999

Dalli J., Minister of Finance, Budget Speech 2002, 21<sup>st</sup> November 2001

Mifsud Bonnici F., *Time for a change*, interview in The Malta Independent, 3<sup>rd</sup> January 1999

Mifsud Bonnici F., *Stock Exchange Chairman will not seek re-appointment*, interview in The Sunday Times, 3<sup>rd</sup> January, 1999

The Times (Malta), front-page article, *Malta Financial Services Authority to be sole regulator*, 6<sup>th</sup> October 2001

## **Some useful websites**

### Local:

[www.mfsa.com.mt](http://www.mfsa.com.mt),  
[www.centralbankmalta.com](http://www.centralbankmalta.com)

### EU:

[www.fsa.gov.uk](http://www.fsa.gov.uk),  
[www.bancaditalia.it](http://www.bancaditalia.it),  
[www.consob.it](http://www.consob.it),  
[www.isvap.it](http://www.isvap.it),  
[www.banque-france.fr](http://www.banque-france.fr),  
[www.amf-france.fr](http://www.amf-france.fr),  
[www.fi.ee](http://www.fi.ee),  
[www.cnb.cz](http://www.cnb.cz),  
[www.nbs.sk](http://www.nbs.sk)

### Other:

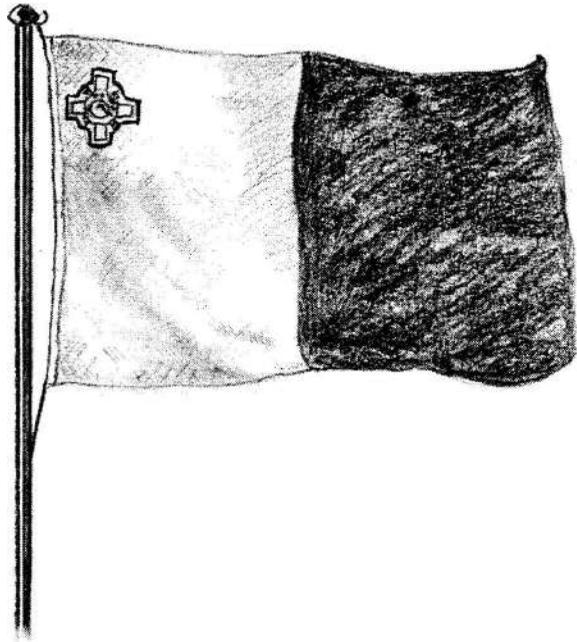
[www.fsa.go.jp](http://www.fsa.go.jp) (Japan),  
[www.gfsc.gg](http://www.gfsc.gg) (Guernsey),  
[www.jerseyfsc.org](http://www.jerseyfsc.org),  
[www.centralbankbahamas.com](http://www.centralbankbahamas.com),  
[www.bidc.com](http://www.bidc.com) (Barbados),  
[www.central-bank.org.tt](http://www.central-bank.org.tt) (Trinidad and Tobago),  
[www.bom.intnet.mm](http://www.bom.intnet.mm) (Mauritius)

**David Fabri**

21 July 2006 (Revised)







## ***ADMINISTRATIVE LAW***



## **Governmental Liability, Immunity and Article 6 of the ‘ECHR’.**

**Dr. Peter Grech LL.D.**<sup>403</sup>

The prominence of the issue concerning the limits of Governmental liability in tort in the study of Maltese Administrative Law has survived the end of the distinction between acts ‘*iure imperii*’ and acts ‘*iure gestionis*’ as a determinant of State liability in our case law.

It may be that the question of ‘Governmental Liability in Malta’, eloquently brought to the fore by the late Professor Wallace Gulia through his book by the same title, published more than thirty years ago, raises so many intriguing questions about the nature and origins of Maltese Administrative Law that we simply cannot help keeping the subject on the agenda. The discussion is nevertheless not lacking in relevance. After all, the present being the result or, some would say the ‘funeral’, of the past, anyone taking an interest in the Administrative law of Malta may at least deem it proper to familiarise with the way in which the basis of that law was perceived in the late nineteenth and the early twentieth century and with how it changed and developed to become what it is today.

The study of what is sometimes termed an ‘identity crisis’ of Maltese Administrative Law also necessarily requires knowledge of its historical background.

The issue is however not just one of nostalgia or of purely historical or evolutionary interest. It may also have a bearing on the applicability of Article 6 of the European Convention on Human Rights and on the possibility for the individual to challenge an exclusion of State liability stipulated in the law.

<sup>403</sup> Dr. Peter Grech is the current Deputy Attorney General and senior lecturer at the University of Malta.

It is recognised that over the years legislators have found it appropriate to include provisions in various laws which grant immunity from proceedings to persons performing particular functions.

Such immunities or restrictions on liability are most common in matters concerning the exercise of judicial functions, the workings of the postal and telecommunications services, transportation and in other activities which in some legal systems are categorized as falling under a special legal regime regulating 'public utilities'. The internal functioning of the armed forces is also an area where such immunities from liability are not uncommon.

It is accepted that these immunities, particularly when they come in the form of restrictions on liability or of substitute systems of liability,<sup>404</sup> are not *per se* incompatible with the rule of law or with the European Convention on Human Rights but their abuse by the legislator would be unacceptable to the enforcement bodies of the Convention.

In its judgement in the case of **Fayed v United Kingdom**<sup>405</sup> the European Court of Human Rights stated that 'it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons'.

A recent judgement of the Grand Chamber of the European Court of Human Rights in the case of **Roche v United Kingdom**, and the dissenting opinions delivered in the same, illustrate the questions raised by State immunity and the relevance of knowing its roots.

<sup>404</sup> Vide paragraph c of the final provisions of the Council of Europe's Recommendation No R (84) 15 relating to public liability adopted by the Committee of Ministers on the 18 September 1984.

<sup>405</sup> (1994) 18 EHRR 393 para 65

In that decision the historical aspect was referred to in particular for the purpose of determining whether a situation was such where there was no ‘civil right’ under domestic law, in which case Article 6(1) of the Convention would not apply, or whether an immunity only constituted a procedural bar to an action for the enforcement of a right, in which case Article 6 (1) would be applicable and the immunity would require justification.

### **The ‘Roche’ Case**

Thomas Michael Roche served in the British army between 1953 and 1968. In 1981 he was diagnosed as suffering from a number of ailments which he suspected to result from tests of mustard and nerve gases in which he had participated, against extra payment, at the ‘Chemical and Biological Defence Establishment’ at Porton Down in 1962 and 1963.

Following an unsuccessful application for a service pension in 1991 Mr. Roche threatened proceedings against the Ministry of Defence alleging negligence, assault and breach of statutory duty by the Ministry.

A legal obstacle however stood in his way in the form of a provision of the Crown Proceedings Act 1947.

Section 10 of the Crown Proceedings Act provided that, ‘No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown’ if the Secretary of State issued a certificate accepting that ‘the suffering’ was attributable to service for the purpose of an award under a compensation scheme for disablement or death of members of the armed forces.

In practice one could see this section, as granting the Government the option to pre-empt an action for damages against it, by accepting to grant the serviceman a pension or other compensation. Mr. Roche claimed, *inter alia*, that this option granted to the Secretary of State to exclude proceedings in tort against the State

by issuing such a certificate violated article 6 of the European Convention on Human Rights on the basis that it denied the 'right to a court' guaranteed by that Article. The issue of the compatibility of State immunities and of special systems of State liability not involving the courts with Article 6 of the ECHR, which, guarantees the right to access to a court in the 'determination of civil rights and obligations', therefore came once more under the scrutiny of the European Court of Human Rights<sup>406</sup>.

The first and principal question to be answered on this matter was whether the applicant had a 'civil right,' as autonomously defined<sup>407</sup> for the purposes of the Convention by the case law of

<sup>406</sup> Other cases where the question as to whether domestic law merely imposed a procedural bar on an action or whether no 'substantive right' existed are *Ketterick vs United Kingdom* (1982) 5 EHRR 465, *Pinder v United Kingdom* (1984) 7 EHRR 464, *Fayed v United Kingdom* (1994) 18 EHRR 393, *Osman v United Kingdom* (1998) 29 EHRR 245, *Z v United Kingdom* (2001) 34 EHRR 97, *Tinnelly & Sons v United Kingdom* (1998) 27 EHRR 249, and *Fogarty v United Kingdom* (2001) 34 EHRR 302

<sup>407</sup> "It is recognised, first, that the expression "civil rights" in article 6 of the Convention is autonomous: *König v Federal Republic of Germany* (1978) 2 EHRR 170 at 192-193, paragraph 88. This means that the concept of a "civil right" cannot be interpreted solely by reference to the domestic law of the member state. It is the view taken of an alleged right for Convention purposes which matters. But, secondly, the Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law; it does not itself guarantee any particular content for civil rights in any member state: see, for example, *Z v United Kingdom* (2001) 34 EHRR 97 at 134-135, 137, paragraphs 87, 98. Thus for purposes of article 6 one must take the domestic law as one finds it, and apply to it the autonomous Convention concept of civil rights. It is evident, thirdly, that the Strasbourg jurisprudence has distinguished between provisions of domestic law which altogether preclude the bringing of an effective claim (as in *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 and *Z v United Kingdom* (2001) 34 EHRR 97) and provisions of domestic law which impose a procedural bar on the enforcement of a claim (as in *Stubbings v United Kingdom* (1996) 23 EHRR 213, *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *Fogarty v United Kingdom* (2001) 34 EHRR 302). The European Court has however recognised the difficulty of tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, acknowledging that it may be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy: see *Fayed v United Kingdom* (1994) 18 EHRR 393 at 430, paragraph 67. An accurate analysis of a claimant's substantive rights in domestic law is nonetheless the first essential step towards deciding whether he has, for purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as will engage the guarantee in article 6." –per Lord Bingham in '*Matthews v Ministry of Defence*' [2003] UKHL 4

the European Court of Human Rights , in terms of Article 6 to claim damages for tort against the Crown or whether he had no such right under domestic law in which case, there being no ‘civil right’ to determine, he would not be able to invoke Article 6.

The historical development of Governmental liability in the United Kingdom assumed cardinal importance in the debate on this question.

Prior to 1947 in the United Kingdom it was a well-established common law rule that the Crown was not liable in tort.

In his judgement in the case of **Matthews vs Ministry of Defence**<sup>408</sup> Lord Bingham described the situation as follows:

*“Few common law rules were better established or more unqualified than that which precluded any claim in tort against the Crown, and since there was no tort of which the claimant could complain (because the King could do no wrong) relief by petition of right was not available”*<sup>409</sup>,

The effects of this rule were nevertheless mellowed in a number of ways. One practice allowed that the action be initiated against the civil servant who actually caused the injury, with the Crown ‘standing behind its delinquent servant’ if the latter had acted in the course of his duty and accepting responsibility for the payment of any damages awarded by the Court. Where the individual author of

<sup>408</sup> [2003]UKHL 4, 13 February 2003

<sup>409</sup> Quoting *Feather v R* (1865) 6 B & S 257 at 295-297, 122 ER 1191 at 1205-1206; and *Robertson: Civil Proceedings by and Against the Crown* (1908), pages 350-351.) In the nineteenth century several British cases held that the King could do no wrong and that there was therefore immunity from actions in tort. Vide *Viscount Canterbury v Atorney General*(1842) 1 PH 306; *Tobin v R* (1864) 16 CB (NS) 310.. It is also to be noted that the question of monarchical immunity (irresponsabilite’) was also a feature of French law during the pre-revolutionary ‘ancien regime’ period with the principle ‘le Roi ne peut mal faire’ being used to describe the monarch’s legal status. Vide *Duncan Fairgrieve ‘State Liability in Tort’* OUP 2003

the act could not be identified there was the practice of appointing a nominee defendant in order to allow the case to proceed.

This notwithstanding, it was still felt that the Crown's position was unacceptable and a committee, chaired by the Lord Chief Justice was appointed in 1921 to propose amendments to the law. The Committee produced a draft bill and a short report in February 1927<sup>410</sup> which proposed to make the Crown liable in tort. However the same draft Bill provided for an exclusion of actions of members of the armed forces against the Crown 'in respect of any matter relating to or arising out of or in connection with the discipline or duties of those forces or the regulations relating thereto, or the performance or enforcement or purported performance or enforcement thereof by any member of those forces, or other matters connected with or ancillary to any matters aforesaid'<sup>411</sup> The Bill was however not enacted.

In 1946 the House of Lords decision in the case of **Adams v Naylor**<sup>412</sup> considered the practice of appointing a nominee defendant in cases where no individual civil servant could be identified as the author of the damage as unacceptable. The same judgement, and another judgement delivered shortly after by the Court of Appeal,<sup>413</sup> strongly urged changes in the law.

The Crown Proceedings Bill, based on the draft bill of 1927 but with a number of modifications, was published in 1947. It provided for the liability of the Crown in tort at par with a person of full age<sup>414</sup> but it still provided for the exclusion of claims against the Crown by members of the armed forces in relation to their duties.

<sup>410</sup> Crown Proceedings Committee: Report (Cmd 2842)

<sup>411</sup> Clause 29(1)(g)

<sup>412</sup> [1946] AC 543

<sup>413</sup> *Royster v Cavey* [1947] KB 204

<sup>414</sup> An outline of the Act is given in the Roche judgement at paras 76 et seq:

"The 1947 Act was divided into four parts: Part I "Substantive law" (sections 1-12 of the Act); Part II "jurisdiction and procedure"; Part III "judgments and execution"; and Part IV "miscellaneous".

78. Section 1 provides for the Crown to be sued as of right rather than by a petition of right sanctioned by Royal fiat.

79. Section 2 of the 1947 Act provides:

The exclusion was retained in section 10<sup>415</sup> of the Crown Proceedings Act 1947 with provision for compensation being made through a compensation scheme.

“2. Liability of the Crown in tort

(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property;

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”

<sup>415</sup> Section 10 of the Crown Proceedings Act, entitled ‘Provisions relating to the Armed Forces’ read as follows:

“(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if -

(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the crown, and

(b) the [Secretary of State] certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:

Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if-

(a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and

(b) [the Secretary of State] certifies as mentioned in the preceding subsection: nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered

Provision was later made for the exclusion of liability in tort to be suspended by means of the Crown Proceedings (Armed Forces) Act 1987 but this was not done retrospectively and Mr. Roche could not benefit from this change.

After having examined the decision of the House of Lords in the **Matthews** case<sup>416</sup>, the European Court of Human Rights came to the following conclusion in the case of Roche:

*“Drawing on the historical context, the text and purpose of, in particular, sections 2 and 10 of the 1947 Act, the House of Lords concluded that section 10 did not intend to confer on servicemen any substantive right to claim damages against the Crown but rather had maintained the existing (and undisputed) absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. The Lords made it clear that prior to 1947 no right of action in tort lay against the Crown on the part of anyone. The doctrine that “the King could do no wrong” meant that the Crown was under no liability in tort at common law. Section 2 of the 1947 Act granted a right of action in tort for the first time against the Crown but the section was made expressly subject to the provisions of section 10 of the Act. Section 10 (which fell within the same part of the 1947 Act as section 2 entitled “substantive law” – see Lord Hope in the Matthews case at paragraph 94 above) provided that no act or omission of a member of the armed forces of the Crown while on duty should subject either that person or the Crown to liability in tort for causing*

by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.

(3) .....a Secretary of State, if satisfied that it is the fact:-

(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or

(b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;

may issue a certificate certifying that to be the fact; and any such certificate shall, for the purpose of this section, be conclusive as to the fact which it certifies.”

<sup>416</sup> vide note 408

*personal injury to another member of the armed forces while on duty. Section 10 did not therefore remove a class of claim from the domestic courts' jurisdiction or confer an immunity from liability which had been previously recognised: such a class of claim had never existed and was not created by the 1947 Act. Section 10 was found therefore to be a provision of substantive law which delimited the rights of servicemen as regards damages claims against the Crown and which provided instead as a matter of substantive law a no-fault pension scheme for injuries sustained in the course of service.*<sup>417</sup>

*omissis*

*124. Accordingly, this Court finds no reason to differ from the unanimous conclusion of the Court of Appeal and the House of Lords as to the effect of section 10 in domestic law. It considers that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law (Z and Others, § 100). In such circumstances, the applicant had no (civil) "right" recognised under domestic law which would attract the application of Article 6 § 1 of the Convention (Powell and Rayner v. the United Kingdom, cited above, § 36).*

*It is not therefore necessary also to examine the parties' submissions as to the proportionality of that restriction. It is further unnecessary to examine the Government's argument that Article 6 was inapplicable on the basis of the above-cited judgments in Pellegrin and R. v. Belgium.*

*125. The Court concludes that Article 6 is not applicable and that there has not therefore been a violation of that provision."*

The judgement on Article 6<sup>418</sup> provoked dissenting opinions from eight of the Grand Chamber's seventeen judges with the following remarks by Judge Zupancic being particularly strong:

<sup>417</sup> Para 122

<sup>418</sup> The Court also found that there had been no violation of Article 1 of Protocol No 1 (16 votes to 1), no violation of Article 14 in conjunction with Article 6 and Article 1 of Protocol

*“It is ironic that we should, precisely in British cases, build on the distinction between what is procedural and what is substantive. While the Continental legal systems have, for historical reasons, traditionally maintained the strictness of the distinction, it is precisely the common-law system which has always considered the right and the remedy to be interdependent.<sup>419</sup> Is the remedy something “substantive”? Or is it “procedural”? Is the legal fiction “the Crown can do no wrong” – and the consequent blocking of action (immunity) – merely procedural? Or has the substantive right of the plaintiff simply been denied? As we move from one British case to another the dilemma appears in cameo. It is becoming clear that we need to resort back to common sense.*

*Omissis*

*A substantive right is its remedy.*

*It is ironic that so often common sense and common law should come into direct collision. It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities when the distinction the judgment is built upon is pure legal fiction. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back.”*

### **The ‘dilemma’ and the doctrine of ‘iure imperii’**

Could the ‘dilemma’ come back in a Maltese case?

No 1 (unanimously), no violation of Article 13 in conjunction with Article 6 and Article 1 of Protocol No 1 (16 votes to 1), and no violation of Article 10. The Court however unanimously found that there had been a violation of Article 8 of the Convention.

<sup>419</sup> “ 1. See more extensively, Zupancic, Adjudication and the Rule of Law, 5 European Journal of Law Reform 23-125, 2003.”

The doctrine of ‘*iure imperii*’ as defined in the landmark case of **Busuttil v La Primaudaye**<sup>420</sup> has generally been interpreted as having effectively recognised Government’s immunity from actions in tort arising out of acts where the Government is acting in its capacity as political sovereign (*jure imperii*). It is also understood to have done so in a substantive and not in a merely procedural sense. Persons such as Busuttil, the silversmith who had claimed to have suffered damages because of the allegedly careless manner in which the police had taken control of his shop in connection with criminal proceedings, are considered not to have had a ‘civil right’ to sue the Government in tort.

This was subject to the ‘palliative’ of suing the individual officers who were responsible for the damage in their private capacity. The reference to the doctrine in the **Busuttil v La Primaudaye** judgement was based on the writings of the Italian authors Bonasi and Gabba but at the time when the judgement was delivered the doctrine also applied in France. In the famous **Arret Blanco** of the 8 February 1873 the Tribunal des Conflicts had decided that the administrative courts had jurisdiction to hear actions brought against the State for damages caused by persons which the State employs in the public service. Following that decision a number of governmental acts, defined as *actes d’authorite*’ whereby the administration exercised powers specific to the executive, were declared to be non-justiciable while the remaining acts of Government, known as *actes de gestion* could give rise to liability. The immunity prevailed until it was abandoned in the Conseil D’Etat decision of the 10 February 1905 in the case of *Tomaso Grecco* which involved a claim for damages against the police on account of alleged negligent use of a firearm. The claim was denied on the basis of lack of proof but the principle of “irresponsabilite” of the police when carrying out *actes d’authorite*’ was not upheld. The interpretation of the judgment of the Court of Appeal in the case of **Busuttil v La Primaudaye** is also still a matter for debate. The question is whether the judgment of the Court of Appeal in that case merely confirmed the First Hall’s judgement without

<sup>420</sup> Civil Court First Hall, 15 February 1894, per Judge Chappelle

passing any comment, which appears to have been the interpretation adopted by Prof. Gulia in the introduction to 'Governmental Liability in Malta'<sup>421</sup>, or whether it merely confirmed the judgement only on the basis of the principles of civil law and in particular of the principles of the law of tort regarding '*culpa in eligendo*'.

In his notes on 'Cases in Administrative Law' Prof. Ian Refalo interprets the **Busuttil v La Primaudaye** judgements as being 'no authority at all' that the Government enjoyed some form of immunity from liability when acting '*iure imperii*' and argues both that the Civil Court First Hall's judgement 'never came to the firm conclusion that the doctrine is applicable to Malta' and that the Court of Appeal upheld the first judgement 'applying solely the principles derived from Section 1037 of the Civil Code'. Unlike Professor Gulia, Professor Refalo interprets the 'golden' silence of the Court of Appeal as implying that 'one must therefore understand that the Court of Appeal was not endorsing the application of that doctrine'. If this interpretation were to be adopted, the 'civil right' to sue the Government in tort must be considered to have existed.

It is, of course now established that the doctrine of State immunity for acts '*iure imperii*' has been superseded at least since the judgement of the Civil Court First Hall in the important case of **Lowell vs Caruana**.<sup>422</sup> That judgment however did recognise that the doctrine did once form part of Maltese judge made law *inter alia* quoting the cases of **Galea v Galizia**<sup>423</sup> and **Azzopardi v Malfiggiani**<sup>424</sup>

<sup>421</sup> 'All that the Appellate Court found in its power to say in respect of such far-reaching judgment is 'Concorrendo nelle conclusioni della Corte di prima istanza che ....(a concise recital of the facts).....Decide confermando l' appellata sentenza'.....although silence is golden, in this case it certainly amounts to acceptance in view of the decision.' ('Governmental Liability in Malta p 8)

<sup>422</sup> Civil Court First Hall, 14 August 1972

<sup>423</sup> Court of Appeal, 8 November 1935, Vol XXIX.1.345

<sup>424</sup> Commercial Court 5 January 1902, Vol XVIII.III.69

Nowadays governmental liability in tort or quasi-tort insofar as these result from ultra *vires* administrative acts is regulated by article 469A (5)<sup>425</sup> of the Code of Organization and Civil Procedure and the Government may also be liable to pay compensation for breaches of Chapter IV of the Constitution on Fundamental Human Rights, of the European Convention on Human Rights, and for violations of EU law.

The doctrine of State immunity for acts '*iure imperii*' therefore appears to be strictly history as far as governmental liability in Malta is concerned.. It may still be relevant to keep in mind however that the rule that 'The King can do no wrong' also appeared to have been laid to rest in the United Kingdom almost sixty years ago through the Crown Proceedings Act 1947, or so Mr. Roche might have thought.

