

HUMAN RIGHTS IMPLICATIONS OF PROTECTING THE MATRIMONIAL HOME

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While international human rights instruments often emphasize the need to respect the family as a unit as well as the individual's right to privacy, they do not normally include specific safeguards of the matrimonial home. However any provision that purports to promote respect for a person's right to privacy and his home necessarily implies a considerable amount of protection for the place where the family resides – the matrimonial home. There is a need for more specific international protection of the matrimonial home, a need to balance the protection of the matrimonial home with other human rights, such as the right to privacy of an individual spouse. The right to marry and form a family as well as the right to privacy remains one of the very basic of human rights. The matrimonial home is but a facet of the implementation of such a right. There is an obligation on the part of States to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. Moreover the individual who openly and publicly committed himself to marriage, would have his investment in children, home, assets and future earnings, protected by legal and social provisions. The Matrimonial Home despite all the problems that arise when protecting it, would appear to be an important means of complying with international human rights law.

1. Introduction

While international human rights instruments often emphasize the need to respect the family as a unit as well as the individual's right to privacy, they do not normally include specific

safeguards¹ of the matrimonial home. However any provision that purports to promote respect for a person's right to privacy and his home necessarily implies a considerable amount of protection for the place where the family resides – the matrimonial home. In what follows, I will briefly review the kind of protection given to the matrimonial home under international human rights instruments as well as in comparative law, before focusing on the way in which the matrimonial home is protected under Maltese statutes as interpreted by various local court decisions. My aim will be two fold: (1) to highlight the need for more specific international protection of the matrimonial home; as well as (2) to underline the need to balance the protection of the matrimonial home with other human rights, such as the right to privacy of an individual spouse.

2. The Protection of the Matrimonial Home in International Human Rights and National Law

Under European Community law, the European Court of Justice (ECJ) has time and again required that when member States implement provisions of Community law, they must do so in such a way as to respect the provisions of the European Convention of Human Rights. The right to respect of family and Private life necessarily included decent housing for the individual and his family. This was another way of protecting the matrimonial home, even though nothing in the founding treaties and subsequent amending

¹ For example the Universal Declaration of Human rights (art. 16(3)), the International Covenant on Civil and Political Rights (art. 23(1)), the International Covenant on Economic Social and Cultural Rights (art 10(1)), and the American Convention on Human Rights (art 17(1)) all declare that the family is "*the natural and fundamental unit*" and the African Charter on Human and People's Rights speaks of "*the natural unit and basis*". All instruments speak of the family as a unit. The home, or the matrimonial home is only a necessary accessory. All instruments except the European Convention on Human Rights, call for the protection of the family by society and the state (Universal declaration of Human Rights, International Covenant on Civil and Political Rights, and the American Convention on Human Rights) or "by the state" (African Charter on Human and People's Rights). The international Covenant on Economic Social and Cultural Rights as well as the African Charter call for assistance as well as protection of the family whereas the European Social Charter qualifies the protection to "*appropriate social, legal and economic*" protection "*to ensure its full development*".

instruments included anything to that effect. When a Member State implements provisions relating to Regulation 1612/68 on migrant workers, the resultant provisions had to be read in such a way that they complied with human rights provisions such as those in the European Convention on Human Rights.² Article 10 of that Regulation permits members of a migrant Community worker's family to install themselves with the workers of the member State, provided that that the worker has available for the family housing "*considered as normal for national workers*" in that region. Germany had implemented these provisions in a way which made the renewal of a family member's residence permit conditional upon the family living in appropriate housing, not merely at the time of their arrival, but for the entire period of residence. The Court ruled that the relative German legislation was incompatible with Community Law:

*"Regulation No 1612/68 must also be interpreted in the right of the requirement of respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That requirement is one of fundamental rights which, according to the Court's settled case-law, restated in the preamble to the Single European Act are recognised by Community Law"*³

Article 7 of the Charter of Fundamental Rights of the European Union (2000) seems to lend substance to an already maturing concept:

"Everyone has the right to respect for his or her private and family life, home and communications".

Such a right would no doubt include the right to a secure and established matrimonial home as well as parental access and custody of children, the right to have and form social relationships and certainly the protection of personal reputation. Although the concept of respect for private and family life finds its roots in article 8 of the European Convention Of Human Rights (1950), yet in the Charter, it does not suffer the same derogations and limitation as in the Convention and therefore its application is more complete and comprehensive. It remains another matter, however, how much

² Case 249/86, "Commission v. Germany" (1989) ECR.(1990) 3 CMLR 540

³ Ibid. para. 10.

of the rights in the Charter are, or can become enforceable in time, given the present development of Community law, both as regards the question of remedies as well as regards "locus standi".⁴

Article 8 of the European Convention on Human Rights, provides a fairly good protection for the home, taken here to mean also the matrimonial home, although the concept extends beyond what is normally meant by the term "home". One would normally limit the concept of "home" to a person's private address, but we know now, that it could also include a person's professional address.⁵

