law journal

Vol. XI SPRING 1984

ID-DRITT

ID-DRITT

LAW JOURNAL

Vol. XI SPRING 1984

Organu uffiċjali ta' l-Għaqda Studenti Tal-Liġi

Official organ of the Law Society - University Of Malta

ID-DRITT LAW JOURNAL

VOLUME XI SPRING 1984 NUMBER 1

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***ID-DRITT Law Journal* is published in Spring and Autumn by the *Għaqda Studenti Tal-Liġi* (Għ.S.L. – Law Society) of the University of Malta, Tal-Qroqq, Msida, MALTA.**

Domestic subscriptions are LM 3.00 per year, foreign subscriptions are a) Ordinary at U.S. $ 10 p.a. or b) Student at U.S. $ 7 p.a. (Prices exclusive p. & p.) Periodical exchange agreements are available on a current subscription basis, although back issues may be requested and/or exchanged subject to availability. Subscriptions are renewed automatically unless timely notification of cancellation is received from the subscriber. Issue receipt is presumed unless notification to the contrary is received within sixty days of the subsequent mailing date.

Requests for subscriptions and/or single issues should be addressed to:

The Marketing & Finance Officer
ID-DRITT Law Journal
Faculty of Law
University of Malta
Tal-Qroqq
MALTA

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Artwork and Cover Design by Stefan Attard

ID-DRITT Vol. XI is designed and produced by Joe Cannataci, Christian Farrugia and Frank Bowman.

Phototypeset in "TIMES" 10/11 Pt. by COMPRINT Ltd., Pietà, MALTA.

Offset printed at Eagle Press, Tarxien, Malta – July 1984.

ID-DRITT LAW JOURNAL

VOLUME XI **SPRING 1984** **NUMBER 1**

1983 – 84
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i. to promote all forms of legal studies.
ii. to facilitate the exchange of ideas between local students and their fellow-students abroad.
iii. to serve as a link between the Għ.S.L.'s members, the Faculty of Law and the legal professions.

ID-DRITT has a dual function: as a **Student** Law Journal, it provides an outlet for academic research and criticism, considering the implications and problems presented by Law, legal systems, legal theory, judicial decisions etc. As a **Law Student** Journal, it is the policy of ID-DRITT to encourage the fundamental discussion of issues in legal education and to question received opinion. This is not to say that ID-DRITT has set views on every policy question or that it represents propoganda for a particular point of view. Its attitude to legal education however, is one of enquiry and criticism. It is a further aim of the Journal to provide a forum wherein students from different countries can exchange ideas and information. This orientation of ID-DRITT Law Journal as an inter-university publication will thus help fulfil a need felt by law students both in Malta and abroad.

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EDITORIAL

The 'Cry for Reform' is **not** the plaintive call of some proverbial lost voice in the desert. Get four or five law students together and if you'll start them off on the subject, you'll never hear the end of it! Even when one takes into consideration that law students are, after all, **law students**, and likely to over-state their case, one must admit that, regardless of sex, political inclinations and the endless divergence of opinions, one finally emerges with a number of areas of Maltese legal education which most students and Faculty members would like to see overhauled.

BACKGROUND

A Maltese context lends a particular twist to the knotty problems of legal education, which in turn cannot be studied in isolation from the present predicament of Maltese tertiary education in general. Firstly, Malta is an island, and this in itself is an indication to the effort required to avoid cultural insularity. It is also a very small and very poor (in terms of natural resources) island – economic survival depends on the hard work of its inhabitants for apart from the sun and the sea and a rich historical heritage spanning six thousand years, our island possesses no natural resources, no oil or diamonds or gold or any precious minerals to bolster up its economy.

In spite of all these drawbacks, the University of Malta grew steadily over the past two hundred years, overcoming problems of financial viability, colonial rule, political and social change until it had established itself by the late 1960's and early seventies as one of the oldest and best universities in the British Commonwealth. Recent highlights in the evolution of the University were the transfer to the new modern campus at TAL-QROQQ in the sixties, the introduction of free tuition for all

students in 1970 and the growth of the University student population to an average of 1500 by 1975.

Reform came with the Socialist Government's Education Act of 1978, bringing with it the suppression of B.A. and B.Sc courses and the introduction of the student-worker scheme. In effect, this means that the student intake and curricula, and thus the academic life at the University of Malta is tied directly to the Government's estimte of the nation's needs in terms of specialised personnel in the various sectors of the infrastructure. Entry into and economic subsistence in the various courses now depends on the willingness of the State or private enterprise to sponsor the student concerned as a student-worker, wherein every student spends 5½ months of study during the academic semester and 5½ months working for his/her employer/sponsor every year for the duration of the course.

It is not our intention here to embark on a general re-evaluation of the student-worker scheme. Nor is it possible, on the other hand, to discuss Maltese legal education without touching upon some points of the student-worker scheme within which it has operated for the past five years. One would inevitably face the question: "Why go on about reform? Were the recent reforms outlined above not adequate?" And the answer would have to be an honest "**NO**". The student-worker scheme ensures receipt of a cheque at the end of the month, (to most law students, but not **all** – an anomaly which has been allowed to persist for far too long) and this increases the individual student's economic ability to further his/her studies. That much is true. On the other hand, little or nothing has been done to reform the methods and subject matter of the legal education provided by our University's Faculty of Law and this, in this instance, is the chief concern of this editorial. Before expanding on this point however, a brief comment is called for on the present system of entry into the Law course.

ENTRY INTO THE LAW COURSE

While welcoming financial aid, most students deplore a system wherein, in reality, the *numerus clausus* for entry into the course is dictated by the number of sponsorships that employers are willing to offer, especially in the field of law, a class of self-employed professionals where genuine sponsors are few and far between. A *numerus clausus* in most universities of the democratic world is normally worked out as a compromise between 3 main factors listed here in their order of priority:

1) The number of students that the Faculty of Law can comfortably, or, more often, **possibly** accomodate.
2) The demand for Law courses among applicants for admission into University.
3) The student population/output reasonably desirable in a liberal democratic society, taking into account economic orientation and social goals.

Unfortunately enough, for any academically qualified aspirants to entry into the Law course, who do not find a place within the limited number available in the Government sponsorship programme and who are not well connected enough to obtain some form of private sponsorship, the Socialist Government has seen fit to ignore the above criteria for establishing a *numerus clausus* and instead tied the latter directly to the subjective discretion of (to put it in its proper Marxist perspective) "the effective controllers of the means of production" i.e. the State and private enterprise. In other words, if the Government, or Factory Y or Company Z foresees that in 6 years time it will require X number of lawyers, then, and only then, will places become available at the Faculty of Law of our University. Under this system tertiary education does not remain a **right** fought for and won like so many others – primary and secondary education, minimum wage, old age and disablement pensions and other social services. It becomes a **privilege** granted by those who are in a position to so decide, supposedly on the criteria of whether one would need graduates in this or that office or factory in a number of years' time. The fact that this system, as always under all governments left or right, is operated in the name of the common good, the much-vaunted public interest, does not change the ugly fact that **true free choice** in education and vocational training has received an untimely setback.

After having somehow obtained admission into the Law course, one begins recognising, as the months and years go by, the many sectors requiring various degrees of reform.

LENGTH OF THE ACADEMIC SEMESTER

University studies require a commitment to evaluation, research and analysis which can only be realised with the dedication of enormous amounts of time. The present student-worker scheme allows for a study phase 5½ months long – that is up to 4 months lectures and study, 2 weeks of Christmas/Easter breaks and 1 month of examinations. In the Law course, besides the one month

of written examinations, it is normal to add a further five to eight weeks over which oral examinations in each subject are staggered out. It is the unanimous opinion of all students and Faculty members concerned that the four months available for lectures and study is far too brief a period. Law, like most other subjects, is a field growing at a rapid pace. The new developments and legislation which each year brings with it means that there is more to study and discuss, not less. In brief, it is generally felt that the lecture hours, tutorials, research work, debates, seminars, library and home study time and the other bits and pieces which fill in every minute of University life, require at least 8 full months, with a further month allocated to examinations per academic year. That this cannot be achieved within the present 6 months work/6 months study framework is obvious. That this will a) increase the quality of the University's academic standard, b) reduce tension and cramming on the part of the students, c) remove the present division of the student body into two groups and d) do away with the present duplication of work (lectures and examinations have to be repeated twice a year since at present every student input is divided into two roughly equal groups, each group alternating its study and work phases with the other) imposed yearly on a small and hard-pressed Faculty staff, is equally obvious.

OF CREDITS AND UNITS

An urgent reform which must be undertaken immediately concerns the method of assessment of law students, for the introduction of the student-worker scheme has brought with it no reform of this aspect of legal education. Promotion from year to year, a student's failure or success, still depends primarily if not exclusively on those four breathless hours of written examinations and the short oral test in each subject at the end of each semester. This dependence on those crucial four hours is unfair in that the result does not truly reflect a student's preparation and aptitude in the legal field, but rather his ability to **write** as fast and as convincingly as he can in 240 minutes. Factors such as illness, psychological stress, family anxieties, a slow/untidy handwriting combine to distort a result which is taken to be a reflection of the student's capabilities.

Many students therefore wish that our Faculty be modernised on the same lines as most other faculties, with the introduction of a units and credits system. In this way less importance would be attached to the student's performance in the

final examinations while his efforts and gradings in assignments, tutorials and lectures would be continuously assessed throughout the academic year and taken into consideration when calculating the final grade at the end of the semester. This can be more easily achieved by the adoption of a units and credits system with a predetermined number of credits being attached to each unit and/or assignment. Each subject would be allotted a number of units, according to its importance in relation to the course of studies. Each unit would be a quasi-self contained module with a determined amount of lecture hours, tutorials, assignments and seminars. The number of credits which one may be awarded would be distributed between assignments, attendance and examinations according to the pre-determined ratio.

The flexibility of the unit system is not only adjustable to the availability of lecturers, (a practical expedient in a Faculty heavily dependent on part-time lecturers) but also permits a greater degree of specialisation to the individual law student, who, after completing the requisite number of units in basic subjects such as Constitutional, Civil, Criminal and Commercial Law, would be able to choose more units in a certain subject than in another.

It is immediately apparent that to implement such a system, it would be necessary to undertake a critical re-appraisal of all the subject-matter taught in the Faculty of Law, prior to breaking down the various subjects into various modules. Equally important is the availability of the staff required to lecture, conduct seminars and tutorials and correct the regular assignments set.

Other than a change in the method of assessment, a diversification is also called for in the subjects taught. When drawing up the schedule of units which one may follow in our LL.D. course one would do well to allocate a number of units to several subjects which have hitherto been more or less neglected in our system of legal education. Units on a) Economics of Law Practice b) Legal Research Techniques c) Economics d) Political Sciences e) Philosophy f) Psychology g) Sociology etc. would further enhance the preparation and competence of our undergraduates. Here again, the need for adequate Faculty staff must be re-iterated, although some degree of inter-change with other Faculties would probably be feasible and rewarding.

CONCLUSION

The above is by no means an exhaustive list of the reform needed in our Faculty. Lack of space does not, in this

instance, permit any discussion of questions such as examination resits, financial aid, re-structuring of law courses with the introduction of a different system of degrees (such as LL.B and LL.M as well as LL.D), International Institutes, etc. In outlining our most basic needs we can but try to increase the student-body's and public's awareness of the reforms required and hope that we will be able to look back on some genuine progress by the next time that we will be preparing this editorial column. It is however difficult to ignore the feeling that some problems have been allowed to haunt the Faculty of Law for far too long, especially when one turns to the editorial columns of the original Law Journal and finds that thirty years back our predecessors were repeatedly lamenting the lack of lecturers, facilities, legal publications . . . !

J.A.C.

Articles

ARREST OF VESSELS IN MALTA

Malcolm R. Pace

A. JURISDICTION OF COMMERCIAL COURT AS ADMIRALTY COURT.

The Vice-Admiralty Courts Act 1863[1] regulated in Malta a Vice-Admiralty Court as in other British Possessions of the time. Similar courts existed in Malta before this time. Its jurisdiction was analogous to that of the High Court of Admiralty of England and in general the Court took cognizance of all maritime causes, including those relating to prize. In many cases the jurisdiction of the Vice-Admiralty Court over such matters far exceeded the ordinary and fundamental limits of jurisdiction as established by Maltese general law. In this Court, proceedings were either by an action in personam or by an action in rem. Irrespective of who the shipowner was, the action in rem was exercised against the vessel which, as a separate distinct judicial entity, assumed the role of defendant in the proceedings and was considered to be the debtor. The flag of the vessel or the nationality or domicile of the plaintiff or the place where the occurrence giving rise to the claim took place, did not limit in any way the jurisdiction of the Vice-Admiralty Court in an action in rem. Jurisdiction was established by the mere fact of the vessel being within the territorial waters over which the authority of the court extended. The only fundamental requirement was that the vessel proceeded against was within the territorial waters and a warrant for arrest could be served and executed. Service of the warrant was considered to be notice to the shipowner of the proceedings. The vessel was represented by the master during the hearing of the cause.

The Commercial Court was also competent[2] to take cognizance of all controversies relating to acts of trade between any persons, including all transactions relating to vessels and navigation. There existed in Malta therefore two courts having jurisdiction over matters relating to vessels and navigation, but with a fundamental difference. The jurisdiction of the Commercial Court was established by a local law and was exercised in accordance with the provisions contained in the Code of Organisation and Civil Procedure.[3] The Vice-Admiralty Court possessed the jurisdiction established by The Vice-Admiralty Courts Act 1836, which was in part special and in part concurrent with the ordinary jurisdiction of the Commercial Court.

By the Colonial Courts of Admiralty Act 1890,[4] the Vice-Admiralty Courts Act of 1863 was repealed and authority was given to

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1. (26 Vict. c.24)
2. s.640 (b) Commercial Code Chapt. 17.
3. Chapt. 15 of the Revised Ed. of Laws of Malta.
4. (53 & 54 Vict. c.27)

effect a jurisdictional transfer where necessary. The Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance no. III of 1892 (Chapter 41) was promulgated whereby it was enacted that the jurisdiction hitherto exercised by the Vice-Admiralty Court was to be exercised by the Commercial Court, whose original jurisdiction over maritime causes was thereby extended.

Various legal and procedural questions may arise as a result of the transfer of jurisdiction exercised by the Vice-Admiralty Court to the Commercial Court. On the application of the defendant in an action in rem in respect of any cause of damage and, on the institution of a cross-cause for damage sustained by the defendant in respect of the same collision, if the vessel of the defendant had been arrested or security given to him to answer judgment in the principal cause and, the vessel of the plaintiff could not be arrested in the cross-cause and security was not given to answer judgment therein, the Vice-Admiralty Court had the power, if it deemed fit, to suspend the proceedings in the principal cause until security was given in the cross-cause to answer judgment. The position of the original defendant who was the plaintiff in the cross-cause was therefore made secure in this manner. The Vice-Admiralty Court (Transfer or Jurisdiction) Ordinance No. III of 1892 however did not contain anything in respect of this matter and it may therefore be concluded that this particular rule of the Vice-Admiralty Court is no longer in force in so far as it provided that the mode of procedure is to be the same as that in force in the Commercial Court under the Code of Organisation and Civil Procedure. It is interesting to note that since 1980 it is now possible under Maltese law to set up a counter-claim by way of reconvention even when the procedure is by way of writ of summons.[5]

The Merchant Shipping Act XI of 1973 repealed[6] the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance Chapter 41 but ordained that the Commercial Court was to continue to exercise the jurisdiction hitherto exercised by the Vice-Admiralty Court, and to be regulated by the provisions of the same Ordinance until new rules are made.[7]

The Colonial Courts of Admiralty Act 1890[8] had limited the jurisdiction of the Colonial Courts of Admiralty to the Admiralty jurisdiction of England, as it existed at the time of the passing of that Act. Thus any subsequent extensions, amendments or repeal of the English jurisdiction after 1890 did not apply to the Colonial Courts of Admiralty.[9]

The Admiralty Court Act 1840[10] extended the jurisdiction of the Admiralty Court to cover actions in respect of mortgages, questions on title of ownership of vessels, possession, salvage, damages, wages, bottomry and as to salvage, towage or necessaries supplied to any foreign vessel.

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5. s.398 (1) COCP by Act XXXI.
6. s.376.
7. s.370 M.S.A. Act XI 1973.
8. (53 & 54 Vict. c.27).
9. Halsbury, Statutes Vol 1, Admiralty, P.15.
10. (3 & 4 Vitc. c.65).

The Admiralty Court Act 1861[11] was passed to extend the jurisdiction and improve the practice of Admiralty in England and is still in existence to this date in Malta, although parts had by 1890 already been repealed in England,[12] because no further legislation has since been enacted on this subject in Malta. The 1861 Act indicated matters in which the Admiralty Court had jurisdiction such as claims for building, equipping or repairing of any vessels,[13] for necessaries supplied to any ship,[14] for any claim by the owner of goods for damage done to the goods,[15] and for damage done by any vessels.[16] The exercise of an action in rem no longer required as a condition, the existence of a right of maritime lien on the vessel. The jurisdiction in rem of the English Admiralty Court was at one time restricted to the enforcement of maritime liens. Jurisdiction was extended by the Act to cover matters between co-owners touching ownership, possession, emploment, earnings of any vessel registered in England or Wales and to settle accounts between them,[17] over any claim by a seaman of any vessel for wages[18] and over any claim for any registered mortgage.[19] Meanwhile, the ordinary English jurisdiction was radically altered,[20] with the Court of Admiralty becoming part of the Supreme Court, Probate, Divorce and Admiralty.

The importance of the Vice-Admiralty Courts Act 1863 lies in the clarity in which it lists the heads of jurisdiction. With effect from the 1st July 1891, the Colonial Courts of Admiralty Act 1890 came into operation repealing the Vice-Admiralty Courts Act of 1863 and thereby abolishing the Vice-Admiralty Court in these Islands. This law, which empowered the enactment of Ordinance III of 1892[21] entitled the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance which came into operation on 10th June 1892, conferred the Admiralty jurisdiction upon the Commercial Court. While the jurisdiction was to continue to emanate from Imperial Statutes, the procedure to be followed in the Commercial Court was to be in accordance with that in force under the Code of Organisation and Civil Procedure.

It appears that the Admiralty jurisdiction enjoyed by the High Court of England as in 1890 is the jurisdiction extended upon the Maltese Commercial Court. When the 1890 Act repealed the Vice-Admiralty Courts Act 1863 the intention of the legislator was not to maintain its continued effect on the Colonial Court of Admiralty but to transfer it to the ordinary

11. (24 Vict. Cap. 10).
12. s.14, 15, 17, 19, 20 & 22 were repealed in UK before 1890 – vide Halsbury, Statutes Vol 1, Admiralty. By the M.S.A. 1894, s.9, 12 & 24 were also repealed.
13. s.4
14. s.5
15. s.6
16. s.7
17. s.8
18. s.10
19. s.11
20. The Judicature Act 1873.
21. Chapt. 41 of the Revised Ed. of the Laws of Malta, since repealed by Act XI of 1973.

courts. The Admiralty jurisdiction was conferred on the Commercial Court in addition to its ordinary jurisdiction emanating from the Code of Organisation and Civil Procedure. The Admiralty jurisdiction conferred on the Commercial Court was limited to that enjoyed by the High Court of England at the time of the enactment in 1890 of the Act.[22]

Subsequent extensions of jurisdiction after 1890 in England, do not apply to Colonial Courts of Admiralty and have no effect on the jurisdiction of the Commercial Court, (such as the Administration of Justice Act 1920, The Supreme Court of Judicature (Consolidation) Act 1925, The Administration of Justice Act 1956 and The Supreme Court Act 1981.) Ever since the entry into force of the 1964 Independence Constitution of Malta, despite the power to improve the Admiralty jurisdiction by means of local legislation, this has not yet been used. The Merchant Shipping Act 1973 merely effected a formal change as the same Admiralty jurisdiction was retained. The Vice-Admiralty Ordinance 1892 was merely repealed by s.376 of the 1973 Act whereas s.370 (1) enabled the Commercial Court to continue to exercise the Admiralty jurisdiction hitherto exercised by virtue of Ordinance III of 1892. The Admiralty jurisdiction is useful in so far as it extends the jurisdiction of our Courts beyond the limits of the ordinary jurisdiction imposed by s.743 (1) of the Code of Organisation and Civil Procedure.

In terms of s.4 of the Admiralty Court Act 1861,[23] the vessel or the proceeds thereof must be under the arrest of the Court for there to be jurisdiction over any claim for the building, equipping, or repairing of any vessel.[24] By virtue of s.6 the Court has jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried to any port in England or Wales in any vessel and naturally applies to cargo vessels arriving in Malta, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the vessel, unless the owner is domiciled in England or Wales or where applicable in Malta, at the time of the institution of the cause. But it is the defaulting vessel and not any other in which this vessel sends the cargo to the port of delivery that is liable to arrest in such a suit.[25]

S.11 provides that the Court shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act whether or not the vessel or the proceeds thereof are under the arrest of the said court. The jurisdiction over mortgages given to this Court by s.3 of the 1840 Act was conditional on the vessel being already under arrest or the proceeds thereof in the Registry. By

22. Cfr the judgment in Barchi et v. Kaptan D'Amico noe 24.5.1976 where the Commercial Court however delineated its Admiralty jurisdiction on the Vice-Admiralty Courts Act 1863.