Given that the doctrine of *iure imperii* was neither introduced nor abrogated by legislative intervention and that it was superseded in case law prior to the enactment in 1995 of article 469A (5) and given the long span of time during which it served as a reference point in various judgements of our courts, it may not be completely safe to assume that the effects of the doctrine may not become a point of debate in some Article 6 case centring on the existence or otherwise of a 'civil right' against the Government in Maltese law.

In 1935 the Court of Appeal held in **Cassar Desain vs Forbes**<sup>426</sup> that English Public Law applied in Malta but that the common law of England is not the common law of Malta. That dictum, which therefore appears to have excluded the applicability to Malta of the

<sup>425</sup> 469A (5)" In any action brought under this article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The said damages shall not be awarded by the court where notwithstanding the annulment of the administrative act the public authority has not acted in bad faith or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power."

<sup>426</sup>Court of Appeal 7 January 1935, Vol XXIX.1.43

common law doctrine that 'The King can do no wrong', may today be out of date. However in view of the large number of Maltese laws and Constitutional principles and provisions based on British counterparts, one can also never be too sure that the old British rule of monarchic immunity will not surprisingly spring to relevance in some Article 6 litigation as to whether in granting an immunity or in imposing a special system of liability the Maltese legislator, at the relevant time, was barring access to the courts or was merely retaining an immunity which was already in place at the time.

**Peter Grech**  
August 2006





Pastel Drawing – © Claude Micallef-Grimaud 2006



*MARITIME LAW*



## Some Thoughts on the Special Maritime Privilege under Maltese law and in a Comparative Context

Dr. Ivan Vella  
LL.M, LL.D.

### (1) Ships and the Maritime Privilege or Lien

Under the provisions of the Merchant Shipping Act of Malta<sup>427</sup> ships and other vessels are deemed to be a special type or class of movable property, being separate and distinct assets within the estate of their owners.<sup>428</sup> The main reason for this ‘ring-fencing’ appears to be the protection of those creditors of the owners who have claims relating to such ships and other vessels. The law in fact states that this is ‘for security of actions and claims to which the vessel is subject.’<sup>429</sup> Even in the case of the owner’s bankruptcy all actions and claims to which the ship may be subject have preference on such ship over all other debts of the owner’s estate.<sup>430</sup> It is submitted that these provisions apply to all ships and other vessels, and not simply to those that may have Maltese nationality. It may however be presumed that they do not apply to ships and other vessels that enjoy immunity from civil process.

One of the ways in which a ship may constitute security for a debt or other obligation is by a special privilege created upon it by operation of law.<sup>431</sup> The debts secured by a special privilege upon a ship (the law actually speaks of a ‘vessel’ in this context) are those set out in article 50 of the MSA. The language of this provision seems to imply that it constitutes a *lex specialis* and that no other debt may be secured by a special maritime privilege upon

<sup>427</sup> Chapter 234 of the Laws of Malta - hereinafter the “MSA”.

<sup>428</sup> Article 37A(1) of the MSA.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> Article 37B(1) and (2)(c) of the MSA.

a ship.<sup>432</sup> However the law recognizes that separate items upon a ship may themselves be subject to special privileges under the Civil Code.<sup>433</sup>

Article 50 of the MSA also recognizes the special privilege granted to the seller under article 2009(d) of the Civil Code<sup>434</sup> to secure a claim for any part of the price of the vessel that remains unpaid, provided that such privilege is registered, in so far as a Maltese ship is concerned in its register and in the case of other vessels in the Public Registry, within two days from the date of sale.<sup>435</sup>

Although it is not entirely clear whether special privileges other than these may be created over ships and other vessels it would appear that the general and special privileges over movables contemplated in the Civil Code may, at least in theory, be applicable also to ship and other vessels.<sup>436</sup> It may also be recalled that as a rule under the Civil Code general privileges and special privileges over movables are not subject to registration.<sup>437</sup>

## **(2) The Nature of the Special Maritime Privilege**

At the very simplest level the special maritime privilege<sup>438</sup> is a *privileged claim or right of preference on maritime property* which the nature of the claim (or debt) confers upon a creditor over other creditors.

<sup>432</sup> This also appears to be confirmed by article 1997(2) of the Civil Code which provides that the provisions of Title XXIII [Of Privileges and Hypothecs] of the Civil Code do not apply to ships or to debts to which ships may be subject, except so far as they are consistent with the provisions of the MSA.

<sup>433</sup> Article 37B(3) of the MSA. See also article 40(1)(a) of the MSA.

<sup>434</sup> Article 50(p) of the MSA. In terms of article 2009(d) of the Civil Code the debt due in respect of the price of a thing, whether the sale has been effected with a stipulation as to credit or not, gives rise to a special privilege over the particular thing.

<sup>435</sup> See article 52 of the MSA.

<sup>436</sup> See article 37D(2) of the MSA.

<sup>437</sup> Article 2032 of the Civil Code.

<sup>438</sup> In jurisdictions influenced by the Anglo-Saxon common law system this is usually referred to as a lien, which means a charge over property for the purpose of securing an underlying claim.

Maritime property should include the ship or vessel to which the claim relates. More generally, in many jurisdictions, it also includes all the ship's appurtenances (equipment that forms an integral part of, or is otherwise essential to, the ship) that are on board the ship and that belong to the owner of the ship (in other words, those that are not leased to the owner or otherwise owned by third parties). However exceptionally under English law and the law of some other States all such appurtenances, even those that are not owned by the ship-owner, may be attached by a salvage lien. Bunkers are also included within the meaning of the term 'appurtenances' and are subject to the same considerations.

Our law does not appear to draw some of these 'finer' distinctions in so far as maritime privileges and mortgages are concerned. In the first place article 37A(2) of the MSA simply provides that a 'ship' includes 'together with the hull, all equipment, machinery and other appurtenances as accessories belonging to the ship, which are on board or which have been temporarily removed therefrom.' This may suggest that the ownership of the 'appurtenances' may be irrelevant, but the expression 'belonging to the ship' may be construed as meaning that for 'appurtenances' to fall within the meaning of the expression 'ship' and therefore to be *inter alia* subject to a special maritime privilege they must belong to the person or persons who own the ship. Moreover, in terms of article 50 of the MSA the special privileges contemplated therein attach to the 'vessel' and to 'any proceeds from any indemnity arising from collisions and other mishaps as well as any insurance proceeds.'

In some jurisdictions freight that is being earned at the time when the privilege (or lien) arises may also be covered by a maritime privilege (or lien) over maritime property. Special rules may apply in this regard depending on the type and origin of the privilege (or lien) - *vide* also in this regard the relative provisions in the applicable international conventions.<sup>439</sup> This does not appear to be the case under Maltese law.

<sup>439</sup> See in particular, Articles 2 and 4 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1926 (adopted in Brussels on April 10, 1926) – hereinafter the "1926 Convention". The other international conventions of

Moreover in theory cargo may also be maritime property and may therefore be attached by a privilege (or lien). It should however be noted that the carrier's privilege (or lien) against cargo for unpaid freight is an application of the principle of *ius retentionis* or, in other words a possessory privilege (or lien); and therefore once the carrier loses possession of the cargo the privilege (or lien) is extinguished.

Maritime property may also include the wreck of a ship attached by a privilege (or lien). This hypothesis does not appear to be excluded under Maltese law. Generally also included are the proceeds of a judicial sale of a ship attached by a privilege (or lien), and any security put up by the owner thereof (directly or indirectly, for instance, through his Protection and Indemnity Club) to prevent the arrest of such ship or the release of such ship if it is arrested (in such cases the privilege or lien is effectively transferred to the funds).

In most jurisdictions the following are not considered to be maritime property, but they are deemed so under the provisions of the applicable international conventions, in particular those of the 1926 Convention:

- (i) any salvage remuneration payable to a ship attached by a privilege or lien; and
- (ii) any general average contribution payable to a ship attached by a privilege or lien; and
- (iii) insurance proceeds payable in respect of loss of, or damage to, a ship attached by a privilege or lien.

It may be recalled that the latter item is expressly referred to in article 50 of the Merchant Shipping Act.

relevance are the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967 (adopted in Brussels on May 27, 1967) and the International Convention on Maritime Liens and Mortgages 1993 (adopted in Geneva on May 6, 1993). The latter two conventions are not yet in force.

### **(3) Types of Maritime Privileges or Liens**

In civil law countries there are generally two types of privileges that attach to maritime property:

- (a) the special (or statutory) maritime privilege; and
- (b) the possessory privilege (an application of the general principle of *ius retentionis*) that is based on a right of possession of property pending the discharge of any outstanding obligations incurred in relation to such property (for example, in the context of ship repair) – once possession is lost the right under the possessory privilege is also lost.

In the common law system there are various types of liens that may apply in a maritime context. For example in the United Kingdom the liens that apply to maritime property are:

- (a) the maritime lien proper that owes its origin to the general maritime law;
- (b) the so-called statutory lien that owes its origin to statute (in the main part set out in section 20 of the Supreme Court Act);
- (c) the possessory lien – the same principles described above also apply here; and
- (d) the equitable lien (that arises in equity through a relationship or contract between the parties where it is otherwise impossible to establish another type of lien; this lien is extinguished when the property attached thereby is acquired by a *bona fide* purchaser for value without notice thereof).

#### **(4) Some Characteristics of Maritime Privilege or Liens**

The following are some characteristics of maritime privileges (or liens). They apply generally to maritime privileges and liens indiscriminately. Some nuances of meaning may however apply in distinguishing the maritime privileges recognized in civil law countries from the maritime lien recognized under the common law system.

a) *It arises by operation of (substantive) law in a number of circumstances defined by statute or by the general maritime law (or, at times, by general principles of law or by the common law) – usually for services rendered in respect of such property or for damage caused through the instrumentality of such property.*

The creation of the maritime privilege or lien does not pre-suppose the responsibility or liability of the ship for the underlying debt which it secures. As a matter of fact the theory of the personification of the ship is now largely discredited in most jurisdictions. The justification for the creation of the maritime privilege or lien (as with all other privileges and liens) is that an asset belonging to the person liable for the claim (directly or indirectly) is made available as a security in the interests of the person who holds the claim. The ship herself is not responsible, nor can she be held liable, for any such claim as she lacks the necessary legal personality. At most the ship is recognized as having some form of judicial or quasi-judicial personality, in other words the ability to stand as defendant (and, perhaps, as plaintiff) in judicial proceedings.

b) *It is created automatically, without the need for any declaration or registration or other formality or special condition of proof.*<sup>440</sup>

<sup>440</sup> See Article 11 of the 1926 Convention: 'Subject to the provisions of this Convention, liens established by the preceding provisions are subject to no formality and to no special condition of proof.'

If the conditions required by law for the creation of a privilege or lien over a ship subsist, the owner of such ship can not prevent such creation or accrual except if he satisfies the underlying claim or debt or provides an indemnity for its satisfaction (in which case the privilege or lien may be seen as being transferred to the alternative security, if any, furnished by the owner by way of indemnity for the claim or debt). It should be recalled that the effect of a non-lien clause (usually in charterparty agreements, in ship sale agreements and in ship mortgage or ship *hypothèque* agreements) is simply that of obliging one of the parties (the charterer or the seller or the mortgagor or debtor) to indemnify the other (the owner or the purchaser or the mortgagee or hypothecary creditor) in the event that a privilege or lien accrues during the former's possession (etc) of the property in question.

c) *Generally the maritime privilege or lien accrues from the moment of the event or other circumstances out of which it arises.*

Under English law a distinction is drawn between statutory liens or rights of action *in rem* and the historical maritime liens. The former are deemed to come into existence from the moment in time when the claim in admiralty is commenced, in other words when the *in rem* claim form is filed. On the other hand the maritime lien, albeit inchoate, is deemed to come into existence (in a sense retrospectively and only after the claim is commenced or brought as an action *in rem*) from the point in time when the underlying event or other circumstance arose. This distinction is largely due to historical reasons, and is nowadays dictated by procedural expediency. It does not apply under Maltese law.

d) *It is in the nature of an accessory or ancillary right based (and therefore largely dependent) upon an underlying (personal) claim against the proper debtor or defendant, but otherwise having 'a life of its own'.*

The privilege or lien is an accessory or ancillary (security) right. This means that the existence of a privilege or lien necessarily presupposes the existence of an underlying (*in personam*) claim

that the holder of such privilege or lien has either against the owner (*prima facie*) of the property in respect of which the privilege or lien is created or against another person who is liable for such claim instead of the owner (*pro hac vice*). The following considerations follow:

(i) The *only* purpose of the lien or privilege is to confer a privileged security right over the property to which it attaches. The privilege or lien is, at most, co-extensive with the value of the property to which it attaches. However it does not necessarily extend to the value of the underlying claim.

(ii) In a sense the rights conferred by the privilege or lien may be exercised by the holder thereof independently of the pursuit of any action against the person liable for the underlying claim.

(iii) However if the underlying claim is for any reason extinguished the privilege or lien is usually also automatically extinguished.

(iv) The privilege or lien presupposes that the person who at the time of the relative cause of action (giving rise to the privilege or lien) is ‘personally’ liable for the underlying claim, was either the owner of the property subject thereto or any other person acting *pro hac vice* (in other words, legally representing or acting instead of) the owner in relation to such property. The latter concept would presumably include the demise charterer and, in most jurisdictions, the time charterer. In some jurisdictions it could also include the voyage charterer. This matter does not appear to be addressed directly and unequivocally under Maltese law. Clearly the owner’s liability will be adequately established if he is legally vicariously liable for the underlying claim (for instance, if the ship causes damage to third party property whilst under the control of the master employed by the owner or even whilst under the control of a pilot).

(v) If an action is brought on the basis of the privilege or lien the claimant’s potential satisfaction is, at least *prima facie*, limited by reference to the privilege or lien. Accordingly if the owner of the

attached property fails to appear in proceedings commenced *in rem* (in other words, directly against the property attached by the privilege or lien) the plaintiff's remedy will be limited to the value of the property attached by the privilege or lien.

(vi) In the civil law system this will normally be the case whenever the property in question has been transferred to third parties after the privilege has accrued. In such cases the proceedings are indirectly brought against the property's new owner who will either lose the property (that will be sold under the authority of the court - judicial sale) or prevent this and retain the property by paying the privileged creditor the value of the property at the time of its arrest or seizure. Otherwise, if the property is still held by the person liable for the underlying claim, the proceedings must be brought against such person but may be (and are normally) anticipated by a precautionary seizure of the property attached by the privilege (on the basis of the real rights attaching thereto). In such case, if the defendant fails to appear or if there is no other property pertaining to him over which judgment may be executed, the plaintiff's remedy will still be limited by reference to the value of the privilege.

(vii) The above considerations will therefore also apply in both the civil and common law systems if the owner (or any other person interested in the property) sets up a fund to release the property. In such case the fund set up shall be equal to the value of the property subject to the privilege or lien if such value is less than, or equal to, that of the underlying claim, or shall be equal to the value of the underlying claim if such value is less than that of the property attached.

(viii) Nevertheless, in all cases, if the person liable for the underlying claim appears in the proceedings to defend or otherwise oppose such proceedings he will thereby expose himself to liability for the full value of the underlying claim. In the common law this submission to jurisdiction effectively converts the proceedings into hybrid proceedings: partly *in rem* and partly *in personam*.

(ix) Furthermore, if for any reason (as explained above) the claimant fails to obtain full satisfaction from proceedings brought in terms of the lien or privilege, his rights in terms of the underlying claim will be preserved up to the value of the unsatisfied balance (because the extinguishment of the privilege or lien does not necessarily extinguish the underlying claim).

(x) It should be remembered that the privilege or lien is both a substantive right and a procedural remedy.

*e) t is a real right (a ius in rem) over the property in respect of which it is created.*

This means that the privilege or lien attaches to, and follows, the property even if it is acquired by third parties in good faith. It also suggests that the privileged creditor's rights are rights in the property and therefore, by inference, preferred rights.<sup>441</sup>

*f) It entitles the holder of the privilege or lien (the privileged creditor or lienor) to security and priority in respect of the property in question against other creditors of the owner of such property.*

All the property of a debtor is the common guarantee of his creditors, all of whom have an equal right over such property, unless there exist between them lawful causes of preference.<sup>442</sup> A privilege is a 'lawful cause of preference.'<sup>443</sup> A special maritime privilege is such a lawful cause of preference that affects only a ship or other vessel belonging to the debtor. The debt covered by the special maritime privilege is secured by the privilege over the ship, and the creditor who holds the privilege will see his claim satisfied out of the proceeds of sale of the ship in preference to other unsecured creditors of the same debtor.

<sup>441</sup> See paragraph (f) below.

<sup>442</sup> Article 1995 of the Civil Code.

<sup>443</sup> See article 1999 of the Civil Code.

g) *It is enforceable either by an action against the owner of the property or, in some jurisdictions, by an action against the property itself (the action in rem) – the right of the privileged creditor or lienor is to have the property subject to the privilege or lien seized or arrested and sold under the authority of a competent court, and to have his claim satisfied out of the proceeds of such sale.*

This in itself suggests that the existence of a maritime privilege or lien presupposes a right of arrest or detention or seizure by judicial process of the property attached by the privilege or lien. The means of enforcement of the right in the privilege or lien are purely procedural matters that are determined only by reference to the law of the place where the action is made (the *lex fori*).<sup>444</sup> In the ultimate analysis however the privileged creditor always has the right to request the sale of the property subject to the privilege or lien and to have his claim satisfied (in preference to other unsecured or less secured creditors of the same debtor) out of the proceeds of such sale.

h) *It is (generally) enforceable even against innocent purchasers of the property for value because it travels with, or follows, the property secretly and unconditionally.*

The maritime privilege or lien is not usually registered or subject to a system of registration. It therefore attaches to a ship secretly and unconditionally, and remains so attached in latent form. Although an innocent purchaser may have no means of finding out the existence of the privilege at the time of the purchase the law prefers to protect the creditor secured by the privilege or lien.<sup>445</sup>

### **(5) The Special Maritime Privileges under Article 50 of the MSA**

The debts referred to in article 50 of the MSA are the following:

<sup>444</sup> See the illustrations at paragraph (d) above.

<sup>445</sup> See Article 8 of the 1926 Convention: ‘Claims secured by a lien follow the vessel into whatever hands it may pass.’

- (a) Judicial costs incurred in respect of the sale of a ship and the distribution of the proceeds of such sale.
- (b) Fees and other charges due to the Registrar of Ships under the MSA.
- (c) Tonnage dues.
- (d) Wages and expenses for assistance, recovery or salvage, and for pilotage.
- (e) Wages of watchmen and other expenses of watching a ship from the time of entry into port up to the time of sale (custodia legis).
- (f) Rent of the warehouses in which the ship's tackle and apparel are stored.
- (g) The expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port.
- (h) Wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.
- (i) Damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman.
- (j) Moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage ('necessaries'), but only if the debt has been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner. This formula appears to exclude any such debts incurred by a demise or time charterer of the ship. It may be noted that under Article 13 of the 1926 Convention the provisions thereof 'apply to vessels under

the management of a person who operates them without owning them or to the principal charterer, except in cases where the owner has been dispossessed by an illegal act or where the claimant is not a *bona fide* claimant.’

(k) Ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying any other privilege, though in any case for a sum in the aggregate not in excess of four thousand units.<sup>446</sup>

(l) Moneys lent to the master for the necessary expenses of the vessel during her last voyage, and the reimbursement of the price of the goods sold by him for the same purpose.

(m) Moneys due to creditors for provisions, victuals, outfit and apparel, previously to the departure of the ship on her last voyage, but only if the debt has been contracted directly by the owner of the ship, or by the master, or by an authorized agent of the owner. This again appears to exclude any such debts incurred by a demise or time charterer of the ship.

(n) Damages and interest due to the freighters (in other words, shippers and/or consignees) for non-delivery of the goods shipped, and for injuries sustained by such goods through the fault of the master of the crew.

(o) Damages and interest due to another vessel or to her cargo in cases of collision of vessels.

(p) The debt specified in article 2009(d) of the Civil Code for the balance of the price from the sale of a ship.

The debts giving rise to maritime liens under the 1926 Convention are the following:

<sup>446</sup> This is equivalent to Lm4,000.

(i) Law costs due to the State, and expenses incurred in the common interest of the creditors in order to preserve the vessel or to procure its sale and the distribution of the proceeds of sale; tonnage dues, light or harbour dues, and other public taxes and charges of the same character; pilotage dues, the cost of watching and preservation from the time of entry of the vessel into the last port.

(ii) Claims arising out of the contract of engagement of the master, crew, and other persons hired on board.

(iii) Remuneration for assistance and salvage, and the contribution of the vessel in general average.

(iv) Indemnities for collisions or other accidents of navigation, as also for damage caused to works forming part of harbours, docks, and navigable ways; indemnities for personal injury to passengers or crew; indemnities for loss of or damage to cargo or baggage.

(v) Claims resulting from contracts entered into or acts done by the master, acting within the scope of his authority, away from the vessel's home port, where such contracts or acts are necessary for the preservation of the vessel or the continuation of its voyage, whether the master is or is not at the same time owner of the vessel, and whether the claim is his own or that of the ship chandler, repairers, lenders, or other contractual creditors.

## **(6) Extinguishment of the Special Maritime Privilege**

As with all other privileges, the special maritime privilege may be extinguished by extinguishment of the principal or underlying debt or obligation (including prescription thereof), by the creditor's renunciation and by the prescription of the right of action relating to the privilege itself.<sup>447</sup>

<sup>447</sup> See also, article 2084 of the Civil Code.

Moreover, as a rule a special privilege over a movable (such as a ship) ceases to exist if the property subject thereto passes into the hands of a third party.<sup>448</sup> Article 37D(2) of the MSA similarly provides that a privilege (whether general or special) to which a ship may be subject under the provisions of the Civil Code shall not continue to attach to it when the vessel is transferred to third parties.

However the special maritime privileges specified in article 50 of the MSA are also extinguished (unless an action for recovery of the claim secured by a privilege is previously brought before a competent court) upon the expiry of a period of one year from the date of the registration in the register of the ship in question of the voluntary sale of that ship, or upon the expiry of one year from the date of closure of the register of the ship in question if the same was closed after the voluntary sale of the ship.<sup>449</sup> The special maritime privileges are also extinguished by the sale of the vessel made pursuant to an order or with the approval of a competent court according to the forms prescribed by law.<sup>450</sup>

Under the provisions of the 1926 Convention the liens cease to exist (apart from the other cases provided for by national laws) at the expiration of one year.<sup>451</sup> The necessities and disbursements lien is however extinguished upon the lapse of six months.<sup>452</sup>

In principle the loss or destruction of a ship or other vessel does not extinguish the special maritime privilege that may have previously accrued over it. The privilege survives on the wreck if there is a wreck. However if the ship is totally destroyed or lost without a trace then it is impossible for the privilege to remain in existence.

