Old Wine in New Bottles: Shifting the Criminal Sanction into Administrative Law *Part 2*[1]

1. EXTINCTION OF THE CRIMINAL & ADMINISTRATIVE ACTIONS

The payment of an administrative penalty brings about the extinction of the criminal action. For instance, article 26 of the Environment Protection Act provides that when a compromise penalty is agreed to and paid by the offender to the Environment Fund, 'all such person's liability with respect to that offence shall be extinguished' but payment of such compromise penalty does not, in terms of the same provision, 'extinguish any civil liability to make good any damages to any person or authority and any liability arising under article 24 of this Act', that is, in connection with an action for damages to make good for the damage caused to the environment. Hence, in this instance, a particular conduct may give rise to both a criminal and an administrative action. But once an administrative penalty is paid, the criminal action is automatically extinguished. Furthermore, the compromise penalty has to be paid 'before criminal proceedings have been instituted in connection with any offence' under the Environment Protection Act so as to ensure that the criminal and administration actions cannot be exercised concurrently and that the same conduct is not punishable twice.

Once a criminal offence has been depenalised then the criminal action cannot be prosecuted. The proviso to article 14(1) of the Eco-Contribution Act states that:

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Errata Corrige: At page 35, paragraph 2.2. and at page 37, paragraph 3.2, of *Law and Practice*, Issue No. 11 of May 2006, the words 'the Malta Stock Exchange *qua* Listing Authority' should read 'the Malta Financial Services Authority *qua* Listing Authority' in view of Legal Notice 1 of 2003 in terms of which the Malta Financial Services Authority was appointed as the Listing Authority for the purposes of the Financial Markets Act, Cap. 345.

[1] This paper gives the position of the law as at 4th January, 2006.

[2] *Repubblika ta' Malta vs. Emmanuel Grech*, Constitutional Court, 27th September 1990, Kollezzjoni, Vol. LXXIV, 1990, Pt. I, pp. 188-209. The Constitutional Court held that there was no violation of articles 39(1) and (8) of the Constitution in those cases when the Attorney General decides to issue the bill of indictment before the Criminal Court or the criminal charge before the Court of Magistrates as a Court of Criminal Judicature as the Attorney General is in this respect exercising a quasi-judicial function. In

'in all cases where the Authority imposes an administrative penalty in respect of anything done or omitted to be done by any person and such act or omission constitutes a criminal offence, no proceedings may be taken or continued against the said person in respect of such criminal offence.'

In other words, once an administrative penalty is imposed, the Authority cannot either take, or continue, criminal proceedings against the same person on the same fact. However, the words 'may be ... continued' gives the impression that it is possible to take both administrative and criminal proceedings concurrently but once the administrative penalty has been inflicted pending criminal proceedings, the criminal action will then have to come to an abrupt halt. Although one hopes that the Authority will not exercise concurrently administrative and criminal proceedings, article 14(1)(a) and article 16 of the Eco-Contribution Act are essentially regulating the same conduct. In fact, article 14(1)(a) empowers the Authority to impose an administrative penalty upon any person who 'infringes any provision of this Act or of regulations made there under' whilst article 16 of the same enactment provides for a criminal offence in the case of 'any person who contravenes or fails to comply with any of the provisions of this Act or of regulations made there under'. Both provisions are essentially regulating the same conduct. Further, in the case of an administrative infringement, it 'shall not, unless provided otherwise by or under this Act exceed thirty thousand Liri for each infringement' and 'two hundred Liri for each day of infringement' whilst in the case of the criminal offence, the punishment is a 'fine (multa) not exceeding five thousand Liri or an amount equal to three times the amount of the eco-contribution payable on the products in respect of which the offence is committed, whichever shall be higher, or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment, in respect of any conviction.' And in the case of a second or subsequent conviction for an offence the punishment of imprisonment is increased up to a term not exceeding one year.