23. 24 Vict. Cap. 10.

24. The Administration of Justice Act 1956 does not have this requirement in England.

25. "The Ironsides" 31 L.J. (Ad.) 129.

s.11 of the 1861 Act, a registered mortgage could have the vessel arrested at his own suit although he entered the Court without the advantage of a maritime lien.[26]

B. DEFENDANT IN AN ACTION IN REM

The procedure against the vessel in Admiralty Courts appears to have originated simply as a needy and effectual means of compelling the wrongdoer to defend the action or to make recompense.[27] It is almost impossible to avoid personifying the vessel and speaking of her as the actual wrongdoer but this can be misleading.

The shipowner can represent his interest and appear in representation of the vessel as a defendant in an action in rem but the action does not become an action in personam if the action was started as an action in rem, the two actions being separate. The appearance given by the defendant in an action in rem is simply an appearance to protect his interest in the property under arrest.[28] When the plaintiff proceeds in rem and the proceeds of the property are found to be insufficient to meet the claim, it is not competent for the court to introduce upon the proceedings in rem, proceedings in personam to make good the excess, as the court cannot permit proceedings not justified by the original process.[29] The plaintiff however may commence an action in personam in a regular manner to recover damages unsatisfied by the action in rem.[30]

Damage wrongfully done by the vessel, while in possession of the charterer, is damage done by the shipowners or their servants. Vessels suffering damage from a chartered vessel are prima facie entitled to a maritime lien upon that vessel and look to the vessel as security for restitution.[31] On the other hand, it has also been reaffirmed that a vessel can only be made the subject of compensation for damages caused in a collision if these were caused by her owners.[32] Proceedings in rem are commenced by process served upon the vessel, which is considered to be notice to all persons having any interest therein and all such persons are therefore entitled to appear as defendants. The owner therefore has an interest in defending the proceedings brought in rem. The remedy afforded by proceedings in rem however cannot extend the property proceeded against. A shipowner appearing cannot be made personally responsible except for costs of the case, beyond the value of the vessel and the freight.[33]

Bail is to be considered as given not for the amount of damage done but for the value of the vessel proceeded against. On application the

26. Maclachlan "Treatise On the Law of Merchant Shipping" (1892) p.62.
27. Marsden "Collisons at Sea" p.74 Vol.4 British Shipping Laws.
28. William & Bruce "Admiralty Practice" 1869 p.68.
29. "The Hope" (1840) 1 W.R. ob 154.
30. "The Zephyr" (1827) 166 E.R. 160.
31. "The Lemington" (1874) 2 Asp. Mar. Law. Cas. 475.
32. "The Parlement Belge" (1880) 5 P.D.; "The Tasmania" (1883) 13 P.D. 110.
33. "The Victor" (1860) Lush 72.

court will order the amount to be reduced should bail be given for a sum beyond the value of the vessel and freight. It has been suggested[34] that it may be advisable to improve upon the traditional method of summoning the master on behalf of the vessel and on behalf of the owner by the addition of the words "and the owner in representation of his interest in the said ship."[35] The extent of the shipowner's interest would therefore be clearly restricted and confined to that of the vessel proceeded against.

C. THE PROPER WARRANT FOR ARRESTING THE VESSEL

In English law the vessel must be arrested by service of the Writ and a warrant of arrest in order to get the action in rem properly under way. Usually service of the writ of summons is accepted and an undertaking is given to enter an appearance and provide bail or similar security. In terms of s.8 Chapter 41, after 1892 in Malta the mode of procedure in the Vice-Admiralty Court was to be the same as that in the Commercial Court. The point therefore arose whether a vessel should be arrested by a warrant of impediment of departure of a vessel or by means of a warrant of seizure. The warrant of impediment of departure may not have the effect of arresting the vessel as control of the ship remains in the hands of the master except only that the vessle is unable to sail.[36] The "warrant of arrest" found in English law is inexistent in Maltese Law. The Code of Organisation and Civil Procedure Chapter 15 provides for a warrant of impediment of departure and a warrant of seizure. Although there are certain differences the warrant of seizure is closer to the "warrant of arrest". The view has been expressed that a vessel could be kept under the jurisdiction of the court by means of either of these two warrants and a judgment could be given execution.[37]

In **Francesco Chirri v. Giuseppe Rodante**[38] the Commercial Court came to the conclusion after an examination of sections 849 and 285 to 305 of the Code of Organisation and Civil Procedure, that:

> *"Jidher li l-mandat ta' qbid hu aktar viċin lejn il-'Warrant of Arrest' Ingliż fil-mod li jiġi esegwit; però hemm xi differenzi wkoll dwar ċerti poteri mogħtija lill-Marixxall.*
>
> *Il-mandat ta' impediment tas-safar tal-bastiment regolat mill-artikoli 858 sa 875 tal-istess Kodiċi, iservi biex jiġi assikurat li l-bastiment jinżamm f'Malta sakemm tiġi assikurata l-pretensjoni tal-attur. Dan jiġi esegwit billi l-Marixxall jieħu l-miżuri*

34. Fenech Adami V. Christos, 6th April 1972.

35. Cfr Prof. J.A. Micallef "The Liability of the Ship in Admiralty Courts and the Position of Shipowners as Defendant in an Action in Rem." CMLV.

36. "The Mariner" Giacomo Strano v. Antonio Zahra noe 30th June 1975, Court of Appeal.

37. "The Paralos" Francesco Chirri v. Giuseppe Rodante 9th October 1977, Commercial Court per Mr Justice G Schembri.

38. ibid.

meħtieġa kif awtorizzat bl-artikolu 862 (kif emendat bl-Att XXIII tal-1971) u billi jagħti l-avviż lill-Kontrollur tad-Dwana skond l-artikolu 859 (1).

Kemm bil-mandat ta' qbid u anke bil-mandat ta' impediment tas-safar tal-bastiment jiġi assikurat li l-bastiment jibqa' fit-territorju fejn din il-Qorti għandha ġurisdizzjoni, u b'hekk ir-'res' tibqa' passibbli għall-atti eżekuttivi wara li tingħata s-sentenza. Ġaladarba hu hekk il-Qorti hi tal-fehma li fis-sistema proċedurali tagħna l-iskop tal-'Warrant of Arrest' Ingliż, jista' jintlaħaq jekk jiġi maħruġ wieħed miż-żewġ mandati fuq imsemmija skond il-għażla tal-attur."

The defendants had pleaded the nullity of the Writ of Summons as it had not been preceded by the issue of a Warrant of Impediment of Departure and that therefore the Court did not have jurisdiction. The Court stated that the writ of Summons in an action in rem should be accompanied by one of the above mentioned warrants for the purpose of establishing the Court's jurisdiction. This indicates that the 'res' is already under the authority of the Court and ensures that it will remain within the territory during the proceedings. It is for this reason that in the Admiralty action the Warrant of Arrest is also issued upon the issue and service of the writ.[39]

By virtue of the Admiralty Court Act, 1840,[40]:

"... whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the Registry of the said Court, in either case the said Court shall have full jurisdiction to take cognizance of all claims and actions ..."

S. 4 of the Admiralty Court Act 1861 is similar in this respect.

These provisions imply that the arrest of the vessel should precede the action but:

"It is noteworthy that the Writ of Summons was unknown in Admiralty Cases before 1875, when it was first introduced..."[41]

It appears that when the Writ of Summons was introduced in UK in 1875 the procedure of the action in rem was modified by making it necessary for it to be commenced with the writ of summons.[42]

Even before 1890 therefore the procedure was that the writ of summons was issued before the arrest of the vessel and the position in England today is that "..; service of the writ on the res will be acquired in order to get the action properly under way and arrest of the res is usually

39. McGuffie, Fugeman and Gray "Admiralty Practice" 1964 para 50 Vol. 1 British Shipping Laws.
40. s.3
41. op. cit. para 8.
42. "The Longford" (1889) 14 P.D. 34.

effected at the same time by virtue of a warrant of arrest which is also served upon the res."[43]

In this case the plaintiff had not obtained the issue of either warrant prior to the writ of summons but the vessel was already prevented from sailing on account of other previous warrants. The point had to be determined therefore whether yet another warrant of impediment of departure is required in the case of a vessel which is already affected by similar prior warrants. On this matter the Commercial Court made reference to McGuffie:

> *"When it is proposed to begin a second or subsequent action against property which is already under the arrest of the Court, a second or subsequent writ in rem must be taken out. But it is only if the second or subsequent plaintiff wishes to proceed to judgment before the first plaintiff is ready to do so that the second or subsequent plaintiff need take out a warrant of arrest and actually arrest the property for the second or subsequent time . . ."*[44]

Although not essential to obtain the issue of another warrant to establish jurisdiction, the Court stated that it would be prudent for the plaintiff to take all the available precautionary measures. After all, the danger remains that the previous warrant may be withdrawn, as a result of which, the vessel would otherwise be able to escape.

It is important to note that there is no available procedure in Malta to obtain "a caveat against release" similar to that found in the United Kingdom. During the proceedings the plaintiff nevertheless took the wise precaution of obtaining the issue of another warrant of impediment of departure of the vessel.

In **Giacomo Strano v. Antonio Zahra**[45] the defendant pleaded that the court had no jurisdiction by s.743 of the Code of Organisation and Civil Procedure since both parties were of foreign nationality. Furthermore it was claimed that the plaintiff had no right to ask for the issue of a warrant of impediment of departure of the vessel he was serving, while he was still employed as a member of the crew. A vessel which is not registered in Malta carried with it, whichever port it may go to, a presumption that it belongs to the country of origin where it is registered. Even though a judgment could eventually be executed on the bail or other security provided on behalf of the vessel to rescind the warrant of impediment of departure, the fact remains that none of the elements contemplated in s.743 could be satisfied to enable the jurisdiction of the court to be invoked. For the local courts to have jurisdiction the defendant must be domiciled in Malta, whereas when the warrant of impediment of departure of the vessel was issued the defendant was not in Malta. The action was instituted against the defendant

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43. op. cit. para 50.
44. op. cit. "Admiralty Practice" para 278.
45. "The Mariner" 30th June 1975, Court of Appeal.

although he was the owner of the vessel which was restrained from sailing and which could have been sold to satisfy the judgment creditor. Yet the possibility of execution of the judgment against the defendant is not of itself sufficient to give the local courts jurisdiction. This fact could be taken into account if the defendant was a citizen of a country to which s.743 (1) (g) applies.

Apart from the normal jurisdiction of the Commercial Court which was therefore inapplicable in this case, the Court of Appeal then considered the special jurisdiction of the Commercial Court in terms of the Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance of 1892 (Chapter 41) as revoked by s.376 (3) of the Merchant Shipping Act 1973 saving the provisions of s.370 (1) of the said Act. The appellant submitted that the Commercial Court had jurisdiction since the vessel was in Maltese territorial waters when the action in rem against the vessel was commenced and in which the nationality of the vessel or that of its owners was irrelevant. In the Vice-Admiralty Court it was also possible to proceed in personam against the owners of the vessel. However the action of plaintiff was not instituted in rem as the request for the appointment of curators was to represent a person, namely, the owner of the vessel and not to represent the vessel itself. Had the action been exercised in rem the Commercial Court would have had jurisdiction as a Court of Vice-Admiralty which grants the possibility of an action against a vessel which is in Maltese territorial waters in the circumstances provided by law. Among the instances indicated in the Admiralty legislation there is that of claims for seamen's wages whether or not the vessel is foreign.[46]

The transfer of jurisdiction from the Vice-Admiralty Court to the Commercial Court did not extend the jurisdiction of the Commercial Court as regards an action in personam in that the Commercial Court was not granted the faculty of deciding cases against persons not domiciled in these Islands and during their absence from Malta. The only possible extension is that regarding the place where the incident giving rise to the action took place that is, even if it occurred outside territorial waters[47] such that a similar case could be comprised in and assimilated with that indicated in s. 743 (1) (e) of the Code of Organisation and Civil Procedure. This would however require the presence of the defendant in Malta. The distinctive feature of the Admiralty Court in England was the action in rem[48] and there was a time when the English Court did not permit proceedings in personam[49] until this was expressly allowed by statute and which in any case required the defendant to be served possibly even "out of the jurisdiction" if he is abroad.[50]

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46. The Admiralty Court Act, 1861 (24 Vict. c.10) Section 10; vide also The Vice-Admiralty Courts Act 1863 (26 Vict. c.24).

47. Cfr s.13 op.cit. 1863 Act.

48. Earl Jowetts "Dictionary of English Law".

49. The English & Empire Digest Vol. 1 P.12 No. 68; Halsbury's Laws of England (4th Ed.) p.208 – 301.

50. Cheshire Private International Law 9th Ed. p.85 et seq in terms of the Rules of the Supreme Court.

The Court of Appeal then considered appellant's submission that in issuing a bank guarantee to obtain the release of the vessel in view of the warrant of impediment of departure, the defendant had submitted himself to the jurisdiction of the court. The defendant claimed that the way the warrant had been issued showed that there was a possibilty of an action in rem being instituted and he therefore gave a bank guarantee to obtain the release of the vessel without prejudice, whereas eventually the action was actually instituted in rem. Therefore once the writ of summons that followed was not made in the same terms as the warrant of impediment of departure, the latter expired and lost its effect. The court observed that in the warrant and in the issue of banns for the appointment of a curator there was no reference to the vessel being the debtor, but on the contrary it was stated that the claim was against the owner of the vessel and that it was with reference to this debtor that the bank guarantee was issued. There was no connection on the printed form of the warrant to show that the vessel was the debtor and in the form, the vessel merely apeared as one of the assets of the debtor which could satisfy the claim of the plaintiff.

The Court remarked:

> *"Apparti li l-mandat ta' impediment ta' safar ta' bastiment m'għandux l-effett tal-'arrest' tiegħu peress li jibqa' fil-kontroll tal-proprjetarju tramite l-kaptan, salv biss li l-bastiment ma' jkunx jista' jsiefer (arg. obiter Vol. XX.III.60 pag 61 fin-nofs u Vol XX.III.677 a pag. 679) u apparti jekk fil-każ in eżami il-kontramandat kellux jinħareġ imħabba n-nuqqas ta' nomina ta' prokuratur da parti tad-debitur (art. 837(2) Proċedura Ċivili), jibqa' dejjem il-fatt li l-azzjoni kif intentata ma kienitx fil-ġurisdizzjoni tal-Qorti adita."*

The fact that security was given for the vessel to be released normally does not prejudice the question of jurisdiction.[51] Naturally, it would be better in similar cases to state expressly that the security is being given without prejudice, but on the other hand the parties cannot impose jurisdiction on the court.

The action in rem is based on the serving of a writ of summons on the "res" (ship, cargo or freight) and the arrest of the "res" so that plaintiff could exercise his rights on the res by selling it under the authority of the court. The arrest is unnecessary according to English procedure if sufficient surety is provided to cover the plaintiff's claim which can only be exercised on the "res" and not on any other property of the owner. It is necessary therefore for plaintiff to ensure that the res is under the jurisdiction of the court to be served with the writ of summons. The vessel or other "res" has to remain in the territory where the court has jurisdiction for the eventual execution of the judgment. The "res" would be represented by the surety if any is given.

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51. Salvatore Liberto v. Dr Aduardo Amato et. Vol XXIV.I.1145.

D. *WARRANT PRESUMES JURISDICTION*

Apart from whether the jurisdiction of the Maltese Courts is thereby extended or derogated from, the courts normally give effect to exclusive jurisdiction clauses. In **Fenech Adami noe v. Christos noe**[52] to exercise jurisdiction notwithstanding the existence of an exclusive jurisdiction clause which is made use of by the defendant in bad faith or to circumvent the rights of others and by which a disclaimer of the Court's jurisdiction would deprive plaintiff of the only means of enforcing their claim. The Commercial Court[53] had admitted that the Court did possess a discretion as to whether or not to exercise jurisdiction but by means of its judgment declared itself not to have jurisdiction and allowed defendant's plea. The fact that a warrant of impediment of departure had been issued was considered by the court of no relevance because such a warrant does not create jurisdiction but presupposes it.[54] Even though there was jurisdiction of the court over foreign vessels, such jurisdiction could be excluded by agreement of the parties. An agreement by parties referring disputes to a specific court or tribunal is valid and usually binding on the parties as a rule. Our courts would still have limited jurisdiction for the ascertainment of damage and loss of cargo when such verification can only be made locally where the cargo has been discharged or more easily and expeditiously.[55]

In "The Beldis"[56] the development of jurisdiction in rem was examined. The arrest of a debtor or of a res was in the past considered to confer of itself jurisdiction in rem. Eventually the only factor that gave rise to jurisdiction in rem was the arrest of the vessel. The notion of the action in rem under English law has nothing to do with the notion of the real action found in continental laws of procedure.[57] The principal purpose of the English action in rem is for the claim to be satisfied by means of the vessel itself, which is therefore arrested. In fact the arrest constitutes the commencement of the proceedings and is the basis of the jurisdiction of the court. "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."[58]

The nationality of the vessel is completely irrelevant for the existence of the court's jurisdiction in rem, the vessel's presence in the country's territorial waters being the only requisite. The remedy in rem is not found on maritime lien but merely enables the claimant to arrest and detain the property and give him a charge upon it subject to other prior

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52. withdrawn on 9 June 1972 before the Court of Appeal.

53. 6th April 1972.

54. Louis Cornelius v. Carlo Valentini, Vol XXVIII.III.749; Ugo Pace noe v. Alfredo Benjacar noe Vol. XXVIII.III.866.

55. Carmelo Galea v. Dr. Paolo Grech et noe Vol XXXIII.III.474.

56. (1936) 53 Lloyd's Rep. 255.

57. including our own which follows the Fenech and Neapolitan systems of procedure as hitherto had been followed.

58. Carver "Carriage of Goods by Sea" 10th ed. by R.P. Colinvaux p.936 Vols. 2 & 3

claims.[59] The ambit of the Admiralty proceedings in rem is therfore no longer considered coterminus with the ambit of the maritime lien. For a defendant to be allowed to take advantage of the exclusive jurisdiction of a foreign court, all the circumstances of the case and a number of factors must be examined by the court, such as in what countries the evidence is more readily available, the connection either party had with each country and whether the plaintiff would be prejudiced by having to sue in the foreign country, by losing security for his claim or by being unable to enforce his judgement.[60]

Should a decision be taken not to exercise jurisdiction the court could merely decline jurisdiction and order the non-suiting of the defendant by a judgment of "liberatio ab observantia judicii" which would however leave the plaintiff completely unprotected. Alternatively the court could give such orders as it may deem fit to safeguard the plaintiff's interests considering all the circumstances of the case.[61] In "The Elefteria"[62] the court exercised its discretion by granting a stay, subject to appropriate terms as regards security.

In **Dr. H Peralta noe v. Stefanos Chatzakis noe**[63] plaintiff filed a writ of summons before the Commercial Court requesting that the master on behalf of the vessel and on behalf of the owners and charterers of the ship be condemned to pay the amount due under a loan agreement which constituted a first preferred mortgage over the vessel and to hand over possession of the vessel in accordance with the mortgage agreement. A warrant of impediment of departure of the vessel was obtained from the Commercial Court and subsequently also a precautionary warrant of seizure of the ship. The Commercial Court rejected the defendant's plea and upheld its jurisdiction.[64] On the basis of s.743 of the Code of Organisation and Civil Procedure[65] the Court stated that it would have declined jurisdiction without hesitation, were it not for the claim for possession of the vessel, both parties were not Maltese and the loan transaction had no local connection. Taking into account the nature of the action the Court declared it had jurisdiction if the action was in rem but no jurisdiction if the action was in personam. In actions in rem the jurisdiction of the court rested solely on the basis that the vessel was in the territorial waters and detained so that execution could be levied on it. While admitting that the court had jurisdiction to entertain the claim for possession the defendant contended that jurisdiction to entertain one claim did not in any way imply

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British Shipping Laws.

59. "The Beldis" (1936) 53 Lloyd's Rep. 255.

60. Cfr "Teh Elefteria" (1969) 1 Lloyd's Rep. 237.

61. Prof. JM Ganado "Actions In Rem and Exclusive Jurisdiction Clauses" Article in Law Journal "Id-Dritt" Vol V May 1975 p.48 – 54.

62. (1969) 1 Lloyd's Rep. 237.

63. "The Maria 'A'" withdrawn before the Court of Appeal on 13 February 1976.

64. 5th December 1975.

65. Chapt. 15.

jurisdiction to entertain the other demand as they were two distinct claims which had to be considered separately. There was no doubt as to the "in rem" nature of the claim for possession but defendant maintained that the claim for the payment of the debt was a purely personal action and not an action in rem. The action for the payment of the debt was not an action for the sale of the vessel. There was no specific demand for a sale. The judgment condemning the defendant to pay the debt did not necessarily lead to the eventual sale of the vessel. The condemnation for the payment of the debt has as its legal consequence also the possibility of execution of other assets of the defendant apart from the vessel.

