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Malta's Rule of Law in Crisis: Perspectives from a Captured Member State

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Benedetta Lobina [1]

Abstract

Perhaps owing to its unique legal and political history and its status as the smallest Member State of the European Union, Malta has been largely overlooked in the fast-growing EU rule of law literature, despite suffering from substantial deficiencies characterised by lack of judicial independence, curtailment of free press, high level corruption, as well as the engagement in dubious practices such as the sale of EU citizenship. Furthermore, the Maltese case is peculiar as the government operates through systematic violations of the rule of law in its procedural guise, whereby breaches do not lie in the open repudiation of legislation and checks and balances, but rather in the lack of impartiality in the process of administration of the rules, which in turn are particularly vulnerable to abuse. Despite the lack of overt legislative misdemeanour, this practice undermines the rule of law as well as the fundamental assumption of mutual trust upon which the EU is based. The present paper will critically analyse the erosion of the rule of law in Malta, highlighting how the lack of domestic checks and balances affects sincere cooperation and the EU legal and political order as a whole. It will argue that the lack of impartiality in the judicial system, the attacks on independent media and the promotion of corruption-prone activities, such as the sale of EU citizenship, openly contradict EU values under Article 2 TEU and pervert the system in favour of a government that seeks to preserve its power and remove accountability.

Keywords:
Malta – rule of law crisis – EU law – Article 2 TEU

Introduction

The 2004 enlargement remains one of the most momentous events in the history of the European Union. Having granted accession to ten new member states, it constituted an unprecedented effort to expand and deepen integration, which has not been matched since. Nevertheless, twenty years later, its legacy has become increasingly tainted by mounting divisions, dissent, and the shadow of a growing crisis: rule of law backsliding. Since 2010, Hungary and Poland have distinguished themselves for their systemic annihilation of checks and balances at domestic level and an open rejection of EU law and values. While these egregious cases have received much deserved attention in the literature and from EU institutions, other member states have also come under scrutiny due to their questionable adherence to the rule of law.

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The present paper will focus on the case study of Malta. Perhaps owing to its unique legal and political history and its status as the smallest Member State of the European Union, Malta has been largely overlooked, despite also suffering from substantial rule of law deficiencies characterised by lack of judicial independence, curtailment of free press, high level corruption but also the engagement in dubious practices such as the sale of EU citizenship.

This contribution will critically analyse the erosion of the rule of law in Malta, highlighting how the lack of domestic checks and balances affects sincere cooperation and the EU legal and political order as a whole. It will be argued that the lack of impartiality in the judicial system, the attacks on independent media and the promotion of corruption-prone activities openly contradict EU values under Article 2 TEU and pervert the system in favour of a government that seeks to preserve its power and remove accountability.

Malta's journey towards joining the European Union

Along with eight Central-Eastern European countries, Hungary, Poland, Slovenia, Slovakia, the Czech Republic, Estonia, Latvia, Lithuania and fellow Mediterranean island Cyprus, Malta joined the European Union in 2004. Often characterised as the Eastern Enlargement, the accession campaign of 2004 was heralded as one capable of truly reuniting Europe after the end of the Cold War and the fall of the Communist regimes, and encouraging democratic growth in the region (Levitz and Pop-Eleches 2010, p.457). However, just ten years after accession, studies found that the influence of the EU had become ineffective, as several member states, including Hungary and Romania at the time, and later Poland (Wyrzykowski 2019), were experiencing a process of democratic backsliding and directly challenging the ability of EU institutions to enforce Union values (Sedelmeier 2014, p.4).

In this context, Malta presents itself a significant outlier, as it cannot be grouped with the former Soviet satellite states not only due to geographical distance, but also owing to its very different legal and political history (Sammut 2020, p.325). Malta gained independence from the United Kingdom in 1964 and first applied for membership to the European Community in 1990. Its unicameral Parliament has fostered a two-party system which has allowed nearly all governments since 1996 to hold the absolute majority. The Nationalist Party (Partit Nazzjonalista – PN) and the Labour Party (Partit Laburista – PL) dominate the political landscape, with the latter having held power since 2013. After the first ten years of membership, the overall assessment of Malta's EU experience was a positive one, also distinguishing it from the more troubled cases of fellow Mediterranean member states like Greece or Spain (Harwood 2016; Izzo Clarke 2014).

