ARTICLES

THE MALTESE CRIME OF ESPIONAGE AND THE NULLUM CRIMEN SINE LEGE CERTA MAXIM: COMPLEMENTARY OR CONFLICTING?

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This paper analyses the crime of espionage from the perspective of the *nullum crimen sine lege certa* principle of human rights law. It argues that this crime - contained in only one provision of the Maltese Official Secrets Act - is so wide that several thousand different permutations of the completed offence can be contemplated and this without including those situations where the crime is considered from the viewpoint of a preparatory act, an attempt, a conspiracy, or an incitement to commit the said crime. Moreover, this still does not take on board article 3(2) and article 5 of the Act which further extend the provision's already extensive purport. This ambiguity in the proper construction of the provision under consideration runs counter both to article 39(8) of the Constitution of Malta and to Article 7 of the European Convention of Human Rights. Hence legislative measures need to be taken to ensure that the crime of espionage is defined with circumspection so as not to violate the *nullum crimen* human rights maxim.

1. Introduction

This paper studies the crime of espionage in Maltese Criminal Law from the viewpoint of the *nullum crimen sine lege certa* principle of Human Rights Law. The central question which this paper posits is whether the crime of espionage in Maltese Criminal Law is compatible with the human rights principle of legality. In this sense, the writing of this paper has been triggered off by the need to

establish with certainty whether the crime of espionage is human rights compliant from the viewpoint of the principle of legality and, should this not be the case, where are the incongruities found.

The applicable provision in the Constitution of Malta (hereinafter 'the Constitution'), the European Convention of Human Rights and Fundamental Freedoms (hereinafter 'the Convention') and the Maltese Official Secrets Act (hereinafter 'the Act') are first set out. Then this paper defines what is the *nullum crimen sine lege certa* principle and moves on to study the constitutive ingredients of the crime of espionage and how these have been interpreted in the leading British case on the subject. Subsequently article 3(1) of the Act is analysed in the light of the Constitutional and Conventional provisions to establish to what extent does that article contravene article 39(8) of the Constitution and Article 7 of the Convention especially in so far as the ambiguity of this provision under consideration is concerned.

In so far as Maltese law is concerned, the *nullum crimen* principle of legality in Criminal Law is contained in the Constitution of Malta and the European Convention Act. Although the Act does not contain provisions which directly contravene these two principles, the formulation and/or construction of article 3(1) of the Act might lead to an infringement of the *nullum crimen* maxim as will be explained in this paper.

Article 39 (8) of the Constitution provides that:

> *No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.*

Article 7 of the European Convention on Human Rights and Fundamental Freedoms reads as follows:

> *1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 3 (1) of the Official Secrets Act states as follows:

3. (1) If any person for any purpose prejudicial to the safety or interests of the State -

(a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or

(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or

(c) obtains, collects, records, or publishes or communicates to any other person any secret official code word or password or sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy,

he shall be liable, on conviction, to imprisonment for any term not less than three years and not exceeding seven years.

An analysis of article 3(1)(a) of the Act indicates that there are 5 separate offences created by that provision. Article 3(1)(b) contains 24 different offences whilst article 3(1)(c) creates 270 diverse offences. In all, the provision establishes 299 distinct offences. If all the combinations were to be considered together, there is the potential to commit 32,400 different offences.[1] That is the maximum amount of offences a single person can commit under article 3(1) in the completed form. But this calculation does not include preparatory acts, attempted offences, conspiracies to commit an offence under

[1] 5 x 24 x 270 = 32,400.

article 3(1) or incitement to commit such an offence as the provision under review refers only to the completed offence. If more than one perpetrator were to be involved the number of offences - whether completed, attempted, conspired, incited or preparatory - will have to be multiplied by the number of perpetrators. Mathematically, the number of offences which article 3(1) of the Act creates is - to say the least - astronomical. Undoubtedly the main problem here lies in a multiplicity of offences contained in one single provision that gives rise to legal uncertainty.

It is argued that this crime does not meet one of the ingredients of these principles as laid down by the European Court of Human Rights, that of forseeability, due to its ambiguity in certain parts thereof which makes the provision unclear and hence in breach of the principle of legality. The crime of espionage as it obtains in article 3(1) of the Maltese Official Secrets Act is also studied from a comparative perspective that takes into consideration British and Canadian case law which has interpreted the constitutive ingredients of this crime.

2. The *Nullum Crimen Sine Lege* Human Rights Principle

The *nullum crimen sine lege* rule implies that no crime exists unless there is a law which provides for the creation of such offence. Such offence may be contained in an enactment as is the case of the Act and, for instance in England, in the Common Law.[2] In Malta where no common law exists, a person may be punished only when the conduct in question is clearly considered by law to be punishable. It must therefore correspond to the statutory definition of the offence charged and must also satisfy the requirements of the general principles of criminal law (e.g. in *dubio pro reo*). The judge is thus deprived of all creative capacity in this sphere. He may never complete the criminal law by introducing new crimes constituted by novel elements. The judge is not there to fill up the *lacunae* of the legislature.

The legislature alone can establish the constitutive ingredients of

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[2] For a discussion of the Common Law within the context of the *nullum crimen sine lege* maxim, *vide* Glanville Williams, *Criminal Law: The General Part*, London, Stevens and Sons Ltd., 1961, second edition, pp. 592-600.

a criminal offence whilst it is the judiciary alone which applies the punishments contemplated in the provisions of a law to an offender. This implies that a penalty cannot be inflicted by analogy. Indeed, in the case of a *lacunae* in a criminal statute the judge has no other option but to acquit the accused person.