The notion of an action in rem in maritime law bears no relationship to the continental distinction between personal and real actions. A personal action for the payment of a debt for instance may easily qualify as an action in rem in a maritime case. The majority of actions in rem are intended for the enforcement of obligations and according to the continental classification would be regarded as personal actions. In terms of s.35 of the Admiralty Court Act 1861[66] the Admiralty Court has jurisdiction both in rem and in personam. It is not necessary in all cases in which a person has a right of action in the Court of Admiralty against any vessel to obtain a warrant for the arrest thereof in order to institute proceedings but a person may also proceed by way of personal action against the owners of the vessel.[67]

It can be argued that the Commercial Court has jurisdiction to entertain an action instituted by a foreign creditor in Admiralty against his debtor who happens to be in Malta even though this may be outside the ambit of s. 743 of the Code of Organisation and Civil Procedure provided that the matter fell within the jurisdiction of the Vice-Admiralty Court in 1892.[68] But the courts have not yet emphatically accepted this principle.

By the Admiralty Court Act of 1840[69] the High Court of Admiralty had full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgages of any vessel under arrest or the proceeds of its sale deposited in the Court Registry. In terms of s. 11 of the Admiralty Court Act 1861,[70] however, the High Court of Admiralty was given jurisdiction to take cognizance of a claim whether or not the vessel or the proceeds thereof be under the arrest of the said court, in the case of a mortgage registered under the Merchant Shipping Act and this provision remains applicable to our Commercial Court.

Any judgment obtained in an action in rem can only be enforced on the vessel itself if the action is instituted only against the vessel, in the absence of any extension expressly made by law. Normally the action in rem is instituted against the Master "on behalf of the vessel and of her owners and charterers." The Master's representation in such a case is necessarily

66. (24 Vict. cap. 10).
67. Williams & Bruce "Admiralty Practice" p.186 et seq.
68. See Strano v. Zahra 30 June 1975, Court of Appeal.
69. (3 & 4 Vict. c.65).
70. (24 Vict. c.10).

limited to the vessel and does not extend to other assets. The main object of arresting a vessel is to cause an appearance on the part of her owners and to enable the court to enforce judgment against a vessel "without reference to the question whether her owners at the time of the arrest were or were not her owners when the collision occurred."[71] On the other hand, normally a judgment obtained against a person is enforceable against all the assets of that person. It does not appear however that in an action against the master on behalf of the vessel, the addition of the words "... and of her owners and charterers" makes any substantial difference to the nature of the action and execution of the judgment obtained is restricted to the particular vessel.[72]

The procedure followed before the English courts is markedly different to that followed in Malta. A writ of summons is first filed and an application for the arrest of the vessel is filed subsequently in England in actions in rem. In contrast the normal procedure in Malta is to obtain an impediment of departure against the vessel either before or after the filing of the writ of summons and usually also a precautionary warrant of seizure of the vessel is issued. Normally an application for the judicial sale of the vessel is made thereafter but plaintiff may ask for such an order also in the original writ itself.[73]

It is well established in our local case law[74] that the Commercial Court has jurisdiction by the mere fact of the vessel being within the territorial waters over which the authority of the court extends and "... molto di più quando la stessa è elevata sotto l'autorita di questa corte."[75]

In English cases there is frequently a joint demand in the same action, such as a request for a declaration of the validity of the mortgage and for the sale of the vessel[76] or a claim for the recovery of possession of the vessel and for its judicial sale. Notwithstanding the difference in procedure to English law it appears that the Commercial Court has jurisdiction in an action in rem made by a mortgage in Malta to obtain possession of the vessel[77] and or to enforce payment of the debt when the vessel is within the territorial waters and is subject to a court warrant.

In **Capitano Demetrio Nicolaki v. Dr Gius. Agius et**[78] the Commercial Court held that as a Court of Vice-Admiraltv it is competent to consider any claim brought against a vessel, local or foreign and irrespective of who the shipowner is, when the vessel is present within territorial waters, and especially when the vessel is arrested under the authority of the

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71. Marsden "Collisions at Sea" (1880) p.32, Vol. 4 British Shipping Laws.

72. Prof JM Ganado & Dr H Peralta "Jurisdiction in Actions by Mortgagees" Article in Law Journal "Id-Dritt" Vol VIII 1977 pp.60 – 66.

73. s.306 (1) Code of Organisation and Civil Procedure Chapt. 15.

74. "The Citè de Nancy" Remigio Vadalà v. A. Zammit Cutajar Vol XXV.III.677; Mifsud v. Capitano Migliori Vol XXV.III.762.

75. "The Despina" Nicolaki v. Dr Agius noe Vol XX.III.60.

76. "The Lord Strathcone" (1920) 21 Lloyd's Rep. 186.

77. "The Maria 'A'" Dr H Peralta noe v. Stefanos Chatzakis noe 17 February 1976 Commercial Court.

78. "The Despina" 1907 Vol XX.III.60.

Commercial Court.[79]

In **Angelo Barchi et v. Orazio D'Amico**, plaintiffs who were foreign crew members with the exception of one Maltese claimed payment of their wages in respect of the MV "Athena II" registered in Panama. The jurisdiction of the Court was said to be in terms of s. 370 of the Merchant Shipping Act XI of 1973 rather than being based on s. 743 of the Code of Organisation and Civil Procedure.

In any case of a foreign vessel it was said to be in the Courts' discretion whether to exercise jurisdiction.[80] This principle was also enunciated in the United States.[81] There have been instances according to Maltese case law where the local Court, notwithstanding that it had jurisdiction, declined to take cognizance of a case when it resulted that the parties had agreed to refer the matter to a foreign court in the event of a dispute. In this case the Court did not uphold the preliminary plea of lack of jurisdiction but reserved its discretion whether to take cognizance of the case in issue.

In **Francesco Chirri v. Giuseppe Rodante**[82] the Commercial Court held it had jurisdiction under s.370 of the Merchant Shipping Act 1973[83] to deal with a case instituted by the former master of a vessel for wages against a vessel constrained to remain in Malta by means of several warrants. It had been stipulated in the conditions of employment that all disputes relating to wages had to be submitted to the Court of the Republic of Panama for decision. The Court however has a discretionary power whether or not to deal with such cases wherein disputes are to be submitted to a foreign court as had been held in Strano v. Zahra noe.[84] In the case at issue the Court declared that it had jurisdiction to deal with the case, bearing in mind that the vessel was flying a flag of convenience, the probability of the vessel visiting the country to which disputes were to be submitted was rather remote, that the vessel was to be found in Malta subject to several warrants and a plaintiff could enforce his claim, besides the fact that plaintiff's claim, which related to a relatively small amount of wages, would not justify very high costs to prove his claim and therefore plaintiff would otherwise be deprived of his rights.

In **Stefanos Pateras noe v. Dr H Peralta noe and Dr F Farrugia noe**[85] the vessel did not figure among the defendants and had not been

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79. Contrast the Commercial Court Judgments "The Eleni B" Bugeja v. Foros, 16 August 1977 and "The Athena II" Barchi et v. D'Amico 24th May 1976 per Mr Justice G Schembri.

80. Cfr also Fortunato Policardi noe v. Dr Paolo Azzopardi et noe Vol XXVIII.III.1264.

81. "The Hermine" US District Court of Oregon (1874) Asp. Mar. Law Cases Vol II p.380; vide also "The Leon XIII" English Court of Appeal 1883 Asp. op. cit. Vol V p.73.

82 "The Paralos" 9 October 1977 op.cit.

83. Act XI of 1973.

84. Court of Appeal, 30 June 1975. Vide also Policardi noe v. Azzopardi et noe 2 February 1934, Commercial Court; re "The Hermine" (U.S.D.C.1884) and "The Leon XIII" (1883) 8 P.D. 121.

85. "The Oceanic Winner" (Ex-"The Champion Colocotrinis") 2 October 1978, Commercial Court, per Mr Justice G Schembri.

summoned in court. The action was directed against two companies registered abroad summoned through curators. An action in rem has to be directed against the vessel itself when it is in territorial waters in such a way that the vessel could eventually be auctioned under the authority of the court. The Commercial Court held that it had no jurisdiction under s. 370 (1) of the Merchant Shipping Act XI of 1973 under which it could exercise as part of its ordinary jurisdiction, the jurisdiction formerly exercised as a Vice-Admiralty Court, to deal with a case concerning an order by Greek Courts about a vessel which was not a party to the suit in Malta and concerning companies registered abroad.

Plaintiff claimed that the Commercial Court could exercise its ordinary jurisdiction under s.743 (1) (c) of the Code of Organisation and Civil Procedure which stated that the court had jurisdiction over "any person, in matters relating to property situated or existing in these Islands." Our courts had interpreted this section as referring to actions having as their object something to be found in Malta. In this case the vessel had been at Malta Drydocks and plaintiff had issued a warrant of impediment of departure. It could not however be stated, by the way the writ of summons was drawn up, that it referred to the vessel that was to be found in Malta.

It was also alleged by plaintiff that the defendants had accepted the jurisdiction of the court when they had filed a writ of summons against the plaintiff demanding surety. The court held that defendant Dr Farrugia on behalf of the United Maritime No. 1 Tanker Transport Inc. had gone to court as a result of the issue of precautionary warrants of impediment of departure, being forced to institute proceedings to protect their interests, rather than taking the initiative. An action similar to the one instituted by the defendants did not imply acceptance of the court's jurisdiction. A warrant does not confer jurisdiction and the same applies to the relative procedures. As the Commercial Court stated:

> *"Azzjoni intiża għar-revoka ta' mandat kawtelatorju, jew għall-protezzjoni kontra d-danni naxxenti mill-istess mandat, ma turix li b'hekk min qed jaġixxi jaċċetta il-ġurisdizzjoni tal-Qorti li ħarġet il-mandat. Dan hu wieħed mill-mezzi mogħtija mill-Liġi biex l-allegat debitur jipproteġi ruħu kontra il-ħruġ ta' mandati kawtelatorji ... bl-istess mod, azzjoni rigwardanti l-istess mandat għar-revoka tiegħu, jew depożitu biex jinħareġ kontro-mandat, ma' jirradikawx il-ġurisdizzjoni."*

In the case at issue moreover, an express reservation had been made with reference to the jurisdiction of the court. The Commercial Court upheld defendants' plea that it had no jurisdiction and declared defendants non suited.

In **Carmel Bugeja noe v. Capt Kostantinos sive Kostos Foros noe**[86] the defendant pleaded that nowhere in the English legislation prevailing

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86. "The Eleni B" 16 August 1977, Commercial Court, per Mr Justice V Sammut.

upto 1890[87] is there mentioned the jurisdiction of the Vice-Admiralty Court in the case of the payment of insurance premiums and therefore an action in rem could not be instituted. The Court noted that in Barchi et v D'Amico noe[88] the Court as differently presided, had listed the instances contemplated in the 1863 Act[89] rather than stating that an action in rem can be exercised in respect of every maritime claim and had observed that: "L'eżistenza jew le ta' 'maritime lien' fuq il-vapur kien immaterjali għall-eżerċizzju tal-azzjoni 'in rem' ..."

> *"The expression 'necessaries supplied' in s.6 of the Admiralty Court Act 1840,[90] which gave the Admiralty Court jurisdiction over foreign ships, though it is not to be restricted to things absolutely and unconditionally necessary for a ship in order to put to sea ... must still be confined to things directly belonging to the ship's equipment necessary at the time and under the then existing circumstances for the service on which the ship is engaged. But the insurance of a vessel is something quite extraneous to its equipment for sea and however prudent it may be for an owner to insure, it is a prudence exercised for his own protection, and not for the requirements of the vessel, which is the sense in which the word necessaries is used in the statute ..."*[91]

It has also been stated:

> *"An insurance is not a necessary for a ship and therefore neither the broker nor the underwriter can proceed in rem against a foreign ship for premium."*[92]

The court therefore upheld defendant's preliminary plea and declared it had no jurisdiction.

At a time when there existed both the Vice-Admiralty Court and the Commercial Court, it was held[93] that litis pendentia:

> *"si induce dalla citazione, colla quale il citato è chiamato a rispondere alla domanda dell'attore, innanzi la Corte, dalla quale quell'atto è spedito, e non da un atto cautelatorio."*

Moreover, the Court stated:

> *"che l'arresto, sia della persona, sia di cosa ad esso appartenente, sebbene, nello antico Diritto dei Romani fosse*

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87. including the Admiralty Court Act 1840 (3 & 4 Vict. c.65), the Admiralty Court Act 1861 (24 Vict. c.10) and the Vice-Admiralty Court Act 1863 (26 Vict. c.23 & 24).

88. 24 May 1976, Commercial Court.

89. which defined ship as "any description of vessel used in navigation not propelled by oars whether British or foreign."

90. (3 & 4 Vict. c.65).

91. "The Heinrich Bjorn" (1885) 10 P.D. 44.

92. Arnould "The Law of Marine Insurance and Average" 14th ed. 1954 Vols 9 & 10 British Shipping Laws.

93. Cap. Giorgio Arvanitis v. Cap. William Smith Commercial Court 19 Ottobre 1888.

stato, anche in materia Civile, una specie di citazione, chiamata, citatio realis, cesso' pero di esserlo anche nel Diritto nuovo dei Romani, e non lo è stato mai nel Diritto moderno."

Once a warrant has been issued in respect of the vessel and the transaction relates to an obligation in favour of a local person and which could therefore be enforced in these Islands, the Court had jurisdiction.[94]

E WARRANT OF IMPEDIMENT OF DEPARTURE

The object of a warrant of impediment of departure[95] is to secure a claim which might be frustrated by the departure of the debtor or any vessel.[96] In the application for the issue of a warrant of impediment of departure the applicant shall correctly state besides the name and surname, the occupation, approximate age and place of birth of the person restrained or other particulars, not being less than four so as to enable the persons on whom the warrant is served to establish the identity of the person so restrained. Often the particulars of the master on behalf of the vessel are indicated, besides the name of the vessel, her tonnage, other relevant information and the place where the vessel is lying. In cases of urgency however the applicant may declare that he is not in a position to indicate four particulars but must furnish such particulars within 15 days by way of a note under oath to be served within 48 hours on the Commissioner of Police, the Officer charged with the issue of passports and the Comptroller of Customs.

By the warrant of impediment of departure the Marshal is ordered to detain the vessel and to deliver to the Comptroller of Customs a copy of the warrant requiring him not to grant clearance to such vessel or to withdraw it if already granted. A copy of the warrant shall also be served on the master or other person in charge of such vessel. The Marshal is authorised to adopt, subject to the directives of the Registrar, all such measures as he may deem necessary for the due execution of the warrant. The applicant must state or note in the application that his claim might be frustrated by the departure of the vessel. Where the warrant is demanded after a debt or claim has been judicially acknowledged the applicant shall make reference in the application to the judgment acknowledging his debt or claim, and declare that the judgment has not been wholly fulfilled. In the case the warrant is demanded pendente lite, the applicant shall declare the fact of the pendency of the action.

When it is found that the warrant of impediment of departure was obtained upon a malicious demand, the court shall condemn the applicant to a penalty to be paid to the person against whose vessel the warrant shall have been issued,[97] independently of any action for damages

94. "The Danae" Page v. Topp 7 April 1906 Commercial Court in virtue of Art. 749 (7) of the Code of Civil Procedure now s.743 (1) (g) COCP Chapt. 15.

95. Form No.23 is used in relation to impediments of departure of vessels.

96. other than a ship of war.

97. s.869 (2) COCP.

and interest. A foreigner obtaining the issue of a warrant of impediment of departure to protect a claim which does not fall within the jurisprudence of our courts does so vexatiously and maliciously and renders himself liable to a penalty.[98] An unsuccessful outcome in the action is not on its own sufficient to render the party liable to a penalty. For a penalty to be incurred, it is necessary that the plaintiff had absolutely no justification to obtain the issue of a warrant of impediment of departure.[99] The party suing out the warrant may be liable for damages and interest in all cases in which the warrant of impediment of departure is declared to have been unjustly obtained.[100] The failure to institute legal proceedings in support of a claim by a person who has obtained the issue of a warrant of impediment of departure, and the failure to satisfactorily prove the claim, are not enough to show that such demand was made maliciously to the extent of becoming liable for the payment of a penalty, but could give rise to liability for the payment of damages and interest.[101] The power of the courts to award damages and interest on the issue of precautionary warrants when the applicant does not conform to the provisions of the law is discretionary, and should not be exercised if the circumstances are such as to leave a reasonable doubt of the insolvency of the debtor.[102] Upon the demand by writ of summons of the person against whose vessel a warrant has been issued the court may, on good cause being shown, order the party suing out the warrant to give, within a time fixed by the court, sufficient security for the payment of the penalty and of damages and interest.[103]

A vessel may deliberately and easily avoid entering a jurisdiction where it would be subject to legal proceedings. It is therefore very useful, if not vital, at times for creditors whose claims are not secured by a mortgage on the vessel or who do not have a maritime lien or privilege, to be able to establish readily through their Counsel at which suitable port, where the vessel may be lying or any of its intended or likely destinations, the vessel may be arrested as security for the claim and the Admiralty jurisdiction invoked. Often the Court requires security from the plaintiff in the event of arrest as provisional seizure, in addition to the court costs and other expenses, which in some countries may be very high. In Japan the security to be lodged by plaintiff must be equivalent to roughly one-third of the value of the vessel or one-third of the amount of the alleged claim, whichever is the higher, to cover possible damage sustained by the vessel's owner.[104] This would inevitably rule out the possibility of arresting the vessel at a Japanese port where the claim is relatively small in relation to the value of the vessel. In contrast, in Malta while the amount of security

98. "The Adelaide" Dr Gabriele Castorina noe v. Natale Tarco Vol XXXIII.III.499.
99. Louis Cornelius v. Carlo Valentini Vol XXVIII.III.749.
100. s.870 COCP.
101. Vincenzo Stivala v. Alfonso Landro Vol VI. p.66.
102. Giov. Falzon v. Banchiere Giov. Scicluna Vol XXVIII.III.1067.
103. s.871 COCP.
104. Lloyd's Maritime & Commercial Law Quarterly 3 (1981) 360.

required from plaintiff to cover damages for wrongful arrest is a matter for the Court's discretion, the legal requirement is far less stringent. A warrant of impediment of departure issued before the debt or claim has been judicially acknowledged shall cease to be in force if the applicant shall not bring his action within 4 working days from the day on which notice of the execution of the warrant has been given to him or within 10 working days from the issue of the warrant whichever is the earlier.[105] Moreover, the applicant shall be liable for damages and interest.

A warrant issued for the purpose of securing the enforcement of a judgment shall not cease to be in force when a deposit of security is given to safeguard the rights or claim. Unless the person restrained appoints an attorney to represent him in the action in addition to giving a deposit or security the warrant shall cease to be in force.[106] The law does not provide any other remedies except for the measures contemplated in the Code of Organisation and Civil Procedure for the effects of a warrant of impediment of departure to cease.[107] A warrant of impediment of departure remains in force for only six months from the day of issue unless it has already ceased to be in force for other reasons or an extension has previously been obtained.[108] In terms of s.875 no warrant of impediment of departure may be issued agianst any vessel wholly chartered in the service of the Government of Malta or employed in any postal service.

The Court of Magistrates or inferior courts cannot issue an impediment of departure in respect of any vessel.[109] Once a vessel has obtained clearance it is not possible to issue a warrant of impediment of departure in security of any right or claim against the master, engineer, seaman or other person regularly enrolled in all cases in which such person is exempted from personal arrest.[110] Nor is it possible for a warrant of seizure or warrant of impediment of departure to be issued against any person belonging to any vessel wholly chartered in the service of the Government of Malta if such person is in these Islands or in the waters of these Islands with the vessel to which he belongs.[111]

F WARRANT OF SEIZURE

The applicant for a warrant of seizure is to bring the action in respect of the claim within four working days from the delivery of the notice of execution of the warrant. Otherwise the effects of the warrant shall cease.[112] The court may rescind the warrants unless the plaintiff shows during the hearing, prima facie, sufficient ground for the security obtained

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105. s.872 COCP.
106. s.873 (2) COCP.
107. Capitano Angelo Casella v. Neg. William Leonard Vol VII p.202.
108. s.874 (1) COCP.
109. s.840 (1) COCP.
110. s.840 (3) COCP & s.361 (f) & (h), COCP.
111. Cfr s.361 (g) COCP.
112. s.849 (2) COCP Chapt. 15.

by that warrant. The applicant may be condemned by the court to pay damages and moreover a fine not exceeding LM100, should the applicant not bring the action in time or if he had not in any manner called upon the defendant to pay the debt or give sufficient security within the previous 15 days. If the plaintiff's claim is found to be groundless in fact and in law or the circumstances of the debtor were notoriously such as not to give rise to any reasonable doubt as to his solvency the applicant may be similarly liable.

The judicial sale by auction of the property seized shall not take place without a previous judicial acknowledgement of the debt or claim. The precautionary warrant of seizure has effect for six months after which it lapses unless renewed before that time.

The precautionary warrants of seizure and the warrant of impediment of departure shall be rescinded[113] if the party against whom they are issued makes such deposit or gives such security as according to the circumstances may be sufficient to safeguard the rights of the claimant.[114]

Any judgment rescinding a warrant of seizure, a garnishee order or warrant of impediment of departure of a vessel may be enforced after the lapse of 24 hours.