Nevertheless, Malta's issues regarding its respect for the rule of law have risen to prominence in the wake of the assassination of investigative journalist Daphne Caruana Galizia in 2017, a political murder with alleged links to several sitting members of the then-Prime Minister's cabinet, belonging to the government led by the Partit Laburista (Taub 2020). Though throughout her career Caruana Galizia had exposed the extensive corruption and dubious practices of the Maltese authorities (Callus 2017, p.415), it was her tragic death and the subsequent legal proceedings that sparked scrutiny from international organisations.

As a consequence, in 2019, *The Economist*'s Democracy Index first classified Malta as a "flawed democracy" (Schembri Orland 2021b) and it was flagged as a "significant decliner" and a "country to watch" by the 2020 Corruption Perception Index (Schembri Orland 2021a). But what caused the decline of democracy in Malta and in the European Union?

The State of the Rule of Law in the EU.

The rule of law is one of the founding values of the European Union entrenched under Article 2 TEU, which reads:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The definition of rule of law as pertains to EU law was provided in Regulation 2020/2092, and it includes:

> the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

In order to ensure that shared values are effectively preserved for the benefit of the internal market and the European Union itself, respect for the rule of law constitutes a prerequisite for accession that aspiring member states must satisfy. This requirement is set out in Article 49 TEU, which states that "any European State that respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

The main sources of rights in Malta are its Constitution, which was drafted upon gaining independence in 1964, together with the European Convention Act of 1987, which incorporated the European Convention of Human Rights into the Maltese legal system (Xuereb 2019, p.151). The rule of law is not explicitly mentioned, although respect for it is paramount to ensure the proper and correct functioning of the Constitution (Cremona 1997, p.118).

When Malta expressed its intention to join the European Union with a referendum in 2003, it was subjected to the so-called Copenhagen Criteria for accession. The Copenhagen Criteria are a set of political and economic conditions meant to ensure the viability of prospective member states, including the stability of their democratic institutions and rule of law (Hillion 2014, p.2). The importance placed on these principles is connected to the notions of sincere cooperation, mutual trust and mutual recognition of all member states' judicial systems, upon which the Single Market, the Area of Freedom Security and Justice and the entire integration project as a whole are based (Wolff 2013, p.120). This was underlined in 2014 by then Commission President Barroso, who affirmed that "there is no freedom, and no free trade, if the rules are unclear and their application uncertain or uneven" (Barroso 2014).

The presumption of compliance with the rule of law has allowed for the removal of physical as well as intangible borders between legal systems (Janse 2019, p.346). As found by the European Court of Justice (ECJ) in the *Achmea case,*

> EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law [...]

Therefore, the rule of law plays the fundamental role of being the value that permits the sound balancing of common interests, mutual trust and protection of fundamental rights (Herlin-Karnell 2014). Likewise, in the absence of this equilibrium, mutual recognition systems fail to deliver sufficient protection of rights and uniform standards of justice, tainting the integration process.

When petitioning for EU membership, thanks to its long-standing economic relationship with the Union, and perhaps benefiting from the comparison with the Central Eastern European countries that were going through the same process at the time, Malta was regarded as politically advanced and an overall good candidate (Mut Bosque 2015, p.119).

Nevertheless, in the years following the 2004 accession, the flaws of the Copenhagen Criteria have become apparent. Former Commission Vice-President Vivien Reding described this phenomenon as the "Copenhagen Dilemma," a paradox whereby prospective member states can be monitored and denied access based on their respect of the rule of law under Article 49(1) TEU, while no such scrutiny is available once accession is granted (Reding 2013). As a result, there are several member states which, were they to apply for EU membership today, would not satisfy the Copenhagen Criteria for accession. Operating under the presumption that in ordinary circumstances member states are complying with EU values under Article 2 TEU, monitoring of actual respect for values and its enforcement has not been provided for at Union level (Bonelli 2017, p.179).

This pitfall has proven especially detrimental in regards to Hungary and Poland, whose governments have engaged in a process of deliberate democratic backsliding and autocratisation since 2010 and 2015 respectively. The EU's inability to effectively deal with such robust attacks to its values and principles has shown the limits of trusting integration as an infallible recipe to promote and maintain democracy and the rule of law within the member states (Atanasova and Rasnača 2022). At the same time, such egregious cases, so concerning as to warrant the activation of the "nuclear option" under Article 7(1) TEU (see Pech and Jaraczewski 2023; Fleck, Chronowski and Bárd 2022), have overshadowed other member states' less advanced but perhaps more sophisticated and equally dangerous gradual erosion of checks and balances. The following analysis will focus on the case of Malta, comparing and contrasting the actions of the ruling Labour Party with the Hungarian-Polish playbook and unveiling a different pattern of rule of law crisis.

