The Cardinal Rights Pertaining to a Suspect or Accused Person Prior to the Making of a Confession - With Special Reference to Malta

Thesis submitted by

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ABSTRACT

This thesis examines whether the following four cardinal rights, namely, the right to legal assistance, right to legal aid, the right to information and the right to silence are exhaustive and whether they are applied in a manner which reflects the spirit of EU law. Prior to delving into each individual right, the author will define certain keywords used throughout the thesis with the aim of establishing uniform definitions applicable to each individual right. The central question of this thesis is whether these four chosen cardinal rights are absolute rights or whether they have limited application. Focus is placed on the Maltese legal position. Whether it is in line with other European Member States in the implementation of such rights or whether it lags far behind. In so doing, the study outlines whether the intention of the legislator in promulgating these laws by transposing EU Directives is truly reflected in the court judgments which are delivered. This thesis incorporates vast references to relevant judgments delivered by the Maltese courts and includes a comparison of the same with judgments delivered by the ECtHR and the ECJ. In the case of contrasting decisions, the author highlights the differences and examines whether the decision is the result of a wrong or restrictive interpretation on the part of the Maltese courts. The study aims to show that these four cardinal rights established in the EU Directives only provide minimum standards and that there are several jurisdictions including Malta which provide more fundamental guarantees. The study questions whether the four chosen rights have in fact facilitated investigations or whether they served to complicate matters in this regard. Paramount importance is given to the fact that these rights as outlined in the letter of rights must be made known to a suspect prior to the commencement of any investigation by a police officer or any judicial authority. If these rights are afforded to suspects at the early stages, this would guarantee a fair trial in the criminal process and reduce the possibility of violations of rights. So far, Malta has transposed all the EU Directive relating to three of these cardinal rights, although it is currently facing infringement proceedings about the right to legal aid. Once the EU Directive on legal aid is transposed into national legislation, there will be an overhaul in

the application of this right. Currently, the right to legal aid is available to every person on the island. There is no merits or means testing. In fact, it may be stated that this right is often abused to the detriment of those suspects and accused persons who require legal assistance and cannot afford to pay for such assistance. The harmonisation of these rights in Member States ensures that citizens of the European Union are treated, in the same way, irrespective of which country they happen to be in when faced with a criminal investigation. In its conclusion, the study highlights certain areas which need improvement by putting forward adequate recommendations to ensure that the right to a fair hearing is properly safeguarded.

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DEDICATION

To the fondest memory of my dear father Joseph whose love for me had no boundaries. To my mother Marguerite for always believing in me and for never failing to be there for me. To my three children Justine, Alexander and Chiara for their endless love, patience, and support. To my brother Jose and sister Victoria for inspiring me to work hard and making sure I do not give up. This thesis is as much theirs as it is mine.

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TABLE OF CONTENTS

TABLE OF STATUTES

1. Maltese Law

i. Primary Legislation

Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta
Constitution of Malta
Criminal Code, Chapter 9 of the Laws of Malta
Dangerous Drugs Ordinance, Chapter 101 of the Laws of Malta
Development Planning Act, Chapter 552 of the Laws of Malta
European Convention Act, Chapter 319 of the Laws of Malta
Environment Protection Act, Chapter 549 of the Laws of Malta
Gender Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta
House of Representatives (Powers and Privileges) Ordinance, Chapter 113 of the Laws of Malta
International Protection Act, Chapter 420 of the Laws of Malta
Interpretation Act, Chapter 249 of the Laws of Malta
Official Secrets Act, Chapter 50 of the Laws of Malta
Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta
Money Laundering Act, Chapter 373 of the Laws of Malta
Motor Vehicles insurance Third party risks Chapter 104 of the laws of Malta
Police Act, Chapter 164 of the Laws of Malta
Public Administration Act, Chapter 497 of the Laws of Malta
Victims of Crime Act, Chapter 539 of the Laws of Malta
Traffic Regulation Ordinance, Chapter 65 of the Laws of Malta

ii. Subsidiary Legislation

Reception of Asylum Seekers Regulations, S.L. 420.06

iii. Implementing Acts and Legal Notices

Act No. IV of 1980 'Statute Law Revision Act'

Act No. XIV of 1987 'An Act to make provision for the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to become and be, enforceable as, part of the Law of Malta' dated 19th August, 1987

Act III of 2002 entitled 'The Criminal Code (Amendment) Act' dated 9th April, 2002

Act No. IV of 2014 entitled 'An Act further to amend various laws related to criminal matters' dated 18th March, 2014

Act No. LI of 2016 Criminal Code (Amendment No. 2) Act, 'An Act to provide for legal assistance during detention and other rights to arrested persons' dated 28th November, 2016

Act XVIII of 2017, 'An Act to regulate the organization, discipline and duties of the Police Force, and to provide for matters ancillary or consequential thereto' Dated 28th April, 2017

Act No. XXXII of 2018 entitled an 'Act to amend the Criminal Code, Cap. 9, the Drug Dependence (Treatment not Imprisonment) Act, Cap. 537 and to provide for other matters dealing with them or ancillary thereto' dated 20th July, 2018

Legal Notice No. 35/2010, Criminal Code (Amendment) Act, 2002

Legal Notice No. 414/2014, Legal Aid Agency (Establishment) Order

Legal Notice No. 102/2017, Interview of Suspects and Accused Persons (Procedure) Regulations 2017

2. UN Treaty Law

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force on 26 June 1987) 1465 UNTS 85 (UNCAT)

3. European Treaties and Conventions

Charter of Fundamental Rights of the European Union [2000], OJ LC 364/1
European Convention for the Protection of Human Rights and Fundamental Freedom, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS 126
European Convention on Preventing and Combating Violence against Women and Domestic Violence, 11 May 2011, CETS 210
European Convention on Action against Trafficking in Human Beings, 16 May 2005, CETS 197
Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJU 339/3,
Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

4. EU Legal Instruments

Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
[2009] OJ L 7/01
Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/01
Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in

matters of matrimonial property regimes [2016] OJ L 183//01

Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107

Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2003] OJ L 180/31

Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1

Directive 2012/13 of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L 142/1

Directive 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1

Directive 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1

Directive 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1

5. Other

African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

6. Foreign Law

i. Australia

Evidence Act 1995

The Privacy and Personal Information Protection Act 1998 NSW (PPIP Act)

ii. Austria

Code of Criminal Procedure 1975

iii. Belgium

Code of Criminal Procedure (Code d'instruction criminelle / Wetboek van strafvordering) 1808

iv. Canada

Constitution Act 1982

v. Croatia

Criminal Procedure Code 2009

vi. Cyprus

Chapter 55 of the Laws of Cyprus, Criminal Procedure 1959

vii. Estonia

Code of Criminal Procedure 2003

viii. Finland

Criminal Investigation Act 2014

ix. France

Code of Criminal Procedure (Code de procédure pénale) 1959

x. Greece

Code of Criminal Procedure, 1951

xi. India

The Constitution of India

xii. Ireland

The Police and Criminal Evidence (Northern Ireland) Order 1989 (Codes of Practice) Order 2015

S. I. No.119/1987, Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Station) Regulations, 1987

xiii. Italy

Codice Procedure Penale 1988

xiv. Germany

Code of Criminal Procedure 1987

xv. Latvia

Criminal Procedure Law of the Republic of Latvia 2005

xvi. Luxembourg

Criminal Procedure Code (Code d'Instruction Criminelle) 1808

xvii. Lithuania

Code of Criminal Procedure

xviii. Netherlands

Code of Criminal Procedure 1881

xix. New Zealand

Evidence Act 2006

xx. Slovenia

Criminal Procedure Act 1995

xxi. Spain

Ley de Enjuiciamiento Criminal [Law on Criminal Procedure]

xxii. United Kingdom

Police and Criminal Evidence Act 1984

The Criminal and Justice Public Order Act 1994

The English Police and Criminal Evidence Act of 1984 (PACE Act)

Criminal Procedure and Investigations Act 1996

Criminal Justice Act 2003

xxiii. United States of America

The Constitution of the United States

American Convention of Human Rights

TABLE OF JUDGMENTS

Courts of Magistrates as a Court of Criminal Judicature (CMCCJ)

Il-Pulizija vs Emmanuel Vella 17 January 1986 as per Magistrate Albert Borg Olivier dePuget

Il-Pulizija vs Simon Xuereb 12 March 1997 as per Magistrate Jacquline Padovani Grima

Il-Pulizija vs Mahmud Ali Amber, 19 June 1998 as per Magistrate Consuelo Scerri Herrera

Il-Pulizija vs Kenneth Azzopardi, 6 February 2013 as per Magistrate Marseann Farrugia

Il-Pulizija vs Eugenio Sultana, 26 February 2016 as per Magistrate Natasha Galea Sciberras

Il-Pulizija vs Claude Formosa, 25 October 2016 as per Magistrate Victor Axiack

Il-Pulizija vs Wayne Falzon, 2 August 2017 as per Magistrate Donatella Frendo Dimech

The Police vs Nicolae Materinca, 13 January 2020 as per Magistrate Neville Camilleri

il-Pulizija vs Annabelle Grech et, 12 November 2020 as per Magistrate Joseph Mifsud

Court of Criminal Appeal of Malta (Inferior Jurisdiction) (CCA)

Il-Pulizija vs E Mifsud, 20 October 1956 as per Mr Justice William Harding

Il-Pulizija vs George Spiteri, 8 March 1984 as per Mr Justice Carmel A. Agius

Il-Pulizija vs Emmanuel Vella, 29 January 1987 as per Mr Justice Carmel A. Agius

Il-Pulizija vs Anthony Azzopardi, 14 May 1987 as per Mr Justice Carmel A. Agius

Il-Pulizija vs Nazzareno sive Reno Zarb, 22 February 1993 as per Mr Justice Carmel A. Agius

Il-Pulizija vs Mark Aquilina u Carmel sive Charles Azzopardi, 22 September 1993 as per Mr Justice Carmel A. Agius

Il-Pulizija vs Amadeo Brincat et, 6 June 1994 as per Chief Justice Vincent De Gaetano

Il-Pulizija vs Donald Vassallo et, 30 April 1998 as per Mr Justice Patrick Vella

Il-Pulizija vs Carmel Camilleri and Therese *sive* Tessie Agius, 9 October 1998 as per Mr Justice Patrick Vella

Il-Pulizija vs James Gullaimier et, 12 February 1999 as per Mr Justice Patrick Vella

Il-Pulizija vs Angelos Bartolo u omissis, 11 January 2007 as per Mr Justice Joseph Galea Debono

Il-Pulizija vs Jonathan Grech, 25 January 2007 as per Mr Justice Joseph Galea Debono

Il-Pulzija vs Keith Cremona, 7 January 2010 as per Mr Justice Joseph Galea Debono

Il-Pulizija vs Justin Farruġia, 25 October 2012 as per Mr Justice Michael Mallia

Il-Pulizija vs Alexei Zerafa 31 July 2013 as per Mr Justice David Scicluna

Il-Pulizija vs Charlene Carm Simpson, 1 November 2013 as per Mr Justice Lawrence Quintano

Il-Pulizija vs Joseph Camilleri, 25 February 2016 as per Madam Justice Edwina Grima

Il-Pulizija vs Raymond Grech Marguerat, 28 June 2017 as per Madam Justice Edwina Grima

Il-Pulizija vs Claire Farrugia, 20 November 2018 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Carmelo sive Charles Grech, 6 December 2018 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Nicholas Dimech, 15 January 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Omissis Shannon Cauchi Omissis, 15 January 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Michael Borg Omissis, 15 January 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Arnold Farrugia, 17 January 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija v. Claire Farrugia, 17 January 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Omissis Anthony Cremona,14 February 2019 as per Madam Justice Consuelo Scerri Herrera

Il-Pulizija vs Maximilian Ciantar, 27 February 2019 as per Madam Justice Edwina Grima

Il-Pulizija vs Amad Masoud, 16 May 2019 as per Madam Justice Consuelo Scerri Herrera
Il-Pulizija vs Sandro Spiteri, 18 June 2019 as per Madam Justice Consuelo Scerri Herrera
Il-Pulizija vs Claude Formosa, 23 July 2019 as per Madam Justice Consuelo Scerri Herrera
Il-Pulizija vs Christian Fenech, 4 August 2020 as per Mr. Justice Aaron Bugeja

Court of Criminal Appeal of Malta (Superior Jurisdiction)

Ir-Repubblika ta' Malta vs Mikiel Vella et, 10 May 1985 as per Chief Justice Carmelo Schembri and Mr Justices Carmelo Scicluna and Hugh Harding
Ir-Repubblika ta' Malta vs Meinrad Calleja, 3 May 2000 as per Chief JusticeJoseph Said Pullicino and Mr Justices Carmel A. Agius and Noel Arrigo
Ir-Repubblika ta' Malta vs Domenic Briffa,16 October 2003 as per Chief Justice Vincent De Gaetano and Mr Justices Joseph A. Filleti and David Scicluna
Ir-Repubblika ta' Malta vs Godfrey Ellul, 17 March 2005 as per Chief Justice Vincent De Gaetano and Mr Justices Joseph A. Filleti and David Scicluna
Ir-Repubblika ta' Malta vs Jason Calleja, 3 July 2007 as per Chief Justice Joseph Said Pullicino and Mr Justices Carmel A. Agius and Noel Arrigo
Ir-Repubblika ta' Malta vs Carmel Saliba, 2 May 2013 as per Chief Justice Silvio Camilleri and Mr Justices David Scicluna and Joseph Zammit Mckeon
Ir-Repubblika ta' Malta vs Martino Aiello, 9th April 2018 as per Chief Justice Silvio Camilleri and Madam Justice Edwina Grima and Mr Justice Joseph Zammit Mckeon
Ir-Repubblika ta' Malta vs Hassan Ali Mohammed Abdel Raouf Josephine Wadi, 27 January 2021 as per Chief Justice Mark Chetcuti and Madam Justice Edwina Grima and Mr Justice Joseph Zammit McKeon
Ir-Repubblika ta' Malta vs Rosario Militello, 27 January 2021 as per Chief Justice Mark Chetcuti and Madam Justice Edwina Grima and Mr Justice Joseph Zammit McKeon

Criminal Court

Rex vs George Briffa, 7 November 1930 as per Mr Justice William Harding

Ir-Repubblika ta' Malta vs Simon Xuereb, 5 January 2004 as per Mr Justice Joseph Galea Debono

Ir-Repubblika ta Malta vs Allan Galea, 4 October 2013 as per Mr Justice Lawrence Quintano

Ir-Repubblika ta' Malta vs Spiridione Mercieca, 11 April 2014 as per Mr Justice Lawrence Quintano

Ir-Repubblika ta' Malta vs Pasqualino Cefai, 18 June 2014 as per Mr Justice Michael Mallia

Ir-Repubblika ta' Malta vs Martino Aiello, 9 May 2017 as per Mr Justice Antonio Mizzi

Ir-Repubblika ta' Malta vs Hassan Ali Mohammed Abdel Raouf Josephine Wadi, 12 December 2019 as per Madam Justice Consuelo Scerri Herrera

First Hall Civil Court – Constitutional Jurisdiction (FHCC)

Angela Busuttil vs Avukat Ġenerali, 3 October 2003 as per Mr Justice Noel Cuschieri

Avukat Dr Alfred Grech vs Avukat Ġenerali, 27 April 2007 as per Mr Justice Tonio Mallia

Alfred Joseph Baldacchino et vs Avukat Ġenerali, 19 October 2007 as per Mr Justice Tonio Mallia

Il-Pulizija vs Mark Lombardi, 9 October 2009 as per Mr Justice Tonio Mallia

Simon Bugeja vs Avukat Ġeneral, 25 February 2010 as per Madam Justice Jacquline Padovani Grima

Charles Steven Muscat vs Avukat Ġenerali, 10 October 2011 as per Mr Justice Gino Camilleri

Simon Xuereb vs Avukat Ġenerali, 14 October 2011 as per Mr Justice Tonio Mallia

Il-Pulizija vs Pawlu Grech, 3 November 2011 as per Mr Justice Joseph R. Micallef

Ir-Repubblika ta' Malta vs Alfred Camilleri, 16 January 2012 as per Mr Justice Anthony Ellul

Joseph Bugeja vs Avukat Ġenerali, 23 March 2012 as per Mr Justice Tonio Mallia

Gregory Robert Eyre vs the Attorney General, 27 June 2012 as per Madam Justice Anna Felice

Il-Pulizija vs Nazzareno Grech, 9 July 2014 as per Madam Justice Jacquline Padovani Grima

Joseph Lebrun vs Attorney Ġeneral, 19 January 2015 as per Madam Justice Anna Felice

Malcolm Said vs. Avukat Ġenerali et, 14 January 2016 as per Madam Justice Jacquline Padovani Grima

Aaron Cassar vs Avukat Ġenerali, 28 January 2016 as per Madam Justice Lorraine Schembri Orland

John Udagha Omeh vs Avukat Ġenerali, 31 January 2017 as per Madam Justice Anna Felice

Frank Sammut vs l-Onorevoli Speaker et, 31 January 2017 as per Mr Justice Joseph Zammit McKeon

Christopher Bartolo vs Avukat Ġenerali, 23 November 2017 as per Madam Justice Jacquline Padovani Grima

Tancred Tabone vs l-Onorevoli Speaker et, 2 May 2018 as per Madam Justice Anna Felice

Marvin Debono vs Avukat Ġenerali u l-Kummissarju tal-Pulizija, 17 October 2018 as per Mr Justice Joseph R. Micallef

Elton Gregory Dsane vs Avukat ta' l-Istat, 30 July 2020 as per Mr Justice Toni Abela

Christopher Bartolo vs Avukat ta' l-Istat, 22 June 2021 as per Mr Justice Toni Abela

Constitutional Court

Ir-Repubblika ta' Malta vs Gregory Robert Eyre and Susan Jayne Molyneaux,1 April 2005 as per Chief Justice Vincent De Gaetano and Mr Justice Joseph D. Camilleri and Joseph A. Filletti

Il-Pulizija vs Alvin Privitera, 11 April 2011 as per Mr Justices Geoffrey Valencia, Tonio Mallia and Gannino Caruana Demajo

Il-Pulizija vs Mark Lombardi, 12 April 2011 as per Mr Justices Albert Magri, Geoffrey Valencia and Giannino Caruana Demajo

Il-Pulizija vs Esron Pullicino, 12 April 2011 as per Mr Justices Albert Magri, Geoffrey Valencia and Giannino Caruana Demajo

Simon Xuereb vs Avukat Ġenerali, 28 June 2012 as per Mr Justices Albert Magri, Geoffrey

Valencia and Giannino Caruana Demajo

Charles Steven Muscat vs Avukat Ġenerali, 8 October 2012 as per Mr Justices Noel Cuschieri, Joseph Zammit McKeon and Giannino Caruana Demajo

Joseph Bugeja vs Avukat Ġenerali, 14 January 2013 as per Mr Justices Noel Cuschieri, Joseph R. Micallef and Giannino Caruana Demajo

Il-Pulizija vs Tyron Fenech, 22 February 2013 as per Chief Justice Silvio Camilleri and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Il-Pulizija vs Amanda Agius, 22 February 2013 as per Chief Justice Silvio Camilleri and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Victor Lanzon nomine vs Kummissarju tal-Pulizija 25 February 2013 as per Mr Justices Noel Cuschieri, Joseph Zammit McKeon and Giannino Caruana Demajo

Geoffrey Galea vs Avukat Ġenerali et, 28 June 2013 as per Chief Justice Silvio Camilleri and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Anthony Taliana vs l-Kummissarju tal-Pulizija et, 6 February 2015 as per Chief Justice Silvio Camilleri and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Richard Cuschieri vs Attorney Ġenerali, 12 February 2016 as per Chief Justice Silvio Camilleri and Justices Noel Cuschieri and Giannino Caruana Demajo

Daniel Alexander Holmes vs Avukat Ġenerali et, 3 May 2016 as per Chief Justice Silvio Camilleri and Mr Justices Giannino Caruana Demajo and Noel Cuschieri

Christopher Bartolo vs Avukat Ġenerali et, 5 October 2018 as per Chief Justice Silvio Camilleri, and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Alfred Camilleri vs Avukat Ġenerali, 14 December 2018 as per Chief Justice Joseph Azzopardi and Mr Justices Tonio Mallia and Anthony Ellul

Brian Vella vs Avukat Ġenerali, 14 December 2018 as per Chief Justice Joseph Azzopardi and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Il-Pulizija vs Aldo Pistella, 14 December 2018 as per Chief Justice Joseph Azzopardi and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Graziella Attard vs Avukat Ġenerali, 27 September 2019 as per Chief Justice Joseph Azzopardi and Mr Justices Noel Cuschieri and Giannino Caruana Demajo

Morgan Onuorah vs Avukat Ġenerali, 27 January 2021 as per Chief Justice Mark Chetcuti and Mr Justices Justice Giannino Caruana Demajo and Anthony Ellul

Clive Dimech vs Avukat Ġenerali, 27 January 2021 as per Chief Justice Mark Chetcuti and Mr Justices Giannino Caruana Demajo and Anthony Ellul

Court Decrees

Il-Pulizija vs Gianluca Caruana Curran et, Court of Magistrates as a Court of Criminal Judicature, 17 February 2021 as per Magistrate Natasha Galea Sciberras
Il-Pulizija vs Yorgen Fenech, Court of Magistrates as a Court of Criminal Judicature, 2 October 2020 as per Magistrate Rachel Montebello
Il-Pulizija vs George Degorgio, Court of Magistrates as a Court of Criminal Judicature, 3 December 2019 as per Magistrate Joseph Mifsud
L-Avukat Generali vs Keith Schembri et, Criminal Court, 12 November 2020 as per Madam Justice Edwina Grima.

Bills of Indictments

Criminal Court as per Madam Justice Consuelo Scerri Herrera, Bill of Indictment 12/2019 in the names Ir-Repubblika ta' Malta vs Romario Barbara (27 October2020). This was overturned on Appeal on the 26th May, 2021 per Chief Justice Mark Chetcuti, Madame Justice Edwina Grima and Mr Justice Giovanni Grixti.

Criminal Court as per Madam Justice Consuelo Scerri Herrera, Bill of Indictment 5/2020 in the names The Republic of Malta vs Christopher Doll (17 November 2020). This was overturned on Appeal on the 22nd September, 2021 per Chief Justice Mark Chetcuti, Madame Justice Edwina Grima and Mr Justice Aaron Bugeja.

Judgments of the Court of Appeal concerning Appeals lodged from the decisions of Planning Appeals Board

Godfrey Psaila vs Planning Authority, 25 February, 1994
Joseph Mifsud vs Planning Authority , 28 October, 1994

European Court of Human Rights (ECtHR)

Wemhoff. v. Germany App no 2122/64 (ECtHR, 27 June 1968)

Koplinger v. Austria App no 1850/63 (ECtHR, 1 May 1969)

Engel and others v. The Netherlands App no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976)

Ensslin, Baader and Raspe v. Germany App no 7572/76 (ECtHR, 8 July 1978)

Airey v. Ireland App no 6289/73 (ECtHR, 9 October 1979)

Deweer v. Belgium App no. 6903/75 (ECtHR, 27 February 1980)

Artico v. Italy App no. 6694/74 (ECtHR, 13 May 1980)

Jespers v. Belgium App no 8403/78 (ECtHR, 14 December 1981)

Pakelli v. Germany App no 8398/78 (ECtHR, 25 April 1983)

H. v. Spain App no 10227/82 (ECtHR, 15 December 1983)

Ozturk v. Turkey App no 8544/79 (ECtHR, 21 February 1984)

Goddi v. Italy App no. 8966/80 (ECtHR, 9 April 1984)

Campbell and Fell v. UK App no 7819/77; 7878/77 (ECtHR 28 June 1984)

Bricmont v. Belgium App no 9937/82 (ECtHR, 15 July 1986)

Johnston and others v. Ireland App no 9697/82 (ECtHR, 18 December1986).

Kamasinski v. Austria App no 9783/82 (ECtHR, 19 December 1989)

Frau v. Italy App no 12147/86 (ECtHR, 19 February 1991)

Quaranta v. Switzerland App no. 12744/87 (ECtHR, 24 May, 1991)

S v. Switzerland App no. 12629/87; 13965/88 (ECtHR, 28 November,1991)

Pham Hoang v. France App no. 13191/87 (ECtHR, 25 September 1992)

Croissant v. Germany App no. 13611/88 (ECtHR, 25 September,1992)

Edwards v. UK App no 13071/87 (ECtHR, 16 December 1992)

Funke v. France App no 10828/84 (ECtHR, 25 February 1993)

Poitrimol v. France App no 14032/88 (ECtHR, 23 November 1993)

Imbroscia v. Switzerland App no. 13972/88 (ECtHR, 24 November 1993)

Pelladoah v. the Netherlands App no 16737/90 (ECtHR, 22 September 1994)

Hokkanen v. Finland App no 19823/ 92 (ECtHR, 23 September1994)

Murray v. UK App no 18731/91 (ECtHR, 8 February 1996)

Choudhary v. UK App no 27949/95 **(**ECtHR, 13 May 1996)

Benham v. UK App no 19380/92 (ECtHR, 10 June 1996)

Saunders v. UK App no 19187/91 (ECtHR, 17 December 1996)

Foucher v. France App No 22209/93 (ECtHR, 18 March 1997)

Daud v Portugal App no 22600/93(ECtHR, 21 April 1998)

Twalib v. Greece App no 24294/94 (ECtHR, 9 June 1998)

Geyseghem v. Belgium App no 26103/95 (ECtHR, 21 January 1999)

Pélissier and Sassi v. France App no 25444/94 (ECtHR, 25 March 1999)

Jasper v. UK App no 27052/95 (ECtHR, 16 February 2000)

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

Mattoccia v Italy App no 23969/94 (ECtHR, 25 July 2000)

Averill v. UK App no 36408/97 (ECtHR, 6 September 2000)

Schöps v. Germany App no 25116/94 (ECtHR, 13 February 2001)

Krombach v. France App no 29731/96 (ECtHR, 13 February 2001)

Heaney and McGuinness v. Ireland App no 34720/97 (ECtHR, 21 March 2001)

Paul Quinn v. Ireland App no 36887/97 (ECtHR, 21 March 2001)

P.G. and J.H. v. UK App no 44787/98 (ECtHR, 25 December 2001)

Brennan v. United Kingdom App no 39846/98 (ECtHR, 16 January 2002)

Janosevic v. Sweden App no 34619/97 (ECtHR, 21 May 2003)

Meftah and Others v. France App no 32911/96, 35237/97 and 34595/97 (ECtHR, 26 July 2002)

Czekalla v. Portugal App no 38830/97 (ECtHR, 10 January 2003)

Logerblom v. Sweden App no 26891/95 (ECtHR, 14 April 2003)

Allan v. UK App no 48539/99 (ECtHR, 5 February 2003)

Pedersen and Baadsgaard v. Denmark App no 49017/99 (ECtHR, 17 December 2004)

Weh v. Austria App no 38544/97 (ECtHR, 8 July 2004)

Santambrogio v. Italy App no 61945/00 (ECtHR, 21 December 2004)

Cevizovic v. Germany App 49746/99 (ECtHR, 29 October 2004)

Ocalan v. Turkey App no 46221/99 (ECtHR, 12 May 2005)

Mayzit v. Russia App no 63378/00 (ECtHR, 6 July 2005)

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LIST OF ABBREVIATIONS

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Courts of Justice of the European Justice
CCA	Court of Criminal Appeal
CJPOA	Criminal Justice and Public Order Act
CMCCJ	Courts of Magistrates as a Court of Criminal Judicature
CMCI	Courts of Magistrates as a Court of Criminal Inquiry
CT	Constitutional Court
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment
EAW	European Arrest warrant
EC	European Convention
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESI	Electronically Stored Information
EU	European Union
FHCC	First Hall Civil Court
FRA	EU Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
LPP	Legal Professional Privilege
PAC	Public Accounts Committee
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UN	United Nations
UNCHR	United Nations High Commissioner for Human Rights

UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
UNPG	United Nations Principles and Guidelines

CHAPTER ONE – INTRODUCTION

1. THESIS

> [P]rotecting the human rights of individuals subject to criminal proceedings is an essential element of the rule of law. - Michael O'Flaherty (2016) [1]

In democratic countries, both suspects and accused persons facing criminal proceedings should be protected by the rule of law. At present, individuals subject to interrogation, have a myriad of legal rights, which if not observed, can lead to their acquittal or to the nullity of the trial. It is important that the judge bases his or her judgment on the admissible facts brought forward in the trial. It is therefore imperative that the investigating officers only present evidence which is admissible. Should these rights not be granted to suspects and accused persons prior to their interrogation, any evidence obtained during the same interrogation would be considered inadmissible. The study will examine the four cardinal rights, also referred to as the chosen rights, pertaining to a suspect and accused prior to an interrogation:

i. The Right to Legal Assistance

ii. The Right to Information in Criminal Proceedings

iii. The Right to Legal Aid

iv. The Right to Silence

[1] EU Agency for Fundamental Rights (FRA) 'Rights of suspected and accused persons across the EU: translation, interpretation and information' (2016) Luxembourg publication office of the European Union, 3 < https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf> accessed November 2018. (FRA - Rights of suspected and accused persons across the EU)

These four rights are considered as cardinal in that together they share a common goal, namely, to give protection to suspects and accused persons prior to an interrogation. These rights can be considered as a vehicle for the promotion and protection of the common normative framework within which the police and other investigating authorities should work. They provide a structure in guaranteeing the protection of all human rights, for instance: they protect the suspect from the possibility of incriminating oneself. Other fundamental rights are also important, but their potential cannot be met if these four cardinal rights are not first in place. These four rights should be followed consecutively and in the aforementioned order of priority, particularly because one would be unable to consider the right to interpretation if the suspect or accused has not been granted the right to legal assistance or the right to remain silent.

In July 2009, the Swedish Presidency of the European Union (EU) presented a new Roadmap regarding the protection of suspects and accused in criminal proceedings. The Roadmap set out its vision to foster the right to a fair trial in criminal proceedings across the EU.[2] The EU subsequently issued Directives intended to safeguard the fundamental human rights of both suspects and accused persons. The following, are four of these Directives which play an important part on the chosen rights:

i. EU Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Directive on the right to access to a lawyer);[3]

[2] Mar Jimneo-Bulnes, 'Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?' (2010) Centre for European Policy Studies (CEPS) <https://www.ceps.eu/ceps-publications/towards-common-standards-rights-suspected-and-accused-persons-criminal-proceedings-eu/> accessed April 2018.
[3] [2013] OJ L 294/1.

ii. EU Directive 2016/19 guaranteeing legal aid for suspects and accused persons in criminal proceedings (Directive on the Right to Legal Aid);[4]

iii. EU Directive 2012/13 on the right to information in criminal proceeding (Directive on the right to information in criminal proceedings);[5] and

iv. EU Directive 2016/343 strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (Directive on the presumption of innocence and the right to be present at the trial).[6]

These Directives were, however, preceded by several other legislative instruments aimed to achieve similar objectives in protecting the rights of suspects and accused persons facing criminal proceedings. These include the European Convention on Human Rights and Fundamental Freedoms[7] (ECHR); treaties like the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[8] the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[9] and the Charter of Fundamental Rights of the European Union[10] (CFREU). These legal instruments form an integral part of the sources which developed these cardinal rights and lay down several fundamental human rights which are interlinked to the criminal process. Following the enactment of the European Convention Act,[11] local courts have referred to the case-law of the European Court of Human Rights (ECtHR)

[4] [2016] OJ L 297/1.
[5] [2012] OJ L 142/1.
[6] [2016] OJ L 65/1.
[7] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[8] Adopted 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85 (UNCAT).
[9] 26 November 1987, ETS 126.
[10] In December 2000, the European Commission, the Council and the Parliament jointly signed and solemnly proclaimed the CFREU. It emphasises that respect for fundamental rights will be at the basis of all European law.
[11] Chapter 319 of the Laws of Malta.

when delivering judgements. The Maltese Courts adhere to the decisions of the ECtHR not only because ECtHR judgments given against Malta have a binding effect but also to avoid the possibility of having Maltese- delivered judgments overturned by the ECtHR. Reference to such case-law must certainly be made to attain harmonisation of these rights in all Member States.

It appears that there were various players which improved the development in the application of these four cardinal rights pertaining to suspects and accused persons prior to the making of a confession. Undoubtedly, foreign academic papers and books are a continuous source of reference with regard to the interpretation of the Directive focusing on these same rights; however, in the case of the specific right to legal aid, reference to such academic works may be regarded as merely theoretical since the Directive has not yet been transposed into Maltese legislation. Therefore, as the position in Malta regarding legal aid may be described as *sui generis*, a situation which does not exist in any other Member State, this study shows that foreign literature on this matter may not be completely relevant to the local scenario. National case-law does, however, refer to foreign academic works relating to the other three Directives, but the interpretation which is adopted by the foreign authors on these same Directives might not always be in line with Malta's national legal system.

Regarding the right to legal representation, it appears that the legislator faced significant pressure when introducing such right into local legislation even prior to the transposition of the EU Directive 2013/48. This situation was mainly generated by the reluctance of the police to have lawyers present during interrogations due to the fact that they believed that they would attain less admissions of guilt. This may be one of the primary reasons why this right took eight years to be implemented and why it was coupled with the right to draw inferences. Subsequently, it took another six years to eliminate the rule of inference and to introduce for the first time the right to legal representation throughout the entire criminal investigation. The fact that it took fourteen whole years for this right to be freely exercised highlighted the severe need for the application of this right and for investigations to be carried out in a more thorough manner. In this regard, foreign authors and

parliamentary debates played a huge role in the development of this right. Moreover, it is safe to conclude that parliamentary debates, acts of parliament, academic papers and books and jurisprudence, both local and foreign, could all be considered as major contributors in the application of these cardinal rights, including the right to legal aid.

It is pertinent to point out at the outset that the transposition of these three Directives is entirely within the remit of each Member State and therefore the ultimate aim of harmonisation might not be readily attained. In line with the above, however, the study shows that foreign legislation may provide insight on the interpretation of the principles set forth in the Directive. Maltese jurisprudence is continuously developing and can thus be considered as a key source in the development of such rights. Indeed, this study shows that these rights are dynamic rights which constantly require clarification and elucidation.

Notwithstanding the above, it does not seem that all is well with the *status quo*. Dealing with these rights has however proved to be an arduous task for several reasons. In theory these rights seem to be wide reaching, however, in practice a few difficulties do exist and thus the study will delve into the matter as to whether additional safeguards should be introduced to the criminal process to safeguard the right to a fair trial. The question as to how these rights are to be a better safeguard has become a central concern in the development of the right to a fair trial, keeping in mind the paramount significance to defend basic procedural matters even at a national level. Legal doctrine has shown relatively little interest in the conceptual and practical issues relating to the structure of fundamental rights and the reason for 'shaping' such rights.[12]

When one considers that in the EU there are more than eight million ongoing criminal proceedings,[13] it becomes clear that the protection of fundamental human rights, including those relating to matters of procedure, is a matter of the utmost significance. Regarding EU Directive 2012/13 on the right to information in criminal proceedings, the Commission stated that in the eight million criminal proceedings pending in Member

[12] Eva Brems and Janneke Gerrards, *Shaping Rights in the ECHR* (Cambridge University Press 2013).
[13] European Commission Press Release 'Commission proposal to guarantee citizens' right to access a lawyer to become law' (2013) <http://Europa.eu/rapid/press-release_IP-13-921_en.htm> accessed 6 June 2019.

States every year, suspects 'are only informed about their defence rights orally, in a technical and incomprehensible language, or not at all.'[14] Failure to guarantee this right, results in deterioration of the right to a fair trial. This is indeed one of the reasons why the present study was carried out to outline the *lacunae* present in the procedural rights, which rights are at the very basis of every criminal process.

The early stages of the criminal justice process are crucial to suspects who have been apprehended or detained in relation to an allegation of criminal behaviour.[15] The fact as to whether decisions are taken or not will have a bearing on the length of their arrest and the content of the investigation to follow, as to whether they are going to be charged in court and consequently afforded a fair trial. Throughout this time, detained and arrested persons are at greater risk of ill treatment, neglect and demands for bribes, situations which may lead to coerced confessions and unlawful detention.[16] At that moment in time the suspect, when not an experienced offender, is put in a vulnerable position with his or her main interest being released from arrest. It can be said that suspects become vulnerable due to the well-established practices of the police when exerting psychological weaknesses on suspects.[17] Koen Geijsen et al believe that 'psychological vulnerabilities in police suspects may interfere with the demands of police interrogations, and thereby increase the risk of an unreliable statement, or even a false confession.'[18]

All suspects and accused must be made aware of their fundamental human rights prior to interrogation. At this pre-trial stage, legal assistance is imperative to guarantee a fair trial

[14] 'Roadmap Practitioner Tools: Right to information Directive. The letter of rights. Right to Information on the accusation. Right to Access to the case file witnesses and other non-suspect' (Fair Trails Europe, Legal Experts Advisory Panel March 2015) <https://www.fairtrials.org/wp-content/uploads/Right-to-Info-Toolkit-FINAL1.pdf> accessed 27 May 2020.
[15] Jeremy McBride, *Human Rights and Criminal Procedure, The case law of the European Court of Human Rights* (2nd edn, Council of Europe 2018).
[16] Moritz Birk and others, *Pre-trial Detention and Torture: Why Pre-trial Detainees Face the Greatest Risk* (Open Society Foundations 2011).
[17] Neil Brewer and Amy Bradfield Douglass, *Psychological Science and the Law* (Guildford Press 2019).
[18] Koen Geijsen, Corine de Ruiter, Nicolien Cop, Luca Cerniglia, 'Identifying psychological vulnerabilities: Studies on police suspects' mental health issues and police officers' views.' (2018) 5 (1) Cogent Psychology <https://www.tandfonline.com/doi/full/10.1080/23311908.2018.1462133> accessed June 2018.

according to the rule of law.[19] A unreceptive approach, where the investigating officer or law enforcement officer waits for the accused to claim his right, is insufficient, and the police must guarantee that the suspects understand their cardinal rights, four of which are those outlined above. Unfortunately, several obstacles may hinder these rights, the main point of contention being the acknowledgment of safety measures. Although these rights are of the utmost importance, they could easily be ignored in practice and transformed into illusionary rights.

It must be recognised at this early stage that even though the Maltese national courts have registered great progress in the application of such rights and in trying to adhere to judgments of the ECtHR, there is still room for improvement. This will be explained further throughout this thesis with a particular focus on the four inter-linked cardinal rights. One cannot discuss the right against self-incrimination without simultaneously discussing the right to information. Similarly, one cannot discuss the right to legal aid without discussing the right to legal assistance.

1.1 DEFINITIONS OF KEY TERMS USED IN THIS THESIS

1.1.1 Criminal Proceedings

The term 'criminal proceedings' is extensively mentioned in all four Directives forming part of this study. Under each Directive's scope sub-heading, there is explicit reference to suspects and accused persons undergoing 'criminal proceedings.' However, the Directives fail to give a definition of the term 'criminal proceedings.' The Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU attempted to define 'criminal proceedings' by stating that these are all the proceedings taking place within the EU, whose aim is to establish guilt or innocence

[19] Ed Cape et al, *Improving Pre-trial Justice: The Roles of Lawyers and Paralegals* (Open Society Foundations 2012) s 4.1 - 4.7.

of suspects, or to decide on the outcome following a guilty plea in respect of a criminal charge.[20]

Theodore Konstandmides, however, believes that the Directives' procedural rights are aimed at providing individuals with safeguards 'more immediately rather than wait for the close of proceedings against them'.[21] In fact, he draws a comparison with the Convention and states that, in the case of the Directives, the effectiveness of fair trial rights should not be limited by the ex-post nature of the application process as happens with the application of the Convention.[22] This is the same as saying that 'the follow up phase builds on what was learned during the preliminary investigations.'[23] In a more specific manner, Steve Peers when discussing the cardinal right to legal assistance explains that 'rights will apply from the moment that a person is '*made aware*' by the authorities 'by official notification or otherwise' that he or she 'is suspected or accused of having committed an offence' until the conclusion of those proceedings.[24] Similarly, Professor Ranier Grote opines that 'a fair trial as contemplated in Article 6 of the ECHR is not limited to the trial, but is applicable to the proceedings as a whole.'[25] Dr Maria Yordanova goes a step further by stating that in order for an individual to benefit from the full rights available to the defence in 'criminal proceedings', the lawyer 'has to obtain the status of defence counsel and this is possible from the moment the alleged offender is 'detained' and not only when charges have been brought against him/her.'[26] Dr Maria Yordanova's reasoning is further reinforced as she states that the authorities are obliged

[20] Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union {SEC (2004) 491} /* COM/2004/0328 final - CNS 2004/0113 */ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52004PC0328> accessed 27 May 2020.
[21] Valsamis Mitsilegas, Maria Bergström,Theodore Konstandmides, *Research Handbook on EU Criminal Law* (Edward Elgar Publishing Limited 2016) 174.
[22] ibid.
[23] Wayne W Bennett and Karen M Hess, *Criminal Investigation* (8th edn, Wadsworth Publishing 2006) 19.
[24] Steve Peers, *EU Justice and Home Affairs Law* (4th edn, Oxford University Press 2016).
[25] Professor Ranier Grote, 'Protection of Individuals in the Pre-Trial Procedure' <http://hrlibrary.umn.edu/fairtrial/wrtf-rg.htm> accessed 27 May 2020.
[26] Dr Maria Yordanova and others, *Right of Defence and the Principle of Equality of Arms in the Criminal Procedure in Bulgaria.* (Centre for the Study of Democracy 2012).

to inform the accused about the defence rights prior to carrying out any investigations or procedural steps involving the accused.[27]

Therefore, the rights of the defence commence from the moment the suspect is apprehended by the authorities.

1.1.2 Pre-trial Stage

A pre-trial investigation is the first stage of the criminal process. The purpose of the pre-trial investigation is to determine all significant circumstances of a crime quickly and fully and to identify the person who might have committed that crime. This stage paves the way for a proper hearing of the case in court. As pointed out by Chandra Mohan Upadhyay, pre-trial detainees should be distinguished from convicted persons.[28] Detainees should be afforded treatment which corresponds to their status as detainees and not convicted persons. This imposes the burden of proof of the charge on the prosecution and the accused has the benefit of doubt.[29] Dr Ranier Grote identifies the pre-trial stage as covering the entire criminal proceedings from the time when the police or the prosecuting magistrate first learns of the occurrence of a crime, up to the moment of the hearing on the charges before a court.[30] The European Court of Human Rights (ECtHR) considers that the principle of fair trial enshrined in Article 6 of the ECHR is not limited to the trial, but is applicable to the proceedings as a whole, of which the trial is only the culmination.[31]

In 2002 the Criminal Code underwent a major restructuring process pursuant to which police powers were extended and refined.[32] It is the duty of the Police to '…prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence and to bring offenders whether

[27] ibid.
[28] Chandra Mohan Upadhay, *Human Rights in Pre-trial Detention* (Ashish Publishing House (APH) 1999) 13.
[29] ibid.
[30] Grote (n 25).
[31] *Imbroscia vs Switzerland* App no 13972/88 (ECtHR, 24 November 1993) 13; *Murray v. UK* App no 18731/91 (ECtHR, 8 February 1996) 26.
[32] Act III of 2002.

principals or accomplices before the judicial authorities.'[33] In exercising such a duty the police must ensure that they do not disregard the rights of the suspect and accused. In these circumstances, the presence of lawyers would ascertain that all rights pertaining to suspects are made known.

Pre-trial proceedings are recognised in Malta and are known as the '*in genere'*.[34] The investigations relating to the *in genere* are held by the duty Magistrate to ensure that the preservation of the subject matter of the alleged crime is carried out under the supervision of an independent judicial officer. Evidence collected during this time benefits from objectivity, independence and public faith emerging from the investigations. Although suspects may be asked to give evidence, the scope of the inquiry is not to establish guilt but rather to preserve evidence.[35] This inquiry forms part of pre-trial proceedings, so much so that the *procès-verbal* drawn up by the Inquiring Magistrate is presented in the acts of the proceedings against the suspect once and if charged in court.[36] The *procès-verbal* drawn up by the Magistrate has probatory value in the trial of the cause, and hence the importance of duly granting suspects their rights.

Since 1854,[37] the Maltese Criminal Code has catered for rules of procedure directed to safeguard the rights of the person charged and eventually accused, by offering a person charged with a more serious offence, the possibility of having his case tried by the Criminal Court. Prior to this stage, the compilation of evidence is carried out before a separate court which examines the evidence presented by the prosecution. It ensures that evidence is compiled before an independent judicial authority, and in the presence of the person charged, with the full possibility for the person charged to participate in his criminal process. This procedure can be rather lengthy, cumbersome, and costly because the person charged with a criminal offence is also entitled to be assisted by a legal aid lawyer when he does not have the means to engage a lawyer of his own choosing. The

[33] Criminal Code, Chapter 9 of the Laws of Malta, art 346(1).
[34] ibid art 546.
[35] Ir-*Repubblika ta' Malta vs Jason Calleja* (CCA Superior Jurisdiction, 3 July 2007).
[36] Criminal Code art 550(1).
[37] Order-in-Council of the 30 January1854.

scope of the proceedings in front of the Court of Magistrates as a Court of Criminal Inquiry (CMCI) is the collection, compilation and preservation of evidence prior to the commencement of the trial when the accused person is formally charged with an indictable offence.

Therefore, there are three types of pre-trial proceedings in Malta:

i. Proceedings carried out by the Magistrate sitting as a Court of Criminal Inquiry;[38]

ii. Proceedings carried out by the Magistrate on duty when conducting an *in genere* investigation;[39] and

iii. Proceedings carried out by the Police independently from the Magistrate on duty, in relation to crimes which carry a punishment of less than three years imprisonment and in crimes where there is no subject matter to be preserved, for instance: perjury or calumnious accusations.[40]

Proceedings before the Inquiring Magistrate and the executive police are crucial and may be described as a delicate stage of the criminal process. Any confessions are taken down in writing and used as evidence during the trial. Furthermore, when the cardinal rights are granted, fear of wrongdoing is minimised.

[38] Criminal Code, Book Second, Part I, Title II, sub-title II entitled 'Of the Court of Magistrates as Court of Criminal Inquiry General Provisions applicable to the Court of Magistrates, whether as Court of Criminal Judicature or as Court of Criminal Inquiry'.
[39] Criminal Code, Book Second, Part II, Title II, entitled 'Of Inquiries relating to the "In genere", Inquests and "Reperti''.
[40] ibid. An *a contrario senso* interpretation of art 546(1) is applied.

1.1.3 Charge

The term 'charged' has been used extensively by the ECtHR. In *Blockhin v. Russia*,[41] the court held that the term 'criminal charge' has an 'autonomous' meaning independent from the various classifications found in the domestic legal systems of Member States. It further explained that the term must be construed within the meaning of the Convention.

The case in the names *Engel and Others v. The Netherlands* [42] set out three factors which must be taken into consideration when determining whether a person is subject to a 'criminal charge,' namely:

i. The domestic classification, in other words how the particular act classifies as an offence;
ii. The nature of the offence; and

iii. The nature and degree of severity of any possible penalty in case of guilt.[43]

This test was however limited in scope since it failed to identify the exact moment at which a person is 'charged.' In several cases that followed, the court adopted a substantive, rather than a formal approach, in determining when a 'charge' takes place in terms of Article 6.[44] It defined the term 'charge' as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence,'[45] without elaborating much further.

[41] App no 47152/06 (ECtHR, 23 March 2016) para 179.
[42] App no 5100/71 (ECtHR, 8 June 1976).
[43] ibid.
[44] Guide on Article 6 of the Convention – Right to a fair trial (criminal limb) (2020) Council of Europe (Guide on Article 6 of the ECHR) <https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf> accessed 27 May 2020. Vide *Deweer v Belgium* App no 6903/75 (ECtHR, 27 February 1980) para 44.
[45] ibid.

Over time, the ECtHR began to consider circumstances which could equate to the suspect being 'charged' and thus entitled to his rights. These include the situations when a person is arrested on suspicion of having committed a criminal offence;[46] a suspect is interrogated about his participation in acts constituting a criminal offence;[47] a person who has been questioned in respect of his or her supposed involvement in an offence,[48] irrespective of the fact that he or she was formally considered as a witness,[49] and a person has been formally charged with a criminal offence under the procedure set out in domestic law.[50] In all such circumstances, an individual is considered to be 'charged with a criminal offence' and can therefore claim protection under Article 6 of the Convention and the Directives. Moreover, the interpretation given by the ECtHR strengthens the argument that fundamental rights apply to all individuals from the moment their '*status quo'* changed and thus includes the pre-trial stage.

1.1.4 Suspect

Despite its continuous use, the term 'suspect' is not defined in the Directives. Silvia Allegrezza et al define a 'suspect' as being 'any individual who has not yet been officially charged or indicted by prosecuting authorities.'[51] However, Irina Ionescu explains that the status of a 'suspect' is attained when a person is being interrogated and investigated about a crime and is made aware of an allegation that he has committed the crime.[52] Such person

[46] *Heaney and McGuinness v. Ireland* App no 34720/97 (ECtHR, 21 March 2001) para 42; *Brusco v. France* App no 1466/07 (ECtHR, 14 January 2011) paras 47-50.
[47] *Aleksandr Zaichenko v. Russia* App no 39660/02 (ECtHR, 28 June 2010) para 41-43; *Yankov and Others v. Bulgaria* App no 4570/05 (ECtHR, 23 December 2010) para 23; *Schmid-Laffer v. Switzerland* App no 41269/08 (ECtHR, 16 September 2015) paras 30-31.
[48] *Stirmanov v. Russia* App no 31816/08 (ECtHR, 29 April 2019) para 39.
[49] ibid.
[50] *Pélissier and Sassi v. France* App no 25444/94 (ECtHR, 25 March 1999) para 66; *Pedersen and Baadsgaard v. Denmark* App no 49017/99 (ECtHR, 17 December 2004) para 44.
[51] Silvia Allegrezza, Valentina Covolo, 'The Directive 2012/13/EU on the right to information in criminal proceedings: Status Quo or Step Forward?' (2016) 43 <https://www.pravo.unizg.hr/_download/repository/3_-_The_Directive_201213EU_on_the_Right_to_Information_in_Criminal_Proceedings_status_quo_or_step_forward.pdf> accessed June 2018.
[52] Irina Ionescu and others, 'Post-Lisbon guarantees in criminal proceedings: Access to a lawyer according to directive 2013/48/EU' (2015) 3<http://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Romania%201.pdf> accessed 27 January 2016.

is made aware of this state of affairs either through an official notification or by means of any other method. Additionally, the status of 'suspect' is maintained until the arraignment stage at which point the individual no longer remains a 'suspect' and becomes an 'accused'.[53]

The Maltese Criminal Code was once again amended[54] to include a definition of the term 'suspect' and currently provides that a suspect 'is a person who is detained or arrested by the Executive Police or any other law enforcement or judicial authority where such person has not been charged before a court of justice of criminal jurisdiction and who is being questioned by the Executive Police or any other authority in relation to any criminal offence.'[55] There is no need for the official notification of the charge; however, it is necessary that the person is arrested and investigated for a criminal offence. A problem may arise when a person is called to report to the Police Headquarters 'voluntarily' as in this case. It is questionable whether the person would to be considered as a *'suspect'*.[56]

1.1.5 Accused Person

The definition of the term 'accused' has not been so controversial and as outlined by Sri Nogen Senabaya Deori 'it refers to a person charged with an infringement of the law for which he is liable and if convicted then he is to be punished.'[57] An offence is further defined as an act of commission or omission made punishable by any law for the time being in force. The term 'accused' is defined in the Maltese Criminal Code as being a person who 'has committed a criminal offence'.[58] In Malta a person is charged in court with the commission of an offence either by means of a *writ of summons*[59] issued by the executive police or in serious offences by means of a *bill of indictment* issued by the

[53] ibid.
[54] By means of Act No. LI of 2016.
[55] Criminal Code art 355AT (1)(a).
[56] Criminal Code art 355AD (7).
[57] Sri Nogen Senabaya Deori, Chief Judicial Magistrate, Tinsukia, 'Rights of accused at pre- trial stage' <http://tinsukiajudiciary.gov.in/source/misnotice/Rights%20of%20Accused.pdf> accessed 28 May 2020.
[58] Criminal Code art 355AT (1)(b).
[59] Criminal Code art 360 (2).

Attorney General (AG) at the closure of the Criminal Inquiry and served on the accused.[60] 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 crime, a person is subsequently notified with the charge sheet and from that moment on his status changes to that of an accused person.

1.1.6 Cardinal Rights

Suspects and accused persons subjected to interrogation have a myriad of legal rights which if unobserved, could lead to the nullity of the trial or to their acquittal, to the detriment of justice. The author emphasises that the term 'cardinal rights' is used throughout this thesis, refers to the previously mentioned four chosen rights. These rights impose positive obligations on States to actively protect the rights of individuals facing criminal proceedings. These are the very rights upon which other rights are established, for instance: the right to have consular representation once under arrest; the right to have medical assistance if the suspect or accused person is feeling unwell or alternatively the right to inform a member of the suspect's family that the suspect is under arrest. One cannot comprehend these latter rights without first ensuring that the suspect and accused are aware of their cardinal rights. Some of these secondary rights ensue from the bill of rights to which the suspect is entitled prior to interrogation and thus come into play once the right to information is made known to the suspect and/or accused. The four chosen rights are considered as cardinal because they are of utmost importance in guaranteeing a fair trial. The pertinent criterion when analysing the cardinal rights of a suspect and/or accused person lies in the presence of a direct and immediate link between the measures sought by the individual and the effects on his right to a fair trial. This is being stated since the rights of individuals are not automatically considered as fundamental rights. If individual claims cannot be made under one of the fundamental human rights contained in the Convention, the application would not constitute a violation of the latter. Discussing obligations, Jean-François Akandji-Kombe explains that:

[60] Criminal Code art 438 (1).

> [E]very right may entail three kinds of obligations; "the 'obligation to respect," which requires the state's organs and agents not to commit violations themselves; the "obligation to protect" which requires the state to protect the owners of rights against interference by third parties and to punish the perpetrators; and finally the "obligation to implement," which calls for specific positive measures to give full realisation and full effect to the right.[61]

On the other hand, the ECtHR has opted for a simpler, two-pronged approach dividing states' obligations into two categories: (a) negative obligations and (b) positive obligations. The negative obligations, always regarded as intrinsic in the ECHR, require states from interfering in the exercise of rights. The same, however, does not hold true for the positive obligations. The prime characteristic of positive obligations as outlined by the ECtHR is that in practice, they require national authorities to take the necessary measures to safeguard a right[62] or, more specifically, to adopt reasonable and suitable measures to protect the rights of the individual. Considering that in most cases positive obligations have the effect of extending the requirements which states should satisfy, their legal basis is undoubtedly important. As a consequence of the general principle of attribution, which dictates that the court is not competent to protect rights which do not have their basis in the ECHR, European judges have endeavoured to link every positive obligation to a clause of the ECHR.[63]

1.1.7 Confessions

The term 'confession' generally refers to a statement made by an individual whereby s/he acknowledges his/her guilt in the commission of a crime. It is worth noting that there has been a considerable amount of research on 'confessions,' most likely due to the fact that 'it is one of the most valuable pieces of evidence in reaching a proper verdict on the

[61] Jean-François Akandji-Kombe, 'Positive obligations under the European Convention on Human Rights A guide to the implementation of the European Convention on Human Rights Human Rights handbook. No. 7' (Council of Europe 2007) 5 <https://rm.coe.int/168007ff4d> accessed July 2018.
[62] *Hokkanen v. Finland* App no 19823/ 92 (ECtHR, 23 September1994).
[63] For example, *Johnston and others v. Ireland* App no 9697/82 (ECtHR, 18 December1986).

merits.'[64] Dino Bottos further explains that 'confession' includes both oral and written communications or utterances as well as the physical conduct and gestures of the accused.'[65] Paul Marcos also affirms that 'in criminal law, confession evidence is a prosecutor's most potent weapon - so potent that …. [..].. the introduction of a confession makes the other aspects of a trial in court superfluous.'[66] Legal scholars go as far as to refer to confessions as both the king[67] and queen[68] of evidence in the courtroom, precisely because confessions tend to be synonymous with convictions. Hence the Chinese saying, 'convictions begin with confessions.'[69]

A detailed examination of the definitions of 'confession' given by legal scholars certainly highlights the importance of a confession and, more precisely, the voluntariness that is required for its efficacy. Rod Gehl et al emphasise the importance in 'understanding the correct processes and legal parameters for interviewing, questioning, and interrogation, that can make the difference between having a suspect's confession accepted as evidence by the court or not.'[70] In their view, confessions made in certain circumstances may be contested in a court. The trial judge in *R v. Amasimbi*,[71] expressed a similar opinion and stated that 'an unfair enquiry may be followed by an unfair trial and a fair enquiry may in its turn lead to an unfair trial'.[72] Zaza Namoradze, further explains that confessions,

[64] Dino Bottos, DePoe & Bottos 'The Admissibility of Statements' (2016) (Prepared for: Legal Education Society of Alberta) <https://www.lesaonline.org/samples/62001_04_p1.pdf> accessed 28 May 2020.
[65] ibid.
[66] Paul Marcos, 'It's not about Miranda: Determining the voluntariness of confessions in Criminal Prosecutions' (2006) 40 Val. U. L. Rev. 601 (2006) <https://scholar.valpo.edu/vulr/vol40/iss3/4> accessed May 2020.
[67] Redlich, Allison D. Yan, Shi Norris, Robert J. Bushway, Shawn D 'The Influence of Confessions on Guilty Pleas and Plea Discounts' (2018) Psychology, Public Policy, and Law 24 (2) 147 <https://doi.org/10.1037/law0000144> accessed October 2018.
[68] Rosen-zvi, Issachar and Fisher, Talia, 'Overcoming Procedural Boundaries' (2008) Vol. 94, No. 3 Virginia Law Review<https://ssrn.com/abstract=1004886> accessed October 2018.
[69] Ira Belkin, 'China's Tortuous Path Toward ending Torture in Criminal Investigations' (2011) Colombia Journal of Asian Law, Vol.24 no. 2 <https://doi.org/10.7916/cjal.v24i2.3308> accessed October 2018.
[70] Rod Gehl and Darryl Plecas, *Introduction to Criminal Investigation: Processes, Practices and Thinking* (Justice Institute of British Columbia 2017).
[71] (1991) SCJ 210; The Criminal Justice System and the Constitutional Rights of an Accused Person' Law Reform Review Paper (Port Louis, Republic of Mauritius 2008) <http://lrc.govmu.org/English/Documents/Reports%20and%20Papers/48%20rev-pap-071009.pdf> accessed 29 May 2020.
[72] ibid.

usually obtained at the pre-trial stage, tend to be excellent evidence during arrest or when such evidence is produced.[73]

Reuben Johnson Mbuli defines a confession as a statement made by a suspect pursuant in which he voluntarily, knowingly and intelligently acknowledges the commission of or his participation in a crime and from which it is clear that there is no defence that would justify his conduct.[74] Sir Rupert Cross et al further explain that the element of voluntariness is crucial since it affects the admissibility or otherwise of the confession. In fact, they go on to state that a guilty confession is only admissible if it was made voluntarily.[75] Furthermore, John Frederick Archbold[76] emphasises it is indisputable that for a confession to be admissible it must be 'free and voluntary.'[77]

Voluntariness, is not, however, a rule of admission; rather, it is intrinsically linked and relates closely to the right to silence, the right to a fair trial, and the honesty of the process.[78] Nicole Jedlinski, referring to the well-known case on the subject in the names *R v. Oickle*[79] states that voluntariness of a confession diminishes when there are threats or promises; oppression; operating mind and/or police trickery.[80]

The Maltese Criminal Code provides that a confession must be made voluntarily for it to be admissible and indicates factors which could affect its voluntariness. It provides that a confession, whether in writing, made orally or recorded by audio-visual means, may be

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[73] Zaza Namoradze, 'The Right to Early Access to a Lawyer in Criminal Proceedings in Europe.' (2009) Paper presented at the International Legal Aid Group conference in Wellington, New Zealand <https://www.researchgate.net/publication/322888452_The_Right_to_Early_Access_to_a_Lawyer_in_Criminal_Proceedings_in_Europe_Paper_presented_at_the_International_Legal_Aid_Group_conference_in_Wellington_New_Zealand_April_2009> accessed April 2018.

[74] Reuben Johnson Mbuli, 'Admissions of Confessions in Criminal Trials' (Degree of Doctor Legum thesis, University of Zululand, 1993).

[75] Sir Rupert Cross and others, *An Outline of the Law of Evidence* (Butterworths 1986) 141-142.

[76] Irish Barrister and author to various legal books including Archbold Criminal Pleading, Evidence and Practice which he is most famous for.

[77] John Frederick Archbold 'Archbold's Summary of the Law relative to Pleading and Evidence in Criminal Cases with Precedents of Indictments and the Evidence necessary to support them' (Gould Banks and Co. 1835) 117.

[78] *R v Patterson*, 2017 SCC 15 (CanLII) para 15.

[79] *R v Oickle*, 2000 SCC 38 (CanLII) para 33.

[80] Nicole Jedlinski, 'The Interplay between section 7 of the Charter and Voluntariness After R v Singh' < http://www.cba.org/cba/cle/PDF/CRIM12_paper_Jedlinski.pdf> accessed 29 May 2020.

used as evidence against the confessor only if it was made voluntarily, without any extortion, threats or intimidation, or of any promise or suggestion of favour.[81]

In this light an interesting question arises, namely whether the term 'voluntary' also means that a confession must be 'spontaneous.' It can be argued that voluntariness implies that a confession is made by the unconditioned, free will of the accused without any coercion. However, it is not expected that a person reveals facts '*suo moro'*.[82] Therefore it appears that spontaneity is not a formal requisite.[83] Prosecutors must always show that the defendant made a 'free and unconstrained choice'[84] and that the confession was 'the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will.'[85]

This raises an additional question as to by whom the voluntariness of a confession must be proven. It appears that the courts must evaluate whether there were any inducements and 'circumstances surrounding the confession'[86] The general rule, confirmed in the case in the names *Il-Pulizija vs James Gullaimier et*,[87] is that similarly to all other types of evidence, the obligation to prove the voluntariness of a confession rests on the prosecution and the prosecution must present *prima facie* proof that the statement was obtained 'voluntarily.' This is in line with the general dogma set out in the continental legal system that '*onus probanti incumbit ei qui dicit non ei qui negat.* '[88] Reuben Johnson Mbuli holds that it would be wrong to reject all confessions *a priori,* however, each confession must be subjected to certain safeguards so that confessions can conform to the commands of a civilised criminal justice system.[89]

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[81] Criminal Code art 658.
[82] Translation: An act of authority taken without formal prompting from another party.
[83] *Il-Pulizija vs Carmel Camilleri u Therese sive Tessie Agius* (CCA, 9 October 1998).
[84] *State v. Bowers, 661 N.W.2d 536, 541 (Iowa 2003); see also Steese v. State*, 960 P.2d 321, 327 (Nev. 1998).
[85] *Marquez v. State*, 890 P.2d 980, 986 (Okla. Crim. App. 1995).
[86] ibid
[87] CCA, 12 February 1999.
[88] Translation: He who alleges a fact must prove it.
[89] Namoradze (n 73)

In the United Kingdom (UK), the police have the duty to caution suspects before questioning them,[90] and unlike the situation in Malta, if they fail to do so the court may exclude the statement under the Police and Criminal Evidence Act[91] (PACE Act). The Codes of Criminal procedure in both Germany and Italy also impose a clear duty to caution.[92] In Germany where the duty to caution was introduced in the year 1964, were initially reluctant to adopt this approach but eventually decided in favour of excluding statements made in instances where this duty was disregarded.[93] Italian jurisprudence, on the other hand, did not reflect this. The failure to warn a suspect or a defendant of his right to silence did not lead to automatic inadmissibility under the Code of Practice and Procedure,[94] but the 'interview' could be nullified.[95] This position changed with the amendments laid down by Act No. 63 of 1st March 2001 pursuant to which statements obtained without caution were deemed to be inadmissible. Akin to the situation in Malta, in Belgium there is no duty to caution the suspect and thus a statement is not excluded if given without a caution.

Considering the abovementioned Directives, it is questionable whether he criteria for the admissibility of a confession are adequate to ensure the protection of the rights of suspects and accused persons when making a confession.

1.2 AIMS OF THE RESEARCH

This study examines whether the four cardinal rights are exhaustive and whether their implementation reflects the spirit of the law. Furthermore, shortcomings at EU level and at domestic level will be identified and discussed. The idea behind the chosen four EU

[90] Although the legal basis for the duty is nothing more solid than a Code of Practice: PACE Act 1984, s.78, para 10.
[91] John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* (Sweet and Maxwell 2001) para 15-455 and cases there cited.
[92] Code of Criminal Procedure, Germany s 136.163a (3)-(4) stop; Codice Procedure Penale, Italy s 64 (3), 210 (4) and 363 (1).
[93] Joseph von Gerlach 'Die Vernehmung des Beschuldigten und der Scutz vor Selbstbeschuldigung in deutschen und anglo-amerikanishen Strafverfahren.' In U. Ebert (ed) Festchrift fur Ernsst-Walter Hanack (Berlin 1999)117.
[94] Code of Practice and Procedure s 191.
[95] ibid s 180. Corte di Cassazione 12 November 1991Marino e altro (1994) CP 98.

Directives mentioned earlier on, was the harmonisation of the laws of the Member States to encourage mutual trust in the decisions delivered by the courts. Strengthening mutual trust requires detailed rules on the protection of the procedural rights and hence the importance of transposing the EU Directives into national legislation.

This study will inquire whether the spirit of the law in providing such rights is reflected in the implementation of the same rights. There have been numerous contrasting judgements delivered in Malta and this has led to great uncertainty, with several applications filed regarding individual rights which need to be addressed. The study will focus on whether the hypothesis as to whether the intention behind the promulgation of these written rights is truly reflected in the judgments delivered by the ECtHR and whether such decisions are subsequently mirrored by the Maltese courts. It is this major concern of inconsistency in interpreting these rights that has induced the author to undertake this research study. Consequently, conflicting judgments will be examined to analyse whether the Maltese Courts' approach is compatible with the principles of legal certainty and the requirement of foreseeability - both of which are fundamental elements of the ECHR.

In civil law systems like Malta's, there is no doctrine of precedent; judges in Malta are not bound to follow previous judgments delivered on the same issue by the same court. This has resulted in conflicting opinions being expressed in judgments delivered by the same court presided over by different judges.[96] It may appear that at times the written rights are just paying lip service to implementing European legislation into Malta's national system since the true spirit of the underlying meaning is not always reflected in its case law. This is the quintessence of the outlook that outlines this study, namely whether the four promulgated rights to a suspect or accused person are enough to guarantee that suspects and accused persons are given a fair trial.

The author will define the four chosen cardinal rights and then proceed to examine whether the quality of such rights is sufficient to guarantee the worth of the same rights.

[96] Jacques Grima, 'Legal Certainty and the Constitution: Is Malta ready for the doctrine of judicial precedent?' (LL.D. thesis, University of Malta 2017).