When there is an impediment of departure with regard to a vessel, it is often necessary for the case to be dealt with quickly, in view of the high cost incurred for each day the vessel is delayed. There are 6 working days in which to file the note of appeal and 12 working days when the procedure is by libel or petition. In practice, this means a month. In case of urgency, there are two alternative ways to abridge these time limits. The normal way is for the lawyer to be present when the judgment is being given and immediately after to ask the court verbally to abridge the time limit. In case of opposition by the other party, the matter is entirely at the discretion of the court. Alternatively, an application may be made before the same court to shorten the time limit. Often the 6 days would have elapsed already by the time the application is notified to the other party. This involves delay and therefore the other method is eminently better.

G DETENTION OF VESSELS UNDER M.S.A.

In terms of s.371 (1)[115] where a vessel is to be or may be detained under the Merchant Shipping Act, any commissioned officer on full pay in the Naval or Military Service of the Republic of Malta,[116] or any Police Officer not below the rank of Inspector, or any officer of Customs, or any officer of the Ministry responsible for shipping, or any Maltese Consular Officer may detain the vessel. If the vessel after detention or after service on the Master of any notice of or order for detention proceeds to sea before it

113. subject to the provision sof s.873 & s.891 of the COCP and of s.357 of the M.S.A. 1973.

114. s.822 (2) COCP.

115. M.S.A. Act XI 1973.

116. as amended by L.N. 148 of 1975.

is released by the competent authority, the master of the vessel and also the owner and any person who sends the vessel to sea and who is party or privy to the offence shall be liable for each offence to a fine not exceeding LM200. Where a vessel is to be or has already been detained under this Act the officer authorised to clear the vessel outwards shall refuse to clear that vessel outwards.

By virtue of s.357 (1) where a warrant restraining a vessel is obtained in connection with a claim which may be subject to a limitation of liability[117] or security is given to prevent or obtain release from such a warrant, the Court may order the release of the vessel or security, provided sufficient guarantee or security has previously been given, whether in Malta or elsewhere, in respect of the claim. If the guarantee in relation to any claim was given in the port where the event giving rise to the claim occurred or, if that event did not occur in a port, the first port of call after the event occurred, or in the port of disembarkation or discharge in relation to a claim for loss of life or personal injury or for damage to cargo, the court shall order the release of the vessel or security if the relevant port is also in a country to which the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships[118] applies.

117. in terms of Part IX of the Merchant Shipping Act 1973.
118. Signed in Brussels on 10 October 1957.

PUBLISH AND BE DAMNED

Pierre Cassar

Ordinance No. IV of 1839 drafted by the Royal Commission of 1836, abolished 'censorship' and provided against 'abuses of the consequent liberty of publishing printed writings.'[1]

Before the said ordinance was enacted, printing was a Government monopoly. According to law, no trade or business could be exercised in Malta without a previous Government licence. By simply refusing to grant any licence to exercise the trade of printer, Government ensured that nothing was printed in Malta except at its own press and with its previous permission which could be withheld without any reason being given.[2]

Since Ordinance IV of 1839 censorship has never been reintroduced in Malta. However, the absence of legal restraint before publication is guaranteed by the Press Act of 1974 and not by our Constitution. Nevertheless, any system of prior restraints of expression comes to the court bearing a heavy presumption against its constitutional validity.[3]

Freedom of expression cannot be adequately protected merely by limiting the use of remedies which may affect it, nor by avoiding any form of prior restraint. If there is a right to free expression, than it is essential that it should be reflected in the substantive law, for it is this which ultimately determines the climate within which journalism and other forms of public debate may take place. It is no use insisting that there is freedom to 'publish and be damned' if at the end of the day fear of damnation exerts too great a restraint, for the substantive law then becomes itself a form of prior restraint even if its remedies are limited to subsequent operation.[4]

Once this is appreciated, it becomes imperative to enquire how the law of libel affects the newspapers' right to write and publish their material freely while highlighting the importance of the defence of fair comment.

It is much to be desired that newspapers and television should be free to being to the notice of the public, any matter of public interest or concern. The law recognises this already by the defence of fair comment on a matter of public interest.[5]

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1. J.J. Cremona; Human Rights Documentation in Malta, 1966.
2. J.J. Cremona: Human Rights Documentation in Malta, 1966.
3. Near v Minnesota 1931.
   Bantam books v Sullivan 1963.
   New York Times Co. v U.S. 1971.
4. Freedom of expression as a public interest in English Law by Alan Boyle, Public Law Journal 1982.
5. Lord Denning 'What next in the law?' Pt. 5, page 585.

According to L.J. Scott in Lyon v Daily Telegraph Ltd., "the right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom."

In Malta, the defence of fair comment has been accepted by our courts even before the 1961 Constitution introduced a justiciable bill of rights.

The courts are conscious of the paramount importance of the press.

> "... *Il-kunċett tal-libertà tal-istampa kif qed tiżviluppa llum, u li dil-qorti temmen ħafna fih hu li figura pubblika bħal ġurnalista, jew trade unjonista, bħal imputat, mhux biss għandhom id-dritt li jikkritikaw per eżempju Ministru u jiċċensuraw l-operat tiegħu, iżda għandhom dover li jagħmlu dan meta hu l-każ. Però l-kitba trid tkun ġusta, fil-limiti imposti mill-liġi, u bażata fuq fatti sostanzjalment veri. L-imputat jista' jibqa ċert u miegħu l-ġurnalisti kollha li ċertament mhux ser tkun din il-qorti li tnaqqaslu mill-libertà tal-kelma u tal-espressjoni, anzi tridu jikkonvinċi ruħu li l-aħjar protezzjoni għal dan id-dritt sagrosant jsibha fil-qorti. Però din il-qorti trid tagħmilha ċara wkoll li l-libertà tal-kelma ma tifssirx li anki jekk qed tgħid fatti li temmen li huma veri, tista' taqbad u tuża l-aggettivi kollha adattati u mhumiex, u imbagħad meta xi ħadd jiġbidlek l-attenzjoni, meta l-froġa tkun saret, kif volgarment jingħad, inti tiddefendi ruħek billi ssostni sinifikat differenti għall-dawk l-aġġettivi milli jkun tagħhom id-dizjunarju jew kif jifhimhom kulħadd. Jekk tagħmel dan, ma tistax titieħed bis-serjetà anzi jkollok tbati l-konsegwenzi.*"[6]

Unfortunately our courts have refrained from elaborating the defence of fair comment. Nor have they been very instrumental in granting our newspapers more liberty. Today the defence of fair comment is essentially the same as that expounded by Judge Harding over thirty years ago. Then, as now, the notion of the defence of fair comment has remained the same, in spite of the fact that in this span of time the legislator has attached more importance to the liberty of speech by embodying it in the constitution as a fundamental human right, a right which was not constitutionally enshrined at the time of Judge Harding's utterance.

According to the law of Malta, three requisites are required to constitute a fair comment:

(1) a matter of public interest. "il-fatti bħala tali jridu jkunu fuq kwistjoni ta' interess pubbliku."[7]

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6. Il-Pulizija v Alphonse Farrugia, Perit Michael Falzon v Paul Spiteri – 5th December 1980 decided by Magistrate Agius.
7. Il-Pulizija v Perit M. Falzon, Sandro Calleja v Paul Spiteri 1977. Mizzi J.

(2) Facts must be correct. "Biex l-eċċezzjoni tal-fair comment tiġi anki biss konsedrata, hu meħtieġ li tkun saret narrazzjoni sostanzjalment eżatta tal-fatti li fuqhom il-kumment hu bażat."[8]

(3) Comment must be honest. "Il-kliem ... fil-kwadru taċ-ċirkostanzi u tal-kuntest li ntqalu ma kienux akkompanjati bl-intenzjoni difamatriċi, imma biss bl-intenzjoni li jsir kumment ġust moderat, onest u doverus, bla eċċessi u sekondi fini u mingħajr il-movent ta' interessi oħra, u b'dan il-mod jeskludi fiċ-ċirkostanzi konġuri, l-element psikoloġiku tal-inġurja cioè l-animus injurandi."[9]

In England the defence of fair comment may be recapitulated by quoting the case Slim v Daily Telegraph 1968. The Court of Appeal held that: "In considering a plea of fair comment it is not correct to canvass all the various imputations which different readers may put upon the words. *The important thing is to determine whether or not the writer was actuated by malice.* If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He has nothing to fear, even though other people may read more into it. I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to publish his letter. It is often the only way to get things put right. The matter must of course be one of *public interest*. The writer must get his *facts right*: and he *must honestly state his real opinion*. But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions."

The difference between the law of Malta and the law of England lies in the so called element of "mens rea". English law is concerned with the publisher's intention. In Maltese law the publisher's specific intention is irrelevant. What matters is the consequence of the publication.[10]

The result is that English law affords protection to the 'honest man expressing his genuine opinion on a subject of public interest, then no matter that his opinion was wrong or exaggerated, or prejudiced: and no matter that it was badly expressed so that other people read all sort of innuendos into it; nevertheless he has a good defence of fair comment'. The defence of fair comment in an identical case here in Malta, would not be of much use.

On the 5th October 1928 in the case Mr. Masini v Avukat Bartolo, the court laid down the principle that in a trial on proceedings for libel, if the defendant did not succeed in proving the truth of the writing,

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8. Il-Pulizija v A. Farrugia. Perit M. Falzon v Paul Spiteri 1980. Magistrate Agius.
9. Reginald Cilia v Lionel Pugliesevich 1963. Harding J.
10. "Mhux dak li seta' talvolta kellu f'rasu min kiteb l-artikolu li jgħodd imma dak li fil-fatt kiteb." Dom Mintoff v Thomas Medley et ne 1953.

but satisfied the court that he was in good faith and that he had a just reason for publicising the facts proving that he honestly believed the allegations to be true and that he exercised due care and diligence in ascertaining such allegations, then he may be exempted from criminal liability.

In effect this judgement gave the newspapers further protection. The judgement gives newspapers nothing less then a defence of fair information on a matter of public interest.

Fifty years after our courts delivered this judgement Lord Denning came out strongly in favour of the defence of fair information on a matter of public interest.

"... in many cases, however, the newspapers are not able to rely on fair comment because they cannot prove that the facts stated are true. Where this is the case, there is sometimes a need for the newspapers to be granted a privilege – a qualified privilege – for them to give fair information to the public when it is in the public interest for them to do so. This privilege may be defeated if the newspaper is actuated by malice, but otherwise it should avail the newspaper." "I would like this principle emerging: if the newspaper or television receive or obtain information fairly from a reliable and responsible source, which it is in the public interest that the public should know, then there is a qualified privilege to publish it. They should not be liable in the absence of malice."[11]

Unfortunately, such a defence, does not probably exist any longer in our law. In fact our courts, in Police vs Joseph James Scorey 1949, have rejected the defence that the article was published in the honest belief that it was true.

Judge Harding rejected the defence's plea arguing that in the Masini – Bartolo case, the court was relying on S 21 of Ordinance XIV of 1889 which made the animus injurandi the basic ingredient of the offence.

As long as our courts interpret the word 'knowingly'[12] so as to include both specific and generic intent, technicalities will prevail over our right to a free press which is yet unafraid to expose itself to the chilling effect of libel.

Interest in the freedom of expression is at its peak within the area of official conduct and political debate.

The public conduct of a public man is a matter of public interest and may be discussed with the fullest freedom. It may be made the subject of hostile criticism and hostile **animadversions**; provided the language of the writer be kept within the limits of an honest intention to discharge a public duty, and is not made as a means of promulgating slanderous and malicious allegations ... and whether instead of a fair, reasonable and honest comment upon the circumstances, it was made an opportunity for gratyfing personal vindictiveness and hostility.[13]

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11. Lord Denning – 'What next in Law?' – Part V; 7 Fair Information, page 188.
12. As found in S 25 of the Press Act 1974.
13. Il-Pulizija v Joseph Micallef Stafrace 1959 – Judge Harding.

"Huwa veru li kull ċittadin għandu d-dritt jikkommenta f'ġurnal u anki, jekk jidhirlu, b'mod aħrax, indipendentement minn jekk il-qarrej ma jikkonvidix l-opinjoni tiegħu fuq materja ta' interess publiku; imma ma jistgħax fil-kitba tiegħu jattribwixxi lill-uffiċjal publiku għemil diżonest fl-esekuzzjoni tal-kariga tegħu mingħajr ma jipprova l-allegazzjoni tiegħu."[14]

Our courts have accepted the principles that considerable latitude must be given to political writers,[15] after all the object of this branch of the law is not to interfere with temperate discussion of politcal questions.[16]

The pronouncements which our courts have made regarding official conduct and political debate are at face value conducive to free expression.

However, when one reviews the judgements decided by our courts, one has to come to the conclusion that the balance is invariably tipped in favour of the Plaintiff. Suffice it to mention the following facts to substantiate this statement:

(a) Falsity is presumed.
"Il-falsità tal-kliem inġurjużi hija preżunta favur il-kwerelant."
Buttigieg vs Montanaro, 15th December 1964.

(b) As soon as the court decides that the publication is defamatory, damages follow automatically, without any need for the plaintiff to prove actual injury. It is only in this field of the law, that damages are awarded for "mental suffering." In the case Captain Agius vs J. Attard Kingswell et noe 19860; damages were given without any inquiry into the commercial damages, the plaintiff claimed to have suffered after the publication.

Highly controversial statement of comment is proved to be factual and true the courts will uphold the "pre-eminence of free expression".

In America, the law of libel is subject to the pre-eminence of the concept of free expression, and therefore the balance is tipped in favour of the defendants (i.e.) the newspapers.

In America, in 1964, the Warren Court, sweeping aside 175 years of settled law regarding libel, held in New York Times Co. vs Sullivan – that the First Amendment bars a state from awarding a public official damages for a defamatory falsehood relating to his office, unless the falsehood is published with knowledge of its falsity or with reckless disregard whether it is true or false.[17]

This decision enables the American Press to pursue investigations into corruption and other abuses of public position, relieving newspapers, reporters, editors, and publishers of the worry that they might have to pay

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14. Il-Pulizija v Dr. Carmelo Caruana 1958 – Judge Flores.
15. Il-Pulizija v Nestu Laiviera 1953 – Judge Harding.
16. Il-Pulizija v Joseph Micallef Stafrace 1959 – Judge Harding.
17. Archibald Cox – Freedom of Expression – 1981.

damages to a public person whom they injure by publishing what some judge finds to be a false and defamatory statement of fact.[18]

In Gertz vs Robert Welch, Inc. 1974, the Burger Court yielded to more cautious weighing and balancing of interests. The court found the interests to be the circulation of information and debate upon matters of public significance, on the one side, and the individual's private personality – his dignity and worth – on the other.[19]

In the case of a public figure, Justice Powell argued that the imposition of liability for anything less than an intentional or reckless falsehood, carries too much risk of self censorship resulting in suppression of truth, but the balance is to be struck more favourably for a private person because a private person, unlike a public official or public figure, does not voluntarily expose himself to risk of falsehood, and lacks opportunity to command attention for his reply.[20]

Four rules emerged from this case:

1. The Constitution (of America), gives the press absolute freedom to publish statements about public figures that turn out to be false, unless the publisher knew they were false or recklessly disregarded warning of their untruth.
2. The first amendment frees the press from liability to other persons, when there is neither negligence nor more serious fault.
3. Conversely, the states are free to expose liability for defamation of a private person, if the publisher or broadcaster is at fault.
4. Damages may be avoided to compensate for "actual injury", but punitive damages will not be allowed unless the statements were intentionally or recklessly false. Actual injury includes impairment of standing in the community, personal humiliation, and mental suffering. Injury must be proved however; it cannot be presumed from the fact of publication.

Our constitutional court cannot be as liberal and egalitarian as the American Courts. The reason is that the very wording of our Constitution is more restrictive than the First Amendment. Nonetheless, our Constitution grants us the right to free speech. Our legislator did not give us such a freedom to protect academic and harmless discussion. S. 42 of the Constitution of Malta was written primarily to afford a defence to those men who are prepared to denounce injustice and who wish to expose deception in Government. The fact that our constitution gives us such right, indicates that our democratic framework is profoundly committed to the principle that debate on public issues should be uninhibited, robust and wide open.

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18. Archibald Cox – Freedom of Expression – 1981.
19. Archibald Cox – Freedom of Expression – 1981.
20. Archibald Cox – Freedom of Expression – 1981.

THE CHANGING FACE OF LAW: A MARXIST PERSPECTIVE

Toni Abela

I remember our lecturer of philosophy of law telling us in our first year, that "... law goes no further than the word itself." Thus having been imbued with Kelsenian positivism, we constantly find ourselves between harsh social reality and legal codifications which have remained unaffected by social change. This means that, by adhering to the positivist school of thought, the most human of natural sciences is ethically stripped of its human content. This is what one may call the cult of "the pure theory of Law"[1] so vehemently denounced by the German philosopher G. Radbruch after the Second World War. Positivism acquires particular importance when coupled with the other belief that "ubi societas ibi ius". This may be termed as the philosophy of "essentiality", in that we are made to believe that the existence of a normative order is a "sine qua non" for the preservation of an ordered society. However, we tend to confound the word "society" with the other word "state". What we must understand is that the present form of the law emerged with the creation of the modern state. If we regard the state "as old as man himself", society is older still and the present form of law was not a natural consequence of society but a political appendage to state mechanism. Indeed one may affirm that the present systems of law are relatively recent phenomena in the history of political thought. The logical outcome has been that, in the mind of students, law has become synonymous with the state. Law, instead of being viewed as the product of a living society, is still conisdered to be the will of the state ("quod principis plaquit legem habeat vigorem").[2]

Considering the present "cadre" of legal philosophy in Malta, it becomes very difficult to talk of what Marxism has to say about law. Indeed, writing about this subject in our country is treading on thorny ground due to the accumulation of preconceived ideas against Marxism throughout the years. Marxism tends to be associated with an iconoclastic creed which underrates the importance of law in society.

To put it succinctly, what Marxism talks about is Change, a word which carries "revolutionary" implications for those who have comfortably consolidated their positions in society and are happy with the present state of affairs. Life being dynamic, all things are in a state of metamorphosis. To borrow the Heraclitean axiom, the Marxist belief that

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1. For example, we were once told in purely Kelsenian language that section 66 of the Maltese Constitution constitutes the "grundnorm" of the Maltese legal system.

2. See a very interesting article by N. Bobbio in the "**American Journal of Comparative Law**" No.3, 1959 p.332.

human relations in society are constantly in a state of flux, inevitably leads to the result that socio-political institutions, which have their roots in socio-economic factors (these being the sum total of human relations within a particular system of production) are equally in a state of flux. Therefore, a legal system, being such an institution, necessarily changes with the flowing magma of human relations underlying it.[3]

In the history of philosophy of law Marx acquires a marked importance for several reasons. The first lies in the chronological fact that he appeared on the scene at a time when after the total philosophy of Hegel, the young Hegelians of the time were in much the same position as the Greeks after Aristotle. What is more, he arrived at a very ripe moment which enabled him to absorb the flow of three major sources of human understanding, these mainly being, English classical philosophy, French socialism and German classical philosophy. All three sources led Marx to recognise that "... legal regulations as well as forms of state are to be understood neither in themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life...".[4]

Marx broke away from the contemporary philosophical tradition in two major respects. From the time of the pre-socratic philosophers up to the time of the "total philosophy" of Hegel, only the Greek atomists had endeavoured to explain the real, material essence of life, albeit from a physical perspective. More than trying to answer the question of "What is the purpose of things?" they tried to answer the other more important question: "What causes things to come into being?" In other words, the atomists, unlike Socrates, Plato and Aristotle, sought to understand the world without introducing the notion of **purpose**, that is, without trying to give a theological explanation.[5] It was only with the advent of Marx that interest was again kindled in the philosophy of the cause of things rather than in their purpose. His theory of historical materialism, which I purport to discuss later on, aims at providing us, not with an explanation of **why** socio-political institutions exist but rather with an insight into **what causes them** and how they come into being.

Secondly, Marx managed to detach himself from the German idealist philosophy of his time. In Marx's opinion, all inherited conceptions of law represent idealist embellishments of existing conditions, and in order to edify them, one is forced to reject that deep sense of social justice.[6] It is for this reason that Marx, even from his student days, always strove to explain the law as a reflection of actual reality. He always considered law, not as a being in itself, (i.e. a closed universe of norms) but as a system highly sensitive to the socio-economic changes within the bosom of society

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3. Marx's attachment to movement and change had always been manifest in him. In 1839 he chose as a subject for his doctoral thesis the epicurean and democritean philosophy of atomism – David Mcllelan: **"Karl Mars – His Life and Thought"**. Paladin. p.38.
4. Karl Marx **"Preface To A Critique Of Political Economy"**. MESW.1.362.
5. Bertrand Russel: **"History Of Western Philosophy"**. Unwin Paperbacks p.84.
6. Paul Philips: **"Marx And Engels On Law And Laws"**. p.5.

as a whole. Law cannot be considered independent from that which gives it meaning and existence. In purely Marxist language this is known as the fetishism[7] of law. Law was no longer the fruit of the Kantian "a priori" nor the Hegelian "Idea" or "Spirit" outside man (though in earlier stages of his life he had once contended both views). Nor did he find the essence of laws in past history of people (Volksgeist) as the Historical school, headed by Von Savigny, contended. Marx's main interest was in the struggle of man bound together against nature, in the first instance, with the economics of society, which according to him, revealed the "anatomy of society", at least of the modern European society under a capitalist system of production.