<sup>448</sup> Article 2002(1) of the Civil Code.

<sup>449</sup> Article 37D(3) of the MSA.

<sup>450</sup> *Ibid.* Article 9 of the 1926 Convention speaks of the need for ‘formalities of publicity which shall be laid down by the national laws.’

<sup>451</sup> Article 9 of the 1926 Convention.

<sup>452</sup> *Ibid.*

## **(7) Duty of Disclosure and ‘Indemnity’**

Whenever a vessel is sold the seller is bound by law to inform the purchaser of all privileged debts on the vessel and to furnish to the latter a list of such debts signed by him.<sup>453</sup> If the seller either fails to furnish such list or omits to mention any privileged debt in the list the purchaser may (in the event he sustains damages as a result of such failure or omission) exercise all rights competent to him against the seller ‘with all such means as the law provides against debtors committing fraud in contracting debts.’<sup>454</sup> This has an impact on the type of damages that may be recovered by the purchaser by including the possibility of recovering damages that are not foreseeable at the time of the seller’s omission.

## **(8) The Possessory Lien or Privilege**

The law also grants a (specific/statutory) possessory lien over a ship in favour of a ship repairer, builder or other creditor into whose care and authority the ship is placed for the execution of works or for any other (lawful) purpose.<sup>455</sup>

This lien entitles the privileged creditor to retain possession of the ship in question until he is paid the debt due to him.<sup>456</sup> Consequently, apart from the other causes that extinguish privileges or liens, this lien is extinguished when the creditor voluntarily releases the ship from his custody,<sup>457</sup> but it is not extinguished if the ship is released pursuant to a court order or following a judicial sale of the ship.<sup>458</sup> In the latter case the privileged creditor still enjoys priority over the proceeds of the sale.<sup>459</sup>

<sup>453</sup> Article 53(1) of the MSA.

<sup>454</sup> Article 53(2) of the MSA.

<sup>455</sup> Article 54(1) of the MSA.

<sup>456</sup> Article 54(2) of the MSA.

<sup>457</sup> Article 54(3) of the MSA.

<sup>458</sup> Article 54(4) of the MSA.

<sup>459</sup> *Ibid.*

## (9) Ranking

Ranking (or priority) is a purely procedural matter that ought to be regulated exclusively by reference to the *lex fori*.<sup>460</sup> Ranking is an exercise in ‘relativism’ it involves the ascertainment, ‘comparison’ and actual ‘pigeon-holing’ of the various, particular secured claims over the (passive) subject of the enforcement proceedings.

In so far as special maritime liens are concerned our law adopts the ‘last-voyage’ rule.<sup>461</sup> Accordingly the debts contracted on the occasion of a ‘subsequent arrival or return’ at the same port have preference over those contracted on the occasion of a ‘former arrival or return.’<sup>462</sup>

Subject to the ‘last-voyage’ rule, article 54A(1) of the MSA provides that the debts specified in article 50 of the same statute rank in the order set out and in preference to other hypothecary and privileged claims.<sup>463</sup> The possessory lien or privilege always ranks before the debts specified in article 50(*k*) to (*p*), and it ranks after the debts specified in article 50(*c*) to (*j*) only if such debts are created prior to that secured by the possessory lien or privilege, otherwise it always ranks before such debts but after those specified in article 50(*a*) and (*b*).<sup>464</sup>

A debt secured by a mortgage registered under the MSA or by a foreign mortgage recognized under the provisions of the MSA

<sup>460</sup> See Part (10) below.

<sup>461</sup> See Article 6 of the 1926 Convention: ‘Claims secured by a lien and attaching to the last voyage have priority over those attaching to previous voyages. Provided that claims arising on one and the same contract of engagement extending over several voyages all rank with claims attaching to the last voyage.’

<sup>462</sup> Article 51 of the MSA.

<sup>463</sup> This is also the position under Article 5 of the 1926 Convention: ‘Claims secured by a lien and relating to the same voyage rank in the order in which they are set out in Article 2.’ However it is also provided there that ‘the claims mentioned under nrs 3 [salvage and general average] and 5 [necessaries and disbursements] in that Article rank, in each of the two categories, in the inverse order of the dates on which they came into existence.’ For such purpose, claims arising from one and the same occurrence are deemed to have come into existence at the same time (Article 5).

<sup>464</sup> Article 54A(2) of the MSA.

always ranks after the possessory lien or privilege and the debts specified in article 50(a) to (k), but before the debts specified in article 50(l) to (p) and all other hypothecary and privileged claims.<sup>465</sup>

In all cases competing creditors under the same heading (or type of debt or privilege) rank rateably (*pro rata*), subject to the ‘last-voyage’ rule and irrespective of the actual date of creation of the competing debts, if the proceeds are insufficient to satisfy all claimants in full.<sup>466</sup>

## **(10) Conflict of laws**

A distinction must be drawn between the procedural side of the maritime privilege or lien and the substantive side. A maritime privilege (like all privileges) is a product of substantive law and gives rise to substantive rights (including real rights). It is therefore submitted that all issues pertaining to the substantive rights in the privilege or lien must be determined by reference to the law that regulates the creation of the privilege or lien.

It should also be recalled that the maritime privilege or lien is an accessory or ancillary right,<sup>467</sup> and as such, at least in principle, the law that regulates the creation and application of the underlying obligation ought to regulate the creation and application of the maritime privilege or lien. This means that in order to determine whether a maritime privilege or lien is created on a particular ship one must, in the first place, look to the law regulating the underlying obligation giving rise to the debt that is purportedly

<sup>465</sup> Article 54A(3) of the MSA. This is not entirely consistent with Article 3 of the 1926 Convention that provides as follows: ‘The mortgages, hypothecations, and other charges on vessels referred to in Article 1 rank immediately after the secured claims referred to in the preceding Article. National laws may grant a lien in respect of claims other than those referred to in the said last-mentioned Article, so, however, as not to modify the ranking of claims secured by mortgages, hypothecations, and other similar charges, or by the liens taking precedence thereof.’

<sup>466</sup> Article 54A(4) of the MSA. See also Article 5 of the 1926 Convention: ‘Claims included under any one heading share concurrently and rateably in the event of the fund available being insufficient to pay the claims in full.’

<sup>467</sup> See paragraph (d) in Part (4) above.

secured by the said privilege or lien. If the governing law of the underlying obligation provides for the creation of the maritime privilege or lien then it may be reasonable to assume that such privilege or lien does in fact apply and exists. This is however only the first limb of the test.

Frequently the (security) rights conferred by the privilege or lien are exercised in a jurisdiction other than that the law whereof governs the creation of the privilege or lien as aforesaid. In such hypothesis if the enforcement is to be allowed in such jurisdiction the laws applicable there must also recognize the possibility of having a maritime privilege or lien on the ship or vessel in question in the particular circumstances of the debt which is sought to be secured. This is the second limb of the test. If this test fails the enforcement rights inherent in the maritime privilege or lien must be brought elsewhere.

All matters of procedure, including ranking, should be determined exclusively by reference to the *lex fori*.<sup>468</sup>

### **(11) Some Concluding Thoughts**

In concluding, it would appear that some aspects of the law on maritime privileges may need some fine-tuning. The following issues in particular appear to call out for the legislator's attention:

(1) The sometimes inconsistent use of terminology (for instance the 'ship'/'vessel' dichotomy) in the applicable provisions may need to be ironed-out to avoid possible ambiguity in interpretation.

(2) Establishing a clear and unequivocal *numerus clausus* of privileges attaching to ships and other maritime property may be a plus, in that ship owners and operators would know in advance the bases on which an arrest of their ships may be made under the laws of Malta where applicable.

<sup>468</sup> See Part (9) above.

(3) Such a process may perhaps also warrant a revision of the debts secured by a special maritime privilege. Some of the debts may perhaps not merit or justify security in the form of a maritime privilege.

(4) Some clarity may perhaps also be introduced in relation to debts contracted by a demise charterer or by a bareboat charterer or even by a time charterer of a vessel.

(5) There may also be a revision of the rules concerning the ranking of privileged claims, perhaps making them more consistent with those applicable in other States, in particular those that adhere to the provisions of the 1926 Convention.

(6) The definition of the subject-matter of the maritime privilege (or 'maritime property') may also have to be revised. As the situation currently stands it is neither entirely consistent nor entirely inconsistent with the provisions of the 1926 Convention.

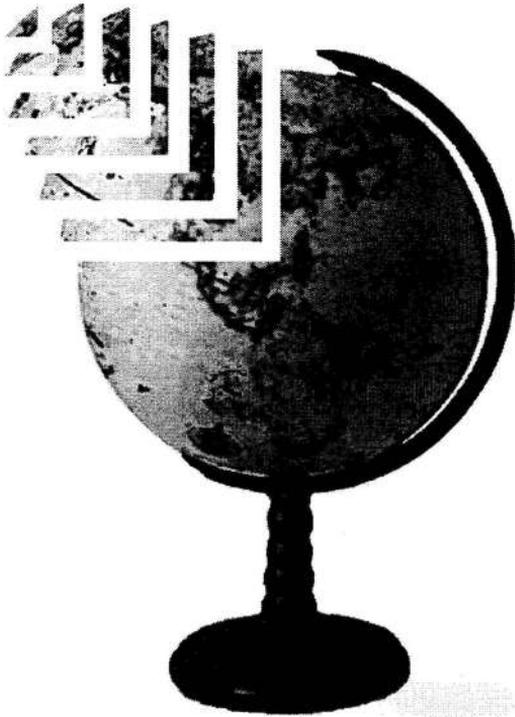
(7) There is a total dearth of guidance on conflict of law issues.

It is believed that these matters may be addressed by the legislator to ensure consistent application of judicial pronouncements in disputes on this subject.

**Ivan Vella**  
August 2006







# ***PRIVATE INTERNATIONAL LAW***



## The *Renvoi* Debate

Dr. Patricia Cassar-Torregiani

B.A., LL.D., B.C.L. (Oxon)

### Introduction

‘Much of the discussion of the *renvoi* doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected’.<sup>469</sup>

Conflicting views and different approaches seem synonymous with the doctrine of *renvoi*. It has been regarded by some as a distortion of choice of law principles, while others praise its merits and advocate its ‘absolute acceptance’.

The ambivalent attitudes that surround *renvoi* reflect the ambiguity of the subject which the doctrine strives to address – how one is to understand the reference to a foreign *lex causae*. As *Dicey and Morris* point out, the term ‘law of a country’ can mean, in its narrower and more usual sense, the domestic law of any country; alternatively, it can refer in its wider sense to all the rules, including the rules of the conflict of laws, which the courts of a country apply to a particular case. This ambiguity of expression gives rise to the very problem of *renvoi*.<sup>470</sup> This attitude is mirrored in the development of the concept, which has neither been steady nor principled.<sup>471</sup>

<sup>469</sup> Collins L. et al., *Dicey and Morris: The Conflict of Laws*, 13 ed., London: Sweet and Maxwell, 2000

<sup>470</sup> As above

<sup>471</sup> *Bremer v Freeman* (1857) 10 Moo. P. P. 306, being used as authority both for and against the doctrine.

*Broadly speaking, there exist two divergent approaches to the subject. A somewhat absolutist approach would entail accepting or rejecting the doctrine in its entirety. On the other hand, the more moderate stance would recognise the worth of the doctrine by focussing on areas of the subject wherein it may be put to optimal use, while, at the same time, showing up the areas where the doctrine would do best not to intrude.*

It is proposed to deal with both approaches and conclude that a proper understanding of the doctrine of *renvoi* requires an understanding of how the various parts of the conflict of laws fit together and that *renvoi* is an essential part of an integral whole – with the logical conclusion that its complete eradication would in effect cause the conflicts edifice to fall like a pack of cards.

*Renvoi* is, as Briggs states, the ‘subject’s principal tendon’;<sup>472</sup> but – if I may extend the metaphor slightly further – tendons, though essential, are not put to use all the time and for all the activities of the body of which it forms part, – such is the case with *renvoi*: its constant use and application in every part of the subject will be just as disastrous as its total annihilation.

*The aim of renvoi can be seen as striving to achieve a measure of international harmony amidst the contextual environment of private international law. In cases involving a foreign element, it is clearly desirable that the issue will be determined in the same way in any of the courts of the States which are connected with it. However, the fact that different connecting factors are used in different systems militates against this ideal solution. This is the state of affairs that renvoi addresses and provides an argument for supporting its application.*

<sup>472</sup> Briggs A., ‘In Praise and Defence of Renvoi’, *International and Comparative Law Quarterly* 47 (1998), 877 – 884.

## The Theories of *Renvoi*

*The ‘internal law theory’<sup>473</sup> rejects the doctrine of renvoi and it is this that in some authors’ opinion is ‘in general correct and desirable’.<sup>474</sup> The reference to the ‘law of X’ is interpreted as being a reference to the internal law of X, without reference to its conflicts rules. This method therefore requires proof of the domestic law of the foreign country, but does not require proof of its conflict rules.<sup>475</sup> It seems that if this rule were adopted everywhere, each conflicts system would in itself be perfectly consistent, but the diversity of connecting factors would have an injurious impact on international harmony.<sup>476</sup>*

Moving forward along the doctrinal journey, the approach of adopting single or partial *renvoi*, involves construing the reference to the foreign law as a reference to the whole of that system’s law. Further on still, one finds the doctrine of Total *Renvoi*, also known as the Double *Renvoi* or Foreign Court Theory, which dictates that the forum judge who is referred by his own law to the legal system of a foreign country must apply whatever law a court in that foreign country would apply if it were hearing the case. This involves a reference to that system’s entire law, including not only its conflict rules but also the policy with regard to *renvoi* itself, in order to arrive at the very same conclusion as the judge sitting in the other forum would arrive at. The forum judge therefore steps in to the shoes of the foreign judge and decides the case. For this reason it is also known as ‘Impersonating the Foreign Judge’. This approach involves accepting the foreign country’s rules as to *renvoi* and doing whatever the foreign judge would do. In this way, if the

<sup>473</sup> Also referred to as the Simple, Rational or Internal Law Theory.

<sup>474</sup> See for example, North P.M. and Fawcett J.J., *Cheshire and North’s Private International Law*, 13<sup>th</sup> ed., London: Butterworths, 1999

<sup>475</sup> This approach has been adopted in two early English decisions: *Hamilton v Dallas* (1875) 1 Ch D 257 and *Bremer v Freeman* (1857), above at note 3. This approach was also directed to be used by the Law Commission in most recent reforms to the English conflict of laws.

<sup>476</sup> Kahn-Freund O., *General Problems of Private International Law*, Aspen Publishers, reprint of 1976 the edition, 1981

foreign law refers to English law and rejects the *renvoi* doctrine altogether, the result is that the forum's domestic law is applicable, while if the foreign law refers to the law of the forum, and adopts the doctrine of single *renvoi*, the result is that the foreign domestic law is applicable.

It is perhaps this latter theory which has been subjected to most criticism which would strive to argue that 'in all but exceptional cases the theoretical and practical difficulties involved in applying the doctrine outweigh any supposed advantages it may possess.'<sup>477</sup>

### **Criticism**

It has been stated that the contention of those who favour the doctrine of *renvoi* is that it ensures that the same decision will be given on the same disputed facts irrespective of where the case is heard. However, *renvoi* does not necessary entail uniform decisions. Apart from the problems which arise should the foreign court also adopt the total *renvoi* theory, another obstacle to uniformity is that the forum judge cannot don the mantle of the foreign judge without reservations since a matter classified as procedural according to the law of the forum will be submitted to the forum's internal law, even though the foreign judge may have regarded it as substantive; moreover, a rule may not be able to be applied on grounds of public policy or because it is a penal, revenue or other public law matter. In such case, the application of the rules of foreign law will be excluded.

The total *renvoi* doctrine is simply very difficult to apply. Not only must the judge ascertain the precise decision the foreign judge will give but he must ascertain as a fact the precise position that prevails in the foreign country with regard to single *renvoi*.

<sup>477</sup> Dicey and Morris, *The Conflict of laws*, and Cheshire and North, *Private International Law*, above at notes 1 and 6 respectively.

Another criticism levelled against the doctrine is its unpredictability of result since it makes everything depend on ‘the doubtful and conflicting evidence of foreign experts’.<sup>478</sup> It must be borne in mind that foreign law is a question of fact and has to be proved by evidence in each case; if the evidence is inadequate, no issue of *renvoi* may be said to arise. This in itself may lead to conflicting decisions – depending on the strength of the evidence in each case. Moreover, *renvoi* requires proof not only of the conflict rules of the foreign country, but also of the foreign rules about *renvoi* – an even harder issue regarding which to obtain reliable information.

In the ultimate analysis, it may just be fanciful for the forum judge to think that he is impersonating the foreign judge – apart from the issues of procedure and public policy mentioned earlier, he cannot even be expected to know the substance of the foreign applicable law.

*Morris* held that *renvoi* was a thoroughly bad thing.<sup>479</sup> He was of the opinion that the English choice of law rules were historically devised without any thought to *renvoi*, so that they would effectively operate as selective rules for the application of foreign *domestic* laws alone. Accordingly, it amounted to a subversion of the English choice of law rules if the judge chooses a particular law but then allows a foreign judge to apply his own choice of law rules to ‘jettison’ the English choice of law rule. However, this objection may be met by conceiving of two types of choice of law rules – one set does indeed comprise of a framework of reference to domestic law; but then, in other areas there can be seen to be rules which make reference to foreign jurisdictions, in the sense that the rules do not point to a particular law but provide a mechanism for finding it.

<sup>478</sup> Re Askew 1930 2 Ch. 259

<sup>479</sup> McClean J.D., *Morris: The Conflict of Laws*, 5<sup>th</sup> ed, London: Sweet and Maxwell, 2000

Indeed, with regard to the rhetoric of *renvoi*, most of the objections levelled against the doctrine boil down to the allegation that the forum court abandons its own choice of law rules and defers to the superior authority of a foreign choice of law rule. Through this two-stage process, the forum's choice of law rule is overridden and displaced, thereby representing a loss of control by the domestic court.

However, these objections fade if we conceive of the issue as a one-stage process; that the choice of law rule of the forum is – to choose the law which a foreign judge would apply; for example, ‘that the English choice of law rule for capacity to marry is that it is governed by that law which would be applied to the case by a judge sitting at the place where the *propositus* is domiciled.’ In this way, the court would be choosing the law ‘by formula rather than by immediate geographic designation’.<sup>480</sup> This approach does away with any considerations of preference and superiority accorded to a foreign choice of law rule because it is the forum's choice of law rule that directs the forum judge to whatever law the foreign judge would apply. Still, universal and constant use of the *renvoi* doctrine cannot be the ideal position; an equilibrium must be found.

### **Finding the Equilibrium**

It is recognised that *renvoi* is inapplicable in many cases. Amongst these areas are those such as contract and tort – can this be said to be correct in all cases? A look at the English experience may clarify things somewhat.

Starting from the concept of tort, section 9(5) of the *Private International Law (Miscellaneous Provisions) Act*, 1995 excludes any reference to *renvoi*:

<sup>480</sup> Briggs, above at note 4, 882

‘The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned’.

With regard to matters falling outside the Act and governed by the Common law, there is no direct English authority; however Scottish and US authority indicate that *renvoi* is inapplicable to tort cases.<sup>481</sup> Clearly, while the commission of a tort is unexpected, the contingency is not unforeseen; the aim of excluding *renvoi* is accordingly, to prevent the frustration of any action which may have been taken to provide for such possibility. Therefore, the justification for this is that in many cases, such as insurance, were the English court to apply anything other than the foreign domestic law, this could amount to contradicting the assumptions upon which the policy was taken out.

Nevertheless, the exclusion of *renvoi* in this field of the conflict of laws has had the result of limiting, if not preventing altogether, the English court from controlling forum shopping. There seems to be no doubt that Lord Wilberforce’s reference in **Boys v Chaplin (1971)**<sup>482</sup> to the *lex loci delicti* was intended to prevent forum-shopping. He sought to construct a choice of law rule by preventing the parties from evading the operation of the proper law. The concern was with the possibility of a Maltese citizen suing another compatriot in England for damages for pain and suffering. Only if the reference to the *lex loci delicti* was held to include a reference to the conflict rules of the foreign country would the English judge be empowered to decide the case in the same way as a Maltese/Ontarian judge would decide it – and thus discourage forum-shopping.

<sup>481</sup> M’Elroy v M’Allister (1949) S.C. 110; Haumschild v Continental Casualty Co (1959) 7 Wis. 2d 130

<sup>482</sup> (1971) A.C. 356

Shortly after, another method through which the English courts could control forum shopping came with **Spiliada**<sup>483</sup>. Control of forum shopping did not need to depend solely on choice of law, but could be dealt with directly – through the jurisdictional solution: the doctrine of *forum non conveniens*.

However, within the English context, it may be persuasively argued that the *Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*<sup>484</sup> has severely limited the court's powers to stay proceedings on *forum non conveniens* grounds. Since the jurisdictional solution is no longer available, the choice of law solution becomes all the more attractive as it allows the court to fabricate the doctrine *forum non conveniens* by reference to its choice of law rules.

The relationship between *renvoi* and principles of jurisdiction is demonstrated by reference to the decision of the High Court of Australia in **Breavington v Godleman** where three judges held that the case should be decided as if it had been tried in the courts of the Northern Territory (the *lex loci delicti*).<sup>485</sup> This reliance on choice of law rules to discourage forum shopping was probably connected to the fact that the Court had just rejected the English version of *forum non conveniens* in **Oceanic Sun Line Special Shipping Co. Inc. v Fay**, and therefore was less able to prevent forum shopping by use of jurisdictional rules.<sup>486</sup>

In the face of this, the Law Commission's decision to exclude *renvoi* from the law of tort appears to be misguided; as does the approach taken in the Foreign Limitation Periods Act 1984 (where under section 1(1) one applies conflicts of law rules to arrive at the

<sup>483</sup> *Spiliada Maritime Corporation v Cansulex Ltd* (1987) A.C. 460, HL

<sup>484</sup> Consolidated version published in 1998 (Official Journal, 27.26.02.1998). The Lugano Convention has been incorporated into Maltese law by the Legal Procedures (Ratification of Conventions) Act, Cap 443 Laws of Malta.

<sup>485</sup> (1989) 169 C.L.R. 41

<sup>486</sup> (1988) 165 C.L.R. 197

law governing the issue, and then under section 1(5) it is the domestic law of that country which is applicable).