The study will examine whether there is need to propose reforms, particularly to Maltese law, to improve the current situation regarding the implementation of these chosen four cardinal rights from the moment of arrest during pre-trial investigations and during the trial or alternatively, whether the rights as implemented and exercised are truly effective rights as intended by the spirit of the Directives. This thesis incorporates an extensive study of relevant judgments delivered by the Maltese courts, including a comparison of the same with judgments delivered by the ECtHR and by the ECJ (European Court of Justice). In the case of contrasting decisions, the author highlights the differences and examines whether the decision is the result of a wrong or restrictive interpretation on the part of the Maltese courts.

This thesis also focuses on the procedure that has been adopted by the police upon interrogations, and prior to a confession. Moreover, the author delves into the measures which have been undertaken or proposed to be undertaken in the light of Act No LI of 2016[97] and Legal Notice (LN) No. 102/2017[98] pursuant to the Directive on the right to access to a lawyer. The latter Directive has brought about novel and important scenarios predominantly regarding the right to legal assistance and the right to legal aid. It is to be noted that although the deadline for the transposition of the Directive on the Right to Legal Aid was May 2019, this Directive has not yet been transposed into Maltese Legislation.

It must be emphasised that these rights, as established in the previously mentioned four EU Directives, provide the minimum standards and thus existing laws in domestic jurisdictions may provide a stronger threshold. For example, both the CFREU and the Directive on the Right to Legal Aid provide that legal aid is to be given to indigent persons whereas the Maltese Criminal Code provides that the right to legal assistance is to be given to whoever asks for it. There is no eligibility test for its application in Malta. Therefore, in certain circumstances domestic legislation may provide more fundamental guarantees than the minimum rights found under the four chosen Directives. This study questions whether the four chosen Directives have facilitated investigations or complicated the

[97] Criminal Code (Amendment No. 2) Act, an Act to provide for legal assistance during detention and other rights to arrested persons.
[98] Interview of Suspects and Accused Persons (Procedure) Regulations, 2017.

existing system. It will also examine whether the police are now working more comfortably or whether they are still struggling with prosecutions.

The Directive on the right to information in criminal proceedings stipulates that information must be given to all suspects prior to interrogation. This piece of legislation provides that each suspect is given a Letter of Rights outlining the procedural rights pertaining to individuals being investigated for a criminal offence. All relevant information should be provided so as to enable them to prepare their defence. This Directive will therefore be examined to analyse whether granting the right of information and access to material evidence to suspects and/or accused truly assists them in the preparation of their defence.

As indicated above, this study also includes an examination of the Directive on the presumption of innocence and the right to be present at the trial dealing with the right to silence. This right is of the utmost importance especially when in the context of confessions. The four cardinal rights established in the above-mentioned EU Directive also feature in the Constitution of Malta and hence the study will also be referring to the latter, this being the supreme law of the country. In carrying out this research, the study will demarcate which particular attention should be given and subsequently proceed with making recommendations for the system's improvement. The aim of this thesis is to see whether the four chosen cardinal rights are practical and effective as opposed to theoretical and illusionary. The final hypothesis that this thesis will evaluate is whether the legislator's intention behind the promulgation of these four cardinal rights is being reflected in Maltese case law.

The specific research questions this study will address include the following:

i. Are the chosen four cardinal rights merely theoretical, illusionary rights or are they effective in practice?

ii. Do these four statutory cardinals rights guarantee a fair trial to suspects and accused persons in their criminal proceedings?

iii. Is the transposition of these rights truly reflected in Maltese case-law?

iv. Are suspects and accused persons in a better position post-Act No LI of 2016?

v. Are there any *lacunae* which could be identified to ensure the rights of suspects and accused persons prior to the making a confession?

vi. Are Maltese judgments in line with the decisions of the ECtHR?

1.3 METHODOLOGY

The first two years of this study were spent pursuing potential sources of material, through reading numerous scholarly reviews and legal books on the subject; analysing local and European jurisprudence and examining statutory legislation. The intention was to empirically test the impact of numerous judgments delivered by Maltese courts in relation to the rights of the suspect and accused prior to interrogation when making a confession and whether such judgments were in fact acknowledging the developments at a European level. This aim could only be achieved once the framework in which these judgments were delivered was properly understood. The author chose Malta as a case study to scrutinise the legal stumbling blocks which may be countered in the implementation of EU norms and procedures.

From a domestic viewpoint, scholarly publications on the four cardinal rights are scarce and there are hardly any publications on the effects of the transposition of the EU Directives into local legislation. However, the numerous court judgments delivered by the

Maltese courts, in both their criminal and constitutional competences make up for the few scholarly publications. An in-depth study and analysis of local case law was undertaken with the aim to investigate whether decisions taken in certain judgments were reproduced in subsequent judgments or alternatively whether the courts abandoned certain decisions for new ones. Undoubtedly, over the years, suspects' rights have been strengthened. However, there are still several *lacunae* which once identified and addressed will add to the efficacy of these rights.

Visits were made to the Melitensia section of the library of the University of Malta to research Maltese theses and dissertations.[99] Multiple visits to the library of the Maltese Parliament were also made to access parliamentary debates on the subject to be able to understand the legislative steps taken to amend the existing laws of Malta and better understand the *rationale* of the legislator. In this regard, reference to parliamentary debates is made to highlight and discuss the major amendments implemented in the national laws of Malta because of the transposition of the EU Directives. The author also focuses on reports drawn up by Commissions nominated by the government of Malta to create a holistic reform in the administration of justice. One of these reports was carried out by the 'Holistic Reform of the Justice System Commission'[100] headed by Judge Emeritus Giovanni Bonello.[101] The Reform focused on various legal aspects within the entire Maltese Justice System. After embarking on various consultations with numerous

[99] Janice Chetcuti, 'Is the current regime of legal aid enough to ensure the protection of the fundamental Human Rights of the individual?' (LL.B. dissertation, University of Malta 2016), Kaylie Bonnett, 'An Analysis of Article 3(3)(b) of Directive 2013/48/EU and its Impact on Maltese Criminal Law of Procedure (LL.B. dissertation, University of Malta 2016), Martina Borg Stevens, 'Does the Disclosure of Evidence in Maltese Criminal Proceedings fulfil the requirements of the fundamental Right to a Fair Trial under article 6 of the European Convention on Human Rights? '(LL.D. thesis, University of Malta 2015), Elena Marie Bajada 'The Right to Legal Advice in the Investigative Stage of Criminal Proceedings. (LL.D. thesis, University of Malta 2015), Mario Demarco, 'A reappraisal of Police Powers and Remedies available for their misuse' (LL.D. thesis, University of Malta 1988).

[100] The Holistic Reform of the Justice System Commission, final report as on 30th November 2013. Commission was presided by Mr. Justice Dr G. Bonello K.O.M., L.L.D. and formed by other three members; Mr. Justice Dr Philip Sciberras L.L.D., Prof K. Aquilina L.L.M (I.M.L.I.), L.L.D (Melit.), Ph.D. (Lond.) (L.S.E.), Dr R. Frendo M. Phil (Crim.) (Cantab.), L.L.D. (Melit.). (The Holistic Reform of Justice Commission Final Report)

[101] A former ECHR Judge (1998-2010), considered by many as a Liberal judge, probably, also the only one whose separate and dissenting opinions were published during his tenure. He has published tens of books. Jean Paul Costa, described him as 'Vanni, robust independence of spirit and unflagging commitment to the protection of human rights.'

stakeholders, the Commission came up with four hundred and fifty recommendations. In addition to this report, the study will refer to other reports which gave impetus to changes that took place in Malta, especially those regarding the right to legal aid.

Consideration is given to the procedural sections in the Criminal Code which deal with the rights of suspects. Here the author will review the historical path which led to the codification of such rights. The study also refers to the Constitution of Malta, particularly to chapter four which focuses on the fundamental human rights of the individual. Local courts frequently pronounce themselves on human rights breaches, highlighting the issues which emerge in the interpretation of these rights. Most shortcomings contradict the spirit of the ECHR and the *dicta* delivered by the ECtHR. This is important, especially when one considers that the breaches are far from minor insignificant issues.

From a European point of view, the author refers to several sources. The available material is abundant in the form of books and journals, thus allowing for a wider debate on local shortcomings. Notably, reference is made to the CFREU, ECHR and to the EU Directives on the subject under examination particularly those concerning the four cardinal rights belonging to suspects and accused persons. The case law database of the EU[102] which provides access to the case-law of the ECtHR was indeed helpful and in fact part of this study includes the charting of numerous case-law of the ECtHR. The facts of each case determine the way in which individuals across the EU could have been affected by domestic prejudices. On the other hand, the *dicta* of the judgments provide authoritative interpretation of EU norms, at times paving the way for further legislative reform. ECtHR judgements decided against other Member States are not binding on Maltese courts, however, they certainly effect the decisions taken by them.

[102] HUDOC European Court of Human Rights.

1.4 OVERVIEW OF THE THESIS

This introduction provides a general overview of the importance of the four chosen cardinal rights and introduces the structure followed in this study. This thesis is divided into six chapters, excluding the introduction and conclusion. The study dedicates its first introductory chapter to emphasise the importance of the chosen four cardinal rights in relation to suspects and accused prior to a confession. The introduction also gives a definition of the key terms that are common to all four Directives so that the reader will be in a better position to understand this thesis. The study will highlight the aim and research subject under examination together with the methodology used for this same purpose.

Chapter two focuses on the literature review, outlining the importance of conducting a systematic search of each individual chosen right, and paying attention to their theoretical and practical value. It refers to several legal scholars who have expressed themselves on the chosen four rights and gives insight as to how these rights should be implemented.

Chapter three focuses on Malta and legal developments that took place throughout the years in an attempt to harmonise the right to legal assistance as a newly acquired right under the Maltese Criminal law system. This chapter will help the reader to understand why the Maltese courts gave numerous decisions, over a short period of time, on this newly acquired right, even at pre-trial stage. This right is of paramount importance since it is the foundation of all the other chosen cardinal rights.

The fourth chapter focuses on the Directive on the right to access to a lawyer. This chapter evaluates the application of this right as identified in the Directive and subsequently moves on to its transposition[103] into Maltese legislation. The study explains how the ECtHR's decisions have influenced Maltese case-law, even though at times national courts have not adhered to these decisions. Emphasis is placed on the strengths and

[103] Act No. LI of 2016.

weaknesses of this right with the author highlighting situations which could have been addressed with more clarity. The author concludes by assessing whether the right to legal assistance is exhaustive or whether a fresh approach is necessary to raise the minimum standards mentioned in the Directive.

The fifth chapter deals with the right to give information to the suspect and accused from three perspectives: firstly, it deals with the fundamental rights that the suspect and accused are given as outlined in the Letter of Rights prior to interrogation; Secondly, it analyses the right entitling suspects to be provided with a copy of their charge so that they are put in a better position to defend themselves. Thirdly, it examines the suspect's and accused's right to promptly be given material evidence of the case. It is not clear when such documents should be given and it is also unclear whether the term 'material evidence' mentioned in the Directive refers to evidence which is of a material nature or whether such evidence must be material to the investigation. Malta's position with respect to this right is discussed in the light of Act No. IV of 2014 which amended the Criminal Code.

The right to legal aid, its importance, and the variation in different countries is examined in the sixth chapter focuses on the right to legal aid.[104] In this chapter, the author discusses the 'Means Test' and 'Merits Tests' that must be carried out in some Member States. Reference is made to the Constitution of Malta which emphasises this right, and to the limited occasions where the national courts interpreted this right. A comparison is made between the Directive and Maltese Criminal Code and the study will examine the way the two legal instruments lay down this right. In Malta, this right seems to apply to all suspects and accused persons alike regardless of financial stability.

The final chapter focuses on the right to silence[105] with all its limitations, with reference to the Maltese scenario. This chapter explores whether the right against self-incrimination is intricately linked to the presumption of innocence and whether this right is an absolute or relative right. This is specifically mentioned because there are at present several laws

[104] Criminal Code art 355AUA (4). Added by Act LI.2016.4.
[105] Criminal Code art 366E as introduced by ACT No. XXXII of 2018.

which shift the *onus* of proving or disproving a case upon the suspect or accused person. Thus, in these circumstances suspects are unable to sit back and evaluate the proof presented by the prosecution but must react proactively to eliminate the presumption of guilt that lies against them. This is evident in several domestic laws, including those dealing with the Drug Ordinance, Customs Ordinance, and Financial Regulations.

In the conclusion, the study acknowledges the procedural improvements that have been made. Subsequently, the findings of this study are summed up and the author advances proposals to improve the current position by harmonising it with international and European standards and placing Malta on the same footing as its European counterparts. Prominence is given to issues and tensions arising from the effective and strict implementation of legislative acts and codes.

CHAPTER TWO - LITERATURE REVIEW

2. INTRODUCTION

Arlene Fink states that 'a research literature review is a systematic, explicit and reproducible method for identifying, evaluating and synthesizing the existing body of completed and recorded work produced by researchers, scholars and practitioners.'[106] In this chapter the author carries out this same exercise in relation to the research question namely, whether the rights of a suspect and/or an accused prior to interrogation, are effective rights or merely illusionary.

The author has chosen to research the rights pertaining to suspects and accused persons because in Malta there have been allegations of unethical and inhumane conduct by the police force during interrogations, referred to as third degree interrogations, where a suspect is beaten by the police until a confession is made.[107] Likewise there have been several recent court decisions which have misinterpreted the right to legal assistance thereby creating a lot of legal uncertainty. The development of these rights in Malta was rather slow, and it took years of pressure from various sources to finally attain the current landscape. The right to legal assistance during investigations was inexistent until the year 2010, whereas the right to disclosure was only introduced in domestic law of Malta in 2014.

The four chosen cardinal rights form the basis of the rule of law and are all directed towards giving the suspect and accused person a fair hearing in criminal proceedings. One cannot discuss the right to legal assistance without discussing the other three rights chosen since the other three rights are an integral part of the right to legal assistance. It is difficult to discuss the right of disclosure without first analysing the right to be assisted by a lawyer.

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[106] Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (3rd edn, Sage Publications, Inc.2010) 3.

[107] Andrew Azzopardi, 'No nostalgia for the 80s' *The Malta Independent* (17 June 2015). <http://www.independent.com.mt/articles/2015-06-17/blogs-opinions/No-nostalgia-for-the-80s-6736137459> accessed 15 December 2017.

In the same manner, the right to information could be described as ineffective if the information is not given in the presence of one's lawyer. It is for this reason that the author feels that research on all four rights is of paramount importance.

This literature review focuses on the four chosen cardinal rights individually with an aim to pinpoint the inadequacies which exist in the exercise of such rights and their characteristics as absolute or otherwise. The four cardinal rights are:

i. The Right to Legal Assistance

ii. The Right to Information

iii. The Right to Legal Aid; and

iv. The Right to Silence.

The author reviews the relevant literature on the subject to identify gaps in research areas. Although domestic academic works are scarce, post-introduction of the four EU Directives dealing with the four chosen rights, the author refers to foreign authors together with local, international, and European case law which is continuously evolving. These four cardinal rights have been identified due to their importance in guaranteeing a fair trial. This thesis aims to portray that, at times, the four rights are intrinsically related and hence the significance of analysing each right in this study.

2.1 THE RIGHT TO LEGAL ASSISTANCE

The first right discussed in this study is the right to legal assistance. This is a vital procedural right granted to suspects and accused persons when facing criminal proceedings. The ECHR guarantees this right in Article 6 (3)(c) whereas the CFREU includes for this right in Article 48 (2). The Directive on the right to legal assistance, further elaborates on this right by *inter alia* laying down its extent. In fact, it took more

than twenty-eight months and a record number of eight trialogue discussions before an agreement was ultimately reached on the wording of this Directive.[108] From an examination of the recital to the Directive, it is evident that its provisions are consistent with the case-law of the ECtHR, with the Directive going even beyond by providing that legal assistance is to be made available during investigations. Pia Janning states that 'the Directive builds on the existing rights protected in the CFREU (made binding by the Treaty of Lisbon[109]) and the ECHR,[110] as interpreted by the Court of Justice of the European (CJEU) and the ECtHR.'[111]

The European Commission concluded in its Green Paper that 'whilst all the rights that make up the concept of "fair trial rights" were important, some rights were so fundamental that they should be given priority.'[112] At the top of the list was the right to legal advice and assistance seen by the Commission as the foundation of all other rights.'[113] As observed by several commentators, the right to legal assistance is a key aspect of procedural rights of suspects and accused persons. Andrea Anastasi outlines that this right is indeed considered as one of the essential requirements of the right to a fair trial.[114] The European Committee for the Prevention of Torture and Inhumane or Degrading Treatment (CPT) also recognised this right as one of the most crucial rights in protecting against the risk of ill-treatment in cases of deprivation of liberty.[115] The importance of this right lies in the

[108] Jacqueline E Ross, Stephen C Thaman, *Comparative Criminal Procedure* (Edward Edgar Publishing Limited 2016) 265.
[109] Prohibition of torture and inhuman or degrading treatment or punishment (Article 4); the right to liberty and security of person (Article 6); respect for private and family life (Article 7); the right to an effective remedy and the right to a fair trial (Article 47); the presumption of innocence and the rights of the defence (Article 48).
[110] Prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the right to liberty and security of person (Article 5); the right to a fair trial (Article 6); Article 6(3) (c) provides that a person charged with a criminal offence has the right to defend himself through legal assistance; right to respect for private and family life (Article 8).
[111] Pia Janning, 'The Procedural Rights Directives of the EU Directives of the EU: An explanatory Guide' (Irish Council for Civil Liberties, 2014) 27.
[112] Commission of the European Communities, 'Green Paper from the Commission - Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union' COM (2003) 75 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003DC0075> accessed 28 May 2020.
[113] ibid.
[114] Andrea Anastasi, 'The right to legal assistance during interrogation. An analysis of the development of a right long withheld in Malta' (LL.D. thesis, University of Malta 2018) 18.
[115] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) 2nd General Report on the CPT's Activities, Strasbourg, Council of

fact that the right of access to a lawyer plays a crucial part in facilitating other procedural rights such as the right against self-incrimination[116] and the right to be given information.

2.1.1 'Effectiveness and undue delay' in the exercise of the right to legal assistance

The Directive seemingly requires lawyers to exercise an active defence at the earliest stages of proceedings particularly during police detention and police interviews.[117] Nonetheless, as John Jackson highlights, lawyers' right to effective participation and active defence at these stages have not been fully embodied, be it in the accusatorial or inquisitorial traditions.[118]

Ed Cape et al believe that a lawyer's assistance would improve the suspect's position by ensuring that the suspect's rights are not disregarded.[119] By systematically interpreting the provisions relating to the right to legal assistance, this study will show, as indicated by Tommaso Rafaraci, that there is a relationship between the rights to defence and the rights to a lawyer.[120] Similarly, James J. Tomkovicz explains that legal assistance enables the accused to protect and exercise all the other rights that are vital components of a fair trial.[121] The author affirms that such right is the pivotal axil around which most other defence rights rotate and hence the significance of analysing this cardinal right in depth.

Europe, 13 April 1992, para. 36; 28th General Report of the CPT, Strasbourg, Council of Europe, 26 April 2019, para. 66.

[116] *Salduz v. Turkey* App no 36391/02 (ECtHR, 27 November 2008).

[117] Thus, Article 3 (b) of the Directive includes the right to have a lawyer present and 'participate effectively' in any questioning, including by police, as well as the right for a lawyer to attend certain investigative actions with participation of the suspect.

[118] John Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence', *The Modern Law Review* 79(6) (2016), p. 994.

[119] Ed Cape et al (n 19).

[120] Tommaso Rafaraci and Rosanna Belfiore, *EU Criminal Justice: Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's office* (Springer 2019) 63.

[121] James J. Tomkovicz. *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution* (Greenwood Press 2002) 49.

The Directive underlines that access to counsel makes it possible for suspects and accused persons to exercise their defence rights in a 'practical and effective manner.'[122] Taru Spronken explains that 'effectiveness' may vary depending on the outcome of substantive evidential and procedural rules and on the quality of the enforceability mechanisms adopted.[123] Mary Ann Glendon emphasises the need for effective assistance and holds that it is incumbent upon a State to ensure that legal representation is 'effective'.[124] The case-law of the ECtHR further clarifies that legal assistance should be effective pre and post-trial,[125] and provides that the State is under an obligation to confirm that legal counsel has the necessary information to prepare a proper defence.[126] In addition, if the counsel's representation is ineffective then the State is obliged to appoint another lawyer.[127] The importance of effective assistance is further emphasised by the obligation on EU Member States to provide this assistance 'without undue delay.'[128] The Directive sets a timeframe within which this right must be exercised and, as outlined in the report from the Commission to the European Parliament and the Council,[129] this could be inferred from a number of points in time from which the right to counsel has to be ensured.

[122] Directive on the right to access to a lawyer art 3 para 1. However, the first draft of 6 June 2011 was more detailed and precise since it provided that legal assistance should not be subject to limitations that could deter the suspect's or accused's right to defence.
[123]Taru Spronken and Ed Cape, *Legal Advice at the Investigative Stage* (Metro, May 2007).
[124] Mary Ann Glendon, *'Knowing the Universal Declaration of Human Rights'* 73 Notre Dame Law Review 1153 (1998) <https://scholarship.law.nd.edu/ndlr/vol73/iss5/18> accessed November 2019.(She describes the UDHR as the '*single most important reference point for cross-cultural discussion of human freedom and dignity in the world today'*).
[125] *Pavlenko v. Russia* App no. 42371/02 (ECtHR, 4 October 2010); *Lebedev v. Russia* App no 4493/04 (ECtHR, 2 June 2008) and *Artico v. Italy* App no 6694/74 (ECtHR, 13 May 1980).
[126] *Goddi v. Italy* App no 8966/80 (ECtHR, 9 April 1984); *Ocalan v. Turkey* App no 46221/99 (ECtHR, 12 May 2005).
[127] *Artico v. Italy* (n 125).
[128] Directive on the right to access to a lawyer art 3 para 2.
[129] Report from the Commission to the European Parliament and the Council On the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Brussels, 26 September 2019 COM(2019) 560 final <https://ec.europa.eu/info/sites/info/files/implementation_report_on_the_eu_directive_on_access_to_a_lawyer.pdf> accessed November 2019.

2.1.2 Participation of a lawyer

The Directive lays down the type of participation the lawyer must exercise during an interrogation, stating 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.'[130] It also identifies situations where the suspect or accused person would have the right to legal assistance outside the court room, namely the lawyer's participation at investigative and evidence gathering acts, identification parades, confrontations and reconstructions of the crime scene. It appears, however, that the matter of 'participation' must be regulated by procedures in national law, provided that these procedures do not prejudice the effective exercise and essence of this right.[131] The fact that such an important matter is left to be regulated by domestic law could undermine the aims of harmonisation since the State is left to regulate itself in this field. Another shortcoming in this Directive was pointed out by Taru Spronken when stating that the Directive fails to indicate the duration of time that the suspect may have with his lawyer 'since this all depends on the complexity of the offence involved.'[132] In pre-trial investigations the time frame cannot exceed forty-eight hours, this being the maximum legal time of arrest.

From the ECtHR's case law, it is evident that the consultation should take place in private. The Strasbourg Court has ruled that the right to a fair trial was compromised when the communication between the lawyer and the client took place in the presence of a prison guard,[133] or in the presence of police officers,[134] or if the suspect could only communicate with his lawyer through a glass partition.[135] The problem here is not one of lack or regulation but one of precise implementation.[136] Several empirical studies show,[137] that,

[130] Directive on the right to access to a lawyer preamble art 25.
[131] Paul Mevis and Joost Verbaan. 'Legal Assistance and Police Interrogation' (2014) ELR Issue 4 <http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/4/ELR_2210-2671_2014_007_004_002> accessed May 2018.
[132] Taru Spronken, *EU-Wide Letter of Rights: Towards Best Practices* (Intersentia 2010) 28.
[133] *S v. Switzerland* App no 13965/88 (ECtHR, 28 November 1991).
[134] *Rybacki v. Poland* App no 52479/99 (ECtHR, 13 April 2009) para 53-62.
[135] *Oferta Plus srl. v. Molodova* App no 14385/04 (ECtHR, 23 May 2007).
[136] Stefano Ruggieri, *Human Rights in European Criminal Law: New Developments in European Legislation and* Case Law after the Lisbon Treaty (Springer International Publishing Switzerland 2015) 68.
[137] Stefan Schuman, Karen Bruckmuller, Richard Sawyer. 'Assessing Pre-Trial Access to Legal Advice – Results of a Comparative Legal and Empirical Study' (2012) Vol 3 Issue 1, New Journal of European

upon arrest, it can sometimes take hours for a lawyer to turn up and the suspect would have no space to speak with the lawyer in private, at times in the presence of an officer.[138] Gur Nedim insists that 'communications between lawyers and their clients are protected under legal privilege and cannot normally be disclosed in court,'[139] although the situation in Malta seems to be different. In Malta, the police may use information gathered by listening in, in view of the specific provision of the law which states that if any precaution, formality or requirement prescribed under this Title[140] is omitted, this shall be no bar to proving, in any manner allowed by law, the facts to which such precaution, formality or requirement relate.[141]

2.1.3 Right to choose a lawyer

The right of choice is a general principle found under the Convention,[142] the Directive under examination,[143] and the Criminal Code.[144] The Directive mentions the right to appoint a lawyer 'of one's own choosing.' However, this study will show that this right is not an unqualified right as it does not necessarily entitle the suspect to choose his/her own lawyer without any restrictions imposed by national law. The authorities may for instance set standards regarding qualifications of practice of law allowing only graduates with a warrant to practice as legal counsels at the Bar.[145] They can also restrict the number of lawyers on a defence without violating the Convention,[146] and refuse to accept lawyers

Criminal Law 31. 58% of the officers taking part in this research study admitted that supervision restrictions exist at pre-trail stage, specifically during interviews held between suspects and their lawyers.

[138] *Brennan v. UK* App no 39846/98 (ECtHR, 16 January 2002). The Court affirmed that the presence of the police officer during the interview that was held between the suspect and his lawyer violated the suspect's defence rights. The case of *Rybaki v. Poland* (n 134) also dealt with the presence of the prosecutor during the meeting between the defence lawyer and his client.

[139] European Union Agency for Fundamental Rights (FRA) 'Access to justice: Defendants need more information and better access to legal assistance.'(Vienna 27 September 2019) <https://fra.europa.eu/en/news/2019/access-justice-defendants-need-more-information-and-better-access-legal-assistance> accessed November 2019.

[140] Entitled 'Law of Criminal Procedure.'

[141] Criminal Code art 349 (2).

[142] ECHR art 6 (1)(c).

[143] Directive on the right to access to a lawyer preamble art 28.

[144] Criminal Code art 355AU (4).

[145] *Mayzit v. Russia* App no 63378/00 (ECtHR, 6 July 2005) para 68.

[146] *Croissant v. Germany* App no 13611/88 (ECtHR, 25 September 1992).

whose joint legal assistance presents a possible conflict of interest[147] or replace lawyers who repeatedly fail to appear for their brief. The right of choice sets in when the 'accused asks for a particular lawyer on arrest or detention.'[148] At this point the officer should provide the accused with a fair opportunity to exercise his right of choice, during which time all questioning must cease.[149] Where the selected lawyer is not accessible, the accused has the right to refuse to speak with other lawyers and wait some time for their lawyer of choice to respond.[150] Once a considerable amount of time has passed, the arrested person is then expected to exercise the right to legal assistance by communicating with another lawyer.[151] It may be stated that an accused person who fails to contact the lawyer of choice and subsequently refuses to speak with duty counsel would have failed to be reasonably conscientious.[152]

As highlighted by Peter J Dostal when referring to the case *R v Blackett*[153] there are three prerequisites in fulfilling the right of choice namely:-

i. Whether the police have fulfilled their duty to act diligently in simplifying the right of the accused to communicate with a lawyer of their choice.

ii. If the police acted in breach of their duty, the trial judge must then decide whether the accused fulfilled his or her duty to act diligently to exercise the right to a lawyer. If the answer is yes, then there is no breach. If the answer is no, then there is a breach.

[147] *Pavlenko v. Russia* (n 125) para 107.
[148] *R v. Connelly*, [2009] ONCA 416 (CanLII).
[149] ibid.
[150] *R v. Willier*, [2010] 2 SCR 429, 2010 SCC 37 (CanLII).
[151] ibid.
[152] *R v. Richfield*, [2003] CanLII 52164 (ON CA), (2003), 178 CC (3d) 23 (Ont. C.A.).
[153] *R v Blackett*, 2006 CanLII 25269 (ON SC).

iii. If a breach is established the court must consider whether to exclude the consequent evidence.[154]

Having outlined above the exercise that must be undertaken to establish abuses of this right, it should be mentioned that the Directive does not provide any remedy in the event of a breach in the exercise of the right to choose a lawyer.

2.1.4 Waiver of Legal Assistance

Another important consideration relating to the right to legal assistance is its waiver.[155] Jill E. B Coster van Voorhout explains that the suspect and accused have a right to waive this right if three conditions are met.[156] Firstly, that suspects fully understand what the right to legal counsel entails. Secondly, that they could make their own choice as to whether they should exercise such right. Thirdly, that they understand the effects which such renunciation may have on their defence rights. Jacqueline Hodgson warns that the decision to waive legal advice is significant and should not be made simply out of a belief that it may save time.[157] She suggests that it would perhaps be opportune to make legal advice the default position in that suspects can only renounce to such right after having spoken with a lawyer.[158] In fact, this is the current position in Belgium where suspects can waive their right only after having first received such assistance.[159] As will be explained in this thesis, the situation in Malta regarding waivers needs to be addressed especially in regard to cases where the suspect and/or accused person are foreign and are quick to register an admission in hope of being given a lighter sentence and earlier exit from the country.

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[154] Peter J Dostal 'The Criminal Law Notebook – Right to Choice of Counsel' (August 2019) <http://criminalnotebook.ca/index.php/Right_to_Choice_of_Counsel> accessed November 2019.
[155] Directive on the right to access to a lawyer art 9.
[156] Jill E. B Coster Van Voorhout, '*Ineffective Legal Assistance. Redress fir the Accused in Dutch Criminal Procedure and Compliance with ECHR case law'* **(**Brill Nijhoff Leiden 2016).
[157] Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account* (Oxford University Press 2020) 214.
[158] ibid.
[159] This theory, however, was rejected by the UK Supreme Court in Mc Gowan v B [2011] UKSC 54.

2.1.5 Identification of gaps to be addressed in this thesis

As evidenced from the above, there are still a number of gaps in the right to legal assistance which must be identified and subsequently addressed in order for this right to be perfected, including the following:-

i. Lack of definition of the term 'effectiveness;'

ii. Clarification as to term legal participation and whether it can take place throughout the interrogation;

iii. Identifying the moment in time in which the right to legal assistance must be given and if it should extend to witnesses too or simply be reserved for suspects and accused persons, particularly as the evidence of a material witness can affect the situation of a suspect and accused person;

iv. Addressing the issue as to whether the right to legal assistance includes the right of choice of lawyer and the consequences in the event of a breach in the application of this right;

v. The parameters regulating the way for private communication to reduce the possibilities of eavesdropping.

vi. A better explanation of the circumstances of a waiver to the right to legal assistance to reduce abuse.

2.2 THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

This is the second cardinal right which the study discuses. The right is enshrined in the Directive on the right to information in criminal proceedings and applies from the moment

individuals are made aware that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings.[160] A difficulty arises as to the extent of protection which the Directive affords to persons whom the authorities have reason to believe have committed an offence but who are not 'made aware' that they are suspected or accused. This issue has been dealt with by the ECtHR which held that when a person is considered to be a 'suspect,' that person should be treated like a suspect associated with the commission of a particular offence and thus be notified of his/her defence rights.[161] This second cardinal right is closely linked to the right to legal assistance since its value can only be appreciated once the suspect and/or accused person is assisted by a lawyer who can in turn explain to him/her the importance of such a right especially prior to a confession. As emphasised by the Hungarian Helsinki Committee[162] 'the right to information is a crucial building block of the right to a fair trial, and without it, other rights which exist in law are in practice illusory.'[163]

2.2.1 Letter of Rights

The right to be provided with a Letter of Rights is a new and specific measure which is not found in ECtHR case-law. Its inclusion in the EU Directive, has marked a step forward in protecting the rights of suspects and assuring them a fair trial. This right found in the Criminal Code[164] and the Police Act[165] ensures that every arrested person knows both the reason for their arrest as well as the evidence collected against them. It also includes information on one's own rights in case of arrest, such as the cardinal right to silence and right to engage a lawyer.[166] The law is, however, silent as to the consequences which would ensue if the police fail to abide by this provision. Thus, it appears that, due to the

[160] Directive on the right to information in criminal proceedings art 2 (1).
[161] *Bandaletov v. Ukraine* App no 23180/06 (ECtHR, 31 October 2013) para 56.
[162] The Hungarian Helsinki Commitee is one of the leading non-governmental human rights organizations in Hungary and Central Europe. It monitors the enforcement of human rights in Hungary, enshrined in international human rights instruments; provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations.
[163] Hungarian Helsinki Committee, 'Accessible Letters of Rights in Europe (2015-2017)' (1 September 2015) <https://helsinki.hu/en/accessible-letters-of-rights-in-europe/ >accessed December 2019
[164] Criminal Code art 534AB.
[165] Chapter 164 of the Laws of Malta.
[166] The Police Act Chapter 164 of the laws of Malta (The Police Act) art 65.

absence of a remedy, the obligation on the part of the police cannot be considered as effective.

The Directive provides[167] that all suspects and accused persons whether arrested or not, are to be notified of their rights[168] This should be done 'promptly' and at the latest before the first official interview. As highlighted by Theodore Kostadinides et al, the provision of this type of information is crucial. Suspects must know their rights if they are to appreciate how to exercise them; they must know the reason for their arrest and the nature of the offence they are charged with; and they must have access to the evidence against them, if they are to mount a defence.[169] Jodie Blackstock agrees with the proposition and stated that suspects cannot be presumed to know their rights the moment they are faced with a criminal investigation.[170] She further believes that when suspects are not informed of their rights at an early stage in police custody prior to a confession, the protective value of those rights would be ineffective in practice. Birgit Sippel[171] in fact emphasises that being aware of one's rights is the first step towards having them respected.[172] The is important in ensuring the right to a fair trial in criminal proceedings.[173]

It appears that despite this legal obligation, problems still arise where, for instance, the Letter of Rights is not available in the language understood by the suspect and/or accused. A case in point is Lithuania[174] where translation of such rights is done orally and thus the suspect does not have the time to digest and analyse what is being said. Likewise, at times, the Letter of Rights is written in legal jargon and complex sentences thus making it

[167] Directive on the right to information in criminal proceedings art 2 (1).
[168] ibid recital 19.
[169] Mitsilegas et al (n 21).
[170] Jodie Blackstock et al, *Inside Police Custody; an empirical Account of Suspects rights in four jurisdictions* (Cambridge, Instersentia 2014) 145.
[171] A German Member of Parliament who works towards police and judicial co-operation at an EU level and encourages the implementation of EU Directives on procedural safeguards.
[172] European Parliament, *Report on on the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings* (COM (2010)0392 – C7-0189/2010 – 2010/0215(COD)) (2011). Position of the rapporteur 23 <https://www.europarl.europa.eu/doceo/document/A-7-2011-0408_EN.pdf >accessed November 2019.
[173]European Parliament 'A "letter of rights" to ensure fair trials for those deprived of their liberty.' (2011) <https://www.europarl.europa.eu/news/en/press-room/20111121IPR31954/a-letter-of-rights-to-ensure-fair-trials-for-those-deprived-of-their-liberty> accessed 30 May 2020.
[174] Code of Criminal Procedure of Lithuania s. 268.

difficult for the suspect to understand its importance,[175] and this despite the Directive's requirement that the Letter of Rights be drafted in simple and accessible language.[176] Once again, the Directive fails to provide a remedy in situations where the suspect and/or accused did not understand the Letter of Rights due to complex or different language.

2.2.2 Right of suspect to be notified with the charge

Closely connected to the matter of notification of rights is the requirement to notify the suspect with the charge. Notification of the charge enables the suspect to make important decisions in relation to their defence. If for instance, suspects are not made aware of the timing of the offence for which they are being investigated, they may be deprived from indicating their alibi. The right to be informed of charges implies the right of having the charges issued in a language which the suspect and/or accused understands. It further implies that domestic authorities must provide adequate interpreters and translators to fulfil this requirement and enable a suspect or accused person to defend himself/herself adequately.[177]

2.2.3 Right of access to material evidence

Member States must ensure that access is granted to all material evidence in the possession of the authorities,[178] to those persons or their lawyers in order to safeguard the fairness of the proceedings and prepare the defence.[179] Glidewell LJ, in Ward elaborates and states that the duty of disclosure must be defined and understood if the risk of conviction of the innocent is to be reduced to an absolute minimum.[180] Stefano Ruggeri likewise insists that

[175] Fair Trials, 'Understanding your rights in police custody. The European Union's model of Letters of Rights'<https://euagenda.eu/upload/publications/untitled-102060-ea.pdf> accessed 30 May 2020.
[176] Directive on the presumption of innocence and the right to be present at the trial art 4 para 4.
[177] United Nations Office of the High Commissioner for Human Rights (UNHCR) 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' (New York and Geneva 2003) 232.
[178] *Edwards v. UK* App no 13071/87 (ECtHR, 16 December 1992) para 36.
[179] Directive on the right to access to a lawyer art 7.
[180] *R v. Judith Ward* (1993) 96 Cr.App.R. 1.

prompt access must be granted to ensure the effective exercise of the defence's rights and at the latest upon submission of the grounds of the charge to the judgment of a court.[181]

Similarly, Ian Dennis adds that it would be difficult for a lawyer to advise the client on how to act if he is unaware of the material evidence in the possession of the investigating officer.[182] In fact, the police are required to make an adequate disclosure at the outset of the investigation as otherwise it may appear that the trial is unfair, or could, in extreme cases, expose the defence lawyer to damages.[183] In fact Birch, goes as far as saying that it is safe for a lawyer to advise his client to remain silent under interrogation until a disclosure is first obtained.[184]

There should be guidelines regulating the communication of information including the timing of disclosure. This is a pertinent right belonging to the suspect prior to making a confession, since if s/he were to know of the material evidence in hand s/he may be induced to make a confession possibly so that s/he may plea bargain the punishment.

Stefano Ruggieri argues that access restrictions should be interpreted strictly in line with the principle to the right of a fair trial under the ECHR and with the ECtHR case law.[185] The decision whether the material evidence is relevant or not is left entirely in the hands of the investigating officer. This should not be the case since it gives too much indiscriminate discretion to the police. In New South Wales, for example, the suspect can submit a freedom of information request to the Information and Privacy Commission in order to be able to access any undisclosed information.[186] Certainly, the Commission's

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[181] Stefano Ruggieri, *Transnational Evidence and Multicultural Inquiries in Europe: Development in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases* (Springer International Publishing 2014)114.
[182] Ian Dennis, *The Law of Evidence* (4th Edn, Sweet & Maxwell 2010) 356 – 357.
[183] ibid.
[184] Andrew Sanders, Richard Young, and Mandy Burton, *Criminal Justice* (3rd edn, Oxford University Press 2007).
[185] Stefano Ruggieri, *Criminal Proceedings, language and the European Union: Linguistic and Legal Issues* (Springer 2013) 114 accessed December 2019; *Vera Fernandez –Huidobro v. Spain.* App no 74181/01 (ECtHR, 6 January 2010).
[186] The Privacy and Personal Information Protection Act 1998 NSW (PPIP Act) <https://www.legislation.gov.au/Details/C2020C00237> accessed November 2018.

ruling would be independent from the discretion exercised by the police officer whilst assessing such a request. In this light Maltese law would have to be revisited.

2.2.4 Identification of gaps to be addressed in this thesis

For the right to information to be considered as complete and flawless, several gaps must be addressed, including the following:

i. The lack of a time-frame within which the suspect must be informed that s/he is being investigated for an offence;

ii. The absence of a time-limit regulating the provision of the Letter of Rights to a suspect/accused person;

iii. The inefficacy of the Letter of Rights if given in the absence of a lawyer;

iv. The remedy which should be available if the Letter of Rights is not duly provided;

v. The remedy which should be available if the Letter of Rights is not translated in the language that the suspects understands or if it is written in a complex manner;

vi. The appointment of an independent person to explain the implications of the letter of rights;

vii. The fact that in some EU countries, not all rights are included in the Letter of Rights;

viii. The lack of a definition of 'material evidence';

ix. The lack of a clear definition of the right of disclosure and clarity on the time-frame within which this right can be exercised;

x. The matter pertaining to the investigating officer's authority to decide which evidence should be construed as material, with no recourse to a higher authority. In this case, the author examines whether this subjective decision must be questioned and, if so, the possible rectifications;

xi. The lack of clarity surrounding the police's duty to keep the suspect duly informed of all material evidence obtained in the investigation, in particular whether the police are only obliged to disclose the information in their possession prior to the investigation;

xii. The provision of the Directive stating that information must be given to the suspect against a fee, in particular the scenario where the suspect is indigent and is availing himself of the right to legal aid.

These are but a few of the questions which the extant literature hardly addresses, let alone answers. This study will therefore address the aforementioned gaps in the subsequent chapters.

2.3 THE RIGHT TO LEGAL AID

This is the third cardinal right which the study will examine. A right which is certainly closely linked to the right to legal assistance. Its importance stems from the fact that the state is recognising that even indigent persons are entitled to a fair trial and to have a defence once under investigation. Miri Sharon et al, explain that 'legal aid' includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means

or when the interests of justice so require.[187] A better meaning to legal advice and assistance was given by Clark Byran Keegan Gerard who explained that it consists in advice given by a lawyer either on the application of law or any particular circumstance that arose in relation to which the party is seeking advice or as to what legal steps a party might appropriately take.[188] 'Representation,' on the other hand, denotes the act of speaking on behalf of the individual before an investigating officer or before the court.[189] It is worth noting that the right to legal aid is not absolute because it is only available for suspects and accused persons 'who lack sufficient resources'[190] to pay for the service.[191] Gabriela Knaul[192] describes legal aid as the foundation of other rights including the right to a fair trial and the right to an effective remedy. She continues by stating that it is an important element of a just system of administration of justice, based on the rule of law and an important safeguard that ensures fairness and public trust.[193] Being a party to a number of international conventions,[194] Malta must ensure that the institute of legal aid is effective and that its domestic law reflects the aims of the conventions to which it is a party, however, as discussed in subsequent chapters the institute of legal aid in Malta must necessarily be revisited. Besides the Directive on the right to legal aid in criminal proceedings,[195] EU legislation lays down the obligation to provide legal aid in several

[187] United Nations Office on Drugs and Crime (UNODC), *Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes Practical Guidance and Promising Practices* (United Nations 2019) 8. (UNODC Handbook)
[188] Clark Bryan and Keegan Gerard, *Scottish Legal System* Essentials (3rd edn, Dundee University Press 2012) 105.
[189] Sanders et al (n 184) p. 62.
[190] Directive on the Right to Legal Aid art 4 (1).
[191] *Croissant v. Germany* (n 146) para 36; *Orlov v Russia* App no 29652/04 (ECtHR, 21 September 2011).
[192] Gabriela Knaul took up her functions as UN Special Rapporteur on the independence of judges and lawyers on 1st August 2009. Ms. Knaul has a long-standing experience as a judge in Brazil and is an expert in criminal justice and the administration of judicial systems.
[193] United Nations General Assembly (UNGA) Special Rapporteur on the Independence of Judges and Lawyers, Legal aid, a right in itself, Geneva, 15 March 2013, UN Doc: A/ HRC/23/43. The report analyses the possibilities of providing legal aid to individuals who come into contact with the law but cannot afford the costs of legal advice, counsel and representation.
[194] ECHR art 6 (3)(c); International Covenant on Civil and Political Rights (ICCPR) art 14 (3)(d); Convention on preventing and combating violence against women and domestic violence art 57; Convention on Action against Trafficking in Human Beings art 15 (2); Convention on Jurisdiction and The Recognition And Enforcement Of Judgments In Civil And Commercial Matters art 50.
[195] Directive on the right to legal aid.

other instances.[196] This fact *per se* is evidence of the importance of this right and thus the Directive must also be examined in the light of other legislation.

The Directive defines legal aid as 'the funding by a Member State of the assistance of a lawyer, enabling the exercise of the right to access to a lawyer';[197] nonetheless, the recital to the Directive further elaborates that 'legal aid should cover the costs of the defence of suspects, accused persons and requested persons.'[198] Although it might seem that the definition is rather wide, in fact it detracts from the definition given in the 'Recommendations of the Commission'[199] and from the text of the draft proposal for a Directive from 2013.[200] It detracts from the former since the Recommendations explain that the term 'funding' entails covering the costs of the defence and the proceedings for suspects or accused persons in criminal proceedings and requested persons in European arrest warrant proceedings. It detracts from the draft proposal because similarly to the recommendations of the Commission the proposal suggests that the expenses which should be covered are those relating to the defence and those relating to the proceedings.[201]

[196] CFREU art 47; Regulation No 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) s 27; 'Council Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations s 44; Council Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing regulation (EC) no 1347/2000 s 50; Regulation No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments s 56; Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes' s 55; European Parliament and Council Directive 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1 art 18.
[197] Directive on the right to legal aid art 3.
[198] ibid art 8.
[199] Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings [2013] OJ C378/11.
[200] EU Commission, 'Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings' /* COM/2013/0824 final.
[201] Directive on the right to legal aid recital 5.

2.3.1 Entitlement to the right to legal aid

Whilst there is no question that from a European law angle the suspect, during pre-trial proceedings, as well as the accused person facing trial are entitled to legal aid by the state if they are indigent, the Directive provides a different standard from the ECHR when assessing eligibility for this right. Whereas the ECHR requires that both a 'Means Test' and a 'Merits Test'[202] are carried out prior to the State giving such service, the Directive,[203] in line with the UN Principles and Guidelines (UNPG),[204] requires that Member States grant legal aid after applying either the Means or the Merits Test, or both depending on the Member State in question. Therefore, the Directive affords the Member States the discretion to choose which test should be adopted.

Roberto Kostoris confirms that Member States may apply different tests.[205] Referring to the means test, he explains that a Member State should consider all relevant and objective factors, such as the income, capital and family situation of the individual claiming the right.[206] When applying the Merits Test, a Member State should take into consideration the seriousness of the crime, the complexity of the case,[207] and the severity of the punishment that can be awarded.[208] It should nevertheless be borne in mind that, although it is possible for the right to legal aid to hinge upon the Merits and the Means Test, some legal scholars are not in favour of a system where the right to legal aid depends upon one's financial means.

[202] *Quaranta v. Switzerland* App no 12744/87 (ECtHR, 24 May 1991) para 27; *Pham Hoang v. France* App no 13191/87(ECtHR, 25 September 1992) para 39; *Tsonyo Tsonev v. Bulgaria* (no. 3) App no 21124/04 (ECtHR, 16 January 2013) para 50; *Zdravko Stanev v Bulgaria* App no 32238/04 (ECtHR, 6 February 2013) para 36.
[203] Directive on the right to legal aid art 4(2).
[204] UNGA, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 28 March 2013, A/RES/67/187 (UNPG).
[205] Roberto E. Kostoris, *Handbook of European Criminal Procedure* (Springer 2018).
[206] ibid.
[207] *Quaranta v.* Switzerland (n 202) para 32 and 33.
[208] Kostoris (n 205).

The Criminal Code infers that the service is not subject to any material consideration, and thus creates no barriers for the application of legal aid.[209] On the contrary, the Constitution of Malta[210] provides that a person charged with a crime shall be permitted to defend himself or by a lawyer and a person who cannot afford legal representation as is reasonably required by the circumstances of his/her case shall be entitled to have such representation at the public expense. This raises the question as to whether it is only the indigent who can ask to be assisted by legal aid. Although the Constitution of Malta does not clearly state that legal aid is to 'be given free when the interests of justice so require,' as provided in the ECHR, it provides a different qualification in that it is to be given in those circumstances where it is 'reasonably required.'[211] This suggests that the national test is far more wide reaching because there are several situations which could render the right 'reasonably required.'

2.3.2 Early access to legal aid

Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law.[212] This is in fact reflected in the Directive which provides that legal aid should be granted without 'undue delay' and at the latest before questioning by the police or before the investigative or evidence gathering acts referred to in the Directive on the right to access to a lawyer are carried out.[213] It suggests that the early stages of the criminal justice process are also crucial for the efficacy and effectiveness of the criminal justice system as a whole. During this time, the magnitude and type of evidence collected, and therefore the prospects for a fair trial and decisions about guilt or innocence, are determined.[214] The right to legal aid, like the right to legal assistance, commences from

[209] Criminal Code art 355AUA: 'The Advocate for Legal Aid shall gratuitously undertake the defence of any accused who has briefed no other lawyer or legal procurator or who has been admitted to sue or defend with the benefit of legal aid.'
[210] Constitution of Malta art 39 (6)(c).
[211] ibid.
[212] Ed Cape et al (n 19).
[213] ibid.
[214] David Berry, *The Socioeconomic Impact of Pre-trial Detention* (Open Society Foundations 2011). In the Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World (General Assembly resolution 65/230, annex, Para. 52), Members States of the United Nations recommended that Member States should

the moment the person becomes a suspect and before s/he is questioned by the police or other authority. The law also provides that this right should be granted 'without undue delay'.[215] It remains to be seen whether a witness in a criminal trial may also benefit from the right to legal aid.

2.3.3 Quality of service in the right to legal aid

The Directive also addresses 'quality of service.'[216] Miri Sharon et al, believe that having a vision of quality is the first step towards establishing measures for quality control.[217] Most States require lawyers to have sufficient competence, whereas some require that they meet levels of high quality.[218] Others tie the quality to fair conclusions or the protection of fundamental human rights. The exact meaning of the term 'quality of service' in the Directive is not entirely clear. Similarly, although the UNPG state that governments should continuously improve the quality of legal aid services, they fall short of explaining the level of quality which should be attained.

The Directive provides that Member States should provide an 'effective legal aid system that is of an adequate quality.'[219] Taru Spronken refers to the general rule quoted in the case law of the ECtHR[220] that the State should intervene only if the lawyer provides inadequate legal assistance that is manifest or that in some way is brought to their attention.[221] This happens when the lawyer does not attend sittings and does nothing for

endeavour to reduce pre-trial detention, where appropriate, and promote increased access to justice and legal defence mechanisms.

[215] Criminal Code art 355AUA.

[216] UNODC, 'Early access to legal aid in criminal justice processes: a handbook for policy makers and practitioners' (2014) <https://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf> accessed 30 May 2020.

[217] UNODC Handbook (n 187).

[218] UNODC, Global Study on Legal Aid -Global Report (October 2016) <https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf> accessed December 2019

[219] Directive on legal aid in criminal proceedings art 7 (1)(a).

[220] *Artico v Italy* (n 125) para 23.

[221] Coster van Voorhout. (n 156) 447.

the accused.[222] Stefan Trechsel is of the same opinion and agrees that the authorities should intervene in the matter due to the contingent right to an effective defence under the Convention.[223] Tilden Meijers on the contrary, adopts a different approach by deducing a higher test from Article 6 (3) of the ECHR and insisting that counsel is obliged to observe his/her professional demands independently of whether the State intervenes or not.[224] David Harris et al opine that when an accused is legally assisted, the lawyer serves as a 'watchdog of procedural regularity.'[225] It is evident that the extent of state intervention when handling claims regarding 'effective assistance' should be properly clarified.[226]

2.3.4 Non applicability of the right to legal aid to legal persons

Both the Directive and the ECHR fail to provide a definition of 'person' and it is consequently unclear whether the right to legal aid should also be granted to legal persons. Similarly, the CFREU does not directly refer to legal persons as it provides that 'legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'[227] Juha Palkamo et al assert that, although legal persons are not usually eligible for legal aid, a key element in granting legal aid is to consider the aid's beneficiary.[228] Jonquille Elizabeth Barbara et al do not share the same opinion and assert that the question must be assessed in the light of the applicable rules and the situation of the legal person concerned.[229] In fact, in *DEB Deutsche*

[222] Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken, *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Instersentia- Interpwen Oxford 2007).
[223]Stefan Trechsel, and Sarah J. Summers, *Human Rights in Criminal Proceedings* (Oxford University Press 2005) 286. Vide *Koplinger v Austria* (Dec.), Commission decision of 29 March 1966, HUDOC no. 1850/63 (dismissal of motion).
[224] Coster van Voorhout (n 156).
[225] David J. Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) 474, with a reference to *Ensslin, Baader and Raspe v. Germany* App no 7572/76 (ECtHR, 8 July 1978).
[226] ibid.
[227] CFREU art 47(3).
[228] Juha Palkamo et al, Legal Aid for Legal Persons, Themis 2016 International Judicial Cooperation in Civil Matters – European Civil Procedure < https://www.ejtn.eu/PageFiles/14777/Written%20paper_Finland.pdf> accessed April 2017
[229] Coster van Voorhout. (n 156)

Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,[230] the ECJ stressed that, while the grant of legal aid to legal persons is not impossible, it must be assessed in light of the applicable rules and the situation of the company concerned. It continued by listing the elements which should be considered to assess whether legal aid could be granted to legal persons.[231] In its case-law, the ECJ seemingly indicates that the limitations on a legal person's access to legal aid should be based on objective and reasonable justifications.

2.3.5 Gaps in the Literature to be addressed in this thesis

The right to legal aid is of paramount importance not least because it assists the most vulnerable. The following are some of the various questions which must be addressed:

i. Whether the right to legal aid is available to witnesses;

ii. Whether legal persons in Malta should also be entitled to legal aid;

iii. Whether the quality of service of legal aid in Malta equates with that provided in other Member States;

iv. Whether the right of choice *vis-à-vis* legal assistance also applies in the case of a legal aid lawyer;

v. Whether the legal aid lawyer appointed at pre- trial stage should handle the entire case especially if there is an arraignment;

[230] Case 279/09 *DEB v. Germany* [2010] ECLI:EU:C:2010:811 para 52-58.
[231] ibid.

vi. Whether the suspect and/or accused person is only entitled to the right to legal aid paid in relation to a defence or whether such right likewise covers expenses relating to the proceedings;

vii. The Directive provides that the service must be "adequate" but what if the appointed legal aid lawyer has no experience in criminal law? Can one conclude that the service is "adequate?" Further, if the legal aid lawyer at pre- trial stage is different from the legal aid lawyer during the on-going proceedings and they are not of the same opinion regarding the line of defence, can one assert that the accused person was given a satisfactory defence?

2.4 THE RIGHT TO SILENCE

The right to silence is the fourth and final cardinal right which will be explored in this thesis. This right may at times be considered as the most important right pertaining to a suspect and accused person facing criminal proceedings. The right to silence is a legal principle which guarantees all persons the right to refuse to answer questions by police officers or court officials. It is a legal right acknowledged, explicitly or by convention, in many of the world's legal systems. Trechsel Summers explains that this is one of the most controversial rights, having different interpretations across Member States, creating ambiguity in the implementation of the right in national legal systems.'[232] Mr Justice Starke[233] made a strong and far-reaching statement in the course of a judgment of the Supreme Court of Victoria, Australia, when he stated that 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. In fact, Ed Cape et al. held that 'the primary rationale for custodial legal advice and assistance adopted by the ECHR is to give effect to the privilege

[232] Trechsel and Summers (n 223) 341; Alexander Zahar and Goran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press, 2007) 303.
[233] Denis J Galligan. '*The Right to Silence Reconsidered. Current Legal Problems*' Volume 41, Issue 1 1988 (December 1988) 69-92.

against self-incrimination and the right to silence, in particular by preventing coercion or oppression.'[234] The right to silence is not an absolute right, and it is primarily up to the national law to determine rules regarding the admissibility of evidence and its probative value.[235]

There is no direct reference to the right to silence in the ECHR. The Court has, however, established that the right to silence and the right not to incriminate oneself are 'generally recognised international standards which lie at the heart of the notion of a fair procedure' (fair trial) under Article 6 of the ECHR which is, in principle, applicable when a person has been charged with a criminal offence.[236] This has given rise to disagreements and difference of opinions regarding the precise moment at which the right to fair procedure arises. Does it only apply at the trial itself? Does it apply at an earlier preliminary stage, once a person is in police detention, once a person has factually been 'charged? Does it apply during police interrogation, on the street or at a residence? Whilst this issue continues to divide the court,[237] courts seem to have given this term a broad interpretation so as to include an investigation prior to the issuance of possible criminal charges later.[238] The test for the applicability of Article 6 (1) depends on whether the individual's situation has been 'substantially affected' rather than whether that individual has been charged.[239]

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[234] Jacqueline S. Hodgson and Edward Cape , 'The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice' (May 18, 2015) New Journal of European Criminal Law, Vol. 5, Issue 4, 2014, Warwick School of Law Research Paper No. 2015/ <https://ssrn.com/abstract=2607573> 11 accessed November 2018.

[235] *Saunders v. UK* App no 19187/91 (ECtHR, 17 December 1996) 65.

[236] *Zaichenko v. Russia* App no 33720/05 (ECtHR, 1 May 2007) 38; *Murray v. UK* (n 31) 3; Kathleen A. Cavanaugh, 'Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom', Cornell International Law Journal, Vol. 35: Issue 3, art 4 <https://scholarship.law.cornell.edu/cilj/vol35/iss3/4/?utm_source=scholarship.law.cornell.edu%2Fcilj%2Fvol35%2Fiss3%2F4&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed December 2019; Berger Mark, 'Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights, (2006) Vol. 12, p. 340 Columbia Journal of European Law <https://ssrn.com/abstract=980946> accessed January 2020; Mike Redmayne, 'English Warnings' (2008), 30 CARDOZO L. REV. 1047; Amann Diane, 'A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context' (1998) UCLA Law Review, Vol. 45, 1998, UGA Legal Studies Research Paper No. 2016-10, Dean Rusk International Center Research Paper No. 2016-04 < https://ssrn.com/abstract=2741227> accessed January 2020.

[237] *Ambrose v. Harris* [2011] UKSC 43.

[238] This point was also confirmed in *Murray v. UK* (n 31) and *Saunders v.UK* (n 235).

[239] *Paul Quinn v. Ireland* App no 36887/97 (ECtHR, 21 March 2001).

2.4.1 The right to silence as opposed to the right not to incriminate oneself

As emphasised by Yvonne Marie Daly, the right to silence, or the privilege against self-incrimination, has long been recognised as an important procedural protection for the accused in the criminal process and has been described as a fundamental principle in any liberal society.[240] The ECtHR too has emphasised that the right to silence and the right against self-incrimination are international recognised standards which lie at the centre of the notion of a fair procedure under article 6 of the ECHR.[241] They do not, however, have an identical meaning. As identified by Carmen Adriana Donocos,[242] the right to silence is the unspoken procedural guarantee to the right to a fair trial which results from the case-law of the ECJ within the meaning of Article 6 (1) of the ECHR according to which judicial authorities cannot oblige a suspect or an accused person to make statements. The right to silence therefore includes the right not to incriminate oneself. Carmen Adriana Donocos goes on to say that the suspect or accused cannot be pressured to assist in the production of evidence and cannot be punished for failing to provide certain evidence.[243] On the other hand, the right not to contribute to one's own incrimination is the implicit procedural guarantee of the right to a fair trial which also results from the case law of the ECHR within the meaning of Article 6 (1) where judicial authorities cannot oblige any suspect or accused person to co-operate with the prosecution by providing evidence which may incriminate him/her or which would create the basis for a new criminal charge. These two rights are certainly applicable to witnesses insofar as the statement they make might be self-incriminating.[244] Therefore, judicial authorities which find that the witnesses might incriminate themselves through a statement have the obligation to suspend the hearing and to communicate to them the fact that they have the right to remain silent and that, on the basis of the statements by which they incriminate themselves, they could face

[240] Yvonne Marie Daly, 'The right to silence: inferences and interference' (2014) The Australian and New Zealand Journal of Criminology SAGE Publications 47(1) pp. 59-80 < https://doi.org/10.1177/0004865813497732> accessed February 2020.
[241] *Shlychkov v Russia* App no 40852/05 (ECtHR, 9 May 2016) para 81; *Saunders v UK* (n 235) para 68.
[242] Carmen Adriana Donocos 'Guarantee of the Right to Silence and of the Right not to contribute to One's Own Incrimination in Romanian' (2018) vol. 1 no. 1 Open Journal for Legal Studies, 2018, *1*(1), 37-50 <https://doi.org/10.32591/coas.ojls.0101.04037d> accessed February 2020.
[243] ibid.
[244] *Allan v. UK* App no 48539/99 (ECtHR, 5 February 2003), *Bricmont v. Belgium* App no 9937/82, (ECtHR, 15 July 1986).

criminal prosecution.[245] Alexander Trechsel affirms that while the right to silence only refers to verbal communication, the right to non-self-incrimination is not limited to verbal expression, protecting individuals against the obligation to deliver documents.[246]

When considering the scope of the right to silence, the right appears to be wider than the right to avoid self-incrimination since it protects suspects and accused persons from making any kind of statements. The recital provides that 'individuals should not be compelled to produce incriminating circumstances, evidence or documents during interrogations.'[247] Thus, it may appear that the Directive protects a broader right. This provision protects the freedom of the suspect or accused to choose whether to speak or to remain silent when questioned. One may ask whether the right also includes the right not to answer all questions or simply the right not to answer incriminating questions. In conceptualizing this right, this study analyses whether 'the right to remain silent' must be given a restrictive meaning in view of the decisions of the ECtHR, particularly whether accused persons have the right not to give evidence irrespective of the nature of the questions asked.[248]

2.4.2 Circumstances that weaken the right to silence

The drawing of inferences from the right to silence may be perceived as reducing the strength of such a right. The Directive provides that suspects or accused persons who exercise this right cannot then have this fact used against them as evidence that they have committed the offence.[249] It appears that there are provisions in the Directive which weaken the very strength of the right, such as the provision which allows Member States to permit judicial authorities to consider the co-operative behaviour of suspects and accused persons. The author considers this circumstance at a later stage to examine

[245] *Cesnieks v. Latvia* App no 9278/06 (ECtHR, 11 May 2014).
[246] Trechsel and Summers (n 223) 342.
[247] Directive on the presumption of innocence and the right to be present at the trial recital 25.
[248] *Saunders v. UK* (n 235).
[249] Directive on the presumption of innocence and the right to be present at the trial art 7 (5). This seems to go further than the censured case law of the ECtHR in *Murray,* which considers, under certain conditions, negative effects of the choice to stay silent. See*, Murray v. UK* (n 31) See more recently *O'Donnell v .UK* App no 16667/10 (ECtHR, 7 July 2015).

whether such a condition discourages suspects and accused persons from making use of the right to silence.

One of the most debatable questions in relation to the right to silence is the possibility to draw inferences from the suspect's silence. Most EU Member States, the UK excluded, do not provide for inferences in their legislation.[250] If adverse inferences can be drawn from silence, this could arguably give rise to the accused being indirectly pressured not to remain silent during pre-trial questioning, thereby undermining the very same right to silence. The right has been described as a 'qualified right' that must be balanced against other public interests and that may be impinged upon in certain contexts.[251] Legal obligations to file tax returns or to provide motor documents on police request are examples of public interests undermining the right to silence.[252]

The question, therefore, is whether any impingements on the right to silence are overshadowed by the supposed benefits of discouraging the right by permitting adverse inferences to be drawn from its application. Accordingly, this dissertation analyses the importance of the right to silence and the interests it is said to protect. These concerns must be balanced against the benefits of allowing adverse inferences from pre-trial silence. To assist with this analysis, the author undertakes a comparative analysis of the UK system, which caters for the drawing of inferences, as opposed to the Maltese system in the case of taking forensic samples. In the latter case, an inference can be drawn where the appropriate consent to the taking of an intimate sample was refused without a good cause. Those who have to judge 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.[253] Therefore, a question which the author addresses is

[250] The Criminal Justice and Public Order Act (CJPOA), 1994 s 34 allows an inference to be drawn from exercising the right to silence during pre and post charge questioning.
[251] Law Commission 'Criminal Evidence: Police Questioning' Preliminary Paper No 21, Wellington, New Zealand, September 1992)10 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20PP21.pdf> accessed August 2020.
[252] Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 540.
[253] Criminal Code art 355AZ.

whether one can conclude that the exercise of the right to silence may result in tacit self-incrimination in those instances where inferences can be drawn.

2.4.3 The right to testify or not to testify

In civil law systems, use is made of the term 'the right to testify or not to testify.' In this regard Irena Nesterova Arija Meikalisa insists that individuals must be informed that not providing a testimony will not be considered as an impediment from the discovery of the truth or an evasion of the pre-trial proceedings.[254] For instance, in the Czech Republic, a person is not compelled to testify.'[255] Similarly, in Latvia, the accused has the right either to testify or not.[256] In Latvia, a quantitative survey[257] was carried out amongst two hundred and one accused persons, forty-two defendants and eighty-eight officials to gauge the effectiveness of the right to silence. Questions relating to the right to silence were also asked and it transpired that this right was violated significantly. The accused were asked if the right to remain silent was explained to them before they gave evidence, forty-three per cent (43%) of the interviewees answered 'No', twenty- one per cent (21%) stated that the right was explained to them in the first interrogation, and only sixteen per cent (16%) said that the right was explained every time. Furthermore, five per cent (5%) of the interviewees answered that the right was explained in the court hearing.

2.4.4 Identification of gaps to be addressed in this thesis

Amongst the gaps the author has come across in this research study, this study addresses the following *lacunae*:-

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[254] Irena Nesterova Meikalisa, *'The right to information about the right to silence as a EU procedural guarantee in Criminal proceedings and it impact on national legal systems*.' (Faculty of Law, University of Latvia) <https://www.law.muni.cz/sborniky/dny_prava_2012/files/pravoEU/NesterovaIrena_MeikalisaArija.pdf> accessed May 2020.

[255] Taru Spronken (n 132).

[256] Criminal Procedure Law, Latvia <https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law> accessed November 2019.

[257] Meikalisa (n 254).

i. Whether the right to silence only applies to a suspect and/or accused person and whether it extends to witnesses or victims, particularly as the silence of a witness may affect the confession of an accused in cases of alibi or collaboration;

ii. Whether the right to silence is identical to the right not to incriminate oneself and whether it includes the right not to testify;

iii. The exact moment at which this right can be exercised and whether it entitles the suspect and/or accused to refrain from participating in investigative measures;

iv. Whether this right can be coupled with the right of inference and, if so, the extent and implications;

v. Whether this right is only enforceable in a court vested with criminal investigation and during interrogation of an offence or even before other tribunals where the person could be subject to a fine or criminal action.

These are but a few of the salient aspects that the study will address discusses in the chapter relating to this right to silence.

2.5 CONCLUSION

This thesis concentrates on an in-depth analysis of the four cardinal rights with a view to determine whether these rights are truly effective rights enjoyed by suspects and accused persons prior to the making of a confession. The research assesses in a comprehensive manner, the impact of EU legislative efforts in harmonising procedural safeguards; evaluates recent advancements in the case law of the European courts[258] and local case

[258] C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

law; unpacks the complexity of the challenges that lie ahead for the national courts, and outlines potential next steps to address the challenges effectively.

