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ID-DRITT

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'e would like to thank J. Caruana Scicluna, L. Mizzi, A. Padovani, A. Pulicino, and A. Rutter Giappone for their help in the publication of the ɔurnal.

Nota Editorjali: Mejju 1975.

Wasalna lejn it-tarf ta' sena akkademika mimlija ġrajjiet. Naħseb għalhekk li jkun sewwi nħarsu kemm 'l ura lejn il-passat, u 'l quddiem lejn il-futur.

Kif bdiet is-sena, l-Għaqda kibret sew fin-numru minħabba żieda mhux tas-soltu fl-ewwel sena. L-istudenti f'dan il-kors urew ċertu interess inkoraġġanti fl-Għaqda, u r-rappreżentanti tagħhom kemm fuq il-Kumitat tal-Għaqda, kemm fuq il-Bord Editorjali, urew kemm huma kapaċi jaħdmu. Iktar tard fis-sena, l-Għaqda organizzat forum dwar ir-relazzjonijiet industrijali u ieħor dwar is-sistema avversarja. L-għażla tal-kelliema għal dawn il-panels ma setgħetx tkun aħjar; l-organizzazjoni kienet tajba; u l-udjenza, għalkemm forsi xi ftit żgħira, dejjem uriet u ġibdet interess: kien tassew inkoraġġjanti li tara studenti jbiddlu ideat ma' ħaddieħor b'mod sod u li jiftiehem. Rapport dettaljat dwar dawn il-fora jidher f'ediaajoni oħra ta' dan il-ġurnal. L-Għaqda kienet ukoll imdaħħla fl-organizzazzjoni ta' forum dwar l-abort, flimkien mal-Moviment Kattoliku Studenti Università. Il-kontribuzzjoni tagħna hemm kienet siewja u wkoll apprezzata. L-Għaqda wkoll organizzat għall-ewwel darba bibita żgħira għall-membri professjonali tal-Fakultà u għall-istudenti. Barra milli kienet lejla tassew pjaċevoli fiha nfisha, laqgħat bħal dawn igħinu biex irawmu fina l-fehma li aħna ilkoll qegħdin naħdmu flimkien, biex nagħrfu aħjar in-natura vera tad-Dritt, u għalhekk tal-Bniedem. U fl-aħħar: id-Dritt. Nixtieq hawnhekk nirringrazzja 'l ħbiebi tal-Bord Editorjali li taw tant żmien, xogħol, u nkwiet għall-ġurnal, ġie li quddiem problemi iebsin. Aħna ppruvajna nagħtu l-aħjar li stajna għax jidhrilna li l-Kultura legali tagħna hekk ħaqqha.

Wieħed irid igħid li dan ma hux biżżejjed. Dan li sar għen biex iġġenera interess ġdid fl-Għaqda: dak l-interess irid jiġi miżmum permezz ta' sforzi ġodda mill-membri tal-Kumitat ta' l-Għaqda u mill-istudenti kollha.

Fl-aħħar, l-Għaqda u l-Bord jixtiequ jirringrazzjaw lid-Dekan tal-Fakultà, il-Professur Edwin Busuttil, għall-għajnuna u nkoraġġiment siewja li huwa wera matul is-sena. Nixtieq nisżi ħajr ukoll lis-Sinjorina Maria Cordina, segretarja tal-Fakultà, li dejjem kienet lesta li tgħaddi l-artikli bit-typewriter meta x-xogħol tagħha kien jippermettilha.

CHARLES DEBATTISTA

Editorial Note: May 1975.

We are almost at the tail end of a rather eventful academic year, and it would be well, I believe, to look back and turn towards the future.

At the beginning of the year, the Society swelled in its ranks as a result of an unusually populous First Year. These have shown a healthy interest in the Law Society, and their representatives both on the Society Committee and on the Editorial Board have proved their mettle to all and sundry. Later on in the year, the Society organised a forum on industrial relations and another on the adversary system. The panels speaking at these fora could not have been better chosen; the organisation was good; and the audiences, though perhaps rather thin, were always interested and interesting: it was encouraging to see students exchange ideas in a firm and coherent manner. We will carry a proper report of these fora in our next issue. The Society was also involved in the organisation of a forum on abortion, together with the University Students Catholic Movement. Our contribution here was, I think, valid and appreciated. A novelty this year was the cocktail party organised by the Society for students and staff. Besides being an enjoyable evening in itself, meetings like this help in creating the sentiment that we are all working together in search of a better understanding of Law and, therefore, of Man. And finally, of course, Id-Dritt. I would like to thank all my friends on the Editorial Board for having contributed so much time, work and worry, at times in the face of acute difficulties, to the journal. We have tried to give of our best, because we think our legal culture deserves it.

Of course, this is not enough. All this helped in creating a new-found interest in the Society: that interest must be sustained by renewed efforts by Committee Members and the students at large.

Finally, the Society and the Editorial Board would like to thank the Dean of the Faculty, Prof. Edwin Busuttil, for the valuable help and encouragement which he has shown throughout the year. I would also like to thank Miss Maria Cordina, the Faculty Secretary, who has always been ready to type out scripts of articles, when she finds it possible to do so.

CHARLES DEBATTISTA

CONTENTS

THE MALTESE CORSAIR COURTS

PAUL CARUANA CURRAN

THE COURTS IN THE 17TH CENTURY

Privateering in Malta is known to have existed long before the Order's arrival. Its usefulness became more and more apparent as time passed. As the population of Malta multiplied from the 16th century onwards, commerce and the number of merchants, as also privateering and those who were connected with it, increased proportionately. At the same time, however, abuses, which had always existed, also increased. In 1605, the Grand Master Alof de Wignacourt found it necessary to set up an organisation to control privateering and to give the corsairs a statute to observe.

Thus on the 17th June, 1605, the Magistrato degli Armamenti came into being. It was composed of five Commissioners, all of them nominated personally by the Grand Master and changed in rotation at two-yearly intervals. Three of the Commissioners were Knights Grand Cross, the fourth member being a senior knight. All four were drawn from different 'languages'. The fifth member was a secular learned person, usually a lawyer.

Licenses could be granted by the Grand Master on the corsair's application, but only after the Grand Master had been given a favourable report by the Magistrato as to the quality of the armament, its provisions and its fighting potential. It was also specifically laid down that Christians, and even infidels carrying a Christian passport, were not to be molested. Before leaving port, the corsair captain had to swear not to attack Christians and to provide a solvent surety (*pleggio di bandiera*) to guarantee his obligation.

The Magistrato during the 17th century exercised jurisdiction over all litigation concerning corsairs who flew the flag of the Religion. Those corsairs who flew the Grand Master's flag were subject, however, to the Grand Court of the Castellania, which was a lay court. From both these courts there lay an appeal to the Suprema Curia d'Appello e Tribunale dell'Udienza. The Castellania, whose main concern was the normal litigation of the civilian population, became of great use to the Corso when in the closing decades of the 17th century the corsairs ran into trouble. The fact was (as shall be explained below) that the Maltese corsairs now began to attack Greek shipping and since the Greeks were Christians, they rightly sued the corsairs in the courts of Malta. But while from decisions reached in the Magistrato there lay a second

appeal to the Vatican Courts, no such thing could be done from the Castellania, since this latter court was maintained by the Grand Master in his own capacity as a sovereign prince, and not as head of the Order, which was supposed to be subservient to Rome. Inevitably there was a greater chance, of a prize being declared illegal when the case was referred to Rome.

The Consolato del Mare

In 1697 the Grand Master set up the Consolato del Mare, again in his capacity as a sovereign prince. This was organized on the lines of similar courts in other important commercial centres in the Mediterranean (Messina, Barcelona and Valenzia), and was meant to deal with all matters conceming normal commerce. The 'consuls' of the Consolato del Mare were four merchants of experience in maritime trade, who sat two at a time, and the 'assessore', the qualified judge, who sat only when required. They were all appointed by the Grand Master.

The Maltese Corso, having reached its zenith in the closing decade of the 17th century, was, in the last years of that century, visibly in decline. One reason for this decline was the rise of French influence and commerce in the Levant. The French king was, in the interest of French commercial activities, putting pressure on the Grand Master to restrict the damage being done to Turkish shipping in the Levant by Maltese corsairs because this was leading to violent reprisals by the Turkish authorities on French merchants in the ports of Syria, Phoenicia and Egypt which were ruled by the Sultan. The second, equally important reason for the decline of the Corso was the increased use of Greek shipping by the Moslem merchants of the levantine ports. This was a clever, but at the same time only natural move by the Turks as the Greeks were their subjects. In time this move proved to be the Turk's own undoing as it was through their increasing merchant fleet that the Greeks asserted their claims to nationhood after the long Turkish occupation.

By about 1700 the clash in the east between the Greeks and Maltese became marked. So large a proportion of levantine merchandise was being carried on Greek ships, that it was impossible for the Maltese Corso in the Levant to function without it molesting Greek shipping. The Greek merchants whose goods were plundered by Maltese corsairs were entitled to come to Malta and sue the latter in the Maltese courts.

In the light of this, the importance of the Consolato del Mare during the 18th century becomes clear. All corsairs who were licenced to sail with the flag of the Order, as had generally been the practice in the 17th century, were subject to the Magistrato and ultimately to an appeal to Rome. In answer to this the corsairs were being licenced in increasing numbers to sail with the personal flag of the Grand Master. These were subject to the jurisdiction of the Castellania.

Within a few years of its establishment the Consolato took over the responsibilities of the Castellania with regard to the corsairs flying the flag of the Grand Master. As with the Castellania before 1697 the decisions reached in the Consolato were only subject to the appeal to the Tribunale dell'Udienza and there was, therefore, no possibility of a second appeal to Rome.

The competence of the Consolato allowed for flexibility of manoeuvre and it was quite perfectly in order that it should deal with the effects of privateering on commerce. It was provided in the Statutes of the Consolato that in case of doubt or conflict as to whether the cognisance of a law-suit belonged to the Consolato or to another court of Malta, it was the Grand Master who was to decide which court was competent. On the whole it was obvious that the Consolato had a general jurisdiction over all maritime affairs while the Magistrato had a special one over privateering.

For over three decades the Consolato del Mare remained of paramount importance, dealing with all litigation concerning corsairs flying the Grand Master's flag. The Pope, however, through the Inquisitor on the island, began to exercise pressure on the Grand Master and the corsairs flying his flag. He had taken it upon his shoulders to protect Greek shipping from attack by fellow Christians. He refused to recognize the Consolato del Mare as a prize court. In 1733 the Grand Master had to give up the use of his personal flag. This meant the end of the Consolato del Mare as a prize court, for now all corsairs had to fly the Religion's flag and were responsible to the Magistrato degli Armamenti, which was ultimately subject to the feared appeal to Rome. This remained the situation for the next half century, which was largely a period of decline for the Corso.

A second remedy sought by the Maltese corsairs in order to interrupt the process of the decline of their activity in the Levant was to sail under the flags of foreign princes, usually that of the Grand Duke of Tuscany or that of the King of Spain. These princes

had altogether different rules regarding the Greeks. The decisions of their courts were not subject to appeal to the Vatican courts and it seems that the Greeks were not given quite as fair a chance as they were in the Maltese courts. Of course in these cases the Greek merchants could not sue in any of the Maltese courts since these did not claim jurisdiction over the corsairs of Tuscany and Spain. By 1732, however, the Grand Master, as a result of diplomatic pressure from the Pope had to prohibit the use of foreign flags by Maltese corsairs.

The Tribunale degli Armamenti under the Code de Rohan

The Magistrato degli Armamenti, now known as the Tribunale degli Armamenti, was reconstituted in 1784, when the Code de Rohan came into force. It substantially improved the position of the Corso. This was made possible by a thorough reorganization, as far as privateering was concerned, of the entire juridical structure and machinery that existed at that time. Of interest here is the reorganization of the Magistrato or Congregazione, which now became the Tribunale, and that of the appeal court. The Consolato del Mare was reduced to a shadow of its former self. It now had its name changed to Tribunale Marittimo dealing exclusively with normal peacetime commerce. As may be noticed, many of the old names were changed, though for no apparent reason. But it is clear that the transformation of the prize court from Magistrato to Tribunale had a definite meaning.

From 1784 there actually came into being not one tribunal but two, or perhaps more exactly two sections of the same tribunal. One was the Tribunale degli Armamenti con Bandiera del Nostro Ordine, while the other became the Tribunale degli Armamenti con Nostra Bandiera (i.e. of the Grand Master). The former remained constituted on the same lines of Wignacourt's law of 1605 with five commissioners and observing the statutes and regulations which had been valid for the old Magistrato. The Tribunale degli Armamenti con Nostra Bandiera was really a new court altogether. It was composed of only three officials. One was the *ricevitore pro tempore* who was a senior knight in charge of the collection of sums due to the Treasury, including the important 10% share (or tithe) of the value of the booty always paid to the Grand Master, known as *Diritti di Ammiragliato*. This fee was also paid by foreign corsairs who came to Malta to sell their booty. The second member was the *consultore*, most commonly a lawyer. The third

member was the *cancelliere* or *mastro notaio*. All three were nominated by the Grand Master and could be removed by him.[1]

As to the appeal after 1784, the Code brought into existence a much more complex system which was of great use to the Maltese corsairs. The old Suprema Curia d'Appello e Tribunale dell'Udienza now became known as the Tribunale della Publica Udienza. This, with a much more limited competence, took over the duties of the old appeal court. It was to it that the appeals of the Tribunale con Bandiera dell'Ordine went, as had been the case before 1784.[2] The decisions and judgements of the Tribunale della Publica Udienza were, of course, still subject to a final appeal to Rome, although this was not mentioned in the Code de Rohan. The Tribunale degli Armamenti con Bandiera dell'Ordine, according to the Code, had to observe all the regulations which had been made by the Consiglio Compito and the Consiglio di Stato[3] and this made it automatically subject to the appeal to Rome.

A new court of appeal had meanwhile been created in 1782, styled the Supremo Magistrato di Giustizia and designed to take over some of the duties of the overworked Suprema Curia d'Appello e Tribunale dell'Udienza. From 1784, it became known as the Tribunale Collegiato. This new court was to hear all appeals from the Tribunale degli Armamenti con Nostra Bandiera.[4] The decisions reached by the Tribunale Collegiato could not have the force of law until approved by the Grand Master himself.[5] Rome is not mentioned, and since there were no previous statutes binding either the Tribunale degli Armamenti con Bandiera or the Tribunale Collegiato, as both were newly established courts, it is clear that the new Code did not recognise any appeal to Rome in their re-

[1] Diritto Municipale di Malta (Code de Rohan), Book I, Chapter XXXV, Articles I and II.

[2] Diritto Municipale di Malta, Book I, Chapter XXXVII, Article I.

[3] The Consiglio Compito was the supreme authority of the Order, being the tribunal of appeal from the Consiglio di Stato. It was composed of all the ordinary state councillors together with another sixteen knights, two from each *langue*, all over 25 years of age and members of the order for at least five years.

[4] Diritto Municipale di Malta, Book I, Chapter VIII, Article XX: The distinction between the two sections of the Tribunal is brought out very clearly by the fact that Appeals from their decisions lay to different courts.

[5] Diritto Municipale di Malta, Book I, Chapter VIII, Article XL.

gard. It is to be noted that the Code de Rohan is completely silent on the question of the appeal to the Pope and that of the independent jurisdiction of his Inquisitor on the island.

Thus the Corso found good backing in one or two subtly thought out provisions of the new Code. The Code de Rohan and the Tribunale degli Armamenti it constituted in 1784 were partly behind the revival of the Corso in the late 18th century. They could not, of course, guarantee that the corsairs would win all their cases, but they did give them protection from undue interference by Rome.

As before 1784 the Tribunal had both judicial and administrative functions and exercised detailed supervision over the ships, crews, equipment, provisions, disposal of booty, and the considerable litigation connected with the Corso.

During this period the *ricevitore* of the Order, who was the presiding member of the Tribunal, was the Balí Fra Gioacchino de Britto, of the Langue of Castille. His family had old connections with the Order.

The *consultore*, or legal expert, was Raffaele Crispino Xerri, one of the *Uditori*. He had a distinguished career also under British rule, being made a member of the Supreme Council of Justice and knighted in 1818. The high rank of the two leading members of the Tribunal shows the prestige of the Corso.

The *cancelliere* or *maestro notaio*, was Giuseppe Vella, a notary from Burmola, who practised from 1761 to 1800. This official had very onerous duties, keeping the records of prize cases, drawing up inventories of the booty arriving in Malta, inspecting and searching ships and keeping a separate account of the transactions handled through the bank of the Tribunal.

Under these three there were an assistant notary, an accountant and other officials.

The procedure of the Tribunal, as can be seen from the records, was kept as simple and short as possible. No holidays were allowed excepting those required 'in honour of God'.[6]

Two Important Cases

In the last twenty years of the Order's presence in Malta and hence of the Corso's existence, there was in fact a revival of Maltese privateering in Barbary (North African) and Levantine waters. If, however, the effort of the Corso in the Levant was to

[6] Diritto Municipale di Malta, Book I, Chapter XXXV, Article III, and the note by Sir Antonio Micallef.

be sustained it was imperative for the corsairs to have at least some good lines of defence in the law suits instituted against them by the Greeks.

The two cases related here were typical of the litigation in Maltese courts resulting from the intense Greeco-Maltese rivalry in the Eastern Mediterranean. On the 20th March, 1796 Captain Giorgio Mitrovich[7] left Malta for Barbary, and subsequently sailed to the Levant, in command of the xiabec *Santissimo Crocifisso e la Beata Vergine del Carmine* (almost all corsair vessels bore religious names) with a crew of 37 men. In the course of his cruise Mitrovich seized two vessels. The first he captured off Navarino. This ship was a cutter or palandra and was commanded by a Greek Teophilius of Negroponte, who said that he was carrying his cargo from Trieste to Samos. He produced a recommendation of the Order's consul in Trieste requesting Maltese corsairs not to molest him. Mitrovich sent his clerk aboard to carry out the *visita* or search. The cargo was found as described by the Greek captain but in addition the clerk found some munitions of war, a Turkish flag, a Turkish passport and a Turkish contract relating to the purchase of the cutter. Mitrovich decided to arrest the cargo ship and to bring her to Malta so that it would be decided whether it was legal prey or not.

The second vessel Mitrovich captured off Cape Spartivento. On being sighted by the corsair, the Greek captain, Dimitri Liodi, hoisted a Greek flag, then lowered it and hoisted a Turkish flag. The merchant ship, a pollacca, when called to obedience, took to flight. She was soon overtaken by Mitrovich. Liodí said he was carrying wheat from Alexandria to Marseilles, but had changed route to Malta and that he had a recommendation from the Papas of Mykonos asking Maltese corsairs not to molest his ship. He also showed a Turkish passport. Mitrovich, however, found she was carrying four cannons and other minor weapons. She also carried a Turkish pennant. In view of these circumstances and for lack of proof of the Christian ownership of the vessel and cargo, Mitrovich

[7] Mitrovich was the best anown among a large number of Slavs resident in Malta at the time profiting from the business of privateering. He was the grandfather and godfather of the future Maltese patriot (his namesake) of the 1830's who was born in 1795, when Giorgio the elder was at the height of his career, and who pleaded so much for Press liberty and more education for Malta. See Parochial Registers, Senglea, Births, 1775-1796, fol. 452 and Catholic Greek Parish Church, Valletta, Baptism, fols. 19-20.

brought the vessel to Malta for examination.

The validity of the depredations was strongly contested by both Liodí and Negroponte. The case Liodí vs Mitrovich is unique because it contains the complete record of the appeal by the advocate Salvatore Chapelle on behalf of Mitrovich. It is here reported first because the Tribunal decided this case before that of Negroponte.

Chapelle's argument was developed on the following lines. Cases of depredations of Greeks by Maltese corsairs were not to be viewed principally under the *Jus Comune* but under the *Diritto Municipale* (Code de Rohan), the relevant provisions[8] of which were based on the Clementine Bull of 1738. Both the Bull and the Code as statute laws made it clear that it was for the Greek claimant to prove that the depredation was unlawful. He had to bring strict and conclusive proof that both the vessel and the cargo were Greek-owned. If he failed to do so the Tribunal's decision was clear. In any case Mitrovich would prove that the vessel was Turkish.

Chapelle referred to the fact that the pollacca had first put up the Greek flag, then hurriedly replaced it with the Turkish flag. He argued about the Greeks' habit of cheating and their innate characteristic of colluding with their Turkish masters. He submitted that no proof of Greek ownership was produced and that Liodí was not covered by any passports, except for some ineffective letters of recommendation. Consequently, he said that the prey was lawful under the Code de Rohan. With regard to the *Jus Comune* Chapelle submitted that in previous cases Greek claimants had never been successful when the vessel had been carrying both a Turkish flag and a Turkish pennant.

This case did not go too well for Mitrovich, however. The Tribunal decided that the captured pollacca should be restored and that the Greeks should be paid the auction price of the cargo as damages and interest. They must have been impressed by two practical arguments raised in defence of the Greeks by Giovanni Calcedonio Debono. The first was based on the justification of the pollacca's attempt at flight. The Greeks declared that they believed Mitrovich's xiabec to be a Barbary corsair and that they only fled for that reason. The second argument was directed against Chapelle's point regarding the Greek variations of flag. They ar-

[8] Diritto Municipale di Malta, Book VI, Chapters XIV and XV.

gued that they had no choice, as Ottoman subjects, but that of flying the Turkish flag, which protected them from Turkish and Barbary corsairs; while they had to carry a Greek flag in order to protect themselves from unlawful attack by fellow Christians. Thus the Tribunal had to recognise the usage of the Greeks of flying two flags, which was a great advantage to the growth of Greek shipping. The Greeks, as Christians and Ottoman subjects, were, in fact enjoying the best of both worlds.

In the other case, Negroponte vs Mitrovich, the Greeks only scored a narrow victory, as can be seen from the decision of the Tribunal given on 28th April, 1797. The Tribunal held that the vessel and cargo were owned by Christians and that there was not enough proof that the cargo would be used by Turks rather than Greeks. The destination of the cargo was the island of Samos, which the Maltese interests claimed to be inhabited by Turks and Greeks, while the Greeks contended that it was inhabited by their co-nationals except for the Aga who collected taxes, and a small garrison. The Tribunal took the latter view. It also held that the arms and munitions of war on the vessel were too small to be of any assistance to the Turks. The Tribunal ordered Mitrovich to return the vessel and cargo, but it dismissed, in this case, all Greek claims for damages and interest on the grounds that the provisional arrest of the vessel was justified under several aspects, such as the original presentation of insufficient and contradictory documents as well as the presence of what were, strictly speaking, munitions of war. It was worth noting, however, that as late as February 1798, Nicola Calafatti, a relative of the ship's owner, was still in Malta trying to obtain execution of the decision reached. The Maltese financiers frequently adopted delaying tactics in order to make things as difficult as possible for the Greeks.[9]

Legal practice and tradition owe the Maltese Corso a debt of gratitude for there was a sincere effort by the judges and officials

[9] The sources for the two reported cases are –
Archives Courts Malta,
Tribunal Armanentorum,
Acta Originalia,
Vol. B. 26, Case 20, fols. 2-6, 36-58 for the case Liodi vs Mitrovich; and
Vol. B. 29, Case 1 for the case Negroponte vs Mitrovich.
See also the thesis by the writer of this essay – 'The Last years of the Maltese Corso', Chapters I and III and Appendix III.

of the Tribunals, as well as by the Maltese Lawyers practising in that court, to put things right wherever justice and equity so required. Many illustrious Maltese lawyers such as Chapelle, Bonavita, Torregiani, Calcedonio Debono and Giovanni Nicolò Zammit took part in its proceedings. The Magistrato, or the later Tribunale, was a true and proper prize court administering the law of nations as then already acknowledged by enlightened international legal opinion, and especially as recognised by the relevant provisions of the Code de Rohan. The records of the corsair courts of Malta, if we may call them so, are still excellently preserved in local archives. They provide reliable evidence of the understanding and appreciation of this branch of the law in Malta even in those far off, swashbuckling times.

DOCTORS AND WOULD-BE DOCTORS IN THE LAW REPORTS

By courtesy of the Editor, St. Luke's Hospital Gazette

J. J. CREMONA

This paper is the St. Luke's Day Oration delivered to the Malta Branch of the British Medical Association on the 18th October 1973 at the Medical School of the University.

DOCTORS (and, following the order in the title of this lecture, I shall come to would-be doctors later) figure in our law reports in several guises – as plaintiffs or defendants in civil actions, as persons charged in criminal actions, as witnesses and, lastly and more commonly, as experts. For the purposes of this lecture, I am confining my interest to doctors *qua* doctors as otherwise there are, of course, numerous instances of doctors figuring in the law reports as ordinary litigants. Obviously there is nothing to preclude doctors from joining in this national pastime which is court litigation and, as I said, there are several reported cases of doctors, even some of the most reputable ones, suing or being sued for damages in connection with traffic accidents, whereas in relation to traffic accidents I am obviously more concerned with doctors as experts

assessing, for instance, (and this is by no means easy) the percentage of an injured person's permanent incapacity for the purposes of an action for damages.

I should like to start with a famous civil case in which a doctor unfortunately figures as defendant and I should like to do so because the case is concemed with the fundamental question of a doctor's responsibility arising out of the carrying out of his professional duties. The case, which is in the Law Reports (Vol. XXXV, Part 2, pages 55-56), was decided by the Court of Appeal on the 2nd April 1951. In this case a father, on behalf of his son under age, sued a doctor for damages arising out of the fact that the son, who was under the professional care of the doctor, allegedly through the doctor's negligence, lost his foot and suffered permanent debilitation. Warrants of seizure and of impediment of departure, as well as a garnishee order, were also issued against the doctor.