Both the *nullum crimen* and the *nulla poena sine lege* principles bring certainty within the criminal law: a person knows beforehand that a particular conduct is considered to be reprehensible by the State and, if committed, is punished accordingly. The ingredients of the criminal offence consequently have to be defined with precision so that everybody knows what is expected of him/her.

The Irish Supreme Court's decision in *King v. Attorney General*[3] concerned the construction of a vague and indefinite provision of the Vagrancy Act 1824. Section 4 thereof established the offence of 'loitering with intent' and applied to every 'suspected person or reputed thief' proved to have been frequenting, or loitering in, various public places 'with intent to commit a felony'. No overt act was necessary to prove that intent as it could be inferred from the circumstances and the accused's previous convictions (similar to the first part of article 3(2) of the Act which can also be criticised on this ground). The Supreme Court unanimously held that such a provision was untenable as -

> *... the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature... so out of keeping with the basic concept inherent in our legal system that a man may walk about in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling uncon-*

[3] [1981] I.R. 233.

> *stitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance.*

The Court consequently held that the offence under examination, both in its essential ingredients and the mode of proof of its commission, violated Article 38.1 and Article 40.4.1 of the Irish Constitution.[4]

Van Dijk and Van Hoof note that the legal certainty aimed at by the two maxims requires that Parliament formulates criminal offences clearly and unambiguously and that such laws are applied by the courts in a restrictive fashion. They opine that this 'requirement serves to avoid that a criminal conviction is based on a legal norm of which the person concerned could not, or at least need not, have been aware beforehand.'[5]

Although there are quite a number of Maltese cases which deal with the interpretation and application of these two principles, these deal mainly with the non-retroactivity of the criminal law aspect of these principles except for one case - that of *Il-Pulizija v. Capt. Joseph E. Agius*.[6] In this judgment the Court held as follows:

> *Normally there is no difficulty, if the diction of the law permits, to include things which were not included in the law when it was made. Naturally, in the case of a criminal statute, the maxim nullum crimen sine lege is of fundamental importance and, therefore, the law's interpreter should not make good by supplementing the defect in the law's diction or try to twist its text or else exclude the benefit of doubt where there is ambiguity. But where none of these hurdles et similia exist, by way of principle the old law may include other things which fall within the mischief which the statute intended to cure.*[7]

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[4] Article 38. 1 provides that 'No person shall be tried on any criminal charge save in due course of Law' whilst Article 40.4.1. provides that 'No citizen shall be deprived of his personal liberty save in accordance with Law'.

[5] Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, The Netherlands, Kluwer Law and Taxation Publishers, 1990, p. 359.

[6] Criminal Court (Appeal Competence), 14 March 1959 in *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta*, Vol. XLIII, Pt IV, 1959, pp. 1008-1015 at p. 1011-2.

[7] Author's Translation.

Numerous are the cases decided by the European Court of Human Rights and the reports drawn up by the European Commission of Human Rights on the principle of legality. Noteworthy about this case law is that two ingredients of Article 7, paragraph 1, of the Convention are identified: those of accessibility and foreseeability. As to the latter ingredient, the European Court of Human Rights held that:

> *The Court recalls that the scope of the notion of forseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 26, para 68). A law may still satisfy the requirement of forseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A, no. 316-B, p. 71, para 37).*[8]

That the Court can resort to judicial interpretation of a criminal statute has been made abundantly clear in its case law:

> *However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant develop-*

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[8] *Cantoni v. France*, 22 October 1996, paragraph 35, p. 13.

> *ment is consistent with the essence of the offence and could reasonably be foreseen.*[9]

Thus, the European Court of Human Rights applies a twofold criterion - accessibility and foreseeability - in order to determine whether the national law is in breach of the Conventional provision. Nevertheless, this article is focusing only on the aspect of the principle of legality, that is, whether the crime of espionage in article 3 of the Act is ambiguous to such extent that it contravenes the foreseeability criterion of the Strasbourg jurisprudence.

3. Article 3(1) of the Official Secrets Act

It is incumbent at this stage to analyse article 3(1) of the Act from the perspective of the *nullum crimen* maxim. Article 3(1) concerns the offence of spying and has, in a U.K. case, been extended also to cover cases of sabotage.[10] It is modelled on section 1 of the U.K. Official Secrets Act 1911 as amended by the U.K. Official Secrets Act 1920. All breaches of article 3(1) of the Act are crimes as can be seen from the penalty attached to it, namely, imprisonment for any term from three to seven years.

Article 3(1) of the Act provides that 'any person' may commit the crimes therein contemplated. In other words, this provision applies not only to Maltese citizens as defined in Chapter III of the Constitution of Malta and the Maltese Citizenship Act[11] but also to permanent residents as defined in article 7 of the Immigration Act[12] as well as to any foreigner, whatever his nationality, domicile or place of residence. In order that there may be an offence committed under this article, there must be a wrongful intention in the person committing the acts prohibited in paragraphs (a) to (c) of article 3(1), amounting to 'a purpose prejudicial to the safety or interests of the State'. The latter words, it has been held in *Chandler v. D.P.P.*, were considered by the House of Lords to involve a subjective test. Indeed,

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[9] *S[1].W. v The United Kingdom*, 27 October 1995, paragraph 36, p. 11 and *C[1].R. v The United Kingdom*, 27 October 1995, paragraph 34, p. 10.

[10] *Chandler v. D.P.P.* [1962] 3 All ER 155.

[11] Chapter 188 of the Laws of Malta.