The question arises - who decides which action is to be instituted, that is, whether it should be criminal or administrative? My reading of the law is that the Commissioner of Value Added Tax does so. But is this correct from a constitutional point of view in the light of the Constitutional Court's judgment *Repubblika ta' Malta vs. Emmanuel Grech*[2]?

2. REGULATIONS ESTABLISHING ADMINISTRATIVE SANCTIONS

Not all administrative penalties are established by primary legislation. On the contrary, various enactments have recently empowered Ministers and competent authorities to establish both administrative offences and/or the penalties to be inflicted in the case of a transgression thereof.[3] Presumably this is so because such

procedure makes it easier to update the list of administrative measures and the quantum of each penalty. No recourse to Parliament is required in such instances although *stricto jure* the House of Representatives can still annul such subsidiary legislation in terms of the negative resolution procedure contemplated in the Interpretation Act.[4] Take the case of the Central Bank of Malta (Penalties for Offences and Infringements) Regulations, 2003. This Legal Notice was published on 28th February 2003 and revised by Legal Notice 330 of 2004 on 11th June 2004. Maximum penalties at Lm 5,000 were doubled to Lm 10,000 in such a short span of time. On the other hand, it seems that when administrative penalties are approved as a primary law they are not changed so frequently but following a long passage of time. A case in point is the administrative penalty in article 58 of the Development Planning Act, which was set at Lm 1,000 on the enactment of the law in 1992 and only updated to Lm 10,000 by the Development Planning (Amendment) Act in 2001.[5]

3. COUNCIL OF EUROPE'S RECOMMENDATION ON ADMINISTRATIVE SANCTIONS

Recommendation No R (91)1E of the Committee of Ministers to Member States on Administrative Sanctions[6] applies to any form of punitive administrative measure, be it pecuniary or otherwise. Outside the ambit of administrative sanctions are 'measures which administrative authorities are obliged to take as a result of criminal proceedings' and 'disciplinary sanctions'.

the instant case, such function had not been exercised in a capricious way. But does this reasoning apply to the public administration which does not always enjoy the same constitutional safeguards as the Attorney General does in terms of article 91(3) of the Constitution?

[3] For instance, article 54 of the Data Protection Act, Cap. 440, article 17 of the Co-operative Societies Act, Cap. 442, article 19 of the Producer Organisation Act, Cap. 447, article 54(4) of the Sports Act, Cap. 455, and article 100(2) of the Medicines Act, Cap. 458.

[4] Article 11 of Cap. 249.

[5] Article 52 of Act No. XXI of 2001 substituting article 58 of the Development Planning Act, Cap. 356. To date article 52 aforesaid has not yet come into force and hence the administrative penalty is still established at Lm 1,000.

[6] Adopted by the Committee of Ministers on 13 February 1991. Vide https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=34769&SecMode=1&Admin=0&DocId=392990.

[7] Equivalent to the *nullum crimen sine lege* principle in constitutional criminal law.

[8] Equivalent to the *lex non habet oculos retro* principle of constitutional criminal law.

[9] Equivalent to article 39(8) of the Constitution of Malta concerning criminal offences.

[10] Equivalent to the *ne bis in idem* principle of constitutional criminal law.

[11] Application of article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

The Recommendation lays down eight principles, which can be summarised as follows:

Principle 1	Administrative sanctions have to be laid down by law.[7]
Principle 2	Administrative sanctions cannot be retroactive,[8] administrative sanctions cannot contemplate a more onerous sanction than the criminal offence which has been depenalised and administrative sanctions created following depenalisation should not burden the person on whom the administrative authority is considering imposing a sanction than s/he would have been burdened had the criminal offence not been depenalised.[9]
Principle 3	No person may be penalised twice for the same act.[10]
Principle 4	An action by an administrative authority has to be taken within a reasonable time and administrative proceedings have to be conducted with reasonable speed.[11]
Principle 5	Any procedure capable of resulting in the imposition of an administrative sanction has to be terminated and cannot be left pending *ad infinitum*.[12]
Principle 6	Persons faced with an administrative sanction have to be informed of the charge against them; they are to be given sufficient time to prepare their case; their representative has to be informed of the nature of the evidence against them; they have the opportunity to be heard before any decision is taken;[13] and an administrative act imposing a sanction has to contain the reasons on which it is based.[14] These principles[15] may be dispensed with, either in full or in part, in cases of minor importance only if the administrative sanction to be applied is a limited pecuniary penalty and the person charged consents thereto and such procedure is in accordance with the law.
Principle 7	The onus of proof shall be on the administrative authority.[16]
Principle 8	An administrative sanction shall be subject, as a minimum requirement, to control of legality by an independent and impartial court established by law.

4. ADVANTAGES OF RESORTING TO ADMINISTRATIVE OFFENCES

From the above, it appears that the creation of administrative offences is favoured by the legislature over criminal offences because administrative offences bring about the following advantages:

(a) they remove social stigma once the offence is not prosecuted by a court of criminal jurisdiction;
(b) they are more appropriate for minor offences as they provide for less formal procedures which are normally associated with a court of law;
(c) they bring about more specialisation in the reviewing body, especially if a quasi-judicial body, when an appeal or review proceedings are lodged from the public authority's decision before an appeals board or similar tribunal;
(d) they guarantee a speedier process as administrative offences are heard by a tribunal which normally deals only with those cases whilst in the case of the courts they deal with several other distinct categories of cases;
(e) no imprisonment can be inflicted by way of punishment;
(f) no entry is made in one's conduct certificate and hence no problems with job prospects are encountered; nor is there a need to file an application in the competent court to remove an entry in one's conduct certificate;
(g) they are easier to administer and, initially, do not require the intervention of an outside third party such as the Executive Police or a court of justice;
(h) they come in a variety of sanctions and therefore they can be tailor made from case to case;
(i) they are sometimes of a contractual nature as is the case of a compromise penalty and hence the contravener would be voluntarily admitting his/her guilt and taking the pertinent remedial action without the need for the competent public authority of coercing him/her in doing so;
(j) they assist in decreasing the court's backlog of cases as minor cases do not end up before the inferior courts but before a specialised tribunal which normally hears only those types of cases;
(k) they do allow for a procedure of mediation and conciliation and hence the problem might be resolved at an early stage without the need to have further recourse to administrative measures;
(l) they permit enforcement of offences in a quick, easy and inexpensive process without costly court action or the need to prove the elements of a criminal offence.

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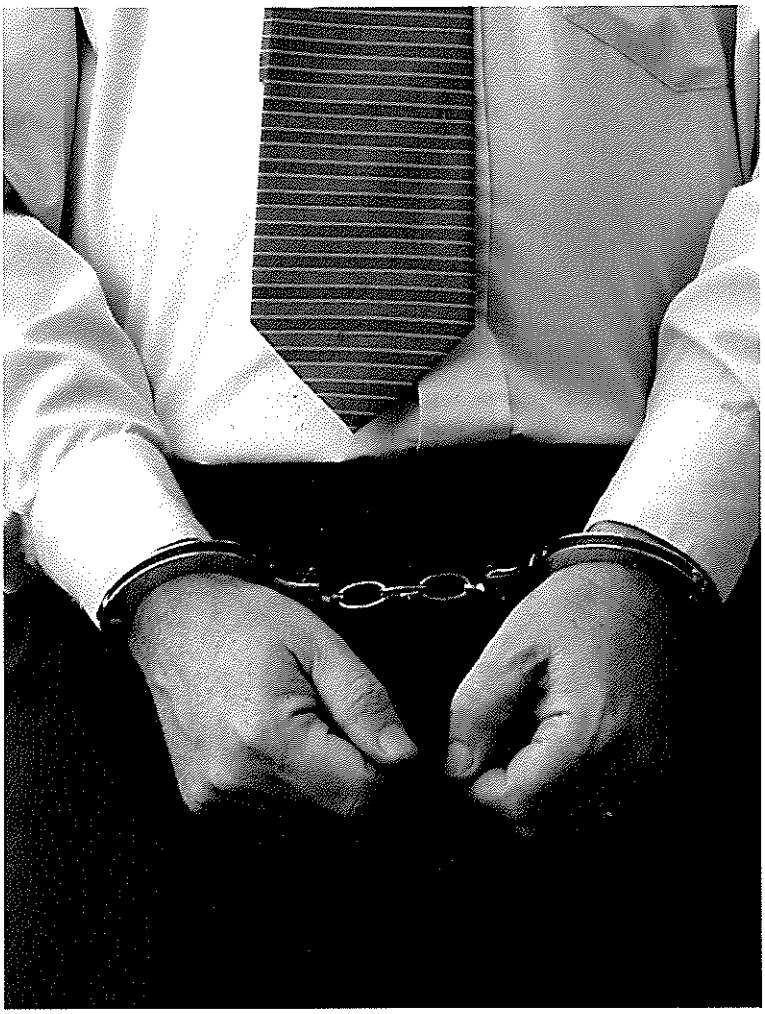