There are several problems in the development of such rights, and, at times, it may appear that the national laws of Malta do not conform to one another. The study addresses such inconsistencies and proposes possible solutions. The study has already outlined several lacunae in the existing laws by identifying instances where there seems to be no remedy in the case of a breach of obligations. Although the situation in Malta has improved significantly in that it has witnessed the enactment of amendments intended to bring these four chosen cardinal rights in line with those in other Member States, there are still hurdles which must be overcome before it can be concluded that these four cardinal rights are perfected.

CHAPTER THREE - THE HISTORICAL DEVELOPMENT OF THE RIGHT TO LEGAL ASSISTANCE IN MALTA

3. INTRODUCTION

In recent years, the infringement of suspects' rights during investigation and prior to arraignment has resulted in several miscarriages of justice in Malta. Such situations led to acquittals and, indeed, at times, to wrongful convictions.[259] This chapter analyses the historical development of the right to legal assistance in Malta and focuses on the various amendments made to the Criminal Code, aimed at bringing the latter in line with the ECHR and the most recent Directive on the right to legal assistance. It took a very long time for the right to legal assistance to be codified in the domestic laws and thus, to be able to better understand the rationale behind court decisions delivered at different points in time, it is important to discuss the measures and steps prior to its implementation. The changes brought about by the implementation of this right were duly reflected in court judgments, at times being diametrically opposed.

3.1 HISTORY OF THE RIGHT TO LEGAL ASSISTANCE

The first noteworthy event recognised under domestic law which underlined the need for a provision on the right to legal advice at pre-trial stage, dates back to 1980 when serious accusations regarding abuse by police officers during interrogations, were brought to light.[260] It was therefore, during the first half of the 1980s that the need for the right to legal advice during interrogation first materialised; unfortunately, however, Parliament did not ascribe much importance to this matter. In the latter half of the 1980s, a number of accused were acquitted, irrespective of the fact that they had signed a statement confirming their admission of guilt,[261] on the grounds that such confessions were tainted

[259] Mario De Marco. 'A Reappraisal of Police Powers' (LL.D. thesis, University of Malta, 1988).
[260] Valentina Lattughi, 'The Adequacy of the Right to Legal Advice as put into Practice' (LL.D. thesis, University of Malta 2011) 13.
[261] *Police vs. E Mifsud* (CCA, 20 October 1956); *Rex v. George Briffa* (CC, 7 November 1930); *Pulizija vs. George Spiteri* (CCA, 8 March 1984); *Police vs. Anthony Azzopardi* (CCA, 14 May 1987), *Pulizija vs.*

with police mistreatment during interrogation.[262] One such case is *Il-Pulizija vs Emmanuel Vella*[263] wherein Magistrate Borg Olivier de Puget held that only two steps could have been taken to circumvent such mistreatment; either to disregard *in toto* all the confessions that the police obtained from the suspect, whilst still under arrest or, alternatively, to inform the suspect of his right to have a lawyer accompanying him throughout the interrogation.[264] The Magistrate was in fact concerned about the practice of interrogation in Malta, particularly the fact that suspects were not accompanied by a lawyer, and that suspects were placed in an intimidating situation.[265] This judgment clearly established the conviction that in order to obtain a statement which is truly free from coercion,[266] the suspect must be assisted by their lawyer during the interrogation.

On the 19th August, 1987, the ECHR became part of Maltese law when the European Convention Act came into force, granting all Maltese citizens the right to petition to the Strasbourg organs. The long title of this enactment provided for:

> [A]n act to make provision for the substantive articles of the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, to become and be enforceable as, part of the law of Malta.'[267]

The incorporation of the ECHR into Maltese law was deemed necessary as it provided for broader rights when compared to the Constitution of Malta which, at that time, provided that the five codes of Malta, including the Criminal Code, could not be challenged for human rights violation in terms of the Constitution. It is worth noting that a few months prior to the enactment of the European Convention Act, Parliament granted to all persons present on the Maltese islands the right to petition the Strasbourg organs. Additionally, it also acknowledged the jurisdiction of the ECtHR for a period of five years, with effect

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Carmel Camilleri and Therese sive Tessie Agius (CCA 9 October 1998); *Pulizija vs. Donald Vassallo et* (CCA 30 April 1998).

[262] 'Torture in Malta?' *The Sunday Times* (Malta, 27 January 1985) 13.

[263] CMCCJ 17 January 1986 and confirmed by the CCA 29 January 1987.

[264] 'Third Degree Third Time.' The Sunday Times (Malta, 26th January 1986) 13.

[265] 'Detainees, something to celebrate' The Sunday Times (Malta, 6 April 1986) 13.

[266] ibid.

[267] Act No. XIV of 1987.

from the 1st May 1987. The Convention and four of its protocols were ratified in 1966 and 1967, but at that time they had not yet been incorporated into local legislation. As a first remedy, it is the First Hall Civil Court (FHCC) that offers the necessary protection of the rights enshrined in the ECHR, and the Constitutional Court acts as an appellate court. It is only when all local remedies have been exhausted[268] that the applicant may seek recourse to the ECtHR.

In 1990, Malta became a member of the CPT. The latter noted in its first report on Malta that several basic safeguards of human rights, regarded as being essential for police investigations, were absent from Maltese law. In fact, it pinpointed that access to legal advice was not given to suspects in the first forty-eight hours of detention. The CPT recommended to the Maltese authorities a strategy that provided for the right to legal advice at the pre-trial stage and that police officers be proficient to oversee the right to legal advice, without being accused of police impropriety.[269] In its report, the CPT recommended that the right to legal assistance during interrogation should be introduced in three stages; immediate, short term, and medium term. The CPT's immediate recommendation required the Maltese authorities to permit detained persons to communicate by telephone with their chosen lawyer, and to clearly restrict any prospects for the police to exceptionally delay or refuse such telephone communication. In the short term, the authorities were to allow detained persons the right to make contact and see a lawyer. Lastly, in the medium term, the authorities were to further examine whether a legal advisor should be present during police interrogations.[270] It also stated that adequate training for police and prison officers was necessary to prevent torture and inhumane or degrading treatment or punishment. This would include training, on the fundamental safeguards such as access to legal advice during interrogation.[271]

[268] *Angela Busuttil v. Avukat Ġenerali* (FHCC- Constitutional Jurisdiction, 3 October 2003).
[269] Council of Europe (1990) *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (<http://www.cpt.coe.int/documents/mlt/1992-05-inf-eng.htm> accessed 16 May 2019.
[270] ibid.
[271] ibid.

The CPT made a second visit to Malta in 1995 and noted that Malta had not made any progress in the implementation of the CPT's 1990 recommendations on the right to legal assistance during interrogations. It confirmed that the risk of ill-treatment was highest immediately after the arrest, and therefore insisted that the right to legal assistance be granted to detainees immediately upon detention. The CPT restated that its previous recommendations detailed in its 1990 report should be implemented with immediate effect and solicited the Maltese authorities to ensure that the right to legal assistance was safeguarded by the Maltese Law.

The first document which introduced the right to legal advice during the investigation stage was titled 'The White Paper Proposals for a Bill Entitled the Police Code (1997).'[272] It was held that through the introduction of this right, police ill-treatment would come to an end and furthermore the Bill served as a safeguard to guarantee the rights of detainees, by giving them the opportunity to obtain a lawyer's advice during the interrogation process.[273]

It was only in the year 2000, that the recommendations of the CPT were taken on board in a White Paper entitled 'Fighting Crime Under the Rule of Law'[274] which contained the first proposal for the introduction of the right to legal advice during police interrogation. As outlined by Kevin Aquilina,[275] the term 'introduction' may seem to be abhorrent in the field of human rights for they are not to be conceded by the State but simply recognised.[276] He further states that the choice of the term 'introduction' was not coincidental. This consultative document[277] was launched to introduce, *inter alia*, the right of the accused to consult a lawyer before the commencement of an interrogation, particularly at the investigation stage. This law was intended to curb the exercise of

[272] Robert Azzopardi, 'The Right to Legal Counsel During Police Interrogations in Malta (B.A. (Hons.) Criminology thesis, University of Malta 2012) 13.
[273] ibid.
[274] In the year 2000, the Ministry for Home Affairs published this White Paper which proposed that the right to legal assistance should be introduced during police interrogations.
[275] Former Dean at the Faculty of Laws of the University of Malta. He authored various books and reports and also drafted various laws and regulations.
[276] Kevin Aquilina, *Human Rights Law: Selected Writings* (University of Malta 2018) 485-491.
[277] The Consultative Document entitled 'Il-Glieda kontra l-Kriminalita' Bis-Sahha tal-Ligi' 2002.

police power at interrogation stage[278] and to prevent infringements of the rights granted to detainees.[279]

Whilst this right was being assiduously discussed in Parliament both by the government of the day and the opposition, Bill No. 28 (the Bill) was published in the government gazette of the 26th June, 2001 to amend the Criminal Code by introducing the amendments proposed in the White Paper of 2000. On the 9th of April 2002, Act No. III of 2002, was enacted by Parliament to provide for the right to legal assistance during interrogation. This right, although enacted in April, 2002 did not come into force until eight years later by LN 35 of 2010.[280] This meant that prior to the 10th February 2010, a detained person could under no circumstance ask for any type of legal assistance whilst under interrogation, and this despite the fact the right to legal assistance was codified in the Criminal Code. At the time, it could only be granted once an arraignment took place, independently of whether the accused was charged or not. In fact, Dr Franco Debono[281] highlighted that prior to the entry into force of LN 35 of 2010, it was up to the lawyers to duly inform suspects' families that, under Maltese law, suspects were not entitled to legal assistance during pre-trial proceedings.[282]

During pre-trail proceedings, suspects were only entitled to know the reason for their arrest. This regrettable situation created ambiguity since legislators were recognizing the suspects' and accused persons' right, to have legal assistance prior to interrogation yet at the same time there was no effective implementation. Therefore, *ab initio*, it appeared that such a right was theoretically ineffective and unenforceable.

Prior to the introduction of this amendment, there was no provision for legal assistance during pre-trial investigation and during interrogation by the police or by a Magistrate

[278] Stefano Filletti. 'The Lawyer's Role in the Criminal Process' (Academic Oration, Valletta, 22 November 2011)
[279] Robert Azzopardi (n 272).
[280] Criminal Code (Amendment) Act, 2002 (Act III OF 2002), Commencement Notice
[281] A lawyer who specialises in Criminal cases and a former Member of the Maltese Parliament.
[282] Franco Debono, 'The Rights of the Accused in Light of Recent Developments and Proposed Reforms' An article written in the book 'Id-Dritt' (Ghaqda Studenti tal-ligi Publication 2014) Volume XXIV 264.

acting in an investigative capacity. Prior to questioning, suspects would be cautioned[283] and would simply be cognisant of their right to remain silent and that anything they said could be taken down in writing and produced as evidence. No hostile comment by the prosecutor or the adjudicating judge could be made upon the accused's refusal to give evidence.[284]

For a better understanding of the right to legal assistance as practiced in Malta, particular reference must be made to the various statutes which brought about this right, since it was not imported lock, stock and barrel from foreign jurisdictions but, rather, was modified over the years. The current situation seems to be nothing more than a mirror image of the provisions of EU Directive 2013/48. However, a new problem has arisen because several defence lawyers are contesting statements released by suspects when they were not given the right to be assisted by a lawyer.

3.2 ACT NO. III OF 2002

Act No. III of 2002 - the Criminal Code (Amendment) Act, 2002 - was projected to alter the Criminal Code extensively.[285] The introduction of the right to legal advice to persons detained by the police and prior to interrogation was one of the notable changes that this law aimed to ascertain.[286] In fact, as highlighted by Kevin Aquilina, no changes were effected to the text of Article 355AT during the process of implementing the White Paper, the Bill and the Act.[287] In fact all, three versions of Article 355AT of the Criminal Code, though still not in force were identical.[288] This Article was modelled on the PACE Act. As outlined by Kevin Aquilina, Article 355AT introduced for the first time, an arrested

[283] Criminal Code art 658 'Any confession made by the person charged or accused whether in writing , orally or by other means may be received in evidence against or in favour of the person as the case may be, who made it provided it appears that such confession was made voluntarily and not extorted or obtained by means of threats or intimidation, or of any promise or suggestion of favour' This was prior to the amendment made by Act LI .2016 which introduced the words 'by audio visual means too'.
[284] Criminal Code proviso to art 634(1) 'Provided that the failure of the party charged or accused to give evidence shall not be the subject of adverse comment by the prosecution.'
[285] Debono (n 282).
[286] ibid.
[287] Aquilina (n 276).
[288] White paper clause 61; Bill clause 66, pp C 1415-1417; art 74 of Act III of 2002.

person's right to privately consult with his chosen lawyer, either in person or via telephone, for a period not exceeding one hour. [289]

Dr Franco Debono states that the right to legal assistance was a priority on both parliamentary and forensic agenda, and that the introduction of Article 355AT was a small step in the right direction. Nevertheless, such amendments failed to bring Malta in line with the Strasbourg judgments.[290]

Following the introduction of this amendment, LN 437 of 2002 set out the authorised places of detention, other than police stations, for the purpose of this provision, namely:

i. The lock up at the Police General Headquarters at Floriana;

ii. The lock up in the building of the Law Courts at Valletta;

iii. The lockup in the building housing the administrative section of the Police Department at Victoria Gozo.

This newly introduced right generated problems in Malta for many reasons. Primarily, lawyers were dissatisfied with its implementation. They argued that the one-hour timeframe set out in the law was in itself a restriction to the very same right. They asserted that lawyers were unable to advise their client since *a priori* no information would be given and thus, in the absence of such information concerning the investigations, their advice would be given in a vacuum.[291] They also argued that, due to lack of space, local police stations were not well equipped to ensure privacy between the suspect and his lawyer. In Malta, several police stations have only one office which is used by an inspector; thus, the suspect would need to communicate with his lawyer in the presence of the investigating officer. In addition, several police stations only have one telephone which is located in the office of the inspector, at times also tapped, and thus some may

[289] Aquilina (n 276) 518.
[290] Debono (n 282) 261, 263.
[291] Aquilina (n 276).

fear the possibility of having their conversation recorded or overheard. Similarly, there is no investigation room at the Maltese courts and, therefore when a suspect is called upon to give evidence in front of a duty Magistrate, everything takes place in the latter's chambers. As no audio recording system is in place, suspects may claim that the content of their statement is not true. Likewise, there is no space where the confidential communication between the lawyer the suspect may take place. In practice, conversations between lawyers and suspects occur in the corridors of the courts for everyone to hear.

Therefore, the matter of confidentiality between the lawyers and clients have been questioned. Lawyers felt that although, in theory, the suspect enjoyed this limited right, at the same time the privilege of confidentiality between lawyer and client was being trampled upon. Furthermore, the law also imposed an obligation on the investigating officer to record the time of the lawyer-client communication, and to similarly take note, in the presence of two witnesses of the fact that a suspect chose not to utilise this right.[292]

Dr Franco Debono during the parliamentary sitting of the 4th July, 2001, launched a vociferous campaign against the way this right had been introduced. He held that it could not be considered as an absolute right since it was not available throughout the entire investigation. Dr Tonio Borg,[293] during the parliamentary sitting of the 19th November, 2011stressed the importance of the right to be assisted by a lawyer before interrogation, but did not specifically outline the problems that could ensue from the limited time of assistance. He failed to elaborate on the right itself but concluded that such right should be introduced in Maltese legislation since it is a right universally recognised in every democratic society. Criminal law practitioners, Dr Josè Herrera[294] and Dr Joseph

[292] Criminal Code art 355AT.
[293] Deputy Prime Minister responsible for Home Affairs in 2011.
[294] Dr Jose' Herrera is the present Minister of Culture, Local Government and Maltese Patrimony and was reported to having said that: 'The right to legal advice prior to interrogation in Malta was not being upheld, after one of his clients was found guilty on the basis of a statement he gave, after he was denied access to a lawyer'. -
- Kurt Sansone, 'The Cost of Delaying Human Rights.' *Times of Malta* (Malta 29 May 2011) <http://www.timesofmalta.com/articles/view/20110529/local/The-cost-of-delaying-human-rights.367832> accessed 16 June 2019.

Giglio,[295] held that although the legislator had, for the first time, introduced the right to legal assistance, this was not well-received amongst criminal lawyers as it still needed fine tuning to reflect developments in other Member States, where the right to legal assistance during interrogation was already made available to suspects throughout the entire interrogation. However, the *status quo* remained unchanged.

On the 15th January, 2010, the former Minister of Justice and Home Affairs, Dr Carm Mifsud Bonnici, informed the President of the Chamber of Advocates that the government intended to bring Article 355AT into force together with some other Articles of the Criminal Code which had been introduced by Act III of 2002 and requested him to relay to the Commissioner of Police the names and particulars of the lawyers who were willing to give legal assistance to suspects and arrested persons.

On the 3rd October, 2011,[296] the former Chief Justice Dr Silvio Camilleri stated in an opening session of the forensic year of the law courts, that the government of the day was not giving the administration of justice the attention it deserved and was instead focusing on the economy sector. He went on to state that in a democratic society, justice should be given due importance since it is one of the essential components for a democracy. Such a thought was also echoed by another criminal law practitioner Dr Stefano Filletti[297] when he emphasised that:

> [W]hat first seems to be an amendment championing rights of persons suspect has become a seriously onerous obligation for lawyers. The obligation can be extended in the event that the right to legal advice is developed to a right to have a lawyer present during the course of interrogation.[298]

[295] ibid. Dr Joseph Giglio is an imminent criminal lawyer and examiner at the University of Malta. who was reported of having said that 'What is happening is a result of the legislator's reluctance to take note of developments in the ECtHR. For years, we either slept on them or perhaps pretended they were not happening.'
[296] Department of Information (DOI), 'Diskors Tas-S.T.O. l-Prim Imħallef Silvio Camilleri fl-okkażjoni taċ-ċerimonja tal-ftuħ tas-sena forensic 2011–2012' press release number 1855 (2011) <file:///C:/Users/rcolo/Downloads/pr1855.pdf> accessed August 2019.
[297] Head of Department of Criminal Law at the University of Malta.
[298] Filletti (n 278).

Dr Franco Debono, once again campaigned strongly in Parliament[299] to have the right to legal assistance enshrined in national law because he believed that this right would automatically reduce police abuse. On the other hand, it would ascertain that a suspect is treated with dignity. The right to legal advice at the initial stages of the criminal investigation could also lead to the possible reduction in the number of violations which could procure an unfair trial, especially because investigations must be evaluated in their entirety. On the 8th November 2011, after latching on to the Chief Justice's comments expressed a month earlier, Dr Franco Debono moved on to present in the House of Representatives a private member's motion[300] pursuant to which he called for major reforms in the judicial system which affect the workings of a democracy and the fundamental human rights of the individual.

Amongst the many proposed reforms, reform number six, taking into account the judgements delivered by the ECtHR, the rule of disclosure and other ancillary matters, dealt with the right to legal assistance during interrogation. Dr Debono proposed that such measures be discussed in the House of Representatives, especially as what was being expressed publicly in the media was being ignored. However, this motion was not tabled for debate until June 2012. In the meantime, the opposition had proposed another motion of censure[301] against the then Minister of Justice Dr Carm Mifsud Bonnici, for taking too long to bring this enacted right into force. The motion was brought to debate prior to Dr Franco Debono's motion regarding judicial reforms.

Dr Franco Debono was disappointed with the government he represented for not having tabled the motion for discussion in the House prior to the motion of censure and, from

[299] Parliamentary Session no 439 p.983 - 25th January, 2012 wherein he asked why the State had taken so long and dragged its feet to introduce the law regarding the right to legal assistance during interrogation. Parliamentary Session number 56, p. 843 18th November 2008 Hon Dr Debono stated that it was high time that the state recognises the right of a suspect during interrogation and thus the time had come to introduce legislation in this regard.

[300] Parliamentary Session number 489, Private Members Motion in Parliament number 260, 12th June 2012 <https://parlament.mt/media/18253/motion-no-260-private-members-motion-on-the-judiciary.pdf> accessed March 2020.

[301] Parliamentary Session number 477, Private Members Motion number 280 29th May 2012 <https://www.parlament.mt/media/18233/motion-no-280-reforms-in-the-justice-and-home-aff-sectors.pdf > accessed on March 2020.

then on, embarked upon a campaign on the local media.[302] This was done to ascertain the introduction of the right to legal assistance into the Maltese legal system. In fact, Dr Angele Muscat reports that Dr Debono stated that his motion was intended to be used as 'a catalyst, a spark for the principle of legal assistance to be set in motion.'[303]

The first Maltese law reform to deal with this right was enacted in this vein, namely, to ascertain a fair trial from the initial stages. After all, there would be no point in speaking about equality of arms and fairness of procedures when an individual would have already prejudiced his own trial by releasing a statement without the safeguards provided for in the law. Dr Elena Marie Bajada in fact states that 'the right to legal advice prior to interrogation is a safeguard in ensuring that the accused is aware of all rights and of the existing legal situation.'[304] During this time the suspect had no statutory right not even under the Criminal Code to speak to a lawyer prior to interrogation by the police or any investigating authority. As indicated by Dr Franco Galea, the Constitutional Court could have upheld this right through the Constitution.[305] However, there seems to be no court decision on this course of action. The only case brought forward related to the *in genere* inquiry that was carried out in connection to the Shimshar tragedy,[306] though this case was withdrawn prior to the delivery of the judgment.

Moreover, this right as introduced and as accompanied by the rule of inference met a lot of opposition. It is immediately noted that the rule of inference was short-lived in the Maltese legal system, particularly as a number of statements were contested before the law courts on the grounds that if such rule of inference was not in existence, the suspect could have acted differently when faced with an investigation. The rule of inference meant

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[302] Franco Debono, 'Vision for Justice' *Times of Malta* (Malta 11 September 2011); Franco Debono, 'Essential Legal and Administrative Reforms' *Times of Malta* (Malta 12 October,2011); John Busuttil, 'Absent from Parliament but present and relevant in an exclusive reform interview with Franco Debono' *Illum* (Malta 9 June 2015); Saviour Balzan, 'Still defiant-Franco Debono' *MaltaToday* (Malta 16 January 2012).

[303] Angele Muscat, 'It-twelid tar-riforma tal-ġustizzja- Franco Debono' (2016) <it-twelid_tar-riforma_tal-gustizzja_franco_debono.pdf (riformagustizzja.com)>accessed November 2018.

[304] Elena Marie Bajada, 'The Right to legal Advice in the Investigative Stage of Criminal Proceedings' (LL.D. thesis, University of Malta 2015).

[305] Franco Galea. 'The Right to Legal Advice During Police Interrogation – The Maltese Niceties' An article written in the book 'Id-Dritt' (Ghaqda Studenti tal-ligi Publication 2011) VOL XXI 257 et seq.

[306] *Simon Bugeja vs l-Avukat Generali* (FHCC, withdrawn on the 25 February 2010).

that suspects could incriminate themselves by adverse inferences if they chose to remain silent upon interrogation. Article 355AT of the Criminal Code was designed to be the main provision that dealt with the right to legal assistance, but it had to be read in conjunction with Article 355AU[307] which dealt with the drawing of inferences from the silence of suspects during the interrogation stage. Article 355AU of the Criminal Code was modelled on the UK's Criminal and Justice Public Order Act 1994.[308] The Explanatory Memorandum explained that newly introduced Article 355AU allowed the drawing of inferences by the court or the jury in the scenario where an accused relies on a fact during his trial which he would not have mentioned at the pre-trial stage.[309]

Dr Franco Debono opined that 'what *prima facie* appears to be an important milestone in the safeguarding of the rights of suspects may ultimately result in a deadly snare and could lead to one's self- incrimination.'[310] Although one could not be found guilty solely based on an inference from his/her silence, such inferences[311] would surely play a significant role in the criminal proceedings. It appears that the introduction of the notion of inference compromised the newly legislated right to legal assistance. Most worrying was sub-article (3) of Article 355AU which provided that the prosecution could be authorised by the Court to comment on the fact that the suspect did not request the right to take legal advice during police investigations. Thus, it evidently appears that the rights incorporated under Article 355AT[312] were jeopardised in 2002, with the amendments that introduced the drawing of inferences from the silence of the accused. The right which the legislator gave

[307] Criminal Code art 355AU (1): 'Where in any proceedings against a person for an offence, evidence is given that the accused –(a) at any time before he was charged with the offence, on being questioned by the police trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, sub article (2) shall apply if it is shown that the accused had received legal advice before being questioned, charged or informed as aforesaid.'
[308] The Criminal and Justice Public Order Act 1994 s 34 and 38(3) for the test of these provisions vide Richard Card and Richard Ward. The Criminal Justice and Public Order Act 1994, Bristol Jordan Publishing,1994 p301-302 and p 306.
[309] Roger Leng and Richard D. Taylor, 'Blackstone's Guide to The Criminal Procedure and Investigations Act 1996' (Blackstone Press Limited, 1996) 26.
[310] Debono (n 282) 270.
[311] ibid.
[312] ibid 261.

was, in fact, useless since it worked out better for the suspect to refuse legal assistance and remain silent rather than answer all questions put to him/her. This was so because there could only be an inference in circumstances where legal advice had been received by the accused meaning that if the suspect exercised the right to silence and did not take legal advice, no conventional inferences could be drawn according to Article 355AU.[313] The prosecutor could, however, only comment on the refusal of legal assistance. It seems that the legislator introduced this inference to try and balance the rights of the suspect and the needs of the prosecution.

The rule of inference did not, however, last long. It was the Court itself in one of its salient judgments in the names *Il-Pulizija vs Wayne Falzon,*[314] which outlined the danger of the application of such inference. It held that the Maltese legal system is accusatorial and thus the prosecution must prove guilt. The rule of inference was shifting the *onus* of proof onto the defence to disprove the inference and thus the Court felt that this contradicted the right to silence to which suspects are entitled. The Court further held that the prosecution should never expect the court to discard the evidence of the accused on the premise that the accused failed to mention his defence at the first opportunity given to him. Although it held that it might benefit an accused person to rid himself of any suspicion cast upon him at investigation stage, the right to remain silent and not to incriminate oneself is reflected in the Constitution of Malta which supersedes the implementation of the rule of inference. It must likewise be recalled that the right to legal assistance could only be exercised for an hour prior to interrogation, meaning that the lawyer was not always cognisant of the nature and the implication of the charges to be brought forward against the accused. The *a priori* determination of the time a lawyer needs to spend with suspects to be able to advise on the offence/s being attributed to them could somewhat be dangerous. Naturally, each case must be analysed on its own merits. Dr Franco Galea opines that, instead of setting a fixed duration, the legislator should have provided for the suspension of the time of detention whilst the lawyer is in consultation with the suspect.[315] This recommendation could be problematic as the forty-eight-hour time period of arrest should be maintained.

[313] *Ir-Repubblika ta' Malta vs. Carmel Saliba* (Criminal Court, 2 May 2013).
[314] CMCCJ 2 August 2017.
[315] Galea (n 305) 257 et seq.

During this time, lawyers acquaint themselves with all the records in the prosecution's file and were faced with restrictions when retrieving information regarding a case.[316] Together with the rule on the drawing of inferences, this led to a result which defeated the scope of the right to legal advice prior to interrogation. It seemed to create more of a prejudice than provide a benefit to the suspect.

3.3 THE BONELLO COMMISSION

The outrage caused by the enactment of this law led the government of the day to set up a Commission,[317] to carry out a 'holistic reform' in the administration of justice known as the Bonello Commission for the Holistic Reform of the Justice Sector and chaired by former ECtHR judge Dr Giovanni Bonello. One of its terms of reference, was precisely to handle the matter regarding legal assistance during the period of arrest.

The new Labour Government, from the start of the new legislature in 2013, assigned paramount importance to the justice system reform in Malta. One of its very first pronouncements was the establishment of a high-level Commission tasked to reform the justice sector. Several of the topics discussed in the Bonello report were aimed at strengthening the justice system and increasing measures to improve the efficacy of procedures and were subsequently included in the final report of the Bonello Commission.[318] Measure numbered four hundred and forty-nine[319] of the report provides that although the Commission agreed with the right to legal assistance, it believed that such right should nevertheless be reinforced. It suggested that the lawyer should be allowed to be present during the entire police interrogation as soon as the suspect is placed under arrest.

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[316] Lattughi (n 260)13.
[317] The members of this Commission were the following: Judge Emeritus Dr Giovanni Bonello KOM , LL.D. President Judge Emeritus Dr Philip Sciberras LL.D. Member Professor Kevin Aquilina LL.M. (I.M.L.I.) LL.D. (Melit), Ph.D.(Lond) (L.S.E.) Member Dr Ramona Frendo M.Phil. (Crim.) (Cantab.), LL.D. (Melit.).
[318] The Holistic Reform of Justice Commission Final Report (n 100).
[319] ibid Measure 449 p 184.

Detainees, together with their respective lawyer, should be informed *a priori* about the line of questioning that the police intent to pose to them and about the crimes relevant to their interrogation. The Commission held that arrested persons should have the right to ask to speak to their lawyer privately on at least one occasion during the interrogation. It held that every interrogation that is carried out should be recorded by audio-visual means to be used as evidence in court, if the need arises. It further provided that for the right to legal assistance to be suspended, the police should first obtain the consent of the Magistrate on duty. The Commission emphasised that if the suspect chose not to make use of the right to legal assistance, the prosecution could not use this fact against that person. It clarified that in situations where suspects availed themselves of legal assistance and failed to mention a fact that should have been mentioned, guilt is not automatic. Likewise, it opined that once a person has been arrested and detained, a family member ought to be informed about the fact of the arrest and the place where the suspect is being detained. A number of these suggestions now feature in the Criminal Code.

3.4 ACT NO. IV of 2014 – THE RIGHT TO INFORMATION AND LETER OF RIGHTS

Following the introduction of the right to legal assistance in the Criminal Code by Act No. III of 2002, the legislator introduced another novel right relating to the right to information, namely that the Letter of Rights must be given to suspects and/or accused persons prior to the commencement of the interrogation.[320] The right to legal assistance is one of the main rights mentioned in the Letter of Rights. The introduction of this right was welcomed because through the Letter of Rights, there is *prima facie* proof that suspects have been made aware of their rights.

The Police Act[321] provides that:-

> [W]here the Letter of Rights is not available in the appropriate language, the person arrested shall be informed of his rights orally

[320] Criminal Code art 534AB Schedule E.

[321] Act XVIII, came into force on the 12th May 2017 as subsequently amended by Act XIII of 2018 and Act XXVII of 2018, 'An Act to regulate the organization, discipline and duties of the Police Force, and to provide for matters ancillary or consequential thereto.'

> in a language that he understands and the Letter of Rights shall, subsequently and without undue delay, be provided to him in a language that he understands.[322]

The provision of the Police Act has also been reflected in the Criminal Code.[323] It ensures that persons under interrogation are given all the rights they are entitled to, in particular the right to be promptly informed about their procedural rights by the police and the court, as the case may be.

Amongst the rights that ensue from the Letter of Rights [324] is the right to assistance by a lawyer and entitlement to legal aid. Prior to Act III of 2002, the investigating officer was obliged to inform suspects that they had the right to speak to a lawyer or to a legal procurator in confidence, *de viso* or telephonically for one hour, prior to the commencement of the interrogation. Dr Franco Galea described the one hour limitation as 'unreasonable' and pointed out that this might not be sufficient depending on the complexity of the charges.[325] He also noted that the manner in which the right was indicated that there was no obligation for the investigating officer to inform suspects of their right at a later stage but only prior to the commencement of the interrogation.[326] A number of local journalists[327] started to question the introduction of this right, in particular its impact on solving crime. In this regard, Kevin Aquilina explained that he introduction of this right will not necessarily result in a reduced number of convictions, and that for justice to be attained, it is important to protect individuals' fundamental human rights rather than merely seek to secure convictions.[328]

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[322] The Police Act art 65.
[323] Criminal Code art 534AB.
[324] For instance the right to be entitled to free legal advice and the conditions to obtain such advice, the right to be informed of defence of the offences he is suspected or accused of having committed, the right to interpretation and translation and the sacred right to remain silent.
[325] Galea (n 305) 260.
[326] ibid.
[327] Christian Peregin. 'Police prepared for legal assistance law' *Times of Malta* (Malta 17 January 2010) <https://timesofmalta.com/articles/view/police-prepared-for-legal-assistance-law.290130 > accessed March 2020.
[328] Aquilina (n 276).

Local police officers were equally unenthusiastic about the idea of altering the current system to include the possibility of having a lawyer present during interrogation.[329] During this period, the police went on to interview suspects immediately; however, the suspect could still exercise the right to remain silent. The suspect could be assisted by the police to communicate with a lawyer or a legal procurator, but the police could not suggest the name of the lawyer or of the legal procurator to be engaged during such arrest. Indeed, in 2010 the Chamber of Advocates was requested by the Minister for Justice and Home Affairs to submit a list of advocates to the Police Commissioner.[330] It is also noted that whilst the law provided for the right to consult with a lawyer or legal procurator, it failed to provide for the situation where the suspect was indigent and thus could not engage a lawyer of his choice. Articles 570 to Article 573 of the Criminal Code dealing with legal aid did not make any reference to Article 355AT relating to the right to legal assistance at pre-trial stage. Nevertheless, it is submitted that even if such cross-reference existed, the Maltese system, unlike the British system, provides that the demand for legal aid at the State's expense must be made directly to the court. At present, as discussed in the next chapter, there is a system in place where the investigating officer conducting the investigation can directly contact the legal aid lawyer on duty. Furthermore, at the time, no mention was made to the situation where the suspect was a minor or a vulnerable person and whether the lawyer could be present during the interrogation; today this has also been addressed.[331]

Undoubtedly, the presence of a lawyer could have been construed as having a watchdog for illegalities, whether real or perceived, and nonetheless would be beneficial for the smooth administration of justice.[332] As elaborated upon by Dr Franco Galea, the 'presence of a lawyer is not that of legitimising what would otherwise be illegal but to actively

[329] Tonio Azzopardi, 'Right to legal assistance during questioning: Why are we lagging behind?' *Times of Malta* (23 January 2005) <https://timesofmalta.com/Articles/view/right-to-legal-assistance-during-questioning.101259> accessed 5 February 2020.
[330] This was requested by means of a letter by the Minister of Justice and Home Affairs addressed to the President of the Chamber of Advocates dated 15 January 2010.
[331] Criminal Code art 355AUJ introduced by Act LI of 2016.
[332] Willem-Jan Verhoeven, 'Perspectives on Changes in the Right to Legal Assistance Prior to and During Police Interrogation' (2014) ELR no 4 171 <http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/4/ELR-D-14-00017.pdf > accessed January 2019.

protect the interests of his client.' The PACE explains that the only role of a lawyer is to protect and advance the legal rights of the respective client. On occasions this may require the lawyer to give advice which has the effect of the suspect avoiding giving evidence which strengthens a prosecution case. The lawyer may intervene for the purpose of clarification, challenge an improper question to their client or the way it is put, advise their client not to reply to a particular question or if they wish to give their client legal advice.

In conclusion, although it is believed that the introduction of legal assistance as introduced by Act No. III of 2002 was a step in the right direction, the manner of its introduction by the legislator created several problems. There were various limitations which impaired the effectiveness of such right against the ill-treatment of persons held in custody as they were still deprived of the presence of a lawyer whilst being interrogated by the police. Furthermore, because the right to legal assistance could be delayed for a maximum period of thirty-six hours if the person is suspected of a crime (other than a contravention), The CPT 2011 report on Malta extrapolated that for this right to be truly effective, it was imperative that it is made available immediately after arrest when the detained person is most at risk of enduring intimidation or ill-treatment. It went on to state that access to a lawyer must be guaranteed from the very beginning[333] of a person's arrest, as well as during interrogation. This must be guaranteed irrespective of the offence that the suspect has allegedly committed.

3.5 HISTORIC JUDGEMENTS BY THE MALTESE COURTS

Over the years, Maltese Courts were reluctant to grant this fundamental human right.[334] In *Il-Pulizija vs Mark Lombardi*,[335] the court failed to declare as inadmissible a statement

[333] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or
Punishment, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 26 to 30 September 2011* (CPT/Inf (2013) 12 Strasbourg 4 July 2013) <https://rm.coe.int/168069752e> accessed 1 February 2018
[334] José Herrera, 'Fundamentally Confusing' *The Times of Malta* (7 November 2012) <https://www.timesofmalta.com/articles/view/20121107/opinion/Fundamentallyconfusing.444316> accessed 1 February 2018.
[335] FHCC Constitutional Jurisdiction, 9 October 2009.

given in the absence of a lawyer, arguing that the fact that the accused was not assisted by a lawyer during his interrogation did not constitute a breach of his fundamental human rights. It held that the mere fact that there was no lawyer present during interrogation did not imply that the rights of the accused were affected. It also held that if the statement was given voluntarily, it should be deemed part of the evidence.[336] However, later in 2011, after the Salduz case,[337] Maltese Courts seemed to have drawn upon this judgement and changed their approach *vis-à-vis* the right to legal assistance during interrogation. In April of 2011, the Maltese Constitutional Court delivered three landmark judgements on the matter, these being the Lombardi,[338] Privitera[339] and Pullicino[340] cases.

In *Il-Pulizija vs Alvin Privitera,*[341] the Constitutional Court, confirmed that as the suspect was not assisted by a lawyer during his interrogation, his fundamental human rights were infringed. The Court referred to the Salduz Case[342] which had confirmed that the right to a lawyer should be made available as from the first interrogation of the suspect. In this case the applicant was not granted legal assistance because the provisions of Article 355AT of the Criminal Code were not yet in force. The Constitutional Court ruled that, in its judgements, the ECtHR had established that legal assistance during interrogation is a requirement of the right to a fair trial.[343] The Court held that in this case, the only incriminating evidence that the prosecution had against the suspect was the statement he had made during interrogation in the absence of a lawyer. It emphasised the rule that a suspect must be legally assisted from the primary stages of investigation and explained that the fact that the suspect was still a minor should have been an additional factor for not requiring him to make a statement in the absence of a lawyer.

[336] ibid.
[337] *Salduz v. Turkey* (n 116).
[338] *Il-Pulizija vs Mark Lombardi* (Constitutional Court, 12 April 2011).
[339] *Il-Pulizija vs Alvin.Privitera* (Constitutional Court, 11 April 2011).
[340] *Il-Pulizija vs Esron Pullicino* (Constitutional Court, 12 April 2011).
[341] *Il-Pulizija vs Alvin.Privitera* (n 339).
[342] *Salduz v. Turkey* (n 116)
[343] ECHR art 6 (3)(c).

In *Il-Pulizija v. Mark Lombardi,*[344] the Constitutional Court was once again asked to determine whether the refusal of the right to legal assistance during interrogation was tantamount to a breach of the fundamental rights granted to a suspect in terms of Art. 6 (3)(c) of ECHR, which holds that everyone charged with a criminal offence has the right to defend himself either in person or through a lawyer of his or her preference, or if the person does not have the means to pay for such legal assistance, to be granted legal aid for free.'[345] In this case, the Court *obiter* made reference to various ECtHR cases, including *Dayanan v. Turkey,*[346] the ECtHR had stated that a restriction on the suspect's right to a lawyer was tantamount to a violation of Article 6 even in circumstances where the suspect chose to remain silent throughout the interrogation. On appeal, the Constitutional Court reversed the judgment of the FHCC, which had previously held that the absence of a lawyer during interrogation did not amount to a violation of Article 6 of the ECHR. The Constitutional Court concluded that the suspect's right to a fair hearing had been indeed impinged upon in the circumstances.

Il-Pulizija vs Esron Pullicino[347] is the third salient judgment. Here again the prosecution appealed the decision of the FHCC[348] which had decided that releasing a statement in the absence of a lawyer during an interrogation, breached the suspect's fundamental human rights as protected by Article 6 of ECHR. The Court rejected the appeal and confirmed that the absence of a lawyer affected the suspect's right to a fair hearing.

It can be said that the aforementioned judgments affirmed the ECtHR judgments on the importance of the right to legal assistance during interrogation. In conformity with *Imbroscia v. Switzerland,*[349] it was made clear that any statements or confessions made by a suspect in the absence of a lawyer are unsafe since it is difficult to overturn opinions formed on the basis of statements made in the absence of a lawyer.[350] Whereas previously

[344] See (n 335).
[345] ibid.
[346] *Dayanan v. Turkey* App. no 7377/03 (ECtHR, 13th October 2009).
[347] See (n 340).
[348] *Il-Pulizija vs Esron Pullicino* (FHCC Constitutional Jurisdiction, 24 February 2010).
[349] See (n 31).
[350] ibid.

voluntary statements were considered by the Maltese Courts to constitute absolute proof, the Courts began to take a diametrically opposed approach and deemed such statements as proof of the breach of one's fundamental right to a fair hearing. For a considerable time, it seemed that the issue of right to legal assistance during interrogation was settled and that statements obtained in breach of Article 6 (3) ECHR were to be considered as inadmissible evidence.[351]

However, problems arose when the national courts came to consider whether illegally obtained statements were, because of their illegality, to be removed from the acts of the case. It appeared that in the case of the Magistrates' Court, it was settled that this court would not order the removal of the statements from the acts but would ignore the contents of the statements entirely. On the other hand, the Criminal Court took a different view and decided that such statements were to be admitted as evidence and that court would address the jury on the principles established by the Constitutional Court.[352] The author is of the opinion that this was unreasonable as this approach required jurors to read the contents of the statement and then ignore the same.

Notwithstanding the fact that the Constitutional Court initially seemed to adopt a uniform position on the issue, later delivered judgments stating that there were no violations of the rights of the suspect when suspect releases a statement in the absence of his lawyer. In fact, in *Charles Steven Muscat vs Avukat Ġenerali,*[353] the Court overruled its own decisions of the preceding year thereby causing confusion on the issue, creating legal uncertainty, and consequently raising questions as to whether the right to legal assistance was really considered as a fundamental human right in Malta.

The delay in ascertaining the right to legal assistance during the initial stages of investigation certainly produced its consequences. Dr Franco Debono, who pressured the government to enforce this law noted that there was the impending issue that every statement given before February 2010 was taken in violation of the fundamental human

[351] Herrera (n 334).
[352] ibid.
[353] Constitutional Court, 13 July 2018.

rights of suspects and persons held in custody with the consequence that every criminal case prior to that date may be threatened.[354]

3.6 EU DIRECTIVE 2013/48

In 2009 the EU approved the Procedural Rights Roadmap.[355] The Roadmap set out a programme of legislation to establish minimum standards in relation to five strategic procedural rights, with Measure C[356] regarding the right to legal advice and the right to legal aid.[357] Directive 2013/48/EU of the European Parliament and of the Council of 22nd October 2013 lays down minimum rules which concern the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, the right to have a third party informed upon deprivation of liberty, and the right to communicate with third persons and with consular authorities while deprived of liberty. Consequently, it encourages the application of the CFREU, including Articles forty-seven and forty-eight thereof, by building upon the ECHR, as construed by the ECtHR. The said Directive provides criteria on the right of access to a lawyer. Case-law ascertains to attain objectivity of proceedings, a suspect or accused person must be able to benefit from legal services particularly from legal assistance. To this end, the lawyers of suspects and/or accused persons should be able to ascertain, without restraint, the fundamental facets of the defence. The EU's Justice Commissioner at that time, vice-president Viviane Reding, held that this law was a victory for justice and citizens' rights.[358]

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[354] Kurt Sansone, 'The cost of delaying human rights' The Times of Malta (29 May 2011) <https://www.timesofmalta.com/articles/view/20110529/local/The-cost-of-delaying-humanrights.367832> accessed 15 February 2018.

[355] Also known as the Stokholm programme, Council Resolution 2009/C 295/01, Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings OJ C 295/1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF> accessed 10 November 2015.

[356] Upon which the Directive was based.

[357] European Rights Network, 'A Guide to Minimum Standards on the Right of Access to a Lawyer and to Communicate Upon Arrest' (2012) Justicia 4<http://eujusticia.net/images/uploads/pdf/Policy_paper_Access_to_a_Lawyer_December_2012.pdf> accessed 25 October 2018.

[358] European Commission Press Release 'Commission Proposal to guarantee citizens' rights to access a lawyer to become law' (7 October 2013) <http://europa.eu/rapid/press-release_IP-13-921_en.htm> accessed 5 February 2018.

Pursuant to this Directive, Member States are to ascertain that suspects or accused persons have the right to be assisted by a lawyer throughout the investigation and that their lawyer can effectively participate.[359] Naturally, participation is allowed in accordance with the procedural law existing in each Member State as such participation must adhere to the procedures under national law. It is, however, important that any such procedures do not in any way hinder the effective exercise and spirit of the right in question. In those eventualities where the lawyer does participate in the investigation, the participation is to be noted[360] in accordance with the domestic law of the Member State where the interrogation took place.[361] Certainly the extent of the lawyer's legitimate participation differs greatly from one Member State to another.[362]

This novel right was transposed into the Criminal Code by Act No. LI of 2016[363] and it caters for the presence of a lawyer at interrogation stage, whilst still under arrest, during the trial once arraigned and even at other evidence gathering events such as searches, reconstruction of crime scenes, and identification parades.[364] Its extent featured in several cases decided by the ECtHR namely *Sirghi v Romania*[365] and *Simeonovi v Bulgaria*[366] wherein the Strasbourg court highlighted the importance for legal assistance in procedural actions.[367] The Directive is analysed in detail in the next chapter when the author discusses the cardinal right to legal assistance. Its importance lies in the fact that nowadays there

[359] Pia Janning, 'The EU directive on the right of access to a lawyer: A guide for practitioners' (2015) Irish Council for Civil Liberties 11. <http://eujusticia.net/images/uploads/pdf/Right_of_Access_to_a_Lawyer_Practitioners_Guide_ (1).pdf> accessed 7 January 2018.
[360] Directive on the right to access to a lawyer recital 25.
[361] ibid art 3(3)(b).
[362] Anna Ogorodova and Taru Spronken, 'Legal advice in police custody: From Europe to a local police station' (2014) ELR Issue 4 <http://www.erasmuslawreview.nl/tijdschrift/ELR/2014/4/ELR_2210-2671_2014_007_004_003/fullscreen> accessed 15 February 2016.
[363] Act No. LI of 2016. An Act to provide for legal assistance during detention and other rights to arrested persons dated 28 November 2016.
[364] Criminal Code art 355AUA (8)
[365] App no 19181/09 (ECtHR, 24 August 2016) para 44.
[366] App no 21980/04 (ECtHR, 12 May 2017) para 111.
[367] *Ozturk v Turkey* App no 8544/79 (ECtHR, 21 February 1984) paras 48-49; *Oner and Turk v. Turkey* App no 51962/12 (ECtHR, 30 June 2015) para 47.

seems to be more uniformity in the judgements being delivered by the Maltese courts on this matter.

3.7 ACT NO. LI OF 2016 – AN ACT TO PROVIDE FOR LEGAL ASSISTANCE DURING DETENTION AND OTHER RIGHTS TO ARRESTED PERSONS

On the 28th November, 2016, Act No. LI of 2016 was enacted to cater for legal assistance during detention. In fact, it introduced for the first time the suspects' right to be assisted by a lawyer during the entire interrogation by the executive police or other investigating authority. The previously mentioned rule of drawing negative inferences was removed from the codified laws by the same Act No. LI of 2016. The negative inferences rule had been heavily criticised in Malta. Dr Gianella De Marco[368] explained to the *Times of Malta* that the rule disadvantaged the accused, explaining that while the accused believed that they had a right to legal assistance, no sooner did they exercise this right, then the rule of inference came into effect.[369] Dr Josè Herrera also declared that the inference rule may be considered anti-constitutional as it contradicted the fundamental right to a fair hearing.[370]

This 2016 Act certainly brought about a revolution to the existing Criminal Code since it affected the intrinsic rights available to the suspect and arrested person prior to interrogation. Reference to this Act is made throughout this study. The Act transposed into national law the provisions of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and

[368] An imminent Maltese criminal lawyer and litigator. She is also a senior partner within the firm Guido De Marco and Associates.
[369] Waylon Johnston, 'Criminal defence lawyers complain of new legal 'con'' *Times of Malta* (17 February 2010) <https://www.timesofmalta.com/articles/view/20100217/local/criminal-defence-lawyerscomplain- of-new-legal-con.294434> accessed 15 February 2018.
[370] Matthew Xuereb, 'Suspects are 'better off' not consulting their lawyer' *Times of Malta* (14 February 2010) <https://www.timesofmalta.com/articles/view/20100214/local/suspects-are-better-offnot-consulting-their-lawyer.294057> accessed 15 February 2018.

with consular authorities while deprived of liberty published in the Official Journal of the EU.[371]

The author opines that, besides the removal of the drawing of negative inferences, one of the most important new elements of the law is where possible, questioning must be recorded by audio-visual means. Article 355AUA (8)(d) provides that a copy of the recording is to be given to the suspect at the end of the interrogation and such evidence is admissible. Therefore, if the suspect or accused person alleges that the recording has been tampered with, he has the right to prove this in their defence. Undoubtedly, this provision benefits both the suspect and the prosecution. Recording the interrogation also protects the suspect from the use of coercive tactics which may lead to false confessions. Additionally, the police may pay more attention to the interrogation as the need for hand-written notes is diminished. Furthermore, the police may later revisit the recordings and come across certain details which could have initially been overlooked.

Subsequent to the enactment of this law dealing with the right to legal assistance, the police sought direction on the implementation this right as they needed to regulate and organise the way in which investigations were to be carried out, bearing in mind that this was the first time that the police were going to be 'monitored by a lawyer, during their interrogations. Guidance was vital to ensure that the lawyer assisting the suspect would be aware of the procedures to be followed and the extent of the efficacy of such right and whether its applicability was being restricted.

3.8 LN 102/2017 – THE INTERVIEW OF SUSPECTS AND ACCUSED PERSONS PROCEDURE REGULATIONS 2017

The Hon Minister of Justice Dr Owen Bonnici in exercise of the powers conferred by Article 355AUA (8)(c) of the Criminal Code, enacted regulations regarding the way suspects' and accused persons interviews should be carried out. The regulations enacted subsequent to the transposition of the EU Directive were intended to bring Malta in line

[371] OJ L294/1, Volume 56 6 November 2013 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048> accessed November 2019.

with the other Member States with respect to conducting interviews of suspects and accused persons. . It appears from an examination of this Legal Notice that focus was placed on the manner in which suspects and accused persons were being interviewed in the United Kingdom and thus the PACE Act provided guidance during the drafting of the legal notice. Some provisions of this legal notice, in fact, are a mirror image of the PACE Act.

The LN highlights the fact that a police officer may not do or say anything to discourage a suspect or accused person who is entitled to legal assistance from exercising such right. It also provides that when a suspect is to be legally assisted by a lawyer, no interviews can commence before a lawyer is present unless there are authorised delays for the presence of a lawyer. To this end, the LN provides a time frame of two hours within which the lawyer who has accepted the brief must make himself /herself available. Should the lawyer fail to be present within this timeframe such delay would be deemed an unreasonable and it would be the duty of the legal aid lawyer to attend instead to give such assistance so that the interview may commence. This begs the question as to whether it was necessary to place a time-limit for the lawyer's attendance and to replace him/her by a legal aid lawyer, especially since the suspect is entitled to choose the lawyer. Likewise, one asks whether the chosen lawyer would lose the chance of assisting the suspect if he/she is in court assisting some accused in a trial, if and the two-hour time frame elapses. Similarly, if the legal aid lawyer steps in to assist the suspect and the advice differs from that given by his/her chosen lawyer, this could give rise to an 'ineffective' service. In view of the ascertains of the ECtHR that rights should not be 'theoretical or illusionary but practical and effective.'[372] This provision certainly needs seeing too since it may create more uncertainties.

Rather strangely, the LN contains a provision which indicates that prior to the initiation of an interview the suspect/accused person has the right to meet in private or to communicate telephonically with the lawyer who took up his/her brief for a maximum

[372] *Plonkla v. Poland* App. no 20310/02 (ECtHR, 30 June 2009).

period of one hour, unless a police officer not below the rank of Superintendent allows a longer period of time for such consultation. Directive 2013/48 provides that the lawyer can participate effectively in the interrogation and this LN seems to have clarified the definition of '*participation'* by stating that during the interview the lawyer has the right to question the suspect and/or the accused person subject to the provisions of the Criminal Code only once the prosecution has concluded its line of questioning and that any replies and any observations made will be recorded by the interviewer in writing or by audio-visual means. Therefore, it appears that lawyers have an active role in this investigation if they can intervene and put forward questions to the accused[373] although the Criminal Code is not entirely clear on this point.

The Criminal Code is silent as to what happens in instances where the lawyer fails to compose himself well by, for example, answering himself the questions put forward to the suspect or trying to stop the interview from taking place. The LN provides for this by stating in that the interviewer would have to solicit the lawyer to excuse himself or be removed from the room where the interview is taking place, if need be, by force.[374] In this situation the interview is suspended and another lawyer or the Duty Advocate for Legal Aid shall be called into replace the said lawyer. The interview shall then continue in the presence of the other lawyer or of the Duty Advocate for Legal Aid. However, this can only take place with the consent of a police officer not below the rank of Superintendent or of the duty Magistrate.

The Magistrate shall then carry out an investigation and, should he/she reach the conclusion that there was misbehaviour on the part of the lawyer, the incident will be reported to the Committee for Advocates and Legal Procurators of the Commission for the Administration for Justice for any disciplinary action it might wish to take against the said lawyer. The author feels that such an eventuality could possibly prejudice the police's investigation as the same would be suspended whilst the forty-eight-hour time-limit for arrest would still be running. This could be of a detriment to the police as well as to the

[373] LN 102 of 2017, Interview of Suspects and Accused Persons (Procedure) Regulations, 2017 (LN 102/2017) s 5.
[374] LN 102/2017 s 6(2).

suspect/accused who would perhaps not have been given the opportunity to talk about a potential *alibi.* Thus, the disciplinary measures mentioned in these regulations are not sufficient in this instance.

These regulations also cater for the scenario where there is an irregularity in the interview, such as misconduct by the interviewer. In this case, the lawyer would need to submit a report in writing to the duty Magistrate within forty-eight hours from the conclusion of the interview or from when he/she was asked or decided to leave the interview. Undoubtedly the LN has at least clarified some of the questions that were raised and will be examined further in the subsequent chapter together with the transposition of the Directive.

These regulations were destined to outline each step that must be followed when engaging a lawyer to assist the suspect and to explain the participation or otherwise of legal counsel. Undoubtedly, such regulations do not always help to elucidate the framework within which the lawyer is to perform whilst an interrogation is taking place since some of the provisions of this legal notice may at times be in direct conflict with Directive 2013/48 dealing with the right to legal assistance. The fact that this legal notice was based on the PACE Act could be interpreted as dangerous since in Malta we do not apply the same rules of inference adopted in the United Kingdom and therefore the status quo of a suspect prior to interrogation in Malta is different to that a suspect facing an investigation in the United Kingdom. Therefore, this study shows that this legal notice, which should be considered of paramount importance, needs to be reassessed to bring investigations in line with the Directive for the purpose of harmonisation of laws in Member States.

3.9 MALTA'S POLICE ACT

The Police Act[375] was re-enacted to control the organization, discipline, and duties of the Police Force and to regulate the way interrogations must take place. This piece of legislation was of paramount importance as it provided guidelines to be followed during police interrogations after the enactment of the EU Directive 2013/48. The Police Force also issued a Code of Practice under the Police Act[376] to regulate the practice that must be followed when questioning arrested persons.

This Code of Practice was designed to be available for implementation in all police stations and in all venues where interrogations take place, thus making it accessible to all members of the public.[377] The purpose of an interrogation is to verify whether the reasonable suspicion in the person being questioned is legal or not and, if legal, to obtain proof and evidence both in favour and against the person interrogated for the purpose of an eventual arraignment in Court.[378] This Code enhanced the right to legal assistance since it ascertained and outlined the steps that the police should take prior to the commencement of the interrogation of a suspect. For the first time the question of '*vulnerability*' was addressed, in that the police were given instructions on how to interrogate persons belonging to this class.[379] Precautions should be taken to ensure that such persons understand the situation and that their statement is not obtained because of any unnecessary inference of the interrogating officer.[380] Evidently, this Code intended to improve the image of the police force by avoiding accusations of mistreatment by the police during the time of arrest and the reduction of cases where statements are questioned before the courts. Legal advice at pre-trial stage, besides being important for defending the accused, is also considered to be a procedural safeguard to ascertain that the evidence collated can be relied upon.[381]

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[375] The Police Act was re-enacted by Act XVIII of 2017 and subsequently amended by Act XIII of 2018 and Act XXXII of 2018. An Act to regulate the organization, discipline and duties of the Police Force, and to provide for matters ancillary or consequential thereto.
[376] The Police Act art 38 (1) The Minister may by regulations issue codes of practice in connection with … (b) 'the detention, treatment, questioning and identification of persons by police officers. This can be found listed as the Third schedule and entitled the Code of Practice for Interrogation of Arrested Persons. (Code of Practice for Interrogation of Arrested Persons).
[377] Code of Practice for Interrogation of Arrested Persons, General Rules.
[378] ibid, 1.
[379] ibid,17(c).
[380] ibid.
[381] Anna Ogorodova and Taru Spronken (n 362).

However, once again, it is to be noted that the non-observance of this Code of Practice does not nullify a confession unless such non-observance is tantamount to the involuntariness of the statement. This is due to the fact that the legislator has not removed Article 658 of the Criminal Code, which states that the prosecution must demonstrate to the satisfaction of the court that the statement released by a suspect is released 'voluntarily' and 'without any threats, promises or favours.'[382] Subsequent to the introduction of the above mentioned Code of Police Practice, Maltese law created confusion on this subject since it provided no *strictu juris* guidelines and left the matter to be assessed solely in the light of Article 658 of the Criminal Code regarding the caution to be given to the accused.

3.10 A BRIEF SUMMARY OF THE HISTORICAL ACCOUNT

The chapter started off with a discussion relating to the period prior to the introduction of the right to legal assistance and how it was originally introduced in 2002 with a time-limit of one hour prior to the start of an interrogation. It also delved into the recommendations made in 2013 by the Commission for the Holistic Review of the Justice Sector (the Bonello Commission); the changes brought about by Act No IV of 2014 which introduced the right to information and letter of rights; the new EU Directive on the subject, Act LI of 2016 which transposed the new EU Directive; the new Police Act and finally LN 102 of 2017 regulating interrogations.

This chapter placed the right to legal assistance in its historical perspective by tracing the development of this right in a very short time span. It traced all the important developments which have taken place in Maltese criminal law in less than a decade and how Maltese law has, progressively developed and indeed, been turned on its head, from a regime which practically gave minimal to nil rights to suspects in detention to a very elaborate legal framework protecting the interests of such persons. This chapter is of

[382] Criminal Code art 658.

paramount importance for the purpose of this thesis since it outlines in a concise manner the development of Maltese criminal law with reference to one of the cardinal rights discussed in this thesis, namely the right to legal assistance.

3.11 CONCLUDING REMARKS

Today, suspects in Malta are granted the right to legal assistance before and more importantly during interrogations. For years, this right was almost non-existent or fundamentally limited, and authorities turned a blind eye to the fact that the fundamental human rights of their subjects were not being fully protected. As a result of continuous pressure from lawyers, the CPT, and ECtHR itself, Maltese law nowadays mirrors the provisions of the ECHR and Directive 2013/48/EU.

To date, however, Maltese courts have pronounced themselves differently when interpreting the right to legal assistance. On the 27th January 2021, the Court of Criminal Appeal (CCA), in the judgments of *Ir-Repubblika ta' Malta vs Rosario Militello* and *Ir-Repubblika ta' Malta vs Hassan Ali Mohammed Abdel Raouf Josephine Wadi*, concluded that it could not expunge a statement of a suspect solely on the basis that it could potentially infringe his right to a fair hearing because he was not assisted by a lawyer during the interrogation. On the other hand, on the same day, the Constitutional Court, in the judgment of *Morgan Onuorah v. Avukat Generali*, emphasised that the lack of legal assistance during an interrogation was tantamount to a procedural defect in the proceedings and hence the criminal courts should disregard any statement provided by suspects in the absence of their lawyer. This shows that, to date, it is not clear whether a breach of the right to a fair hearing would subsist when a suspect is not accompanied by a lawyer during interrogation. Although Maltese courts are not bound by the doctrine of precedent, they apply the principle of *auctoritas rerum similiter judicatarum*[383] to establish legal certainty. Unfortunately, this divergence in judgments is leading to legal uncertainty with respect to the interpretation of the right to legal assistance.

[383] Translation: the authority of things are always judged in the same manner.

Having outlined the road taken to introduce the cardinal right to legal assistance, the thesis moves on to discuss the newly acquired right to legal assistance in particular the exercise thereof by suspects and/or accused persons and whether the suspect and/or accused person also has the right to waive the right to legal assistance. The next chapter discusses in depth the pros and cons and subsequently highlights its deficiencies. However novel, this situation has certainly created a new set of questions regarding the way interrogations are taking place today, many of which are addressed in domestic case-law that the study refers to.

CHAPTER FOUR - THE RIGHT TO LEGAL ASSISTANCE

4. INTRODUCTION

The right to legal assistance in criminal proceedings is enshrined as a fundamental right and as a basic element of a fair trial in most European countries and international

instruments. Article 6 (3)(c) of the ECHR stipulates that every individual charged with a crime has the right to his/her defence.

The same wording is found in Article 14(3) of the International Covenant on Civil and Political Rights (ICCPR),[384] which gives to the suspect and accused person the right not to be pressured to testify or to confess guilt. Article 47 of the CFREU, which entered into force with the Lisbon Treaty, states that 'everyone shall have the possibility of being advised, defended and represented'. Furthermore, Article 48 (2) of the same Charter guarantees the respect for the rights of the defence. Similarly, the Basic Principles on the Role of Lawyers implemented by the United Nations (UN) provide that everyone has the right to the legal assistance of their choice throughout all stages of criminal proceedings.[385] Unquestionably, it is the right to legal assistance that guarantees the effective exercise of all other procedural rights in criminal proceedings.[386] This is the reason why the author has chosen to examine this right in detail prior to moving on to examine the other three chosen rights.

Andrea Anastasi held that EU Directive 2013/48 stipulates that a suspect's right to legal assistance commences at the beginning of the investigation to ensure that the latter's right is safeguarded, and that no information is provided under duress or coercion.[387]

Suspects are safeguarded from any potential breach which may affect the proceedings, and which may give rise to an unfair trial if no legal assistance is provided. The first hours in police custody are crucial for those who are being investigated for a criminal offence. Every decision will determine the accused's ability to effectively defend himself; the length of his detention; whether he will be arraigned in court and other matters relating to his defence at a later stage. During this time, suspects may lack the ability to make the

[384] UNGA, ICCPR, 16 December 1966, UN, Treaty Series, vol. 999, p. 171.
[385] UN 'Basic Principles on the Role of Lawyers, Eight United Nations Congress on the Prevention on Crime and the Treatment of Offenders, Havana (27thAugust to 7th September 1990) UN Doc A/CONF.144/28/Rev.1 at 118 (1990) {1(UN Basic Principles on the Role of Lawyers).
[386] Ilias Anagnostopoulos, Assoc. Professor, School of Law, National University of Athens; Chair, Criminal Law Committee, Council of Bars and Law Societies of Europe (CCBE). The Article is based on a speech at the CCBE Human Rights Seminar in Athens, on 16 May 2013.
[387] Anastasi (n 114) 10.

right decision. Prompt access to legal advice and assistance is the key to guaranteeing a fair trial and the rule of law.[388] Early intervention by lawyers helps to ensure that rights are respected, improves the efficiency and fairness of the criminal justice system and represents an important safeguard against torture and other forms of ill-treatment.[389]

Advocates of the right to legal assistance, prior to and during interrogation, argue that access to a legal advisor is necessary to protect the autonomous legal position of suspects. In addition, they also argue that lawyers can protect suspects against unlawful use of police pressure.[390] They recommend that early access to legal assistance, especially during investigations, may harm the truth finding process and reduce the effectiveness of police interrogation.[391]

Anna Ogorodova and Taru Spronken identified the practical factors that influenced the implementation of the EU Directive.[392] Founded on their legal (normative) analysis and empirical research, they concentrated on five aspects of the right to legal assistance, namely:

i. The conditions for waiver of the right

ii. The right of timely access to a lawyer

iii. The right to have a lawyer present at suspect interrogations

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[388] Ed Cape et al (n 19) 41-55.
[389]UNCHR, Association for the Prevention of Torture and Asia Pacific Forum of National Human Rights Institutions, Preventing Torture: An Operational Guide for National Human Rights Institutions (May 2010).HR/PUB/10/1.
[390] WJ. Verhoeven and L. Stevens. 'The lawyer in the Dutch interrogation room: Influence on police and suspect'
(2012) 69 Vrijie Universiteit Amsterdam <https://research.vu.nl/en/publications/the-lawyer-in-the-dutch-interrogation-room-influence-on-police-an> accessed Janauary 2021.
[391] M. Bockstaele, 'Verandering in verhoor- en onderzoekstechnieken ingevolge de "Salduzwet"' [Changing interrogation and investigation techniques in accordance with the "Salduzwet"], in P. Ponsaers, J. Terpstra, C. de Poot, M. Bockstaele & L. Gunther Moor (eds.), *Vernieuwing in de opsporing: een terreinverkenning [Innovation in criminal investigation: an exploration]* (2013) 197. D. Dixon, 'Common sense, legal advice and the right of silence', *Public Law* 233 (1991).
[392]Ogorodova and Spronken (n 362).

iv. The right to effective participation of a lawyer during interrogations of a suspect; and

v. The right to a lawyer of one's choice.

From their comparative analysis of four European jurisdictions (France, the Netherlands, England and Wales, and Scotland) they concluded that further measures are still necessary to ensure proper implementation of the EU Directive in local police stations. This is also the case in Malta as will be demonstrated in this chapter.

Willemn-Jan Verhoeven opined that 'the transposition of the EU Directive required the development of programs, policies, measures and training of both criminal justice personnel and legal professionals.'[393] In fact, this is an on-going process, and it is in this respect that the right to legal assistance still needs fine tuning in its applicability. This notwithstanding, the Directive was hailed by lawyers and human rights organizations as an important step towards the creation of a European area of liberty and justice.[394]

Act LI of 2016 introduced a new chapter[395] in the Maltese Criminal Code. Unlike the amendment introduced previously with Act no. III of 2002, the new chapter provides no time limitation for legal assistance. This was welcomed by the legal profession, as it established that arrested persons are to be given the right to legal assistance the moment they are deprived of their liberty. The right to legal assistance must subsist throughout the interrogation if needed. The promulgation of Act LI of 2016 led to the enactment of Article 355AUA in the Criminal Code. Prior to this, persons due for questioning were still protected by means of Article 6 (3) of the Convention as a result of case-law delivered by

[393] W.J Verhoeven 'Perspectives on Changes in the Right to Legal Assistance Prior to and During Police Interrogation' (2014) Erasmus Law Review, <http://www.erasmuslawreview.nl/current_issue/Perspectives_on_Changes_in_the_Right_to_Legal_Assistance_Prior_to_and_During_Police_Interrogation> accessed December 2020.
[394] See, for example, the Law Society of England and Wales Response of 13.7.2011 to the Ministry of Justice Discussion Paper on the EU Draft Directive on the right of access to a lawyer in criminal proceedings, available at www.lawsociety.org.uk.
[395] Sub Title IX entitled 'Right to Legal Assistance and other rights during detention' of the Criminal Code of Malta, namely art 355AT.

the ECtHR.[396] However, although, Malta was a signatory to the Convention, suspects were still not entitled to the legal assistance prior to their interrogation. Despite having EU laws available for such protection since 1987, it was only after this right was included in Malta's Criminal Code that it was tested. The lack of legal assistance was never challenged in Malta solely on the basis of the Convention. All applications filed after the promulgation of this law namely, Act LI of 2016, focus on the absence of such right during pre-trial proceedings and are based on a breach of Malta's Constitution, the ECHR, the Criminal Code and to the EU Directive 2013/48 as transposed.