[12] Chapter 217 of the Laws of Malta.

the court opined that these words are not directed to the actual or potential effect of the defendant's action but to his or her intention.[13]

3.1. The Interpretation of Article 3 in the Chandler v. D.P.P. Judgment

In *Chandler v. D.P.P.*[14] the House of Lords held that if a person enters an airfield which comes within the definition of a 'prohibited place' with the purpose of obstructing or interfering with the operational activities of that airfield, then s/he can be convicted of an offence against section 1(1) of the U.K. Official Secrets Act, 1911 (being the equivalent section to article 3(1) of the Act) even though s/he had no intention of spying. The fact that his/her motive for wishing to interfere was to persuade the U.K. Government to change its policy on nuclear weapons was held to be immaterial. The House of Lords also held that a person accused under this section cannot bring evidence to prove his/her interference was not prejudicial because the maintenance of the base itself was prejudicial to the safety and interests of the State. This follows, it was held, from the rule that the disposition and order of the armed forces are within the exclusive prerogative of the Crown, and cannot be challenged in the courts.[15]

This case has to be analysed in greater depth as the construction given by the House of Lords to section 1 of the U.K. Official Secrets Act 1911 might potentially conflict with the *nullum crimen* maxim of criminal law.

The appellants were charged with conspiracy to commit and to incite others to commit an offence under section 1 of the U.K. Official Secrets Act 1911, in terms of which it was a felony *inter alia* to enter any prohibited place for any purpose prejudicial to the safety or interests of the State. The appellants all admitted responsibility for organising a demonstration at Wethersfield R.A.F. station, the declared intention of the demonstration being to enter the station and ground all aircraft and demanded the reclaiming of the base for civilian purposes.

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[13] *Chandler v. D.P.P.* [1962] 3 All ER 155.
[14] *Ibid.* p. 142.
[15] *Ibid.*

Appellants appreciated that what they were doing was unlawful and that they ran the risk of prosecution under the U.K. Official Secrets Act. However, they claimed that their purpose was not prejudicial to the safety or interests of the State since their main object was to publicise the dangers of nuclear weapons. Accordingly the appellants wished to call evidence as to the desirability of the Government's policy of maintaining nuclear weapons and the dangers inherent in the policy, and of the matters on which their own actions and beliefs were founded. At the trial, Havers J. refused to allow counsel for the defence to call evidence either as to the defendant's belief that their acts were beneficial to the State, or to show that their purpose was not in fact prejudicial to the safety or interests of the State. Furthermore, the jury was directed that it was no defence that obstruction of the base would in the long run be beneficial to the State. A prosecution witness, Air Commodore Magill, gave evidence that interference with the ability of aircraft to take off was prejudicial to the safety or interests of the State. The appellants having been convicted, appealed to the Court of Criminal Appeal, which affirmed their convictions.

Lord Parker C.J. in delivering the judgement of the Court, had no difficulties in holding that the mischief aimed at by the Act was not limited to espionage or to the collection and disclosure of secret information. As section 3(c) refers to 'damage' done to a prohibited place, and section 3(d) provides that a place may be declared a prohibited place on the ground that 'the destruction or obstruction thereof, or interference therewith, would be useful to an enemy' it was clear that the Act was not limited to spying.[16]

Moreover, the Lord Chief Justice also rejected the argument that it was necessary to prove that the defendants intended to prejudice the safety or interests of the State. If Parliament had considered it necessary to prove an intent to prejudice, it would have been easy to include such a provision in the Act -

> *Once the proposed act is ascertained, as it was here, the only remaining question is whether that act is in fact prejudicial to the safety or interests of the State. On that issue the defendants' own state of mind as to the intent*

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[16] [1962] 3 W.L.R. 700.

> *with which the act was to be performed is quite irrelevant and we think that the judge was right in ruling out cross-examination and evidence on that matter.*[17]

In conclusion, the Lord Chief Justice pointed out that it was open to the defence to show that the acts proposed would not prejudice the operational effectiveness of the airfield. However, the appellants could not produce such evidence once their purpose was to immobilise the aeroplanes.

Leave to appeal to the House of Lords having being granted on the ground that the question of public importance was the proper construction of the words 'for any purpose prejudicial to the safety or interests of the State', the appellants again argued that the Act did not cover their non-violent civil disobedience. The House of Lords however dismissed their appeal thereby confirming the convictions.

The House of Lords considered whether section 1 applied only to spying or even to other offences. The object and origin of side notes was clearly explained by Lord Reid:

> *In my view side notes cannot be used as an aid to construction. They are mere catch-words and I have never heard of it being supposed in recent times that an amendment to alter a side note could be proposed in either House of Parliament. Side notes in the original Bill are inserted by the draftsman. During the passage of the Bill through its various stages amendments to it or other reasons may make it desirable to alter a side note. In that event I have reason to believe that alteration is made by the appropriate officer of the House - no doubt in consultation with the draftsman. So side notes can not be said to be enacted in the same sense as the long title or any part of the body of the Act. Moreover it is impossible to suppose that the section does not apply to sabotage and what was intended to be done in this was a kind of temporary sabotage.*[18]

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[17] *Ibid.*

[18] [1962] 3 All ER 145, 146.

