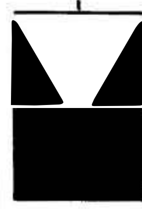

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VOLUME XVI 1991

ID-DRITT

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VOLUME XVI 1991

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VOLUME XVI **1991**

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EDITORIAL POLICY

ID-DRITT Law Journal is an official publication of the Għaqda Studenti tal-Liġi (Għ.S.L. – Law Students Association – University of Malta) and as such it serves to help fulfil the aims expressed in Article 2 of the Għ.S.L.'s Statute:

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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1. Major articles should generally be of between 5,000 and 10,000 words. Notes which have the character of signed editorials/short communications are to be between 1,000 and 2,500 words long.
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EDITORIAL

The complaint voiced in the **Editorial Note of Volume XV**, by the undersigned that it was proving to be increasingly hard to attract Maltese as well as foreign authors of a certain calibre to contribute to this **Law Journal** since *"all are notoriously busy with their legal profession"*, has not fallen on deaf ears! Indeed, a very quick glimpse at the **Contents** reveals that this **Edition** of **ID-DRITT** contains a record number of various contributions.

This **Editorship's** goal to include at least one article written by a foreign author who is an authority in his particular field, has been realized once again.

In this Edition, one will find an article by **Professor D. Lasok,** who visited Malta in October 1990. He delivered a public talk, now being published, on *"The effect of the membership of the European Community upon the national legal systems".* This talk was well attended by students reading law at the Faculty of Laws, University of Malta. Prof. D. Lasok, Emeritus Professor of European Law, University of Exeter is an internationally known authority in the **European Legal Studies'** field, and his publications are constantly referred to by students reading European Law.

One may also find another article by a foreign author who is currently the Director of the **Mediterranean Academy of Diplomatic Studies** at the University of Malta. Professor Dietrich Kappeler's paper entitled, *"The Swiss experience with neutrality and its relevance for Malta"* was presented at the International Colloquium

on Neutrality and Non-Alignment in the Post-Cold Era held in Malta on November 4-8, 1991. In attendance were many authorities from various countries who discussed the concepts of 'Neutrality' and 'Non-Alignment' within the framework of the new international scenario as delineated in a **Report** being published in this **Edition.**

Trying to be innovative in presenting this law journal has proved to be the hallmark of a successful marketing exercise. Indeed, **Volume XIV** witnessed the introduction of a section in the law journal, dedicated to **who is who in the legal field.** This has been greatly appreciated since each interview enables us to get a much closer focus on a prominent figure in the Maltese legal field. This Edition carries an interview with Professor Renè Cremona LL.D. Dean of the Faulty of Laws, University of Malta as well as President of the Chambers of Advocates.

Volume XVI is yet again introducing a new section dealing with court cases. In this volume, one will find a summary of all the Constitutional Court Decisions of 1988 compiled by Professor Ian Refalo B.A. LL.D.. We are confident that this innovation will also prove to be successful with both law students and lawyers alike.

Last year, a group of University law students launched the **Human Rights Research Unit (Malta)** *"to promote, in complete autonomy, the protection and development of the Fundamental Human Rights.... "*. This group has managed to translate into English all local judgements in the field of human rights delivered since 1964. This was made possible under the guidance of Professor David J. Attard LL.D., D.Phil (Oxon.) In the near future, the Unit intends to publish all the translated judgements together with their Maltese version. The Editorial Board of this Law Journal encourages such a challenging exercise especially when one considers the lack of legal publications in Malta.

On behalf of the Board, I would like to convey my personal thanks to **Mid-Med Bank Ltd** for part-sponsoring this publication of **ID-DRITT Law Journal** once again.

24.XII.91 M.A.T.

Articles

THE EFFECT OF THE MEMBERSHIP OF THE EUROPEAN COMMUNITY UPON THE NATIONAL LEGAL SYSTEMS

D. Lasok

Introduction

As Malta is bracing herself up for the membership of the European Community it seems timely to reflect upon the effects of the membership on the national legal systems. Politicians and economists face a challenge of this new venture in their own fields but lawyers, apart from the challenge, have to prepare themselves for a mighty shock to the national system. The waves of this shock will reverberate throughout the whole system for membership means more than a new political alignment or adjustments of economic policy or trade rules.

It is so because the EC is a "new legal order in International Law embracing not only the member states but also their citizens" (Case 26 / 62: *Van Gend* v *Nederlandse Administratie der Belastingen* (1963) ECR 1 at 29). It has been established by law and it is governed by law, hence the tendency towards a legalistic bureaucracy in the management of its affairs.

Behind the political ideal of a European Union, still on the far horizon, lies the hard economic reality because political integration is to be achieved through economic integration. The law plays a vital role in this process since it is used as the instrument of defining economic policies and the machinery for their enforcement. Thus legal integration forms a part of this process.

Although set on a federal course the Community is still searching for its constitution and no-one can be sure what form will this unprecedented political animal take. Probably it will be like a camel – a strange-looking creature – as if it had been designed by a committee of politicians rather than the Almighty, though to insist on that might suggest that God has no sense of humour. He has, but his absence marks the debates about the future of the Community in as much as some have said, in the Catholic Church, that the Holy Spirit forgot to attend Vatican II.

The controversy about the future of the Community reflects two broad questions, i.e. whether the Community should be a Community of peoples disregarding national boundaries and state sovereignties or the Community of sovereign states acting in harmony for the good of the European Continent from the straits of Gibraltar to the Urals. The other aspect of the controversy

reflects the methods to be applied in order to achieve the desired effect. Here we can see a sharp conflict between the evolutionary-pragmatic approach favoured mainly by Britain and Denmark and a doctrinaire-formalistic approach championed at present mainly by France and Italy. Assuming that both wish the same, i.e. a united Europe, the difference seems more in the means and the timing of the action than in the ultimate objective. Both reflect different historical experiences and different constitutional methods. The British approach, insisting on a gradual development moving step by step in accordance with the programme laid down in the Treaties, lacks the drama and the rhetoric of the Latin races but can claim a realistic stance since the politics is the art of the possible. Therefore it insists on the completion of the internal market, now set for the end of 1992, and the development of a common foreign policy alongside the defence rather than embarking on a written constitution devised by University professors. Recent events have, at least partially, vindicated this approach. Countries which advocate a high speed of the political integration tend to lag behind when it comes to the implementation of their duties. Indeed the record of enforcement actions taken against these countries before the Community Court belies their "pro-European" commitment. Events in Eastern Europe have changed the rules of the game. There seem to be no longer two hostile blocs facing each other menacingly but a new opportunity to work together and to turn, as it were, swords into ploughshares. NATO too will have to change and adopt a new role. All this requires consolidation of the EC in face of the need of a massive economic aid to foster the revival of democracy in Eastern Europe.

The rape of Kuwait and the Middle East crisis, echoing the pre-1939 anxieties, has exposed the weakness of the EC as a collective would-be world power. Some countries, like for example Britain, vigorously responded to the challenge but others were slow in showing an effective support for the United Nations' resolutions condemning Iraq's aggression against Kuwait and ordering sanctions. The Community collective response was feeble as it was limited to a vocal condemnation of Iraq. Under the presidency of Italy it exposed itself as a muscular but headless body, thus proving that it is, at present, an economic giant but a political dwarf.

It is clear that, in order to fulfil its historical purpose of uniting the Continent the Community must maintain a dynamic momentum. However it is a chicken and egg dilemma whether the Community should adopt out of the blue, as it were, a federal constitution signalling the demise of the sovereign state or build upon the existing institutions and, by reforming itself, gradually find, by experience, the most appropriate form of government. It seems that the latter is the right way. Therefore I do not expect any dramatic results from the Intergovernmental Conference to be held in December in Rome under the Italian presidency, though some improvement in the cumbersome decision-making process, a better co-operation in economic and monetary policy and the much needed implementation of the Treaty provisions on the political co-operation in the sphere of foreign policy (E.P.C.) may emerge. Besides, there is still the unfinished business of the internal market which raises a delicate

question of improving the machinery for the enforcement of the member states' obligations.

However, whatever the prognostications, we are witnessing an exciting and positive development of the old Continent though it is confined at present to twelve countries only with the danger that the Community may become a cosy, selfish and self-centered club. What should the outsiders do? I think they should join, for the future of the Community is their future too and the future of the whole Continent. The price of joining is, as we shall see, a substantial surrender of their sovereignty in exchange for active participation in the decision-making process. Apart from the economic benefits of the enlarged internal market few countries can expect direct financial benefits for somebody has to pay for the common policies and, in this world, there are very few cheerful givers.

The process of admitting new members is a formal one. After the application to the Council of Ministers and a positive opinion of the Commission the Council decides by a unanimous vote after receiving the assent of the European Parliament acting by an absolute majority. There is no automatic admission even for countries which have enjoyed the status of association (See Commission opinion on the admission of Turkey, December 1989) like for example Malta since 1971. According to the Treaties (EEC Art.237, amended by Single European Act, Art.8, Euratom Art.205; ECSE Art.98) the only qualification required is that the applicant is a ''European'' country but in practice, further unwritten conditions have been applied, namely that the applicant is a parliamentary democracy and is willing and able to carry out the obligations arising from the membership. Still further qualifications from the unsuccessful application of Turkey have emerged, i.e. that the applicant's economy has been aligned to that of the Community, that it has a good record of human rights and no quarrels with the existing members.

Malta eminently fulfils the condition but admission like the application is a political decision and here you never know who your real friends are. One of the problems Turkey had to face were the competing interests of the Mediterranean countries which do enjoy a substantial support of the Community. Let us hope that no such problem will arise in the case of Malta and that the decision will be taken on merit. Let us turn now to the effects of accession to the Community.

Community Solidarity and State Duties

The Treaty of Accession and the Act of Accession which, in legal terms, embody the results of the negotiations for membership are *sui generis* international instruments. They bind the acceding state, the Community and the existing member states into a collectivity which is set on a course of development towards a federal system. The process seems irreversible since the founding Treaties (with the exception of the Treaty setting up the Coal and Steel Community) have been concluded for ''an unlimited period'' and there

is no provision for withdrawal or expulsion. It is assumed, therefore, that members shall work together in harmony to carry out the objectives of the founding Treaties and strive for the ideal of the European unity. This is implied in the "solidarity" clauses of the Treaties *(EEC art 5; Euratom art 192; Coal and Steel art 86)* whereby the member states undertake to take all appropriate measures to fulfil the obligations arising from the Treaties and to refrain from any measures which could jeopardize the attainment of these objectives.

Next to solidarity the Treaties *(EEC art 7; Euratom arts 96 and 97; Coal and Steel art.69)* impose upon the member state a general duty of non-discrimination on the ground of nationality which affects not only relations between them, especially as regards track and the protection of ratio and national interest but also the rights of individuals. Moreover, coupled with the social provisions of the Treaty, the principle of non-discrimination has been developed by the jurisprudence of the Community Court to the extent of censuring national laws which permit discrimination between men and women (See e.g. Cases 61 / 81: Commission v United Kingdom (1982) 3CMLR 284; Case 165 / 81: (1984) ICMLR 44 and Case 248 / 83: *Commission* v *Germany* (1986) 2CMLR 588; Case 163 / 82: *Commission* v *Italy* (1984) 3CMLR 169. The member states whose national laws discriminate between men and women in areas covered by the Treaties (e.g. employment and social security) have to adjust their legislation accordingly.

The principle of non-discrimination on the ground of nationality applies to all persons in all situations covered by Community law. Therefore, for example, a British tourist attacked and injured in France could not be denied compensation under the French scheme which provided compensation for the victims of crime but limited it to French citizens only (Case 186 / 87: *Covan* v *Tresor Public* (1990) 2CMLR 613.

Membership of the Community entails a complex and extensive system of state duties which is essential to the legal concept of the Community. These duties are both general *(e.g. solidarity)* and non-discrimination and specific, laid down in detail in the Treaties and consequential legislation. Some are positive *(e.g. to enact laws for consumer protection)* others negative *(e.g. to refrain from discriminatory taxation of goods imported from another member state)*. Certain duties are explicit, others are implied. Explicit duties are expressed in the form of a command *(e.g. that customs duties are to be abolished)* whilst implied duties can be inferred from the provisions of the Treaties which envisage a certain action *(e.g. adjustment of obligations arising from treaties with non-member countries)* or control of the state apparatus in its executive, legislative and judicial functions in order to facilitate the execution of explicit duties. Thus the executive must adopt the administrative measures necessary to carry into effect the Community policies; the legislature must enact the laws necessary to be in line with Community policies and the courts must ensure not only the correct application of Community law but also the legal protection which individuals, whether the citizens of a member state or the nationals of another member state, derive from Community law.