The right to respect for the home extends to ensuring that a scheme requiring that people who want to live in a particular area but lack residence qualifications obtain licences to do so, is administered with proper attention to the particular circumstances of an individual's situation. In particular, it breached Article 8 when the Guernsey Housing Authority refused a licence to a couple who had built a residence for themselves and their family at a time when they possessed residence qualifications but subsequently lost them by absence. In the "Gillow" case⁶ the applicants had acquired a house

⁴ For a thorough examination of the problem of "locus standi" before the European Court of Justice, vide, T.C. Hartley, *The Foundation of European Community Law*, 3rd Edition, Ch 12 p 361, H.G. Schermers and D. Waelbroeck, *Judicial protection in the European Union*, 5th Edition, p. 221-247; L.N. Brown and T Kennedy and Jacobs, *The Court of Justice of the European Communities*, 4th ed., p. 130-142; J Steiner, *Textbook on EC Law*, 5th ed. P. 424-438; legality, standing and substantive review in *Community Law*, P. Craig (1994) 14 *Ox J.L.S.* 507; Article 173 EC, general Community Measures and Locus Standi for Private Persons: *Still a Cause for individual Concern?* M. Hedemann-Robinson, (1966) 2 *European Public Law* 127.

As to what extent is the Charter enforceable? Vide Wouters Jan, *Why a Charter of Fundamental Rights for the EU?*, Editorial, *Maastricht Journal of European and Comparative Law*, 2001/1. JOHN CHRISTOPHER MCCRUDDEN, *The Future of the EU Charter of Fundamental Rights. The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*, Olivier de Schutter, <http://www.jeanmonnetprogram.org/papers/04/040701.html>. The EU Charter of Fundamental Rights, Dermot Walsh, President's Hall, Law Society, Blackhall Place, 18th October 2003. <http://www.lawsociety.ie/newsite/documents/members/hrwal.pdf>.

⁵ "Niemetz v. Germany", Judgement of the 16th December 1992, Series A, No. 251-B (1993) 16 EHRR 97.

⁶ "Gillow v. United Kingdom" Eur. Ct HR, Series A, No 109, Judgment of 24 Nov 1984, 11 EHRR, See also Wiggins v. United Kingdom, Application No 7456/76, Report: 13 DR 40, Eur. Comm. HR.

in Guernsey during a period of employment in that country. When they moved to some other place in the same country they rented out the house to third parties, thereby losing their residence qualifications, but subsequently returned to live in it. The argument was, that, by renting the property to third parties they had contributed to the housing accommodation in the island. On their return, they had no other home in the U.K. or elsewhere, and the property had in the meantime become vacant. They were refused the necessary license to re-occupy the house, and even prosecuted and convicted for unlawful occupation. The European Court of Human Rights concluded that the refusal of a licence to occupy their home and the subsequent conviction for unlawful occupation violated article 8 of the Convention. The licensing policy of the Guernsey authorities failed to take into account the particular circumstances of the complainants. An interesting question to be asked would be, to what extent would planning restrictions including development and conservation schemes be deemed to violate article 8 insofar they deprive persons of ordinary means to build on their own property.⁷ In a small country like Malta such a question is already very relevant.

A large part of the cases submitted to the European Court of Human Rights in Strasbourg deal with the violation of the place where one lives permanently by third parties or the state. It seems to support a positive obligation on the state to protect people's home from pollution and similar hazards created by private enterprise. Therefore where the state fails to warn inhabitants of a certain area about a threat to their health from environmental factors that have been known to the state or its agents, then the state has violated the provisions of article 8.⁸ The state should give effect to its obligation through proper regulation and enforcement to protect

⁷ Vide "Chapman v. United Kingdom" Eur. Ct. Hr, App. No 27238/95. Judgement of 18th January 2001. It was held that the state is justified in refusing to allow a person to live in a caravan on his own land, placed there without planning consent. However it has been argued that the decision very much depends on the margin of appreciation which the Strasbourg Court allows to states in developing land-use planning controls. If planning controls are taken to the point where roamies and other travellers are unable to find a place for their, mobile homes, it may be regarded as depriving them of the right to respect for their homes under article 8(1).