This is also the position with regard to the law of contract under article 15 of the Convention on the Law Applicable to Contractual Obligations.<sup>487</sup> The general refusal to apply *renvoi* to contracts is based on the view that a contract specifying a particular law would always mean the domestic law as otherwise the parties' expectations would be defeated.

However, what is the position where the parties have expressly made *not* a choice of law, but a choice of court? The generally assumed position is that this constitutes a strong presumption that the domestic law of chosen court will apply; the Rome Convention takes a similar approach, as is noted from the Giuliano and Lagarde Report.<sup>488</sup> This does not seem to necessarily accord with the parties' expectations: if they wanted litigation to take place in a particular court, it seems to follow that they would have opted for the law which would have been applied by a judge sitting in that court – this undoubtedly would include that forum's conflict rules. *Renvoi*-reasoning would ensure such conclusion; however, the dogmatic exclusion of the concept militates against such an approach with the result that the parties' intentions cannot be given effect to. It is for this reason *Briggs* states that whilst the unsupervised administration of a doctrine of *renvoi* may be capable of upsetting the sensible intentions of commercial men, a principled use of the technique may be the only way of giving effect to them.<sup>489</sup>

*Renvoi is clearly an integral part of the conflict of laws. This is further seen in the characterisation exercise: acceptance of renvoi*

<sup>487</sup> Rome Convention (1980) OJ L266 of 9 October. Consolidated version found in (1998) OJ C27/47. This does not form part of Maltese law but is part of English law, for example. The relevant domestic provisions in this regard are found in the Contracts (Applicable Law) Act (1990) c. 36, Schedule 1. *Renvoi* is also excluded in the common law of contracts, as is seen from *Amin Rasheed Shipping Corpn v Kuwait Insurance Co*, the *Al Wahab* (1984) AC 50 and *Re United Railways of Havana and Regla Warehouses Ltd* (1960) Ch 52.

<sup>488</sup> (180) OJ C282/17

<sup>489</sup> *Briggs*, above at note 4.

*explains the different approaches taken in this area. In cases where renvoi operates, we are not to tie the foreign judge's hands binding him to the forum's characterisation of the issue; for example, whether (in a case of marriage without obtaining the requisite parental consent) the marriage is formally valid. The correct approach is to ask the judge to whose law we are referred whether or not the marriage is valid by reason of the lack of parental consent. This is clearly not necessary in cases where renvoi does not operate; here there is no concern with what a foreign judge would do and there is no reason why we cannot first characterise the issue according to the rules of the lex fori and then, frame the question in these terms.*

A *renvoi*-type reasoning is also perceived in the Incidental Question in the sense that the subsidiary issue is referred to the law governing the main question for its determination.<sup>490</sup>

*Dicey and Morris* state that the doctrine should not be invoked unless it is plain that the object of the English conflict rule in referring to a foreign law will, on balance, be better served by construing the reference to mean the conflict rules of that law.<sup>491</sup> This contention neither advocates its total exclusion, nor its absolute acceptance. However, the ideal solution need not lie at either of the two extremes; rather, in order to provide the necessary flexibility and justice, it appears essential that the doctrine of *renvoi* applies only in those situations where such goal can be achieved. This is why it may seem misguided to argue for its non-application in all cases in certain issues such as contract and tort. Regarding it as an irritant will necessarily detract from its worth in weaving a net over many issues in the conflict of laws and contributing to its consistency and coherence.

In this respect, as *Briggs* points out that 'it operates not as a refinement or complication to rules for choice of law, but the

<sup>490</sup> *Schwebel v Ungar* (1963) 42 D.L.R. (2d) 622 (Ont. C.A.); *Lawrence v Lawrence* (1985) Fam. 106.

<sup>491</sup> *Dicey and Morris*, above at note 1.

mechanism which supplies the intellectual harmony, or co-ordination, between rules on jurisdiction and rules on choice of law.<sup>492</sup> In fact, this argument is taken as far as to state that while this does not mean that the doctrine should be applied at all times and in all cases, its application should preferably be regarded as the rule, rather than the exception, thus departing somewhat from *Dicey and Morris's* contention.<sup>493</sup>

In the ultimate analysis, *Kahn-Freund's* concluding point seems to address the ideal approach – whatever attitude academic writers choose to adopt, the solution to the application of the doctrine should not depend on any *a priori* principle, such as that of the ‘inherent’ nature of a reference to a foreign law as a reference to internal law only or as a ‘total’ reference including conflicts of law rules.<sup>494</sup> It is advisable therefore to approach the question pragmatically rather than dogmatically, proceeding on a case by case analysis and providing for the application of *renvoi* when it promotes justice, without being hindered from so doing by ‘no-*renvoi* clauses’ and the like, since such blatant rigidity can hardly be the key to a just conclusion in any case.

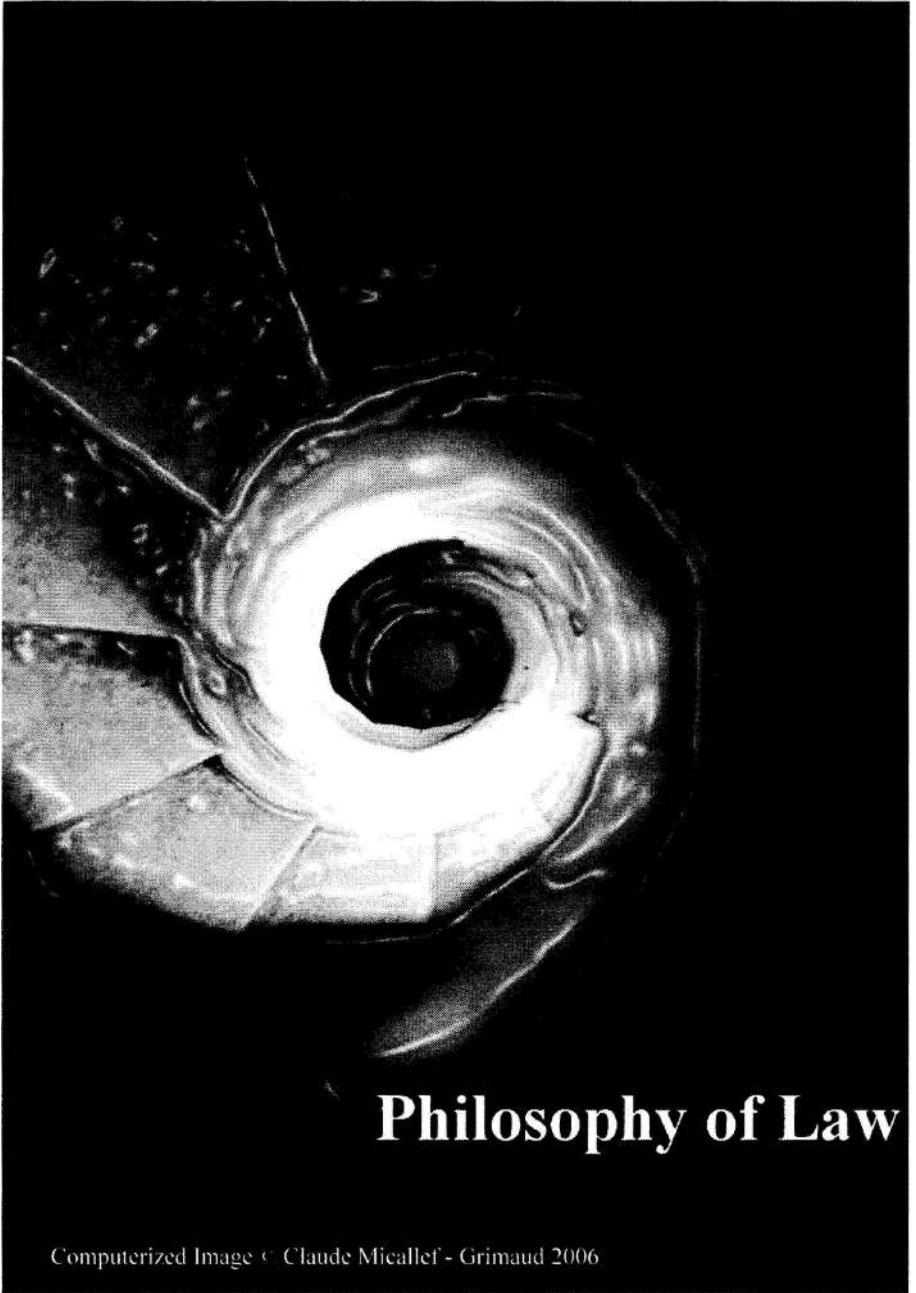
**Patricia Cassar Torregiani**  
March 2006

<sup>492</sup> Above at note 4

<sup>493</sup> Above at note 1

<sup>494</sup> Above at note 8





# Philosophy of Law

Computerized Image © Claude Micallef - Grimaud 2006



## The Metaphysical Aspects of Philosophy of Law

Dr. Alan Xuereb  
M.Phil. (Jur.), LL.D.

### Introduction

Philosophy of law deals also with juridical ontology. This study concerns the metaphysical aspect of the natural juridical order, with natural law and with the natural rights of the human person. However, there is another aspect which Dario Composta<sup>495</sup> calls "*diceologia*" which is a branch of ontology dealing essentially with the virtue of justice.

Composta puts forward two considerations:

Justice as "*iustum*" is not superior to natural law,<sup>496</sup> but it presupposes it;

Justice, being one of the cardinal virtues is connected to morality, but must be distinguished from the other virtues, namely prudence, fortitude and temperance, in that it renders morality, legal.

Justice is a form of *deontology* that may be called *diceologia*. Del Vecchio states that: *If the obligatoriness of justice, moralises the Law, this happens due to a process of legalisation of morality.*<sup>497</sup>

<sup>495</sup> Composta, Dario - *Filosofia del Diritto II - I fondamenti ontologici del diritto*, Pontificia Università' Urbiniiana, Roma 1994 Capitolo VIII "La Giustizia Nella Storia Del Pensiero" pp.217-224.

<sup>496</sup> Natural Law as intended in this thesis is a method not a code. Suffice it to say for now that in England the theory of natural law led to the Magna Carta, the Glorious Revolution, the declaration of right, and the English Enlightenment. It was the basis for the US revolution and the US bill of rights.

<sup>497</sup> Composta, op. cit. at p.218 para-phrasing Del Vecchio, *La Giustizia*, 3 ed. Roma 1946, p.46.

The word “justice” is itself a symbol as that term is understood in the psychological and philosophical system of one of the most influential thinkers of this century, Carl G. Jung. Jung states that:

*"...a word or an image is symbolic when it implies something more than its obvious and immediate meaning. It has a wider 'unconscious' aspect that is never precisely defined or fully explained."*<sup>498</sup>

Is this not what is meant when lawyers say that the law is presumed to be always speaking about? What is just and equitable in certain circumstances is within the discretion of a trial judge such that our concept of equity, or justice is neither precisely defined nor fully explained.

Law exists primarily to maintain order in society, and from this standpoint it appears quite conservative. When lawbreakers are dealt with under criminal law, the intention is to preserve and defend society and the way it is run more or less in a Hobbesian manner. Society has a working structure which depends on complying with the “rules”. Persons who breach these rules are made liable to punishment in order to restore the social fabric:

## **NO LEGAL SANCTION = NO LEGAL RULE**

### **The Contractarian Government**

Lawyers are familiar with the necessity of voluntary compliance with laws of general application. Without such voluntary compliance chaos, or a state of revolution exists. We are familiar with the concept of this voluntary compliance as being of a contractual nature, of give and take, between the citizen and the state, between one citizen and another. Reiman describes the

<sup>498</sup> Jung, Carl G. ed. *Man and His Symbols*, New York, Bantam Doubleday Dell Publishing Group Inc., 1968, p. 4

Western experiences as being "the history of contractarian moral theory from Hobbes to Rawls."<sup>499</sup>

The notion of the social contract, of the necessity for voluntary compliance are not strictly Western ideas but are ancient and cross-cultural. (i) Taking unfair and unlawful advantage of one's fellows, and (ii) of the protections that the community provides (such as the Constitutional guarantees) are, one might say, universally condemned and found to be blameworthy, two elements said to attach to the notion of injustice.

It is common these days to hear criticism of procedural rights and privileges as being a shield for the guilty. The foregoing concerns, it is submitted, are of the rudiment of what it is to be human within the social context. They are specifically human, rather than specifically Western.

Justice should be done to those whom the institution would otherwise exclude.<sup>500</sup> Justice necessitates recognition of the *different*, but faces also the risk of incorporating or annexing difference in the name of a liberal consensus or some new and as yet indefinite universalising political doctrine.<sup>501</sup> Critical study of law supposes the injustice of modern legality and yet fails to make categorical its conception of justice and the criteria upon which the bias and intolerance of law are denounced. There is a profound scepticism of orthodox positivist philosophy of law towards morality which is shared by progressive lawyers and by the critical legal theory.

Their reservations probably stem historically from a rather muted approach to morality and justice adopted by Marx and Marxist theory. The majority of legal thinkers, however, concluded that Marx's frequent references to the unfair nature of capitalism were polemical and pragmatic and that he and Marxism had no true

<sup>499</sup> Jung, op.cit. p. 83.

<sup>500</sup> Williams (1991)

<sup>501</sup> Politics, Postmodernity And Critical Legal Studies-The Legality Of The Contingent - Costas Douzinas, Peter Goodrich And Yifat Hachamovitch -Routledge 1994.

theory of justice. Moreover, this attitude was characteristic of radical lawyers, who denounced justice as ‘class justice’, while their struggle was aimed at achieving ‘social justice’.

Strangely enough, progressive lawyers were both in favour and against justice, they were motivated by moral indignation but unable or uninterested in developing either a critical conception of justice, or else a programme for legal doctrine. On the other hand, a post-modern theory of justice allows otherness to survive and to become a theoretical space through which to criticise the campaign of the law’s ceaseless repetitions. Justice in the post-modern era, however, cannot follow the protocols of a theory- it is thus, not a concept and does not apply a principle, value or code.

The post-modern judge is concerned with justice as applied to *id-Dritt* - he stands next to the litigant who comes before the court of justice<sup>502</sup> and hears his speech or request. Justice returns to ethics when it recognises the embedded voice of the litigant, when it gives the other person in his/her concrete materiality a *locus standi*. The law here is committed to the form of universality and abstract equality; but a just decision must also respect the requests of the contingent, incarnate and concrete other, it must pass through the ethics of alterity in order to respond to its own embeddedness in justice. In this unceasing conjunction, this commitment and detachment, this alternating current between the most general and calculating and the most concrete and incalculable, or between the legality of form and legal subjectivity, lays the ethics of a critical legal response to the material legal person, law’s morality of the contingent.

Law is general and abstract. Law must necessarily be phrased in an impersonal way because it is addressed to hypothetical persons who may or may not fit the category of behaviour for which the law is framed. Furthermore, the law treats all persons in the same way when they come under its operation. Although under certain circumstances differences among people are taken into account, the

<sup>502</sup> Where there is a reference made to the Law intended as *Dritt*.

general character of law has the effect of treating all persons alike. This makes Law necessarily impersonal and abstract; and officers of Law must likewise think in terms of rules, not people; giving at times the impression that the preservation of a rule has a higher value than preservation of human dignity. Although a legal rule is, in fact, general, it nevertheless refers to concrete human beings whose behaviour it is designed to regulate. Whoever formulates a legal rule certainly has in mind the possibilities, tendencies, and dispositions of human beings, and he proceeds on the assumption that these conditions of behaviour are common to most men. It is hardly correct, therefore, to say that Law is abstract if this means that Law does not take into account the capacities of concrete persons.

The legal rule, just as the moral rule, is chiefly concerned with the behaviour of human beings, and for this reason, the category of Law is not fundamentally different from the moral category.

The conclusion one may now draw is that Law contains reasons for its enforcement, which go beyond the special concerns over the persons immediately involved. The importance of “generality” in law is not that it deflects law from personal concerns but rather that it seeks to be relevant to many persons and many times. In order to retain the relevance of law for a continuous period of time it is necessary to preserve its general character, not identifying the law with a particular event.

The stipulation of the law against homicide does not stipulate anything about the instruments used or the times at which the act may be committed, for it (the law) must be able to control all the great variety of ways in which the act is committed. However, even here the law shows considerable flexibility, for the specific result of killing a person has a variety of legal consequences. The law takes into consideration such factors as justifiable homicide in self-defence, excusable homicide, duress, insanity, accident, and mistake of fact.

Moreover, laws are binding in a particular place. A system of laws is effective and applicable in a limited geographical or cultural area. Only under special circumstances does a person in one state or nation have any legal liabilities under the laws of another state or nation. Laws apply for the most part only to the regular members of a community or to those outsiders who actually enter the community either physically or through such channels as trade and commerce.

Legal obligations thus have a limited scope of applicability; they apply to a specific group of people who have a certain formal relation to the lawgiver. Only when a law is mutually recognised, as between two or more nations, does it travel beyond its original boundaries. The European Convention on Human Rights, is an example of how a regional agreement can be incorporated into domestic law through parliamentary legislation. It is very much to the point here to recall that the legal philosopher Austin would not accord to international law the quality or character of "law". For him these rules governing matters between nations were called "positive morality" and not law.

Fourthly, as seen, law is concerned with external conduct. Thus there must be a standard of behaviour by which the law can measure an act - a standard on which reasonable men will agree. However, to get such agreement from reasonable men, they must be offered some evidence of external behaviour, which they can confidently analyse. The law is capable of making important distinctions between various types of behaviour, and it makes these distinctions chiefly based on external facts. However, the same act can transpire under different circumstances with correspondingly different legal consequences. For example, a man repairing a chimney throws or drops a brick down from the roof, thereby hitting another man and killing him. One may consider here three main sets of circumstances in which this might have taken place: a passer by climbed over a fence, was walking along the side of the house where there was no path and where no one was accustomed to walk, and was struck on the head when the brick-layer discarded a defective brick over the side; the brick-layer had carelessly piled

some bricks on the roof and one of them slid over the other side, striking a mailman who was approaching the side door where he always delivered the mail; the brick-layer recognised an old enemy and hurled the brick at his head. The differences between these three variations are obvious to a reasonable man analysing the specific details of the external act; there is no need to know any more about these acts for reasonable men to understand the different degrees of responsibility and culpability involved. Law, however accurate, cannot reach into the subtle wellsprings of benevolence; it cannot animate by force what by its very nature must be spontaneous and free. Nor can the law pursue people through all their waking moments, guiding and controlling them as they touch or intersect each others' lives in an indeterminate number of ways and in varying degrees of intimacy.<sup>503</sup>

Law then, must wait for a particular act; a single event lifted from an endless chain of human behaviour before its mechanism of control can operate. However, the event that triggers the mechanism of law enforcement is an external event, some mode of external behaviour. While the law can command the payment of taxes, it cannot require the additional element of cheerfulness, and while some aspects of marriage can be controlled by law, such as the registration and mode of the marriage, the community of acquests or the separation of property, etc..., there is no way for the law to guarantee true tenderness. The efficacy of law seems to end at the threshold of man's internal self, and at this point, there is nothing to judge the human act, except perhaps morality and God.

Upon closer inspection however, the distinction between external and internal behaviour is not so sharp or clear as it first appears. External behaviour is never unrelated to an internal act or to internal motivations. And we now that Man is not a dualistic entity, but a mono-existential entity. The same external act can, however, be produced by a variety of internal motivations. While the law is concerned chiefly with the external act and, indeed, will

<sup>503</sup> The gentle pliability of human existence with its constantly novel experiences, enlarging horizons, and delightful and tragic new turns and surprises cannot at any one moment be adequately anticipated nor fully captured in the form of a legal principle.

come into play only where there is such an act, the law nevertheless takes into account the factor of motivation, usually speaking of this element as “intent”. To be sure, intent can be discovered only if there is some accompanying public act which is objective evidence of intent. The needs corroboration of the alleged facts through valid evidence.

Law is nevertheless profoundly concerned at appropriate times with the inner life of the actor as the decisive element in determining the fact and degree of guilt or responsibility. The law reflects the internal working of the moral self in still another way. Even though the legal rule applies ostensibly and in most instances to an external act, it is of utmost importance to bear in mind that the emergence or creation of the legal rule in the first place is an internal act.

Fifthly, law is concerned with minimum moral standards. In fact in most societies, the law limits itself to those requirements considered basic to the social order. This is particularly true in a society which exalts the value of human freedom. The scope of freedom is in inverse proportion to the scope of law, for as the coercive power of law is extended over human life, to that extent human freedom is diminished. However the freedom of individuals has to be in accordance and in relation to, (not to mention respective of) the rights and freedoms of others. As the American Supreme Court remarked:

*"The liberty of the individual to do as he pleases in even innocent matters is not absolute; it must frequently yield to the common good".*<sup>504</sup>

In a free and open society, therefore, the law is restrained and restricted to guaranteeing the minimal conditions for an orderly and peaceful community. The law provides the structure within which men can live with reasonable assurance that promises will be kept, property will be safe, and that people will not suffer intentional physical harm. Once these minimal guarantees are secured, the law

<sup>504</sup> Adkins vs Children's Hospital (1923) 261 US 525.

can refrain from prescribing man's conduct in more specific detail. The law has frequently been considered as playing the role of an umpire: it watches the contest only to insure that nobody is pushed off the track or tripped. It is not the function of the law to make sure that everybody wins the contest, but only that the lanes are kept clear. In this view, the law is limited to providing a race course within which various kinds of events can be performed, depending upon what the people find interesting and compelling.

This is to say that the law as such is not the agency for bringing to fruition the full possibilities latent in human nature or its destiny. There may also be a deep scepticism in this view over whether there is any particular fate or discernible structure in human nature, the possibilities of which should be persuaded into reality by the agency of law. Even if human nature did require special modes of behaviour, this view asks, is it by law that this behaviour should be ordered? The law simply liberates Man from daily concern over survival so that within this secure context he can turn his attention and energies to those more intricate and personal relations which his moral and social nature urges upon him.

In this context humans assemble to marry, do business, debate, study, and worship. They express ideas about goodness, justice, truth and about ultimate reality. Human beings communicate through speech, the printed word, and various forms of art. They form associations for the production of goods, education of children and adults, and for the worship of God. The way humans act in this broad sense cannot be fully prescribed by law because life in this sphere is too polymorphous. Large areas of life must be left untrammelled in order to preserve the possibility of free and creative new adaptation of human values.

Law is brought into the area of art, literature, education and religion, under great peril. For the law, before it can be the guide for the community, must itself be informed by the highest insights of the community. Can the Law, however, decisively control those

areas of behaviour which by their very nature are still in the process of discovery? Can the law define what is truth or how God is to be worshiped? If law is brought into this arena the result may be catastrophic. The injustice that may accrue is incalculable, ranging from ethnic cleansing to concentration camps. This reminds us of what Pontius Pilate had asked Christ during the latter's trial: "what is truth?". Implicitly asking "cannot there be more than one truth?". This was another way of inquiring "what is justice?", implying perhaps that justice is multifaceted, but that the law is inflexible and prescribes behaviour with a certain amount of certitude. Even if reasonably reliable "truth" is available to a community, is it within the scope of the law to regulate the broad area we have here been describing, or is this to be reserved for the more subtle control of morals? The breadth of the law's concern is in no wise way suggested by what the nature of law is. Whether the law will be used narrowly or widely is not a matter of the meaning or nature of law but a consequence of society's decision about its use.