There is also an implied duty of vigilance exemplified by the right of the member states to challenge the validity of acts of the Community institutions (whether legislative or administrative) even if they have been party to the act in question *(e.g. a regulation made by the Council of Ministers)*. Such challenge can be taken on the grounds of lack of competence, misuse of powers, breach of Community law or of an essential procedural requirement. This enabled recently the United Kingdom to obtain annulment of two directives, one for the use of agricultural hormones in cattle fodder and another providing for minimum standards for the comfort of battery hens. In both cases the text of the directive differed from the version on which the vote was taken, the irregularities having been perpetrated in the secretariat of the Council (Case 68 / 86: *U.K.* v *Council* re Agricultural hormones (1988) 2CMLR 543 and Case 131 / 86: *UK* v *Council,* re battery hens (1988) 2CMLR 364).

The relations between the member states in areas covered by the Treaties are not governed by the classical rules of International law but by the Treaties establishing the three Communities which together form the Constitution of the European Community. Thus in the policital sphere the member states are committed to the European Political Co-operation which entails the co-ordination of national policies relevant to the Community; they participate in the Community Institutions in accordance with the Treaty provisions and provide personnel for the Community civil service. In the economic sphere they undertake to co-ordinate their national economic policies within the Treaty framework and in accordance with the decisions of the Community institutions in which they participate. Even in the social sphere the member states assume certain duties, i.e. the general duty of non-discrimination and specific duties entailed in the freedom of movement of workers and self-employed persons coupled with the provision of social benefits for Community citizens as well as the protection of fundamental human rights regarded as one of the general principles of Community law.

The member states assume, of course, financial responsibility for the cost of the running of the Community and its policies. Thus they have to contribute to the Community budget whose main source of revenue are the Community "own resources" consisting primarily of the common customs tariff duties and a proportion of the value added tax which is a system of internal taxation levied according to common rules.

Enforcement of Member States' Duties

The Community is founded on the rule of law applicable to the member states and their citizens alike. The member states have undertaken unconditionally and without reservation the obligation of submitting the differences arising from the interpretation and application of the Treaties to the jurisdiction of the Community Court *(EEC art.219; Euratom art.193; Coal and Steel art.87)*. By expressly renouncing any other method of solving disputes between sovereign states they have submitted their conduct to the judicial

control of one of the Community institutions. This constitutes an authority far exceeding the rules hitherto recognized in classical International law (Case 25 /59: Netherlands v High Authority (1960) ECR 355).

Having submitted their differences to compulsory adjudication by the Community Court they have also delegated the power of enforcement to the Commission *(EEC art.169; Euratom art.141; Coal and Steel art.88)* acting as the ''guardian of the Treaties''. The Commission acts either on its own initiative or upon hearing complaints from another member state or even from individuals. The Commission acts according to a set procedure first investigating the allegations and then trying to settle the matter directly with the state concerned. If it considers that the state is in breach of a duty it will deliver a reasoned opinion stating the charge and enjoining the state to comply. In the event of non-compliance it must institute enforcement proceedings before the Community Court in which it acts as an accuser and prosecutor. These cases arise mostly from the failure of the member states to implement Community measures adequately or in time.

It is also provided that a member state may sue another directly *(EEC art.170; Euratom art.142; Coal and Steel art.89)* but the procedure seeks to avoid such a confrontation. Therefore the complaint must first be passed on to the Commission which will investigate the matter and will try to find a solution. If it falls to do so either the Commission or the complaining state may sue. I am aware of one case only in which a member state sued another one directly *(Case 141 / 78: France v United Kingdom (1979) ECR 2923).*

The function of the Court in these cases is to declare the legal position and thus bring the erring state back on the path of legality. It is assumed that, motivated by the rule of law, the states will comply with the judgment. Should they fail to do so the Commission may bring another action this time for the declaration that the member state concerned has failed to fulfil an obligation under the Treaty *(EEC art.171; Euratom art.143).* Such cases are extremely rare. Should a state once more defy the judgement the judicial process would be exhausted, the ultimate solution being a political one.

This is the Achilles heel of the enforcement system because there is no practical way of physical execution of the judgements. Two such examples spring to mind: the wine war between France and Italy in 1975 when France refused to admit Italian wine and the matter was settled by the Commission providing a subsidy to the Italian wine producers for the conversion of their product into industrial spirit. The other is the ''guerre de moutons'' between France and the United Kingdom. Back in 1978 there was a judgement against France (Case 232 / 78: *Commission* v *France* (1979) ECR 2729 and 24, 97 / 80: *Commission* v *France* (1980) ECR 1319) ordering France to remove the obstacles to the importation of sheepmeat from the U.K., but France refused to comply and aid to French sheep farmers was granted. However the ''war'' continues and this summer especially violence by the protesting French farmers prevented the free movement of the product. In the common market based on the free movement of goods there is no excuse for that and the state bears

responsibility for the unlawful behaviour of its citizens. Unless direct diplomacy solves the problem a new case may be brought against France, which is regrettable because it exposes her hypocrisy.

Delegation of Powers to Community Institutions

The duties outlined above impinge upon virtually all aspects of power vested in sovereign states and limit the state's freedom of action traditionally associated with the pursuit of national interests. These interests have to be accommodated within Community interests pursued for the benefit of the collective by the Community institutions.

The Treaties establishing the three Communities together with their amendments and the Accession Treaties fall into a category of their own. They are self-executing treaties in so far as they take effect automatically without the necessity of being transformed into national law. They are not mere contracts between the parties but "treaty-laws" since they establish autonomous international bodies having their own institutions and their own law. They constitute a new legal order in International law embracing the member states and their citizens *(See Case 26 / 62, Van Gend (1963) ECR 1).* This reflects three legal orders interlocked like three intersecting circles: the International law of treaties which gave birth to the Communities, national law of the member states which delegate power to the Community institutions and resulting therefrom the autonomous legal order of the Community. Such configuration marks in the first place the impact on the national constitutions.

This impact permeates the whole national legal system, both public and private.

In order to establish the Community structure and to enable the institutions to function the member states had to delegate portions of their sovereignty for that purpose. Countries whose constitutions do not have the necessary mechanism *(i.e. countries which subscribe to the dual concept of law)* have to change their constitutions or pass special enabling laws in order to undertake the duties inherent in the membership of the Community and to curtail their freedoms of action in specified areas in favour of the institutions.

However once delegated the power cannot be withdrawn (Case 24 / 83: Gewiese v Mackenzie (1984) ECR 874) or, as stated by the Community Court, where the Community has acted within its competence the member states must refrain from taking concurrent action (See for example Case 22 / 70: *Commission* v *Council* (1971) ECR 263, at 274). However, until the Community has claimed its competence by using it the member states are free to act as sovereign states for this is their residual right. Cases 3, 4, 6 / 76: *Officier van Justitie* v *Kramer* (1976) ECR 1279). This is the doctrine of the "occupied field" which in a recent case (Case 60 / 86, *Commission* v *United Kingdom* (1988) 3CMLR 437) prevented Britain from enacting legislation which would extend the number of lighting devices compulsory for motor cars beyond the list comprised in a Community directive. Thus Community law

determines the extent of the legal integration and does not permit the member states to be out of step either by exceeding the limit or failing to reach it.

By virtue of the Treaty and the Act of Accession new members negotiate a package deal the effect of which is that, after the transitional period, they are in the same legal position as the founding members. This is a mixture of constitutional and consequential law for the Treaties, like modern constitutions, reveal a political and an economic charter. In the first place new member states accept, immediately and without reservations, the political structure of the Community, i.e. its constitution enshrined in the founding Treaties. This enables them to participate in the Community institutions and play their part in the Community decision-making process, including the Community legislation. They also accept the international treaties which the Community has made with third countries and the arrangements with international organizations. The former limit their power to negotiate trade agreements in their own right and obliges them to adjust their existing treaties with such countries so as to make them compatible with their Community obligations. The latter may limit their participation in the international organizations in so far as the Community may take their place.

The package deal imports volumes of Community legislation which take effect immediately unless delayed by transitory provisions.

This part of the package can be described as the economic law of the Community i.e. rules, rooted in the founding Treaties, which govern the regulation of trade and the economic activities whether of public bodies or private corporations and individuals coming within the concept and scope of the common market. It also includes certain procedural rules such as the rules for the investigation of breaches of Community competition law and the rules for references to the European Community Court from the national jurisdiction and for the enforcement of the judgments of the Community Court as well as the decisions of the Commission entailing fines and penalties.

Provisions have also to be made for the implementation of future Community legislation. There are two kinds of such legislation: regulations i.e. rules which have an immediate and unconditonal effect and directives which do not have the same effect. Therefore regulations, in theory, do not require any specific incorporation into the national system. However they may necessitate the repeal or amendment of the national law and, therefore, the legislature has to act accordingly. Even if they constitute a new body of law it is expedient, at least for the sake of good order, to put them onto the statute book according to the national procedure.

The efficacy of the regulations is well illustrated by a case involving the payment of a premium in respect of slaughtered dairy cows (Case 93 / 71: *Leonesio* v *Italian Ministry of Agriculture* (1972) ECR 287 at 295). In order to reduce the milk production and also phase out small dairy farmers the Community, by a regulation, provided for the payment of a premium to dairy farmers if they had their cows slaughtered. The premium was to be paid by the national authorities but Italy failed to implement the regulation and,

therefore, the authorities were unable to pay. However the Community Court held that the farmer who fulfilled the conditions of the regulation had a right against the state and this right did not depend upon the implementing national legislation. Therefore Italy was in default because she failed to meet her obligation. The inefficiency of the national apparatus provided no defence (Case 39 / 72: *Commission* v *Italy* (1973) ECR 101).

Directives are chiefly the instrument of the harmonization of national laws. They are like commands issued to the member states telling them to achieve a certain objective, e.g. to introduce Value Added Tax, but leaving them the choice of the method to achieve the prescribed result. Unlike regulations, directives have in principle no direct effect as far as the individuals are concerned. They impose obligations upon the member states to which they are addressed which must be discharged by proper legislation. Therefore mere administrative implementation, e.g. circulars, which can be changed at any time by the national bureaucracy will not suffice (Case 239 / 85: *Commission* v *Italy,* re toxic and dangerous waste (1988) ICMLR 248). Failure to implement constitutes a breach of the Treaty.

Individual rights, on the other hand, are created only by those directives which expressly provide for such rights without further enactment like, e.g. the directives harmonising the nursing profession (See Case 29 / 84: *Commission* v *Germany*, re nursing directive (1986) 3CMLR 579). However even those directives which do not create subjective rights may provide a defence to prosecution under national law which is inconsistent with a directive (See Case 148 / 78: *Pubblico Ministero* v *Ratti* (1979) ECR 1629). It follows that member states cannot rely, as against individuals, on their own failure to implement a directive (See the judgement of the *French Conseil d'Etat* in *Compagnie Alitalia* (1990) ICMLR 248).

The shock administered to the national legal system upon accession consists of an imposition of autonomous rules common to whole Community but alien and perhaps even difficult to understand because of their nature and origin. However not only the texts but also their interpretation in the form of the persuasive authority of the judgments of the Community Court in previous cases have to be taken on board as a new source of law available to the courts, the state authorities and private parties.

Indeed the Court has proved to be the most effective agent of legal integration. Although it has no legislative function its judgments command not only universal respect but also a law-making effect. Its main impact lies in the sphere of "constitutional law" of the Community and the implementation of Community economic policies where the founding Treaties have been drafted in general terms only and where conflicts between the Community and the member states have to be solved. It has defined the Community as a "new legal order" and elevated the Treaties founding the Communities to the status of basic law. It clarified the position of the Community in its external relations especially as regards the GATT, defined the parameters of Community competence to enter into international trade agreements (Opinion 1 / 79: Re Draft International Agreement on Natural Rubber (1979) ECR 2871) and developed an effective system of judicial control of administrative and legislative

acts of the Community institutions. Whilst defining the relationship between the Community and the member states the Court defined the principles upon which this relationship is based and in this way filled the gaps in the founding Treaties. It also proved to be a champion of individual rights especially in the field of the movement of persons, social security and the exercise of the right of establishment of the professions and of the right to provide services in face of national restrictions. In these areas it insisted on a strict interpretation of duties of the member states and on the right of foreigners to be heard and to be treated on equal terms with their citizens.

Impact Upon Substantive Law

A glance at the EEC Treaty reveals the nature and scope of the economic law, i.e. of the rules which govern the Common Market and the various policies which affect not only the running of the national economy but also relations between private parties be they commercial corporations or private individuals. These include: Customs laws affecting trade within the Common Market and the world at large; immigration rules affected by the free movement of persons; social security; the right of establishment and professional qualifications of self-employed persons; the provision of services and the movement of capital including its effect upon banking and insurance; agriculture; transport; competition; dumping of goods; state aids to industry; state commercial monopolies, taxation, intellectual property, corporations and labour relations, consumer protection, environment, to name the most important areas of the law affected by Community membership. The necessary adjustments and derogations during the transitional period will be negotiated and comprised in the Act of Accession which, judging by precedents, turns out to be a massive volume.

Procedure and Criminal Law

National procedural law is, in principle, left intact though provisions have to be made for the enforcement of Community rules of competition, references to Community Courts and the enforcement of the judgments of the Community Court and of the decisions of the Commission. And so is national criminal law, though it has to be borne in mind that criminal sanctions, especially those which are used to enforce trade and market regulations, must not contravene Community law (see e.g. Case *Redmond* v *Pigs Marketing Board*...).

