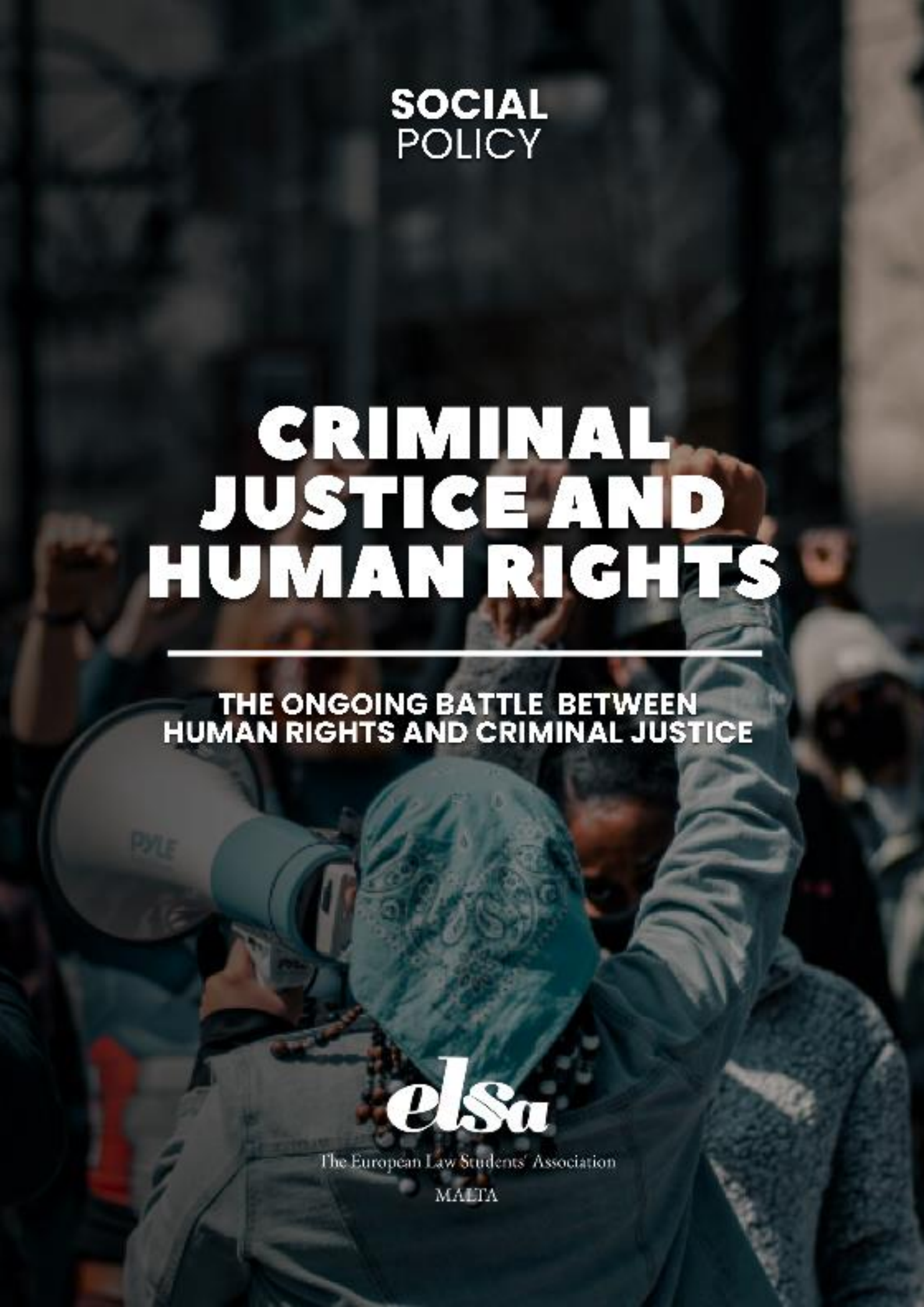

SOCIAL
POLICY

CRIMINAL JUSTICE AND HUMAN RIGHTS

THE ONGOING BATTLE BETWEEN HUMAN RIGHTS AND CRIMINAL JUSTICE

elsa
The European Law Students' Association
MALTA

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The ELSA Malta National Board's vision is to create a world where the student is able to thrive on both an academic level as well as a social one. From publishing academic materials to hosting events and competitions, the student is at the forefront of the mission of ELSA.

Foreword

In a world where the principles of justice and the protection of human rights are often tested, the intersection of criminal justice and human rights represents a critical area for discussion. It is with great honour and enthusiasm that I write this foreword for ELSA Malta's first Social Policy Paper for the 2024/25 term – authored by a group of dedicated law students under the auspices of said law student organisation – and coordinated by a spectacular colleague and an equally spectacular friend, Beppe Gauci.

This publication embodies the curiosity, critical thinking, and passion of the next generation of legal professionals. By inspecting the byzantine tapestry woven by the meticulous relationship between criminal justice systems and human rights, the writers of this Policy Paper have tackled one of the most pressing issues of our time: how to ensure that justice is served without compromising the inherent rights and dignity of the individual. Thus, their commendable work delves into the challenges faced by modern criminal justice systems, including the delicate balance between public safety and individual freedoms, as well as the ongoing evolution of legal frameworks to uphold fundamental human rights.

What makes this paper particularly noteworthy is the diversity of perspectives it offers, which also reflects the international ethos of ELSA. The analysis is enriched by the global context within which ELSA operates, allowing the authors to draw on comparative insights and consider varying approaches to criminal justice and human rights across jurisdictions.

This publication also stands as a testament to the power of collaboration and education. It demonstrates how law students, armed with a commitment to justice and equity, can contribute meaningfully to the global discourse on issues that affect millions. Their work serves as both an academic contribution and a call to action for policymakers, practitioners, and fellow students to continue striving for a criminal justice system that respects and protects the rights of all.

Once more, I proudly commend both Beppe Gauci and the authors of this paper for their diligent efforts and thought-provoking contributions. I am confident that this publication will inspire not only its readers but also future generations of legal professionals to engage deeply with the critical issues it explores.

Alec Carter

President of ELSA Malta

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Preamble

By Beppe Gauci

Within the societies built today lies the safety net of criminal justice, being the foundation of order and democracy. In layman's terms, those who commit crimes must face the consequences of their acts, and those who are innocent go free. However, through all this, there exists an extremely fine-line between criminal justice and human rights, and as aspiring legal professionals, it is our duty to analyze how truly fine this line is.

Criminal justice is somewhat of a double-edged sword; its imposition is necessary to protect society and the human rights of all. However, criminal justice, in being a double-edged sword, has the potential to breach these pivotal rights. That is what this paper is about: those instances where criminal justice goes beyond the realm of what is required and clashes with the human right through defilement of vital protections of the accused and the victim, be it through bureaucracy or shortcomings of the state.

For understanding, the paper is split into subheadings, each dealing with a separate human right in relation to criminal justice.

To label this paper as a purely judgmental outlook on the system today is incorrect. This paper will seek to find the root of the problem and not only comment on it but also define tangible solutions. This is in line with ELSA Malta's vision in creating a ***"just world in which there is respect for human dignity and cultural diversity."*** How can one create this said ***"just world"*** without making reference to its shortcomings?

This paper shall not serve only as a solution but as a beacon of hope, an image for the future. It symbolizes that there is potential in our futures, the lawyers of tomorrow, creating a document in which they provide tailor-made solutions to combat injustices that spawn in criminal justice. ELSA Malta is committed to this and this paper reflects our vision.

Some Constitutional and Conventional Perspectives on Bail

By Daniel Soler

A General Introduction

Most law students have heard about the legal concept of bail. Such concept is barely discussed in the first two years of the law course, and for those students who don't frequent the courts of criminal or constitutional jurisdiction, the intricacies of the institute of bail remain unclear up until fifth year wherein they critically dissect and delve into this institute. Between the moment they heard the word 'bail' and the moment of thoroughly studying it for their fifth year examinations, certain questing keep lingering and running through the corridors of their minds, such as, what exactly is bail? Is it an absolute right, or are there restrictions? Is it the rule or the exception? Which rights and interests shall be balanced within the context of bail? It is well to ask these questions while dissecting the institute of bail, and the only way to obtain answers is to first grasp the basic and fundamental principles which govern this complex institute.

While the scope of bail is to prevent unlawful and/or unnecessary detention of presumed innocent persons, its implementation is far from straightforward. This complexity can be seen by taking a glance at Title IV "Of Bail" within Chapter 9 of the Laws of Malta (Criminal Code), especially when analysing the conditions, requirements and intricacies under Section 575[1]. Section 575(1) discusses the crimes in respect of which bail is not granted. As a result, it is a crucial and consequential section within our Criminal Code, and the question of granting or not granting bail within such context is a decision which judges and magistrates must courageously take regularly. Section 575 is one of three important legal provisions which I cannot but mention for the purposes of this policy paper, the other two being:

- Section 5 (First Schedule) of Chapter 319 of the Laws of Malta, the European Convention Act; and

[1] Chapter 9 of the Laws of Malta, Section 575

- Section 34 of the Constitution of Malta

Prior to delving into the link between the above-mentioned laws, I shall delve into more detail regarding the actual definition of bail and the fundamental principles which govern it.

Defining Bail

Unlike other areas of law wherein legal definitions have not been clear-cut, there is consensus among jurists and legal writers with regards to the definition of bail. In fact, various court judgments (both local and continental) equally define the concept of bail, albeit wording it differently. In simple terms, the institute of bail is a process by means of which a person awaiting trial is temporarily released from custody. Authors such as Samuel Clarke consider bail as being a legal mechanism – "*bail serves as a legal mechanism to release defendants before trial while ensuring their court appearance*"[2]. Another definition I came across was that postulated by Joseph Giglio who claims that "*bail may be broadly defined as that institute, whereby a person who has been so arrested is released from custody upon giving sufficient security that he will attend in court when required to do so in connection with the criminal proceedings in respect of which he has been granted bail"*.[3]

The Complexities Arising From The Inherent Nature Of The Institute Of Bail

The major complexity arising out of the inherent nature of bail is the need to balance conflicting rights of the accused or suspected person on the one hand, and interests of the alleged victim/s, the State and the public on the other hand. Consequently, the decision whether or not to grant bail is repeatedly shrouded with the need of balancing such conflicting rights and interests.

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[2] S. Clarke, J. L. Freeman, G. Koch, 'Bail Risk: A Multivariate Analysis' (The Journal of Legal Studies, 1976)

[3] Joseph Giglio (1993). Recent Developments in the Granting of Bail under Maltese and Foreign Law (A thesis submitted for the Degree of Doctor of Laws). https://www.um.edu.mt/library/oar/bitstream/123456789/61143/1/Giglio_Joseph_RECENT%20DEVELOPMENTS%20IN%20THE%20GRANTING%20OF%20BAIL%20UNDER%20MALTESE%20AND%20FOREIGN%20LAW.pdf

The institute of bail needs to embrace the principle of the presumption of innocence which our Criminal Code bestows on an accused or a suspect. This presumption emanates from due process guarantees which are duly safeguarded by the European Convention on Human Rights and the Constitution of Malta[4]. In this regard, one must look at Section 6(2) of the European Convention on Human Rights and Section 39(5) of the Maltese Constitution.

Section 6(2) of the European Convention on Human Rights asserts that – "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*"[5].

Section 39(5) of our Constitution provides a similar provision, stipulating that – "*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty*"[6].

The above-mentioned provisions portray the importance of the principle of the presumption of innocence, in that such principle is being equated to a fundamental human right within the context of a fair trial.

Since the fundamental principle of the presumption of innocence seems to be so potent, one might rightly ask – if an individual cannot be considered guilty before charges are proved against him beyond a reasonable doubt, then how can it be sensible to detain such individual pending trial?

If one were to think of the presumption of innocence as overriding, one may conclude that the use of preventive detention is erroneous. As a result, one may think that a person must be granted bail upon promising and assuring the Court that such person will appear in Court after being instructed to do so. If we are to adopt this line of reasoning, we could claim that any other approach would be inconsistent with the notion that an accused is presumed innocent[7].

However, from jurisprudence and the law itself, we know that this is not the line of reasoning one ought to take. This is because the rationale behind the concept of bail is also shrouded by other, equally important interests, namely the interests of the State to ensure that the judicial process is not stultified and the interests of

[4] https://gtg.com.mt/the-institute-of-bail-in-malta/ (GTG Advocates)
[5] Chapter 319 of the Laws of Malta, Section 6(2)
[6] The Constitution of Malta, Section 39(5)
[7] Joseph Giglio (1993). Recent Developments in the Granting of Bail under Maltese and Foreign Law (A thesis submitted for the Degree of Doctor of Laws).
https://www.um.edu.mt/library/oar/bitstream/123456789/61143/1/Giglio_Joseph_RECENT%20DEVELOPMENTS%20IN%20THE%20GRANTING%20OF%20BAIL%20UNDER%20MALTESE%20AND%20FOREIGN%20LAW.pdf

the community as a whole,[8] not to mention the rights of victims to have their day in Court. This is precisely why our legislators have set forth principles whereby an attempt is made to strike a balance between the aforementioned conflicting rights and interests.

Is the Granting of Bail an Absolute Right, or are there Restrictions?

The granting of bail is **not an absolute right** and hence, can be restricted. Essentially, such limitation is the lawful arrest or detention of a person based on a **reasonable suspicion** of having committed the offence[9].

Is pretrial detention the rule or the exception?

In '*Edwin Bartolo u Alfred Desira vs Agent Registratur tal-Qrati nomine'* it was stated that "*Bħala prinċipju l-liberta' tal-persuna hija r-regola, u l-arrest għandu jitqies bħala l-eċċezzjoni*"[10]. Hence, when a person is in custody, by virtue of the right to their personal liberty, the institute of bail is available to grant provisional personal liberty until the Court makes its final determination[11]. Given that an arrest is the exception to the rule, the prosecution shall justify why the applicant should not be granted bail[12]. Since freedom is the rule it is up to the prosecution to prove that a person charged does not deserve bail, or cannot be trusted if he is granted freedom. The *onus probandi* vests on the prosecution.

The Relevant Legal Provisions Relating To Bail

One must note that bail can be granted for a variety of crimes and not only for the more serious crimes which are mentioned under Section 575(1) of our Criminal Code[13]. Albeit this equal possibility of requesting bail for differing crimes, crimes against the safety of the government and crimes liable to the punishment of life imprisonment require a stricter degree of consideration for bail *ex lege*[14].

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[8] Ibid

[9] https://gtg.com.mt/the-institute-of-bail-in-malta/ (GTG Advocates)

[10] 'Edwin Bartolo u Alfred Desira vs Agent Registratur tal-Qrati in rappresentanza tal-Qorti Kriminali tal-Magistrati Ta' Malta, Presjeduta Mill-Magistrat Dr. Joseph Apap Bologna; u l-Kummissarju tal-Pulizija', First Hall of the Civil Court, 1989.

[11] https://gtg.com.mt/the-institute-of-bail-in-malta/ (GTG Advocates)

[12] Ibid

[13] Chapter 9 of the Laws of Malta, Section 575(1)

[14] https://gtg.com.mt/the-institute-of-bail-in-malta/ (GTG Advocates)

As stated, apart from Section 575, it is crucial to consider Section 5 (First Schedule) of the European Convention Act and Section 34 of the Constitution. Section 5 and Section 34 are similar in nature. This is especially so in view of the subject-matter of this article which, as per its title, partakes of a human rights dimension. In fact, Section 5 establishes the right to liberty and security of person, and Section 34 tackles the protection from arbitrary arrest or detention.

The link between these three provisions is of paramount importance. Whenever a Court is faced with a request to grant bail to the benefit of a person accused of a crime against the safety of the government (such as treason) or a crime liable to the punishment of life imprisonment (such as wilful homicide), Section 575 is considered to be the *lex specialis*. Consequently, Section 575 becomes the main provision which the Court takes cognizance of when determining whether to grant bail or otherwise. Notwithstanding such a fact, the Court, alongside Section 575, must also consider Section 5 and Section 34. This is because, if the court fails to also take in consideration the latter two provisions, it would mean that such Court would have neglected and ignored the fundamental human rights, safeguards and protections which the accused or suspected person could have a a right to benefit from. This unfortunately leads to unfairness and arbitrariness within the judicial process. Hence such omissions by the Court must be avoided.

Relevant Local and Continental (Regional) Jurisprudence Relating To Bail

RELEVANT LOCAL JURISPRUDENCE

I shall be focusing on some relevant and very recent case-law on the subject matter in this heading.

Adrian Agius vs L-Avukat tal-Istat, L-Avukat Generali u r-Registratur tal-Qrati Kriminali u Tribunali[15]

The plaintiff instituted a case before the Constitutional Court, claiming that he has suffered a breach of his fundamental right to liberty deriving from Section 34 of the Constitution and Section 5 of the European Convention Act[16]. Such claim was based upon the assertion that his requests were being denied due to an alleged

[15] Adrian Agius vs L-Avukat tal-Istat, L-Avukat Generali u r-Registratur tal-Qrati Kriminali u Tribunali (Qorti Kostituzzjonali) [2022]
[16] Chapter 319 of the Laws of Malta, Section 5 (First Schedule)

fear of public disorder which is a criterion that is not recognized under Maltese law. The plaintiff also claimed that the First Hall of the Civil Court (Constitutional Jurisdiction) was wrong when it concluded that he did not suffer a breach of his fundamental rights in the light of the seriousness of the charges brought against him. Such plaintiff argued that although it is true that he is accused of murder, there are other people accused of murder which do not find themselves detained. He maintained that the severity of the charges must have an equal effect for every person accused of murder, and if not, such severity should not be considered at all.

574.(1) Any person charged or accused who is in custody for any crime or contravention may, on application or as provided in article 574A, be granted temporary release from custody, upon giving sufficient security to appear at the proceedings at the appointed time and place under such conditions as the court may consider proper to impose in the decree granting bail which decree shall in each case be served on the person charged or accused

The defendants responded by stating that the right to liberty is not absolute. Consequently, a person can be deprived of his liberty when the detention is according to law and is done so that such person is brought before a competent legal authority on reasonable suspicion that he committed a crime. The defendants argued that Agius tried to play down the seriousness of the charges undertaken against him. Such defendants maintained that the fact that other persons accused of murder have been released from custody is irrelevant. The defendants went on to remind the Court that the plaintiff is allegedly part of a criminal organization, emphasizing that this portrays that the case at hand is horribly grave. They also held that despite such a fact, the denials of the plaintiff's applications for bail were never solely based upon this gravity because the Court always considered all the circumstances of the case and gave a well-reasoned decision predicated on a detailed analysis of the circumstances of the case.

The Constitutional Court agreed with the argument of the defendant that Agius has undermined the seriousness of the crimes with which he is charged. With regards to this, the Court noted that the plaintiff only referred to the fact that he was charged with being involved in a murder, and that he forgets that he is facing other charges such as that of actively participating in a criminal organization. To strengthen its own thesis, the Court quoted from a judgment delivered by the European Court of Human Rights which declared that in cases involving criminal organizations "continuous control and limitation of the defendants' contact with

each other and with other persons may be essential to avoid their absconding, tampering with evidence and, most importantly, influencing or even threatening witnesses"[17]. The Court also took note of the fact that the plaintiff was being charged as a recidivist. For these reasons, the Court maintained that the plaintiff is wrong when he compares his case to another case wherein, according to him, bail was granted even though the accused was charged with murder.

Regarding the plaintiff's argument relating to the issue of public disorder, the Constitutional Court seconded the First Hall of the Civil Court's (Constitutional Jurisdiction) consideration that the decisions of the Court of Magistrates and the Criminal Court were not in actual fact based on the issue of public disorder but more on the gravity of the crimes with which the plaintiff is charged.

Due to the above-mentioned reasons, the Constitutional Court concluded that Agius did not suffer any breach to his fundamental rights by being denied bail. As a result, such Court upheld the judgment of the First Hall of the Civil Court (Constitutional Jurisdiction).

Yorgen Fenech vs Avukat tal-Istat, Avukat Ġenerali, u b'digriet tat-2 ta' Ġunju, 2021, ġew awtorizzati jintervjenu fil-kawża in statu et terminis l-Avukat Peter Caruana Galizia, Matthew Caruana Galizia, Andrew Caruana Galizia u Paul Caruana Galizia[18]

The plaintiff instituted a case before the Constitutional Court, claiming that his prolonged arrest violates his fundamental rights deriving from Section 5 of the European Convention Act and Section 34 of the Constitution. The plaintiff held that the issue of whether or not he is granted bail directly impacts his fundamental rights. To strengthen his claims, Fenech reminded the Court that the granting of bail is the rule, while detention is the exception. He went on to state that every court decree has become stereotyped, aimed at denying bail. According to Fenech, such state of affairs presumes his guilt, hence undermining the principle of the presumption of innocence. Another point raised by the plaintiff was that the appealed judgment lacks the impartiality expected from the First Hall of the Civil Court (Constitutional Jurisdiction).