Aristotle saw in law the instrument for habituating men to the morally good life; Soviet jurists saw in law the agency for the remaking of human nature; and in the United States the law has gradually absorbed many areas of behaviour which were previously considered the proper province of morality. The scope of law then changes from one era to the next, and in our era law has spread its control over a very wide span of human behaviour. It may be that the law never self-consciously or deliberately enforces an immoral mode of behaviour; those who fashion the law, for the most part, believe that the substance of the law is either required by moral considerations or at least by the general welfare of the community, which is itself a moral consideration.

The scope of law appears to increase as a society becomes more sensitive to how human beings "ought" to be living or how the social life of men can be improved. The simple guarantee that promises will be kept has expanded into a broader control over what kinds of promises or contracts will be permissible in the first place. Moreover, the guarantee of the safety of property has also

been accompanied by a radical re-conception of what private property means and what rights collective society has in this property.<sup>505</sup> The protection from injury has also been broadly reinterpreted so that today injury is no longer limited for the purposes of law to physical harm but now includes such forms as injury to reputation caused by slander and injury to personality caused by segregation - such as in the new consumers' tribunal arbitration, where moral damages can be awarded.

Sixthly, the law is made not discovered. Early jurists were fond of saying the opposite - that laws are not made, they are found. But by this they probably simply meant that the *obligatoriness* of a law was to be found in its moral defensibility. Certainly, laws are made in the sense that they emerge from a formal process of enactment. Certain modes of behaviour are neither just nor unjust, neither good nor bad, (they are value-neutral) until a formal rule is made to regulate them. Let us take an example: some of the traffic control transform otherwise neutral behaviour into contraventions as soon as they become official. It is an offence to travel at certain speeds or park in certain locations only after rules declaring these as offences are promulgated. Without such an applicable rule these acts are legally indifferent.

The positing or making of the rule is the only way law comes into being for these acts. Positive laws prescribe our behaviour not only in these areas which are morally indifferent before the law is made for we have already seen that the law as often enforces behaviour which is suggested or required by moral obligations. Even here, however, the law is made and has a positive character only because of an act of the official lawgiver, who has the authority to enact such law as provided by the Constitutional order of his system. Whether the substance of the law is morally neutral or morally freighted, the quality of law attaches to a rule only when it becomes part of an official system of rules, under the recognition of a Constitutional system, through an act of the political sovereign,

<sup>505</sup> Such as minimum wage and social security laws.

either through the legislative process as in Malta, or through the judicial process.

Why ask such questions before concretely investigating injustice and unconstitutionality? Though there are many ways in which the word “law” can be used, we can now limit this concept to those rules which are the official norms of behaviour within a society and which are made official in some positive way by the sovereign authority. To say that law is a rule of behaviour commanded by the sovereign means no more than that until a rule has this element of positive enactment or recognition it may be a customary rule, a moral rule, a religious precept, but not law. This does not mean that customary, religious or moral rules do not at any particular time have the *obligatoriness* of a legal rule.

When the common man in the street says “there ought to be a law against it” he is alleging that what at the moment may be only a moral obligation ought to be made a legal obligation. The moral rule and the legal rule may very well have the same substance, but what transforms the moral rule into a legal rule is its official recognition or promulgation by the political sovereign. The moral rule by itself is not a law. But the moral rule can be or become relevant to the process of law. However, one must understand that laws do not in every instance perceivably have a moral basis. This means that, in the narrow view, the quality of law is conferred on a rule by the act of positive recognition or promulgation. This does not necessarily mean that a person has rights only if the law makes them or confers them upon him.

It is one thing to say that to make a legal rule is to create a right and that until the legal rule is made a person has no right at all; it is quite another thing to say that when the legal rule is made the conditions for dealing with human rights in a legal way have been established. Generally speaking, rights have their initial form in morality. When we speak of fundamental rights of the individual we are referring to moral human rights really. In this sense the legal rule is only the official recognition and the technical means of enforcement of rights. The law does not invest a human being with

the qualities of worth and dignity - these other values flow and are intrinsic to human nature when viewed from the standpoint of morality. The identification of rights is never complete, either in the fullness of their description or in their number, for specific rights come to light only as conditions focus upon them. The moral priority of rights, however, does not alter the fact that a right becomes legal only after a law has been made, either by legislation or a judicial decision. There are times when a moral right has not yet been legislated but becomes relevant for the first time in the course of a controversy in the judicial process. The making of law is, therefore, not in every instance the beginning of a right, but in critical areas of human behaviour it is the extension and transformation of the moral right into law. Law in the making often reflects the weakness, selfishness, and predatoriness of which men are capable. The existentialist view recognises that there is no guarantee that the law will always be made in accordance with Man's moral insights or the requirements of his moral nature. Though human and political rights incorporated in most Constitutions guarantee such rights, there is no way to guarantee that loopholes in these Constitutions give way to unjust laws which nonetheless are not unconstitutional. However, a legal "safety-valve" exists in most jurisdictions - that is the fact that laws are promulgated, and enacted, but may be repealed.

Finally, legal obligations are not nearly so ultimate as are moral obligations. In spite, of the intimate relation between law and morality, the law is not the standard of morality, though it might be a standard of morality. Law and morality are bound together because the function of law as an agency for controlling human behaviour cannot proceed without reference to moral imperatives. Law here is seen as a flexible tool for regulating human conduct, and its flexibility is the outcome of man's ever new insights into what is morally right. To a large extent the direction in which the law will lead human behaviour is suggested by the moral tendencies of a community. A law which seeks to enforce fair trials for all people clearly has a different moral quality from a law which prohibits members of a minority race to own property. Every legal system is made up, on the one hand, of laws which reflect

clear moral imperatives and on the other hand of laws which clearly cannot be morally justified. If the law were to represent our only standard of right, we would lose the independent perspective which moral insight provides from which to evaluate the law. We constantly speak of good laws and bad laws, and we do this from whatever moral position we have taken. When our moral judgement condemns a law as bad, we are faced with the dilemma of obligations contradictory to the legal rule and to the moral rule. There are in other words two at least dimensions on the plane of obligation; there is allegiance to the fundamental and inalienable rights of the individual, and loyalty to the democratic legal order.

In a democratic system of law there is a double basis for legal obligation. The law is obeyed, for more than one reason: Firstly, because of its moral quality; secondly, it is obeyed because it is a proper and official part of the structure of law; and thirdly because generally there is a sanction of some kind attached to the non-compliance of the legal rule. It may be that not a single law can ever arouse complete or unanimous consent about its moral defensibility, yet it is generally obeyed by virtually the whole community.

There is then a kind of morality, or moral obligation, which compels one to obey the law for the sake of the community, even when one does not accept the moral substance of the law. The members of a democratic community will to varying degrees and extents, always have some criticism to make of the laws. Most of these moral criticisms have the effect of reducing or eliminating for such a person the moral obligation to obey the law - he may decide that the law simply violates elementary distributive justice, as in the case of an unjustly discriminatory tax; but the fact that a law is morally deficient does not immediately lead to disobedience of the law, for there is still the second basis of *obligatoriness* - that the system of law, which encompasses the remaining rules and procedures, must be upheld. This is particularly important when one considers that an individual's criticism of the law may not be shared by other members of the community who also presume to be expressing their moral judgements. Again, even the bad law is

obeyed under certain circumstances, because in this way the structure of the legal order is preserved.

In a democratic society there are specific remedies available for dealing with an unjust law which falls within the paradigm of what is generally held “unjust”, without threatening anarchy or chaos. The main among these remedies are the legislative and judicial processes of declaring a law unconstitutional, and thus null and void. It is possible, therefore, to renounce one’s obligation to the questionable morality or injustice of the law and at the same time to obey the law for the sake of the legal order upon which other important values continue to depend.

In such a case one affirms his higher obligation to the moral rule in whose light the law now becomes morally deficient. The degree of “injustice” in the law will vary from law to law, and thus the intensity of one’s reaction to it will also vary. The unjust law can either be superseded by a new law or challenged through the judicial process. If neither of these procedures is available because either the mode of power or the predominant opinion is contrary to a person’s moral sensitivity, he then must decide whether to continue to obey the law out of a desire to preserve the legal order or whether his moral obligation overrides even this second basis of the law’s *obligatoriness*.

The life of the law involves a continuous process of protest. No formulation of positive laws can ever be taken as absolute or eternal. The basis of continuity in the law is provided by those accurate and fundamental insights into human nature and rights which history continues to affirm. Legislation and court decisions prevail only as they continue to fit the moral and existential expectations of society. Where these laws have lost their contact, either with the practical necessities or the moral sensitivities of the time, they either fall into desuetude or are altered or eliminated altogether. If they are neither abolished nor are they in disuse, then the result may be injustice.

There are times also when the whole structure of law, and not simply a specific law, is looked upon as of secondary importance by some in the solution of severe social problems. The overwhelming sense of moral obligation concerning human relations overrides the more deliberate processes of law. The feeling that the solutions to these problems are immediately mandatory and cannot wait for the inherently sluggish pace of the law nor take the risk of a technical diversion or obstruction has often led men to bypass the procedures of law by disobeying the law. This has resulted in civil disobedience, riot, revolt and in the most critical of cases in revolutions. The law, as will be seen, has learned to anticipate this problem and has made provisions for predictable protest. Contrary to the Marxist tradition, it is claimed that successful revolutions are social disasters. On the other hand contrary to the liberal-conservative tradition, it is claimed that reforms are not the [only]<sup>506</sup> driving force of history either. Social progress is won by lost revolutions since they force the rulers to install reforms in order to avoid subsequent revolutions thus initiating the evolutionary process of breaking the foundations of unjust systems.<sup>507</sup> However, although there is some postponement of disobedience to law through the double basis of law's *obligatoriness* and through the availability of regular procedures for challenging and altering the law, the time may very well come when a person feels that his obligation to law is not ultimate, that his moral obligations are of a higher order.

Laws are the tangible means of expressing the practical reasonableness of authority and its subjects towards the common good of a community.

## LAW => JUSTICE => COMMON GOOD

<sup>506</sup> My qualification, not Novak's

<sup>507</sup> Nowak, Leszek *Revolution is an Opaque Progress But a Progress Nonetheless in Social System, Rationality and Revolution*, Nowak, Leszek (ed) Publisher: Rodopi, Amsterdam 1993

Laws must also abide by the theory of justice as fairness while respecting and preserving the absolute as well as contingent rights of all individuals.

The aim of law ought always to be justice. This does not mean that it is always going to be so; in reality positive laws are generally though not exclusively an attempt to enforce and achieve the principles of justice. According to Finnis ‘there are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy’.<sup>508</sup> Furthermore, the aim of justice is the common good, which may be described as the good or well-being of the community as a whole, without however, neglecting the individual good, which in a truly ‘good community’ should be compatible with the common aims and goals. In fact we may summarise the argument by saying that the aim of the common good is the good of all individuals.

### **Law as Practical Reasonableness**

In discussing his account of law in the *Summa Theologiae*, Aquinas offers this definition of law:

*"Law is the reasonable ordinance or prescription which is promulgated, is for the common good, and comes from the one who has charge of the community".<sup>509</sup>*

The source of human behaviour is reason, but also within reasoning there is something which is a source of everything else, with which law must primarily be connected.

As Hart puts it ‘law must have a minimum content of primary rules and sanctions in order to ensure the survival of the society or its

<sup>508</sup> Finnis, John – Natural Law and Natural Rights p.3

<sup>509</sup> ST I-II q. 90 a. 4

members and to give them practical reason for compliance with it<sup>510</sup>

In practical reason, which is thus concerned with behaviour, that source is our ultimate goal in life, and that, is happiness or bliss?<sup>511</sup> Therefore, according to Aquinas, law must concern itself above all with our orderedness to well-being that may only be achieved through justice.

*'The force of a law depends on the extent of its justice. In human affairs, a thing is said to be just because it is right, which means that it is according to the rule of reason.'*<sup>512</sup>

Furthermore, since parts in their incompleteness are ordered to the completeness of their wholes, and each human being is a part of a complete self-contained community, law must properly be concerned with the general welfare of the community.

Since law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good - thus all law is somehow ordered to the general good. However, this does not mean that the common or general well-being is in opposition to the personal good.

The prescriptions of law apply the law to what it regulates. Moreover, orderedness to the general good, which is law's concern, is applicable to individual goals and so certain of its prescriptions concern individual acts.

However, a problem then arises as to who may and can legislate? Given that law is only so properly called, when it relates primarily to the general good who may plan for the common good? Planning for the general or common good of one's own community belongs

<sup>510</sup> Hart, pp 189-90

<sup>511</sup> Aristotle in his definition of matters of law makes mention of happiness and the city community. He asserts that we call those acts just in law that promote and conserve "happiness" and its components in the city state, for it is the city that is the complete self-contained community, as Aristotle says elsewhere.

<sup>512</sup> Aquinas, Summa Theologiae I-II q. 95 a.2.

either to the people as a whole (in a democracy) or to someone standing in for the whole people (which could be a parliament). Thus, legislating belongs either to the whole people, or else to some public, thus legitimised person[s] whose role and function it is to care for the whole- [a] representative [s] of the people.

Aquinas suggests that all positive laws necessarily have four characteristics:

- 1) The law must pertain to reason; (Practical Reasonableness)
- 2) It must always be directed towards the common good; (Justice)
- 3) Laws are only to be made by the whole community or a delegate; (Authority)
- 4) The law must be promulgated.

Human Law must also be enforceable and thus have legal obligatoriness.

Law thus, exists not only in the one doing the regulating, but also shared in the one regulated. In this way, everyone is a law unto himself, by sharing in the orderedness coming from the regulator.

### **Laws must be enforceable – Obligation**

One must clearly distinguish between moral obligation and legal obligation. Moral obligations may be traced back to a more encompassing moral norm, for example the moral norm respecting the value of the human person whereas the legal obligation can be traced back to some democratic Constitution (or Act in the absence of a written Constitution).

It is important to keep in mind, that:

*“The equal obligation in law of each obligation-imposing law is to be clearly distinguished from the moral obligation to obey each law”*

Enforceability partakes to the legal obligation realm. A private person can admonish, but if his admonitions are not heeded, then he has no power of enforcement to foster *uprightness* effectively.

Nevertheless, law, to foster practical reasonableness and the well-being of citizens effectively, must have this power, as Aristotle says. This power resides in the people or the public authorities that can inflict penalties, so legislation is reserved to them.<sup>513</sup>

Moreover, just as the good of an individual is not the ultimate goal, but must serve the general good, so the good of a household must serve the good of the city, in turn the good of the city must serve the good of the whole nation and thus of the whole international community.

Furthermore, if law is to have the binding force proper to it as law, it must be applied to those who are to be subject to it by some promulgation that brings it to their notice. Promulgation then is required if law is to have force. Law is an ordinance of reason, made for the general good, laid down by whoever has the care of the community, and which is promulgated.

## **Laws Require Authority<sup>514</sup>**

<sup>513</sup> On this point see Finnis (op. cit.), who discusses both authority and law (coercion) in quite some detail.

<sup>514</sup> There exist very enlightening relations between the concept of authority and that of law. It is perfectly appropriate to speak of the authority of the legislator, and it would be arbitrary to identify authority and executive power. Authority and law appear to evidence opposite intelligible tendencies, and this is intriguing. Also when authority serves to insure the united action of a community under certain circumstances which render unanimity precarious, authority is exercising an essential function. But after we have discounted all factors of a negative character, such as ignorance, short-sightedness, and selfishness, it is the contingency of our ways, the possibility of attaining our goal one way or the other, which renders unanimity precarious and causes authority to be the indispensable condition of steady unity in common action. Authority is perfectly at home in the management of contingency and in the uttering of practical conclusions. Law is more at home in the realm of necessity. If any law is so grounded in a necessary state of affairs as to be unqualifiedly

Authority is basically necessary to unite the political community towards the common good, while possessing the ability to solve its co-ordination problems. All forms of authority, and in this case political authority, must also respect the rights of all individuals according to their own practical reasonableness, and conform to the theory of justice as fairness.

The expression ‘authoritarian government’ then, may be considered redundant inasmuch as every government implies authority. Yet it is not by meaningless chance that this expression has come into existence, for in contrast to those governments which systematically proceed by law, as far as law can go, the governments which want their initiative to be, as far as possible, free from direction and restriction by law can be called authoritarian with some decency.

Accordingly, the principle of government by law is held in check by the inevitable and fully normal contingency of the situations that government has to deal with. The relevance of this principle is straightforward, for law admits of powerful and lasting guarantees against arbitrariness. Beyond the last settlement of law, Man is but precariously protected against the arbitrariness of his decisions. Government by law is a principle that must be asserted with special firmness and frequently recalled, precisely because it is inevitably restricted by opposite requirements.

The principle of government by law - which evokes an analogous term, namely the Rule of Law - is subject to such precarious conditions that, if it were not constantly reasserted, it soon would be destroyed by the opposite and complementary principle - that of adequacy to contingent, changing, and unique circumstances.

immutable, this is a law in the most excellent sense of the term, but only Eternal Law may be immutable. Let us not forget that anything man-made is relative, both in form and in content.

## **Law Must be Just**

This point has been delved into in the chapter concerning justice.

Laws participate unequally in the character of law. Some are “morally charged” others are relatively speaking “morally neutral”; but the point is that there is nothing neutral in the true sense of the word.

It is argued that contemporary theories of justice focus exclusively on nearly just societies and ignore the issues in radically unjust societies. As a result of this focus, these theories have four important shortcomings when they are viewed from the perspective of someone living in a radically unjust society. The first deficiency is that contemporary theories of justice do not provide sufficient guidance on the way in which injustice should be identified. The second deficiency of these theories is that they have a lack of clarity on the issue whether theories of justice are universally applicable to all societies. The third deficiency is the relative neglect of clear guidelines on an appropriate method that could be used for designing, constructing and justifying a theory of justice. The fourth deficiency of contemporary theories of justice is an absence of thorough evaluation of forms of political action that could be considered to be acceptable strategies for the transformation of a radically unjust society into a nearly just society. These shortcomings imply that these theories of justice cannot be applied to the problems of radically unjust societies in a simplistic fashion.<sup>515</sup>

## **Concluding Notes on Law**

Law ought to be a servant to the human being, and the human being should never be a servant to the Law. Law remains essentially a yardstick. It will always be a way of testing and

<sup>515</sup>LOTTER, H P P - Deficiencies in Contemporary Theories of Justice, S Afr J Phil, 172-185, N 90

crystallizing public opinion. No doubt that Law is willy-nilly, also organized public opinion, but it is not just that. Law is also a set of basic moral substantive and procedural values, that have been fashioned in accordance with higher “behavioural norms”. However, there is nothing absolutely incorrect in saying that there is an element of organized popular ethos in every bit of legislation (even in the most unpopular law, such as the VAT legislation locally and the racial laws in Nazi Germany) passed through Parliament, it is wrong to state that Law is exclusively or mainly that. After all public opinion is the result of the prevailing values in that society. Again not just that, since public opinion takes into account not only the higher percentages of “ays” but also of “nays”. The whole process is a comparative analysis, a juggling feat in an attempt to resolve conflict, tension, dispute, inconsistency and other niceties of the sort. It is also true however, that there is much more than that; laws are also a result of past societal processes and cultures, of past ideals, of past aspirations, of past necessities, of past discrimination (sometimes positive and sometimes negative) and so on. Besides being also a product of the present equivalent of all these and more!

Unjust laws, as will be seen, may therefore be described or defined diversely; perhaps in accordance with the prevalent values of one society or in those of another in many ways different or in conflict, but what appears to be common to most is that the importance of the human person remains paramount. The problem was that in some societies some were not considered persons.

### **Concluding Notes on the Common Good**

The state of affairs appears to have become slightly more complicated in reality than in theory. The emergence of the phenomenon that has been termed as: *neuveaux riche* has changed the idea of low educational background equated with a low income (and thus poverty). This has also been experienced in Malta where people who traditionally come from a “working class” background have ascended the economic ladder and have now acquired a new purchasing power. They are economically wealthier. What still

remains uncertain is whether this new economic power has ameliorated their educational, cultural and artistic skills? Are they better persons? Do the *neuveaux riche* lead a more fulfilled life? Do they contribute more towards the common good of others and of humanity besides perhaps fuelling the economical engine of the society they live in? Does humanity and future generations gain anything at all from the fact that more persons gain more money but essentially these persons remain stuck in ignorance and muddled-headedness? The argument being submitted here is that going up the economic ladder is not always equivalent to going up the social ladder. This is an emerging millennium justice-related problem.

A sense of injustice is also heard in Jonah who on taking passage in a ship that would carry him away from Nineveh, he was caught in a great storm and swallowed by a fish, to be regurgitated alive three days later on dry land:

*".... I cried by reason of my affliction to the LORD, and he heard me; out of the belly of hell cried I, [and] thou heardst my voice."*<sup>516</sup>

A sense of injustice was also felt by Habbakuk:

*"Why dost thou show me iniquity, and cause [me] to behold grievance? for devastation and violence [are] before me: and there are [that] raise strife and contention."*<sup>517</sup>

He then exclaims, out of what we might at first classify as justified rebellion to what Habbakuk considered an injustice towards him:

*"Therefore the law is slackened, and judgment doth never go forth: for the wicked doth encompass the righteous; therefore wrong judgment proceedeth."*<sup>518</sup>

<sup>516</sup> Jon 2:2

<sup>517</sup> Hab 1:3

<sup>518</sup> Hab 1:4

The sense of injustice here is *interpersonal*, since it is directed either towards God, or towards other humans. This kind of injustice is not attributed to misfortune.

*“It is the betrayal that one experiences when others disappoint expectations that they have created in him.”<sup>519</sup> This sense of injustice has always been with us. We hear for example, the sense of injustice in the story of Job the Hebrew hero of the biblical Book of Job, which deals with the fundamental problem of undeserved suffering. Afflicted through Satan with the loss of family and possessions, and then with disease, the upright Job accepted all as the will of God.<sup>520</sup>*

*“So Satan went forth from the presence of the LORD, and smote Job with sore boils from the sole of his foot to his crown.”<sup>521</sup>*

Dickens is not alone. The hero of Heinrich von Kleist’s Michael Kohlhaas and Coalhouse Walker, who is at the centre of E.L. Doctorow’s rhythm, live in remote ages and circumstances which make all the difference in the meaning of their otherwise identical experiences of political injustice.<sup>522</sup> The first life in a society that is said to be generally just, and Kohlhaas is subjected to an exceptional outrage. Coalhouse lives in unjust, racist America at the turn of the century. Except for their time, place and colour, they are meant to be the same man.