Relationship Between Community Law and National Law

In theory Community law forms an integral part of the national system and has to be applied as such by the national authorities. In reality, however, it has to be applied as an autonomous system uniformly in the whole Community

not only to safeguard its integrity but also to ensure that its integrationist force is not spent in the vagaries of national practices. In this respect one has to bear in mind that the principal function of the Community Court is to "ensure that in the interpretation and application of the Treaty the law is observed" (*EEC art.164; Euratom art.136; Coal and Steel art.31).*

This means that the Court not only exercises a judicial control over the Community institutions and over the member states in conformity with the principle of legality but also has a duty similar to that of the supreme court of a federation of supervising the administration of justice in the state members of the federation. However the Community is not yet a federation and the Community Court is not a federal court a with direct authority over the judiciaries of the member states. It has, though, an indirect authority inasmuch as the courts form part of the machinery of the state and the state is responsible for their behaviour within the sphere of its obligations towards the Community, the control of such obligations being within the power of the Community Court. (*See Case 77 / 69: Commission* v *Belgium* (1970) ECR 237). Another form of supervision is exercised through the machinery of reference for preliminary rulings which will be considered later.

In the circumstances it fell to the Community Court to define the principles which govern the relationship between the Community law and national law. These principles, i.e. autonomy, direct applicability and supremacy of Community law, do not rest upon express provisions of the founding Treaties but, emanating from judicial logic, they provide a practical guide to the relations between the two systems. All three can be traced back to the Van Gend Case (*Supra*) where the Court had to explain the nature of the EEC Treaty and its effect upon the customs law of a member state.

The principle of the autonomy of Community law means that it is quite independent of the legislation passed by the member states (*Case 28 / 67: Mölkerei Zentrale* (1968) ECR 143) and has to be interpreted and applied uniformly throughout the Community. Since the Community and the member states perform different functions the efficacy of the Treaty would be impaired if, in the context of partial integration with national law, the specific tasks entrusted to the Community were not interpreted as totally independent. It means, in practical terms, that e.g. in the field of competition when the two systems overlap national authorities have to apply Community law to the extent to which it overlaps with national law but are free to apply national law in areas which are not covered by Community law (*Case 14 / 68: Wilhelm (1969) ECR 1*). In this way the integrity and the unity of Community law within the entire Community is safeguarded whilst anything outside its domain is left to a free disposition of the member state.

An analysis of the Treaties and Community legislation reveals that certain provisions are self-executing, i.e. directly applicable, whereas others represent a programme or a policy which have to be transformed into particular rules of law. There is also the whole host of Community directives which have to be implemented. These are binding upon the state as they are addressed to

the state compelling the state to carry out its obligation in the field of legislation but they do not necessarily create rights before so implemented. By contrast directly applicable rules take force in the territory of the member states without further enactment and, in this respect, constitute directly enforceable Community rights which can be relied on by the citizen. To illustrate this concept: In the Van Gend Case (*supra*) the Community Court held that there was an unconditional obligation on the part of the member state to refrain from introducing new customs duties which, in turn, created a corresponding right in favour of the importer. In another case (*57 / 65: Alfons Lutticke (1966) ECR 205*) the Court ruled that a member state must not impose on the product of another member state any internal tax in excess of the tax levied on similar domestic product. In yet another case (*2 / 74: Reyners* v *Belgium (1974) ECR 631*) a Dutch national qualified as a lawyer in Belgium was held to have a right to practise his profession in Belgium notwithstanding the requirement that only Belgium nationals could be admitted to legal practice. The principle was reiterated in many cases and perhaps in the most striking manner in the second Simmenthal case (*106 / 77, (1978) ECR 629*) where it was linked with the principle of supremacy, the Community Court stating that a directly applicable Community rule takes precedence over the national legislation whether antecedent or subsequent to the relevant Treaty provision.

As can be seen the principle of direct applicability addressed legislators and judges is the criterion of individual rights rooted in Community law which the legislator ought to respect and the judge must uphold. Case law suggests that in order to be directly applicable the provision of Community law must impose on the member state a clear and precise obligation; it must be unconditional, i.e. not accompanied by any reservation and the application of the Community rule must not be conditional upon any subsequent legislation whether of the Community institutions or of the member states (*Advocate-General Mauras in case 41 / 74: Van Duyn (1974) ECR 1337*).

As mentioned earlier the principle of supremacy of Community law is closely linked with the principle of direct applicability. It has been deduced by the Community Court not so much from the provisions of the founding Treaties as from the constitutions of the member states and the federal concept of the Community. It was first mentioned in the Van Gend case (*supra*) to solve the problem of a conflict between the Treaty and national customs law. It was firmly established in Costa v ENEL (*Case 6 / 64 (1964) ECR 585*) a case concerning *inter alia* the question whether Italian law nationalizing the electricity industry was compatible with the EEC Treaty. The Community Court held that the Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts were bound to apply. Because of its special and original nature it could not be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Commenting specifically on the impact of the Community upon national legislation the Court said that "the transfer by the states from their domestic

legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail''. Addressing itself to the national judicature the Community Court ruled in the Simmenthal case cited above that ''a national court which is called upon to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation and it is not necessary for the court to request or await a prior setting aside of such provision by legislative act or other constitutional means''. This should not be read as an attempt to incite the national judiciary to rebellion but to re-state the principle of state duty under the Treaties to adjust it machinery, both legislative and judicial, to the obligations arising from the membership of the Community and to remind of the federal concept of the Community. Indeed, if national legislature could override Community law or if national courts could disregard Community law when in conflict with their own, this would be the end of the Community as a supra national organization. It should not be surprising, therefore, that Community law should prevail even if ''it is alleged that the basic rights guaranteed by the national constitution were violated'' (*Case 11 / 70: Internationale Handelgesellschaft (1970) ECR 1125*). This statement, in a case involving a spurious claim that an agricultural regulation had violated the principles of the Grundgesetz, had initially upset the Germans but now (*Re the Application of Wünsche Handelgesellschaft (1987) 3CMLR 225*) they admit that even in that area references to the Community Court are acceptable.

Though the Community Court has no power to strike down national legislation it can achieve practically the same result through the principle of supremacy by declaring such legislation ''incompatible with the Treaty''. The message in such a case is for the state concerned to amend its laws under the pain of prosecution by the Commission for a breach of the Treaty.

Cases involving between Community law and national law come often before the Community Court by virtue of the procedure for a preliminary ruling (*EEC art.177; Euratom art.150; Coal and Steel art.41*) which constitutes a bridge between the Community and the national jurisdictions. This enables the national courts to refer for interpretation points of law arising in the course of application by them of the Community Treaties, the Community legislation and of the acts of bodies established by the Council. It should be borne in mind that this procedure does not establish a right of recourse to the Community Court but a machinery available to national courts whereby they obtain an authoritative interpretation of points of law essential for their decision. Thus the rôles of the two jurisdictions are divided: the national court poses the questions which the Community Court answers and then the national court decides the case on the basis of the answers received. Although the procedure for the reference is governed by national rules the power to refer has been given to the national judge by the Treaty directly and this power must not be curtailed or inhibited by national procedures (*Rhein-Mühlen Cases (1974) ECR 33 and (1974) ECR 139*).

According to the Community Court procedure every reference is notified to all the member states and to the Commission as well as the Council if the act which is to be interpreted has emanated from the Council. In this way the matter ceases to be of sole concern to the parties to the dispute and the adjudicating court; it thus becomes of common concern to the member states and the Community institutions which may intervene in the proceedings. As a result the referring court, the institutions and the authorities of the member states obtain the benefit of an authoritative interpretation of the point involved whilst the Commuity system becomes enriched by a judgment which commands a universal attention and contributes to a uniform understaning and application of Community law.

CONCLUSIONS

The law is not the sole prerogative of lawyers but as a profession they are primarily affected by the imposition of Community law upon the national system. They have to learn new rules and acquire new skills. They have to grapple with new and alien ideas, principles and terminology often inadequately rendered by translation. On Malta's accession Maltese will become one of the official languages of the Community and Maltese lawyers will be called upon to play their part.

Government lawyers will be responsible together with the Community bureaucrats for the drafting of the Community legislation. They will have to learn new skills and the art of working together with Community lawyers. They also will advise their Government on the application of Community rules and defend the Government position before the Commission and the Community Court.

Lawyers in commerce and industry will have to be able to advise their clients on a variety of subjects within the whole area of the law of the economy as outlined above and how to obtain grants for industry and development.

Lawyers in private practice will have to be able to advise their clients not only on the relevant aspects of the Community law but also on its effect on the national system in various areas, including criminal law. They ought to gain expertise in "Euro-defences" before the national courts and in the drafting of references to the Community Court. They must also learn how to conduct cases before the Commission and the Community Court.

Judges too must become familiar with the substance and procedural Community law, the distinction between the directly and indirectly applicable Community rules and the techniques of the reference for preliminary ruling. Their authority will not be diminished but the variety of their work will increase.

However there is nothing to be afraid of. An island country which, like a rock in the sea, has survived centuries of foreign domination including the British rule, is well equipped to undertake the obligations arising from the membership of the Community and to play a positive role in the construction of Europe.

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THE SWISS EXPERIENCE WITH NEUTRALITY AND ITS RELEVANCE FOR MALTA

Dietrich Kappeler

The permanent neturality of Switzerland is the product of a long historical evolution. It began as a practice and eventually became a legal status embodied in international legal instruments and recognized by the international community. Malta's neutrality is due to rather recent developments and is based on a policy decision later embodied in an agreement with Italy and a constitutional provision. It owes as much to the ideas of non alignment as to the concept of perpetual neutrality in a precise legal sense. There may thus be some advantage in relating the Swiss experience in order to see what lessons Malta may be able to draw from it as regards her own external policies.

1. Neutrality and International Law [1]

1.1. Neutrality in times of armed conflict

The very expression "neutrality" has been coined for a context where two or more States are in a relation of war and others must decide whether to join one side in the conflict or try to keep out of it altogether. Thus, in traditional manuals of international law, neutrality is dealt with together with the laws of war [2]. For the same reason, it was codified together with the laws of war at the Hague Peace Conference of 1907 [3].

Neutrality in this legal sense presupposes a state of war between two or more States. Such a state used to be easy to identify as States were wont to declare war on each other before putting their armies in the field. In the rare cases of an armed attack not preceded by a declaration of war, the attacked State would immediately declare war on the aggressor. It was then prudent for third States, especially those situated in the neighbourhood, to declare their neutrality if they did not want to be drawn into the conflict. As a result of these actions, the laws of war would govern the relations between the belligerents whereas the laws of neutrality would govern the relations between each of the latter and the States which had declared their neutrality. When the war came to an end, normally by means of a peace treaty between the belligerents, the laws of peace would automatically apply again to the relations between all concerned in lieu of the laws of war and neutrality.

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Neutrality in a legal sense was therefore a temporary status following a policy decision of the State(s) concerned. Precise rights and obligations both of the belligerents and the neutrals ensued which matched each other [4]. The neutral State was not allowed to participate in or interfere with the hostilities in any any manner whatsoever. In exchange the belligerents had an obligation to respect the neutral State's territory and nationals as well as its ships on the sea. The neutral State was entitled and indeed obliged to defend its territory against any encroachments, and this included in more recent years the air space [5]. The neutral State was not permitted to provide weapons and other means of warfare to a belligerent and the other side was therefore authorised to search neutral ships for such "contraband". Nationals of the neutral State within the territory of a belligerent could not be treated as enemy aliens. There were less strict rules regarding economic relations, although it was generally understood that a neutral State should not overtly favour one belligerent side at the expense of the other [6].

Since 1945, war as a means of conducting international relations is outlawed by article 2 (4) of the United Nations Charter. Only in self-defence may States still use armed force. As a result, war is no longer declared, and where one breaks out, each side claims that the other has been attacking it or threatening to do so and that it therefore is acting in self-defence. Wars are now known as international armed conflicts, whose existence is determined by the de factual use of armed force. The laws of war are applicable to them and third States may still declare their neutrality [7]. However, there is a strong body of opinion according to which neutrality is no longer possible where the United Nations are engaged in military activities against a State found guilty of a threat to the peace, a breach of the peace or an act of aggression. At least members of the United Nations are then seen as legally bound to side with the organization against the violator of the Charter.

1.2 Neutralisation, policies and legal restraints of permanent neutrality

Neutralisation is a legal undertaking by a State, either of its own free will or imposed on it by a treaty, to act in a manner which will prevent it from becoming involved in future armed conflicts [8]. This was the case of Belgium when its separation from the Netherlands was recognized by the major European powers in the last century. Neutralisation was also agreed on with regard to Laos at the Indochina Conference of Geneva in 1963. Switzerland obtained her neutralisation at the Congress of Vienna in 1814 / 5 as shall be shown below. Finland undertook to remain neutral in all future conflicts that might involve the Soviet Union in a treaty of friendship signed with the latter in 1948. Austria amended her constitution in 1955 to include an obligation to observe perpetual neutrality and then notified this fact to all States with which she had diplomatic relations. On the other hand, Sweden has since the last century followed policies meant to prevent her from becoming involved in any sort of armed conflict and Ireland has done the same since becoming independent in 1921. Costa Rica has adopted a neutral stance by voluntarily abolishing its armed forces in 1947.