5. CONCLUSION: WHERE TO DRAW THE LINE

The line of demarcation between criminal offences and administrative or civil offences is not that lucid in Maltese Law. Administrative law on the subject is still evolving and so are the principles that regulate it. At the moment of writing it is still early to decide where to draw the line of demarcation between criminal offences and administrative offences. At times the position is clear; at other times it is blurred. The same can be said more so with regard to the application of human rights provisions to administrative measures. For instance, which are those criminal law principles that apply or should always apply to administrative offences? Should and does the *ne bis in idem* rule apply indiscriminately to all administrative offences? Should and does the presumption of innocence apply to administrative offences once these are considered to give rise to

[12] Application of the principle of certainty of the law.

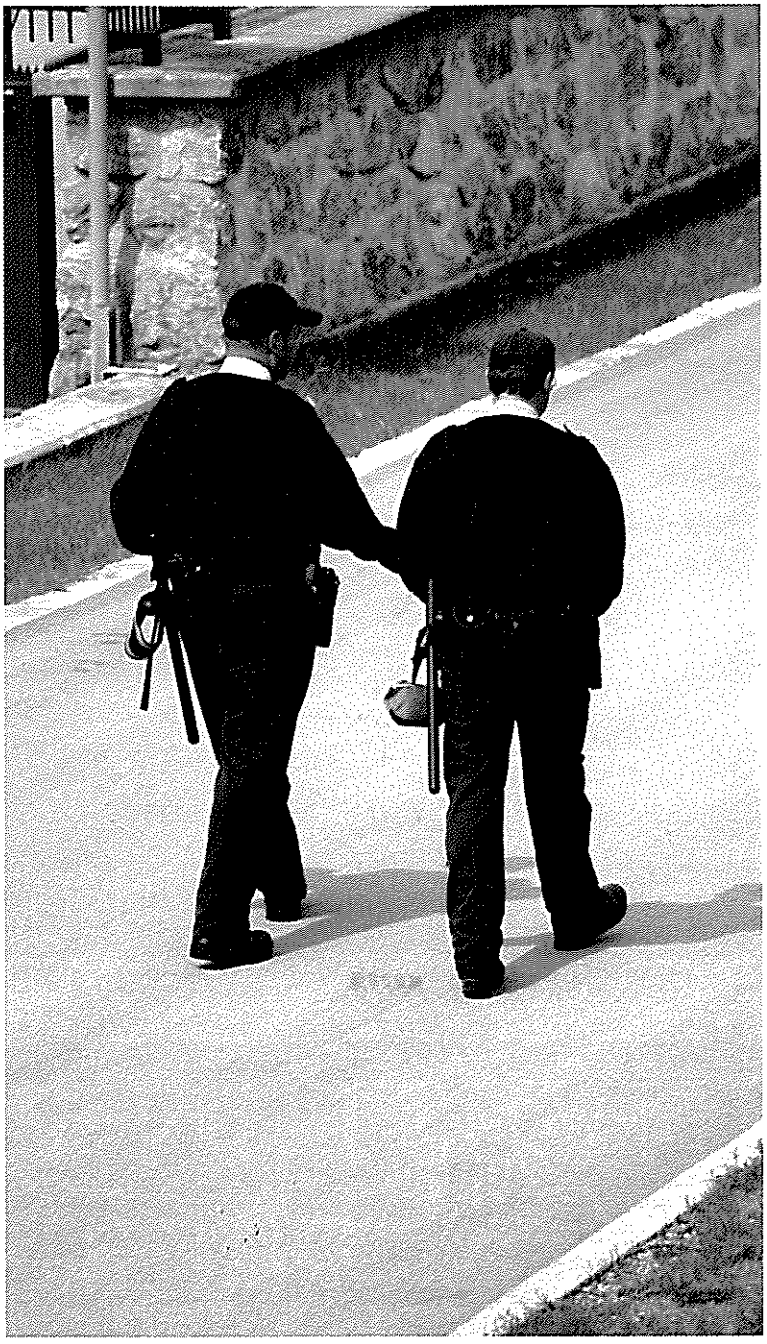
[13] Application of the principle of *audi et alteram partem*.