3.2. Observations on the Chandler Judgment

A number of observations need to be made on the *Chandler* judgement. First, it must be pointed out that no similar charge as that preferred against Mr. Chandler and the other five accused could be preferred in Malta under the Act due to the fact that the said Act does not contemplate a conspiracy to commit any offence under the Act. On the other hand, it is possible to prefer such a charge under the general offence of conspiracy as contained in the Criminal Code.[19] This notwithstanding, the Chandler judgement is still important for a proper construction of article 3(1) of the Act as the House of Lords has authoritatively interpreted the expression 'any purpose prejudicial to the safety or interests of the State' in the opening part of section 1(1) of the U.K. 1911 Act. Unfortunately, the Maltese Criminal Court has avoided in the three cases prosecuted under article 3(1) of the Act to define these words.[20]

Secondly, the House of Lords in the *Chandler* case has extended section 1 of the U.K. 1911 Act to include sabotage apart from spying. However, although the term 'sabotage' was used by their Lordships, no exact definition of the term was afforded contrary to the definition of spying given by Lord Radcliffe.[21] On the other hand, it seems clear from the judgement that amongst the constitutive elements of sabotage their Lordships included obstruction, interference, damage or destruction.

Donald Thompson has criticised this interpretation given by the House of Lords. He contends that by analysing the legislative history of section 1, it will be observed that the said section was not intended to cover sabotage.[22] If his construction of the provision is correct then the decision violates the *nullum crimen* principle. However, Thomas does not agree with Thompson arguing that Viscount Haldane had, when introducing the Official Secrets Bill in

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[19] Article 48A of the Criminal Code.

[20] His Majesty's Criminal Court (at Malta) has not given any definition of the said expression contrary to the House of Lords in the *Chandler* case in the three decided cases on the subject: *His Majesty the King vs. Herbert Charles Pollok and Constant Kahil*, 16 June 1934; *His Majesty the King vs. Arnaldo Belardinelli*, 13 March 1935; and *His Majesty the King vs. Dr. Nicolò Delia and Giuseppe Flores*, 26 June 1936. The provision as it obtained in the 1930s is still extant to date.

[21] [1962] 3 All ER 148.

[22] [1964] 2 QB 7.

1911, stated that 'there have been cases in which he found people close to magazines - very convenient targets for dropping explosives from above' as implying that Haldane had also sabotage in mind.[23]

Thomas quoting *Regina v. Aubrey, Berry and Campbell* points out that at first Berry and Campbell had been indicted for section 1 charges although later such charge was dropped. Thomas contends that this implies that section 1 may thus be applied also to subversion even though there is no decided case which confirms this interpretation.[24] I do not see any conflict with the *nullum crimen* maxim as the wording of section 1 of the U.K. Act admits of a construction to include sabotage. After all, it is only the marginal note in articles 3 and 17 of the Act (i.e. sections 1 and 7 respectively of the U.K. Official Secrets Act 1911) which mention 'spying': the text of articles 3 and 17 of the Act do not expressly use the term; nor are we afforded in the Act with a definition of the expression 'spying'. Indeed, whilst the marginal note to article 17 of the Act reads 'Penalty for harbouring spies', article 17 is by far wider as it contemplates the crime committed by any person who harbours another person who is about to commit or who has committed 'an offence under this Act'. The latter expression covers not only article 3(1) offences but also all offences created under the Act even though no question of spying may be involved as in the case of an unlawful disclosure of information (articles 6 to 13) or the offence committed by a forward receiving agent (article 21(4)).

Furthermore, I also agree that section 1 of the U.K. 1911 Act may be further expanded to include subversive acts in so far as sabotage is but only one particular manifestation of a subversive activity. Indeed, the amendments which were proposed in a Home Office report to the Official Secrets Act 1889 and which were subsequently included as section 1 of the Official Secrets Act 1911 were intended to include not only actual espionage but also -

> *... the preparation for and carrying out of those secret attacks on arsenals, explosive factories, and works of*

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[23] Rosamund M Thomas, *Espionage and Secrecy: The Official Secrets Act. 1911* in Public Law, 1963, pp. 201-226.

[24] Rosamund M. Thomas, *Espionage and Secrecy: The Official Secrets Acts 1911 - 1989 of the United Kingdom*, London, Routledge, 1991, pp. 38-39.

> *strategic importance which would be attempted during the critical moment preceding or immediately following a declaration of war or an attempted invasion.* [25]

The criticism levelled against the definition of what constituted the equivalent of a prohibited place in the Official Secrets Act 1889 made in this report was to include acts of sabotage apart from spying -

> *It seems desirable to have words which clearly include telegraph stations and lines, wireless stations, electrical apparatus, and everything else which might be destroyed by explosives ...*[26]

The report also suggested that a spy should be defined as a person engaged in any proceedings which constitute offences under section 1 of the Official Secrets Act 1889 and that, therefore, both acts of espionage as well as hostile acts were included in what was intended by the term 'spy'.[27] These recommendations were incorporated in the text of the Official Secrets Act 1911.

Moreover, commentators on the criminal law agree that section 1 of the U.K. Official Secrets Act 1911 applies also to sabotage. Smith and Hogan contend that the literal meaning of section 1 extends beyond spying. They cite as an example that of a person who approaches an airfield or munitions factory with the object of causing an explosion, so as to impede the defence of the realm against an enemy and conclude that if 'this is a purpose prejudicial to the safety or interests of the State, his conduct falls within the plain meaning of section1.'[28] They further express the opinion that there is nothing in the Act which supports the narrow construction which

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[25] Appendix V of the *Report And Proceedings Of A Sub-Committee Of The Committee Of Imperial Defence Appointed To Consider The Question Of Foreign Espionage In The United Kingdom,* October 1909, p. 33.

[26] *Ibid.,* p. 34. It is further stated that - It is also important to protect those points, not being military or naval works, where mischief might be done, with the help of explosives, at a critical time, e.g., bridges or viaducts likely to be used in the concentrating of troops at the moment of a hostile landing.