Marx's rejection of German idealist philosophy brings us to the discussion of the theory of historical materialism. As a socio-economic concept, the theory of historical materialism tries to give an explanation of how social systems work and what causes social transformations.

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7. In his social theory Marx used the word fetish in a late 18th century sense that was derived from the early anthropological study of Charles De Brosses. A fetish was an inanimate object worshipped because of its alleged magical powers. Marx adopts this concept to the nature of commodities under a capitalist mode of production. Thus, Marx argued that the fetish character of commodities is derived from the peculiar social character of the labour which produces it. His view was that useful objects become commodities only because they are products of private labours carried on independently of one another, rather than labours carried on in a consciuosly social fashion by means of a plan. In a capitalist, commodity-producing society, in Marx's view, relations based on the exchange value of commodities (or social relations of things) came to control the distribution of labour products and the distribution of labourers themselves within the production process. Since, according to Marx, producers and their products are manipulated by the workings of a fetish (the commodity), socio-economic relations in a capitalist society are and appear to be, material relations between persons and social relations between things, though this does not in itself constitute a full understanding of the situation. Now the question arises of how this concept of fetishism is connected with law.

Marx and Engels did not expressly make a direct link, but they often hit upon themes containing similar arguments (eg. Karl Marx **"The Trial Of The Rhineland District Committee Of Democrats"** or in **"The Revolutions of 1848"**). Some Marxists have, however, explicitly used the term fetishism to refer to attitudes towards the legal form. Whenever law is raised to the position of being the foundation stone of social transformation, or being the cause of social transformation, marxists perceive the fetishism of law at work. The fetishism of law is the converse belief that law is vital. This fetishism arises because of the manner in which law touches upon every aspect of social life. It defines, analyses and regulates all manners of relations, and ordinary citizens learn to interpret social phenomena according to legal categories. Yet, the key point to historical materialism is, that the law is not basic to social structures and that to believe that all these social relations are created and depend on law is to mistake the appearance of legal omnicompitence for the reality of material determinism. As the most authoritative Marxist scholar on the subject put it "social relations are not commanded by Law" (Pasukanis E.B. **"Law and Marxism: A General Theory". chap.111)**. Pashukanis contended that because the relation between debtor and creditor is generally only understood within a legal framework, this suggests that law is the basis of social life and commercial intercourse. According to Marxism however the legal relation is determined by deeper elements in the social formation. – See further an interesting study on this problem written by Balbus I.D. **"Commodity Form And Legal Form"** in **"Reasons"**. See also C.E. and Rich R.M. **"The Sociology Of Law"** (Butterworths. Toronto, 1978) esp. pp.83 – 85.

8. In the **"Preface"** to **"A Contribution To The Critique Of Political Economy"** Marx writes: "I was taking up law, which discipline, however, I only pursued as a subordinate subject along with philosophy and history." MESW.1.361.

We may commence by stating that when one studies the evolution of human societies, the role of conscious action in the determination of events presents a central theoretical problem. Thus our query hinges on the answer to the question of whether we are free to determine and create our own history or whether we are conditioned by our environment from early stages of existence to follow evolutionary patterns. Therefore, it would be appropriate to ask the following question: How far is the feeling of choice inherent in human existence when participating in historical events?

It is possible to make a general division of social theories into those that attribute to the human mind the capability of overcoming all circumstances of existence in such a manner as to determine the course of history and those other theories which consider human action under the light of specific modes of social activity, determined by external factors. The first of these approaches may be termed as "idealism" while the second may be called "materialism".

In the history of social thought seldom do we come across a theorist who remained blindly faithful to one extreme or another. Marx was no exception. Though it is true to say that in formulating the theory of historical materialism he rejected the philosophy of the German idealist philosophers of his time, he nonetheless remained unaffected by a total endorsement of materialism.[9] However, when it comes to interpret his ideas, the crux of the problem lies in the attempt to find how he endeavoured to reconcile a fundamental orientation towards materialism while at the same time admitting a margin of freedom to the individual by consciously acting to change and transform the environment and consequently society.

The problem acquires particular importance and significance in the analysis of law, for legal institutions and rules are constantly considered to be the fruits of purposive human actions. In modern society where the predominant form of law is a complex regulatory code, this purposive, artificial aspect of the law is particularly manifest. It is precisely here, that the theory of historical materialism makes its major contribution. It provides us with the scientific explanation of how these consciously created laws are in the last analysis conditioned and determined by material circumstances.

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9. It should be observed that Marx seldom referred to himself as materialist. In the **Thesis On Feuerbach** he alluded, in any case, to his presupposition as a "new" materialism, to be distinguished from materialism as previously understood. Traditionally materialism is the philosophical doctrine that reality is ultimately material and so it follows that immaterial phenomena do not exist (for example, God) or are manifestations of some essentially material process which we do not as yet understand fully (for example thought). Marx rejected this, not because he could claim to refute it, but because it posed questions irrelevant to his investigations of social phenomena. So when he claimed to be a new materialist we can from his comment infer two things: (a) he was not an idealist who takes the ultimate constituent of realtiy to be ideas, thought, mind, or something similar and (b) that to be a materialist on the Marxian model one need only make his triune supposition i.e. individuals, their activities and material conditions.

In this sense economic relations acquire vital importance for the proper interpretation of law from a Marxist perspective. Indeed law is presented as dependent upon the level of economic development or form of property relations. Law is "the official recognition of facts".[10] Here Marx rejects the speculative philosophy of German idealism and makes his own the transformative method of Ludwig Feuerbach. He reverses the "nature" of things and Man no longer remains the predicate of his studies but is reinstituted as the subject. In other words, he uses philosophy to transform the world rather than to interpret it.[11] In the eyes of Marx, therefore, law is no longer conceived as an autonomous principle playing a causal role in the historical process, as some still want us to believe up to this day. On the contrary it is specifically against this tradition that Marx stresses that "revolutions are not made by law."[12]

The theory of historical materialism is not uniformally endorsed by all Marxists. Various interpretations have been advanced as to what this theory imports. Orthodoxy, as in other branches of thought, has claimed those who have embraced this theory without reservations. Others, unable to receive it in its unrevised form, have given it a pliable interpretation in accordance with the exigencies of modern society.[13] In spite of this lack of uniformity among Marxist scholars, there is one work which has been considered as definitive. This is Marx's "Preface" to an essay entitled "A Contribution to a Critique of Political Economy".[14]

Given the close relationship between the relations of production and the material world, Marx suggests in the "Preface", that all social institutions of a community, including its structures of political authority and its laws, **arise from** and adapt themselves to the nature of relations of production. Thus, laws are determined in their form and content by the relations of production, that is to say by the material base or what is interchangeably called the **substratum**. Indeed if a conflict develops between the political and legal **superstructure** and the requirements of the relations of production, i.e. the substratum, then severe dislocation will result which calls for a change in the latter.[15]

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10. Karl Marx: "**The Poverty Of Philosophy**". MECW.VI.50.
11. See Marx's "**Thesis on Feuerbach**".
12. Karl Marx "**Kapital**". Vol.1.p.750.
13. The author of this article adheres to the latter school of thought.
14. Karl Marx: "**Preface To A Contribution To The Critique Of Political Economy**". In "**Early Writings**". ed. L.Colletti. (Peguin NLR, 1975) p.424.
15. The traditional Marxist school conceive the economic relations as the sub-structure and the legal institutions as the superstructure. Sub-structure (base) and superstructure are metaphors borrowed from architecture. It is obvious that they only serve to illustrate the connection, not to define it in exact terms. This superstructure, according to Marx's well-known formula (vide "**Preface**"), comprises not only law but also ethics and culture. See Karl Renner "**The Institutions Of Private Law And Their Social Functions". Ed. O. Khan-Freund** (Routeledge & Keegan Paul 1949. repr 1976) pp.106 – 108. See for a valuable general discussion of base superstructure Williams. R. (1973) "**Base And Superstructure**" New Left Review **82** 3 – 16; Hall S. "**Rethinking The 'Base And Superstructure' Metaphor**" in "**Class, Hegemony And Party**" ed. Bloomfield J. (Lawrence and Wishart London).

In its pure form, the theory of historical materialism argues that legal phenomena are essentially superstructural, in that they are determined by the economic basis of society. This metaphor of base and superstructure has usually been taken as "il punto di partenza" in explaining the nature of law from a Marxist perspective. We come across this metaphor for the first time in the "Preface", wherein it is said that the economic structure or base constitutes "the foundation on which rises a legal and political superstructure". In this and other passages therefore, the superstructure is conceived as an "expression" or a "reflection" of the material base.

How is one to proceed so that we may distinguish between the substratum and those rules which are essentially superstructural? By what method is one to determine that certain rules are superstructural "sic et simpliciter"? In recent years the distinction between the two has been bridged by critics of Marxist philosophy.[16] What is more, Marxists themselves have noticeably modified their enthusiasm for a strict adherence to the base and superstructure model.[17]

The theory of historical materialism suggests that law or rather, a system of law, besides being an instrument of class oppression, also provides the rules by which the relations of production are constituted. For instance in a society of hunters, one may identify the relations of production as those arrangements set up for the trapping of prey and the distributing of food. Let us suppose that this arrangement is substantiated by a conventional rule which requires every able-bodied man to participate in the hunt. In order to obtain the respect of the members of the tribe to such a rule, it may be enforced or implemented by means of sanctions such as ostracism, removal of privileges etc. A question to be asked is whether this rule forms part of the relations of production or whether it is superstructural in form.

Looking at the rule from a practical angle, it seems to be a constituent part of the arrangement, and as such cannot be detached from the relations of production by simply regarding it as superstructural. Without such a rule or custom, food supplies would be endangered by a small group of men reluctant to participate in the hunt. This rule, therefore, appears to be at the heart of the productive process since it is an essential ingredient of the relations of production. Yet, looking at this rule from the social angle, it is closely analogous to law or morality, which according to the theory of historical materialism, is located within the superstructure. This shows that in practice, it becomes difficult to maintain a net distinction between base and superstructure unless it is insisted that such rules are incorporated in the superstructure.

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16. See Acton H.B. "**The Illusion Of The Epoch – Marxism-Lennism as a Philosophical Creed**". (Cohen and West Ltd. London 1955) at pp. 137, 164 – 168, 172 – 179, and 270. See also Popper K.R. "**The Open Society And Its Enemies**" Vol.11 (London 1952).

17. Williams R. "**Marxism And Literature**" pp.75 – 82; Cain M. and Allen Hunt "**Marx And Engels On Law**". Law, State and Society Series (Academic Press 1979) pp.48 – 51. See also Thompson E.P. "**The Poverty of Theory**" (Merlin Press London 1978) p.288.

The problem of defining the relations of production becomes more complicated in a technologically advanced society. For instance, in a society such as ours, based on the exchange of commodities, it is virtually impossible to make an analysis of the relations of production without falling on the basic legal framework of contracts and the protection of private ownership afforded both by civil and criminal law. Consequently though the Maltese Civil Code is part of the Maltese legal system, and as such may be generally described as superstructural, particular sections regulating the law of contract play an important role in the material base. Similarly those wanting to acquire the ownership of a thing are encouraged to do so in the Civil Code section 357 of Civil Code which gives the right to dispose of the thing duly acquired by any of the modes foreseen by the law in the **most absolute manner**. This means that the proprietary rights emanating from the general right of ownership, contain within themselves, before anything else, an economic significance for the holder of that right. Nor would the crucial process of extraction of surplus value from labour occur were it not for a reliable framework of rules similar to the contract of employment. Again therefore, there is the problem of defining the relations of production so that they do not include significant elements of the superstructure. To this extent it is impossible to maintain that the material base determines the form and content of the legal superstructure when the material base itself is composed of law.[18]

In order to steer ourselves out of this antinomy, we may resort to the distinction between law and other kinds of normative or semi-normative rules. Innumerable norms exist within a particular society under the form of customs, morals, rules of etiquette and law. Sense can be made out of the base/superstructure metaphor by arguing that only those norms which have not as yet crystallised into legal rules, form the relations of production. These may be termed as informal customary rules in contrast to legal or formally recognised rules. The crystallisation of informal customary rules begins by some social force challenging them. This challenge may consist in a controversial issue or when any behaviour which tends to depart from their dictates is either energetically defended or suppressed. This in turn, creates a disputable area, the confines or legal existence of which are determined or resolved, by some authoritive body, such as a court of law, or until it is officially recognised as a legal rule by an act of Parliament. Either the ruling of the Court or the act of Parliament will lay down definitively the standard of behaviour required. It is the "iter" through which informal customary rules are transformed into formal legal norms. Thus tension in the relations of production transfer these informal customary rules through the mechanism of state from the material base to the superstructure.

It is imperative to recall that Marxism regards values, beliefs and motivations for conscious action as the outcome of practical activity.

18. Plamenatz J. "**Man And Society**". Vol.1 p.282.

As such, law is bound to be inspired by the dominant ideologies which emerge from social practices occurring in the mode of production. Legal regulation inevitably coincides with such norms of behaviour as it is merely a more precise and positive articulation of the requirements of the dominant ideology.

From the moment at which formal legal rules come into existence, they absorb within them all those prevailing customs with which they coincide. To this extent, law is a metanormative process because it overlays and engulfs existing standards of conduct which may have appeared within the relations of production. In this sense this interpretation fares well with Marxism, for while it does not deny that legal rules are superstructural, it also admits that law possesses metanormative qualities. This puts us in the position of locating legal rules in the relations of production, even though in the last analysis, they are institutionally speaking, superstructural.

It would seem that the theory of historical materialism states the obvious: **law changes with society**. However obvious this observation may seem to be, Western legal philosophy has always been alien, save for some insignificant exceptions, to what one may label as "**the philosophy of change**". Marxism in its purest form, emphasises that the objective conditioning of law by the economic base by no means rules out the voluntary conscious participation of people as a vital constituent element in elaborating and developing the law. Law, although particularly influenced by the economy of a society, nonetheless remains the product of collective and conscious activity.[19] This is what "the withering away of the law" implies.[20] Law, as it stands at present times, will wither away in the sense that by a continuous process of evolutive change (which may consist in a revolutionary movement as was the case in the French Revolution), it will in the future metamorphosise into an altogether different normative order.

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19. In a letter to J. Bloch Engels writes: "According to the materialist conception of history, the **ultimately** determining factor in history is the production and reproduction of real life. Neither Marx nor I have ever asserted more than this. Hence if somebody twists this into saying that the economic factor is the **only** determining one, he transforms that proposition into a meaningless, abstract, phrase. The economic situation is the basis, but the various elements of the superstructure – political forms of the class struggle and its results, such as constitutions established by the victorious class after a successful battle etc, juridical forms, and especially the reflections of all these real strugles in the brains of the participants, political, legal, philosophical theories, religious views and their further development into dogmas – also exercise their influence upon the course of historical struggles and in many cases determine their **form** in particular. There is an interaction in all these elements in which, amid the endless host of accidents (that is, of things and events whose inner interconnection is so remote or so impossible of proof that we can regard it as nonexistant and neglect it.), the economic movement is finally bound to assert itself. Otherwise the application of the theory to any period of history would be easier than the solution of a simple equation of the first degree." MESC,394 – 395.

20. Two misconceptions must be cleared. (i) Whenever western writers on the subject of law accuse marxism of underrating law, they present a very subjective conception of law, so that its withering away appears to be the abolition of human rights and their legal guarantees.

Law is subject to the dialectical rules of life as much as humanity and its activity are. No person can be accused of legal nihilism for believing in the predicament that "law will wither away" in the same manner that a person cannot be accused of misanthropy for stating that man is mortal. "Society does not depend on law." This is a legal fiction. The law rather depends on society . . . As soon as the code ceases to correspond to social relations, it is no more than a bundle of paper. Social relations cannot make old laws the foundation of the new development of society, nor could these laws have the old social circumstances. These laws emerged from those old circumstances and must perish with them. They must alter in line with the changes in the conditions of life. The defence of old laws against the new needs and claims of social development is fundamentally nothing but a hypocritical defence of outdated particular interest against the contemporary interest of the whole.[21] You may resist a change in the law and prolong the life of old ones, but change will come. This is an inevitable outcome.

However, they fail to explain or at times consciously disregard the fact, that when speaking about the withering away of the law, Marxism has in mind least of all any annulling of man's rights and freedoms, but rather the ending of State compulsion as the specific feature of the law. (ii) What is more many attribute this phrase to Marx's writings, when in reality Marx always refrained from mentioning either the withering away of the State and least of all of the law. The origin of the phrase "withering away" is found in a tract written by Engels entitled "**Anti-Duhring**". And even here, Engels speaks only of the withering away of the State and not of law. I. Lenin was the first to subscribe explicitly to the thesis that the law will wither away. In his "**The State And The Revolution**" he understood Engels to say, that if the State will wither away law will necessarily also wither away.

21. Articles from the "Neue Rhenisch Zeitung" pp.227 – 247. See also Mehering K. "**Karl Marx: The story of his life**". (Allen and Unwin London) p.183.

THE TRIAL OF A CRIMINAL DEFENDANT IN THE UNITED STATES

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There are basically two categories of crimes in the United States – misdemeanors and felonies. A felony is a serious crime for which the law has provided a possible penalty of at least a year in prison or the death penalty. The offense is a felony even though the defendant ultimately receives a sentence of less than a year in prison. A misdemeanor is a less serious crime for which the severest possible penalty the judge may impose under the law is less than a year in prison. This article will discuss how a felony trial is conducted in the United States. Misdemeanors are tried in a similar – but less formal – manner.

In discussing how a criminal felony trial is conducted in the United States, one must keep in mind that there are 51 separate sets of laws setting forth both trial procedures and substantive criminal laws. Each state and the federal government has its own set of laws which govern the particular jurisdiction. Thus, conceivably what may be a crime in one state may not be so in another. Also, the sentence for a crime in a particular state will likely differ from a neighboring state. And, of course, each state provides for its own procedural and evidentiary rules and regulations for the conduct of a criminal trial. Nevertheless, these factors notwithstanding, there are certain basic procedures applicable to all jurisdictions in the United States – and it is these common methods of trial in America that are discussed below.

A PRELIMINARY HEARING PROCEDURES

Under the American criminal justice system, the Court becomes involved in the case immediately upon the arrest of the defendant. A preliminary hearing is a relatively informal proceeding held promptly after arrest in which a judge first determines whether the defendant has an attorney. The Sixth Amendment to the Constitution of the United States provides that "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of Counsel for his defense." Where incarceration may be a consequence of the prosecution, the defendant is entitled to have an attorney appointed by the Court in the event he cannot afford one.

The judge next will determine at the preliminary hearing whether the accused is entitled to be released from custody on bail. If the accused subsequently appears at the trial proceedings, bail is refunded, but failure to appear results in forfeiture of bail. In most states, a defendant is

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allowed to deposit a portion of his bail (usually 10%), most of which deposit is refunded if the defendant honors his obligation to appear. Moreover, courts generally have the power to allow release without any deposit – merely accepting the defendant's signature on a bond that makes him liable for the amount of bail if he fails to appear.

Finally, at the preliminary hearing, the judge will determine whether there are reasonable grounds for believing the accused person committed the offense – that is, whether it is fair, under the circumstances, to require him to stand a regular trial. If after such a hearing the judge decides that the accusation is without probable cause, the accused will be discharged. This discharge, however, will not bar a grand jury indictment if subsequently developed evidence (or the same evidence presented at the preliminary hearing) satisfies the grand jury that the accusation is well founded. If the preliminary hearing judge decides that the accusation is a reasonable one, the accused will be "bound over" to the grand jury – that is, held in jail until the charge against him is presented to a grand jury for consideration.

B GRAND JURY PROCEDURES

A grand jury is usually composed of twenty-three citizen-voters, sixteen of whom constitute a quorum. The votes of twelve members are necessary to the return of an "indictment." After hearing the alleged facts related by the victim or other persons, the grand jury will return an indictment if it decides that there are reasonable grounds for proceeding to an actual trial of the person charged.

The Constitution of the United States does not require that state prosecutors use a grand jury to charge felony offenses, and there is an increasing tendency to enact statutes that permit the prosecution to charge felonies by filing an information – a sworn statement by the prosecutor setting forth the charges. Like the preliminary hearing, the consideration of a felony charge by a grand jury is in no sense of the word a trial. Only the state's evidence is presented and considered; the suspected offender is usually not even heard, nor is his lawyer present to offer evidence in his behalf.

C POST-GRAND JURY PROCEDURES

Following an indictment, the next step is the appearance of the accused person before the judge who will try the case. The indictment is read to the defendant or the essence of its contents is made known to him; in other words, he is advised of the criminal charges made against him. If he pleads guilty, the judge will order that the probation department, an administrative unit of the court, prepare a presentence investigation report of the defendant's background. The judge will also set a date for sentencing some time after the judge, the prosecutor and defense attorney have had an opportunity to examine the presentence investigation report. However, if

the accused pleads not guilty, a date is set for his actual trial.

After entering his plea of not guilty, the defendant may seek to terminate the prosecution's case, or at least seek to prepare a better defense, by utilizing a procedure known as making or filing a *motion.* A motion is merely a request for a court ruling or order that will afford the defendant the assistance or remedy he is thereby seeking. Some of the more frequently used motions are to dismiss the indictment and to suppress – keep out of the trial – a confession or other evidence sought by the police from the defendant.