[14] Application of the principle of the duty to give reasons for decisions taken.

[15] Application of article 6(3) of the European Convention of Human Rights and Fundamental Freedoms.

[16] Application of the principle of *probatio incumbit ei qui dicit non ei qui negat*.

[17] Application of the principle of legality.



punitive measures? Does the principle of prohibition of interpretation by analogy apply to administrative measures? What type of burden of proof is required in administrative offences – is it proof beyond reasonable doubt or proof on a balance or probabilities? Can administrative sanctions always be applied retroactively? To what extent do the rules of evidence apply to the procedure in terms of which an administrative sanction is inflicted and which rules of evidence should apply to administrative proceedings leading to punitive measures, criminal or civil? Finally, can conciliation and mediation and other forms of non-judicial means of dispute settlement precede administrative proceedings and, if so, how, when and to what extent? All these and other issues still have to be addressed by the Maltese legislator and by case law in order to formulate a consistent, coherent and uniform procedure for administrative proceedings.

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Again, the inundated propagation of administrative sanctions in the statute book brought about by the concurrent creation of various bodies corporate and public offices all empowered to inflict some form of punitive measures might induce such bodies and officers to view the penalties levied therefrom not as a preventive and deterrent measure as originally intended by the legislator, but as an instrument of levying fines to make good for the lack of revenue generated by such bodies and offices and thereby serving as a means of beefing up their revenues to be able to meet their annual recurrent expenditure.

Undoubtedly the recent trend is to increase administrative sanctions thereby lessening criminal offences. Parliament seems to have adopted a policy to do away with, as far as possible, minor criminal offences prosecutable before the Court of Magistrates as a court of first instance. Instead of the judicial organ of the state, taking cognisance of such offences, it is bodies corporate and public officers who inflict administrative offences with a right to contest that determination before a quasi-judicial and/or judicial body. Of course, as in other fields of the law, this procedure does have both its advantages and disadvantages. However, what is being recommended in this paper is that if Parliament continues with its current course of action of depenalisation, it should as a minimum standard of justice ensure that the eight principles on administrative sanctions set out by the Council of Europe's Committee of Ministers are invariably and scrupulously adhered to and that existing administrative proceedings leading to a punitive measure should be reviewed in the light of the aforesaid. Whether administrative sanctions will stand the test of time still has to be seen. ▨