[27] *Ibid.,* p. 36.

[28] J.C. Smith and Brian Hogan, *Criminal Law.*, London, Butterworths, 1988 (sixth Edition), p. 839.

defence counsel sought to give to section 1, and that 'the decision on this point seems clearly correct'.[29]

Third, the terms 'safety' and 'interests' are not synonymous. Whilst the term 'safety' is more akin to the term 'security', the expression 'interests' has to be given a wider interpretation. Indeed, the latter term may include interests of the State which are not of a defence or military nature but, say, of an economic, technological or scientific nature. In this case, although there is no real or imminent threat to the existence of the State, the State itself may want to suppress the disclosure of any information which a potential enemy might be interested in acquiring and which the State considers, e.g., in its economic interest, that such information should not be divulged.

Of course, these interests have always to be linked to a 'purpose prejudicial to the State' and such information has to be 'useful to an enemy' in order that the crimes contemplated under article 3(1)(b) and article 3(1)(c) of the Act might subsist. In the case of article 3(1)(a) there need not be the second ingredient, that is, usefulness to an enemy, in so far as this element does not form part of the constitutive ingredients of article 3(1)(a). Once the definition of a prohibited place may be extended by the Prime Minister, the crime contemplated under article 3(1)(a) may well cover non-military places such as a laboratory where experiments are carried out to produce solar energy operated cars.

Fourth, what does the term 'State' mean? I think that this term should be contrasted with the expressions 'Republic of Malta' and 'Government of Malta' as used in the treason provision of the Criminal Code.[30] Indeed, the term 'State' is equivalent to the expression 'Republic of Malta' and not to the term 'Government of Malta' because 'Government of Malta' can be construed in a narrow way to mean only the executive branch of the State (including the Armed Forces of Malta and the Maltese Police Force) thereby excluding the Legislature and the Judiciary. On the other hand, the term 'State' is more embracing and should also include all the organs of Government.[31]

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[29] *Ibid.* p. 789.

[30] Article 56 of the Criminal Code.

[31] The notion of 'State' is discussed in Alf Ross, *On The Concepts "State" and "State Organs" in Constitutional Law,* Scandinavian Studies in Law, 1961, Vol. 5, pp. 111-

In *Chandler v. D.P.P.*, it was held that 'State' (per Lords Reid and Hodson) meant the organised community or (per Lords Devlin and Pearce) the organs of Government of a national community, and the words 'the interests of the State' meant such interests according to the policies of the State as they in fact were, not as it might be argued that they ought to be.[32]

The State is a politically organised community under a sovereign government. Such State need not have a democratic government: there might well be a dictator in power even though, in both the U.K. and in Malta, such is not the case.

With regard to the offences contemplated under article 3(1) of the Act, the state is the victim against which the crimes therein mentioned are perpetrated. The State is thus not only a politically organised community but also a subject of rights: the crimes mentioned in article 3(1) are committed against a juridical person - the State. Indeed, the Act considers the State as the juridical person *par excellence* of public law as the protection which it is being afforded by the criminal law has been singled out in its favour as distinct from the other subjects of the law (such as natural persons or other moral persons).

For the purposes of article 3(1), it is necessary to distinguish between the real personality of the state (i.e. the community of people) and the juridical personality of the State. When any crime is committed, even though the victim usually is a natural person, that crime is also committed against the State as the State's authority is being questioned. In the crimes contemplated under article 3(1), the passive subject of the crimes is not a natural person but the State itself. The juridical personality of the passive subject and that of the State under article 3(1) are fused together.

The constituent elements of the juridical personality of the State are those which are found in Article 1 of the Montevideo Convention on Rights and Duties of State, 1933:

129; H.C. Dowdall, *The Word "State"* in The Law Quarterly Law Review, 1923, Vol. 39, pp. 98 - 125; Giorgio del Vecchio, *The Crisis of the State* in The Law Quarterly Review, 1935, Vol. 51, pp. 615-636; Rolando Tamayo Y Salmoran, *The State as a Problem of Jurisprudence* in Henri J.M. Claessen and Peter Skalmik (Eds.) *The Study of the State,* The Hague, Mouton Publishers, 1981, pp. 387-407 and Hans Kelsen, *Pure Theory of Law,* Berkeley: University of California Press, 1967, pp. 279-344.

[32] [1962] 3 All E.R. 143.

> *The State as a person of International Law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.*[33]

Thus, Government is only one out of the four constituent ingredients of statehood under Public International Law.[34] What is important in this context is that the term 'State' as defined in the Montevideo Convention should not be confused with the term 'Government'.[35] Again, the Constitution of Malta gives the term 'State' a very wide meaning;[36] in the Constitution, the term 'State' can be easily substituted by the expression 'the Republic of Malta'.[37]

These principles under discussion require that punishment may be inflicted only when the act in question is clearly considered by law to be punishable. It must therefore correspond to the statutory definition of the offence charged. The judge is deprived of all creative capacity in this sphere and s/he cannot, as the Law Lords did in the *Chandler* case, introduce novel elements such as the royal prerogative which is not recognised in Malta in construing article 3(1). In the case of a *lacuna*, the judge has only one option - that of acquitting the accused - even though it would be to the advantage of society that the mischief in question should be reprehended.

Furthermore, due to the royal prerogative, one of the constituent elements of section 1 of the U.K. Act was in *Chandler v.D.P.P.* not proved in the normal way, that is, by bringing forth evidence and being cross-examined on it, but a single declaration made by a rep-

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[33] D.J. Harris, *Cases and Materials on International Law*, London, Sweet & Maxwell, 1991 (fourth edition), p. 102.