D TRIAL PROCEDURES

A person accused of a felony is entitled to trial by jury as a matter of constitutional right. He may waive this right, however, and elect to be tried by a judge alone. In some jurisdictions the defendant has an absolute right to his waiver (e.g., Illinois); in others (e.g., the federal system) it is conditioned upon the concurrence of the judge and the prosecution.

If the case is tried without a jury, the judge hears the evidence and decides for himself whether the defendant is guilty or not guilty. Where the trial is by a jury, the jury determines the facts and the judge serves more or less as an umpire or referee; it is his function to determine what testimony or evidence is legally "admissible," that is, to decide what should be heard or considered by the jury. But in a trial by jury, the ultimate decision as to whether the defendant is guilty is one to be made by the jury alone.

In the selection of the jurors, usually twelve in number, who hear the defendant's case, most states permit his attorney as well as the prosecuting attorney to question a large number of citizens who have been chosen for jury service from the list of registered voters. In the federal system and a growing number of states, however, most trial judges will do practically all the questioning, with very little opportunity for questioning accorded the prosecutor and defense counsel. Nevertheless, each lawyer has a certain number of "peremptory challenges," which means that he can arbitrarily refuse to accept as jurors a certain number of those who appear as prospective jurors. In addition, if any prospective juror's answers to the questions of either attorney reveal a prejudice or bias that prevents him from being a fair and impartial juror, the judge, either on his own initiative or at the suggestion of either counsel, will dismiss that person from jury service. The avowed purpose of this practice of permitting lawyers to question prospective jurors is to obtain twelve jurors who will be fair to both sides of the case.

After the jury is selected, both the prosecuting attorney and the defense lawyer are entitled to make "opening statements" in which each outlines what he intends to prove. The purpose of this is to acquaint the jurors with each side of the case, so that it will be easier for them to follow the evidence as it is presented.

After the opening statements the prosecuting attorney produces the prosecution's testimony and evidence. He has the burden of proving the state's case "beyond a reasonable doubt." The prosecution has the obligation in most, if not all, cases to notify the defence of any evidence that would be of significance in exculpating the accused or in mitigating his sentence, if the prosecution is aware of this evidence. If at the close of the prosecution's case the judge is of the opinion that reasonable jurors could not conclude that the charge against the defendant has been proved, he will "direct a verdict" of acquittal. That ends the matter and the defendant goes free – forever immune from further prosecution for the crime, just as if a jury had heard all the evidence and found him not guilty.

If at the close of the prosecution's case the court does not direct the jury to find the defendant not guilty, the defendant may, if he wishes, present evidence in refutation. He himself may or may not testify, and if he chooses not to appear as a witness, the prosecuting attorney is not permitted to comment upon that fact to the jury. The basis for this principle whereby the defendant is not obligated to speak in his own behalf is the constitutional privilege that protects a person from self-incrimination.

The prosecution is given an opportunity to rebut the defendant's evidence, if any, and the presentation of testimony usually ends at that point. Then, once more, defense counsel will try to persuade the court to "direct a verdict" in favour of the defendant. If the court decides to let the case go to the jury, the prosecuting attorney and defense counsel make their closing arguments.

In their closing arguments the prosecutor and defense counsel review and analyze the evidence and attempt to persuade the jury to render a favourable verdict. The judge will then instruct the jury as to what law it should consider in weighing the evidence.

When the jurors have reached a decision, their participation in the case is then at an end. In the event the jurors are unable to agree on a verdit – and it must be unanimous in most states – the jury is discharged, and a new trial date may be set for a retrial of the case before another jury.

If the defendant is found guilty, it becomes the function of the trial judge to fix the sentence (set the penalty) within the legislatively prescribed limitations. The typical penalties include prison or jail term, partial confinement where the defendant may live in jail but be released during the day for work or school, fine, probation, restitution and combinations thereof.

E POST-TRIAL PROCEDURES

After a verdict of guilty, there are still certain opportunities provided the defendant to obtain his freedom. He may file a "motion for a new trial," in which he alleges certain "errors" committed in the course of his trial; if the trial judge agrees, the conviction is set aside and the defendant may be tried again by a new jury and usually before a different judge. Where this motion for a new trial is "overruled" or "denied," the

judge will then proceed to sentence the defendant. After he has been sentenced, the convicted defendant may appeal from both his conviction and sentence to a reviewing court or to a series of reviewing courts. In some instances this appeal may culminate in a review by the United States Supreme Court. If a defendant is without funds to either defend himself at trial or to appeal from his conviction, an attorney will be appointed by the court to represent him free of charge and the costs of trial and appeal will be paid by the government.

Conclusion

Some people in my country argue that with all these procedural safeguards and rights of the defendant, it is too difficult and slow to convict an accused. However, these criticisms are usually answered with the gentle reminder that our criminal justice system is premised on the notion that we are willing to tolerate a system that may permit 100 guilty persons to go free in order to assure that not one innocent person is wrongly convicted.

Assignment

"A REVIEW OF CRIMES AGAINST THE ADMINISTRATION OF JUSTICE"

*Andrew Azzopardi, William Azzopardi, Joanne Catania, Charles Gafà, Maria Grech, Consuelo Herrera, Paul Saliba**

The crimes which we will discuss fall into the wide class of offences against the public administration which more particularly impede or interfere with the proper administration of justice. These crimes are dealt with in our code in Sec 99 to 110; the salient offences being:

1. calumnious accusation;
2. simulation of an offence;
3. perjury;
4. retraction;
5. false swearing.

In the course of the discussion we will refer to the writings of Italian jurists which have laid the foundations of these sections in our code.

A. Calumnious Accusation:

This subject is dealt with in Section 99 of our Criminal Code which lays down that:

"99. (1) Whosoever, with intent to harm any person, shall accuse such person before a competent authority with an offence of which he knows such person to be innocent, shall, for the mere fact of having made the accusation, on conviction, be liable –

(a) to imprisonment for a term from thirteen to eighteen months, if the false accusation be in respect of a crime liable to a punishment higher than the punishment of imprisonment for a term of two years;

(b) to imprisonment for a term from six to nine months if the false accusation be in respect of a crime liable to a punishment not higher than the punishment of imprisonment for a term of two years; but not liable to the punishments established for contraventions;

(c) to imprisonment for a term from three days to three months, if the false accusation be in respect of any other offence.

(2) Where the crime is committed with intent to extort money or other effects, the punishment shall be increased by one degree.

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An analysis of this section reveals the three constituent elements of this crime which are: 1) accusation of an offence made to a competent authority; 2) intent to harm the person accused and 3) knowledge on the part of the accuser of the innocence of the person accused.

1) According to Section 529 of the Criminal Code any person may give information to the police of any offence liable to prosecution "ex Officio" of which he may have in any way become aware. Moreover, in Section 532 it is laid down that any person who considers himself aggrieved by any offence and who may wish proceedings to be taken for the punishment of the offender, if known or if unknown, in case he be discovered, may make an instance or complaint to any officer of the police. There are only two ways in which notice of the commission of an offence may be given to the police not to mention the "notizia criminis" whereby public officers are expressly bound by law to give notice of any offence of which they may have become aware in the execution of their duties. However then the law speaks of accusation in this section it refers to any way in which a notice may be given to the competent authority. It is not necessary that it be done formally under the law of procedure as was decided in **Police vs Karmenu Mifsud** (1935). A point which arises here is whether to constitute the crime, the accusation (denunzia) of the offence must be spontaneous or whether it is enough if there is an element of volition. In **Police vs N. Brincat et.** (1951), it was held "il-kelma 'jakkuża' għandha tiftiehem fis-sens tal-kelma 'jiddenunzia' u hemm din id-denunzia meta l-informazzjoni falza tiġi mogħtija lill-awtorità mhux biss volontarjament imma ukoll spontaneament, b'mod li fl-att tad-denunzjant ikun hemm ċerta inizjativa".[1] It went on to say that if there is no element of spontaneity in the making of the accusation only the charge of defamation would arise. In **Pulizija vs Nazzarenu Borg** (1965), the accusation lacked the element of spontaneity and therefore the accused was found guilty only of defamation.

However **Antolisei** contends that the 'denuncia' does not have to be spontaneous. Another point to mention is that the accusation must be of an offence, i.e. a fact which has the character of a criminal wrong be it only a contravention. If the fact is not a criminal offence the competent authorities may not be moved to institute proceedings against the person accused and it is only in such case that such person may be exposed to injury through the misdirected istrumentality of penal justice. Thus in **Police vs Vincenzo Attard** (1949), it was stated that: "Biex ikun hemm ir-reat ta' falza denunzja hemm bżonn li d-denunzja falza tkun dwar delitt jew kontravenzjoni li jagħtu lok għal azzjoni kriminali persegwibili quddiem il-Qorti ta' Ġustizzja Kriminali. Għaldaqstant minn jiddenunzja falzament membru tal-pulizija li naqas mid-dmirijiet tiegħu għalkemm jista' jġib konsegwenzi serji skond l-Ordinanza tal-Pulizija mhux ħati ta' kalunja"[1]

In **Police vs Giuseppe Attard** (1950) (Mr Justice Montanaro Gauci) the court held that in so far as the accusation made is not in respect of

1. *Police v. Vincenzo Attard* (1949) – Law Reports Vol. XXXIII Part N p.963.

an offence subject to a criminal action before a criminal court, there is no calumnious accusation even if such an accusation may subject the person concerned to disciplinary action before an authority other than the criminal court.

2) The second element refers to the intent to harm the person accused. The accuser who believes another person to be guilty or else suspects him to be guilty is not guilty of calumnious accusation even if the person is later found innocent. This statement manifests the crucial requirements of our law with regard to the specific intent of this offence. Therefore the law could not reasonably punish the accuser who would not have acted from malice or would have acted rashly or with patent imprudence without pondering on the consequences of the accusation. The harm to which reference is here made may merely consist in exposing the victim to the possibility of criminal proceedings being taken and punishment awarded against him. This principle was well expounded in the case **Police vs Violet Smith:** "Huwa veru li skond il-liġi Maltija biex jiġi ntegrat delitt ta' kalunja huwa meħtieġ l-element intenzjonali fis-sens illi il-kalunjatur irid ikun għamel ir-rapport falz bil-ħsieb li jagħmel ħsara lil xi ħadd; imma hu paċifiku illi dan ifisser illi hu biżżejjed li l-kalunjatur ikun jaf illi l-inkolpat kien innoċenti tar-reat lilu attribwit u l-kalunjatur ma jistax jgħid li dan l-element huwa nieqes meta huwa ma setax kien ingannat meta għamel ir-rapport, u għalhekk ma jistax jgħid li kien in 'bona fede' meta għamel l-istess rapport"[2] However this does not entail the necessity of indicating the person accused by name.

According to **Pessina**, since the essence of calumnious accusation is the possibility of criminal proceedings, a person who accuses another of criminal offence which can only be dealt with on the complaint of the injured party is not guilty of calumnious accusation. A formal complaint of the injured party is needed. Furthermore calumnious accusation cannot arise when a person is accused of an offence which has been extinguished or barred. [3]

Italian jurists hold different views on the issue of whether a calumnious accusation is committed by a person for the purpose of saving himself from a charge. **Carrara** admits impunity for the calumny committed for the purpose of saving oneself from a capital charge but not in other minor cases. The best solution however is given by **Mortara** i.e. "il diritto di difesa non si può spingere fino al punto di legittimare una lesione così grave della personalità altrui". [4]

3) The knowledge on the part of the accuser of the innocence of the person accused constitutes the specific formal elements of the crime which requires both the design to injure and the knowledge of the innocence of the accused. In fact, in **Police vs Mary Dark**, the court, after listing the three elements of the offence of calumnious accusation, stated that "mhux

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2. *Police v. Violet Smith* – Law Reports Vol. XXXVI (d) p.767.
3. Pessina, Vol. III, p.251.
4. Mortara, para. 1097.

biżżejjed li jirrikorru l-ewwel żewġ elementi. Jekk ma jirrikorix ukoll l-aħħar element ma hemmx reat ta falsa denunzia". The knowledge of the accused's innocence must be certain. In **Rex vs Katerina Debono** it was held that "perche si verifichi la calumnia diretta occorre oltre alla falsa denunzia fatta con animo di nuocere il denunziato, la cognizione nel denunziante contemporanea alla denunzia dell'innocenza del denunziato".[5] Here alone can it be said that the accuser had deliberately and maliciously made the false imputation. The mere falsity is not alone sufficient for it might have been stated involontarily out of supposition. Any false accusation without the element of malice may only give rise to a responsibility of negligence for civil purposes.

Carrara states that "Bisogna cioè che non solo l'accusato abbia dichiarato l'innocenza propria ma di più che sia dimostrata dell'offeso che lo denunzio come autore del delitto la cognizione di tale innocenza".[6] In **Police vs Maria Caruana** "l-element intenzjonali fir-reat ta' kalunja huwa insitu fix-xjenza tal-falsità jiġifieri illi ma jistgħax jingħad, li ma jirrikorrix l-element morali meħtieġ għar-reat ta' kalunja jekk l-imputat kien jaf li l-addebitu minnu magħmul ma kienx veru".

The knowledge of innocence must be present when the person makes the accusation. This emerges clearly from the wording of Section 99 which considers the crime complete by the mere act of laying the information or making the complaint. Hence, calumnious accusation is a typical formal offence and consequently there can never be an attempted calumny. If a person gets to know of another's innocence after accusation is made, such a person is not guilty of calumny even if he persists in his accusation and subsequently adds further discriminating statements.

A final question to be considered is whether the crime of calumny subsists only in the case in which an accusation is made against an innocent person or also in the case in which the responsibility is falsely aggravated. Many writers including **Impallomeni** hold that even in such a case the calumny subsists since the accusation is attributing an offence which strictly speaking the offender had not really committed or would have committed in part.[7] However other writers remark that the law in the crime of calumnious accusation punishes the false information or complaint and therefore the injury caused to the administration of justice by the partial falsity is set off by the advantage of a discovered offence and the punishment of an offender.

Some continental codes and text books deal with calumnious accusation under another form namely the fabrication of false evidence which our law lays down as a separate offence under Section 109. Whereas the false accusation we have already dealt with, made orally or in writing by any information, report or complaint constitutes the calumnious accusation properly so called verbal or direct, this other form consisting in falsely

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5. *Rex v. Katerina Debono* (1919) – Law Reports Vol. XXIV parte 2, p.886.
6. Carrara, *Programma, Parte Speciale*, para. 2623.
7. Impallomeni, *Codice Penale Italiano Illustrato*, Vol. II p.249.

fabricating factual evidence of an offence against an innocent person, constitutes the calumnious accusation known as real or indirect. For instance, **Crivellari** mentions the case of a knife full of blood or a stolen object put in the house of the accused. The offender does not have to go and report the crime. It suffices that the offender knew the police were about to search the house or other personal affects of the person on whom he wants to let the blame fall.[8]

Carrara after making the division into verbal and real calumnious accusation further subdivides verbal calumnious accusation into **materiale** "quando s'inventa un delitto non esistente, per imputarlo ad una determinata persona ... **speciale** quando un delitto vero s'imputa a chi non vi ebbe parte ...; **formale** se il delitto vero s'imputa al vero deliquente, ma con circostanze false che ne modifichino la procresi criminosa".[9]

B. Simulation of Offence:

Section 109 (2) deals with the crime of simulation of offence and lays down:

> *"Whosoever shall lay before the executive police any information regarding an offence knowing that such offence has not been committed, or shall falsely devise the traces of an offence in such a manner that criminal proceedings may be instituted for the ascertainment of such an offence, shall, on conviction be liable to imprisonment for a term not exceeding 1 year".*

The simulation of an offence is considered as a crime because of the injury which it does to the administration of justice by misleading it. This crime differs from that of calumnious accusation in as much as in the simulation of an offence there is no specific accusation against any determinate person and there is not therefore the intent to cause an innocent person to be unjustly convicted or charged. Moreover the crime of calumnious accusation does not, like this crime, presuppose the inexistence of the material fact.

Like calumny, as was said in **Police vs Thomas Sapiano** (1959) "is-simulazioni ta' reat tista' tkun tant verbali jew diretta, kemm ukoll reali jew indiretta ... Jekk id-denunzjant jiddenunzja reat li kien jaf li ma sarx iżda ma jagħmel xejn biex joħloq it-traċċi ta' dak ir-reat hu jkun ħati biss ta' simulazioni verbali jew diretta. Biex ikun ħati anki tal-forma tas-simulazioni reali jew indiretta, hemm bżonn li traċċi tar-reat jiġu minnu realment u materjalment ċreati".

The simulation may be of any offence (i.e. a crime or a contravention) and it must be made in a manner as to make possible the initiation of criminal proceedings for the ascertainment of the supposed offence. The specific malice of this crime consists in the intent to deceive or

8. Crivellari, *Il Codice Penale*, Volume Sesto, (1895).
9. Carrara, *Programma, op. cit.*, para. 2613.

mislead justice by denouncing or making appear an offence which is known not to have been committed and not in the intent to harm directly by the simulation any other person.

Article 367 of the Italian Penal Code speaks of such fabricated offences and Article 369 speaks of false self-accusation whereby one declares falsely to be the perpetrator or an accomplice of a crime to which he was an outsider. As to the latter offence, **Crivellari** says that such a person should not be punished as nobody exposes himself to an unmerited punishment unless he has a proper motive to rid himself of guilt, unless he has a grave reason. But despite this, the code caters for this hypothesis and is favoured by Crivellari as it is the case of a person who plays around with justice and can lessen the trust of citizens in public security, thus rendering unpunished the true offender. **Crivellari** considers only one case in which the accuser commits a merciful sacrifice in directing the accusation to the salvation of a relative.[10]

Another offence contemplated under this class of offences is the crime of **perjury** in criminal and civil proceedings. Our law does not give a definition of this crime which is called false testimony in other systems of law. According to Crivellari perjury "si fa consistere in un giuramento falso scientemente prestato da una delle parti".[11] This is criminal not only because it is immoral but also for the real damage caused to the administration of justice; and if it occurs in civil cases, can be used as an instrument of fraud and theft.

In the United Kingdom, the law relating to perjury is the Perjury Act 1911 and runs as follows: "if any person lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding which a) he knows to be false or b) does not believe to be true, he shall be guilty of perjury".[12]

Perjury proper is dealt with in Sections 102, 103 and 104 of our Criminal Law; the first two relate to perjury in criminal proceedings and the other to perjury in civil proceedings. Although no definition is available in our code, perjury can be defined as any false statement in civil or criminal proceedings, material in such proceedings wilfully made by any witness, referee or interpreter lawfully sworn by the court. Perjury may therefore be said to require the following four essential ingredients:

a) testimony, reference or interpretation in judicial proceedings whether civil or ciminal;
b) an oath lawfully administered by the competent authority;
c) falsity of such testimony, reference interpretation in a material particular;
d) wilfulness of such falsity or ciminal intent.

With regards to (a) perjury cannot arise except if testimony,

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10. Crivellari, *op. cit.*
11. *ibid.*
12. Smith & Hogan, *Criminal Law*, 4th Ed., 1978, Butterworth's, p.71.

reference or interpretation has been given during a cause before a court. Falsity committed in any other case may constitute the crime of forgery or if an oath is required the crime of extra-judicial perjury, but not the crime of false testimony.

'Testimony' or personal evidence as distinct from real evidence means any statement or declaration possessed of probative force in respect of the facts stated or declared, made before a competent court under oath according to the provisions of the law.

'Reference' or expert opinion is the report ordered by the competent court to be made by referees or experts in cases where for the examination of a person or thing special knowledge or skill is required.

'Interpretation' refers to the situation in which the court appoints an interpreter where a person taking part in court proceedings is deaf and dumb or unable to write and such interpretation is given an oath.

Both parties in a civil suit and the accused in civil cases may give evidence. In so doing the parties are considered as witnesses and the provisions of the law relating to witnesses apply to such parties so that they may also be convicted of perjury. In fact in **Police vs Rita Portelli** the court said: "id-disposizzjoni tal-liġi li tikkontempla l-każ ta' min jagħti xhieda falza f'materja ċivili tgħodd ukoll jekk dak li jagħti xhieda falza ikun parti fil-kawża ċivili fejn jagħti dik ix-xhieda".[13] This is also the position held by Maino.

A person may be convicted of this crime only if the false testimony has been given in judicial proceedings. The Italian Criminal Code speaks of those who depose before the judicial authority. According to Manzini this includes both the common and the special judicial authorities. Ecclesiastical tribunals are excluded, but court martials are not.

In the United Kingdom, 1(2) of Perjury Act 1911 states that the expression judicial proceedings includes a proceedings before any Court, tribunal or person having by law power to hear, receive and examine evidence on oath.[14]

The relevant sections of our code speak of civil proceedings and criminal proceedings. Proceedings here mean court proceedings but the term must not be taken to include all court proceedings. Its meaning is limited to that of a cause, that is to say contentious proceedings which call for a decision. Consequently, false testimony given in proceedings before the court of voluntary jurisdiction does not fall under this crime. The same holds good for false testimony given before the Court of Magistrates sitting in the capacity of a court of criminal inquiry because such proceedings do not constitute a trial where a final decision is given.

If the Court before which the proceedings are brought lacks jurisdiction, perjury is impossible.