A few questions need to be addressed to determine whether the right to legal assistance is merely an ineffective, abstract right or whether it is a successful and practical right.

The key questions that arise from domestic case law are the following:

i. Do suspects and/or accused persons enjoy the same right to legal assistance as citizens in other Member States? This is crucial because although the EU Directive should apply to all Member States, its implementation in the domestic law of each Member State may be different;

ii. Is the suspect and/or accused person in a better position now that the right to legal assistance has been codified into national law? This is very relevant to Malta because prior to this right being codified, a suspect had no such right during pre-trial proceedings, despite the fact that Malta is a member of the EU and a signatory to the CFREU and ECHR;

iii. What is the dominant position being taken by the Maltese Courts when faced with a request from the defence to discard the statement of an accused, pending proceedings, on the basis that

[396] Tonio Azzopardi (n 329).

such statement was taken without the suspect having been given the right to legal assistance?

iv. Alternatively, what would the position taken by the courts be if a person has already been convicted of a crime solely on the basis of a self-incriminating statement given by the accused in the absence of a lawyer? Would such person be able to institute fresh proceedings before the Courts claiming that he had had an unfair trial on the basis of Section 6 of the Convention?

v. Similarly, do the Courts deal with statements released by 'vulnerable' persons and hardened criminals in the same way?

With these questions in mind, this thesis will explore the significance of the right to legal assistance and the way it is being construed. Although, emphasis will be placed on Maltese jurisprudence, reference will also be made to the case law of the ECtHR.

4.1 CHAPTER OVERVIEW

This chapter will focus on the way the right to legal assistance is developing. It will also highlight the different interpretations that are being given to this cardinal right. In the national scenario, this right has opened a Pandora's Box, with numerous interpretations being given to its applicability. Different opinions on this right will be discussed, primarily whether this right should be considered as a fundamental human right in criminal proceedings and whether it should be given to all suspects. The chapter will examine whether this right can only be exercised in on-going investigations and proceedings, or whether it can be applied retrospectively to cases which are *res judicata*. The Directive is silent on this point. The author will also focus on whether there can be any derogations or waivers from such right. Privileged communication between suspects and lawyers will also be considered. The author will also delve into the issue as to whether this right should extend to suspects and/or accused persons who are subject to minor

offences.

4.2 THE RIGHT TO LEGAL ASSISTANCE

The right to legal assistance in the EU Directive 2013/48, is indistinguishable from the same right provided for in the ECHR.[397] This provides that a suspect should be entitled to this right as soon as practicable. This should also be in line with the first principle adopted by the 8th UN Congress on the Prevention of Crime.[398] For this right to be effective, timing is of essence. In fact, the ECtHR held that prejudice suffered by the accused as a result of the absence of legal assistance during interrogations, cannot be reversed and thus, emphasised the importance of such right being given prior to interrogation.[399] In the *Salduz* case, the court highlighted the importance of early access to a lawyer, particularly when facing serious charges, to ascertain that the right to a fair trial remains practical and effective. Article 6 (1) states that access to a lawyer should be provided immediately upon the first interrogation of the suspect by the police.

The ECtHR issued several decisions depicting situations as to when a suspect should be given this right to legal assistance. These include when:

i. A search is carried out in the home of a suspect; [400]

ii. The person is informed by the police of the charges that are being issued against him;[401]

iii. The person is under arrest;[402]

[397] ECHR art 6 (3).
[398] UN Basic Principles on the Role of Lawyers (n 385).
[399] *Salduz v. Turkey* (n 116).
[400] *Ommer v. Germany* App no 26073/03 (ECtHR, 13 November 2008) para 69 judgment no 2.
[401] *Ommer v. Germany* App no 10597/03 (ECtHR, 13 November 2008) para 54 judgment no.1.
[402] *Wemhoff. v. Germany* App no 2122/64 (ECtHR, 27 June 1968) para 19; *Cevizovic v Germany* App 49746/99 (ECtHR, 29 October 2004) para 59.

iv. The prosecution asks for the immunity of the suspect to be lifted [403] or

v. There exists an audit report carried out by the tax authorities encompassing an obligation for the person to pay tax surcharges.[404]

The above-mentioned text is slightly 'softer' than that of the Commission Proposal, which provided for the exercise of this right 'as soon as possible'. However, it respects the standards set by the ECtHR in *Murray, Salduz* and *Dayanan*.[405]

Tonio Azzopardi[406] asserts that the *rationale* behind this right to legal assistance is very clear. A suspect who is being interrogated in the presence of a lawyer, is in a better off position, because his/her chances of being informed of his rights are greater than when being unassisted; because a lawyer will undoubtedly see that the suspect's rights are being respected; because a lawyer will guide the suspect as to whether he should cooperate with the police or exercise the right to silence granted to him by the Constitution.[407]

The ECtHR[408] held that a suspect must be given access to legal assistance from the moment there is a 'criminal charge' against him, within the autonomous meaning of the Convention. It further emphasised that a person obtains the status of a 'suspect', and thus is entitled to the protection of the Convention, not when he is formally notified, but when the national authorities have sound reasons to suspect that the individual was involved in the offence being investigated.[409] To this effect, the ECtHR held that all services associated with the right to legal assistance should be provided to ensure the fairness of

[403] *Frau v. Italy* App no 12147/86 (ECtHR, 19 February 1991) para 15.
[404] *Janosevic v. Sweden* App no 34619/97 (ECtHR, 21 May 2003) para 92.
[405] ibid.
[406] A Maltese litigation lawyer specialising in human rights law and who has also represented clients before the ECtHR.
[407] Tonio Azzopardi (n 329).
[408] *Simonov v. Bulgaria*. App no 21980/04 (ECtHR, 12 May 2017); *Ibrahim and others v. UK* App no 50541/08,50571/08,50573/08 and 40351/09 (ECtHR, 13 September 2016).
[409] Guide on Article 6 of the ECHR (n 44).

proceedings. The fundamental aspects of a person's defence must be secured, and this also includes: the 'discussion of the case; organization of the defence collection of evidence favourable to the accused; preparation for questioning; support of an accused in distress and checking of the conditions of detention.'[410]

Reference can also be made to the Working Documents of the European Commission which predates the Directive. It was held that the right to legal assistance, as identified, should be offered before the first interrogation. In fact, the EU Directive 2013/48, under the sub-heading 'Temporal scope' states 'that access to a lawyer must be granted ahead of the first police interrogation,' which is a reality in at least three jurisdictions (Luxembourg, Malta and Denmark). The ECtHR further observed that in the absence of compelling reasons that do not prejudice the proceedings, the lack of legal assistance during an interrogation would constitute a restriction of the accused's defence.[411]

The ECtHR further states in its judgments[412] that in those jurisdictions where proceedings can take place in the absence of the accused, the latter is still entitled to the right to legal assistance, even though the accused is not physically present in court.[413] Moreover, the ECtHR provides that for the right to legal assistance to be effective, it should not be dependent on unwarranted formalistic conditions.[414]

Suspects may also be assisted by a lawyer of their choice the moment they are suspected of having committed an offence and face interrogation. This was confirmed in *Powell v*

[410] *Dayanan v. Turkey* (n 346).
[411] *Panovits v. Cyprus.* App no 4268/04 (ECtHR, 11th March, 2009).
[412] *Geyseghem v. Belgium* App no 26103/95 (ECtHR, 21 January 1999) para 34; *Campbell and Fell v. UK* App no 7819/77; 7878/77 (ECtHR, 28 June 1984) para 99; *Poitimol v. France* App no 14032/88 (ECtHR, 23 November 1993) para 34; *Pelladoah v. the Netherlands* App no 16737/90 (ECtHR, 22 September 1994) para 40; *Krombach v. France* App no 29731/96 (ECtHR, 13 February 2001) para 89; *Galstayan v. Armenia.* App no 25465/15 (ECtHR, 12 February 2019) para 89.
[413] The right to legal representation is not dependent upon the accused's presence - *Geyseghem v. Belgium* (n 412) § 34; *Campbell and Fell v. UK* (n 412) § 99; *Poitrimol v. France* (n 412) § 34.
[414] Human rights and market access Direitos humanos e acesso ao Mercado. Revista de Direito Interntcional .15(2) October 2018 <file:///C:/Users/Dell/Desktop/MarketaccesspublicadoRDI5277-23544-2-PB.pdf> accessed 16 December 2020.

Alabama [415] where the Supreme Court of The United States held that a defendant should be afforded a fair opportunity to secure counsel of his own choice. However, the right to choose one's lawyer is not absolute,[416] and is based on two considerations, namely, the defendant's right to the effective assistance of counsel and judicial concern with ensuring the effective administration of justice.[417]

4.3 THE RIGHT TO LEGAL ASSISTANCE IN MALTA

The author will examine whether Malta is implementing the right to legal assistance correctly and in line with decisions of the ECtHR. At present, once the investigating officer informs suspects that they are being investigated on suspicion of having committed a criminal offence,[418] they are entitled to legal assistance.[419] This applies prior to interrogation and regardless as to whether suspects are deprived of their liberty or not.[420] The Court of Magistrates as a Court of Criminal Judicature (CMCCJ),[421] in one of its decrees, held that the definition of 'suspect' under Article 355AT (2)(a) should not only include detained suspected persons, but also suspected persons who voluntarily report to the police station for questioning. In the above-mentioned decree, the Court stated that it is its duty to give effect to the provisions of the Directive by means of the EC doctrine of indirect effect (also known as the obligation of harmonious interpretation). The Court must always consider the EU Directive when interpreting domestic law. Therefore, although, national law dictates that the right to legal assistance is to be afforded to suspects

[415] *Powell v. Alabama*, 287 U.S. 45 (1932 7 November 1932). This was a landmark United States Supreme Court decision in which the Court reversed the convictions of nine young black men for allegedly raping two white women on a freight train near Scottsboro, Alabama. The majority of the Court reasoned that the right to retain and be represented by a lawyer was fundamental to a fair trial.<https://supreme.justia.com/cases/federal/us/287/45/> accessed December 2020.
[416] Karen A. Covy. 'Right to Counsel of One's Choice: Joint Representation of Criminal Defendants' (1983) Notre Dame Law Review (Vol.58) 793<https://scholarship.law.nd.edu/ndlr/vol58/iss4/> accessed December 2020.
[417] The Supreme Court recognised the need for judicial balancing of interests where the defendant exercises his right to choose counsel solely as a dilatory tactic. *Holloway v. Arkansas*, 435 U.S. 475 (1978).
[418] Criminal Code art 355AU (1).
[419] Criminal Code art 534A.
[420] Criminal Code art 355AT (4) 'For the purpose of this sub/title, the expression 'lawyer' means an advocate or a legal procurator who is authorised by law to exercise that respective profession in terms of law.'
[421] *The Police vs. Nicolae Materinca* (CMCCJ, 13 January 2020).

who are detained and/or under arrest, the applicability of this right has been extended to all individuals from the moment they become a suspect, irrespective whether under arrest, detained or not. This means that Maltese law gives more protection to a 'suspect' than the ECHR (which only provides for this right to be given to a person who is denied his liberty).

The right to legal assistance does not mean that the suspect is obliged to answer all the questions asked by the investigating officer. It is of paramount importance that the suspect is given his statutory '*caution*': 'You do not have to say anything unless you wish to do so, but what you say may be given in evidence.'[422]

A pertinent matter to examine is whether that which is said casually by a suspect to a person in authority during interrogation would be tantamount to a statement. Could such evidence be used against the suspect in all cases? Is whatever the suspect states to a person in authority tantamount to a statement? Could the defence ask for such information to be disregarded, especially if uttered in the absence of a lawyer and prior to legal assistance having been given? These questions were addressed in *Ir-Repubblika ta' Malta vs. Alfred Camilleri,*[423] where the Court held that the statement of an accused person given in the absence of his lawyer should be withdrawn from the acts of the proceedings to guarantee a fair trial. Judge Ellul insisted that in this manner, the Court will ensure that no reference would be made to such a statement. The latter went on to state that this approach should likewise be applicable to the evidence given by the prosecution's witnesses to report on what was said in their presence by the accused prior to him being given his right to legal assistance.[424]

However, although the reasoning in this judgment made a lot of sense, this position was reversed in several other judgments that followed.[425] Nevertheless, these judgments were delivered prior to the transposition of the EU Directive 2013/48 and also prior to the

[422] Code of Practice for Interrogation of Arrested Persons, Caution, 4.
[423] FHCC Constitutional Jurisdiction, 16 January, 2012.
[424] ibid.
[425] ibid.

introduction of the right to legal assistance in the Criminal Code. Nowadays, interviews can be recorded by audio-visual means[426] and anything which is not recorded is inadmissible. Although the situation is seemingly clearer, domestic courts are still, however, inconsistent in their decisions in this regard.

4.4 INCONSISTENT JUDGMENTS ON THE RIGHT TO LEGAL ASSISTANCE DELIVERED BY THE COURTS OF MALTA

It is evident that although the right to legal assistance is a statutory right (which on paper may appear to be exhaustive), in practice its application has encountered a number of hurdles, possibly due to its staggered implementation.

Prior to the transposition of the Directive, the position adopted in Malta with respect to the right to legal assistance could be categorised into two categories:

i. Statements released prior to the 10th of February 2010, where the suspect/accused was not entitled to any form of legal assistance during interrogation according to the domestic law of Malta; and

ii. Statements released on and after the 10th of February 2010 but before 28th of November 2016 where the suspect/accused was only allowed to speak to a lawyer at the beginning of an interrogation for a maximum period of one hour and subject to the rule of inference.

The application of the right to legal advice at the initial stages of an interrogation has been tested in several instances. The courts gave different interpretations in this regard, taking into consideration the period of time when such statements were made, and also the type of persons releasing such statements, particularly distinguishing between 'vulnerable'

[426] Criminal Code art 355AUA (8)(d).

persons or not. The recent judgments of *Farrugia v. Malta*[427] and *Beuze v. Belgium,*[428] have established that, with respect to admissibility of statements as evidence, the question whether a person is 'vulnerable' or otherwise, should no longer be a factor.

4.4.1 Statements released by a suspect prior to 10th February 2010

From 2002 up to 2010, suspects and accused persons were not entitled to any legal assistance under the Criminal Code or any other statutory law. The Maltese Constitutional Courts limited themselves to dealing with the breach *per se* and although specifically requested to provide a remedy for such breaches being asked, did not provide to do so. Hence, this issue was left to be dealt with by the Criminal Code. This is an unusual way of dealing with the complaint since *ab initio,* the Criminal Code, unlike the Constitutional Court, is impeded from giving a remedy for any breaches affecting human rights.

The right under Article 6 of the Convention was challenged in various cases before the Constitutional Court. In the judgment *il-Pulizija vs. Esron Pullicino,*[429] the defence questioned the admissibility of the accused's statement released on 26th February, 2006, on the premise that it was given without prior notice to his right to be assisted by a lawyer. In *Salduz v. Turkey*,[430] the accused was a minor, however, whilst Turkish law already provided for this right to legal assistance during interrogation, in Malta such right did not exist in practice, despite its inclusion in the statutory law books which proved to be unenforceable. Pullicino felt aggrieved that he was not given the right to legal assistance prior to his interrogation, and also claimed that as a minor he should have been considered as a 'vulnerable' person. The Constitutional Court referred to Article 6 of the Convention and to judgments of the ECtHR which held that the right to legal assistance is not an absolute right. The judgments of the ECtHR established that although in certain circumstances the right cannot be granted, the right to legal assistance is the rule and not

[427] App no. 63041/13 (ECtHR 4 June 2019).
[428] App no 71409/10 (ECtHR, 9 November 2018).
[429] Constitutional Court, 12 April 2011.
[430] See (n 116).

the exception. The Court referred to the judgments of the ECtHR [431] and whilst affirming the rule that a suspect and/or accused person should always be given the right to legal assistance, it continued to state that since the accused was still a minor, the fact that he was not assisted by a lawyer amounted to a further aggravation.

Following the decision of the Constitutional Court, the Pullicino case was remitted to the CMCCJ for continuation and the latter court discarded the statement released by the accused on the premise that it had been taken without legal assistance and therefore should not directly or indirectly influence those proceedings. As the police had based their case solely on his statement, taken in the absence of his lawyer, Pullicino was acquitted.[432] Therefore, in line with the Constitutional ruling, the Magistrate felt that this was tantamount to a violation of the accused's right to legal assistance, even though, Article 355AT of the Maltese Criminal Code was implemented but not yet enforced. In this case, the CMCCJ implemented a right that was already universally accepted, although not yet in force in Malta. It gave importance to the fact that accused persons are entitled to a fair trial as guaranteed in Article 6 of the ECHR.

In another important judgment,[433] on the same subject, the Constitutional Court decided that there was a violation of the right to a fair trial of the accused (although not a minor), who had given a statement in the absence of legal assistance. The Court arrived at the same conclusion as that of the Pullicino judgment. However, in this case, it went further and held that a statement which is given without the right to legal assistance may infringe the right to remain silent, leading the suspect to incriminate himself. This was the first time that the Maltese Constitutional Court dealt with the right to legal assistance in circumstances where the accused was not 'vulnerable'. The Constitutional Court once again, did not provide a remedy to address the damages suffered by the applicant even though there was a flagrant breach of human rights as protected by the ECHR and the

[431] *Poitrimol v. France* (n 412); *Demebukov v. Bulgaria* App no 68020/01 (ECtHR 28 February 2008) and *Salduz v. Turkey* (n 116).
[432] CMCCJ, 2 November 2011.
[433] *Il-Pulizija vs. Alvin Privitera* (Constitutional Court, 11 April 2011).

Constitution of Malta. The Court reached the same conclusion in the Privitera[434] and Pullicino[435] cases, where it held that the statement of the accused can have no direct or indirect influence on the outcome of the criminal proceedings if this was taken in violation of the accused's right to a fair trial and thus decided to discard the statement and in the absence of other evidence acquitted the accused.

In *Il-Pulizja vs. Mark Lombardi*:[436] the FHCC, in its Constitutional jurisdiction, enunciated a new principle, namely that proceedings should be seen in their entirety and the Court should not simply investigate whether the applicant was given his right to legal assistance prior to releasing his statement, since this factor alone was not tantamount to a violation of Article 6 of the ECHR. However, on appeal, the Constitutional Court revoked the judgment given by the FHCC and concluded that there was no reason why it should contest the admissibility of the statement of the accused in his criminal proceedings, since such a statement should have been considered *a priori* as inadmissible. Once again, however, the Constitutional Court[437] refrained from providing an effective remedy even though asked to do so. In this latter Lombardi case, the Court bravely concluded that the right to legal assistance is the rule and that derogation therefrom is the exception.

Karen Reid asserts that while the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance so as to constitute a decisive factor in the general appraisal of the overall trial.[438] Adopting this reasoning, the Court held in the Lombardi case that the lack of legal assistance during pre-trial proceedings can be considered as such particular incident, since it may create the framework in which the parties at the trial can discuss the relevant charges. Subsequently, this state of affairs led to a landslide of human rights cases by defence lawyers in criminal proceedings, where statements made by accused persons, who

[434] Constitutional Court, 11 April 2011.
[435] Constitutional Court, 12 April 2011.
[436] FHCC, 9 October, 2009.
[437] It concluded by stating that the moment Lombardi was interrogated and released two statements with the investigating officers, it amounted to 'a systematic restriction of access to a lawyer pursuant to the relevant legal provision*s' Boz v. Turkey* App no 2039/04 (ECtHR, 9 February 2010) and *Dayanan.v. Turkey* (n 346).
[438] Karen Reid, *A Practitioner's Guide to The European Convention of Human Rights* (4th edn Sweet and Maxwell 2011)

were denied the right to legal assistance, were used to achieve a conviction. The repercussions of this unhappy situation echoed through Parliament and as a result the Government of the day was nearly brought down. Following the Pullicino, Privitera and Lombardi judgments, the court reversed its approach in several cases and concluded that the mere fact that the right to legal assistance was not provided did not necessarily translate into an unfair trial.

In a case that followed, which incidentally also ended up before the ECtHR, the Constitutional Court took a different approach. In *Ir-Repubblika ta' Malta vs. Martin Dimech',*[439] the accused, contested his statement on the basis that it was released at a time when the right to legal assistance, prior to interrogation, had not yet been in force. The Constitutional Court decided that the applicant had not suffered prejudice when he was not granted access to legal advice.[440] However, when the case was brought before the ECtHR[441] the court held that since the proceedings before the local courts had not been concluded as the accused was still awaiting trial, the ECtHR could not eliminate the possibility that the adjudicating local court would take cognizance of the fact that legal advice was not granted. The ECtHR found that local remedies were not yet exhausted, and that it could only decide on the application once the case was finally decided in Malta. The Court ruled that there would be nothing precluding the accused from re-applying to the ECtHR after his case was concluded in Malta. Contrary to its previous decisions, the Constitutional Court decided that the applicant, Martin Dimech, did not suffer any prejudice when he was not assisted by a lawyer whilst giving his statement. The Court felt that this fact did not create an objective danger that could give rise to a violation of his right to a fair trial in accordance with the Convention and it therefore dismissed his claim.[442] This conclusion was repeated in several cases that followed.[443]

Despite this reasoning of the Constitutional Court, the CCA rejected the appellant's appeal

[439] Constitutional Court, 26 April 2013.
[440] ibid.
[441] *Martin Dimech v. Malta* App no 34373/13 (ECtHR, 2 July 2015).
[442] Likewise *Geoffrey Galea vs. Attorney General et* (Constitutional Court, 28 June 2013).
[443] *Vide Ir-Repubblika ta' Malta vs. Carmel Saliba* (CCA, 2 May 2013); *Il-Pulizija vs. Pawlu Grech* (FHCC Constitutional Jurisdiction, 3 November 2011).

and confirmed the preliminary judgment delivered by the Constitutional Court and considered that the two statements released by the appellant (although given without legal assistance) were to be considered as admissible evidence. The Constitutional Court did not consider the right to legal assistance as an inherent right guaranteeing a fair trial, but based its decision on the provision laid down in the Criminal Code of Malta. This provision states that confessions are admissible if not obtained on the basis of '*fear, threats and promises'*. Here, it appears, that the Court went back in time and based its decision on the fact that the statements were given according to Article 658 of the Criminal Code, and thus there was no potential violation to the right of the accused to be given a fair trial. This judgment, although delivered shortly after the abovementioned judgments of Lombardi, Privitera and Pullicino, went completely against the *raison d'etre* of those same judgments.

Following the above mentioned Dimech case, the court in *Il-Pulizija vs. Alexei Zerafa*[444] stated that the right to legal assistance is nothing more than a choice which the subject has. In other words, he may choose to make use of the right to legal assistance, and he may choose otherwise. It insisted that during this period the State did not have a duty to give legal assistance to a person who is being interrogated on the suspicion of a crime. It held that if a confession is made without legal assistance, this does not necessarily mean that there is a violation of human rights and consequently felt that this did not lead to the inadmissibility of the confession. It is to be noted that the Criminal Code in this case went back to the decision taken in the Lombardi case, namely, that proceedings are to be seen in their entirety. It categorically stated that in principle there is no fundamental right to legal assistance, but that there exists the fundamental right to a fair hearing when a person is charged with a criminal offence. It consequently rejected the appellant's claim when he alleged that he was not given a fair trial and also rejected the defence's plea to disregard the statement in the assessment of the case.[445]

[444] CCA, 31 July 2013.
[445] This was also the position taken in *Anthony Taliana vs. il-Kummissarju tal-Pulizija et,* the fact that a person was not assisted by a lawyer, does not necessarily mean that such person had his fundamental human rights infringed.

To conclude, although, these cases all deal with statements being made at a time when there was no statutory provision for the right to legal assistance prior to interrogation, the decisions reached by the courts as identified above were inconsistent.

4.4.2 Statements released after the 10th February 2010 but before the 28th of November 2016

During this time, the suspect/accused was only allowed to speak to a lawyer at the beginning of an interrogation for a maximum period of one hour. Although, one might have thought that the introduction of legal assistance for a period of one hour prior to an interrogation would have improved matters for suspects and accused alike, it did not. Once again, the courts were (and still are) inundated with preliminary pleas to disregard statements on the basis that the accused had legal assistance for only one hour prior to the interrogation and not throughout the entire interrogation (as provided in the Directive on the right to legal assistance).

In *Il-Pulizija vs. Carmelo sive Charles Grech*[446] the CCA, on the basis of Directive 2013/48/EU and the jurisprudential development, confirmed the decision of the CMCCJ to discard the statement released by the accused on the 16th April 2012, even though the accused had exercised his right to speak to a lawyer prior to his interrogation. It based its judgment on the fact that although the accused had availed himself of the right to legal assistance for an hour prior to the onset of the interrogation, there was no assistance by a lawyer throughout[447] the interrogation. The Court felt that anything that happened in the absence of the lawyer could have prejudiced the accused person in his trial when he cooperated with the police and answered certain questions that were put to him by the investigating officer. It held that the fact that the accused was entitled to speak with a lawyer for an hour prior to interrogation was not sufficient and thus upheld the accused's claim to discard his statement. The Court also added that it would discard all that was said by witnesses with reference to the statement of the accused.[448] Several other judgments

[446] CCA, 6 December 2018
[447] Emphasis placed by the author.
[448] The court took the same approach in *Il-Pulizija v. Nicholas Dimech (*CCA, 15 January 2019)

[449] followed this line of reasoning.

However, recently in *Il-Pulizija vs Maximilian Ciantar,*[450] the Constitutional Courts moved in another direction after considering the judgment given by the Grand Chamber of the ECtHR in *Beuze v. Belgium.*[451] In this latter case, the ECtHR held that it should see whether there are any *'compelling reasons'* for the restriction of the right of access to a lawyer and should thus carry out an evaluation in relation to 'the fairness of the proceedings as a whole and the relationship between the two stages of the test'.[452] This latter judgment distinguished between two minimum requirements namely:-

i. The right of communication and consultation with a lawyer prior to the commencement of the interrogation, which includes the right to give to the lawyer instructions of a confidential nature, and

ii. The physical presence of the lawyer at the commencement of the questioning during pre-trial proceedings. Once again it emphasised the need for such legal assistance to be effective and practical.[453]

4.4.3 Legal Uncertainty

Malta is currently facing legal uncertainty with respect to the application of the right to

[449] Including *Il-Pulizija vs. Aldo Pistella (*Constitutional Court, 14 December 2018); *Il-Pulizija vs. Omissis Shannon Cauchi Omissis* (CCA, 15 January 2019); *Il-Pulizija vs. Michael Borg* Omissis (CCA, 15 January 2019); *Il-Pulizija vs. Omissis Anthony Cremona* (CCA, 14 February 2019); *Il-Pulizija vs. Claire Farrugia* (CCA, 20 November 2018); *Il-Pulizija vs. Amad Masoud*, (CCA, 16 May 2019); *Il-Pulizija vs. Sandro Spiteri,* (CCA, 18 June 2019) and *Christopher Bartolo vs. Avukat Generali et* (Constitutional Court, 5 October 2018).
[450] CCA, 27 February 2019.
[451] See (n 428).
[452] ibid.
[453] Guide on Article 6 of the ECHR (n 44).

legal assistance. In fact, in the case of *Ir-Repubblika ta' Malta vs Rosario Militello* this issue was raised by the defence before the Criminal Court of Appeal. The latter requested the issue to be referred to the Constitutional Court and held that the judgment in the names Ir-*Repubblika ta' Malta vs Rosario Militello* given by the Court of Appeal in its superior jurisdiction[454] and delivered alongside a number of other judgments[455] revoked a preliminary judgment previously delivered by the Criminal Court,[456] thereby causing this legal uncertainty. In this latter decision, the Criminal Court had ordered the withdrawal of the accused's statement from the proceedings and ordered that no reference should be made to the same statement since this was given in the absence of his lawyer.

However, on the same day, the Constitutional Court in the cases *Izuchukwu Morgan Onuorah vs Avukat Generali*[457] and *Clive Dimech vs Avukat Generali*[458] upheld the applicants' request for the withdrawal of their statement from the criminal proceedings they were facing due to the fact that the statement was released in the absence of their lawyer. Militello, in his demand for a Constitutional reference, stated that these judgments, delivered on the same day, are precluding lawyers from assisting their clients according to guided principles and this because there is severe inconsistency in the interpretation and application of the right to legal assistance. It resulted that the interpretation adopted by the Constitutional Court was diametrically opposed to that being applied by the Criminal Court of Appeal in its superior jurisdiction. The applicant Militello further claimed that as a result of this state of affairs, his fundamental rights as protected by Article 39 of the Constitution of Malta and Article 6 of the European Convention were violated. The AG in his defence argued that the right to a fair trial does not bring into question the correctness of court decisions in their merits, although he acknowledged that certain procedural principles had to be guaranteed.

[454] Delivered on 27 January 2021.
[455] Vide *Ir-Repubblika ta' Malta vs Hassan Ali Mohamed Abdel Raouf et* decided on 27 January 2021; *Ir-Repubblika ta' Malta vs Enan Ahmed El Fadali* decided on 27 January 2021; *Ir-Repubblika ta' Malta vs Martino Aiello* decided on 27 January 2021.
[456] Delivered on 31 December 2019.
[457] Delivered on 27 January 2021.
[458] ibid.

The Criminal Court when faced with such an application held[459] that the necessity of legal certainty is an intrinsic right to the right to a fair hearing. Even though the doctrine of legal precedence is not applied in the Maltese legal system, this does not mean that a court may, without giving any explanation, depart from a decision given by a previous court. The court embraced the legal latin dicta namely *auctoritas rerum (perpetuo) similiter iudicatarum.* '[460] This latter principle was adopted in a number of judgments delivered by the Maltese courts.[461]

In the case *Albu v Romania*[462] the court held that;-

> The principle of legal certainty, guarantees, inter alia, a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law[463]

The Criminal Court upheld the plea for a Constitutional reference whilst acknowledging that there is a state of legal uncertainty pertaining to the importance that must be attributed to a statement given in the absence of legal assistance, especially during the short period of time where the right of inference formed part of Maltese legislation. The Court went on to order the suspension of the criminal case until the Constitutional reference is decided.

In a very recent judgment delivered by the FHCC in the names Christopher *Bartolo vs Avukat ta l-Istat*[464] the Court adopted the same approach taken by the Constitutional Court in the earlier judgments mentioned above of *Onuorah Morgan vs Avukat Generali*[465] and

[459] Decided on 1 June 2021.
[460] See (n 383).
[461] Vide Ignatious u Carmela konjugi Debono et vs Direttur tal-Artijiet Court of Appeal 9 May 2017.
[462] App no 34796/09 (ECtHR 10 August 2012).
[463] Vide also in this regard *Iordan Iordanov and others v. Bulgaria* App. no 23530/02 (ECtHR, 2 October 2009) para 49-50; Nejdet Şahin and Perihan Şahin v. Turkey App. no. 13279/05. (ECtHR, [GC] 20 October 2011) para 47; Ştefănică and Others App. no 38155/02 (ECtHR 2 Frar 2011) para 31,
[464] Delivered on the 22 June 2021.
[465] Constitutional Court, 27 January 2021.

Clive Dimech vs Avukat Generali.[466] In all cases, the Court stated that the statements released by the suspects in the absence of their lawyer, infringed their right to a fair trial. In this case, the FHCC decided in the same manner as the Constitutional Court in *Brian Vella vs Avukat Generali.*[467] Despite the fact that Bartolo's criminal appeal is still pending, the FHCC did not declare his plea premature but upheld it and declared that the applicant had suffered prejudice due to his incriminating statements. It also took a step further and declared that the confirmation of such statements under oath before the inquiring magistrate, also gave rise to a violation of his right to a fair trial and this because the statements could have influenced the jurors in their decision.

The FHCC remedied Bartolo in the same manner it remedied Brian Vella in *Brian Vella vs Avukat Generali.* The Court ordered that the applicant be placed in *status quo ante* prior to the commencement of the criminal case and also ordered that the statements be withdrawn from the proceedings and that no reference should be made to them in the trial. The Court referred to what Karen Reid stated in her book 'A practitioner's Guide to the European Convention on Human Rights', namely that:

> While the conformity of a trial with the requirements of Article 6 must be assessed on the basis of the trial as a whole, a particular incident may assume such importance as to constitute a decisive factor in the general appraisal of the trial overall.[468]

In other words, an illegally obtained piece of evidence can contaminate the whole criminal process. Moreover, although many judgments have tackled this matter, uncertainty remains in the application of this right. This therefore shows that in Malta, the application of this right is not always consistent with European case-law.

4.4.4 Factors affecting the fairness of the proceedings

The ECtHR held that the following list of factors drawn from its case law were appropriate

[466] Constitutional Court, 27 January 2021.
[467] Constitutional Court, 14 December 2018.
[468] Reid (n. 438) p. 70.

and should be considered when assessing pleas made in relation to statements taken without legal assistance, namely;[469]

i. [W]hether the applicant was particularly vulnerable, for example due to age or mental capacity.

ii. The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with – where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair.

iii. Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.

iv. The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.

v. Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.

vi. In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.

vii. The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case.

[469] See *Ibrahim and Others v. UK* and *Simonov v. Bulgaria* (n 408).

viii. Whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter.

ix. The weight of the public interest in the investigation and punishment of the particular offence in issue; and

x. Other relevant procedural safeguards afforded by domestic law and practice.

In conclusion, the Court emphasised that a very restricted analysis must be undertaken where there are no 'compelling reasons' to justify the constraint on the right of access to a lawyer. In fact, in the *Ibrahim and others v. UK*[470] judgment, the Court found that there was a violation of the right to a fair trial not solely on the basis that the confession was released at a moment in time when the accused was not assisted by a lawyer, but also on the basis of an assessment made on the 'overall fairness' of the proceedings. In this case, it felt that there was a combination of factors that rendered the proceedings unfair as a whole. Therefore, this meant that restricting access to a lawyer during questioning does not automatically mean that there is a violation of the right to a fair trial but that the Court should examine the 'overall fairness' of the proceedings to be able to determine if a violation exists.

In the same manner, the CCA in *Il-Pulizija vs. Maximilian Ciantar*[471] concluded that it should reflect community law and therefore did not consider the statement of the accused as inadmissible but held instead that it is up to the Constitutional Court to carry out an assessment of the 'overall fairness' of the proceedings. It held that it did not have Constitutional competence and thus, did not have the competence to see if there existed an actual violation of the right to a fair trial or if there could be a potential violation thereto. It felt that it could not decide *a priori* whether the fact that the accused was

[470] ibid.
[471] See (n 450).

deprived of legal assistance during interrogation, automatically amounted to a violation of his right to a fair trial especially when the ECtHR was now directing the domestic courts to examine the proceedings in their totality based on the following two considerations: existence of compelling reasons for the right to be withheld and the overall fairness of the proceedings.

With reference to the Ciantar case, the Court examined numerous circumstances, such as: -

i. That the accused was assisted throughout the trial and during his trial he did not raise the issue with regards to the probative value of his statement.

ii. That the Court was not provided with any evidence which proved that the statement was being contested.

iii. That the accused was given legal assistance prior to giving his statement.

iv. That despite being twenty-six years of age, Ciantar already had eleven convictions registered on his conviction sheet and thus could not be considered as a vulnerable person.

v. That the accused did not allege that the nature of the charges brought forward against him, were not explained to him or his lawyer.

vi. Neither the accused nor his lawyer contested the nature of the evidence that the prosecution held.

vii. In his statement, the accused only corroborated with what the victims (being the primary witnesses in this case) had said when

> they particularly recognised the accused as being one of the thieves.

In this regard, however, mention must be made to the joint concurring opinion of Judges Yudkivka, Vučinić, Turković and Hüseynov in the above case of *Beuze v Belgium*[472] where *inter alia* they explained that it is not correct for the Court to consider the overall fairness of an applicant's case when a systematic ban exists, affecting every other individual in the applicant's position and in the absence of any assessment by the relevant national authorities. They further stated, that 'any derogation must be justified by compelling reasons pertaining to an urgent need to avert danger for the life or physical integrity of one or more people'.[473] In addition, they also highlighted that the principle of proportionality must be given importance and that any derogation must comply with the same principle. This implies that an adjudicator must always seek to limit restrictions and the duration of the same restrictions to the right of access to a lawyer. They concluded by stating that a strict approach must be taken by the Courts towards an outright ban on the right to legal assistance. Failure to do this would result in conflicts with both the jurisprudence and EU law.

In *Il-Pulizija vs. Aldo Pistella*,[474] a Magistrate had suspended criminal proceedings against Pistella to allow the Constitutional Court to decide on an issue pending before it, namely that, as to whether the accused fundamental human rights had been breached due to the fact that his lawyer was only allowed to be present for an hour prior to the interrogation and not during the entire police questioning. Pistella's lawyer argued that the ECtHR insisted that suspects were not only entitled to consult a lawyer before giving their statement, but also to have a lawyer present during the statement. This reasoning is supported by several court decisions and the EU Directive 2013/48. It is understood that Pistella was only in possession of around hundred grams (100g) of heroin at the time of arrest, but as he had been intoxicated when questioned, he had claimed to have sold three kilograms (3kg). The defence lawyer rightly argued that had the accused been assisted

[472] See (n 428).
[473] ibid.
[474] See (n 449).

throughout the interrogation, this error would not have occurred. Certainly, the lawyer would not have allowed the suspect to say something so untrue. The FHCC[475] in its decision gave a clear direction on the interpretation that should be given to legal assistance in the context of releasing statements upon interrogation, and this in line with Directive 2013/48. It held that the fact that a person is not assisted by a lawyer during interrogation, especially in cases like Pistella's where the accused asked for such assistance and the request was turned down meant that his right was prejudiced since such statement was going to be used as evidence by the police against him in his trial, which is still pending, before the Criminal Court. It held that although proceedings must always be seen in their entirety, in order to see whether there has been a violation of any fundamental right to a fair trial, consideration must still be given to the fact that no reference should be made to the statement in his criminal trial.

This decision was appealed before the Constitutional Court and this Court upheld the decision reached by the FHCC.[476] The Court stated that no violation of the right to a fair hearing had occurred; however, it took a pre-emptive measure and ordered the statement released by Pistella to be excluded from the acts of the criminal proceedings since it was released without the applicant having been given legal assistance. It concluded that no reference to the statement should be made at the trial so as to avoid irregularities. Thus, the decision taken by the Criminal Court to await the judgment of the Constitutional Court made a lot of sense since otherwise the result could potentially have been different.

Alternatively, in *il-Pulizija vs Martin Aiello,* the Constitutional Court[477] was faced with yet another case regarding the inadmissibility of a statement released in October 2014 when the accused was only given the right to speak to a lawyer by phone or face to face for a maximum period of an hour. It decided that there was no violation to the right to a fair trial and did not order the withdrawal of the statement from the criminal proceedings. The Court felt that the accused understood the limited right to legal assistance, which he had refused. As a result, he had deprived himself from seeking legal advice to prepare

[475] FHCC, 27 June 2017.
[476] Constitutional Court, 14 December 2018.
[477] Constitutional Court, 27 March 2020.

him for his interrogation and to be given information about the consequences which would ensue if he chose to reply to the questions put forward to him instead of opting to exercise his right to silence.

The Court referred to the earlier judgment of *Charles Steven Muscat vs. Avukat Generali* [478] where the Court had held that the applicant had failed to raise this issue before the criminal courts during the compilation stage. This meant that the accused did not object to the presentation of his statement in the proceedings and that he did not feel that he was in any way prejudiced by it. It held that due to the fact that the applicant still had to undergo his trial by jury, it was the duty of the judge presiding over the jury to inform the jurors about the danger in relying wholeheartedly on a statement without taking note of other circumstances. It upheld the judgment given by the FHCC which stated that the fact that an accused person was not granted the right to legal assistance throughout the interrogation did not equate to a violation of his right to a fair trial. Reference was made to the case in the names *Beuze v. Belgium*[479] but the Court held that in this case there were no justifiable reasons for depriving the accused from being assisted by a lawyer throughout the interrogation, apart from the fact that the law did not allow it. This Court opposed the Criminal Court's[480] decision which declared the statement as inadmissible and therefore concluded that it should not form part of the evidence to be given to the jurors during the trial by jury. Thus, once again, it seems that the courts were being inconsistent in their decisions.

In two very recent judgments *ir-Repubblika ta' Malta vs. Christopher Doll*[481] and *ir-Repubblika ta' Malta vs. Romario Barbara',*[482] the Court considered the dissenting opinions of the judges in the *Salduz v. Turkey* case*:* When considering whether a statement delivered in the absence of a lawyer should be considered as admissible evidence, regard must be given to the fairness of the proceedings as a whole. In these two cases the Court

[478] Constitutional Court, 8 June 2012. It confirmed the decision given by the FHCC on the 10 October 2011.
[479] See (n 428).
[480] Criminal Court on the 9 May 2017 declared the statement as inadmissible in the proceedings before the Jury on the basis that the statement was released without legal assistance.
[481] Criminal Court Bill of Indictment 5/2020 (17th November 2020).
[482] Criminal Court Bill of Indictment 12/2019 (27th October2020).

held that since both cases were still on-going, and the accused were going to be judged by lay persons, jurors could be affected by the contents of the statement and on this basis, declared such statements as inadmissible evidence and ordered that a copy of the same should not be given to the jurors. The Criminal Court, however, fell short of declaring that the rights of the accused to a fair trial were infringed. A *contrario senso* one may argue that if the case was to be decided by a judge without a jury, then its decision could have been different. However, it is interesting to note that the preliminary judgment against Romario Barbara was declared null on the 26th May 2021 on the basis of a procedural issue since the Court of Appeal in its Superior Jurisdiction decided that the demand for the declaration of the inadmissibility of a statement should not be presented by means of an application. It decided that the applicant should have first requested the Court to be able to present another aggravation regarding his line of defence in addition to those presented by him once notified with the bill of indictment. Furthermore, in the case of Christopher Doll, the Court of Appeal in its Superior Jurisdiction overturned the judgment delivered by the Criminal Court and held that the statement of the accused was to be considered as admissible evidence on the premise that the accused would always have a right to appeal from the verdict and judgment of the Criminal Court in the event of the finding of guilt. It concluded that this right would eradicate any risk which the Criminal Court had perceived as existing during the trial where the accused may suffer an alleged breach of his rights.

Malta's national courts are taking the same stance as the ECtHR. This being that the absence of the right to legal assistance prior to and/or during the interrogation does not necessarily mean that there has been a violation of the right to a fair trial. However, it is of utmost importance that an examination of the overall fairness of the proceedings is undertaken to establish whether there is a violation of the right to a fair trial.[483]

4.5 IMPORTANT ASPECTS OF THE RIGHT TO LEGAL ASSISTANCE

[483] Vide Ir-*Repubblika ta' Malta vs. Hassan Ali Mohammed Abdel Raouf Josephine Wadi* (Criminal Court, 12 December 2019); *Graziella Attard vs. Avukat Generali* (Constitutional Court, 27 September 2019).

Having discussed the right to legal assistance in Malta, it is now important to examine other issues which are directly affected by the right to legal assistance, and which may also affect the 'overall fairness' of proceedings. This is important because the law is silent on such matters, and interpretations of the same are only available from an appreciation and understanding of national judgments.

4.5.1 The right to legal assistance in proceedings which are a *res judicata* with special reference to Malta.

The author has so far discussed the right to legal assistance in relation to cases that are still *sub judice* where the admissibility or otherwise of such statements certainly plays an important role on the evidence that must be analysed prior to the judge and/or jury reaching a verdict. However, convicted persons have also claimed that they were not given a fair hearing as their case had been decided solely based on their statement released in the absence of a lawyer. It appears from examining a number of judgments in Malta that convicted persons who claim unfairness of trial due to the absence of legal assistance when releasing a statement are treated differently from persons who put forward the same claim whilst criminal proceedings are still pending.

One well known judgment is that of *il-Pulizija vs. Simon Xuereb,*[484] where the applicant was found guilty by the CMCCJ, which sentence was subsequently confirmed on appeal,[485] on the basis of a confession released by the accused during interrogation and in the absence of a lawyer pursuant to which he had admitted to the offence of importation of drugs. Mr Xuereb later asked the FHCC to declare that his fundamental human rights had been breached as he had not been given access to a lawyer at the time of making his statement and that, as a result, he had unjustly incriminated himself. The CCFH, however, rejected [486] his plea on the grounds that although Mr Xuereb had admitted the offence at pre-trial stage in the absence of a lawyer and when he was still a suspect, he had then

[484] CMCCJ, 12 March, 1997.
[485] *Ir-Repubblika ta' Malta vs. Simon Xuereb* (Criminal Court, 5 January 2004).
[486] *Simon Xuereb vs l-Avukat Ġenerali* (FHCC Constitutional Jurisdiction, 14 October 2011).

confirmed his admission in court in the presence of his lawyer prior to the judgment. The Constitutional Court[487] held that the right to legal assistance should not be applied retroactively to cases that are *res judicata* and consequently the absence of legal advice could not affect decisions that were final.[488]

4.5.2 Constitutional references do not equate to a stay of criminal proceedings

There are instances where accused persons facing a criminal trial feel that their Constitutional rights have been infringed and therefore ask the Criminal Court to stay proceedings so that the Constitutional issue may be decided first. It would certainly be logical to wait for the Constitutional redress prior to proceeding with the trial, since once the statement of an accused person is exhibited in the proceedings, this could affect the merits of the case. However, with respect to on-going proceedings before a Criminal Court or CCA, domestic law is silent. Maltese law provides for such an eventuality only before the CMCJ [489] even though such courts deal with less serious offences. In this eventuality 'when the court accedes to a request for a Constitutional reference',[490] the law provides for a stay of proceedings before the CMCJ. Thus, in such a circumstance, the CMCJ must await the decision of the Constitutional Court. In stark contrast, there is no such disposition to comfort the other courts vested with criminal competence to follow suit even though these courts handle graver and more serious cases.

It appears that since the law does not provide for such eventualities the matter is left to the discretion of the presiding judge. In the case *Christopher Bartolo vs. Avukat Generali,*[491] the FHCC ordered the withdrawal of the statement from the acts of the criminal proceedings and added that no reference can be made by other witnesses to this

[487] *Simon Xuereb vs l-Avukat Ġenerali* (Constitutional Court, 28 June 2006).
[488] *In Bugeja v. Attorney General*, both the FHCC on the 23 March 2012 and the Constitutional Court on 14 January 2013 held that 'the right to legal assistance was not intended to create a formality, which, if not followed, provided the accused with a means to avoid facing his sentence.' Likewise in *Gregory Robert Eyre v. the Attorney General,* (FHCC, 27 June 2012) 'The court echoed the principle that the retrospective effect of a judicial decision is omitted from cases that are a res judicata.'
[489] Criminal Code art 402 (1)(d).
[490] Constitution of Malta art 46 (3).
[491] FHCC, 23 November 2017.

same statement. It held that the applicant should be given the possibility to withdraw or confirm the admission made before that Court.[492] In this case the CCA had upheld the request for a stay in proceedings and thus the applicant did not suffer any prejudice. If, on the other hand, the CCA had insisted on carrying on with the criminal trial, the court itself would have possibly created another injustice. In *Il-Pulizija vs Arnold Farrugia,*[493] on the contrary, the CCA rejected the plea for a stay of the proceedings and decided to deal with the matter regarding the admissibility of statements itself. The Constitutional Court [494] reached the same decision taken by FHCC in the case *Christopher Bartolo v. Avukat Generali et* [495]and held that it was discarding the statement released by the accused. However, what would have been the situation had the court decided otherwise? The intervention of the legislator is clearly necessary at this stage.

4.5.3 The right to legal assistance in minor offences in Malta

It appears from an examination of the Directive that the right to legal assistance is not contingent upon the gravity of the offence being investigated but, rather, is a right that should be available to all suspects and accused persons who would be imprisoned if convicted. However, the issue has arisen as to whether this right to legal assistance should likewise also be available to suspects and accused persons who are investigated for minor offences.

The Preamble to EU Directive 2013/48 [496] provides that in several Member States there are some minor offences, namely minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences which are deemed to be criminal offences. It further provides that in such cases, it would be unreasonable to require that the authorities guarantee all the rights under this Directive. However, should the law of a Member State provide that deprivation of liberty may be imposed as a sanction

[492] ibid.
[493] CCA, 17 January 2019.
[494] Constitutional Court, 15 January 2020.
[495] FHCC, 23 November 2017.
[496] Right to access to a lawyer in Criminal Proceedings Directive preamble art 17.

for a minor offence, then the Directive should be applied in the proceedings held before a Court having jurisdiction in criminal matters.

The issue arose in the case *Il-Pulizija vs. Claude Formosa,*[497] where having been involved in a collision, the accused was taken to the local police station and asked to submit to a breathalyzer test. The accused refused to do so unless his brother (who happened to be a lawyer) was present. The Police deduced that he was not willing to give such a breath sample and thus arraigned him in Court and charged him with the offence of failing to submit himself to the breath alcohol test. The CMCCJ[498] found him guilty of this offence and held that in minor offences the accused was not entitled to the right to legal assistance. The CCA reversed the judgment and referred to the Preamble to the EU Directive which states that the Directive does not apply in instances where the deprivation of liberty cannot be imposed as a sanction.[499] In Malta, the offence of withholding consent to a breath alcohol test is punishable with imprisonment and therefore, the court concluded that the accused person had a right to legal assistance.[500] Should there be amendments to the punishment that is to be given in case of a guilt for instance that the punishment of imprisonment is removed and perhaps the fine increased then the suspect would no longer be entitled to the right to legal assistance as is the case in certain jurisdictions of other Member States.

Hence, in the case of minor offences the yardstick is one that depends on the severity of the punishment that can be awarded. However, what if the punishment awarded is the payment of a fine that cannot be met? If payment is not affected by the convicted person, the fine is converted into imprisonment at the rate of one day for every thirty-five euro or part thereof that remains unpaid.[501] Therefore, the fact that the Directive only provides for legal assistance only in the case of offences that are punishable with a term of imprisonment can be perceived as a restriction on the fundamental right to legal

[497] CCA, 23 July 2019.
[498] CMCCJ, 25 October 2016.
[499] Right to access to a lawyer in Criminal Proceedings Directive preamble art 17.
[500] *Vide* also *Il-Pulizija vs. Christian Fenech* (CCA, 4 August 2020).
[501] Criminal Code art 11(3)

assistance.

4.5.4 The right to legal assistance is applicable *erga omnes* and is not restricted to *'vulnerable' persons.*

Initially, the Maltese Courts felt that the right to legal assistance should only be mandatory where the suspect is a 'vulnerable person*'.* This was the approach adopted at a time when the term 'vulnerable*'* was not defined in any statute and thus entailed a very subjective examination. In fact, experts have pointed out that 'vulnerability' is indeed decided arbitrarily and have subsequently enquired on the definition of the term 'vulnerability'.[502] Jonathan Doak and Claire McGourlay assert that suspects who are familiar with the criminal justice system and/or considered to be in a good position to handle police interrogations would not be prejudiced if the lawyer is not present.[503]

For considerable time, the position in Malta, in line with ECtHR's case law,[504] was that only *'vulnerable'* persons should be entitled to the right to legal assistance. In fact, in several cases, [505] the Court took the approach that the right to legal assistance in the case of 'vulnerable' persons is absolute, thereby, implying that in the case of 'non vulnerable' persons, the right was qualified. However, in *Victor Lanzon nomine vs Kummissarju tal-Pulizija*,[506] the Court held otherwise. It ruled that the applicant, a minor, could not expect to be treated favourably upon arrest due to the fact that he was a sixteen year old.

Despite the teachings set out in the *Salduz* case, Malta has adopted two diametrically opposed views with regards to 'vulnerability'. The first approach is the one adopted prior

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[502] David Lindsay, 'State potentially facing thousands of human right breach claims, and millions in damages' (2016) *The Malta Independent* <http://www.independent.com.mt/Articles/2016-01-16/local-news/State-potentially-facing-thousands-of-human-right-breach-claims-and-millions-in-damages-6736151863> accessed 31 January 2018.
[503] Jonathan Doak and Claire McGourlay, *Evidence in Context* (Routledge 2012) 203.
[504] *Magee v. UK* App no 26289/12 (ECtHR, 12 August 2015); *Salduz v. Turkey* (n 116).
[505] *Il-Pulizija vs Kenneth Azzopardi* (CMCCJ, 6 February 2013); *Il-Pulizija vs. Tyron Fenech* (Constitutional Court, 22 February 2013). In these judgments the Court held the right to legal assistance was intended to guard persons in particular circumstances of 'vulnerability, weakness or anxiety' that as a result made inculpating statements despite their innocence; *Il-Pulizija v. Amanda Agius* **(**Constitutional Court, 22 February 2013).
[506] Constitutional Court, 25 February 2013.

to *Mario Borġ v. Malta*,[507] where the courts only seemed to state that there was a violation to the right of a fair trial in those cases where the right to legal assistance was not given to 'vulnerable persons' The second approach is that adopted post *Mario Borġ v. Malta*, where the courts held that the right to legal assistance should always be given irrespective of whether the person is 'vulnerable' or not, since the absence of such right may *inter alia* affect the right to a fair trial.

In *Mario Borġ v. Malta,* the applicant was not legally assisted during questioning in police detention, a result of the lack of an *ad hoc* provision in the statutory laws of Malta at the time. The applicant complained that the Criminal Court of Malta had altered the interpretation given by the ECtHR on the right to legal assistance during police interrogation. He felt that this contradicted the principle of legal certainty and was in breach of Article 6 of the Convention. The applicant took his case to the ECtHR which held that the denial of the right to legal assistance at the pre-trial stage amounted to a breach of Article 6 (3)(c) of the Convention. The Court further held that there was a violation of Article 6 (1) of the Convention due to the lack of legal certainty[508] concerning the constitutional proceedings.

The Maltese Courts subsequently began to apply the right to legal assistance to all suspects irrespective of whether they were vulnerable or not.[509] Thus, the prevailing view is that statements taken in the absence of a lawyer should be considered inadmissible regardless of whether the person releasing such statement is a '*vulnerable'* person or not.

4.6 DEROGATIONS FROM THE RIGHT OF ACCESS TO A LAWYER

The Commission's Proposal, provided for a temporary derogation[510] from the right of

[507] App no 37537/13 (ECtHR, 12 April 2016).
[508] A Maltese judgment which also dealt with the right to legal certainty is *Alfred Camilleri vs l-Avukat Ġenerali* (Constitutional Court, 14 December 2018).
[509] *Malcolm Said vs Avukat Generali et* (FHCC, 14 January 2016); *Il-Pulizija vs Joseph Camilleri* (CCA, 25 February 2016); *Il-Pulizija vs Eugenio Sultana* (CMCCJ, 26 February 2016).
[510] Now provided for in art 8 of the Directive on the right to access a lawyer.

access to a lawyer when such derogation is justified by 'compelling reasons pertaining to an urgent need to avert serious adverse consequences for the life of physical integrity of a person'[511] and required 'a duly reasoned decision taken by a judicial authority on a case-by-case basis'.[512] However, as outlined by Steven Cras, the Council maintained a much wider wording of the derogation provisions, including the need to prevent 'substantial jeopardy to on-going criminal proceedings'[513] as grounds to derogate from the right of access to a lawyer. Ilias Anagnostopoulos explains that the final text followed the Council's position though included some additional safeguards such as the obligation to remind the suspect of his inherent right to remain silent, respect of defence rights and the privilege against self- incrimination.[514] Article 8 (1) and Recital 39 of the Right to access a lawyer in criminal proceedings Directive provide a general proportionality clause regarding all derogation decisions.

It appears that the scope of the derogations is open to abuse. There is, for instance, no apparent reason why access to a lawyer in general might jeopardise an investigation. This was pointed out by the Council of Bars and Law Societies of Europe [515] in its Position of the 22nd January 2013 wherein it is stated that the lawyer's involvement and participation in investigations is, for reasons such as preventing abuse and establishing the truth, a positive rather than a negative connotation.[516]

The Council of Europe Secretariat, in its opinion dated 9th November 2011,[517] held that if

[511] Right to access a lawyer in criminal proceedings Directive art 3(6).
[512] ibid art 8(2).
[513] Ibid art 3(6).
[514] Ilias Anagnostopoulos 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?' (April 2014) European Criminal Law Review< https://www.researchgate.net/publication/262576494_The_Right_of_Access_to_a_Lawyer_in_Europe_A_Long_Road_Ahead> accessed December 2020.
[515] The Council of Bars and Law Societies of Europe (CCBE). 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer and on the right to inform a third party upon deprivation of liberty' <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_Position_papers/EN_CRM_20130122_Access-to-a-lawyer-and-the-right-to-inform-a-third-party-upon-deprivation-of-liberty.pdf> accessed December 2020.
[516] ibid.
[517] Council of Europe, Opinion of the Secretariat on the Commission's Proposal for a Directive of the European Parliament and of the Council on "the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest" (Strasbourg, 2011)

there are extraordinary circumstances, where the lawyer of a suspect could be jeopardizing the investigation, then it is only access to that particular lawyer who should be denied. In fact, in respect of this matter regarding derogations, it held that it would be best if Article 8 (c) specifically mentions the possibility to appoint an alternative lawyer. This would be in line with the view of the CPT.[518] Unfortunately, the final compromise text of Article 8 (2) has retained the provision that derogation decision may not only be taken by a judicial authority but by any other competent authority. Therefore, under this provision, the police could possibly exclude legal assistance at the crucial stage of pre-trial investigations, a situation which could lead to abuse.

In Malta, there was an Article in the Criminal Code[519] which dealt with the right of an officer not below the rank of a Superintendent to delay the right to legal assistance when he had reasonable grounds to believe that:

i. It could lead to interference with or harm to evidence connected with the offence being investigated or interference with or physical injury to other persons;

ii. It would lead to alerting other persons suspected of having committed an offence though not yet arrested for it;

iii. It would hinder the recovery of any *res furtiva* as a result of such an offence; and

<https://www.statewatch.org/media/documents/news/2011/nov/coe-opinion-right-to-info.pdf > accessed December 2020.

[518] CPT organisations on the Draft Directive dated 15.4.2013 The Law Society of England and Wales, Response to the Ministry Standards (CPT/Inf/E (2002) – Rev. 2011, p.11 at 41, available at www.cpt.coe.int; See also comments in the Joint Briefing of ECBA, Amnesty International and other of Justice of 13.7.2011, at 8, p. 14-16. <www.lawsociety.org.uk> accessed December 2020.

[519] Criminal Code art 355AT (5) introduced by Act III of 2003 and amended by Act LI of 2016.

iv. In the case of a person detained for an offence of drug trafficking, bribery, or money laundering, it would hinder the recovery of the value of that person's proceeds from the offence.

Today, however, this provision has been amended by Act LI of 2016, and derogation to the right to legal assistance is only envisaged in 'exceptional circumstances and only at pre- trial stage where the physical remoteness of the suspect makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty,'[520] or if the request is justified in the light of the of the case on the basis of one of the following factors, namely:

i. Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; and

ii. Where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

However, an examination of this provision reveals that there is no legal time frame within which a delay for legal assistance must be exercised. The legislator uses the term 'without undue delay and after the deprivation of liberty.'[521] Nevertheless, this may appear to be a very subjective term. It could lead to abuses if the delay in granting access to legal assistance is stretched to the amount of time necessary for the police to finish. The CPT was not in favour of the suspension of such right, and in fact felt that if it were to delay the giving of such right it would be creating 'misgivings '[522] It further opined that it would be more in synch with the protection of the fundamental human rights of every individual

[520] Criminal Code art 355AUA (11).
[521] Criminal Code art 355AUA (11).
[522] Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Maltese Government on the visit to Malta from 3 to 10 September 2015* (CPT/Inf (2016) 25 Strasbourg 25 October 2016).

if an independent and unbiased lawyer, were to be entrusted with the task of verifying the need for such a delay. Having said this, such recommendation may be unpractical especially in Malta where the lawyers who work in the criminal sphere are very few.

4.7 THE WAIVER TO THE RIGHT TO LEGAL ASSISTANCE

Can a suspect and accused person waive the right.to legal assistance? The answer is in the affirmative. As outlined by Jeffrey P Swayman, this right is not absolute and there is no universal obligation imposed on the courts to recommend the provision of legal advice to all accused persons under all circumstances.[523] The accused can therefore decide to defend himself by appearing *pro se* and, in so doing, waive his right to counsel.[524] This decision however, must be made 'intelligently', 'understandingly; and 'knowingly' in order for the defendant to waive his right to counsel.[525]

Under EU law, Article 9 of the Directive on the right of access to a lawyer in criminal proceedings postulates three conditions for a valid waiver:

i. The suspect or accused person must be provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it.

ii. The waiver must be given voluntarily and unequivocally; and

iii. It must be recorded in accordance with the law of the EU Member State.[526]

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[523] Jeffrey P. Swayman*, State v. Wellman:* Intelligent and Knowing Waiver of Right to Counsel, 2 OHIO N.U. L. REV. 53 (1974).
[524] The right of a criminal defendant to conduct his own defence is both a constitutional and a statutory right. For constitutional right, see *U.S. v. Plattner* 330 F.2d 271, 273-275 (2d Cir. 1964); *Bayless v. U.S* 381 F.2d 67, 71 (9th Cir. 1967). For statutory right, see 28 U.S.C.A. § 1654 (1966).
[525] *Argersinger v. Hamlin* 407 U.S. 25 (1972); *Carnley v. Cochran* 369 U.S. 506 (1962); *Johnson v. Zerbst* 304 U.S. 458 (1938).
[526] See Right to access to a lawyer in Criminal Proceedings Directive.

This right of waiver as provided in the Directive was challenged in the case *Zaichenko v Russia.*[527] The Court held that there was no infringement of Article 6 (3)(c) of the Convention and stated that the Directive is consistent with the provision of the Convention when referring to the establishment of a minimum level of gravity in order to confer the right of access to a lawyer.

From an examination of judgments delivered by the ECtHR, the following requirements validate the right to decline legal assistance at pre-trial, namely:

i. That the renunciation is unequivocal;[528]

ii. The voluntariness and knowledge of the renunciation;[529]

ii. That the suspect could have reasonably anticipated the significance of his refusal to legal assistance;[530]

iii. Familiarity with police procedures;[531]

iv. Rights have to be given to the suspect in a language that he is conversant with.

v. The right and refusal to such right has to be given in writing;[532]

vi. The Court has to take note if there was any stress and/ or confusion regarding the refusal that led the suspect to refuse such a right;[533]

[527] See (n 236).
[528] *Yoldas v. Turkey* App no 27503/04 (ECtHR, 23 May 2010).
[529] *A. and Others v. UK* App no 3455/05 (ECtHR, 19 February 2009).
[530] *Saman v. Turkey* App no 35292/05 (ECtHR, 5 July 2011).
[531] *Pishtanikov v. Russia* App no 7025/04 (ECtHR, 24 December 2009).
[532] *Panovits v. Cyprus* (n 411) para 74.
[533] *Stojkovic v France and Belgium* App no 25303/08 (ECtHR, 27 January 2012); *Zaichenko v. Russia* (n 236) para 55.

vii. The young age of the suspect;[534]

ix. The intelligence level and whether the suspect is illiterate.[535]

Can a suspect or accused person who refused to be assisted by a lawyer subsequently revoke such a waiver? The Directive[536] provides for a solution and states that this can be done at any time during the criminal trial. In fact, the suspect or accused person should be informed of this right too, although this is not effectively done. In practice, no mention is made of the right to claim legal assistance once this right was renounced. Naturally, a revocation would only take effect from the time that it is made.[537] In fact, where a waiver of the right to legal assistance is made and then subsequently the suspects or accused persons change their mind and request such assistance, that waiver would no longer hold and would be disregarded.[538] Likewise, if a waiver was accepted in circumstances where the suspect or accused was subjected to ill-treatment by the police, that waiver would be invalid and would be disregarded.[539] The Court held that the court is obliged to examine the circumstances under which the waiver was given to ascertain that it was not given in circumstances that violated the Convention.[540] However, it should be stated that under the draft Directive on procedural safeguards for children suspected or accused in criminal proceedings, children may not waive their right to a lawyer.[541]

The right to decline legal assistance at pre-trial is recognised by all Member States, including Malta.[542] The Criminal Code of Malta provides that 'the suspect or accused person shall be provided orally or in writing with clear and sufficient information in simple and understandable language about the content of the right concerned and the

[534] *Güveç v. Turkey* App no 70337/01 (ECtHR, 20 April 2009); *T and V v. UK [GC]* App 24724/94 (ECtHR, 16 December 1999)
[535] *Kaciu and Kotorri v. Albania* App no 33192/07 and 33194/07 (ECtHR, 9 December 2013); *Panovits v. Cyprus* (n 411) para 120.
[536] Right to access to a lawyer in Criminal Proceedings Directive art 9(3).
[537] *Artur Parkomenko v. Ukraine* App no 40464/05 (ECtHR, 16 May 2017) para 81.
[538] ibid.
[539] *Turbylev v. Russia* App no 4722/09 (ECtHR, 6 October 2015) para 96.
[540] *Rodionov v. Russia* App no 9106/09 (ECtHR, 11 March 2019) para 167.
[541] European Commission, Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings /* CM/2013/0822 final - 2013/0408 (COD) */,art. 6.
[542] Criminal Code art 355AUG.

possible consequences of waiving it'. [543] It also states that 'the waiver shall be given voluntarily and unequivocally'[544] and can be revoked at any point in the criminal proceedings'.[545] In *Ir-Repubblika ta' Malta vs. Martino Aiello*[546] the Court considered that the fact that Aiello refused to speak with a lawyer when releasing his statement did not equate to a refusal of legal assistance, bearing in mind that this case was heard at a time when the law did not provide for the right to legal assistance throughout the entire interrogation. The Court held that the accused had neither refused assistance throughout the investigation nor refused to have a lawyer participating actively in the interrogation.[547] In Malta, suspects and accused persons can waive their right to legal assistance during the interrogation and during all evidence gathering acts as stated in Article 355AUA (8)(e) of the Criminal Code, provided that they are aware of the implications of this waiver. Uninformed waivers may lead to unsafe judicial decisions and in consequence to unsafe convictions.[548]

4.8 CONFIDENTIALITY OF SOLICITOR- CLIENT COMMUNICATIONS

Legal Professional Privilege is a fundamental human right. It is of the utmost importance

[543] Criminal Code art 355AUG (1).
[544] ibid.
[545] Criminal Code art 355AUG (3).
[546] Criminal Court, 9 May 2017.
[547] Vide also *Marvin Debono vs. L-Avukat Ġenerali u l-Kummissarju tal-Pulizija* (FHCC, 17 October 2018); *Ir-Repubblika ta' Malta vs. Martino Aiello* (CCA, 9 April 2018); and *Il-Pulizija vs. Claire Farrugia* (CCA, 17 January 2019); *Il-Pulizija vs. Arnold Farrugia* (CCA, 17 January 2019).
[548] European Criminal Bar Association 'Statement on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceeding and on the right to communicate upon arrest' (2011) ECBA 4 <http://ec.europa.eu/justice/policies/criminal/procedural/docs/com_2011_326_en.pdf> accessed 20 April 2012.

for a suspect/accused to seek legal advice without fear of disclosure to third parties.[549] Lawyers have a duty to protect information obtained from their clients and to refrain from divulging such information to others. Full confidentiality of communication between suspects/accused persons and their lawyer is emphasised in several International and European legal instruments. For instance, the UN Havana Principles on the Role of Lawyers [550] and Article 9 of The Council of Europe Standard Minimum Rules for the Treatment of Prisoners provide that all prisoners, including all arrested and detained individuals can be visited by their lawyers. Such meetings, between prisoners and their legal counsel, can be within sight but not within hearing of any enforcement officials.[551] The Council tried to restrict the confidentiality of communications between suspects/accused and their legal counsel, however, this was strongly opposed by lawyers and human rights organizations[552] as it was considered to be an attack on the fundamentals of legal defence.