The facts of the case were as follows. On the 18th March 1944 the doctor performed an operation on the boy's foot, which had been paralysed through poliomyelitis. Next day the doctor visited the patient and, as he stated in evidence, found everything normal. He failed to visit him on the 20th but on the 21st he did visit him, after having first declined, on the insistence of the person who called him and he found the boy flushed and feverish. Again on the 22nd he failed to see the boy and on the 23rd the boy's mother took him to the doctor's house. The doctor tore open the bandage and, after some medication, applied another bandage on everything there was. On the 25th the boy's mother again went to the doctor and informed him that the exposed part of one of the toes there was a blister. Notwithstanding this information, the doctor failed to go and see the boy. From the 26th onwards the mother started taking the boy to the doctor daily and the doctor continued to treat him regularly till August of the same year when the boy's foot, gangrenous and mummified, dropped off spontaneously as Professor Peter Paul Debono, to whom the boy's family had turned, was uncovering it. The medical experts appointed by the Court reached the conclusion in their report that the gangrenous process had begun from one to two days after the operation, that is to say between the 19th and 20th March, and continued on its normal course till the foot's spontaneous amputation four months later and that the position could have been remedied had the doctor become aware of it in time. They said that in this case gangrene was occasioned by the

pressure of the plaster bandage, which seriously obstructed the circulation, added that it was to be expected that after such an operation the foot should swell and the bandage consequently tighten. They admitted that the doctor had not noticed the condition of the boy's foot in those first days after the operation, but felt that this was due to a professional error of judgment, an error in the interpretation of clinical facts, and that this error was not due to negligence.

Both the court of first instance and the Court of Appeal, however, disagreed with the experts' conclusion that there was no negligence, and this on the basis of the statements of the experts themselves. It was remarked in the judgment that, according to the experts themselves, the critical period was between the 19th and the 23rd and during this period the doctor had failed to see the patient on the 20th and the 22nd, and it was only on the insistence of a certain person that he went to see him on the 21st. The experts themselves stated in their evidence that common prudence did in fact suggest that the doctor should have seen the boy also on the 20th and added that in the period between the 20th and the 23rd the doctor should have gone to see the boy irrespective of any symptomatology which the boy presented on the 20th, but by reason only of the fact that the operation had taken place on the 18th, considering the nature of the operation itself. The experts themselves also stated that in this period between the 20th and the 23rd the symptoms, especially local ones, increased in severity and this should have caused the doctor to become aware of the gangrenous process, had he in fact gone to see his patient. Indeed, as I said, it was on the basis of the experts' findings themselves that both Courts reached the clear conclusion that there had been negligence on the part of the doctor.

The Court of Appeal agreed with the Court below that on the facts as established the doctor had not used the diligence of a *bonus paterfamilias* and had shown imprudence in not having continually kept, as he should have done, an eye on the patient in the days after the operation when the danger of gangrene was so much present and could have been avoided by his attention. He was thus at fault and was responsible for the consequences.

The Court of Appeal, quoting from Italian and French text-writers, held that it was clear from the authorities and the decided cases that a doctor was not responsible for damages resulting from an excusable professional error and this was excusable if it stem-

med from the uncertainties and imperfections of the sciences and not from negligence or sheer incapacity. But the position was, of course, different if the error was, as the Court put it, *grossolano*, which, literally translated, means 'coarse', or if the damage was attributable to his not showing the prudence, diligence and attention of a *bonus paterfamilias*, which, as you know, is the ordinary standard of care required by our law. This proposition, as indeed also the writ of summons itself, was based on the basic provisions of Sections 1074 and 1075 of the Civil Code, which provide that 'every person... shall be liable for the damage which occurs through his fault' and that 'a person shall be deemed to be at fault if, in his own acts, he does not use the prudence, diligence and attention of a *bonus paterfamilias* but 'no person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence of attention in a higher degree'.

Another class of reported cases in which doctors figure, this time as plaintiffs, in civil suits and which illustrate the eternal hazards of credit, relate to doctors' actions for the payment of professional fees. First of all, as you know, there is prescription, which is here used not as a medical term but as a Maltese and Continental legal term denoting one of the causes of extinction of obligations (by lapse of time) which is in general justified by the social necessity of ensuring the certainty of juridical relationships, but – and I quite realize this – can be also most infuriating. On the other hand, the running of prescriptive time may in some cases be suspended or interrupted. Procedurally prescription is a defence against an action and in civil matters cannot be raised by the Court of its own motion, but unfortunately is quite often cheerfully raised by the defendant, and this at any stage of the proceedings, even on appeal. One of the facts of life of universal application is that there is very little enthusiasm for payment, at least when one is at the paying end. No doubt you all know that, according to law, actions by physicians, surgeons and obstetricians to get payment for their visits or operations are barred by the lapse of two years. So please beware.

I am now thinking of one particular doctor (whose case, decided by the First Hall of the Civil Court in 1928, figures in Vol. XXVII, Part 2 pages 53-55 of the Law Reports) who must have found the defence that was set up against his action for the payment of professional fees perhaps much more disconcerting than just prescrip-

tion. The patient, defendant in the suit, did not contest the fact that he had called the doctor to make use of his professional services, nor indeed did he contest the bill. His defence was only that the treatment which the doctor had given him, notwithstanding the doctor's repeated assurances that it would have been efficacious, had not produced the anticipated effect and that in fact he was worse. He added that he would not have entrusted his case to the doctor if he had not assured him about the result of the treatment, and in fact he had told the doctor not to start the treatment if he did not feel certain of its efficacy. It was established that the treatment had negative results and Professor Peter Paul Debono expressed the opinion that the patient's illness was incurable.

The Court in this delicate case had regard to the relevant circumstances. It held that it was clear that the payment of a doctor's professional fees could not be subjected to the condition of the patient's recovery, notwithstanding the doctor's assurances and expressions of confidence in the result of the treatment which, rightly or wrongly, he thought would be conducive to recovery, provided – and this is a very important proviso – there was no evident bad faith or evident abuse of the exercise of his profession on the part of the doctor. In this case, bad faith, the Court said, 'could not be presumed solely from the negative result of the treatment or Professor Debono's opinion that the patient's illness was incurable'. The case was, of course, decided on its own merits, due allowance being made for the possibility in other circumstances of the presence of bad faith or abuse in the exercise of the profession, and this is quite understandable.

As I said, the Law Reports also show some interesting cases of doctors as defendants in criminal cases. I should like in the first place to refer to a reported case decided in 1917 which concerned a charge against a Sliema doctor of having refused to give his professional services when called upon so to do in an urgent case and which indeed relates to what is often an agonizing situation for a medical practitioner (Law Reports, Vol. XXIII, Part 1, pages 1083-1086). As you know, the Medical and Kindred Professions Ordinance (Chap. 51) provides in section 6 that it is the duty of every licensed medical practitioner to practise his profession whenever he is so required in cases of urgency, whether by day or by night, and without any wilful delay to render his aid and prescribe the necessary remedies. The Ordinance also prescribes penalties for offences against this provision.

The facts of this particular case were as follows. In the early hours of the 19th August 1917 a man was roused from his slumbers by a kind-hearted woman who told him that another woman, a neighbour, was ill and she asked for his help. He found the sick woman so ill that he called a priest and the priest suggested that he should call a doctor. He then embarked on a series of fruitless peregrinations. Having gone first to one doctor with negative result, he then went to the doctor concerned in this case, making known to the person who peeped out of the window the object of his visit and the urgency of the case, but was informed by that person that the doctor could not attend to the case as he had only shortly come home. After having unsuccessfully sought another doctor at his residence and also unsuccessfully requested the address of another from the duty police officer, the man went again to the doctor concerned, but again with negative results. Then he went, again unsuccessfully, to call another doctor. The net result was that up to six o'clock in the morning no doctor had gone to see this woman. In court the doctor concerned pleaded in justification indisposition resulting from tiredness which necessitated rest. The Court of Magistrates held that, according to the teachings of jurists, the reason justifying a doctor's refusal to give his professional services when so required in cases of urgency had to be grave, and that not only had this doctor failed to show sufficient justification for his refusal, but the evidence showed that his defence was groundless. On appeal by the doctor, the appellate Court affirmed the judgment. It observed that the conditions for the existence of the contravention in question were, first, the urgency of the case in connection with which a licensed doctor is required to give his professional services and, secondly, the unreasonableness of his refusal to do so. The Court added that one could only adjudicate upon the urgency of the request on the basis of the circumstances antecedent to or concomitant with the request itself, that is to say on the basis of the circumstances in which the case presented itself and not of the subsequent circumstances; these might conceivably disclose that the apprehended urgency did not as such exist whereas it could be shown that the circumstances themselves did in fact justify at the time the apprehension of that urgency. With regard to the second point, the Court said that, in order to decide on the reasonableness or otherwise of the doctor's refusal, it was necessary to have regard to the ground for the refusal, the ascertainment of the existence of such ground and its appreciation being left to the Court.

Quoting from the French legal writers Chauveau and Helie, the Court made it clear that the assessment of such ground could not indeed be left to the individual appreciation of the practitioner to whom the request was made. Obviously this is a very delicate matter involving a fine appreciation of all relevant factors.

Other reported cases in this class relate to another important duty of medical practitioners under the Prevention of Disease Ordinance (Chap. 59). Section 5 of this Ordinance provides as follows: *Every* medical practitioner attending on or called in to visit a patient shall forthwith, on becoming aware that the patient is suffering from a disease to which this part of the Ordinance applies, send to the Superintendent a certificate stating the name, age and address of the patient, and the disease from which, in the opinion of such medical practitioner, the patient is suffering'. This provision, according to Section 38 of the same Ordinance with which it must be read, applies even where there exists only a reasonable suspicion that the disease is one of those specified in the said Section 38. A cade of a charge under this Ordinance against a medical practitioner came before the Court of Magistrates in 1938. It did not present much difficulty from the evidential point of view. In this case, reported in Vol. XXX, Part 1, pages 543-549 of the Law Reports, it was established in evidence that the doctor, who had a sick child under his care, actually declared to the child's mother that the case was one of diphtheria, gave the child several injections of anti-diphtheria serum, warned the child's parents to say nothing about case, created in them the fear that they would be arrested if they talked and stating that if he was caught he would be fined twenty pounds, asked them to hide the empty phials, advised them to remove their young daughter from the house, warned them not to admit anybody into the house and, notwithstanding all this, sent no certificate to the Sanitary Authorities and then expected to get away with it in Court. It is not surprising in the circumstances that when he took the witness stand he only made his position worse.

The case is interesting only because it involved an important question about prescription. We have seen that prescription, as a cause of extinction of civil obligations is not too friendly to the medical practitioner who is a little remiss in sending his bills. But in a criminal case, on the other hand, prescription can only operate in favour of the person charged, in this case the medical practitioner concerned. The Court of Magistrates accepted the doctor's plea,

as it held that the doctor had declared the child to be suffering from diphtheria on the 20th December 1937 and the summons had been served on him on the 22nd March 1938, that is to say more than three months after the commission of the contravention. As in such cases the prescriptive period is 3 months the criminal action was thus barred by prescription and the doctor was acquitted. On appeal by the Attorney-General, however, the appellate Court reversed the judgment, found the doctor guilty and fined him. It held that the offence in question was a continuing one, that is to say one in which the course of action continues *de die diem,* and in such cases the prescriptive period only commences to run on the day when the violation of the law ceases. In this case the appellate Court held that the permanence of the anti-juridical state ceased with the child's death, so as long as the child remained alive the doctor was still violating the law in not giving the prescribed notice. The boy died on the 23rd December 1937 at two o'clock in the morning, and the summons was served on the doctor on the 22nd March 1938. The criminal action against the doctor stood, saved probably to the doctor's bitter disappointment, by just a narrow margin. Another question in connection with a charge against a doctor under this section arose in a reported case of 1954 (Vol. XXXVIII, Part IV, pages 786-788 of the Law Reports). The doctor concemed submitted through his counsel that the provision in question was not to be construed as imposing a duty to send the prescribed certificate on *each* doctor having the patient under his care or called to visit him. It was contended on behalf of the doctor that it was sufficient if only one doctor sent the certificate in cases, like the one in question, of a consultation where there was thus more than one doctor involved. The Court – and its view was endorsed by the appellate Court – was unable to accept this contention in view of the clear wording of the law which, after all, was also consonant with the *ratio legis* in as much as otherwise, in the case of a plurality of doctors concerned, each might well rely on the other as to the sending of the certificate with the unfortunate consequence that no certificate might in the end be sent at all.

Enough of this rather unhappy though very interesting subject of criminal prosecutions; I would ask you now to transfer your attention from the dock to the witness-box which, I know, can sometimes seem hardly less unpleasant. In connection with this subject, I should like to refer to a case which, because it is only too recent, has not yet been reported but which may well eventually find its

way into the Law Reports. This the case of **Balzan v Ciantar** which my colleagues and I on the Court of Appeal decided on the 24th November of last year.

No doubt you all know that nowhere are doctors really and truly in fantastic demand as witnesses these days as in Rent Regulation Board cases. You also know that doctors are being continuously asked – I was going to say 'pestered' – to make out certificates attesting that one or the other or both of the parties in a rent case suffer from some disease or preferably from a multiplicity of them as, for the purpose of the assessment of the respective 'hardship' of the parties, the more the diseases listed the greater appears to be the lessor's chance of recovering possession of his building or the tenant's chance of retaining it. Whilst in the old days to call a man 'baswi' very likely led to a case of slander, nowadays the parties in a rent case sport their rupture as if it were a family heirloom. In our procedural system a medical certificate is in principle of no evidential value unless the doctor who subscribed it confirms its contents on oath in the witness-box.

Now in the **Balzan v. Ciantar** case it was contended on behalf of the appellant before us in the Court of Appeal that a doctor's evidence as to the state of health of one of the tenants was merely an *ex parte* expression of opinion. It was stated in the judgment that a doctor having a person under his professional care and called by that person to give evidence on his behalf may be expected to testify, whenever this is relevant to the case, not only on the illness with which that person is affected (which has never attracted any objection), but also on what *that* particular person whose health background is after all normally known only to his personal doctor, should or should not do for the treatment cure or relief of that illness. The doctor testifies on what he himself knows about the patient as such, and this does not relate only to the illness which he has diagnosed, but also to what the patient, in the state of health in which he has been found to be, should or should not do on account of that state of health. Obviously, the Court added, both one and the other of these matters necessarily imply a certain subjective appreciation. But in the circumstances this is in itself inevitable, and, contained within proper limits, in normal circumstances is not procedurally wrong. May I, however, add, by way of a sad postscript to this, that I have at times seen medical certificates which looked elegantly tailor-made for the case, and some even recommended that the patient should have the particular house he was after.

Lastly I should like to say something about doctors as court experts. Mention of doctors as experts is to be found practically everywhere in our Law Reports. In our legal system, as you know, the expert is appointed by the Court itself and I feel that this system has much to commend it. We find doctors as experts in practically all reports of criminal trials on such charges as homicide and bodily harm. In one such case, which was decided by the Criminal Court in 1955 (Vol. XXXIX, Part IV, pages 914-915 of the Law Reports) the accused objected to the word *ċar* (clear) in the phrase *jesponuh għall-periklu ċar tal-mewt* (expose the victim to a clear danger of death) in the medical experts' report, on the ground that it is exclusively for the jury to adjudicate on this factor. The Court, however, overruled this objection on the ground that danger of death admits of certain gradations, ranging from remote danger to clear danger, and in the report this was correlated with the traumatic effect, the study of which is a matter which falls within the technical competence of the medical experts.

In civil matters, too, there are several reported cases relating to doctors as experts. In particular there was a time when the Courts held that it was impossible to entrust experts with the examination of the question of the mental sanity of a person – usually a testator – who was already dead at the time (Vol. XX, Part 1, page 193 and Vol. XXIV, Part 1, page 794 of the Law Reports). But more recently (Vol. XXXIV, Part 1, pages 108 to 133) a different view has been taken.

An interesting case arose in 1947 and is to be found in Vol. XXXIII, Part II, pages 73-74 of the Law Reports. In a case of separation the husband, who was the plaintiff and was alleging adultery on the part of his wife, requested the Court to appoint medical experts to ascertain whether his wife, the defendant, was pregnant. The First Hall of the Civil Court held that in the field of private law the examination of the person of any of the parties for evidential purposes was not provided for and so, in the event of opposition on the part of the person concerned, such examination was not admissible.

A similar case, but with a more modern flavour, occurred in 1952 and is reported in Vol. XXXVI, Part 1 pages 297-298 of the Law Reports. In a case of illegitimate filiation in which the plaintiff was alleging that the defendant was the father of her illegitimate child, the defendant asked the Court of Appeal to appoint an expert to carry out the necessary blood test on the plaintiff in order

to exclude his paternity in respect of the child. The Court held that such a test was admissible whenever the parties consented to it. In this case both the plaintiff and the defendant had in fact consented; but as the mother was appearing in the case also as *curatrix ad litem* of the child, the question arose whether in this capacity she could give her consent on behalf of the child. The Court held that as it was in the child's interest that his paternity be established and it did not appear that the test in question could be prejudicial to his health, it could in the circumstances supply this consent itself. A similar case is at present pending before us in the Court of Appeal and the relevant tests are actually being carried out. This, I think, evinces what I may call a prudent progressiveness in the Courts' approach to certain delicate problems.

Now I should like to draw here a very firm line dividing the first part of my lecture dealing with doctors from the second part concerning would-be doctors. But before dealing with these – and by would-be doctors I mean those who purport to exercise the medical profession without being qualified doctors – I should like to refer very briefly to those who, though qualified doctors, seek to exercise the medical profession without having first obtained the necessary licence to practise medicine in these Islands and (since 1959) being registered in the Medical Register, as provided in Section 4 of the Medical and Kindred Professions Ordinance (Chap 51).

A reported case of a foreign doctor or rather of a Maltese with a foreign medical degree who practised medicine in Malta without the requisite licence came before our Courts in 1939 (Vol. XXX, Part IV, pages 637-641 of the Law Reports). A person with such a Maltese surname as Mifsud, but a graduate of a French University *without a local licence,* practised medicine here and was convicted. He did not appeal against his sentence, but thought he was smart enough to get round it. He made arrangements with a licensed Maltese doctor for the opening of consulting rooms in Strait Street, Valletta and the locally licensed doctor was paid three pounds a week apart from two shillings in respect of every patient, and what was left after deducting expenses went to the man who was referred to as the French doctor. This man was convicted of having contravened Section 4 of the said Ordinance (Chap. 51) and this time appealed against his conviction. The appellate Court held that it had been established in evidence that the man examined patients, made diagnoses and prescribed treatment, and that

this did in fact constitute the exercise of the medical profession. Even if he did this without payment, the offence, of the unlawful exercise of the medical profession would subsist as the purpose of gain was not a necessary ingredient of this offense, this having been established in the earlier case of *Salunto.* Nor did the presence of the licensed doctor alter the position at law for whether by himself or in conjunction with others, this man certainly did contravene the law.

The *Salunto* case referred to in this judgment, also a reported case (Vol. XXV, Part IV, pages 914-917 of the Law Reports), is an interesting one. It refers to a proper quack and a female one – not that female quacks are any worse than male ones. This woman admitted that she cured people by recommending or administering to them such innocuous substances as ordinary purges and that for this she used to get some food or a little money. The Court held that the offence of the unlawful exercise of the medical profession was not negatived by the fact that the substances prescribed or supplied were innocuous (indeed by relying on such supposed cure the 'patient' in fact usually omitted or delayed the *proper* cure) or that the emoluments received were small.

In another reported case (Vol. XXXII, Part IV, pages 918-922 of the Law Reports) a much more serious view was taken of the defendant's misdeeds. A man without any professional qualifications posed as a medical specialist and even assured his 'patients' that they would be cured by him within a specified time, receiving payment for his service. With intent to make gain, he prescribed treatments which were of no benefit whatever to his 'patients'. Moreover, he publicly represented himself as a doctor and even managed to figure as such in the telephone directory. The appellate Court held that this was not a case of a mere violation of the said section 4 of Chap. 51, but that there were in this case all the ingredients of the much more serious crime of *truffa* under section 322 of the Criminal Code, including that *mise en scene* which is typical of this crime. The man was given six months in prison where it is hoped he had occasion to meditate on the long arm of the law and sort out the major from the minor offence.

I do hope you have not found this little guided tour of our *giurisprudenza* uninteresting. I, for one, always feel that there is a ring of reality about decided cases which to me at least is often more appealing than the writing of theoreticians. I do realize that I have often had to focus your attention on those doctors, indeed

extremely few, who have fallen foul of the law and this may perhaps on the whole have appeared to you a little dismal. But it is the dark side of things that brings out more fully the brighter side and the medical profession in Malta has indeed a very bright record. After you have heard all this, I should not like any of you to look upon the law with even the slightest degree of unfriendliness, for may I conclude by saying – and I firmly believe this – that the law is indeed the best friend of an honest man.

DOES 'LEGAL RELATIONSHIP' CONSTITUTE AN IMPEDIMENT TO MARRIAGE IN MALTA?

A. DEPASQUALE

1. NOTION OF 'LEGAL RELATIONSHIP'.

By 'Legal Relationship' we are here understanding specifically that special relationship in law that arises between an adopter and the person adopted by him in any way which, according to the laws of the country, constitutes a true legal adoption. This special relationship lies in the fact that, once legal adoption has truly taken place to the full satisfaction of the law, in the eyes of the law in most respects and almost as a general rule the adopted child assumes the same relationship to the adopter (or adopting spouses) as any child born in lawful marriage bears to his parents.

2. 'LEGAL RELATIONSHIP' IN THE LAW OF MALTA REGARDING MARRIAGES.

The Civil Code of Malta, while regulating the rights and duties arising from validly contracted Marriage together with such other civil effects as filiation and parental authority does not say how Marriage is to be validly celebrated in Malta. It fails to make any provisions either about the formalities required in its celebration or about the essential requisites on the part of the spouses contracting Marriage that could affect its validity.

It is, however, the constant doctrine and practice of our Civil Courts to require that marriages celebrated in Malta between parties of whom at least one is a member of the Catholic Church be

celebrated according to the form laid down by Canon Law and that such marriages be regulated also as regards 'essentials' by the Canon Law of the Catholic Church then applying. Among these 'essentials' one finds the juridical capability of both parties of contracting Marriage according to the law. This capability does not exist wherever a 'canonical impediment' to Marriage comes between the parties. This occurs when there is any circumstance which, according to Canon Law, affects the juridical capability of the parties to contract Marriage either by making it simply unlawful for them to contract it ('simply prohibitive impediments') or even by rendering them incapable of marrying validly ('diriment impediments').

Our Civil Code lays down no impediments to Marriage when dealing with marriage itself. Yet in view of what we have just said we must conclude that even in Civil Law marriages celebrated in Malta between parties of whom at least one is a member of the Catholic Church are unlawful if affected by a canonical impediment which is simply prohibitive, and altogether invalid if affected by such an impediment that is diriment. The whole question, therefore, seems to boil down to this: Does present-day Canon Law of the Catholic Church include 'legal relationship' among either the prohibitive or the diriment canonical impediments?

3. 'Legal Relationship' in Canon Law regarding Marriages.

This question brings us face to face with a somewhat embarassing situation in Malta. As we have seen, civil society in Malta by custom refers us to Canon Law in all that regards the essentials and formalities of marriage of members of the Catholic Church in Malta. Canon Law, on the other hand, refers us back to Civil Law of each State when speaking of 'legal relationship' as an impediment to marriage. In fact, canon 1059 lays down that: 'In those regions where, according to Civil Law, legal relationship arising from adoption renders marriage unlawful, marriage is unlawful also according to Canon Law'. Canon 1080 similarly states: 'Persons who by Civil Law are held incapable of contracting marriage between themselves because of legal relationship arising from adoption, cannot validly contract marriage between themselves according to Canon Law'.

The existence or otherwise of a prohibitive or diriment impediment of legal relationship arising from adoption, therefore, is made to depend by Canon Law and for Canon Law on the particular

State's decision to make marriages between its members affected by this relationship unlawful or even altogether invalid. While making no such provision when dealing with Marriage, our Civil Code might have something to say about the matter when speaking of the effects of Adoption.

4. EFFECTS OF LEGAL RELATIONSHIP ACCORDING TO MALTA'S ADOPTION LAW.

While nothing in the sections of our Civil Code dealing with adoption (sec. 131 to 153) prior to 1962 even remotely implied the existence of any legal obstacle to marriages between the adopter and the person adopted by him or her, some generic expressions of the Adoption Act, 1962, may easily lead one to assume that such marriages would in Malta be not simply unlawful but even altogether invalid.

The key paragraph of the 1962 Adoption Act is that contained in section 138(a) of our Civil Code[1] which states: 'Upon an adoption decree being made (a) the person in respect of whom the adoption decree is made shall be considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other person or persons, relationship being traced through the adopter or adopters...'

These generic words of the Adoption Act, 1962 and of our Civil Code can be taken to mean that between the person or persons adopting and the adopted person there arises a diriment impediment to marriage depriving them of the capability of marrying between themselves. For if, once adoption has taken place according to the law, the adopted person acquires the same 'rights and obligations of relatives in relation to each other' as though he were the adopters' child born to them in lawful wedlock, it would seem that he would also contract any limitation of rights such as impediments to marriage under which relatives within certain degrees of kinship labour. Now in Canon Law, which is accepted by the juridical order of our State as applicable to all Catholics domiciled in Malta, there exists the diriment impediment of consanguinity to marriages between blood-relations within certain degrees of kinship: it would therefore follow that between the adopted and the

[1] In this article we shall be quoting the Civil Code as amended up to the 31st. December 1967 unless otherwise indicated.

latter's relatives there arises also the *diriment* impediment of legal relationship.