⁸ "Guerra vs. Italy", Eur. Ct. HR (1998) 26 EHRR 357.

people's homes from excessive nuisance. For example, a number of complaints arise from nuisance caused by adjacent commercial activity.⁹

Maltese case law has found a different way to deal with such complaints, based on the concept of abuse of rights. Every owner of the premises has the right to make use of it as he deems fit, unless such use does not cause damage to his neighbour. On the other hand, the neighbour must suffer the discomfort and the inconvenience unless this exceed the limits of tolerance that is reasonably expected by the norms of the so called "good neighbourliness". A pig farm, which was built alongside residential premises, could cause considerable discomfort exceeding the limits of tolerance.¹⁰

The old Roman law principle "*qui suo iure utitur non videtur iniuriam facere*" necessarily implies, that in the legitimate exercise of one's rights one could also encroach on the activity of others and possibly cause harm or discomfort. Translated into property law terms, this means that one could very easily come in conflict with the rights of third parties and the use of one's proprietary rights might result in damage to the property of others. This damage would not be "wrongful" if the exercise of those rights is legitimate.¹¹

The other side of the coin would imply that in the legitimate exercise of one's rights, one could not possibly cause damage to others, since an act that results in damages to others becomes necessarily unlawful and illegitimate.¹²

However the bottom line in these cases both at the European as well as the local level would be the test of reasonableness or proportionality, in weighing the individual interest and that of the community, whether the latter interest is represented by the state, a strong commercial enterprise or just a neighbour.

⁹ "Lopez Ostra vs. Spain", Judgement of the 9 Dec. 1994. Series A, No. 303-C. The complaint has been brought under Article 1 of Protocol 1, but it has been suggested that a better basis for the complaint would have been Article 8, Vide Jacobs and White, *The European Convention on Human Rights*, Second Edition, p 195.

¹⁰ "Duminka Mifsud et vs. Joseph Falzon" Court of Appeal 10th April 1989, per Harding H., Herrera and Agius vide also "Ciantar vs. Ciantar" Vol.XXX-III-365

¹¹ "Joseph Attard et vs. Paul Baldacchino et" Court of Appeal 3th October 2001, per Said Pullicino J., Filletti J.A. and Depasquale F.

¹² "APS Bank Ltd. vs. Amalgamated Building Contractors Ltd", Court of Appeal, 5th October 2001, per Said Pullicino J., Agius C., and Camilleri J.D.

At the core of the right to respect for the home is the right to occupy the home and the right not to be expelled from it. It would appear from the case-law that the concept does not only cover a home which has been lawfully established and therefore a gypsy who had lived in her home for five years without planning permission, was still entitled to respect for her home.¹³ One must however allow a certain amount of elbow-room for planning authorities to control the sites in which gypsies could live. A wide margin of appreciation is usually allowed in favour of a planning authority so long as procedural safeguards are in place allowing the balancing of interests involved.

The concept of the home is therefore quite a broad one, and although it would appear, that so far there is no case-law on the subject, it would also embrace the matrimonial home. Within the context of the interpersonal relationship between the spouses, such a concept is rarely mentioned in terms of human rights law. However the concept is also applicable vis-a-vis third parties, the right of the children not to be removed from the matrimonial home and this is probably where issues of human rights law may become relevant.

3. Maltese Statutes and Case Decisions

In Maltese family law the concept of the Matrimonial Home is of recent origin.¹⁴ It purports to give a wider protection to the family, not so much in regulating entitlement in the event of marital break down, but in giving recognition to a fundamental ingredient which is basic to the right to respect for private and family life, the respect for the home. However, giving effect to these provisions is problematic in practise. An examination of the case-law is indicative in this regard.

3.1 Why the matrimonial home?

One would have thought that the only people entitled to exclusive possession of the matrimonial home are spouses who are married to

¹³ "Buckley vs. UK" (1997) 23 EHRR, 101

¹⁴ Article 3A was introduced in the Civil Code of Malta (Chapter 16 of The revised Edition) by Act XXXI of 1993.

each other. However, section 3 A of the civil code seems to point towards a wider scope in whose interest the matrimonial home is established to include the primary interest of the "family".¹⁵

There seems to be, however, some confusion about the person in whose interest an order, whether temporary or definitive is awarded in cases of marriage breakdown or grave disagreement between the spouses over the matrimonial home.

Regardless of possessory rights over the matrimonial home, it is clear that a spouse does not have the right under section 3A (2) to transfer "inter vivos" his or her share in the matrimonial home without the consent of the other party and generally speaking a spouses ability to "deal" with the matrimonial home is deeply restricted.

It is not at all clear whether it is possible under the present regime of our civil law to issue an interim measure in the form of a warrant of prohibitory injunction¹⁶ (often called a restraining order) that prevents one spouse from annoying or harassing the other spouse, irrespective of any proceedings for separation.

Such an order would contain very strict parameters that include orders requiring the one spouse to stay away from a particular address. It could be that in certain fact situations where abuse is an

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- ¹⁵ **3A.** (1) The matrimonial home shall be established where the spouses may by their common accord determine in accordance with the need of both spouses and the overriding interest of the family itself.
- (2) Where the matrimonial home is wholly or in part owned or otherwise held under any title by one of the spouses, such spouse may only alienate by title *inter vivos* his or her right over the matrimonial home:
- (a) with the consent of the other spouse; or
- (b) where such consent is unreasonably withheld, with the authority of the competent court;
- (c) in a judicial sale by auction at the instance of any creditor of such spouse.
- (3) The party who has not given his or her consent to a transfer, may bring an action for the annulment of a transfer which has not been effected in accordance with sub-article (2) of this article, within one year from the registration of the transfer.