Nonetheless, the Directive provides for confidentiality between suspects and their lawyer and considers it imperative to ensure 'the effective exercise of the right of the defence and is an essential part of the right to a fair trial.'[553] Similarly, the Maltese Criminal Code guarantees the confidentiality of communication between suspect and lawyer. It explains that 'communication' includes meetings, correspondence, telephone conversations and any other form of communication permitted by law.[554] In the interest of justice, the time has come for the police force and the court administrators to provide a room to be used for investigation purposes where a suspect can communicate with his/her lawyer

[549] Legal professional privilege in criminal cases—overview. <https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/391421/5KRM-KX61-F188-N1H5-00000-00/Legal_professional_privilege_in_criminal_cases_overview#> accessed January 2021.
[550] UN Basic Principles on the Role of Lawyers (n 385).
[551] See also Article 8(d) of the American Convention on Human Rights: '2. Every person accused of a criminal offence is entitled, with full equality, to the following minimum guarantees: (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel.< https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed November 2020.
[552] See, for example, the Joint Statement of Open Society Justice Initiative, Fair Trials International, ECBA and other organisations of 7.5.2012, p.8-9, available at www.ecba.eu, CCBE position papers of 22.1.2013, p. 2-3 and 24.5.2013, p. 4., available at www.ccbe.eu, Position no. 02/2013 January 2013 of the Bundesrecanwaltskammer, p 4, <www.brak.de> accessed November 2020.
[553] Right to access to a lawyer in Criminal Proceedings Directive recital 33.
[554] Criminal Code art 355AUB (1) and (2).

privately. Unfortunately, the law does not stipulate the repercussions in situations where enforcement officers fail to observe this right. In Malta, the courts do not embrace the American legal theory of the forbidden fruit.[555] If the police obtain information by breaching the confidentiality rule, no measures can be taken against the police for such breach. In the United Kingdom, the Police and Criminal Evidence Act gives courts the discretion to exclude evidence obtained improperly. [556] The Directive should have provided that evidence acquired in violation of this right should be considered as inadmissible evidence. As pointed out by Ilias Anagnostopoulos admitting such tainted evidence in court, undermines the fair character of criminal proceedings and opens the door for miscarriages of justice.[557] Moreover, it does not dissuade police and prosecuting authorities from applying abusive practices and systematically violating suspects' rights.'[558]

4.9 PRINCIPAL FINDINGS

i. The right to legal assistance is considered as a fundamental right and an important element to a fair trial. This right guarantees the effective exercise of all other procedural rights in criminal proceedings.

ii. The right to legal assistance must be exercised at the early stages of criminal proceedings, including the pre-trial stage. A suspect who is being investigated for an offence should be given the right to legal assistance prior to his interrogation. Prompt access to legal assistance is the key to guarantee a fair trial and the rule of law.

[555] Vide *il-Pulizija vs Annabelle Grech* (CMCCJ, 12 November 2020); ir-*Repubblika ta' Malta vs Meinrad Calleja* (CCA, 3rd May 2000).
[556] Police and Criminal Evidence Act s 78.
[557] Ilias Anagnostopoulos (n 514).
[558] Monrad G. Paulsen, 'The Exclusionary Rule and Misconduct by the Police' (1961). 52 J. Crim. L. Criminology & Police Sci. 255.

iii. Following the transposition of EU Directive 2013/48 and the promulgation of Act LI of 2016, time limitation on the use of such right is no longer an issue. At present, the right to legal assistance subsists throughout the whole interrogation.

iv. The prejudice suffered by an accused because of the absence of such right being given, cannot be reversed.

v. The right to legal assistance also applies to persons who choose not to be present in court for the trial, since such right does not depend on unwarranted formalistic conditions.

vi. The right to legal assistance is a dynamic right and its interpretation is forever changing in favour of the accused. The first mention to such right was enunciated in the *Salduz v Turkey*[559] case where the ECtHR held that such right should be automatically given to vulnerable persons being investigated. *A contario sensu,* the right to legal assistance was not to be given to individuals who were not vulnerable. The ECtHR subsequently held that a systematic restriction to the right to legal assistance also led to a violation of one's right. In *Beuze v Belgium*[560] the goal posts changed again because the Grand Chamber stated that for the court to decide that there has been a violation of the accused's rights due to the absence of the right to legal assistance, a number of criteria need to be examined, followed by an objective test to assess whether a violation existed in the trial. The case of *Farrugia v. Malta*[561] went a step further from the *Beuze v Belgium*[562] case where the court provided that it had to examine whether there were any 'compelling reasons' restricting the right to legal assistance and subsequently assess 'the fairness of the proceedings as a whole and the relationship between the two stages of the test. Thus, so far, there is no single interpretation of the right to legal assistance and its applicability.

[559] See (n 116).
[560] See (n 428).
[561] See (n 427)
[562] See (n 428).

vii. The right to legal assistance is applicable to all offences punishable with imprisonment. Moreover, it is not the offence itself which determines whether a suspect and/or accused must be granted the right to legal assistance, but the punishment awarded if the suspect and/or accused were to be found guilty of the same offence.

viii. The right to legal assistance cannot be invoked in cases that are *res judicata*.

ix. The right to legal assistance can be waived provided that the suspect and/ or accused person is made aware of the ramifications of such waiver.

x. Derogations to this right can be given in very strict circumstances as explained earlier on.

xi. Although the right to legal assistance was introduced into the Maltese Legal system in 2016, there still exists a state of legal uncertainty in the interpretation of this right, particularly with respect to statements given prior to the rights's introduction in Maltese Law.

4.10 CONCLUSION

The transposition of the EU Directive on the right of access to a lawyer clearly demonstrated the added value of better establishing this right under national legislation. The Directive helped to harmonise minimum standards and 'turned the area of liberty and justice proclaimed in the EU treaties from a legal vision to an everyday reality.'[563] Although *lacunae* in the legislation still exist, this was certainly a step in the right direction to achieve effective defence all over Europe. The protection of individual rights in criminal proceedings will remain an on-going task in years to come.

[563] House of Lords (European Union Committee) Report on the European Union's Policy on Criminal Procedure 26.4.2012, p. 23 et seq., J. Vogel / H. Matt, Gemeinsame Standards für Strafverfahren in der Europäischen UnionStrafverteidiger 2007, p. 206 et seq.

In Malta, despite the significant developments in the legislation relating to the right to legal assistance, there is still room for improvement. However, the current position is certainly more favourable than the approach which was adopted pre-2010. Although the right to legal advice prior to interrogation is guaranteed as a fundamental protection for every person detained as a suspect, the right to legal assistance during investigative proceedings needs fine tuning to achieve greater consistency. In Malta, the interpretations of this right by the Constitutional Court differs at times from that given by the CCA. This should not be the case since the right is of a fundamental nature and affects all proceedings. Although the Constitutional Court has upheld many applications of accused persons, declaring a violation to their right to legal assistance, it has never gone so far so as to award any damages for such infringement despite the fact that it is competent to do so. Maltese citizens may be treated differently from citizens of another Member State due to lack of harmonisation in the transposition of EU Directive 2013/48 throughout different Member States.

To conclude, although Maltese Courts are trying to tackle this right in the same manner as other European Courts, there is still room for enhancement and improvements.

CHAPTER FIVE – THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

5. INTRODUCTION

The EU Directive 2012/13 of the European Parliament and of the Council of the 22nd May 2012 entitled 'The Right to Information in Criminal Proceedings' provides for the European harmonisation of rights and is 'designed to strengthen cooperation between

Member States but also to enhance the protection of individual rights'.[564] It applies to suspects and accused persons irrespective of their legal status, citizenship or nationality, and initially, had to be transposed into Member States' national legislation by 2 June, 2014.[565] The Directive focuses on the right to information and the procedural rights that each suspect and accused is entitled to, namely: the right to information about the rights pertaining to the suspect and accused; the right to know the nature of the accusation against the accused and the right to access material evidence of the case. These are the three rights that will be discussed in detail in this chapter. Their importance lies in the wide scope of their application since such rights are available to suspects and accused throughout the entire process, including at the appeal stage.[566]

The right to information about the suspect's or accused's rights is not envisaged by the ECHR. However, it can be inferred from the case-law of the ECtHR, particularly on Article 6 of the ECHR, according to which Member States must take a proactive approach to ensure that persons facing criminal charges are informed of their rights.[567] The significance of the right to information of an accused or suspect's rights can hardly be overstated. In examining the Directive, one comes across concrete definitions to the relevant provisions of the ECHR and the case-law of the ECtHR. The Directive also goes beyond them by providing new rights.

It may be stated that as the legal basis of the Directive is Article 82 (2) Treaty on the Functioning of the European Union (TFEU),[568] its application does not extend to legal persons, because the English version of the text refers to the right of 'individuals' in criminal proceedings. Collectively, the other language versions of the TFEU provide an unclear picture as for instance, whilst the German version[569] seems to support the meaning

[564] Right to Information in Criminal Proceedings Directive, recital 2.
[565] ibid, art 11.
[566] ibid, art 2.
[567] *Padalov v. Bulgaria* App no 54784/00 (ECtHR, 10 November 2006) para 52-54; *Talat Tunç v. Turkey* App no 32432/96 (ECtHR 27 June 2007) para 61; *Panovits v. Cyprus* (n 411) para 73. See also the explanatory memorandum to the Commission proposal.
[568] [2016] OJ C202/1.
[569] 'Die Rechte des Einzelnen im Strafverfahren'. Translation:-The rights of the individual in criminal proceedings.

of the English text, other versions, such as the Dutch[570] and the French,[571] do not restrict the applicability of the Directive to merely natural persons. The CJEU has already delivered a decision in this regard in the case *DEB Deutsche Energiehandels-und Beratungsgesellschaft, mbH* [572] wherein it held that the principle of effective justice protection as enshrined in Article 47 of the CFREU must be interpreted to mean that it is not impossible for legal persons to rely on this principle.

It is evident that the Council refined the text produced by the Commission and transferred certain rights from Article 3 of EU Directive 2012/13, which applies to all suspects and accused, to Article 4, which is only applicable to detained and arrested persons. The right of access to the materials of a case, for instance, is only applicable to detained and arrested persons. The Council also added a key right in criminal proceedings, notably the right to silence.[573] Such right, however, was already discussed by the Commission in 2006 in the Green Paper on the presumption of innocence[574] by the Commission in 2006 and is also discussed in this thesis in a subsequent chapter. The Directive highlights the Council's pro-rights stance,[575] and gave a concrete meaning to the case-law of the ECtHR.[576]

5.1 RIGHT TO INFORMATION ABOUT RIGHTS

The Directive provides that Member States should ensure that information on, at least, certain procedural rights must be provided to suspects and accused persons 'promptly' and 'orally' or 'in writing.'[577] This includes all suspects irrespective of whether they are

[570] 'Die rechten van personen in de strafvordering'.Translation:- The rights of accused persons in criminal proceedings.
[571] 'Les droits des personnes dans la procédure pénale'. Although all language versions of the Treaty are equally valid the fact that the text was originally drafted in the French language, under the Presidency of Valéry Giscard d'Estaing, might carry some weight in this matter.
[572] C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811 para 59.
[573] Directive on the right to information in criminal proceedings art 3(1)(e).
[574] Commission of the European Communities, *The Presumption of Innocence,* (Green Paper, COM 2006 174 final) s 2.5 is on the right to silence.
[575] Steven Cras and Luca de Matteis, 'The Directive on the Right to Information – Genesis and Short Description' [2013] eucrim - The European Criminal Law Associations' Forum <https:??doi.org/10.30709/eucrim-2013-004//> accessed June 2020.
[576] *H. v. Spain* App no 10227/82 (ECtHR, 15 December 1983).
[577] Directive on the right to information in criminal proceedings art 3(2).

deprived of their liberty or not. Therefore, it also includes those persons in Malta who are asked to voluntarily attend the police headquarters for questioning.[578] Furthermore, suspects giving evidence before the duty Magistrate should also be informed of their cardinal rights, and the responsibility of the duty Magistrate is to ensure that these rights are duly given.

The Directive further outlines the minimum procedural rights which are to be given to such persons namely, the following five rights:

i. The right to access a lawyer

ii. The right to legal aid and the conditions to obtain such advice

iii. The right to be informed of the accusation in terms of Article 6 ECHR

iv. The right to interpretation and information

v. The right to remain silent.

Having described the rights that must be made known to a suspect and accused person, it is equally important to establish when these rights should be granted to such persons. This matter was subject of, extensive discussion during the negotiations between the European Council and the European Parliament. The European Parliament suggested that this should happen 'at the point when those rights become applicable and in any event upon questioning by law enforcement authorities.'[579] The Council, on the other hand, felt that this was rather vague and proposed that the information be given before the suspect and/or accused person is first interviewed by any police or other investigating officer. Due to such disagreement, the term 'promptly' was introduced in the Directive. This was the

[578] Criminal Code art 355AD (7).
[579] Cras and de Mattheis (n 575).

same term used in the Proposed Framework Decision[580] which the Commission proposed in line with the term used in Article 6 (3)(a) of the ECHR. However, having outlined this in the Recital, a reference to the term 'official interview' was retained.[581] Thus, if the standards of the ECHR are maintained, this means that the procedural rights must be given by the competent authorities as early as possible. In this manner, the accused person would be able to make the correct decisions in the exercise of his defence. Such procedural rights, however, are to be given according to the national law of the Member States.[582]In practice, therefore, the information that must be given to a suspect and accused person may differ from one Member State to another, especially because the Directive only provides minimum rules based on Article 82 (1)(a) of the TFEU.

5.2 RIGHT TO INFORMATION ABOUT THE 'ACCUSATION'

The right to information about the 'accusation' stems from Article 6 (3)(a) of the ECHR which in turn refers to the term 'charge.'[583] This is of paramount importance because a person who's charged with having committed an offence should be able to prepare his defence. All suspected or accused persons must be provided with information about the criminal offence they are suspected or accused of having committed. The information must be given 'promptly' and must include:

i. A description of the facts, including time and space, where known of the criminal act the persons are suspected or accused of having committed.[584]

ii. Detailed information on the accusation, which should include the possible legal classification and nature of the alleged offence in

[580] Commission, 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union', COM (2004) 328 final, s 14.1.
[581] Directive on the right to information in criminal proceedings recital 19.
[582] Directive on the right to information in criminal proceedings recital 20.
[583] Recital 14 of the Directive on the right to information in criminal proceedings states however, that the term "accusation" in the directive is meant to describe the same concept as "charge" in art 6(1) ECHR since the term 'charge is a term that is used in common law systems.
[584] Directive on the right to information in criminal proceedings recital 28.

sufficient detail, as well as the nature of the participation by the accused persons.[585]

The right to be provided with information about the accusation has to be distinguished from the right to information about the rights themselves. Access to information about the rights, being a right in itself, established the mechanism for claiming the right to information about the accusation. The right to be informed about the accusation would be futile if suspects and accused persons are not informed of their rights. It would certainly not suffice if the authorities informed suspects and accused persons about their rights and subsequently fail to inform them about the offence they are suspected of having committed.

Article 6 (2) of the ECHR provides that 'suspects or accused persons who are arrested or detained should be informed of the reasons of their arrest or detention, including the criminal act they are suspected or accused of having committed'. The Directive further provides that if in the course of the criminal proceedings the details of the accusation change to the extent that the position of suspects or accused persons is substantially affected, this should be communicated to them whenever necessary so as to safeguard the fairness of such proceedings and to enable suspects or accused persons to exercise their right to defence.[586] The ECtHR went further and provided that it is not enough for the competent authorities to provide such information only when requested;[587] rather, Member States have a positive obligation to make the information available to suspects and accused persons.[588] As noted by Cape et al,[589] this is done so that 'the suspected and accused persons fully understand the effective exercise of their right with 'a view to challenge the lawfulness of their arrest or detention'.[590] Although, the Commission's

[585] Directive on the right to information in criminal proceedings recital 28 and art 6 (3).
[586] Directive on the right to information in criminal proceedings recital 29.
[587] *Mattoccia v Italy* App no 23969/94 (ECtHR, 25 July 2000) para 65.
[588] According to article 5(2) of the ECHR 'A person arrested must be informed promptly, in a language which he understands, of the reasons of his arrest and the charges against him.' article 6 (3) provides that this is applicable also to persons charged with a criminal offence. Vide *Panovits v. Cyprus* (n 411) paras 68 and 72; *Talat Tunç v. Turkey* (n 567) para 6; *Padalov v. Bulgaria* (n 567) para 52.
[589] Ed Cape and Zaza Namoradze, *Effective Criminal Defence in Eastern Europe* (Moldova: Soros Foundation 2012).
[590] Directive on the right to information in criminal proceedings recital 30.

proposal in Article 6 of the Directive contained a general rule on information about the charge, in the final text of this article, the right of information about the 'accusation' was tailored to apply to different situations or phases in criminal proceedings.

There are two schools of thought on the right to information, particularly on the timing as to when such right should be given. There are those who feel that this right to information about the accusation has to be given in the course of the pre-trial investigation, when the person acquires the status of a 'suspect,' as is the case in Austria,[591] Belgium,[592] Croatia,[593] Estonia,[594] Finland,[595] France,[596] Greece,[597] Luxembourg,[598] the Netherlands,[599] Slovenia[600] and the United Kingdom.[601] On the other hand, other Member States have introduced this obligation only when the suspect or accused person is deprived of his/her liberty (upon arrest or shortly after) such as Cyprus,[602] Ireland,[603] Italy[604] and Malta.[605] The laws of the latter group, specifically mentions that the right to information on the accusation is to be provided upon deprivation of liberty through the letter of rights. In addition, there are also divergences with respect to the details that should be given to the accused or suspect about their accusations. Most Member States demand that

[591] Code of Criminal Procedure (Strafprozessordnung, StPO), 1975, paras. 6 (2) and 50 (1).
[592] Code of Criminal Procedure (Code d'instruction criminelle / Wetboek van strafvordering) 1808, art. 47 bis.
[593] Criminal Procedure Code 2009, art 208(5).
[594] Code of Criminal Procedure 2003, art 34(3).
[595] Criminal Investigation Act 2014, Ch. 7, Section 10.
[596] Code of Criminal Procedure (Code de procédure pénale) 1959, art 114.
[597] Code of Criminal Procedure, 1951, Art. 101, 104-105 and 412. See also Greece, National Commission for Human Rights (NCHR) (2015), p. 7 (calling for 'the obligation of the competent authorities to fully inform the accused person about the accusation [to be] stated explicitly.')
[598] Criminal Procedure Code (Code d'Instruction Criminelle) 1808, art 24-1; Bill 6758 'Strengthening the procedural guarantees in criminal matters' 2014.
[599] Code of Criminal Procedure 1881, sec 27 et seq.
[600] Criminal Procedure Act 1995, art 148 (3).
[601] Police and Criminal Evidence Act 1984 (PACE); Revised Code of Practice for the Detention, Treatment and Questioning of Persons By Police Officers – Code C (201), paragraph 3.26; The Police and Criminal Evidence (Northern Ireland) Order 1989 (Codes of Practice) Order 2015; Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (1 June 2015), paragraph 3.16 (b).
[602] Chapter 55 of the Laws of Cyprus, Criminal Procedure (1959) as amended by Rights of Persons under Arrest and Detention Law" (N. 163(I)/2005), art 3(1) and 7 (2), 2005.
[603] S. I. No.119/1987, Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Station) Regulations, 1987, Reg 8(1) and (9)(1); see also *Health Service Executive v White* [2009] IEHC 242.
[604] Codice di Procedura Penale 1988, art. 415bis.
[605] Criminal Code art 534AB (3) and Schedule E.

information regarding the date and place of the commission of the offence must be given, for instance: in Croatia, the authorities must provide good 'grounds of suspicion'[606] while in Portugal a 'document specifying the particulars of the case'[607] must be provided. Thus, although the purpose of the Directive is to harmonise Member States' legislation, it appears that Member States have adopted different approaches.

5.2.1 Letter of Rights

The Directive[608] provides that Member States shall ensure that suspects or accused persons who are arrested or detained are 'promptly' provided with a written letter of rights as proposed in the Green Paper of 2003.[609] They must be given the opportunity to read the letter of rights and allowed to keep it whilst deprived of their liberty. There were almost no discussions in the Council regarding the proposal of the Commission, namely, to provide suspects and accused persons with a copy of the letter of rights.[610]

Taru Spronken explains that the letter of rights serves the purpose of setting out the framework and legal basis with respect to the information which should be provided to suspects and accused.[611] Furthermore, the letter of rights will help to avoid miscarriages of justice and reduce the number of appeals.[612] Jean Flamme states that in some Member States, information is given in a standardised manner and operates as a form of checklist which the investigating officer must adhere to.[613] It is observed that in some Member States such as the Czech Republic, Luxembourg and Estonia, suspects must sign the form to confirm on record that the interrogating officer has performed his duty of cautioning

[606] Croatia's Criminal Procedure Code (n 593).
[607] Code of Criminal Procedure (Código de Processo Penal) 1987, art. 58(4).
[608] Directive on the right to information in criminal proceedings art 4(1).
[609] Commission of the European Communities, *Procedural Safeguards for suspects and defendants in Criminal Proceedings throughout the European Union* (Green paper COM 2003 75 Final).
[610] Cras and de Mattheis (n 575). According to the Commission's Impact Assessment accompanying the proposal, 11 Member States were already operating a letter-of-rights system before the proposal was submitted.
[611] Taru Spronken, (n 132) 92.
[612] Commission, 'Fair trial rights: European Commission proposal giving citizens the right to information in criminal proceedings to become law' (2012)< https://ec.europa.eu/commission/presscorner/detail/en/IP_12_430> accessed January 2021.
[613] Jean Flamme, *Defence Rights: International and European Developments* (Maklu 2012) 92.

the suspect.[614] This certainly reduces possible police abuse unless it is proven that such signing was done under duress, coercion or threat. Other Member States, like Malta, provide information in the form of leaflets, brochures or plain letters which are given to the suspect without a receipt from the latter ascertaining that such document was indeed provided.

There were considerable debates between the European Commission and the European Parliament with respect to who is entitled to receive this document. The Commission suggested that the right should be given to all arrested persons whereas the European Parliament opined that this document should be given to all persons who are deprived of their liberty. The Council feared a wide interpretation, particularly since in several Member States, like Malta, it is possible for suspects or accused persons who are not arrested to nonetheless be deprived of their liberty for a limited period in order to attend procedural acts such as identity parades. The Council was reluctant to provide this right to such persons. In the end, however, a compromise was attained and in fact the recital[615] indicates that the notion of arrested or detained persons should be understood to refer to any situation where during the criminal proceedings, such persons are deprived of liberty within the meaning of Article 5 (1) of the ECHR as interpreted by case-law. Today, the right to be provided with the letter of rights is extended to all detainees and arrested persons in all processes forming part of the criminal proceedings.[616]

The Council and the European Parliament also discussed at length the contents of the letter of rights. There was a consensus that, at least as a minimum, it should encapsulate the cardinal rights mentioned under Article 3. The final text, however, also included the additional rights mentioned in Article 4. Recital 22 states that the letter of rights may also include other relevant procedural rights which apply in other Member States. One relevant question is whether the letter of rights should, for instance, also include information

[614] Taru Spronken (n 132).
[615] Directive on the right to information in criminal proceedings 21.
[616] This has also been indicated in the heading of Annex I to the 2012/13 ED Directive: 'The Member State's Letter of Rights must be given upon arrest or detention. This however does not prevent Member States from providing suspects or accused persons with written information in other situations during criminal proceedings.

regarding the way one may challenge the lawfulness of an arrest, or how to obtain a review of detention, or how to present an application for bail. The spirit of this Directive indicates that it is sufficient if for suspects or accused persons to be made aware of these procedures and, if they are interested in them, further information may be given to them through their lawyer. The study reveals that in the interests of justice, the inclusion of more information in this document would more easily ascertain a fair trial since this would diminish the need for interpretation and establish a more objective approach.

The letter of rights should be drafted in simple and accessible language,[617] taking into account any particular needs of the vulnerable.[618] Regarding the term 'vulnerable persons', the Recital provides that such persons can include children or persons who have a mental or physical impairment.[619] In order to promote consistency amongst Member States, a template letter of rights is provided in Annex I to the Directive,[620] although Member States are not obliged to use this model. When preparing their letter of rights, Member States may amend the model to align it with their national rules and to add further useful information. The Proposed Framework Decision[621] likewise requires all Member States to 'ensure that police stations keep the text of the written notification in all the official Community languages to be able to offer an arrested person a copy in a language he understands'.[622] Where a letter of rights is not available in the appropriate language, suspects or accused persons should be informed of their rights orally in a language that they understand. Thus, Member States are required to make the letter of rights available in multiple languages, not only in the twenty-three official languages of the EU. Belgium, for instance, has already prepared a letter of rights in more than fifty different languages, including such unusual languages as Gujarati, Tatar, and Urdu.[623] Likewise, England and Wales, Germany, and Sweden have translated the letter of rights in more than forty

[617] Directive on the right to information in criminal proceedings art 4(4) and recital 22.
[618] Directive on the right to information in criminal proceedings art 3(2).
[619] Directive on the right to information in criminal proceedings recital 26.
[620] 'Arrest Rights Brief No. 2: The Right to Information (June 2012), Open Society Justice Initiative, para. 52. < https://www.justiceinitiative.org/uploads/e49bcd69-c7be-4ba9-8182-fa03a7705d81/arrest-rights-brief-right-to-Information-20121021.pdf> accessed December 2014.
[621] Commission, 'Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328} s 14.3.
[622] ibid.
[623] FRA - Rights of suspected and accused persons across the EU (n 1).

languages.[624] In Malta, to date, the letter of rights is only available in English and Maltese.

It appears that the effectiveness of the letter of rights and its procedural framework is largely dependent on the manner it is being implemented. Jean Flamme believes that the letter of rights is perceived by the police as a burden and an unnecessary formality[625] and, consequently, the police may discourage a person from exercising this right.[626] Libor Kilemk shares the same opinion and states that the effectiveness of the letter of rights may be thwarted by the police's attitude.[627]

5.3 RIGHT OF ACCESS TO MATERIALS RELATING TO THE CASE

The right of access to materials of the case stems from Article 5 (2) and 6 (3)(1) of the ECHR as interpreted by the ECtHR. Regarding Article 6 (1), the Court ruled that it is an important aspect of the right to a fair trial that criminal proceedings should be adversarial and there should thus be equality of arms between the prosecution and defence. The investigating and prosecuting officers should disclose to the defence all material evidence in their possession whether for or against the accused.[628] With respect to Article 5(4), the ECtHR stated that equality of arms is not guaranteed if the lawyer is denied access to documents in the investigation file which are essential to effectively challenge the lawfulness of a client's detention.[629]

The Directive[630] defines the latest possible stage of the proceedings when access should be granted, namely 'upon submission of the merits of the accusation to the judgment of a

[624] Taru Spronken and Marelle Attinger, '*Procedural rights in criminal proceedings existing level of safeguards in the European Union'* (28 July,2009) European Commission, December 2005, 81 <https://ssrn.com/abstract=1440204>accessed January 2021
[625] Flamme (n 613).
[626] ibid 93.
[627] Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (1st edn, Springer 2017) 619.
[628] See, e.g., *Jasper v. UK* App no 27052/95 (ECtHR, 16 February 2000), para 51; *Edwards v. UK* (n 178) paras 46-48.
[629] *Vide Schöps v. Germany* App no 25116/94 (ECtHR, 13 February 2001) para 44; *Mooren v. Germany* App no 11364/03 (ECtHR, 9 July 2009), para 124.
[630] Directive on the right to information in criminal proceedings art 7(3).

court,'[631] but provides in addition that access should be given 'in due time to allow the effective exercise of the rights of the defence.'[632] Such access is necessary 'to safeguard the fairness of the proceedings and to prepare the defence.'[633] In this way, Article 7 (3) gives rise to different practices in the Member States. Some states may choose to follow the Directive and provide access to the case material at the latest conceived stage of the proceedings. Other states may think that it is essential to provide access in the earlier stages (during or at the end of the pre-trial investigation) for there to be an effective preparation and exercise of the defence. This decision is most likely to be based on national laws and practices.

Grace Mulvey et al, feel that 'access to materials of the case signifies being able to obtain any documentation that is relevant and significant to one's case from the competent authorities'.[634] It is noted that access to material evidence in criminal proceedings, although not a right expressly stated under Article 6 of the Convention, is indisputably an inherent and crucial requirement for a fair trial.[635] The ECtHR has explicitly declared that a default in the proceedings relating to access to materials may violate the adversarial proceedings requirement and 'the equality of arms principle' which is enshrined in Article 6 of the ECHR. In fact, the ECtHR held that failure to disclose such material information may lead to a defect in trial proceedings.[636] The Commission provided guidelines about the duty of disclosure but, in doing so, it did not identify the moment as to when such

[631] In *Kolev*, the CJEU held that the requirements of article 7(3) are met if access to the case materials has been granted "after the lodging before the court of the indictment that initiates the trial stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file in the course of proceedings, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings." CJEU, *Criminal proceedings against Nikolay Kolev and Others,* [2018] ECLI:EU:C:2018:392 para. 100.
[632] Directive on the right to information in criminal proceedings art 7(3).
[633] Directive on the right to information in criminal proceedings art 7(2).
[634] Grace Mulvey and Sineas Skelly, *Know your rights to information on criminal charges* (Justicia European Rights Network December 2012) p 24.
[635] Justice response to the European Commission Consultation Paper on Procedural Safeguards for Suspects and Defendants in criminal Proceedings (April 2002) para 72 <http://www.justice.org.uk/images/pdfs/minimum%20standards pdf > accessed April 2019.
[636] *Edwards v. UK* (n 178) para 36.

information must be disclosed.[637] It is evident that although the Convention does not clearly indicate that the duty to disclose is available at pre-trial stage, it must be understood, in line with the teachings of the Commission, that such right is to be made available at the pre-trial stage to enable the accused person to have adequate time and facilities for the preparation of his defence in order to conform to the principle of a fair trial and 'equality of arms'.

Jonathan Auburn affirms that the right to access materials requires that each party must be given a reasonable opportunity to present his case under conditions which do not place the accused at a disadvantage in relation to his adversary .[638] The ECtHR in *A v. UK*[639] and similarly the House of Lords in the *UK in R vs Secretary of State for Home Department,*[640] held that a fair trial requires sufficient disclosure to enable the accused to prepare for his/her line of defence.[641] 'Equality of arms' is a jurisprudential principle of the ECtHR which comes into play when each party is given a reasonable possibility to present its case in conditions that will not place that party at a disadvantage against its opponent.

In a very recent decree in the names *Il-Pulizija v Gianluca Caruana Curran et*[642] the court referred to the UK's AG's Guidelines on Disclosure found in the Criminal Procedure and Investigations Act 1996 as subsequently amended by the Criminal Justice Act 2003 which state that;-

> [D]isclosure refers to providing the defence with copies of, or access to, any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed.'[643]

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[637] The European Commission Consultation Paper on Procedural Safeguards for Suspects and Defendant's in criminal Proceedings (Justice ICE response April 2002) para 74 <http://www.justice.org.uk/images/pdfs/minimum%20standards pdf.> accessed April 2019.
[638] Jonathan Auburn, *Legal professional privilege: law and theory* (1st edn, Hart publishing 2000) 43.
[639] App no 3455/05 (ECtHR, 19 February 2009).
[640] Decided by the House of Lords, Great Britain (UK) 8 December 2005.
[641] *Jespers v. Belgium* App no 8403/78 (ECtHR, 14 December 1981).
[642] Decree delivered by the CMCCJ on the 17th February 2021.
[643] Criminal Procedure and Investigations Act 1996 s 8

In this case, the court upheld the defence request, made right after the arraignment and therefore at the initial stages of the proceedings, to be provided with a copy, of the statement given by the *parte civile* during pre-trial investigations. The court held that although such document was inadmissible evidence because the *parte civile* would have to testify *viva voce*, it could be used by the defence for such witness and thus decreed that this constituted material evidence of the case.

5.3.1 Types of disclosure relating to the right of access to materials relating to the case

The case law of the ECtHR reveals that there are two types of rules of disclosure. There are those which permit the defence to examine the prosecution's case prior to the commencement of the trial, and those which enable the defence to obtain that information in the possession of the prosecution which, if used, may either help the lawyer in his defence or help secure a reduction in sentence. What would, however, be the case if the prosecution refers to disclose material evidence to an accused person who is defending himself? This matter was dealt with in *Foucher v. France*[644] wherein the court held that there was a violation of the principle of 'equality of arms' in conjunction with Article 6 (3) of the Convention. The court held that since the Convention established an accused person's right to defend himself and since Foucher was not given access to the information he requested, in particular copies of documents in the possession of the prosecution, this amounted to a violation of the right of the accused to prepare an adequate defence.[645]

The Directive provides that where a person is arrested or detained at any stage of the criminal proceedings, Member States must ensure that documents relating to specific cases in the possession of the competent authorities and which are essential to effectively challenge the lawfulness of the arrest or detention[646] are made available to the arrested person or to their lawyer.[647] The recital to the Directive explains the meaning of the term

[644] App No 22209/93 (ECtHR, 18 March 1997).
[645] ibid.
[646] In accordance with national law.
[647] Directive on the right to information in criminal proceedings art 7 (1).

'documents'; this includes photographs and audio and video recordings which are essential to challenging the lawfulness of the arrest or detention of suspects or accused persons in accordance with national law. These must be made available to those persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with the ECHR.[648] Grace Mulvey defines 'material evidence' as evidence which is relevant to the case and may have an influence on the outcome of the trial.'[649]

David Ormerod and David Perry give examples of material evidence that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused namely:

i. [A]ny material casting doubt upon the accuracy of any prosecution evidence.

ii. Any material which may point to another person, whether charged or not (including a co-accused) being involved in the commission of the offence.

iii. Any material which may cast doubt upon the reliability of a confession.

iv. Any material that might go to the credibility of a prosecution witness.

v. Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers.

[648] ECHR art 5 (4).
[649] Grace Mulvey & Sinead Skelly (n 634) p 8.

vi. Any material which may have a bearing on the admissibility of any prosecution evidence.[650]

The recital further provides that these materials may be contained in a case file or otherwise held by the competent authorities in any appropriate way in accordance with national law.[651] At the latest, access must also be given on submission of the merits of the accusation to a court, and detailed information should be provided on the accusation, including the nature and legal classification of the criminal offence as well as the nature of participation by the accused person.'[652] Although access to materials of the case should be provided free of charge, recital 34 provides that this should not prejudice any national law provisions which fees for copying documents or for sending copies to the lawyer concerned. It is important that such fees are not excessive so as not to undermine the efficacy of this right. France[653] and Hungary,[654] for instance, provide that the first copy of case materials is to be provided for free whereas, in Romania,[655] there is a standard fee for obtaining copies of the case file. Some lawyers have held that eleven-euro cents (€0.11) per page is rather high and thus hinders the access to such evidence.[656]

5.3.2 Restrictions to the right of access to materials relating to the case

Access to the materials of the case is not an unfettered right since there are instances where access to certain materials may be refused provided, however, that the right to a fair trial is not prejudiced. The Directive provides instances when such access may be denied, namely:

[650] Blackstone's Criminal Practice (Oxford University Press 2013) p. 2909 -2910.
[651] Directive on the right to information in criminal proceedings art recital 31.
[652] Directive on the right to information in criminal proceedings art recital 6(3).
[653] Code of Criminal Procedure (Code de procédure pénale) 2 March 1959, art 114.
[654] Order 12/2014 (VII. 11.) of the National Office for the Judiciary on the regulation of application of documents related to the guidance of juveniles as model forms in criminal, civil and misdemeanour proceedings.
[655] A 2015 executive order of the Ministry of Internal Affairs sets a standard price for obtaining copies from case files.
[656] FRA - Rights of suspected and accused persons across the EU (n 1).

i. Where access may lead to a serious threat to the life or the fundamental rights of another person,[657] or

ii. If the refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an on-going investigation or seriously harm the national security of the Member State where the criminal proceedings were initiated.[658]

iii. If such access would violate the domestic law of a Member State with regard to the protection of personal data and the whereabouts of protected witnesses.[659]

However, it is the judicial authorities that must decide whether the circumstances indicated above warrant a refusal. It is noted that refusal to access is the exception and not the rule. Accordingly, a refusal must be weighed against the rights of the suspect's and accused's right of defence, taking into consideration the different stages of the proceedings.[660] Any such restriction on the rights of the defence should be strictly proportionate and counterbalanced by procedural safeguards adequate to compensate for the handicap imposed on the defence. The need for disclosure or non-disclosure should at all times be under assessment by the trial judge.[661] Recently, in Malta, an application was filed before the CMCI in the on-going case in the names *Il-Pulizija vs Yorgen Fenech*[662] where the defence lawyers requested to be given a copy of the call profiles and geo-location data of a number of persons mentioned in the trial for the purpose of establishing cellular activity at the time of the commission of the alleged offence. The Court rejected this request on the basis that the information amounted to personal data and, thus, access to such material evidence would constitute a restriction of the fundamental human rights protected by Article 7 and 8 of the ECHR and of the CFREU.

[657] Directive on the right to information in criminal proceedings recital 32.
[658] ibid.
[659] Directive on the right to information in criminal proceedings recital 33.
[660] Directive on the right to information in criminal proceedings recital 32.
[661] *Rowe and Davis v. UK* App no 28901/95 (ECtHR, 16 February 2000).
[662] Decree dated 2nd October 2020 per Magistrate Dr Rachel Montebello.

5.3.3 Restrictions to the right of access to materials relating to the case in *lex specialis*

Modelled upon international legal legislative instruments to fight against the laundering of illicit money, laws on the prevention of money laundering may be one of the *lex specialis* which prevent the disclosure of material evidence as the investigation of such crimes is very complex and has no geographical boundaries. The Court may frequently be required to strike a balance between the serious investigation of such crimes and the respect that must be shown to the rights of suspects. This balance may not always be attained since the AG, who prosecutes such crimes, may receive from various sources materials which are relevant to the offence being investigated whilst suspects are faced with an Attachment or Investigation Order which impedes them from disposing of any of their assets during the time that such Order is in place. Although such orders are temporary in nature, their duration may be extended by an application to the court despite the drastic effects that such Orders may have on those being investigated. Such Orders are generally issued by a court upon a request made by a Judicial Authority (in Malta, by the AG) independently from the police and thus one asks whether the right of access to materials relevant to the case still subsists in these instances. Undoubtedly, that the person being investigated should be considered as a suspect even at this primary stage where no formal charges have been issued.

Recently, before the Criminal Court, Matthew Castagna, an applicant *qua* suspect of money laundering, presented an application in the acts of an Attachment Order asking the court to order the prosecution to give the suspect a copy of all the material information it had in its possession prior to the issuance of such Order so that he could be made aware of the offence for which he was being investigated and, if necessary, be able to prepare his defence. The AG objected to such a request on the premise that, unlike the obligation imposed on the executive police, the office of the AG was not bound to disclose any information it had received. The AG referred to Article 4 (6A)[663] of Chapter 373 of the

[663] 'Where an attachment order has been made or applied for, whosoever, knowing or suspecting that the attachment order has been so made or applied for, makes any disclosure likely to prejudice the effectiveness

Laws of Malta which clearly states that an Attachment Order is confidential and that anyone who reveals any information which 'may prejudice the effectiveness of the said order or any investigation connected with' is liable to an offence. On the contrary, the Commissioner of Police replied that he had no objection to the release of information which led to the issuance of such an Order, and while stating that such disclosure would be given at the opportune moment, did not indicate the appropriate moment. The court, in its decree,[664] referred to Article 534AF of the Criminal Code which states that the obligation to disclose material evidence is only imposed on the police in those instances where the suspect is detained or under arrest, circumstances which were not present in the case under examination. It also emphasised that the obligation to disclose rests only on the police. The court reminded the applicant that such right was not an absolute right as, in fact, the law itself provides limitations on the exercise of this right, and thus rejected the request.[665]

The Court thus felt that the right to adhere to the ordinary law of the country was supreme even though it felt that the measure taken by the AG in issuing such an Order had drastic effects on the applicant.

5.4 HISTORY OF THE RIGHT TO INFORMATION UNDER MALTESE LAWIN THE PERIOD BEFORE THE EU DIRECTIVE 2012/13

In Malta, under the Constitution's provisions entitled 'to secure protection of law', 'every person charged with a criminal offence shall be afforded a fair trial'.[666] This includes *inter alia* the right that such person is informed in writing in a language which he understands and in detail of the nature of the offence charged as provided in Directive 2012/13.

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of the said order or any investigation connected with it shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) or to imprisonment not exceeding twelve months, or to both such fine and imprisonment.'

[664] Decree of the Criminal Court in the names *L-Avukat Generali v Keith Schembri et* (Criminal Court, 12 November 2020).

[665] *Vide* also *L-Avukat Generali v Keith Schembri et* (Criminal Court, 19 October 2020) wherein a similar application was made.

[666] Constitution of Malta, art 39 (1).

Although it does not specifically mention the right of access to material evidence, it further states that such person must also be given adequate time and facilities for the preparation of a defence. These rights appertain to accused persons only and not to suspects at pre-trial.

The topic of disclosure was first discussed in Parliament in 2001 when Dr Gavin Gulia, then Opposition Member of Parliament, referred to Article 5 of the Criminal Procedure & Investigations Act 1996 of the UK when addressing Parliament[667] about the right to disclosure by the Police, and appeared to be in favour of introducing such right. He stated that disclosure would assist the accused at the time of deciding whether to request legal assistance, and that it is not an ideal situation to have the accused person pass on such information to the lawyer, particularly as, in most scenarios, the accused would be a layman and not an individual who is well versed in the workings of the law.[668]

Eventually, Act No. III of 2002 introduced for the first time in Malta the element of disclosure under the heading 'Powers and Duties of the Police in respect of court proceedings' by amending Article 356 of the Criminal Code. This, however, applied limitedly as the obligation to disclose evidence was imposed when there was an arraignment in court. In other words, there was no right to disclosure during the pre-trial stage as envisaged in EU Directive 2012/13 and as enshrined in Article 6 of the Convention. The law as amended with regard to the right of disclosure in criminal proceedings read as follows:-

> [I]t is the duty of police prosecuting officers to disclose to the defence such evidence which may appear to favour the person charged and which the police, for any reason, might not have the intention to produce before the court as evidence for the prosecution.[669]

From an examination of this section, it is clear that the duty to disclose is placed only on

[667] Parliamentary Debate, Session number 569, (Criminal Code (Amendment) Bill (Second Reading)) p. 293-294, 4th July, 2001.
[668] ibid.
[669] Criminal Code art 356 (2) introduced by Act III of 2002.

the police and that the duty itself is restricted because the police are only obliged to disclose evidence which in their opinion favours the accused and, moreover, in those instances where the police have no intention to produce it during the trial. It is therefore only when these two conditions are met that the police are bound to comply with the obligation to disclose. This begs the question: what would the position be if the police, unaware of the defence that the accused is going to present, were to refrain from considering the evidence they have to be in favour the accused? Would such a failure amount to a violation in the criminal trial? Likewise, what if the undisclosed police evidence is discovered at a later stage, once the trial is over? Can the accused person claim a violation of his fair trial rights? The law remains silent on these points.

5.4.1 References to national case-law to the right to information prior to the legislative introduction of such right

In the case *Il-Pulizija vs Charlene Carm Simpson*[670] the appellant was contesting the admission she had registered before the CMCCJ on the premise that she was not given sufficient time to reconsider her plea and due to the fact that the Court did not itself examine the charges brought forward against her in the light of her admission in terms of Article 392A (3) of the Criminal Code. This appellant further stated that there were unequivocal failings in the statement presented in court which did not reflect all that was discovered by the police in this case, namely the existing financial divergences which the police arbitrarily refused to mention to the accused and which, as a result, were not mentioned in her statement. The appellant stated that the lack of disclosure had placed the lower court in a disadvantageous position when that court was evaluating the charges and facts to ultimately arrive at a decision.[671]

The Court rejected the plea, stating that the prosecution had exhibited two statements and not one as erroneously indicated by the defence, and reiterated that the said statements contained all the facts of the case amounting to the elements of the crimes as indicated in the charge sheet and subsequently admitted by the applicant. The court, however, brushed

[670] CCA, 1 November 2013.
[671] ibid.

aside the issue of disclosure and failed to deal with the plea raised by the defence.

As noted earlier, the government of the day had appointed the Commission for the Holistic Reform of the Justice Sector[672] in March 2013 to conduct a review of the existing justice system. The Commission had issued two reports for public consultation which were discussed at length with most major stakeholders in the judicial system. The final report was presented to government on 30 November 2013 and for the first time, pre-trial disclosure was included in the 119th measure under recommendation 119 entitled 'Procedure of Disclosure.' It stated the following:

> [S]ince the procedure of disclosure is not used in a way it can help to speed up court cases, the procedure of disclosure should be introduced -during the pre-trial hearing stage - so that it will not be possible, for a party to produce a proof at the last moment of which the other party has no clue and has little chance to contradict it, except in the case where the party had become aware of the fact or any document in the course of the hearings. In this way none of either parties will try to take abuse of the judiciary process to shock the other part with a surprise of this kind.

There is no doubt that the introduction of this provision in the law would have benefitted accused persons by enabling them to prepare their defence from an early stage and would have thus reduced the risk of accused persons being presented with an unexpected document, in which eventuality the accused would have perhaps needed to change the line of defence halfway through the criminal proceedings. This would certainly have been welcomed by the legal profession as it would have enabled lawyers to better defend their clients. Judge Giovanni Bonello, who chaired the above mentioned Commission and who proposed this measure, stated that 'his intention was to ensure that the bottom line is 'equality of arms' in the discovery of truth.'[673] Such an amendment to the law would have helped to guarantee the discovery of the truth and thus the court would not

[672] The Holistic Reform of Justice Commission Final Report (n 100).
[673] Interview held by Dr Martina Borg Stevens on the 12th January 2015 when preparing her thesis for University entitled 'Does the Disclosure of evidence in Maltese Criminal Proceedings fulfil the requirements to the fundamental right to a fair trial under article 6b of the European Convention?' (LL.D. Thesis, University of Malta, 2015).

simply rest its case *secundum allegata et probata.*[674] Also, this could have precluded parties from keeping important documents away from the case.

At times, for example if a person is taken unawares by the production of a document s/he would not have known about, s/he would consequently have to request an unwarranted adjournment consequently causing a delay in the trial too. Likewise, if the defence is made aware of the evidence the police have in hand at an early stage, the defence could register a guilty plea at the initial stages of the proceedings causing justice to be dispensed with faster, resulting in no waste of time and less expenses to the government coffer. Although some might argue that it is unfair for the police to disclose the documents it has in its possession if disclosure would weaken its case, one must bear in mind that the police should not pursue a conviction but rather help the court reach a fair judgment.

Disclosure was once again used as a defence in another case pending before the Criminal Court in the names *Ir-Repubblika ta' Malta vs Spiridione Mercieca*,[675] wherein the AG was asked to present a note in the acts of the case within five days from the notification of the court decree, stating his objection to the admissibility or otherwise of the witnesses indicated by the defence. The AG objected to the appellant's list of witnesses on the basis that the appellant had not indicated the reason for such witnesses in his original note of defence, presented at the preliminary stage. The defence believed it was not bound to disclose the reason to produce such witnesses, as unlike the police, it was not bound by the element of disclosure. The Court rejected the defence's argument and although, it did examine the duty of disclosure vis-à-vis the, it held that the AG could present his reply regarding the admissibility of witnesses if the reason for the production of such a witness or document is, at least, indicated. If this is not indicated, an obstacle to the proper administration of justice would be created as the adjudicator presiding over the case would have to prepare him/herself both about the evidence that the prosecution would be bringing forward during the compilation of evidence and with regard to that presented by

[674] Translation: Things alleged and proved.
[675] Decided *in parte* by the Criminal Court, 11 April 2014.

the defence.

It is interesting to note that during the second reading of Bill No. 168 of 2016[676] introducing legal assistance during interrogation, the Honourable Minister of Justice spelt out a definition of the term 'disclosure' as the same should be understood in Malta's national law, notwithstanding that the law relating to disclosure was already introduced in the legal system (though not at pre-trial stage).[677] He described the right of disclosure as the arrested person's right to be informed of the reasons for arrest and to be given access to the evidence held on file. He further stated that such right is already available in other jurisdictions and that its introduction into the Maltese legal system would undoubtedly enhance the system.[678]

The first time that the right to full disclosure was mentioned in a court of law *obiter* was in the trial by jury before the Criminal Court in the names *Ir-Repubblika ta' Malta vs Pasqualino Cefai.*[679] The judge thought that in the interest of the administration of justice, it was opportune to comment on the on-going discussions that were taking place at the time. He held that the Court noticed with great satisfaction that the right to disclosure was introduced in Maltese law and that this would undoubtedly help the accused in his/her defence. He emphasised that, together with the right to legal assistance given to each arrested person at pre-trial stage, this right aims to enhance an accused person's right to a fair trial as guaranteed by the Constitution of Malta. However, the judge held that these rights also create obligations, and that the right to disclosure had to be well balanced with the jurors' right to take cognizance of the conviction sheet of the accused person appearing before them. The judge explained that in those instances where the accused person is to be judged by the Magistrate or Judge, the latter would be aware of the conviction sheet of the accused from the initial stages of the proceedings. Similarly, as jurors are akin to judges, why shouldn't they also know the past of the person they are going to pass judgement on? He argued that if accused persons decide to give evidence, would it not be

[676] Criminal Code (Amendment No. 2) Bill
[677] Parliamentary Session Number 448, Criminal Code (Amendment No. 2) Bill 7th November 2016.
[678] ibid.
[679] Criminal Court, 18 June 2014.

better if they could assess such evidence in the light of objections affecting the credibility of witnesses?[680] The Court went on to state that this proposition was innovative and that it attracted considerable opposition from lawyers working in the criminal field. It was not new since the English system, well known for its conservative approach, had already introduced this consideration to the jury. Although the court understood that such a proposition needed to be studied in detail, it remarked that however, it was opportune to discuss it in the light of the right to disclosure, particularly to examine the effects such a proposal would display in Malta's juridical system.

5.5 THE RIGHT TO INFORMATION IN MALTA POST EU DIRECTIVE 2012/13

Bill No. 34 of 2014 entitled 'Various Laws (Criminal Matters Amendment Bill)' was presented in Parliament by the Parliamentary Secretary for Justice Dr Owen Bonnici on 15 January 2014. It covered *inter alia* the Maltese laws implementing Directive 2012/13/EU of the European Parliament and of the Council of 22nd May 2012 on the right to information in criminal proceedings, to strengthen the rights of suspects and accused in Maltese criminal proceedings. The Member of Parliament shadowing justice, Dr Beppe Fenech Adami, hailed the Bill as a positive step towards increasing and securing the rights of suspects whilst eliminating abuses .[681] During the second reading of this Bill, the Hon Dr Owen Bonnici held that the Directive, will enable persons who are arrested or detained as suspects or accused to be informed of their procedural rights by the relevant authorities.[682] He highlighted that the implementation of Article 534AF[683] will overhaul the way prosecutions and investigations are undertaken in Malta. The Hon Dr Emanuel Mallia[684] enquired about those situations where there is an irregularity in the disclosure procedure, and whether such irregularity would annul the criminal process and acquit the

[680] Criminal Code art 637.
[681] Parliamentary Debate, Session number 118, Various Laws (Criminal Matters) Amendment Bill (Second Reading), p. 859, 11 February 2014.
[682] ibid 853.
[683] Right of access to the materials of the case, Criminal Code art 534AF.
[684] Former Minister for Home Affairs and National Security of the Republic of Malta.

accused.[685] The Criminal Code does not provide an answer to this legitimate quandary.

Malta introduced the right to full disclosure in its statutory book on 18th March, 2014 by Act No. IV of 2014. The latter Act went a step further than what was previously introduced by Act 111 of 2002, in that it provided for full disclosure by the police and the defence even at the pre- trial stage in line with EU Directive 2012/13 and the ECHR. This was a novelty because for the first time, the suspect was given the right to know what material evidence the investigating police officer had in hand prior to proceeding to investigate him. It also provided that the police should disclose the evidence it had in its possession. However, it did not impose such an obligation on other investigative officers such as the AG in criminal investigations or the Commissioner of VAT[686] in VAT investigations. As a result of this Act, all suspects and accused persons have the right to access the documents and other material concerning their case free of charge from the moment they are called upon to make a statement, provided that such materials are 'related to the specific case **and** are essential to challenge effectively the lawfulness of the arrest or detention'.[687] An interesting observation would be: may a suspect resort to the right of disclosure if the suspect is not challenging the arrest? Are the police still bound to hand over the material evidence in their possession which is related to the specific case? Another problem may arise in circumstances where the police have substantial intelligence in hand but no material evidence when the suspect is arrested and exercises his/her right of disclosure. As at that moment in time the police would have no material evidence to disclose, should they inform the suspect about their intelligence or should they state that they have no evidence in hand? Or should the police send for the suspect again when material evidence is in hand and pass it onto him/her? It is only when these questions are answered that one can state that the right to disclosure benefits a suspect. For the time being, it can safely be said that the right to disclosure in Malta needs fine-tuning before it can be considered as a beneficial right to suspects.

[685] Parliamentary Debate, Session119, Various Laws (Criminal Matters) Amendment Bill (Second Reading cont), p. 915, 12 February 2014.
[686] Valued Added Tax
[687] Criminal Code art 534AF (1).

5.5.1 Definition of the term 'document'

It is of paramount importance to define the term 'documents' before attempting to understand the right to disclosure of material documents. Maltese law is silent on this matter and thus reference must be made to the British system. This term can give rise to various interpretations since it is not restricted to paper or to originals as may be understood at an initial stage. Undoubtedly, it would include all electronically stored information (ESI), for example, emails and data held in databases especially in investigations relating to financial fraud or money laundering. ESI would also include sound files, electronic personal organisers, file servers, backup taps and hard drives. It would also include the metadata attached to such documents, for example: hidden data, including the history of a document to discover the original author; the creation data to establish the creator of the file under examination; hidden notes; and, at times, whether a blind copy has been sent to a recipient who says that he was not aware of such a document. On the other hand, hard copy documents would include correspondence faxes, memoranda, reports, photographs, plans, diaries, and board minutes. The obligation to disclose would naturally subsist vis-à-vis documents that are within the party's control; in other words, documents which are in one's physical possession. Unlike the Directive, Maltese law does not establish a mechanism to which the suspect can resort if the prosecuting officer refuses to entertain a request for the disclosure of such material evidence. In such circumstances, it may be argued that perhaps the defence lawyer may during an investigation, file an application to the duty Magistrate, or during an arraignment, to the presiding Magistrate, asking for a ruling as to whether the defence should be given a copy of the material evidence held by the investigating/prosecuting officer. This concern is still to be tested in court and may cause problems due to the forty-eight hour time-limit during which police may detain a suspect under arrest. There is urgency for a decision on this matter since it could affect the outcome of an investigation, whether the suspect will collaborate or not with the investigating officer. It would certainly affect his status quo in the investigation.

Similarly, what would the position be if a dispute arises as to whether documents should

be disclosed or not and the party objecting to the disclosure destroys or modifies such documents? The law is silent too in this regard.

5.5.2 Duty of the police to give access to all material evidence in their possession

In line with the provisions of the Directive, Maltese law also provides that:

> [T]he person suspected or accused shall have access, which shall be free of charge, to all material evidence in the possession of the Police, whether for or against the said suspect or the accused, or to his lawyers in order to safeguard the fairness of the proceedings and to prepare his defence.[688]

An important question is whether 'material' evidence constitutes physical evidence or whether the evidence to be produced must be 'material' as in relevant to the on-going proceedings. For example, when a suspect is being interrogated and gives an *alibi,* the evidence presented by that *alibi* may not be 'material', because it could be the case that, a witness saw the suspect somewhere different to where the police are alleging. Although this is not material evidence to the same degree as DNA or a fingerprint, it is nonetheless evidence of paramount importance for the defence and of 'material' relevance to the case, and thus should in principle be disclosed. It would perhaps be more feasible if instead of the word 'material', the legislator had provided a more coherent and comprehensive approach which includes all evidence that has a bearing on the decision to be taken by the court. There is a stylistic difference between the British system of drafting laws, and the continental system. In the former, the legislator tends to focus on the detail whereas, in the latter, a principle is legislated upon and has its significance and application to cases determined by the courts. It could be argued that evidence should not be presented in a trial unless it is relevant to the proceedings, and that therefore the term 'material' could apply in both instances in that the physical ('material') evidence must be relevant ('material') to the issue.

[688] Criminal Code art 534AF (2).

Moreover, it appears that once the document is presented to the defence, the latter is only able to use it in relation to the ongoing proceedings against the suspect or accused person. One asks about the situation where such evidence is needed for on-going proceedings against accomplices who are not co-accused. As the investigation would relate to the same crime, would such evidence be available also in those proceedings or would it be disregarded since they are separate proceedings against different accused? It remains uncontested that if such a disclosed document is read out in court, it may be freely reported in terms of Article 7 of the EU Directive 2012/13. The Criminal Code provides that:

> [W]here a person is arrested and detained at any stage of the criminal proceedings, any documents in the possession of the Police which are related to the specific case and which are essential to challenge effectively the lawfulness of the arrest or detention, shall be made available to the arrested person or to his lawyer.[689]

5.5.3 Time frame for disclosing material evidence

The law provides a time-frame within which the material has to be provided to the defence; it states that this should occur 'in due time to allow the effective exercise of the rights of the defence and at the latest upon submission on the merits of the accusation'.[690] Again, the law does not define the term 'due time' and therefore this is a matter which is decided by the prosecution. It would have been better if guidelines were published to indicate the right time, for example, whether this is at the interrogation stage prior to the taking of a statement from the suspect or, alternatively, if an arraignment has taken place at the initial stage of the proceedings following the evidence of the investigating officer, or otherwise at any stage prior to the prosecution declaring it has no further evidence to bring forward. Nonetheless, should the police obtain other material evidence during the investigation, access must also be granted to the defence in due time for it to be examined by the suspect or accused person.[691] Having said this, if the police are uncooperative, the defence cannot exercise any control to ensure that it is made aware of such documentation.

[689] Criminal Code art 534 AF (1).
[690] Criminal Code art 534AF (3).
[691] ibid.

Difficulties may arise when the Inquiring Magistrate holds an inquiry and during the inquiry the Magistrate is presented with a number of documents. The police would be unable to inform the suspect about them or to disclose them to the suspect even though the suspect may be interrogated by the police. A Magisterial Inquiry is headed by the duty Magistrate to preserve the evidence which may be presented in court at a later stage and at this stage, the police are only obliged to disclose the documents into their possession and not those which are presented in the acts of the inquiry. The police may therefore refrain from disclosing evidence even in circumstances when there is already a suspect. In the *in genere* proceedings, all documents and reports of experts remain in the hands of the inquiring Magistrate and the police can only disclose them upon an *ad hoc* decree being given. Also, once the inquiry is concluded, the *procès verbal* of the Magistrate, together with the acts of the proceedings of the inquiry are transmitted to the AG and not to the Commissioner of Police. If the *procès verbal* is concluded and sent to the AG and subsequently a person is interrogated, it would take time for a suspect to present a request to the Inquiring Magistrate to have access to a particular document, since this application would have to be notified to the AG who would then in turn remit the case file to court for the Inquiring Magistrate to take cognisance of it. It is only then that the Inquiring Magistrate would be in a position to deliver a decree. This process would therefore take a long time and, bearing in mind that the police would be bound with the forty-eight-hour rule of arrest, in such scenarios where an inquiry is held, the police are not in a favourable position to disclose information immediately upon request even though Directive imposes an obligation in this regard.

5.5.4 Discretion of the Court of Magistrate to refuse access to material evidence

The Court of Magistrates (if proceedings are still at investigation stage), may, without prejudice to the right to a fair trial, 'refuse access to certain materials if such access may cause a serious danger to the life or the fundamental rights of a third party or if such rejection is warranted to protect public interest or where it could be prejudicial to an on-

going investigation.'[692] However, if due to the circumstances of the investigation the police are of the opinion that the material requested may cause threat or danger to the life of a suspect, or cause interference to an on-going investigation or danger to national security, the Court of Magistrates may refuse access.[693] This too can bring about an injustice since the law only refers to the obligation on the Court of Magistrates to listen to the submissions of the prosecution on the matter and thus once again the defence could be left in the dark. As the term 'on-going investigations' could encompass multiple circumstances, it would be opportune if the request by the police is made in writing to the duty Magistrate (if during pre-trial stages) and that the application is appointed for hearing so that, given the element of adversarial proceedings, both the prosecution and the defence can be heard and would be able to participate in the decision as required under Article 6 of the Convention. The procedure for court intervention is not, however, outlined. One therefore asks whether the court would be able to intervene on a request made by the police officer, or upon a request by the defence.

It must be emphasised that in all cases, a restrictive interpretation to withholding material evidence should be given as delineated in Recital 32 of the Directive.[694]

5.5.5 Non-disclosure of evidence

In Malta, unlike other jurisdictions such as the UK,[695] the decision of non-disclosure of evidence is taken by a judicial authority and the law does not provide the defence with the possibility of appealing from such decision. This is because Maltese law does not require the judicial authorities to give reasons for the decision, a procedure which could lead to abuse. The parameters which are available to the Court of Magistrates to refuse access to

[692] Criminal Code art 534AF (4).
[693] ibid.
[694] Recital 32 provides, 'restrictions on such access should be interpreted strictly and in accordance with the Principle of the right to a fair trial under the ECHR and as interpreted by the case-law of the European Court Of Human Rights'.
[695] In the UK it is made by a minister on account of State Security.

material to avoid causing 'prejudice to an on-going investigation'[696] can give rise to various interpretations. Maltese law, like the EU Directive, does not provide any guidelines on the interpretation that is to be given to the word 'prejudice'. Does this mean that the prosecution must prove a financial prejudice or is it enough if it proves a prejudice to the merits of the case, irrespective of how minimal the prejudice is? Or does the term 'prejudice' refer to the complexity of the criminal trial? This too needs clarification to avoid misunderstandings since such a term is very subjective.

Similar to the EU Directive, Maltese law does not provide for a mechanism that is to be adopted should the defence lawyer want to challenge the decision of the investigating officer regarding the disclosure of documents. The right to disclosure does not in itself entail an obligation to provide for a specific appeal procedure or a complaint procedure in which such failure or refusal may be challenged. It would be advisable if legislation could provide for a procedure that could be followed in those instances where there is a refusal or denial of disclosure. In addition, the law should also provide an aggravation to the offence of failing to disclose material evidence if it is proven that the officers failed to disclose material evidence either because they were negligent or malicious. If it is proven that such failure had a determining outcome on the case, such situation should be considered as an aggravation to the offence. Such instances would be, for example, failure to disclose DNA evidence, a fingerprint, gunshot residue and results or similar forensic tests which could determine the accused's guilt or innocence. This way, the police would be more cautious when dealing with the disclosure of evidence.

5.5.6 Possible venues to contest a decision regarding non-disclosure of material evidence

The matter relating to an unjust trial, resulting from the lack of adherence to the disclosure obligation could perhaps be tested under Maltese law before the CCA if the accused chooses to address such default in one of his aggravations to the judgment delivered by the first court. This could possibly be done under the following provision:

> On any appeal against conviction by the person convicted, the Court

[696] Criminal Code art 534AF (4).

> of Criminal Appeal shall allow the appeal – ...
>
> (b) if it thinks that there has been an irregularity during the proceedings, or a wrong interpretation or application of the law, which could have had a bearing on the verdict.[697]

Naturally, there are various types of irregularities that may exist throughout the proceedings; however, it is important that such irregularity is one which could have a 'bearing on the verdict' and thus a miscarriage of justice would have occurred. In the case Ir-*Repubblika ta' Malta vs Jeanette Brincat* [698] the Court held that the determining factor is whether, despite the default or defaults that resulted before the jury, there is still a strong case against the appellant for the reasonable jurors to reach the same guilty verdict.

However, the situation does not seem to be the same before the CCA in its superior competence. A person convicted on indictment may appeal to this court against his conviction in all cases or against the sentence passed on his conviction, unless the sentence is one fixed by law.[699] So what if the judgment given by the Criminal Court is one within the parameters of the law and the accused still believes that had the requested documents been exhibited s/he may have been acquitted? What would his/her position be? Can s/he be treated differently from those who have been convicted and who file an appeal before the same court on a different ground or those who file an appeal to the CCA in its inferior competence? Surely, this anomaly must be addressed.
Alternatively, the appellant can file an application before the CCA during appeal proceedings (thus indicating that the court of first instance had already established guilt) asking the court to use its supplemental powers by ordering the documents which were not exhibited in the first instance (notwithstanding the obligation of disclosure) to be presented. The CCA can only uphold such a request if it thinks it expedient in the interest of justice. In this regard, the law states that:

> [T]he Court of Criminal Appeal may, if it thinks it is necessary or expedient in the interests of justice –

[697] Criminal Code art 501.
[698] CCA Superior Jurisdiction, 25 September 1978.
[699] Criminal Code art 500 (1).

> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;[700]

The law, however, does not state which documents the prosecution would be obliged to provide to the defence at its request. Therefore, it is all a matter of interpretation as to whether such a demand can be made to this court for the use of its supplemental powers. Should the problem arise at pre-trial stage, in other words where the prosecution does not present the documents during investigation, there is no redress in the law except perhaps through the filing of a constitutional case before the FHCC. The suspect may however still encounter difficulty because until that stage he would not have suffered a 'prejudice' have to first exhaust local remedies and be facing a conviction before he/she can claim that he/she has suffered a violation to his fundamental human right as enshrined in Article 6 of the Convention.