The second requisite for perjury to exist is that the false testimony shall have been given on oath lawfully administered by the

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13. *Police v. Rita Portelli*, Law Reports, Vol. XXXIII p.662.
14. Smith & Hogan, *op. cit.*, p.713.

competent authority. In other systems of law, like the Italian system, this requirement is not essential. But in our law if the testimony is not given on oath, no statement or affirmation however false, will constitute the crime. The situation as it obtains in England according to the Oaths Act 1888 is that one is permitted to affirm if he objects to taking of an oath on the grounds that he has no religious belief or the taking of oaths is not permitted by his religion.[15] This was extended by the Oaths Act of 1961 to whom it is not reasonably practical to administer an oath in the manner appropriate to his belief. In England, according to the Oaths Act, a person who has affirmed is subject to the law of perjury just as if ceremony used is immaterial as long as the person who administered them has authority and that they are accepted by the person taking the oath.[16] Hence if an atheist has agreed to swear on the Holy Bible, it would not later be an excuse to annul the testimony. The principles in English Law in this matter are completely coherant to our law. In Maltese law, the oath has not only a religious significance but also a legal one, the reason being that from the religious point of view, once a person answers what he is interrogated he may feel a further duty to disclose everything that may be relevant to the proceedings without being interrogated about them. Legally he has no such obligation. The authorities which are competent to administer the oath are those expressly indicated by the law i.e. every court and every judge and magistrate including judges' assistants according to recent legislation.

C. Falsity:

In dealing with false testimony our law simply speaks of 'giving false testimony' without specifying. English Law goes further and punishes the witness who being lawfully sworn in a judicial proceeding wilfully makes a statement material to that proceeding which he knows to be false or does not believe to be true. On the other hand in Article 372 the Italian code speaks of the witness who 'inanzi alla autorità giudiziaria afferme il falso o nega il vero, averso face in tutto o in parte ciò che sa intorno ai fatti sui quali è interrogato'.

Our code does not analyse the element of falsity but the same rules should apply. It is evident that mere refusal to testify does not mean perjury; such refusal is itself a crime (Section 515). Such refusal must not, however, be confused with the failure to disclose anything the witness may know about the facts. The oath is taken as power to speak the whole truth as far as he knows it. Therefore if he leaves out something he knows or says he knows nothing he fails in his duty and if he does it in bad faith or with criminal intent he is guilty of the crime of false testimony. The same may be said with regard to negative statements i.e. those in which the witness denies having seen or heard the facts on which his evidence is required. In fact Carrara says "il criterio della falsità della testimonianza non dipende dal

15. *ibid.* at p.712.
16. *ibid.*

rapporto fra il detto e la realtà delle cose ma dal rapporta fra il detto e la scienza del testimonio''.[17]

But in all cases in order that the crime of false testimony may subsist it is necessary that the falsity be material to the cause. This is expressly required in the UK Perjury Act 1914. If therefore the falsity falls upon irrelevant circumstances which whether true or false could in no way influence the result, the crime cannot arise because no possibility of injury which alone justifies the punishment would exist (Section 153 of Criminal Code & Section 554, 589 of Code of Organization & Civil Procedure).

The Italian Code mentions three ways in which evidence may be said to be false: (1) by affirming what is false; (2) by denying what is true; (3) by reticence.

(1) A witness affirms what is false when he makes a positive statement which does not conform to his knowledge of the facts or circumstances with which such statement deals, such as when one pretends to have received a perception which in fact he has not perceived or alters that perception which in fact he has had.

(2) A witness denies the truth when he makes a negative statement which does not conform to his knowledge of the facts or circumstances with which such statement is concerned. The witness may deny altogether that he has received these perceptions which in fact he received or while not denying the particular fact or circumstances, he denies that such fact or circumstance took place in the time, or place or manner that he knows it to have taken place.

(3) The Italian and Maltese notion of perjury includes reticence i.e. the failure to disclose in whole or in part that which the witness knows about the particular *factum probandum*. The English Perjury Act does not include this form of false testimony. Failure to disclose is different from refusal to give evidence or to answer any question put to the witness in court. Such refusal may constitute the crime contemplated in Section 515 or 130 of the Criminal Code but not the crime of perjury.

The fourth element: The formal element of this offence consists in the consciousness of uttering a falsehood or concealing the truth. Any error of forgetfulness excludes the criminal intent. Consequently it is necessary to prove this criminal intent. **(Chaveau et Helie).**[18] On the other hand, however, the criminal intent need not consist in the wish to injure any particular person. The question whether there was this criminal intent is one of fact, the solution of which depends on the particular circumstances of the case. The point is not settled among the authorities whether a person is liable to the punishment for false testimony who makes a false deposition to save himself. Article 384, of the Italian Code, exempts from punishment any person who, by manifesting the truth would inevitably expose himself or a close relative to a grave injury to his liberty or his reputation. Under our law the position would appear to be as follows: as regards the accused he is

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17. Carrara, *op. cit.*, para. 2678 – 2698.
18. Chaveau et Helie, No. 3072.

competent though not a compellable witness, and since all the provisions relating to witnesses shall apply to the accused giving evidence on oath, if he makes a false deposition, he becomes guilty of a false testimony. As regards all other witnesses the general rule is that no witness can be compelled to answer questions which might subject him to a criminal prosecution. But if the witness does not claim the privilege to which he is entitled and gives his reply on oath he cannot alter or pervert the truth and if he does he is guilty of false testimony **(Police vs Vassallo 1948)**. However, if he was wrongly compelled by the court to give a reply, then if he gives a false answer, it does not seem that he could be held guilty of a crime. What we have said applies only to the position which might expose the witness himself to criminal proceedings. Finally, persons bound to secrecy by their profession e.g. advocates and priests may not be compelled to disclose certain matters which the law itself covers with privilege (Section 638 of Criminal Code and Sections 587 & 689 (2) Code of Organisation & Civil Procedure).

D. Retraction:

Italian law provides that in case of perjury: "il colpevole non è punibile se, nel procedimento penale in cui ha prestato il suo ufficio, ritratta il falso e manifesta il vero prima che l'istruzione sia chiusa con sentenza di non doversi procedire, ovvero rinvista a cazione della falsità . . . la falsità sia intervenuta in una cause civile, il colpevole non è punibile se ritratta il falso e manifesta il vero prima che sulla domanda giudiziale sia pronunciata sentenza difinitiva anche se non irrevocabile".[14] (Article 376).

Our Criminal Code does not contain any express provision to this effect. But the principle of retraction has been accepted in our case-law. In the appeal case **Rex vs P. Borg** the accused was charged with having knowingly purchased stolen property and moreover with having given false evidence. With regard to the charge of perjury, counsel for the defence contended that there had been timely reteraction and, therefore, there was no offence. The Court (C. Borg C.J., Edg. Ganado & Harding J.J.) held that retraction, if timely, negatives the offence – it is timely if made before the termination of the proceedings. The principle the Court held, may be inferred from Section 601 of the Code of Organisation and Civil Procedure applied to criminal proceedings by Section 641 of the Criminal Code. That Section lays down that if the witness or interpreter at any time before the hearing of the case is concluded wishes to make any addition or correction, the Court shall allow such addition or correction and shall give weight thereto according to circumstances.

There is no doubt that retraction comes well within the notion of "any addition or correction" mentioned by the Law in section 601 of the Code of Organisation and Civil Procedure and section 641 of the Criminal Code. The provision also indicates the time within which retraction is to be admissable.

The main reason why our courts have endorsed this principle of retraction is that the different parts of testimony form one whole. Hence such a testimony cannot be considered complete and irrevocable except

when the discussion on the cause is closed. Section 515 of the Criminal Code says that the courts may lead a witness who has been drifting away from the truth back to it, by warning him, keeping him apart, or even arresting him Yet even in such a case, the witness is free from any punishment if he retracts. Moreover, it is sufficient if the retraction is voluntary. No spontaneity is necessary.

In Malta, if retraction takes place during the **Appeal Stage** there is no liability. In Italy as soon as **particular** proceedings are closed i.e. when the sentence of the Court of 1st instance is given, one is liable even if one attempts retraction on appeal.

Crivellari also points out that if the offender retracts the accusation or reveals the simulation before any proceedings against the victim, there is a lessening of punishment. If the retraction happens afterwards but before the verdict is pronounced, there is lessening of punishment but not to the extent aforestated.[19] In Section 16 of the Criminal Code we read that if the Criminal Court feels that the witness is given a false testimony, it can order that the person be put under the Court of Judicial Police for the necessary enquiry. If the situation occurs under the Court of Judicial Police this court shall act ex officio. This power is also vested in the Civil Courts. Here, the point arises whether the witness under enquiry still has the right of retraction. If the witness retracts at this stage he may be free from liability if the proceedings of the cause have not yet been closed. If however on account of the witness concerned the court proceedings would have had to come to a standstill, till the proceedings of the false testimony are terminated, he cannot any longer retract. The reason is that in such a case the decree by the court of suspension until the proceedings of perjury are over is regarded as closing the hearing of the cause at this stage. Witness has hindered justice to such a degree that he can no longer be liberated from any punishment not even if he volontarily retracts during the enquiry stage before the Court of Judicial Police.

E. False Swearing:

This subject is dealt with in the Criminal Code in various sections. Section 105 extends the punishment of false testimony to referees or experts or interpreters. The moral element of this crime is clearly indicated by the words "knowingly" and "maliciously". Here the law punishes the deliberate and intentional perversion of the truth. Section 100 deals with the crime of subornation of false testimony, false reference or false interpretation. Subornation is the instigation to commit any one of the crimes mentioned in this section. It is the procuring of a business to make a false testimony or of a referee to make a false report, or of an interpreter to make a false interpretation in each case in a civil or a criminal cause. Section 101 deals with fabrication or production of false evidence. Documentary evidence plays a very important part in most judicial trials. Therefore any person who prepares, puts together or brings up any false document for the

19. Crivellari, *op. cit.*

purposes of any criminal or civil proceedings, and any person who knowingly produces any false document although he may not have himself prepared or brought up such document, are dealt with by the law as if they had themselves originally forged the document.

Judicial perjury is dealt with in Section 106. This section deals with false statements on oath made otherwise than by a witness or a party, or the accused or a referee in a civil or criminal cause, or by an interpreter in a judicial proceeding.

The elements of this crime are:

1. a false statement
2. wilfully made
3. on oath
4. before a person authorised by law to administer oaths

Section 110 speaks of the offence which consists in deterring a person from coming forward to give necessary information or evidence in a civil or criminal cause or to the competent authority.

The second species of the same offence consists in knowingly suppressing, destorying or altering the traces, or the factual evidence of an offence.

ID-
DRITT

Outlook

EXTERNAL STUDIES WITH THE UNIVERSITY OF LONDON

After completing their studies in the University of Malta, many students have sought to further their education by taking up graduate and/or post-graduate studies in universities overseas, especially in the United Kingdom and Italy. This is perhaps more common in faculties such as Medicine rather than Law, but interest in foreign degrees is steadily mounting. Acquiring a foreign degree often means further specialisation, prestige and a better chance of obtaining a good job in Malta and abroad. Many students however find it impossible to even contemplate studying abroad because of the financial difficulties involved. An excellent way of overcoming these difficulties is to take up external studies with a reputable foreign university, and in this short paper we are taking a look at the facilities for external students in an institution which has long found favour with the Maltese, the University of London. First and Higher degrees may there be taken in a variety of subjects, but we are here restricting ourselves to the field of Law.

Although the scope of this paper is limited to **External Studies,** (a review of **Internal Studies** in the same University may perhaps be featured in the **OUTLOOK** section of a forthcoming issue of ID-DRITT), we have thought it interesting to include the following brief rundown of the facilities available in the University of London's Faculty of Laws, together with some relevant information, applicable and useful to both Internal and External Students.

FACULTY OF LAWS

Degrees
Bachelor of Laws (LLB); Master of Laws (LLM); Master of Philosophy (MPhil); Doctor of Philosophy (PhD); Doctor of Laws (LLD).

Schools of the University
King's College London, London School of Economics and Political Science, Queen Mary College, University College London, School of Oriental and African Studies.

Notes: 1. Information as to qualification as Solicitor should be sought from the Law Society, Chancery Lane, WC2A 1PL, London.

2. Information regarding examinations for the Bar should be sought from the Council of Legal Education, Gray's Inn Place, WC1 5DX, London.

3. Candidates may apply to register for the LLB Degree of the University in English and French Law. The course of study for this degree extends over four years full time, two years of which are spent at King's College London and two years at the University of Paris I. For details of the course candidates should write to the Registrar, King's College London.

4. The London School of Economics offers a Degree of Bachelor of Laws with French Law. The third year of the course is taken at the University of Strasbourg. Details of the course are available from the Registrar, the London School of Economics.

A. WHAT DO EXTERNAL STUDIES ENTAIL?

Before making any commitment to a programme of study, the student should consider very carefully what is entailed. Those who have not appreciated in advance the time and effort involved often experience a sense of failure when they do not succeed in reaching the standards required. That success is possible is proved by the number of students whose names appear on the pass lists each year but it becomes possible only if a careful assessment is made of the implications of external study and if plans are related realistically to the assessment. The examinations taken by the External Student do not differ in standard from those taken by Internal Students, for most of whom study under the guidance of University teachers is their main commitment. The External Student may have to reconcile the demands of his course with those of his family and of his occupation; moreover he may have to go to several different sources to clarify a point which could be dealt with briefly by the Internal Student's teacher. Clearly the part-time student will expect to spend longer over his course but so much depends on the individual's power of assimilation, on the background knowledge which he already possesses and on his other commitments that it is impossible to suggest a time-scale for a part-time student working for a degree. Registration for a first degree or diploma is valid for a maximum period of eight years. Many students are able to complete the degree examinations well within this time but five years should be considered as a reasonable minimum period to devote to study and for most degrees this is prescribed as a minimum for the part-time student. Students are asked without final commitment to state in advance their plans for taking examinations and this is another area for realism. a premature attempt at an examination courts failure and resultant loss of confidence. Postponement within the eight year period is always possible and sometimes advisable.

A.1 THE RELATIONSHIP OF THE UNIVERSITY TO ITS EXTERNAL STUDENTS

The University has two main classes of student – Internal and External. Both must satisfy the University requirements for registration and both must pass the examinations prescribed by the University in order to qualify for the award of a degree; but whereas an Internal Student must follow a regular course of study in one of the colleges of the University and under the guidance of its Teachers, the University does not provide courses of instruction for its External Students and generally speaking they are free to determine for themselves the way in which they prepare for its examinations.

The University of London awards its degrees to External Students solely on their performance in examinations, and many thousands of men and women throughout the world have thus been enabled to qualify. They have prepared themselves by attendance full-time or part-time at institutions, by a correspondence course, or by private study. For 128 years, from 1836 when the University was founded to the founding of the Council for National Academic Awards in 1964, the University of London offered the only opportunity of obtaining a degree without attending a university.

While the University does not offer courses of instruction to External Students it does provide an Advisory Service, (See D4).

A.2 ENTRANCE REQUIREMENTS

Qualifications for entry to degrees and diplomas of the University of London are normally stated in terms of passes and grades at ordinary and advanced level at a General Certificate of Education examination. There are however other ways of qualifying. These are detailed in a pamphlet entitled 'University Entrance Requirements' but the student can best obtain a ruling on his individual position by writing to the Secretary for Entrance Requirements giving full details of his present educational and professional qualifications and stating the course for which he hopes to study. If his qualifications prove satisfactory after checking he will be issued with a Statement of Eligibility.

Every Student has to hold a Statement of Eligibility. The University Entrance Requirements Division is always under pressure and at particular times considerable delays occur. If the student does not wish to be delayed he should make these enquiries as early as possible and should reply promptly to requests for documentary evidence. With his Statement of Eligibility a student will receive a registration form. A student should not begin any course until he has completed and returned that form, and been registered.

A.3 COST

The cost of obtaining a degree as an External Student falls under three heads:

(1) fees payable to the University for registration and entry to examinations;
(2) tuition fees, if any;
(3) purchase of books and incidentals.

It is difficult to be precise about what is involved under any but the first heading. Tuition fees depend on the kind of tuition arranged. In making enquiries about the alternatives available to him the student should not forget to explore the cost, especially the expense involved in travel, since all examinations must be taken in London.

B. FIRST DEGREES – BACHELOR OF LAWS (LL.B)

Although it is not a professional qualification, (Obtaining the LL.B degree does **not** automatically enable the graduate to practice as a Solicitor or as a Barrister in the U.K.), the LL.B's importance is enhanced when seen as a stepping stone to students who wish to take higher degrees **on an external basis**. (See note to section on Higher Degrees).

B.1 ENTRANCE REQUIREMENTS

General Entrance

It is possible to satisfy the general entrance requirements for a degree in any one of three different ways:

1. By holding G.C.E. passes in approved subjects to fit either Scheme A or Scheme B.

Scheme A. 2 Advanced level passes and 3 Ordinary level passes.

Scheme B. 3 Advanced level passes and 1 Ordinary level pass.

Note: G.C.E. Ordinary level qualifications obtained in Examinations in and after June 1975 must be of Grade A, B or C. Grades below C will not be accepted in satisfaction of entrance requirements. The same subject may not be counted at both levels. Passes need not have been obtained at the same examination or on the syllabus of the same examining board.

2. By holding a degree of an approved university.
3. By holding an approved professional qualification obtained by examination.

LL.B. REQUIREMENTS

A candidate must satisfy the general entrance requirements under Scheme A or Scheme B, in approved subjects, and these must include either a pass at grade C or above in one of the 'A' level subjects or passes at not less than grade D in two 'A' level subjects.

'A' level subjects which provide a useful background for degree studies in Law are History, Government and Political Studies/British Constitution or Constitutional Law, and General Principles of English Law. Law subjects are set only by the AEB and the Oxford Board in the G.C.E. examinations.

Note: Government and Political Studies/British Constitution and Constitutional Law are counted only as one 'A' level pass for degree entrance, so only one of these subjects should be offered.

B.2 EXAMINATION

To be taken in three parts. Intermediate Laws must be completed before Final Part I, and Final Part I before Final Part II.

The normal minimum period of study (registration period) for external part-time students is four years, and students are normally required to spend a minimum of two years preparing for the Intermediate Examination in Laws, and one year each for the Final Part I and Part II examinations.

Examinations are held in June each year.

B.3 STATUTES AND OTHER DOCUMENTS IN THE EXAMINATION ROOM

London University do not provide statutes or other documents in the examination room. However, candidates for the Final LL.B. Examination are permitted to bring into the examination room:

1. A Queen's Printer copy of any statute which the Regulations for the time being state that a candidate may bring into the examination room and of any statute, amending the permitted statutes, passed since 1980 or such later date as may be stated in the Regulations;
2. A copy of any other material which the Regulations for the time being state that a candidate may take into the examination room.

Personal annotation on statutes and other materials permitted to be taken into the examination is forbidden. This includes underlining, the circling of key words, the use of coloured highlight markers and any other form of marking.

For the Intermediate Examination in Laws no statutes or other documents are permitted in the examination room.

B.4 INTERMEDIATE LAWS (*ALL FOUR* SUBJECTS TO BE TAKEN)

No exemptions are given by London University from the whole or from any subject of the Intermediate Laws examination except in the cases set out below:

(1) Candidates who have obtained the London University B.A. General degree or B.Sc. Economics degree or the B.Sc. Estate Management degree having taken certain Law subjects for these degrees;

(2) Candidates who have obtained degrees of London University other than the B.A. General degree, the B.Sc. Economics degree or the B.Sc. Estate Management degree which have included the study of Law with syllabuses similar to those prescribed for the Intermediate Laws examination (each application of this kind is considered individually on its merits);

(3) Graduates of other Universities or holders of CNAA degrees whose studies for their degrees have included Law, with subjects corresponding to the subjects of the Intermediate Examination in Laws (each application will be considered individually on its merits).

(4) Candidates who have passed an Intermediate or equivalent examination in Laws at a University in the British Isles or under the CNAA (each application will be considered individually on its merits).

(5) Candidates who have passed the Examination for Call to the Bar of England and Wales as conducted by the Council of Legal Education of London or the Qualifying Examinations of the Law Society of England may apply for exemption from the whole of the Intermediate Examination in Laws. Applicants will be required to submit official evidence of their qualification.

(6) Candidates who are qualified to practise as barristers or solicitors outside England may apply for exemption from the whole or part of the Intermediate Examination in Laws. Applicants will be required to submit official evidence of the qualification they hold and of their examination syllabus. Each application will be considered individually on its merits.

B.5

The following is a breakdown of many of the subjects set for the LL.B examinations. Also included are a list of recommended text-books, in order that Maltese law-students may obtain an idea of the material already covered in the LL.D course of the University of Malta.

B.5a Intermediate Laws

1. CRIMINAL LAW

Smith & Hogan: Criminal Law.....Butterworth.
Smith & Hogan: Criminal Law.....Cases & Materials.....Butterworth.
Smith: The Law of Theft.....Butterworth.
or
Griew: The Theft Acts 1968 & 1978.....Sweet & Maxwells.

2. CONSTITUTIONAL LAW

S.A. de Smith: Constitutional and Administrative Law.....Penguin.
or Hood Phillips: Constitutional and Administrative Law.....Sweet & Maxwell.
or Wade & Phillips: Constitutional Law & Admin. Law.....Longmans.