[34] Cf. Ian Brownlie, *Principles of Public International Law*, Oxford, Clarendon Press, 1990 (fourth edition), p. 72.

[35] Cf. David M. Walker, *The Legal Theory of the State* in Juridical Review, 1953, Vol. 65, pp. 255-261.

[36] 'State' is used twelve times in Chapter II of the Constitution of Malta and the obligations imposed by the Constitution on the State have to be exercised by one and all and not only by the Executive organ of the State.

[37] Articles 8 and 9 of the Constitution are a literal translation of article 10 of the Italian Constitution. In the Italian Constitution the term 'Repubblica' is used whilst in the Maltese version it has been translated as 'State'.

resentative of the State was considered sufficient to constitute evidence. The evidentiary rules of credibility were thus displaced once an authoritative declaration was made by Air Commodore Magill that a particular act was prejudicial to the safety or interests of the State. This made it very difficult for the accused to put up any defence at all once the competent officer had given his evidence.

One must admit that it is the Government who should set out the country's defence policy and that a court should as far as possible avoid a political debate in a judicial forum. But should these assertions imply that the right of cross examination be denied to an accused person whose liberty is at stake?

Even the right to a fair trial might have been prejudiced in *Chandler v. D.P.P.* as the Government adduced expert evidence - that of Magill - apart from the fact that Magill in practice could not be cross-examined and the accused were deprived from adducing their own expert evidence. There does not seem to have been an equality of arms between the Prosecution and the Defence.

Indeed, the Chandler judgement was criticised on the ground that it was inappropriate to resort to the Official Secrets Act against nuclear protesters when, as D.G.T. Williams opines, it was then possible to have recourse to the common law offences of riot (or violent disorder) unlawful assembly, affray and other crimes affecting public order.[38]

Thomas concludes this argument by proposing that -

> *... although section 1 of the 1911 Act should not be invoked for crimes other than espionage without careful consideration of alternative laws under which charges could be brought, its terms remain available to deal with sabotage and related offences at a 'prohibited place' by consent of the Attorney General.*[39]

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[38] D.G.T. Williams, *Not In The Public Interest: The Problem Of Security In Democracy*, London, Hutchinson & Co. Ltd., 1965, pp. 109-111. These are now statutory offences under sections 1 to 10 of the Public Order Act 1986.

[39] Rosamund Thomas, *Espionage and Secrecy: The Official Secrets Acts 1911-1989 of the United Kingdom, op. cit.*, p. 94.

4. The Ambiguity of Article 3(1)(c) of the Act

The next aspect to be considered is whether article 3(1)(c) of the Act is clear or otherwise. Must the information mentioned therein apply only to the communication of information that is officially secret? Article 3(1)(c) contemplates communicating 'any secret official code word or password, or any sketch, plan model, article or note or other document or information'. In interpreting the equivalent expression to article 3(1)(c) of the Act, Canadian Courts[40] have on a number of occasions held that only 'secret official' information is subject to the Canadian Official Secrets Act.

Do the words 'secret official' in article 3(1)(c) refer only to 'code word' and possibly 'password' or do they qualify all of the list mentioned in article 3(1)(c) including 'information'? M.L. Friedland[41] argues that the words 'secret information' did not appear in the 1889 or 1911 U.K. Official Secrets Acts. In fact, these words were added by a Schedule at the end of the U.K. 1920 Act and were referred to in the Act itself as 'minor details'. No one suggested that by adding these words the meaning of the 1911 Act was being changed. Indeed, the 1911 Act was introduced in part to control the activities of German agents who were openly collecting information that was clearly not secret or official such as sketching harbours.

In the U.K. it is not at all surprising that the words 'secret official' have been held to qualify only the words 'code word' and 'password'.[42] Not only is this interpretation given to section 1 of the U.K. Official Secrets Act 1911 but also to section 2 thereof where the words 'secret official' are also used. Indeed, it has been held in the U.K. that the information under section 2 of the 1911 Act need only be of an official character and not necessarily secret.[43]

Canadian Courts do not agree with their British counterparts in construing the expression 'secret official'. In the *Biernacki Case*,[44]

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[40] Franks Committee, *Departmenal Committee on Section 2 of the Official Secrets Act 1911*, London, H.M.S.O., Cmnd. 5104, Volume 1, 1972, p. 125. Franks Report, *op. cit.*, p. 125.

[41] Martin L. Friedland, *A Century of Criminal Justice*, Toronto, Carswell Legal Publications, 1984, p. 147.

[42] Franks Committee, *op. cit.*, p. 125.

[43] *R. v. Crisp and Homewood* (1919) 83 J.P. 121.

[44] Judgement No. 5626, Court of Preliminary Inquiry, District of Montreal. This

Judge Shorteno dismissed the accused at the preliminary hearing on the ground that there was not sufficient evidence to warrant a committal for trial. Indeed, the accused went to Canada from Poland and began to collect information preparatory to the setting up of an espionage ring. According to the judgement, the information which Biernacki was collecting did not correspond to that contemplated in section 3(1)(c) of the Canadian Official Secrets Act. Judge Shorteno decided that the words 'secret official' qualify not only 'code word or password' but also the rest of the clause so that the term 'information' should be read as secret and official information.

The grammatical construction of article 3(1)(c) of the Act is not a clear one and one may argue in favour of two different and opposite constructions. One can argue in favour of Judge Shorteno's decision in the sense that once there is no comma inserted between 'code word' and 'password', the expression 'secret official' applies to all the list mentioned in article 3(1)(c) as it does not only qualify the term 'code word'. Moreover, one can also argue that the title of the Act itself may be used as an aid to construing article 3(1)(c) as the title is contemplating official secrets.