The plaintiff's case was also based upon the assertion that, since Maltese Law does not include the element of 'public disorder', this element should not have

[17] Štvrtecký v. Slovakia (QEDB, 05/06/2018)

[18] Yorgen Fenech vs Avukat tal-Istat, Avukat Ġenerali, u b'digriet tat-2 ta' Ġunju, 2021, ġew awtorizzati jintervjenu fil-kawża in statu et terminis l-Avukat Peter Caruana Galizia, Matthew Caruana Galizia, Andrew Caruana Galizia u Paul Caruana Galizia (Qorti Kostituzzjonali) [2022]

been considered by the Courts when deliberating on whether he should be granted bail. Fenech concluded this argument by maintaining that the jurisprudence of the European Court of Human Rights declares that the element of 'public disorder' can only be considered when it is recognized under domestic law.

The plaintiff concluded his remarks by affirming that, the fact that he is allegedly wealthy should not be considered as a factor which reduces his chances of being granted bail, because this would constitute prejudice and discrimination against the allegedly wealthy.

The defendants responded by stating that, the fact that the judgment of the First Hall of the Civil Court (Constitutional Jurisdiction) was not in favour of Fenech, does not mean that the judicial process was not impartial.

In response to the plaintiff's argument regarding the element of 'public disorder', the defendants held that Section 575 obliges the Courts to consider all the circumstances of the case. Moreover, they maintained that the list provided within Section 575 is intended to give broad discretionary powers to Criminal Courts in their evaluation of bail requests.

As a rebuttal to the plaintiff's submission regarding his alleged wealth, the defendants asserted that, the fact that Fenech is in possession of substantial financial assets is a relevant factor which must be considered because such assets make it possible for him to abscond without difficulty.

The Constitutional Court shot down the plaintiff's claim that the decrees of the Criminal Court are stereotyped. With regards to the plaintiff's lack of impartiality theory, the Constitutional Court maintained that a thorough reading of the entire appealed judgment reveals that the First Hall of the Civil Court (Constitutional Jurisdiction) conducted an impartial analysis. The Constitutional Court went on to declare that considering the plaintiff's wealth does not constitute discrimination. This is because, for a wealthy individual, it is much easier to abscond or leave Malta. Therefore, the Constitutional Court concluded that considering the plaintiff's wealth is not only justified but necessary. Due to the above-mentioned reasons, the Constitutional Court decided that the continued detention of Fenech is based on relevant and sufficient grounds. It follows that Fenech did not suffer any breach of his fundamental rights. As a result, the Constitutional Court upheld the judgment of the First Hall of the Civil Court (Constitutional Jurisdiction).

Relevant Continental (Regional) Jurisprudence

Mamedova vs Russia[19]

Mamedova was detained in Russia on charges of embezzlement. She instituted a case before the European Court of Human Rights (hereinafter referred to as "ECtHR"). Her complaint was based upon the allegation that the Russian Courts did not provide sufficient reasons for extending her detention, hence violating her rights under Section 5 of the European Convention on Human Rights. In sum, Mamedova's arguments can be split into two:

1. The Russian Courts failed to justify her prolonged detention.
2. Her appeals against the detention orders were not addressed promptly, leading to violations of her right to have the legality of her detention reviewed by a Court in a timely manner.

The major issue within the case was whether the **gravity of the offence** could serve as a sufficient basis for prolonging pre-trial detention. The ECtHR emphasized that the mere gravity of the offence cannot justify lengthy periods of detention without additional justifications, such as risks of absconding, tampering of evidence, or reoffending. In relation to this, the ECtHR stressed that a blanket reliance on the seriousness of the charges undermines the safeguards enshrined in Section 5 and the principle of the presumption of innocence.

Ultimately, the ECtHR reached the following conclusions:

1. The Russian courts did not provide relevant and sufficient reasons for Mamedova's continued detention.
2. Mamedova's appeals were not reviewed speedily. The delays in the review process breached her right to have the lawfulness of her detention assessed promptly.

The ECtHR opined that such state of affairs violated her fundamental rights under Section 5. As a result, the ECtHR decided the case in favor of Mamedova, finding Russia in violation of Section 5. The significance of this judgment lies in the fact that it underscored the importance of providing specific justifications for detention extensions and ensuring the prompt review of detention orders.

[19] Mamedova vs Russia, ECtHR (1st June 2006, Application No.7064/05)

Moiseyev vs Russia[20]

Moiseyev was arrested in Russia in 1995. A few years later, in 1998, he was convicted of espionage. Moiseyev decided to institute a case before the ECtHR to challenge his pre-trial detention. He claimed that Russia was in violation of Section 5 because his pre-trial detention was unjustified and excessively long.

Moiseyev's arguments regarding the excessive length of his pre-trial detention can be split into three:

1. **Excessive pre-trial detention.**
2. **Reasonableness of pre-trial detention.**
3. **Access to a Judge.**

Regarding the former, the ECtHR noted that Moiseyev's pre-trial detention lasted for three years and six months. The Russian Courts attempted to justify this lengthy detention with general and somewhat abstract reasons such as the complexity of the case. However, the ECtHR emphasized that these justifications were not substantiated with specific facts or evidence.

With regards to Moiseyev's pleadings tackling the reasonableness of his pre-trial detention, the ECtHR held that Russian Courts failed to demonstrate the necessity of detaining Moiseyev for such an extended period without a trial. The ECtHR reminded the Russian Courts that Section 5 requires a concrete assessment of whether the grounds for detention remain valid over time, with regular reviews. Despite this requirement, the ECtHR observed that the Russian Courts did not provide sufficient reasons for prolonging his detention.

In relation to the latter, the ECtHR declared that Moiseyev was not given adequate opportunities to challenge his detention before a judge, nor was there proper judicial scrutiny to assess whether his continued detention was justified.

[20] Moiseyev vs Russia, ECtHR (9th October 2008, Application no. 62936/00)

Moiseyev went on to challenge the justification and lawfulness of his pre-trial detention. In this respect, his arguments can be split into two:

1. **Failure to provide adequate justification.**
2. **Lack of legal clarity.**

Regarding the former, the ECtHR found that Moiseyev's detention lacked sufficient grounds in accordance with Section 5. This is because it believed that Moiseyev's continued detention was based on vague references to state security and speculative concerns without concrete supporting evidence.

With regards to the latter, the ECtHR clarified that Section 5 requires that detention must be "in accordance with a procedure prescribed by law"[21]. Despite this requirement, the ECtHR determined that Moiseyev's detention did not meet such standard because the procedural rules for justifying his extended pre-trial detention were not properly followed by the Russian Courts.

Ultimately, the ECtHR ruled in favour of Moiseyev, concluding that Russia had violated his rights under Section 5 by:

- Failing to provide valid legal and factual reasons for Moiseyev's extended pre-trial detention.

- Denying Moiseyev the opportunity for a prompt and effective judicial review of the legality of his detention.

- Not respecting the procedural safeguards and guarantees necessary to prevent arbitrary detention.

The ECtHR's ruling in Moiseyev's case underscored the importance of judicial scrutiny and proper justification for detention. It highlighted the obligations of states to avoid arbitrary detentions and ensure timely and effective judicial oversight.

[21] The European Convention on Human Rights, Section 5(1)

The Conundrum Relating To Electronic Tagging

The use of electronic tagging as a condition for bail has triggered considerable debate in the criminal justice system. As an alternative to traditional forms of detention, electronic tagging involves monitoring persons accused of a crime via wearable devices, such as ankle bracelets, which keep an eye on their movements and location. My aim in this section of my policy paper is to explore both the arguments in favour and the arguments against electronic tagging, while also examining the most recent stance taken by our Constitutional Court regarding this issue.

Arguments In Favor of Electronic Tagging

The seven key arguments in favour of electronic tagging, *inter alia*, include:

1. **Electronic tagging is cost-effective**. More often than not, electronic tagging is more cost-effective than detaining people in prison. This is due to the fact that the day-to-day expenses of electronic tagging prove to be lower than the day-to-day expenses of detention, making it a financially effective option.
2. **Electronic tagging aligns with the principle of the presumption of innocence**. This is because electronic tagging allows presumed innocent people to stay within their social circles while safeguarding public safety. Electronic tagging is a less confining alternative to detention, hence respecting the fundamental human rights of persons who are accused but not yet convicted, such as the fundamental right to liberty.
3. **Electronic tagging decreases overcrowding within prisons**. Prisons are often overcrowded because there are many undergoing pretrial detention. Electronic tagging presents a solution to this issue, permitting people to await trial in the community while being monitored. This permits resources to be distributed to individuals awaiting trial for graver crimes or convicted persons.
4. **Electronic tagging aids in boosting public safety**. Electronic tagging provides authorities with the necessary tools to keep an eye on the location of persons released on bail. This decreases the fear of absconding and non-observance of bail conditions, hence boosting public safety. Furthermore, electronic tagging imposes geographical limitations, hindering accused persons from setting foot in certain areas, such as close to victims, to decrease the risk of reoffending.

5. **Electronic tagging helps reduce bail violations**. Since accused persons know that they are being electronically monitored, they would feel discouraged from considering absconding or violating bail conditions. Furthermore, monitoring data can be used as evidence in Court if breaches occur, guaranteeing transparency and accountability.
6. **Electronic tagging encourages rehabilitation and reintegration**. Electronic tagging permits people to retain employment and social connections while on bail. Such continuity can prove to be a catalyst for their rehabilitation and reintegration into the community. Moreover, as a result of the use of electronic tagging, individuals are given the opportunity to portray that they observe bail conditions, which illustrates their commitment to reform.
7. **Electronic tagging could, ultimately, constitute the major technological innovation which enables the granting of bail.** In view of the prospective changes to Malta's laws regulating the pre-trial procedure, shorter committal proceedings are most likely to take place. This will reduce the risk of tampering with evidence. Consequently, the benefits of electronic tagging may increase in so far as the danger of absconding, especially in as much as third country nationals are concerned, would remain the major challenge for Courts to surmount, at such point.

Arguments Against Electronic Tagging

The seven key arguments against electronic tagging, *inter alia*, include:

1. **Electronic tags lack reliability and suffer from technical issues**. Electronic tags can suffer from connectivity issues and false alerts. As a result, this can lead to adverse legal consequences for persons abiding by their bail conditions. Moreover, merely relying on electronic tagging may lead to a faulty sense of security. This is because human supervision is still crucial, and electronic tagging is not always able to successfully keep an eye on all types of criminal activity.
2. **Electronic tagging does not effectively deter people from committing crimes**. There is hardly any evidence portraying that electronic tagging effectively deters individuals from committing crimes while on bail. In this regard, critics maintain that electronic tagging is an artificial solution that does not tackle underlying causes of offending conduct. Moreover, such

critics stress that electronic tagging does not physically hamper an individual from committing crimes.

3. **Electronic tagging may quell concerns of absconding, but it leaves the danger of tampering with evidence unchanged.** Since it is arduous to escape with an electronic tag, many believe it may be the right solution to alleviate concerns that the accused might not appear on the day of trial. However, an electronic tag cannot diminish, let alone remove, the risk (prospect) which involves the intimidation of witnesses and the tampering of evidence, amongst others.
4. **Electronic tagging limits one's privacy and liberty**. Electronic tagging involves constant monitoring, which critics deem too invasive. Such a system can limit the privacy rights of presumed innocent persons. Furthermore, constantly being tagged may carry a social stigma which can adversely affect an individual's sense of dignity. Unfortunately, such state of affairs could result in anxiety and shamefulness.
5. **It is highly doubtful whether electronic tagging is cost-effective**. This is because the expenses of implementing, upkeeping, and monitoring electronic tagging may be considerable. Critics state that these resources should be allotted towards probation services and rehabilitation programs. Another point which critics raise is that, investing hugely in electronic tagging systems without tackling deeper social issues, such as poverty and the social stigma attached to mental health can prove to be ineffectual.
6. **Electronic tagging undermines the principle of the presumption of innocence**. Critics claim that the use of electronic tagging goes against the well known phrase of "innocent until proven guilty". This is because, imposing tagging before trial could give rise to the notion that the individual is already being presumed guilty even though he is not yet convicted, undermining the significance of this fundamental safeguard**.**
7. **Electronic tagging can have adverse effects on rehabilitation and reintegration**. Electronic tagging may detach people from their family, friends, and social circles, obstructing the path to social reintegration. Another negative aspect of constant electronic monitoring is that it may cause stress and sometimes even depression. This obscures the person's capability of focusing on their rehabilitation journey.

At this juncture, a very recent judgment is worth a final mention, in the context of this sub-heading relating to electronic tagging.

Daniel Muka (Passaport Albaniż BD8707291) vs L-Avukat tal-Istat; u l-Avukat Ġenerali[22]

In its judgment, the Constitutional Court noted that the latest rulings by the Criminal Court all denied Muka's requests for bail. The Constitutional Court realised the fact that the Criminal Court's main fear related to the possibility that Muka may obstruct the ongoing investigation. Regarding this, the Constitutional Court declared that such conduct could occur irrespective of whether the accused is wearing an electronic tag or not.

The Constitutional Court, while conceding that the correct implementation of electronic tagging through a suitable legal framework makes it a viable option, also took note of the fact that despite several proposals over the years to introduce this tool into our legal framework, no bill has been presented. Coupled with this, the Constitutional Court emphasized that the absence of a domestic legal framework contemplating this option for individuals held under preventive detention does not translate into a violation of the fundamental right to personal liberty, contrary to what Muka argues. In other words, the Constitutional Court could not perceive a violation of the right to personal liberty solely based on the Maltese State's failure to legislate in favour of implementing tools like electronic monitoring or tagging for individuals under preventive detention, given that the same Maltese State then offers all the other guarantees and protections required by the Constitution, the European Convention, the laws, directives, and regulations of the European Union, and taking into account the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union against arbitrary arrest.

The Constitutional Court, by virtue of its concluding remarks, went on to mention its core concerns and worries in relation to the use of electronic tagging. In this regard, the Constitutional Court stressed that, due to the fact that it is easier to leave Malta because it is surrounded by sea, the use of electronic tagging does not necessarily prevent individuals from fleeing the Maltese islands. Moreover, the Constitutional Court did not fully subscribe to the notion that electronic tagging serves as a deterrent against committing further offenses.

All in all, this judgment reveals the complexities around the subject-matter. It also discloses the extent to which Courts need to balance out the competing and

[22] Daniel Muka (Passaport Albaniż BD8707291) vs L-Avukat tal-Istat; u l-Avukat Ġenerali (Qorti Kostituzzjonali) [21 October 2024]

conflicting interests of the stakeholders within the iter proceduralis. Most importantly, it cements the correct jurisprudential thought to the effect that:

'L-electronic tagging iservi sabiex l-iktar jiġi żgurat li l-akkużat jattendi għas-seduti.' It does not quell other concerns which strongly militate against the granting of bail.

Concluding Remarks

This policy paper has juxtaposed concluding the ongoing dilemma which our Judges and Magistrates are constrained to deal with in order to strike the right balance between on the one hand permitting the exercise and application of the fundamental rule which enables liberty of the individual and on the other hand ensuring that alleged victims and society be assured that the accused will appear at a given date and time in court in order to face criminal charges undertaken in the name and in representation of the republic of Malta. This balances and embraces the consideration of various laws, including the relevant provisions of the Criminal Code, of the Constitution, and of the European Convention Act.

A cumulative perspective leads one to believe that, all in all, our Courts have a good track record when they come to decide on such thorny matters. There might be room for improvement, maybe insofar as the discretion of our Courts should be safeguarded. However, there seems to be little room to change, amend or insert criteria and factors which our Courts should take into account. Naturally, such criteria and factors should not, in any manner whatsoever, infringe fundamental human rights of individuals who benefit from constitutional and conventional provisions in this regard. Yet, a predicament which should always be avoided is one wherein the granting of bail would serve to allow an accused either to evade the administration of justice or to influence it in his favour.

The Privilege Against Self-Incrimination

Thomas Sciberras Herrera

Introduction

The privilege against self-incrimination is rooted in the Latin maxim *nemo tenetur seipsum accusare*, meaning *"no one is bound to accuse themselves."* The privilege allows a person to refuse to answer any question, or produce any document or thing, if doing so would tend to expose the person to conviction for a crime.[23]

The importance of this right in a democratic society lies in the principle that the prosecution bears the burden of proving the accused's guilt, independent of the defendant's statements, as encapsulated in the maxim *qui accusat probat*. Madam Justice Consuelo Scerri Herrera identifies the right to silence and the privilege against self-incrimination as cardinal rights of a suspect prior to an investigation, stating that:

> ***"the right to silence is a crucial building block of the right to a fair trial, and without it, other existing rights would be illusory[24]"***

Like many other foundational principles of criminal law, this privilege has its origins in the English common law system, where it has long served as a crucial safeguard against unjust prosecution and coercion.

From the mid-sixteenth century, when sources first provide a glimpse into the conduct of early modern criminal trials, until the late eighteenth century, the fundamental safeguard for defendants in common law criminal procedure was not the right to remain silent, but the opportunity to speak.[25] This evolving legal landscape eventually gave rise to the right to remain silent, which emerged from

[23] Australian Law Reform Commission, *Privilege Against Self-Incrimination* (Report No 129, 2015) https://www.alrc.gov.au/wp-content/uploads/2019/08/fr_129ch_11._privilege_against_self-incrimination.pdf accessed 23 October 2024

[24] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 194.

[25] John H. Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1993-1994) 92 Michigan Law Review 1047

Sir Edward Coke's[26] challenge to the ecclesiastical courts and their use of the *oath ex officio.*[27]

The *oath ex officio* required a person suspected of heresy to swear to answer truthfully all questions posed. The individual would then be questioned about their beliefs. If their answers were deemed careless or false, the court could punish them for heresy or perjury.[28] As Chief Justice, Coke successfully asserted the common law courts' authority to issue writs of prohibition against ecclesiastical courts that attempted to use this method.[29] This pivotal moment marked the beginning of what are now taken-for-granted rights - the right to remain silent and the right against self-incrimination.

The American Perspective on Self-Incrimination

The phrase "I invoke the Fifth" has become a staple in American pop culture, often depicted in films and television shows such as *The Godfather II* and *Lincoln Lawyer*. This reference to the Fifth Amendment of the U.S. Constitution, ratified in 1791, signifies not just a cinematic moment but a fundamental legal principle: the right against self-incrimination.

The Fifth Amendment encompasses several rights, such as protection against double jeopardy, just compensation for expropriation, the right to due process, and, most significantly for the purposes of this paper, the right against self-incrimination.

> *"No person shall… be compelled in any criminal case to be a witness against himself."*[30]

American courts have rightly recognised that this privilege is rooted in common law, as frequently cited in landmark judgments. A powerful quote from the U.S. Supreme Court is often referenced in jurisprudence whenever this right is invoked:

> *"So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of*

[26] Edward Coke, *Encyclopaedia Britannica* (2006) https://www.britannica.com/biography/Edward-Coke accessed 23 October 2024.
[27] Dinu Ostavciuc and Tudor Osoianu, 'Freedom of Self-Incrimination' (2023) https://cogito.ucdc.ro/COGITO_SEPTEMBER_2023.pdf accessed 23 October 2024.
[28] Charles H Randall Jr, 'Sir Edward Coke and the Privilege Against Self-Incrimination' (1956) 8 SCLR 417, 418
[29] Ibid
[30] United States Constitution Amendment V (1791)

evidence, became clothed in this country with the impregnability of a constitutional enactment."[31]

The Fifth Amendment was first recognised by the U.S. Supreme Court in 1965 in the case of *Eddie Dean Griffin*[32], who had been convicted of murder by a California court after refusing to take the stand and give testimony[33]. Consequently, as a result of this refusal, both the judge and the prosecutor inferred guilt. The Supreme Court declared these comments improper and deemed such inferences a clear violation of the Fifth Amendment[34].

Another important milestone reached by the U.S. Supreme Court continued to evolve this right, as established in the case of *Miranda v. Arizona*[35], which mandates that law enforcement in the U.S. is obligated to warn a person of their constitutional rights, including their right to remain silent. This landmark case has led to what are known in the States as the Miranda warnings[36], the first of which is "You have the right to remain silent." The significance of this judgment translates to the application of the Fifth Amendment outside the courtroom. In fact, the Court stated that, "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[37]

[31] Brown v Walker 161 US 591, 596–97 (1896)
[32] Griffin v California 380 US 609, 610–11 (1965)
[33] Michigan Law Review, Vol. 78, No. 6 (May, 1980), pp. 841-871
[34] Ibid
[35] Miranda v Arizona 384 U.S. 436 (1966)
[36] https://www.uscourts.gov/sites/default/files/mirandawarningfinal.pdf accessed 17 October 2024.
[37] U.S. Courts, 'Facts and Case Summary - Miranda v. Arizona' https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-miranda-v-arizona accessed 17 October 2024.