This interpretation of section 138 of our Civil Code seems to be suggested by the generic wording of the law as well as by the fact that the Adoption Act of 1962 seems set on placing on a par to all intents and purposes the adopted child with the child born in lawful wedlock. One might also see a requirement of decency, to obviate as much as possible dangers of excessive and unlawful 'familiarity' between the adopter and the adopted, a requirement parallel to that existing between in-laws which is adduced to justify the impediment of affinity. Such a requirement to exclude the possibility of the creation of marital relations between the adopted and the adopter could be deemed to have been strong enough to induce our legislators to create the impediment of legal relationship between the adopter and adopted by depriving them by law of the capability of marrying between themselves, just as the legislators of some other countries such as the United Kingdom, Italy, Spain and several Latin American countries have felt it necessary or convenient to do.

5. ANOTHER INTERPRETATION.

It seems to me, however, that another interpretation can be given to these words of section 138 of our Civil Code, more restrictive of their meaning, in such a way that the possibility of marriage between adopter and adopted is not excluded. Besides, reasons can be brought in favour of the non-existence of an impediment to marriage based on the legal relationship arising out of adoption which seem to me *at least* as strong as the reasons that militate in favour of the existence of such an impediment in Malta.

This second, more restrictive, interpretation of the words of section 138 of our revised Civil Code would restrict the 'rights and obligations of relatives in relation to each other' to those referring to maintenance and education (physical, moral and spiritual) of children and to parental authority. In other words they would refer to 'mutual rights and duties of Ascendants, Descendants, Brothers and Sisters, and certain other Persons related to each other by Affinity' that are the subject-matter of sub-title II of Title I of the first book of our Civil Code (sections 14 to 41), as well as to those rights and duties which are governed by Title IV of the same book ('Parental Authority', sections 154 to 184). This interpretation would certainly not allow the expression of section 138 to be

taken to mean the creation of a diriment impediment to marriage between adopter and adopted.

If this interpretation were to seem excessively and arbitrarily restrictive of the expressions of section 138, nevertheless careful study of their context would appear to vindicate its validity. For:

(i) the same subsection (a) of section 138 goes on to deal with the obligations of the wife in cases where the adopters are husband and wife: it does this by excluding the adopting wife's liability to maintain, educate and assign dowry to the adopted child, unless the adopting husband is unable to discharge these obligations. This seems to show that the section is concerned with rights and duties of maintenance and education.[2] This impression is further strengthened by the next two sections of our Civil Code. Section 139, in fact, deals with orders for payment of maintenance, while section 140 deals with property rights between adopter, adopted, and the relatives of the adopter.

(ii) Secondly, by comparing the 1967 amended edition of the Civil Code with the 1942 edition it becomes evident that section 138 of the *new edition* is meant to replace sections 139 to 142 of the older law. These sections of the Old Code speak of the 'duties of the adopter', of 'assignment of dowry to adoptive daughter', of the 'duties of the adoptive mother' and of the 'reciprocal liability for maintenance' respectively: all this in terms of rights and duties connected with the education and maintenance of the adopted child and the latter's duties later in life with respect to the maintenance of his adoptive parents.

[2]The same point can be made by examining a provision in the same section of the 1962 Adoption Act, and consequently in the same subsection (a) of section 138 that has been deleted by section 20 of the Civil Code (Amendment) (No. 2) Act of 1973 as no longer necessary after the reforms in the rights of women introduced by this latter Act. This deleted provision laid down that, in the case of an adoption decree made in favour of a woman who was the sole adopter of a minor, the Court should appoint her by the same decree tutrix of the adopted child, and that the provisions of section 169 of the Civil Code (now also amended), dealing with the usufruct of a widowed mother, who has not remarried, on the property of the children during their minority, would apply to her so long as she did not marry or remarry. This clause in the original Adoption Act of 1962, in fact, once again demonstrates that the 'rights and obligations' for which the legislator was making provision in these sections referred to guardianship, maintenance, education and property rights.

(iii) Thirdly, subsection (b) of section 138 states that: 'the relatives of the person in respect of whom the adoption decree is made shall lose all rights and be freed from all obligations with respect to such person'; that is, to the adopted child. The law is evidently still referring to the same 'rights and obligations of relatives in relation to each other' of subsection (a) whose precise meaning is of such great interest to us for the purpose of this article. Now if we were to admit that this expression in subsection (a) includes also a reference to the existence of an impediment of legal relationship arising out of adoption to a marriage between adopter and adopted, based on the impediment of consanguinity existing between the child and his natural relatives, we cannot logically exclude the impediment of consanguinity from among the 'rights and obligations' that are legally dissolved between the adopted child and his natural relatives in subsection (b). This would lead us to conclude that, as far as it lies within its power, our Civil Law here meant to remove the matrimonial diriment impediment of consanguinity between the adopted child and his natural relatives – something which our Civil Code evidently had no intention of doing. Conversely, it would seem that our legislators had no intention of creating a new impediment to marriage, that of legal relationship arising out of adoption, between adopters and adopted.

Independently of the context of section 138, there seems to be quite a few extrinsic reasons which also postulate and tend to confirm a more restrictive interpretation of the key words of section 138 ('the rights and obligations of relatives in relation to each other') that would in no way demand the existence of a diriment impediment to marriage between an adopter and the adopted. One can summarize these reasons as follows:

(i) If the words of section 138(a) are taken to include also the creation of a diriment impediment of legal relationship arising out of adoption, the adopted child would be incapable of contracting valid marriage not only with his or her adopters but with a whole series of persons related to the adopters by consanguinity.[3] For, being 'considered with regard to the rights and obligations of relatives in relation to each other, as the child of the adopter or adopters born to him, her or them in lawful wedlock and as the child of no other persons or person, relationship being traced through the adopter or adopters...', the adopted child would thus,

[3] That is, by natural generation from a close common ancestor.

even for reasons of marriage and of capability of contracting marriage, have to be considered as though he or she were the natural son or daughter of the adopters not only as regards his or her adopters but also as regards the relatives, by consanguinity, of the adopters. This would mean that the adopted child would be incapable of contracting marriage with all ascendants of the adopters and with all blood-relations of the adopters in the natural collateral line of consanguinity to the third canonical degree, calculating these degrees by considering the adopted child as though he or she were the natural child of the adopters.[4] This line of reasoning could even be carried a step further by postulating, logically, that such a diriment impediment would arise also between the adopted child and other adopted children within the degrees in which marriage is prohibited because of consanguinity. No legal order that I know of postulates the existence of an impediment to marriage of legal relationship arising out of legal adoption that goes so far since, if they admit such an impediment, they generally limit the effect of the impediment to invalidate or prohibit marriage merely between adopters and adopted.

(ii) Our legislators, in drawing up the Adoption Act of 1962 had not only our past legislation on adoption to which they could refer, but also the English Adoption Acts of 1950 and 1958, which explicitly and clearly laid down a diriment impediment (of legal relationship) to the marriage of the adopter with his or her legally adopted child.[5] Had our legislators wanted to create a similar marriage impediment for Malta, they could easily have made special provision for it on the lines of these Acts.

[4] This would exclude all 'adopted' brothers/sisters; uncles/aunts; great-uncles/aunts; nephews/nieces; first and second cousins.

[5] Section 10, subsection (3) of the Adoption Act, 1950 lays down: 'For the purpose of the law relating to marriage, an adopter and the person whom he has been authorised to adopt under an adoption order are deemed to be within the prohibited degrees of consanguinity notwithstanding that by a subsequent order some other person is authorised to adopt the same infant.' And the Adoption Act, 1958, section 13, subsection (3), repeats: 'For the purpose of the law relating to marriage, an adopter and the person whom he has been authorised to adopt under an adoption order shall be deemed to be within the prohibited degrees of consanguinity; and the provisions of this subsection shall continue to have effect notwithstanding that some person other than the adopter is authorised by a subsequent order to adopt the same infant.'

(iii) The English Adoption of Children Act of 1926, in section 5 which deals with the 'Effect of adoption order' subsection (1), contains expressions which closely resemble those of section 138 of our Civil Code, but which are clearly restricted to rights and duties connected with the 'custody, maintenance and education of the adopted child'.[6] None of these or any other similar expressions of the English Act, 1926, were taken to mean the creation of a diriment impediment to marriage between adopter and adopted in English law: so much so that when, in 1950, the new Adoption Act created this impediment between adopter and adopted even if the adoption order had been made under the Adoption of Children Act, 1926, it nevertheless took pains to point out that marriages celebrated before the first day of January, 1950 would not be rendered null, presumably since the impediment started to exist only under the Adoption Act of 1950.[7] Therefore, even though, in English Law the impediment of consanguinity had existed for centuries, expressions similar to those of our present legislation about the effects of an Adoption Order that were contained in the English Adoption of Children Act, 1926, were never interpreted as creating an impediment to marriage, like that of consanguinity, but based on the legal relationship arising out of legal adoption.

6. Conclusion.

There are, therefore, strong reasons in favour of interpreting the

[6] 'Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished,' and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock, and in respect of the liability of a child to maintain its parents the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock: . . .'

[7] Cf. Adoption Act, 1950, Fifth Schedule, 1: 'Subsection (3) of section ten of this Act shall apply in relation to an adoption made under the Adoption Act, 1926, . . . as if it were an adoption order within the meaning of that subsection:

Provided that nothing in this paragraph shall invalidate a marriage solemnised before the first day of January nineteen hundred and fifty.'

words 'The rights and obligations of relatives in relation to each other' of section 138 of our Civil Code in a way which does not imply the creation of a diriment impediment to marriage between the adopted on one hand and the adopters and their blood-relations on the other. Indeed, it seems to me that these reasons are at least as strong as those that militate in favour of the more extensive interpretation of those words that would see in them the introduction of a new diriment impediment to marriage, that of 'Legal Relationship' based on legal adoption.

As a minimum, therefore, I think that one has to admit that there is room for prudent doubt as to whether the Civil Law of Malta accepts the legal relationship arising out of legal adoption between the adopted on one hand and the adopter and the latter's relatives on the other as constituting an impediment to marriage. Given that the right to marry is a basic natural right of all human beings who are not debarred by divine or legitimate human law from contracting marriage, this clear fundamental right could not be limited by a doubtfully existent law: so much so, that canon 15 of the Code of Canon Law lays down that 'in case of doubt in law, laws are not binding even if they are invalidating or inhabilitating laws'. In fact, it is fair to assume that if our legislators really wanted to create such an impediment to marriage, they would have done so clearly and unequivocally as their British counterparts did in 1950.

All in all, therefore, given the doubtful meaning of section 138 of our Civil Code, and its complete lack of any other reference to the existence of any such impediment of 'Legal Relationship' to marriage, it would seem that none of the natural rights of adopters or their relatives to marry adopted persons have been curtailed by our Civil Law. Hence one cannot but conclude that at present in Malta the impediment of 'Legal Relationship' to marriage does not exist, whether as prohibitive or as diriment, even for Canon Law. It is another matter whether this impediment should be introduced by our Civil legislators: I prefer, however, to leave it up to them and to our sociologists and other competent persons of our community to make up their minds on this question.

THE RIGHT TO CONSCIENTIOUS OBJECTION

MICHAEL FRENDO

1. AN ANALYSIS OF THE RIGHT

Conscientious objection is the assertion of moral conviction as a basis for defiance of what the law prescribes. It is an inner feeling of moral obligation not to comply with legal norms which you consider wrong; a refusal to aid, or participate in, acts which to you are morally reprehensible. The conscientious objector re-evokes the words of Henry Thoreau:

'I do not lend myself to the wrong which I condemn'.

It is within this delicate field of conscience and of morality that we have to venture in order to attempt an analysis of the right to conscientious objection. Conscientious objection is a term that lends itself to wide application and it must be stated at the very outset that we shall restrict the meaning of the term to the refusal to bear arms in clear contravention of the law of the country.

This is a conflict situation par excellence. Indeed it is a situation of *acute* conflict for the very physical existence of a society may be put in question. We shall see that the circumstances within which the right to conscientious objection may exist, could be crucial to its legal recognition or otherwise. Thus the problem varies in its gravity according to the context in which it is seen: from peacetime to wartime, from a totalitarian state to a democracy.

Conscientious objection to military service creates, as Ginsberg puts it, 'a tragic situation in which right clashes with right'.[1] It is a direct confrontation between an individual and the society in which he lives, with the individual's only line of defence being his conscience. The mere readiness of a society to consider an argument based exclusively on conscientious objection, truly reveals the unique respect that such society has for this 'inner voice' (as Gandhi used to call it) that exists within every human being. The conscientious objector, by the very stand that he takes, is asserting that his personal moral objections bear more weight than the reasons for obedience of the law. The political source of the law is, therefore, extremely important as a guide while tracking this rugged path of moral reasoning that leads to the final individual

[1] Ginsberg Morris, On Justice in Society (1971), p. 241.

decision. An individual living in a totalitarian society where the law is an imposition, where he does not enjoy any sufficient means to change the government, will find it quite easy to justify breach of the law on the grounds of conscientious objection – without having any qualms of conscience. Though even in this case he may have to distinguish between the duty to defend the fatherland, if such a duty exists, and a refusal to defend a political system to which he does not adhere. The conflict situation in a democratic society is basically different, and even more delicate. Here government rules by will of the majority, and enactment of the law must be seen as an expression of such will. Moreover, in this case, the individual does have means, provided by the law itself, to convince the majority of his point of view and to change the government of his country. A moral justification of disobedience, a balance between the liberty of conscience and the duty to respect the social right, is even more difficult to find in a democratic society.

One solution would be for the conscientious objector to adopt an attitude of classic non-violent passive resistance and break the law accepting the submission of the legal consequences. This would not be a solution found by balancing right with right. This would be an unquestioned preponderance of the social right through the total renunciation of the right of the individual. And the social conscience of most democratic societies is not satisfied by such resolution of the conflict.

On the other hand national communities usually also assert that the defence of the fatherland is a duty incumbent on every citizen. And such defence is the raison d'être of conscription legislation. However, there has developed an attitude that such a duty is not an absolute one and that, in the interest of a more tolerant and just society, the extent of its operation is to be retrenched by the existence of a sphere within which the right to conscientious objection may be exercised. The balance to be reached is a very fine one, and a change in circumstances may immediately unbalance the relationship between the right and the duty.

In view of all this, there seems to be a kind of proportionality between the recognition of the right to conscientious objection and the degree of hazard that such recognition entails for society. Thus it is easier to envisage a right to conscientious objection in peacetime than in wartime, especially if it happens to be a defensive war. Ironically, of course, wartime is the period when the conscientious objection of the individual is most pronounced. Data re-

lating to the states which recognise conscientious objection as a valid basis for exemption from military service, shows that the right has not been exercised extensively. In the Federal Republic of Germany, where there is perhaps the most advanced type of legislation on conscientious objection, the right has been exercised by only 0.8% of those called for service with the armed forces. In Austria, the percentage stands at 0.06%.[2] What would happen if the percentages suddenly soared? The military defence programme of a country could suddenly be gravely hampered if not totally paralysed. The situation seems to be analogous to the question of legality of homosexuality. When homosexuality is at a low level, the hazard of extinction of a society is practically non-existent, just as fear of insufficient defence is unfounded when conscientious objectors amount to less than one per cent of persons called up for military training. Let us now envisage a situation, hypothetical and not likely to occur, where the rate of homosexuality reaches such a peak that the life of that society is endangered: would the right subsist? All this is indicative of the negative pressures that the right to conscientious objection is bound to suffer were it to prove a danger to the existence of the same society within which it functions.

The law of proportionality exists also on another level, that is, between the degree of moral conviction of the individual and the recognition granted by the law to the right of conscientious objection. As will become even more clear in our exposition of the legal situation in particular countries, it is easy to ascertain a blatant tendency to distinguish between the various types of moral arguments raised as a justification for objection. Thus, for objectors to be recognised as possessing the right to exemption from military service, they are usually expected to show conviction of a rejection of armed force. Hardly any country considers conscientious objection to a particular war as a valid ground for exemption.

The reason is certainly not for lack of sincerity, for objection to a particular war can be equally conscientious as that to violence or to destruction: the objector may refuse to participate in a war which he considers as aggressive, or in which nuclear weapons will be used. Indeed, one writer asserts, absolute objection seems

[2]Council of Europe, Report on the Right of Conscientious Objection, Document 2170 (Rapporteur: Mr. Bauer), IV. Explanatory Memorandum by Mr. Bauer, (1967), p. 8.

to be less reasonable than objection to a particular war.[3]

It seems, however, that the case of the total pacifist, or of persons of similar belief, exacts more respect and consequently more tolerance from the social conscience, than the case of other objectors.

Another reason could be that, were governments to allow exemption on the basis of particular conscientious objection, the hazard involved would increase since a great number of people would qualify. Thus we realise that in the case of objectors to particular wars of violence, both instances of proportionality that we have mentioned, come into play. The scales here tend to weigh down in favour of the duty of defence and the social right of self-preservation.

Is our analysis of conscientious objection an attempt to establish the existence or inexistence of a *new* right? Or does the right to conscientious objection exist veiled behind rights already legally recognised by many nations?

'All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship'. Article 31(1) of the Malta 1964 Constitution states a principle that is endorsed by the Constitutions of many states in the world. The Universal Declaration of Human Rights in article 18 recognises that:

> 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

Article 9.1 of the European Convention on Human Rights reaffirms the existence of the right in exactly the same words of the Universal Declaration of Human Rights. As regards the European Convention it is worth noting that in the Parliamentary Conference on Human Rights (Vienna, 18-20 October 1971) the right of conscientious objection was referred to as an additional right to be suggested for inclusion in the Convention.[4] This is, to my mind,

[3] Singer Peter, Democracy and Disobedience.

[4] Council of Europe, Report on the Parliamentary Conference on Human Rights, Document 3078, (Rapporteur: Mr. van der Stoel), (January 1972), pp. 6, 7: paragraphs 13, 14.

incorrect. The right to conscientious objection is but a corollary of the broader right inherent in man: the right of freedom of conscience. Religious belief and its expression does not merely entail freedom of worship in a material way. It entails the right to believe in a set of values, the right to propagate their acceptance and the freedom to live them. Conscientious objection is the result of adherence to values which treasure life to such an extent that aggression, violence, destruction, are plain stark anathema. To dissect the spiritual in man and separate conscience from belief is a task that goes beyond the Herculean. The existence of the right to freedom of conscience and the right to conscientious objection is one and homogeneous. We can thus in reality only speak of conscientious objection as an extension of the right to freedom of conscience, since they are essentially one and the same right. In this conclusion I am, after all, comforted by a resolution of the Consultative Assembly of the Council of Europe itself, which states, *inter alia*:

> '2. This right shall be regarded as deriving logically from the fundamental rights of the individual in democratic Rule of Law States which are guaranteed in Article 9 of the European Convention on Human Rights.'[5]

The right to freedom of conscience is thus to be regarded as comprising within itself the right to conscientious objection and recognition of the latter is not the creation of a new right but merely an extension of the legal application of the former. Most constitutions guarantee freedom of conscience and this provides a rich source of derivation for the right to conscientious objection.

2. Recognition of the Right

Legal recognition of the right has not as yet become very widespread on the national level, let alone on the international level. Many countries still regard the duty of defence as so overwhelming as to leave no room for exemption to individual convictions to the contrary. We shall discuss the legal situation in four countries primarily: the Federal Republic of Germany, Sweden, Italy and Malta. Of these four, Malta is the only nation without compulsory military service, while the Federal Republic of Germany is the only state

[5] Resolution 337 (1967) on the right to conscientious objection, Consultative Assembly of the Council of Europe.

that has the right to conscientious objection firmly recognised in its Basic Law. Sweden and Italy recognise the right but only through ordinary legislation.

Thus we realise the wide divergence of opinion as regards the protection by law of this right. Even in the countries where protection is given, the degree with which it is given reveals whether the acceptance of the right is a full and mature acceptance or whether social prejudice against objectors still persists.

Let us compare the legal state of the right in Sweden and the Federal Republic of Germany. In Sweden various legislation has been enacted since 1902, the latest being the Law on Unarmed Service 1966. Objectors are not exempted from military service: they are only given permission to do other service as an alternative. Thus their work is regarded as part and parcel of the total defence programme of the state. Though legislation regarding the endorsement in law of the right has existed for a long time, we are here dealing with *ordinary* legislation. On the other hand, the right in the Federal Republic is protected by the Basic Law of the land. Article 4, relating to freedom of creed and conscience, states, in subsection (3):

> 'No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law'.

Thus recognition to the right is granted by article 4(3) itself, while federal law only serves as a means of its practical application. This specific constitutional recognition reflects a respect for the individual conscience that is equalled only by the Netherlands constitution which contains a similar provision. It is also worth noting here that recognition of the right to conscientious objection comes within the same article that recognises freedom of conscience and religion. This seems to support the contention that one is only an extension of the other.

In countries recognising the right, the difficulty inevitably arises of denoting the persons entitled to it; that is, who are the conscientious objectors? In Sweden the right is given to persons who are sincerely opposed to performing service to such an extent that an attempt to coerce them to do so would lead to a crisis of conscience. Only universal objection to military service is accepted as a ground for alternative service.

In the Federal Republic, application of the term 'conscientious'

is as wide, if not wider. The Federal Administrative Court regards as a conscientious decision, 'any serious moral decision, i.e. any decision distinguishing between "good" and "evil" which in a given situation an individual regards as binding on himself unconditionally, so that he cannot act in contravention of it without experiencing grave moral distress'.[6] The authorities do not decide the righteousness of the objection but simply its genuine conscientious origin. Thus motivation may be philosophic, political or moral, and is, in any case, irrelevant. However the nature of the objection itself does count. The Federal Constitutional Court has decided that conscientious objection must apply to *any* armed service. Thus, like Sweden, 'conditional' objectors eg. to specific wars, or specific enemies, are not exempt from service. Yet it seems that the validity of this statement is not an absolute one, and though the law of proportions we discussed in our analysis of the right is still generally discernible here, it may be that new currents may render its application less universal. Indeed in the United Kingdom, when military service was still compulsory, political objectors eg. individuals who objected to a particular war, were considered as falling within the legal definition of conscientious objectors. The law stating this was enacted in 1941. This is a possible way of development for the West German legislation.

The existence of a conscientious objection has to be ascertained and this obvious need marshalls us into the delicate sphere of evaluation of judgement on that which is most intimate to man: his conscience. It is no wonder therefore that for the just application of the right there is need for a thorough examination of the individual case. Such a preoccupation with justice is reflected in the procedures set up both in Sweden and in the Federal Republic. In both countries the individual has the possibility of appeal so that his case is once more considered and decided upon. In Sweden the examining Committee is presided by an ex-judge while in West Germany the chairman must be a magistrate or senior civil servant who is over thirty-two years old. Composition of the Committees, of course, reflects the seriousness of the issues involved which are

[6]Study on the legal position of conscientious objectors in the member States of the Council of Europe presented by the *Max Planck Institute for Comparative Public Law and International Law*, Heidelberg, Appendix to Report on the Right of Conscientious Objection, Council of Europe Document 2170, (5967), p. 54.

apt to be acutely difficult and where legal experience would be a help. In Sweden the objector may appeal to the King in State Council, which in practice is the Government. In the Federal Republic the protection afforded to the citizen is wider. Against the committee, the conscientious objector has various ways open for him to appeal. He may appeal for a re-examination of his case by the administrating authorities; the second decision is taken by a board adhered to a higher authority, the Kreiswehrersatzamt, the competent District Recruiting and Replacement Office. Appeal to an Administrative Court is then open, and following certain procedure, revision may be sought from the Federal Administrative Court. Finally, there is right of appeal to the Federal Constitutional Court against any violation of fundamental rights in the course of proceedings. Thus we realise that a miscarriage of justice vis-a-vis the conscientious objector is less likely to occur in the Federal Republic where judgement on the issue may be put through a wide process of purification.

In both Sweden and the Federal Republic, objectors who are exempt from military training have to undergo alternative service. Immediately, the query arises: does this mean that recognition of the right is conditional? Is this a penalty inflicted on the objectors in order to exculpate them from the guilt of exemption? Is alternative service, a consequence of recognition of the right?

Once more the duty to defend the fatherland comes into play. In reality, recognition of the right to conscientious objection only means exemption from the rendering of military service to the country. It does not exempt from the duty of rendering service to the country, and alternative service has, in my view, to be seen in this light. The upholding of the right does not automatically mean the discarding of the duty to contribute to the defence of state through national service. Yet the service rendered by the objectors to the country should not be regarded as inferior to that rendered by the members of the armed forces.

Thus the service of the conscientious objectors should correspond to that of regular conscripts. This principle – at least as regards duration – is firmly entrenched in article 12a(2) of the 1949 Basic Law of the Federal Republic. Article 12a was inserted in the Basic Law by federal law of 24 June 1968, and is the article which also speaks of compulsory military service for men who have attained the age of eighteen years. In section (2) it reads:

'A person who refuses, on grounds of conscience, to render

war service involving the use of arms may be required to render a substitute service. The duration of such substitute service shall not exceed the duration of military service. Details shall be regulated by a law which shall not interfere with the freedom of conscience and must also provide for the possibility of a substitute service not connected with units of the Armed Forces of the Federal Border Police.'

This section emphasises the attitude that the work done by objectors has equal value, in the eyes of the community, as that done by the normal conscripts. The situation is different in Swedish law.

In Sweden, the length of non-combatent service is 540 days while the duration of normal military service is 394 days. Conscripts may, however, *voluntarily* do an additional 146 days as part of special units. As regards, non-combatants, therefore, the 146 days are extra and compulsory. This state of affairs reveals a derogatory view of the service rendered by non-combatants. This 'penalty' for enjoyment of the right, is also found in the Italian legislation recognising the right. In Italy until 1972 there was obligatory military service but no recognition of the right to conscientious objection. No mention of the right is made in the Constitution and moreover, the laws relating to national military service left no room for possible exemptions or alternative work for objectors. The Constitution in article 52 says that:

'The defence of the fatherland is a sacred duty of the citizen.'..