5.6 PRINCIPAL FINDINGS

A thorough examination of this chapter results in several findings which must be addressed possibly even by legislative intervention to ensure that the right itself better reflects the fundamental human rights of both suspects and accused persons. It results that although the intention behind the EU Directive 2012/13 on the right to information was to harmonise Member States' laws, there is a lot to be done to achieve this intended uniformity, particularly as Member States are still dealing with this right differently. The aforementioned findings are the following: -

i. It is not enough for suspects and accused persons to be granted procedural rights; rather, they must be aware of these rights to be able to fully exercise them. Needless to emphasise, the provisions of the Directive provide added value to the ECHR and the case-law of the ECtHR, since the Directive outlines the definition of these rights in a clear statutory legislative act that can be enforced before the

[700] Ibid art 506 (a)

ECJ; however, the transposition of this Directive into domestic law has given rise to different interpretations of this same right. One must not forget that the Directive only provides minimum rights;

ii. The Directive provides that Member States should ensure that information on at least certain procedural rights must be provided to suspects and accused persons 'promptly' and 'orally' or 'in writing.' This includes all suspects irrespective of whether they are deprived of their liberty or not and persons who have been asked to attend a police station voluntarily as happens in Malta;

iii. The moment at which this right to information is given may vary from one Member State to another since such procedural right is to be given according to the national law of each Member State and the Directive only provides minimum rules. There are two groups which provide different timings for the exercise of the right to information, namely: those countries which believe that it is to be given in the course of pre- trial investigations and other countries which claim that such right is only applicable to persons detained or under arrest;

iv. The Directive provides a better explanation of the right of access to the materials when compared to the Convention, which is silent on this matter. It is only through the case-law of the ECtHR that such right was practically applied;

v. The right to information is not absolute. In some investigations, such as those relating to money laundering may be legitimately withheld;

vi. The right to information may be perceived as merely theoretical since there is no mechanism for the exercise of such right;

vii. There are also different opinions when it comes to the type of material information which should be given to the suspect relating to his/ her accusation;

viii. The Directive provides that the letter of rights is to be given to all suspects who are detained or arrested whereas a number of national legislations provide that such letter of rights is to be given to all suspects irrespective of whether they are under arrest, detained or not. The contents of this letter of rights differ from one Member State to another since it is a matter of domestic law. There is another discrepancy in the application of this right in that there are a number of Member States where suspects and accused persons have to sign for this document whereas in other Member States there is no such obligation of receipt;

ix. The right to disclose material evidence is only binding on the prosecution and not on the defence and thus this may infringe the principle of equality of arms. Likewise, the law does not stipulate a time-frame within which such right can be exercised and thus it may be applied differently in Member States;

x. The Directive provides that the right of access to material evidence applies to pre-trial proceedings whereas, although interpreted in the same manner, the Convention provides no similar provision;

xi. The Directive, particularly its recital, provides a definition of the term 'document' and thus there should be uniformity in interpreting this term in all Member States, unless the domestic law of the Member State provides otherwise or has opted to leave out the definition given to the term 'document';

xii. The right of access to materials is not absolute and can be refused in several instances as specified in the Directive and as transposed into the domestic law. However, it is up to a judicial authority to examine whether such refusal is warranted and thus this may lead to a subjective test being carried out on a case-by-case basis, unless there is a *lex specialis* which automatically prohibits the giving of material evidence in regard to the offence being investigated such as the prohibition in the Prevention of Money Laundering Act. There should be a system

of procedural safeguards adequate to compensate for the handicap imposed on the defence;

xiii. The material information that is given can only be used in relation to the offence under examination and with regard to the suspect to whom it was given; therefore, its applicability is not *erga omnes*;

xiv. Access to material evidence should be free of charge although the Directive provides that it is up to the domestic law to decide. Once again, this may lead to inconsistency in the approach taken by various Member States;

xv. There is no mechanism available to contest the decision of the investigating authority which refuses the access to such material evidence, and each eventuality is treated on a case-by-case basis. There is no objective test carried out. There is no mechanism for appeal from such decision either and thus this can be dangerous as the fundamental human rights of the individual may be hindered;

The Directive is silent on the matter as to the consequences of an irregularity in the disclosure procedure. Would this result in the acquittal of an accused person on procedural grounds? It is imperative that a mechanism to address such shortcomings is introduced to provide an effective remedy to the exercise of the right.

5.7 CONCLUDING REMARKS

The Directive on the right to information in criminal proceedings may be described as an important step towards providing a full catalogue of procedural rights for suspects and accused persons. The Directive ensures that suspects and accused persons are informed of their procedural rights. The Directive also gives a more concrete meaning to the general indications in the ECHR and case law of the ECtHR in relation to this right for example, in the case of access to materials of the case. In some areas, it even goes beyond the minimum standards of the ECHR and case law of ECtHR by creating new rights such as

the provision relating to the written letter of rights upon arrest.

The situation in Malta has certainly improved since the transposition of EU Directive 2012/13 although there are still gaps in Maltese law which must be addressed for the right to be truly effective. The question of access to materials lends itself to many interpretations and thus clarity in the legislation is needed. Whilst it would be true to state that the right to information as outlined in the Directive constitutes a minimum right, domestic law seems to have transposed this Directive in its totality without inserting any more guarantees for the suspect and accused person. Although as discussed above, the right itself is not an absolute right, it is nonetheless 'a requirement of fairness'.[701] The prosecution ought to disclose to the defence all material evidence for or against the accused, and the failure to do so should equate to a defect in the trial proceedings. The author however stumbles on the fact that ECtHR, looks at the overall fairness of the proceedings and not at an isolated defect in procedure. By way of conclusion, it is crucial that this right is not perceived as a negative right or as a burden affecting the performance of a trial, but rather as a right that can effectively enhance the efficiency of the criminal process geared to ascertain that justice is well dispensed.

[701] *Edwards v. UK* (n 178) para 36.

CHAPTER 6: THE RIGHT TO LEGAL AID

6.1 INTRODUCTION

The UN Special Rapporteur on the Independence of Judges and Lawyers maintains that the right to legal aid 'must be recognised, guaranteed and promoted in criminal matters given its importance as a vital guarantee for the right of an effective remedy, the right to equality before the courts and the right to a fair trial'.[702] Legal aid is essential to guarantee a fair criminal justice system based on the rule of law and may be described as a right in itself and an essential precondition for the exercise and enjoyment of numerous human rights , including the rights to a fair trial and to an effective remedy.[703]

The right to legal aid is a pertinent procedural right in criminal proceedings that has been long established and widely recognised.[704] In fact, the national laws relating to legal aid have been amended on various occasions and Act XXIII of 1971, *inter alia*, amongst other changes, required that the reference to *in forma paupris* was substituted by the term the benefit of legal aid. However, the institute of legal aid is still in dire need of change, especially if one were to consider legal aid as an indispensable tool which is necessary for the secure good functioning of the national judicial system. Early access to this right ensures that suspects and accused persons are provided with an adequate defence. There is a marked difference between the right to legal aid and the right to legal advice. In fact, the right to legal assistance is only a part of the right to legal aid since the term 'legal aid' is more wide-reaching.

The term 'legal aid' encompasses legal advice, assistance and/or representation, and the

[702] UNGA, 'Report of the UN Special Rapporteur on the Independence of the Judges and Lawyers', 9 June 2017, A/HRC/35/31.
[703] UNCHR, 'Legal aid, a right in itself' – UN Special Rapporteur'. accessed February 2021. <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E> accessed October 2019.
[704] Rights in practice: Access to a lawyer and procedural rights in criminal and EAW proceedings (European Union Agency For Fundamental Rights, 2019), <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-rights-in-practice-access-to-a-lawyer-and-procedural-rights-in-criminal-and-european-arrest-warrant-proceedings.pdf>accessed January 2020.

provision of it at no cost to the person entitled to it.[705] 'Assistance' means help and support in taking any correct action that the person might take whether by taking the action on their behalf or by assisting them to take that action. 'Representation', on the other hand, refers to the act of communication on behalf of the suspect/accused before a prosecutor, tribunal with penal sanctions or a Criminal Court.[706] As pointed out by Simon Rice,[707] the right to legal representation is hardly ever referenced explicitly. It is only established by inference from the systems and institutions of the State. Superior Courts and academics have recognised a right to legal representation in particular circumstances through two channels, by implication in constitutional guarantees of equality and by implication in a guarantee of a fair trial.[708]

Access to legal aid reinforces the principle of 'equality of arms' between the parties to the trial and guarantees the right to a fair trial for indigent persons. In Malta, unlike other Member States, the right to legal aid is available to every suspect and accused irrespective of his financial status. There seems to be a *sui generis* legal position. The effectiveness of this right may be limited,[709] depending on its implementation in the national law of Member States. Gabriela Knaul asserts that it is of utmost importance that legal aid schemes are independent, functional, and accessible to ensure equal access to justice for all.[710] Furthermore, Cape and Hodgson affirm that it is useless to have the right to legal assistance when actual access to such assistance is impossible.[711]

This chapter will provide an analysis of the laws which refer to the right to legal aid with

[705] UNPG (n 204) para 8 of the Introduction to the UN Principles Guidelines.
[706] Asher Flynn, Jacqueline Hodgson, Jude Mc Culloch and Bronwyn Naylor 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' Melbourne University Law Review, vol 40(1) p. 207-239.
[707] Simon Rice is an Associate Professor, and Director of Law Reform and Social Justice, at the Australian National University College of Law in Canberra.
[708] Simon Rice, 'A Human Right to Legal Aid' (4 February 2009) University of Sydney <https://www.researchgate.net/publication/228243556_A_Human_Right_to_Legal_Aid> accessed February 2020.
[709]UNODC, Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners (Criminal Justice Handbook Series 2014) 1, 5 <http://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf> accessed October 2019.
[710] See (n 702).
[711] Edward Cape and Jacqueline Hodgson, 'The Right to Access to a Lawyer at Police Stations, Making the European Union Directive Work in Practice' [2014] New Journal of European Criminal Law, 461.

a focus on Malta as elucidated through its own case law. It will also refer to the Convention as expounded upon through the case law of the ECtHR, and to the EU Directive 2016/1919 on legal aid.[712] This chapter will conclude with a general overview of the existing right to legal aid.

6.2 LEGAL AID IN THE EUROPEAN UNION

The right to a lawyer and to legal aid is set out in wide terms in the ECHR,[713] and to this end there are numerous cases of the ECtHR interpreting the implications of this Convention right. The ECHR provides that everyone 'charged' with a criminal offence has the right to defend himself either personally or through his lawyer, or if indigent, the right to legal assistance at no cost.[714]

6.2.1 Eligibility - Means and Merits Tests

According to the Convention, a person has the right to free legal aid if two conditions subsist: first, if one does not have sufficient means to pay for legal assistance (the 'Means Test'), and second, when the interests of justice so require (the 'Merits Test'). These two conditions are set out in Article 6 (3)(c) of the ECHR and Article 14 (3)(d) of the ICCPR.

The ECtHR has adopted the Means Test to examine whether a person is entitled to free state-aid to verify whether the suspect can prove that he does not have sufficient means to pay for legal assistance. There is no definition of the term 'sufficient means', and the suspect bears the burden of proving his financial indigence: case law has, however shown that the Means Test relates to that person's resources, including income and wealth. This test was adopted in the cases *Twalib v. Greece*[715] and *Tsonyo Tsonev v Bulgaria*[716] wherein the ECtHR held that although it is up to the national authorities to demarcate the financial

[712] Directive on the right to information in criminal proceedings.
[713] art 6.
[714] ibid art 6 (3).
[715] App no 24294/94 (ECtHR, 9 June 1998).
[716] App no 33726/03 (ECtHR, 1 January 2010).

threshold for the Means Test, there must be adequate guarantees against uncertainty in the assessment of the claim. In *Santambrogio v Italy*,[717] the applicant was denied legal aid on the grounds that his means exceeded the statutory limit, and this was not considered to be a violation of Article 6 (1) by the ECtHR. The ECtHR held that the decision to refuse to grant legal aid was taken according to law and that the Italian legal system provided sufficient guarantees against arbitrariness in the determination of eligibility for legal aid. The Court opined that although the accused must prove his indigence, he does not need to prove his impoverishment 'beyond all doubt'. In *Pakelli v Germany,*[718] the ECtHR considered the applicant's claim that he could not afford a lawyer by referring to his tax-related statements and the fact that the applicant had spent the previous two years in custody while his appeal on points of law was pending. In this instance, the Court held that in the absence of signs to the contrary, the ECtHR[719] was satisfied that the applicant's financial status did not allow him to pay for legal assistance.[720] However, the Court adopted a subjective test which could thus give rise to other interpretations if different factors were considered.

The UNPG have underlined the importance of still providing legal aid to individuals who fail the Means Test but still cannot afford or access a lawyer.[721] The UNPG also provide that the criteria for applying the Means Test should be 'widely publicised to ensure transparency and fairness'.[722]

6.2.2 The Merits Test

The Merits Test, as established by Article 6 (3) of the ECHR relates to the necessity of confirming effective access to justice according to the circumstances of each case. The State can choose when, in the proper administration of justice, 'the public interest'

[717] App no 61945/00 (ECtHR, 21 December 2004) para 55.
[718] App no 8398/78 (ECtHR, 25 April 1983) para 34.
[719] See also: *Twalib v Greece*, App no 24294/44 (ECtHR, 9 June 1998) para 51.
[720] Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 3.
[721] UNPG (n 204) para 41(a).
[722] ibid para 41(b).

requires that the accused must be provided with a legal aid lawyer. The ECtHR has identified three factors to determine whether the 'interests of justice' demand free legal aid namely:

i. The gravity of the offence and the severity of the impending sentence.
ii. The complexity of the case and the social impact; and

iii. The personal situation of the accused.

These factors should be examined together, however, if one factor is present, the need for legal aid subsists.

In *Quaranta v. Switzerland*,[723] the Court considered these factors and rejected the defendant's claim. However, in *Zdravko Stanev v. Bulgaria,*[724] the Court went a step further and outlined important criteria that should be assessed in the appellate stage of criminal proceedings to determine whether the accused person is entitled to legal aid, namely: the nature of the proceedings; the capacity of an unrepresented appellate to present a particular legal argument; the severity of the sentence imposed by the lower courts; and the seriousness of the offence.

The right to legal aid applies in all cases where the deprivation of liberty is possible[725] and should therefore be provided whenever a term of imprisonment may be imposed. In *Benham v UK,*[726] (a case where the applicant had been charged with non-payment of a debt and such offence carried a maximum punishment of three months in prison), the ECtHR held that the potential punishment was serious enough to conclude that the request was being made in the interests of justice and that, therefore, the applicant should benefit

[723] See (n 202).
[724] App no 36760/06 (ECtHR, 17 January 2012).
[725] *Benham v. UK* App no 19380/92 (ECtHR, 10 June 1996) 59; *Quaranta v. Switzerland* (n 202) para 33; *Zdravka Stanev v. Bulgaria* App no 18312/08 (ECtHR, 12 October 2016) para 38; *Talat Tunç v. Turkey* (n 567) para 56; *Prezec v. Croatia* App no 48185/07 (ECtHR, 15 October 2009) para 29.
[726] *Benham v. UK* (n 725).

from legal aid. In other circumstances where the deprivation of liberty does not feature, the ECtHR will examine the case, its conditions, and the consequences, if any, of the conviction.

Regardless of the two aforementioned eligibility tests, the possibility of granting legal aid does not only depend on one's financial means, but also on the Member State one happens to be when the need arises. For instance, in Belgium ten to twenty percent of the population qualifies for legal aid; in Finland, it is around seventy-five percent (75%); in Italy, simply two or three percent, whereas in Poland there are no clear standards for entitlement as this depends on the nature of the charge.[727] Despite the importance of legal aid in the primary stages of the criminal justice process, in Greece, no legal aid is available at the initial stages of an investigation while the suspect is in police custody. This was also the situation in Malta prior to the enactment of Act LI of 2016.

6.2.3 The right to choose a lawyer

Article 6 (3)(c) of the ECHR provides that a person charged with a crime has the right to 'legal assistance of his own choosing', unless he wants to defend himself. Despite this provision, people requesting legal aid are not always presented with this choice. The State must also ensure that the appointed legal aid lawyer is competent. Principle 6 of the United Nations Basic Principles on the Role of Lawyers speaks of the need for the State to provide a lawyer who is experienced, competent and familiar with the nature of the offence assigned to him.[728] On the other hand, the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provide more detailed guidelines by stating that the appointed lawyer should be 'qualified to represent and defend the accused'[729] and 'have the necessary training and experience corresponding to the nature

[727] Zaza Namoradze 'The European Union Embraces a Common Approach to Legal Aid' [19 October 2016] Open Society Justice Initiative <https://www.justiceinitiative.org/voices/european-union-embraces-common-approach-legal-aid> accessed July 2019.
[728] UN Basic Principles on the Role of Lawyers (n 385).
[729] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. Sec G, Legal Aid and Legal Assistance, (c) 1.

and seriousness of the matter'.[730] Furthermore, the lawyer must 'be free to exercise his or her professional judgment in a professional manner free of influence of the State or the judicial body',[731] 'advocate in favour of the accused',[732] and 'be sufficiently compensated to provide an incentive to accord the accused …adequate and effective representation.'[733]

In *Meftah and Others v. France,*[734] the ECtHR held that the right to choose a lawyer is not absolute, whereas, in *Logerblom v. Sweden*,[735] the court held that as a rule the right of choice should be respected. The ECtHR has held that the right to a lawyer of one's own choice may be restricted when the interests of justice so require. For instance, in *Croissant v. Germany*,[736] the ECtHR held that importance should be given to the defendant's wishes, however, national courts may disregard such wishes on good grounds and in the interest of justice. [737]

In *Dvorski v. Croatia*,[738] the ECtHR held that it could not provide *ab initio* explicit rules for the appointment of legal aid lawyers but that it would look at the proceeding's objectivity. From an examination of the case-law of the ECtHR, it seems that the right to choose one's lawyer is not absolute as it depends on the subjective test carried out by the court in each individual case.

Thomas Smith examines the implications of the right of choice and states that without choice a client would be allocated a stranger and thus trust would be undermined. Without trust their relationship would not be fruitful and would result in ineffective representation to the client.[739]

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[730] ibid sec. G (c) 2.
[731] ibid sec. G (c) 3.
[732] ibid sec. G (c) 4.
[733] ibid sec. G (c) 5.
[734] App no 32911/96, 35237/97 and 34595/97 (ECtHR, 26 July 2002).
[735] App no 26891/95 (ECtHR, 14 April 2003) para 54.
[736] See (n 146).
[737] ibid, para 29. See also: *Lagerblom v. Sweden* App no 26891/95 (ECtHR, 14 April 2003)55, holding that Article 6 (3)(c) cannot be interpreted as securing a right to have public defence counsel replaced. See also *Dvorski v. Croatia*, App no 25703/11 (ECtHR, 20 October 2015) para 94, holding 'that an accused bearing the costs of his own lawyer has the right to choose save for 'exceptional circumstances'.
[738] App no 25703/11. (ECtHR, 20 October 2015) paras 107-108.
[739] Thomas Smith, 'Trust, choice and money: why the legal aid reform "u-turn" is essential for effective criminal defense' [2013] Criminal Law Review, 2.

Professor McCamus further states that if the legal aid system encapsulates a method for quality-assurance, the necessity of choice of counsel would consequently become irrelevant as faith is and should be instilled in the system.[740]

6.2.4 Legal aid affords protection to vulnerable persons

Legal aid should be made available to vulnerable groups and to people who, because of their personal circumstances, are not able to defend the case themselves. The ECtHR thus considers the education, social background and personality of the applicant and subsequently adjudicates according to the complexity of the case. The ECtHR in *Quaranta v Switzerland*[741] stated that legal aid should have been granted as the defendant was a foreign young person, a drug user, came from a disadvantaged background and was living on social benefits.[742]

It is therefore apparent that the right to legal aid also affords protection to persons with circumstances, which category of persons may encompass women, children, and people with medical issues. There are several countries where women face cultural barriers[743] to access legal aid since they are not informed of their rights. In fact, victims of domestic violence are at times treated as suspects and accused in Court and several eventually also end up withdrawing their complaint and refusing to give evidence due to fear.

In fact, as quoted in the UNPG, special measures are required to ensure easier and better access to legal aid for women,[744]enabling legal aid lawyers to ensure that the special needs

[740] John A Epp, Derek O'Brien, 'Defending the right to choose: legally aided defendants and choice of legal representative' [2001] European Human Rights Law Review 1, 6 as quoted in Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services (Toronto: Attorney-General of Ontario 1997) vol 1, 134.
[741] See (n 202).
[742] ibid, para 35.
[743] Penal reform International 'Briefing on the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' [April 2013]<www.penalreform.org/wp-content/uploads/2013/05/PRI-Briefing-on-Legal-Aid-Guidlines-and principles-April20131.pdf.> accessed January 2020.
[744] UNPG (n 204), para 52.

of women are met.[745] In Malta, this is relevant in view of the Gender Based Violence and Domestic Violence Act[746] which enables the police to take urgent action and, at times arraign the alleged perpetrator within forty-eight hours. In such circumstances, the law should extend the right to legal aid to further the person filing the report as that person could be considered as 'the vulnerable' person who needs assistance despite not being detained or accused.

Similarly, children are also at risk when acting in breach of the law. They are more likely to misunderstand the criminal justice system because of their age and level of understanding and are thus at risk of being ill-treated. This was recognised in a joint report of the Office of the United Nations High Commissioner for Human Rights (UNCHR), The United Nations Office on Drugs and Crime (UNODC) and the Special Representative of the Secretary General on Violence against Children who held that enforcement officers are frequently liable for violence against children when the latter first entangle with the law.[747]

6.3 EU DIRECTIVE 2016/1919 – LEGAL AID FOR SUSPECTS AND ACCUSED PERSONS IN CRMINAL PROCEEDINGS AND FOR REQUESTED PERSONS IN EAW PROCEEDINGS

The EU has established standards regarding access to legal aid and accompanying rights by issuing the EU Directive 2016/1919 on Legal Aid. This Directive, published in 2009, is the sixth and last of a series of legal instruments implemented in line with the EU Roadmap to reinforce the procedural rights of a suspect or accused person in criminal proceedings. It deals with the right to legal aid which should have been transposed into national legislation across the EU by May 2019 (except for Denmark, Ireland and the UK).[748]

[745] UNGA Res, Strengthening crime prevention and criminal justice responses to violence against women (31 March 2011) 65/228.
[746] Chapter 581 of the Laws of Malta.
[747] UNPG (n 204), para 21.
[748] EU Publications Office, Directive on the right to information in criminal proceedings Summary (26 September 2018) <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX%3A32016L1919> accessed April 2020.

The rapporteur of the EP wished to keep the Directive short and simple and in fact, it is not a lengthy Directive.[749] The Directive establishes a legislative framework for a system of legal aid in Member States. However, Member States must still provide the practical and detailed mechanisms governing the system.

The purpose of this new EU Directive is stated in the recital, namely to 'ensure the effectiveness of the right of access to a lawyer as provided for under the EU Directive 2013/48'. The Commission was not desirous of reproducing the provisions of the Convention; rather, it wished to ensure that the Directive affords added value. In fact, this Directive provides extensive rules on procedural safeguards in a binding legislative instrument. The Member States are obliged to bring their domestic law in line with this Directive, and the TFEU lays down tough influential mechanisms to ensure that Member States adhere to this Directive. The inclusion of the procedural rights, resulting from the ECHR and its case law in the Directive, have certainly added effect and value to the latter.

The Directive guarantees the assistance by a state-funded lawyer to suspects and accused persons in criminal proceedings and to requested persons who are subject of EAW proceedings. Minimum standards are set out to regulate the provision of legal aid to suspects and accused persons. Indirectly, therefore the Directive strengthens the trust between Member States in so far as the criminal justice system is concerned and consequently also improves mutual recognition of decisions in criminal matters. It should be emphasised that the Directive enshrines the minimum rights and does not replace the rights enjoyed by suspects or accused persons in terms of the Convention or domestic law. Member States are not precluded from setting higher standards in their domestic law regarding the right to legal aid.

Legal aid is to be granted without delay by the competent authority[750], and it should be provided before the commencement of questioning by the police or person in authority

[749] Directives on procedural rights often are twice as long.
[750] Directive on the right to information in criminal proceedings, art 6 (1).

and before any investigative or evidence gathering act.

6.3.1 Definition to the term legal aid in the EU Directive 2016/191

Unlike the Convention, the Directive defines the term 'legal aid' as 'the funding by a Member State for the assistance of a lawyer enabling the exercise of the right to access to a lawyer when required in the interest of Justice'.[751] Thus, unlike the Convention, the Directive provides that legal aid should be available when 'required in the interest of justice' and not solely when the accused person is charged with a serious offence before a court of law, or when he is impoverished. Therefore, its effects are more wide-reaching. This element was included to reflect the abovementioned judgments delivered by the ECtHR.[752]

Under the Directive, a suspect or accused person has the right to legal aid when the following twofold analysis is made, namely: lack of sufficient resources, and when the interest of justice so requires.

The EP wanted to add another condition relating to the social and personal circumstances of the person concerned but, this was left out to exclude eligibility for legal aid vis-à-vis certain offences. However, reference to that prospect was made in the recitals, which provide that 'the merits test may be deemed not to have been met in respect of certain minor offences.'[753] With the aim of entertaining the EP's request, a specific provision was introduced to oblige Member States to ensure that the needs of vulnerable persons are taken into consideration during the implementation process and in practice.[754]

Legal aid is a form of help that is provided by a State to its people, particularly to indigent

[751] Directive on the right to information in criminal proceedings art 7.
[752] *Quaranta v Switzerland* (n 202); *Pham Hoang v France* (n 202).
[753] Directive on the right to information in criminal proceedings.
[753] ibid, recital 13.
[754] ibid, art 9.

individuals. Member States apply the Means Test[755] or Merits Test or both,[756] to establish whether an individual is eligible for legal aid. Once the tests are fulfilled, legal aid should be accessible at all stages of proceedings. It is imperative that legal aid is made available immediately upon request since it could very well affect the notion of a fair trial.[757]

6.3.2 Applicability of the Directive

The Directive applies to suspects and accused persons in criminal proceedings who are entitled to a lawyer in terms of EU Directive 2013/48 discussed earlier on in this thesis. There is however no mention of the scenario where a person would need such assistance before a board or before an Authority that is not an independent and impartial Court set up by law; for instance, before an Authority where an administrative payment could be made to avoid criminal action. Therefore, indirectly, the Directive applies to all people who are under arrest and who are still subject to interrogation prior to a possible future arraignment. This position has clarified multiple issues which arose in the past under the Convention in relation to the provision of legal aid prior to an arraignment or prior to notification of a criminal charge. By virtue of the Directive, it is now evident that all persons subject to a criminal interrogation are entitled to legal aid.

The Directive is not applicable in those instances where suspects, accused persons or requested persons have waived their right to be assisted by a lawyer in accordance with Article 9 or Article 10 of EU Directive 2013/48 and have not revoked such waiver, and in those instances where Member States have applied temporary derogations according to Article 3 (5)(6) of Directive 2013/48 for the duration of the derogation. Similarly, it does not apply in those instances where the law of a Member State provides for the imposition of a sanction by an authority regarding a minor offence. This Directive becomes applicable

[755] ibid, art 4 (3).
[756] ibid, art 4(2).
[757] See Template Brief Issue #1 Early Access to Legal Assistance - Legal Brief prepared by Open Society Justice Initiative to assist legal practitioners to litigate issues of early access to legal assistance for people accused or suspected of crimes' (Open Society Justice Initiative, April 2012) <http://www.opensocietyfoundations.org/briefing-papers/legal-tools-early-access-justice-europe> accessed December 2019.

if an appeal is from the decision taken by that authority is lodged before a court having criminal jurisdiction. Thus, the Directive fails to provide for legal aid in the case of contraventions since these are minor offences. The question that arises is whether the right to legal assistance must be mandatorily provided in cases of contraventions which are punishable by imprisonment. Although, the Directive falls short of explaining this the Convention's applicability is not restricted, particularly as the latter grants the right to all suspects irrespective of deprivation of personal liberty from the moment, they are spoken to by a police officer or judicial authority, subject always to indigence and the interests of justice.

The Directive establishes rules on the functionality of the legal aid system, demanding an effective and competent legal aid authority that must take decisions meticulously, respect the rights of the defence and require Member States to offer adequate funding and training of legal aid decision-makers and lawyers destined to safeguard the fairness of proceedings. It reinforces the fundamental principle of 'equality of arms' between the prosecution and the defence, and stresses that the right to a fair trial should not only be granted to those who can afford legal assistance. The Directive further provides that Member States must take all the necessary steps to ascertain that there is an effective legal system safeguarding the fairness of the proceedings. However, as the system may vary from one Member State to another, it is possible that citizens of the EU will not be treated in the same manner.

Legal aid must be effective, of an adequate quality to defend the fairness of the proceedings and respect the independence of the legal profession. This is important because in some countries, including Malta, a lawyer who has no expertise on the subject and who has not been briefed about the case may be called upon to give legal aid. The Directive also provides[758] that the suspect, accused or requested person has the right, if justified by the circumstances, to replace the legal aid lawyer. It is however submitted that this should not be easily allowed since at times, changing lawyers halfway through a brief could give rise to a change of defence and could thus create confusion about the defence being given. Such a provision should therefore be clarified.

[758] ibid, art.7.

In the Maltese legal aid system, there is no continuity in the service provided particularly because when a detainee requests legal aid assistance, he is assigned the legal aid lawyer on the daily roster. If such person is subsequently arraigned in court on another day, he would then be assisted by the legal aid lawyer who is on duty on that day. Moreover, another lawyer is usually assigned when an appeal is lodged. Due to the lack of continuity, it may be stated that this arrangement goes against the spirit of the Directive.[759]

The mere fact that the State appoints a legal aid lawyer is not enough to fulfil its obligation under the Directive. If the appointed legal aid lawyer fails to provide effective representation, the State is under an obligation to intervene and rectify the failure.[760] The principle of state intervention was set down in *Kamasinski v. Austria*,[761] where the ECtHR held that national authorities are only allowed to intervene in accordance with Article 6 (3)(c) in cases where the legal aid lawyer's failures emerge clearly during the proceedings or are otherwise brought to their attention.

The ECtHR has held that in those situations where the failure is empirically obvious, the accused need not actively complain or bring the failure to the state's attention. In *Sannino v Italy*,[762] the national Court had nominated different legal aid lawyers at each hearing and the ECtHR concluded that the Court had failed to ensure an actual and real defence even though the applicant had not complained about the situation to the Court or to his lawyers. These principles have been adopted and affirmed by the Human Rights Committee, applying Articles 9 and 14 of the ICCPR.[763]

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[759] Vide *Elton Gregory Dsane vs L-Avukat ta' l-Istat* (FHCC, 30 July 2020).
[760] Open Society Justice Initiative 'Legal Aid in Europe: Minimum Requirements Under International Law' (April 2015) p. 9 <https://www.justiceinitiative.org/uploads/d69e329c-6cb7-47ca-bdf0-07f8992a728b/ee-legal-aid-standards-20150427.pdf> accessed December 2020
[761] *Kamasinski v. Austria* App no 9783/82 (ECtHR, 19 December 1989) para 65. See also: *Artico v. Italy* (n 125) para 36; *Sannino v. Italy* App no 30961/03 (ECtHR, 13 September 2006) para 49; *Czekalla v. Portugal* App no 38830/97 (ECtHR, 10 January 2003) para 60; *Daud v. Portugal* App no 22600/93 (ECtHR, 21 April 1998) para 38.
[762] *Sannino v Italy* (n 761) para 51; *Krylov v Russia* App no 36697/03 (ECtHR, 14 June 2013) para 44.
[763] Aleksandr Butovenko v. Ukraine, Communication No. 1412/2005, U.N. Doc. CCPR/C/102/D/1412/2005 (2011).

6.3.3 Breaches of the Directive

The Directive provides in Recital 27 that the national law of a Member State should provide a remedy,[764] where the right to legal aid is undermined, delayed, or refused.[765] However, the Directive fails to explain how the fairness of the proceedings and the rights of the defence are to be protected. This is left to be dealt with by the national courts. Reference is made to international and regional standards, namely, the Fair Trials Position Paper which states that there should be minimum standards regarding the effective remedies that can be awarded where legal aid 'is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid', as set out in Principle 9 of the UNPG. Under the UNPG, 'such remedies may include a prohibition on conducting procedural actions, release from detention, and exclusion of evidence, judicial review and compensation'.[766] As was stated many times by the ECtHR, including in *Salduz v. Turkey,*[767] the ideal situation would be to place the accused in the *status quo ante* prior to the infringement. Moreover, under the *Salduz* doctrine, if the violation is such as to deprive the suspect of his right to legal aid prior to the trial, such breach would require the exclusion of any evidence obtained in the absence of a lawyer.[768] In Malta in the case *Elton Gregory Dsane v. State Advocate,*[769] the applicant complained of unfairness because he was not well informed by his legal aid lawyer of his right to lodge an appeal from his prison sentence. The Constitutional Court upheld the appeal and took a novel decision when it ordered that applicant be placed in a *status quo ante* immediately after the judgment of the first court was given so that the timeframe to present his appeal would start running afresh.

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[764] Directive on the right to information in criminal proceedings, art.8.
[765] Fair Trials, 'Practitioners' Tools on EU Law -Legal Aid Directive' (Fair Trails, November 2020) 14 <https://www.fairtrials.org/sites/default/files/FT-Toolkit-on-Legal-Aid-Directive.pdf> accessed December 2020.
[766] UNPG (n 204).
[767] See (n 116).
[768] LEAP and Fair Trials, 'Access to a Lawyer Directive - Access to a Lawyer: A General Approach and Specific Issues; Waiver; Derogations and Implementation Checklist for National Authorities (LEAP and Fair Trials Europe, Spring 2016) <https:/www.Fairtrials.org/wp-cntent/uploads/A2L-Toolikit-FINAL pdf> accessed November 2019.
[769] Constitutional Court, 24 August 2020.

The consequences which would ensue from a violation of the right to legal aid might differ depending on whether the violation occurred at pre-trial stage, during the trial or at appeal stage. The earlier a violation to Article 6 (3) of the ECHR is identified, the more possible it would be to provide an effective remedy within the progression of the trial.

6.4 LEGAL AID IN MALTA

The main domestic laws which provide for the right to legal aid in Malta are the Constitution of Malta and the Criminal Code. However, besides these primary laws there are a few other laws which provide for such statutory assistance such as the International Protection Act,[770] the Victims of Crime Act[771] and the Regulations related to the Reception of Asylum Seekers.[772]

The right to legal aid in criminal proceedings is a protected right under Article 39 (6)(c) of the Constitution which provides that that everyone 'charged' with a criminal offence has a right to defend himself or through his lawyer, or if indigent, that legal assistance should be provided for free.

There are various dispositions in the Criminal Code which refer to legal aid and these are found under the title 'Provisions Applicable to the Courts of Criminal Justice to see to the Adequate Defence of the Parties Charged or Accused'.[773] Another provision is found under Title III Part II Book Second entitled 'Of Counsel for the Accused' which provides *inter alia* that 'the Advocate for Legal Aid 'shall gratuitously undertake the defence of any accused who has briefed no other advocate or who has been admitted to sue or defend with the benefit of legal aid in any court mentioned in this code.'[774] It can safely be said that the situation ensuing from the Criminal Code appears to be more favourable to the accused than his entitlement under the Convention and Constitution of Malta because it

[770] Chapter 420 of the Laws of Malta in art 7(5).
[771] Chapter 539 of the laws of Malta.
[772] S.L. 420.06 of the Laws of Malta regulation 6 (2) and 6 (5).
[773] Criminal Code art 519.
[774] Criminal Code art 570 (1).

ascertains that the right to legal aid starts from the moment the person becomes a suspect and before questioning by the police or other authority.[775] Despite this, there still seems to be a restriction in those instances when the suspect is summoned to appear before an Agency, Authority, Board, Tribunal or regulatory body to negotiate the payment of compromise penalties,[776] even when the value of such penalties is high.

The Constitution further provides that unless the charge is withdrawn, a person is to be afforded a fair hearing within a reasonable period of time by an independent and neutral court established by law.[777]

Furthermore, the Criminal Code provides that, 'it shall be the duty of the courts of criminal justice to see to the adequate defence of the parties charged or accused[778]. In the case *Noel Aquilina vs Avukat Generali u l-Kummissarju tal-Pulizija*[779] the applicant alleged procedural infringements and a violation of Article 39 (6)(c) of the Constitution in proceedings that were carried out before the Court of Magistrates. The Court observed that the applicant was not assisted by a lawyer during the sitting at which he had admitted the charges brought against him and that the court had failed to appoint a legal aid lawyer throughout the proceedings. As a result, the probation officer was never questioned on the pre-sentencing report and no submissions were made on the accused's behalf. Additionally, the accused was never asked by the court whether he wanted to be assisted by a lawyer throughout the proceedings.

The defendants affirmed that since the accused had pleaded guilty to all charges there was no need to appoint a lawyer. However, the Court concluded otherwise by referring to Article 6 (3) of the Convention and Article 39 (6)(c) of the Constitution.

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[775] Criminal Code art 355AUA.
[776] Some laws provide for the payment of administrative fines instead of court proceedings, these include: The Environment Protection Act, Chapter 549 of the Laws of Malta art. 26; Development Planning Act Chapter 552 of the Laws of Malta LN 276/12 Regulation 6 (1) as amended by LN 124/15, Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta art, 20 D (1) (d).
[777] Constitution of Malta, art 39 (1).
[778] Criminal Code art 519.
[779] FHCC, 8 October 2010.

The Criminal Code further provides that in those instances where the accused disturbs the good order of the sitting and after being admonished by the court, repeats such behaviour, the court may order him to be removed from the courtroom and proceed with the trial in the presence of his advocate or if he has no advocate, in the presence of an Advocate for Legal Aid, to represent the absent accused.[780] In this manner, the right to be assisted is guaranteed even in the accused's absence.

6.4.1 Requirements for legal aid

In criminal matters, the right to legal aid is applied across the board and no Means Test is applied. However, the accused must have not briefed another lawyer before.

The Legal Aid Agency states that in criminal cases, from the time a person is held in police custody up until the trial, no Means Test is applied.[781] However, the right to legal aid without a Means Test during criminal proceedings remains unclear. In 2016, a Courts of Justice Charter published by the Courts of Justice Department within the Ministry of Justice, Culture and Local Government stated that every person charged had the right to defend himself in person or through his lawyer or if he lacks the means, through the services of the Advocate of Legal Aid. [782]

In one particular instance, an accused person requested to benefit from legal aid however, the request was turned down by the presiding Magistrate since the accused was gainfully employed.[783] This could be considered as abuse of power because the current system, the national system does not, allow the Court to reject such a request on the grounds of wealth or income.

The Permanent Law Reform Commission made reference to Article 519 which deals with the responsibility of the court to ascertain an adequate defence for an accused person in

[780] Criminal Code art 524.
[781] Criminal Code art. 355AUA.
[782] Ministry for Justice, Culture and Local Government, Courts of Justice Citizens Charter, Courts of Justice Department, 28 July 2016, p 9 <http//www.justiceservices.gov.mt/CourtSevices/Courts_of_Justice.pdf > last accessed February 2021.
[783] Matthew Agius 'Man arraigned on domestic violence charge' *Malta Today* (Malta, 27 October 2016) <http/www.maltatoday/com.m/news/court_of_Jusitce_EN.pdf> accessed June 2020.

ensuring the accused's proper defence and to Article 570 which deals with the appointment of the Legal Aid Advocate in trial by juries. It emphasised that 'Neither of these provisions impose a "merits" test and a "means" test before the accused is allowed legal aid in criminal proceedings.'[784] The Commission was not critical of this liberal approach and confirmed that 'this legal position should in no way be disturbed.'[785]

The Bonello Commission,[786] mentioned in the preceding chapter, criticised the lack of 'means testing' in criminal proceedings and affirmed that introducing such a test would reduce abuse of public funds and therefore it would bring into force an element of accountability which is presently missing.[787] Some opine that 'although the merits test cannot be deemed as appropriate in criminal matters; any accused should be considered meritorious of legal aid, a more stringent approach to the allocation of legal aid should be applied when it comes to the satisfaction of the financial thresholds.'[788]

The Bonello Commission took note of a bill which was presented to it by Dr Mark Said[789] whereby he recommended that there should be a competent authority within the government to implement its duties regarding the benefit of legal aid. Amongst its functions, Dr Said suggested that the competent authority should take the appropriate measures to assess the financial means of the applicant requesting legal aid and also decide whether recipients of legal aid must refund some or all of the funds disbursed by the same authority, if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipients themselves and to collect any reimbursement so due.[790]

The first part of the bill delves into the procedure that must be followed to sue or defend

[784] Permanent Law Reform Commission, 'Law Relating to Legal Aid' (Report Number 1, 1991) para 10.2.
[785] ibid para 10.3.
[786] The Bonello Commission managed to draw up a comprehensive report made up of 450 recommendations aimed at strengthening the justice system (30 November 2013).
[787] The Holistic Reform of Justice Commission Second document for public consultation measures 61-62.
[788] Jasmine Marie Abela 'Legal Aid in Criminal matters – A way forward' (LL.D. thesis University of Malta 2015).
[789] Public prosecutor at the Office of the Attorney General.
[790] A Bill presented by Dr Mark Said, entitled 'Abbozz ta' Ligi Msejjah Att dwar l-Ghajnuna Legali' attached as Appendix V to the Bonello Commission Report.

with the benefit of legal aid in civil proceedings. Part two deals with the right to legal aid in cross-border issues, and part three of the bill covers the right to legal aid in criminal proceedings. The last part of the bill, being of particular relevance to this study, also makes reference to legal aid when it comes to prohibited immigrants as defined by Article 5 of the Immigration Act, Chapter 217 of the Laws of Malta. Any prohibited immigrant subject to a removal order is entitled to legal aid before the Immigration Appeals Board. In this regard, the bill also provided a partial exclusion by stating that persons seeking humanitarian protection are also entitled to legal aid under the same conditions applicable to prohibited immigrants, but illegal immigrants landing on EU shores by boats are excluded from any right given by the same Article. Besides the above, the bill went so far to suggest a number of provisions in the Criminal Code and the Code of Organisation and Civil Procedure should be repealed.

However, from a thorough examination of the Report presented by the Bonello Commision, much of the recommendations proposed by Dr Said in the proposed Bill where disregarded and were not included in the amendments which were introduced in the Criminal Code by subsequent legislation.

In fact, the Bonello Commission sought to review the financial thresholds imposed in a civil court[791] to bring them in line with the current standard of living, though in regard to proceedings of a criminal nature, no financial threshold was imposed. Recommendations regarding financial thresholds should perhaps be considered once the Directive is transposed and means testing procedures become applicable in Malta.[792] It certainly would reduce the case-load currently pending before the Legal Aid Agency and in turn would lead to a system of better legal aid service. It is important to note however, that the introduction of the Means and Merits test may render the appointment of legal aid lawyers more laborious and may also create a back log in case management. At present, it is quite easy for the system to be affected by rampant abuse because there is no mechanism to prevent such abuse. To alleviate this shortcoming the novel suggestion of the Bonello Commission

[791] Code of Organisation and Civil Procedure (COCP) art 912 (b).
[792] Commission for Holistic Reform of Justice System (second document for consultation (Parliamentary Secretary to Justice 2013) para 27.

that the Department for Social Security should examine cases of potential abuse[793] could be followed.

6.4.2 The appointment of a legal aid lawyer

A request for legal aid may be made either orally or through an application submitted to the Advocate for Legal Aid.[794] The law distinguishes between the appointment of a legal aid lawyer before 'any court' vested with criminal competence, and before a CMCCJ. In the former case, where the criminal court is informed by the accused that he has been unable to brief a lawyer or that s/he wishes to avail himself of the benefit of legal aid, the court shall cause 'the declaration of the accused to be sent to the Advocate for Legal Aid who within two working days shall file a reply indicating if the request of the accused has been accepted and if so give the name of the Advocate for Legal Aid who will be representing him.[795] In this case, the legal aid lawyer is given adequate time to meet the accused and to prepare the brief prior to providing assistance. It also helps in the smooth running of the appointment of cases before the courts, as it often happens that those cases, where a legal aid lawyer is appointed, are appointed/adjourned by an agreement between the defence the prosecution.

However, this system does not apply in cases which are being heard before the CMCCJ because in these latter instances the court would suspend the hearing and immediately appoints a lawyer from the panel of advocates for legal aid.[796] As such cases are heard summarily, The court allows the appointed lawyer to appear and then proceeds to order the continuation of the case since such cases are heard summarily. In most instances, the case is not adjourned to another day.

Although one may perceive the Maltese system as effective, the right to legal aid is not being exercised in line with the case -law of the ECtHR. It is rather difficult for a lawyer

[793] ibid para 91.
[794] Criminal Code art 570 (2).
[795] Criminal Code art 570 (4).
[796] These are mentioned in art 91 of the COCP.

to assist a client there and then and without being given an opportunity to examine witnesses whose testimony is deemed necessary for the defence of the accused. Even though most cases brought before the Court of Magistrates are contraventions, some offences are still punishable with imprisonment of up to two years. These are the cases which fall within the remit of this court when exercising its original competence.[797]

This is also the case where there is an on-going investigation, and the suspect asks to be assisted by a legal aid lawyer. Regardless of the suspect's means of subsistence, the law provides that the investigating officer must give the suspect a list of lawyers and legal procurators drawn up by the Chamber of Advocates and the Chamber of Legal Procurators and submitted on a yearly basis to the Executive Police from which the suspect can choose his lawyer.[798]

The law stipulates the manner of appointment of the legal aid lawyer, but what happens in practice is different. The suspect or accused person is given no choice but is assigned the lawyer who is on duty on the appointed day. This system has not yet been challenged in court, but should there be an application in this regard, the applicant may well be able to claim that he was not given a fair trial and that, contrary to the law, he was not assigned a lawyer of his choice.The Maltese courts cannot contest the qualifications of the appointed legal aid lawyers and are therefore left with no choice but to appoint the lawyer who happens to be on duty even if the said lawyer is not well-versed in criminal law The required qualifications for the appointment of the legal aid lawyer are the following:

i. Degree in Law from the University of Malta.

ii. Warrant to practice as a lawyer on the Maltese Islands.

iii. At least two years proven experience in civil litigation and criminal matters after obtaining warrant.

[797] Criminal Code art 370 (1)(a).
[798] Criminal Code art 355AUA (4).

iv. Fluency in speaking and writing Maltese and English.

Therefore, no specialisation is required and in fact there are no specialist lawyers employed with the Agency for legal aid.

In the case *Stephen Galli v. Malta*[799] the applicant claimed that, during his detention at the Corradino Correctional Facility, he suffered an infringement of his right not to be subjected to torture or degrading treatment. The ECtHR expressed concerns about the acts and omissions of lawyers appointed under the legal aid system in Malta. The court noted in its decision that the current situation, 'could result in a hindrance by the State of the effective exercise of an applicant's right' to claim a violation of the ECHR. Th ECtHR contacted the legal aid lawyer and asked him to make submissions on behalf of his client, but no reply reached Strasbourg. Subsequently, the court sent a registered letter to the legal aid lawyer, notifying him that the time for his submissions had expired and alerted him to the fact that no extension had been requested by him. The president of the European Court's section reacted by stating that in view of 'the repeated failings of the applicant's legal representative from the legal aid office in Malta, the lawyer should no longer represent or assist the applicant. The Maltese Government was also asked to comment on whether the acts and omissions of Mr Galli's legal aid lawyer were attributable to the State and if that were the case whether Malta had hindered the applicant from effectively exercising his right to seek redress. The government had presented its submissions, but these were not listed in the decision of the ECtHR. The Court construed Mr Galli's failure to reply as an expression of disinterest and subsequently struck the case off its list.

The Maltese system regulating the appointment of legal aid lawyers may seem simple; however, it is tainted by several drawbacks. There is, for instance, only one roster for legal aid lawyers covering the island of Malta. This roster places one legal aid lawyer on duty for twenty-four hours to cover a whole island covering a population of over four hundred

[799] App no 20346/15 ECtHR. Case struck off the list on the 8 February 2018.

and forty-one thousand one hundred and three.[800] It is questionable whether it is realistically possible for legal aid lawyers to simultaneously handle, during the same morning, private practice clients and legal aid clients. What would happen if there are two or more accused with different requirements: can the lawyer still carry on with the assigned briefs if he/she has a conflict of interest? What if the legal aid lawyer is called to assist in a police station and at the same time called to assist with an arraignment in court: can the lawyer be in two places at once? These are but a few of the problems which legal aid lawyers face daily. This invariably results in such lawyers giving an unprofessional service to the detriment of their client and consequently, in line with the research question, such service could be considered unsatisfactory and could also, possibly give rise to Constitutional cases based on a breach of Article 6 of the ECHR.

In the past, legal aid lawyers were appointed by the Minister of Justice and their contract of service was signed by the AG. It is interesting to note that, until recently, their salary was paid by the Office of the AG. The matter pertaining to the payment of the salary, was discussed in the Constitutional case in the names *Daniel Holmes vs L-Avukat Ġenerali*[801] where the Court held that although legal aid lawyers were paid by the AG, they were still to be considered as independent and autonomous from the latter.

Today, the legal aid lawyer is no longer paid by the office of the AG but by the Ministry of Justice. S/he is employed on a part-time basis, receives an honorarium of six thousand euro per annum, and can carry on with his/her private practice. The carrying on of private practice may cause problems since the lawyer may be more inclined to dedicate time to private clients.[802] The number of lawyers who provide this service is minimal and certainly inadequate. In the year 2008, there were six lawyers for Malta and two lawyers for Gozo; ten years later, as of May 2018 there were twenty-five lawyers on the list, twenty

[800] The current population of Malta is 441,103 as of Friday, February 14, 2020, Worldometer elaboration of the latest United Nations data <https://www.worldometers.info/world-population/malta-population/> accessed June 2020.
[801] *Daniel Alexander Holmes vs l-Avukat Ġenerali et* (Constitutional Court 3 May 2016).
[802] Dr Carla Camilleri 'Access to Legal Assistance in Malta - Mapping the availability of legal assistance for the protection of fundamental rights in Malta' (aditus foundation, The Critical Institute, 2017) p 38-39.

designated to give legal aid service in Malta and five for Gozo[803] per total population of four hundred and forty-one thousand five hundred and forty-three inhabitants.[804] In 2019, the Minister of Justice recruited another five lawyers to provide this service.

6.4.3 The possibility of appeal from a decision denying legal aid

It could be stated that there is no need for an appeal system in Malta because the legal aid system is liberal and does not dent to the right to legal aid. However, this might change with the transposition of the EU Directive in national law. An appeal system would surely be required if Malta were to introduce the Merits Test for the determination relating to access to legal aid. This system already exists in the civil sphere, where the Merits Test is applied because the FHCC is empowered to review the decision taken by the Advocate for Legal Aid by giving the parties the equal opportunity to be heard and to present their submissions.[805]

Such an application may take time to be heard and in criminal proceedings time is of the essence especially when a suspect and/or accused is under arrest. Therefore, would the forty-eight-hour rule still apply when a decision on the eligibility of legal aid is pending? If denied, how would a person be able to claim his right to legal aid before the superior courts? How would a person know of his right to appeal from this decision?

The appointment of legal aid lawyers in Malta has been contested before the Constitutional Court by the accused persons claiming violation of their right to a fair trial. In one such case, *Aaron Cassar vs l-Avukat Ġenerali*,[806] the Court held that although the system should be reformed, it was not causing any injustice. The ex-Director General of the Law Courts, stated during an interview held with the Commission for Holistic Reform of Justice System, that complaints brought forward to the administration are mostly based

[803] Victor Paul Borg 'Legal Aid in Gozo is a lawyer's bounty' *Times of Malta* (Malta, 14 May 2018) <https://timesofmalta.com/articles/view/legal-aid-in-gozo-is-a-lawyers-bounty.678896> accessed April 2020.
[804] < https://worldpopulationreview.com/countries/malta-population/> accessed April 2020.
[805] COCP art 917.
[806] FHCC, 28 January 2016.

on, the service given by the assigned lawyers. However, there is no mechanism to address these complaints.

The appointment of legal aid lawyers can be challenged by means of a Constitutional case, pursuant to which the applicant could claim that his right to a fair trial was infringed. The problem is, however, that, this route is only available at the end of the criminal proceedings and therefore after the alleged infringement has occurred.

In *John Udagha Omeh vs Avukat Ġenerali*[807] the applicant claimed that his fundamental rights enshrined in Article 39 (6)(c) of the Constitution and Article 6 (3)(c) of the Convention, were violated because of the deficiencies in the legal aid system which precluded him from having an adequate defence. The applicant complained that his right to a fair trial was breached due to various shortcomings in the legal aid system which were not, however, attributed to the individual lawyers who assisted him before the Courts. Consequently, the Court held that since Omeh manifestly failed to identify and prove specific failings by the court-appointed lawyers, his complaint in this regard was unjustified.

Similarly, in *Aaron Cassar vs L-Avukat Ġenerali et*[808] the applicant complained sbout the fact that the provisions of the law on n legal aid, did not apply to pre-trial investigations. The Court held that Article 39 of the Constitution did not apply before the Courts of Magistrates as a Court of Criminal Inquiry and the Inquiring Magistrate, but only applied to proceedings before Courts which deliver judgments in favour or against the accused.

6.4.4 Right of choice to one's own lawyer

The current system provides that with respect to cases before the Courts of Magistrates, legal aid lawyers are to be appointed by the court on a rota basis according to the roster issued by the Director of the Legal Aid Agency. On the contrary, with respect to cases

[807] FHCC, 31 January 2017.
[808] FHCC, 28 January 2016.

before the superior courts the lawyer is appointed by the Advocate of Legal Aid. In such a system, seemingly unique to Malta the accused does not have the right to choose his lawyer. The FHCC in *Alfred Joseph Baldacchino et v L-Avukat Generali*[809] held that a person cannot choose his legal aid lawyer in both civil and criminal proceedings. The Code of Organisation and Civil Procedure (COCP) provides that a party can, on adequate grounds, request the court to substitute the legal aid lawyer or procurator by another one from the rota.[810] The lack of a provision on replacement in the Criminal Code does not necessarily mean that a legal aid lawyer cannot be replaced but it does mean that any replacement would have to be decided upon by the adjudicator.

In Malta, as only one legal aid lawyer is on duty on a particular day to cover the whole island and as all cases are heard before the same court of law, the appointment could give rise to conflict-of-interest issues. The legal aid lawyer may be faced with co-accused charged with the same offence but having different defences or suspects detained in custody, waiting to be interrogated and possibly blaming each other while at the same time being called by the court to a hearing. Indeed, Justice Susan Glazebrook confirms that that conflicts of interest are present with lawyers working in small countries, although they occurred more in large firms.[811] The Permanent Law Reform Commission stated that the right of choice should not be granted as it is to be presumed that appointed lawyers and legal procurators can perform their roles. Furthermore, it continued that if this right were to be granted, it would lead to a considerable increase in the cost of the administration of legal aid and would completely revamp the current system.[812]

It would be difficult for the legal aid system to function effectively if the right of choice is granted, especially if the same lawyers would be constantly chosen by the suspects or accused. This would lead to an uneven distribution of cases amongst legal aid lawyers. In these circumstances, would the chosen lawyer be able to refuse a case due to a heavy

[809] FHCC Constitutional Jurisdiction, 19 October 2007.
[810] COCP art 91.
[811] Justice Susan Glazebrook, 'Conflicts of interest: The New Zealand perspective' [2006] 1, 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334323> accessed September 2019.
[812] Permanent Law Reform Commission, 'Law Relating to Legal Aid' (Report Number 1, 1991) para 7.2.

workload or should the accused's right of choice take precedence? Should trials be postponed or adjourned simply because the chosen lawyer is too busy to handle another case? These are two questions which may arise if the suspect/accused were to be given the right to choose the legal aid lawyer.

6.4.5 The expertise of the legal aid lawyer

The current system does not require legal aid lawyers to be specialised in criminal law and this even though offences are becoming increasingly complicated especially those relating to financial crime. In fact, in the case *Daniel Alexander Holmes v L-Avukat Ġenerali et*[813] the applicant claimed a breach of this right to a fair trial on the basis of lack of specialisation on the part of the legal aid lawyer. In another case, also in the names *Daniel Holmes vs l-Avukat Ġenerali et,*[814] the applicant alleged a breach of Article 39 (6)(c) of the Maltese Constitution and Article 6 (3)(c) of the ECHR on the grounds that the legal aid lawyer was assigned to him from a list of only two lawyers on the roster in Gozo and that no account was taken of their experience. The Court, however, rejected both his pleas. In the latter case, the court stated that Holmes was not complaining about the service provided to him by a particular legal aid lawyer but rather about the legal aid system. The Court concluded that it should not carry out a theoretical examination of the legal aid system but should alternatively examine whether in this instance the assistance received by Holmes breached his fundamental rights.

The discussion above begs the question as to whether specialisation in one field of law would be sufficient, primarily because a lawyer with as criminal law specialisation may not be able to defend a client before the Constitutional Court, a situation which could create another problem. In one of its recommendations, the Bonello Commission stated that a system of specialisation should be created.[815] On the other hand, in another recommendation, the same Commission opined that, regardless of the nature of the case,

[813] FHCC Constitutional Jurisdiction, 3 October 2014.
[814] Constitutional Court, 3 May 2016.
[815] Commission for a Holistic Reform in the Justice System' (Second Consultation paper) 9.

the appointed lawyer should handle all the cases relating to the original claim.[816] It believes that this is necessary to enhance continuity and to strengthen the client-lawyer relationship.[817]

6.4.6 The need for continuity in legal representation

In 1991, the Permanent Law Reform Commission compiled a report outlining the need for continuity in the legal aid service. Continuity should be provided in appeal sittings; in ancillary proceedings by the reference of one court to another, where the benefit of legal aid has already been granted and in proceedings instituted following a time limit imposed by the court.[818] This would require an accused to be assisted by a legal aid lawyer in all court proceedings, however, it does not state that the lawyer must be the same person throughout.

The law provides for continuity in legal representation when before the Criminal Court and based on Article 571 (1) of the Criminal Code, an accused declares a conflict and claims that as a result he cannot be assisted by the Legal Aid Advocate. In such case, the Criminal Court would order that the accused be assisted by the lawyer nominated *a priori* in terms of Article 517 of the Criminal Code. Thus, continuity is not automatic.

Lawyers who assist their clients before the Courts of Magistrates do not lodge appeals. Clients wanting to appeal a judgement must seek the assistance of the Legal Aid Agency and request the appointment of Advocate for Legal Aid who appears solely before the Criminal Court and Criminal Court of Appeals. This can prejudice the accused since the new lawyer would not be familiar with the defence raised by his predecessor and would also be constrained by a timeframe within which to prepare the appeal. Moreover, since new lawyers cannot be heard on appeal, the lawyer may also be constrained against his conviction to prepare an appeal using the same defence raised by the previous lawyer.

[816] ibid para 39.
[817] ibid para 42.
[818] Permanent Law Reform Commission 'Law Relating to Legal Aid' (Report Number 1, 1991 para 3.9.

If the Means or Merit test is introduced in Malta, how would the accused be defended in proceedings ancillary to the original proceedings? Would the accused have to repeatedly re submit himself to the tests before the different courts repeatedly or would the first analysis be sufficient? This question highlights the difficulty arising from the transposition of the EU Directive in domestic law, particularly that relating to the eligibility to the right to legal aid.

There are several specialised laws which guarantee the right to legal aid. The Victims of Crime Act[819] provides to victims of crime the right to request a legal aid lawyer to assist them during criminal proceedings and the International Protection Act[820] grants individuals wishing to appeal from the first instance decision of the Refugee Commissioner to be assisted by a legal aid lawyer.[821] At first instance, however, there is no right to legal aid and this may certainly prejudice asylum applicants, particularly since they do not receive advice on the preparation of their asylum application and interview before the determination of their status.[822] Therefore, not much can be done by the legal aid lawyer who is appointed at appeal stage. NGOs, such as aditus and the Jesuit Refugee Commission help at first instance *pro bono* but unfortunately this aid is not accessible to every applicant. In contrast with other countries, aspiring lawyers in Malta are not obliged to work *pro bono* before becoming lawyers. However, in 2017 a legal clinic was set up by the Faculty of Laws of the University of Malta,[823] to assist vulnerable individuals, including asylum seekers.[824] The author opines that an amendment should be introduced to the Refugees Act to establish legal assistance at first level.

[819] Chapter 539 of the Laws of Malta, art 4(d)
[820] Chapter 420 of the Laws of Malta.
[821] ibid, art.7(5).
[822] Information given by TON legal practitioners, an NGO during interviews conducted on the 3rd October 2016.
[823] David Grech Urpani 'Maltese Students Are Forming Malta's First Free Legal Clinic' *Lovin Malta* (Malta 24 April 2017) <https://lovinmalta.com/lifestyle/living-in-malta/maltese-students-are-forming-maltas-first-free-legal-clinic/> accessed on 18 March 2021.
[824] Pro Bono Institute and Latham & Watkins LLP 'Pro Bono Practices and Opportunities in Malta' (May 2019) <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-malta-3.pdf/> accessed on 17 March 2021.

6.4.7 The Legal Aid Agency in Malta

Following the proposals submitted by the Commission for the Holistic Reform,[825] the legal aid agency was formed. The Public Administration Act,[826] via Legal Notice 414 of 2014, to regulate the Legal Aid Agency (Establishment) Order, 2014 regulating the institute for legal aid. This Agency is headed by the Advocate for Legal Aid, who provides the necessary assistance in connection with le]gal aid. The Agency is included within the remit of the Ministry of Justice and is governed by the provisions of the Financial Administration and Audit Act.[827]

The Advocate for Legal Aid is employed full-time, by means of a definite contract with the office of the Attorney General, and is thus precluded from having any private work, unlike legal aid lawyers. The Agency handles administrative matters relating to the appointment of lawyers for legal aid in criminal courts and provides administrative support on the granting legal aid in cross-border disputes. Apart from acting as an agency for the provision and reform of legal aid, the Agency organises training for lawyers and constantly monitoring the system.[828]

The Legal Aid system in Gozo falls under the remit of the Legal Aid Agency, however, it seems to function differently from the system adhered to Malta. In Gozo, individuals usually pick a lawyer of their choice and ask the lawyer to take up their case, thereby eliminating the need to wait for the assignment of the case by the Agency. This is dangerous because the system in Malta provides legal aid to all, irrespective of one's income. As a result, there could very well be legal aid lawyers who are inundated with work and others who, despite being on the legal aid list, are given no briefs at all, even though all lawyers would be, earning the same remuneration. Undoubtedly, this system

[825] The Holistic Reform of Justice Commission Final Report (n 100). Recommendation 16.
[826] Public Administration Act, Chapter 497 of the Laws of Malta.
[827] Legal Aid Malta, Standard Operational Procedures for Legal Aid Lawyers and Legal Procurators assisting legal aid clients (July 2018) sec 7 (Legal Aid SOP) <https://justice.gov.mt/en/legalaidmalta/Documents/SOP%20%20Legal%20Aid%20Lawyers%20and%20Legal%20Procurators%20FINAL%20-%2006%20July%202018.pdf> accessed January 2021.
[828] LN 414 of 2014, art. 4.

needs to be addressed.

In 2016, in exercise of the powers conferred by Article 36 of the Public Administration Act, the Prime Minister enacted new regulations on the functions and operations of the Legal Aid Agency. The Agency is now obliged to maintain databases and records of relevant documentation. This is novel since in the past the Agency kept no records. As this obligation is statutory, the Agency will now be in a better position to provide a service which is based on statistics and thus while the workload of the legal aid lawyer may diminish, the suspect and/or accused person will be given a better service. Unfortunately, statistics on the number of people granted or denied legal aid and the number of cases processed were not publicly available at the time of writing of this thesis.

In July 2018, the Legal Aid Agency issued a Standard Operational Procedure (SOP) for Legal Aid Lawyers and Legal Procurators assisting legal aid clients.[829] The objective of the SOP, is to lay down the procedure which is to be followed by lawyers and/or legal procurators when assisting the accused. The SOP stipulates that legal aid lawyers must be available to assist clients according to the roster issued by the Registrar of the Criminal Court;[830] Lawyers are obliged to attend to detained clients and call up on them prior to interrogation.[831] Subsequently, legal aid lawyers are also obliged to continue assisting clients before the Courts following arraignment.[832]

Legal aid lawyers are obliged to provide the assigned client with an appointment within a reasonable time. They are also responsible for preparing legal documents and presenting them to the court registries within the prescribed legal timeframes and according to the constraints of the client.[833] However, there are numerous problems that lawyers face daily. One example is the situation where a person is arrested and is assigned the legal aid lawyer on duty on that day. The latter advises him not to divulge anything during interrogation.

[829] Issued by the Legal Aid Agency, 188/189 Old Bakery Street, Valletta.
[830] Legal Aid SOP (n 827) s 4.2.1.
[831] ibid s 4.2.2.
[832] ibid s 4.2.3.
[833] ibid s. 4.2.4.

Subsequently, the person is arraigned in Court and is assigned another legal aid lawyer who is on the roster of the day of the arraignment and this lawyer gives him different advice. This reflects the lack of continuity in the system. The service being given is ineffective and unsatisfactory and thus cannot be described as beneficial to suspects and accused persons.

6.4.8 Disciplinary Board created under the Legal Aid Agency

Following the report presented by the Commission, the Legal Aid Agency set up an independent Disciplinary Board to receive complaints submitted by legal aid clients. The complaints are subsequently forwarded to the Board of Examination headed by the Advocate for Legal Aid.[834] Subsequently, the Board would make recommendations to the Head Advocate of Legal Aid or the Minister of Justice according to the circumstances of the case and would advise on the route to be taken. Ultimately, these complaints may lead to disciplinary measures against legal aid lawyers and this at the sole discretion of the Disciplinary Board following a subjective examination.