Distinction Between the Right to Silence and the Privilege Against Self-Incrimination

It would be interesting to highlight that the right to silence and the privilege against self-incrimination are often used interchangeably and, in common parlance, are often used to refer to the same situations. However, they do not have the same identical meaning. The right to silence is the unspoken procedural guarantee to the right to a fair trial which results from case-law of the ECJ[38] within the meaning of *Article 6(1)* of the ECHR[39] according to which judicial authorities cannot oblige a suspect or an accused person to make statements[40]. The right to silence therefore includes the right not to incriminate oneself.[41] It can be argued that the privilege against self-incrimination is more far-reaching, as it is not only limited to verbal expression but also extends to the delivery of documents.[42]

The Use of the Term 'Privilege' Versus 'Right'

It is interesting to note that in the legal sphere, the term 'privilege' rather than 'right' is used with respect to the protection against self-incrimination. This nomenclature is of utmost interest because, although the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a privilege is, in essence, the opposite of a duty[43]. Hence, the privilege against self-incrimination implies that individuals do not have a duty to disclose self-incriminating information. However, despite the use of the term 'privilege,' this can be a misnomer because, in an accusatorial system like Malta's, silence should be regarded as a right rather than a privilege[44].

Inferences and the Privilege Against Self-Incrimination

The term *inference* is often used in discussions about the privilege against self-incrimination. Inferences are a form of circumstantial evidence which is directed to establish the guilty of an accused person[45]. Inference, finds its expression in "it

[38] European Court of Justice
[39] European Convention on Human Rights
[40] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 50.
[41] Ibid
[42] Ibid, 51
[43] C. Donahue, 'Hohfeld'(Harvard Law School) http://www.law.harvard.edu/faculty/cdonahue/courses/prop/mat/Hohfeld.pdf accessed 17 October 2024.
[44] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 195.
[45] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 213.

is raining, therefore the streets will be wet"[46], it is an enthymeme[47]. Explicitly formulated, it was claimed, the argument thus presented would read, "Whenever it rains the streets will be wet, it is raining; therefore the streets will be wet."[48] However, such straightforward inferences in criminal law can be dangerous as they can be wrongly drawn, leading to unwanted conclusions and perverting the course of justice[49].

Act III of 2002 established the rule of inferences within Maltese law, thereby enacting *Article 355AU*[50] of the Criminal Code, which has since been repealed and is no longer in effect. This article stipulated that inferences could only be expressly drawn if the accused had received legal advice.[51] Consequently, if the accused exercised the right to silence without consulting legal counsel, no conventional inferences could be drawn under *Article 355AU*.[52]

Under the previous legal framework, the right against self-incrimination and the right to silence were automatically forfeited once the accused took the witness stand during their own trial.[53] The *ratio legis* behind this approach was that if an accused individual is innocent and has nothing to hide, they should answer all questions posed to them.[54] Madam Justice Consuelo Scerri Herrera emphasised the chaos this provision created within the legal framework, which ultimately led to its removal from the statute books. She stated:

> *"This created an upheaval in the legal community, primarily because there can be a myriad of reasons why an individual may choose to exercise his right to silence, and inferring guilt from silence is no more reasonable than inferring innocence."*[55]

[46] Wilfrid Sellars, 'Inference and Meaning '(1953) 62 *Mind* 313, 338 https://www.jstor.org/stable/2251271 accessed 21 October 2024.
[47] An incomplete syllogism, in which one or more premises are unexpressed as their truth is considered to be self-evident (*Collins English Dictionary*)
[48] Wilfrid Sellars, 'Inference and Meaning '(1953) 62 *Mind* 313, 338 https://www.jstor.org/stable/2251271 accessed 21 October 2024.
[49] Charles Mercieca, 'Inferences in Malta: A Case for More Inferences '(LLB (Hons) thesis, University of Malta, 2016), 12
[50] Repealed by Act LI of 2016
[51] Charles Mercieca, 'Inferences in Malta: A Case for More Inferences '(LLB (Hons) thesis, University of Malta, 2016), 16
[52] Ibid
[53] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 216.
[54] Ibid, 217
[55] Ibid

Another aspect of this phenomenon of inferences is that the law[56] permits the drawing of inferences when the accused refuses to provide an intimate sample. An intimate sample is defined as "a sample of blood, semen or any other tissue fluid, or pubic hair, and includes a swab taken from a person's body orifice other than the mouth"[57]. A suspect or accused must be properly cautioned before providing an intimate sample that could lead to adverse inferences. This caution is essential for the sample to be admissible as evidence[58].

In essence, this is the only case in which an inference of guilt arises. If an individual refuses to provide an intimate sample, their silence is deemed tantamount to an admission of guilt. Consequently, in this scenario, the broad privilege against self-incrimination does not apply.

Inversion of Proof: Another Inference?

While the privilege against self-incrimination is undeniably vital in safeguarding individuals from coercive legal practices and assumes great importance, as shown in the outlined jurisprudence, there are specific instances where this right does not apply. Specifically, it cannot be exercised in cases where there is an inversion of proof. Put simply, inversion of proof means that the accused is not presumed innocent but is presumed guilty. This is the case for instance in drunk-driving offences[59], driving without an insurance policy[60], and money laundering offences[61].In these three scenarios, there is yet another suspension of the privilege against self-incrimination. Similarly to how the failure to provide an intimate sample results in an implication of guilt, the commission of these acts also leads to an inference of guilt. Consequently, this represents an additional exception within the Maltese legal system where inferences are applicable.

[56] Article 335AZ, Criminal Code (Malta), provides: "Where the appropriate consent to the taking of an intimate sample from a person was refused without a good cause, in any proceedings against the person for an offence, those who have to judge of the facts may draw such inferences from the refusal as appear proper, and the refusal may, on the basis of such inferences, be treated as, or as capable of amounting to corroboration of any evidence against the person in relation to which the refusal is material."

[57] Article 350, Criminal Code

[58] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 219

[59] Traffic Regulation Ordinance (Chapter 65, Laws of Malta)

[60] Motor Vehicles Insurance (Third Party Risks) Ordinance (Chapter 104, Laws of Malta) Article 3(1A)

[61] Prevention of Money Laundering Act (Chapter 373, Laws of Malta)

Inferences in the English System

Unlike the Maltese legal system, which does not permit any cases of inference - aside from the intimate sample - the English legal system, through the Criminal Justice and Public Order Act of 1994[62], allows for four specific instances in which inferences may be drawn[63]. Therefore, in these four instances, guilt is inferred, and the presumption of guilt arises, resulting in the suspension of the privilege against self-incrimination.

In their respective listed order:

1. The Failure to mention facts[64],
2. the accused silence at trial[65],
3. the failure of the accused to account for objects[66] and
4. the failure of the accused to account for his own presence at a particular place.[67]

Inferences in a Maltese Jury: Author's Take

Naturally, our jury system upholds the privilege against self-incrimination. However, while this principle is safeguarded, no one can control the private thoughts of the jurors, which are inevitably influenced by the persuasive arguments of the key players - the defence, prosecution, judge, or even witnesses. In light of this, the judge bears the responsibility to clarify all relevant legal principles while addressing the jurors. This includes explicitly stating that the accused's decision not to testify must not be interpreted as an indication of guilt.

Nevertheless, when the accused chooses not to take the stand, they remain vulnerable to how effectively their lawyer can convince the jury that this silence does not suggest guilt. From my limited experience attending jury trials as a law student, I've observed that defence lawyers often emphasise the argument:

> *"If you, the jury, believe there is something left unsatisfied because the accused did not testify, it simply means that the prosecution has failed to meet the burden of proof - proof beyond a reasonable doubt."*

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[62] https://www.legislation.gov.uk/ukpga/1994/33/contents

[63] Charles Mercieca, 'Inferences in Malta: A Case for More Inferences '(LLB (Hons) thesis, University of Malta, 2016), 12

[64] http://www.legislation.gov.uk/ukpga/1994/33/section/34

[65] http://www.legislation.gov.uk/ukpga/1994/33/section/35

[66] http://www.legislation.gov.uk/ukpga/1994/33/section/36

[67] http://www.legislation.gov.uk/ukpga/1994/33/section/37

This highlights a crucial point: in a jury system, the risk of inferring guilt from silence is ever-present, and success often hinges on the skill of the lawyer in shaping the jury's perception. Strong argumentation is not just a talent but an essential necessity in ensuring a fair trial.

The Maltese Legal Framework on Self-Incrimination

Professor Aquilina provides a thorough comparison between the Maltese constitutional provision and its American equivalent, asserting that:

> *"Article 39(10) of the Constitution grants the right mentioned therein only to individuals who are accused of a criminal offence. In other words, contrary to the Fifth Amendment of the U.S. Constitution, this right does not extend to witnesses but is limited to the accused. The fact that Article 39(10) does not apply to witnesses does not imply that such individuals are unprotected by the ordinary law of the land. It is sufficient to mention Section 643[68] of the Criminal Code in this context."*[69]

Focusing on the Maltese legal system, this right is also guaranteed by the Constitution[70], as stated in *Article 39(10)*: *"No person who is tried for a criminal offence shall be compelled to give evidence at his trial."* This constitutional tenet is reflected in the Criminal Code[71] in *Article 634(1)*[72]. Interestingly, although *Article 6* of the ECHR[73], which deals with the right to a fair trial, does not specifically mention this right, the ECtHR[74] has consistently recognised it as one of the essential elements of the right to a fair trial[75].

[68] "No witness may be compelled to answer any question which tends to expose him to any criminal prosecution."
[69] Kevin Aquilina, 'The Right against Self Incrimination under Maltese Law with Particular Reference to the Official Secrets Act' (2005) 9(2) Mediterranean Journal of Human Rights 39
[70] Constitution of Malta
[71] Laws of Malta, Cap 9
[72] Kevin Aquilina, 'The Right against Self Incrimination under Maltese Law with Particular Reference to the Official Secrets Act' (2005) 9(2) Mediterranean Journal of Human Rights 31, 32
[73] European Convention on Human Rights
[74] European Court of Human Rights
[75] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 203.

The Brian Tonna Case and Relevant ECtHR Jurisprudence

To better understand this right, it would be beneficial to examine the most recent case law, particularly case law that is relevant to today's political-judicial reality. The most recent judgment in this regard was delivered by the First Hall of the Civil Court in *Brian Tonna v. Speaker of the House of Representatives et al*[76].

This case involved an application to the FHCC by the appellant, who was facing criminal proceedings on the same matter. The application followed a decision by the Speaker to compel him to give evidence before the Parliamentary Public Accounts Committee, despite his objection based on the right to silence. The appellant invoked this right for two reasons:
(1) he was under investigation by the Auditor General, and
(2) he had been accused of money laundering in separate criminal proceedings.

The Speaker clarified, among other things, that any witness summoned to appear before the Committee who does not face charges related to the matter being considered must appear and respond to questions but cannot be compelled to answer questions that, in the view of the witness or their lawyer, could incriminate them. The Speaker's ruling was founded on *Rule 4*[77] of the *Guide for Witnesses Appearing Before the Public Accounts Committee of the House of Representatives.*[78]

In its considerations, the Court referred to *Rule 19* of the same Guide, which explicitly states, *"No witness is to be compelled to answer a question which might incriminate him/her."* Moreover, the Court also referred to ECtHR case law, such as *Shannon v. United Kingdom*[79], where the applicant was summoned for an interview by financial investigators after already being charged with offences related to false accounting and conspiracy to defraud. Similarly, as in the *Brian Tonna case*[80], the matter involves a committee rather than a court, raising parallel concerns about the right against self-incrimination during non-judicial

[76] Brian Tonna v Speaker of the House of Representatives et al (Civil Court, First Hall (Constitutional Jurisdiction), 365/21 GG, 19 April 2021

[77] A person who, having been duly served with a copy of the warrant as prescribed in article 4 above, fails, without lawful excuse, to appear before the Committee, or having appeared before the Committee refuses to be sworn or, subject to guideline 19 below, to answer questions shall be guilty of contempt of the House and shall be liable to the penalties prescribed in article 11 of the House of Representatives (Powers and Privileges) Ordinance (CAP 113).

[78] Parliament of Malta, 'Guide to PAC Witnesses' (October 2011) https://parlament.mt/media/93635/guide-to-pac-witnesses-as-at-october-2011.pdf accessed 18 October 2024.

[79] Shannon v The United Kingdom (Application no 6563/03) [2005]

[80] Brian Tonna v Speaker of the House of Representatives et al (Civil Court, First Hall (Constitutional Jurisdiction), 365/21 GG, 19 April 2021

proceedings. The court ruled that forcing him to attend the interview and answer questions on matters for which he had already been charged violated his right against self-incrimination, breaching *Article 6* of the ECtHR.

Of essence is the fact that the Court also referred to the criteria regarding the extent to which this right can be invoked, given that it is not an absolute right and is also based on proportionality. These criteria were outlined in another ECtHR case[81], wherein the Court laid out four criteria that must be taken into consideration:

1. The nature and degree of compulsion used to obtain the evidence.
2. The weight of the public interest in the investigation and punishment of the offence at issue.
3. The existence of any relevant safeguards in the procedure; and
4. The use to which any material so obtained is put.

The court said that in a scenario where a person is at the centre of allegations such as those against Tonna, that right assumed a greater importance,

> *"f'xenarju fejn persuna hija fic-centru ta 'allegazzjonijiet bhal dawk mertu ta 'din il-kawza, dan il-jedd ghandu jassumi importanza ta 'livell aktar ghola mhux biss ghaliex kien gia imputat izda ukoll ghaliex kien gia assista u kien ghadu qed jassisti fi proceduri hekk imsejha pre-trial. Ghalhekk ir-Ruling u l-gwida ghax-xhieda fejn jitkellem dwar proceduri kriminali ossia akkuzi pendenti, jonqsu milli jharsu l-jedd ta' smiegh xieraq."*

Terrorism and the Privilege Against Self-Incrimination

Another interesting facet of this privilege is its application in cases of terrorism. ECtHR jurisprudence[82] has made it clear that, unlike the right against torture, this right is not absolute. There is a clear tension between the competing values of security and human rights in the fight against terrorism[83]. While it is unlikely that the general public would support extending the privilege against self-incrimination to individuals accused of terrorism, this reflects public sentiment rather than legal principle. This issue was explored in *Ibrahim and Others v. the United Kingdom*[84].

[81] Jalloh v Germany (Application no 54810/00) [2006] ECHR
[82] Jalloh v Germany (Application no 54810/00) [2006] ECHR
[83] Matthew Seet, 'Suspected Terrorists and the Privilege against Self-Incrimination' (2015) 74 Cambridge LJ 208
[84] Ibrahim and Others v United Kingdom (Application Nos 50541/08, 50571/08, 50573/08 and 40351/09) [2016] ECHR.

Two weeks after the London bombings of 7 July 2005[85], bombs were detonated on the London transport system but failed to explode. *Safety interviews*[86] were conducted urgently for the purpose of protecting life and preventing serious damage to property, without any lawyer present and before the suspect could seek legal advice, as authorised under the UK Terrorism Act 2000[87]. However, during these interviews, the police failed to provide the standard caution or inform the suspects of their right against self-incrimination. Instead, the police incorrectly told the suspects that the court could infer guilt from their silence.

During the *safety interviews*, the applicants denied any involvement in or knowledge of the events of 21 July. However, at trial, they acknowledged their involvement, claiming the bombs were a hoax and not intended to explode. Their statements from the interviews were admitted as evidence, resulting in convictions for conspiracy to murder, which the Court of Appeal did not overturn.

The fourth applicant, initially interviewed as a witness, inadvertently incriminated himself by discussing his encounter with a suspect and the assistance he provided, without being informed of his rights. Following his arrest, he referenced his earlier statement in subsequent interviews, which was also admitted as evidence, leading to his conviction for assisting a bomber.

The applicants argued that their lack of access to legal counsel during initial questioning and the use of their statements violated their right to a fair trial under *Article 6* of the Convention[88]. This situation underscores the vital importance of the privilege against self-incrimination, which serves as a crucial safeguard for fair trial rights, especially in high-stakes contexts such as terrorism cases.

Regarding the first three applicants, the Court stated:

> *"The Government had convincingly demonstrated in the case of the first three applicants the existence of an urgent need when the safety interviews were conducted to avert serious adverse consequences for the life and physical integrity of the public. The police had had every reason to assume that the conspiracy was an attempt to replicate the events of 7 July and that*

[85] 'London Bombings of 2005' *Encyclopaedia Britannica* (Britannica, undated) https://www.britannica.com/event/London-bombings-of-2005 accessed 21 October 2024

[86] Terrorism Act 2000 (UK), Sch 8, para 8(1): "Subject to sub-paragraph (2), an officer of at least the rank of superintendent may authorise a delay— (a) in informing the person named by a detained person under paragraph 6; (b) in permitting a detained person to consult a solicitor under paragraph 7.

[87] Matthew Seet, 'Suspected Terrorists and the Privilege against Self-Incrimination' (2015) 74 Cambridge LJ 208

[88] *Information Note on the Court's case-law* 199 (August-September 2016) summarising the facts of *Ibrahim and Others v. the United Kingdom* [GC] (Applications nos. 50541/08, 50571/08, 50573/08 et al.) [2016] ECHR; author's summary.

the fact that the bombs had not exploded was merely a fortuitous coincidence. The perpetrators of the attack were still at liberty and free to detonate other bombs."[89]

In contrast, concerning the fourth applicant, the Court concluded:

"[it] found that the Government had not convincingly demonstrated that those exceptional circumstances were sufficient to constitute compelling reasons for continuing with the fourth applicant's interview after he began to incriminate himself without cautioning him or informing him of his right to legal advice."[90]

Thus, the Court found no violation concerning the first three applicants but determined a violation for the fourth. The distinction in this scenario, as outlined by the Court, is the "*exceptional circumstances*" dictated by the threat to the public. The case of *Ibrahim* represents a clear departure from the Court's pre-9/11 absolutist position, which maintained that, even in the presence of a terrorist threat, security and public order concerns could not justify a violation of the privilege against self-incrimination under *Article 6(1)*[91].

Conclusion

As discussed at length, the privilege against self-incrimination continues to strengthen the right to a fair trial as envisaged by *Article 6* of the ECHR. This privilege is not only a legal safeguard but also a cornerstone of individual freedom, ensuring that no person is compelled to act against their own interests in the face of potential coercion or unjust prosecution. However, it is essential to recognise that the exercise of this right can expose the accused to the drawing of adverse inferences and hence be considered as a double-edged sword[92], which presents a complex challenge within the legal framework.

Furthermore, it is important to highlight that, although Malta currently has no law *in vigore* addressing inferences, the existence of laws that reverse the burden of proof effectively implies a presumption of guilt. This means that the individual in question is presumed guilty and must prove their innocence, which, in essence, constitutes an inference against them.

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[89] *Information Note on the Court's case-law* 199 (August-September 2016) summarising the facts of *Ibrahim and Others v. the United Kingdom* [GC] (Applications nos. 50541/08, 50571/08, 50573/08 et al.) [2016] ECHR

[90] Ibid

[91] Matthew Seet, 'Suspected Terrorists and the Privilege against Self-Incrimination' (2015) 74 Cambridge LJ 208

[92] Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 230.

Reasonable Time as A Disregarded Necessity

Harry Thake

Introduction

'Justice delayed is justice denied'. These words are emblematic of the value that 'reasonable time' holds in the workings of our justice system. In reading Article 39, being the right to a fair trial, many make the mistake of glossing over these words, though this is a grave mistake to make. Reasonable time is the cornerstone of any fair hearing, though as will be seen in many cases along the years, the so called 'reasonable time standard' has not been adhered to by our courts, leading to some even posing the question of whether our court can truly be considered a fair one.

Reasonable time, though analysed and discussed in great detail in recent times cannot in any way be described as a new concept or idea with its roots tracing all the way back to the 17th century in the *'Magna Carta Libertatum'*, which were written by Sir Edward Coke in a series of comments about the infamous Magna Carta.[93] Coke took to describing delay in proceedings as a kind of 'denial'. Moreover, the aforementioned maxim 'justice delayed is justice denied', was also a sentiment first propounded by Coke whose words are echoed in court decisions to this very day.

Reasonable Time Today

A few hundred years on from Sir Edward Coke, one can observe that the importance of reasonable time on a global scale has made quite the jump in relevance. On a European level, reasonable time is regulated by Article 6(1) of the European Convention[94], that deals with the right to a fair hearing, which has been transposed into the Maltese legal system through Chapter 319 of the Laws of Malta. On a local level, it is also enshrined into article 39(1) of the Maltese Constitution[95] that mentions reasonable time in relation to criminal charges and

[93] Milošević M and Bojović AK, 'Trial within Reasonable Time in EU Acquis and Serbian Law' 1 EU and Comparative Law Issues and Challenges, 447

[94] European Convention (Article 6)

[95] Maltese Constitution (Constitution of Malta) (article 39)

also in sub article 2 of that same article which deals with disputes on a civil level in relation to reasonable time.