An attempt to include a form of exemption in the constitution had been made in the Constituent Assembly, but it was overruled.[7]

Could the right have been legally derived from existing provisions? Article 19 states that:

'Everyone has the right to profess freely his own religious belief in any form, individually or collectively, to preach it and to worship in public and in private, provided this does not involve rites which offend against public morality'.

Besides this, Article 21 affirms:

'Everyone has the right freely to express his thoughts through word, writing or other means of communication'

[7] ibid. p. 80.

Yet, both article 19 safeguarding religious freedom of conscience and article 21 safeguarding a more philosophical freedom of conscience, were regarded in law as not including the right to dissent to military service. The sacred duty of defence of the fatherland was considered as overriding and this was supported by the rejection of attempts to include recognition of the right in the Constituent Assembly. The situation was similar to that in Switzerland where it is held that religious views will not free citizens from their civic duties.[8]

Conscientious objection was considered a desertion of a sacred duty and the lack of legislation affording legal protection to the right reflected a social attitude of distrust and denigration towards conscientious objectors.

The law approved on December 14th, 1972, changed the legal situation. The right to conscientious objection was legally recognised and thus it was realised that the sacred duty to defend the fatherland did not necessarily mean direct military defence. Objectors who satisfy a special tribunal that their case is based on 'profound religious or philosophical or moral convictions' are now granted exemption from military service and are given altemative service. The law has strengthened the practical legal value of articles 19 and 21 of the Constitution.

However the past long experience of rejection of legal recognition of the right have left its imprint on the recognition itself. Thus, as in Sweden, the non-military period of conscription is 23 months instead of 15. The difference in duration is here harsher than that in Sweden, by approximately 94 days. This is undoubtedly a reflection of the unfavourable social view of conscientious objection, a view that, up to a few years ago obstructed attempts towards recognition.

In Malta the situation is a most happy one since military service is not compulsory. This, however, does not mean that there is no place for a discussion of the right to conscientious objection in Maltese law. The right to freedom of conscience is established in article 41 of the Malta Constitution and this is a source of interpre-

[8] ibid. p. 131. In Switzerland, on the first of March 1968, new regulations for the treatment of conscientious objectors came into effect. Provision was made for a judge to end a sentenced conscientious objector's liability for further service and less severe conditions of detention now apply. (Keesings, Contemporary Archives, p. 22550)

tation for the right to conscientious objection, were compulsory military service to be introduced. Article 41 affirms that:

> 'All persons in Malta shall have full freedom of conscience and enjoy free exercise of their respective mode of religious worship'.

Not only is interpretation unhindered by any reference to a sacred duty of defence of the fatherland; it is aided perhaps, by the reference to conscientious objection in article 36 relating to protection from forced labour:

> '36(1) No person shall be required to perform forced labour.
>
> (2) For the purposes of this section, the expression "forced labour" does not include:
>
> (c) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;'

It would be preposterous to state that there is here an implicit acceptance of the right to conscientious objection. It seems safe to affirm however that the provision sets the stage for acceptance and renders the right less of a novelty to local legislation. Mere mention of the right in the constitution put us legally in a position more advanced than many other countries. The wording of s36(2)(c) is worth comparing with that of Article 4.3(b) of the European Convention on Human Rights. Article 4.3(b) reads:

> '3. For the purposes of this Article the term "forced or compulsory labour" shall not include:
>
> (b) any service of a military character or, in case of conscientious objectors *in countries where they are recognised,* service exacted instead of compulsory military service.'

The legislators of the Convention felt the need to express clearly that here reference was being made to countries which already recognise the right to conscientious objection. Is it not strange that the question of conscientious objection is mentioned in our Constitution where not even military service is compulsory and thus

no need for existence of the right arises? One could perhaps deduce that the legislator of the Constitution was perhaps suggesting the compatibility of the acceptance of the right to conscientious objection with the recognition of the right to freedom of conscience and religion. But this of course remains in the field of speculation. One might safely venture to state, however, that the wording of article 39 somewhat clears the ground and that together with article 41 this is a possible germ from which the recognition of the right might emerge.

We have thus considered the four countries we purported to discuss and though for the picture to be complete we would have to set on a world tour, the four countries we have seen give us a wide spectrum of social and legal environments within which the right to conscientious objection exists.

On the international level it is impossible to speak of legal recognition of the right because such recognition does not exist. International entities and organisations have however acknowledged the existence, or the need for consideration of the existence, of the right to conscientious objection to military service. Amnesty International is a pioneer in the field and its groups have worked for the relief or release of many who suffer because of their conscientious objection. It was also Amnesty International which suggested discussion of the topic to the Council of Europe which in turn took up the challenge and has done valuable preparatory work. The question was discussed extensively in the Council of Europe Consultative Assembly, in the Vienna Conference on Human Rights of 1971, and elsewhere.

In 1967, the Consultative Assembly approved a resolution (Resolution 337) on the right of conscientious objection. The resolution dwells briefly but concisely on the basic principles involved, on procedures to be adopted and on the alternative service. It speaks of the right and its logical derivation from article 9 of the Convention; it also affirms the need for the decision-making body on the conscientious objection to be 'entirely separate from the military authorities', and that the applicant should be allowed to be represented and call witnesses. As regards alternative service, the resolution upholds that:

'1. The period to be served in alternative work shall be at least as long as the period of normal military service.
2. The social and financial equality of recognised conscien-

tious objectors and ordinary conscripts shall be guaranteed.' ...

More emphasis on equality of duration of service should, in my view, have been forthcoming, though one has to bear in mind that suggestions for international agreement have to be of a minimum standard as regards requirements.

In the report on the Parliamentary Conference on Human Rights, *inter alia,* suggestions revolved round a possible definition of a common attitude to conscientious objection, 'with a view to the examination of this question at the United Nations', and also possibly drafting of a European instrument.[9] In the report on action to be taken on the conclusions of the above-mentioned Conference, the view is expounded that consideration of the right should lead more to a common definition of attitude and perhaps the establishment of a European statute for conscientious objectors, then to an incorporation of the right in the European Convention on Human Rights.[10] This reluctance to introduce it directly into the Convention is of course due to the difficulties that radiate from the right to conscientious objection as a right, and from its acceptance within the law. And at present there appears to be not enough common ground among the European states for them to accede on the international level to the obligation of observing the protection and respect of such a right. The need for the delineation of a common sphere of agreement as to what is conscientious objection is a primary one, and also imminent. The drawing up of a statute for conscientious objectors should not be regarded as a final aim. It should be considered as an intermediate step towards the final incorporation of the right to conscientious objection within the European Convention, as an extension of the right to freedom of conscience protected by section 9.

Even in the Universal Declaration of Human rights adopted by the General Assembly of the United Nations on December 10th 1948, no explicit reference is made to the right to conscientious objection. Article 18 however speaks in terms which, as in other instances, leave room for interpretation:

[9] Council of Europe, Report on Parliamentary Conference on Human Rights, Document 3078, (1972 Jan), p. 26, (Appendix III).

[10] Council of Europe, Report on action to be taken on the conclusions of the Parliamentary Conference on Human Rights (Vienna 18-20 October 1971), (Rapporteur: Mr. Grieve), (October 1972), pp. 11, 12.

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'.

Conscientious objection is nothing less than observance of one's belief, and thus falls within the definition of the right as divulged here. The effect of the Universal Declaration of course is not a legal one and the obligation for its observance is only a moral one.

The major churches too have altered their attitude to conscientious objection and the Second Vatican Council in a resolution urged that 'laws make human provision for the case of those, who, for reasons of conscience, refuse to bear arms'.[11]

The tide towards acceptance of the right seems to be favourable but as yet, on the international level, legal recognition of the right to conscientious objection is still forthcoming.

3. Discrimination in Recognition

Most constitutions which recognise fundamental human rights, including the right to freedom of conscience, also uphold that:

'The enjoyment of the rights and freedoms... shall be secured without discrimination on any ground such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

This is taken from article 14 of the Convention on Human rights and is meant as an illustration of similar provisions that exist in national constitutions and international instruments. The principle is embodied in section 33 of the Malta Constitution, in s3 of the Italian Constitution, and in s2 of the Universal Declaration of Human Rights.

It is a fact that in countries where the right to conscientious objection is not recognised, ministers of the Protestant and Roman Catholic churches especially, are usually exempt from rendering military service. This is undoubtedly based on the profession of love and non-violence that such persons manifest through their re-

[11]Hill Christopher, (editor), for Amnesty International, Rights and Wrongs: May Patricia, Conscientious Objection, pp. 121-145.

ligious life. This exemption, however, does not extend to other religious groups of individuals. In Spain, for example, ministers of the Jehovah Witnesses – unlike ministers of the Roman Catholic Church – are imprisoned each time they conscientiously refuse to undergo military training.[12] The same problem arose in the Federal Republic of Germany, that is, in a country where the right is recognised and alternative service is provided. Jehovah Witnesses in that country asked to be granted the same treatment as that accorded to priests of the Protestant and Roman Catholic churches. The Federal Administrative Court held in several judgements that there exists no similarity between the office of the ministers of these cults and that of priests of the two great churches.[13] However convenient this solution may be, it is still, to my mind, a case of outright discrimination. Freedom of conscience and its equal application is here put in issue. In actual fact the exemption accorded to ministers of those churches is based on respect for their beliefs and the expression of such beliefs in their way of living. The right to freedom of conscience is not the exclusive province of some religions: it is the right of all religious cults, indeed of all individuals. If it is recognised for one then it should be recognised for the other.

It would be interesting to consider the situation in Italy, preceding the legal recognition of the right in 1972. A discussion of this pre-recognition state of the law is relevant in that it serves as a guide for any analysis of the legal situation in countries, such as Spain, where the right is not recognised but similar constitutional or other legal provisions exist.

The question of equality draws our attention to two constitutional provisions of great relevance:

Article 3:

> 'All citizens have equal social dignity and are equal in law, without distinction as to sex, race, language, religion, political opinion, personal and social condition.'

We have already expressed arguments that apply also to this section. It is worth noting however that s3 has been used already by the Italian Constitutional Court as a means of modifying existing legal situations considered incompatible with the principles it enunciates. Thus article 781, of the Civil Code, for example, deal-

[12] ibid.

[13] Council of Europe, Document 2170 cit. at (6), p. 75.

ing with donations between spouses and remniscent of the *Lex Cincia* in Roman Law, was declared unconstitutional on 27th June of 1973, one ground being incompatibility with article 3 of the Constitution. The potential in this article is thus amply illustrated.

But perhaps no constitutional article can be as specific and as relevant to discrimination as article 8:

'All religious confessions are equally free in law'.

This means exactly what it says: there is equal freedom for all religious confessions and such equality must necessarily include equal freedom to comply with principles in which adherents to a particular confession believe. What was good for Roman Catholic priests in Italy should also have been good for ministers of other professions. Indeed it should have been good for all individuals who conscientiously objected. Why should we differentiate? Are not they all entitled to freedom of conscience in law?

There are countries which still do not recognise the right to conscientious objection and then adopt this type of half-measures in favour of particular groups. There are also states which recognise the right but, notwithstanding this, give preferential treatment to certain groups. Both classes are guilty of discrimination. Exempting certain religious groups from military training is an implicit recognition of their right to conscientious objection and an affirmation, in their regard, of the right to freedom of conscience. Denying the extension of such exemption is, in reality, denying the equal enjoyment, by other individuals or groups, of the right to express through their lives the maxims in which they believe.

The situation in Malta as elsewhere seems to be safeguarded by section 33 of the constitution which pledges no discrimination on various grounds, including religion. It would be interesting to consider the effect which a declaration that the official religion of the island is the Roman Catholic religion would have were compulsory conscription to be introduced. Would this mean automatic and exclusive exemption to ministers of the Roman Catholic church as priests of the official state religion? This is assuming that no right to conscientious objection is recognised, for all. As regards this part on discrimination in recognition I would like, finally, to touch once more on an argument already expressed. I am referring to the question of alternative service by conscientious objectors, and whether this is to be regarded as a consequence of recognition or as a consequence of a duty to contribute to the social good. Let us ac-

cept the argument that alternative service is the result of the duty towards the existence of the state. This would immediately present us with a picture of sexual discrimination. Alternative service has to be performed only by male citizens. In an age where there is justly, a widespread cry for the emancipation of women and for the removal of sexual discrimination, is not the compulsion of alternative service only on male citizens, an example of discrimination? The duty towards the good of the community is equally shared by both sexes alike and the kind of work allotted to conscientious objectors (eg. hospital work, clerical work) is surely not beyond the physical capacity of female citizens. The duty to defend the state as a duty requiring extra contributions to the community is a duty incumbent on all alike. The impediment for conscientious objectors to achieve this through training in arms, lies in their conscience; that of women lies, it is said, in their nature. Thus both should be given the opportunity to fulfill their duty in ways which they can follow. The discrimination would thus be healed.

4. The Meaning of Recognition

Acceptance of the right to conscientious objection is closely connected to personal attitudes and beliefs about the nature of man. The widespread rejection of armed force by the international community thus reveals a change in attitude that also reflects favourably on the possibility of acceptance of conscientious objection. Unfortunately the idea of aggression as a basic human instinct still exists and as one author puts it, 'refusal to fight is felt, consciously or unconsciously, to be not quite normal, or even cowardly.'[14] Suffice it to quote an Italian military court:

> 'To be and to feel a man is equivalent to feeling the Fatherland within oneself and to be moved by the idea of its value and the will to see it perpetuated.'[15]

Recognition of the right to conscientious objection means a rejection of this idea of man and manlihood. It means an affirmation of the loving qualities of humanity, a declaration of abhorrence to war and violence, an upholding of the pacifist in man. Such recognition would signify a humane development in the law as a reflec-

[14] Hill Christopher, opus cit. at (11).

[15] Council of Europe, Doc. 2170 cit. at (6), p.88. This is taken from a Court judgement in the days when no legal recognition was granted.

tion of a better understanding and greater respect by the social conscience for the freedom of the individual to conduct his life in conformity with what he professes to believe.

NOTE OF THANKS

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ACTIONS 'IN REM' AND EXCLUSIVE JURISDICTION CLAUSES

J.M. GANADO

IT is my intention in the present Article to deal with one particular aspect of exclusive jurisdiction clauses. As a rule, the Courts have given effect to such clauses, independently of the point as to whether the jurisdiction of the Maltese Courts is thereby extended or derogated from. However, the point has arisen as to whether in the presence of such a clause, the Court still possesses a discretion to exercise jurisdiction, if it considers that the clause is being made use of in bad faith or, at least, in order to try to circumvent the rights of others. This particular point was discussed *ex professo* in a case 'Dr. Edward Fenech Adami noe. vs. Arsemis Christos noe.' which was withdrawn on the 9th June, 1972 before the Court of Appeal as the parties had arrived at an amicable compromise. In the absence of the judgment of the Court of Appeal, it becomes doubly useful to examine in some detail the main points that were discussed in that case.

A consignment of cigarettes had been loaded on a ship with a Panamanian registration for delivery to consignees in Yugoslavia. Plaintiff alleged that the cigarettes had never been delivered to the consignees and, after having obtained from the Court the issue of an impediment of departure against the ship, claimed payment of

the value of the goods from the ship. The defendant pleaded that the Maltese Court did not have jurisdiction to take cognisance of the case on the ground that according to the Bill of Lading all disputes between the parties were to be decided by the Courts of London or Rotterdam. In fact, the Bill of Lading stated as follows:

> 'All claims arising on this Bill of Lading, as well as on the above charter party, shall be brought either before the Court of London or the Court of Rotterdam at Carriers' option to be declared within 14 days of the day of claimant's written request.'

It may be pointed out that plaintiffs were a Belgian Company and neither of the parties was connected in any way with Malta.

The Commercial Court, by means of its judgment of the 6th April 1972, allowed defendant's plea, declaring itself not to have jurisdiction. The Court accepted the validity and efficacy of the clause in the Bill of Lading.[1] It examined the various cases mentioned under s. 743 of the Code of Civil Procedure, concluding that the particular case did not fall within those provisions in the light of the interpretation given by case-law.[2]

With regard to the provisions of the Merchant Shipping Act, the Court considered that the fact that a warrant of impediment of departure had been issued was of no relevance, because such a warrant presupposed jurisdiction and did not create it.[3] Although there was jurisdiction over foreign ships, such jurisdiction could be excluded by agreement and the Court, therefore, found itself devoid of jurisdiction.

It was plaintiff's contention that, even if the Clause in the Bill of Lading were to be regarded as valid, the Court would still have jurisdiction to take cognisance of the case if it was satisfied that a disclaimer of the Court's jurisdiction would deprive plaintiffs of the only means of enforcing their claim. In this case, the defendant company possessed only one ship and it was evident that the ship would never go to London or Rotterdam to submit herself to being arrested in those ports. In the hearing before the Court of Appeal, this contention was elaborated further and this particular aspect deserves detailed examination.

[1] The judgments raised upon by the Commercial Court are those mentioned in this note and in notes (2), (3) and (4) infra Vol. XXIX.I.1317; XXX.II.373; XXXI.III.239; Vol. XXXIII.III.474; Vol. XVIII.III.66

[2] Vol. XXVI.I.37; XXXII.II.164; Vol. XXXIII.III.497; Vol. XXVIII.III.1017

[3] Vol. XXVIII.III.744,749; Vol. XXVIII.III.866

It is an accepted principle that the mere presence of a ship, albeit of foreign nationality, in Maltese territorial waters confers jurisdiction on the Commercial Court, as a Court of Vice-Admiralty jurisdiction, in regard to actions *in rem* made by any person. The relevant law was Ordinance III of 1892 (Chap. 41 of the Laws of Malta)[4] which conferred on the Commercial Court the jurisdiction arising from the Colonial Courts of Admiralty Act 1890. One of the cases in regard to which Admiralty jurisdiction was exercisable referred to any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

The development of jurisdiction *in rem* was examined in the 1936 judgment 'The Beldis'.[5] Originally, the notion had been accepted that the arrest of a debtor or of a *res* (in the Admiralty jurisdiction sense) of itself conferred jurisdiction *in rem*. Subsequently, the idea of personal arrest was set aside but the importance of the arrest of the *res* remained; in fact, it was the only factor that radicated jurisdiction *in rem*.

One must bear in mind that the notion of the action *in rem* under English Law has no connection whatsoever with the notion of the real action as accepted in continental laws of procedure, including our own. The English action *in rem* is the action brought before the Admiralty Division of the High Court against a ship or other things, such as cargo or freight, connected with a ship, or against an aircraft, and its principal purpose is that the claim be satisfied by means of the *res* itself. Therefore, the object is arrested so that the plaintiff's claim can be satisfied thereby. The arrest in fact is the commencement of the proceedings and indeed the basis of the Court's jurisdiction.

As is stated by Carver 'Carriage of Goods by Sea':[6]

> 'By means of this remedy the person suing can at once obtain the property proceeded against as security for the claim, before that has actually been established and judgment obtained.'

and

> 'A claim for breach of a charter party by refusing to perform the agreed voyage was within the meaning of s. 2 of the Act of 1869,

[4] Now abrogated by the Merchant Shipping Act 1973 (Act XI of 1973). Vide infra.

[5] Vide Vol. 18, pg. 598 of the Reports of Maritime cases.

[6] Carver, 'Carriage of Goods by Sea', 10th Edition by R.P. Colinvaux, p. 936.

so were claims for not delivering in accordance with the contract.'[7]

For the existence of the jurisdiction *in rem* of the Court, the nationality of the ship is completely irrelevant. The only requisite that is necessary is that the ship be in the country's territorial waters.[8] Although at one time, a belief had grown up that the ambit of Admiralty procedure *in rem* was coterminous with the ambit of the maritime lien, this belief was soon displaced by the judgement of the Court of Appeal in 'The Heinrich Bjorn' and in 'The Beldis'.[9] In the latter judgment it was clearly stated that the remedy *in rem* was not founded upon a maritime lien, but merely enabled the claimant to arrest and detain the property and gave him a charge upon it, subject to other prior claims from the time of the arrest.

Despite the existence, in the charter party or in the Bill of Lading, of a clause similar to the one quoted above, the Courts retain the discretion as to the exercise of their jurisdiction.[10]

It is almost a platitude to state that all contracts must be performed in good faith and that bad faith constitutes an exception to every rule. When one of the parties acts in bad faith, he would be thereby violating the contract and, therefore, would not be able to enforce the contract against the other party. The abusive exercise of a right, especially when that right is of a procedural nature, is ab abuse *contra legem* and in the light of the doctrine of the *abus de droit,* it is universally repressed by the Courts. Under the law of Procedure, the requirement of a juridical interest for the making of an action is based on the concept that one should not abuse of his substantive rights when these are not backed by an interest recognised by law. Similarly, for a defendant to be allowed to take advantage of the exclusive jurisdiction of a foreign tribunal, the Court must examine all the circumstances of the case and especially the following factors:

(i) Did the defendant genuinely desire trial in the foreign country or was he taking procedural advantages by trying to have

[7] Carver op. cit. p. 939.

[8] Carver, op. cit. p. 941.

[9] The Heinrich Bjorn (1886) 11 A.C. 270 and The Beldis (1936) p. 51.

[10] Reference may be made to an article by Bissett-Johnson in the International & Comparative Law Quarterly of October 1970 and to the case-law therein quoted especially 'The Eleftheria' (1969) All England Reports pg. 601.

the case heard by the foreign Courts?

(ii) Would the plaintiff by prejudiced by having to sue in the foreign country, by losing security for his claim or by being unable to enforce his judgment there?

In this particular case, it was alleged that the defendants had acted in a fraudulent manner. The defendants had in no way attempted to honour their obligations towards the plaintiffs; indeed, after the issue of the warrant of impediment of departure by the Commercial Court in Malta, the defendant ship had tried to escape from Maltese territorial waters, was intercepted by a vessel of the Malta Armed Forces and forced to return to harbour. It was alleged that the defendant wanted to continue to evade plaintiffs' rights and was asking for the assistance of the Court to be able to continue the fraudulent behaviour. The criteria aforementioned were some of those put forward by Mr. Justice Brandon in the case 'The Eleftheria'[11] aforequoted and it seems that such criteria were very apposite and deserving of being followed.[12]

The Commercial Court had admitted that the Court did possess a discretion as to whether to exercise jurisdiction or not.[13] The Court had felt that once there was the clause in the Bill of Lading, such discretion was not to be exercised. It must be submitted, however, that the Court's discretion arises only when there is a specific clause excluding jurisdiction, as otherwise the Court seized of the case would have no option but to deal with its merits. In this case, this was not some clause specifically agreed

[11] Weekly Law Reports (1969) p. 1077.

[12] The other factors were the following:

(a) In what countries the evidence on the issues of fact is situated or more readily available and the effect of that on the relative convenience and expense of trial;

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English Law in any material respects;

(c) With what country either party is connected and how closely;

(d) Would the plaintiff be prejudiced by having to sue in the foreign country, as he would be faced with a time-bar not applicable in England or he would be unlikely to get a fair trial for political, racial, religious or other reasons.

[13] It had been accepted by the Malta Courts that a Court would normally, exercise jurisdiction in regard to matters which have to be dealt with locally, such as the ascertainment of a state of fact in Malta.

upon between the parties for some particular reason, in order to avoid serious inconveniences or some abuse in their inter-relations, but was just a clause which happened to be in the printed form of the Bill of Lading. It is submitted that such a consideration is to be taken into account by the Court in exercising its discretion as to declining jurisdiction or not.

One must now consider the eventuality that a Court decides not to exercise jurisdiction. One must try to establish what orders the Court should give in this regard. One alternative would be for the Court to merely decline jurisdiction and order the non-suiting of the defendant by a judgment of *liberatio ab observantia judicii.* This would leave the plaintiff completely unprotected but would be giving effect entirely to the exclusion its jurisdiction. Another alternative would be for the Court to give such orders as it may deem fit to safeguard the plaintiff's interests. In the aforementioned case 'The Eleftheria', Mr. Justice Brandon stated as follows:

> 'The question whether to grant a stay or not, and if so on what terms, is one for the discretion of the Court. Having arrived at the clear conclusion which I have stated, I shall exercise my discretion by granting a stay, subject to appropriate terms as regards security'.

The above quotation indicates that the English Court in that case adopted the second alternative. However, in exercising its discretion, even on the point as to whether security should be ordered or not, the Court must consider all the circumstances of the case. If the necessity or reasonableness of issuing proceedings in disregard of the exclusive jurisdiction clause is not explained to the Court's satisfaction, then possibly the Court would not feel called upon to order that security be given, but on the other hand the existence of one or more Courts possessing exclusive jurisdiction may be a reason for the ship never to enter the territorial waters of the particular country or countries and that factor in itself should be considered. This is entirely a question of fact to be dealt with according to the details of each particular case.

The new Merchant Shipping Act enacted by Act XI of 1973 left the jurisdiction of the Commercial Court unchanged. In fact, s. 370 provides that the Commercial Court *shall continue* to exercise, as part of its ordinary jurisdiction and in accordance with the mode of procedure in force in that court, the jurisdiction hitherto exercised by it, by virtue of the Vice-Admiralty Court, (Transfer of Ju-

risdiction) Ordinance.[14] The Minister responsible for shipping has been authorised to make rules to regulate the procedure to be followed by or before the Commercial Court in any matter falling within the jurisdiction of that Court by virtue of s. 370 and, until such rules are made, the provisions hitherto applicable under Chap. 41 (namely ss. 3, 4, 5) shall continue to apply.