¹⁶ Section 873 (1) of the Malta Civil Code, Cap.12 of the revised Edition of the Laws of Malta, provides: "*The object of a warrant of prohibitory injunction is to restrain a person from commencing or continuing the erection of any building or work whatsoever or from demolishing or renovating any building or work, or to restrain from entering any premises or place, or from doing any thing whatsoever which might be prejudicial to the person suing out the warrant*".

issue, a spouse could be given sole possession of the matrimonial home by way of a non-molestation or restraining order.

Sociological studies reveal that a large number of women in third world countries face domestic violence. This may be also the case in our country even in recent times. But most women in this situation did not opt for a separation for fear of being rendered shelter-less. Civil law remedies against violence and aggression are thought to be inadequate. In recent times, many countries have enacted laws to protect women's right to their matrimonial residence. So long as our law did not recognise the women's right of residence or to a share in the matrimonial home; then women were systematically deprived of this right. The economic rights of married women were usually confined to maintenance. Hence, for most women, separation from bed and board, in effect, brought about destitution.¹⁷

Two issues which are relevant in disputes over the matrimonial home are those of ownership and possession. While ownership implies legal title, women's contribution to the domestic unit, both in economic and through services rendered as a "housewife," have gained legitimacy.

The new section 3A of the Civil Code does not confer any proprietary rights even though a spouse's proprietary interest in the matrimonial home is restricted. Section 55A empowers the Court to decide who should occupy the matrimonial home once separation is pronounced. Therefore the concept of the matrimonial home confers on the spouses certain rights. These are rights of occupation of spouses and nothing more. In a judgement of separation the application of section 55A of the Civil Code is quite different from the application of section 48 and 51 which imply the loss of proprietary rights.¹⁸ In practice most married couples hold property

¹⁷ Sen, Amartya. 2000. *Development as Freedom*. Anchor Books, Shawa M, 2002, Gender Implications of the National Land Policy, Paper presented at the National Civil Society Meeting on Land Reform Policy, Ryalls Hotel, Blanytre. UNAIDS 2002, Report on the Global HIV/AIDS Epidemic, December 2002, Kalabamu, F. 1998, 'Effects of gendered land rights on urban housing by women in Botswana', *Proceedings of the International Conference on Land Tenure in the Developing World with a focus on Southern Africa*, University of Cape Town, January 1998.

¹⁸ "Maria Dark vs. Raymond Dark", P.A. 18th March 2003, per Onor. Dr Raymond C. Pace. Vide also "Sylvana Farrugia vs. Joseph Farrugia", P.A. 3rd December 2002. "Patricia Stellini vs. Joseph Stellini", P.A. Per Onor Dr. Raymond C. Pace, 8 th January 2003. "Hugh Greengrass vs. Lucia Greengrass" P.A. 2nd October 2003, per Onor. Dr. Raymond C. Pace.

jointly. Their home will be owned in joint names or subject to a tenancy agreement where both spouses are named as joint tenants. However in some cases where there is only one party to the marriage who is legally entitled to occupy the matrimonial home, the law gives Matrimonial Home Rights to the other non entitled spouse.

Even way back before any idea of the concept of the matrimonial home started to develop and have some weight with our reformers, our courts had already recognised the substantial importance of giving the "other" spouse rights over a tenancy, which, for all intents and purposes of the law was in the husband's name. Even if the house was only leased out to one of the spouses, or because, according to the prevailing law then, the husband as the head of the household was the only subject of rights pertaining to the household. Therefore the wife of the tenant who was away from Malta, had a legal interest to appeal from the judgement of the Rent Regulation Board which had ordered the eviction of the husband who had emigrated to Australia.¹⁹ The concept of matrimonial home was sanctioned, because the Court said, the wife had the right to occupy the matrimonial home when her husband was away. She even had the right to appeal in her own name, without prior authorisation, even though she was technically not a party to the suit in first instance. The Court of Appeal accepted the argument that, whoever emigrates to another country is not likely to come back soon, and therefore is not likely to keep a residence in Malta. However this presumption would certainly not apply to the matrimonial home, which was at the time occupied by the wife, who had not as yet decided whether to follow her husband to Australia or remain in the house in Malta.