The argument that no one is politically innocent is, however, interesting. For it is framed in the language of justice and appeals to its principles. It is by these that it must therefore be judged. Retaliation, it is claimed, is just punishment of those who deserve

<sup>519</sup> Shklar, Judith - The Faces Of Injustice - p83

<sup>520</sup> Only after friends had argued with him that suffering was the result of sin, did Job, sure of his faithfulness, lose patience and question God's omnipotence. In the epilogue, probably a later addition, he is restored to his former fortunes when he submits again to the will of God, which, however, remains mysterious and inscrutable. Ayyub (Job) and his sufferings are mentioned in the Koran.

<sup>521</sup> Job 2:7

<sup>522</sup> Ibid.

it, and everyone without exception in an oppressive society does deserve it.

If the charge of universal guilt could mean anything at all, it would have to refer to passive, not active, injustice. However, the crime that every inhabitant of an oppressive society is being charged with is not Ciceronian passive injustice, indeed, have paid more attention to the political issues presented by racism, taken active sides, and in general should have been better informed and more vocal.

Good citizens should, indeed, have paid more attention to the political issues presented by racism, taken active sides, and in general should have been better informed and more vocal. Being a good citizen is not the same thing as being wise, unbiased, humane, or unusually independent. No such claims can or should be made of citizenship. Rousseau was right when he remarked that the *best* citizens were xenophobic and bellicose. Passive injustice is a civic failing, not a sin or a crime. It refers to the demands of our political role in a Constitutional democracy, Shklar states that it does not refer ‘... to our duties as men and women in general’.<sup>523</sup>

### **The Republic of Malta – A Constitutional State**

The Republic of Malta is a Constitutional unitary state. Its history predates Roman times, the largest island having been used as a trading outpost by the Phoenicians and then settled by Carthage. It was conquered by Rome in 218 B.C. and remained a part of the Roman Empire long past dissolution of the land-based power in Italy. In A.D. 533, the islands shifted to the control of the Eastern (Byzantine) Empire in Constantinople. From 870 to 1090, Malta was under Arab domination; then it became a vassalage of the Kingdom of Sicily, itself a part of the Spanish (and later Holy Roman) Empire. In 1530 the Emperor Charles V ceded the islands to the Order of St. John of Jerusalem.

<sup>523</sup> Shklar, J. op.cit. at p.98

The military/religious order ruled Malta until the islands were conquered by Napoleon in 1798; this was a brief conquest lasting only two years until the French were ejected by the inhabitants who eventually sought British protection. Malta was formally ceded to Great Britain in 1814 by the Treaty of Paris and became a British colony. In 1949 it became a dependency of the United Kingdom, and from 1964–1974 it was an independent constitutional monarchy within the British Commonwealth. With the Constitution of 1974, Malta was transformed into an independent republic within the British Commonwealth. A new constitution was promulgated on 21 September 1984, although the form of government remains the same: an independent republic within the Commonwealth.

The present governmental and administrative structure on Malta is typical of that left in place by Great Britain when granting independence to one of its colonies. The executive, formerly the governor general and now the more powerful president, shares authority with the prime minister and cabinet; legislation is made in a unicameral parliament and interpreted by an independent judiciary. The fundamental law is the constitution, which is subject to amendment in a complicated fashion. The president is the weakest party in the executive branch, with the prime minister and cabinet having real executive authority. The only exception to the unitary nature of the Maltese constitutional system is the limited self-government granted to the smaller island of Gozo in 1961.

## **Legal History**

The basic, formative first period of Maltese legal development covers the twelve centuries from the period of Byzantine rule (which commenced about 533) until the Napoleonic conquest of 1798.<sup>524</sup> During this entire span, Roman law was established as the

<sup>524</sup> The 200 years of Arab rule (870–1090) left little or no impression on the Maltese legal system; even then, the territory was regarded as a trading and shipping outpost and Islamic legal traditions never took root. A strong Christian tradition, first Orthodox and then Roman Catholic, proved resistant to any Arab influence.

guiding force for the Maltese legal system. This was not the classical Roman law of the Empire, but rather the extensive and sophisticated medieval Roman law codified under Justinian in the *Corpus juris civilis*. This tradition was continued under the Norman and Spanish rulers who came from Sicily and, finally, for two centuries under the Knights of Malta. The further major influence was that of Roman Catholic canon law, which was especially strong in the development of family and personal law.

The modern era begins with the brief French occupation of 1798–1800. No immediate French legislation affected Malta, but the Napoleonic concept of, and approach to, codification found reception in a society based on the civilian Romanist tradition.

When Malta was ceded to Great Britain in 1814 by a formal treaty (the continuing rebellion against French domination never having achieved the status of successful independence) it carried with it—into British rule—its own legal system and traditions (since Malta was ceded or conquered, there was no long tradition and earlier date on which to base the application of common law). British rule lasted until 1949, but Maltese law developed within a wide framework of continental civil law mixed with common law influences and institutions. The “Civil code” was adopted in 1868 and 1872 and represents an amalgam of French legislation (the Code Napoléon of 1804) plus substantial borrowings from the long development of the Italian civil code of 1865 and was also combined with the inflexible and pervasive influence of Roman Catholic canon law.<sup>525</sup>

Commercial law also exhibits considerable French influence, even though there is no commercial code as such. The “Commercial code” which is Chapter 17 of the *Revised edition* is actually a series

<sup>525</sup> The populace is overwhelmingly Roman Catholic (about 98%), and canon law still plays a major role in domestic life. The Church’s influence has been somewhat lessened since a 1983–85 dispute over expropriation of Church property and the position of the Church in the Maltese educational system. A marriage law of 1975 is something of a turn away from strict canon law.

of 1857–1858 ordinances on trade and maritime commerce based on the *French Code de commerce* of 1808. This has now been greatly reformed by subsequent British legislation or Maltese versions of English acts. Generally, English law has been more influential in commercial law and less so in civil law. Equally, the Maltese Code of organization and civil procedure (Chapter 15 of the *Revised edition*), which was enacted in 1854, is a combined version of the *French Code de procedure civil* of 1807 and local customary law.<sup>526</sup>

### **Legislation and the Judicial System**

Modern Maltese law is now a thoroughly intertwined admixture of medieval Roman law, European continental codification (particularly the French and Italian traditions), latterly increasingly influenced by English common law since 1815.

The structure was superimposed on an English “compiled” codification and continues to be so controlled. Whenever the written or codified law is silent, recourse is permitted to custom—essentially Roman or canon law.

Public law (constitutional, administrative and criminal) has followed English examples and models, as one would expect of a nation that was a British colony for nearly a century and a half.<sup>527</sup>

The court system, established by the English and continued under the Republic, consists of Inferior or Magistrates’ Courts, one for the island of Malta and one for the islands of Gozo and Comino. From these courts, appeals may be taken to larger panels of the same magistrates and then to either the Court of Criminal Appeal in Malta or the superior courts, all sitting at Valletta in Malta. The superior courts are divided into a Civil Court (First Hall), hearing

<sup>526</sup> E. Busuttill, “Malta,” *International encyclopaedia of comparative law*. Vol. I, “National Reports,” fascicle “M.” Tübingen, Mohr, 1974.

<sup>527</sup> The legal system of Malta” by C.A. Charles. Vol. 4 (revised) *Modern legal systems Encyclopaedia*. Buffalo, N.Y., Hein [1988].

appeals, and the Civil Court (Second Hall), which has jurisdiction over non-contentious matters. There is a separate Commercial Court which also serves as the Admiralty Court. There is a Court of Criminal Appeals for cases beyond the Civil Court.

The judges have been for the most part Maltese and have included some eminent jurists. Occasionally, Chief Justices of the calibre of Sir Arturo Mercieca (who was later exiled) stood up to arbitrary and illegal British measures or enactments in the worst days of colonialism. Another bold judgement was that in the 1940s by Mr. Justice A. J. Montanaro Gauci, himself an Anglophile, on the illegality of deportation orders.

*The Constitutional Court was established in 1972, when the right of appeal to the British Privy Council was abolished. While the concept of precedent is not so strongly followed in Malta as in most Commonwealth jurisdictions, judicial decisions are controlling in the absence of legislation or clearly identified custom.*

Although appointed by the President, acting in accordance with the advice of the Prime Minister, judges and magistrates are independent of the Executive. A person must have practiced as an advocate in Malta for a period of not less than seven years to qualify for appointment as a magistrate, and twelve years to qualify for appointment as a judge. Judges and magistrates enjoy security of tenure and they can only be removed by the President in the event of proved inability to perform the functions of their office (whether arising from infirmity of body or mind or from any other cause) or proved misbehaviour upon an address by the House of Representatives supported by the votes of not less than two-thirds of all members thereof.

The influence of Roman Law and of the Napoleonic Codes is easily identified in present day Maltese Law, particularly civil law. English Law has, since the early part of the last century, had its fair share of influence in criminal procedure, certain areas of criminal law, public law and in particular the law relating to merchant

shipping. Maltese criminal law always adopted the maxim of English practice: guilt, not innocence, has to be proved.

It is very much to the point here to recall that the legal philosopher Austin would not accord to international law the quality or character of “law”. For him these rules governing matters between nations were called “positive morality” and not law.

*For example, a man repairing a chimney throws or drops a brick down from the roof, thereby hitting another man and killing him. One may consider here three main sets of circumstances in which this might have taken place: a passer by climbed over a fence, was walking along the side of the house where there was no path and where no one was accustomed to walk, and was struck on the head when the brick-layer discarded a defective brick over the side; the brick-layer had carelessly piled some bricks on the roof and one of them slid over the other side, striking a mailman who was approaching the side door where he always delivered the mail; the brick-layer recognised an old enemy and hurled the brick at his head.*

*The differences between these three variations are obvious to a reasonable man analysing the specific details of the external act; there is no need to know any more about these acts for reasonable men to understand the different degrees of responsibility and culpability involved. Unconstitutional Acts – The United States*

Under the New York State Constitution, bench trials are not permitted in death penalty cases and under the state's capital punishment statute, the death penalty may not be entered upon a guilty plea.<sup>528</sup> Taken together, New York State law thus mandates two separate levels of penalty for the same offence, with only those who assert their innocence being eligible for the death penalty.

Trial courts in two first degree murder cases held these plea provisions to be facially unconstitutional under **United States v.**

<sup>528</sup> See, NY Constitution, art. I, § 2; CPL 220.10[5][e]; 220.30[3][b][vii].

**Jackson.**<sup>529</sup> Subsequently, in the separate declaratory judgment actions, the Appellate Divisions of the Second and Fourth Departments declared the plea provisions constitutional.<sup>530</sup>

In **Jackson**, relied upon by both trial courts and the New York Court of Appeals, the United States Supreme Court invalidated the death penalty provision of the Federal Kidnapping Act, 18 USC § 1201[a]. The federal act allowed a defendant to be sentenced to death only after a jury trial. The Jackson decision explained that the provisions at issue needlessly encouraged defendants to enter guilty pleas and jury waivers to avoid death sentences which impermissibly burdened the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial.

In this case, respondents argued that the New York statute is distinguishable from the Federal Kidnapping Act in at least three ways: (1) the defendant does not have unilateral control over the plea process because he can only plead guilty to first degree murder with an agreed upon sentence with the permission of both the court and the People,<sup>531</sup> (2) the challenged provisions simply codify permissible plea bargaining which was not at issue in the federal act and; (3) the New York statute requires a bifurcated trial whereas the Federal Kidnapping Act permitted a unitary trial.

The New York Court of Appeals concluded that respondents' attempts to distinguish this statute from the federal act at issue in **Jackson** fail and thus held the challenged provisions of the New York statute to be unconstitutional. However, because the constitutional provisions were severable, it declined to invalidate the entire statute.

<sup>529</sup> 390 U.S. 570 (1968) See also *People v. Hale*, 173 Misc. 2d 140; *People v. Mateo*, 175 Misc. 2d 192.

<sup>530</sup> *Hynes v. Tomei*, 237 A.D.2d 52; *Relin v. Connell*, AD2d , 674 NYS2d 192.

<sup>531</sup> See, CPL 220.10[5][e]; 220.30[3][b][vii];

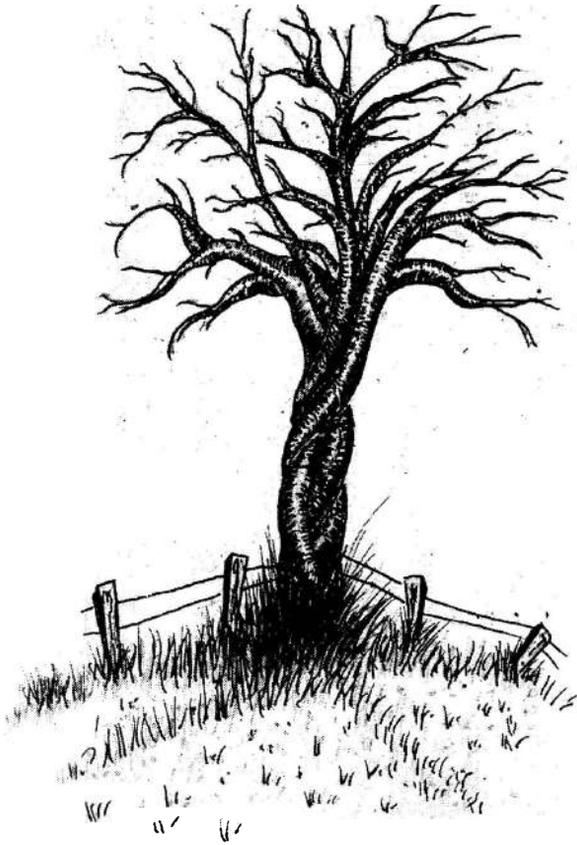
The issue here was whether the New York capital punishment statute violates Fifth and Sixth Amendment rights by imposing death only on those who proclaim their innocence and are, subsequently, granted a jury trial.

The New York Court of Appeals in the cases **Hynes v. Tomei** and **Relin v. Mateo** held the new York capital Punishment Statute was unconstitutional.<sup>532</sup> Defendants should not have to make a choice between death and the exercise of their constitutional rights. The provisions endangering a defendant's constitutional rights should be excised and the resulting statute may remain standing.

**Alan Xuereb**  
August 2006

<sup>532</sup> 1998 N.Y. Int. 0171 (Dec. 22, 1998).





**GENERAL**



## **Lawyer-Client Relations: What Goes on and Who's in Charge?**

**Dr. David E. Zammit**  
LL.D., Ph.D., (Dunelm)

### **Introduction**

One dimension of law that all practising lawyers must face is handling relationships with clients. Traditionally this was not considered as something that could or should be researched. Recently, however, sociologists, linguists and other social scientists working within the area of socio-legal studies have paid a lot of attention to lawyers' interactions with their clients. Their studies highlight important aspects of the processes involved, particularly the relationship between power and representation. Yet they also suffer from deficiencies, which partly derive from their hidden theoretical and methodological assumptions. This paper aims to review and critique these studies, in the hope that the resulting insights may stimulate more reflection by the profession on this important aspect of advocacy.

### **Lawyers as "One-Way" Translators**

Many of these studies focus on the way in which lawyers transform disputes, through their representation of clients. For instance, in their analysis of the way in which American divorce lawyers interact with their clients, Sarat and Felstiner (1986) emphasise the different agendas of both parties. Lawyers view the dispute in terms of its monetary consequences, while clients are often more interested in other matters, such as emotional vindication. Lawyers must therefore invest a lot of time in schooling their clients to accept their view of what the really important issues at stake are. In the process, they try to lower clients' expectations, re-defining both the dispute and even clients' selves so as to exclude those aspects

which cannot easily be inserted into the legal categories. Clients react to lawyers' efforts to narrow and re-define their cases by trying to obtain their lawyers' support for their own claims. They attempt to create emotional ties with their lawyers, who are wary of this. Clients persistently try to introduce the history and moral implications of their marriage relationships into their conferences with their lawyers. Lawyers in turn respond by partially legitimating their clients' stands, but do not in practice act on them. The effect of lawyers' attempts to separate the emotional aspect of the divorce from the material aspect, leaves clients feeling ambivalent and schizoid. They tend eventually to accept their lawyers' settlement of the dispute; but they feel angry and mistrustful of lawyers and the legal system.

Sarat and Felstiner have further developed these themes in two other articles. In one, they look at the effect of these processes on clients' views of the legal system (Sarat & Felstiner 1989). They observe that while American divorce lawyers do act as intermediaries between the legal system and their clients, their brokerage activities are restricted to the sort of transformation of clients' lives and expectations which they discussed in the previous article. These lawyers do not, however, attempt to translate legal rules into concepts which their clients can handle. Consequently lawyers operate so as to translate clients' lives in order to be able to describe them in terms which mesh with legal categories; but they do not translate these legal categories so as to render them comprehensible to clients. This 'one-way translation'<sup>533</sup> of lawyers enables them to prevent clients from gaining independent access to (and knowledge of) the public discourse of the law. Such independent access could undermine lawyers' claims to specialised expertise and their control over the case. Instead lawyers propagate cynicism about the system, suggesting that it does not work in terms of the legal rules. In this way, they imply that their own usefulness lies less in their knowledge of the law, which a well-

<sup>533</sup> Lawyers' brokerage is 'one-way' according to this model, since it departs from a particular interpretation of the legal rules and attempts to translate clients' experiences to fit into this interpretation. Such a model does not envisage the rules themselves changing in response to clients' stories.

educated client might acquire, than in the insider contacts and connections which they possess.

In the second article, (Sarat & Felstiner 1988), these issues are explored from the perspective of C. Wright Mills' analysis of 'vocabularies of motive'.<sup>534</sup> They show how American divorce clients resort to vocabularies of motive in an effort to explain their own behaviour and that of the other spouse. While clients are very concerned to explain the motivations of their spouses' *past* activities, lawyers consider these to be legally irrelevant and do not really support their interpretations. However, when they attempt to impute the *present* actions of their spouses to negative traits in their characters, lawyers intervene in order to promote an alternative interpretation. They suggest instead that these actions are situationally determined by the stage which the divorce has reached. Through ensuring clients' agreement with their vocabulary of motive, lawyers obtain authorisation to take the legal steps which they perceive as necessary. Thus lawyers' transformation of clients' understandings of their disputes extends to persuading them to re-interpret the behaviour of their own spouses.

The ultimate dominance of the lawyer's view of the dispute is an assumption which underlies all the articles reviewed so far. This 'one-way translation' model of lawyers' brokerage ensures that they are always seen as the active agents who transform and rephrase disputes against the backdrop of the impotent resentment of their clients. In this model, the legal rules constitute an unalterable backdrop, conditioning lawyers' interactions with clients, while themselves remaining unaffected by these processes. This assumption also pervades other studies.<sup>535</sup> Thus Blumberg (1975) observes that the American criminal defence lawyers he studied are embedded within networks of organised complicity linking them

<sup>534</sup> Mills argued that that distinct vocabularies of motive characterise different social strata and are utilised in different social situations ( Mills 1940: 904).

<sup>535</sup> Ingleby (1988) confirms many of the observations of Sarat and Felstiner, showing how English divorce lawyers transform the way their clients view their cases so as to push them towards a mediated settlement and away from litigation.

up to prosecution lawyers, judges and administrative personnel within a closed court community. These social networks are a strategic response to the organisational problems of the criminal courts and lawyers find that forming part of them is a necessary condition for success. However, the other side of the coin is that through these networks lawyers come to be more responsive to the needs of the court community than to those of their clients and they therefore become “double agents” (Blumberg: 1975: 328) who seek to persuade their clients to plead guilty and have a vested interest in limiting the scope and duration of the case. In this context, clients experience legal representation as a ‘confidence game’ played at their expense.

Bogoch and Danet (1984) also adopt a ‘one way translation’ model of brokerage in order to make sense of the interaction between an Israeli legal aid lawyer and her client. They analyse this encounter in great linguistic detail so as to show the strategic way in which this lawyer used language in order to assert control over the conversational agenda, suppressing her clients’ views so as to ensure the domination of her interpretation of the dispute.<sup>536</sup> Through these tactics this lawyer managed to acquire power at the expense of her client. They were so blatantly employed because they occurred in the context of a legal aid case. This lawyer was a member of a bureaucracy and did not stand to gain through being more responsive to her client. A private practitioner might be expected to show more understanding of clients’ perceptions of the case.

This conclusion indicates a significant problem with many of the studies which have been reviewed. It seems that most of the proponents of the ‘one way translation’ model of legal representation have not been sufficiently sensitive to the context in which their own studies have been carried out. In the research of Sarat and Felstiner, for example, it is initially stated that American

<sup>536</sup> Thus they show how she interrupted her client frequently, especially when he was in the middle of an utterance; used directives, coercive requests and formal language; questioned the client’s own knowledge; asked apparently random questions and laid claim to an intimate knowledge of her client’s background.

divorce lawyers are the subject of research. However there is little attempt to relate the conclusions reached to the specific context in which research was carried out. Rather their conclusions, although based on the observation of a few cases, are often presented as iconically encapsulating general truths about lawyers and the law. Yet context clearly *does* explain many of the observations which are made, entering into the picture in various ways. To put it succinctly, there can be many different types of lawyers, a great diversity of cases and clients and broader cultural and social variations which might explain observed behaviour.

A related criticism is the conspicuous absence of the lawyer's point of view from these studies. We hear a lot about the clients' emotions and very little about those of their lawyers. However attention to the practical constraints under which lawyers labour might expose important contextual factors affecting the quality of legal representation. Exploring lawyers' perspectives might also reveal short-comings in the 'one way translation' model of legal brokerage.

### **Modifications to the Model**

These points are brought home if one considers other studies, such as the one carried out by Flood on corporate lawyers in Chicago. His approach is characterised by its greater sensitivity to the practical dilemmas lawyers must face. He argues that from the perspective of the lawyers he studied, the management of uncertainty is the most prominent feature of legal work (Flood 1991). Corporate lawyers feel uncertain due to a variety of factors, which range from their own subservient position within large law firms dominated by a few senior partners to the ambiguity of the legal rules themselves.

An important cause of uncertainty is the behaviour of large business clients, who may withhold important information from their lawyer, leaving him in the dark as to the real issues which are at stake in business negotiations. This is consistent with the attitude such clients adopt during conferences with their lawyers, when

they often question their expertise and assert the primacy of knowledge of the marketplace over knowledge of the law. In this context, lawyers have to struggle to assert themselves and resort to various tactics to reduce uncertainty. They do not always succeed in imposing their definition of the situation and often have to accept that of their clients.