A State which has opted for permanent neutrality has to accept certain restraints in the conduct of its foreign policy [9]. These have never been clearly defined by an international convention but are rather the product of long-lasting practice, especially as followed by Switzerland. The main restraint is the impossibility for a neutral country to enter any kind of military alliance. Moreover it should follow general policies that render its permanent neutrality credible, in particular by not entering such close links with one or several countries as would make it impossible to remain neutral should the latter become involved in an armed conflict. Until recently, this was seen as meaning that a permanently neutral State could not join a supranational organization such as the European Community.

1.3 Neutrality and non-alignment

Non-alignment is an attitude evolved by countries of the third world as well as Yugoslavia who wished to remain outside the conflict opposing the two blocs led respectively by the Soviet Union and the United States [10]. Since 1962, these countries form a loose association known as the Non-Aligned Movement. Over the years they have worked out some basic principles which must be adhered to if a country wishes to be known as non-aligned. These somewhat resemble the restraints imposed on States following a policy of permanent neutrality, but only as regards the two superpowers and their military alliance systems. Thus a non-aligned country may not enter a military agreement with a superpower or a country bound to a superpower by a military alliance. But otherwise non-aligned countries remain practically free in the choice of their foreign policy. In particular they may remain close to one power bloc and hostile to the other and are in no way obliged to assume an attitude of equidistance. Non-aligned countries also may set up military alliances among themselves and assist each other in armed conflicts, at least to the extent this is not in violation of the UN Charter.

2. Antecedents of Swiss Neutrality [11]

2.1. The Swiss Confederation around 1500 and its internal contradictions

The Swiss Confederation traces its origins back to an alliance concluded in 1291 by three small alpine communities in which they promised each other assistance against any feudal power that might want to deprive them of the privilege of freedom of the Empire all enjoyed [12]. The alliance managed to survive initial onsloughts and to attract or conquer other rural and urban communities with similar aims until it covered about two thirds of the present territory of Switzerland. As a result the confederated communities had developed considerable military strength which they sometimes put at the service of surrounding monarchs such as the king of France. After some resounding victories on the battlefield, the Swiss decided to engage in a bit of imperialism of their own and involved themselves in the struggle for the control of Northern

Italy. However these endeavours were not universally popular and a considerable rift developed as to the advisability of continuing with expansionary policies. As a result the forces sent across the Alps became soon insufficient for the task set for them and eventually were beaten at Marignano in 1515 by the king of France.

During the same period Switzerland became split as regards the movement of reformation of the church. Some cantons became protestant whereas other remained catholic and some contained both communities. This led even to religious wars among cantons. As a result the view came to prevail that if she did not want to break apart and be swallowed up by her neighbours, Switzerland should henceforth abstain from any active involvement in armed conflicts beyond her borders. Instead, individual cantons made armed forces available to neighbouring rulers as mercenaries whose involvement in battles did not affect the canton of origin or Switzerland as a whole.

2.2. Swiss neutrality during the 30 years war

This war, which ravaged much of Europe between 1618 and 1648, was in part a war of religion and the Swiss cantons were often under considerable pressure to join the side close to their particular religious views. This only confirmed the Swiss in their conviction that their only salvation lay in keeping out of any military involvement altogether. The practice they then followed has become the foundation of the classical law of neutrality, albeit with one exception. The Swiss pushed non-involvement so far as not to interfere with armed forces crossing their territory as long as they did so peacefully.

When an overall arrangement known as the Peace of Westphalia was reached in 1647 and 1648, the Swiss reaped the benefits of their attitude in that they secured recognition of their formal independence from the Holy Roman Empire and a degree of recognition of their practice of non-involvement in the armed conflicts of their neighbours.

2.3 Switzerland during the Napoleonic wars [13]

For nearly 150 years, Switzerland was able to preserve her position of de facto neutrality and to avoid involvement in the numerous wars faught by her neighbours. But this happy state of affairs came to an abrupt halt in 1798, when the then General Bonaparte decided to forcibly bring the benefits of the revolution to Switzerland and occupied most of her territory. A united Helvetic Republic was proclaimed, with no regard for the country's ethnic, linguistic, cultural and religious diversity. As a result unrest and military coups were the order of the day and the armies of France and her enemies criss-crossed the country, with major battles being faught on its territory. Eventually Napoleon imposed a new, less unified constitution which made Switzerland a sort of French protectorate.

3. The legal foundation of Switzerland's present neutrality

3.1. The Congress of Vienna's handling of Switzerland [14]

As the Napoleonic armies collapsed, the Swiss cantons reconstituted their loose alliance of soereign entities and sought recognition of this confederation at the Congress of Vienna. They also sought restoration of their perpetual neutrality.

The powers of the Congress in their turn had no wish to become involved in battles over who would control the several passages over the Alps within Switzerland. They admitted that the existence of an independent and neutral Switzerland was indeed in their interest. They produced a Declaration on March 20th, 1815 that they would recognise and guarantee Swiss neutrality provided that Switzerland formally accepted such a declaration. However the return of Napoleon for 100 days interrupted everything and Switzerland was forced to let the allied troops pass through her territory in order to invade France. After the final demise of Napolean, negotiations were resumed on the basis of a Swiss draft declaration of neutrality, which was endorsed by the major powers on November 20th, 1815 with only minor alterations.

The Declaration states that the powers formally recognise the perpetual neutrality of Switzerland and guarantee the integrity and inviolablity of the latter's territory. The powers moreover decided to neutralise parts of Savoy contiguous to Switzerland for better protection of the latter's neutrality.

3.2. Switzerland, the 1919 Paris Peace Conference and the League of Nations: Differential Neutrality [15]

Switzerland sent negotiators to the Peace Conference of 1919 to ensure that her neutrality would not be affected. In fact the Treaty of Versailles formally recognised it while abolishing the neutralisation of Upper Savoy and Switzerland's right to militarily occupy that territory if this was required in the interest of her own neutrality. Switzerland herself was not a signatory of the Treaty of Versailles, but she had expressed her agreement with the above provisions.

More difficult was the question of whether Switzerland could become a member of the newly created League of Nations. The Covenant of the League set up a system of collective security under which member States were obliged to participate in punitive actions decided by the League's Council against members who contravened the principles and rules of the Covenant. Such actions could take the shape of economic sanctions or military operations.

Switzerland, which had just bought the confirmation of her neutrality by enouncing her rights in Upper Savoy, was in no mood to abandon her status in order to become a member of the League. After long negotiations, a compromise was found. The Council of the League, in a declaration of February

13, 1920, noted the unique nature of Swiss neutrality and its contribution to international peace, which meant that its continuation lay in the interest of the international community. Switzerland was formally freed from any obligation to take part in military sanctions or to allow armed forces engaged in such sanctions to pass through her territory. In exchange she agreed that she would participate in non-military sanctions, even at the risk of somewhat compromising a policy of strict neutrality. As a result, Switzerland became a member of the League following a national referendum which endorsed the proposal of the government to that effect.

3.4. Switzerland's declaration of return to integral neutrality in 1938 16

Switzerland became a very active member of the League under what became known as a policy of "differential neutrality". When Italy invaded Abyssinia in 1935, she willingly voted for economic sanctions and decreed a partial embargo on exports to Italy. However, when it became clear that Britain and France had only voted for the sanctions to ignore them thereafter, Switzerland began to reconsider her position. Two of her neighbours, Italy and Germany, had left the League and Austria was thereafter absorbed by Germany, leaving only France as a neigbour still belonging to the League. This let the Swiss Government to issue a statement on May 11th, 1938 according to which Switzerland henceforth would return to a policy of strict neutrality, while not changing in any other way her attitude with regard to the League of Nations.

4. The practice of Swiss neutrality

4.1. 19th century conflicts [17]

During the first decades following the peace settlement of 1815 no major military conflicts occurred in the immediate neighbourhood of Switzerland. However, the general political climate in the surrounding countries led to a considerable stream of prominent refugees seeking asylum in Switzerland. This caused major difficulties with the governments concerned, which Switzerland found hard to handle as she still was a loose association of sovereign entities with hardly any central competences. From the 1830s onwards, Switzerland became absorbed in her internal affairs as an ever stronger movement promoted liberal reforms within the cantons and sought to establish a federal State with relatively strong central powers. This led to skirmishes between progressive and conservative cantons. The latter eventually sought an alliance with Austria to preserve the status quo, in clear contradiction with the official policy of neutrality. A brief civil war ensued which ended with the victory of the progressive cantons and the immediate drafting of a federal constitution which was adopted in 1848, the very year when socialist revolutions broke out all around Switzerland.

The new federal State managed to weather this first storm only to become involved in a far more perilous situation when the people of the Canton of Neuchatel, which up to then had as its nominal ruler the king of Prussia, decided to set up a republic. The king seriously considered military intervention but eventually relented under strong pressure from Britain. Swiss neutrality had also to be preserved during the war of Italian unification, in which Austria and France took also part and as a result of which Upper Savoy changed hands and became French. The brief war between Prussia and her German allies and Austria in 1866, in which Italy took also part, was again involving immediate neighbours. Although some skirmishes took place close to the border, the war was over so quickly that Switzerland hardly had time to organize armed protection of her frontiers. On the other hand, the Franco-Prussian war of 1870 / 1 several times menaced to engulf border regions of Switzerland as military strategies of both sides contemplated sending their armies through Swiss territory in order to attack the enemy from an unexpected direction. Eventually the only major incident was the surrender of a whole French army to the Swiss who had to disarm it and find food and shelter for thousands of men.

4.2. The first world war [18]

This war began with the invasion of Belgium, another neutral country, by Germany, in complete disregard of relevant treaty obligations. Switzerland had therefore to fear a similar fate, all the more so as both France and Germany had plans to attack all the more so as both France and Germany had plans to attack each other by sending armies through Swiss territory. Fortunately no such plans were implemented. Thanks to her neutrality Switzerland also overcame the internal problem of her German-speaking population sympathising with Germany and the French-speakers sympathising with France. Switzerland also played a major role as protecting power of the belligerents and as a centre of exchange of wounded and sick prisoners of war. Towards the end of the war public opinion became ever more favourable towards an international institution to maintain peace, as a result of which the later decision to join the League of Nations was greatly facilitated.

4.3. The inter-war period [19]

As already indicated, Switzerland became an active member of the League of Nations. She also developed further the idea that neutrality in legal and military terms does not mean ideological neutrality. After it was found that the Soviet diplomatic mission had been involved in subversive actvities, diplomatic relations with the USSR were broken and Switzerland strongly objected to the idea of admitting that country to the League of Nations.

However it was the rise of fascism and national-socialism which brought new perils for Switzerland's neutrality. Germany openly claimed German-speaking Switzerland as hers and so did Italy with regard to Italian-speaking

regions. This led to a closing of ranks among the Swiss population of all languages and political persuasions against the two would-be annexors and their ideology. Especially Germany became the target of violent press attacks which led to extremely tense situations. The Swiss government however refused to control the press, further emphasizing the non-ideological aspect of Swiss neutrality.

4.4. The second world war [20]

Swiss military preparation for self-defence had been stepped up during the last pre-war years and full mobilization took place as soon as the war broke out. The most crucial moment appeared to be May and June 1940, when Hitler's armies overran France and Mussolini's troops tried to meet with them along the Swiss border. This failed to materialise thanks to strong French resistance, so that until 1944 landlocked Switzerland had access to the sea through a nominally independent part of France. But in fact she was surrounded by Axis powers and their subjects and in no position to maintain an even-handed approach to both sides in the war. As allied troops drove Germany out of France and Italy, there was again a risk that Swiss territory might be crossed. Moreover, Switzerland came under very strong pressure to participate in the economic boycott of Germany and to hand over to the allies all German property. In difficult negotiations a solution was reached after the war which did not overly compromise the general attitude of neutrality of Switzerland.

4.5. Swiss neturality and the UN [21]

The United Nations Organization was set up as an alliance against the Axis powers while the second world war still on. In such a body, there was no room for neutrals who were only allowed to send observers to San Franciso. The observers from Switzerland concluded in their report to the government that the new organization had powers to enforce participation in economic and military sanctions, even against non-members, which would make it impossible for Switzerland to maintain her traditional neutrality as a member. Thus, when after the end of the war the Organization invited neutral countries to become members, Switzerland, contrary to Finland, Ireland and Sweden, did not apply.

In the years that followed, when the UN was split into two camps by the cold war, there appeared to be no reason for Switzerland to change her attitude. Even when neighbouring Austria became neutral in 1955 and nevertheless joined the United Nations, Switzerland decided not to follow her example. The situation then still was that only neutral Austria separated Switzerland from the Warsaw Pact countries, so that there was a strong possibility of wars being fought along her borders. But as in prewar days, there was no ideological dimensions to Swiss neutrality. Public opinion was overwhelmingly anti-communist and supporting the ideals of Wastern democracy. Switzerland was even able to be of some help in situations where the UN was directly involved

in a conflict, as happended in Korea in the 1950s. To this day Switzerland is represented on the armistice control commission in Panmunjon.