In similar cases, it would not be acceptable to argue that since the tenant has emigrated, the leasehold agreement has lapsed or that his wife is obliged to following him and therefore her occupation of the premises has become illegal. The Court held that it is not a question of domicile, but of residence in the material sense of the word, and even though the husband has emigrated "animo non redeundi" leaving the wife in the matrimonial home, of which he is the tenant, the landlord has no right to consider the leasehold terminated and request the eviction of the wife of the émigré. As the law stands to-day, it would be easier for a judge to order the

¹⁹ "Joseph L. Pave vs. John Lewis et." Kollez. Vol XL pt. I sez. I p. 5

transfer of the leasehold of the matrimonial home to any of the parties.²⁰

3.2 What are Matrimonial Home Rights?

Regardless of actual ownership, each spouse is regarded as having an equal interest in the “matrimonial home” the family residence ordinarily occupied by the spouses at the time of separation. Even if one spouse owned the matrimonial home before the marriage each of the spouses have the following rights:

- a. If in occupation, the right not to be evicted/excluded by the other spouse save with permission of the Court.
- b. If not in occupation, a right with permission of the Court to enter in to and occupy the home.

The Matrimonial home, therefore is the family home, it is where the family lives and where the children feel most comfortable. Often it is the most expensive and valuable thing the family owns.

It is therefore not surprising that the question of awarding the possession of the matrimonial home is linked with that of the custody of the children, in the sense that it would be in the interest of the children not to be removed from the home that they feel comfortably in, and therefore who gets the custody of the children should also get the possession of the matrimonial home.

3.3 What are the important factors that a court would take into consideration?

A court will consider a number of factors in deciding who should have the possession of the matrimonial home. The most important one is whether there has been domestic violence. If there has been no violence, the court will consider how difficult it is for the spouses to remain together, each spouses’ financial circumstances, and the availability of alternative accommodation (for instance, with family members). If there are children, the court will consider what arrangement is in the children’s best interests. But the paramount

²⁰ “Sylvana Farrugia vs. Joseph Farrugia” P.A. 3rd December 2002, per Onor. Raymond C. Pace.

interest of the children is not the only factor that a court of law takes into consideration in deciding who should remain in the matrimonial home.²¹ Other circumstances are considered, such as whether the spouse who is excluded from the matrimonial home is likely to find an alternative accommodation²², whether he/she can afford to have an alternative accommodation, perhaps the ownership of the house²³, the likelihood that the spouse remaining in the matrimonial home would need to be protected after the last of the children has reached majority, the track record of the spouse ordered to leave the matrimonial home,²⁴ or that none of the contending parties actually owned the matrimonial home.²⁵

Where the husband claimed that he was sick and could not work, therefore he could not afford to rent or acquire another premises, the Court, allowed the splitting and segregation of the matrimonial home.²⁶ This conclusion, however gives rise to some perplexities. It is clear that the law speaks of the “matrimonial home” as a unit and nowhere does it seem to provide for the splitting and partition of the “home”. The segregation and partition of the matrimonial home had been made unilaterally by one of the spouses, and therefore was unauthorised and illegal. It turned out that in the end the court sanctioned, something, which was illegally perpetrated. Considerations

²¹ “Maria Fenech vs. Andrew Fenech”, P.A., 30th July 2001 per Onor. Dr. Noel Arrigo.

²² “Maria Fenech vs. Andrew Fenech” P.A., 30th July 2001 per Onor. Dr. Noel Arrigo.

“Minkejja illi l-interess ta’ xi minuri li jista’ jkun hemm qed tabita fid-dar matrimonjali huwa fattur ta’ certa rilevanza fil-materja, l-interess tal-minuri m’huwix l-uniku konsiderazzjoni li ghandha twassal lill-Qorti ghall-provedimenti simili stante illi, kif huwa ukoll rikonoxxut f’gurisdizzjonijiet ta’ pajjiżi oħra, f’dan il-każ ukoll l-interess tal-persuna li tkun tista’ tigi żgumbrata”.

Translation: “Although the interest of the minor child who may be living in the matrimonial home is a factor which gains a certain relevance in this matter, the interest of the child is not the only interest which induce the Court to give similar provisions, since, as it is well established in jurisdictions of other countries, in this case the interest of the person to be evicted is also to be taken into consideration”.

²³ “Mary Grace Borg pro et noe. vs. George Borg” P.A 23rd April 2001, per Onor. Noel Arrigo J. Vide also: “Lilian Whismayer pro et noe vs. Anthony Whismayer, P.A. 23rd February 2001, per Onor. Dr. Noel Arrigo.

²⁴ “Rita Mifsud vs. Joseph Mifsud” P.A. 9th October 2004, per Onor. Dr. Ray. C. Pace

²⁵ “Patricia Stellini vs. John Stellini”, P.A. 8th January 2003 per Onor. Dr. Ray C. Pace.

²⁶ “Mary Grace Borg vs. George Borg”, *ibid.*

of practicality must have been uppermost in the judge's mind, and the fact that the matrimonial home was conveniently²⁷ divisible.