Flood's research depicts lawyers in a very different way from the articles previously reviewed. Stressing lawyers' vulnerability to client pressure raises doubts about the universal validity of the 'one way translation' model of legal brokerage, since it suggests that lawyers' perceptions of the issues at stake will not necessarily prevail over those of clients. Griffiths's (1986) research on Dutch divorce lawyers also departs from this model. In fact, he goes even further than Flood in claiming that lawyers are not only subject to clients' pressures, but may also transform their explanation of the legal rules in order to cope with these pressures. His thesis is that lawyers are best viewed as 'double intermediaries', who not only transform clients' stories so as to engage with legal categories, but *also transform the legal rules when they explain them to their clients*. This process of transformation can occur in very subtle ways.<sup>537</sup>

However, while Griffiths accepts that lawyers may modify their *explanation* of the obtaining legal position in response to clients' pressure, neither he nor Flood go quite so far as to state that lawyers' *interpretation* of the legal rules may change in response to clients' pressures. Consequently although Griffiths describes lawyers as 'double intermediaries', he does not completely depart from the 'one way translation' model of their activities. In his scheme the legal rules themselves remain largely uninfluenced by lawyers' interactions with clients. At best, these interactions may condition the type of legal advice lawyers might give to clients. But they could have no impact on the way in which lawyers interpret

<sup>537</sup> For instance, lawyers can change the law simply by remaining silent about legal possibilities, or by presenting their opinion as the attitude of the courts. In this way lawyers actually exert influence by effacing themselves.

the legal rules when representing these clients during court litigation.

### **Is Power Involved?**

Despite their differences, the studies reviewed reflect a broad consensus of opinion that lawyers are best described as mediators between their clients and the legal system. They derive the theoretical interest of studying lawyer/client interaction from the way the power struggle between lawyers and clients illuminates the wider issue of the social impact of legal systems. At this stage it is useful to consider the recent research of Travers, who adopts a polemical attitude towards these assumptions on the basis of his field research with a firm of criminal defence solicitors in the North of England (Travers 1991). His arguments can be summarised as follows:

- 1) Conventional sociological studies of lawyer-client interaction have overly theorised the subject. A preoccupation with grand sociological themes exoticises the subject unnecessarily, leading researchers to ignore the practical, improvisatory, character of the actual work involved. He sought to remedy this in his own research through adopting an ethno-methodological approach to observe the daily work of a legal firm.
- 2) On the basis of his fieldwork, he concludes that accounts such as that of Blumberg (1975) are wrong in presenting a cynical view of lawyers as ‘double agents’ engaged in a ‘confidence game’. He gives a detailed analysis of a case he witnessed in which a lawyer persuaded a client to plead guilty, overcoming her client’s initial resistance to this plea. This analysis shows how the lawyer’s advice was motivated by the desire to obtain the best possible deal for her client in a context where the outcome of the case was never in any doubt and where a guilty plea enabled the lawyer to minimise the adverse effects her client would face (Travers 1992).
- 3) Travers also attacks the claimed significance of power for understanding lawyer/client interaction (Travers 1994). His

argument is that lawyers *are* in a position of interactional dominance vis-à-vis their clients, but that there is nothing surprising or sinister about this, since it is a natural result of the fact that they are legal experts, possessing more knowledge of the law than their clients do. An analytical focus on power obscures the practical features of legal work and adds nothing to our understanding of it. Moreover, clients do not normally see themselves as involved in a power struggle with their lawyers. Finally, the interactional dominance of lawyers is variable, diminishing in proportion to clients' intelligence and experience of the system.

These arguments directly attack the consensus of opinion underlying the other studies reviewed. If correct, the theoretical significance of studying legal representation is considerably reduced. A critique of them will therefore provide the basis on which to develop our understanding of legal representation.

My assessment of Travers's ideas will depart from a re-evaluation of his use of ethnomethodology. It seems that he sees ethnomethodology as something more than a technique for social investigation focusing on the micro-processes through which everyday reality is constructed. He argues that while conventional sociological accounts over-theorise the subject, ethnomethodology allows direct observation of the practical basis of everyday decisions. Thus it can be used to rebut 'ironical' accounts of lawyer/client interaction such as Blumberg's (*op.cit.*). This approach is more sympathetic to lawyers' perspectives; exposing the practical constraints they face and the hidden work performed for clients. Yet the argument is fundamentally flawed in suggesting that it is possible to observe any human activity without recourse to some implicit theory regarding the purpose of that activity.

The ethnographic truism that perception is always mediated by culture is confirmed by Travers's own resort to an explanatory theory for the actions of one lawyer he observed. He claims that she: "had to make the best she could out of a situation where the ultimate outcome for the defendant was at no time in doubt"

(Travers 1992: 35). Similarly his caution against undue exoticisation of lawyer/client interaction must be seen against the background of his own research, where words like ‘mundane’ and ‘boring’ are bandied around until they acquire an exotic halo.<sup>538</sup>

The problems with this approach become clearer when looking at the practical examples given. Travers cites Sarat and Felstiner's work as an example of an overly theoretical approach. Yet their conclusion that American divorce lawyers try to persuade their clients to abandon emotive discourse surely identifies a practical concern which forms part of their everyday work. Even more telling is the example of lawyer/client interaction which he provides when criticising Blumberg's description of such encounters as ‘confidence-games’. He argues that this case confirms the superiority of an ethnomethodological approach, since it shows that lawyers may persuade their clients to plead guilty without betraying professional ideals of defending them to the hilt. However a close analysis can easily account for the differences between his conclusions and Blumberg's. Indeed, Travers's rebuttal of Blumberg depends on exposing the *hidden* work lawyers do for their clients, thus confirming Blumberg's argument that legal work leaves room for suspicion in clients' minds that confidence games are being played at their expense. Moreover Travers admits that he studied a firm of solicitors whose distinguishing characteristic is unusual sympathy towards their clients' point of view, evoking the possibility that Blumberg's insights might apply to the way *most* criminal defence lawyers handle their clients.

Ultimately the deficiencies of Travers's analysis of legal representation derive from his conception of power. Here his argument revolves around the related claims that (a) focusing on power adds nothing to our knowledge of legal representation and

<sup>538</sup> Indeed some degree of exoticisation seems indispensable if socio-legal studies are to fulfil their critical potential. This is because, as Bourdieu (1977) observes, the ultimate disguise of processes of domination are precisely notions of what is ‘ordinary’ and ‘natural’. In this context the only way to expose hegemonic power structures may be through questioning what is ‘ordinary’ and ‘taken for granted’.

(b) there is nothing sinister about lawyers' power, which is a natural outcome of their knowledge of the law. This last claim can usefully be approached from the standpoint of Sherr's research (1986), which set out to assess the quality of lawyers' communicative skills by testing the ability of a set of graduate lawyers to interview clients during their first meeting. Sherr makes practically no reference to power in his analysis, preferring to refer to an idealised model of how lawyer/client interaction should proceed to ensure optimal communication between the two sides. As a result, he can only interpret many of his findings as a failure in communication on the part of lawyers, while they would be perfectly intelligible as attempts to acquire power vis-à-vis clients by withholding information.<sup>539</sup>

Once one accepts that power is an important feature of legal representation, this raises the second issue of the way in which to conceive power. Hannerz (1992) also derives lawyers' power from their legal knowledge. Unlike Travers, who sees this as natural and reassuring, Hannerz suggests that the routine, systematic and unintentional qualities of professional power are *the* factors which ensure domination. On the one hand Travers argues that there can be nothing sinister about a power which is so routinely exercised that most clients do not consider themselves to be involved in a power struggle with their lawyers. On the other, Hannerz points to the contrast between the insecurity of clients, whose contact with lawyers is generally a 'one-off' experience, and the routine character of legal work for lawyers. The latter unintentionally dominate their clients while maintaining a view of their work as simply part of the division of labour (Hannerz 1992: 121).

Hannerz's conception of power corresponds to that underlying much contemporary social research. Lukes, for instance, describes power as the ability to shape the mental landscape of the dominated by making certain possibilities unthinkable and thereby imposing misunderstanding of the objective situation (Lukes 1993). Bourdieu

<sup>539</sup> Sherr observes regretfully that the lawyers he studied do not inform their clients of the work they intend to do for them, that they tend to exercise excessive control over the conversational agenda, often cross-examine clients and use difficult language.

also portrays symbolic power as an invisible power which can be exercised: “only with the complicity of those who do not want to know that they are subject to it or even that they themselves exercise it” (Bourdieu 1992: 164). As opposed to a hierarchical view which identifies power with legitimate authority, this conception emphasises the fact that power is exerted over human beings (Aron 1964) and is therefore socially negotiated (Simmel 1978). For this reason, power is primarily seen not as an object to be possessed; but rather as something which must be communicated through cultural media like discourse (Foucault 1990), or even silence.<sup>540</sup> This stress on the communicative nature of power intersects with the work of linguists and other cultural analysts who have also emphasised the power-laden nature of communicative relations (Bakhtin 1994).<sup>541</sup> The resulting perception of power foregrounds rhetoric and persuasion more than imperative commands and authority.

In this context, it is interesting to note that Travers’s own case-studies are replete with instances of discursive struggle, in which lawyers try to persuade their clients to follow their advice against the resistance of the latter. However, rather than describing these as attempts to exert power, Travers prefers to write about the: “interactional pressure” (1994: 24) exerted by lawyers, who are in a position of: “interactional dominance” (*ibid*: 26). A close reading of his writings reveals two further reasons for this careful avoidance of the descriptive terminology of power. The first relates to the way in which a power analysis tends to shift from the study of lawyer-client interviews to: “that of law as a macro-institution” (*ibid*: 28). He argues that moving from one to the other is incorrect, not least because it gives a distorted characterisation of lawyers and legal work.

The problem with such reasoning has been identified by Bourdieu, who observes that one cannot understand the form of small-scale

<sup>540</sup> As in Lukes’s (1993) conception.

<sup>541</sup> Here I have in mind Bakhtin’s focus on the way speakers compromise between what they would like to convey through their words and what is realistically possible given the linguistic effects of existing power relations.

linguistic exchanges (such as those between lawyers and clients), if one does not take into account larger structural discrepancies in power:

*That is what is ignored by the interactionist perspective, which treats interaction as a closed world, forgetting that what happens between two persons –between an employer and an employee or, in a colonial situation, between a French speaker and an Arabic speaker-- derives its particular form from the objective relation between the corresponding languages or usages, that is, between the groups who speak those languages (Bourdieu 1992: 67).*

This integrative capacity of power, which connects minor events to larger social forces constitutes the most important objection to Travers's attempt to detach research on the everyday business of legal representation from the study of larger social power relations. By contrast, a more fruitful way of exploring legal representation is provided by Johnson (1972). In his study on the sociology of the professions, he argues that the increasing specialisation brought about by the division of labour also increases the social distance between lawyers and clients and gives rise to uncertainty as to how legal needs are to be determined and catered for. This uncertainty may be resolved in favour of the lawyer or his client depending on larger power relationships between lawyers and different categories of clients.

Comparing Johnson's approach to Travers's brings out the second reason for the latter's avoidance of power. In fact, while Johnson sees uncertainty as a central feature of lawyer/client interviews, Travers emphasises that the outcome of these interviews is never in any doubt. This is because the lawyer's perception of the issues at stake and the necessary legal response must necessarily prevail over that of the client, given the lawyer's greater knowledge of the legal rules. Like the previously reviewed studies, Travers therefore promotes a 'one-way translation' model of legal representation; in which the lawyer translates his client's story to fit into unchanging legal descriptive categories. Johnson's analysis compels us to

explore the other possibility: what if uncertainty is also resolved in favour of the client; so that it is the lawyer's interpretation of the legal rules which alters to accommodate the client's perception of the issues involved and the necessary legal response? In this 'two-way' model of legal brokerage, neither the distribution of power between lawyers and clients nor the interpretation of the legal rules are seen as fixed *a priori* by the legal system. Rather, both are socially negotiated between particular lawyers and clients in a manner which reflects broader power relationships.

### **Lawyers as “Two-Way” Translators**

To comprehend the practical processes to which the 'two-way' model of legal representation refers, it is useful to refer to the analytical framework constructed by Mather and Yngvesson (1981). They identify two ways in which the linguistic description of a dispute can be transformed after it has been brought before a third party to be resolved.

The first, which they call 'narrowing', is fundamentally a conservative act, occurring when the dispute is re-phrased in terms of established linguistic categories. This process of narrowing is equivalent to the sort of changes which lawyers must bring about to clients' perceptions of their cases in terms of the 'one-way translation' model.

The second type of dispute transformation is 'expansion'. This is a radical phenomenon, occurring when a dispute is re-phrased in terms of categories which were not previously accepted by the third parties hearing the dispute.

It corresponds to the reinterpretation of legal rules which can occur when, in response to client pressure, lawyers are led to regard laws in terms of clients' stories, rather than translating clients' stories in legal terms. Table one illustrates these divergent models of legal representation:

## Table one

---

**First Scenario:** 'One-way Translation'

(The model of Sarat & Felstiner)      **Legal Rules → Lawyer → Client's Story**  
 (Unchanged) (Dominates)      (Translated)

**Second Scenario:** Modified 'One-way Translation'

(The model of Griffiths & Flood)      **Legal Rules → Lawyer ↔ Client's Story**  
 (Unchanged) (Tries to control) (Translated)

**Third Scenario:** 'Two-way' Model

(Johnson's model)      **Legal Rules ↔ Lawyer ↔ Client's Story**  
 (Reinterpreted) (Tries to control) (Translated)

In Table One, the First Scenario presents the 'one-way translation' model. Here the legal rules are seen to determine lawyers' relations with their clients. Lawyers' power is based on their knowledge of the rules. They intervene to transform, by a 'narrowing' translation, clients' perceptions of the case. The interpretation of the legal rules is uninfluenced by lawyer/client interactions.

The Second Scenario maintains, but modifies, this model. Here it is accepted that clients may also put pressure on their lawyers, leading to changes in their explanation of the legal position. However lawyers' interpretation of the legal rules remains unaffected by this process. By contrast, the Third Scenario accepts that both 'narrowing' and 'expansion' may occur. Lawyers may also change their interpretation of the legal rules so as to accommodate clients' stories. This 'two-way' model envisages that clients may also exercise a cultural power of persuasion over their lawyers.

Additional confirmation of the utility of the “two-way” translation model is provided by a recent article by Miller (1994), which applies narrative analysis to the study of legal representation. Here she follows in the footsteps of Cunningham (1989); who views legal representation as an act of translation by which lawyers try to translate their clients’ stories into the conceptual categories of the laws and vice versa. However Miller attempts to move beyond these studies because the metaphor of translation suggests that lawyers mediate between two completely different languages which do not intersect and limit themselves to explaining words in one language in terms of the other. Since neither of the languages is altered by the translation, this metaphor does not allow for the possibility that the legal rules themselves might be reinterpreted in response to clients’ stories. Also, it naively assumes that clients are always powerless, that their stories must always diverge from those of lawyers and that clients want lawyers to tell their versions. Most damagingly, the translation metaphor obscures the way: “legal story-telling, at its best, is more than either lawyer or client story-telling” (Miller 1994: 527).

Miller’s own description of legal representation rests on the insight that stories bridge the gap between clients’ perceptions and the legal rules. Because stories create a discursive continuum between these two poles, they can be a vehicle for the expression of clients’ power; enabling them to appropriate the meaning of the legal rules in their own interests.<sup>542</sup> Clients’ narratives have the potential of enriching legal doctrine by providing a different perspective on the legal categories. This in turn affects the role of lawyers, who can no longer assume that their interpretative outlooks will necessarily prevail over those of their clients and must now view legal representation as a process for which clients are co-responsible. By explicitly linking the rule/story dialectic to what I have called a ‘two way’ conception of legal representation, Miller highlights the

<sup>542</sup> She illustrates this by referring to a case she defended, showing how attention to the clients’ story meant giving the client more power to participate in the decisions that were taken in regard to his case and also led her to view both the legal rules and the factual evidence in a new light.

uses of narrative analysis to explore the way lawyers and clients negotiate power in specific cases of legal representation.

## Conclusion

It is clear in this context that the greater analytical usefulness<sup>543</sup> of the 'two-way' model lies in the way it avoids prejudging the outcome of lawyer-client interaction. Since power is not considered as the exclusive possession of those who know the legal rules, our attention is directed to the cultural power which may be exerted by clients and through language. Here the analytical tradition which detaches the study of lawyer/client interaction from the wider process of legal representation, can be seen to perpetuate a view of the legal rules as an inflexible backdrop determining the outcome of such interaction. Only by making the interpretation of the legal rules part of the analysis of lawyer/client interaction can we avoid the limitations of the 'one-way translation' model. It is therefore necessary to explore the interaction between the interpretation of legal rules and that of clients' stories throughout the entire process of legal representation. Research in this field should be holistic: relating lawyer/client interviews to the drafting of judicial acts, court litigation and adjudication.

To conclude, it appears from this analysis that lawyer/client interaction is an important indicator of the way in which law is made socially present and applicable in a particular setting. Research in this field should aim to contextualise particular observations within a more holistic understanding of the way legal processes and institutions operate in a specific society. One must

<sup>543</sup> As confirmed by its ability to explain aspects of Travers's own analysis which he left in the dark. In fact, the case-study which he used in order to attack Blumberg's description of law as a confidence game was clearly a case of dispute expansion. Travers notes that the client in this case resisted her lawyer's attempts to persuade her to plead guilty and that the lawyer did not advise her to plead guilty to the facts as presented by the prosecution, but to a similar set of facts which only constituted a technical offence. He also observes that this offence was one which the Magistrate's Court had not encountered before and there was some initial confusion as to whether to allow it. Here the client's resistance to the insertion of her case into narrow legal categories can be seen to have led to a change in the legal categories, towards a closer match with the client's understanding of her case.

keep in mind that both lawyers and clients are themselves theorising agents. So as to avoid reproducing traditional professional assumptions about the lawyer/client relationship, one should avoid using a legalistic terminology and conceptual frameworks to underpin research. In particular, one should avoid assuming that lawyers are/should be in charge of the relationship because they (should) know the law.

### Select Bibliography

Aron, Raymond 1964. "Macht, power, puissance: prose democratique ou poesie demoniaque?" *European Journal of Sociology*, Vol. 1, pp. 27-51.

Bakhtin, Mikhail 1994. *The Dialogic Imagination*, Texas, University of Texas Press.

Bogoch, Bryna and Brenda Danet 1984. "Challenge and Control in Lawyer -Client Interaction: A Case Study in an Israeli Legal Aid Office," *Text*, Vol.4, Nos. 1-3, pp. 249-275.

Bourdieu, Pierre 1977. *Outline of a Theory of Practice*, translated by R. Nice. New York: Cambridge University Press. 1992. *Language and Symbolic Power*, translated by G. Raymond and M. Adamson, Cambridge, Polity Press. 1997. *The Logic of Practice*, translated by R. Nice, Cambridge, PolityPress.

Blumberg, Adrian 1975. "The Practise of Law as Confidence Game," in Aubert, V. (ed.), *Sociology of Law*, U.K., Penguin Books Ltd.

Cunningham, Clark D. 1989. "A Tale of Two Clients: Thinking About Law as Language," *Michigan Law Review*, Vol. 87, pp. 2459 – 2494

Flood, John 1991 "Doing Business: The Management of Uncertainty in Lawyers' work," *Law and Society Review*, Vol. 25, No. 1, pp. 41-72.

Foucault, Michel 1977, *Discipline and Punish: the birth of the prison*, U.K., Penguin Books Limited. 1980. *Power/Knowledge: Selected Interviews and other writings of Michel Foucault (1972-1977)*, Colin Gordon (ed), Brighton, Harvester Press. 1990. *The History of Sexuality, Vol. 1*, U.K., Penguin Books.

Griffiths, John 1986. "What do Dutch lawyers actually do in divorce cases?," *Law and Society Review*, No. 20, pp. 135-175.

Hannerz, Ulf 1992. *Cultural Complexity: Studies in the Social Organization of Meaning*, New York, Columbia University Press.

Ingleby, Ronald 1988. "The Solicitor as Intermediary," in Dingwell, R. & Eekelaar, J. (ed.), *Divorce Mediation and the Legal Process*, Oxford, Clarendon Press.

Johnson, Terence 1972. *Professions and Power*, UK, Macmillan.

Lukes, Stephen 1993. *Power: A Radical View*, U.K., Macmillan, 1994. *Power*, Oxford, Blackwell.

Mather, Lynn and Barbara Yngvesson 1981. "Language, Audience and the Transformation of Disputes," *Law and Society Review*, Vol. 15, pp. 775 - 821.

Miller, Binny 1994. "Give Them Back Their Lives: Recognizing Client Narrative in Case Theory," *Michigan Law Review*, Vol. 93, pp. 485 - 576

Mills, C.W. 1940. "Situated Actions and Vocabularies of Motive," *American Sociological Review*, p. 904.

Sarat, Austin and William Felstiner 1986. "Law and Strategy in the Divorce Lawyer's Office," *Law and Society Review*, Vol.20, No.1, pp. 94-134; 1988. "Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction," *Law and Society Review*, Vol.22, No.4, pp. 737-769. 1989; "Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office," *Yale*

*Law Journal*, Vol.98, No.8; 1995, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process*, New York and Oxford, Oxford University Press.

Sherr, Avrom 1986. "Lawyers and Clients: The First Meeting," *Modern Law Review*, No.49, pp.323-357.

Simmel, Georg 1978. *The Sociology of Georg Simmel*, Kurt H. Wolff (ed.), U.K., The Free Press, Macmillan.

Travers, Max 1991. *The Reality of Law: An Ethnographic Study of an Inner-City Law Firm*, *Unpublished Ph.D. thesis, University of Manchester*; 1992. "Persuading the client to plead guilty: an ethnographic examination of a routine morning's work in the magistrates' court," Occasional Paper Number 23, *Department of Sociology, Manchester, University of Manchester Press*; 1994. *Taking instructions and giving advice: a preliminary examination of some routine aspects of legal work*, Paper presented at the *World Congress of Sociology, July 18-23, Bielefeld, Germany*.

**David Zammit**

August 2006



## Just Problems?

Dr. Alan Xuereb  
M.Phil. (Jur.), LL.D.

### Preservative Justice

Justice is normally the language of complaint, and sometimes of revenge. Justice is often, therefore, analysed as a negative virtue whose demands can be met simply by doing nothing beyond correcting the wrongs inflicted on others.<sup>544</sup>

However, most worked-out views as to what constitutes injustice involve at least an outline image of justice in a positive sense which goes beyond correcting the wrongs that have been done and include an impression of a "just" human relationship. The idea of injustice is closely associated with reactions to the disappointment of existing expectations.<sup>545</sup>

Hence justice, at least in its negative expressions, can have strong conservative implications in that it seeks to sustain the *status quo* in society against destructive and disorderly intrusions.