It is therefore clear that there is no break in continuity through the enactment of the new Merchant Shipping Act. In fact, a Court with Vice-Admiralty jurisdiction existed in Malta since the beginning of the British domination.[15] Side by side with the Vice Admiralty Court there also existed the Commercial Court whose jurisdiction was regulated by the Code of Organisation and Civil Procedure. That Code specifically referred to claims concerning maritime matters and conferred relative jurisdiction on the Commercial Court. Therefore, there existed two Courts, whose jurisdiction partially overlapped. In cases covered by such partial overlapping there was concurrent jurisdiction of the two courts. This state of affairs was remedied by the Colonial Courts of Admiralty Act 1890 and Ordinance III of 1892, which vested on the Commercial Court the jurisdiction hitherto exercised by the Vice Admiralty Court. Apart from the special procedure for Preliminary Acts, the procedure to be followed was the ordinary one established by the Code of Civil Procedure.

The position had not suffered any change through the enactment of the 1973 Merchant Shipping Act which in this respect has confirmed the Commercial Court's jurisdiction as hitherto obtaining.

[14] Chap. 41 of the Laws of Malta.

[15] Reference may be made to a Government Notice of the 16th November 1826 and to the Vice-Admiralty Courts Act 1863 (26 Vict.c.24).

DEBONO vs SALVINO BUGEJA NOE ET[1] AN EXERCISE IN JUDICIAL RESTRAINT

ALFRED GRECH

FOLLOWING the decision of the Civil Court 1st Hall in 'Debono vs Salvino Bugeja noe et' those who are not prepared to accept the tunnel vision of the 1st Hall must be at pains to grope for a better appreciation of the problem of controlling administrative action in Malta.

The Housing Secretary had issued a requisition order on a particular tenement which was duly served on Debono on the 26th March 1974. Debono had taken the tenement on lease, on the 11th March 1974 and went to live in it with his family on the 12th March. On eviction, the plaintiff retired to his private van as a protest and immediately instituted action against the Housing Secretary. He alleged that he was unlawfully evicted from his dwelling and that the alternative accomodation offered by the Housing Department was too small to live in.

As a preliminary objection, the Court had to decide, whether the other defendant, the then Parliamentary Secretary responsible for Housing, had a 'locus standi indicii' in the case. The court decided in the negative '(billi) tilliberaħ mill-ħarsien tal-ġudizzju'.

On the merits, plaintiff asked the Court to annull the requisition order due to substantial irregularity, a process which involved the examination of the merits of the administrative act and decide whether extraneous considerations had been taken into account by the issuing authority, making that act incorrect according to the enabling powers – in short the court had to exercise, judicial review.

Materially this was what plaintiff asked. But the wording of the claim was rather confusing. In the first place, it was submitted that the Housing Secretary had not observed the rules of natural justice. The meaning of 'natural justice' in this context is not clear. Because if plaintiff referred to the non-observance of the rules of natural justice as a test of control upon the administrative act, the phrasing is rather unhappy, if not improper. Natural Justice features as a test for control in Judicial or quasi-judicial[2] functions

[1] 1st Hall – 14th August, 1974.

[2] Vide comments on the distinction between Judicial and Quasi-Judicial.

of administrative bodies, where the elements of adjudication as laid down in the Report of the Committee on Ministers' powers[3] can be detected. In the present case, the Administrative action in issue is purely 'administrative',[4] and the Housing Secretary is nowhere required by law to adjudicate upon the facts in exercising his discretion.

Again, reference to the action being 'ultra vires' can lead to, perhaps, unfortunate conclusions, because this is a term normally used in that part of Administrative Law dealing with delegated legislation. But if 'ultra vires' is to be broadly interpreted then it could mean any exercise of power beyond authorisation. In that case the action of the Housing Secretary may be impugned either because it is an action which the law does not empower, or because it has been done for a purpose which the law does not contemplate. One is formal the other is substantial.

Be that as it may, plaintiff challenged the reasonableness of the requisition order having regard to the provisions of section 4 of the Housing Act, that the requisition order is to be issued by the Housing Secretary 'in the public interest or for providing living accomodation to persons or for ensuring a fair distribution of living accomodation'. When reasonableness is the question the adjudicating authority has to go behind the facts and incidents which determined a particular decision or action, and decide whether the conclusions reached compare with the given standards. The text of the law is not very helpful in this, because it is clearly evident that the vague diction is intended to confer the widest possible power (a blank cheque) on the administrative authority in exercising its discretion. But there is at least the 'public interest' qualification of section 4 and any requisition order may be reviewed accordingly, however vague and ambiguous the meaning of the term.

The Court was not even prepared to go as far as that however. The decision of Mr. Justice Xerri was plain and categroic. Section 4 of the Housing Act empowers the Housing Secretary, 'if it appears to him to be necessary or expedient in the public interest, or for providing living accomodation to persons or for ensuring a fair distribution of living accomodation', to requisition 'any building'

[3] Committee on Minister's Powers Report 1932 p. 71 et seq.

[4] Vide the Housing Act 1949, which does not require any save procedure save that the Housing Secretary 'may in his absolute discretion' and 'in the public interest' issue a requisition order.

and 'may give such directions as appear to him to be necessary or expedient in order that the requisition may be put into effect or complied with'. This absolute discretion vested in the Housing Secretary in 1949 was never since restricted neither by law nor by the Courts of Law. Nor was there any variation in interpretation by the Court. So all the Court can do is, to ascertain that the form prescribed by law has been followed, and that the official issuing it was vested with the proper authority. The discretion of the Housing Secretary is not subject to review by the Courts. The Court was satisfied that in the present case the Housing Secretary acted according to law with the formalities prescribed and therefore plaintiff's claim could not be accepted.

This decision is typical of the attitude the Maltese Courts have taken towards the exercise of Administrative discretion. The line of judgements upholding the unrestricted exercise of administrative action dates back to the decision given by the First Hall of the Civil Court in 'Demarco vs Turner'[5] where it was held that:

> 'ove gli attori avessero fatto domanda per la revocazione dell'atto compiuto dal Direttore dei servigi veterinari per non essersi costui mantenuto nell'orbita delle sue attribuzioni non abbia ecceduto i limiti posti dalla legge, questa autorità giudiziaria avrebbe potuto esaminare la legalità del provvedimento emanato da quell'ufficiale pubblico, e la questione insorgente da tale domanda, e negare qualsiasi effetto giuridico all'atto compiuto, senza averne la facoltà di complierlo, o in eccesso di tale facoltà, o senza aver osservato le forme e le procedure all'uopo necessarie; ma essi attori pongono come base delle altre loro domande quella per la revoca del giudizio emesso da quell'ufficiale, e questa quistione sfugge al potere, giudizionale di questo tribunale Civile, il quale non puo censurare i criteri che hanno ispirato detto Direttore, nel fare quella dichiarazione, senza che esso Tribunale venga ad invadere il campo che non è suo.'[6]

So long as the statutory requirements for validity of form and procedure are observed, the Courts would not interfere with the exercise of Administrative Action, even where the Administrator has erred in law or in fact. Justification for this line of defence

[5] Vol. XXVIII-II-455.
[6] Ibid at p. 458.

was sought in the outmoded concept of Sovereign immunity and infallibility,[7] together with the complementary conception of executive action in terms of power and 'imperium'.[8] It found a solid foundation in the doctrine of double personality which placed the administration beyond the control of the Courts when acting 'iure imperii'. Practical considerations must have played their part as well. Examining the substance of a purely Administrative Act may involve the Courts in a perilous adventure to the depths of political argument. And the courts may indeed be unprepared to wet their finger tips.

Also, the administrative official may not have given a reasoned answer in the exercise of his discretion. It might be impossible to overrule his action from the attending considerations. This was the problem which the British Judges had to face in developing an effective theory of judicial review. On the one hand they had to tread cautiously not to limit the powers conferred by Parliament, however wide and absolute, if they were to be exercised in the national interest, while on the other 'Judicial self-preservation may (have) alone dictate(d) restraint'.[9]

The issue may be tinged by the doctrine of Ministerial Responsibility to Parliament on questions of policy. But it must be realized that Parliament does not have the material opportunity to discuss, let alone control the sporadic actions of the various officers down the administrative echelons. Nor can Parliament reverse decisions or grant remedies to injured individuals. The ultimate control remains with the Judiciary.

In England the implications of the unrestricted increase in administrative powers were fully realised when Parliament and the Executive started to make improper encroachments on the territorial preserves of the Courts. 'Lyanage vs R.' (1967) was the occasion for Parliament to attempt a reversal of a decision given by the House of Lords with retroactive effect. It was argued that if the Judges ought not to set themselves up as politicians, the politicians ought not to set themselves up as Judges. 'The Government manifests its non-partizan approach to a matter of public concern, the judges manifest their sense of obligation towards the Welfare

[7] The Doctrine that the Crown can do no wrong.
[8] Vide Gulia 'Governmental Liability'.
[9] Per Parker C.J. 'Recent Developments in the Supervisory Powers of the Courts and inferior tribunals'

of the State'.[10] Over the past ten years there has been a growing tendency to invoke judicial review, and the courts have been found ready to intervene. They are growing more and more aware of the dangers inherent in absolute power.

The Maltese courts do not seem to be influenced by this movement or similar trends on the Continent where the individual may seek redress against the executive in special Administrative Courts. They have been lost in the wilderness of a judicial labyrinth, by the inconsistent, and by now rejected doctrine of the double personality of the state.[11] And in one judgement at least the notion of 'ius imperii' was even extended to the legislative Acts of parliament,[12] an absurd conclusion which even a bare knowledge of Constitutional interpretation can put to scorn.[13] 'Debono vs Salvino Bugeja noe et' is typical of the restrictive view nothing of which kind is found ranging in the Administrative Courts of the Continent and the ordinary Courts of England. The judicial milestone in 'Sciberras vs The Housing Secretary et'[14] was indifferently discarded and Mr. Justice Xerri decided the case on the strict interpretation of the law. So long as the requisition order was issued according to the formalities and by the authority prescribed by law, the object of the Court was exhausted. A cursory orientation in the practice of judicial review would clearly mark out the difficulties of this conclusion. It is difficult to control administrative action merely by form and authority. It must be conceded that power may be legally vested in an authority and its exercise be unlawful. A right may be abused though not infringed. This was Plaintiff's contention in the case, and the Court was asked to decide on the basis of 'Sciberras vs Housing Secretary noe et'.

The doctrine of the double personality of the State for long in disfavour with the more advanced legal opinion was thrown overboard by the Court of Appeal in 'John Lowell et vs Onor. Dr. Carmelo Caruana et'.[15] It was the pillar on which the long line of de-

[10] De Smith 'Judicial Control of Administrative Action', 3rd ed. p.30.
[11] Lowell vs Caruana C.A. 14th August, 1972.
[12] Vide 'Neg. John Coleiro ne vs. Onor. Dr. Giorgio Borg Olivier'. Vol. XLI-II-1045.
[13] Vide now 'Buttigieg vs Borg Olivier'. Vol. XLVII-I-I
[14] Per Sammut J. First Hall 21st July, 1974.
[15] C.A. 14th August, 1972.

cisions upholding the immunity of Executive action had rested. Once the deep seated foundations for that attitude had been destroyed the Court was able to lay down the principle that where the exercise of administrative acts is in question, the principles of English Law on this point are to be adopted. This is in conformity with 'Cassar Desain vs Forbes'[16] and subsequent decisions.

Three principles from English Public Law were enumerated.

(a) The Court may interfere where the exercise of discretion was not according to the conditions provided by Statute, or, in other words had violated the basis of the power granted by statute – excess of power;

(b) The exercise of administrative discretion may be controlled where the power has been exercised for a purpose for which it was not conformed. That is to say, when it is used for any other purpose or on considerations extraneous to the legislation which conferred the power – abuse of power.

(c) An authority entrusted with a discretion must not in the purported exercise of its discretion act under the dictation of another body or person.[17] An authority who is vested with a discretion cannot act according to the directions or instructions of his departmental superior, without exercising his independent judgement. Any action or order so made would be invalid.[18]

The Housing Secretary was thus acting illegally when he was directed by the Ministers – a case of failure to exercise a discretion,[19] and when it appeared from the circumstances of the case that the requisition order was issued to circumvent a judgement by the Rent Regulation Board ordering eviction – a case of improper purpose. The Court took the plunge and ordered the restitution of the requisitioned building to requisitionee. That was enough for a first step. Subsequent cases could go on to develop more fully the inner matrix of the doctrine of judicial review and provide the individual with a long needed remedy against the unscrupulous intrusion by beurocratic functions on the checked domain of individual rights.

'Debono vs Housing Secretary' did not follow these steps, and

[16] Vol. XXXIV-1-43.
[17] De Smith, Judicial Review of Administrative Action, 3rd Edn. p. 273.
[18] Basu: Commentary on the Constitution of India, Vol. 1, p. 318.
[19] Vide De Smith op. cit. p. 263 et seq.

rejected all that had laboriously been said. It was a case of sheer backsliding, unmasking an impending fear to move forward with the spirit of the changing times. But the conservative mentality in judicial circles cannot be upheld to the point of legal sophism and legalised injustice. Judicial lethargy to the immediate problems which arouse public concern cannot be glossed over so easily, simply because the common public is unable to follow the subtitles of legal argument.

This is part of the function of the Courts, as guardians of law, to safeguard the rule of law, not necessarily manifest in positive legislation. They should be keen sentinels, prompt to mark the first shoot of social injustice which rears its head on any possible occasion in a democratic society hypnotised by the ideals of liberalism:

> 'Jekk il-Qorti bħal f'pajjiżi demokratiċi oħra, jipprovaw jaqdu l-funzjoni mportanti u xejn faċli ta' *review* assenjata lilhom dana mhux dovut għal xi vellejità jew xi xewqa li tiġi kkritikata l-Amministrazzjoni jew il-leġislatura, iżda huwa dovut biss għan-neċessità tad-disimpenn ta' dmir espressament impost fuqha mill-istess kostituzzjoni. Dan hu partikularment il-każ rigward id-drittijiet u l-libertajiet li dwarhom il-Qorti ġiet Kostitwita bħala sentinella tal-qui vive...'[20]

The matter did not stop there. The decision was appealed from. Before the Court of Appeal, Defence Counsel sought to unearth the penetrating ramifications of judicial practice in England where an administrative action is being contested. The crucial issue was where to draw the line between individual and public interest, and how far are the courts expected to interfere in the exercise of discretion to protect the former. But more important was the reference to the rule of law, and the principle that when the rights of the private citizen have been infringed the Courts should grant a remedy. The reasons for granting a remedy seemed (according to the opinion of the present writer) to outweigh the excuses for administrative immunity. It could be said that this was a case where the deeds themselves spoke loud and clear. But the Court of Appeal did not pronounce itself, because that would have involved an

[20] Buttigieg v. Borg Olivier. C. of Appeal 10th January, 1964. But the reference 'review' in this quotation refers to the Judicial Review of *Legislative* action under the Constitution.

adventurous expedition to those unsafe regions of terra incognita (it was alleged). It could neither refuse to deliver judgment and deny justice. Tactfully it suggested a Compromise.

It was reported afterwards that plaintiff was given a lease hold by the Housing Department instead of the requisitioned building and appeal was abandoned. The dictates of justice were hardly satisfied in this case. But what is more disquieting is the complete failure of the courts to develop a sound system of judicial review which is by now, long overdue.

THE MEANING OF THE 1971 PARIS CONVENTIONS ON COPYRIGHT*

J. A. MICALLEF

MANY complex problems in the field of International Copyright arise because the matter is governed by two different conventions. While most of the European States continued to adhere to the International Conventions signed in Berne in the 19th Century, the United Nations had signed soon after World War II another international instrument known as the Universal Copyright Convention. An attempt has now been made in Paris to bring into closer association these two international agreements and setting up of an international centre as a link between publishing houses and the developing countries.

It was no doubt a unique occasion to observe delegates from so many different countries attending simultaneously two international conventions, and make it clear that they had come to U.N.E.S.C.O. House at Place de Fentenoy, Paris, with the spirit and zeal to revise two conventions simultaneously, albeit in separate gatherings, and to create greater harmony and co-operation between them.

*The Original copy of this Article was sent to Dr. Arpad Bogsch, Deputy Director of the World Intellectual Property Organization who deposited it at the Library of W.I.P.O. at Geneva. A Memo-Study was sent to the Maltese Ministry of Trade and Industry after the Paris Conferences and the matter was the subject of a Public Lecture given under the auspices of the Law Society at the Aula Magna, on April 25, 1972.

Much had been achieved when twenty six countries signed the Paris Acts on the morning of July 24, 1971. Although among the signatories one met the representatives of such small states as Liechtenstein, Monaco and the Holy See, unfortunately Malta did not sign the Acts.

The revision of the Berne Convention was closely linked with the conference on the Universal Copyright Convention. The latter had originally been signed in Geneva in 1952 and had never been revised. Among its signatories where a number of developing countries who had felt that the rules of the Berne Convention were too rigid. It was for the purpose of liberalising these principles that the Berne Convention has now been revised in Paris.

The Director General of the World Intellectual Property Organisation (W.I.P.O.) convened a Diplomatic Conference in search of a general system of international copyright protection that was acceptable to many nations.

The aim of the meeting was asserted by the Director General of W.I.P.O. Professor G.H.C. Bodenhausen, at his opening address on July 5, 1971, when he declared that the delegates were meeting to enable the developing countries to choose a solution fitted to their needs, while, at the same time, acceptable to the countries which are the largest producers of literary, scientific and artistic works.

The two Conferences that took place in Paris were a consequence of some of the principles adopted in the last revision of the Berne Convention held in Stockholm in 1967. The Stockholm Act of the Berne Convention tried to establish a system aimed at meeting certain needs of the developing countries in the fields of culture and education. The system, however, was not readily accepted by a large number of States and many had not ratified it. It became clear that the matter required further review and very detailed preparatory work to provide new solutions were taken in hand by the Secretariat at W.I.P.O.

The task of revising the Berne Convention in Paris, was undertaken by two bodies: the Main Commission and the Drafting Committee. Professor Eugen Ulmer of the Federal Republic of Germany was elected Chairman of the Main Commission. His nomination was proposed by the Delegation of India and supported by the Delegations of the Netherlands, Canada, Italy and France. The Drafting Committee was chaired by Mr. William Wallace of the United Kingdom.

It has been observed that the Paris Acts had been necessitated by the work carried out in Stockholm in 1967 and the recognition of the importance of the Stockholm Convention is now asserted by a declaration in the Preamble which has been re-drafted in such a manner that it no longer makes reference to the previous conferences held in Berlin, Rome and Brussels but underlines only the work done at Stockholm.

A number of general substantive provisions (Articles 1 to 20) of the previous Berne Conventions and the administrative provisions (Articles 22 and 26) have not been altered. Some of these rules had been incorporated in the Stockholm Act, and this, in itself, proved that the Stockholm Conference had achieved some measure of success even among the developing countries.

The Stockholm Convention had already liberalised a number of rules and set up the World Intellectual Property Organization. But some of these rules were not regarded as satisfying the demands and requirements of the developing countries. The Protocol regarding the Developing Countries has now been repealed and submitted by a detailed Appendix which has been liberally inspired in favour of the latter countries.

The Berne Convention has now been revised in Paris in such a manner that matters have been simplified for members of U.C.C. One very important point is that if a member does not give full protection for the life of the author and fifty years after his death as provided in Article 7 of the Berne Convention, such member may now ratify the Paris Convention in part[1] and therefore may, while not acceding to the substantive provisions including the important one relating to the term of copyright, yet adhere in part to the Paris Convention. Subject to a number of exceptions, some of which are quite important, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of the Convention.[2] These exceptions, again have been introduced to enable the Developing Countries to accede to the new Paris Act. The previous Acts of the Berne Convention shall continue to be applicable in relations with countries of the Union which do not ratify the new Convention.

Therefore, until Malta has ratified the Paris Act, we shall continue to be governed by the previous convention which in the case

[1] Article 28 (1b) of the Paris Act of the Berne Convention.
[2] Article 30 Idem.

of Malta is the Rome convention of 1928 and to which we are still bound. Once a country has acceded or ratified the first part of the Convention and the Appendix, it may not then accede to earlier acts.[3] A country may also, finally denounce the Paris Act but this may not take place before the expiration of 5 years from the date upon which it became a member. In case of dispute between two or more countries of the Union concerning the interpretation of the Convention the matter, may, by any one of the countries concerned be brought before the International Court of Justice.

Most of the facilities laid down in the Paris Acts were included for the first time in the Stockholm Convention of 1967 but they have now been altered to meet other requirements of the developing countries. These facilities now no longer form the basis of a Protocol regarding Developing Countries but have been grouped in an Appendix which forms an integral part of the Convention itself.

The Berne Convention recognizes to Authors the exclusive right of making and of authorizing the translation of their works throughout the term of protection laid by the convention. This is not to be less than the duration of the life of the author and fifty years after his death. The Paris Act now modifies this exclusively by authorizing Developing Countries for the purpose of teaching, scholarship or research[4] to substitute such a right by a system of non-exclusive and non-transferable licenses.

A preferential treatment will now be given to those countries which in accordance with the established practice of the General Assembly of the United Nations are regarded as developing countries and which having regard to their economic situation and their social or cultural needs, do not consider themselves immediately in a position to make provision for the protection of all the rights mentioned under the Convention.

No doubt big problems face those nations with a very large number of languages, such as in the case of India, of which only a few are in general use. Indeed in an attempt to improve educational standards in such countries, the Convention has, through a system of licence, restricted the Author's rights of Translation and of Reproduction.

Translations

In examining the facilities of translating works one must ob-

[3] Article 34 Idem.

[4] Appendix (Article II (5)) Berne Convention op.cit.

serve that the provisions of Articles II and III of the Appendix of Paris Act have laid down a number of conditions[5] among which the more important are the following:

A licence to translate shall be granted only for the purpose of teaching, scholarship or research[6] and may be acquired by any 'national of the country', which term the conference meant to include legal entities, local authorities and enterprises owned by the state.[7] A licence may also be granted if all editions of the translations published in the language concerned are out of print. The application for a licence is to be made in accordance with the procedure laid down by the particular country.

Licence rights shall be granted after the lapse of a certain term which has now been shortened considerably by the Paris Acts and is dependent on the kind of language in use. The period is of three years, or any longer period determined by the national legislation of the country, when a translation has not been published in a language in general use in the country, such would be a translation of a work in Malta in the English language. In the case of a translation into a language which is not in general use in a developed country which is also a member of the Berne Convention, the period for application for a licence is further reduced to one year. In either case the period shall commence from the date of the first publication of the work. The three year period in case of a language in general use may be further reduced, to a shorter period of one year, by the unanimous agreement of all the developed countries in which the language is in general use. This rule shall, however, not apply where the language in question is English, French or Spanish.

After the lapse of the above terms, the owner of the right of

[5] This refers to the Berne Convention. Very similar provisions were also introduced in the Paris Act of the Universal Copyright Convention.

[6] M. Kaminstein in his General Report states that it was the understanding of the Conference that the word 'scholarship' refers not only to instructional activities at all levels in tutorial institutions, primary and secondary schools, colleges and universities, but also to a wide range of organized educational activities. The Conference also agreed that the word 'research' could not be interpreted as to permit the translation of copyright works by industrial research institutes or by private corporations doing research for commercial purposes. (Para 73, U.C.C. Report, 1971).

[7] Vide Report of the Diplomatic Conference for the Revision of the Berne Convention dated 23rd July, 1971, Para. 29.

translation shall be allowed further periods of six or nine months as the case may be[8] from the date of the request for authority to translate the work which has been submitted to the owner, or where his identity or address is unknown, copies thereof have been sent to the national or international body.[9] During this further period the owner may himself publish a translation in the language in respect of which the application was made, thus giving the owner of the right of translation a further opportunity of making the translation himself.[10]

When a work consists mainly of illustrations, a licence to publish a translation may only be granted if the stricter conditions laid down in Article II of the Appendix to the Paris Convention are fulfilled.

Translation licences shall terminate as soon as a translation of the work is published in the same language by the owner, or by his authority, at a price reasonably related to prices for comparable works. Any outstanding copies made before the licence is terminated may continue to be distributed until their stock is exhausted. A licence to translate shall be refused when the Author has withdrawn from circulation all copies of his work.[11]

Broadcasting Organizations. While authors of literary and artistic works continue to enjoy, under the revised Berne Convention the exclusive right of authorizing the broadcasting, or rebroadcasting of the work, or its communication to the public by loudspeaker,[12] translation licences may also be granted to any broadcasting organization which has its headquarters in a country making a declaration that it will avail itself of this facility.[13]

While, therefore, translation rights may be acquired by a broadcasting organization, the general rules of the convention remain unmodified.[14] The exclusive rights which authors enjoy to authorize the broadcasting of a work shall be exercised under such terms and conditions which are laid down by the legislation of the Union country. The rules are not in any way to prejudice the moral rights

[8] Appendix Article II (4) a. Berne Convention, op.cit.
[9] Appendix Article IV (2) idem.
[10] Appendix Article II 4b. Berne Convention op.cit. and Art. Vter 2(b) of the Paris Act of the Universal Copyright Convention (U.C.C.) 1971.
[11] Appendix Article II (6), (8), Berne Convention op.cit.
[12] Article II Bis idem.
[13] Appendix Art. II (9) Berne Convention and Art. Vter (8) (U.C.C.) op.cit.
[14] Vide Report para. 33. op.cit.

of the author or his right to obtain equitable remuneration. Although permission to record the work that has been broadcast shall not be implied, unless there is agreement to the contrary, national legislation may authorize the preservation of such recordings in official archives if they are of exceptional documentary character.