The Many Faces of Rule of Law Crises

The term "rule of law crisis" in the context of the EU entered the academic discourse in the last decade, and it refers to the general attack to the founding values encapsulated in Article 2 TEU (Raube and Costa Reis 2021, p.631). In particular, the unparalleled assault on democracy and

shared values which has taken place in Hungary and Poland has been described by Pech and Scheppele as "rule of law backsliding." They defined this phenomenon as

> the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party (Pech and Scheppele 2017, p.10).

For backsliding governments, non-compliance with EU law and values has become an open ideological choice (Scheppele, Kochenov and Grabowska-Moroz 2020, p.6), embracing the system which Scheppele (2018) labelled as "autocratic legalism." The governments' use of ambiguous, rather than outright authoritarian measures has effectively replaced the rule of law with law and order (Kürti 2022, p.73) which grants the administrative sphere undue power over the juridical one (Cheesman 2014, p.108). Yet, although highly manipulated, democratic processes have been retained to maintain the appearance of legitimacy, which has been instrumental in preserving the benefits that come with EU membership (Dixon 2019, p.462).

While these features can be generally found in all cases, there are also some significant differences amongst them, especially in the way the deliberate capture of power is executed by each government. Hungary's government, led by Viktor Orbán and the Fidesz party, was able to radically and systemically entrench its power by drafting a new constitution, which was made possible by the large legislative majority held by the leading party, amounting to a "legal power grab" (Neuwahl and Kovacs 2021, p.18). In Poland, the threshold for constitutional amendments has not been as easily reached by the PiS party when in government, which nonetheless enacted its illiberal agenda in breach of not only EU law, but also of the Polish Constitution itself (Wyrzykowski 2019, p.417).

In the case of Malta, rather than systemic overhauls or unconstitutional reforms, what we witness is systematic violations of the rule of law in its procedural guise, whereby breaches do not lie in an open repudiation of legislation, but rather in the lack of impartiality in the process of administration of the rules, which in turn are particularly vulnerable to abuse (see Gkouvas and Mindus 2020, p.280). The rule of law is largely taken for granted, with the same institutions which are tasked with upholding it actively breaching it by exercising their powers unchecked (see Aquilina 2017a).

This phenomenon is in line with findings about microstates and the quality of their democracy. As scholars Erk and Veenendaal (2014) argued, it is a common occurrence for smaller jurisdictions to present a façade of formally compliant democratic mechanisms, while hiding a thick network of informal societal ties, which often eludes international watchdogs, and deeply affects checks and balances. Despite the lack of overt legislative misdemeanour, this practice deserves equal attention and prompt intervention, as it undermines the rule of law as well as the fundamental assumption of mutual trust, upon which the EU operates.

This informal governmental power-grab is manifest in three main areas which are paramount to the survival of checks and balances and meaningful respect for the rule of law: judicial independence, media freedom and the fight against high-level corruption. By taking advantage of an abuse-prone system free from supranational oversight, the state, under the government of the Partit Laburista, has been found to have fostered a "culture of impunity" according to the public

inquiry conducted into the death of Daphne Caruana Galizia, "leading to a collapse of the rule of law" (Mallia 2021). The following sections will provide a critical analysis of the Maltese government's failure to protect checks and balances through the restriction of judicial independence, freedom of expression and the proliferation of corruption, highlighting how it affects Malta's compliance with EU law and values, as well as the wider implications *vis-à-vis* the system of integration as a whole.

4.1 Judicial independence in Peril

The independence of the judiciary is one of the paramount features of the rule of law and of a functioning democracy, as it provides checks and balances for the executive and legislative powers, it preserves the rights of all subjects of the law and the fairness of law enforcement, and it creates safeguards against corruption and abuse of power (Zoll and Wortham 2019, p.876).