3.4 *Matrimonial home as inviolable*

The law imposes restrictions on the ability of one spouse to dispose or encumber the matrimonial home without the other spouse's consent. Therefore, one spouse cannot sell the matrimonial home or place a hypothec on the property without the other spouse's consent. This protects the value of the property available for sharing at marriage breakdown. Likewise none of the spouses can unilaterally change the locks to the matrimonial home and exclude the other spouse unilaterally even though the other spouses has moved out of the matrimonial home. The reasoning of a court might run like this:

- When the spouses establish the matrimonial home in line with section 3A of the Civil Code, they have an equal of enjoyment to the extent that they should be considered co-possessors of the matrimonial home, independent of the ownership of the property.
- As co-possessors, the spouses are entitled to use the matrimonial home in a reasonable manner and certainly not in a way as to deprive the other spouse from the reasonable enjoyment of it.
- The spouses remain co-possessors even if one of them during the pending separation proceedings leaves the matrimonial home and there is no interim measure by the Court in favour of one of the spouses.
- If this was not the case, and the spouse leaving the matrimonial home during the action of separation does not have the possibility of returning, there is no longer the incentive for the parties to reconcile and it is common knowledge that the law favours reconciliation.²⁸

However it is arguable that too much emphasis is here being put on reconciliation, which certainly remains a value to be protected.

²⁷ The actual term used is "komodament divisbbli" which may not "conveniently" lend itself for a literal translation.

²⁸ "Il-Pulizija vs. Kevin D'Agostino" Criminal Appeal 21st November 2003, per Dr. Vincent Degaetano Judge.

But what about Privacy: the Right to Privacy is, by the way also a fundamental human right. The party remaining at home has got at least the right to be free from untimely intrusions from the party who has for his or her own particular reasons left the matrimonial home. The wife can leave the matrimonial home because she is being beaten up. But the husband may leave the matrimonial home to go and stay with his girlfriend. Should our courts employ the excuse of reconciliation to deny the realities of a situation and deprive the spouse who stays behind the right to some form of privacy and security away from the thought that at any moment in time someone might storm in unannounced?²⁹ It would also appear that if one party excludes the other from the matrimonial home the other party would not be infringing the law if he or she breaks in.³⁰ At any rate,

²⁹ Vide case where a similar application by the wife was refused, "Carmelo Cardona vs. Iris Cardona" still pending. The plaintiff left the matrimonial home and sued for separation while the wife and two children remained in the matrimonial home. An application by the defendant to be allowed to change the locks, on grounds that the surprise visits by the husband are causing mental stress for her and the children was disallowed.

³⁰ "Il-Pulizija vs. Alfred Garroni" Kollexx.Vol.LXVII-V-436. per Imhallef Dr. Carmelo Agius. In this case the Attorney general appealed from a judgement of the Court of Magistrates acquitting the defendant who had alleged that he had the administration of the community of acquests and therefore of the matrimonial home.

"Illi l-appellant ghalhekk ,fuq il-bazi tal-ligiet civili tal-pajjiż u senjatament minhabba li hu f'dan il-każ l-enfitewta kif ukoll il-kap tal-komunjonijoni ta' l-akkwisti u tenut kont li d-dar in kwistjoni hija d-dar konjugali, mhux biss ma kisirx il-ligi meta qabad u sgassa, izda ddefenda d-drittijiet tiegħu meta martu usurpathomlu b'-mod li l-ebda ligi ma' tista' tikkundanna. Ikun assurdu li din il-Qorti tinjora d-disposizzjonijiet kollha tal-ligi civili in materja tar-regim tal-komunjonijoni tal-akkwisti u tati l-barka tagħha li l-konjugi minghajr l-intervent għadizzjarju tarroga lilha nnifisha drittijiet patrimonjali lil-ligi stess fdathom fidejn ir-raġel..."

(Translation: Whereas the appellant therefore, on the basis of the civil laws of this country and especially because he is in this case the emphyteuta, as well as the head of the community of acquests, and taking into consideration that the house in question is the conjugal home, not only did he not break the law when he broke the locks and forced his way in, but defended his rights when his wife usurped them, in such a way that no law could condone. It would be absurd if this Court were to ignore the all the provisions of the civil law relating to the regime of the community of acquests and gives its blessing to the spouse who without the intervention of the judicial authority arrogates to itself the patrimonial rights that the law itself has trusted them in the husband...) Would the Court have used similar arguments to justify a similar conclusion to-day?

it does not matter in the end who owns the matrimonial home, and this fact is of little consequence when the Court comes to a final judgement as to who should live in the matrimonial home to the exclusion of the other.³¹

3.5 *Judicial Restraint?*

The courts seem to be very reluctant during the pendency of a matrimonial case to exclude one of the spouses from the matrimonial home. They would only do so if there is a grave moral and physical danger both to the other spouse and to the children.³² The very fact that a couple is involved in a court case is in itself a source of friction and constant litigation. Does one need to come up against the violent and tragic situations to realise that two people cannot live under the same roof? And whose interest does it serve to allow two warring spouses to live in the same house? Certainly not the children's who invariably are subjected to untold litigation and verbal abuse. Isn't the fact that cohabitation has become impossible enough to warrant an order for one of the spouses to leave the matrimonial home?