The Paris Acts now authorize the grant of a licence to make a translation of a work which has been published in printed or analogous forms of reproduction to any broadcasting organization provided it abides by certain conditions. The translation is to be made from a copy made and acquired in accordance with the laws of the country where the organization has its headquarters. The general report of the convention explains this.[15] The copy from which the translation is made must not be an infringing copy according to the laws of that country and, any use of the translation is not to be made for commercial purposes but is intended for use in broadcasts exclusive for teaching or for the dissemination of the results of specialized research to experts in a particular profession.

The sound or visual recording of a translation which the broadcasting organization enjoying a translating licence makes, may by agreement be used by any other broadcasting organization provided it has its headquarters in the same country as the authority granting the licence. Finally, the broadcasting organization may also acquire a licence to translate any text incorporated in an audiovisual fixation where the fixation was prepared and published for the only purpose of its being used in connection with systematic instructional activities.

Reproduction of Works. The revised Berne Convention in Article IX again reasserts the exclusive right of authors to authorize the reproduction of their works in any form or manner. But the Act itself modifies this right and provides[16] for a system of non-exclusive and non-transferable licences, very similar to that of translating licences, for use in connection with what the new convention describes as 'systematic instructional activities'.[17]

The reproduction licence shall be granted after a period of five years commencing on the date of first publication of a aprticular

[15] Vide Report para. 34, op.cit.
[16] Appendix Article II Berne Convention op.cit., and Article V/Quater (U.C.C.) op.cit.
[17] Article V/Quater (U.C.C.) op.cit.

edition of the work, or any longer period determined by national legislation of the country,[18] if copies of the edition have not been distributed in the country to the general public. A licence for reproduction will also be granted when copies of a work have not been distributed at a price reasonably related to that normally charged in the country for comparable works. In such a case, the work for the purpose of distributing it as a part of an instructional activity systematically carried out may be reproduced even at a lower price.

Exhausted Editions. The relevant time periods, before reproduction of the work is authorized, in case the work has been published in successive editions, are applicable to each edition. Besides when the relevant applicable periods have expired, a licence to reproduce and publish an edition will also be granted if no copies of that edition are on sale for a period of six months or in the case of systematic instructional activities if no copies at reasonable prices are available.

Audio-visual reproductions. The Paris Act of the Berne Convention[19] extends these same rights to the reproduction of works even in audio-visual form. The original fixations containing both pictures and sound must, however, have been prepared and published for the sole purpose of being used in connection with systematic instructional activities. If the reproduction is made from a fixation that has been lawfully made, the conference, on the proposal of the delegation of the United Kingdom, accepted that a fixation prepared solely for use in curricular education could be licensed for reproduction.[20]

Translations. A limitation on the reproduction of translation has been adopted.[21] It precludes the granting of a licence to reproduce and publish a work that is itself a translation from another language unless it was published by the owner of the right of the translation or the translation is not in a language in general use in

[18] This period is reduced to 3 years in the case of works of the natural and physical sciences and technology. It is altered to 7 years for works of fiction, poetry, drama and music and for art books.

[19] Article III (7) (b) Berne Convention op.cit.

[20] Report of the Conference on the Universal Copyright Convention (Para. 110).

[21] Appendix Article III (5) Berne Convention op.cit., and Article Vter 2 (b) (U.C.C.) op.cit.

the State having the power to grant the licence.[22]

Finally, no licence for the reproduction of a work shall be granted if the author has withdrawn from circulation all copies of the edition of that particular work.

CONVENTION FACILITIES

While a view point was expressed at the conference that culture was a fundamental patrimonial right and a part of the general wealth making it a duty of the State to assure the material well-being of the intellectual worker,[23] the conferences have attempted to reconcile the interests of the one hand of those producing works and on the other of those developing countries who for economic reasons are unable to secure rights of publication. The conventions have worked out a compromise pattern. 'While providing better protection for the authors of intellectual works' uttered Monsieur Rene Maheu, the Director General of U.N.E.S.C.O. 'the conference invited proposal for facilitating the dissemination of such works by means of temporary relaxations for the benefit of developing countries'.[24]

The conventions laid down the criteria for considering what is a *developing country*. Similar reckonings were adopted by the two conferences, although the Universal Copyright Convention did not adopt an operative phrase originally evolved at Stockholm. The Conferences did not draw up a list of such countries but considered such country as meaning 'any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations'. The criteria on which the practice is based may vary from time to time and the development of a particular country may also change. The Berne Convention retained in Paris the guiding phrase 'the country which having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision of all the rights' laid down in the Convention. The U.C.C. conference did not feel that these guiding works added anything to the basic criterion and did not adopt them.

[22] Appendix Article III (5) Berne Convention op.cit.

[23] The Delegate of Cuba at the Conference expressed his government's views that the intellectual worker exercised a pre-eminent social function and that no economic barriers of access to works of the mind should exist.

[24] Inaugural address made on the 5th July, 1971, at the opening of the conference for the Revision of the Universal Copyright Convention.

How a developing country becomes entitled

What must a developing country do to entitle it to obtain the facilities laid down in the Conventions? The country must, first of all, become a party thereto. The new Universal Copyright Convention comes into effect three months after 12 states have deposited their instrument of ratification, acceptance or accession[25] and any state not signing the Convention may become a party thereto and it shall come into effect three months after that state has deposited its struments of accession.

The Paris Act of the Berne Convention allows a Country of the Union to accede to it in part by declaring, as has been stated earlier, that Article 1 to 21 and the Appendix, protecting certain fundamental rights, do not apply to the acceding country.[26] In Malta, as our national legislation is not completely in consonance with all the Articles of the Brussels Convention which have now again been reproduced in the Paris Act, we can avail ourselves of this unique opportunity by adhering, at least in part, to the latest convention approved in Paris in July 1971 while remaining bound by the earlier Act signed in Rome in 1928, as Article 7 still fixes the term of protection to the life of the Author and 50 Years after his Death. It is only if Articles 1 to 21 of the Paris Convention have come into force in a country may it not accede to earlier Acts of the Convention.[27]

Special Procedure

A developing country on becoming a member of the Convention[28] if it desires to avail itself of the special facilities of translation and reproduction of works provided for by the Conventions must at the time of ratification or accession deposit with the Director General of W.I.P.O. or U.N.E.S.C.O. as the case may be, a declaration of intent to take advantage of these special rights which shall be effective for a period of ten years from the entry into force of the convention. These periods may be renewed at ten year intervals until the member state ceases to be regarded as a 'developing country'.

The Paris Acts also lay down a special initial procedure that

[25] Article VII and IX. (U.C.C.) op.cit.
[26] Article 28 Berne Convention op.cit.
[27] Article 34 idem.
[28] Vide (i) Article V Bis (1) U.C.C. and (ii) Article I of the Appendix, Berne Convention op.cit.

must be followed before a licence can be obtained. Whether in the case of translation or the reproduction of a work the prospective licencee must make special efforts to negotiate a licence or to find the owner of the right. Either of these facts must be established. Therefore, when the *owner is known*, the person seeking the licence must send him a request to make and publish the translation or to reproduce and publish the edition whether the applicant is successful in negotiating a permission or whether this has been denied to him by the owner. At the time he makes the request the applicant shall also inform any national, regional or international information centre which may have been designated by the government of the state in which the publisher is believed to have his principal place of business. Under the U.C.C. Paris Act, information may instead be given to the *International Copyright Information Centre*, which was set up by U.N.E.S.C.O. purposely to help easing problems facing publishers in developing countries. Throughout the world, 5,000 million copies are published yearly but Asia accounts for only 2.5% while Africa produces 0.15%. There is still a big shortage of domestically produced books in such places as the Arab States and Latin American countries.

When the owner of the right to translate or reproduce a *work cannot be found*, the applicant for a compulsory licence, is required to send to the publisher whose name appears on the work a copy of the application. Similarly a copy shall be sent by registered airmail to a national or international centre. Again under the U.C.C. Paris Act, information may instead be given to the *International Copyright Information Centre*. This latter convention also requires that if the nationality of the owner of the translation right is known[29] another copy must be sent 'to the diplomatic or consular representative of the State of which such owner is a national'. Under the Berne Act it appears from the General Report of the Conference that it is enough that the authority granting the compulsory licence should have taken reasonable steps to ensure that the owner of the right of translation or reproduction has had an opportunity to be aware of the application and to take such measures as may seem to him appropriate.[30]

When the owner of the right of translation or reproduction cannot be found, the applicant for a compulsory licence must show that he

[29] Article V (1) (c) U.C.C. op.cit.
[30] Vide Report U.C.C. 1971 Para. 39. op.cit.

has, in fact, exercised due diligence to trace him. The delegation of India at the conference had proposed an amendment stating that an effort in good faith to comply with the requirements of the convention was enough.[31] The proposal was not, however, accepted by the delegates at the conference as it was rightly considered that a matter whether a licence was rightly granted by the authorities of a country was the responsibility of the courts in the country to be decided in each case.

Conditions for a licence

Finally, the Paris Acts lay down a few conditions to the licence holder availing himself of the facilities of translation or reproduction of the works, namely,

(i) the original title and the name of the author of the work must be printed on all copies of the translation or the reproduction and

(ii) the copies may not be reproduced outside the territory of the country granting the licence.

These two conditions also set up a number of problems to the developing countries and a joint Working Group of the Main Committee of the Universal Copyright Convention and the Berne Convention have recommended that an interpretation of the problems be included in the Reports of the two Conferences. The Delegates at the conventions have accepted that although the compulsory licence holder was to reproduce the work in his own country he could employ a translator in another country and also reproduce the work abroad if no reproduction facilities exist in his country and for economic or practical reasons it cannot be reproduced there.[32]

Conclusion

During the twenty years that have gone by since the passing of the Universal Copyright Convention by the United Nations at Geneva in 1952, problems of translation and reproduction rights had faced newly independent nations. Therefore, while the Paris Acts have attempted to provide a solution they have also protected the copyright owner by providing that a just compensation be paid to him and by placing a ban on the export of books thus translated or reproduced. The criteria for assessing the fair compensation is

[31] Vide Report U.C.C. 1971 Para. 101. op.cit.
[32] Vide Report U.C.C. 1971 Para. 115 op.cit.

also laid down. It must be such as 'is consistent with the standards of royalties normally operating or licences freely negotiated in the two countries'.[33] Moreover, the compensation should be paid in international convertible currency and the national authorities should not restrict the transfer of payment by currency regulations.

Again, the rights of the Author are protected by a ban on export of the works translated or reproduced. The only exception that the Paris Acts make on the prohibition of the export trade is if this is done by a governmental or other public entity and if the work is a translation into a language other than English, French or Spanish. The persons benefitting from such works as recipients must be individuals or organizations of the State granting the licence and the copies are to be used only for the purpose of teaching, scholarship or research. The authority may charge a price for the copies but this is to cover only costs of production without allowing for any financial gain.

The Paris Conferences of 1971 have no doubt provided a basis for future international collaboration in the field of copyright. Nations wealthy in literary and artistic material may make the less fortunate partakers of their resources. The two conventions make an important contribution towards achieving one of U.N.E.S.C.O.'s fundamental aims: the right to culture.[34] They tend to reconcile the right to the protection of the moral and material rights of the author with the right of everyone to participate freely in the cultural life of the community.

[33] Appendix Article IV (6) a. Berne Convention and Art. V/ter (5) (U.C.C.) op.cit.

[34] Article 27 of the Universal Declaration of Human Rights.

NOTARIAL REMINISCENCES OF LAST WILLS

PAUL PULLICINO

THE right to own property imposes upon a person the moral obligation of protecting that property even after he has ceased to live and by making a Will he can ensure that his estate is to devolve on the person or persons of his choice.

A Will is a declaration made by a person in a legally authorized form whereby the declarant, known as the testator or testatrix, makes known his or her wishes as to the disposal of his estate after his death.

If a person dies intestate his succession is regulated by Law, but by making a Will, he can, subject to certain protected interests, which vary from country to country, make known his wishes which are binding after his death.

The Maltese, compared to some other nationalities, are perhaps not very Will-conscious as can be seen by the great number of opening of successions which are filed every year in the Civil Court, Second Hall. However they are gradually learning the importance of making their Will, and I should point out here that the making of one's Will even in the simplest form can save much trouble, expense and loss of time in winding up an estate.

But why do people make Wills? If one looks at this question from the legal aspect the answer lies in the four paragraphs which you have just read.

However some testators seem to think otherwise.

A will, I have found, often brings out the testator's character in no uncertain manner and in making his Will the testator sometimes reveals himself shamelessly or gloriously according to his temperament.

During the exercise of my Notarial profession I have come across several such incidents which prove my point. These incidents have helped to enlighten the otherwise monotonous hours which every professional man must have experienced during the exercise of his daily work.

There was the vindicative testator who wanted to get his own back even after he was gone, who disposed: 'I give and bequeath to my daughter-in-law, wife of my son Paul, the valuable gilt mirror hanging up in the hall so that she may look into it after I am gone and see her ugly face'. This perhaps is not as bad as the bequest made by a husband, which I recently read about, who bequeathed to his dear wife one farthing to be sent to her in coin by post in an unstamped envelope.

Then we get the 'pious' testators who are reluctant to part with their worldly goods even after they are no more and who think that they can make use of their money as stepping stones to the Gates of Heaven by bequeathing the greater part of their estate in pious legacies for the repose of their souls.

I have also come across the jealous testator. One fine morning two elderly spouses walked into my office. "Sur Manifk, nixtiequ naghmlu erba' kelmiet' – which in Notarial language means that they had come to make a joint Will commonly known as *unica charta*. After much discussion about what they wanted to lay down in their Will and after I had labouriously written down their wishes, the husband insisted that I put in a clause whereby the wife was to forfeit the usufruct left to her in the event of her remarriage after his death. The wife agreed provided that the same clause also applied to the husband should she predecease him. The jealous husband objected and a quarrel ensued and both parties left my office in disgust, the wife wanting to know with whom the husband had been going about.

Another testator was so meticulous about leaving his affairs in order and making sure that he would not put his heirs to any trouble declared in his Will that he had paid for his funeral in advance and purchased his coffin which he kept locked in an upstairs room.

Other types are the animal lovers who are apt to prefer four legged animals to their two legged brothers as in the case of the old English lady who left most of her estate to provide for the well being of her cats and who went so far as to mention what food was to be given to them and even providing a resting place for them at the end of her garden.

One old lady not wishing her goodness to be interred with her bones made a bequest to the Royal University of Malta of her corpse for the purpose of dissection by the medical students.

Some people are reluctant to make their Will and keep on postponing the day because they feel that it may bring them some form of bad luck. One testator however, was not so much afraid that he would die but he always feared that he may be buried when still alive and he overcame this fear by ordaining that when pronounced dead he was to be injected with a deadly poison to make sure that when he was to be buried he would indeed be dead.

Finally we have the testators whom I have nicknamed 'the regulators' who are swayed to and fro by the slightest show of gratitude by any member of the family and who keep coming in and out of my office year in and year out changing their Wills, one day leaving a sum of money to Jessie and the next revoking the legacy and substituting Charlie in her stead.

As a Notary I have to certify that a testator who makes a Will is of sound mind, but if I had to be too honest I would probably have been out of business by now.

DELINKWENZA TAŻ-ŻGĦAŻAGĦ

J. SOLER

Din it-taħdita ġiet mogħtija fiċ-Ċentru ta' l-Azzjoni Kattolika, f' Rudolph Street, Tas-Sliema, fis-16 ta' Marzu, 1973.

TAĦT il-liġi maltija persuna tilħaq l-età ta' responsabilità sħiħa u kompleta meta tilħaq it-18 il-sena. Però, anki wieħed minuri, jiġifieri li għad ma għalaqx it-18-il sena, jista' jingieb quddiem il-Qorti fuq akkuża ta' reat, dejjem naturalment jekk dik il-persuna tkun waslet fl-età ta' responsabilità kriminali, għalkemm fi grad imnaqqas. Infatti, il-liġi tagħna tgħid li l-minuri ta' anqas minn 9 snin ikunu eżenti minn responsabilità kriminali għal kull att jew nuqqas, l-istess bħal dak li jkun taħt l-14-il sena, biss f'dan l-aħħar każ jinħtieġ li l-att jew nuqqas ikun sar bla ħażen.

Barra minn dan, żagħżugħ li jkun taħt is-16-il sena jista' jingieb quddiem il-Qorti b'talba li huwa jiġi mibgħut f'Approved School, minħabba li huwa jkun qiegħed jgħix ħajja li aktarx twasslu għaddelinkwenza. Skond l-Approved School Ordinance, illum Kapitolu 75 tal-Liġijiet ta' Malta, meta żgħażugħ taħt is-16 il-sena jinstab ħati ta' reat li jġib għal piena ta' xogħol iebes jew priġunerija il-Qorti tista' flok ma tibgħatu l-ħabs, tordna li jiġi mibgħut f'Approved School u li jinżamm hemm għal żmien ta' mhux anqas minn sentejn u mhux iżjed minn ħames snin, b'dan però li dan iż-żmien jagħlaq meta ż-żgħażugħ jilħaq l-età ta' 18 il-sena jew qabel. Iż-żgħażugħ jista' wkoll, b'ordni tal-Qorti, jiġi kollokat bħala *apprentice* f'sengħa jew mestjer utili ma' persuna rispettabbli u ta' fiduċja, li tobbliga ruħha li tkun responsabbli għal dak iż-żagħżugħ sakemm jagħlaq it-18 il-sena; jekk din l-ordni għal xi raġuni jew oħra ma tkunx tista' jiġi eżegwita ż-żgħażugħ jiġi miżmum' f'Approved School għal żmien kollu li kellu jagħmel bħala *apprentice*. Il-liġi tawtoriżża wkoll lill-Qorti li tista', fuq talba tad-Direttur tal-Approved School, wara awtoriżżazzjoni mill-awtorità kompetenti, tagħti waħda jew l-oħra mill-imsemmija ordnijiet, jekk tkun soddisfatta li ż-żgħażugħ ta' taħt is-16 il-sena jkun qiegħed jgħaddi ħajja tali li aktarx ħafna twaqqgħu fid-delinkwenza.

Ta' min hawn josserva li f'Malta għad ma għadniex istituzzjoni simili għal dik, illum magħrufa bħala St. Philip Neri School, riservata għas-subien, fejn jinżammu delinkwenti żgħażagħ nisa; u għalhekk bl-Att nru. V tal-1956 ġie maħsub li *female juvenile offenders* taħt is-16 il-sena jiġu miżmuma f'Istituti approvati bħala xierqa

biex jirċievu u jieħdu l-kustodja ta' bniet ħatjin. F'Malta wkoll għad mhux possibbli li d-delinkwenti żgħażagħ jiġu trattati u mqassma xjentifikament a bażi ta' sistema ta' klassifikazzjoni u speċjaliżżazzjoni, kif isir barra minn Malta, speċjalment fl-Ingilterra, fejn l-Approved Schools huma differenti skond l-età, l-istruzzjoni, ir-reliġjon, kif ukoll id-deficjenza mentali tad-delinkwent.

Il-leġislaturi tad-dinja kollha illum irrealiżżaw li d-delinkwenza fiż-żagħżagħ hija aktarx ir-riżultat ta' bosta fatturi, li fuqhom l-istess żagħżagħ ma għandhomx kontroll. Għalhekk ġie maħsub għal dawn iż-żagħżagħ trattament ġdid, bażat fuq li l-ewwel konsiderazzjoni għandha tkun il-ġid taż-żgħażagħ, kompatibilment mal-interessi tas-soċjetà u li ż-żgħażugħ jinżamm kemm jista' jkun il-boghod mill-ħabs. Dan kollu jinsab imdaħħal fid-disposiżżjonijiet tal-Att nru. V tal-1956, li minnhom wieħed jara li l-istat tal-liġi tagħna huwa fil-qosor dan:

1. Il-minuri ta' anqas minn 9 snin huwa eżenti minn kull responsabilità kriminali għal kull att jew nuqqas.

2. Il-minuri ta' taħt l-14 il-sena huwa wkoll eżenti minn responsabilità kriminali għal kull att jew nuqqas magħmul bla ħażen.

3. Il-minuri li jkollhom taħt l-14 il-sena, imma l-fuq minn 9 snin, għar-reati li jagħmlu b'ħażen, jeħlu, meta jinstabu ħatjin, il-piena taċ-ċanfira jew tal-ammenda. Il-Qorti, però, tista' minflok iġġiegħel li jidher quddiemha l-ġenituri jew il-persuna li jkollha dmir tat-trobbija tal-minuri, u, jekk ir-reat jiġi ppruvat, tista' tobbliga lill-ġenituri jew lil dik il-persuna l-oħra li jieħu ħsieb tal-imġieba tal-minuri taħt penali minn £M2 sa £M100. Il-Qorti għandha f'dawn iċ-ċirkostanzi fakoltajiet oħra, u ċjoè tista' jew tikkundanna lill-istess ġenituri jew dik il-persuna l-oħra għal piena maħsuba mill-liġi, meta l-fatt seta' jiġi evitat bid-diliġenza tagħhom, jew tista' tagħti ordni biex il-minuri jitqiegħed f'Approved School jew f'Istitut approvat, skond jekk ikun tifel jew tifla.

Dejjem bl-istess ħsieb ta' riforma aħjar taż-żgħażagħ ġie introdott bl-imsemmi Att tal-1956 is-sistema tal-*absolute discharge*, li permezz tiegħu jekk il-ħati jkollu anqas minn 18 il-sena meta jagħmel ir-reat, il-Qorti tista', jekk ir-reat ma jġibx għal piena tallavori forzati għall-iżjed minn 10 snin, u wara li tieħu kont taxxorta u taċ-ċirkostanzi tar-reat u tal-kondotta, jekk jidhrilha xieraq, tilliberaħ għal kollox.

Jista' jingħad li dawn il-provvedimenti kollha tal-liġi ftit li xejn

jiġu applikati mill-Qrati, u dan mindu beda jitħaddem l-Att nru. XII tal-1957, li l-quddiem insemmi aktar fit-tul.

Id-delinkwenza taż-żgħażagħ hija problema li l-leġislaturi ilhom jaffrontaw minn ħafna snin. Anki f'Malta, fejn kull sena jiġu mressqin quddiem il-Qrati mijiet ta' *juveniles*, dan il-problema llum sar tabilħaqq ta' gravità soċjali u nazzjonali.

Id-delinkwenza taż-żgħażugħ hija dovuta fil-maġġuranza tal-każi għal difetti fil-karattru u fil-personalità taż-żgħażugħ stess, għal xewqat u impulsi mhux soddisfatti, għal djar imħarrbta, għal traskuraġni u negliġenza tal-ġenituri, għal kondizzjoni ekonomika li fiha jkun jinsab.

L-impulsi tas-serq, ta' *petty violence* u ta' xewqat irregolari sesswali huma, f'ċertu sens u f'waqt jew ieħor taż-żgħożija, naturali u kważi istintivi fit-tfal kollha. Jekk dawn in-nuqqasijiet jiġu korretti u kastigati hekk kif it-tifel juri l-iċken tendenza għalihom, bejn l-erba' ħitan tad-dar, l-ebda problema soċjali ma jinħoloq. Però, malli l-istess nuqqasijiet jiġu kommessi fil-pubbliku u hekk tiġi vjolata l-isfera tad-drittijiet ta' ħaddieħor, huma jiffurmaw parti mill-pjaga tas-soċjetà moderna, li hija preċiżament id-delinkwenza fiż-żgħażagħ.

L-esperjenza tal-ħajja ta' kuljum turina li l-maġġoranza tad-delinkwenti żgħażagħ tappartjeni lill-klassijiet aktar fqar tal-popolazzjoni. Infatti kulħadd jaf li dawn il-klassijiet jgħixu kollha flimkien fl-istess naħa tal-belt jew raħal, bla ebda konnessjoni ma' elementi aħjar tas-soċjetà. F'ambjent simili huwa faċili li jkun hemm għadd ta' kriminali abitwali, li ċertament il-kondotta tagħhom tant morali kemm soċjali ma hiex tali li wieħed ifaħħar, wisq anqas jimxi fuqha. Għalhekk iż-żgħażugħ, li jgħix f'dawn iċ-ċirkostanzi, meta għal xi raġuni jew oħra jiġi in konflitt mal-liġi, ma jiġix meqjus f'dak iddawl ikrah kif kien ikun kieku huwa kien jgħix f'dar aħjar.

L-effett taċ-ċirkostanzi domestiċi fuq il-moħħ taż-żgħażugħ huwa wkoll mill-akbar; infatti, il-faqar, il-ġlied fid-dar u t-taħlit tas-sessi jġibu fil-minorenni dak is-sens ta' insekurità, li huwa tant meħtieġ għall-iżvilupp normali tal-personalità umana. Il-missier jista' jkun diżokkupat u l-omm tkun kostretta toħroġ mid-dar biex tfittex hija stess ix-xogħol, u hekk tabbanduna l-kura ta' uliedha. B'dan il-mod iż-żgħażugħ, għalkemm fl-isbaħ snin ta' ħajtu, jibda jħoss qabel iż-żmien il-bżonn u jsir jaf bil-ġlieda ekonomika għall-eżistenza. Huwa jsib ruħu kontinwament f'tentazzjoni qawwija li jieħu mis-soċjetà dak li jonqsu, anki bla kunsens u kontra r-rieda tassid.

Iċ-ċokon tad-dar, fejn iż-żgħażugħ ma jsibx dak li jrid u lanqas l-imħabba tal-omm, iġiegħluh naturalment ifittex li żvog u r-rikreazzjoni fit-toroq, u hemm aktarx li jintaqa' ma' l-agħar tipi ta' delinkwenti, li jgħallmuh il-ħażen u li juruh kif għandu jikser il-liġi bla ma jinqabad – pass dan li, jekk jirnexxi, iservi ta' deni akbar, għax idaħħlu fih sens ta' kburija, u hekk ikun l-ewwel att ta' ħajja ta' delinkwenza, mgħoddija kollha bla hena u forsi wkoll bla libertà f'ċella ta' ħabs.