M.L. Friedland argues that the phrase 'official secret' is used nine times throughout the Canadian Official Secrets Act and that in each case it precedes the word 'code word' or 'password'. In six occasions no comma is used. Furthermore, there are two instances where the expression 'secret official code word or password' appears at the end of the same list found in article 3(1)(c) and, therefore, cannot possibly qualify the earlier specific items.[45] In the *Toronto Sun Case*, Judge Walsberg discharged the accused on the preliminary hearing because the information had to be secret and in that case it could no longer be assumed that it was such.[46]

If the information need not be 'secret official' as the U.K. Courts hold, is not one widening article 3(1)(c) too much? Consider, for example, the Canadian case of *Spencer*.[47] Spencer was a post-office

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judgement is unreported. Cf. M.L. Friedland, *National Security: The Legal Dimension*, Toronto, footnote no. 116 at p. 147.

[45] *Ibid*, p. 42.

[46] *R. v. Toronto Sun Publishing Ltd.* (1979) C.C.C. (2d) 535 (Ont. Prov. Ct.).

[47] Cf. *Report of the Commission of Inquiry into Complaints Made by George Victor Spencer*, Ottawa, 1966.

employee who supplied the Russians with important information that would help them establish foreign agents in Canada. This consisted of outwardly innocuous information on such matters as names, with dates of birth and death, gathered from tombstones in local cemeteries. The Russians could then send in an agent with a foreign birth certificate and other documentation who would take on the identity of one of these persons. Since the real person was dead the chance of detection was lessened.

If the British construction were adopted, Mr. Spencer would probably be found guilty of an offence as the information which he had collected was not 'secret official' and, consequently, falls under section 1(1)(c) of the 1911 Act. On the other hand, if Mr. Spencer was charged before a Canadian Court, the probability is that he would be discharged at the preliminary hearing as the information gathered by him is not 'secret official' and, consequently, does not contravene section 3(1)(c) of the Canadian Official Secrets Act.

With regard to the expression 'obtains' in article 3(1)(c) of the Act reference is to be made to article 2 of the Act which provides that expressions referring to obtaining any sketch, plan, model, article, note or document includes the copying or causing to be copied the whole or any part of any sketch, etc. and that the expression 'communicating' in the same paragraph includes communication in whole or in part, and whether the sketch, etc. itself or the substance, effect, or description thereof only be communicated, and also includes the transfer or transmission of the sketch, etc.

Collection of information may take place in several ways. Electronic surveillance is but one of the modern techniques to collect information. Interception of oral communications by technical devices can take two different forms: the recording of telephone conversations and the planting of hidden microphones. Although Maltese Law does have among its enactments a law regulating the interception of communications,[48] article 3(1)(c) of the Act does to a certain extent regulate such a matter in so far as -

(a) there is collection of information by electronic surveillance;
(b) such task is undertaken for any purpose prejudicial to the safety or interests of the State; and

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[48] Security Services Act, Cap. 391, articles 6 to 10.

(c) the information gathered is calculated to be or might be or is intended to be directly or indirectly useful to an enemy.

It follows from article 3(1)(c) of the Act that mere collection of such information as, for example, that regarding the supplies or resources of a locality, or the contents (or emptiness) of a military storehouse, or the reconnaissance of tactical positions, or the addition of details not included in published official maps, may be an offence under this section, whether or not there is any communication to any other person.

Article 3(1)(c) of the Act applies to all such information, whether relating to a prohibited place[49] or not, although more proof of a prejudicial purpose is necessary where the information does not relate to a prohibited place.

In order to comprehend what information is calculated to be or might be useful to an enemy under article 3(1)(c) of the Act, reference may be made to the case *R. v. M.*,[50] a case under the similar provisions contained in Regulation 18 of the U.K. Defence of the Realm (Consolidation) Regulations, 1914, when it was held that if a person intentionally communicates information, intending to inform and not to mislead, it is immaterial whether the information is true of not.

An objective test has to be adopted in order to appreciate what 'might be directly or indirectly useful to an enemy' in article 3(1)(c) of the Act. This expression does not look at what the accused intended. On the other hand, what is 'intended to be directly or indirectly useful to an enemy' poses a subjective test as here one has to discern what the accused intended.

As to what is 'calculated to be directly or indirectly useful to an enemy', the term 'calculated' has to be first interpreted. Glanville Williams holds that the primary meaning of 'calculate' is to reckon or design but the notion of design gradually disappeared, leaving merely the sense 'suited; of a nature proper or likely to'.[51] He thus opines that if the word is found in a criminal statute, it should -

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[49] This is defined in article 2 of the Act.
[50] [1915] 32 1 Times Law Reports 1, C.C.A.
[51] Glanville Williams, *op. cit.*, p. 66.

> *... in accordance with the general presumption that mens rea is required, be interpreted in the primary sense of the verb as involving design or at least foresight.*[52]

In article 3(1)(c) of the Act, *mens rea* is not presumed but contained within the meaning of the term 'any purpose'. Thus, it seems that the correct construction of the expression 'calculated' should be that of 'likely'. It is the same meaning which is given by the U.K. Law Commission to this expression in section 53(1) of the U.K. Police Act.[53] Thus. it appears that the objective meaning should be upheld.

