GOVERNMENT LITIGATION PRIVILEGES IN MALTA- IS THE RIGHT TO A FAIR HEARING AT RISK?

Ruth Bonnici

ABSTRACT

Governments enjoy certain privileges which are necessary for the efficient governance of a country. These privileges, by benefitting the government with advantageous conditions or imposing further requisites on the individual may potentially impinge upon an individual's right to a fair hearing by denying him access to justice or making such access more difficult.

KEYWORDS: ADMINISTRATIVE LAW – LAW OF PROCEDURE – HUMAN RIGHTS LAW – ARTICLE 6 ECHR

GOVERNMENT LITIGATION PRIVILEGES IN MALTA- IS THE RIGHT TO A FAIR HEARING AT RISK?

Ruth Bonnici[1]

1. Introduction

In the field of litigation the Government enjoys certain privileges which are mostly of a procedural nature. Most of these privileges are found in the Code of Organisation and Civil Procedure[2].These include the right for the Government to be served with a judicial intimation ten days prior to the filing of a writ against it;[3] the power of the Government, in specified instances, to bypass litigation and obtain the issue of an executive warrant of seizure on the sworn declaration of a Head of Department when an amount is due;[4] the right of the Government to have its cases heard before others;. There are also various limitations on the issue of warrants of prohibitory injunction against it and the fact that no precautionary warrants, except a warrant of prohibitory injunction, may be obtained against the Government[5].There are other privileges relating to evidence, Government files and documents and these include the exemption of the Government from paying any guarantee in relation to proceedings initiated by it,[6] and tax related privileges. Evidently some of these privileges might interfere with one's right to a fair trial while others that simply aid the administration of government are necessary, justifiable and could not impede the other party's rights.

The right to a fair trial requires respect for the principle of equality of arms. The duty to act fairly (or the notion of 'natural justice') is reminiscent of Article 6 of the European

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2 Chapter 12 of the Laws of Malta, COCP.

3 COCP, Article 460 (1).

4 COCP, Article 466.

5 COCP, Article 837 (2).

6 COCP, Article 905 (a)

Convention of Human Rights (herein after the "ECHR") and article 39 of the Constitution of Malta which enshrines these principles. The most important of these principles and which is highly relevant for the discussion at hand is 'nemo judex in causa propria', the rule which states that no one should be a judge in his own case. These principles must be safeguarded throughout the whole of the judicial process, including at the pre-trial stage. Moreover other requisites to the right to a fair hearing include: real and effective access to a court and possibly also to legal aid;a hearing before an independent and impartial court or tribunal established by law to be held within a reasonable time; real opportunities to present one's case or challenge it; reasons to be given for the judgment; and the publicity of the hearing and the judgment. This right holds such a 'prominent a place in a democratic society...that it cannot be sacrificed to expediency'[7] even though most of the privileges are necessary for efficient governance.

2. Proceedings against the Government

Subject to certain exceptions, section 460(1) of the COCP provides that,

> No judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded against the Government… except after the expiration of ten days from the service against the Government of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated.

If a person fails to give such prior notice, the act or proceedings will be null. The only procedures exempted from this requirement are: (a) actions for redress on the basis of a violation of human rights under section 46 of the Constitution; (b) warrants of prohibitory injunction; (c) actions for the correction of acts of civil status; (d) actions to be heard with urgency; and (e) referrals of disputes to arbitration.[8] Moreover, section 460(1) does not apply in the case of electoral disputes and in those cases where according to the provisions of any law a particular procedure including a time limit or other term is to be observed.

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7 *Kostovski Case v the Netherlands* [20.11.1989] (ECHR) Series A, No. 166 20.

8 COCP, Article 460 (2).

The Civil Court, in *David Harding v Lawrence A. Farrugia et*[9], remarked that the Government and other bodies and persons mentioned above are placed in a special and privileged position when one compares them to other defendants in judicial proceedings.

Prior to the 1981 amendments, there was no such requirement regarding the prior notice of an action against the Government.[10] 'The Ostensible purpose of this enactment is to give government a chance, if it deems the request made in the judicial letter or protest to be justified, to comply therewith voluntarily, thus avoiding court proceedings.'[11]According to the 1993 White Paper prepared by the Permanent Law Reform Commission (hereinafter the "PLRC" or Commission) [12]this 'draconian measure is unnecessary and in no way helpful to the ultimate resolution of the dispute on the merits.' In fact the PLRC had proposed that this provision be deleted. Unfortunately, however, despite the Commissions's remarks and recommendations this rather extreme measure has been retained by the legislator thus continuing to restrict one's opportunity to present his case and have access to justice merely on such a procedural point which tips the scales in favour of the Government.

This has been repeated by the Commission for the Holistic Reform of the Justice System, in its final report;

> Din il-Kummissjoni qiegħda tirrakkomanda illi kawża kontra l-Gvern, tibda mill-ewwel u ma jkunx hemm għalfejn iċ-ċittadin jaħli l-ħin biex jistitwixxi proċedura bla bżonn u jonfoq flus żejda biex joqgħod jibgħat ittra uffiċjali lill-entità tal-Gvern konċernata, sempliċement biex jinformaha li se jagħmel kawża kontra dik l-entità tal-Gvern. Dan apparti l-fatt li ċ-ċittadin m'għandux l-istess *equality of arms* kontra l-gvern.[13]

The Maltese Courts have given article 460 a restrictive interpretation. The Civil Court, in *Venugopal Jeyakrishna Moorthy v. Chairman Korporazzjoni tax-Xogħol u Taħriġ*[14]*,* stated;

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9 9.02.1987 CC

10 The notice of action procedure in Maltese law; should it be repealed?, Kevin Aquilina, *Mediterranean Journal of Human Rights*, Vol. 12, pp. 57-81

11 *Special Treatment of Government in Procedural Matters*, Michael Spiteri, LLD Thesis 1981, pp 22.

12 This is a body commissioned by the respective officer of Government to draft legislation in the name of the aforesaid in accordance with its instruction.

13 Commission for the Holistic Reform of the Justice System, Final Report 30th November 2013, 64.

14 [24.11.2010] CC.