Barra minn dan, kif intqal, iż-żgħażugħ jista' jiġi mħajjar jinxeħet f'din il-ħajja fuq l-eżempju, jekk mhux fuq it-tagħlim, tal-istess missieru. Kontra dawn il-fatturi kollha hemm it-tagħlim, ix-xogħol u t-tħabrik tal-Knisja Kattolika, li però huwa evidenti tista' teżerċita biss influwenza morali.

B'kull ma għidt sa hawn ma ridtx infisser li d-delinkwenza taż-żgħażagħ tinstab biss mita jkun hemm dawk iċ-ċirkostanzi, għaliex fuq kollox u qabel kollox l-ewwel ħaġa li tagħmel liż-żgħażugħ delinkwent hija l-personalità tiegħu nnifsu. Infatti, jingħataw każi fejn id-delinkwent jikkommetti ksur tal-liġi biss minħabba vanità diżordinata biex jidher jew għal xewqa sfrenata li jpatti għal xi difett fisiku jew b'reazzjoni kontra ħaddieħor li jaħseb li qiegħed jittraskurah jew xort'oħra jagħtih il-ġemb. Hemm ukoll kawżi psikoloġiċi, dovuti għal dik li tissejjaħ *ereditarjetà*, li minħabba fiha l-minuri jirreaġixxi b'mod anormali f'ċirkostanzi li ħaddieħor jikkunsidra bħala għal kollox innoċenti jew għall-anqas normali.

Fl-Ingilterra dan il-problema tad-delinkwenza huwa kombattut bis-sistema hekk magħruf tal-*probation*, li ġie stabbilit aktar minn 60 sena ilu. F'Malta dan il-mezz ta' korrezzjoni taż-żgħażagħ ġie mħaddan għall-ewwel darba mill-liġi bl-Att nru. XII tal-1957, li però beda jseħħ erba' snin wara, u preċiżament fit-30 ta' Ġunju, 1961. Skond din il-liġi meta kontra żgħażugħ issir akkuża ta' reat f'Qorti Kriminali u jiġi misjub ħati, minflok ma jiġi mwaħħal piena ta' flus jew mibgħut il-ħabs, huwa jiġi mqiegħed *on probation*, ċjoè taħt is-sorveljanza diretta u kontinwa ta' uffiċjal tal-Qorti, imsejjaħ *probation officer*, għal perijodu ta' mhux aktar minn tliet snin, kif jiġi fissat mill-istess Qorti. B'dan il-mod il-ħati jibqa' membru ħieles tas-soċjetà, imma mill-mument li jkun taħt *probation* huwa jibda jikseb il-vantaġġi ta' edukazzjoni morali u soċjali tal-*probation officer*, li għandu d-dmir li jifforma fiż-żgħażugħ karattru ġdid u sod, biex hekk dan ikun jista' jgħix ħajja ġdida u ta' fejda, ikun jista' jilqa' d-diffikultajiet tal-ħajja u jsir ċittadin tajjeb b' sens ta' onestà soċjali u b'osservanza skrupuluża tal-liġi.

Matul il-perijodu tal-*probation* il-ħati jkollu l-opportunità li jerġa' jikseb l-isem tiegħu onorat, li qabel ikun tilef. Is-suċċess tal-*probation* jiddependi ħafna mill-kapaċità, personalità u attitudini tal-*probation officers*, li għalhekk għandhom ikunu nies ta' esperjenza kbira, ta' integrità personali, jridu jkunu ukoll ta' edukazzjoni matura b'mod li jkunu kapaċi jistabilixxu l-kawżi soċjali u psikoloġiċi li wasslu lit-tali individwu għad-delinkwenza u jirrimedjaw għalihom. Huma ftit f'Malta l-każi, u dan nista' ngħidu mill-esperjenza tiegħi personali, mita wieħed jikkunsidra n-numru kbir ta' żgħażagħ trattati b'dan is-sistema, fejn il-*probation** ma mexxitx.

Bis-sistema tal-*probation* lill-ħati tiġi mogħtija għajnuna biex huwa jżomm ruħu ta' *good behaviour* billi jiġi provvdut xi mezz ta' sorveljanza matul iż-żmien tal-istess *probation*. Kif jgħid F.T. Giles fil-ktieb tiegħu "The Magistrates Courts":

> "The probation system is a remarkable growth in our penal system. It gives judges and magistrates full power to exercise the prerogative of mercy . . . It marks the lawgiver's complete if tardy recognition that it is not enough that laws be just. He must also allow those who administer them to be generous."

Huwa ċar li l-*probation system* ma hux xi rimedju infallibili jew dejjem effikaċi: id-delinkwenza taż-żgħażagħ tiġi mnaqqsa u possibilment għal kollox eliminata jekk kull tifel u tifla ta' Malta jgħixu f'*comfortable homes*, biex jiġi evitat li huma jgħaddu ż-żmien fit-toroq u fil-ħwienet, ambjenti li għar-raġunijiet li jifhimhom kull-ħadd iwasslu malajr għal vizji u ħażen ta' kull xorta:

> "Improve the living conditions of the poorest sections of the population, educate people in parenthood so that they inculcate a sense of social discipline in their offspring, ensure that all children have opportunity and place for innocently and interestingly enjoying their leisure, and then the juvenile delinquents who will still need to be brought before the courts will be mainly those whom the law can only refer to a specialist in mental disorders".

Dan inkiteb fl-Ingilterra, però jgħodd kważi f'kollox anki għal Ġżira tagħna.

Ħaġa oħra ta' l-akbar importanza huwa t-twaqqif ta' *clubs* u ċent-

* Minn 275 ruh li gew imqeghda taht il-"probation" matul dawn l-ahhar ghaxar snin, kienu 26 biss li kisru l-"probation". Dan ifisser li l-*probation* kellha success ta' 90.6 fil-mija.

ri ta' rikreazzjoni għaż-żgħażagħ ta' kull età li hekk ikollhom fejn jesplikaw l-attività naturali għal dik l-età, bla ma jgħaddu għal fatti oħra immorali jew xorti oħra projbiti mill-liġi. Attivitajiet oħra soċjali, bħal ma huma ċirkoli drammatiċi, sportivi u letterarji, taħt id-direzzjoni u kontroll ta' nies, li għandhom iż-żmien u l-kapaċità neċessarja, jgħinu ħafna biex it-tfal maltin jitgħallmu, u aktar tard jgħaddu lil ta' warajhom, il-prinċipji ta' kondotta tajba u ta' *good citizenship*.

Qabel ma nagħlaq irrid insemmi pjaga tas-soċjetà tal-lum; fil-pajjiżi kollha, u sfortunatament, anki f'Malta, daħlet l-aktar fost iż-żagħżagħ id-drawwa tad-*drugs*. Huwa ċar li mita d-*drug* tittieħed fuq preskrizzjoni ta' tabib, u kif dan jordna, bħala kura għal xi marda fisika jew mentali, ma hemm xejn ħażin; iżda mita wieħed jabbuża mid-*drugs* u jeħodhom biex ineħħi s-sens tal-inibizzjoni naturali għal dak li hija d-deċenza, il-pudur, eċċ. il-konsegwenza aktarx tkun li huwa jkun jista' jagħmel dak li, bla dawk id-*drugs*, ma kienx jagħmel, għax kontra l-morali jew il-liġi u hekk isir delinkwent. L-abbuż tad-*drugs* li f'Malta huwa punit b'liġi speċjali jġib miegħu r-riskju li dak li jkun isir għal kollox dipendenti minnhom, jiġifieri ma jkunx jista' jgħaddi mingħajrhom. Għalkemm għad ma wasalniex fil-proporzjon ta' pajjiżi oħra, għadd kbir ta' żgħażagħ qed jingħiebu quddiem il-Qrati fuq dan ir-reat, u għalhekk huwa tajjeb li jiena nsemmi dak li jgħid awtur modern ingliż fuq l-effett tad-*drugs:*

"The abuse of drugs in this country is at present of large proportions... It is responsible each year for thousands of deaths by suicide and by accidental overdosage; for an enormous, but virtually unmeasurable, amount of private suffering, and for the loss to society, in terms of reduced working efficiency, of millions of man-hours every year'.

Kif kelli bosta drabi okkażżjoni nara fiż-żmien li kont nippresjedi l-Qrati tal-Maġistrati, dawn iż-żgħażagħ, subien u bniet, dedikati għal dan il-vizzju tad-*drugs*, barra l-kondizzjoni miżerabbli ta' saħħithom, isiru nies bla rieda, nies inkapaċi li jikkontrollaw ix-xewqat u l-passjonijiet tagħhom, b'mod li faċilment jikkommettu attijiet mhux permessi mill-liġi jew mill-morali, u xi drabi mill-aktar skandlużi, li tagħhom ma jixraq li nagħti aktar tagħrif.

Minħabba dana kollu nappella liż-żgħażagħ hawn preżenti biex, jekk xi ħadd joffrihomlhom, juru karattru sod u rieda qawwija u jirrifjutaw dawn id-*drugs*, kif ukoll li jagħmlu kull ma jistgħu biex

shabhom jew dawk li jkunu maghhom isegwu l-eżempju taghhom. Rakkomandazzjoni din li l-awtur qabel imsemmi jesprimi b'dawn il-kliem:

> "We should all learn to rely as little on drugs as possible; stop taking tranquillisers or pep pills when we are merely worried about something that any normal person would worry about, or because we are just *fed-up*... Modern drugs are potent and effective; they are a dagger to destroy the enemy of disease, but like a dagger, those who play about with them incompetently and unnecessarily are liable to get badly hurt'.

SHORT-TERM TREATMENT OF ADULT OFFENDERS*

DAVID SCICLUNA

INTRODUCTION

A study of the short-term treatment of offenders must inevitably be based on recent developments in the field of social controls in general and penal policy in particular in developed communities. Hence one must consider:

(a) the imprisonment crisis – many countries now tend to replace long sentences by medium or short sentences, and to develop methods which simply restrict liberty or are outright alternatives for imprisonment. This decrease in prison sentences seems to show that there is a new trend towards a more social rather than merely penal treatment of offenders. And this is consistent with a desire to avoid, as far as possible, stigmatising the individual with imprisonment which may constitute a serious obstacle to his social rehabilitation and may even become a factor in 'secondary deviation';

(b) the difficulty of imposing imprisonment in view of both the increase in the number of offenders and the improvement in treatment standards, and the fact that imprisonment is less easily tolerated by those subjected to it than in the last century;

(c) particularly in advanced societies, social attitudes towards

offenders might undergo a change. Indeed it is already possible that in the future the treatment of offenders will be considered more and more as an aspect of social management rather than a simple matter of adjusting penalties.

The Concept

One must distinguish between 'closed' treatment in prisons (institutional treatment) and 'open' treatment on probation (non-institutional treatment or treatment at liberty). A third and less familiar heading which provides a halfway house between 'closed' and 'open' treatment has been proposed and may be referred to as 'intermediate treatment' (vide infra).

Short-term imprisonment has for several decades been a major concern for penal administrators and criminologists due to the fact that this form of punishment has all the drawbacks of imprisonment without providing for the offender to be observed and treated with a view to his social rehabilitation. This objective is regarded as essential under modern penal legislation.

Recommendations by various local and international gatherings have led to certain reforms of legislation and practice aimed more especially at restricting the imposing of short-term imprisonment in favour of treatment measures without, however, producing wholly satisfactory solutions.

In view of a prevalent international practice, short-term imprisonment consists of sentences of six months or less. This criterion is not, of course, applicable to short-term treatment at liberty which, in principle, necessitates longer periods. A probation period of one year can thus be regarded as short term treatment at liberty as the probation period is usually two to three years. It may here be opportune to point out, that under the legislation of some States of the USA, the probation period must correspond to the length of the prison sentence prescribed for the offence concerned and may consequently be no more than a few months.

How Effective Short-Term Treatment?

It is difficult to assess the generic effectiveness of short-term treatment. Moreover, up to now no research seems to have established that the efficacy of a given kind of treatment is linked essentially with its duration.

The methodological and practical difficulties impeding research on the effectiveness of treatment – definition of the 'success' criteria of a penal method, preparation of a sample valid for re-

search, etc. – are severely emphasised by experts. Here have to be considered a great variety of forms of treatment, with different duration, in dissimilar institutions, with staffs and groups of delinquents of different kinds. Nor would such analysis be simple if restricted to a certain group of offenders for their psychological and social traits and criminal antecedents would vary widely (as witness the Resocialisation Experiment with Short-Term Offenders carried out by Mrs. K. Bemsten and Professor K.O. Christiansen in Denmark). It is indeed usual to measure the effect and the success of a given regime of treatment by reference to the recidivism of the treated offender. But this recidivism is not unequivocal because its nature and gravity within the various periods may vary without being able to consider the treatment as a failure. Though one is bound to conclude with Scarpitti/Stephenson and with Field that 'in the last analysis, the crucial test of programme effectiveness is recidivism, despite its many shortcomings'.

Research programmes carried out so far have produced rather fragmentary results and therefore have given no scientific evaluation of the effectiveness of short-term treatment. In fact, both short-term imprisonment and alternative measures leave many questions unanswered, and there is ample scope for penological and criminological research.

Current trends in legislation and practice

All governments emphasise the difficulties of arranging penal treatment during short-term imprisonment, though some consider such treatment feasible and useful in certain cases.

The draw-backs inherent in short-term imprisonment seem in a number of European countries to be aggravated by the large number of sentences of this kind imposed, making it difficult to arrange a satisfactory penitentiary regime. Thus, in January 1970, of the total number of inmates in Danish and Dutch prisons, 83% and 84.9% respectively were serving sentences of six months or less, the lowest percentage for the same period being that registered by France, namely 10%.

For such short-term prisoners, little constructive training is possible, but imprisonment has its full disrupting effect on the offender's employment and family. Where an offender's first prison sentence is a short one, there is the added disadvantage that he becomes familiar with prison, losing his fear of the unknown. These considerations led the second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1960, to

urge a reduction in the use of short sentences, especially for trivial offences. The Congress suggested an extended use of probation, fines, 'extramural labour', 'suspended sentences', and 'other measures that do not involve the deprivation of liberty'.

On the legislative plane, there is definitely a trend towards limiting to a minimum the application of short-term prison sentences.

French legislation has favoured the system of *semi-liberty*. This is an intermediate stage between imprisonment and liberty for long-sentence prisoners, and is also a means of enforcing short prison sentences. Semi-liberty offers many advantages in the latter case, particularly because it avoids the drawbacks inherent in short terms of imprisonment.

A semi-free offender can keep his job, which means that he avoids the latent unemployment in prisons, is able to continue to support his family and may even be able to make such payments to his victim as are specified in his sentence.

Secondly, the semi-liberty system enables an offender to be kept out of continuous contact with other offenders and so removes (or at least reduces) the risk of desocialisation as a result of imprisonment.

Finally, although a semi-free offender enjoys a fairly large measure of freedom, he is nevertheless subjected to supervision and social guidance.

This form of treatment, first provided for in the 1958 Code of Criminal Procedure, has been further developed since 1970. As a result of an Act of 17 July 1970, whenever a court passes a prison sentence of six months or less, it may decide that the sentence should be served under the semi-liberty system provided the offender can show evidence of having a job or attending a course of education or vocational training or submits to medical treatment.

The semi-liberty system enables an offender to take part in the above-mentioned activities outside prison, without continuous supervision. He is required to return to prison each day at the end of the period needed for the activity and to remain there on days when, for whatever reason, the activity does not take place. If a semi-free offender misbehaves or fails to comply with the obligations imposed by the court, his semi-liberty can be withdrawn by the court of his place of detention on a recommendation from the judge responsible for the enforcement of sentences.

Besides the semi-liberty system, the prison authorities and enforcement judges may grant a *leave* for specific purposes. This is

authorisation to leave the prison for a limited period, which is deductible from a prisoner's sentence.

In the United Kingdom, the introduction of suspended sentences in 1968 has made it possible to suspend execution of sentences of six months or less in certain cases.

The trend away from short terms of imprisonment towards sentences restricting liberty or even involving no deprivation of liberty is born out in *judicial and administrative practice.*

In Belgium, week-end detention and semi-detention came about as a result of administrative circulars, while in France, a circular of 26 December 1968 recommending judges to apply the system of semi-liberty from the start of sentence was the origin, in this respect, of the Act of 17 July 1970.

To sum up, the attempt by legislators and the penal administration to avoid short terms of imprisonment is motivated by the large number of such sentences and the difficulty for the penal system of executing them, as well as scepticism regarding all efforts to organise treatment of an offender within such a framework. However, certain States, including the Scandinavian countries, seem to be less pessimistic than others with regard to the drawbacks of short-term imprisonment (especially when this measure substitutes long-term deprivation of liberty in respect of some categories of offenders.)

Possible future trends in short-term treatment

1. Institutional Treatment

Short prison sentences in the traditional form of continuous detention could be used constructively to detect the offender's personality and to choose a suitable treatment programme.

(a) Detection of the offender's personality.

Although many States have provisions for pre-sentence enquiries, these do not yet affect the majority of people sentenced to short terms of imprisonment, and consequently when they enter prison only very scanty information exists as their identity, past record, the offence committed, etc. In almost all cases no further investigation is made into the character of the convicted person during imprisonment, since such enquiries seem unnecessary in view of the relatively short sentence. As a result, the requirements for carrying out any programme of treatment are missing from the start.

A detection process is to be considered important since its results can be used for applying a programme of treatment if the

sentence is sufficiently long. But it could also be considered invaluable for:

(i) *arranging after-care* designed to limit to a minimum the danger of recidivism by the offender; and

(ii) *the treatment of the offender in case of a new sentence.*

Detection is meant to establish the difficulties in the convinced person's relationship with society and to facilitate the drawing up of individual or group treatment programmes. During the detection process, moreover, special efforts should be made to establish the offender's attitude towards himself and his offence and to make sure that he will co-operate actively in his own treatment.

(b) Treatment.

Short-term imprisonment is regarded as inhibiting, but the upheaval it causes in the offender's social, family and working life is so great that he may become anti-social. The stigma attaching to imprisonment is an additional obstacle to his social rehabilitation. Furthermore, there are major difficulties in the way of the organisation and application of a treatment programme, including the briefness of the imprisonment which is sufficiently long for reconstructing the offender's personality or even for complete vocational training, the wide variety of offenders sentenced to a short term of imprisonment (first offenders or even recidivists), and the large number of offenders serving a short-term sentence.

While appreciating these difficulties, the opportunities afforded by short-term institutional treatment were carefully examined by the Sub-Committee set up by the European Committee or Crime Problems to study the problems involved in the short-term treatment of adult offenders, and the following conclusions were reached:

'– In principle, there is no difficulty in implementing programmes of treatment during short terms of imprisonment. However, these programmes must be defined in different terms from those employed hitherto, which have been geared to long-sentence and time-tabling requirements as much as to the treatment.

'– A multi-purpose treatment geared to the length of the prison sentence needs to be studied in relation to the aims of short-term imprisonment and the personalities of the offenders to whom it is to be applied. However, there are great discrepancies in this respect between the courts and bodies providing treatment.

'– In view of a trend towards fewer short prison sentences in

some States, one is led to conclude that offenders sentenced to imprisonment are those who incline towards persistent delinquency, have committed an offence particularly frowned on by society or are considered unsuitable for treatment at liberty. In other words, institutional treatment should be regarded as one of a differentiated range of penalties available to the courts, to which it may be necessary to resort, in the case of certain offenders representing a danger to society, for a limited period and in material conditions resembling those of the community at large.'

However, in view of the difficulties of providing institutional treatment for short-term prisoners, the European Committee on Crime Problems has recommended the limitation to a minimum of prison sentences for authors of minor offences or for individuals considered to be not very dangerous to society. For such offenders, the various forms of treatment without deprivation of liberty or, at most, entailing only a restriction of liberty, have been judged preferable.

2. Non-Institutional Treatment

The various forms of treatment at liberty (probation and similar measures) as well as suspended sentences are an important alternative to short-term imprisonment, and formed the subject of Resolution (65) 1 of the Committee of Ministers of the Council of Europe whereby it was recommended to Member States of the Council of Europe to provide for certain forms of treatment at liberty for various offenders.

Emphasis is now being made on the intensity of treatment at liberty, thereby justifying a reduction in its length. It thus generally implies fewer offenders being placed under one probation officer's care and possibly an attempt being made to relate the character of the officer to that of the offenders. Furthermore, the active participation of the community in general and of the offender himself in such treatment are aspects which are receiving greater attention in certain States.

In the United States, the aim of the research carried out by the Special Intensive Parole Unit since 1953 and the Community Treatment Programme applied by the California Youth Authority since 1961, is to explore the possibilities of giving offenders intensive treatment within – and with the assistance of – the community. According to the reports of the officials of the Community Treatment Programme, that Programme has led to a drop in the rate of recidivism and an improvement in the results of psychological

tests undergone by young offenders who benefited by it. Other United States authorities have applied similar programmes to minor or adult offenders.

The positive results achieved by these experiments have been highly recommended in governmental reports on crime problems. One nevertheless still fears that such methods are only practicable in a limited number of cases having regard to the characteristic features of criminality in the social group in question.

3. Intermediate Treatment

For offenders judged unsuitable for treatment at liberty, less segregational forms of treatment which endeavour to avoid 'desocialising' the convicted person so that he may more effectively be 'resocialised' should therefore be particularly encouraged.

'Intermediate treatment' measures can be visualised as lying somewhere halfway on a continuum between the two extremes of (a) imprisonment under conditions of total deprivation of liberty, requiring the offender to sleep away from his home, and (b) of serving probation terms which in most cases enables an offender to sleep at home and deprives him of a minimum amount of liberty. These intermediate measures include the following:

(i) *Semi-liberty:* This term covers a number of measures which differ both in origin and in objective but have in common the condition that the offender shall reside at least part of the time at a given place. Semi-liberty may cover:

– *semi-detention*, whereby the offender is deprived of his liberty in the evenings and at night, at week-ends, on public holidays and during his holidays.

– *residence in hostels or half-way houses*. In these establishments, which are smaller than prisons, offenders are not wholly segregated from the community and are given aid by the wardens.

– *work release* under which a prisoner lives and sleeps in a penal institution and goes out daily to normal outside work.

(ii) *Week-end detention*, whereby offenders are deprived of liberty from Saturday afternoon to Monday morning.

(iii) '*Attendance centres*'. These centres were set up in the United Kingdom in 1950 for young offenders; they are also provided for by the Children and Young Persons Act 1969. Offenders are required to attend a centre for a total of 24 hours on alternate Saturday afternoons. Time at the centre is divided between physical training and technical education.

(iv) *Community service.* Offenders are required to perform unpaid work of value to the community in their leisure time.

(v) *Financial penalties.* These penalties may take various forms such as that of 'day-fines' (whose amount is calculated in the light of the gravity of the offence and the offender's disposable income).

(vi) *Various prohibitions, disqualifications, deprivations of rights or positive requirements*, for example, professional disqualifications, withdrawal of driving licences, prohibition to use cheques or other forms of credit, compulsory medical treatment, etc.

The concept of intermediate treatment, though perhaps still new and controversial, might be useful if one recognises possible advantages which have already accrued through its similar use in the juvenile field. However, these measures should not be applied as they are to adult offenders but should first be tried out and adapted to the special conditions and requirements of adult offenders.

These measures, sometimes described as measures restricting liberty and regulated by legal provisions which differ widely from country to country, have a common denominator: they are more than just a variation of deprivation of liberty. However, in view of the lack of suitable facilities and some hesitancy on the part of the administrative authorities, these measures have not yet been fully exploited. Admittedly, such measures may be motivated by a wide variety of factors ranging from the urgent need to empty prisons and to the more lofty aim, in an era of humane and enlightened penal policy, of finding a means of rehabilitating offenders. They are also an indication of some change in the attitude of society to offenders, a change which inevitably will encourage the development of a new system of penal justice.

In view of the considerations outlined above, the Committee of Ministers of the Council of Europe adopted a Resolution 'On the Short-Term Treatment of Adult Offenders' (Resolution (73) 17) on the 13 April 1973 at the 220th meeting of the Ministers' Deputies, recommending the governments of member States:

'1. to take all possible steps to limit prison sentences for authors of minor offences or for individuals considered to be not very dangerous to society;

2. to use, in cases where imprisonment is unavoidable, the period of detention as far as possible to make a summary study of the personality and an examination of the environmental cir-

cumstances of the offender, if this has not already been done before imprisonment. The results should be used to throw light on the offender's difficulties in social relationships, and advantage might be taken of them for his treatment, which remains the main purpose of any penal measure, in all cases where treatment is useful and practicable, including after-care;

3. to give consideration to the possibilities offered by probation of a special short-term nature, it being understood that:

– the relative brevity of such a trial period could be offset by intensive treatment implying a limitation in the number of offenders entrusted to a single specialised probation officer, and possibly by selecting the latter on the basis of some degree of matching between his personality and that of his charges;

– although such treatment is already being carried out on an experimental basis in some States, it could be applied only to a small number of offenders, having regard to the characteristic features of criminality in the different member States;

4. to promote at the legislative or administrative level a set of carefully graded measures, half-way between imprisonment and complete liberty, thus paving the way for new forms of penal treatment. Since the aim of these measures is to ensure that the offender is no longer treated as an outcast but shall benefit by a process of assistance and social education, they should imply on the one hand the co-operation of the community and on the other hand the participation of the offender in the determination and implementation of his treatment. They may take various forms, either signly or in combination, including restriction of liberty, fines, social supervision of one kind or another, and suspension of certain civil rights.'