However, as the United Nations, in the wake of decolonization, became increasingly universal, Switzerland found it more and more difficult to claim a neutral stance between the Organization and a country it branded a violator of the general principles of the Charter. When therefore the Security Council instituted economic sanctions against Rhodesia in 1965. Switzerland found that a position of neutrality in the traditional sense would in fact favour Rhodesia against the UN. She therefore froze her economic relations at the level of the year preceding the imposition of sanctions and followed the UN in refusing diplomatic recognition of the breakaway country and eventually even closing down her consular offices.

By the end of the 1960s the Swiss government had come to the conclusion that the manner in which the Charter provisions relating to collective security were applied in practice would not compromise her perpetual neutrality should she become a member of the Organization. Parliament approved the proposal to seek membership while making a formal statement regarding the continuing policy of neutrality. However, the Swiss people, who under mandatory provision of the constitution had to vote on the issue, rejected by 3 to 1 the idea of adhering to the UN.

4.6. Swiss neutrality and the European Community

Being situated in the centre of Europe, Switzerland had always favoured moves towards European unity, if only to end the recurrence of wars among her neighbours. On the other hand, the very strict interpretation of her neutrality led her government to be very cautious when considering membership of organizations promoting such integration. Thus Switzerland became a member of the Council of Europe only in 1961. She chose not to join the European Coal and Steel Community of 1952 nor the European Economic Community of 1957. Instead she actively participated in the planning and implementation of the European Free Trade Area of 1959.

As the European Communities grew both in size and actual integration, Switzerland found that more than two thirds of her trade was with member countries and that she had to adjust increasingly her economic legislation to Community rules. After the unification of the communities and the launching of ambitious plans for monetary and political integration, Switzerland had to consider whether staying out was any longer advisable and indeed even feasible. Together with other neutral countries of EFTA she initiated negotiations in 1990 aiming at the creation of a European Economic Space which would encompass both the EC and EFTA and under whose rules EFTA countries could somehow participate in the making of EC decisions that would affect them.

The collapse of communist regimes in Eastern Europe in the same year created a completely new situation with the possibility of Eastern European countries applying for EC membership having to be considered. Moreover

Austria, Finland and Sweden felt that the end of the cold war fundamentally affected their interpretation of permanent neutrality, to the point where they now could contemplate membership of the EC. This left Switzerland very much on her own, with negotiations for a European Economic Space taking an ever more disappointing turn. Increasingly, there are voices both in the government and parliament and in the public which advocate membership of the EC, even at the cost of a considerable re-interpretation of the meaning of perpetual neutrality. However, public opinion remains very divided on the issue.

4.7. Swiss neutrality and the Gulf war

The end of the cold war not only affected developments in Europe. It also unblocked mechanisms in the United Nations which had been jammed since the early days of the Organization. When Iraq invaded Kuwait in August 1990, there was immediate response from the Security Council which condemned the aggression and decreed an economic embargo of Iraq. It later decided to authorise military enforcement action by troops of member countries which had been assembled in Saudi Arabia. All this placed Switzerland into a difficult position, as once again economic neutrality would in fact have favoured Iraq. The Swiss government therefore decided to join unilaterally the worldwide embargo while re-affirming Swiss neutrality in military matters. Thus, when actual military operations began, Switzerland closed her airspace to any military aircraft except those transporting medical and other relief equipment. This contrasted with Austria, where overflights were readily allowed.

4.8. An evaluation of Swiss neutrality as it has been practiced

The following salient traits appear to result from ancient and recent Swiss practice:

i. The purpose of a policy of perpetual neutrality is to allow for formal neutrality in any kind of war, but more specifically in a war between neighbours of Switzerland or in which such neigbours are involved.

ii. To ensure this, Switzerland must abstain from involvement in any kind of military alliances and agreements. She must at all times be able to dissociate herself from any country engaging in war to the extent necessary for maintaining a credible and legally consistent neutrality with regard to such a war.

iii. Swiss neutrality must be armed, i.e. the country must be in a position to defend herself in times of war against attacks or encroachments from any belligerent side.

iv. Swiss neutrality is not ideological. Swiss citizens and media are free to express their views on other countries and ideologies as long as this does not infringe Swiss libel laws.

v. Swiss neutrality is not part of Switzerland's written constitution which makes only a passing reference to it when defining the functions and powers of the government. This means that Swiss authorities are relatively free to define the precise content of their policy of permanent neutrality in the light of the prevailing international situation. The relatively rigid approach followed during the 1950s and early 1960s was rather an exception in this regard.

vi. In times of peace, Switzerland does not feel that permanent neutrality greatly hampers her freedom in dealing economically with other countries. The negative attitude as regards accession to the European Community was dictated by the fact that this is a supranational institution whose decisions and rules prevail over those of the member States. Moreover, most members of the EC are also members of the NATO Alliance.

5. Comparison with other neutral States

5.1. Austria [22]

Austrian neutrality dates from 1955, when a peace treaty ending the situation resulting from the second world war was being negotiated. Austria amended her constitution by including a provision that she would follow a policy of perpetual neutrality along the same lines as Switzerland. This was notified to all governments with which Austria had diplomatic relations. None objected and this is seen as a worldwide recognition of Austrian permanent neutrality. Shortly thereafter Austria became a member of the United Nations. Her neutrality was mentioned but no special declaration was made as later envisaged by Switzerland. Ever since Austria and Switzerland have closely consulted with each in other in all matters relating to their neutrality. Austria had a more outgoing approach and presently sees no reason to remain outside the EC. She has already officially applied for membership. On the other hand, there appears to remain a great popular attachment to neutrality as such, so that voices suggesting a re-orientation of foreign policy approaches have had a rather negative response.

5.2. Finland [23]

Finnish neutrality is based on a provision (art. 4) of her Treaty of Friendship with the Soviet Union of 1948, which refers to art. 3 of the Finnish Peace Treaty of 1947, which in turn refers to an earlier Finnish-Soviet Treaty of 1940. The upshot of it is that Finland and the Soviet Union undertake not to conclude or accede to an alliance directed against the other side. The Finnish view ever since has been that Finland may stay neutral in the cold war confrontation, but with a special obligation to do nothing even remotely hostile to the Soviet Union. This led to a very cautious foreign policy, avoiding early

accession to such European organizations as the Council of Europe and even the European Free Trade Association. Only the lessening of East-West tensions in the 1960s and early 1970s have allowed Finland to become a more active participant in European affairs [24] . However, until a year ago, the very idea of joining the European Community was seen as totally impossible. After the collapse of communist regimes in Easter Europe and the developments in the Soviet Union in early 1991, this stance was however completely abandoned and Finland now actively seeks membership of the EC.

5.3. Sweden [25]

Sweden used to be one of the greater military powers of Northern Europe. However, since the end of the Napoleonic wars, she has followed a consistent policy of avoiding involvement in military conflicts. This let her stay neutral also in the first world war, and at least since then, Sweden, in spite of the lack of any formal international commitment, is seen as a permanently neutral country. As a result, Germany refrained from attacking her in 1940. Sweden joined the United Nations as soon as neutrals were invited to do so and she has been very active in the Organization. Sweden has been contributing troops to most peacekeeping operations and never felt that he neutrality should apply in cases where the UN imposed economic or military sanctions. During the cold war, Sweden tended to follow a policy of even-hadedness even as regards political statements. She condemned both the USA and the USSR for what she saw as breaches of international law, and of all the European neutrals she showed the earliest and deepest affinity with the Non-Aligned Movement. Like Switzerland, Sweden found accession to the European Community incompatible with her traditional policies of permanent neutrality. After the events of 1990 however, she abruptly changed her stance and is now applying for full membership.

5.4. Ireland [26]

Ireland stayed neutral in the second world war because of her hostility to Britain, stemming from the conditions under which she got independence in 1921 and the fact that Britain continued to occupy Northern Ireland. After the war, this occasional neutrality was transformed into a policy of permanent neutrality, in particular as regards the East-West confrontation. As far as the United Nations are concerned, Ireland has never felt that she should remain neutral where the Security Council decided to apply economic or military sanctions. Irish troops regularly take part in peacekeeping operations.

5.5. Others

Since the second world war Costa Rica has declared herself perpetually neutral in 1947 and for this purpose dissolved her armed forces. Cambodia

tried to remain neutral in the Vietnam War and to gain recognition as a perpetually neutral country, but these efforts came to naught when the USA invaded the country in 1971. Laos declared herself neutral in 1962 and this was recorded by the international conference meeting in Geneva the same year. However, after the collapse of South Vietnam in 1975, a communist government took over in Laos and neutrality was abandoned de facto.

6. Malta's neutrality [27]

6.1. Antecedents

Under British rule Malta was an important strategic asset. There was a huge naval base and important forces were stationed in Malta all the time. When NATO was established, Malta became the Mediterranean headquarters of the Organization. At independence in 1964, a Mutual Defence and Assistance Treaty was signed with Britain, under which she was able to continue to use her military facilities on the islands.

A rather radical change of policies occurred when the Malta Labour Party came to power in 1971. Negotiations were initiated to end British military presence, which led to an interim agreement in 1972, under which that presence had to be terminated by 1979. The NATO headquarters were removed. In 1973, Malta became a member of the Non-Aligned Movement. The idea to neutralise the country was launched in 1976. The intention was that Malta's neutrality would not only be recognized but also guaranteed by other countries. The then Italian Foreign Minister suggested a joint recognition and guarantee by Italy, France and the Maghreb countries. However the Government of Malta preferred to negotiate such recognitions and guarantees bilaterally with the countries concerned.

6.2. International and national legal foundation of Malta's neutrality

In December 1980, Malta and Italy exchanged notes containing a declaration that Malta would henceforth be a permanently neutral State. Italy undertook to guarantee this neutrality and both sides were to seek recognition and guarantee from Mediterranean and other countries. This exchange was ratified and instruments of ratification were exchanged in May 1981. Recognition was expressed in reply to requests from Malta by France, Yugoslavia, Greece, the Soviet Union, Algeria, Libya and Tunisia, but none of these countries undertook to guarantee Malta's neutrality. To this day, Italy remains the sole guarantor.

On May 15th, 1987, the Constitution of Malta Amendment Act IV was adopted, which reproduces the Maltese declaration of 1980 and thus makes it a fundamental rule of internal law.

6.3. The content of Malta's neutrality

In the relevant texts it is affirmed that

> Malta is a neutral State, actively pursuing peace, security and social progress...by adhering to a policy of non-alignment and refusing to participate in any military alliance.

To this are added various undertakings regarding the non-toleration of military bases and the like. There is also an express affirmation that Malta's neutrality shall not prevent her from participating in any actions decided by the UN Security Council under Chapter 7 of the Charter.

The combination of neutrality and non-alignment may surprise at first sight. The manner in which it is formulated however clearly indicates that Malta's policy of non-alignment is merely an element of her overall policy of permanent neutrality. In other terms, she has undertaken to remain neutral in any future conflict except where the UN Security decides military sanctions or where she has to react in self-defence against a violation of her neutrality. This view is confirmed by the Italian guarantee under which Italy undertakes to assist Malta in such situations of violation of her neutrality in conformity with the principle of collective self-defence as formulated in Article 51 of the UN Charter.

The antecedents of the Maltese declaration and the manner in which foreign policy was conducted after its adoption leave however some room for ambiguity. It rather clearly appears that what Malta sought essentially was a guarantee of her inviolability by her immediate neighbours on the Northern and Southern shores of the Mediterranean. The attitude towards the world at large was covered by a policy of non-alignment. In a similar vein one notes that under a Treaty of Friendship and Cooperation concluded with Libya in November 1984, the two sides undertook to exchange military information and Malta unilaterally undertook not to allow her territory to be used in any agressive design against Libya. This last provision would appear pointless, as such abstention is the essence of a policy of permanent neutrality. On the other hand, exchange of military information might be seen as rather incompatible with that same policy. The clauses in question were abolished by an agreement between the two countries of November 1990.

6.4. The dynamics of Malta's neutrality

Over the last 20 years, Malta has been an eloquent defender of closer relations between the countries around the Mediterranean. She has vainly tried to get North African countries included in the Conference on Security and Cooperation in Europe and she has obtained from the latter a declaration regarding Mediterranean, as well as a special meeting on Mediterranean questions in October 1990 in Palma de Mallorca, where the idea of a Conference on Security and Cooperation in the Mediterranean was mooted.

From all this one may conclude that whereas Malta was certainly intent on protecting her own security through a guaranteed status of permanent neutrality, she also, and probably to a much greater extent, intended to use that status as a means of further promoting her ambitious as spokesman for closer relations among Mediterranean countries, in particular between those on the Northern and Southern shores.