> Illi f'għadd ta' sentenzi li ngħataw minn dawn il-Qrati fit-tifsir li huma taw lil dan l-artikolu, ingħad dejjem li l-azzjonijiet li ma jaqgħux taħt il-morsa tal-imsemmi artikolu 460 huma dawk li jissemmew b'mod tassattiv fis-subartikolu (2) ta' dak l-artikolu. Kull azzjoni oħra li taqa' 'l barra minn dawk il-każijiet speċifiċi trid tabilfors tgħaddi mill-għarbiel preventiv tal-interpellazzjoni..."Illi l-Qorti hija tal-fehma li l-imsemmi artikolu jgħodd ukoll għal kawża ta' stħarriġ ġudizzjarju mressqa taħt l-artikolu 469A tal-Kap.12 tal-Liġijiet ta' Malta (*Grace Sacco v. Superintendent Mediku fl-isptar Ġenerali ta' Għawdex*), u dan għaliex azzjoni bħal dik ma taqa' taħt l-ebda waħda mill-għamliet ta' proċeduri mssemmija fis-subartikolu (2) tal-artikolu 460, liema lista hija waħda tassattiva.[15]

The six month period provided for in Article 469A COCP cannot be interrupted in any manner and therefore cannot be extended. Thus effectively a person wishing to sue the government on the basis of 469A has six months less ten days to file the case.

In the case referred to above an explanantion of the article was provided and the justification elaborated upon;

> Hu fatt indubitat li l-Artikolu 460 tal-Kap. 12 hu min-natura tiegħu odjuż in kwantu jista' jagħti lok għal dikjarazzjoni ta' nullitá u jtellef persuna drittijiet meta wieħed iqies it-terminu ta' sitt xhur impost għall-istħarriġ ta' għemil amministrattiv skond l-Artikolu 469A tal-Kap. 12. Madanakollu bl-emenda li daħlet fis-seħħ bl-Att VIII tal-1981 il-Gvern, il-korpi u l-persuni ndikati fl-artikolu *de quo* ġew imqegħdin f'posizzjoni differenti u privileġġjata minn intimati u/jew konvenuti oħrajn li jkunu qiegħdin jittieħdu kontrihom proċeduri ġudizzjarji. Mid-diċitura wzata mill-leġislatur jirriżulta wkoll li l-liġi tirrikjedi tassattivament il-preżentata tal-ittra uffiċjali jew il-protest ġudizzjarju. L-iskop ta' dan il-provvediment hu sabiex jagħti lill-Gvern, il-korpi u l-persuni ndikati l-opportunitá li jiddefendu lilhom infushom kif jixraq f'każ li jittieħdu xi proċeduri kontra tagħhom.[16]

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15 In numerous judgments delivered by these Courts in the interpretation given to this article, it has always been stated those actions that do not fall within the eventualities contemplated by article 460 are expressly mentioned in subarticle (2). Any other action which is beyond these specific cases is not exempt. In the Court's opinion the mentioned article applies also in the case of judicial review brought under article 469A of Chapter 12 of the Laws of Malta (*Grace Sacco v. Superintendent Mediku fl-isptar Ġenerali ta' Għawdex*), and this because such an action does not fall under any of the actions mentioned in article 460 (2).

16 *Grace Sacco v Is-Superentendent Mediku fl-Isptar Ġenerali ta' Għawdex et* [16.10.2007] CC.

The Government is in a way being given more time than if it were any other person, who is thus being given less time,and one would have the case thrown out on a procedural point, thus impinging upon the right to access to justice and right to a fair trial. An alternative system should be applied to save such cases while still allowing the Government enough time to defend itself since the trend is against nullity of cases for procedural irregularity although the courts are still strict on this rule.

One could here thus suggest an expansion of the exemptions to include actions brought under Article 469A to reduce the number of justified claims of administrative unfairness which are thrown out in case of failure to adhere to this procedure. This could be done since one can interpret the 469A procedure as similarly including and protecting rightssafeguarded by the Constitution thus falling under Article 460 (1) COCP and thereby being exempt from this restrictive procedure.

Article 460 is given such importance that the fact that the Court Registrar allows the writ to be filed is made irrelevant to the question of its nullity. The nullity that is brought about is absolute and cannot be corrected.[17]This was the case in *Roger Sullivan noe v Comptroller of Customs*[18] where the plaintiffs brought an action against the Comptroller claiming recovery of damages suffered by them as a result of the execution of a warrant of seizure. The Defendant, among other things, pleaded that the writ was null as he had not been previously served with an official letter calling upon him to effect payment of the damages claimed. The failure of plaintiffs to do so brought about the nullity of their writ and defendant had to be non-suited. The applicant thus lost the case on the basis of this procedural privilege.

1. Proceedings for debts due to Government

Prior to 1995 the Government could enforce a claim without awaiting the court's judgment. The Head of the Department concerned had to ask the Court to issue a warrant of seizure

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Undoubtedly Article 460 of Chapter 12 is in its nature odious in so far as it enables a declaration of nullity and breaches individuals' rights when one considers the six month time limit imposed in Article 469A. Nevertheless, by virtue of the amendments introduced by Act VIII of 1981 the Government, and entities indicated in the article are put in a different and privileged position from other defendants against whom judicial proceedings are brought. The law also requires the service of a judicial letter or the judicial protest. The point of this law is to give the Government, and listed entities and bodies the opportunity to defend themselves as they see fit when procedures are instituted against them.

17 *Advocate Dr.Louis Vella et v Ronald Grech*, [22.6.1992], CC.

18 [15.1.1993], CC.

against the debtor upon his sole oath that the debt was due. A writ demanding payment was not needed at any point in time. It was not possible to stop or delay this warrant, and the debtor could either suffer execution or pay under protest. After the execution of the warrant the debtor had the opportunity to bring an action for a declaration that the sum was not owing to the Government.[19] This was a breach of article 6 ECHR because there was a determination of civil rights without a judgment from any impartial and independent court or tribunal and such access was only available after issuance of the warrant. The case, *Spiteri noe v Acting Comptroller of Customs*[20]clearly illustrates the position before 1995. Sections 466 and 468 of the Code of Organization and Civil Procedure have since been amended by the 1995 Act.