BIBLIOGRAPHY

*1. Based on the Report of the European Committee on Crime Problems on Short-Term Treatment of Adult Offenders (drawn up by Sub-Committee No. XI), Council of Europe, Strasbourg, 1974. Particular reference to the following texts:

2. Bemsten, K. and Christiansen, K.O.: A Resocialisation Experiment with Short-Term Offenders, Scandinavian Studies in Criminology 1, 35 ff., 1965.

3. McClean, J.D. and Wood, J.C.: Criminal Justice and the Treatment of Offenders, 123-128, 1969.

4. Kaiser, G.: Research relating to short-term treatment of adult offenders.

5. Picca, G.: Short-term treatment methods for offenders in France.

6. Andry, R.G.: Short-term treatment of adult offenders.

Further reference:

7. Council of Europe (European Committee on Crime Problems), Suspended Sentence, Probation and other alternatives to Prison Sentences, 1966.

8. Council of Europe (European Committee on Crime Problems), Short-Term Methods of Treatment for Young Offenders, 1967.

9. Council of Europe (European Committee on Crime Problems), The Effectiveness of Punishment and other measures of Treatment, 1967.

10. Council of Europe (European Committee on Crime Problems), Collected Studies in Criminological Research 1, 1967.

11. Council of Europe (European Committee on Crime Problems), Standard Minimum Rules for the Treatment of Prisoners, 1973.

12. Field, E.: Research into Detention Centres, British Journal of Criminology 9, 71, 1969.

13. Scarpitti, F.R. and Stephenson, R.M.: A Study of Probation Effectiveness, The Journal of Criminology, Criminal Law and Pol. Science, 369, 1968.

TAQSIR TAS-SENTENZI TAL-BORD TAT-TAXXA TA' L-INCOME (1957)

(Dawn ir-rakkolti huma miġbura mill-Onor. Imħallef G.O. Refalo LL.D.)

Kawża Nru. 1/1957 deċiża fis-6 ta' Settembru, 1957.

Appell minn assessment *ex officio*.

L-appellant, bil-ħanut tad-drappijiet ta' l-irġiel, kellu kotba regolari li ġew aċċettati mill-Bord. Il-Bord laqa' l-appell.

Ex officio assessment.

Kawża Nru. 2/1957 deċiża fil-24 ta' Jannar, 1959.

Appell minn assessment ex officio.

L-appellant kellu awment ta' kapitali u l-kotba tiegħu kienu inattendibbli. Il-Bord iffissa l-income billi mall-awment tal-kapitali żied in-nefqa tal-appellant u d-divida bin-numru tas-snin; għalhekk f'dan il-kaz il-Bord ma setax jaċċetta t-talba għall-deduzzjonijiet għall-initial allowance u għal wear and tear.

Ex officio assessment.

Kawża Nru. 3/1957 deċiża fis-7 ta' Mejju, 1957.

Appell minn assessment ex officio.

L-appellant kien skarpan, jaħdem u jgħix ma' missieru u f'seba' snin kellu awment ta' kapitali ta' £2186. Il-Bord iffissa l-income fi £360 fis-sena, billi ddivida l-awment ta' kapitali bin-numru ta' snin, u żid magħhom £4 fix-xahar li l-appellant ġuvni kien jonfoq għal kapriċċi tiegħu.

Ex officio assessment.

Kawża Nru. 4/1957 deċiża fil-21 ta' Mejju, 1957.

L-appellant bil-ħanut ta' spray painter kien iddikjara li jaqla' taħt £240 u l-Kummissarju llikwida l-income tiegħu f'£400.

Il-Bord laqa' l-appell bl-ispejjeż, għax il-kotba tal-appellant kienu jidhru attendibbli.

Ex officio assessment.

Kawża Nru. 5/1957 deċiża fil-25 ta' Settembru, 1957.

L-appellant bil-ħanut ta' fonderija, appella minn assessment ex officio.

Il-Bord sab il-kotba attendibbli, pero għamel xi korrezzjonijiet, u ta' lill-appellant tant l-initial kemm il-wear and tear allowance, fuq xi għodod mixtrija; inoltri il-Bord irrikonoxxa wkoll is-salarji imħalsa lil ulied l-appellant; il-Bord illikwida wkoll l-income.

Ex officio assessment.

Kawża Nru. 6/1957 deċiża fil-15 ta' Marzu, 1957.

L-appellant talab riduzjoni ta' taxxa għas-sena ta' stima 1951, 1952, 1953. Il-Kummissarju ammetta biss dik għas-snin 1952, 1953, billi rritiena li għal dik tas-sena 1951 kien għadda t-terminu stabbilit fl-art. 67(1).

Dan l-artiklu kien ġie emendat bl-Att XX/1955, u l-Bord irritiena li din l-emenda ma setetx tiġi applikata għal dan il-każ għax it-terminu stabbilit fil-liġi qabel l-emenda kien diġa' skada.

Il-Qorti ta' l-Appell b'sentenza tas-17 ta' Ottubru, 1957 ikkonfermat. Ara Appell Nru. 19.

Rifużjoni tat-taxxa.
Liġi emendata – liema applikabbli.
Liġi antika u liġi ġdida.
Art. 67(1) Income Tax Act, 1948.

Kawża Nru. 7, 8/1957 deċiża fit-23 ta' Lulju, 1957.

Żewġ appelli separati ta' mejn minn nies bi sħab f'negozju wieħed ġew trattati kontestwalment u deċiżi b'sentenza waħda.

Il-Bord iddeċida li l-appellanti kienu aċċettaw il-figuri li a bażi tagħhom sar l-assessment u għalhekk ma kienx hemm lok ta' appell.

Kwistjoni ta' fatti.

Aċċettazzjoni tal-income stabbilit.

Kawża Nru. 9/1957 deċiża fil-25 ta' Marzu, 1957.

Il-Bord iddeċida li l-lawdemju huwa income taxxabbli għax jaqa' taħt id-diċitura ampja tal-artiklu 5(1) li jikkomprendi *rents, royalties, premium and any other profits arising from property.*

Lawdemju – income.

Kawża Nru. 10/1957 deċiża fit-13 ta' Settembru, 1957.

L-appellant, sensal, appella minn assessment ex officio. L-appellant spjega l-awment tal-kapitali li kellu, u l-Bord laqa' l-Appell.

Kwistjoni ta' fatti.

Ex officio assessment.

Kawża Nru. 11/1957 deċiża fis-7 ta' Settembru, 1957.

L-appellanti, bil-ħanut tad-deheb, appellaw minn assessment ex officio.

Il-Bord ikkalkula l-gross profit bir-rata ta' 11 1/2% fuq is-sales.

Kwistjoni ta' fatti.

Ex officio assessment.

Kawża Nru. 12/1957 deċiża fid-19 ta' Awissu, 1957.

L-appellant kien qiegħed iħallas annuity ta' £90 fis-sena talli ġew trasferiti f'ismu xi shares, u annuity ta' £6 fis-sena bi ħlas ta' debitu tiegħu ta' £90.

Il-Bord iddeċida li dawn l-annuities ma kienux deduċibbli għax kienu spejjeż *for the acquisition of an asset and as such a payment of a capital sum*'.

Annuities – mhux deduċibbli għax ta' natura kapitali.

Kawża Nru. 13/1957 deċiża fil-21 ta' April, 1959.

Kwistjoni ta' fatti.

Il-Bord iddeċida li n-negozju kien kollu ta' l-appellant, u li ħutu ma kellhom ebda sehem minnu. Inoltri l-Bord aċċetta l-istima ta' l-istock kif magħmula mill-appellant, b'xi modifiki żgħar.

Kawża Nru. 14/1957 deċiża fit-22 ta' Lulju, 1957.

L-appellant ippretenda li jiddeduċi £24 spejjeż ta' lukanda meta minħabba l-impieg tiegħu ġie trasferit Għawdex.

Il-Bord iddeċida li dawk l-ispejjeż ma kienux deduċibbli għax kienu spejjeż domestiċi jew privati fit-termini tal-art. 11(a).

Spejjeż domestiċi, privati.
Spejjeż ta' lukandi.
Art. 11(a) Income Tax Act, 1948.

Kawża Nru. 15/1957 deċiża fil-11 ta' Novembru, 1957.

F'Awissu 1952 l-appellant kien mar f'Sanatorium fl-Isvizzera mnejn irritorna f'Novembru 1954. Hu ħalla l-familja Malta, fejn kellu l-interessi kummerċjali tiegħu. Il-Kummissarju kien iddeċida li fis-sena bażi 1953 l-appellant ma kienx residenti Malta u għalhekk ma taħx deduzzjonijiet personali.

Il-Bord laqa' l-appell u irrevoka bl-ispejjeż, u ddeċida li l-appellant kien residenti Malta, għaliex l-assenza tiegħu minn Malta, għalkemm prolungata kienet provisorja, u dovuta għal skop ta' kura, u bl-intenzjoni li jiġi lura malli t-tobba jippermettulu.

Il-liġi tiddefinixxi individwu "residenti fil-Gżira" bħala dak li "jirrisiedi fil-Gżira" ħlief għal dawk l-assenzi temporanji illi l-Kummissarju jidhirlu raġunati u mhux inkonsistenti mal-pretenzjoni ta' dak l-individwu li huwa residenti fil-Gżira. Fuq dan il-punt iddeċiżjoni tal-Kummissarju hija sindakabbli mil-Qrati, għaliex mhiex rientranti fl-eżerċizju tal-executive discretion.

Residenti fil-Gżira.
Personal allowance.
Deċiżjoni tal-Kummissarju – sindakabilità ta'.

Kawża Nru. 16/1957 deċiża fit-28 ta' Frar, 1959.

Appell minn assessment ex officio.

L-appellant iġġustifika pjenament l-awment tal-kapitali.

Il-Bord aċċetta il-kotba tal-appellant salvo xi modifikazzjonijiet imħabba xi nuqqas għad deprezzament li l-Bord ma qabilx miegħu u minħabba xi spejjeż ta' natura kapitali li kellhom jonqsu millewżitu.

Ex officio assessment.

Kawża Nru. 17/1957 deċiża fis-26 ta' Novembru, 1957.

Appell dwar deduzzjoni tal-ispejjeż tal-vjaġġi magħmula għal skop tan-negozju.

Il-Bord osserva li għandha issir distinzjoni bejn l-ispejjeż li jsiru biex jinżamm kuntatt ma' ditti li magħhom it-taxpayer ikun soltu jinnegozja u dawk l-ispejjeż li jsiru biex jinħolqu relazzjonijiet kummerċjali ġodda. Fl-ewwel każ l-ispejjeż jikkostitwixxu spiża ordinarja ossia ta' revenue nature, fit-tieni każ spiża straordinarja, ossia ta' natura kapitali.

L-ispiża relativa hija deduċibbli sakemm tkun kontenuta fillimiti tar-raġonevolezza u unikament għall-iskop tal-produzzjoni tal-income. F'dan il-każ l-appellant kien ivvjaġġa bil-car, mezz iktar kostuz, u l-Bord naqqas l-eċċess mill-ispiża. Inoltri ddeċida li l-appellant ma kellux bżonn jieħu l-ibnu miegħu.

Il-Bord iddeċida wkoll li r-rigali kostuzi li l-appellant għamel lil ħbieb antiki tan-negozju ma kienux saru *wholly and exclusively in the production of the income.*

Deductions – spejjeż ta' vjaġġi għan-negozju.
– rigali –

Kawża Nru. 19/1957 deċiża fl-24 ta' Settembru, 1958.

Appell minn assessment ex officio.

Il-Bord osserva li l-profitti murija mill-appellant, b'negozju talgħamara, kienu irrisorji, li għalhekk fid-deskrizzjoni tiegħu iffissa il-gross profit realizzat mill-appellant fuq il-bażi ta' 23.5% fuq issales at cost tan-negozju kollu meħud globalment.

Ex officio assessment.

Minn din id-deċiżjoni sar Appell lill-Qorti ta' l-Appell li b'sentenza tal-15 ta' Mejju, 1959 (Nru. 22) ikkonfermat.

Kawża Nru. 20/1957 deċiża fit-8 ta' Ġunju, 1959.

Appell minn assessment ex officio.

L-appellant bil-ħanut tal-laħam kien iddikjara profit ta' perċentaġġ ta' bejn it-8 u l-11% fuq is-sales u l-Kummissarju illikwida l-gross profit fuq il-bażi ta' $12\frac{1}{2}$% fuq is-sales at cost. L-appellant ma kellux kotba regulari.

Il-Bord irritiena li l-appellant ma pprovax illi l-assessments tal-Kummissarju kienu eċċessivi.

Ex officio assessment.

Kawża Nru. 21/1975 deċiża fil-5 ta' Jannar, 1959.

Appell minn assessment ex officio.

L-appellant kellu lukanda u ma żammx kotba regolari.

Il-Bord iffissa l-profitti ta' l-appellant.

Fil-kors ta' l-appell, l-appellant talab deduzzjoni għal medical expenses, li ma kienux ġew mitluba fil-formula tar-return. Il-Bord osserva li skond il-liġi din it-talba għandha issir fuq il-formola preskritta, u għalhekk il-Bord ma setax f'dak l-istadju jieħu konjizzjoni ta' din it-talba, salvo dejjem għall-Kummissarju l-fakoltà illi jekk qatt jidhirlu jagħti huwa xi deduzzjoni lill-appellant għal dak il-fini.

Ex officio assessment.
Medical expenses mhux imsemmija fir-return.

Kawża Nru. 22/1957 deċiża fil-11 ta' Novembru, 1957.

L-appellant, Nutar appella minn assessment ex officio.

Il-Bord laqa' l-appell bl-ispejjeż, għax aċċetta x-xhieda ta' l-appellant, u għax minn professjonista fl-ewwel snin tal-karriera tiegħu wieħed ma setax jistenna qliegħ superjuri.

Ex officio assessment.

Kawża Nru. 23/1957 deċiża fid-9 ta' Mejju, 1958.

L-appellant, burdnar, appella mill-assessment ex officio ta' £700 fis-sena bħala income.

Il-Bord iffissa l-income ta' l-appellant fi £300 fis-sena, wara li kkunsidra ċ-ċirkustanzi kollha.

Kawża Nru. 24/1957 deċiżjoni preliminari tal-21 ta' Marzu, 1958.

Il-Bord iddeċida li l-eċċezzjoni ta' l-inappellabilità mhix dilatorja imma perentorja u għalhekk setgħet tiġi mogħtija fi kwalunkwe stadju.

Min jonqos li jagħti l-informazzjonijiet mitluba mill-Kummissarju wara li jkun ġie mibgħut in-notice of objection, jista' jappella middeċiżjoni tal-Kummissarju lill-Bord.

It-talba għar-reviżjoni tal-istima magħmula lill-Kummissarju għandha ssemmi preċiżament ir-raġunijiet tal-oġġezjoni. In-nuqqas ta' dawn il-motivi fin-notice of objection jimporta nullità. (Ara Appell Każ Nru. 1).

Deċiżjoni finali tal-4 ta' Novembru, 1959.

L-appellant, neguzjant, appella minn assessment ex officio.

Il-Bord irrikostruixxa il-profitti ta' l-appellant mill-kotba tiegħu, però żiedlu xi spejjeż li ma setgħux jiġu dedotti.

Eċċezzjoni ta' inappellabilità.
Notice of objection.
Ex officio assessment.

Kawża Nru. 25/1957 deċiża fit-8 ta' Ġunju, 1958.

L-appellant ippretenda li l-immobili li kienu ġew mixtrija f'ismu, kienu jappartienu lil ħutu wkoll, għaliex għalkemm xtrahom f'ismu, kien xtrahom fl-interess tal-ġenituri tiegħu.

Il-Bord ordnalu jadixxi l-Qorti Ċivili kompetenti biex in kontestazzjoni tal-persuni interessati jipprova l-pretenzjoni tiegħu. Il-Qorti laqgħet it-talba.

Għalhekk il-Bord irritiena li l-appellant wasal biex jipprova l-pretenzjoni tiegħu u osserva: "A skons ta' ekwivoċi'l-Bord iħoss li għandu jiddikjara illi mhux kwalunkwe deċizzjoni għandha neċessarjament torbtu, speċjalment jekk ma tkunx saret in kontestazzjoni tal-persuni kollha interessati, li fosthom fil-każ preżenti kien ikun il-Kummissarju tat-Taxxi Interni. F'dan il-każ ma sar xejn bil-moħbi, is-sentenza tal-Qorti Ċivili ma ġietx mogħtija fuq xi sempliċi ammissjoni tal-konvenuti, imma wara li nstemgħu il-provi.

Immobili mixtrija f'ismu – ta' terzi.

Kawża Nru. 26/1957 deċiża fit-8 ta' Ġunju, 1959.

Biex ikun hemm lok għal personal allowance in bażi għall-ar-

tiklu 22(1)(b) u 22(3) iċ-*child* orphan of the father irid ikun mantnut għal kollox mill-individwu li jirreklama l-allowance. F'dan il-każ l-appell ġie miċħud għax iċ-*child* għalkemm student universitarju però kellu aġenzija tal-lottu li miġnha kien qala' b'xi £76.

Personal allowance – child.

INDIĊI

tad-deċiżjonijiet tal-Bord ta' Kummissarji Speċjali tat-taxxi.
(Kumpilat minn Tonio Azzopardi)

INDIĊI

ta' artikoli tal-liġi ta' l-Income Tax 1948 imsemmijin

Artikolu	*Nru. tal-kawża*
5(1)	9
11(a)	14
22(1)(b)	26
22(3)	26
67(1)	6

BOOK REVIEW

The European Company – A Comparative Study with English and Maltese Law. – J.MICALLEF LL.D., Dr. Jur. [EUR]. Rotterdam University Press, 1975, LXVI + 649 pp. (appendices and index – 116 pp.) Paperback: £M7.50.

Dr. Joseph Micallef's recent studies in Rotterdam, London and Rome have produced their fruit in the form of one of the more enlightening works recently published on the European Company. This volume which is published in Holland surveys the draft Statute for a European Company published by the Commission of the European Economic Communities. The said Statute has been prepared by the Commission upon a first draft made by Pieter Sanders, Professor of Law at the Erasmus University of Rotterdam. The aim of the draft is that of providing for the creation of machinery to enable existing 'societies anonymes' from different member States of the EEC to merge and form joint holdings and similar arrangements without the difficulties at present existing under national

Company laws. When this draft sees the light of day, after overcoming the hurdles of a political nature at present being raised against its acceptance, the new addition to the existing corporate structures in Europe will, after a period of teething troubles find its proper place in the economic life of our continent and exert a profound influence thereon.

Dr. Micallef's work will at such future stage serve of great use to companies wishing to avail themselves of the European Company for expansion. This work covers the entire subject and contains a clear exposé of the methods, rules and formalities connected with the setting up of a European Company or *Societas Europaea* as the drafters of the Statute prefer to call the structure. The author solves problems relating to organization of Capital Management and Control, Meetings and Auditing, Rights of Shareholders and Employees and other provisions of the draft. It is truly a handbook on the S.E.

But this statement does not really do justice to this work. For one does not have to await the passing of time nor the enactment of the definitive Statute in order to assess Dr. Micallef's contribution to legal literature. In fact, as the title of the book itself shows, this is a comparative study. Here lies the central feature of the work. The work was undertaken in the year when Britain joined the Common Market and in this regard it has an immensely useful purpose. By constant reference to English and Maltese Company law, the author not only brings out the qualities and deficiencies of the draft Statute, but also offers a number of proposals for the updating and modernizing of English and Maltese Company Law. Against the backdrop of local Maltese Companies and their English similar counterparts, we are shown in a realistic way, what the formulators of the European Company, the S.E., are trying to bring about. The comparison is never unbalanced. Each chapter, and often even parts of chapters, are divided into three sections, one dealing with the S.E., a second with English Company law and a third with Maltese Company law, when this differs from English law. By this method, the author achieves a critical approach to existing laws together with academic insight into proposed EEC law. This is the original contribution which the author makes to the ever-growing EEC legal literature.

The introduction to the work covers, in a concise way, the evolution of the concept of a European Company spanning different countries and existing beyond any one national legal system. He

clearly outlines the development of the harmonization of national company laws of the EEC member States, by means of conventions and directives in the first place and by the proposed draft Statute in the second place. The contribution of Pieter Sanders to the scheme is given due prominence. The extent of the Statute is assessed and the reader can already see the need for a European Company and the broad outline of the scheme.

In Chapter one, on the character of the S.E., the comparative study between the draft Statute, English Company Law and Maltese Company Law comes to the fore and the author, amongst other questions, delves into the question of the nature of the founder members of an S.E. These, according to the Statute, are to be existing *societes anonymes* from different member States of the EEC. The distinction between *Societe Anonyme* and other types of companies is well known on the continent but not so in the U.K. There the only distinction made is that between a public and a private limited liability company. The author enters into the question of whether a private limited liability company can be considered a *societe anonyme* and, therefore, capable of being a founder of an S.E.

The second chapter deals with the actual formation of an S.E. Here the author presents the subject clearly. He analyses the different stages required both at the national and at the Community level for the setting up of any of the four types of S.E. In this part of the work it is not possible to discern the slightest lack of continuity in the subject matter, because of the fact that each of the four ways of setting up an S.E. are separated, the one from the other, by a comparative study of the relative English and Maltese law. One may tend to lose sight of the S.E. at moments, when the author enters into either the merger laws of the U.K. or the way of creating subsidiaries under Maltese law. However, the treatment of the subject is very thorough and an analysis of the titling in the table of contents will show how strictly the author adheres to the comparative approach. The work is not solely on the S.E., but is intended to compare the S.E. with English and Maltese companies. The last part of the chapter on companies with a single shareholder is very interesting.

The chapter on Capital constitutes, in my opinion, an outstanding contribution to Company law. Dr. Micallef draws upon the many distinctions in types of Capital in a limited liability company and contrasts these with the simpler system adopted by the draft Sta-

tute. The liabilities, rights and duties of shareholders, whether of preference or ordinary, nominative or bearer shares, are all given ample treatment. The position of debenture holders, who, in the proposed European System will be organized in a general body, without legal capacity but with a set of defined rights, is just one of the sophisticated novelties contained in the draft Statute. The author, throughout the work, is always ready to point out the better features of the Statute, though he also makes it his task to stress any deficiencies whenever these exist.

Chapters four and five constitute the cornerstone of this fine volume. They deal with the management structure and participation of workers, respectively. The two tier system of management has been the subject of many a legal debate on the continent. It has acquired more and more adherents and many European countries now make it mandatory upon companies of a certain size to adopt this system. The Board of Management is entrusted with the running of the enterprise while the Supervisory Board is to supervise and control all acts carried out by the Management. This system, which as the author points out, finds its historical source in post-war occupied Germany, is imposed as a *sine qua non* for the S.E. The rules adopted in the draft Statute offer a number of interesting solutions to the difficult situation which has been created by the passage of power from its traditional seat in the general body of shareholders to the management.

The excellence of this part of the book is sustained throughout the entire chapter. The author investigates the British position and finds that an analogy can be drawn between the two tier board system and the practice in limited liability companies. The distinction between the board of directors and general managers, as brought to light by the author, affords a very similar effect and accomplishes safeguards similar to those of the two boards required by the draft Statute. Thus a transition from the present position to the one advocated in Europe will not be too difficult to make. Much research has been made in this respect by Dr. Micallef and it is surprising to learn that advocates for the introduction of the two tier system into English company law have been numerous.

Maybe even more interesting is the fifth chapter on Mitbestimmung, also known as workers' participation. The evolution of the theory, which the author prefers to call Employees' Participation, and its application, whether through participation in management or participation in ownership, are dealt with. The study made on the

Maltese position is, probably, the first ever presentation of the legal aspects of the problem in Malta. We find that practice has preceeded the enactment of any legal machinery and that, notwithstanding this, the firms which have chosen to apply the concept are functioning without undue difficulties.

The scope of Mitbestimmung on a larger scale in Europe and the U.K. is studied in a most scholarly way. Economic, legal and sociological questions are finely woven together to produce a most readable and learned discussion which throws feelers beyond the present day into the near future when, it is hoped, the relationship between shareholder, management and labour within the corporate structure will have found its proper balance. The author does not hesitate to suggest in his concluding comment that 'we must abandon old outlooks and embrace the new social philosophy on corporate bodies ...'

Chapter Six, on Accounts and Auditing, deals with one of the difficult problems of a transnational corporation such as the S.E. The various accounting systems and the unacceptability of accountants' qualifications outside their own national borders, do not readily allow for the harmonization of the laws on auditing. Yet the draft Statute attempts a uniform solution which is to be admired. The closing chapter on groups of companies tackles the requirements for publicity and the special rules of accounting whenever an existing S.E. joins or becomes part of a group. The notion of Konzern, or group of companies, is brought out and the need for legislation on such groups pointed out.

Dr. Micallef has also taken great care in compiling a very detailed index. In it he prints, in its entirety, the Maltese Ordinance X of 1962, thus allowing foreign students to have a reference which would otherwise be hard to obtain. The bibliography referred to by the author is extensive, as is the table of cases.

Dr. Micallef has produced a truly well balanced volume which will serve scholars, both in Malta and abroad, as a reference work on the *Societas Europaea*. For local readers it opens new vistas and challenges local enterprises and the legislature to attempt an updating of local corporate structure. For the law student in particular, it affords a ready comparison with English Company law and adds to the already existing literature on local Company law.

On the continent, this work will lay another stone on the edifice of Community legal literature. Its timely appearance after the publication of the Commission's draft and in the midst of the great

debate currently going on, will contribute to the final decision on the S.E. It will be hailed as one of the few comprehensive works on the future of international company law published in recent years.

For readers in the United Kingdom, it provides a number of practical answers for a modernization of Company law irrespective of the outcome of the current renegotiation of British membership in the EEC.

Finally, when the proposed Statute on the *Societas Europaea* enacted, this volume will probably be amongst the select works in the English language which every person, in the legal or business world should consult.

JOHN VASSALLO