7. Concluding remarks

7.1. Comparison of Maltese and Swiss views

In part the initial incentive to seek neutrality has been the same for both countries. Switzerland was situated in the middle of a region of greater powers continually at loggerheads with each other and at times vying for the control of the Swiss mountain passes over which their armies could be sent from North to South or South to North. Malta lies in the very centre of the Mediterranean which, in the 1970s, was the object of major power struggles between countries bordering it as well as far away superpowers. Neutrality in both cases, if generally recognized by these in the vicinity, became a protection as well as a means of avoiding being drafted into one or the other of contending camps.

Swiss neutrality has however had the additional reason of preventing a linguistically, culturally and religiously fragmented country from breaking apart under the strains resulting from affinities with neighbouring regions. Malta on the other hand is culturally, linguistically and religiously homogenous, so that attractions from nearby countries and cultures do not as such threaten disruption.

Swiss neutrality was always seen first and foremost as a means of keeping the country out of possible wars. In the field it was wholly successful. Should war cease to be a probability in Europe, there would be not much left to justify a continued policy of permanent Swiss neutrality. Maltese neutrality, strongly influenced by the concept of non-alignment, is much more concerned with tensions and conflicts short of war, in particular right now the North-South antagonism due to uneven development. The aim of Maltese neutrality in this context is less to keep aloof than to have the possibility to act as an intermediary and mediator, both politically and economically.

Swiss neutrality was always armed. The chances of defending the territory of Switzerland are enhanced by its geographical configuration, which allows at least in the central part for effective resistance with relatively modest means. Switzerland also had the means and the will to keep her armed forces in proper preparedness and suitably equipped. Malta is a group of small islands in the middle of the Mediterranean. There is no way in which she could resist effectively a determined attempt at invasion with her own means. Thus the choice of neutrality was meant to lessen the danger of invasion and to obtain certain guarantees from neighbours and especially Italy. As a result, Malta, like Costa Rica practices a non-armed neutrality. Her armed forces serve mostly for peace-time purposes.

7.2. The objective context: is there room for neutrality in present Europe, the Mediterranean, the world at large?

The heyday of European neutrals – and non-aligned – came with the CSCE process, especially in its initial stages, when the N + N (neutral and non-aligned) Group acted both as go-between and initiator of compromise proposals. This role is most likely over as a result of the present multipolarity combined with a much greater amount of shared beliefs and goals. New conflicts have mainly emerged inside existing composite States and neutrality is much more difficult to observe in such situations, as Austria is currently finding out with regard to Yugoslavia. One might also imagine irredentist conflicts between States aiming at changes of borders to bring minorities from one country to another. Here again there may be little room for neutrality as regards countries with close affinities to such minorities. Generally, Europe will have to set up much stronger central mechanisms to maintain peace and keep order among its tumultous populations. Such mechanisms will not allow for neutrality, as their success will be dependent on their commands being obeyed by all.

The situation in the Mediterranean is very different. The divide between European and Arab riparians with Turkey and Israel being neither is likely to deepen as regional integration progresses on both sides. There is still a lack of cultural and even human mutual understanding which tends to exacerbate even minor problems and conflicts. Therefore Malta's self-chosen role as mediator will gain in importance even if her means may be inferior to the task she has set herself. There is also a danger that economic and cultural links with Europe will easily outweigh the shallow closeness to the Arab world resulting from a common language and relatively close human relations. However Malta could and should continue to be the focal point of attempts to keep the pan-Mediterranean dialogue alive in as many fields as possible, and in this respect her very special brand of neutrality-cum-non-alignment may be of some help, even if this should not be overrated.

7.3. Conclusion

For Malta, the long experience of Switzerland with permanent neutrality serves mainly as an illustration of the possibilities and limitations of such a policy. But the conditions and general environment of the two countries are too different to allow for many analogies. Good knowledge of the the Swiss experience may help to avoid pitfalls or unjustified ecpectations, but as far as practical policies for the future are concerned, Malta will have to find her very own way by herself.

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1. For a recent brief overall description see the article of BINDSCHEDLER, R.L.: Neutrality, Concept and General Rules in Encyclopedia of Public International Law, 4, pp. 9 – 14.
2. Thus, OPPENHEIM's International Law, vol. 2 is made up of three parts: Settlement of State Differences (i.e. disputes), War and Neutrality. This presentation has been maintained up to the latest edition by LAUTERPACHT.
3. See Conventions V (Rights and Duties of Neutral Powers and Persons in War on Land) and XIII (Rights and Duties of Neutral Powers in Naval Wars).
4. For a recent summary of these rights and duties, consult the artides of MADDERS, ZEMANEK, KUSSBACH, DINSTEIN in Encyclopedia of Public Intemational Law, loc.cit, pp. 14 – 31.
5. During the time the author was working in the legal division of the Swiss foreign ministry, the question of whether there was a duty for neutral States to oppose the passage through their air-space of ballistic missiles was seriously considered. In view of the extreme difficulties of taking any effective measures against such brief passages it was decided that the neutral State could not be considered as violating its duties if it failed to intercept such missiles.
6. In the early years of the second world war the USA nevertheless undertook a major effort to support first Britain and then the USSR in their war effort against Germany, including by providing them with weapons, warships and warplanes, while remaining nominally neutral. See OPPENHEIM – LAUTERPACHT, Intemational Law, 7th edition, 1952, pp.637 – 640.
7. See SCHINDLER, D.: Transformations of the Law of Neutrality Since 1945, in: Humanitarian Law of Armed Conflict: Essays in Honour of Frits Kalshoven, Dordrecht 1991, Martinus Nijhoff, pp. 267 – 386.
8. See the article of VEROSTA, S. in Encyclopedia of Public International Law loc.cit., pp. 31134.
9. See the concise article of BINDSCHEDLER, R.L. in Encyclopedia of Public International Law, loc.cit.; pp. 133 – 139.
10. For detailed information consult ŠUBRA RAO, T.V.: Non-Alignment in International Law and Politics, 2nd ed. and WILLETTS, P.: The Non-Aligned Movement.
11. See BONJOUR, E.: Histoire de la neutralité suisse, Neuchâtel 1949, La Baconniére, chapter I.
12. An entity enjoying freedom of the Empire was directly subject to the Holy Roman Emperor and thus was not bound to any lesser feudal power. Such freedom was mainly given to newly founded cities but the Swiss cantons of Uri, Schwyz and Unterwalden had obtained the same privilege soon after the opening of the Gotthard passage over the Alps.
13. See BONJOUR, op.cit., chapters V and VI.
14. See BONJOUR, op.cit., chapter IX.
15. See BONJOUR, op.cit., chapter XXI.
16. See BONJOUR, op.cit., pp. 354 – 357.
17. See BONJOUR, op.cit., chapters X – XIX.
18. See BONJOUR, op.cit., chapter XX.
19. See BONJOUR, op.cit., chapter XXI.
20. See BONJOUR, op.cit., chapter XXII.
21. In three reports, beginning in 1967, the Swiss government has exhaustively reviewed the implications of the UN Charter for Swiss neutrality, both as a non-member and as a member of the organization. In 1981, these considerations were once more reviewed in a message to the parliament regarding the accession of Switzerland to the United Nations (Message du Conseil Fédéral à l'Assemblée Fédérale du 21 décembre 1981, Feuille fédérale 1982 I p. 505).
22. See Encyclopedia of Public International Law, loc.cit., pp. 135 – 6 and bibliography p. 138.
23. See CAMILLERI, T. The Neutrality of Malta, LL.D. thesis 1991, pp. 126 – 7, JAKOBSON, M.: Finnish Neutrality.
24. This became manifest when, at the prompting from the USSR, Finland convened a Conference on Security and Cooperation in Europe in 1973 and again in 1975, this time at the level of heads of State and government to sign a Final Act.
25. See ASTROM, S.: Sweden's Policy of Neutrality.
26. See CAMILLERI, op.cit., pp. 133 – 137.
27. For a full account and discussion consult CAMILLERI op.cit., pp. 49 – 116. Also see RONZITTI, N.: Malta's Neutrality, Italian Yearbook of International Law I, 1985.

THE ROLE OF THE LEGAL PROCURATOR IN THE MALTESE JUDICIAL SYSTEM

Paul Saliba

The institution of the Procurato *(Procuratori* and *Sollecitatori approvati)* finds its origins prior to the promulgation of the *Prammatiche* by Grand Masters Lascaris (1640) and Caraffa (1681), [1] . In the *Leggi e Costituzioni Prammaticali* of Grand Master Manoel de Vilhena (promulgated in 1723) a distinction is drawn between the competence of the advocate *(giurisperito)* and the legal procurator *(procuratore* or *sollecitatore approvato)* in requests for the issue of executive warrants [2] . One finds also references to the profession in the *Consolato di Mare di Malta* promulgated by Grand Master Perellos in 1697.

Professional Status and the Element of Representation

Basically the word *procurator* denotes, in general terms, *a person who acts in the interest of another person.* (Likewise in Roman Law one comes across the *procurator ad litem,* who was a person who could institute and plead in judicial proceedings in the name and on behalf of another person - which was a function quite diverse from that of the tutor or curator) [3] .

The nomenclature of legal procurator is found in various juridical systems, where its origins can be traced back quite extensively. In Scotland, the *procurator* is a ''law agent'' who practices before the Inferior Courts. In England, the person who pleads before the Ecclesiastical Courts and Admiralty Courts is known as *proctor,* which is a variant of the same term.

In our legal system, the relationship between the legal procurator and the client is similar to that between the advocate and the client; hence, in a judicial sense, it is a relationship *sui generis* [4] .

Definition of the Duties of the Legal Procurator

In the Maltese judicial system, the duties of the legal procurator had already been defined since the times of Grand Master Manoel de Vilhena. In fact, the *Costituzioni di Manoel* (in Title XII, which is modelled on the *rito siculo* and deals with procedure) provide that nobody shall be allowed to file written pleadings or any other judicial act, either in the name of the plaintiff or in the name of the defendant, unless he would have made known his

appointment as agent or as procurator to that effect. Subsequently, the British Colonial Administration in Malta made its first endeavour to legislate on the profession of the legal procurator in virtue of the preamble to Proclamation No. XII of 1827.

In the course of time, the representative character of the function of the legal procurator (that is, the juridical relationship between the legal procurator and the client) was restricted to that of a defending counsel before:
(a) the Courts of Magistrates;
(b) the Court of Voluntary Jurisdiction, and
(c) certain special tribunals (e.g.: the Rent Regulation Board, the Rural Leases Control Board, the Board of Special Commissioners, etc.)

In the performance of all the other duties, the legal procurator is to place himself under the direction and guidance of an advocate engaged by the client. (In this respect, the function of the legal procurator in Malta varies from that of the solicitor in England).

A definition of the status and duties of the legal procurator was given by the **Hon. Dr. (later Sir) Vincent Frendo Azopardi**, then Crown Advocate, when giving evidence before the Royal Commission of 1911, to question No. 10,031: "Now will you tell us about the procurators?". Dr. Frendo Azopardi replied thus on oath: "*The local solicitors are styled* ***legal procurators.*** *Their status is different from that of the English solicitors. Legal procurators are admitted to the practice of their profession by a Governor's warrant, as in the case of advocates. The conditions for obtaining the warrant are, mutatis mutandis, the same as in the case of advocates. The legal procurators are not required to go through a regular course of legal studies or to obtain a university degree in law. They have to pursue a social course of study of the rudiments of civil and criminal law and of the practice of the Courts. The principal duties of the legal procurators are to assist the advocates, with whom they are retained, in the proceedings of the case; to file written pleadings in the Registry on behalf of the clients, and to perform generally other services in connection with the preparation of cases by the advocates. Legal procurators are admitted to plead in the Inferior Courts. They are entitled to the same privileges, and are subject to the same disqualifications, as the advocates. Their fees in civil matters are regulated by the tariff annexed to the Laws of Organisation and Civil Procedure, and in criminal matters, as in the case of advocates.*"

In re **Tabone vs Farrugia et** (Law Reports, Vol.XI, p.506), the Court of Appeal defined the limits of the mandate of the legal procurator in the following terms:

Considerando il diritto, il mandato di procuratore legale è quello di fare pel suo mandante, nello affare a lui commesso, tutto ciò che, secondo la legge, appartiene alla sua professione seguendo la direzione dell'avvocato, quando vi sia, e questo mandato non ha altri fuori di quelli nascenti dai doveri stessi della professione, (art. 1635 dell'Ord [6] VII del 1868).

The said section 1635 (section 1686 in the present Code) provides that: "Where a person has been employed to do something in the ordinary

course of his profession or calling, without any express limitation of power, such person shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by him."

Duties of the Legal Procurator before the Superior Courts

The essential duties of the legal procurator in front of the Superior Courts are:
(a) to assist the advocate;
(b) to file judicial acts; and
(c) in general, to make himself disposable and useful by attending sittings, obtaining adjournments of cases when so required, and following the proceedings in Court during the absence of the advocate.