The same law was consequently tested in *Busuttil v the Prime Minister*[21]. As the law prohibited the debtor from challenging, stopping or delaying the proceedings under the warrant there was a violation of the fair hearing rule under article 6(1) of the ECHR. 'L-art. 466 ma jikkontrastax mal-Kostituzzjoni u mal-Konvenzjoni Ewropeja. L-art. 467 tal-Kap. 12 kien hekk jikkontrasta u ghalhekk il-Kontrollur tad-Dwana ma setax jghaddi ghas-subbasta qabel ma jottjeni sentenza kontra r-rikorrent.'[22]

Section 467 was subsequently substituted in the 1995 amendments. Under the law as it is today there is the possibility of applying to the Court for a determination on the Government's claim. In particular the Court observed that the most offensive aspect of this procedure was that the debtor was not permitted to oppose the execution of the Government's pretended claim. Such a prohibition by an independent and impartial tribunal could produce irreversible effects as far as his property is concerned. This circumstance is giving rise to the violation of his fundamental rights in denying access to an impartial and independent tribunal.

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19 Ian Refalo, Administrative Law Case Summaries, 2012 93. It is a fact that article 460 of Chapter 12 is in it's nature odious as it can give rise to a declaration of nullity and impair a person's rights when considering the six month term imposed for the judicial review of administrative acts in Article 469A of chapter 12. However, through the amendment enacted by ACT VIII of 1981 the Government, and persons indicated in the article de quo were put in a different and privileged position when compared to other defendants against whom procedures are being brought. The law requires, compulsorily, the filing of a judicial protest or a judicial letter. The aim of this provision is to give the government and other indicated persons the opportunity to defend themselves when procedures are instituted against them.

20 *David Spiteri noe v Acting Comptroller of Customs* [30.10.1989] CA. Commercial Jurisdiction

21 *Joseph Busuttil nomine v Prime Minister* [20.7.1994] Constitutional Court.

22 *Ibid*. Article 466 does not go against the Constitution or the European Convention. Article 467 of Chapter 12 was in breach and thus the Comptroller of Customs could not opt for auction before acquiring a judgment against applicant.

In article 466 the Government is given the power to bypass litigation and obtain the issue of an executive warrant on the sworn declaration by a Head of Department that an amount is due. The debtor has to either pay or file an application opposing the declaration. He is effectively being forced to file the case himself rather than the government filing the case and the debtor defends it. What the government obtains is an executive title which is a decision on a matter which may then be enforced or executed by means of executive warrants.

The Government is to serve an official letter on the individual concerned containing the claim put forward and to accompany it by a sworn declaration by the Head of Department stating that the amount is due. The law at present lays down that a person served with such an official letter has twenty days within which to bring a claim through an application filed at the courts to show that the amount is not due by him. If the applicant fails to bring forward such application then the amount will be considered as definitely due to the Government and is to have the effect of a *res judicata*. The main issue, however, is that the government does not have to bring any evidence to obtain an executive title but simply makes a declaration. A similar procedure also arises from the VAT Act[23] which in turn does not provide for any opposition.

The warrant as a precautionary measure to safeguard the interest of the creditor, is not in itself objectionable, however; the issue of a warrant without the debtor being allowed the opportunity to oppose it is intolerable. The Government is here allowed to bypass the normal course of litigation and obtain an executive title without going through the litigation procedure as any other creditor would.

Professor Ian Refalo expresses his doubt as to whether the amendment is sufficient to satisfy the reasons as to why the amendment came about initially. This is because, the obtaining position now is that it becomes a res judicata unless challenged within the time period provided.[24]

One should here take note of what the PLRC had to say on these sections,

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23 Chapter 406 of the Laws of Malta.

24 *Cases in Administrative Law*, Profs. Ian Refalo, revised text January 2012, 69.

> The Commission is of the opinion that the obtaining position needs amendment. On the other hand, the Commission is also aware that an amendment may possibly make the collection of Government dues more difficult. This would be both undesirable and ultimately harmful, as in the long run it could become a source of unnecessary litigation, delay and attendant costs.[25]

The Commission criticized the article on the grounds that 'in so far as the debtor is disallowed by law from making opposition to the execution of a claim brought against him by a Government Department, his access to the Court, if not denied altogether, is severely restricted.'[26] The amendment suggested by the Commission was in the sense that the debtor should be allowed to make formal opposition where this type of warrant was issued, and where opposition was made the warrant would only have the effect of a precautionary warrant and the Government would then be bound to bring its claim to Court for judgment. The 1995 Act chose a different method, one which might not necessarily be better than the previously obtaining situation. The present situation renders the matter a 'res judicata' in favour of the Government without the individual having access to the court. Seeing that a person might not realize the consequences that will elapse should he not resort to the procedure by application within the period allowed the measure seems to be excessively harsh and draconian.

The burden to obtain a hearing has been shifted completely on the individual because it is up to him to bring the case to court, should he so desire and if he does not do so within a very short time period he is prevented from claiming the amount that was not due by him. In Mr. Justice Caruana Demajo's words, as quoted by Professor Ian Refalo, the failure to be made aware of the consequences of lack of action in such circumstance would amount to the denial of a fair hearing because you cannot assume that every individual knows about the intricacies of legal procedure. One could thus say that provided that the individual is informed of this time limit within which he has to bring his action there is no violation of his right to a fair hearing as he will have access to the courts without being deprived of the enjoyment of his assets.

Similarly, as provided in Article 59 of Chapter 406 of the Laws of Malta (VAT Act), any notice issued by the Commissioner showing any amount of tax and administrative penalty due by a person is, unless contrarily proven, sufficient evidence that the amount is due to the Commissioner by that person and constitutes an executive title. The Commissioner may

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25 Permanent Law Reform Commission, Draft Bill Section 200.

26 *Ibid*.

request the payment by means of a demand note, and if the payment requested is not made within thirty days from the date when it is served on that person, the Commissioner may proceed to enforce payment after two days from the service on that person of an intimation for payment made by means of a judicial act. Upon the lapse of the period of two days the Commissioner is entitled to execute his claim for the amount demanded in the judicial act.

This procedure clearly violates the individual's right to a fair hearing since he is first deprived of the enjoyment of his property and only subsequently does he have the possibility of challenging the executive title. One could here suggest that this procedure should be made more similar to that in Article 466 of the COCP thus allowing the person the chance of having access to court before enforcement of payment.