As to the term 'enemy', this term is not restricted to belligerents but has a wider meaning as is the case with the meaning given to the term in *R. v. Parrott*.[54]

What has to be established here is whether there is any ambiguity as aforesaid in this provision. The solution seems to differ according to which construction is given to section 3(1)(c), i.e. whether the Canadian or the British interpretation is adopted. But before taking up this aspect it is necessary to clarify at this stage what is meant by the expression 'any purpose prejudicial to the safety or interests of the State'.

5. Ambiguity in Establishing The *Mens Rea* Requirement

The leading case concerning the construction of the expression 'purpose prejudicial to the safety or interests of the State' is *Chandler v. D.P.P.* According to Lord Reid, 'purpose' within the meaning of section 1 of the U.K. Official Secrets Act 1911 was to be distinguished from the motive for doing an act, and the words 'any purpose' meant or included the achieving of the consequence which a person intended and desired to follow directly on his act, viz. his direct or immediate purpose as opposed to his ultimate aim, and even if a person had several purposes, his immediate purpose remained one of them and was within the words 'any purpose'.[55]

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[52] *Ibid.*

[53] The Law Commission, *Codification of the Criminal Law - Treason, Sedition and Allied Offences*, Working paper No. 72, London, H.M.S.O., 1977, p. 55.

[54] [1913] 8 Cr. App. R. 186.

[55] *Chandler v. D.P.P.* [1962] 3 All ER 143.

The House of Lords held that if a person's direct purpose in approaching a prohibited place was to cause obstruction or interference, and such obstruction or interference was found to be prejudicial to the defence dispositions of the State, an offence was thereby committed under the section; the indirect purposes or motives of the accused in bringing about the obstruction or interference did not alter the nature or content of his offence.[56]

Lord Radcliffe held that in the *Chandler Case* it was not difficult to draw a distinction between the purpose and the motive, as the purpose of the appellants had been to immobilise the airfield, the motive being to achieve their ultimate aim in regard to nuclear disarmament. The statute was concerned with the direct purpose and not with the motive or indirect purpose.

Another point made by the House of Lords concerns what constitutes the state and the interests of the state. Though Lord Reid held that 'State' means 'the organised community'[57] he held that the words 'the interests of the State' did not necessarily mean the interests of the majority; and distinguishing the court's right to consider what is in the public interest he considered that the Act should be construed if possible so as not to leave the jury the political question of whether a particular policy was beneficial in the interests of the State.[58]

Once the organs of government had decided their policy it was not open to the courts to consider the rightness or wrongness of it.[59] The Courts cannot inquire into matters of policy decided under the prerogative powers or under statutory powers giving discretion in management or control.

Accordingly, once the Government has determined its policy and it is established that the actions of the defendant conflict with that policy then if it may be evident that the policy is foolish and the defendant's action right, the court will be unable to intervene: the purpose prejudicial to the safety or interests of the State will be made out and the offence proved. This cannot mean that all evidence on the question of prejudice must be excluded, for the requirement that there

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[56] *Ibid.* 149.
[57] *Ibid.* 156.
[58] *Ibid.* 160.
[59] *Ibid.*

must be a purpose prejudicial to the safety or the interests of the state is clearly essential for liability under the section, and must be determined by the jury.

If the British construction of section 1(1)(c) of the U.K. Official Secrets Act 1911 is adopted, then this means that the Strasbourg organs would have to examine the construction given by British Courts to that paragraph, namely that -

(a) not all the information named therein need to be secret;
(b) that 'safety or interests of the State' means essentially what the Government says that it is.

6. Conclusion

It is difficult to consider as reasonable a provision that in its completed form establishes 32,400 different permutations of the offence, let alone if a preparatory act, an attempt, a conspiracy or an incitement to commit a crime under article 3(1) of the Act are added thereto. When article 3(1) of the Act is read together with article 23[60] of the Act, the combined effect - excluding complicity - is that these two provisions combined together contemplate 1,296,000 distinct offences. Again, this amount does not take on board the extensive interpretation that may be given to article 3(1) of the Act through the application of articles 3(2) and 3(5) of the Act.

Although *stricto jure* subversion is part and parcel of the offence created by article 3(1) of the Act, there is no doubt that this provision should have clearly and unequivocally said so: it should not be left to the courts to make sense of what the legislator had in mind when enacting the statute. Furthermore, once the provision under examination's marginal note refers to spying, this term should also be clearly defined and its constitutive ingredients set out with precision to distinguish them from the other crimes contemplated in the

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[60] 23. Any person who attempts to commit any offence under this Act, or solicits or incites or endeavours to persuade another person to commit an offence under this Act, or aids or abets and does any act preparatory to the commission of an offence under this Act, shall be liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

Official Secrets Act such as sabotage, obstruction, interference, or disclosure of official information.

The fact that different courts - British and Canadian - have given a different interpretation to the equivalent provision in the U.K. and Canadian Official Secrets Acts to article 3(1) of the Act, in itself already points out to the unclear nature of the provision under review. Not only so but the divergent interpretations given cannot be said to be minimal in view of the fact that U.K. and Canadian courts have delivered contradictory and irreconcilable opinions.

Finally, the *mens rea* ingredient of this crime tends to be very subjective and not easily discernable because it depends to a large extent on what a prosecution witness sets it out to be. This, of course, makes it impossible to know with absolute certainty what is actually being criminalized especially in the case of the U.K. where, due to the royal prerogative, it is not possible to cross examine the said witness.

Undoubtedly, for the reasons given above in this conclusion, the provision under examination - which dates back to 1911 - infringes the *nullum crimen sine lege certa* maxim of human rights law and hence the necessary action should be taken by the Maltese legislature for its reform.

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