The rule of law and reasonable time, in my opinion go hand in hand. Thus, the rule of law does not only suffer in a jurisdiction when there is a denial of access to our courts, or when there is blatant abuse of power, but in my opinion our sacred rule of law may also collapse if persistent and serious delays in the administration of justice persist in a country. Even though eventually justice can and in all likelihood will eventually be meted out there is in fact no excuse in a legal system for the workings of justice to unnecessarily stall. As the Latin maxim goes "justice delayed is justice denied", thus the existence of a reasonable time standard in cases ensures that the court is held accountable for any delays in procedure that prolong the legal dispute unnecessarily and which sometimes lead to parties in the case waiting years for the court to decide on legal points or for cases to reach their long-awaited conclusion.

Even though the question of reasonable time has been one of abundant debate and discussion over the years, lawmakers have continued to avoid granting a clear definition of what constitutes a case being decided in 'reasonable time' and leave it in the hands of the judge or magistrate presiding over the case instead. This was highlighted in the case *Emanuela Brincat vs Attorney General (21 February 1996)*[96] where, inter alia, the court claimed that the term reasonable time in itself contains a large element of discretion and does not lend itself to a definition in rigid terms. Thus, one is able to note within this idea of reasonable time that there lies a significant element of subjectivity, where the judge with a view of the facts of the case before him, decides whether the time taken for a case to move forward is considered 'reasonable' or justifiable in some way.

A noteworthy case along these lines is that of *Peter Manduca vs Prime Minister*[97] *(23rd January 1995)* where after 11 years only a preliminary point had been decided, that being of deciding whether the case would be heard before the rural leases board or the civil court. In view of this fact the court deemed that such delay was unreasonable and breached the reasonable time requisite that court hearings must follow in order for a trial to be deemed fair.

[96] Emanuela Brincat vs Attorney General (CC) (21st February 1996)

[97] *Peter Manduca vs Prime Minister (23rd January 1995) 24/17 JPG, Constitutional court, Monday, 29th October 2018*

Reasonable time in criminal vs civil cases

When discussing reasonable time, it is also paramount that a clear distinction be made between reasonable time in a criminal and in a civil context. Unnecessary delays in procedure in criminal proceedings are deemed to me of a graver nature than that of civil due to the perceived loss of liberty of the person involved in the trial. Criminal charges are deemed to be more damaging to the person on the receiving end of them, with potential to severely damage the reputation and livelihood of the person involved. In the *David Marinelli vs Attorney General*[98] case the courts took it upon themselves to emphasise the distinction stating that *'while in civil proceedings one can accept certain delay, no such delay is acceptable when a criminal charge is hanging above a person's head'.*

This distinction was also maintained in a constitutional judgment delivered by the First Hall of the Civil Courts *on 13 April 2021 in Noel Xuereb vs Avukat Generali u Kummissarju tal-Pulizija*[99]. In this case Xuereb filed a constitutional case after being charged with corruption crimes in January 2007 with the case finally concluding 12 years later in April 2019, with the attorney general and the commissioner of police arguing that the case took long due to the perceived complexities of the case. The case was decided in Xuereb's favour, with the court believing there to be a breach in his fundamental human rights. In handing out compensation the court considered the blow that these criminal charges dealt to Xuereb's livelihood resulting in him being dismissed from his post at Mater Dei hospital and ultimately being pushed into a state of depression. Consequently, he was awarded €100,000 in damages for a breach of his human rights, with this case proving a great lesson on why reasonable time in criminal proceedings holds such weight.

The police vs Tarcisio Mifsud[8] case threaded upon similar ground with the constitutional court confirming a judgement of the lower courts that the delaying tactics of the attorney general, that being the constant sending back of evidence for further examination of witnesses did in fact amount to a breach of the right to a fair trial. Furthermore, in this 3-year period in 15 out of the 27 sittings that were convened nothing took place and consequently the prosecuting officer and the attorney general were requested by the courts to file all their evidence 4 months from the date of judgment, laying bare again the more extensive degree of

[98] David Marinelli vs Attorney General, First Hall civil court,29th May 2009, 5/2008/1

[7] Noel Xuereb vs Avukat Generali u Kummissarju tal-Pulizija

[8] Il-Pulizija Vs Tarcisju Mifsud, Constitutional court, 114/2018 FDP, 13th July 2021

emphasis the courts put on lengthy proceedings in criminal cases as opposed to civil cases.

Reasonable Time in Action

The courts always retain an obligation to conclude matters within a reasonable time. Occasionally though there have been instances where though there had been a reasonable time violation, in part the extent of the delay was down to the accused and thus the courts find ways to navigate these waters appropriately. A situation along these lines unfolded in *Spiteri vs Malta*[100] where the European court concluded that though a violation of the reasonable time requirement had taken place since the domestic courts had contributed greatly to the delay, it refused to give just satisfaction and award any damages to Spiteri as it believed he too had contributed substantially to such a delay.

The obligations of the state are also an interesting point of discussion in relation to reasonable time. As the court put it in *Azzopardi vs Malta*[101] 'it is the duty of the state to organise the legal system in such a way that the courts are put in a position where they can guarantee everyone's right to have a final decision within a reasonable time.' The court here also cited Vocaturo vs Italy[102] where the court stated that the excessive workload of the court also did not exonerate the state from responsibility.

Recently, with the COVID-19 pandemic in our country, the state's role in maintaining a sound legal system was further highlighted by our courts. In the *Olive Gardens case*[103] though the courts did agree that the pandemic could serve as a pretext for some delay in our legal system, when it appeared that Covid would stick around for some time, the courts felt that the state had a duty to find alternative means to hear cases. Thus, the state in any situation is endowed with the responsibility of organising its judicial system so that cases may be heard within a so called 'reasonable time'.

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[9]Spiteri vs Malta Application no. 43693/20, 30 September 2020

[10] Azzopardi vs Malta, (Application no. 28177/12),6th February 2015

[11]Vocaturo vs Italy, 28/1990/219/281, 24 May 1991

[12] Olive Gardens Investment Ltd vs State Advocate et (CC) (22nd June 2022) (178/20)

[13] *Justice within a reasonable time* (2022) Times of Malta https://timesofmalta.com/article/justice-within-areasonabletime.814548#:~:text=As%20a%20rule%20of%20thumb,six%20years%20at%20two%20levels accessed 23 October 2024.

Malta's Reasonable Time Problem

The efficiency of criminal procedure is of critical importance for any jurisdiction that claims to uphold the rule of law. Thus, with a glance into recent statistics revealed by the EU, the question of reasonable time in local proceedings has gained even greater importance. Statistics from the 2016[104] Council of Europe's European Commission for the Efficiency of Justice painted a far from ideal picture of our legal landscape's efficiency to say the least. As former Chief Justice Emeritus Vincent De Gaetano pointed out a couple of years ago, Malta hardly fares well compared to its European counterparts in this department. In civil cases whilst the European median for civil cases stood at around 122 days, in Malta it stood around 783 days. Of a graver nature though was Malta's performance in criminal procedural efficiency where at a European level the median for criminal proceedings on an appeal level was at 77 days whereas in Malta it stood at a staggering 1,025 days, a number of a seriously threatening nature for the rule of law in any country.

Mr. Justice De Gaetano went on to list some of the problems which he believes may in some shape or form have contributed to the lengthy proceedings in our jurisdiction. Dr De Gaetano cited unnecessary litigation, the lack of staff and resources in the Attorney General's office, the lack of court halls in the country and also lengthy committal proceedings, which had been abolished in other countries a number of years ago, as some of the reasons for this disparity though this list should, in all likelihood, be a longer one. The speed of hearing suits principally is reliant on efficiency-generating legislation and when chosen, judges, and when these two areas aren't up to standard which in my opinion they are not at times, then this is reflected in lengthier proceedings.

An article which very well encapsulates the problem which we have with reasonable time-relating legislation is Article 195 (2). This article lays down rules which in and of themselves are praiseworthy but are not kept because they are disconnected with the actual procedure of our state. Our current system is a system where we have little or no information before the case begins. This is an article that thus appears to assume there has been prior discovery or shared disclosure by the parties which need not have been the case. It is intended to shorten the period of hearing, but it is doing so without assuring that there is an equal spread of information which in litigation translates to equality. This article

though it attempts to shorten lengthy proceedings it presumes the existence of institutes that don't exist. This law would have been a more effective law had incremental changes been affected in preparation for its enactment, before its enactment, though this evidently was not done and thus we are left with an effective article in an ineffective system that does not cater for it.

In relation to judges, though many believe that the quality of judges at this moment is of a very high standard, the lack of judges in general poses quite the problem on the island. With a limited number of judges on the island cases naturally take longer to conclude and this further adds to the lengthy proceedings problem we have in Malta. In research done by the European Union which covered years 2020-2022[105] it revealed that Malta had one of the lowest number of judges per 100,000 citizens in the country with 9, whilst the European average lay at exactly double that. This in my opinion is one of the other great contributors to our reasonable time problems, as whilst we have lawyers abound in this country, judges are quite hard to come by.

Recently, the ECHR also rallied criticism towards Malta regarding a case[106] that had taken a staggering 17 years to conclude, a case which ironically enough revolved around lengthy proceedings. The Court considered that the length of the proceedings, i.e. seventeen years, was "*excessive and failed to meet the 'reasonable time' requirement*" and that the applicants were forced to suffer 'delays which were not attributable to them' in a case which 'could not be considered complex'. Of significance also in this case is the fact that through reference to *Frydlender vs France*[107] and *Zarb vs Malta*[108] the ECHR set down criteria when assessing the reasonableness of lengthy proceedings. The 3 criteria mentioned consisted of: the complexity of the case, the conduct of the applicant and relevant authorities and what was at stake for the applicant in the dispute. With regard to this criterion the court declared that there had been a breach of fundamental human rights, namely through Article 6(1) of the European convention as well as Article 13, the right to an effective remedy, given that originally the constitutional court had awarded the applicants a mere €5,000 each in face of their lengthy proceedings.

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[14] https://commission.europa.eu/system/files/2022-05/part_2_-_eu_scoreboard_-_country_fiches_-_deliverable_0.pdf

[15] Galea and Pavia v. Malta*, (Applications nos. 77209/16 and 77225/16), 11/06/2020*

[16] Frydlender vs France, *(Application no. 30979/96)*, 27 June 2000

[17] Zarb vs Malta, Application no. 16631/04, 27th September 2005

After examining the sheer amount of case law there is in relation to reasonable time in our system, it would not be foolish to begin to wonder why lawmakers do not set down reasonable time parameters in explicit terms in the constitution to give a definite answer to the question of what time is considered reasonable for a case to conclude. The answer to this predicament is an altogether simple one in that there may be circumstances where certain delays are in and of themselves reasonable ones. The case for example may be a complex one which thus requires a detailed and careful investigation or may also be a case which involves collection of evidence from a large number of witnesses which naturally is a very time-consuming affair. Each case is unique with many taking a substantial amount of time to conclude because of the complex nature of the case. Thus, introducing a time barrier/limit into Maltese legislation and into our constitution may be a very dangerous affair that will lead to complex cases being rushed and potentially not so complex cases taking longer with knowledge that they are not in breach of the time limit set out by law.

Conclusion

Through this thorough examination of the state of reasonable time in our country it is with ease that one can conclude that its importance in any jurisdiction should not be underestimated. Malta certainly faces an uphill battle in this regard, with extremely alarming numbers in the face of a problem that has the potential to threaten the fabric of rule of law in our country. With Malta's legal integrity at stake, much should, and I hope much will be done to address this serious legal problem. This means moving away from solely punishing lapses in the 'reasonable time standard' and tackling the underlying reasons that caused the lapses in the first place, which may as we have discussed, involve minor changes in our legal system or in a more drastic scenario, even take the form of an overall change to the current legal system we have in place.

Principles of Arrest; Quid Facti, Quid Juris?

Andrea Farrugia

Abstract

In 2023, two amendments were discussed in parliament on matters of restricting the personal freedom of the individual. This paper, *inter alia*, is to provide several observations onto the amendments through analysing the principles of arrest, both in their legal, and social function.

This paper will supply a selective analysis of the provisions of arrest in the Criminal Code; Chapter 9 of the Laws of Malta, and the principles as found in Human Rights law. I shall provide a comparative study between the Maltese laws, and the English Common Law, in considering the influence of the latter onto the former.

The paper shall delve first into the exercise of defining the arrest, and the accused. It shall inquire unto the police powers of arrest, in determining "reasonable suspicion" as a criterion of a justifiable arrest. A distinction between persons of interest, and the suspect, was noted in light of the restrictions to personal freedom imposed through the arrest, whilst considering the volatility of the innocent person who remains subject to these restrictions. Arbitrary power is discussed under Article 1 of the Italian Penal Code. Under Article 34 of the Constitution, the maximum limit of detention is mentioned primarily in considering the amendment's proposed extension, which will be discussed under direct comparison with the English laws. Similarly, the amendment concerning the freezing of assets through injunction, shall be assessed under the study of an English case law. On the matter of court injunctions, the concept of arrest develops from the pre-trial detention of the accused, into a general restriction of the freedoms of the person.

In discussing the principles, and rights of a justifiable arrest, this paper shall finally consider the notion of 'first principles' whose implementation under scrupulous design must assume primacy. The 'first principle' of the common good, and its relation to personal freedom under a democratic society, as an *a priori* to the rule of law, is argued.

Defining Arrest on Legal and Social Grounds

Our laws provide for the following objective understanding of arrest, under Article 355Z (d); "that the arrest is necessary to prevent the person"[109] -to arrest a free person is to restrict their freedom to such degree wherein their ability to either carry or continue the execution of a crime is prohibited.

For any inquiry unto the function of arrest, one must understand that its importance is not merely as a legal tool, but also in its political consideration it is a necessity within any democratic state to sanction, and expressively instruct the freedom granted by the laws, insofar as there is no infringement by those willing to curtail such freedoms.

In legal procedure, the arrest of an individual secures their part within trial, as the *habeas corpus* initiates the Court's interest in the accused. This is important to consider, especially in Common Law countries, wherein trial *in absensia* is considered to infringe on due process.[110] Holding the accused under custody provides for the acquisition of evidence, and any other information which is personal that, in considering the context of the case, may be only witnessed by the accused.

Defining the Accused

The arrest of a free person itself succeeds the accusation. If we hold that suspicion is not enough, one must inquire not only on the merits of the claim, but also in defining its application to the *person*. In considering the person's arrest, the accusation must be of substance, at least in conforming to the threshold set by the law. This becomes needlessly complicated once extradition is taken into account, especially in considering the variance between languages.[111] We, of course, need not forget the variance between legal culture also.

For the Maltese context, we can safely affirm the integration of English Common law in providing for the identity of the accused. Yet, in determining such identity we do not impose the threshold test as found in the Code for Crown Prosecutors[112]. Such test, valid only once the criteria providing for the Full Code test prove insufficient, incorporates these five conditions; 1.) reasonable grounds

[109]Chapter 9 of the Laws of Malta.

[110]Federal Rules of Criminal Procedure, Rule 43. (1) (US) This law necessitates that the accused is present for trial at "the initial appearance, the initial arraignment, and the plea;" (2) "every trial stage, including jury impanelment and the re- turn of the verdict; and" (3) "sentencing."

[111]Rey v. Government of Switzerland [1998] 3 W.L.R. 1, 7B.

[112]2018 (UK).

for the charge[113], 2.) that further evidence exists[114], 3.) the gravity of the case[115], 4.) objection to bail[116], and 5.) public interest.[117]

It should be understood that such conditions are themselves features within the practice of arrest, largely under the great writ of liberty, and understood within contemporary human rights law. These conditions form part of a logically sound arrest, which must be carried under a clear design which we will discuss.

The Power to Arrest

Under the Criminal Code, Article 355V provides for the following imperatives unto the validity of the execution of arrest; 1.) an official warrant signed by a practicing magistrate, and 2.) under lawful grounds. Inquiring further, we arrive to the understanding that Maltese law provides for the warrant of arrest on such grounds wherein the direct involvement of state intervention is due. This principle expands further, in providing for the capacity to arrest unto "any police officer" as per Article 355X, the police power to arrest is made under the auspice of the state, provided that there is sufficient "reasonable suspicion" to do so. We can find a similar term deployed in English law.[118]

The Court, in the case of The Police vs. Johan Germaine Corneille Van Oudenhove[119] understood that the merit of an arrest was rendered unto the possibility of extradition, as per the "reasonable suspicion" to restrain the freedom of an individual, in spite of the exact text "reasonable suspicion" never appearing in the Extradition Act. It is understandable that proper arrest must not rely on *prima facie* evidence, for the merit of arrest must also prove itself as a tool once the accused has been detained and prepared for the gathering of evidence. Thus, an inquisitorial system of law must determine the guilt of the accused prior to their ascension to trial, as elaborated by the court.

"It requires that the investigating authorities would have completed their work in a way that the authorities would have taken a clear and unequivocal decision to pass onto the next stage, that is to prosecute."

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[113]ibid 5.3.
[114]ibid 5.5.
[115]ibid 5.8.
[116]ibid 5.9.
[117]ibid 5.10.
[118]Police and Criminal Evidence Act 1984, Article 24 (2); "If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it."
[119]Appeal no. 502/2016

It is important to emphasize the reasonableness of the suspicion, for the arrestor must take into consideration the material possibility of the crime, in the capacity to not only form clear intent, but also in its material execution. Any use of superstitious design may provide for the intent, yet the power to arrest revolves around the performance of a material offense, either prior to, upon, or after its impact.

Citizen's Arrest

Our law allows for the private citizen to perform an arrest of another private citizen.[120] This law follows from the Common Law, a practice still in place today.[121] The social consideration of the arrest is highlighted here clearly; that its role is one of a direct influence on civil society. In considering that English law introduced its first urban police force with the 1829 Metropolitan Police Act, and the capacity to initiate private prosecutions still remains in UK law, the role of the judiciary socially qualifies to protect the social body from its members, *by its members*.

The Criminal Law Act of 1967 also establishes a form of citizen's arrest in UK law.[122] It is important to note that the UK law extrapolates further from the permission. Article 3 (1) provides that the use of force by the private citizen is permitted in the "prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large." Given, that the force is reasonable, and proportional.

No Arbitrary Power

Most important is the legal validity of the arrest, not just as understood under Article 355V, but also in considering that the arrest is carried under the suspicion of an offense which violates the laws of the state. Article 1 of the Italian Penal Code states the following;

"Nessuno puo' essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, ne' con pene che non siano da essa stabilite."

This affirms that the greatest principle behind the arrest must be a consideration unto the rule of law, and not arbitrary execution of the seizure of one's freedom

[120]Criminal Code, Chapter 9 of the Laws of Malta, Article 355W.
[121]no. 10 Article 24A.
[122](UK) Article 2 (2); "Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence."

as per the power to arrest in itself. To quote Gian Domenico Pisapia's commentary on this article;

"Questo principio fondamentale, comune a tutte le legislazioni penali moderne, è fissato nell'art. 1 del codice penale, il quale dispone che *nessuno può essere punito per un fatto che non sia espressamente reveduto come reato dalla legge, né con pene che non siano da essa stabilite*."[123]

The law itself defines the criminal act as one which arrives at its conclusion of punishment. In establishing this feature within the written laws, we can define the punishment itself as a preventative measure. In the book *Il Sistema Penale*, Salvatore Aleo describes such character as "of reciprocity".[124] Therefore, one may argue that it is important to draft laws on such matters, for the permission of arbitrary arrest, including detention, performs an unjustifiable act in transforming the arrest itself as a form of punishment[125]. From the perspective of the private person, under our Constitution, if the arrest is proven to be unlawful, the victim has the right to request compensation from the arrestor.[126]

Thirty-Four and Forty-Eight

On the 10th of March 2023, a bill was presented to the House of Representatives with the aim of amending Article 34 of the Constitution, which deals with the rights surrounding arrest. This following amendment was the source of controversy:

"Provided that Parliament may by law provide for the extension, subject to adequate procedural safeguards and to the authorisation of a Magistrate, of the period of forty-eight (48) hours within which the person arrested or detained shall be brought before a court, by other periods not exceeding a further eighty-four (84) hours in total if the person who is arrested or detained is reasonably suspected to have committed a crime liable to a maximum punishment exceeding twelve (12) years imprisonment."[127]

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[123]Gian Domenico Pisapia Istituzioni di diritto penale : parte generale e parte speciale. 3a ed. (CEDAM. 1975) 1.

[124]Salvatore Aleo, *Il sistema penale*. (2a ed. Giuffre. 2005) 65. "Il reato può essere definito in generale come il fatto per il cui autore è stabilita una pena, per evitarne in generale la realizzazione. D'altronde, come si è visto, la pena è definita dalla connessione con il tipo (ovvero l'idea) del fatto che ha la funzione di evitare (il reato). Questo rapporto definitorio può essere considerato, appunto, di reciprocità",

[125]This, of course, should broaden our consideration to the imprisonment of the person itself consisting unto a 'form' of arrest in which the person is severely restricted from even exercising their rights. However, for the sake of this paper, I shall only delve into the pre-trial, and later towards the end, the trial stage.

[126]Article 34 (4).

[127]Bill No. 49 (2023) C899

Whilst such extension may not directly encroach unto the allegation of despotism, it should still be noted that the capacity to detain, therefore physically restrict the freedoms of the person, is in itself the utmost form of security which may, in certain situations, prove to benefit the communities of which the police, in a democracy, are meant to protect.