Another issue found in the VAT Act is that one has to primarily pay a percentage of the tax which is in dispute so as to be able to consequently contest it. This can be seen as a limit to one's right to access the courts and crucially, justice; 'Il-bilanc bejn l-interess pubbliku u l-protezzjoni tad-dritt ta' proprjeta' kien disturbat b'mod evidenti mill-prekondizzjoni li l-appellant kien obbligat li jaghmel bilfors depozitu ta' 25%.'[27]Thus this notion was creating a financial obstacle that was restricting one's access to court. *Frendo v AG* was referred to in the recent case of *Neil Carter vs PM*,[28] where the defendants stated that the issue was not the same as that in Frendo, as in the latter, 25% of the disputed amount had to be paid as opposed to the 5% provided for in the obtaining situation, and the fact that Carter had paid the amount; thus it was not blocking his access. These requisites 'minnhom infushom jikkostitwixxu ksur tal-jedd ta' aċċess għal qorti minħabba li joħolqu pre-kondizzjoni għat-tressiq innifsu tal-att meħtieġ biex jinbeda l-appell mill-istejjem magħmula.'[29] The court held that Carter's right had been violated through the imposition of a disproportionate financial hurdle.

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27 *Anthony Frendo v L-Avukat Generali, l-Onorevoli Prim'Ministru u l-Kummissarju dwar it-Taxxi fuq il-Valur Mizjud* [30.11.2001] 592/97 GV. The balance between the public interest and the protection of the right to property was violated in an evident way by the precondition of a 25% payment that the applicant had to make.

28 *Neil Carter u martu Susan, għal kwalsijasi interess li jista' jkollha vs L-ONOREVOLI PRIM MINISTRU, l-Avukat Ġenerali u l-Kummissarju tat-Taxxa fuq il-Valur Miżjud* [30.11.2011] 59/2009. CC

29 *ibid* 18.The requisites in themselves constitute a breach to the right of access to court as they create a precondition for the presentation of the act itself necessary for the institution of appealing the estimations.

2. Issuing a warrant of prohibitory injunction against the Government

'Even where it is possible for John citizen to initiate proceedings against the government, he may not avail himself of all the weapons in the judicial armoury as are available to citizens in disputes inter se. '[30]

One should here note that no other precautionary warrants, except the warrant of prohibitory injunction, may be obtained against the Government. [31]In the issue of such warrant against the Government, or any authority established by the constitution or any person holding a public office in his official capacity, such person or authority has to confirm in open court that the thing sought to be restrained is in fact intended to be done and the court has to be satisfied that unless such a warrant is issued a disproportionate prejudice would be caused when one compares it to the doing of the thing that sought to be restrained.[32]The requisites for the issue of such warrant against a government authority are therefore different from the requirements for the issue of a similar warrant against an individual. It is therefore possible that grave damage will be caused unless the activity is stopped, however, a warrant will not be issued unless the interests of the private individual are shown to outweigh the public interest. The PLRC had proposed the abolition of subsection 3 of section 873, describing it as 'granting special treatment to the party against whom the applicant seeks to obtain the issue of the warrant…therefore, [it is] discriminating in his favour and this is unconstitutional.'[33] This proposal, however, was not reflected in the 1995 amendments of the COCP. Prof. Kevin Aquilina describes this 'special extraordinary procedure … [as]…reprehensible and repugnant to the principles of fairness and justice which require that both parties to a judicial proceeding ought to be treated on the same par'.[34]

Recently, two notableapplications for the issue of warrants of prohibitory injunction against the government authorities were filed. The first was*Aurelia Enforcement Limited v. Regjun Centrali et*[35].In this case the warrant was rejected by the First Hall Civil Court. The

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30 (n.)11 pp.14.

31 COCP, Article 837 (2)

32 COCP, Article 837 (3).

33 Permanent Law Reform Commission, *Final Report on Human Rights and the Code of Organisation and Civil Procedure*, Valletta, 9th February 1993, pp 134.

34 n. (10) pp 80.

35 [15.9.2011] CC.

second was*JF Security & Consulting limited v. MCAST et*[36]in which the application was accepted and the warrantissued. In the latter decision the Court stated:

> Il-liġi teħtieġ li r-rikorrent juri żewġ ħwejjeġ biex ikun jistħoqqlu jikseb il-ħruġ ta' mandat. L-ewwel ħaġa li jrid juri hi li l-mandat huwa meħtieġ biex jitħarsu l-jeddijiet pretiżi minnu. It-tieni ħaġa hi li r-rikorrent ikun jidher li għandu, mad-daqqa t'għajn (prima facie) dawk il-jeddijiet. Il-ħtieġa li jintwera li l-parti li titlob il-ħruġ ta' Mandat bħal dan ikollha prima facie l-jeddijiet pretiżi hija ħtieġa oġġettiva u mhux waħda soġġettiva li tiddependi mid-diskrezzjoni tal-ġudikant.[37]

Prior to the issue of a warrant of prohibitory injunction against a public authority, the authority must not only be allowed to reply but must be heard in open court. In *Parliamentary Secretary for Housing v Salvu Bugeja*[38]as the warrant was decided upon *in camera* there was no hearing on the demand to issue the warrant. The requirements of section 873(3) were therefore not followed and this brought about the nullity of the warrant. A more recent explanation of the law may be found in *Jeremy Cassar Torregiani and Mario Hammett v the Commissioner of Police.*[39] In this case the court had to resolve the issue as to whether the Commissioner of Police had authority to close down an establishment, or whether the police should initiate legal proceedings and leave it up to the court to suspend or remove its license due to suspicion of a breach of its operating license. The court stated that in the circumstances, it was apparent that the prejudice which would be suffered by the applicants was not proportionate to the inconvenience that the defendant would suffer if the warrant was issued. It was further elucidated that a prohibitory injunction serves to offer protection to a person whose rights would be either lost or restricted without such a warrant. From the issue or denial to issue such a warrant one may neither deduce that the court agrees that the applicants have established their rights nor that a person does not have such rights.[40]

An additional hindrance related with this issue is that provided for in article 90(3) of Chapter 504. On the 10th October 2013 the Civil Court in its Constitutional Jurisdiction

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36 [30.7.2011] CC.