In particular, judicial independence is essential for the EU as a *sui generis legal system. As recently reaffirmed by the European Court of Justice in the Land Hessen case,*

> [T]he independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects. It is informed, first, by the principle of the rule of law, which is one of the values on which, under Article 2 TEU, the Union is founded and which are common to the Member States, and by Article 19 TEU, which gives concrete expression to that value and entrusts shared responsibility for ensuring judicial review within the EU legal order to national courts or tribunals. Second, that independence is a necessary condition if individuals are to be guaranteed, within the scope of EU law, the fundamental right to an independent and impartial tribunal laid down in Article 47 of the Charter, which is of cardinal importance as a guarantee of the protection of all the rights that individuals derive from EU law. Last, that independence is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law, which satisfies, inter alia, that criterion of independence.

Furthermore, enforcement of EU law relies on national institutions, including the judiciary, especially when it comes to applying the jurisprudence of the ECJ, giving effect to the rights derived from it (Kochenov and van Wolferen 2018, p.12). National judges are "essential brokers" of the EU's governance capacity, as the authority of domestic courts is critical for the EU to govern its transnational market spanning 27 States and over half a billion citizens (Pavone and Kelemen, 2019, p. 353). Judicial independence is also an essential prerogative for the functioning of the judicial cooperation system, which is contingent on the satisfaction of such criterion by the national court or tribunal (Case C-274/14 *Santander*, para 56).

Case law of the ECJ has been instrumental in defining the features of an independent justice system, which include the protection from external pressure or interference, such as the threat of removal from office (Case C-506/04 *Wilson*, para 51) or the lack of an adequate level of remuneration (Case C-64/16, *Portuguese Judges*, para 45). Furthermore, internal absence of bias and objectivity are also paramount to ensure that judges strictly apply the rule of law free of any interest in the outcome of the judicial process (*Wilson*, para 52).

However, with the global rise of populism which has taken place in the last decade, a trend of governments actively discrediting, weakening or capturing the judiciary has been observed in various member states, most notably Hungary and Poland, but also in lesser-known cases, such as Malta (Jonski and Rogowski 2020, p.2). What makes this case study remarkable is that Malta diverges from the more egregious ones of Hungary and Poland in one central aspect: the absence of clear backsliding through reform of the legal system. Instead, arguably the Maltese system in which appointment, promotion and salary have been controlled by the executive, has been fundamentally flawed since before its accession to the EU (Cachia and DeBattista 2018). Rather than operating through "illiberal reforms," the government systematically takes advantage of vulnerability in pre-existing and apparently sound legislation, abusing its administrative powers to control judicial appointments (Borg-Barthet 2019).

In 2018, the Venice Commission, the rule of law authority of the Council of Europe, expressed serious concerns specifically regarding judicial appointments in the State, strongly criticising the lack of transparency in the process as well as the excessive involvement of the Prime Minister and political actors in general (Venice Commission 2018). The executive was in fact responsible for the selection of judges, magistrates, the Attorney General and the Police Commissioner (Stanton 2022, p.13). Indeed, the discretion afforded by such a system to the PM and his cabinet has resulted in a silent capture of power, though entirely in line with national constitutional law.

By not binding the decision makers to a standard of meritocracy or professional peer review, the system has fostered favouritism, discrimination in treatment, nepotism, and ultimately mediocrity (Aquilina 2017b, p.42). A glaring example of this is embodied by the magistrate first selected to preside over the Caruana Galizia murder case. She was a recent appointee chosen by then PM Joseph Muscat, who also happened to be related to a high-profile Maltese lawyer whose clients included several politicians, not least the Prime Minister himself, some of whom have appeared in relevant murder and money laundering investigations (Borg-Barthet 2019).

The public inquiry announced by the government after years of pressure from the family of the victim was initially highly criticised by the Council of Europe's Committee on Legal Affairs and Human Rights, citing the lack of transparency, possible delays and the appointment of three members of the Board of Inquiry by the Prime Minister, the latter being especially concerning due to the possible conflict of interests with their professional careers which may hinder their impartiality (PACE 2019). Moreover, NGOs condemned the current Prime Minister Robert Abela and other public officials' attempts to end the inquiry and otherwise undermine its autonomy (Daphne Caruana Galizia Foundation 2020).