In his booklet entitled *The Legal Procurator,* published in 1950, **Dr. Maurice Caruana Curran, B.A. LL.D.** (later raised to the Bench and at present Chancellor of the University of Malta) makes the following comments on the primary role of the legal procurator, namely that of filing (and obviously, of following up) of judicial acts in the Registry of the Superior Courts:

In the Superior Courts the right of the legal procurators to file the written pleadings in a cause (sec. 180(b), Code of Organisation and Civil Procedure) has now come to be considered as one of his main duties, for an advocate may not file such pleadings in the Registry, and in the absence of a legal procurator, the client would, as a general rule, have to go to the Court himself for that purpose. Hence the engagement of a legal procurator has become, at least in practice, an almost unavoidable necessity.

In the case of **Dr. Antonio Caruana vs Scerri** (Law Reports Vol. XXVI Part I, p.533), the Court of Appeal asserted the principle that, in line with our judicial system, when a party engages an advocate to defend him or her in litigation, this would be also implicitly authorising the same advocate, as it is encumbent on the latter to do, to "employ" a legal procurator, provided the party would not have *expressly* made known to the advocate his or her wish to the contrary. The Court affirmed furthermore that the assistance of the legal procurator is indispensable to the advocate for the purpose of filing judicial acts, and a client who lets such acts to be filed by a legal procurator would be tacitly acknowledging the services rendered to him by the latter irrespective of whether there had been any direct relationship between them.

As soon as the legal procurator has been assumed, expressly or implicitly, to render his services, he is required to sign, together with the advocate, all judicial acts - with the exception of those of a commercial nature where such acts may be signed by the party (Cfr. Sec. 178 of the Code of Org. and Civil Proced.).

The Legal Procurator as "Ex Officio" Curator

An important role which the legal procurator may be called to fulfil is that of "ex officio" curator. In such capacity, the legal procurator has the duty – together with the advocate appointed also for the same purpose, when the matter falls within the jurisdiction of the Superior Courts, as otherwise the legal procurator so nominated shall act alone – to represent and assist, in judicial proceedings, any one in a variety of persons or institutions, such as, persons interdicted or absent from the Maltese Islands, minors devoid of legitimate representatives, unknown persons who may have a claim to a vacant inheritance, or commercial partnerships without judicial representation.

It is to be noted, in this regard, that in terms of section 936 of the C.O.C.P., the legal procurator, in the exercise of his duties as curator, is bound to use his best diligence for the benefit of the interest which he represents, and shall be personally liable for damages and interest which may be occasioned by his negligence.

The said section 936 provides also that:

"The legal procurator appointed to act as curator shall obtain for the advocate such information as to facts as the advocate shall require, file the written pleadings, be present at the hearing, and afford all other necessary assistance to the advocate."

The Right of the Legal Procurator to Plead

The only Court of superior jurisdiction before which the legal procurator may plead, or, in the Registry of which he may file judicial acts signed by himself and without the intervention of the advocate, is the Second Hall of the Civil Court (Cfr. Sec. 470(2) of the C.O.C.P.).

Besides the aforementioned rights and duties which he enjoys in the Superior Courts, the legal procurator may act as counsel and plead in the Court of Magistrates in civil as well as in criminal matters. These same rights may be exercised by him also in the Rent Regulation Board, the Rural Leases Control Board, the Board of Special Commissioners, and certain other special tribunals.

Qualifications to Practise as a Legal Procurator

As already pointed out, in the *Costituzioni di Manoel* reference is made to the *procuratori o curiali approvati* or *procuratori matricolati.* The qualifications required for the exercise of their profession are:

(a) their proved honesty (nota proibità);
(b) experience in judicial proceedings and in the compilation of evidence;
(c) the prescribed oath of office; and
(d) a warrant or licence from the Grand Master.

A Proclamation issued on 15th October, 1827, provided, *inter alia,* that:
(a) No person would be allowed to sue out any warrant or other writ as Procurator in any of the Superior Courts or before the Supreme Council of Justice, unless he were in possession of a licence from the Head of Government to practise generally in the Courts or Council as a legal procurator, or unless he had received from the Government an official licence to act as such in a particular cause;
(b) Permission to practise generally as a legal procurator was to be granted only to those who were of known honesty, furnished with sufficient experience in judicial proceedings and completely skilled in the English language.

Our law [7] lays down the following requisites that would entitle a person to obtain a warrant of legal procurator:
(a) he is of good conduct and good morals;
(b) he is a citizen of Malta;
(c) he has been approved by the examining board of Faculty of Law, at a regular examination in the subjects of the course of studies to be followed by candidates for the profession of legal procurator, in accordance with the regulations of the University of Malta;
(d) he has, after passing the examination referred to in paragraph (c) or at any time after the 31st day of December of the last academic year of the said course, for a period of not less than one year, attended at the office of a practising advocate of the Bar of Malta and trained himself in the practise of the rofession;
(e) he has been duly examined and approved by two judges, who shall issue under their signature and seal a certificate attesting that they have found him to possess the qualifications above mentioned and that he is competent to practise as legal procurator in the Courts of Malta.

Professional Conduct and Liability

The rules that govern the professional conduct and liability of the advocate apply similarly to the legal procurator. Indeed, it has always been held that the legal procurator, as much as the advocate, is held responsible for professional negligence when such negligence has been proved to be the result of *dolus* or *culpa*; however, he is not responsible for damages when he has acted simply *in error*, unless such error would not have been so manifest that might lead to the conclusion that it was the result of *culpable ignorance* or *evident incompetence* [8]

In his dissertation for the Doctorate in Laws, [9] Dr. Stefan Meilak says that: "...the attitude of the Maltese Courts seems to be a constant one, demanding either culpable negligence of a higher degree or evident incapacity, an attitude which seems to be in conformity with the old Maltese law on the subject where advocates and legal procurators... were only held liable for:

Supina, manifesta ed inescusabile colpa ed ignoranza principalmente ex defectu solemnium et formalitatis processus. [10]

In the section dealing with legal procurators in the said thesis, Dr. Meilak cites from a judgement delivered by the Court of Messina on 25th January, 1893 where it was stated that:

Gli avvocati e procuratori legali non sono responsabili di fronte ai loro clienti se non per dolo o frode oppure per supina ignoranza o per grave ingiuria. [11]

The rules governing the professional conduct of the legal procurator are provided for mainly in Book Third, Title XVII of the C.O.C.P. These provisions, however, concern mostly cases of contempt or improper behaviour towards the Court. On the other hand, the Court of Appeal is empowered to investigate any complaint brought before it by the Attorney General, the Chamber of Advocates, or by the Registrar of the Courts in connection with any *abuse* or *misconduct* attributed to an advocate or legal procurator in the Course of his legal practice.

The Criminal Code likewise provides for disciplinary measures by the infliction of a *multa* or of temporary interdiction from professional practice in cases where a legal procurator betrays the interests of his client [12] . Besides, the Code of Organisation and Civil Procedure [13] provides also for the perpetual disability or temporary disqualification to practise the profession in the case of a legal procurator who has been convicted by a competent tribunal for serious crimes punishable with imprisonment for a term exceeding one year.

Professional Secrecy

The law makes it clear that ''advocates and legal procurators, when they appear before the Superior or Inferior Courts, shall be deemed to be officers of the Court. (Sec. 30, C.O.C.P.) It is a standard rule that a legal procurator (as in the case of an advocate) may not divulge nor may be compelled to despose with regard to, any information known to him in professional confidence from his client.

Section 588 of the C.O.C.P. states that:

(1) No advocate or legal procurator, without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or *loco confessionis* [14] .

Similarly the Criminal Code of Malta, in section 642 (1), under the law of evidence, provides that:

(1) Advocates and legal procurators may not be compelled to despose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.

Fees paid to the Legal Procurator

The fees that may be charged by the legal procurator, like those of the advocate, are determined by law. A general rule is that in cases where the legal procurator renders his professional services jointly with an advocate, his fees are equivalent to one third of those chargeable by the latter, with some exceptions where the fees of the legal procurator equal those of the advocate.

It is to be noted that section 88 of the C.O.C.P. (which makes reference to sec. 83 that applies to advocates), prohibits legal procurators from entering either directly or indirectly, into or from making any agreement or stipulation *quotae litis.*

The fees due to the legal procurator, like those of the advocate, are privileged and take precedence over other claims. These are barred by the prescriptive time limit of two years [15]

Conclusion

The profession of the legal procurator has, throughout the past three centuries, rendered significant service to Maltese society, not only within the framework of the administration of justice but also, and in no lesser degree, in public life. In this respect, the history acclaims such names as Ġużè Muscat Azzopardi and Sir Hannibal P. Scicluna in the field culture; Ċikku Azzopardi, G. Lanzon, Giacinto Tua, Ercole Valenzia, Armando Mifsud and Manwel Quattromani in the political arena; Fortunato Ellul, Bertu Mizzi, Giuseppe Galdes, Ġużè Mangion, Giuseppe Pace Bonello, Robert Dingli and a host of others who have honoured the profession through their competence in the performance of their legal duties and who had also been of considerable help to a number of advocates who in the course of time assumed high positions in the judicial echelon or in public life.

Even today the profession of legal procurator is living up to its tradition and is giving proof that it still has an important and indisputable part to play in the administration of justice for the benefit of the community at large.

The past history of the profession of legal procurator gives credence to Judge **M. Caruana Curran's** remark that the service rendered by the profession over a span of more than three hundred years is "a circumstance which neither the members of the profession itself, in upholding its dignity, nor the authorities, in applying such reforms as may be judged consonant with the times, can afford to overlook."

NOTES

1. Vide: Sir Antonio Micallef's comments in 1843 to the *Code de Rohan* (1784).
2. Vide: Dr. M. Caruana Curran, *"The Legal Procurator"*, 1950.
3. M. Caruana Curran, ibid., p.3.
4. Dr. M. Caruana Curran states: "The legal relationship between the legal procurator and his client is similar to that between the advocate and client, that is, juridically speaking, it is a relationship quite *sui generis*, though it partakes both of the contract of mandate (involving representation) and of the contract of *locatio operarum* (not involving representation)" in *The Legal Procurator (1950)*, p.4.
5. Cfr. *Limits of Evidence of the Royal Commission of 1911*, H.M. Stationery Office, 1912, p.276. It is to be noted that, after having been suspended, together with other courses, for around 14 years, the academic course of Legal Procurator was resumed at the University of Malta in 1987, and restructured as a course leading to the degree of Bachelor of Arts in Socio-Legal Studies.
6. This section corresponds to section 1868 of the Civil Code, revised edition of 1984.
7. Section 87 of the Code of Organisation and Civil Procedure.
8. Cfr. Court of Appeal: Barbara vs Vella, 1.1.1929; Buttigieg vs Hirst noe, 16.02.1945; and others.
9. *Professional Liability*, University of Malta, 1986.
10. Cfr. *Costituzioni di Manoel*, par. 6, Title VIII.
11. Quoted in re Giovanni Fava vs Nutar Giovanni Vella, Vol. XXIX,II,331, 19.02.1935.
12. Sections 122 and 123.
13. Section 84.
14. In a separation case Martha Pace vs Francesco Saverio Pace (Vol. XXV,I,799, 19.05.1924), the Court in its judgement made reference to an English case Wilson vs Restall where it was held that privileged communications include: "Communications between counsel, solicitors and their clerks made in professional confidence unless the client expressly authorised the evidence to be given."
15. Section 2149 of the Civil Code.

* *Chev. Paul Saliba, a practising solicitor since 1948, is the President of the Chamber of Legal Procurators. He also sits on a Commission for the Investigation of Injustices.*

THE FUNDAMENTAL RIGHT TO PROPERTY: A BRIEF REVIEW IN THE LIGHT OF RECENT DEVELOPMENTS

Mark Said

In theory and on the basis of current specific legislation there are two main statutes which may, and have actually infringed upon the right to protection from deprivation of property without compensation (Article 37 of the Constitution) and to protection from privacy of home and other property (Article 38 of the Constitution). These are the Land Acquisition (Public Purposes) Ordinance and the Housing Act (Chapters 88 and 125 respectively of the Laws of Malta), the latter as amended by Act XXXVII of 1989.

The limitations to the above-mentioned rights are specifically established by the relative provisos contained in the respective Articles of the Constitution. This does not create any particular difficulty as it is based on the generally accepted principle enunciated by John Stuart Mill: the liberty of the individual must be thus limited: he must not make himself a nuisance to other people.

Section 47(9) of the Constitution

However, section 47(9) of the Constitution gives rise to a number of problems in its interpretation and application in so far as it directs that the fundamental right to protection from deprivation of property without compensation may be legally infringed upon with the operation of any law in force immediately before 3rd March 1962, or any law made on or after that date that amends or replaces any law in force immediately before that date (or such a law as from time to time amended or replaced in the manner described in that sub-section), provided that such amendment or substitution does not incur any of the prohibitions expressly laid down by paragraphs (a) (b) (c) and (d) of section 47(9).