37 The law required that the applicant shows two things for him to deserve the issuance of a warrant of prohibitory injunction. Firstly, he has to show that the warrant is necessary for his rights to be protected. Secondly, he has to, prima facie, appear to have those rights. This is a necessary element and is not left up to the discretion of the judge.

38 *Parliamentary Secretary for Housing v Salvu Bugeja*[13.6.1989] CC.

39 [20.6.2011] CC.

40 Karl Grech Orr, 'Prohibitory injunction', *The Times* (Malta, 4 July 2011).

stated that 'id-dritt ta' aċċess għal Qorti japplika anke fl-istadju tal-mandati kawtelatorju u mhux biss fl-istadju tal-kawża fil-mertu.'[41]The court then proceeded to quote the well-known case of *Micallef v Malta*[42]which established this principle. The fact that according to article 90(3) of Chapter 504 no precautionary act may be issued by any court against the Malta Environment and Planning Authority restraining it from the exercise of any of the powers conferred upon it by the same article, meant that the applicant's entitlement to access the courts (even at the preliminary stage of granting interim measures) was being effectively deprived. Borg sought a declaration stating that this article was incompatible with the provisions of article 6 of the ECHR and 39 (2) of the Constitution of Malta since in the event that his demand for the issue of a warrant of prohibitory injunction couldn't have been accepted under any circumstances, he claimed he could have irremediably lost one of his civil rights. The court concluded that this article violated one's right to access courts as safeguarded by article 6 of the ECHR.

3. Exhibiting documents and giving evidence

Undoubtedly the most infamous government privilege is that relating to exhibiting documents[43] and giving witness. One can say that such a privilege is part of the law of every country and helps in the administration and proper running of the state. However, this exists in varying degrees and thus not all similar privileges give rise to a violation of article 6. Firstly, one has to distinguish this privilege from the right of access to public documents and to public information. In these cases the point at issue is notthe right of access of an individual to Government documents, but the right of the individual to have Government documents produced in court proceedings. In the case of evidence by public officials or exhibiting public documents there are two types of privilege. The first concerns public order. It is not in the public interest that certain matters be disclosed in a court of law and thus the court may exempt the official concerned from giving that particular type of evidence. Therefore, the court has discretion as to whether to exempt an individual from giving evidence if it feels that it is not in the public interest for that evidence to be given. The court must evaluate whether the claim of public interest is based on sound reasoning or not. This is a privilege which is attached to the matter on which the evidence is being given. The PLRC does however consider this as not affording a privilege to the Government. When the court provides otherwise, it would do so in the public interest and not in the sole

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41 *Borg Tarcisio v L-Onorevoli Prim Ministru Et*, CC Constitutional Jurisdiction [10.10.2013] The right for access to Courts applies even at the stage of precautionary warrants and not simply at the end.

42 17056/06 [15.10.2009]

43 COCP, Article 637 (3), (4).

interest of the Government. The control exercised by the Court makes the provision compatible with the fair hearing rule.

The old concept was that of the crown privilege. Our law prior to 1995 practically used to prohibit questions from being asked to a witness where the reply would involve that witness revealing information obtained from a Government file and/or the production of such documents. Under this situation the Minister responsible for Infrastructure was described by Professor Mifsud Bonnici (sitting as a judge) 'as still living in the time of the Grand Masters where the Grand Master had absolute authority to do as he pleased.'[44]

In the author's opinion this concept was possibly related to a number of ideas which regulated the public service at the time; the idea that the civil service is anonymousi.e. that there is ministerial responsibility for actions of Government but the actions of individual servants of Government are to be anonymous. Anonymity and confidentiality are necessary in order to ensure that civil servants operate independently. The idea was that a civil servant who is granted such protection is more likely to act honestly. If one knows that whatever one says can be made public, one can take that fact into account in carrying out one's job. In *Burmah Oil Co Ltd v. Bank of England*[45]Lord Scarman stated that:

> Different aspects of the public interest may conflict. In the case of Public Interest Immunity, for instance, the balance . . . has to be struck between the public interest in the proper functioning of the public service (i.e. the executive arm of Government) and the public interest in the administration of justice.

It was thus suggested that the argument about protecting communication between civil servants in order to ensure they carry out their duty properly was an exaggeration. These notions have, however, been overtaken as nowadays it is accepted that public servants are required to be accountable. Moreoever, it is believed that a democratic system of government requires a larger degree of openness of the administration.

The current Obama Administration in the United States is seeking to 'strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defence or foreign relations is at stake and only to the

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44 *Mary Grech v Minister responsible for the development of the Infrastructure et* [29.1.1991] CA.

45 [1980] AC 1090.(AG INTERVENING).

extent necessary to safeguard those interests.'[46] The new policy that is being adopted envisages that matters of embarrassment to the Government or situations where errors in administration were committed will not be subjected to privilege. It will only be information that might harm national security if disclosed that will remain subjected to such privilege. The situation is similar in other countries Governments, are trying to adopt more transparent systems, and thus fulfilling the requisites of democracy.[47]

In *Dr Louis Galea ne vs Housing Secretary*[48] it was held that a promise made by a witness to bring information to court and answer the questions that are asked amounted to a renunciation of the privilege. The right to raise the privilege belongs to the witness and if the witness decides not to invoke it the respondents cannot do so in his stead.[49]This fact was decided so even before the law was amended in 1995.

There may be a number of scenariosin which the disclosure of certain information that may be requested may be harmful to the overriding public interest. The result of this is that both in the UK and in Malta, by means of the 1995 amendments, the concept of Crown Privilege evolved into the more modern concept of Public Interest Immunity.

The Report of the PLRC of 1993 had commented on the issue, stating:

> The Government enjoys a privilege in regard to evidence in the sense that certain information is, according to law, privileged and evidence may not be taken about it. The privilege is two limbed: a witness may not be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest; and a witness may not be compelled to disclose any information derived from reports, or from letters, dispatches, or other papers connected with the correspondence of any civil, military, naval or air force department of the public service. The former is relative and subject to the discretion of the court, the latter is absolute and allows the court

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46 Eric Holder, Attorney General, Memorandum for Heads of Executive Departments and Agencies, *Policies and Procedures Governing Invocation of the State Secrets Privilege*, [2009] <http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf.> accessed 20 September 2013

47 Attorney General Edward Levi, Address to the Association of the Bar of the City of New York 1 [28 April 1975] (transcript available in Gerald R. Ford Presidential Library and Museum, Edward Levi Papers, Speeches and Scrapbooks Collection, Volume I).