However, the inquiry was able to run its course successfully, thanks in large part to international pressure and scrutiny which forced the Maltese government's compliance. In its conclusions, published in July 2021, the inquiry revealed that the State shared responsibility in the murder due to having created a culture of impunity spreading across regulatory and prosecutorial bodies, as well as a poor environment for freedom of expression, leading to a collapse in the rule of law (Scicluna 2021).

Even though the current government has engaged with the Venice Commission and since 2020 has embarked in a process of reforms that has been deemed a satisfactory step forward, as it would see the President take over the discretionary role of the Prime Minister in judicial appointment procedures (Venice Commission 2020), a large part of the damage is done. Since 2013, the majority of appointed judges had political connections, including the six positions filled immediately after

proceedings were brought before the Civil Court by NGO Repubblika arguing that the system is in breach of EU law (Borg-Barthet 2019), which merited a reference to the ECJ (see Case C-896/19 *Repubblika*, 2021). Even considering the effect of the reform, such packing of the court system will have a lasting impact, as former ECtHR judge Bonello argued, because the function of most judges and magistrates appointed so far is that of signing off on abuses of power (Muscat 2019, p.46).

Moreover, while the reform positively minimised the role of the Prime Minister, in turn it actively politicised the appointment of the Chief Justice, making it entirely dependent on a two-thirds parliamentary majority, once again failing to distance the State from potentially corruptible practices that public officials may benefit from, and testing whether monitoring bodies and institutions will be persuaded by superficial improvements (Saeed 2021). In its 2022 Annual Rule of Law Report, the European Commission further highlighted the inadequacy of the new appointment system, due to it being effectively disjointed from the judiciary itself.

Other practices, such as the quick and constant turn-over of some top positions amongst judicial and prosecutorial bodies, the lack of clear meritocratic parameters in the evaluation and selection of candidates and the shroud of secrecy that surrounds appointments, contribute to perpetuate the dominance of the executive over the apparatus of the state (Stanton 2022, p.15). Overwhelming governmental control is thus used as a tool to weaken the other branches and curtail their independence. But the government's undue interference is not limited to its influence on the judiciary; the following sections will further discuss how the restriction of media freedom and independent prosecutorial bodies complete the illiberal playbook of the Maltese government.

4.2 Media Freedom: Between Polarization and Intimidation

Freedom of expression, embodied in the work of the press, academic institutions and civil society activism, constitutes a paramount feature of a functioning rule of law system, as well as being a fundamental human right which ought to be upheld in all EU member states and are enshrined in Articles 11, 12 and 14 of the EU Charter of Fundamental Rights, among other freedoms. Transparency is a necessary feature to prevent the exercise of power without restrictions, and open dissemination and access to public information creates accountability between State and citizens, providing sound checks and balances (Peterfalvi and Revesz 2017, p.293).

However, despite Europe being the safest continent for the profession, journalists have been facing an increasingly hostile environment across nearly all EU member states, and several have been killed in the past few years in direct relation to their investigative work on governmental corruption (Selva 2020). The assassination of Daphne Caruana Galizia, as previously discussed, constitutes one of the most notable examples across Europe in recent years, sparking deeper discussion about the relationship between media freedom and the rule of law, as well as Malta's own deficiencies on the matter.

Historically, in Malta, mass media have always been closely tied to the two main political factions, the Labour Party and the Nationalist Party, with party leaders often directly involved in both ownership and publication of the most influential outlets (Cachia and DeBattista 2018, p.13). While this cannot be described as a recent backsliding, the rule of law is nevertheless significantly hindered by factors entrenched in the system. As the European Commission found in its 2022 Rule of Law Report, the entirely political appointment of the Broadcasting Authority members, the lack of a regulatory framework for state advertising, the lack of effective safeguards

for editorial independence and the difficulty in accessing information held by public authorities are all problematic features that ought to be corrected (European Commission 2022).

Despite the constitutional requirement for impartial public and commercial broadcasting, the Broadcasting Authority was found to have failed to enforce such standards, especially in times of political campaigns, including the latest parliamentary elections in 2022 (OSCE 2022, p.16). In particular, it was reported that the ownership of media outlets, above all the two principal commercial TV channels, by the two main political parties, interfered with editorial autonomy and resulted in a distinct lack of pluralistic information on offer (OSCE 2022, p.15). Additionally, the news and current affairs coverage on the Public Broadcasting Services (PBS), the main public channel, was found to favour the ruling party, both in terms of time and tone, with reports of political interference over the choice of topics to cover (OSCE 2022, p.16). Such lack of oversight and meaningful checks and balance can have dire effects on the quality of democracy, and sets up the conditions for potential abuse, as well as falling short of established international standards, according to the OSCE investigation.