3.6 *Sale of Matrimonial Home*

Can a court of law order the sale of the matrimonial home? It would appear that, the law does not provide for such a thing. In "Marthese Vella pro. et noe. vs. George Vella"³³ this is what the Court actually did. There was nothing in the demand nor in the defence pleas which indicated that any of the parties wanted this solution. In fact the plaintiff requested the Court to be allowed to stay in the Matrimonial Home together with the children, whereas the defendant retorted that the matrimonial home was his paraphernal property. It is doubtful how far, as a matter of

³¹ "Josephine Borg vs. Loreto Borg" P.A. 14th October 2001, per Onor. Dr. Noel Arrigo.

³² "Lilian Whismayer pro et noe vs. Anthony Whismayer" P.A. 23th February 2001, per Onor. Dr.Noel Arrigo; "Maria Dark vs. Raymond Dark", P.A. 18th March 2003, per Onor. Dr. Raymond C. Pace.

³³ P.A. per Imhallel Dr. Phillip Sciberras 28th February 2003. vide also, "Antoinette Cauchi pro et noe vs. Alexander Cauchi," P.A. 2nd October 2003. per Onor. Raymond C. Pace.

procedural rectitude, the court could decide on the question of ownership, when such is not included in the demand. In this case the court found that the matrimonial home was bought before marriage by the husband. But it was proved that it was bought in the interest of both spouses, and since the plaintiff, was at that time a minor, she could not be a party to the purchase. It was also proved that the plaintiff and her family contributed towards the expenses involved in the improvement of the matrimonial home. The “*presta nome*” case law on which the Court decided that the matrimonial home belonged to both parties rests on dubious grounds, because that case law is built on the institute of mandate, and on the assumption that no formalities are needed for a person to represent another on a public deed. But in this particular case, if the plaintiff was still a minor at the time of the purchase, how could she at law have instructed her future husband to acquire the property in both names? Be that as it may, however, certainly ordering the sale of the matrimonial home is not what the law contemplates in article 55A of the civil code. Article 55, which seems to be the legal base which the court chose for its decision relates to the liquidation and division of the community of acquests, a far cry indeed from the enjoyment of the matrimonial home.

3.7 Restraining Order

Together with an order under section 55A of the Civil Code, the Court can order the defendant not to go near the matrimonial home or approach the plaintiff and/or the children. In other jurisdictions such an order could be made as a precautionary measure even during the pendency of the lawsuit. Such a measure is not part of the standard precautionary measures that one can find in the Code of Organisation and Civil Procedure, however it would appear that there is nothing in the law to hinder such an order from being made both as an interim measure as well as a definitive order.³⁴ The consequences of such an infringement would be likely to result in contempt of Court proceedings.

³⁴ “Janet Marsala vs. James Marsala” P.A. 3rd December 2002, per Onor. Dr. Ray C. Pace.

3.8 Possession of the matrimonial home

Another consideration is possession of the matrimonial home at the time the marriage breaks down. As already stated, possession does not necessarily relate to ownership of the matrimonial home. The law provides for an automatic equal right to possession of the matrimonial home at the time of marriage breakdown regardless of ownership of the home. This means that if the couple separates, either or both spouses can apply to the court for an order giving one of them exclusive possession of the matrimonial home. In cases of family violence or where there is a need to keep children in a particular neighbourhood for reasons of continuity, an order for exclusive possession can be a valuable tool.

At marriage breakdown, one can also obtain an order from the court prohibiting the other spouse from dealing with any of his or her property until further order of the court. This allows the court to preserve the assets until the end of trial, if necessary, so that there will be property available to divide and to pay for satisfaction of the judgment.³⁵

Section 46, 46A and 47 Cap. 16:- deal with decrees that are pronounced during the pendency of the court case as regards the use and the enjoyment of the matrimonial home, the payment of alimony and the care and custody of the children.

Section 229 of the Code of Organisation and Civil Procedure does not apply to degrees given *pendente lite* in cases of separation or in other family law cases. The Court observed that:

- (a) *The decrees that are given pendente lite in a separation case are intended to regulate the relationship of the parties during the pendency of the court case, and can never never affect the definitive judgement. So much so that the decrees that are not definitive can be modified according to circumstances.*
- (b) *These types of decrees are exceptional in the Maltese legal system and it does not matter if they are interlocutory decrees or otherwise, since they have nothing to do with the type of decrees mentioned in section 229 which somehow or other*

³⁵ Section 876 of the Code of Organisation and Civil Procedure.

regulate procedure before the court".³⁶ (My translation from Maltese)

Therefore the decrees and other provisions given by the Court, *pendente lite*, during a cause of separation have nothing to do with the decrees mentioned in section 229 of the Code of Organisation and Civil Procedure which merely regulate the procedure before the Court.³⁷