48 *Dr Louis Galea ne v Housing Secretary* [3.3.1986] CC

49 *Joseph Grima ne v The Hon. Prime Minister et* [30.1.1997] CC

> no discretion whatsoever. Where a witness claims privilege on the basis of public interest, it is up to the court whether, in its discretion, to allow such claim and exempt the witness from giving evidence on the matter. The control exercised by the court makes the provisions compatible with the fair hearing rule... The problem therefore reduces itself to one of balance, balance between the interests of justice and due process on the one hand and the general public interest on the other. The Commission is of the opinion that at present this balance weighs too heavily in favour of the public interest and needs redressing. It is also pertinent to point out that the doing of justice is as well a legitimate and important public interest in its own right...The essence of the suggested amendment is in the sense that the privilege may only be raised in respect of a more or less restricted class of documents, and thus only if the Prime Minister certifies that the matter is covered by privilege.[50] While restricting the area of privilege, the amendment leaves it ultimately in the hands of the executive to decide whether the matter is covered by same.[51]

This balance that has to be maintained and which the court must keep in mind was referred to in the case of *Conway v Rimmer*[52]. The House of Lords stated that

> When there is a clash between the public interest (1) that harm should not be done to the nation or the public service by the disclosure of certain documents and (2) that the administration of justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or the public service is so grave that no other interest should be allowed to prevail over it, but, where the possible injury is substantially less, the Court must balance against each other the two public interests involved.

The 1995 amendments limited the extent of the privilege under subsection 3 of section 637. The privilege may now only be raised in respect of a class of documents that are described as exempt by the law and only if the Prime Minister certifies the matter as being

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50 PII; "A significant exception to the requirement to disclose additional, relevant material is when Public Interest Immunity (PII) is invoked. This allows a party to seek the permission of the judge to withhold certain additional information on the grounds that disclosure would be contrary to the public interest, including the interests of national security. If the judge agrees, the additional material is withheld from the one party but the other party is also not allowed to use it in court" Human Rights Review 2012, Article 6; The right to a fair trial, 217.

51 PLRC Report 35.

52 [1968] House of Lords.

privileged. Thus, whilst restricting the area of privilege to the instances established in subsection 4 of section 637, the law ultimately leaves the issue in the hands of the Prime Minister to decide whether the matter is covered by privilege or not, seeking to ensure that this power of exemption is not used unnecessarily. One might say that this could impinge on the principle of nemo judex in causa propria as the Prime Minister himself would be deciding the matter. Moreover the lack of a requirement on the Prime Minister to report to anyone and give reasons practically eliminates any possibility of judicial review of his decision.

Crown Privilege was a blanket protection of all government documents and information. It was presumed that all documents in government files and all information relating to government files were protected. The concept of Public Interest Immunity on the other hand reverses this presumption but subjects the exhibition of documents to certain restrictions. Crown Privilege assumes that all government information isprotected, whilst Public Interest Immunity dictates that government documents may be exhibited unless they fall within the limited categories established by law. The current legal position reflects the theory of Public Interest Immunity. The question remains as to which documents should fall within those categories.If too many classes of documents are protected by means of these categories of 'exempt documents' then the result would be most similar to that of Crown Privilege.

Article 637 also includes a provision whereby the Prime minister may issue a certificate stating that the question as to whether a document exists or not should not be asked in court. It would seemthat these certificates could prejudice the right to a fair trial. If the court is precluded from having all the relevant information before it, then the fairness of the trial could be seriously prejudiced. On the other hand it is recognized that there are situations where there is an overriding public interest which should prevent the revelation of such delicate information. Nobody can scrutinize the discretion of the Prime Minister when issuing Public Interest Immunity certificates and this can be a delicate issue especially in criminal cases.

In *Repubblika ta' Malta v Dr. Lawrence Pullicino*[53], the Court of Criminal Appeal held that the privilege does not apply to criminal trials as the law which regulates Criminal procedure is the Criminal Code itself. The Court noted that this privilege could have violated the right to a fair hearing. It concluded that there had to be a balance between the public interest not to disclose the information (because presumably such information is not

53 [07.02.1991], Court of Criminal Appeal (Superior).

disclosed in the public interest) and on the other hand the overriding interest to make sure that justice is being done.

In Zimbabwe, in the *Tsvangirai* treason trial[54]the State made a State privilege claim. The Minister of State for National Security signed an affidavit in terms of section 296(1) of the Criminal Procedure and Evidence Act, stating that he had considered the matter personally and he was of the opinion that the disclosure of information would cause prejudice to the security of the State. In 1976, when section 296 was introduced into the Criminal Procedure and Evidence Act, the objective of the legislature, as elucidated in the parliamentary debates, was to make the Ministerial certificate binding on the court and to prevent the court from looking behind it. One should draw a distinction between the constitution as being non-justiciable in the war situation in 1976, and the present situation where the Bill of Rights in the Constitution is justiciable and there is a fair trial guarantee in the Constitution. Whether the court has the power to look behind a State privilege claim or not has not yet been determined although it should be taken that such power exists due to the current constitutional environment. Where apposite the court would exercise its power to look behind such a claim and assess whether it is justifiable by hearing the Minister's evidence *in camera*.[55]

This privilege, and similar others in different jurisdictions and their justifications have often been commented upon both in courts and by judges in different scenarios. Attorney General Edward Levi delivered an address on the topic of Government secrecy before the Association of the Bar of the City of New York. He stated that, 'in recent years, the very concept of confidentiality in Government has been increasingly challenged as contrary to our democratic ideals, to the constitutional guarantees of freedom of expression and freedom of the press, and to our structure of Government.'[56] Levi requested the appreciation of the Government's need for some degree of confidentiality. This need 'is old, common to all Governments, essential to ours since its formation. Confidentiality in Government go[es] to the effectiveness—and sometimes the very existence—of important Governmental activity… Government must 'have the ability to preserve the confidentiality of matters relating to the national defense.'[57] On the other side of the balance:

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54 *S v Tsvangirai & Ors* H-244-2002.