Another common tactic used by the Maltese government in an attempt to supress scrutiny involves the use of defamation law to target journalists, which results in press censorship, sometimes self-imposed out of fear of civil and criminal charges, and as a consequence has a chilling effect on freedom of speech, public engagement and the rule of law (Moran 2018, p.600). These legal actions fall under the category of strategic lawsuit against public participation (SLAPP), and they are an effective tool in the hands of corrupt elites (Pring and Canan 1996). SLAPP lawsuits are intended to wrongfully deter freedom of speech on public matters and thus have a crippling effect on fundamental rights (Kraski 2017, p.949). The threat of costly litigation often brought in a foreign jurisdiction, is enough to force news outlets, especially independent ones, to remove content of public interest (Borg-Barthet 2020, pp.5-6).

This type of abusive litigation caught widespread attention in 2017, when journalist Daphne Caruana Galizia was murdered in connection to investigations on the practices of money laundering, sale of EU citizenship and overall governmental corruption (in 't Veld 2019). The assassination was the final solution after years of death threats, libel suits and intimidation, and it was immediately followed by SLAPP lawsuits addressed at media outlets that reported news about her work on the Panama Papers and Pilatus Bank (Nenadic 2017, p.4). This practice highlights the systematic nature of actions aimed at curtailing the flow of information, which is still ongoing today (Vassallo 2017, p.10).

Despite the recommendations of the Public Inquiry and the scrutiny of international bodies and civil society (Article 19 2022, p.42), the promise of the adoption of anti-SLAPP measures remains unfulfilled. The threat of costly legal action from mostly UK-based firms persists, journalists and bloggers remain targets of intimidation tactics such as the confiscation of personal belongings or wrongful detention (European Commission 2022), and the safety of journalists continues to be eroded rather than increased.

A new bill introduced in 2022 with the aim of criminalising cyberbullying and cyberstalking, for example, raised concerns for its potential use to stifle freedom of information, in so far as an individual accused of cyber harassment would not be able to argue that they were engaging in discussion of public affairs as their defence (Times of Malta, 2022). Such wording would effectively reintroduce criminal libel under a different guise, while hidden under a shroud of good intentions (Diacono 2022). Moreover, this is an example of a larger phenomenon whereby the ruling elite

seeks to expand its power competencies, in this case by restricting the freedom of media, under the pretext of defending other prerogatives of the state, traditionally the protection of morals (Skrzypek 2022, p.208) or in this case the safeguarding of children activities online.

While negotiations on a new Maltese media law based on the 28 recommendations of the public inquiry have been halted to make way for wider consultations and the publication of a white paper after concerns over numerous deficiencies in the original proposals (De Gaetano 2023), the European media law landscape is undergoing great changes. The new anti-SLAPP directive, nicknamed "Daphne's Law" (ECPMF 2024), and the European Media Freedom Act will demand implementation of stricter rules on area such as the use of spyware to monitor journalists, public media administration and the non-discriminatory and transparent allocation of state advertising, in which Malta's track record has been concerningly poor (Taylor 2023). However, doubts over Malta's ability to comply with EU standards (European Parliament 2023) loom large over the effectiveness of such provisions in guaranteeing journalists their much needed protection.

Overall, Malta's media freedom continues to fall short of European standards, both in regard to a lack of independence and meaningful pluralism, and in the treatment of journalists. When the government imposes disproportionate penalties or restrictions to ideas and information, the result is a vicious cycle of self-censorship and the removal of checks and balances (Moran, 2018, p. 622).

4.3 Corruption, clientelism and cronyism

Respect for the rule of law is not limited to affording rights and benefits directly to citizens, it is also a crucial condition for the sound implementation of investments and business, both public and private (European Commission 2017, p.22). The presence of endemic corruption has a twofold effect on the rule of law, especially in the *sui generis* multi-level system that is the EU; first, member states are relied upon to enforce EU rules at domestic level, and their failed implementation compromises the effectiveness of EU law. Secondly, it endangers the Single Market, as the assumption of lawfulness of all goods and services that are circulated Union-wide is no longer valid (Peirone 2019, p.67). This dichotomy is especially relevant in the case of Malta, where the inadequacy of anti-corruption mechanisms has also fostered the emergence of problematic practices that directly exploit and affect the EU legal system, such as the sale of so-called "golden passports."