However, as Kevin Aquilina writes in his criticism of this amendment, while there were past abuses of the 48 hour rule, in spite of later intervention by the judiciary, there are now newfound possibilities of abuse under this new law.[128] The crux of this opinion rings in highlighting the behaviour of those within the police corps, and that if no change in behaviour occurs, *sans dire* this law would be exploited. Yet, whilst past abuses occurred under the limits of the Constitutional provision, this is first and foremost a law with its own limits, which means that the possibility of scrutinizing the application of the extension is now possible, as it outlines its conditions clearly.

The line here concerns what the law might transform to in the future. When one considers the anxiety of allowing the police force a centimetre, with the alleged propensity of them to ask for a further 100 meters in the future, these considerations should be taken seriously. The Times of Malta reported on the opinions of three opposition MP's whose primary concern was of this historical observation.[129]

One of those MP's noted in his 1988 thesis on Police Powers that in the United Kingdom this limit may be extended once transport, and other territorial features which Malta does not possess are considered.[130] Furthermore, the conclusion of detention differs as well. The English laws terminate detention once the accused are told of their charge, or released, while Maltese law terminates detention once the detainee reaches court.[131]

It should be noted that in the United Kingdom, the maximum is 24 hours[132]. This means the extension is not only warranted but justified if need be. In Malta, the proposed law's extension to the 48 hours is itself only justifiable once the

[128]Kevin Aquilina, Bye-Bye to the 48-hour arrest rule, The Malta Independent. (2023) Available at: https://www.independent.com.mt/articles/2023-04-02/blogs-opinions/Bye-bye-to-the-48-hour-arrest-rule-6736250811 (Accessed: 22 September 2024).

[129]Editorial *PN MPs fret over plans to let police detain some criminal suspects for longer*, (Times of Malta 2023). Available at: https://timesofmalta.com/article/pn-mps-fret-plans-let-police-detain-criminal-suspects-longer.1021870 (Accessed: 24 September 2024).

[130]Mario De Marco, A reappraisal of police powers (Master's dissertation 1988) 2.20.

[131]ibid.

[132]no 10. Article 41.

procedure of the courts is considered. It seems that the proposed extension is only being contemplated for particular crimes, those which carry a 12-year sentence or more, thereby considering that the gravity of the sentence must be proportionate to the security imposed unto the accused. However, it would seem that since drug-trafficking is possibly punished by a maximum penalty of life imprisonment, **every** case of suspicion of drug trafficking can trigger off the application of the 48 hours multiplied by 2 extension.

Yet, one must consider that the accused, in any case, is surrendered to the presumption of innocence; *semper praesumitur pro negante*. Once the accused is rendered through the test, it is important to ask whether an innocent person should be subject to such extension, if any, on the grounds that there was 'reasonable suspicion'. Underlining the possibility of the innocent is however not enough. One must also consider the interests of the court in relation to proper application of arrest.

Persons of Interest

Persons of interest are those whose behaviour may be connected to the unravelling, or the full execution of the criminal act. In his lectures on the institution of criminal procedure, Aldo Moro elaborated the qualification of 'interest' as;

"E, quindi, per "interesse" che cosa intendiamo? Intendiamo la posizione, l'attegiamento, *il modo di essere di un soggetto di fronte ad un bene della vita*, non necessariamente economico – come avviene quando si allude all'interesse in *termini privatistici*, in termini di *giurisprudenza degli interessi* – ma nel significato, nella portata più generale."[133]

This statement is broken into two; the first concerns itself with the goods of life, then the second statement focuses on the role of the person in connection with others. Legally, the person is reprimanded through the concern of, and in considering the harm they exert onto others, as discussed much earlier. A person of interest differs from the suspect, yet under the eyes of the arrest such features are ignored.

In considering the law's indifference between the two, and the variance between sentencing as per Article 31 of the Criminal Code, why should the limit of arrest be inconsequential to the purported crime that the accused has committed? Here

[133]Aldo Moro et al. *Lezioni di istituzioni di diritto e procedura penale : tenute nelle Facolta di scienze politiche dell'Universita degli studi di Roma*. (Cacucci 2005) 195.

I shall posit the question; why ought we consider, alongside a scale of punishment, a similar application to the detention of the person?

The reason lies in the concern featured previously, and the mere fact we separate persons of interest from those suspects. We simply do not know, and therefore cannot judge those whose innocence is imposed as *de jure* first, then proven guilty. What may be permissible is the imposition of an extension unto those who are made suspect, for it is the first step, insofar as it performs the necessary procedural accomplishment of bringing the person to trial.

Persons considered to be interest qualify to that of suspect once there is sufficient grounds for their role in committing the crime. If we take this as logical progression, we may follow the assertion that, prior to trial, there exists one such case of judgment. The law may need to take this into consideration.

Freezing of Assets

After the period of arrest, the Court, through an injunction, may have the sum total of assets of the defendant frozen completely, which means that whilst one may access the static sum, they are prohibited from physically moving, or transferring the sum, or facilitate transactions of any kind. According to the EU Directive "on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union"[134]; the main goal of asset freezing is to stop criminal associations whose operation is largely maintained through the movement of fungibles. If the association's financial reserve were to be frozen, it would be harder for the association to continue operating as normal.

English law, under the Proceeds of Crime Act[135], allows for the authorities to issue a property freezing order. In the case of Fourie v. Le Roux et. the House of Lords inquired on such procedure. Lord Bingham made the following statement.

"In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated."[136]

Mareva, derived from former Common Law parlance, is understood as freezing the total assets of the accused. Our Maltese laws derive much from the English influence, including those laws concerning the freezing of assets. In light of the controversy surrounding the change in law concerning the total sum of assets

[134]DIRECTIVE 2014/42/EU
[135]2002 c. 29.
[136]SESSION 2006-07 [2007] UKHL 1

frozen[137], this paper shall provide two observations; the first involves the role of arrest during pre-trial, the second is derived from an analysis of the opinion of the House of Lords in the aforementioned case of Fourie v. Le Roux et.

The Archaeology of the Accused

When we speak of arrest in terms of procedure, it is the moment a person is 'arrested' by law enforcement, taken into custody, detained, and awaits trial. It is a pre-trial state. However, the common application of the term 'arrest' should transcend further from the procedure. To arrest is to suspend. As a moving animal is suddenly sedated, we perform autopsies on cadavers.

During this period the person is reduced from furthering their performance, for whilst one is still able to exercise their rights, they are however performing under the exception to one particular right. Within this moment, the history of the accused is dissected. During trial much of the evidence is presented up to the point of the alleged crime. To preserve the status quo, Common Law Courts are allowed to issue an interlocutory injunction, prohibiting certain acts from further continuing if their effect is causal to the detriment of the court's decision. In the Common Law, a *Quia Timet* performs similarly in anticipating a future wrong, it restricts the freedom of the defendant during trial.

The intentions made at present is that the halting of any purported furtherance of the act in restricting one's freedom is itself manifestly *good*. It is part of a greater principle within the remit of applying a justifiable arrest. It is, most importantly, itself part of the *nature* of the act. Furthermore, it is important to treat both in a similar vein, once one discusses the opportunity to legislate any new invention.

Fourie v. Le Roux et.

This case primarily concerned issues of jurisdiction. However, the subject-matter was of the freezing of assets of two companies implied in alleged fraud. The facts presented to Court were as follows; two companies registered in South Africa, Herlan Edmunds Engineering (Pty) ltd. And Herlan Edmunds Investment Holdings Ltd (the parent company) were placed under liquidation. The person in charge of liquidation, Mr Fourie, alleged fraud and deception by the majority shareholders of the two companies; Le Roux, and his company Fintrade, through the removal of assets belonging to the companies under liquidation. Mr Fourie, in light of such behaviour, applies for the Mireva Injunction.

[137]Bill no. 76 (2023) C1621-1652.

Le Roux protests for the freezing order's removal. There was no procedure unto which such order would manifestly apply. The Court's judgment sided with Le Roux and discharged the freezing order. Mr Fourie appeals. The appeal was dismissed. The case was appealed again to the House of Lords. The House inquired unto the matter of jurisdiction.[138] Most importantly for the subject of this paper, it also inquired unto whether Mr Fourie was in the right to do so.

The House of Lords would affirm the dismissal of the freezing order. It's dismissal was found on two particular grounds. The first concerned the failure of Mr. Faurie to disclose his application of the freezing order to the defendant. This principle of consultation is mirrored in pre-trial arrest at once the arrestee is informed, in writing, on the grounds and reason for their arrest. The second, and most important, is the injustice present at once the order was issued.

Freezing orders, the House of Lords understood, appear in expectation of any potential disposing of assets, and not as a proprietary remedy. This fine thread of stepping unto a possible injustice appears once we consult those very basic foundations of 'arrest' as per the restrictions imposed. In order to determine the injustice caused, one must not merely observe the laws themselves but also the principles unto which they are to follow. If we are to legislate whilst mitigating any possible injustice, we need to consult first principles, ones which precede the rest. We must ask; "why do we *arrest*?" again.

The Common Good

Jacques Maritain defined the 'common good' as deriving from; "Il fine della società è il bene della comunità, il bene del corpo sociale."[139] From such association with the social body, we can attest to the importance of relating one's personal freedoms with that of a common ground inhabited by others. It is from this relationship wherein the concept of civility emerged. To suspend someone, placing their will under detention for a brief period, then subjecting that someone during trial to restrictions as determined by the magistrates, provides for the security of the commons from the person.

The creation of Human Rights was one such step to intermediate between the freedoms of the person, and those of the commons. Whilst the arrest of a person guarantees security, it must also follow rights which are bestowed onto the individual.

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[138] no. 28.

[139] Jacques Maritain, *La persona e il bene comune*. 3rd ed. (Morcelliana 1973) 31.

The Private Individual

Most evident is the relation to the individual appears in providing the arrestee the reasons for the arrest.[140] Writing in 1947, Hugh Harding observed;

"Considerations touching the personal liberty of the subject have inspired the requirement that the officer of the Executive Police, charged with the execution of a warrant of arrest, must inform the person, subject to such arrest, of the officer's authority and of the reason for the arrest.

In European Case Law, the case of Van Der Leer vs. The Netherlands[141] serves to implement this relationship through the failure to inform the arrestee of the fact that they were, in fact, deprived of their liberty. In the Common Law, this issue was contemplated in the case of Entick vs. Carrington[142]. Whilst the defendants were provided with a warrant from the Secretary of State, the House of Lords held that the trespassing over private property breaches the right only unless trespassing is permitted by law. To quote Lord Camden;

"If it is law, it will be found in our books."

Therefore, in our Constitution under Article 43, protection from arbitrary arrest is provided except for cases outline under the article. In balancing the common good with personal freedom of the private person, the principles of arrest as discussed previously appear under the article, which allows for an objective measure of the law's treatment of the principles.

Conclusion

The first principles of arrest are understood, in this paper, to be the common good, and the rule of law. Each of the two do not assume supremacy over the other. From these, proper arrest is understood upon the legal tenets which compose, largely in synchrony with human rights, the agency of the private individual. Restrictions appear only once some form of judgment is conclusive enough to judge the person's freedom.

Any proposed amendment must take all principles as true, in order for the proper operation of the arrest to be manifestly valid. It is in such explanatory moments wherein the social role of arrest appears clearly; to mitigate any possible continuing damage. Therefore, much of the reform which occurs in any relevant

[140]Chapter 9 of the Laws of Malta, Article 355AT (1).
[141]11509/85.
[142][1765] EWHC KB J98.

section of the law, such as those of police powers, must concern themselves unto the fairness of the act itself.

Whilst our Constitution, and Convention Act provide for human rights within Maltese law, the structures of the state, and its ability to distribute force, remain largely up for debate. If the role is to provide for a democratic structure, then it must fulfil its design to best adapt for it. The Courts already exercise degrees of influence prior to sentencing; thus it is of a fundamental importance to target any amendment which aims to perform necessary, holistic change within the procedure of the courts.

The Disclosure of Evidence

Jake Navarro

Introduction

The Disclosure of evidence has accrued recent academic interest, particularly in light of increased judicial activity on the subject-matter, locally and even by the ECHR. In terms of domestic law, the so-called Right to Disclosure of Evidence is specifically found in Article 534AF of our Criminal Code.[143] This notwithstanding, a sound understanding of the right implies an investigation into EU Law (particularly Directive 2012/13/UE),[144] the Constitutional implications of the Article (the Right to a Fair Trial as befits the Constitution of Malta & the ECHR), together with case-law. Against this bedrock, this paper will seek to analyse the constituent elements of the right and its main import.

The Directive & Article 534AF

Directive 2012/13/UE on the Right of Information during Criminal Proceedings (hereinunder referred to as the Directive) was introduced in 2012, and Member States were obliged to transpose it by 2014. The Directive laid down several rules on suspected or accused persons. It is important to remark that the Directive explains the meaning of suspected or accused persons as referring to " *any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights."* [145]

Article 5(1)(c) of the ECHR details *"the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"*. [146] Case-law has naturally interpreted this and compounded a list of principles and guidelines to better determine the status of an accused. Space precludes a detailed analysis of the latter, yet it is interesting to note how the Directive itself signals the importance of reading the provisions laid down therein

[143] Chapter 9 of the Laws of Malta, Article 534AF
[144] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings
[145] *ibid,* Recital 21
[146] European Convention on Human Rights (ECHR), Art 5(1)(c)

in tandem with the ECHR, and the latter's jurisprudence. As will be revealed hereinunder, this holds true for Article 534AF, insofar as a cross-reference to the deliberations by the ECHR on Article 6 will be made.

Moving on, for the purposes of disclosure, reference must be made to the Directive's Article 7, which has been transposed under Maltese law *tramitee* Article 534AF. [147] Article 7 reads as follows:

1. Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.

2. Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence.

3. Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

4. By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review.

5. Access, as referred to in this Article, shall be provided free of charge.[148]

[147] Chapter 9 of the Laws of Malta, Art. 534AF
[148] n2, Art. 7

The above is mirrored *verbatim* in Article 534AF. As held in ***Ir-Repubblika ta' Malta vs Carina Louise Azzopardi*** "*Illi din id-dispożizzjoni fil-Kodiċi Kriminali trasponiet fil-liġi Maltija d-Direttiva 2012/13/UE tal-Parlament Ewropew u tal-Kunsill ta' nhar it-22 ta' Mejju 2012 dwar id-dritt għall-informazzjoni fi proċeduri kriminali, u dana permezz tal-Att IV tas-sena 2014"*.[149] It is this article which forms the crux of the subject-matter; thus, it is essential to analyse each sub-section in depth. Prior to this endeavour, it is also important to explain the *raison d'etre* behind this entitlement to the defence.

The Raison d'etre

The raison d'etre behind this article is best explained in terms of the Equality of arms notion, and the requirement of having an adversarial trial. That the equality of arms notion underpins the Article was captured in ***Il-Pulizija v Gianluca Caruana Curran*** wherein it was emphasised that "*Dak illi l-liġi trid tassigura b'din id-disposizzjoni tal-liġi hija parita` bejn il-partijiet ossia l-equality of arms bejn il-Prosekuzzjoni u d- difiża u mhux bejn id-difiża u x-xhieda tal-Prosekuzzjoni"*. [150]

Moreover, upon looking at the implications/meaning of having an adversarial trial, the *nexus* with the requirement for disclosure becomes apparent. One can cite the Guide on Article 6 of the ECHR. More specifically, paragraphs 186 *et sea* lay down that "*As a rule, Article 6 § 1 requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused (Rowe and Davis v. the United Kingdom [GC], 2000, § 60). In this context, the relevant considerations can also be drawn from Article 6 § 3 (b), which guarantees to the applicant "adequate time and facilities for the preparation of his defence" (Leas v. Estonia, 2012, § 80)"*. [151]

Similarly, one can also cite the judgement handed down by the ECHR in ***Rowe and Davis v United Kingdom*** wherein it was remarked how "*The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the*

[149] *Ir-Repubblika ta' Malta vs Carina Louise Azzopardi*, Criminal Court 9/04/2024
[150] *Il-Pulizija vs Gianluca Caruana Curran*, *Charles Joseph Mercieca*, Decree by the Court of Magistrates (Criminal Inquiry) 17/02/2021
[151] Council of Europe, 'Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb), 186 *et seq*

Brandstetter v. Austria judgment of 28 August 1991, Series A no. 211, pp. 27-28, §§ 6667).[152] Thus, it is clear that the disclosure of evidence is effectively what having an adversarial trial is all about.

Moving on, the latter two concepts form part of the broader Right to a Fair Trial. This was indeed affirmed in ***A.G P.G. and J.H. v. The United Kingdom*** wherein it was held that *"It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be Adversarial and that there should be equality of arms between the prosecution and defence"*

Thus, from the above, it can safely be submitted that the disclosure of evidence has in mind ensuring that there is equality of arms between prosecution and defence, ensuring that the trial is truly adversarial, and *a fortiori* respect for the Right to a Fair Trial. In confirmation of the aforesaid, one can reference the Parliamentary debates of Article 534AF. Before the plenary, it the following was held, by Onor. Bonnici:

"Din hija l-klawsola li se tagħti d-dritt lis-suspettat jew l-akkużat li jingħata aċċess għall-informazzjoni kollha li tippermetti lilu jew lill-avukat tiegħu biex jattakka effettivament il-legalità tal-arrest jew id-detenzjoni u biex tiġi salvagwardjata proċedura ġusta u jipprepara d-difiża tiegħu. Fil-bidu li ħadt din il-kariga lill-ġurnalisti ma ddejjaqt xejn ngħidilhom li d-dritt tal-arrestat waqt l-interrogazzjoni għandu mankanza kbira għax l-arrestat ma jkollux id-dritt li jaċċedi għall-materjal li jkollha l-prosekuzzjoni. Hawnhekk qed nirreferi għal dak li jgħidulu the right to disclosure fejn l-akkużat ikun jaf il-prosekuzzjoni x'materjal għandha fil-konfront tiegħu"[153]

After having looked at the rationale behind the promulgation of the article, it is now worth analysing the individual sub-sections of Article 7 – as mirrored in Article 534AF

[152] *Rowe and Davis v United Kingdom,* App no 28901/95 (ECtHR, 16 February 2000).
[153] Parliamentary Debates, Session Nr. 118, 11/02/2014

Article 7(1) / Article 534AF (1)

Article 534AF (1) lays down the following:

"Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers." [154]

This section places an obligation on authorities to disclose documents - which are essential to challenging the arrest/detention in terms of its lawfulness - to the accused/his lawful representative. The guiding principle remains the challenge to the arrest *ergo* it is somewhat narrow in scope. It is clear that 7[1] has a particular **aim** in mind and is centred on that. In tandem with this, it is to be observed that the Directive here makes use of the term "*document*".

Article 7(2) / Article 534AF (2)

Article 534AF(2) contemplates a different obligation. This section lays down that:

"Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence." [155]

The main rationale in this sub-section is "*safeguard[ing] the fairness of the proceedings and to prepare the defence"*. This is subject to the caveat that the material which must be disclosed must be **"material".** This paper, at a later stage, will delve into further detail on this notion. At this stage, by way of preliminary, it is important to underscore what was referenced in a decree handed down by the Criminal Court, specifically that "*Il-Qorti tqis ukoll illi dwar dak li jikkostitwixxi evidenza materjali jiddependi dejjem miċ-ċirkostanzi tal-każ partikolari".* [156]

[154] n1, Art 534AF(1)
[155] n1, Art 534AF (2)
[156] n8

Article 7(3) / Article 534AF(3)

This section lays down that;

"Without prejudice to paragraph 1, access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered." [157]

This sub-section touches upon the **time-period** within which the disclosure of material evidence is to be made. The law is quite generic insofar as it only comments on the latest stage where such material must be disclosed. Reference can be made to Cras & De Mattei who argue that "*the concrete circumstances of the case may require that access be given long before that moment (e.g., when a piece of evidence is subject to irreversible modifications requiring that examination by the defence be granted in advance)".* [158] Thus, the moment at which disclosure is made is subject to each case, and ultimately, recourse to a request for disclosure may be sought by the defence.