55 Geoff Feltoe,'Can there be a fair criminal trial where State privilege is claimed?' http://webcache.googleusercontent.com/search?q=cache:tr6M8ucoCiAJ:tsime.uz.ac.zw/claroline/backends/download.php/U3RhdGVfcHJpdmlsZWdlX1RzdmFuZ2lyYWlfY2FzZV8uZG9j%3FcidReset%3Dtrue%26cidReq%3DLB103+&cd=1&hl=en&ct=clnk&gl=mt accessed 20 August 2013

56 (n) 47.

57 *Ibid*, 1–2

> [a]s a society we are committed to the pursuit of truth and to the dissemination of information upon which judgments may be made. The people are the rulers… but it is not enough that the people be able to discuss . . . issues freely. They must also have access to the information required to resolve those issues correctly. Thus, basic to the theory of democracy is the right of the people to know about the operation of their Government.[58]

Levi's aim was to explain that secrecy in certain circumstances is an indisputable necessity for the Government, while at the same time acknowledging that if held in very high esteem it will result in the loss of accountability and the democratic process.[59]In 1826, Thomas Starkie claimed that there are instances 'where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence.'[60]

In the US, the Supreme Court first described the modern systematic outline of the state secrets privilege in the 1953 case[61] of *United States v.Reynolds*[62]; the court stated that

> The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[63]

The privilege was summarized as follows in Reynolds;

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58 *Ibid*, 10-11

59 Robert M. Chesney, 'State Secrets and the Limits of National Security Litigation', [2007]The George Washington Law Review Vol. 75 No. 5/6 1266

60 Thomas Starkie, A Practical Treatise on The Law of Evidence and Digest of Proofs in Civil and Criminal Proceedings (Boston, Wells And Lilly), [1826] 103

61 Todd Garvey Legislative Attorney Edward C. Liu Legislative Attorney, 'The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information During Civil Litigation', [2011]

62 [1953] 345 U.S. 1

63 <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=345&invol=1#f18> accessed 10 September 2013.

> (a) the claim of privilege must be formally asserted by the head of the department charged with responsibility for the information; (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a "reasonable danger" to national security; (c) the court should calibrate the extent of deference it gives to the executive's assertion with regard to the plaintiff's need for access to the information; (d) the court can personally review the sensitive information on an *in camera*, ex parte basis if necessary; and (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.[64]

The court recognized the difference between the specific "state secrets" privilege (linked with military and diplomatic information) from the broader "public interest" privileges (relating to other forms of sensitive Government information and communications). It pressed upon the judiciary's authority to evaluate (thus potentially rejecting) the executive's declaration that secrets are present.[65] Vinson illustrated that the degree of scrutiny should be adjusted with reference to the need for information: 'Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted'. On the other hand, where there is no obvious need, as in Vinson's opinion was the case in R*eynolds* seeing that the plaintiffs could get the information via depositions, the claim of privilege 'will have to prevail'.[66]

This privilege mostly affects one's right to a fair trial where although one might have a case, when the privileged evidence is not exhibited one can no longer prove it. In *White v. Raytheon*[67]the judge held that without the privileged information he could not see any *'*practical means by which Raytheon could be permitted to mount a fair defense without revealing state secrets'.[68] The court concluded that it had 'no alternative but to order the case dismissed'.[69]

In the UK, in the Thetis case[70] regarding the sinking of a submarine during trials, the plaintiffs inevitably lost their case as the affidavit that contained the proof was held to be

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64 Chesney (n) 59, 1251; Reynolds (n) 62 7-11.

65 Chesney (n) 59, 1284.

66 *Reynolds*, 345 U.S. at 10-11.

67 [2008] U.S. Dist. LEXIS 102200.

68 *Ibid*.

69 *Ibid*.

70 *Duncan v Cammell, Laird & Co. Ltd.* [1942] AC 624.

privileged and could not be disclosed. This is a good example where the litigant's interests must be sacrificed to protect secrets of state, in this case, during the outbreak of war.[71]The Thetis doctrine enables the privilege to be invoked in relation to particular kinds of documents, simply because they form part of a special class of documents, regardless of whether the particular document itself contains secret information. The House of Lords held that, irrespective of the nature of the document, a claim made according to the due procedure could not be questioned by the court. This empowers the Crown to override the rights of litigants in any cases where a Government department thinks appropriate and not only in cases of genuine necessity. This went against a long line of authority.The House of Lords eventually shattered what it itself had started by privileging information depending on its class and not its content. The house reversed what it had started in 1942, when after nearly thirty years in *Conway v Rimmer*[72] it changed the basis of the unlimited class privilege and successfully ordered the exhibition of documents against the Crown's reluctance.

It is not uncommon to have debates in court as to whether a document falls within one category or another. The list of exempt documents is vast so it's not uncommon for the government to claim that it falls under another category. These requests are usually refused. In the Thetis case the court defined two criteria as to why a document can be protected; a document can be protected on the basis of its contents (contents claim) or it can be protected on the basis of its classification (class claim). These protections are reflected in section 637. The House of Lords has stated that the courts should be more inquisitive in the case of a class claim than in the case of a contents claim as the former does not necessarily imply that there is secret information. Therefore some documents are protected irrespective of their contents but because they belong to a particular class of documents; ex. cabinet documents which would not necessarily contain secret information but it is in the interest of the efficient running of the civil service that they are privileged.

In 1983 in *Air Canada v Secretary for Trade*[73]Lord Scarman claimed that in his judgment 'documents are necessary for fairly disposing of a cause or for the due administration of justice if they give substantial assistance to the court in determining the facts on which the decision in the cause will depend.'[74] If cabinet papers were to reveal essential information about misconduct of a cabinet minister which was a central issue in litigation it might be appropriate to order that they be revealed. Cabinet papers are still protected with great

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71 Wade and Forsyth, *Administrative Law,* Oxford University Press, Tenth Edition.

72 (n) 52.

73 [1983] 2 AC 394.

74 http:/swarb.co.uk/air-canada-v-secretary-of-state-for-trade-1983/> accessed 20 September 2013.

caution and such papers would be granted a high degree of protection producing only what is relevant.