6.4.9 The creation of a *pro bono* system of legal aid

The term *pro bono* is used to refer to free legal work carried out for the good of the general community.[835] Elizabeth Knowles describes this type of work, as that carried out by private lawyers for the public good free of charge, in particular legal work carried out for a client on a low income.[836] Lamin Khadar traces its origin to Medieval Europe when such service was considered as a charitable duty given by individual lawyers or by the Church to help people in need.[837] In the UK, pro bono services are extremely important because

[834] ibid s. 6 (2).
[835] Jonathan Law and Elizabeth A. Martin *Dictionary of Law* (7th edn. Oxford University Press, 2014).
[836] Elizabeth Knowles, The Oxford Dictionary of Phrase and Fable (Second Edition, Oxford University Press 2005).
[837] Lamin Khadar, 'The Growth of Pro Bono in Europe – Using the power of law for the public interest' (November 2016) <https://probonoconnect.nl/wp-content/uploads/2017/03/PILnet-pro-bono-report.pdf> accessed January 2021.

the cost of state-subsidised legal aid in UK is one of the highest in the world.[838] In Germany, private attorneys are not legally obliged to take on *pro bono* cases. However, it is common for lawyers to provide services for free or at a reduced price to indigent clients.[839]

In Malta, the matter was discussed in the White Paper entitled '*Lejn Ġustizzja Aħjar u Eħfef*' issued by the Ministry of the Interior and Justice.[840] The paper suggested the idea that there should be' professional legal services for free thrust upon lawyers working in the litigation field within the Courts.' Judge Camilleri elaborated on this concept and suggested[841] that a system should be set up in collaboration with the Chamber of Advocates. However, lawyers practicing in court were not in favour of this *pro bono* system. They felt that such a system would impinge on the right of choice to a lawyer and would create a burden on them to provide such service *pro bono.* In general, the lawyers felt that it is the duty of the State to provide for such a service. In fact, the President of the Chamber of Advocates Dr Reuben Balzan stated that 'it is unfair to expect lawyers to provide a service for free when it is the State's obligation to do so.'[842]

In its report on legal aid, aditus Foundation,[843] held however that although the provision of *pro bono* service is unstructured, many private lawyers still offer this service. [844] There are a few NGOs which provide free legal advice to clients and the ad hoc legal clinic set up by the Faculty of Laws at the University of Malta,[845] as mentioned earlier in this chapter.

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[838] United Kingdom: Ministry of Justice, 'International comparison of publicly funded legal services and justice systems' No 14/09 (October 2009 accessed January 2021.
[839] Pro Bono Deutschland <http://www.pro-bono-deutschland.org/en/pro-bono-legal-advice> accessed January 2021.
[840] Published in January 2005 <https://www.parlament.mt/media/52506/2690a.pdf> accessed November 2020.
[841] The Holistic Reform of Justice Commission Final Report (n 100) 271.
[842] Mathew Xuereb, 'Lawyers Back Call for Major Overhauls of the Legal Aid System', *Times of Malta,* (Malta, 15 July 2013) <https://timesofmalta.com/articles/view/Lawyers-back-call-for-major-overhaul-of-legal-aid-system.478005.amp> accessed March 2021.
[843] A non-governmental organisation established in 2011 with a mission to monitor, report and act on access to human rights in Malta.
[844] Camilleri (n 802).
[845] University of Malta, Legal Clinic <http://www.um.edu.mt/crc/projects/legal_ clinic> accessed January 2021.

6.4.10 Witnesses right to legal aid

There is no statutory provision on witnesses' right to legal aid. The reason for this could be that in general a witness is not usually accompanied by a lawyer. However, the need for legal aid to witnesses may arise for instance, in a situation where a witness is indigent and requires the assistance of a lawyer. due to incriminating questions in which case the witness would also be able to exercise the right to silence.[846] Unless assisted by a lawyer, a witness would not be able to comprehend the importance of such right.

The UNPG stipulates that States should consider providing legal aid to witnesses in special circumstances, including but not limited to, when the witnesses can incriminate themselves; when they are vulnerable and when their well-being is at risk.[847]
The ECtHR's case law[848] confirms that the right to legal aid does not extend to a witness if such witness is not being investigated as a suspect to an offence. The defence must, however, exercise caution when questioning a witness as some of the answers could lead to a confession, in which case the witness would need to be treated as a suspect and granted all the fundamental rights, including the right to legal aid. If proceedings are instituted on the complaint of an injured party who is indigent, he/she is also entitled to legal aid.

6.5 PRINCIPAL FINDINGS

i. Legal aid is a right and an essential precondition for the exercise and enjoyment of several human rights , including the rights to a fair trial and to an effective remedy. It is of paramount importance that such right is given at an early stage of an investigation to enable suspects to benefit from such assistance prior to being investigated.

[846] Criminal Code art 643.
[847]UNODC, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems', 2013, A/RES/67/187, 19.
[848] *Brusco v. France* (n 46); *Bandaletov v. Ukraine* (n 161).

ii. Legal aid is not limited to legal assistance but includes advice and representation. Although no mention is made of the latter two, they are established by inference.

iii. The EC provides that this right should be granted when the interests of justice so require'. Thus, a subjective test must be carried out in each individual case. The Convention however fails to mention whether this right is applicable to pre-trial proceedings or only once criminal charges are issued. However, caselaw of the ECtHR has extended its applicability to pre- trial investigations.

iv. The EC requires that two conditions must be met for a person to be eligible to legal aid, namely the Means Test and the Merits Test. As highlighted earlier in this chapter, the right to legal aid does not depend solely on these tests but also on the particular Member State where one happens to be when the need arises.

v. Member States do not apply the same tests and therefore the eligibility for such right may vary from one Member State to another. It is of utmost importance that each Member State has its own legislative framework which provides for the right to legal aid, to safeguard the right to a fair trial for indigent persons.

vi. The right to legal aid does not entitle the suspect and/or accused to choose his/her lawyer. The State must only ensure that the appointed lawyer is competent. and in case of shortcomings on the latter's part, interfere to rectify the situation. For the State to be able to intervene, the shortcomings must disadvantage the defendant[849] and therefore simple errors are insufficient to uphold appeals on the ground of ineffective representation,

vii. The EU Directive 2016/19 sets out minimum rules where suspects and accused persons can be given legal aid and thus indirectly strengthens the trust that Member States have in each other's criminal justice system and subsequently

[849] S Brett Holsombeck, 'Protecting an Indigent Defendant's Right to Appeal or the Demise of Counsel's Right to Exercise Professional Judgement' [2013] Journal of the Legal Profession 175, 179

improves mutual recognition of decisions in criminal matters. This Directive provides the minimum rights and does not replace the rights given to a suspect or accused person by the Convention or domestic law.' The Directive defines the term 'legal aid' and includes the State's obligation to provide a lawyer to a suspect and/or accused when the interest of justice so require. Thus, a two-tier examination must be carried out when considering the eligibility for legal aid: firstly, that the applicant lacks sufficient resources and secondly, when the interest of justice so requires.

The Directive provides that this right should be made available to all persons deprived of their liberty and extends to investigative or evidence gathering acts. However, the Directive is silent as to whether the right to legal aid extends to witnesses or to individuals appearing before an Authority or Tribunal.

The Directive is also silent on the choice of lawyer and on the training that should be provided to appointed legal aid lawyers.

viii. In Malta, everyone is entitled to the right to legal aid. This shows that the right to legal aid is not an illusionary right but an effective one. Although there are several shortcomings, the right to legal aid in Malta goes beyond the minimum rights established in the Directive and its eligibility does not depend on the Merits and/or Means Tests.

6.6 CONCLUDING REMARKS

The right to Legal Aid is not a stagnant right but a dynamic right having different interpretations through the numerous judgments delivered by the ECtHR. However, with the transposition of the EU Directive, Member States' approach towards the right to legal aid should now be more harmonised. Whilst it is true that the Directive only provides the minimum rights, at least this basic right is now guaranteed to all EU citizens through one legal instrument. In Malta, this right is abused to the detriment of innocent persons. and it

would be interesting to see whether Malta will be introducing the Merits and/or Means Test once it transposes the EU Directive. Ultimately, the effectiveness of this right depends on the way the right is made known and provided to the people.

Although the importance of this right has been widely recognised in developed countries, positive action must be taken by States to ensure its true implementation. Failure to do so may lead to an unsustainable legal aid regime which would not be able to safeguard the rights of legal aid clients. It would be futile to have the Convention and the ECtHR acting as a watchdog over all Member States if national judicial systems do not adhere to such rights and enforce their implementation.

CHAPTER 7 -THE RIGHT TO SILENCE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

7. INTRODUCTION

The right to silence, or the privilege against self-incrimination, has long been recognised as an important procedural right for the accused in the criminal process.[850] 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. It encompasses a variety of protections and immunities.[851] The right to silence has been described as a bedrock of the Anglo-American legal tradition and a fundamental principle in any liberal society.[852] There is no clear definition of the right to silence; however, its justification lies in the fact that 'it counterbalances the power inequity between the state and the accused' because the latter is not coerced to incriminate himself/herself.[853] Various definitions have been given and the phrase 'privilege against self-incrimination' has occasionally been used as a synonym.[854] The meaning of the two terms is not, however, identical, although at times the terms may be used interchangeably.[855] The right to silence has been described as having both a narrower and a broader interpretation in comparison to the privilege against self-incrimination.[856] A suspect may remain silent to avoid self-incrimination or to avoid incriminating others. While the term 'privilege' implies special attention accorded as a favour or appreciation, the term 'right' denotes an interest protected as an expression of basic values.[857] In an accusatorial system like Malta's, silence should be regarded as a right rather than a

[850] Yvonne Marie Daily (n 240).
[851] Jake Wilhelm Henderson, 'The weight of silence – An Analysis of the Forensic Implications of pre-trial exercise of the right to Silence' (LL.B. Hons thesis, University of Otago 2018).
[852] Andrew Butler and Petra Butler, *The New Zealand Bill of rights act. A commentary* (2nd edn, LexisNexis New Zealand, 2015) p 1430.
[853] Nkiruka Chidia Maduekwe, 'The Administration of Criminal Justice Act 2015 and The Crime Suspect's Right of Silence: A Clog in the Wheels of Justice?' (2016) SSRN Electronic Journal <https://doi.org/10.2139/SSRN.2813034> accessed September 2019
[854] Steven Greer 'The Right to Silence: A Review of the Current Debate' (1990) The Modern Law Review Volume 53, No 6 p 709 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-2230.1990.tb01837.x> accessed February 2021.
[855] Paul Roberts and Adrian Zuckerman (n 252) 541.
[856] Ian Dennis (n 182). He defines the privilege against self-incrimination as the broader principle. On the other hand, Butler (n 850) 1431 describes the two principles the other way round.
[857] Greer (n 854) p 710.

privilege. It is of paramount importance that this right is explained to suspects and accused persons prior to interrogation because anything they say may be used against them in their trial. These are but a few reasons why the author chose to discuss this right amongst the chosen four cardinal rights.

David Hamer et al describe the right to silence as that right which seeks to reduce the imbalance of power between suspects and the police.[858] It also enables suspects to avoid self-incrimination, and it reinforces the presumption of innocence.[859] The presumption of innocence is the rule requiring the State to prove its case beyond any reasonable doubt. Victor Chu describes this presumption of innocence as the 'golden thread' that runs through the criminal law.[860] A defendant is entitled to remain silent because there is no requirement that they prove their own innocence. Rather, the onus is on the State to prove guilt beyond reasonable doubt.[861]Therefore, before this burden is discharged, the accused has the right to be presumed innocent.[862] Ian Dennis argues that if a suspect is truly presumed to be innocent, then it is wrong for the suspect to be a potential source of incriminating evidence.[863]

A suspect or accused is obliged to give information about his identity.[864] In this respect, Article 370 of the Criminal Code provides for the examination of the accused. When arraigned in court, the accused is asked to provide his name, surname, address, employment and the guilty or not guilty plea he wishes to register. In fact, by ascertaining that the accused has the right to withhold incriminating evidence, it is believed that the

[858] David Hamer et al, Submissions to Criminal Law Review Division Department of Attorney General and Justice Australia, September 2012,2. Also <https://www.uws.edu.au/__data/assets/pdf_file/0008/716579/UWSLR_2013_Volume_17.pdf> accessed April 2021.
[859] ibid.
[860] Victor Chu, 'Tinkering with the right to silence. The Evidence Amendment (Evidence of Silence) Act 2013 (NSW)' (2013) Volume 17 University of Western Sydney Law Review <https://www.uws.edu.au/__data/assets/pdf_file/0008/716579/UWSLR_2013_Volume_17.pdf> accessed April 2021.
[861] *Petty and Maiden v The Queen* (1991) 173 CLR 95, 128–9.
[862] Ian Dennis, 'Instrumental Protection, Human Rights of Functional Necessity? Reassessing the Privilege Against Self-Incrimination?' Vol 54 Issue 2 The Cambridge Law Journal 342 p 353.
[863] ibid 353.
[864] Trechsel and Summers (n 223) 354-355.

right to silence plays an important role in upholding the presumption of innocence in practice.

An individual can incriminate himself/herself by admitting to an accusation, either directly or indirectly. A suspect can incriminate himself directly by disclosing certain details during interrogation. Indirect incrimination can, on the other hand, occur through the spontaneous provision of information without any restriction being used by the other party. The right to non-self-incrimination is aimed at respecting the accused person's right to remain silent. In criminal cases, the prosecution must prove its case against the accused, without exerting any pressure on the latter.[865]

Under the Maltese system, like various other legal systems, accused persons cannot be obliged to incriminate themselves. The accused may choose to speak to the police but cannot be admonished for refusing to do so. The application of this right varies from one jurisdiction to another. Inferences can be drawn from the exercise of the right to silence in jurisdictions such as England and Wales. However, in other countries the drawing of inferences is prohibited. For instance, in New Zealand judges are precluded from drawing guilty inferences from a defendant's pre-trial silence, but the system nonetheless allows adverse inferences as to credibility.[866] This can be compared to the English approach which allows the judge to draw 'proper' inferences from pre-trial silence, including inferences of guilt.[867] On the other hand, in Australia, with the exclusion of New South Wales, no adverse inferences may be drawn.[868] Arguably, an element of indirect compulsion is created when adverse inferences are drawn from silence and this because a suspect or accused will be compelled not to remain silent during pre-trial questioning. This undoubtedly undermines the right to silence.[869]

The privilege against self-incrimination is based on a Latin maxim *nemo tenetur seipum*

[865] *Saunders v. UK* (n 235).
[866] Evidence Act 2006 (NZ) s 32.
[867] CJPOA 1994 (UK) s3 4; Criminal Procedure and Investigations Act 1996 (UK) s 11.
[868] Evidence Act 1995 (Aus) s 89.
[869] Henderson (n 851) 2.

accusare.[870] In a limited sense, the privilege against self-incrimination falls under the broader concept of the right to silence and denotes the idea that we cannot be compelled by the State to provide information which may expose us to criminal liability.[871] It is imperative that every suspect is made aware of all his rights, including the right to silence.[872] This right has been embraced by the ECtHR's interpretation[873] of Article 6 of the ECHR,[874] with the Maltese Courts following closely behind.

In Canada,[875] this right is available to suspects under interrogation and to accused persons facing trial. Furthermore, under Indian Law,[876] defendants enjoy the right against self-incrimination but witnesses are not endowed with this same right.[877] This was confirmed in the judgments *Sharma v Satish*[878] and *Narain Lal v M.P Mistry*[879] On the other hand, in America, the Fifth Amendment to the United States Constitution protects witnesses from being forced to incriminate themselves.[880] Self-incrimination is defined as exposing oneself to 'an accusation or charge of crime,' or as involving oneself 'in a criminal prosecution or the danger thereof.'[881] In fact, the US Constitution provides that in criminal

[870] Translation: 'no man is obliged to accuse himself.'
[871] Law Commission Wellington, 'The Privilege Against Self-Incrimination' (1996) NZLC PP25 1 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20PP25.pdf> accessed 25 March 2021.
[872] Carmen Adriana Domocos, 'Guarantee of the Right to Silence and of the Right not to Contribute to One's Own Incrimination in Romanian Law' Open Journal for Legal Studies, 2018, 1(1), 37-50.
[873] *Saunders v. UK* (n 235); *Choudhary v. UK* App no 27949/95 **(**ECtHR, 13 May 1996); *Salduz v. Turkey* (n 116); *Dayanan v. Turkey* (n 346); *Ambrose v. Harris* (n 237); *Jalloh v. Germany* App no 54810/00 (ECtHR, 11 July 2006); *Borg v. Malta* App no 37537/13 (ECtHR, 12 January 2016); *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979); *Artico v. Italy* (n 125)
[874] ECHR art 6(3)(c): 'Everyone charged with a criminal offence has the following minimum rights:
to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require';
[875] Constitution Act 1982, Canada Charter of Rights and Freedoms s. 11'Any person charged with an offence has the right: c) not to be compelled to be a witness in proceedings against the person in respect of the offence.'
[876] Constitution of India s 20(3)
[877] Rishabh Sethi and Nisha Agarwal 'Right Against Self-incrimination: A Detailed Study of the Constitutional Protection' Journal on Contemporary Issues of Law [JCIL] Volume 5 Issue 3 <http://jcil.lsyndicate.com/wp-content/uploads/2019/04/Right-Against-Self-Incrimination-A-Detailed-Study-of-the-Constitutional-Protection-1.pdf> accessed February 2020.
[878] *Kanti Kumari v State of Jharkhand* (2013) (1) Crimes 212 (214) (Jhar).
[879] *Kartar Singh v State of Punjab* (AIR 1956 PH 1122).
[880] Elvin Egemenoglu, 'Fifth Amendment: An Overview'. (February 2020) Cornell Law School <https://www.law.cornell.edu/wex/fifth_amendment> accessed March 2021.
[881] *Black's Law Dictionary* (5th ed. West Publishing1979) p 690.

proceedings no one shall be compelled to be a witness against himself.[882] The American Constitution also provides that the State must prove a case against an individual independently from such person incriminating himself/herself. In fact, in America, when the defendant pleads 'The Fifth,' he would be refusing to answer a question because of possible incriminating answers. This serves to protect the accused from forced incrimination. As held in *United States vs Habell,*[883] the right against self-incrimination is not limited to a suspect or accused, but to any person who is called upon to give evidence. The presence of a lawyer serves to better inform accused persons of their rights and hence, this right is highly prioritised.[884]

7.1 THE RIGHT AGAINST SELF-INCRIMINATION IN EUROPEAN LEGISLATION

Article 6 of the ECHR and Article 47 of the CFREU[885] prioritise the right to a fair trial, but do not mention the right to remain silent. The rights enshrined in the CFREU are identical to those found in the ECHR. It is to be emphasised that the right to remain silent is one of the facets of the right not to incriminate oneself.[886] The ECtHR has repeatedly pointed out that the privilege against self-incrimination lies at the very core of the notion of a fair procedure under Article 6 of the ECHR.[887]

In addition, sub-section 3(g)[888] of Article 14 of the ICCPR sets out two main aspects of the right not to incriminate oneself: the right not to be forced to testify against oneself and

[882] Fifth Amendment of the U.S Constitution.
[883] 530 U.S. 27, 49 (2000).
[884] *Pishtanikov v. Russia* (n 531).
[885] Article 47 of the CFREU speaks about the right to an effective remedy and the right to a fair trial and provides that: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'
[886] Irena Nesterova Meikalisa (n 254).
[887] *Shlychkov v. Russia* (n 241); Also, *Saunders v. UK* (n 235).
[888] ICCPR s 3(g) 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality Not to be compelled to testify against himself or to confess guilt'.

the right not to be obliged to acknowledge guilt. This Article encapsulates a holistic definition of the right not to incriminate oneself. Furthermore, this right should be perceived as forming an integral part of the wider and more general right to a fair trial. The right against self-incrimination is exercised differently throughout Member States a situation which leads to serious infringements in the comprehension and implementation of such a right in different national legal systems.[889]

The right to remain silent is also mentioned in the Directive on the right to information in criminal proceedings.[890] Unfortunately, this may create confusion in its application across the Member States legal systems. Even though it is evident that this right is protected within the EU legal system, the adopted wording varies when the right is transposed to national law of the different Member States. The Spanish,[891] Maltese[892] and Dutch[893] Letter of Rights includes the specific wording that 'a suspect has the right to remain silent.' However, the latter words are not found in the Letter of Rights used in other Member States, for instance: The Letter of Rights used in the Czech Republic provides that a person 'is not obliged to testify.'[894] Moreover, Latvian law[895] provides that a suspect and accused have 'the right to testify or refuse to give testimony.' In common law systems the term 'the right to silence' is frequently used. On the other hand, in civil law systems the equivalent term used is known as 'the right not to testify' or 'the right to refuse to provide testimony'.

The Directive on the right to information in criminal proceedings does not provide a definition of the right to remain silent, but it imposes the obligation on Member States to provide detainees and arrested individuals with a written Letter of Rights promptly, stipulating that 'whilst questioned by the police or other competent authorities you do not

[889] Trechsel and Summers (n 223) p 341.
[890] Directive on the right to information in criminal proceedings art 3: 'Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, to allow for those rights to be exercised effectively: (e) the right to remain silent.'
[891] Ley de Enjuiciamiento Criminal [Law on Criminal Procedure] art 520 (2).
[892] Criminal Code art 534AB.
[893] Code of Criminal Procedure Netherlands (Wetboek van Strafvordering), art 29, par 2.
[894] Taru Spronken (n 132) Vol 92 para 28.
[895] Criminal Procedure Law of Latvia s 66(1) 15.

have to answer questions about the alleged offence*[..]*'.[896] It is questionable whether a suspect or accused has the right not to speak at all or simply not to answer incriminating questions. The ECtHR has pronounced itself several times on the way the right to remain silent must be interpreted and held that accused persons have the right not to provide a testimony. Although a testimony obtained under duress may not appear to be incriminating, certain remarks may subsequently be used in favour of the prosecution to contradict a witness or to discredit the accused.[897] Therefore, it can be concluded that the right not to testify, as provided in the civil law systems, also includes the right not to give a testimony and the right not to answer all questions. The purpose of the right to information in criminal proceedings is to ensure that a suspect or accused is informed about his rights and consequently, even regarding the waiver of the same rights.

In contrast with the ECHR and CFREU, the Directive on the presumption of innocence adequately provides for the privilege against self-incrimination. The inclusion of this privilege in EU legal instruments signifies that EU Member States are prioritising the right against self-incrimination. However, most jurisdictions have struggled to justify the right against self-incrimination.[898]

The Directive on the presumption of innocence aims to strengthen the accused's rights, including the right to silence. This Directive applies once an individual is suspected or accused of a criminal offence and continues to apply throughout all the criminal proceedings until the judgment becomes a *res judicata.* Civil and administrative proceedings are not included in Article 1[899] and 2[900] of the Directive since these are limited

[896] Directive on the right to Information in criminal proceedings art 4.
[897] *Saunders v. UK* (n 235).
[898] David Dolinko 'Is there a rationale for the privilege against self- incrimination?' (1985 – 1986) UCLA Law Review 1063; John Jackson 'Re-conceptualizing the Right to Silence as an affective fair trial standard' vol. 58, no. 4, 2009, The International and Comparative Law Quarterly, 835.
[899] Art 1:'The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) s 6, ICCPR s 14 and Universal Declaration of Human Rights s 11.'
[900] Art 2: 'The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point (33) thereof, enhanced mutual recognition of judgments and other judicial decisions and the necessary approximation of legislation would facilitate cooperation between

to criminal proceedings. However, the Grand Chamber of the CJEU, in its recent judgment of *DB vs Consob,*[901] acknowledged the applicability of the right to silence to natural persons in administrative investigations on insider trading, noting that their answers may lead to self-incrimination. Some have already labelled the latter judgement as a 'landmark case'.[902] It also follows that a legal person cannot be compelled to provide answers which may incriminate them for unlawful, anti-competitive conduct. However, they may still provide all the information on the facts of the case and disclose the necessary documents, even if these may be used to establish an anticompetitive conduct against them.

The Directive on the presumption of innocence applies only to natural persons in criminal proceedings.[903] The European Parliament's proposal for the Directive to apply to legal persons, proved unsuccessful.[904] The wording of recitals 13 to 15 excludes the Directive's application to legal persons and therefore the latter must rely on other legal instruments for protection, such as the ECHR and the case-law of the ECtHR. Unlike Article 6(2) of the ECHR and Article 48 (1) of the CFREU, the Directive does not refer to 'everyone' but merely to 'suspects and accused persons' and thus it is further restricted to natural persons. However, in the case *Orkem v Commission*[905] the CJEU recognised the protection for legal persons against self-incrimination, in the context of non-contentious proceedings and held that 'although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected

competent authorities and the judicial protection of individual rights. The principle of mutual recognition should therefore become the cornerstone of judicial cooperation in civil and criminal matters within the Union.'

[901] Case- C 481/19 [2021] ECLI:EU:C:2021:84.

[902] Anna Sakellaraki. 'You have the right to remain silent during punitive administrative proceedings CJEU confirms – Case C-481/19 DB v. Consob' (European Law Blog, 25 February 2021) <https://europeanlawblog.eu/2021/02/25/you-have-the-right-to-remain-silent-during-punitive-administrative-proceedings-cjeu-confirms-case-c%e2%80%91481-19-db-v-consob/> accessed 24 March 2021.

[903] ibid.

[904] European Commission, Report on the implementation of Directive (EU) 2016/343 of the European Parliament and of the Council of 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 COM (2021) 144 final March 2015 < Microsoft Word - PresumptionofInnocenceICJJUSTICENJCMbrief.docx> accessed March 2021.

[905] Case 374/87 [1989] ECR 3283.

even during the preliminary inquiry.'[906]

Article 7 of this Directive provides the legal foundation for the right to remain silent and the right not to incriminate oneself. It emphasises that the exercise of these rights is not to be used against suspects and/or accused persons. On the other hand, although the ECtHR has repeatedly reiterated that these rights are recognised international standards which lie at the center of the notion of a fair hearing under Article 6 of the ECHR, they are still not categorically covered by either the ECHR or the CFREU. Therefore, it can safely be said that the Directive is an innovative legal instrument which specifically mentions these rights.

Initially, it was proposed that any evidence obtained in breach of the rights mentioned in Article 7 would be inadmissible, unless the use of the same evidence would not prejudice the overall fairness of the proceedings. However, Article 10 of the Directive presently provides that an effective remedy must be provided if the stipulated rights are in anyway breached and that Members States shall ensure respect towards the rights of the defence and the fairness of the proceedings.

It is the author's opinion that the Directive on the presumption of innocence still fails to address certain issues in relation to the right under examination. Articles 3 and 4 of the Directive require that suspects and accused persons be informed of their right to remain silent. However, no such obligation exists and there is only a weakly formulated suggestion on this in recitals 31 and 32 of the same Directive. Similarly, the waiver of the right to silence and of the right against self-incrimination is not given any consideration in this Directive. Issues still arise regarding testimonies and evidence gathered under duress in non-criminal proceedings since the Directive only applies to criminal proceedings.

This Directive, which should have been transposed into national legislations by the 1st April 2018, appears to have two facets. On the one hand, it is innovative as it privileges

[906] ibid para 33.

the right to silence and the right not to incriminate oneself which are not provided for in either the CFREU or the ECHR. It also goes a step further than the case-law of the ECtHR. On the other hand, however, it includes restrictive interpretations of the judgments of the Strasbourg Court, particularly in the use of legal powers to gain access to evidence. This study indicates that its added value will depend on its implementation in the national laws and the willingness of the courts to ensure that this Directive contributes to the improvement of the rights of suspects and arrested persons in the EU.

Article 10 (2) of the Directive on the presumption of innocence seemingly corresponds with the text of the Directive on the right to access to a lawyer. Article 21 provides that as confirmed by the case-law of the ECtHR, when a person, such as a witness, becomes a suspect or accused, he shall be informed of his right to silence and against self-incrimination. Therefore, this Directive also refers to practical situations. When a person becomes a suspect or accused person in the course of questioning, the inspector must immediately suspend any further questions. However, questioning may continue if the person concerned has been made aware that he or she is a suspect or accused and is able to fully exercise the aforementioned rights provided for in this Directive.

7.2 THE PRIVILEGE AGAINST SELF-INCRIMINATION AS INTERPRETED THROUGH THE CASE-LAW OF THE ECtHR

There is a substantial amount of ECtHR jurisprudence on the right against self-incrimination. Although, this right is not specifically mentioned in Article 6 (3) of the ECHR, the ECtHR has consistently recognised this right as one of the essential elements of the right to a fair trial.[907]

[907] Fair Trails, 'Unit 1: ECHR and ECtHR Case Law - Overall fairness and Article 6(3) guarantees' (25 March 2018) <https://www.fairtrials.org/unit-1-echr-and-ecthr-case-law> accessed 25 March 2021.

7.2.1 *Funke v. France*

The privilege against self-incrimination made an unexpected entry into European Human Rights Law following the case decided by the ECtHR in *Funke v. France.*[908] Mr Funke was found guilty of the offence of failing produce bank statements relevant to an on-going investigation in connection with offences regarding evasion of customs duty. The customs officers' search and seizures did not lead to any criminal proceedings for offences against the regulations governing financial dealings with foreign countries. However, it did give rise to parallel proceedings on disclosure of documents and for interim orders. During their search, the customs officers asked the applicant to produce bank statements for the previous three years. The applicant said he would supply them with such documentation; however, he had a change of heart afterwards. The customs authorities summoned the applicant before the Strasbourg police court seeking to have him sentenced to a fine and to a further penalty of fifty French francs a day until the day the applicant produced the requested bank statements. They also filed an application to have him/her imprisoned.

The national court imposed a fine of one thousand, two hundred French francs on the applicant and ordered him to produce his bank statements to the customs authorities. Failing to produce these bank statements would result in a further penalty of twenty French francs per day. Mr Funke raised several complaints with the Commission. *Inter alia* he complained that his criminal conviction for refusal to produce the documents requested by the customs had violated his right to a fair trial because it infringed his right against self-incrimination. In view of the limited scope of the rights in Article 6 of the ECHR, this was a novel claim[909] and the Court upheld his plea that such an order went against his right to self-incrimination. The Court went on to say that the French authorities violated Mr Funke's right to a fair trial by attempting to compel him to provide incriminating evidence in connection with an offence he had allegedly committed. This judgment clarified that a suspect has the right not to speak, not to answer questions and

[908] App no 10828/84 (ECtHR, 25 February 1993).
[909] However, the privilege had been discussed and applied to European Community Competition law. Vide case 374/87 *Orkem vs Commission 1989 E.C.R. 3283*.

not to supply material evidence which could incriminate him. It further clarified that to see whether a real violation existed, it is not enough for the privilege against self-incrimination to be solely balanced against the public interest.

7.2.2 *John Murray v. UK*

The ECtHR dealt with the right to silence and the inferences drawn from the same right in *John Murray v. UK*. John Murray[910] was one of eight people arrested under the Prevention of Terrorism (Temporary Provisions) Act 1989, and was duly cautioned as specified in the Criminal Evidence (Northern Ireland) Order 1988. Mr Murray had refused to answer all questions during his arrest, despite being warned that a court might draw inferences from his silence. At trial, Mr. Murray chose not to give any evidence. The judge in his decision drew adverse inferences against the defendant under Articles 4 and 6 of the 1988 Order, found Mr Murray guilty of aiding and abetting the false imprisonment of a police informer, and sentenced him to eight years imprisonment.

Mr. Murray appealed to the Court of Appeal in Northern Ireland and had his appeal rejected. He then applied to the Commission and the case was referred to the ECtHR. He complained that his rights were breached under the ECHR, particularly under the premise that there was an infringement of his right to silence during questioning and at the trial, and that the inferences that were drawn by the judge were an integral part of the decision which had found him guilty.

The Commission found that the curtailment of the right to silence was not in breach of Article 6, since the right to silence was not an absolute right. The Court decided that Mr. Murray could have remained silent, and this would not have been tantamount to a criminal offence or a contempt of court. Furthermore, the inferences drawn could not be regarded as unfair, given the presence of sufficient safeguards. His application was thus rejected on the grounds that there was no infringement of his right to silence. However, his application was upheld *in parte* due to the lack of early access to a lawyer. Therefore, it

[910] App no 18731/91 (ECtHR, 8 February 1996).

results that the court can draw inferences from the accused's silence during the investigation, provided that proper safeguards are in place.

It appears that the right to silence is intrinsically tied to the privilege against self-incrimination. The latter right concerns the peril of duress and intimidation on the accused to confess something or give information. On the other hand, the right to silence concerns the gathering of adverse inferences when an accused person refuses to give testimony or to answer any questions. It is interesting to discern that none of these two scenarios appear in the test of the EC. The Murray case clarified the position on the right to silence in European human rights law. However, the right against self- incrimination is yet to be recognised in the same manner.

7.2.3 *Averill v. UK*

In the case *Averill v. UK*[911] the court upheld the proposition that adverse inferences may be justified in certain circumstances. Thus, the right to silence is not an absolute right. and inferences may arise from the nature of the circumstances and not from the seriousness of the crime.

In this case, the applicant had been detained in Northern Ireland in connection with two murders. He had no access to a solicitor during the first twenty-four hours of detention. Fibers taken from gloves and a balaclava found in an abandoned, burnt car, which had been used by the gunmen in the murder, matched fibers found in the applicant's hair and clothing. The applicant refused to answer questions on his whereabouts at the time of the murder and refused to give any explanation as to the matching fibers. At trial, the applicant gave the relevant and necessary explanations and called witnesses in support of his defence. The trial Judge was influenced by the forensic evidence against the applicant and drew strong inferences from the applicant's silence. The applicant was convicted and subsequently filed an application with the Commission, stating that his right to a fair trial had been breached because of the adverse inferences and because of the lack of access to

[911] App no 36408/97 (ECtHR, 6 September 2000).

a solicitor.

This judgment concluded that the lack of legal assistance could prejudice the suspect at the trial. Since the Judge had drawn strong, adverse inferences from the suspect's silence, fairness required that the suspect should have been assisted by a lawyer at the initial stages of police interrogation. This is not a case where a conviction was based solely on the accused's silence. Thus, the prosecution would have had a stronger case if the evidence presented by it required a justification by the defence and the latter fails to provide it. In conclusion, an infringement of Article 6 of the ECHR due to the drawing of inferences from silence can only be determined on a case-by-case basis.

7.2.4 *Saunders v. UK*

Following the Averill case, the ECtHR dealt with another controversial case in the names *Saunders vs UK*.[912] In this case, Mr Saunders was expected to answer questions asked by Inspectors from the Department of Trade and Industry in connection with an investigation which was taking place with regards to a company merger. The information he provided was considered as significant evidence at the trial[913] and he was found guilty and sentenced to imprisonment for commercial fraud. The Commission found that the use of information acquired by the Inspectors under coercion was tantamount to a breach of the privilege against self-incrimination and thus a breach of Article 6 of the ECHR. Even though the information required was not self-incriminating, the Court held that since the applicant was compelled to provide such information, such information should not be used as evidence. The Commission opined that the 'freedom was an important element in safe-guarding an accused from oppression and coercion during criminal proceedings.' It further noted that the freedom was closely linked to the presumption of innocence under Article 6 (2) of the Convention.

In this case, the Judge cited the John Murray case, and added that the prosecution must

[912] See (n 235).
[913] Harris, O'Boyle and Warbrick (n 225).

prove their case without resorting to information obtained through oppression or coercion. In this manner, the right to silence is strongly associated with the presumption of innocence found in Article 6 (2) of the ECHR.[914] This case goes further in safeguarding the right against self-incrimination in that it covers dues and constraints in the form of a threat of a criminal sanction. In conclusion, it must be clarified whether Article 6 of the ECHR prohibits rules requiring an individual to answer questions made by the police or to give evidence in court, and whether the same article permits certain inferences to be drawn by a judge, for instance: when a suspect fails to mention certain facts or fails to justify his presence at the crime scene at the time of the arrest.[915]

7.3 IS THE PRIVILEGE AGAINST SELF-INCRIIMINATION AN ABSOLUTE OR RELATIVE RIGHT?

Is the privilege absolute or relative? As noted above courts are of the opinion that the privilege against self-incrimination should not be treated as an absolute right and that due consideration must be given to the background of the case. This was dealt with in *Heaney and Mc Guiness v. Ireland*.[916] In this case, the Irish Government had argued that the fact that suspected persons were coerced to reply to several questions regarding their *alibi* was a commensurable reply to the intimidation to public security arising from terrorism. The court held that the '*public interest'* argument was not cogent, and that no departure should be made to kill the very essence of the right.

The main criticism of the Strasbourg jurisprudence on this privilege was that it is unclear and embryonic.[917] The judgments of *Saunders* and *Heaney and McGuiness* support a vigorous and effective approach when compared to other judgments such as *Funke v. France* which failed to provide a clear approach. However, the situation was crystallised

[914] *Saunders v.UK* (n 235).
[915] Reference can be made to the Criminal Justice and Public Order Act, 1994 ss 34-39. Reference can also be made to the case mentioned of above *Murray v. UK* (n 31) where the judge had drawn inferences from the fact that an accused charged with a terrorist offense had refused to give evidence at his trial in response to a strong case against him based on circumstantial evidence.
[916] App no 34720/97 (ECtHR, 21 March 2001).
[917] Tim Ward and Piers Gardner, 'The Privilege against Self Incrimination: In search of Legal Certainty' (2003) Issue 4 EHRLR 388.

by *O'Halloran & Francis v. UK*.[918] The applicants in this case had their cars identified on the speed cameras exceeding the maximum speed allowed. Consequently, each applicant received a notice wherein he was duly asked to go to the police and to provide them with information on who was driving the car on the day and time in question. They were also told that failure to do so would amount to an offence punishable with a fine and penalty points to be registered on their driving license. The applicants complained that this threat amounted to compulsion that violated their right against self- incrimination. The Grand Chamber found that there was no violation of Article 6 of the ECHR. It held that the Court should take note of other circumstances which may be relevant in deciding whether there had been a violation to this privilege. In this case, the Court took note of the nature of the report and the fact that the report forms part of the law in force and that it imposes a fine and penalty points on a driver to encourage safety on the roads. It held that the information required by the police was simply information which the applicants should have provided. It held that the threat was not customised to answer a number of questions of a general wide-ranging nature but provided that such an offence contained a safeguard in the form of due diligence. In view of all these factors the Chamber dismissed the application.

Therefore, the Court decided that the direct threat outweighed other important elements. This decision confirms that the privilege against self-incrimination is not absolute. This was also the view taken by the Commission in *Weh vs Austria*.[919] In this case, the Court stated that asking a person to state who was driving a particular vehicle was not self-incriminating.

Stefan Trechsel states that the prosecution must prove the case against the defendant and that the latter is in no way obliged to aid the prosecution by providing evidence against himself. [920] If a defendant is obliged to provide evidence, then the duty of the prosecution to establish proof beyond any reasonable doubt against the accused, as required in most criminal cases, would be watered down.

[918] App no 15809/02 (ECtHR, 29 June 2007).
[919] App no 38544/97 (ECtHR, 8 July 2004)
[920] Trechsel and Summers (n 223). These authors argue that permitting adverse inferences to be drawn from silence defeats the purpose of placing the burden of proof on the prosecution.

7.4 THE RIGHT TO SILENCE AND THE PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE LAWS OF MALTA

In Malta, the right against self-incrimination is entrenched in the Constitution[921] as well as in the Criminal Code. The Constitution of Malta provides that 'no person who is tried for a criminal offence shall be compelled to give evidence at his trial.' [922] In addition, the Criminal Code provides that, 'the failure of the party charged or accused to give evidence shall not be made the subject of adverse comment by the prosecution'.[923] Suspects and accused persons must be informed about their right to silence promptly, and before the official interview of the suspect or accused by the police or other competent authority as indicated in the Letter of Rights.[924] However, the Criminal Code does not mention the waiver of the right to silence. There is no obligation on the court to explain the importance of such right to the accused and to ensure that the accused comprehends the consequences of a waiver. The accused must waive this right knowingly and intelligently, similarly to when he refuses legal assistance.

In *Il-Pulizija vs Nazzareno Grech*[925] the FHCC held that the right to silence and the right not to incriminate oneself are international standards which lie at the centre of the notion of a fair hearing under Article 6 of the ECHR. The Maltese Courts have repeatedly held that this cardinal rule of evidence against self-incrimination must always be observed. In *Il-Pulizija vs Justin Farrugia,*[926] the Court held that the accused is not obliged to say anything or bring forward any evidence. The prosecution and the courts cannot use silence as evidence against the accused. However, the Court may refer to the evidence presented by the prosecution and reach its own conclusions, but it should do this without referring to the fact that the appellant chose not to testify.

[921] The Constitution of Malta art 39 (10).
[922] ibid.
[923] Criminal Code art 634 (1).
[924] Criminal Code art 534 AB (3).
[925] FHCC (Constitutional Jurisdiction), 9 July 2014.
[926] CCA, 25 October 2012.

In the decree in the names *Il-Pulizija vs Mahmud Ali Amber*[927] the Court retained the same line of reasoning when it held that the prosecution cannot force an accused person to testify. However, if the latter decides to testify, then the prosecution can cross-examine him just like any other witness since the provisions relating to witnesses in the Criminal Code also apply to an accused who chooses to testify. It is evident from the aforementioned cases that Maltese law embraces the right to silence and considers it to be a cardinal right of every suspect and accused person.

7.4.1 The right against self-incrimination does not extend to the use of materials obtained from the accused under compulsory powers.

Dovydas Vitkauskas et al state that some physical coercion may be allowed by Article 6 of the ECHR to extract material evidence which exists independently of the will of the accused, for instance: breath, urine, finger, voice, hair, and tissue samples for DNA purposes. Physical coercion, on the other hand, is strictly prohibited and cannot be applied to extract a confession or documentary evidence nor to extract material evidence by serious intrusion into the physical autonomy of the accused.[928] Karen Reid concurs, stating that compulsory powers can be used to extract material which exist independently of the will of the suspect.[929]

There are three main criteria to establish whether the coercion or oppression of the will of the accused is permissible under Article 6, namely:

i. The nature and degree of compulsion used to obtain the evidence.

ii. The public interest in the investigation and the punishment of the offence at issue; and

[927] CMCCJ, 19 June 1998.
[928] Dovydas Vitkauskas and Grigoriy Dikov, 'Protecting the Right to a Fair Trial under the European Convention on Human Rights. A Handbook for Legal Practitioners' (2012) Council of Europe Human Rights Handbooks, Strasbourg p 62).
[929] Reid (n 438) p.250.

iii. The existence of any relevant safeguards in the procedure, and the use of any material so obtained.

When obtaining material evidence goes beyond the mere passive endurance of a minor interference with bodily integrity, a problem may arise. In the case *Jalloh v. Germany,*[930] an emetic was forcibly administered to induce the regurgitation of swallowed drugs. The court held that the right against self-incrimination is mainly concerned with respecting the right of an accused to remain silent. It, however, does not extend to material evidence which may be acquired using compulsory powers which are independent from the will of the accused such as documents acquired pursuant to a warrant, urine, voice or hair samples and bodily tissue for the purpose of DNA testing.[931]

In *P.G. and J.H. v. UK*[932] the court also considered that voice samples which do not include incriminating statements, may be considered equivalent to evidence such as blood and hair, or other objective specimens used in forensics and to which privilege against self-incrimination is not applicable.

Case law on the subject delivered by the US Supreme Court clarifies the statements made above. In *Holt v. US*[933] the Court explained what should be considered as admissible evidence under the Fifth Amendment to the Constitution, which offers protection from coercion to all persons standing trial. The Court noted that such protection is not applicable with regards to the physical characteristics of an accused and provided the following:

> '...[…]the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.
>
> In *US v. Wade*[934] the Court stated that compelling the accused to appear before a witness prior to the trial is distinct from

[930] App no 54810/00 (ECtHR,11 July 2006).
[931] ibid.
[932] App no 44787/98 (ECtHR, 25 December 2001).
[933] *Holt v. United States*, 218 U.S. 245 (1910).
[934] *United States v. Wade,* 388 U.S. 218 (1967).

> compelling the accused to give testimony. It is not compulsion to divulge anything that he might know, but merely to exhibit his physical characteristics. This is very similar to compelling Schmerber to provide a blood sample, which is not covered by privilege. Similarly, compelling Wade to speak was only required to identify a physical characteristic and not to confess his guilt. Hence, these activities are not covered by privilege against self-incrimination.'[935]

In Malta, in the case *Richard Cuschieri vs AG*,[936] the applicant had filed an appeal from the judgment that was delivered by the FHCC where he alleged that when the CMCI ordered him to give a voice sample, such order went against his right against self-incrimination. The FHCC had rejected his plea and held that the coercion which is necessary to take a voice sample is *de minimis* and does not require any medical intervention or any active force on behalf of the applicant. It also held that the sample is taken with all the necessary legal safeguards and under the scrutiny of the inquiring Magistrate and an independent expert who is appointed for this purpose. The voice sample was required to compare it to telephone recordings related to bomb threats which were exhibited in the court proceedings.

Subsequently, the applicant filed an appeal to the Constitutional Court since he believed that the first court wrongly interpreted the concept of a fair trial and insisted that from the moment a person is charged, he is entitled to his right to silence. He stated that the right against self-incrimination includes two rights: his right to remain silent and his right not to be coerced to supply any information. This meant that he had a right to take a passive role throughout the criminal proceedings. However, the Constitutional Court disagreed and stated that there was no breach of Mr Cuschieri's rights and this since the FHCC's judgment was correct and according to law, more specifically Article 397 of the Criminal Code[937] which states that:

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[935] *Holt v. United States* (n 933).
[936] Constitutional Court, 12 February 2016.
[937] 'The court may order the attendance of any witness and the production of any evidence which it may deem necessary, as well as the issue of any summons or warrant of arrest against any other principal or accomplice whom the court may discover. The court may likewise order any inquest, search, experiment, the taking of any sample and any other measure or thing necessary for the fullest investigation of the case.' (Amendment was introduced by Act IV of 2014 in consequence of EU Directive 213/EU-2013).

> The court may order the attendance of any witness and the production of any evidence which it may deem necessary, as well as the issue of any summons or warrant of arrest against any other principal or accomplice whom the court may discover. The court may likewise order any inquest, search, experiment, the taking of any sample and any other measure or thing necessary for the fullest investigation of the case.

The Constitutional Court concluded that Mr Cuschieri had not brought forward any remote evidence which proved that he was coerced to make an incriminating statement and consequently his plea was dismissed.

Similarly, in the case *Joseph Lebrun vs AG*[938] the same issue was addressed. Mr Lebrun was arraigned in Court and charged with the offence of association in the trafficking of drugs. He had released a statement without having been given the assistance of a lawyer. In this case several intercepts of phone calls were presented to Court which were extracted by Malta's Secret Service without his knowledge and the prosecution stated that these phone calls represented a voice sample of the accused. The issue of voice recognition was a concern in these proceedings so much so that the prosecuting officer, made a declaration that he was recognising the voice of the accused in such phone calls. Lebrun complained that he released a statement without being offered legal assistance and that his voice, which was recorded whilst he was releasing a statement, was going to be used for a comparison analysis without him being informed *a priori*. Mr Lebrun contested his statement and stated that his voice analysis was to be carried out in an irregular manner. He alleged that this breached his right to a fair trial.

At this stage, the case was still pending before the CMCI and presently, it is pending trial. The Constitutional Court concluded that in analysing whether there was a breach to Mr Lebrun's right to a fair trial, cognisance must be given to the evaluation of the whole criminal process and thus the present complaint was premature and thus rejected his plea.

[938] FHCC (Constitutional Jurisdiction), 19 January 2015.

7.4.2 Inferences that can be drawn from the right to silence

Inferences are a form of circumstantial evidence which is directed to establish the guilt of an accused person. According to Bryan A Garner an inference is defined as 'a conclusion reached by considering other facts and deducing a logical consequence from them.'[939] An adverse inference is defined as 'a detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control.'[940] It is important to highlight that inferences, drawn from the accused's silence cannot by themselves be considered as evidence of guilt.[941] However, inferences can easily sway a jury in its decision whether an accused should be found guilty or not. Presently, in Malta, the drawing of inferences is very restricted, but this has not always been the case.

7.4.2.1 Inferences from the right to silence prior to Act III of 2002

Prior to the introduction of the provisions on the right to silence in the Maltese Criminal Code, adverse inferences could not be drawn from an accused's pre-trial silence. In il-*Pulizija vs Amadeo Brincat et,*[942] the Court stated that no guilty inference could be drawn since the accused was duly cautioned according to Rule 4 of The Code of Practice for the Interrogation of Arrested Persons[943] and chose to remain silent.

However, following the interrogation, if an accused decided to remain silent during the trial, the court could remark on his silence. This is the position that the Court took in *il-Pulizija vs Mark Aquilina u Carmel sive Charles Azzopardi.*[944] Although, from a legal perspective, the courts were prohibited from commenting on the fact that an accused chose not to testify, the extent to which this discretion could be exercised was not clear.[945] In *ir-Repubblika ta' Malta vs Mikiel Vella et,*[946] the judge presiding the first court stated that

[939] Black's Law Dictionary (8th edn Thomas West 2004) 793.
[940] ibid.
[941] R v Cowan [1996] Q.B. 373; art 355AU (2)(b) Criminal Code.
[942] CCA 6 June 1994.
[943] Chapter 164 of the Laws of Malta Police Act, Fourth Schedule.
[944] CCA, 22 September 1993.
[945] Geoffrey Azzopardi 'The Rule of Inference in Criminal Matters' (LL.D. University of Malta 2016).
[946] CCA 10 May 1985.

the accused chose not to take the witness stand and risk being questioned. He continued by telling the jury that this was a hard and ugly fact that they should consider. The CCA considered this comment on the part of the judge as being excessive and consequently ordered a re-trial.[947]

In *Il-Pulizija vs Nazzareno sive Reno Zarb,*[948] the Court stated that a judge should not comment unfavourably on the accused's failure to testify and that the law prohibited the prosecution from taking advantage of the accused's silence. It went further by saying that it is only when the prosecution establishes a strong *prima facie* case that an inference can be drawn from the evidence gathered against the accused.[949] At times, facts speak for themselves and in such circumstances the accused cannot expect that his silence goes unnoticed.

Prior to 2002, if a suspect or accused refused to provide the police with an intimate or non-intimate sample, the police could compel the suspect to give such sample after obtaining authorisation from the Magistrate.[950] There was no need for inferences to be drawn in these circumstances as the rule of inference was not yet introduced in our law and also because in one way or another, consent was always obtained.[951]

Through jurisprudence, the Maltese courts have highlighted the notion that the exercise of the right to silence was not tantamount to guilt. A commonsense approach was developed in the absence of specific laws on the right to draw inferences. However, the legislator thought that statutory provisions on this matter were needed and thus amendments were introduced to Maltese law by means of Act III of 2002.

7.4.2.2 Inferences from the right to silence following Act III of 2002

[947] ibid.
[948] CCA 22 February 1993.
[949] Geoffrey Azzopardi (n 945).
[950] Criminal Code art 397(1).
[951] Geoffrey Azzopardi (n 945).

Act III of 2002 introduced the rule of inferences in Maltese law. Although the provisions introducing this rule were enacted in 2002, they only became enforceable in 2010 by Legal Notice 35 of 2010.[952]

The drawing of inferences was limited to the situation where an accused refused to provide the police with an intimate or non-intimate sample.[953] It also applied when an accused failed to mention facts in his interrogation upon which he later relied in his defence or, when charged, failed to mention facts he was expected to mention when questioned.[954] However, the latter inferences could only be drawn when an accused exercised his right to legal assistance. This was confirmed in *Ir-Repubblika ta' Malta v. Carmel Saliba.*[955] The Court held that no inferences may be drawn in such circumstances when an accused person decides not to answer questions posed by the police. It went on to state that the right to silence was no longer absolute due to the introduction of Articles 355AT and 355AU of the Criminal Code.

In the case of *Il-Pulzija vs. Keith Cremona,*[956] the CCA held that the first court was entitled to draw inferences against the appellant due to his behaviour and the way he had answered the inspector's questions. The drawing of such inferences can be dangerous as these can be wrongly drawn, leading to unwanted conclusions and perverting the course of justice.[957] An accused may remain silent for various reasons, including stress and fear, which have no connection to guilt and thus one cannot conclude that the exercise of the right to silence is tantamount to guilt.

Maltese courts have also held that inferences of guilt may be drawn in situations which are not specifically catered for under our law [958] In *il-Pulizija vs. Godfrey Ellul*[959] the Court stated that inferences of guilt can be drawn when an accused is faced with an

[952] Criminal Code (Amendment) Act, 2002 (Act III of 2002) Commencement Notice.
[953] Criminal Code art 355AZ.
[954] ibid art 355AU.
[955] CCA, 2 May 2013.
[956] CCA, 7 January 2010.
[957] Charles Mercieca 'Inferences in Malta: A case for more inferences' (LL.B. University of Malta 2016).
[958] ibid.
[959] CCA, 17 March 2005.

accusation by an accuser who is on 'even terms' with the latter. The term 'even terms' does not apply to an inspector interrogating an accused. In such circumstances, if the accused is expected to react and remains silent, then the accuser would be inclined to draw a guilty inference. Furthermore, Article 355AU (2) stated that an accused could not be found guilty solely on the basis of adverse inferences and thus such inferences were only to be used to substantiate other evidence. This was attested in *ir-Repubblika ta' Malta vs Allan Galea*[960] where the court also held that inferences can collaborate the testimonies given by the witnesses and aid in establishing the guilt of the accused.

It is important to highlight that inferences of guilt could not be drawn when an accused refused to answer a question when giving a testimony in a separate trial, regardless as to whether he made use of the right to legal assistance or not. Notably, this did not hold ground when the accused gave testimony during his own trial. The right against self-incrimination and the right to silence are automatically forfeited once the accused takes the witness stand during his own trial.[961] The Criminal Code specifically lays down this principle in Article 634. Furthermore, in the case of *Ir-Repubblika ta' Malta vs. Domenic Briffa*,[962] the court stated that there is no legal obligation for the judge to direct the jury, but he would be merely following established procedure and securing a fair trial according to Article 634. The Court further stated that according to Article 634 of the Criminal Code, the prosecution cannot draw adverse inferences on the basis that the accused chose to remain silent.

Following Act III of 2002, the prosecution could draw an inference when an arrested person refused to give an intimate sample. However, this was not the case when dealing with non-arrested persons. A constitutional reference was made where the Constitutional Court examined Article 355BB, existent at the time, which stated that both intimate and non-intimate samples could only be taken from a non-arrested person with his prior

[960] Criminal Court, 4 October 2013.
[961] The court stated that the appellant Ellul chose to give evidence in his own Jury and thus exposed himself to the possibility of questions being put forward to him by the prosecution in court and similarly by the jurors.
[962] CCA, 16 October 2003.

written consent.[963] Since the individuals in this case were not under arrest and did not give their written consent, the Inquiring Magistrate could not order for the samples to be taken forcefully. This anomaly was later amended by Act XXIV of 2014 and an adverse inference could also be drawn in cases were non-arrested individuals refused to provide the police with an intimate or non-intimate sample.

The *raison d'être* behind the introduction of Articles 355AU and 355AZ was simple: if an accused is innocent and has nothing to hide, he should answer all questions asked. 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. Even though an adverse inference cannot be the sole reason for a conviction, it could easily sway a jury in its decision whether to find the accused guilty or not. Following heavy criticism, the rule of inference under Article 355AU was in fact removed from the Criminal Code by Act LI of 2016.

7.4.2.3 Inferences from refusal to give an intimate or non- intimate sample following Act LI of 2016

The Criminal Code, as amended by the 2002 amendments, saw the addition of Article 355AZ. Article 355AZ allows for inferences to be drawn from the refusal to provide an intimate sample. Briefly, the Criminal Code defines an intimate sample 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'[964] which can be taken trough an intimate search, defined as 'a search which consists of the physical examination of a person's body orifices other than the mouth.'[965].The procedure for eliciting intimate samples is stipulated in Articles 355AP, 355AV, 355AW, 355AX and 355AYof the Criminal Code. The power to elicit an intimate sample from an accused is specifically provided for in Article

[963] *Alfred Degiorgio et. vs Avukat Generali et* (Constitutional Court, 5 April 2013).
[964] Criminal Code art 350.
[965] ibid.

355AP,[966] while the right of the accused to refuse to give the intimate sample is granted through Article 355AW.[967] The question that arises is whether an intimate sample taken without the consent of the accused, constitutes a breach of ones right against self-incrimination. This question was challenged in *Il-Pulizija vs Nazzareno Grech*[968] where the court asked whether the forceful taking of the calligraphy of the accused in terms of Article 397 of the Criminal Code can be considered as a breach to the right against self-incrimination.

It further stated that:-

> [I]n such cases the privilege may not be invoked to prevent such construction when it would frustrate the whole purpose of the investigation. Where an aspect of evidence falls outside the ambit of the Code the general law applies, and in principle the gathering of evidence for the purposes of a criminal prosecution is not subject to the privilege. This has been held to permit the gathering of real evidence, such as the sound of a person's voice;[969] samples from a person's body;[970] subject only to obedience to the normal rules related to trespass and assault, and not to be controllable by reference to the privilege against self-incrimination. Indeed, in such cases, it seems that adverse comment could be made upon, and adverse inferences drawn from, the accused's exercise of his right of refusal.[971]

The Court referred to the notion of real evidence and referred to 'the sound of a person's voice' and the 'samples from a person's body.' Cross and Tapper contend, that no one is compelled to provide a sample of real evidence,[972] however, such rejection could lead to

[966] Criminal Code art 355AP: 'Where the arresting officer or the custody officer has a reasonable suspicion that the person arrested may have concealed on his person any drug the unlawful possession of which would constitute a criminal offence or any other item which a custody officer is authorised by this Code or by any other law to seize from the possession of an arrested person, the said officer may request a Magistrate to order an intimate search of the person arrested.'
[967] Criminal Code art 355AW: 'Subject to the provisions of articles 355AV and 355AX, an intimate sample may be taken from a person arrested only if his appropriate consent is given.'
[968] See (n 925).
[969] *R v. Deenik* (1992) Crim LR 578.
[970] *R v. Apicella* (1985) .82 Cr App Rep 295; *Schmerber vs California* 384 US 757 (1966).
[971] *R v. Smith* (1985) Crim LR 590); Sir Rupert Cross and Colin Tapper, *Cross and Tapper- on Evidence* (8th edn Butterworths 1995) 456.
[972] Colin Tapper, *Cross and Tapper on Evidence* (12th edn Oxford University Press 2010) 270.

inferences. *R v Smith*[973] maintained that hair samples found at the crime scene could be matched to the accused and if the latter refused to give such sample, this could substantiate the testimony of the prosecution's witnesses. Therefore, the refusal to provide intimate samples, allows the drawing of adverse inferences. This is detrimental to human rights especially the right against self- incrimination. In New Zealand, the refusal to provide a blood sample for DNA analysis is a basic human right and no adverse inference may be drawn from it.[974]

A suspect or accused needs to be duly cautioned prior to providing an intimate sample from which adverse inferences might be drawn. The caution is also important for the intimate sample to be considered as admissible evidence. This notion was explored by the court in *Il-Pulizija vs Raymond Grech Marguerat.*[975] Grech Marguerat was not properly cautioned prior to being subjected to a breathalyzer test, which he refused to give. Subsequently, he was given a second caution at the police station by a second police officer. This resulted in a conflict between the first caution (to which he refused to give a breath sample) and the second one. The Court held that due to this conflicting evidence the accused could not be found guilty of refusing to give a breath sample. In such circumstances, adverse inferences can be drawn from the failure of the accused to give such sample.

7.4.3 Right to silence cannot be exercised in cases where there is an inversion of proof

For certain offences there exists a reverse onus. In these cases, it is not the prosecution that must prove its case but, rather, the defence must prove that the accused is not guilty of the offences brought forward by the prosecution. In such circumstances the accused cannot remain silent since he must prove his innocence. This can only be done by giving evidence or by bringing forward proof to negate the charges presented by the prosecution.

[973] *R v. Smith* (1985) 81 Cr App Rep 286.
[974] *R v. Martin* [1992] 1 NZLR 513.
[975] CCA, 28 June 2017.

Chapter 65 of the laws of Malta, entitled the Traffic Regulation Ordinance, provides for drink driving offences. In these offences, there is a *iuris tantum* presumption against the accused in that if he does not submit himself to a breath alcohol test, then he is automatically presumed guilty of the offence Strict liability applies when a suspect or accused person refuses to give an intimate sample in drink/drug driving situations. This strict liability is enshrined in Articles 15B and 15E of Chapter 9 of the Laws of Malta. Article 15E (4) provides that:

> a person who refuses or fails to provide the requisite specimen as provided under this article or regulations made under this Ordinance shall be guilty of an offence and unless the contrary is proved, it shall be presumed that the proportion of alcohol in that person's blood exceeds the prescribed limit.

However, the law further provides that the defence can prove that the accused's failure to provide a specimen was due to physical or mental incapacity to provide it, or because its provision would entail a substantial risk to his health .[976]

Thus, if an accused decides to remain silent and not bring forward a defence as to why he did not take the test, then this would be tantamount to a statement of guilt. Maltese law prescribes *a juris tantum* presumption that one has a blood alcohol limit above the legal prescribed limit if he refuses to give one of the aforementioned samples. In these instances, it is questionable whether the reversed onus of proof is justified and whether such laws are prejudicing the individual's right against self-incrimination. This study has shown that in such circumstances, the right to silence is not given priority and seems to be side lined.

The inversion of proof is also applied in cases where the accused is caught driving without an insurance policy. The law provides that 'It shall be presumed that there was not a policy of insurance in force…[..].. unless the person charged with an offence under sub article (1) shall show the contrary through the production of a certificate of insurance.'[977]

[976] Criminal Code, proviso to art 15 E (4).
[977] Motor Vehicles insurance Third party risks Chapter 104 of the laws of Malta art 3(1A).

Therefore, it is up to the defence to prove that the accused was covered by a motor insurance policy whilst driving. The law further states that it shall be a valid defence, for the defendant to prove that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.[978] Thus, in these circumstances the onus of the driver proving that he was covered with an insurance policy rests upon him.[979] Therefore the accused cannot benefit from his right to silence and once again it can be argued that this inversion of proof can be considered as a restriction on the right to silence.

Similarly, in money laundering offences,[980] the accused person cannot exercise his right to silence during the proceedings since there is also a shift on the onus of proof with regards to the evidence that has to be produced. The law provides that:

> a person may be convicted of a money laundering offence under the Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity.[981]

Therefore, once again, the accused cannot exercise the right to silence and must bring forward evidence to prove that the money allegedly being laundered had a legitimate source. In the case *Il-Pulizija vs Carlos Frias Mateo*[982] the court held that there is no doubt that cases regarding money laundering are amongst the most difficult offences to investigate and prosecute and it is for this reason that the legislator shifted the onus of proof on the accused. The danger of the shift of onus was in fact recognised in *Il-Pulizija vs John Vella,* mentioned in the Frias Matteo case above*,* where the court went so far as to state that money laundering laws introduced radical changes to our domestic legal system. In fact, it insisted that a more scrupulous examination is needed to ensure that no

[978] ibid art 3(1B).
[979] *Il-Pulizija vs Jonathan Grech* (CCA, 25 January 2007).
[980] Prevention of Money Laundering Act. Chapter 373 of the Laws of Malta.
[981] ibid art 2(2)(a).
[982] CCA, 19th January 2012.

inquisitorial injustice takes place when we should be following modern times where the rights of individuals are protected. However, this applies notwithstanding instances when the accused has no other alternative but not to remain silent.[983]

An interesting case arose recently when Mr George Degiorgio, who is presently undergoing criminal proceedings, charged with money laundering offences, had exercised his right to silence during interrogation. However, in court the AG presented an affidavit which the accused had sworn and used as evidence in a civil case. Mr Degiorgio's lawyer claimed that this breached his client's right to silence and asked the CMCCJ to refer this alleged breach to the FHCC in its Constitutional jurisdiction. The defence argued that the presentation of this affidavit was identical to the scenario of the prosecution summoning the accused as its witness.[984] On the other hand, the AG argued that this affidavit was drawn up prior to the criminal proceedings[985] and that civil proceedings were public. The AG referred to the case *Van Vondel v. Netherlands*,[986] which clearly states that the accused's right to silence is in no way breached when the prosecution produces declarations made by him under oath as evidence. The CMCCJ, without going into the defence's claim on the right to silence, rejected the defence's request. Therefore, such a decree may be seen as side lining the right to silence which the accused is legally entitled to.

The Interpretation Act similarly provides that when an offence is committed:

> by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that

[983] The inversion of evidence applies to the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta. Any person caught in possession of a drug mentioned in the schedule annexed to the same Ordinance is presumed to be in violation of the law unless that same person proves to the satisfaction of the court that he has a license issued from the Chief Government Medical Officer authorising him to be in such possession.
[984] Decree delivered by the CMCCJ on the 3rd December 2019.
[985] Edwina Bricat 'George Degiorgio says police document breached his right to silence' *Times of Malta* (Malta 25 November 2019) <https://timesofmalta.com/articles/view/george-degiorgio-says-police-document-breached-his-right-to-silence.752620> accessed 19 April 2021.
[986] App no 38258/03 (ECtHR,25 January 2008).

> the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence.'[987]

In the case in the names *il-Pulizija vs Angelo Bartolo u omisses*[988] the court referred to this section of the law where the accused was arraigned both in his own personal capacity and on behalf of a body corporate charged for an involuntary homicide. Whilst making reference to this section of the law, the court held that once the prosecution establishes that the body corporate was to blame for the accident, it is then up to the accused to exculpate himself from blame by proving that the offence took place without his knowledge and that he had exercised all due diligence, similar to that of the *bonus pater familias,* to avoid the accident from happening. Furthermore, in such cases the accused cannot exercise his right to silence.

In these circumstances, as pointed out by Jake Wilhem Henderson, the burden of proof remains the same when allowing inferences of guilt, since the State still needs to bring other evidence to prove that a suspect or accused is guilty beyond any reasonable doubt.[989] Kent Greenawalt is of the same opinion and asserts that an accused should not be expected to reply to accusations, unless they are backed up with evidence.[990] This, however, could lead to abuse where individuals are arrested and put in a position where they may feel compelled to speak.[991] However, authors like Mike Redmayne, disregard this line of reasoning and state that the police never arrest individuals without having a reasonable suspicion of their conduct.[992] Furthermore, the right to silence aids in preventing police abuse and hence if the latter right continues to be tempered with, human rights infringements are bound to increase.

[987] Chapter 249 of the Laws of Malta art 13.
[988] CCA 11 January 2007.
[989] Roberts and Zuckerman (n 252) 355.
[990] Kent Greenawalt, 'Silence as a Moral and constitutional Right' (1981) 23 WM & Mary L. Rev 15.
[991] Roberts and Zuckerman (n 252) 544.
[992] Mike Redmayne, 'Rethinking the Privilege' (2007) 27(2) OJLS 209, 219.

7.4.4 The right against self- incrimination is not only applicable before a court of law

The Directive on the Presumption of Innocence states that the right to silence and the right against self-incrimination are only applicable in criminal proceedings. However, this statement has been put to the test. Recently, Frank Sammut, who is currently under-going criminal proceedings before a Court of Magistrates for his alleged involvement in crimes relating to bribery and money laundering, was asked to testify before the Public Accounts Committee (PAC) in Parliament. He was asked to give evidence in relation to investigations on the oil scandal that allegedly took place a few years ago.

Sammut's lawyer objected to him giving evidence on the premise that he could incriminate himself since his criminal proceedings were related to the on-going investigation conducted by the PAC. The Chairman of the Committee referred to the Ruling[993] given by the Speaker of the House which *inter alia* provided that the Speaker of the House had expressly ruled that Mr Sammut was expected to testify before the Committee and answer any questions asked. The Speaker also added that if the witness considered a question to be potentially incriminating, he could request not to answer it, although it was ultimately up to the chairperson to accept or reject the request. The defence lawyers objected to such a Ruling and held that this contravened Sammut's rights not to incriminate himself and to remain silent which are the quintessence of the right of a fair hearing according to section 6 of the Convention to which they were entitled.