Article 7(4) / Article 534AF(4)

Article 534AF(4) lays down the following :

"By way of derogation from paragraphs 2 and 3, provided that this does not prejudice the right to a fair trial, access to certain materials may be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted. Member States shall ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review." [159]

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[157] n1, 534AF(3).
[158] Steven Cras and Luca De Matteis, *'The Directive on the Right to Information, Genesis and Short Description*' (2017) eucrim <https://eucrim.eu/articles/directive-right-information/> Accessed 4/10/2024.
[159] n1, Art. 534AF(2)

This section deals with exceptions to the obligations which have already been reviewed. As is clear, the right to disclosure is not an absolute right. As held in ***Rowe and Davis v. The United Kingdom***, "*the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1"*. [160]

Interestingly, one can also reference the employment of these exceptions, by our courts, when faced with a request to disclose police intelligence. Firstly, the latter has been defined by our courts as "*dik l-informazzjoni li l-pulizija tkun ġabret fil-kors tal-istħarriġ tagħha sabiex tipprevjeni jew tinvestiga il-kummissjoni ta' xi reat".*[161] Moreover, our courts have been faced with a request for disclosing such police intelligence to the defence, on a number of occassions. In reply, our Courts have often cited the exceptions postulated in sub-section (4). By way of example, one can reference ***Il-Pulizija (Spettur Omar Zammit) vs Jomic Calleja Maatouk*** , where the Court held :

"In vista tal-fatt li l-vittma/vittmi tal-għemil li allegatament ġie mwettaq mill-imputat u li jinsab addebitat bih għadhom mhux magħrufa, magħdud mal-fatt li l-investigazzjonijiet tal-pulizija għadhom attivi b'dan il-għan, ftit jista' jkun hemm dubbju li l-iżvelar tal-informazzjoni mitluba mid-difiża - in kwantu irid ikun jaf kif u min fejn inkisbet - ***u minkejja li ma tiswa xejn ghad-difiża tiegħu, taf tissarraf fi preġudizzju għall-istess investigazzjonijiet filwaqt li tkun theddida serja għall-inkoluminita tal-istess vittma/vittmi u dan kif kontemplat bl-Artikolu 534AF(4) tal-Kodiċi Kriminali".*** [162]

Thus, it is clear that the right of disclosure is not absolute, with the court having discretion to invoke one of the caveats laid down in the sub-section under examination. Naturally, this cannot be done arbitrarily, and indeed is itself circumscribed by the guiding principle that is the right to a fair trial. In other

[160] n10
[161] *Ir-Repubblika ta' Malta vs Yorgen Fenech*, Decree by the Criminal Court, 1/11/2021
[162] *Il-Pulizija (Spettur Omar Zammit) vs Jomic Calleja Maatouk,* Court of Magistrates (as a Court of Criminal Judicature), 4/04/2022

words, "*għandu […] jiġi kkunsidrat dak kollu li jkun sar fil-kors tal-proċess kriminali"* [163], and an overall balance must be sought.

In fact, the ECHR has pronounced on a number of occasions that although it will not investigate "*whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them"* , however, "*It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused"*. [164]

Cras & De Matteis' deliberations summarise the above, when arguing that :

"a balance had to be found between, on the one hand, the need to ensure that criminal prosecutions can be conducted efficiently through national systems for carrying out investigations without the suspect or accused person or any other third person being made aware of them and, on the other hand, the wish to ensure equality of arms for the defence, by providing the right to have access to the materials of the case…….". [165]

The Meaning of "Material Evidence"

After having looked at the salient aspects of Article 534AF, the *vexata quaestio* remains : What is Material Evidence? In other words, what must the Prosecuting Officer disclose to the accused (his lawful representative). It is clear that the law itself does not offer a definition. Rather, an array of sources have been cited as supplementary guides.

In primis, reference can be made to Recital 31 which states that access to material evidence **includes** access to materials such as documents, and possibly photographs and audio and video recordings. Moreover *"Such materials may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law."*. [166]

[163] *Dustin Bugeja v. Il-Kummissarju tal-Pulizija u l-Avukat Ġenerali,* Constitutional Court 13/05/2024
[164] *Dowsett v United Kingdom*, App no 39482/98 (ECtHR, 24 June 2003) paras 42-43.
[165] n16
[166] n2, Recital 31

Moreover, our Courts have on a number of occasions referred to the U.K Attorney General's Guidelines on Disclosure. [167] These have become an important guide for our Courts to decipher the meaning of material evidence. As held in ***Il-Pulizija vs Gianluca Caruana Curran et*** *" il-liġi tagħna ma tgħid xejn minn dan kollu [making reference to the Guidelines] iżda fil-fehma tal- Qorti tajjeb li ssir referenza għal dawn il-linji gwida sabiex, anke bl-użu tal-bon sens u tal-loġika, wieħed jifhem aħjar x'tista' tikkostitwixxi evidenza materjali taħt l-Artikolu 534AF tal-Kodiċi Kriminali".* [168]

The Guidelines *inter alia* emphasise that "*Material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer,* ***that it has some bearing on any offence under investigation or any person being investigated****,* ***or on the surrounding circumstances of the case****, unless it is incapable of having any impact on the case".* [169] This thus indicates that the role of the prosecutor remains important, insofar as his subjective perspective is the point of departure. Beyond that however, the operative test to take into consideration is whether the material will have a bearing on the offence/ persons involved/ factual circumstances around the offence. Such bearing will necessarily involve envisaging what the trial will involve, what witnesses are likely to be brought forward, and which issues will likely arise in the case.

An invaluable part of the Guide is the section dedicated to examples of different kinds of evidence which are likely to comprise material evidence in need of disclosure. The list is found in paragraphs 86 *et seq* and has been cited on a number of occasions by our courts. This is of significant aid to the Prosecution in determining what evidence is material *o meno*. Such evidence includes:

a) Records such as tapes or recordings of telephone messages which contain descriptions of an alleged offence/offender.

b) Incident logs relating to the allegation.

c) "A "*contemporaneous record*" of an incident. In turn, this can involve crime reports and forms, investigation logs, handwritten or electronic notes by investigators, records of officer actions, and any relevant footage or imagery like CCTV.

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[167] U.K. Attorney-General's Guidelines on Disclosure (2024) <*https://www.gov.uk/government/news/attorney-generals-guidelines-on-disclosure-updated*> Accessed 4/10/2024.
[168] n8
[169] n25

d) Defendant custody record / Voluntary attendance record;

e) Previous accounts made by a complainant / other witnesses;

f) Interview records (written records, or audio or video tapes, of interviews with actual or potential witnesses or suspects);

g) Any material which casts doubt on the reliability of a witness such as relevant previous convictions and relevant cautions of any prosecution witnesses and any co-accused. [170]

The above has therefore been useful in the Court's determination of what material must be disclosed, insofar as it is "material". All-the-more, this has led to different judgements qualifying different evidence as such. By way of example, one can cite ***Elton Gregory Dsane vs L-Avukat tal-Istat'***, wherein the First Hall Civil Court in its Constitutional Jurisdiction considered DNA analysis' results, and statements given, as material evidence. The Court held that the DNA results related to the applicant *"would have led to the proper advice being given to the Plaintiff"* . It was noted that *"the police were in possession of evidence that would have exculpated Hajjaj from most of the accusations."*. [171] Thus, the bearing on the case is manifest.

[170] *ibid*
[171] *Elton Gregory Dsane vs L-Avukat tal-Istat,* First Hall Civil Court (Consitutional Jurisdiction) 30/07/2020

Conclusion

The Right to Disclosure is gaining ground in the Maltese legal system. It is clear that a line of case-law is developing, with an increasing awareness of the need of having a fair trial. This naturally partakes in the wider impetus being developed by the ECHR, in its scrutiny and protection of the Convention's Article 6. All this places a high onus of obligation on the Prosecution and Prosecuting Authorities, to ensure that the Directive's obligations are well-respected, and that the notions of equality of arms and an adversarial trial are upheld. This onus of obligation was noted in Parliament before the article's introduction, when Onor. Bonnici noted that "*Din hi xi ħaġa li se twassal għal bidla enormi fil-mod ta' kif jiġu mmexxija l-investigazzjonijiet f'pajjiżna. Nemmen li jekk titħaddem tajjeb[...]se twassal għal reviżjoni sħiħa tal-kunċett ta' proċeduri ta' kompilazzjoni u biex ngħaddu għal sistema ta' paper committals".* [172]

Against this bedrock, it is clear that the Right to Disclosure merits close attention, by all stakeholders. Ultimately, this boils down to ensuring a person's rights are respected. Henceforth, the developing line of jurisprudence remains a source of academic intrigue and attention.

[172] n11

The Freezing Orders Conundrum

Francesco Sapiano

Introduction

Unlike a large part of the existing literature on this topic, the current discourse now evolves after the introduction of Act IV, enacted in 2024. The extent to which the legislation has played a pivotal role in the progression and improvement in terms of respecting human rights will be critically analysed below.

It is imperative that the focus remains on human rights throughout and therefore, the first identifiable factor to be discussed must be the guarantee chartered by the convention that runs the risk of being jeopardized in a situation where the legislation fails to consider the complete essence of the guarantee in view of the procedural safeguards as delineated in the procedural law relevant to a scenario of this kind.

Article 1 of Protocol 1 to the European Convention on Human Rights (ECHR) guarantees:

"Every natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided by law and the general principles of international law."[173]

This provision is further qualified by allowing states to posit laws they deem necessary to regulate the use of property for the general interest or to ensure the payment of taxes, penalties, or other contributions.

As Tonio Borg explains in his Commentary on the Constitution of Malta[174], states possess the authority to control property under these conditions, provided they adhere to legal frameworks.

[173] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Protocol 1, art 1.

[174] Tonio Borg, Commentary on the Constitution of Malta (Kite,2016) 104.

The European Court of Human Rights (ECtHR) elaborated on the scope of this right in Sporrong and Lonnroth v. Sweden[175]. The Court identified three interconnected principles:

i. The first principle, stated in the opening sentence of the first paragraph, asserts the general right to peaceful enjoyment of possessions.
ii. The second principle, outlined in the following sentence, governs deprivation of possessions, requiring such actions to comply with legal requirements and the broader principles of international law.
iii. The third principle, located in the second paragraph, affirms the state's authority to regulate property use when it serves the public interest, provided the measures taken are necessary and lawful.
iv. Importantly, the ECtHR has stressed that these principles are not standalone but must be interpreted collectively. The second and third principles are assessed within the broader framework of the first principle, ensuring that the right to peaceful enjoyment of property remains central.

This holistic approach is a consistent feature of the ECtHR's case law. When examining cases, the Court first determines whether the state's actions fall within the scope of the right to property.

Next, it considers whether the interference meets three essential criteria:

i. Compliance with the principle of lawfulness.
ii. Pursuit of a legitimate aim.
iii. Proportionality between the means employed and the aim sought.

For instance, in Apostolovi v. Bulgaria[176], the Court emphasized the need for lawfulness as a preliminary requirement. Once lawfulness is established, the Court evaluates the legitimacy of the state's objectives and whether the interference is proportionate to the aim pursued. If any of these criteria are not satisfied, the ECtHR is likely to find a violation of Article 1 of Protocol 1.

Freezing orders under the novice framework are supposedly preventive in nature. The ground and legitimacy for this measure is to preserve assets potentially linked to illicit activities. In Malta, these orders are governed by two primary

[175] App no 7151/75 (ECtHR, 23 September 1982) para 61
[176] Apostolovi v. Bulgaria App no 32644/09 (ECtHR, 07 February 2020) para 91.

frameworks: the Dangerous Drugs Ordinance and the Proceeds of Crime Act, the latter significantly amended by Act VI of 2024.

These amendments have sought to address the balance between effective enforcement of the law and the protection of individual rights. Unlike the blanket seizures under the Dangerous Drugs Ordinance, which presume all property of the accused is derived from criminal activity, the Proceeds of Crime Act now requires prosecutors to quantify or indicate the proceeds of crime they seek to confiscate[177]. This burden of proof must be satisfied within a specific timeframe, and failure to do so results in the automatic termination of the freezing order. This change poses itself as a critical step toward addressing concerns of arbitrariness and ensuring that freezing orders are narrowly tailored to the assets linked to alleged offenses.

Additionally, Act VI of 2024 empowers courts to issue freezing orders limited to specific assets or amounts corresponding to the alleged criminal gains. While general or comprehensive freezing orders may still be issued under exceptional circumstances, prosecutors must justify such measures within 90 days[178], ensuring a higher threshold of accountability. This contrasts sharply with the prior practice, where broad freezing orders often persisted without periodic review, disproportionately burdening the accused.

Another notable improvement under the Proceeds of Crime Act is the provision for increased flexibility in addressing the financial needs of individuals subject to freezing orders. Act VI raised the maximum subsistence allowance to €21,945 annually, ensuring that affected persons can maintain a reasonable standard of living[179]. Furthermore, courts may authorize additional funds for business operations or recurring expenses, allowing individuals to sustain their livelihoods while under investigation. These measures seemingly acknowledge that freezing orders as a punitive measure may unjustly castigate defendants falsely accused.

In comparison, the Dangerous Drugs Ordinance remains rigid, with freezing orders encompassing all assets of the accused without requiring a detailed justification. This framework operates on a presumption that all property is criminally tainted, which critics argue is overly punitive and fails to align with the proportionality principles upheld by the European Court of Human Rights

[177] Proceeds of Crime Act (n 16) Article 36(6).
[178] Ibid Article 36(4)(b)(i).
[179] L.N 31/2024, Establishment of Maximum Amount which may be Released to Persons who are Subject to Attachment Orders or to Seizing and Freezing Orders under the Proceeds of Crime Act, 2024.

(ECtHR). The lack of procedural safeguards under this ordinance starkly contrasts with the more refined approach introduced by Act VI of 2024.

It is also pertinent to briefly discuss the issue of subsistence for individuals subject to freezing orders. Subsistence aims to ensure that individuals, even in adverse situations, are not deprived of the ability to live with dignity and meet their fundamental needs. For instance, in Malta's Proceeds of Crime Act, a portion of frozen assets might be released to allow for subsistence-level expenses.

While Act VI of 2024 increased the maximum allowance for basic needs, human rights considerations demand further procedural consistency and responsiveness to the financial realities of those affected. The ECtHR has repeatedly emphasized the necessity of maintaining a fair balance between the public interest in freezing assets and the private interest in preserving an individual's standard of living. Ensuring that freezing orders do not leave individuals destitute is not merely a practical consideration but a fundamental aspect of respecting human dignity.

By requiring the quantification of proceeds and providing mechanisms for subsistence, the Proceeds of Crime Act aims to lower the the risk of excessive interference with property rights. However, due to the dichotomous framework with inconsistent standards of rigidity, the effects of the amendments made in the Proceeds of Crime Act are limited by the draconian measures found in Dangerous Drug Ordinance.

Freezing orders, while essential for preventing the flow of assets potentially linked to criminal activity into the legitimate economy, must not have a legislative framework that grinds the gears of fundamental human rights to a halt, nor should they become punitive, infringing upon basic freedoms.

Therefore, despite the attempt to align Maltese law with ECHR doctrine, gaps and inconsistencies remain, particularly when considering the proportionality of measures and the procedural safeguards available to affected individuals.

The earlier Maltese framework for allowing blanket freezing orders largely disregarded the proportionality requirement upheld by the European Court of Human Rights (ECtHR). Without the obligation to quantify the alleged proceeds of crime, individuals were often subjected to straining measures that froze all their assets, irrespective of their link to the alleged offense. This not only burdened the accused disproportionately but also risked contravening the principle that preventive measures should not pre-emptively punish individuals or impair their livelihoods without substantial evidence.

The amendments posited by Act VI of 2024 are not necessarily a step forward in protecting human rights within the legal framework. The introduction of a mandatory requirement for prosecutors to quantify or specify the property linked to criminal proceeds has led to a situation whereby the prosecution, to avoid rebuttals of arbitrariness, list every possible avenue of income the defendant, or anybody linked to them may have currently or in the future, and thus are delivering figures that are obscene when considering the scale of the defendant's operation.

Supposedly, by shifting the burden of proof to the prosecution, the amendments ensure that freezing orders are justified and limited in scope, thereby reducing the risk of disproportionately interfering with an individual's property rights. This requires the Court to intervene excessively, increasing the need for the court to make ex-officio investigations when coming to revoke or vary freezing orders pending proceedings. Typically, given the time constraints on the judiciary, such benefit would not be afforded to the defendant. Therefore, the extent to which the amendment offers the accused a more robust opportunity to contest measures that might otherwise violate their fundamental rights is debatable.

Moreover, freezing orders under the Dangerous Drugs Ordinance presume that all property of the accused is derived from criminal activity, a stance that significantly weakens the procedural safeguards available to affected individuals. The lack of mechanisms to challenge these broad assumptions effectively creates inequality in the context of the protection of human rights, as persons accused of drug-related offenses face more invasive measures with fewer avenues for redress.

Therefore, if accepted by the Court, even income that has not yet been made is subject to being frozen[180]. A prime example of this is where the defendant in question is a butcher, and the prosecution file to confiscate the entirety of the butcher's stock as it is considered "proceeds of crime". This not only has an environmental impact as it creates a waste of resources based on a rebuttable legal presumption, but also inhibits the defendant's ability to make a decent living, hampers the reputation of the defendant's business, and affects the accused that depend on the services of the defendant.

The coexistence of contrasting frameworks, specifically the Proceeds of Crime Act and the Dangerous Drugs Ordinance, prove the need for further

[180] Dangerous Drugs Ordinance (n 14) Article 22A(5).

harmonization to ensure that all individuals, regardless of the alleged offense, are afforded equal protection under the law.

Therefore, one of the key recommendations is to address the dual regulatory frameworks for freezing orders in Maltese law. The Proceeds of Crime Act and the Dangerous Drugs Ordinance currently govern freezing orders in different contexts, with the Dangerous Drugs Ordinance applying a presumption that all property owned by someone charged with drug-related offenses is derived from criminal activity. The author argues that this creates an unequal application of justice, as individuals charged under this framework face more invasive measures and fewer safeguards compared to those under the Proceeds of Crime Act.

A single, unified legal framework that would govern all freezing orders, regardless of the offense. By doing so, the system would provide equal procedural safeguards for all individuals, ensuring that freezing orders are applied only when absolutely necessary, and are proportional to the offense. The European Court of Human Rights has consistently emphasized the need for fairness and equality before the law, and this change would align Malta's practice with those standards[181]

Furthermore, the automatic renewal of freezing orders remains a significant concern.

The author calls for more frequent judicial reviews of freezing orders to ensure that they remain necessary throughout the legal proceedings. Freezing orders are currently renewed automatically without sufficient scrutiny in many cases. The author recommends that the court should be required to review freezing orders at regular intervals, particularly to assess whether the amount of property frozen is proportional to the alleged offense. This would ensure that the order does not persist beyond what is necessary, in line with the ECHR's requirement for fairness and procedural protection.

The author also suggests that procedural safeguards should be put in place to protect third parties from irreparable harm. If third parties can show that their property was unjustly frozen, the court should have a clear mechanism to vary or

[181] Vella, T. (2024). The lack of procedural safeguards and the violation of fundamental human rights with respect to freezing orders issued in money laundering proceedings (bachelor's dissertation).

lift the order to avoid undue damage. This could include the immediate return of assets if they are shown to belong to someone uninvolved in the criminal activity.

The freezing of perishable assets or those at risk of depreciation is another area where there is room for improvement. While the current framework allows for the sale of such assets, the author recommends a more structured process to ensure that the value of seized property is preserved. This includes setting clear guidelines for when and how seized property can be sold, particularly to prevent the deterioration of perishable goods. The author suggests that, for assets that could lose value, courts should be obligated to sell them as soon as it is evident that their preservation would be impractical or costly. This would prevent the unjust loss of value due to prolonged storage.

A more robust system for remedying violations is also central to these recommendations. Potentially, an introduction of a system that ensures individuals whose assets are unjustly frozen have access to adequate compensation. If a freezing order is determined to be excessive or wrongful, individuals should not only be allowed to challenge the order but should also be entitled to compensation for damages sustained during the freezing period.[182]

Finally, it must be that the evolving standards surrounding freezing orders and their alignment with ECHR principles are properly communicated to judges, prosecutors, and law enforcement. This may take place through judicial training programs to be implemented ensuring that legal professionals are fully aware of the procedural safeguards required to protect human rights. Additionally, the author advocates increased judicial oversight, particularly for lower courts, to ensure that freezing orders are not issued or maintained without proper legal grounds.

These recommendations, according to the author, are essential not only for ensuring compliance with international human rights standards but also for maintaining the legitimacy of freezing orders as a legal tool in combating crime.

[182] Krista Spiteri Lucas, Freezing orders: a draconian measure? (LL.B Dissertation,2023) University of Malta.

The Vitality of The Constitutional Rights of The Accused and The Victim

Julian Mifsud

A Dual Perspective: Analysing the Human Rights of Both the Accused and the Victim in Criminal Cases in Malta

Malta's legal system seeks to balance the rights of the accused and the victim, aiming for a fair and just process.[183] The accused and victim are granted protections as established under the European Convention on Human Rights (ECHR) and reflected in Maltese law. When delving into the subject matter, both the accused and victim although on different sides of the judicial system are protected by the same rights. Article 39 of the Constitution of Malta[184] and Article 6 of the ECHR allows the accused and the victim to enjoy the right to a fair trial[185]. This right is considered to be a cornerstone of justice that promotes impartiality and transparency in criminal proceedings.