In the UK, apart from Public Interest Immunity, a court may order a part or all of a case to be heard *in camera* so as to protect national security or some other sensitive public interest. Decisions to hold back evidence must be essential and proportionate and cannot undermine one's right to a fair trial. The integrity of the justice system depends on the public being able to see that trials are fair.[75]It was stated in *Ruiz-Mateos v Spain* that'The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party.'[76]This is not the case when "secret evidence" is made available by the authorities and will be considered as evidence even though the person concerned or his lawyer will not have access to it. Neither of them will be aware as to whom the "closed" witnesses are or have the opportunity to examine them in the closed hearings but "special advocates" are appointed to represent the excluded person's interests without communicating with them. This procedure will almost certainly breach one's right to a fair trial.[77]

Closed Material Procedures used in the UK are secret proceedings whereby the Government is given the faculty of presenting evidence to a judge without disclosing it to the whole court. In the UK closed material procedures were established subsequent to the case of *Chahal v. the United Kingdom* at the European Court.[78] The Court held that Mr Chahal's human rights had been violated as he was given no opportunity to dispute the closed material being used against him. The Court elaborated that confidential material might be inevitable where the matter of national security is involved. Nevertheless domestic courts may exercise control on national authorities when these claim that national security and terrorism are involved.[79]

In *Bisher Al Rawi & 5 Others*[80]the Supreme Court pointed out that the principles of open natural justice are essential attributes of common law trials that since the closed material

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75 Metcalfe, E., *Secret Evidence*. JUSTICE. 2009. 224. "The need for a trial to not only be fair but also be seen to be fair is a fundamental principle of English law ('justice must be seen to be done')."

76 [1993] 6 EHRR 505 (civil proceedings) 63.

77 Human Rights Review (n) 23.

78 *Chahal v the United Kingdom* [1997] 23 EHRR 413.

79 Right to a Fair Trial under the European Convention on Human Rights (Article 6), Interights Manual For Lawyers, September 2007 34.

80 *Bisher Al Rawi & 5 Others v Security Service, SIS, the Foreign and Commonwealth Office, Home Office, Attorney General* [2010] EWCA Civ 482.

procedure is so distinct from them, it could only be introduced by parliament. Public Interest Immunity was considered by the Supreme Court as an already ingrained and efficient system which was being employed to keep sensitive material undisclosed in the public interest. Evidence withheld on Public Interest Immunity grounds will not be used as evidence in a case, as opposed to what happens in the closed material procedure. Since 1997, the use of the closed material procedure has expanded and extended across the system. Moreover, the UK Government proposes its expansion, thus potentially impinging even further the right to a fair trial and one's right to know the case against him and to defend himself.

In Malta there are situations in which a secret document is exhibited by being kept in the judge's 'sigrieta'[81]. However, the parties have a right to examine such a document. No copies of this secret document are made and it is not actually inserted in the case-file. The difference between this procedure and that used in the UK is drastic. In the former one is given the right to examine the document himself and not simply through a special advocate, and eventually prepare to defend himself better.

Meanwhile the right of disclosure of all evidence is not absolute.[82]The trial court has to ensure a balance between the public interest in non-disclosure and the significance of the materials in question to the defence; under Article 6(1) only measures which restrict the rights of the defendant that are 'strictly necessary' are tolerable. It was stated in *Mckeown v The United Kingdom*'

> Article 6 in principle requires disclosure but this is not an absolute right and it could be necessary to withhold evidence to preserve the fundamental rights of another or safeguard an important public interest; any difficulties caused to the defence had to be adequately counter-balanced by the procedures followed by the judicial authorities; a failure to disclose material to a trial judge could be remedied by appeal proceedings.[83]

In this case the court referred to Part 1 of the Criminal Procedure and Investigations Act 1996 applicable in Northern Ireland which provides that material must not be exhibited if on an application by the prosecutor, the court concludes it is not in the public interest to disclose it. Section 14A (covering procedures for trial on indictment for scheduled offences)

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81 Referred to as 'sigrieta tal-awla', *see, Il-Pulizija vs Melvyn Mifsud* [30.5.2012], CC.

82 (n) 75.

83 [11.1.2011] (6684/05) 39.

specifies that upon application by the accused to the court it may review its decision to order non-disclosure on grounds of public interest. The ECHR held that

> [T]here was no need for the Court of Appeal to have considered the undisclosed material because the first-instance procedures had complied with Article 6. Moreover, counsel for the applicant before the Court of Appeal had not invited it to consider the material and so it had never been suggested that the Court of Appeal was required to remedy a deficiency which had occurred at first instance.[84]

On the other hand when the defence is not given enough information to come up with counterarguments, and there is no reason is given as to why such information is withheld, the ECHR has held that there is a violation of article 6. Such issues of disclosure of evidence do not comply with the requirements of adversarial proceedings and the equality of arms and neither do they provide adequate safeguards for the accused to be able to protect himself.[85] The court has often defined the term equality of arms so as to mean that neither of the parties is at a substantial disadvantage vis a vis the other and that all parties should be able to discuss and produce arguments in relation to all files submitted to court so as to influence the final decision. These rights of defence have, however, been weighed against other competing interests as seen in most cases. Any difficulties must nevertheless be counter balanced and the restriction of rights of defence is permissible only when strictly necessary.[86]

3. Conclusion

There are certain privileges in our laws which might interfere with one's right to a fair trial while others simply aid the administration of government and are necessary, justifiable and most importantly do not impede with the other party's rights. Through the examination of the four most relevant privileges the author sought to show in which cases a party might be prejudiced when in dispute with the government as some procedures differ in such cases and the situation is different from the one envisaged in disputes

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84 *Ibid*.

85 Case of Leas v Estonia [6.3.2012] (59577/08)84-89. In this case the surveillance file of the accused wasn't disclosed and thus the defendant was not given access to it. He was neither informed of the reason why they were not disclosed not of the nature of the undisclosed material. This as provided in Estonian legislation incorporated in their Code of Criminal Procedure, in their Surveillance Act, and State Secrets Act.

86 Case of Užukauskas v Lithuania *(Application no. 16965/04)* Par 45-51.

between two private parties. These privileges might impinge on one's access to an impartial court or tribunal especially if the individual is not made aware of these special circumstances, however, as stated, most are essential for efficient governance and simply pose diverse requirements without creating a violation.