Mr Sammut's lawyers subsequently filed a case before the Constitutional Court, *inter alia* asking the Court to declare the Ruling of the Speaker contrary to the principles of fair hearing as guaranteed by the Constitution of Malta and the ECHR. The Court handed down the judgment[994] and referred to the Constitution of Malta,[995] in particular that every person charged with a criminal offence shall be presumed innocent until he is proven or

[993] Ruling given by the Speaker as Chairman of the Committee on the 10th December 2013.
[994] *Frank Sammut vs Honourable Speaker et* (FHCC Constitutional Jurisdiction, 31 January 2017).
[995] Constitution of Malta art 39.

pleaded guilty,[996] and that no person should be compelled to give evidence at his trial.[997] Reference was also made to Article 6 of the ECHR, namely that 'everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'[998]

The Court also referred to the 'Guidelines for witnesses appearing before the Public Accounts Committee of the House of representatives, Parliament of Malta' which clearly establish certain salient principles. It stated that all the protection afforded to witnesses in the COCP and the Civil Code, including the protection from self-incrimination shall be applicable to witnesses before the PAC. It made reference to the guidelines, specifically to the part which states that if a person who has been duly served with a copy of the warrant as prescribed under article 3[999] above, fails without lawful cause to appear before the committee or having appeared before the Committee, refuses to be sworn subject to guidelines [1000] below or to answer questions shall be guilty of contempt of the House and shall be liable to the penalties prescribed in article 11[1001] of the House of Representatives Ordinance.[1002] It also made reference to the following:

> [W]itnesses must answer all questions put by the Committee, subject to the protection granted to witnesses under the Laws of Malta, and in particular, without prejudice to guideline 19.[1003]
>
> [A] witness who, subject to guideline 19 below, refuses to answer questions may be reported to the House.[1004]

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[996] Constitution of Malta art 39(5).
[997] Constitution of Malta art 39(10).
[998] ECHR art 6.
[999] House of Representatives (Powers and Privileges) Ordinance Chapter 113 of the Laws of Malta art 5(1):- 'The final determination as to who will be invited to appear rests with the Committee. The request is formally signed and sent out by the Clerk of the Committee.'
[1000] ibid art 19: 'No Witness is to be compelled to answer a question which might incriminate him/her'.
[1001] ibid art 11(5): 'Without prejudice to any higher punishment laid down in the provisions of any other law, any person who commits any of these acts referred to in sub article (4), shall be guilty of an offence against this Ordinance and shall on conviction, be liable to the punishment of admonition or to imprisonment for a term not exceeding six months or to a fine (Multa) of not more than one thousand and one hundred and sixty-four euro and sixty-nine cents (1,164.69) or to both such fine and imprisonment.'
[1002] Chapter 113 of the laws of Malta.
[1003] 'Guidelines for witnesses appearing before the Public Accounts Committee of the House of Representatives, Parliament of Malta' (October 2011) s 14 <https://parlament.mt/media/93635/guide-to-pac-witnesses-as-at-october-2011.pdf > accessed March 2021.
[1004] ibid s 16.

[N]o Witness is to be compelled to answer a question which might incriminate him/her.[1005]

Thus, the Judges felt that the most important provision in these guidelines was Article 19, which states that no witness is to be compelled to answer a question which might incriminate him. In its decision the court held that the applicant was not any ordinary witness, but an accused facing criminal proceedings. It reminded the parties that whilst an accused person has a right not to give evidence, similarly, a witness also has a right not to incriminate himself. It felt that the applicant had the right to invoke his right to silence before the PAC because it supersedes article 16 and 19 of the Guidelines. It felt that these provisions should only apply in those instances where the witness is **not** also an accused person facing a criminal trial. It thus concluded that the Ruling given by the Speaker of the House infringed the rights of the applicant to a fair trial, particularly because the applicant was being deprived of his fundamental right to remain silent and not to incriminate himself. This judgment clarifies that the right to silence applies to administrative proceedings and investigations, where these could potentially affect the rights of the accused facing pending criminal proceedings.[1006] Another similar case was that of *Tancred Tabone vs l-Onorevoli Speaker et* [1007] which was decided in the same vein.

Recently, Brian Tonna, an accused facing trial and placed under a bill of indictment inter alia for offences related to money laundering,[1008] chose to exercise his right to silence when questioned by the PAC on the controversial Electrogas deal.[1009] His lawyer, Dr Stephen Tonna Lowell, addressed the PAC and stated that his client was already asked similar questions by an inquiring magistrate and may be a suspect in ongoing

[1005] ibid s 19.
[1006] Lena Sammut, 'Constitutional Court judgment delivered concerning the right to a fair hearing' *Iuris Malta* (2018)<http://iurismalta.com/constitutional-court-judgment-delivered-concerning-the-right-fair-hearing/> accessed 18 April 2021.
[1007] FHCC, 2 May 2018.
[1008] Matthew Agius 'Enough evidence for Brian Tonna, Karl Ċini and associates to be indicted for financial crimes' *Maltatoday* (Malta 15 April 2021) <https://www.maltatoday.com.mt/news/court_and_police/108971/live_money_laundering_case_against_brian_tonna_karl_cini_and_associates_continues#.YH096-gzZPY> accessed 15 April 2021.
[1009] Ivan Martin '"I choose not to reply"': Brian Tonna stonewalls on Electrogas' *Times of Malta* (Malta 14 April 2021) <https://timesofmalta.com/articles/view/i-choose-not-to-reply-brian-tonna-stonewalls-on electrogas.864711> accessed 14 April 2021.

investigations, therefore he had advised his client not to answer any questions.[1010] The PAC's president stated that while the committee was aware of other legal proceedings against Mr Tonna, the PAC was not aware of any criminal proceedings against him over the Electrogas deal.[1011] He went on to state that Mr Tonna does not have the absolute right not to answer any question made by the PAC. In his ruling, Speaker Angelo Farruġia stated that witnesses summoned before the PAC have the right not to answer any questions which might incriminate them, however, they are bound to answer questions where no criminal charges had been issued against them.[1012] As has already been stated above, Mr Tonna's lawyer had already stated that his client has been asked similar questions by an inquiring Magistrate. Mr Tonna is expected to be recalled before the PAC to answer questions following the ruling given by the Speaker of the House of Parliament.[1013] In light of this study it appears that even if Mr Tonna was not yet facing charges before a court of law, he should still have been given the right not to give evidence since he had already been questioned by an inquiring magistrate on the same issues as a potential suspect. Proceedings carried out before an inquiring magistrate are tantamount to pre-trial proceedings where the right to silence can be invoked.

Another interesting situation that arose with regards to the right to silence outside the courtroom was dealt with by Kevin Aquilina in his book entitled *Development Planning Legislation – the Maltese Experience.*[1014] He held that despite the fact that extra judicial boards embrace Constitutional principles of a procedural nature, it results that the right to silence is not always adhered to. In fact, in the case *Godfrey Psaila vs Planning Authority*[1015] and *Joseph Mifsud vs Planning Authority*[1016] the Board noted that enforcement proceedings were of an administrative nature and not penal in character. It further observed that Article 39(10) of the Constitution of Malta (which has its counterpart

[1010] ibid.
[1011] 'Brian Tonna to be recalled for another grilling in Parliament' *Times of Malta* (Malta 19 April 2021) <https://timesofmalta.com/articles/view/brian-tonna-to-be-recalled-as-speaker-rules-he-must-answer-committees.865842 > accessed 19 April 2021.
[1012] ibid.
[1013] Ruling given by the Speaker as Chairman of the Committee on the 19th April 2021.
[1014] Published by Mireva Publications, 1991, p. 161.
[1015] Decided 25th February, 1994 (Appeal no. 92/93E KA).
[1016] Decided 28th October, 1994 (Appeal no. 204/94E KA).

in section 634(1) of the Criminal Code) concerned criminal proceedings and therefore the applicant could not make use of his right to silence before the administrative board. Here again, therefore, it appears that section 39(10) of the Constitution could not be held to apply to administrative proceedings as well as enforcement proceedings instituted under Part five of the then Development Planning Act 1992.

Thus, it results that this right to silence is forever applicable to persons facing criminal proceedings, but not always applicable to those persons who are subject to administrative proceedings even though their testimony may be used as evidence against them in a criminal court.

7.4.5 The right against self-incrimination as envisaged in *lex specialis*

From an examination of Article 39(10) of the Constitution of Malta, it results that accused persons have the right not to give evidence during their trial. This right is also reflected as a general principle in the Criminal Code particularly in Article 534AB which provides that a suspect or/and accused person has the right to remain silent. However, this right also extends to individuals who are testifying against their spouses or any person who is co-accused with such spouse.[1017] Therefore, the right as envisaged in the Criminal Code is not limited to self-incrimination but is wider in its applicability as it gives the absolute right to silence.

It is interesting to note, however, as remarked by Kevin Aquilina[1018] when commenting on Articles 17 and 22 of the Official Secrets Act[1019] that prima facie such provisions might prejudice the right granted to an accused person to silence under article 39(10) of the Constitution of Malta. These provisions provide for the offence for harbouring spies and the duty of giving information as to the commission of offences, which offences bring about the payment of a fine and/or one-year imprisonment and therefore should such person exercise his right to silence in such circumstance he could be brought to court and charged with contravening such provisions. These provisions also seem to be in conflict with Article 534AB of the Criminal Code which provides for the right to silence to all persons being interrogated and leaves no caveat for the offences mentioned in the

[1017] Art 635 of the Criminal Code.
[1018] *Human Rights Law: Selected Writing*s (University of Malta, 2018) p. 508-533.
[1019] Chapter 50 of the Laws of Malta.

official secrecy act. Therefore, in such a scenario the suspect or accused person cannot exercise his right to silence. This could be a similar situation which was brought before the ECtHR in the case *Saunders v. UK*,[1020] where the Commission found that the use, at the applicant's trial of incriminating evidence, obtained from him under compulsory power, was oppressive and substantially impaired his ability to defend himself against the criminal charges he faced. This situation, therefore, could constitute a violation to his right to a fair trial.

The Official Secrets Act constitute a *lex specialis* and therefore the suspect and/or accused person cannot make use of the general provisions under the Criminal Code but must submit himself to the specific provisions of this specific legislation. Therefore, it is evident that these provisions of the Act have to be amended or revoked, so as to bring all suspects and accused persons alike in the same position in regard to their right to silence. Thus, this study clearly concludes that the right to self-incrimination in the Constitution as further contained in the EU Directive 2013/48 maybe limited in its applicability when dealing with the Official Secrecy Act. This study shows that in such circumstances, the Official Secrets Act is supreme to the general provisions of the Criminal Code and runs contrary to the provisions of the Constitution of Malta. It would be interesting to see what position the Constitutional Court would take on this matter.

Another interesting piece of domestic legislation which seems to impinge on the right to silence is that relating to the Traffic Regulations Ordinance.[1021] This law provides that whenever an offence has been committed as set out in the first column of the Second Schedule of that Ordinance subsists, namely, when the driver is different to the registered owner of the car, for instance in the case of a self-drive car, the person to whom it was hired shall be responsible for the offence.[1022] Such person could exonerate himself from blame if prior or during the proceedings s/he reveals the name of the person who committed the offence and that same person admits to the police to have committed the offence.[1023] Therefore, in such case, the registered owner cannot exercise his right to silence but is expected to speak up to provide for his defence even though the system adopted in Malta is aquisitorial by nature and therefore it should be the prosecution that proves its case beyond reasonable doubt

[1020] See (n 912).
[1021] Chapter 65 of the Laws of Malta.
[1022] ibid, art 54(3).
[1023] ibid.

7.5 PRINCIPAL FINDINGS

i. The right to silence does not equate to the right not to give a testimony.

ii. In Malta, unlike many Member States there is no rule of inference that can be drawn from the right to silence exercised by a suspect or accused person when interrogated and fails to mention facts which are relevant to the defence of the case.

iii. The right to silence is not applicable to legal persons in criminal proceedings.

iv. The right to silence as a rule is not applicable to natural persons facing administrative proceedings, although the CEJU has held otherwise in a recent judgment in the names *DB vs Consob* case.[1024]

v. Although, the right to silence is a Constitutional Right, it is a relative right and has its limitations in those cases where there is a shift of the onus of proof on the accused.

vi. The right against self-incrimination and the right to silence can always be invoked before a court of law in its criminal jurisdiction, therefore by any suspect and/or accused person facing criminal proceedings. This right to silence has been invoked before the PAC with success due to the interpretation which was given by the Constitutional Court in this regard, however, there still seems the need to address this right in regard to the legislation of the Official Secrets Act.

vii. In order to say that the right to silence is supreme in relation to offences relating to the Traffic Ordinance there should be an amendment to Article 54(3) of Chapter 65 of the Laws of Malta.

[1024]See (n 901).

viii. There is no obligation on the court to explain the right to silence or the right against self-incrimination and thus should the suspect or accused person waive his right to legal assistance he may be deprived of this right in its entirety.

ix. The right to silence is not applicable when eliciting intimate and non-intimate samples because adverse inferences may be drawn and this means that once the accused is asked to give a sample, he could indirectly be incriminating himself by adhering to the request.

x. The right to silence is also applicable to witnesses who may potentially incriminate themselves.

xi. There is no sanction for not informing the witness, suspect or accused of their right to silence and of the privilege of self- incrimination. It is questionable whether such evidence would constitute inadmissible evidence and if the only remedy available is to institute Constitutional proceedings.

xii. There is no mention in either the Directive or domestic law whether a suspect or accused can waive his right to silence.

7.6 CONCLUSION

The right to silence can be described as a giant leap forward for the rights of the accused during interrogation. However, it can also be considered as a double-edged sword as the exercise of this right can also expose the accused to the drawing of adverse inferences. This chapter focused on this distinction. It highlighted the application of the right to silence throughout Member States and identified the obstacles that legislators must overcome for this right to be truly effective and not illusory.

Since its promulgation in 1854, the Maltese Criminal Code afforded protection to the suspect or accused. Article 454 (4) of the Criminal Code stipulates that if an accused

remains silent, when asked whether he is guilty or not, his silence shall be taken as a plea of not guilty. In these circumstances, silence favours the accused, however, this is not always the case. As discussed throughout this chapter, the rule of inference, which existed for a short time in Malta, allowed inferences to be drawn when a suspect or accused exercised his right to silence and failed to mention facts later relied upon in his defence. However, such inferences could only be drawn if an accused person exercised his right to legal assistance. Today, although these inferences no longer exist in the Maltese Criminal Code, another rule of inference applies, limitedly to the taking of intimate samples. Understandably, this generated significant controversy given that its effect is to intrude upon a long held and fundamental legal right. At times, it is rightly argued that the introduction of adverse inferences complicates criminal proceedings. It can also be argued that the traditional approach to the right to silence has today been modified.

As outlined earlier on in this study, the Maltese legislator had long delayed introducing the right to legal assistance into Maltese law. However, the Maltese government was encountering strong resistance in this regard and the thought of introducing the rule of inference as well, was to ensure a certain balance.[1025] The Opposition expressed its concern in parliament by stating that too much weight was going to be placed on lawyers, who would be at the mercy of their clients.[1026] Lawyers would have had to provide advice based solely on the little information provided by their clients, which could later prove detrimental to the criminal proceedings.[1027] The author would like to point out that at the time, the police were not obliged to divulge their findings and give access to the evidence gathered to the defence.[1028]

At the time, the Malta Police Force still depended extensively on statements released by the accused and consequently, strongly opposed the introduction of the right to legal assistance into Maltese law. The government countered this resistance with the

[1025] Parliamentary Debate, Consideration of Bills Committee, Official Report, 19.11.2001, Meeting No 113, 8.
[1026] Parliamentary Debate, Plenary Session, 4th July 2001, Sitting No 569, 292.
[1027] ibid.
[1028] The right to disclosure was later introduced by Act XXIV of 2014.

introduction of the rule of inference, to serve as a tool which can be used by the police in the criminal process. However, the rule of inference as legislated, faced harsh criticism. Dr Franco Galea[1029] described the introduction of inferences in Malta as an 'overzealous policy of crime control'.[1030] He argues that although one could not be found guilty solely on the basis of an inference from his silence, such inferences would surely play a significant role in the criminal proceedings.[1031] Most worrying, was sub-article (3) of Article 355AU which provided that the prosecution could be authorised by the Court to comment on the fact that the suspect did not request the right to take legal advice during police investigations.

The drawing of inferences from silence, only when an accused sought legal advice, discouraged individuals from exercising their right to legal assistance. The right as legislated upon, was in fact useless since it worked out better for the suspect to refuse legal assistance and remain silent. Unfortunately, the legislator rushed into introducing the right to legal assistance, which was long overdue, accompanied by the rule to draw inferences, without foreseeing the legal consequences of the latter. As a result, Article 355AU was amended and the rule to draw inferences from silence when the accused failed to mention certain facts was repealed. In fact, in Il-*Pulizija vs Wayne Falzon,*[1032] the prosecuting officer pointed out that the accused failed to mention facts during his interrogation, which he later mentioned when testifying in court. The court in its judgment referred to Article 355AUA (7)(2), which was introduced by Act LI of 2016 and which stipulates that no inference can be drawn in such circumstances.

At present, the rule to draw inferences is limited to the refusal of giving an intimate sample as stipulated in Article 355AZ. But should the legislator include more inferences to Maltese law?

[1029] A litigation lawyer practising in Malta who was called to the bar in 2005. He is based in Valletta and mostly involved in contract drafting, anti-money laundering advice and frequently assists clients in tax related issues.
[1030] Galea (n 305).
[1031] ibid.
[1032] See (n 314).

Some argue that to prevent the right to remain silent from being abused by hardened criminals, the rule to draw inferences shall be included for all serious crimes. However, this study has shown that the present legal position is well balanced and that the inclusion of more inferences from the right to silence may exert more pressure on the accused, leading to more faulty statements and a myriad of human rights cases.

Furthermore, there are circumstances where the right to silence cannot be exercised because in certain cases the onus of proof is shifted onto the defence, where the accused must bring forward evidence to prove his innocence. In the judgment *The Republic of Malta vs Gregory Robert Eyre and Susan Jayne Molyneaux,*[1033] the Constitutional Court stated that 'Article 6 (2) of the Convention does not in principle prohibit presumptions of fact or of law and "reverse onus provisions"'.[1034] In l-*Avukat Dr Alfred Grech vs. l-Avukat Ġenerali,*[1035] the Court stated that even though at times this reversal places the accused at an apparent disadvantage vis-à-vis the prosecution, reverse onus provisions do not hinder an accused from exercising his fundamental human rights. The Court continued by stating that in such circumstances an accused is still given a fair hearing and presumed innocent, even though he must prove his innocence during the proceedings.[1036] It can, however, be argued that the complexity of certain investigations and prosecutions in certain cases, justifies the shift in the burden of proof onto the accused. Moreover, legislators must be cautious when drafting reverse onus provisions as these impinge on the right to silence.

Unfortunately, whenever governments feel pressured to combat crimes, the right to silence is often reconsidered, modified and bypassed. Hannah Quirk, argues how in Britain 1993, the Home Secretary Michael Howard stated that this right was being exploited by terrorists and should be abolished.[1037] Unfortunately, this right was curtailed by Sections 34 to 38 of the Criminal Justice and Public Order Act (CJPOA)1994 which

[1033] Constitutional Court, 1 April 2005.
[1034] ibid.
[1035] FHCC (Constitutional Jurisdiction), 27 April 2007.
[1036] ibid.
[1037] Hannah Quirk, *The Rise and Fall of the Right to Silence* (Routledge 2017).

introduced the drawing of 'such inferences as appear proper'.[1038] It is questionable whether the right to silence is still useful in protecting this 'constitutional right' of innocence, until proven guilty.[1039] Suspects have been terribly disadvantaged by these amendments,[1040] as the right to silence has been curtailed.[1041] Michael Zander[1042] states that in Britain, the right to silence, gives more strength to the prosecution[1043] and suspects exercising their right are more likely to be charged. Quirk emphasises that England led the world in establishing the right to silence as part of a fair trial; but argued that by introducing the amendments which allowed the drawing of inferences, became 'a leader in its retrenchment'.[1044]

In conclusion, this study has shown that the right to silence is not an absolute right and has its limitations, especially when inferences are drawn. It can be argued that inferences should be introduced very cautiously, as poorly drafted provisions in this regard can be ineffective. Unfortunately, this was the situation in Malta when the legislator introduced the rule of inference. The right to silence, accompanied by the rule to draw inferences or not, can be protected by enhancing procedural safeguards, for instance: by amending the Code of Practice for Interrogation of Arrested Persons.[1045] This Schedule, which should be accessible in all police stations for consultation, was last amended in 2002, and does not set out the procedure clearly and in the necessary detail. This can easily undermine the accused right to silence. To prevent this, the necessary amendments should be enacted. In the meantime, it must be ascertained that suspects are duly cautioned in a clear manner

[1038] Hannah Quirk, 'Twenty Years on, the Right of Silence and Legal Advice: The Spiralling Costs of an Unfair Exchange' (2020) Vol 64 no. 4 Northern Ireland Legal Quarterly,465.
[1039] Akorede Ornotayo, 'The Right to Silence – or the Presumption of Guilt?', Academia, <https://www.academia.edu/35736904/The_Right_to_Silence_or_the_presumption_of_Guilt_docx?email_work_card=view-paper> accessed November 2020.
[1040] Liam Lane, 'Does the right to silence at police interview unjustly limits powers of police over detained suspects?' Academia <https://www.academia.edu/36924196/Does_the_right_to_silence_at_police_interview_unjustly_limits_powers_of_police_over_detained_suspects> accessed November 2020.
[1041] Quirk (n 1038).
[1042] Emeritus Professor of Law at the London School of Economics and Political Science.
[1043] All Answers ltd, 'What is the Right to Silence?' (Lawteacher.net, April 2021) <https://www.lawteacher.net/free-law-essays/administrative-law/what-is-the-right-to-silence-administrative-law-essay.php?vref=1> accessed 20 April 2021.
[1044] Quirk (n 1037).
[1045] Chapter 164 of the Laws of Malta Police Act, Fourth Schedule.

and in a language that they understand. Throughout the interrogation suspects must be reminded that their silence would not be tantamount to a guilty plea.

It can be safely stated that Malta has come a long way in safeguarding the right to silence. Even though there is still room for improvement, and this in terms of its compliance with the EU regime, this study revealed that following the 2016 amendments, an appropriate balance has been reached between the rights of the accused and the interests of society at large.

CHAPTER EIGHT - CONCLUSIONS

Having completed a thorough analysis of each individual cardinal right examined in the preceding chapters, this thesis evaluates the findings which have emerged from this study. In this respect, this study poses a further question, namely whether there are other factors to analyse in relation to the examined chosen rights. The reason for this is that many of the major issues appeared, at least in theory, to have been addressed by established

literature and legislation. This thesis, however, reveals that some specific, yet important matters connected to the Maltese reality require further evaluation. Maltese legislation is rife with vague drafting and lack of definitions, a situation which is inconsistent with the scope of application of the chosen rights. Malta's position in relation to these rights is not completely in line with that of other Member States despite the EU's intention to harmonise legislation. As a result, this thesis aimed to establish the shortcomings of these chosen rights in Malta and to develop new ideas and propose solutions to bridge the legal *lacunae* encountered in the practical application of these cardinal rights vis-à-vis suspects prior to their interrogation.

This thesis reveals that during the past ten years, Malta's Criminal Code was subjected to several amendments, most of which strengthened the rights of suspects and aligned them with their European counterparts. The thesis began by discussing the only right which the suspect was entitled to prior to the commencement of the interrogation, namely that s/he must be duly cautioned and that whatever s/he said could be used against him/her. In 2002, by virtue of Act III of 2002, the right to legal assistance was introduced in Maltese law. However, this was limited to one hour prior to the start of interrogation. Upon the transposition of the EU Directive 2013/48 on the right to legal assistance by means of Act L1 of 2016, the right to legal assistance was afforded to all suspects throughout the entire interrogation. This, however, presented several problems in relation to statements which were released prior to the transposition of the Directive and attempts to resolve these issues were made by the courts through their judgments. The right to information was transposed into Maltese law in 2014, but this study reveals that this right could not be properly exercised during that time since suspects were not allowed legal assistance. Another right which is discussed in this thesis is the right to silence. Although forming part of the supreme law of the land since 1964, it was only introduced into the Criminal Code in 2014 with the creation of the letter of rights. The letter must be given to suspects the moment they are apprehended for interrogation. The crucial matter to examine in this regard is whether a suspect will be truly able to understand the implication of this right in the absence of legal assistance. This matter was even more important during a time when the rule of inference formed an integral part of Malta's legislation. The third right that was

dealt with in this thesis is the right to legal aid. This right is a recognised right in Malta and forms part of Maltese legislation, and its applicability in Malta extends beyond the same right which is discussed in the ECHR and the EU Directive. In Malta, the right to legal aid is not subject to a Means or Merits test and is granted to all persons who request it. Therefore, it appears that the exercise of such right in Malta is wider in scope than that it is in other Member States. Once this Directive is transposed, it is likely that Malta's legal system will undergo a metamorphosis, like the one which occurred when the right to legal assistance was introduced. Nevertheless, it may appear that at times the written rights are merely paying lip service to implementing European legislation into Maltese law since the true spirit of the transposed laws are not always reflected in Maltese jurisprudence.

Several fundamental questions remain unanswered, particularly because the courts' reasoning is, at times, either too narrow in scope or somehow flawed. At other times judgments are inconsistent with previous jurisprudence and, occasionally, the courts' arguments simply do not hold water. As previously outlined, there are several judgments which fall short of providing remedies to violations suffered by the suspect.

The specific research questions outlined at the beginning of this study were the following:

i. Are the four chosen cardinal rights merely theoretical, illusionary rights or are they effective in practice?
ii. Do these four statutory cardinals rights guarantee a fair trial to suspects and accused persons in their criminal proceedings?
iii. Is the transposition of these rights truly reflected in Maltese case-law?
iv. Are suspects and accused persons in a better position post-Act No LI of 2016?
v. Are there any *lacunae* which could be identified to secure the rights of suspects and accused persons prior to the making a confession?

vi. Are Maltese judgments in line with the decisions of the ECtHR?

The next step is to answer the above questions in relation to each chosen cardinal right.

8.1 ANSWERING THE RESEARCH QUESTIONS

8.1.1 The Right to Legal Assistance

The Maltese government was initially hesitant to introduce the right to legal assistance, particularly as during the consultation process which preceded the drafting of the Bill, the right to legal assistance was met with considerable resistance from the police force. Although the Bill became an Act of Parliament in 2002, until 2010 suspects and accused persons were not entitled to any legal assistance under the Criminal Code or under any other statutory law. During the period between the 10th February 2010 and the 28th November 2016, an accused was only permitted to speak to a lawyer at the beginning of an interrogation for a maximum period of one hour, and always subject to the rule of inference. At the time, the Maltese government felt that it would be a good idea to introduce the right to legal assistance coupled with the rule of inference. This meant that the rule of inference would apply to anyone who sought legal advice. Many expressed concern, as this mechanism discouraged individuals from exercising their right to legal assistance. As a result, Article 355AU was amended, and the rule to draw inferences from silence when the accused failed to mention certain facts was repealed.

At present, Maltese law provides that the right to legal assistance, which is the pivotal axis around which all other rights rotate, should be granted to all suspects during the pre-trial stage and as stipulated in the Directive. However, this does not mean that the right to legal assistance is consistently applied. To begin with, the Directive demands that lawyers exercise an 'effective defence' at the earliest stages of the investigation, so much so that it provides that the lawyer can also be present during investigative actions with the participation of the suspect. European case-law also dictates that legal assistance should

be effective both at the pre and post-trial stage to the extent that the lawyer is obliged to prepare a proper defence.

It appears however that the Directive affords to Member States the discretion to regulate lawyers' participation in terms of their own national law. The fact that such an important matter is left to be regulated by national law could potentially undermine the aim of harmonisation, since the Member States are afforded the leeway to legislate as they please. As noted earlier, LN 102/17 sets out the parameters within which a lawyer in Malta is to perform whilst an interrogation is taking place. LN 102/17 has seemingly clarified the definition of 'participation' by stating that during the interview the lawyer is entitled to question the suspect and/or the accused person subject to the provisions of the Criminal Code once the prosecution has concluded its line of questioning and that any replies and any observations made will be recorded by the interviewer in writing or by audio-visual means.

However, bearing in mind that the lawyer must await the conclusion of the prosecution's line of questioning prior to asking any questions himself/herself, the effectiveness of this right is questionable in situations where the investigating officer concludes his/her line of questioning close to the lapse of the forty-eight-hour arrest period and the suspect must be released or arraigned in court.

The law does not provide guidance with respect to such a scenario. To rectify this shortcoming, the legislator could possibly introduce an amendment stating that upon the completion of the investigation the lawyer must sign a document indicating that he/she was not in any way impeded from participating in the investigation. Alternatively, the legislator could introduce a timeframe within which the suspect's lawyer would be entitled to ask questions in relation to the interrogation. The author notes that neither the Maltese Criminal Code nor the Directive provide an indication regarding the period of time during which a lawyer would be able to assist the suspect.

Consultation between lawyer and suspect must take place in private. Although the Criminal Code sets no time frame for such communication, the LN provides that such communication is to be limited to one hour, unless a police officer not below the rank of Superintendent, allows a longer period for such consultation. The consultation between the lawyer and the suspect should not be subjected to a time-limit because not all cases present the same complexity. Furthermore, there are instances where previous discussions on the investigation would have taken place. Another pertinent factor to consider is the involvement of the police officer who would be part of the investigation in the decision relating to the time-limit of the communication. Such a decision should be entrusted to a *super partes*. Once again, taking the aforementioned factors into account, the 'effectiveness' of this right is debatable.

The problems that have arisen in Malta mostly relate to the implementation of the right, particularly as in most police stations there is no place where this private communication to take place. In fact, most police offices are divided simply with gypsum boards and thus eavesdropping is the order of the day. The law provides no remedies which could be resorted to if, for instance, the conversation is overheard. Malta does not embrace the American theory of the 'forbidden fruit.' Consequently, if the police obtain information by breaching confidentiality, no measures can be taken against the police for such a breach. The time has come to introduce an amendment in the law, like the one found under UK law where discretion is given to the courts to exclude evidence that is improperly obtained. The admissibility of such tainted evidence in court, severely undermines the fair character of criminal proceedings and paves the way for miscarriages of justice. At present, the only remedy that the suspect has is to exhaust all local remedies prior to initiating a constitutional case before the courts, which may take years. As this is clearly not a sufficient remedy, the law should be amended to provide a more effective remedy for such eventualities.

Both the Directive and the Criminal Code speak of the right to appoint a lawyer of one's own choosing. However, European and national case-law has shown that, due to the restrictions which Member States' national laws might impose, this right is not an absolute

right but rather a qualified right. Domestic laws may, for instance, prescribe standards regarding qualifications of practice; restrict the number of lawyers on the defence team; refuse to accept lawyers whose joint legal assistance presents a conflict of interest or replace lawyers who fail to appear. In fact in Malta, when the accused is assisted by two or more lawyers in trials held by juries, the defence must at the beginning of the trail declare the division of responsibility between the lawyers to distinguish between the lawyer who is to carry out the examination of the witnesses and the lawyer who is to present the oral submissions at the end. This can therefore be perceived as a restriction on the right to choose one's lawyer for one's defence.

European case-law has indicated that in cases where the lawyer selected by the suspect is unavailable, the accused has the right to speak to another lawyer and if that too is not possible, the suspect is to be assisted by the legal aid lawyer and hence not necessarily according to his/her choice. The above-mentioned LN also caters for this type of situation by setting a timeframe of two hours within which the lawyer who accepted the brief must make himself/herself available. Should the lawyer fail to make an appearance in these two hours, the lawyer would be replaced by a legal aid lawyer who might not be the next choice of the suspect. In such scenarios, there could easily be circumstances where the legal aid lawyer provides advice to the suspect which would be materially different from the advice which the suspect would have received from the lawyer of his/her choice. This begs the question as to whether the suspect would have a right of recourse to the court for not allowing him/her to exercise his/her right of choice, and whether this would amount to 'ineffective' legal service.

The Criminal Code does not provide any remedy or action that could be taken in those instances where lawyers fail to compose themselves during interrogations by, for instance, answering themselves the questions put forward to the suspect. In these cases, the police would have the right to remove the lawyer from the investigating room (by force, if need be) and have him/her replaced by the legal aid lawyer. Once again, the decision relating to the lawyer's removal is made by an officer not below the rank of Superintendent or by

the duty Magistrate. To ensure a fair trial, such a decision should be left exclusively to the Magistrate on duty who would be impartial to the investigation.

The LN also provides for the situation where an irregularity in the interview arises through, for example misconduct on the part of the suspect. In such case, the lawyer would need to submit a report in writing to the duty Magistrate within forty-eight hours from the conclusion of the interview. One asks why it is necessary to wait for this length of time? The interview should be suspended immediately and the Magistrate on call should be asked to intervene. Otherwise, there is a risk that the interrogation would be considered as admissible evidence and the suspect would be arraigned in court, only to have this interview declared as irregular and as inadmissible evidence years later whilst the suspect would have possibly remained under arrest. Such amendment is necessary if one is to secure the suspects' entitlement to a fair trial.

Although the law also mentions suspects' rights to waive legal assistance, no obligation is imposed on the investigating officer to explain the implications of such waiver. At times, suspects waive this right under the pretext that they may be reducing time under arrest but the consequences are usually adverse. The waiver should be made after the suspect has spoken with his/her lawyer (as is the case in Belgium where the right can only be waived, after the suspect would have received legal assistance.) In Malta, this is seen in cases where foreigners admit to their charges at the investigation stage under the impression that they will get a lighter sentence and therefore be released quicker and sent to their home country earlier. The time has come for the law to be amended to provide that, similarly, to the way that a declaration is signed by the suspect when the right to legal assistance is waived, there should be another declaration signed by the suspect wherein s/he declares that s/he understood the consequences of such waiver. Such declaration should be counter signed by the lawyer who would have explained the significance of the waiver.

It appears that according to the Directive legal assistance should be given in all circumstances where there is deprivation of liberty. However, under Maltese laws there

is no restriction relating to when such legal assistance is to be given. The Directive also provides that in the case of minor offences, the right to legal aid is not obligatory; however, the yardstick is one which depends on the severity of the punishment that is to be awarded in case of guilt. In Malta, the standard of this right is higher because there is no restriction to its application and before every interrogation the suspect is given his/her right to legal assistance irrespective of whether the offence that is being investigated is punishable by imprisonment or not. In their decisions, the courts have stated that there should be no limitations on the granting of this right and that it is a universal right applicable *erga omnes* and not only to a particular section of society.

In answering the research questions relating to the right to legal assistance, it may immediately be concluded that the right to legal assistance is not a theoretical or illusionary right but a practical and effective one. The right to legal assistance is not available in the same manner in all European Member States, as the Directive only imposes minimum standards, and each Member State must implement the right in its domestic legislation. Although, the right may be exercised differently in Member States, the case-law of the ECJ and ECtHR is of fundamental importance as it serves as a continuous point of reference. The goal posts of the application of this right are forever changing in Maltese jurisprudence since the courts are trying to keep abreast with the European position by applying such dicta locally. One must, however, not fail to mention the fact that this right was only recently introduced in Malta and perhaps it is for this reason that there are still various inconsistencies in its application.

Furthermore, the following inconsistencies must be addressed when focusing on the right to legal assistance:

i. The fact that during an interrogation, a lawyer must await the conclusion of the prosecution's line of questioning prior to asking any questions himself/herself;

ii. LN 102/17 provides that consultation between lawyer and suspect is limited to one hour, unless a police officer not below the rank of Superintendent, allows a longer period for such consultation;

iii. There is no room in most police stations where the suspect and lawyer can communicate privately;

iv. If the police obtain information by breaching confidentiality, no measures can be taken against the police for such a breach;

v. The Criminal Code does not provide any remedy or action that could be taken in those instances where lawyers fail to compose themselves during interrogations. For instance, the decision relating to the lawyer's removal is made by an officer not below the rank of Superintendent or by the duty Magistrate;

vi. LN 102/17 provides that where an irregularity in the interview arises the lawyer would need to submit a report in writing to the duty Magistrate within forty-eight hours from the conclusion of the interview; and

vii. No obligation is imposed on the investigating officer to explain the implications of waiving the right to legal assistance.

viii. There is no legal certainty with respect to the interpretation of the right to legal assistance due to the conflicting judgments delivered by the Criminal Court of Appeal and the Constitutional Court.

The study reveals that the following measures and amendments should be implemented to make sure that the right to legal assistance is effectively exercised in practice:

i. An amendment should be introduced stating that upon completion of the investigation, the lawyer must sign a document indicating that he/she was not in any way impeded from participating in the investigation. Alternatively, the legislator could introduce a timeframe within which the suspect's lawyer would be entitled to ask questions in relation to the interrogation.

ii. The consultation between the lawyer and the suspect should not be subjected to a time-limit. If a time-limit is still imposed, it needs to be decided by a *super partes* and not by a police officer.

iii. Appropriate rooms must be set up at all police stations where suspects can communicate with their lawyer privately.

iv. Discretion should be given to the courts to exclude evidence that is improperly obtained.

v. In order to ascertain a fair trial, certain decisions need to be left exclusively to the duty magistrate and not to police officers.

vi. Where an irregularity in an interview arises, the interview should be suspended immediately, and the duty Magistrate should be asked to intervene; and

vii. An amendment should be introduced stating that the investigating officer is bound to explain to the suspect the implications of waiving the right to legal assistance. The latter would only be able to waive this right after he/she has spoken with his/her lawyer. An amendment should also be introduced wherein the suspect declares that s/he understood the consequences of such waiver and that such declaration should be counter signed by the lawyer who would have explained the significance of the waiver.

viii. The courts must ascertain legal certainty with respect to the interpretation of the right to legal assistance by applying the principle of *auctoritas rerum similiter judicatarum.*[1046] In this manner, lawyers would be in a better position to assist suspects and accused.

By way of conclusion on this right, it may be said that although the transportation of the EU Directive into Maltese legislation by Act LI of 2016 has clearly demonstrated a step in the right direction, *lacunae* in the application of this right still exist and should be addressed to strengthen the suspect's defence. In doing so, the volume of cases that are instituted before the Constitutional Courts would be reduced and suspects' right to a fair trial would be reinforced.

8.1.2 The Right to Information

Similar to the right to legal assistance, the right to information as outlined in the Directive constitutes a minimum right, and Maltese law has transposed this Directive in its totality without inserting any more guarantees for the suspect and accused person. This right should also be an effective right directed towards strengthening the criminal process and guaranteeing a fair trial.

Although it can be inferred from the case law of the ECtHR on Article 6 of the ECHR, this right is not specifically envisaged as a right in the ECHR itself. This right is at the basis of the cardinal rights as in its absence all other rights may be considered as illusionary. This is being stated because a suspect cannot expect a proper defence if s/he is not properly aware of the accusations s/he is facing.

The right to information was introduced in the Criminal Code[1047] in 2014 by virtue of Act IV of 2014. Prior to 2014, there was an indirect reference to this right in the Constitution of Malta which provides that every person who is charged with a criminal offence, 'shall

[1046] See (n 383).
[1047] Criminal Code art 534AB.

be informed in writing, in a language which he understands and in detail, of the nature of the offence charged.'[1048] However, this did not apply to suspects at the pre-trial stage since, at that point, they would not have yet been 'charged.' The law as it stood prior to these amendments, was interpreted to mean that the term 'charged' applied only to accused persons and not to suspects, who may have been informed about the accusation though not yet 'charged'. It was only with the transposition of the EU Directive that Article 534AB[1049] of the Criminal Code introduced the letter of rights. Today, this right applies to all suspects irrespective of whether they are deprived of their liberty or not and, in Malta, also includes persons who are requested to voluntarily attend a police-station.

Problems often arise when it comes to the notification of the charge. In Malta suspects are given a copy of the charge only at the arraignment stage and there is, therefore, no guarantee that the suspect would have known about the charges s/he was being investigated for. The suspect could be under the impression that s/he is being investigated for one offence when, in fact, the offence the suspect eventually faces in court is different. The law should state that the moment a police officer or investigating authority commences an investigation the first matter which should be documented is the provision of information to the suspect relating to the offence being investigated. The local laws which are currently in force only impose such an obligation in those cases where a suspect is under arrest.

Problems also arise before the courts of law in relation to the manner that such rights are given to suspects. Maltese law[1050] provides that such rights as identified in the letter of rights may be given orally or in writing in a simple and accessible way. At the same time, however, the law demands that the letter of rights is given in writing. Thus, there seems to be an inconsistency as to whether the letter of rights should be given in writing or whether it may simply be read out to the suspect. Clarity in this regard is certainly required to avoid misinterpretations. The Criminal Code further provides that the suspect must be informed of such rights in a language that the suspect understands. It is unclear whether

[1048] Constitution of Malta art 39 (6).
[1049] Criminal Code art 534F (1).
[1050] Criminal Code art 534AB (2).

the investigation would be able to proceed if there is no interpreter available and the law is silent on this point. One cannot expect a suspect to exercise his/her rights unless s/he is aware of these rights. It once again becomes evident that the right to legal assistance is intrinsically related to this right. It would be ideal if the letter of rights were to be translated in as many languages as possible beforehand to avoid situations were suspects do not understand their rights due to a language barrier.

There are countries like Malta where the letter of rights is, where possible translated by an interpreter to the language understood by the suspect in a hurried fashion prior to the onset of the investigation. However, it could very well be the case that the translation is not faithful and accurate. It is imperative that the legislator introduces amendments to the effect that the letter of rights is first translated into the language of the suspect and thereafter signed by the interpreter. Following this procedure, the interpreter should then read out the rights to the suspect and the latter should, in turn, acknowledge the receipt thereof and confirm that its contents were understood by signing the letter of rights. In line with the previous observations regarding lawyers assisting suspects prior to a waiver of the right to legal assistance, the letter of rights should be read out to the suspect in the presence of a lawyer. This would serve as a guarantee that the suspect understood the rights read out to him/her. This is being proposed since neither the EU Directive on the right to information nor local legislation provides a remedy in those instances where suspects do not understand the rights read out to them.

According to the Directive, suspects can also avail themselves of the right to disclosure of material evidence. The law does not define the term ‘material evidence’. Therefore, it is questionable whether this term should be interpreted to refer to material tangible evidence or, to evidence which is material to the ongoing investigation. Attaining clarity in this regard is crucial as the disclosure of material evidence to the defence may lead to an admission on the part of the suspect, consequently speeding up investigations and secure more convictions within a reasonable time.

The decision regarding the type of documents which should be considered ‘essential

documents' must be taken either by the police or by the court.[1051] Here again, the study reveals that this is not correct for various reasons. Firstly, because the police are an interested party, and secondly because by the time that recourse to court is taken for direction, the period of arrest would have elapsed if the suspect is detained. The law already grants the Magistrate the discretion to withhold any material evidence which can cause a serious threat to the life or fundamental human rights of another person. Thus, the legislator should also consider granting the duty Magistrate the discretion to analyse the request for material evidence.

It is questionable whether the prosecution must disclose its evidence at the commencement of the investigation; during the proceedings or every time the investigating officer is in possession of new evidence. This is an interesting observation because the prosecution can always defend itself by stating that it provided the defence with the material evidence it had in hand at that moment in time when the request was made. Yet another question is whether the request for disclosure should be made by the defence or whether disclosure should, alternatively, be automatically undertaken by the prosecution. It would be best if the law is amended to state that the prosecution is obliged to disclose its information to enable the defence to regulate its own proceedings. Furthermore, there should be an obligation on the prosecution to hand over all material evidence, both in favour and against the suspect, prior to the arraignment. This way the suspect would be able to make an informed decision with respect to the plea. Despite the fact that the ECtHR looks at the overall fairness rather than at an isolated defect in the proceedings, the study reveals that the prosecution's failure to hand over all material evidence in its possession should be tantamount to an offence.

8.1.2.1 Defence disclosure

It appears that the obligation to disclose material evidence is only imposed on the prosecution. A pertinent point to discuss is whether a suspect would be bound to inform the prosecution if s/he has an alibi which could exonerate him/her, and whether such an

[1051] Criminal Code art 534AD (2)

alibi would constitute material evidence to the charge. For the right to disclosure to be properly exercised, it must be applied to both the prosecution and the defence, especially since the prosecution should strive to ensure that justice is meted out.

The Directive provides that this procedural right is to be given according to the national law of Member States. It also states that the suspect should be informed about his/her right to information at the first 'official interview'. Does this therefore mean that if the interview is not an official interview (such as, an interview at the moment of apprehension), this right should not be given? The exact moment at which such rights must be given may vary from one Member State to another. Likewise, the contents of the letter of rights may vary from one Member State to another. The Directive provides that it is up to the domestic law to decide whether access to material evidence should be free of charge. In Malta, such access is free, but this is not necessarily the case in all Member States, and therefore it may be stated that Member States do not apply this right in an identical manner.

To conclude, the right to information is not an absolute right and may be withheld as envisaged in the Criminal Code in certain specific scenarios such as, for instance, where there is a threat to life or a threat to the fundamental human rights of an individual. There are also specialised laws which prohibit the right of information. The Money Laundering Act, for example, prohibits the police from divulging any of its information during the investigation as this could be tantamount to an offence. Thus, in this vein, the study reveals that this right is a restricted right. This right is restricted in another way because the information supplied can only be used in relation to the offence that was being investigated when the disclosure was made.

There has certainly been a marked improvement in relation to this right; however, there still is much to be done before one can conclude that this right is an effective right. The following are some of the issues which the legislator must take note of:

i. Suspects are usually not aware of the charges they are being investigated for because a copy of the charge sheet is only given to them at arraignment stage;

ii. Maltese law is unclear as to whether the letter of rights should be given orally or in writing;

iii. The law is silent as to whether an investigation would be able to proceed if there is no interpreter available;

iv. Maltese law does not define the term 'material evidence;'

v. The decision regarding the type of documents which should be considered 'essential documents' can be taken either by the police or the duty Magistrate;

vi. It is questionable at what stage the prosecution must disclose its evidence; and

vii. It is unclear whether disclosure should be made by the defence or whether disclosure should, alternatively, be automatically undertaken by the prosecution.

The abovementioned points are hindering the effectiveness of the right to information. Consequently, the following changes and amendments should be introduced:

i. The law should state that irrespective as to whether a suspect is under arrest or not, the moment an investigation commences, the first matter which should be documented is the provision of information to the suspect relating to the offence being investigated;

ii. An amendment must be introduced to clarify whether the letter of rights must be given orally or in writing;

iii. The letter of rights should be translated in as many languages as possible. Following this, the letter of rights should be read out to the suspect in the presence of his/her lawyer and subsequently signed by the interpreter and by the suspect himself/herself;

iv. The law needs to make sure that certain terms are clearly defined to ascertain clarity and avoid confusion;

v. Certain decisions should be taken exclusively by the duty Magistrate due to time restrictions and also because the police are considered to be an interested party to the case;

vi. An amendment should be introduced obliging the prosecution to hand over all material evidence prior to arraignment; and

The prosecution's failure to hand over all material evidence in its possession should be tantamount to an offence.

8.1.3 The Right to Legal Aid

The right to legal aid cannot exist unless the right to a lawyer is also respected. A breach of the latter would generally only come about when an indigent person is unable to exercise the right to legal aid. The reason why the right to legal aid was chosen to be examined in this study is because it is a right which is closed tied to the right to legal assistance. This right has been subject to various tentative reform as evidenced by the Maltese legal aid system. Such reforms include the *'Law relating to Legal Aid, 1992'* presented by the Permanent Law Reform Commission, the 2005 White Paper entitled *'Lejn Gustizzja Ahjar u Ehfef'*; a more recent report issued by a commission chaired by Judge Joseph David Camilleri entitled *'Lejn Riforma tal-Ufficcju tal-Avukat tal-Ghajnuna Legali'*; as well as the recommendations made within the Bonello Commission's report in 2014. Despite all these reforms, the system has yet to be perfected.

This right has long been established and widely recognised as a right in Malta notwithstanding the fact that the EU Directive on the right to legal aid has not yet been transposed. The Constitution of Malta already caters for this right as it provides that everyone 'charged with a criminal offence has the right to legal assistance if indigent, and that legal assistance should be provided for free.'[1052] However, the Criminal Code provides an *a priori test* by stating that legal aid is to be given to all persons, provided that they have not briefed other lawyers before. Therefore, unlike the provisions of the EU Directive and the ECHR, the Maltese Criminal Code does not establish a Means or Merits Test. Nonetheless, the practical application of the right to legal aid without a means test during criminal proceedings remains unclear since, according to a Courts of Justice Charter,[1053] every person charged has the right to defend himself in person or through his lawyer or if he lacks the means, through the services of the Advocate of Legal Aid. The term 'if he lacks the 'means' seems to imply that the court should carry out a Means Test before appointing a legal aid lawyer. This reasoning was put to the test and the court[1054] rejected the accused's request to be assisted by legal aid on the grounds that he was gainfully employed. It is this author's opinion that such a decision was incorrect since the Charter does not have the force of law and therefore the court should not have disregarded the national law of Malta which categorically excludes the requirement for a means test to be carried out.

The Convention does not mention whether this right is available during pre-trial proceedings although, admittedly, the ECtHR case-law has extended its applicability to pre-trial investigations. According to the ECHR a person has the right to free legal aid if two conditions subsist: firstly, if one does not have sufficient means to pay for legal assistance (the 'Means Test'), and secondly, when the interests of justice so require (the

[1052] Constitution of Malta art 39 (6)(c).
[1053] Ministry for Justice, Culture and Local Government, Courts of Justice Citizens Charter, Courts of Justice Department, 28 July 2016, p 9 <http//www.justiceservices.gov.mt/CourtSevices/Courts_of_Justice.pdf > accessed February 2021.
[1054] Decree dated 24th October 2016 where Magistrate Neville Camilleri refused to appoint a legal aid lawyer to assist a Romanian national accused of the offence of Domestic Violence, on the pretext that he was gainfully employed.

'Merits Test'). The ECtHR has adopted the 'Means Test' to examine whether a person is entitled to free state-aid; however, there is no definition of the term 'sufficient means' and thus a subjective test must be carried out. It is the applicant who must prove that s/he does not have the sufficient means to bear the costs of a lawyer. Case-law has shown that it is not only the income of the applicant that is taken into consideration but also his wealth. As the financial threshold must be outlined by the national authorities, the examination of one's wealth may vary from one Member State to another. The study has shown that wealth is not equivalent to financial liquidity and thus under this system, a person may be precluded from being assisted by a legal aid lawyer.

Regarding the other test, namely the Merits Test, it is the state which must define the term 'public interest' in the context of providing an accused with a legal aid lawyer. Under the EU Directive a suspect or accused person has the right to legal aid when the following twofold analysis is made, namely: lack of sufficient resources, and when the interest of justice so requires. Therefore, the entitlement to the right to legal aid in Malta is far more wide-reaching in its scope. Member States do not apply the same tests and therefore the eligibility for such right may vary from one Member State to another. It is of the utmost importance that each Member State sets its own legislative framework which provides for the right to legal aid and this to safeguard the right to a fair trial for indigent persons. Hence, to answer the research question as to whether subjects of Member States enjoy the same rights, it is evident that the answer to this question is in the negative.

In Malta it is the duty of the court[1055] to ensure that the accused is legally assisted to secure that s/he is given an adequate defence. In fact, the Bonello Commission which was established to overhaul the Criminal Code was not critical of this approach and stated that the legal position should remain unchanged. However, if the means test had to be introduced this would reduce the workload that legal aid lawyers are currently burdened with. Certainly, the current procedures lead to abuses because there are several persons who opt to avail of the system of legal aid (especially in cases where the offences are not severe) rather than engage a lawyer of their own choice. This is done to the detriment of

[1055] Criminal Code art 519.

those who truly need such assistance where their financial means preclude them from engaging the lawyer of their choice. There is no system in place to curtail such abuse.

The ECHR provides that a person charged with a crime has the right to be assisted by a lawyer of his choosing. However, it is evident that with respect to the assistance of legal aid lawyers, such choice does not exist. In Malta one cannot choose his/her legal aid lawyers. There is only one legal aid lawyer on duty on a particular day. Thus, the court can only appoint the lawyer on duty in accordance with the daily roster. Problems arise in this regard because it is the same lawyer who must appear in court to assist an accused person upon arraignment, who may also be expected to go to a police station to assist a different suspect who is under arrest, and in addition, and who may also be the same lawyer who needs to assist his/her own private clientele on the same day. The service which such a lawyer provides leaves much to be desired. The study has shown that if the system of legal aid were to encapsulate a method for quality-assurance, the necessity of choice of counsel would consequently become irrelevant as faith would be instilled in the system.

The EU Directive states that legal aid should be provided before the commencement of questioning by the police or person in authority and before any investigative or evidence gathering act. A relevant question is to ask is whether an interrogation would still be able to commence in the absence of the appointed legal aid lawyer if the said lawyer is assisting another client in another location? To ensure that the suspect is not deprived of his/her right to legal aid and to reinforce the effectiveness of this right, it is evident that the number of lawyers who appear on the daily roster must be increased.

Maltese law does not qualify the entitlement to legal aid; it merely states that the suspect must be given such assistance upon request. It is questionable whether this assistance only related to court procedures and police investigations, or whether it also extends to the situation where a suspect goes to the office of the legal aid lawyer for simple advice. Like the Directive, Maltese law is silent in this regard. However, unlike the EU Directive the right to legal aid in Malta is available to all suspects and accused persons irrespective of

whether they are under arrest or otherwise. Furthermore, similarly to the EU Directive and the ECHR, Maltese Law is silent on the availability and eligibility of legal aid to persons who have been called to appear before an Agency, Authority or Tribunal to settle an administrative payment in lieu of criminal proceedings. Failure to affect the administrative payment may result in the institution of criminal proceedings. Since this right does not seem to extend to such eventualities, its effectiveness is questionable.

Although the Directive does not specifically state this, for legal aid to be effective, the legal aid lawyer must be efficient and well versed in criminal law. In some countries, including Malta, a lawyer who has no expertise on the subject and who has not been briefed about the case may be called upon to provide legal aid. The Directive provides that the suspect or accused person has the right, if justified by the circumstances, to replace the legal aid lawyer. This, however, is not an option in Malta. Once a suspect or accused person is assigned to a particular lawyer, such lawyer may only abstain from the case based on the same reasons that a judge can be recused. Whilst it is true that changing lawyers halfway through a brief could give rise to a change of defence and thus create confusion about the defence being presented, the suspect may not be satisfied with the defence being given or may feel that the service being provided is inadequate. In such a situation, it certainly cannot be concluded that the right is effective and that suspects are treated in the same manner throughout the Member States.

The situation is worsened by the fact that there is no continuity in the service given by the legal aid lawyer. It may, as a result, be stated that the way the service is given runs contrary to the spirit of the Directive. When a person is arrested and taken to a police station for interrogation s/he is assigned to the legal aid lawyer who happens to be on the roster on that day. However, if such person is subsequently arraigned in court the following day, s/he is assigned a different legal aid lawyer. The lawyer assisting in the arraignment would generally not be informed of what took place during the arrest, and this can cause that lawyer to give wrong advice to the suspect. The lawyer may, for instance, advice the accused not to admit to the charges and realise later on during the proceedings that the accused has already, in fact, admitted to everything in the statement that was voluntarily

made. This could have an adverse effect on the accused, since s/he would have missed out on registering an admission during the first opportunity and would thus not be entitled to the reduction in punishment that is usually given in the case of early admissions. Another instance where there is no continuity is when the accused person is found guilty and his/her appeal application is not prepared or filed by the lawyer who would have assisted him/her before the court of first instance but rather by the Legal Aid Advocate who until then would not be informed about the facts of the case. Even worse is the fact that the lawyer would have to draft the appeal within a timeframe and would have to embrace the defence presented by the lawyer in the first instance even if s/he does not agree with it. Since at appeal stage the general rule is that no new evidence may be brought forward, immediate legislative intervention is required to ensure continuity of service. The study has shown that the fact that the state appoints a legal aid lawyer is not enough to fulfil its obligation under the Directive if the appointed lawyer fails to provide 'effective' representation. In the above instances, can it be said, however, that the legal aid lawyer is to blame if the representation given was not effective?

8.1.3.1 Appointment of Legal Aid Lawyer

Another flaw in the current system is present in the way legal aid lawyers are appointed. Legal aid lawyers who assist accused persons in court or suspects during police investigations are appointed from the daily roster. These lawyers are not briefed before they are given their assignment and are expected to give an 'effective' service there and then. The current system can create difficulties especially in summary proceedings where the punishment that can be awarded does not exceed two years imprisonment. The legal aid lawyers who are appointed on the day the case is called are then expected to defend the accused to the best of their abilities at times even without having been given the opportunity to summon witnesses. There are instances when the legal aid lawyer on duty is appointed and asks for an adjournment to acquaint himself /herself with the case. If the request is upheld this may lead to the unnecessary lengthening of summary proceedings. For example, when the accused and the witnesses are not notified for the following sitting or even worse, when witnesses duly summoned fail to appear. An amendment to the law

is urgently required to cater for these instances, to ensure that once an accused person is notified with the charges s/he should be informed of his right to legal aid and should s/he wish to make use of the system, s/he would be able to contact the Agency for legal aid and ask for such assistance on the appointed day. In such a case the lawyer may be briefed before the sitting and prepare an adequate defence. This system already exists when it comes to cross examinations that are to take place with respect to witnesses who have given their testimony by affidavits which are then notified to the accused. Alternatively, the accused may file a note in the acts of the proceedings prior to the appointed day for the hearing enabling the court to proceed with appointing the legal aid lawyer prior to the sitting. This would certainly help ascertain a better service. Although one may perceive the Maltese system as effective, the right to legal aid is, at least in this respect, not being exercised in line with the case-law of the ECtHR.

The situation before the Criminal Court is substantially different because once the accused is notified with the charges, he then asks the Agency for legal assistance and this is provided free of charge irrespective of his financial stability. The same lawyer then carries on assisting the accused even at the appeal stage. The lack of continuity is, therefore, only encountered before the pre-trial proceedings and in those proceedings which are heard by the Courts of Magistrates.

In Malta there is a difference between the Legal Aid advocate who is a full-time lawyer employed with the Agency for legal Aid and a legal aid lawyer. Whereas the former assists the accused before the Criminal Court or Criminal Court of Appeal, the legal aid lawyer assists the accused in pre-trial investigations and before the courts of Magistrates. In the latter case, the legal aid lawyer can still have his own legal practice and thus it is often the case that the service provided is not satisfactory since it is more likely that he/she will prioritise his/her private clientele before assisting those accused that were assigned to him through the system of legal aid.

Legal aid lawyers assigned to work on criminal law cases are not given any training and many of them do not have any expertise in the field of criminal law. Therefore, the service

they may provide may be inadequate. The only requirement which must be satisfied for one to be appointed as a legal aid lawyer is that the lawyer must have a two-year proven experience as a lawyer in civil and criminal litigation post the obtainment of the warrant. The time has come for the Agency to start recruiting lawyers who specialise in criminal law. It is unfair to have a family lawyer assisting a person in a criminal case where the punishment may be life imprisonment. Although this may seem an exaggerated example, it certainly happens regularly. When this issue was contested in court, the court held that the applicant was not complaining against his lawyer but against the system and it rejected the case[1056] on the grounds that there is nothing wrong in being assisted by a lawyer who practices both in the civil and criminal field. In fact, it held that in such circumstances the legal aid lawyer may serve better should s/he have to assist the accused in any off- shoot procedures, such as for instance before the Constitutional Court.

In conclusion, although it may appear that the Maltese system of legal aid is functionable and straightforward, it is tainted by the several drawbacks which include:

i. The fact that the EU Directive on the Right to Legal Aid has not yet been transposed;

ii. There is only one legal aid lawyer on duty on each particular day;

iii. Abuse is present since the right to legal aid in Malta is available to everyone;

iv. It is unclear whether legal aid is only related to court procedures and police investigations;

v. Maltese Law is silent on the availability and eligibility of legal aid to persons who have been called to appear before an Agency, Authority or Tribunal to settle an administrative payment in lieu of criminal proceedings;

[1056] *Daniel Alexander Holmes v L-Avukat Generali et* (FHCC (Constitutional Jurisdiction) 3 October 2014para 2.4.

vi. In Malta, suspects cannot change their legal aid lawyer;

vii. The is no continuity of service given by the legal aid lawyer, particularly before the Courts of Magistrates;

viii. When notified with the charge sheet, suspects are not immediately informed on their right to legal aid; and

ix. Legal aid lawyers are not given appropriate training and many of them do not have any expertise in the field of criminal law.

This study has shown that for this right to be considered as effective and practical, positive action must be taken by the State to ensure its true implementation. This positive action must include:

i. The transposition of the EU Directive on the Right to Legal Aid;

ii. The number of legal aid lawyers on the daily roster must increase;

iii. A system must be put in place to prevent clients from abusing the legal aid system;

iv. Amendments must be introduced, clarifying the eligibility of legal aid when it comes to simple legal advice and proceedings before agencies, authorities or tribunals;

v. Suspects should be able to change their legal aid lawyer if the service provided is inadequate;

vi. Amendments must be introduced to reform the legal aid system as a whole, ascertaining continuity of service to suspects;

vii. Suspects must be informed about their right to legal aid when notified with the charge sheet. This will avoid a lot of time-wasting during court proceedings;

viii. Legal aid lawyers should be provided with adequate training;

ix. The legal aid agency should start recruiting lawyers who specialise in criminal law; and

x. A *pro bono* system of legal aid should be established especially since the budget allocated to the legal aid Agency is rather low.

The State's failure to improve the effectiveness of the right to legal aid could be interpreted to mean that the State is not keen to guarantee the right to a fair trial.

8.1.4 The Right to Silence

The last cardinal right which will be examined in the context of *lacunae* which may exist in the domestic law is the right to silence. As previously stated, there is no real definition of the right to silence and even various interpretations have been given, the closest interpretation is that the right to silence is equivalent to the right not to incriminate oneself. It must also be emphasised that the right to silence should not be subject to interpretations. Unfortunately, some have adopted the view that the criminal justice system would be far better if the right to silence did not exist, particularly as criminals would, in its absence, be more compelled to reveal crimes. This study emphasises that the right to silence must be safeguarded and not undermined.

In most cases the onus of proof rests with the prosecution which must prove that the accused is guilty beyond any reasonable doubt. In such circumstances, the accused has the right to remain silent as s/he does not need to prove his innocence. However, this is not the case when there is a shift of the burden of proof on the accused, in which case s/he must give up the right to silence and give evidence. To answer the research question, it

may be stated that this right has its limitations and is not therefore an absolute right.

Under the Maltese system, this right is given to the suspect at the moment the letter of rights is read because the right to silence is one of the fundamental human rights therein mentioned.[1057] Moreover, the accused cannot be compelled to give evidence at his trial. The law provides that no adverse inferences can be drawn if the accused refuses to give evidence. However, this is not the situation in UK where inferences can be drawn from the accused's silence. The drawing of inferences from silence when an accused sought legal advice, discouraged individuals from exercising their right to legal assistance. The right as legislated upon, was in fact useless since it worked out better for the suspect to refuse legal assistance and remain silent. Unfortunately, the legislator hurriedly introduced the right to legal assistance, which was long overdue, accompanied by the rule to draw inferences, without foreseeing the legal consequences of the latter. As a result, Article 355AU was amended and the rule to draw inferences from silence when the accused failed to mention certain facts was repealed.

The right to silence is not applicable when eliciting intimate and non-intimate samples because adverse inferences may be drawn. Once the accused is asked to give a sample, he/she could indirectly be incriminating himself/herself by adhering to the request. This study has concluded that the present legal position is well balanced and that the inclusion of more inferences from the right to silence may exert more pressure on the accused, leading to more erroneous statements and a myriad of human rights cases.

Although there is an obligation to grant the suspect and accused their right to silence, there is no mention of a waiver to this right. Therefore, it appears that the suspect or accused person is free to choose whether to give evidence or not. However, there is no sanction in place against the police for not informing the witness, suspect or accused of their right to silence and of the privilege of self-incrimination. It is questionable whether such evidence would constitute inadmissible evidence and the only remedy available is constitutional proceedings. This is a matter of serious concern and hence why an amendment to the law

[1057] Criminal Code art 534AB (e)

needs to be introduced to provide a sanction against the person who fails to give out such right to a suspect and/or accused person. In this manner, Malta would be a step closer towards safeguarding the right to silence in practice, as the police would be compelled to act more cautiously prior to interrogations.

The study shows that although the laws of Malta have been subjected to various amendments over the years, the right to silence remains a very strong right. However, it can be further protected and this because:

i. The law does not mention anything about the waiver to the right to silence;

ii. There is no sanction in place against the police for not informing the witness, suspect or accused of their right to silence and of the privilege of self-incrimination; and

iii. The Code of Practice for Interrogation of Arrested Persons[1058] should be revisited to reflect the spirit of the EU Directive 2013/48 since it is evident that this was based on the PACE Act, which presided the transposition of the EU Directive into the Domestic law of Malta.

These factors can easily undermine the accused's right to silence. To prevent this, the necessary amendments should be enacted:

i. An amendment should be introduced stating that the investigating officer is bound to explain to the suspect the implications of waiving the right to silence. The latter would only be able to waive this right after he/she has spoken with his/her lawyer. An amendment should also be introduced wherein the suspect declares that s/he understood the consequences of such waiver and that such declaration should be counter signed by the lawyer who would have explained the significance of the waiver;

[1058] Chapter 164 of the Laws of Malta Police Act, Fourth Schedule.

ii. An amendment to the law also needs to be introduced to provide an appropriate sanction against the police officer who fails to give out such right to a suspect and/or accused person;

iii. The Code of Practice for Interrogation of Arrested Persons needs to be amended to include more details which will aid police officers when interviewing suspects. This will also make sure that the suspects' right to silence will not be undermined; and

iv. The letter of rights should be explained to the suspect by an independent person in authority to ascertain that the right to silence therein mentioned is well understood. The letter of rights should also be signed by the suspect.

v. Amendments should be made in relation to Articles 17 and 22 of the Official Secrets Act and Article 54(3) of the Motor Vehicles Ordinance so as to enhance the true spirit and interpretation that must be given to the right to silence pertaining to the suspect and/or accused.

In the meantime, it must be ascertained that suspects are duly cautioned in a clear manner and in a language that they understand. Unfortunately, in those instances where there is a shift of the burden of proof it is evident that the right to silence cannot be exercised. Thus, should such eventualities increase, the right to silence would indirectly be diminished. Nevertheless, when one compares Mata to other Member States this right is stronger in Malta than in any other Member State which adopt the rule of inference.

8.2 FINAL REMARKS

Malta has come a long way in safeguarding the four cardinal rights which are the center of this study. However, problems exist and need to be addressed by the Maltese legislator promptly. It is only in this manner that Malta can safeguard a fair trial for suspects and

accused persons.

Furthermore, the four cardinal rights are effective and not simply illusionary. They certainly cannot be perceived individually as their strength lies in them being granted collectively to the same person prior to the onset of an interrogation. Although each right is distinct from the other, they are not individual rights as their true effectiveness becomes evident when they are provided in a cumulative fashion.

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