Rights of the Accused

The Maltese Criminal Code defines the term "accused" as s being a person who 'has committed a criminal offence. Judge Consuelo Scerri Herrera, in her book '*The Cardinal Rights Pertaining to a Suspect or Accused Person Prior to the Making of a Confession - With Special Reference to Malta'*[186] refers to a person becomes accused when "*they are charged in court with the commission of an offence either by means of a writ of summons issued by the executive police or in serious offences by means of a bill of indictment issued by the Attorney General (AG) at the closure of the Criminal Inquiry and served on the accused. The summons is filed in the registry of the Courts of Magistrates, whereas the bill of indictment is filed in the registry of the Criminal Court. Once charged with a*

[183] *European Convention on Human Rights*. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 27 October 2024).
[184] Legislation Unit (2024) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/const/eng (Accessed: 27 October 2024).
[185] *European Convention on Human Rights*. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 27 October 2024).
[186] *The cardinal rights pertaining to a suspect or accused …* Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/95177/1/21PHDLAW003.pdf (Accessed: 27 October 2024).

crime, a person is subsequently notified with the charge sheet and from that moment on his status changes to that of an accused person."

Presumption of Innocence

The presumption of innocence is a major component of Malta's criminal justice system, ensuring that accused individuals are treated fairly, preventing wrongful convictions, and aligning with international human rights standards. This principle is enshrined in Article 6(2) of the European Convention on Human Rights (ECHR)[187], which Malta has incorporated into its domestic legislation, mandates that every individual accused of a crime is presumed innocent until proven guilty beyond a reasonable doubt. What is interesting about this right is that Article 39(5) of the Constitution of Malta does not consider such right as absolute and does restrict the exercise of it.

The legislative body in particular, has the authority to alter the evidential burden of proof. However, the constitutional clause may be violated if the law changes the burden of proof, so that the accused has no choice but to be found guilty if they are unable to present exonerating evidence. However, everything would rely on how the legislation is written; hence, a clause that demands that an inference be made after specific facts are proven would not always be illegal. Therefore, the constitutionalization of the presumption of innocent will not render all reverse-onus clauses unconstitutional in Maltese law.

The prosecution bears the burden of proof. The burden of proof is with the person making the allegation, as stated in Article 562 of the Code of Organisation and Civil Procedure, in addition to the Criminal Code[188]. There are several exceptions to this norm, such as when the procedures, if held in public, could offend modesty or lead to controversy. In these situations, sittings occur behind closed doors. The criminal justice system has an obligation to ensure that those who are charged or accused have a strong defence and to pay for legal counsel when necessary. As long as they don't violate the law, the courts have the authority to establish rules for how sessions should be conducted as well as for upholding and maintaining order during sessions. A judge sitting in a criminal court is an impartial, passive

[187] *European Convention on Human Rights*. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 27 October 2024).

[188] Legislation Unit (2024a) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/12/eng/pdf (Accessed: 27 October 2024).

observer. He could be contested by either party on legitimate grounds like conflict of interest.

Nowadays, with the emergence of easily accessible news, the legal system faces challenges when it bestows itself on the presumption of innocence. Although the majority of cases are still decided by unbiased judicial member, decisions taken by the Court can still be challenged if persons feel they were not given a fair trial and were perceived as guilty. The Constitutional Court determined that there had been a breach of the presumption of innocence in Police v. Noel Arrigo[189], where the Prime Minister had announced at a press conference that two judges had been arrested on suspicion of bribery and that the decision was in the hands of the Court. According to the Court, "if a public figure expresses an opinion that someone accused of a crime is guilty before that guilt has been shown by the law, that person's right to the presumption of innocence is breached. The Court determined in the *Tancred Tabone* case that a government minister's remarks qualified as such a violation, but private citizens do not."

Right to Silence

The right to silence is a legal principle which allows anyone to refuse answering any question posed by police or court officials. Many scholars debate this controversial concept as to whether it is helping the legal system or injuring it. This is made clear in the judgement Pearse vs Pearse, whereby, the Court stated "the right of silence, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much."

Judge Scerri Herrera mentions Mr Justice Starke who stated in the Supreme Court of Victoria, Australia, *the right to silence is not to be overridden by any doctrine or principle. The principle that no person is obliged to incriminate himself is an indispensable safeguard to secure the citizen's personal liberty against state oppression*.[190]

On the other hand, a scholar K van Dijkhorst, argues that 'purists, whose ivory towers shield them from the reality of practice, and, of course, the traditionalists

[189] CC (29 October 2003) (22/02)

[190] *The cardinal rights pertaining to a suspect or accused* ... Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/95177/1/21PHDLAW003.pdf (Accessed: 27 October 2024).

to whom history hallows behind critical appraisal any precept as long as it supports profitable practice.'

Although thought to be the same, the right to silence and the right to not self-incriminate oneself are not identical. Yes, it is true that both are internationally recognized as pillars of Article 6 of the ECHR. As stated above, the right to Silence pertains to the refusal of answering questions relating to an ongoing investigation or court case, therefore one can say that in practice the right of not self-incriminating oneself falls under the ambit of the right to silence and the right to a fair trial. In instances where the Judiciary discovers that witnesses or the accused may incriminate themselves in a statement, they are required to halt the hearing and inform the witnesses of their right to silence, knowing they may be charged with a crime based on the comments they made. There are cases in which individuals waive their right to silence and cooperate with authorities in exchange for a lesser sentence usually to aid the authorities in an investigation which would lead to a criminal charge for other individuals.

Highlighting what was stated above is the judgement of *Frank Sammut v L-Onorevoli Speaker tal-Kamra tad-Deputati et al*[191]. Malta's Constitutional Court examined whether the Public Accounts Committee's (PAC) procedure infringed Frank Sammut's rights, particularly his right to silence, as he was both a witness before the PAC and an accused in concurrent criminal proceedings. Sammut, accused of criminal offenses related to Enemalta's fuel procurement practices, was summoned by the PAC, where he invoked his right to silence due to the ongoing criminal case. However, the PAC chair referenced a ruling implying Sammut had to respond to questions unless the Committee deemed them incriminating, which could still subject him to penalties if he refused.

The First Hall of the Civil Court found the PAC's Guidelines allowed a witness to refuse incriminating questions but did not fully protect an accused facing parallel criminal proceedings from penalties, thus infringing Sammut's right to silence and a fair hearing. On appeal, the Constitutional Court confirmed that the PAC chair and the Speaker were appropriate defendants due to their roles in enforcing the ruling. The Court upheld Sammut's right to silence, stating that administrative proceedings like the PAC should not override rights essential to ongoing criminal cases, emphasizing that the PAC's Guidelines and the Speaker's

[191] CC(26 January 2018) (13/2014)

ruling were incompatible with the right to silence, particularly for witnesses in pending criminal proceedings.

This judgment underscores the extension of fair hearing and self-incrimination protections in administrative inquiries when they intersect with criminal cases, widening the scope of Article 6 of the European Convention and Article 39 of Malta's Constitution to include administrative investigations that may impact criminal defendants.

The Right to Legal Assistance and the Right to Legal Aid

Both rights are vital to ensure suspects and accused persons have a fair trial and are fairly represented in court. One must see be aware that suspects and accused persons enjoy the right to legal assistance as confirmed in a judgment delivered by the Constitutional Court on 12 July 2023 in the case of Francis Xavier Galea vs the Attorney General[192], the court remarked that the right to legal assistance exists only when a person is deemed to be a suspect. Interestingly, the court went further and stated that due consideration must be given to the criminal procedures both generally and on an individual basis, and the right to a fair hearing is not always violated by the lack of legal help.

The Convention, the Directive, and the Criminal Code all contain the general premise of the right of choice. The right to select one's own lawyer is considered to be a privilege, but does have its restrictions, as it does not always grant the suspect the freedom to select their own lawyer freely from national legal limits. An example of this is that the authorities may establish requirements for the practice of law, limiting the number of graduates who can work as lawyers at the Bar to those who have a warrant. Additionally, they can limit the number of lawyers on a defence without going against the Convention. These restrictions although poised with the word 'restrictions', are there to secure a fair trial in the sense that the accused would have a lawyer defending them that has reached the necessary standard which the law deems satisfactory. In addition to this, the abovementioned restriction on having a maximum of lawyers involved in a person's defence, once again ensures the right to a fair trial, this time to balance out the difference between the prosecution and the defence. This restriction came into place with the aim to not have defence counsels which overshadow the prosecution, in turn reducing the ability of having a fair trial from the State and the victim's perspectives. It is only when the "accused asks for a particular lawyer

[192] CC (12 July 2023)

on arrest or detention," the right of choice is activated. At this point, all interrogation must stop while the police give the accused the chance to exercise his right of choice. The accused has the right to decline to communicate with other lawyers and to wait for their preferred lawyer to answer if the chosen attorney is unavailable. The arrested individual is supposed to use their right to legal aid by speaking with another attorney once a significant period of time has elapsed, although they are free to disregard this requirement and decide to wait longer.

It is ideal for lawyers to assistance their client from the beginning of the legal process. The European Commission in 2003 published a green paper 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union'[193] and in its articles it states that that suspects or accused persons have the right for their lawyers to 'be present and participate effectively when questioned by the police including during court hearings.' It also specifies circumstances in which the accused or suspect would be entitled to legal aid outside of the courtroom, such as when the attorney takes part in identification parades, confrontations, crime scene reconstructions, and investigation and evidence gathering activities. However, it seems that the issue of "participation" needs to be governed by national laws, so long as they don't interfere with the essence and efficient use of this right.

An essential part of the right to legal assistance and the right to legal aid, is confidentiality. If suspects are arrested and questioned by police, lawyers have the chance to speak to their client privately and cannot have their conversation recorded or be used against the client in court, therefore strengthening their right to having a fair trial. Given the specific clause in the law that states that failure to comply with any formality or requirement outlined in Law in criminal procedure will not prevent the police in Malta from using information obtained through listening in to prove the facts to which the precaution, formality, or requirement relates.

The court in Il-Pulizija vs. Mark Lombardi[194] did not rule that a statement made without legal representation was inadmissible, stating that the accused's lack of legal representation during questioning did not amount to a violation of his

[193] *52003DC0075* (no date) *EUR*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52003DC0075 (Accessed: 30 October 2024).

[194] CC, (12 April 2011)

fundamental human rights. It decided that the absence of a lawyer during questioning did not necessarily mean that the accused's rights were violated. It further held that the statement should be considered evidence if it was made willingly. However, following the Salduz case in 2011[195], Maltese courts appeared to have taken this ruling into consideration and modified their stance about the right to legal assistance. Judge Consuelo Scerri Herrera delves into this development of this right and refers to three landmark judgements delivered in a matter of two days between each other.

In Il-Pulizija vs Alvin Privitera[196], the Constitutional Court of Malta ruled that Alvin Privitera's rights were infringed because he was not provided with legal assistance during his interrogation. The Court cited the European Court of Human Rights (ECtHR) decision in Salduz v. Turkey, which mandates the right to a lawyer from the first interrogation. In Privitera's case, the absence of a lawyer rendered his statement the only incriminating evidence against him, which the Court found insufficient for a fair trial under Article 355AT of the Maltese Criminal Code, which was not yet in force at the time. The Court highlighted that, given Privitera's status as a minor, he should not have been required to give a statement without a lawyer, reinforcing that legal representation is essential from the initial stages of investigation.

In Il-Pulizija v. Mark Lombardi, the Constitutional Court was tasked with determining if denying legal assistance during interrogation violated the suspect's rights under Article 6(3)(c) of the European Convention on Human Rights (ECHR), which guarantees the right to legal representation. The Court, referring to ECtHR precedents like Dayanan v. Turkey, noted that restricting access to a lawyer, even when a suspect chooses to remain silent, constitutes a rights violation. The Constitutional Court reversed the previous judgment from the First Hall of the Civil Court (FHCC) that had ruled otherwise, confirming that the lack of a lawyer compromised Lombardi's right to a fair hearing.

In Il-Pulizija v. Esron Pullicino[197], the prosecution appealed an FHCC decision that held the absence of a lawyer during Pullicino's interrogation infringed his Article 6 rights. The Constitutional Court upheld this decision, affirming that without legal assistance, Pullicino's right to a fair trial was compromised.

[195] Salduz v. Turkey (n 116)
[196] CC, (11 April 2011)
[197] CC (12 April 2011).

Judge Scerri Herrera goes on by stating that these three judgements followed the ECtHR line of thinking in the Imbroscia v. Switzerland[198] ruling, where statements or confessions made without legal assistance were recognized as unreliable, given the difficulty of overturning perceptions based on such statements. Previously, Maltese courts had accepted voluntary statements as absolute proof. However, this approach shifted significantly as courts began to view statements made without a lawyer as indicative of a breach of the right to a fair hearing. For some time, it appeared that the issue of the right to legal assistance during interrogation was resolved, with statements obtained in violation of Article 6(3) of the ECHR regarded as inadmissible evidence.

It is possible for an accused or suspected person to reject the assistance of a lawyer, resulting in the waiving of his right to legal assistance. This is possible if three conditions are met.

1. The suspect or accused fully understands what the right to legal counsel entails.
2. That the suspect or accused could make their own choice as to whether they should exercise such right.
3. That the suspect or accused understands the effects which such renunciation may have on their defence rights.

Right to Legal Aid

Legal Aid is fundamental for the justice system to function, some accused persons, suspects, victims or witnesses are not able to pay for a lawyer to defend them, so the state provides them with a lawyer that will give legal advice, assistance and represent them in Court. Legal Aid Malta[199] defines legal aid as the provision of assistance to low-income people who are unable to afford legal representation and access to the court system. Legal aid is important in providing access to justice by ensuring equality before the law, the right to counsel and the right to a fair trial by indigent people. It is central in giving equality before the law in a democratic society.

Legal Aid is not only provided for criminal cases, but also for civil matters, the difference is that there is a means and merit test to be eligible for legal aid in civil

[198] Imbriosicia vs Switzerland (13972/88)
[199] (No date a) *Home - Legal Aid Malta*. Available at: https://legalaidmalta.gov.mt/en/ (Accessed: 01 November 2024).

matters. In Criminal Cases, all persons are eligible for legal aid and no means test is required by law. A request for legal aid will be made either to the Court presiding the case or orally to the Advocate for Legal Aid. In Criminal Cases, legal aid covers all the expenses related to all court registry fees, lawyer and experts' fees until judgment. The judgment may order the client to pay all related fees of the case. While some states require lawyers to fulfil high standards of quality, the majority only require them to be sufficiently competent. Others link the quality to just outcomes or the defence of basic human rights.

In criminal law, not only natural persons can be held accused and found guilty of crimes committed, but even legal persons can also. Legal persons are companies that acquire legal personality. It is important to note that when it comes to legal persons being eligible for legal aid it is rather the exception not the rule, therefore it is rather uncommon for it to occur. When it does occur the main reasons for such an exception is the dire financial situation the company has been left in.

Rights of the Victim

the Victim of Crimes Act[200] was the transposition of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHAA.

Article 2 of Chapter 539 of the Laws of Malta defines a victim as:[201]

a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence; family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death; minors who are witnesses of forms of violence.

[200] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

[201] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

What Are a Victim's Rights?

Legal Aid Malta states that a victim has the following rights[202]:

- shall be communicated, verbally or in writing, in simple understandable language.
- on first contact with a competent authority may be accompanied by a person of his choice in order to understand or be understood.
- the first competent authority in contact with the victim must inform the person with all the rights.
- be able to file a police report and given a copy of the report as expedient as possible.
- be informed about the criminal proceedings and if the offender is released from detention.
- be assisted with legal aid services.

The Malta Victims of Crime Act (VCA)[203], transposing Directive 2012/29/EU, seeks to establish comprehensive protections for victims of crime, aiming to ensure they receive the necessary rights, support, and access to justice. One of the strengths of the Act is its clear definition of victims, which includes not only those directly harmed by a criminal offence but also family members of deceased victims and minors who witness violence. This broader scope ensures that various categories of victims, including vulnerable groups, are explicitly protected. Furthermore, the Act adopts a victim-centred approach, prioritizing the rights of victims to be informed in clear and understandable language and to receive timely updates about the progress of criminal proceedings. Victims also have the right to be accompanied by a person of their choice during initial contact with authorities, which provides emotional and practical support at a critical moment. The inclusion of legal aid services ensures that victims who might otherwise lack the financial resources to navigate the criminal justice system are afforded assistance, further empowering them in the process.

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[202] *Home - Legal Aid Malta*. Available at: https://legalaidmalta.gov.mt/en/ (Accessed: 01 November 2024).

[203] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

The VCA[204] also facilitates victims' participation in criminal proceedings, granting them the right to be represented by a lawyer, to examine or cross-examine witnesses, and to present evidence, provided the court permits it. This right to active involvement strengthens the victim's voice in proceedings that directly affect them and contributes to a more balanced justice process. Additionally, the Criminal Injuries Compensation Scheme[205] offers a valuable means for victims to seek financial redress for harm suffered as a result of criminal acts, reinforcing the Act's emphasis on addressing both physical and economic impacts of crime.

However, despite its positive aspects, the Act has notable limitations. One of the primary criticisms is the restriction on the right to information, which is often contingent on the proceedings being initiated through a complaint (kwerela) from the victim. This creates a potential gap in protection for victims when criminal proceedings are initiated ex officio, where the police initiate the process without a formal complaint from the victim. In such cases, victims may not be fully informed about their rights or the progress of the case, which undermines the victim-centred ethos of the Act. This limitation has been challenged in legal discussions, particularly in light of European Court of Justice rulings that assert the right to information should not be restricted to cases initiated by the victim.

Another challenge lies in the practical implementation of the Act. The complexity of coordinating multiple authorities and agencies responsible for victim support and protection may lead to delays, inconsistencies, or confusion for victims navigating the system. While legal aid is available, some victims may still struggle with the emotional and psychological burden of the crime, making their participation in proceedings particularly challenging. This is especially true for victims of sexual violence or domestic abuse, where cross-examination or presenting evidence can be re-traumatizing. In such instances, the Act's provisions may unintentionally place additional emotional and logistical burdens on already vulnerable individuals.

Moreover, while the Criminal Injuries Compensation Scheme, offers important relief, its implementation can be slow and bureaucratically cumbersome, with victims often facing delays in compensation payouts. This issue could detract

[204] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

[205] https://www.servizz.gov.mt/en/Pages/Police_-Justice-and-Defence/Justice/Administration-of-Justice/WEB106/default.aspx

from the scheme's effectiveness and contribute to victim frustration. Additionally, the reliance on police-initiated proceedings ex officio raises concerns about how the system prioritizes certain cases over others, potentially leading to inequities in how victims are treated. If police fail to investigate or take up a case with the same urgency, victims in such situations may be denied access to the protections the VCA intends to provide.

Case law has highlighted some of these issues, particularly regarding the right to information. In Case C-173/15 (European Court of Justice), the Court emphasized that victims should be informed about the status of proceedings, regardless of whether they initiated the process. This ruling underlined the importance of ensuring that victims are kept up to date on criminal proceedings that affect them, reinforcing the argument that the right to information should not be limited to cases where the victim files a complaint. Similarly, the Mifsud v. Malta[206] case before the European Court of Human Rights showed that in 2014 demonstrated Malta's failure to ensure that victims were properly informed of their rights or the status of their cases. These rulings have had a significant influence on shaping discussions about how the VCA could be improved to guarantee more comprehensive rights and information for all victims, particularly those whose cases are initiated ex officio.

Furthermore, the victim has a right to be present during all proceedings as stipulated in Article 366F;

"366F. Saving the provisions of any law which may provide for trials in the absence of the persons charged or accused, subject to the safeguards provided in Directive (EU) 2016/343 of the European Parliament and the Council of the 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, persons charged or accused shall have the right to be present at their trial."

While the Victims of Crime Act[207] has made significant strides in aligning Malta's legal framework with EU standards for victim protection, there remain several areas for improvement. The limitations around the right to information, the practical challenges in victim participation, and the potential delays in the compensation scheme suggest that further reforms are necessary to ensure that

[206] Mifsud vs Malta (62257/15)

[207] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

the Act fully serves the needs of all victims. By addressing these concerns, Malta could enhance the accessibility, effectiveness, and fairness of its victim support systems, ensuring that victims of crime receive the protection and justice they deserve.

Rights shared by Both the Accused and the Victim

Human rights are enjoyed by everyone even if they are both on other ends of the coin. In criminal cases, both the accused and the victim enjoy the same right. Although the right is the same for both, the elements that are intended to protect them are different. The main pillar that protects both is the right to a fair trial.

Right of Information

The right of information is a fundamental aspect of ensuring fair trials and the protection of human rights for both the accused and the victim. This principle is enshrined in various national laws and guided by international human rights standards to which Malta is a party, such as the European Convention on Human Rights (ECHR).

The accused has a comprehensive right to be informed about the nature and cause of the accusations. This right is established under Article 39 of the Maltese Constitution and Article 6(3)(a) of the ECHR, ensuring that the accused can adequately prepare a defence. In Maltese criminal procedure.

Upon arrest or being formally charged, the accused must be promptly informed of the charges in a language they understand. If the accused does not understand Maltese, they have the right to an interpreter during questioning and throughout the legal process. This guarantee upholds the fairness of proceedings and is in line with Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.