3.9 *Transfer of ownership*

Through the application of section 54 (6) of the Civil Code, the Court may order that the whole of the matrimonial home be transferred to one of the spouses, even though it belongs to both spouses or to either of them.³⁸ Where the husband owed the wife and the children arrears in alimony, and the wife had to incur debts towards the up keep of the household, the wife was awarded his share of the matrimonial home.³⁹ In "Sylvana Stringer pro et noe. Vs. Jeremy Stringer",⁴⁰ the matrimonial home was awarded to the wife in satisfaction of arrears of maintenance, including the expenses for the education of the common children as well as in satisfaction of the wife's share in another property that the husband had in the meantime bought in the U.K., which was included in the community of acquests. Of course where one of the parties voluntarily leaves the matrimonial home during an action of separation, the Court's decision is rendered easier.⁴¹ Or when the defendant had an alcohol problem and was violent towards the plaintiff, it was in interest of

³⁶ Dawn it-tip ta' digrieti "huma eċċezjonali fl-ordinament ġuridiku Malti" u "immaterjalment jekk humiex digrieti interlokutorji jew le, ma għndhom x'jaqsmu xejn mat-tip ta' digrieti imsemmija fl-artikolu 229 li jirregolaw il-procedura, b'xi mod jew iehor quddiem l-istess Qorti". William Grech vs Alfreda Grech, 30 ta' Ottubru 2002, Prim' Awla tal-Qorti Civili, (Onor. Imhallel Raymond Pace).

³⁷ Pierre Grech vs. Joanne Grech, Prim' Awla tal-Qorti Civili (Onor. Imhallel Raymond Pace) – 16 ta' April 2002.

³⁸ "Maria Concetta Cunningham vs. Andrew James Cunningham, app. Civ. 11th February 1966.

³⁹ Emma Borg vs. Avukat Dr. John Mizzi et nominee, App. Cov. 5th October 1988

⁴⁰ P.A. 28th February 2003 per Onor. Dr. Phillip Sciberras.

⁴¹ Mary Rose Spagnol pro et noe vs. Martin Sagnol, P.A. 9th December 2003.

all concerned that he should leave the matrimonial home.⁴² The fact that the defendant had withdrawn money from a joint account and was violent towards his wife and children were good reasons for the court to order him to leave the matrimonial home.⁴³ However, where both parties were responsible for bringing about the matrimonial break down, and it was proved that the wife had an adulterous relationship, the court refused to accede to the wife's request to be awarded the matrimonial home.⁴⁴

4. Conclusions

From this short survey of the case law, it would be rather hard to attempt some guidelines, except the very obvious and the very rudimentary. Any definition of "the matrimonial home" is good and sufficient as a working definition for a marriage so long as the latter does not fail. The very concept of a marriage breakdown seem to defy and contradict the concept of "matrimonial home", because it is inconceivable to think of a matrimonial home for a marriage that at worst, does not exist or at best does not work any more. So what of the house which was meant to be the cradle and nest of the marriage relationship that is not there any more? Has it become a misnomer? Is it used as a sort of deterrent towards the waywardness of anyone who does not take the marriage vows seriously. A safeguard and a form of security for the housewife that is not economically well provided? A haven for the children who know no other place where they can be brought up? And then how many questions does a judge have to tackle before deciding upon the fairness of his judgement, without even beginning to take account of the intractables and the imponderables of the case before him? Certainly there is not enough debate on the questions that arise. Too much emphasis on safeguarding the marriage with little thought on the consequences when, with all the effort and the good will of those concerned

⁴² Carmen Falzon pro et noe vs. Brian Falzon, P.A. 30th March 2004, per Onor. Raymond C.Pace.

⁴³ Rita Mifsud vs. Joseph Mifsud.P.A. 9th December 2004, per Onor. Dr. Raymond C. Pace.

⁴⁴ Rita Gerada vs. Charles Gerada, P.A. 18th November 2004, per Onor.Dr.Raymond C.Pace.

including the mediators, the protagonists to a marriage are irreconcilable?

This article started off from the premise that international human rights instruments do not normally include specific safeguards in respect of the matrimonial home. But Article 23, of the International Covenant on Civil and Political Rights imposes the obligation on State Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. Those states which on 16 December 1966 subsequently adopted and opened for signature the ICCPR, inclusive of Article 23, did so on the understanding that within each state signatory, there should be legal, social or financial provisions in support of marriage and the family. Further, that the individual who openly and publicly committed himself to marriage, would have his investment in children, home, assets and future earnings, protected by legal and social provisions. This implies that marriage would give rights and protection, and when a family had been founded, they must seek to provide the structures for a secure future. In this light, protecting the Matrimonial Home despite all the problems that arise when protecting it, would appear to be an important means of complying with international human rights.