<sup>544</sup> Shklar for example argues that we cannot set rigid rules to distinguish instances of misfortune from injustice, as most theories of justice would have us do, for such definitions would not take into account historical variability and differences in perception and interest between victims and spectators. From the victim's point of view . . . the full definition of injustice must include not only the immediate cause of disaster but also our refusal to prevent and then to mitigate the damage, or what Shklar calls passive injustice. With this broader definition comes a call for greater responsibility from both citizens and public servants. When we attempt to make political decisions about what to do in specific instances of injustice, says Shklar, we must give the victim's voice its full weight." *The Faces of Injustice* - Shklar, J. N. - Yale University Press Pub. : July 1992.

<sup>545</sup> Vide also: Kuklin, Bailey H. - *The Justification for Protecting Reasonable Expectations* [www.hofstra.edu/pdf/law\\_lawrev\\_kuklin.pdf](http://www.hofstra.edu/pdf/law_lawrev_kuklin.pdf).

## **Disputes between Individuals**

When disputes between individuals or groups are considered and settled under private law, the intention is to protect an existing system of rights. If one man encroaches on the rights of another, he is liable to be required to restore the balance, (i) by making good for the damage he has caused or (ii) by paying compensation and/ (iii) or at least undertaking to respect the rights of the injured party in future.

This concept clearly stated in the Maltese Civil Code namely under Article 1047 (1)

*"The damage which consists in depriving a person of the use of his own money, shall be made good by the payment of interest at the rate of eight per cent a year.*

(2) If, however, the party causing the damage has acted maliciously, the court may, according to circumstances, grant also to the injured party compensation for any other damage sustained by him, including every loss of earnings, if it is shown that the party causing the damage, by depriving the party injured of the use of his own money, had particularly the intention of causing him such other damage, or if such damage is the immediate and direct consequence of the injured party having been so deprived of the use of his own money."

## **The Concept of Restitutio in Integrum**

The procedures of legal justice, in these types of instance, are conservative, protecting and restoring an established order thus a form of *restitutio in integrum*. In the Roman empire, where Ticius did wrong to Caius, the former had to compensate the latter by a *restitutio in integrum*. That meant, and still means to this day, placing the victim of a breach of contract or a tortious act in the same position they were before the event. The Romans clearly understood the principle that a claimant must be put back to where they were before the damage was done to them, and this would be

never achieved unless the victim was fully compensated (*in integrum*). Roman law, then, conceived *restitutio in integrum* to be accomplished where the claimant received the principal sum due, interests at a certain rate from a certain date, compensation for their economic losses and the costs incurred by them in seeking justice.

*Restitutio in integrum* has since been fundamental rule of law in the countries that follow civil law. Traditionally, in the civil law system, it includes loss of profits or economic loss in both contract and tort (e.g. Article 1149 of the French Civil Code; Article 1106 of the Spanish Civil Code; Article 1995 of the Louisiana Code 1985). Damages in contract are deemed to be, except in cases of fraud, those which are direct and foreseeable at the time of the contract (Article 1150 France; Article 1107 Spain); damages in tort are those which are direct and immediate including loss of profit, so foreseeability is not necessary.

In civil law, interest is always awarded as part of the economic loss to which claimants are entitled. Interest is payable unquestionably where the debtor has delayed in performing their obligation to pay a sum of money (Article 1153 France; Article 1108 Spain). Pre-judgment interest is awarded as an integral part of damages, in all cases, in the currency of the loss, in both contract and tort, compounded at the average prime rate of the currency in which that loss or damage was sustained, from the date of the breach or the loss to the date of judgment. Post-judgment interest is awarded at the average prime bank rate (so to reflect the monetary value) for the period from the date of judgement until final payment.

In the common law countries, the courts often refuse to award complete compensation (*restitution in integrum*). Most of them have been unwilling to award damages for pure economic loss (i.e. damages in tort when there is no physical damage) even if the damages were direct and foreseeable.<sup>546</sup> Also, almost regularly, damages in foreign currency were refused (until **Miliangos** [1975] in England and **The Amoco Cadiz** [1992] in the US 7th Circuit).

<sup>546</sup> The *Mineral Transporter* [1986] AC 1; [1985] 2 LI R 303.

For example, the common law courts refused pre-judgment interest and interest above a certain rate, although in Admiralty jurisdictions, equity has been recognised and damages have been awarded in a way close to *restitutio in integrum*.

The courts in the UK, US and Australia have very rarely granted economic loss where the claimant did not sustain direct physical damage. Also, common law jurisdictions have been more restrictive regarding interest, though they are opening up gradually (S.35A The Supreme Court Act 1981) so as to render it a matter of the discretion of the court, as opposed to a right of the claimant successful in the judgment.<sup>547</sup>

The discrepancies between civil law and common law over the application of the rule of *restitutio in integrum* have given rise to conflict of laws and to somewhat irrational solutions to the assessment of damages. The laws applicable to damages differ among themselves because some jurisdictions and the practices of certain courts depart from the Roman rule to adopt rules of thumb and unsubstantiated criteria for special circumstances. In Maltese law the *restitutio in integrum* concept is explicitly mentioned in the Commercial Code (Chapter 13) Article 541,<sup>548</sup> regarding the prescription and inadmissibility of action in certain commercial matters, and also in the Civil Code, more precisely under Article 1765<sup>549</sup> relating to the form and effects of donations<sup>550</sup> and also in the Patents Act (Chapter 417) under Article 46 concerning the re-establishment of rights.<sup>551</sup>

## Progressive Justice

*However, law has a progressive or reformative aspect as well. Laws promulgated by the legislature from time to time change the*

<sup>547</sup> Making it a discretionary remedy only: House of Lords in *President Of India vs La Pintada Cia Navegacion* [1984] 2 L.I.R 9 at p23.

<sup>548</sup> Title I

<sup>549</sup> *Restitutio in integrum*. Amended by: XLVI.1973.92.

<sup>550</sup> Sub-title II

<sup>551</sup> PART XIII

*rules in accordance with new conceptions of what is fair and proper. Such as Human Rights legislation, changes in the Maltese Civil Code promoting parental authority instead of paternal authority, changes concerning the promotion of equality between man and woman, the granting of parental leave for both parents, a better distribution of children's allowance benefits, the recognition of the housewife's work through a bonus, there have been new laws about protection at work, requiring safety precautions in industries, forbidding unfair dismissal, limiting the power of employers to make workpeople redundant; and internationally the promulgation of the United Nations` Convention on the Rights of Children, the recognition by the International Community of the principles of Common Heritage of Mankind, of The Rights of Future Generations, and of Common Concern about the planet's climate and so on.*

*In social deontology, as in law, the preservative aspect of justice upholds the established order of things. Persons are entitled to keep what they have, their rights and property. Many feel that it is unjust to upset the existing differentials in pay for different jobs. At the same time nearly everybody also attributes to justice a reformative role, allowing "new" (or should one say newly-recognised) rights to be set up on the basis of (a) **need** or (b) **merit**.*

The idea is that justice, in the sense of retaining differentials for different jobs does not require any class of persons to stay where they are in the established hierarchy, on the contrary, if they are especially talented or especially hard-working, it is just for them to be rewarded and to move up the social scale. What we have up till now called preservative justice tries to keep things as they are, on the assumption that everyone benefits from a stable society, despite the defects of any actual social order.

### **Reformative Justice**

Reformative justice tries to remedy the defects, to redistribute rights in such a way as to make a fairer society. But what is fair? There have been two different, and apparently incompatible, ideas

about this. First there is the idea of justice as depending on merit or desert. It can be seen in criminal justice as well as in ideas of fairness in social ethics. For example, criminal justice is a matter of punishing people who have been found guilty of breaching the law; it would be seriously unjust to punish people who have done nothing to deserve it.

Likewise, just desert has to do with merit - this means that a reward or honour, should go to the person who earns it, who deserves it. To pass over the candidate or contestant who deserved the reward and to hand it to somebody who did not deserve it would be unjust, unfair. Why?

The problem in practice lies in how do you assess who is more meritorious than whom. In other words, how should we classify who is the best candidate? What criteria should we use to assert that "A" is for example, more intelligent than "B" in order to reward him? For now suffice it to say that something which is not due to someone and which is given to him, makes that *donation*, an unfair and unjust act.

However, there is another idea of justice, based on equality and need. According to this view, justice requires us to treat all human beings as equal worth and as having equal claims. According to this view it is unjust to discriminate in favour of some and against others - except in order to meet special needs - what we call positive discrimination. And what is discrimination? Discrimination may be descriptively summarised as treating people unequally and therefore that is often unjust (according an egalitarian concept of justice), discrimination in favour of need has an egalitarian purpose. It gives more to the needy because they have less - it is an attempt to reduce inequality, to approach that ideal of equality for all which according to this view, would be perfect justice.

Other kinds of discrimination, however, are *inegalitarian* in effect as well as in method - they increase the existing inequalities. The idea behind this conception of justice is that the particularly

talented individual already has an advantage over ordinary people. If he is given special rewards, or special prizes, or a specially good job, you will increase his advantage. It may well be advantageous to the community to do this - in that the person with special talents for a particular job, such as running a business or running a school, will no doubt bring more benefit to the community in doing that job than would someone else of less talent.

So it makes sense, it is reasonable to train the talented individual, put him in the responsible job, and pay him well as an incentive. It is socially useful, and right for that reason but if this view is adopted one cannot conclude that this is necessarily just or equitable. Strict justice, according to this view, requires us to treat everybody alike, apart from helping underdogs to approach equality with the rest.

Each of these theories of justice appears to have an intuitive appeal for our moral consciousness. They both make a persuasive case. Professor John Rawls has produced an ingenious suggestion for settling the principles of justice in a rational way. It is intended to be a method of avoiding appeals to intuition with the consequent risk of inconsistent answers.<sup>552</sup>

Rawls uses the device of a hypothetical social contract, a notion familiar in earlier political philosophy but employed for a different purpose. Rawls asks us to imagine a number of people who know the general laws of social science but are ignorant of all particular facts, including their own abilities, their won history, their own position in society, or indeed the time and place of that society. They are asked to agree upon principles for the distribution of benefits and burdens. We can suppose, Rawls adds, that they will think about the matter in terms of self-interest, trying to maximise benefits and minimise burdens for themselves. They do not know where they themselves will be in the ordering of affairs. They might be at the top of the social scale or they might be at the bottom. So, says Rawls, they will take care to make conditions as

<sup>552</sup> Rawls, John, *A Theory of Justice*, Oxford University Press, 1973, especially chapter III.

good as possible for the person at the bottom of the scale, in case they turn out to be there themselves. Their decisions will be motivated by self-interest but will have the effect of serving the interest of everyone impartially, because of “the veil of ignorance”.

In Rawls’s view, that is what constitutes the idea of justice as fairness. Justice then is an institutional arrangement which will, in Rawls’s view benefit everyone impartially, and we can reach an understanding of it by imagining a social contract made in ignorance of one’s personal situation.

Rawls is not here suggesting that the concept of justice can be identified with an idea of self-interest. Justice is essentially impartial between one person and another. This reminds us of Finnis’s requirements of practical reason.<sup>553</sup> The third requirement in Finnis’s list refers to the fundamental impartiality among the human subjects who are or may be partakers of those goods. So, the only reason for me to prefer my well-being is that it is through my self-determined and self-realising participation in the basic goods that one can do what reasonableness suggests and requires, i.e. favour and realise the forms of human *good* indicated in the first principles of practical reason; and so add or contribute to the common good which insures justice for all. As Rawls puts it, if you ask yourself in any situation what would be the just or fair solution of a problem, you should not think in terms of self-interest, giving yourself priority over others. The difficulty is that if people are simply told to think intuitively in terms of justice, they will come up with different and inconsistent answers.<sup>554</sup>

A rational calculation in terms of self-interest will avoid the bare reference to intuitions of justice, but in the ordinary way such a calculation would not give us the impartiality that we need. Moreover, the hypothesis of making the calculation under a veil of

<sup>553</sup> Coherent life plan; No arbitrary preferences amongst the basic values; No arbitrary preferences amongst persons; Proper sense of detachment; Proper sense of commitment; limited relevance of efficient means; Respect for every basic value in every act; Common good of one’s community; Follow one’s conscience;

<sup>554</sup> Raphael, D.D. *Moral Philosophy*, pp.72.

ignorance about one's personal situation is a method of adding impartiality. If one have to provide for my own interests in any and every possible contingency, one am providing for the interests of any everyone, not just for my own. This should remind us of the Kantian Categorical Imperative in the form of "act as if you were legislating for everyone", Rawls would add, starting from the poor.

Kant's "Categorical Imperative" reveals the injustice of "excepting" ourselves from conventional social practices like promise keeping. But can it equally reveal the injustice of "complying" with socially entrenched unjust maxims, e.g., slave-holding maxims in colonial America? Standard Kantian arguments against slavery depend on overly narrow definitions of slavery and by requiring *universalisation* across all rational beings, beg the moral question of whether differences ever warrant different treatment.<sup>555</sup>

To get back to Rawls, behind the veil of ignorance though you might think self-interestedly, you are really constrained reasonably to act as if you were legislating for everyone. This point about legislating for everyone compels us to analyse what would be the result of such a hypothetical contract made under a veil of ignorance about particular facts? According to Rawls, people in this system would go first for a maximum of equal liberty, and then secondly they would agree to such departures from equality as would improve life for everyone, including the least fortunate. The point of the second principle is to make a distinction between just and unjust inequalities. If the giving of special rewards or special opportunities to talented people not only produces substantial benefit for those few, with consequent inequality, but also has the result of improving the general standard of life of the whole community, including the standard of its poorest members, then the inequality is justified.

<sup>555</sup> Calhoun, Cheshire, Kant and Compliance With Conventionalised Injustice - SJ Phil, 32(2), 135-159, Sum 94

However, we have a condition imposed by Rawls: if the benefit accrues only to the privileged group and does nothing to improve the situation of the poor, of those least advantaged, then it is not justified. This is the main argument against factionism. But this is not just a justice argument in favour of charity.<sup>556</sup> There is an economical aspect to it as well; after all a *wealthier* lower class enhances the general good of the whole society. This conclusion gives priority to an equality concept of justice. It also makes some provision for the alternative concept of differential reward, though not in terms of merit, strictly speaking. It says that differential rewards are justified, not because they are deserved by the individuals who get them, but because they benefit the whole community and especially its poorest members. Inequality is supported on the grounds of social utility<sup>557</sup> and helping the needy. So Rawls's idea of justice maintains priority for the *equality-needs* concept, including in it a hint of common utility, but really without any valuation of merit or desert as such.

The conclusion will not be to everyone's liking, but at least it is quite definite in settling the dilemma of choosing between the two traditional concepts.

Furthermore, if the conclusion really has been reached by a rational process of thought instead of appealing to intuitive conviction, we ought to accept it. In fact, Rawls's conclusions do not rest purely on rational calculations which would seem obvious to anyone.

<sup>556</sup> Stressing the point that charity and justice are in fact two very distinct concepts.

<sup>557</sup> 'Social utility' arguments have a strong political impetus, however they might create aberrations. Consider Sottomayor-Cardia, a Portuguese-speaking philosopher, his ideas depart from classical utilitarianism in many ways. In the first place emphasis is laid on the concept of "interest" rather than in "happiness". At the same time there is a vindication of a certain sort of preference for our own interest when confronted with the maximizing principle in its most radical form, as this radical maximizing principle could lead to a sort of "pathological Kantianism". Exception is made in cases of "negative" utilitarianism, that is, when great greatest common "evil". In such cases the author would even allow for some "unjust acts", so that suffering, and every sort of evil for the greatest number could be avoided.

The general idea of equality in the absence of special considerations is rational enough. So is a departure from equality for the sake of benefit for all.

Why should there be special emphasis on benefit for the poor? Intuitively, of course, this appeals to our sense of justice, or at any rate to our sense of morality. Does Rawls succeed in showing that it would appeal to our sense of self-interest if we were clothed in a veil of ignorance concerning our personal situation?

Rawls assumes that a rational self-interested man will always play safe, will think most of cushioning his position if he should turn out to be unlucky. Suppose this hypothetical contractor contemplates two alternative forms of society. One follows the policy of a radical Welfare State, always providing quite a soft cushion for the people at the bottom of the social scale but inevitably at the expense of high taxation for the rest, so that nobody is excessively well off.

The second society still has a cushion for its poorer members, but a less comfortable cushion, and therefore it can leave scope for a few people to gain glittering prizes as the result of special talent, special effort, or simple luck. If we are asked which of the two is the more just society, we may well say the first, but that is an intuitive judgement. If we are asked which of the two would be chosen by a purely self-interested individual who did not know what his personal abilities and fortunes would turn out to be, is it clear that he would go for the first alternative? Why should he necessarily play safe and think mainly of what will happen to him if he is unlucky? Why should he not take a bit of a gamble? In the second society, he will not be so badly off even if he lands up at the bottom of the pile, and there is always the chance that he might turn out to be one of the fortunate few.

The idea of self-interest itself does not imply any preference between timidity and boldness in making this choice. Rawls is not justified in assuming that a self-interested man will be timid rather than bold. This is obvious from the fact that Rawls's first principle of justice assumes the opposite, namely that a self-interested man will prefer boldness to timidity. The first principle requires a maximum of equal liberty.<sup>558</sup> This means that the people taking part in this hypothetical social contract, and choosing from a self-interested point of view, will give priority to maximum of liberty for all.

Rawls makes it quite clear that his specification of equal liberty, rather than some other kind of equality,<sup>559</sup> is deliberate. Is it clear that a self-interested person, dissociating himself from the kind of society he lives in, would necessarily give the highest priority to freedom? Presuming that it makes sense at all to think of self-interested persons making choices in genuine ignorance of their own situation and unaffected by the experience of a particular society, why should we say that their choice would be intrepid rather than insecure in selecting their first principle of justice, and fainthearted rather than resolute in selecting their second principle? Rawls's artifice of a social contract, then, does not give us a rational method of deciding between two rival concepts of justice.

The purpose of the device is to reach impartiality. But that can be done in a simpler way. To get away from a self-interested to an impartial judgement, all one needs to do is to imagine oneself in the shoes of someone else. Is not this in fact the psychological basis of the *needs* concept of justice? If one says that justice requires special attention to the needs of the poor, the idea of self-interested is quite irrelevant.

<sup>558</sup> First Principle: Liberty - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Second Principle: Wealth - Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

<sup>559</sup> Such as equality of equal goods, for instance.

It is not a question of making sure that there will be help for yourself if you ever find yourself landed among the poor. It is a question of a sort of self-identification with the poor, an empathic bondage between your present “self” and the Poor’s condition. One can only appreciate what the poor feel if you imagine what you would feel if you were one of them.

But this is not supposing that you really are one of them, and the moral judgement which it produces is an altruistic one, not a self-interested insurance policy. The question that does need to be raised is whether the moral obligation which arises from sympathy for the disadvantaged is an obligation of justice.

Those who have a predilection for the merit-concept of justice will not dispute that there is a moral obligation to succour the needy, but they will deny that it is an obligation of justice. It is the duty of charity, they will say, a finer thing than justice but not to be confused with it.

Justice has to do with entitlements or rights. There is no right to charity, as there is a right to what you have earned for yourself. Charity is a matter of grace and favour. By all means, a conscientious person will feel that he has a duty to be charitable; if he thinks of himself merely as doing a favour, he may be tarnishing the sheen of charity as a virtue. But for the recipient it is a favour, not a right. As a duty, charity is a ‘duty of supererogation’,<sup>560</sup> it goes beyond what is absolutely required of us by duties of ‘perfect obligation’, by the demands of justice.

In referring to Rawls's definition of justice as a sort of ethical yardstick hardly propounds a novel concept.

<sup>560</sup> Raphael, D.D. Prof. Op. Cit. Pp. 75.

Aristotle considered in his *Nicomachean Ethics* what it means to be unjust and it is submitted approached that word as a symbol in the Jungian sense of the word.<sup>561</sup> One ends up asking the question whether these are *just problems* or *problems of the just*?

**Alan Xuereb**

September 2006

<sup>561</sup>Thomson, J.A.K., translator of *The Ethics of Aristotle, The Nicomachean Ethics*, Markham, Penguin Books Canada Ltd., (1980), p.172. “the word is considered to describe both one who breaks the law and one who takes advantage of another, i.e. acts unfairly.... just means lawful and fair; and unjust means both unlawful and unfair.”



## *Id-Dritt*

2006

A Publication of the Law Students' Society of the University of Malta

### Articles:

- The Institute of '*Retratto Successorio*' under Maltese Law
- The Removal of Relative Incapacities of Children by Act XVIII of 2004
  - The Law of Succession in Malta – A Reappraisal
  - The Civil Code Amendments of Act XVIII of 2004 –  
Community of Property Arising from Succession
  - A Catholic Perspective on Human Rights
- The Right to a Fair Trial in Civil Cases: (Article 6 Para. 1 of the ECHR)
  - An Address relating to the European Convention on Human Rights
    - '*Lawyers as Policemen*' –  
The Prevention of Money Laundering Regulations
  - Combating Money Laundering and Financing of Terrorism;  
*One for All, All For One*
  - Controversial Amendments to the Maltese Criminal Code
    - The Relationship between Maltese Law and EU Law
- Aspects of Interpretation of Multilingual '*Acquis Communautaire*'
  - The Revision of the Working Time Directive
- The Single Unified Supervisory Authority for Financial Services –  
Some Legal and Regulatory issues in Malta and Beyond
- Governmental Liability, Immunity and Article 6 of the ECHR
  - Some thoughts on the Special Maritime  
Privilege under Maltese law and in a Comparative Context
    - The *Renvoi* Debate
  - The Metaphysical Aspects of Philosophy of Law
    - Lawyer-Client Relations:  
What Goes on and Who's in Charge?
      - *Just Problems?*

### Contributors:

Dr. Alan Xuereb, Dr. Anglu Farrugia, Dr. Anthony Ellul, Ms. Cherie Blair, Dr. David Fabri, Dr. David Zammit, Dr. Frank Chetcuti Dimech, Dr. Ivan Sammut, Dr. Ivan Vella, Mr. Chief Justice Luzius Wildhaber, Dr. Patricia Cassar Torregiani, Dr. Paul Debono, Dr. Peter Agius, Dr. Peter Grech, Dr. Phyllis Farrugia, Mr. Justice Rozakis Christos, Dr. Ruth Farrugia and Dr. Silvio Camilleri.



**MICROCOPY**

Photocopy Bureau & Office Stationery  
Triq L-Imhalled Paolo Debono  
Msida MSD 06, Malta  
Tel:21341383 - Email:microcopy@envol.net

ISBN 99932-0-473-0



9 789993 204732