This encompasses the essential facts and legal character of the offense. The accused has the right to access evidence the prosecution intends to use at trial. Under the Criminal Code (Chapter 9 of the Laws of Malta), this obligation ensures transparency and assists in preparing a defence, this can be seen in the case Il-Pulizija vs John Borg* (2020), that emphasizes that any failure to disclose material evidence could infringe the right to a fair trial.

In the case of Police vs Alex Farrugia (2018) the court demonstrated that failure to provide adequate notification of these rights could result in procedural defects

impacting the admissibility of evidence, therefore during the initial stages of arrest or detention, it is of paramount importance that the accused must be informed of their legal rights, such as the right to silence, the right to legal representation, and the right to be informed of the reasons for detention

Right of Information for the Victim

Victims of crime in Malta have distinct rights to information, which facilitate their meaningful participation in the criminal justice process. These rights are grounded in both national legislation and the EU's Victims' Rights Directive (Directive 2012/29/EU). This right is also brought out in article 4 of the VCA[208].

Victims have the right to receive updates on the progress of the investigation and criminal proceedings. They are entitled to know whether an investigation has led to prosecution or not, and they should be informed about key stages of the proceedings, including trial dates and outcomes.

Victims must be informed about their rights and the available support services. This includes information on how to make complaints, receive protection, and seek compensation or restitution. Maltese authorities must ensure this information is delivered in a manner the victim understands, which may include translation services if needed.

Victims are informed about measures available to protect their safety, such as restraining orders or witness protection programs, particularly if there is a risk of retaliation or harm. In *The Republic of Malta vs Joseph Spiteri* (2019), the court emphasized the importance of proactive communication between law enforcement and victims to uphold their right to safety.

Victims are entitled to information about their role in the criminal proceedings, including their right to attend the trial and make statements. In cases involving sensitive crimes, such as domestic violence, the court may take additional measures to ensure victims are kept informed and are treated with dignity.

[208] Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

The Right of Appeal

The right of appeal is a fundamental legal safeguard that ensures a fair and just outcome in criminal proceedings. In Malta, this right is enshrined in national legislation and informed by international human rights principles, guaranteeing that both the accused and the victim have access to mechanisms for challenging judicial decisions. The right of appeal encompasses the principles of due process and judicial review, promoting trust in the criminal justice system. In Malta reflects a complex interplay between protecting the accused's right to a fair trial and respecting the victim's interests. While the accused has a broad right to challenge a conviction or sentence, the victim's influence is more circumscribed, relying on the discretion of state authorities. Ensuring that both parties are adequately informed and supported throughout the appeal process remains a crucial

Right of Appeal for the Accused

The right of appeal for the accused is protected under Article 39 of the Maltese Constitution and elaborated within the Criminal Code (Chapter 9 of the Laws of Malta). The ECHR, through Article 6 and Protocol 7, further reinforces the right to a fair trial and appeal. The accused may appeal a conviction, sentence, or both. Appeals can address errors of law, procedure, or questions of fact, ensuring a thorough review of the initial judgment.

The accused may challenge a ruling if the court misinterpreted or misapplied the law. For instance, in Il-Pulizija vs George Cassar (2017), the Court of Criminal Appeal highlighted that a legal error affecting the fairness of the trial could necessitate a retrial or an acquittal. Appeals can be based on significant procedural flaws, such as improper admission of evidence or violations of the accused’s rights. A notable case, Police vs Salvu Debono (2021), demonstrated how a procedural breach could undermine the validity of a conviction.

The emergence of material evidence that was not available during the original trial can also justify an appeal. Courts must consider whether the new evidence could potentially alter the outcome of the case. The accused must file an appeal within a specified time frame following the initial judgment, typically within eight working days. The appeal process involves a review by the Court of Criminal Appeal, which may either uphold, amend, or overturn the original decision. In addition to this, the accused has the right to be represented by legal counsel during the appeal. This ensures that their case is argued effectively and

in accordance with the law and follows the principles laid out by the right of a fair trial.

The appeal is generally limited to reviewing points raised during the trial. New arguments or evidence are often subject to strict admissibility rules, making comprehensive trial preparation crucial. The appellate court has discretion in determining whether a procedural error is significant enough to warrant a new trial or acquittal, as highlighted in The Republic of Malta vs Joseph Cachia[209].

Right of Appeal for the Victim

In contrast to the accused, the victim's right of appeal is more limited in scope. Victims do not have a direct right to appeal a verdict or sentence but may contest specific decisions through legal mechanisms that impact their interests. The Attorney General, who acts on behalf of the public interest, can file an appeal if the outcome is considered manifestly unjust or if the sentence is deemed excessively lenient. The victim can request the Attorney General to consider an appeal, though the final decision rests with the state. Victims have the right to be informed if an appeal is filed by either party and to receive updates on the appellate proceedings. This right is crucial for ensuring that victims remain engaged and aware of developments that may affect them. Although victims cannot directly appeal, they may have a role in the appeal hearings, especially in cases involving compensation or the protection of victim interests. For example, in The Republic of Malta vs Anthony Grech in 2018, the court considered victim impact statements during sentencing appeals. The victim's limited right to influence appeals can be a source of frustration, especially in cases of perceived judicial leniency. This raises questions about balancing the rights of the accused and victim while upholding the principles of a fair trial. Victims must have access to information and legal support throughout the appeal process. Strengthening communication between the judiciary and victims is essential to mitigate the psychological impact of prolonged legal proceedings. The criminal justice system in Malta is designed to uphold a fair and balanced approach, protecting the rights of both the accused and the victim. This framework integrates constitutional and international obligations, with case law playing a pivotal role in shaping and refining these rights.

The rights shared by both the accused and the victim highlight the criminal justice system’s aim to ensure fairness and transparency. Balancing these rights remains

[209] Republikka ta Malta vs Joseph Cachia (18 March 2015)

crucial, with case law demonstrating the judiciary's role in addressing procedural errors and safeguarding human dignity. Continued efforts to enhance legal protections and reduce delays will strengthen trust in Malta's justice system, benefiting all involved parties.

Conclusion

Policy recommendations aim to enhance the fairness, efficiency, and accessibility of Malta's criminal justice system. By addressing the rights of both the accused and the victim in a balanced manner, these measures will strengthen public trust, promote human dignity, and ensure that justice is both served and perceived to be served. In conclusion, since both parties are entitled to protection under both national and international human rights law, the human rights of the victim and the accused in criminal trials in Malta must be carefully balanced. Although Malta's legal system has made great strides in protecting victims' rights through the Victims of Crime Act (VCA) and its conformity with EU Directive 2012/29/EU, there are still some significant flaws in the system, especially when it comes to guaranteeing victims' complete protection and information access. According to Article 6 of the European Convention on Human Rights (ECHR), which protects the right to a fair trial, the accused are also given strong protections. But in reality, this can occasionally cause conflicts, especially when it comes to pre-trial custody, processes delays, and striking a balance between procedural rights and the need for prompt justice.

Extending the victim's access to information is a crucial area for reform, especially in circumstances where the police started the investigation ex officio. The Victims of Crime Act currently restricts this protection mainly to situations in which victims file a formal complaint; victims are not included in situations when the authorities start criminal proceedings on their own. This has been challenged in recent European Court of Justice decisions, such as Case C-173/15, where it was clarified that victims must be notified about the progress of criminal proceedings, regardless of how they were begun.

Malta ought to think about amending its the legislation to guarantee that all victims, whether or not they report the incident, get thorough and timely updates on the progress of their case. By bringing Malta's legislation into compliance with EU norms, this change would improve victim protection and guarantee that people are informed of events that have an immediate impact on their life.

Additionally, there are worries about delays and bureaucratic inefficiencies that could make it more difficult for victims of crime to receive compensation, even if the Criminal Injuries Compensation Scheme offers a required remedy. In order to ensure that compensation is given as soon as possible following a crime, reforms should concentrate on expediting the application procedure and shortening the waiting period for victims, particularly for those who are experiencing significant physical or emotional stress. Victims shouldn't have to put up with drawn-out administrative procedures, which could make their already challenging situation worse. The implementation of an impartial oversight organisation to oversee the scheme's management could improve its efficacy and provide increased accountability and openness. Malta's criminal justice system must continue to respect the presumption of innocence and fairness as key principles for the accused. Reforms to enhance pre-trial detention procedures are, nevertheless, being called for. As seen in cases like Kamasinski v. Austria, the European Court of Human Rights has repeatedly held that extended incarceration prior to trial may infringe upon the right to a fair trial. Malta must endeavour to decrease needless pre-trial imprisonment, especially by putting stronger substitutes in place such electronic monitoring or more frequent use of bail. This strategy would help guarantee that people who have not been found guilty of a crime are protected from punishment prior to trial, all the while ensuring public safety.

Furthermore, there is a need for improved coordination across the various criminal justice organisations, such as victim support services, judicial authorities, and law enforcement. Improved collaboration would guarantee that the accused's rights are upheld at every stage and that victims receive timely information and assistance. It may be possible to improve the practical implementation of victims' rights by establishing a comprehensive national plan for victim support that includes victim-sensitive training for law enforcement and judiciary personnel. The system in Malta must ultimately work to protect the rights of the victim and the accused in a way that respects human dignity and foster public trust.

Bibliography

Legislation

Constitution of Malta, Articles 34, 39(1), and 39(10).

The European Convention on Human Rights, Section 5(1)

European Convention on Human Rights, Article 6.

European Convention Act, Chapter 319, Laws of Malta.

Article 335 AZ, 350 Criminal Code

Criminal Code, Chapter 9 of the Laws of Malta, Article 355W.

Laws of Malta, Cap 9

Article 34 (4).

DIRECTIVE 2014/42/EU

Bill No. 49 (2023) C899

Legislation Unit (2024) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/const/eng (Accessed: 27 October 2024).

Bill no. 76 (2023) C1621-1652

L.N 31/2024, Establishment of Maximum Amount which may be Released to Persons who are Subject to Attachment Orders or to Seizing and Freezing Orders under the Proceeds of Crime Act, 2024.

European Convention on Human Rights (ECHR), Art 5(1)(c)

Dangerous Drugs Ordinance (n 14) Article 22A(5).

Appeal no. 502/2016

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

Chapter 9 of the Laws of Malta, Article 534AF

Gian Domenico Pisapia Istituzioni di diritto penale : parte generale e parte speciale. 3a ed. (CEDAM. 1975) 1.

(UK) Article 2 (2); "Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence."

Motor Vehicles Insurance (Third Party Risks) Ordinance (Chapter 104, Laws of Malta) Article 3(1A)

Prevention of Money Laundering Act (Chapter 373, Laws of Malta)

Criminal Code, Chapter 9, Laws of Malta, Sections 575, 575(1), and 355AU (repealed).

Criminal Law Act 1967 (United Kingdom), Article 3(1).

Italian Penal Code, Article 1.

Chapter 9 of the Laws of Malta, Article 355AT (1).

App no 7151/75 (ECtHR, 23 September 1982) para 61

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Protocol 1, art 1.

Aldo Moro et al. *Lezioni di istituzioni di diritto e procedura penale : tenute nelle Facolta di scienze politiche dell'Universita degli studi di Roma*. (Cacucci 2005) 195.

Police and Criminal Evidence Act 1984, Article 24 (2); "If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it."

Traffic Regulation Ordinance (Chapter 65, Laws of Malta)

Websites/Articles

"Justice within a Reasonable Time" (2022). *Times of Malta*. Retrieved from [Times of Malta) website](https://timesofmalta.com/article/justice-within-areasonabletime.814548#:~:text=As%20a%20rule%20of%20thumb,six%20years%20at%20two%20levels).

https://gtg.com.mt/the-institute-of-bail-in-malta/ (GTG Advocates)

https://www.um.edu.mt/library/oar/bitstream/123456789/61143/1/Giglio_Joseph_RECENT%20DEVELOPMENTS%20IN%20THE%20GRANTING%20OF%20BAIL%20UNDER%20MALTESE%20AND%20FOREIGN%20LAW.pdf

Australian Law Reform Commission, *Privilege Against Self-Incrimination* (Report No 129, 2015) https://www.alrc.gov.au/wp-content/uploads/2019/08/fr_129ch_11._privilege_against_self-incrimination.pdf accessed 23 October 2024

European Convention on Human Rights. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 27 October 2024).

Legislation Unit (2024a) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/12/eng/pdf (Accessed: 27 October 2024).

The cardinal rights pertaining to a suspect or accused ... Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/95177/1/21PHDLAW003.pdf (Accessed: 27 October 2024).

Edward Coke, *Encyclopaedia Britannica* (2006) https://www.britannica.com/biography/Edward-Coke accessed 23 October 2024.

Dinu Ostavciuc and Tudor Osoianu, 'Freedom of Self-Incrimination' (2023) https://cogito.ucdc.ro/COGITO_SEPTEMBER_2023.pdf accessed 23 October 2024.

The cardinal rights pertaining to a suspect or accused ... Available at: https://www.um.edu.mt/library/oar/bitstream/123456789/95177/1/21PHDLAW003.pdf (Accessed: 27 October 2024).https://www.uscourts.gov/sites/default/files/mirandawarningfinal.pdf accessed 17 October 2024.

U.S. Courts, 'Facts and Case Summary - Miranda v. Arizona' https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-miranda-v-arizona accessed 17 October 2024.

C. Donahue, 'Hohfeld '(Harvard Law School) http://www.law.harvard.edu/faculty/cdonahue/courses/prop/mat/Hohfeld.pdf accessed 17 October 2024.

Wilfrid Sellars, 'Inference and Meaning '(1953) 62 *Mind* 313, 338 https://www.jstor.org/stable/2251271 accessed 21 October 2024.

http://www.legislation.gov.uk/ukpga/1994/33/section/34

No date a) *Home - Legal Aid Malta*. Available at: https://legalaidmalta.gov.mt/en/ (Accessed: 01 November 2024).

Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at: https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).

Home - Legal Aid Malta. Available at: https://legalaidmalta.gov.mt/en/ (Accessed: 01 November 2024).

Legislation Unit (2021) ., *LEĠIŻLAZZJONI MALTA*. Available at:

https://legislation.mt/eli/cap/539/20210723/eng (Accessed: 01 November 2024).
https://www.servizz.gov.mt/en/Pages/Police_-Justice-and-Defence/Justice/Administration-of-Justice/WEB106/default.aspx

Books/Papers/Journals

Milošević, M., & Bojović, A. K. (n.d.). “Trial within Reasonable Time in EU Acquis and Serbian Law.” *EU and Comparative Law Issues and Challenges*, 447.

Aquilina, K. (n.d.). *The Maltese Legal Framework on Self-Incrimination*. [Referenced from manuscript].

Vella, T. (2024). The lack of procedural safeguards and the violation of fundamental human rights with respect to freezing orders issued in money laundering proceedings (bachelor’s dissertation).

Krista Spiteri Lucas, Freezing orders: a draconian measure? (LL.B Dissertation,2023) University of Malta.

Hugh W. Harding, *The accused in Maltese law*. (The Law Journal, 1(6) 1947) 214.

S. Clarke, J. L. Freeman, G. Koch, ‘Bail Risk: A Multivariate Analysis’ (The Journal of Legal Studies, 1976)

Consuelo Scerri Herrera, 'Four Cardinal Rights of a Suspect Prior to an Investigation' (2022) 194.

John H. Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1993-1994) 92 Michigan Law Review 1047

Charles H Randall Jr, 'Sir Edward Coke and the Privilege Against Self-Incrimination' (1956) 8 SCLR 417, 418

Michigan Law Review, Vol. 78, No. 6 (May, 1980), pp. 841-871

Kevin Aquilina, 'The Right against Self Incrimination under Maltese Law with Particular Reference to the Official Secrets Act' (2005) 9(2) Mediterranean Journal of Human Rights 39

Kevin Aquilina, 'The Right against Self Incrimination under Maltese Law with Particular Reference to the Official Secrets Act' (2005) 9(2) Mediterranean Journal of Human Rights 31, 32

Matthew Seet, 'Suspected Terrorists and the Privilege against Self-Incrimination' (2015) 74 Cambridge LJ 208

Milošević M and Bojović AK, ‘Trial within Reasonable Time in EU Acquis and Serbian Law’ 1 EU and Comparative Law Issues and Challenges, 447

Jacques Maritain, *La persona e il bene comune*. 3rd ed. (Morcelliana 1973) 31.

Council of Europe, 'Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb), 186 *et seq*

Steven Cras and Luca De Matteis, *'The Directive on the Right to Information, Genesis and Short Description*' (2017) eucrim <https://eucrim.eu/articles/directive-right-information/> Accessed 4/10/2024.

U.K. Attorney-General’s Guidelines on Disclosure (2024) <https://www.gov.uk/government/news/attorney-generals-guidelines-on-disclosure-updated> Accessed 4/10/2024.

Tonio Borg, Commentary on the Constitution of Malta (Kite,2016) 104.

Dissertations

Joseph Giglio (1993). Recent Developments in the Granting of Bail under Maltese and Foreign Law (A thesis submitted for the Degree of Doctor of Laws).

Charles Mercieca, 'Inferences in Malta: A Case for More Inferences '(LLB (Hons) thesis, University of Malta, 2016), 12

Mario De Marco, A reappraisal of police powers (Master's dissertation 1988) 2.20.

Case Law

Local Jurisprudence

Adrian Agius vs L-Avukat tal-Istat, L-Avukat Generali u r-Registratur tal-Qrati Kriminali u Tribunali* (Constitutional Court, Malta).

Daniel Muka (Passaport Albaniż BD8707291) vs L-Avukat tal-Istat; u l-Avukat Ġenerali (Qorti Kostituzzjonali) [21 October 2024]

Edwin Bartolo u Alfred Desira vs Agent Registratur tal-Qrati in rappresentanza tal-Qorti Kriminali tal-Magistrati Ta' Malta, Presjeduta Mill-Magistrat Dr. Joseph Apap Bologna; u l-Kummissarju tal-Pulizija', First Hall of the Civil Court, 1989.

Yorgen Fenech vs Avukat tal-Istat, Avukat Ġenerali et al.* (Constitutional Court, Malta).

Noel Xuereb vs Avukat Generali u Kummissarju tal-Pulizija* (Constitutional Court, Malta, 13 April 2021).

Il-Pulizija (Spettur Omar Zammit) vs Jomic Calleja Maatouk, Court of Magistrates (as a Court of Criminal Judicature), 4/04/2022

Elton Gregory Dsane vs L-Avukat tal-Istat, First Hall Civil Court (Consitutional Jurisdiction) 30/07/2020

Dustin Bugeja v. Il-Kummissarju tal-Pulizija u l-Avukat Ġenerali, Constitutional Court 13/05/2024

Mifsud vs Malta (62257/15)

Republikka ta Malta vs Joseph Cachia (18 March 2015)

Azzopardi vs Malta, (Application no. 28177/12),6th February 2015

Spiteri vs Malta Application no. 43693/20, 30 September 2020

Brian Tonna v Speaker of the House of Representatives et al (Civil Court, First Hall (Constitutional Jurisdiction), 365/21 GG, 19 April 2021

Ir-Repubblika ta' Malta vs Carina Louise Azzopardi, Criminal Court 9/04/2024

Police vs Tarcisio Mifsud* (Constitutional Court, Malta, 114/2018 FDP).

Il-Pulizija vs Gianluca Caruana Curran, *Charles Joseph Mercieca*, Decree by the Court of Magistrates (Criminal Inquiry) 17/02/2021

David Marinelli vs Attorney General* (First Hall Civil Court, Malta, 5/2008/1).

Emanuela Brincat vs Attorney General* (Constitutional Court, Malta, 21 February 1996).

Peter Manduca vs Prime Minister* (Constitutional Court, Malta, 23 January 1995).

Il-Pulizija vs Johan Germaine Corneille Van Oudenhove* (Constitutional Court, Malta).

Proceeds of Crime Act (n 16) Article 36(6).

Continental (Regional) Jurisprudence

Štvrtecký v. Slovakia (QEDB, 05/06/2018)

Apostolovi v. Bulgaria App no 32644/09 (ECtHR, 07 February 2020) para 91.

Dowsett v United Kingdom, App no 39482/98 (ECtHR, 24 June 2003) paras 42-43.

Mamedova vs Russia* (European Court of Human Rights).

Salduz v. Turkey (n 116)

Imbriosicia vs Switzerland (13972/88)

Moiseyev vs Russia* (European Court of Human Rights).

Shannon v The United Kingdom (Application no 6563/03) [2005]

Jalloh v Germany (Application no 54810/00) [2006] ECHR

Ibrahim and Others vs the United Kingdom* (European Court of Human Rights).

Brown v Walker 161 US 591, 596–97 (1896)

Rowe and Davis v United Kingdom, App no 28901/95 (ECtHR, 16 February 2000).

Griffin v California 380 US 609, 610–11 (1965)

Vocaturo vs Italy, 28/1990/219/281, 24 May 1991

Olive Gardens Investment Ltd vs State Advocate et (CC) (22nd June 2022) (178/20)

Miranda v Arizona 384 U.S. 436 (1966)

Parliamentary Debates, Session Nr. 118, 11/02/2014