The first issue relates to the lack of institutional arrangements to contrast corruption, including the lack of independence of the prosecutor office, which have been at the centre of extensive investigations conducted by the Parliamentary Assembly of the Council of Europe (PACE, 2019, para 33), the Venice Commission (2018, para 143) and the CoE's Group of States against Corruption (GRECO, 2019, para 53-55). Though the government, in 2019, adopted a bill aimed at improving the separation of powers by creating the new office of the State Advocate, transferring over some responsibilities previously covered by the Attorney general, this attempt at implementing recommendations from supranational bodies has been criticised as conceptually flawed and a means to dissuade from further scrutiny (Aquilina 2019), and has not made sufficient progress in the prosecution of corruption, organised crime activities and threats against journalists (European Parliament 2021, para 6-8).

The emergence of the Panama Papers and the investigative work of Daphne Caruana Galizia on the matter have contributed to exposing the high-level corruption of politicians, the

ineffectiveness of anti money laundering measures and the collusion of business and political actors (Cachia and DeBattista 2018, p.16). Indeed, in the last 15 years Malta has emerged as a hub of international organised crime and extra-legal economies, thanks to three factors: its unique historical-geographical features; the prevalence of informality in its political order; and the position of Malta as an often overlooked EU member state, making it the perfect access point to the entire Union (Raineri 2019, p.12).

The politicisation of law enforcement and judicial bodies is the first step to allow for further abuses of power and clientelism in other areas. For example, the Maltese government has been able to use its de jure independent environment and planning authority to enable undue profit from public land resources (Caruana-Galizia and Caruana-Galizia 2018, p.420). But most importantly, it has resulted in systematic delays in the prosecution of high-level corruption and money laundering cases. As noted by the Commission in its Annual Rule of Law Report in 2020 (p.10), the final outcome of justice is severely hampered by the length of proceedings, which are not helped by the lack of resources allocated to the recently overhauled Permanent Commission against Corruption.

Another critical aspect is constituted by the relationship between the practices of clientelism and corruption. Due to the tightness of a small nation's society such as that of Malta (Veenendaal 2019, p.1041), informal patron-client networks are a valuable tool for elected officials to maintain their power by forming a sort of oligarchy (Klíma 2019, p.2). These domestic developments have far-reaching albeit often neglected effects on the EU and its Single Market. The first consequence is the tarnishing of competition law enforcement in favour of an accumulation of political and economic power by the elites, which undermines EU competition law in the process (Cseres 2019, p.84). Without respect for the rule of law, which guarantees that competition rules are specific and their enforcement is fair and predictable, the internal market is distorted, betraying mutual trust (Bernatt 2019, pp.348-349).

Moreover, as noted by Kelemen, the phenomenon defined as "authoritarian equilibrium" sees autocrats exploit their position as the distributors of EU funds in their own favour (Kelemen 2020, p.483). Additionally, EU membership continues to provide perks such as easy access to Foreign Direct Investment, despite the backsliding of values and legality (Kelemen 2020, p.483). Defying checks that would otherwise apply to non-member states allows access to resources that fuel autocrats in a vicious cycle, with the Commission finding itself dependent on the support of national prosecution and judicial authorities to protect the Union's financial interests, and thus failing (Piskorz 2020, p.53).

Along with the misappropriation of funds for illegitimate activities, high-level corruption also affects the rule of law in the Union by distributing irregular goods and services through the internal market with the assumption of compliance. Malta is one of the member states which has chosen to rely on providing secretive financial services to wealthy corporations or individuals for their economic well-being, assisting in procedures such as money laundering and tax evasion or avoidance (Dillon 2020, p.115). One major scandal involved Pilatus Bank, whose connections with the Maltese political class was at the centre of Daphne Caruana Galizia's investigations before she was assassinated (Demetriades and Vassileva 2020, p.25). The bank was in fact the vehicle for moving millions of euros of questionable origin through companies owned by the Azerbaijani ruling elite all across Europe (Meers 2018), and was eventually shut down after the European Banking Authority found it in non-compliance with anti-money laundering and countering

terrorism financing requirements and the European Central Bank revoked its banking licence in 2018 (Basaran-Brooks 2021, p.206).