3. CONTRACT

Cheshire & Fifoot: Law of Contract.....(Limp,) Butterworth.
Cheshire & Fifoot: Cases on the Law of Contract.....Butterworth.

4. ENGLISH LEGAL SYSTEM

Kiralfy: English Legal System.....(paperback) Sweet & Maxwell.
Radcliffe & Cross: English Legal System.....Butterworth.
Maitland: Forms of Action at Common Law.....C.U.P., paperback.

B.5b LL.B. FINAL PART I
(FOUR SUBJECTS TO BE TAKEN)

(1) LAW OF TORT
Street: Law of Torts.....(paperbacks), Butterworth.
Weir: Casebook on Tort.....Sweet & Maxwell.

(2) LAW OF TRUSTS
either Snell: Principles of Equity.....Sweet & Maxwell.
or Hanbury: Modern Equity.....(paperback) Stevens.
Parker & Mellows: the Modern Law of Trusts.....Sweet & Maxwell.

(3) ENGLISH LAND LAW
Cheshire: Modern Law of Real Property.....Butterworth.
or Megarry: Manual of the Law of Real Property.....Stevens.
Wontner: Guide to Land Registry Practice.....Oyez Publishing Ltd.

(4) **ONE** of the following:

(a) ENGLISH ADMINISTRATIVE LAW
Garner: Administrative Law.....Butterworth.
or H.W.R. Wade: Administrative Law.....O.U.P.

(b) LAW OF EVIDENCE
Cross on Evidence.....Butterworth.

(c) MERCANTILE LAW
Atiyah: The Sale of Goods.....Pitman.
Fridman's Law of Agency.....Butterworth.
Markesinis and Munday: an Outline of the Law of Agency.
The Consumer Credit Act 1974.....H.M.S.O.

(5) ROMAN LAW

(6) AFRICAN LAW

(7) MUHAMMEDAN LAW

(8) HINDU LAW

B.5c LL.B. FINAL PART II
(**FOUR** SUBJECTS TO BE TAKEN: (5) JURISPRUDENCE AND ANY **THREE** OF (7) to (23))

(5) JURISPRUDENCE AND LEGAL THEORY
Lloyd: Introduction to Jusiprudence.....Stevens.
Dias: Jurisprudence.....Butterworth.
Note: Both books are essential.

(7) (R) LAW OF EVIDENCE If not already taken for PART I – see Part I above.

(8) ENGLISH ADMINISTRATIVE LAW

(12) HISTORY OF ENGLISH LAW
Baker: Introduction to English Legal History.....Butterworth.
Potter: Historical Introduction to English Law.....(paperback), Sweet & Maxwell.
Maitland: Forms of Action.....(paperback) C.U.P.

(13) PUBLIC INTERNATIONAL LAW
Schwarzenberger: A Manual of International Law (6th ed. 1976).....Professional Bks.
Harris: Cases and Materials on International Law.....Sweet & Maxwell.

(14) CONFLICT OF LAWS
either Graveson: Conflict of Laws.....Sweet & Maxwell.
or Cheshire: Private International Law.....Butterworth.

(16) (R) SUCCESSION
Parry & Clark: The Law of Succession.....Sweet & Maxwell.

(17) MERCANTILE LAW (if not already taken at Part I)
Atiyah: The Sale of Goods.....Pitman.
Fridman's Law of Agency.....Butterworth.
Markesinis and Munday: An Outline of the Law of Agency.
The Consumer Credit Act 1974.....H.M.S.O.

(19) (R) FAMILY LAW
Bromley: Family Law.....Butterworth.

(21) (R) COMPANY LAW
Charlesworth and Cain: Company Law.....Stevens.

C. HIGHER DEGREES

For more detailed information reference should be made to the pamphlet 'Higher Degrees for External Students' which may be obtained on request from the Secretary of External Students.

Graduates of the University of London* may apply for registration as External Students for some Master's degrees, and the degrees of Master and Doctor of Philosophy.

Master's degrees may be examined by written papers or thesis or by a combination of these. The M.Phil. degree requires the submission of a thesis, and in some subjects written papers are also included. For the Ph.D. degree, a thesis is required. For all higher degrees (other than LL.M.) an oral examination is required, which will be conducted only in London.

While acceptance for registration for a first degree is in most cases automatic, provided the candidate satisfies the entrance and course requirements, further conditions must be satisfied by a candidate for a higher degree and each case is considered individually by the Board of Studies concerned.

The University does not appoint supervisors for External Higher Degree students. It does, however, insist on initial consultation with an Adviser as a condition of registration. The Adviser is normally a Teacher of the University who is appointed to discuss the candidate's proposals in detail, to assist in their precise formulation, and to advise the Board on their acceptability. Subsequent consultations with an Adviser can be sought as required, but a consultation is normally mandatory when the thesis title is to be approved.

The registration fee for a higher degree is at present £115, including the fee for initial consultation with an Adviser. Separate fees are charged for subsequent consultations with an Adviser. Entry to the Examination costs £120 for M.Phil. and Master's degrees, or £150 for Ph.D. in 1982 – 83.

* Those who are not already graduates of the University of London are debarred by the Statutes of the University from registration as External Students for higher degrees. This means that it is not within the power of the Senate to make special exceptions, and applications from graduates of other universities cannot be considered (unless, of course, they also possess a degree of the University of London).

D. SOME PRACTICAL TIPS

D.1 HOW TO START

If you wish to read for a London University external degree you should:

1. Make sure that you have the right qualifications to satisfy London University entrance requirements for the degree of your choice.
2. Obtain from London University the full regulations and syllabus for your degree.
3. Register at London University as an external student.

Obtain, from the Secretary for External Students, University of London, Senate House, London WC1E 7HU, three publications (the first two of which are provided free of charge). They are:

1. The General Information Pamphlet for External Students, which explains the external examination system, the advisory service for external students and the university library facilities.
2. The regulations relating to entrance requirements.
3. The regulations and syllabus for your chosen external degree or diploma, which gives details of examination entry fees and dates as well as a detailed subject syllabus.

New issues of degree regulations and syllabuses are published each year in September. Amendments to them are issued from time to time and are sent to registered students automatically. Copies of past examination papers are obtainable from the University of London Publications Office, 52 Gordon Square, London WC1H 0PJ. Be careful to ask for EXTERNAL examination papers. Copies of past papers are not expensive. A price list is available from the Publications Office.

REGISTERING AT LONDON UNIVERSITY

Registering at London University means placing your name on the list of members of London Univesity and paying a registration fee.

For all degrees and diplomas the procedure is as follows:

1. Write to the Secretary for Entrance Requirements, University of London, Senate House, Malet Street, London WC1E 7HU for the University entrance requirements and regulations (if you have not already obtained a copy) and for Form M.

2. Complete Form M, stating the external degree or diploma you wish to take, and return it to London University. If you have the necessary qualifications you will be sent a Statement of Eligibility and a Registration Form R.

3. Complete Form R and send it by registered post or recorded delivery to the Secretary for External Students, University of London, Senate House, Malet Street, London WC1E 7HU together with the registration fee. If your registration is approved a copy of Form R will be returned to you together with a special card for applying later for an examination entry form. You will not need to make a separate application for approval of candidature to take your examination in a particular year.

In general, registration by external part-time students must normally be effected five academic years before entry to a degree final examination (exceptionally, the LL.B degree requires only four years registration period). This registration is then valid over a period of eight years. Five years is considered a reasonable period for external part-time students to devote to their studies for a degree, and for some degrees (e.g. B.Sc. Economics) this is prescribed as an absolute minimum by London University. Postponement of the examinations for any reason is always possible and sometimes advisable.

To all intents and purposes, an academic year is the same as a calendar year. London University will consider, individually on their merits, applications for reductions in this five-year period, but such reductions are generally given only to graduates of approved universities or holders of approved professional qualifications obtained by examination.

D.2 LONDON UNIVERSITY STUDY NOTES

Candidates are strongly recommended to make use of the London University Advisory Servicc for External Students and to obtain

the London University study notes and reading lists for the LL.B. which are available free of charge from the External Department of London University.

D.3 VACATION AND OTHER SHORT COURSES

A number of vacation and other courses are provided annually for registered External Students by the University of London and by some other Universities. Nearly all these courses are specially designed for External Students and they are strongly recommended for students studying privately. A list of vacation courses is included in the Regulations for those degrees for which they are available, or a separate list can be obtained from the Secretary for External Students.

D.4 THE ADVISORY SERVICE AND OTHER FACILITIES FOR EXTERNAL STUDENTS

The University does not provide courses of study by correspondence for private External Students. It provides lists of correspondence courses provided by other institutions but does not advise on their relative merits. Its Advisory Service has been established primarily to assist the private student in the following ways:

(a) by giving advice about the most appropriate qualification to work for, facilities for study which may be available, the content of University syllabuses, library facilities and other facilities for any special preparation which may be required, e.g. oral tuition for language studies, field work, etc.;
(b) by providing in many subjects reading lists or notes which have been prepared by the academic staff of the University outlining the nature and content of the course of reading and other preparation which is required for the particular examinations;
(c) by giving advice in special cases to the student on matters such as the standard of his performance in any University examination which he may have taken during the progress of his studies;
(d) by making arrangements for short courses in some subjects where it is difficult for the External Student to obtain access to the necessary facilities.

The University of London Careers Advisory Service (ULCAS) provides a comprehensive careers guidance and employment service for students and graduates of the University.

All the careers advisers on the staff of ULCAS are graduates who have had considerable work experience outside universities. They may be consulted by appointment, both during term and in the vacations, at the Central Office, 50 Gordon Square. In addition, during term-time, the advisers pay regular visits to the following Schools of the University to see and advise students: Bedford, Chelsea, Imperial, King's, Queen Elizabeth, Queen Mary, Royal Holloway, University, Westfield and Wye Colleges, the

London School of Economics and the School of Oriental and African Studies. The advisers also visit Goldsmiths' College.

ULCAS maintains close links with a very large number of employers in all fields, including the Civil Service, commerce, private and nationalised industries, teaching and other professions, local government, the Police Service, social services, HM Services, research and cultural organisations. Thus whatever career interests are expressed, all necessary information about vacancies, application procedures, training and prospects can readily be provided. Further, the advisers can be of positive help when decisions about careers have to be taken, and are able to give sound advice on the suitability of choices. The careers advisers are backed up in their work by an experienced support services staff and, in this context, particular attention should be drawn to the Information Room and Reference Library facilities available at the Central Office.

Students reading for first degrees are strongly advised to seek careers advice during the latter half of their second year at the University and again at the beginning of their third year. ULCAS is always available to students undertaking postgraduate courses or research and to those graduates already in employment who want independent advice on their progress and likely future prospects or wich to discuss alternative possibilities.

Address: University of London Careers Advisory Service, Central Office, 50 Gordon Square, London WC1H 0PQ. *Telephone:* 01-387 8221.

D.5 SCHOLARSHIPS, STUDENTSHIPS AND OTHER AWARDS

The University offers certain exhibitions and scholarships for award to undergraduate students and a number of studentships and fellowships are available for postgraduate study and research. A small number of prizes for both undergraduate and postgraduate work are also available. Many of these awards are, by the conditions of benefactions under which they were instituted, restricted to particular fields of study. Full details may be obtained on request from the Secretary, Scholarships Committee, Senate House, WC1E 7HU.

Particulars of entrance or other scholarships awarded by Schools of the University and by Institutions having Recognised Teachers may be obtained from the Secretary of the School or Institution in question.

(Students who intend to enter into articles of clerkship with a solicitor are advised to apply for a copy of the Regulations for the award of the Scholarship of the Law Society. Address: The Principal and Director of Legal Studies, Law Society's Hall, 113 Chancery Lane, WC2A 1PL).

D.6 USEFUL PERIODICALS

General

New Law Journal.....Butterworths (published weekly).
Modern Law Review.....Sweet & Maxwell/Stevens (Six parts a year).
Law Quarterly Review.....Sweet & Maxwell/Stevens.
Sweet & Maxwell's Students Law Reporter.....Sweet & Maxwell/Stevens (Published three times a year).
Cambridge Law Journal.....C.U.P. (One volume of 2 parts each year).

Specialist

The Criminal Law Review.....Sweet & Maxwell/Stevens (published monthly).
Public Law.....Sweet & Maxwell/Stevens (published quarterly).

Information about Periodicals can be obtained direct from the Publishers. Addresses to which to write are as follows:

Butterworth & Co. (Publishers) Ltd.,
Borough Green,
Sevenoaks, Kent,
Sweet & Maxwell/Stevens,
North Way,
Andover,
Hants. SP10 5BE.
Cambridge University Press,
Bentley House,
200, Euston Road,
London, N.W.1.

CONCLUSION

While we trust that the information reproduced above will prove to be both interesting and useful to law students, prospective external students are advised to obtain more detailed information directly from the University of London with the help of the various addresses indicated throughout this review.

(Condensed from various publications and guidelines prepared by the University of London and Wolsey Hall Correspondence College, Oxford).

Reports

THE LAW SOCIETY 1984

Joseph Ellis*

The new committee of the law society took office in December 1983 after the Annual General Meeting which was held on November 29 of the same year. In this Annual General Meeting, the Law Representative Committee and the Għaqda Studenti tal-Liġi merged together and the latter body became the sole representative society of the law students at the University.

The last activity of the outgoing committee was the organization of a seminar entitled "New Trends in Company Law" in which Professor J. A. Micallef, Head of the Department of Commercial Law, Dr. J. Borg and Dr. D. Vella took part. The seminar was held on the 29th of November 1983 and the panel discussed the future of Commercial Law especially in the light of the E.E.C. Commission directives.

As already mentioned, the present committee took office in Mid-December 1983, which is not exactly an ideal time for a new committee to start to function especially in view of the fact that, for most committee members, examinations were just round the corner. The committee's first step was to set up a number of sub-committees to deal with individual matters like publications, "Id-Dritt", the publication of Constitutional Court Decisions and so on. These sub-committees were intended to divide the work-load of the Law Society in a rational manner. Unfortunately, the student response to these sub-committees was weak and consequently progress was slower than anticipated.

In January, two activities were held. The first was a seminar, on January 12, on the concept of Worker's Participation. The speakers were Profs. J. A. Micallef, Dr. E. L. Zammit of the Workers's Participation Development Centre and Dr. Michael Frendo.

The second activity, held on January 27th 1984 was the visit of the Honourable Judge Marven Aspen from Illinois, U.S.A. His visit was made possible through the kind offices of The American Centre. His talk on the protection of individual rights under the U.S. Constitution was attended by many law students and members of the Faculty of Law, and we look forward to similar initiatives in the future.

In March, despite this being an examination period for half the Faculty, a Latin American night was organised for students and their friends. The dinner was well attended and held in an amicable atmosphere. It is hoped that in the future, more occasions be held to bring together the students of both study phases.

April was a particulary successful month by way of activities. On the 14th of April, a seminar was held on the theme of 'The Computer

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and the Law'. The panel which was chaired by Dr. A. Bencini, LL.D. consisted of Mr. H. Restall, Mr. J. Cannataci and Dr. Michael Frendo. This seminar gave rise to a fruitful discussion during which various proposals were discussed. As a result, a committee is being set up, including a representative of the Law Society, to examine the feasability of a legal data bank in Malta. The Law Society is also ensuring that our Faculty will benefit from the computerization project to be commenced next year at the University, and talks have already been held with those concerned.

From April 21 to 28, our society was particularly privileged to host Profs. and Mrs. Mauro Cappelletti of the European University Institute. Profs. Cappelletti is the author of many books and is well known in comparitive law circles. We were particularly fortunate to have him over to give us a series of three highly interesting lectures on "The Dimensions of Justice in Modern Times", "The Protection of Collective and Diffuse Interests" and "Models of Legal Aid". Profs. J. M. Ganado, Head of the Department of Civil Law, was instrumental in contacting Profs. Cappelletti, and the Italian Cultural Institute paid his air-fare. It is hoped that in the future, lecturers of the calibre of Profs. Cappelletti be brought to lecture us and the Law Society is working towards these ends. One would wish, however, that the participation of law students be more numerous on such occasions for even though some of these lectures may not have direct relevance to our curriculum, they certainly contribute to a sound legal culture.

On the 19th of May a seminar was held with the title "Is Judicial Review of Administrative Discretion still possible in Malta after Act VIII of 1981?" The panel, consisting of Dr. Vanni Bonello, LL.D., Dr. Ian Refalo, LL.D., and Dr. Joe Brincat, LL.D., M.P., provided an interesting discussion on this highly controversial topic. Though no clearcut solution was given to the problem discussed, various possibilities were explored and the need was expressed to overhaul the administrative law set up in these islands.

The Għaqda Studenti tal-Liġi has also embarked on an ambitious study project on Maltese Constitutional Reform. The aim of this exercise is to take a close look at our present constitutional set-up, compare it with foreign constitutions and identify ways and means of improving the basic law of Malta. The participating students have been divided into four seperate study groups each dealing with Fundamental Human Rights, Seperation of Powers, The Electoral Process and Democratic Institutions. Each study group, under the guidance of one or more lawyers, is expected to report on its findings and conclusions at a National Conference which the Law Society will call within a year or so.

The Għaqda Studenti tal-Liġi has not ignored one of its primary roles, that is, to act as a students' union when necessary. From time to time, representations were made with the competent authorities on issues which closely affect law students. In November 1983 the issue of granting leave to student-workers was resolved to the satisfaction of most student-workers with the exception of some sponsored by a particular government

department. This issue, however, still awaits a complete solution.

Following repeated representations with the University Registrar, legal publications are again being reprinted and the shortage of notes which existed a semester ago has started to disappear. The Għaqda Studenti tal-Liġi has also repeatedly drawn the attention of the authorities to the disastrous shortage of staff at the Faculty of Law. It is our belief that such a shortage is causing untold harm to students and members of the faculty alike. It is our hope that both the senate and council act on the suggestions of the Advisory Committee on legal education and beef up the complement of the Faculty of Law.

Individual cases have also been dealt with in and out of the Faculty Board. One such case concerns the question of re-sits and though no tangible results have as yet been arrived at, it is to be hoped that the committee dealing with this problem recently set up by the Senate would favourably review the present situation. In the near future, the Law Society has to exert more pressure on this issue. The Law Society will also be monitoring very closely any proposed re-structuring of the present examination system which may have an adverse effect on the law student community. This would follow the results of a new committee to be set up by the Senate following a Faculty Board motion to study the possibility of an examination held every two years for law students.

As one may have seen in the short span which has passed since the Autumn issue of "Id-Dritt", the Law Society has not remained idle. In order to increase the momentum of activities, there is not only the need of hard-working committee members who often put the committee's work before their own personal interests but also a valid student participation coming forward with ideas and suggestions and willing to take part in the various organised projects. The Law Society is not merely the nine committee members but embraces the whole of the law student body. We trust, that during the next semester too, the Law Society will have a valid contribution to make towards the improvement of legal education in Malta.

BOOKS RECEIVED

ID-DRITT Law Journal is subscribed to by several universities overseas especially in the United States, the United Kingdom and West Germany. Some of these universities exchange their own law journals with ID-DRITT by way of subscription and these are available for consultation in the Barclays Room of the University of Malta Library or in the Law Society's Office. We are here publishing the titles and an indication to the contents of some of these journals as an information service to our readers, especially law students and Faculty Staff.

1. CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL
(Vol. 13 No. 2 – 1983)

Customary International Law and the United Nations Law of the Sea Treaty
The Institutional Framework of Inter-American Relations
The Endangered Right to Privacy: Use of International Norms by Municipal Forums

2. NORTHROP UNIVERSITY LAW JOURNAL OF AEROSPACE, ENERGY AND THE ENVIRONMENT

Volume 2 (1980) – Solar Energy Issues
Volume 3 (1981) – Environmental Issues
Volume 4 (1983) – Aerospace (Photogrammetry and Remote Sensing Update)

3. HOLDSWORTH LAW REVIEW (University of Birmingham)

Vol. 8 Spring 1983
Preserving Freedom under the Law
Equity looks to the intent not to the form
Matrimonial Property Law Reform: Choosing a new Legal Regime
The Free Movement of Goods and Intellectual Property Rights

Vol. 8 Autumn 1983
Towards a rational Criminal Law
Prospects for Regional Protection of Human Rights in Africa
The Demise of the Game Law System – A Study in Attitudes
A Legal Evaluation of The United States Proposal For The Development of an Orbiting Defence System

4. HOUSTON JOURNAL OF INTERNATIONAL LAW –
Volume 5/Autumn 1982

The Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law
The International Court Of Justice – A Proposal To Amend Its Statute
Teaching, Studying, and Researching Law Abroad: Taxes on Vacation
International Human Rights and the Alien Tort Statute: Past and Future

ALSO RECEIVED

1. Faculty Handbook, Faculty of Law, The University of Birmingham, U.K.
2. Annual Report 1981 – 1982, Institute of Judicial Administration, Faculty of Law, University of Birmingham, U.K.
3. Annual Report 1982 – 1983 Institute of Judicial Administration, Faculty of Law, University of Birmingham, U.K.
4. Annual Report 1982 – 1983 Servicing the Legal System Programme, Faculty of Law, The Queen's University of Belfast, Belfast, Northern Ireland, U.K.
5. Bulletin of the Southern Methodist University School of Law, Vol. LXVIII, 1983 – 84, Southern Methodist University School of Law, Dallas, Texas, U.S.A.