The lack of supervision from the Maltese authorities was deemed responsible for allowing illegal practices, with the country being grey listed by the Financial Action Task Force, a global money laundering and terrorist financing watchdog, in 2021 due to being considered an "untrustworthy jurisdiction" (Scicluna 2021), the first of its kind in the EU. At the same time, the Council of Europe's anti-money laundering monitor Moneyval also flagged Malta's inadequacy, though swift government intervention on the matter was able to satisfy both bodies and preserve the country's booming financial sector with no permanent harm (Fenech 2022, p.267).

Another highly problematic practice in Malta is the sale of "citizenship by investment" (CBI) (Garnier 2020, p.16). Although a growing body of literature is emerging in defence of the potential of such programmes in the context of an increasingly integrated world (Kochenov 2020), the operational system employed by the Maltese government raises serious questions of legitimacy (Ammann 2020, p.326). Amongst others, concerns include the devaluation of democracy if the arrangement is not supported by the majority of voters (van Fossen 2018, p.294), but also the involvement of a private foreign company in managing the scheme, its lack of transparency, and inadequate screening of candidates who will then unconditionally access the EU market as citizens (Case C-369/90 *Micheletti* 1992, para. 15).

For example, as early as 2018 it transpired that several Russian citizens who belonged to the "Kremlin list," a group of businessmen with close ties to Russia President Putin and thus suspected of earning their wealth through corruption, had obtained Maltese citizenship through the scheme (Brillaud and Martini 2018, p.31). The security risk posed by CBI has become even more evident in light of Russia's invasion of Ukraine, and while all other EU member states have since terminated their golden passport schemes, Malta continues to run the programme (Mantha-Hollands and Dzankic 2022, p.11).

Even though citizenship is a competence of the member states, citizenship by investment in Malta has been condemned by both the Commission (European Commission 2019, p.3) and the Parliament (European Parliament 2014; European Parliament 2020), sparking the initiation of legal proceedings before the ECJ, for two connected reasons; the first one regards the possible side-effects, including undermining shared values, mutual trust and the concept of EU citizenship (Weingerl and Tratnik 2019, p.121).

The second involves the presence of significant shortcomings in preventing corruption, money-laundering and tax evasion directly linked to the sale of citizenship (p. 120). Nevertheless, the sale of golden passports still thrives and the Maltese government continues to seek ways to prevent public scrutiny. For instance, a rule of "absolute discretion" that prevents the names of the buyers to be made available to the public was introduced by the Home Affairs Minister. The rule was revoked after causing controversy, but the new system set in its place equally fails to achieve full transparency by only providing a list of new citizens, without any distinction between citizenship acquired through traditional means and passports obtained through investment schemes (Delia 2020).

In conclusion, institutionalised corruption in Malta has become an issue of international relevance. The type of party state capture developed here uses corruption to entrench the leading parties' influence and power over judicial and prosecutorial bodies, national media and the economy (Sata and Karolewski 2020, p.221). Moreover, the presence of systemic corruption,

together with control of the judiciary and repression of free media, creates a situation that can no longer be addressed domestically, therefore requiring the intervention of the EU for the protection of its own values (Closa, Kochenov and Weiler 2014, p.23).

Conclusion

Twenty years since Malta's accession to the European Union, the pitfalls of a then promising new member have been exposed. After enjoying over a decade of economic progress by reaping the benefits of membership and little supranational scrutiny, Malta's rule of law deficiencies have received international attention in light of the politically motivated murder of Daphne Caruana Galizia in 2017. Operating through the abuse of weak administrative procedures rather than legislative overhaul, the ruling Labour Party has successfully entrenched its power over the past decade.

By packing the courts, curtailing media freedom and creating a fertile environment for corruption and clientelism, the basic conditions for meaningful respect of the rule of law are not satisfied. On top of that, Malta effectively fails to meet its obligations under EU law, not only by breaching fundamental values under Article 2 TEU, but also by tainting mutual trust and promoting highly problematic practices such as the sale of EU citizenship. Though the recent wave of international attention has forced the government to address some of the more blatant issues, problems at the foundation, such as the highly politicised nature of the judicial appointment system, the lack of pluralism in the media and the inability to prosecute high-level corruption cases, remain unaddressed.

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