On a cursory look at the said section 47(9) one would be correctly tempted to conclude that both the Land Acquisition Ordinance, being and enactment of 1935, and the Housing Act, being enacted in 1949, are safeguarded from any allegation of a violation of section 37 in terms of section 47(9) itself. Even the above-mentioned 1989 substantial amendments to the Housing Act are safeguarged from any possible violation of section 37 as these, rather than adding to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired, have limited the kinds of property

subject to such possession or acquisition, have not made the conditions governing entitlement to compensation or the amount thereof less favourable to any person owing or interested in the property, and have not deprived any person claiming such compensation a right of access to an indpendent and impartial court or tribunal established by law for the purpose of determining his interest in or right over the property and the amount of any compensation to which he may be entitled, and for the purpose of obtaining payment of that compensation, and securing to any party to proceedings in that court or tribunal relating to such a claim a right of appeal from its determination to the Court of Appeal in Malta.

Yet, in reality, what particular legislation, if at all, did the legislator had in mind when drafting the limitation referred to in section 47(9)? Or was it meant to be a simple general blanket provision? This point, perhaps, may today be more of an acdemical than of a practical value in view of the current amendment being debated in Parliament aiming to make all legislation subject to chapter IV of the Constitution, and in view of Act XIV of 1987 which again renders all Maltese legislation subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Be that as it may, the point was taken to Court in a case recently decided by the First Hall of the Civil Court in its Constitutional jurisdiction. (Architect Edwin Delia et vs Housing Secretary, 14 / 6 / 1991, as per Mr Justice Caruana Colombo, now pending in the Constitutional Court). Mr Delia alleged that the limitation laid down by section 47(9) applied only with reference to the Land Acquisition (Public Purposes) Ordinance, and that the Housing Act did not come within the scope thereof. He contended that even the legislative text was indicative of his allegation. Although the Court did not directly dispose of the issue raised as it found that it need not enquire whether respondent's demand to applicant to afford recognition to the tenant allocated subject premises pursuant to the relative Requisition Order in terms of section 8 of the Housing Act violated section 37 of the Constitution, once the requisites of the latter section were not satisfied in fact, it nevertheless seemed inclined to accept respondent's argument that had the legislator wanted to limit the scope of section 47(9) only to the Land Acquisition (Public Purposes) Ordinance he would have expressly stated so. *ubi lex voluit dixit*. Perhaps the issue might crop up again for deliberation in the Constitutional Court!

The European Convention

As has already been said, Act XIV of 1987 has rendered all Maltese legislation subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, to a limited extent, the right to protection from privacy of home, enshrined by section 38 of the Constitution, is once more found in Article 8 of the European Convention, which lays down one's right to one's private and family life, home and correspondence, whereas the right to the protection from deprivation of property without compensation

is broadly found in Article 1 of the First Protocol to the Convention, which ensures that every natural or legal person is entitled to the peaceful enjoyment of his possessions. Some worthwhile considerations are called for in this regard.

Section 38 of the Constitution affords protection to a right partaking of both of a personal (i.e. privacy of home) as well as of a real (i.e. property) nature. The right protected by Article 8 of the Convention definitely partakes of an exclusively personal nature, as one's private and family life, home and correspondence cannot but be classified as thus. Undoubtedly, there is a discernible overlapping between the concept of property as found in sections 37 and 38 of the Constitution. What is the difference between the two and how are the terms "No person shall be subjected to the search ..... of his property or the entry by others on his premises" to be properly construed? What is the difference between 'property' and 'premises' as found in section 38? Is the definition of 'premises' to be limited only to residential premises, or must one rely on the general and unlimited definition as used in popular English language such that any house or land is covered?

That issue had also been raised in the case Architect Delia vs Housing Secretary, referred to earlier on. The Court was left in no doubt that, within the purview of section 38 taken as a whole, and which affords greater protection to the personal rather than the real aspect of the right in question, 'premises could only be taken to mean residential premises, i.e. it is a pre-requisite for the purposes of that section that one must be in immediate and physical possession of one's property and premises. Again, this deliberation is pending on appeal in the Constitutional Court.

Basing oneself on this position so far enunciated by the Maltese Court with regard thereto, the issue might become problematic and further complicated in the context of the European Convention. At a first glance, it would seem that the equivalent of the local protection to one's right not to be subjected to the search of his property or the entry by others on his premises (as interpreted by the Maltese Court referred to above) lies in Article 8 of the Convention in so far as the right to one's home would also require the immediate and physical possession of 'premises'. Yet there is more to it than meets the eye.

Article 1 of the First Protocol to the Convention is so worded that it would appear to incorporate more than just the counter-part to the local right to the protection from deprivation of property without compensation. Indeed, it does not directly mention the right to compensation as I shall presently outline. Nor, for that matter, does it adopt the word 'property'.

The said Article 1 starts off by establishing the right to the peaceful enjoyment of one's possessions. This might easily entail that no person may be subjected to the search of his property or the entry by others on his premises. It also appears to entail that no property of any description may be compulsorily taken possession of. What is one to understand by "possessions"?

Interpretation of "possessions"

Movables and immovables as well as corporeal and incorporeal possessions definitely fall within this right and are afforded protection. Obviously, possession has to be legitimate as otherwise no such protection may be invoked. Yet can there be one kind of possession, which, though legitimate for all intents and purposes of ordinary law, may not necessarily have the above-mentioned protection extended thereto? Does the European Convention afford protection to the right to the peaceful enjoyment of possessions held by a real title as opposed to possession held only by a personal title, or both? What if, for example, one temporarily possesses property by title of lease (being a personal right) and is prevented from ejoying the peaceful possession thereof? Indeed, according to section 8(2) of the Housing Act the Director of Social Housing may requisition a dewelling house from a tenant in possession thereof. And for the purposes of the said Act, "requisition" means taking possession of a building or requiring the building to be placed at the disposal of the requisitioning authority, and "requisitionee" means the person or persons from whose possession (without any qualification) a building has been requisitioned by the requisitioning authority.

The definition of possession at Maltese ordinary law is so worded that it impinges on this problem of interpretation and application in such a manner that possession held by personal title is left in a most uncertain position. Section 524 of the Civil Code lays down that:

"(1) Possession is the detention of a corporeal thing or the enjoyment of a right, *the ownership of which may be acuqired* and which a person holds or exercises as his own.
(2) A person may possess by means of another who holds the thing or exercises the right in the name of such person.
(3) A person who has the detention or custody of a thing but in the name of another person, is called a holder".

The nature of possession as outlined above affords certain ordinary rights to the possessor in case of molestation or in case of spoliation, but not always such fundamental rights to property and possession as enshrined in the Constitution and the European Convention.

But, then, what is one to make out of section 37 of the Constitution when it prohibits the compulsory acquisition of an interest in or right over property of any description? While, on the one hand, there should be no doubt that the interest which a prospective buyer of land might have on a promise of sale absolutely does not come within the parameters of section 37 (Alfred Balzan vs Prime Minister et, Constitutional Court, 15th January, 1991), though it might be of importance for the purposes of the Land Acquisition Ordinance where 'owner' is defined to include a person having *an interest* in the land (qualified as *'legal interest'* in section 9(2) thereof), on the other hand, it does not result that the Maltese Courts (or the European Court for that matter) have ever directly dealt with the issue here raised, and it remains to be seen

whether the concept of possession and related interests will undergo further evolution.

It has already been noted that to a very large extent the Constitution protects both the Land Acquisition (Public Purposes) Ordinance and the Housing Act from any allegation that they violate section 37 of the Constitution, but that they receive no similar protection with regard to the provisions of the European Convention. Or do they in some manner or other?

Limitations Under The European Convention

An interesting limitation to the right set forth in Article 1 of the First Protocol to the Convention lays out that no one shall be deprived of his possessions except in the *public interest* and subject to the *conditions provided for by law* and by the general principles of international law. Moreover, a state is in no way impaired the right to enforce such laws *as it deems necessary* to *control* the use of *property* in accordance with the *general interest* or to secure the payment of taxes or other contributions or penalties.

Thus, it would appear that if there is a deprivation of possession as authorised by national law and in the public interest, the exception contemplated by the Convention will become the rule and the relative fundamental right is left in abeyance.

Although there are marked differences in substance and in the procedure meant to achieve their scope and purposes, it cannot be denied that both the Land Acquisition Ordinance and the Housing Act have, by law, the conditions provided in the achievement of their respective purposes, and both aim for such purposes in the public interest. Indeed, the Land Acquisition Ordinance itself limits the said acquisition only to public purposes. But is a public purpose one and the same thing as the public interest? No such problem of interpretation arises in connection with the Housing Act as it only mentions the public interest which, on its part, is defined to mean making provisions for securing living accommodation to the homeless and for ensuring a fair distribution of living accommodation.

Section 3 of the Land Acquisition Ordinance provides that the President of Malta may by declaration signed by him *declare* any land to be required for a public purpose. Section 6 of the same Ordinance then lays down that no person shall require any proof of the said public purpose other than the declaration of the President of Malta.

Public Interest

In spite of that, one would be justified to query whether any such declaration that land is required for a public purpose can be challenged in the local courts in the light of the relative provision of the European Convention,

made locally enforceable by Act XIV of 1987, which allows a signatory state a measure of appreciation in what may be deemed necessary to control the use of property in accordance with the general interest.

So far we have nothing much to go by except a partial judgement on this point by the First Hall of the Civil Court in its Constitutional jurisdiction in the case Tracisio Borg et vs Commissioner of Land (3rd May, 1991 as per Mr Justice Anton Depasquale) to the effect that, in spite of what section 6 of the Land Acquisition Ordinance and the proviso of Article 1 of the First Protocol to the European Convention actually entail, a declaration that land is required for a public purpose may be challenged on the basis of an allegation that land is not really required for a public purpose.

Seen in what should be its proper perspective, I feel that a declaration that land is required for a public. purpose is simply a manifestation of Government intention with regard to that land, which should not be subject to judicial review by any court, but which should fail exclusively within the administrative and political domain of Government. This is what the margin of appreciation left to each signatory State should implicate. How the intention so manifested is realised in actual fact is a different matter and procedure should be completely subject to judicial review by the court in allowing an allegation that the use of the expropriated land did not justify the means adopted by Government in declaring that land to be required for a public purpose. Of course, there is no uniformity of thought and practice in determining what constitutes a public purpose.

Compensation

In the Constitution it is an established precept inherent to the right to protection from deprivation of property that when such deprivation satisfies the legal requisites of section 37 that deprivation is subject to full and adequate payment of compensation representing the real value of the property expropriated according to the criteria laid down by the Land Acquisition Ordinance. Such precept is only indirectly referred to in the relative provision of the European Convention which relies on the general principles of international law. These principles, undoubtedly, entertain claims for compensation in much the same way as a similar claim would be entertained by the Maltese court.

The point to be queried, however, is whether the law requires that first compensation must be paid in order that the expropriating authority can consider itself to have legally taken possession of the expropriate land.

This was the argument put forward by applicants in the case Anton Attard et vs Minister of Social Policy et decided by the First Hall of the Civil Court (as per Mr Justice Franco Depasquale, 9th May, 1990), still pending on appeal to the Constitutional Court. The Court there dismissed the argument as unfounded at law for a number of reasons. No direct or indirect inference could

be made that either the Land Acquisition Ordinance itself or section 37 of the Constitution direct that compensation must first be paid for the expropriation to be valid at law. Furthermore, the *ration legis* of both laws cannot but lead to the same conclusion. If this were not so, the procedure for expropriating land required for a public purpose will become self-defeating and stultified when it was meant to be expedient and efficacious. Again one has to take into consideration the amendment to section 22 of Chapter 88, introduced by Act XI of 1989, to the effect that the expropriating authority is now obliged to deposit on account in the Court Registry such amount offered by it by way of compensation and without any prejudice to any balance eventually due to the person having an interest in the expropriated land by way of compensation after the title of such land will have been transferred to the competent authority by outright purchase. Practice shows that much time elapses in any case where the amount of compensation is either agreed upon or determined. *Necesitas publica major est quam privata.*

From what we have seen in this short article it appears that while in practice both the Maltese Courts and the European Court have been inundated with allegations of all sorts of violations of sections 37 and 38 of the Constitution as well as Article 1 of the First Protocol to the European Convention, the fundamental right to property being the next most important human right after the right to life and liberty, in theory a delineation of the right to the peaceful enjoyment of one's possessions poses more questions than it answers.

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MORTMAIN LEGISLATION IN MALTA: THE GENERAL PRINCIPLE

Charles J. Scicluna

1. The Concept of Mortmain and its Origins

The word *mortmain* literally means "dead hand". The expression may well have originated from the rich symbolism of Germanic law; the effect of a culture where every concept of political and social power as well as of friendship and peace was expressed through the hand. The phrase however took on its most widespread usage with the onset of feudalism. Those who lived in the condition of serfs were considered *manus mortuae,* and this derived from the usage whereby the lord exercised his *ius spolii* on the death of the serf. If the lord did not find anything to take as spoil, the right hand of the dead serf was presented for him to clasp as a symbol of his lordship and also of the fact that the serf could serve him no longer [1]. Furthermore, the expression also derives from the macabre analogy with the hand of a dead man which, contracted with *rigor cadavericus,* would not let loose anything which it has grasped [2].

"Men in mortmain" were the serfs of the glebe and vassals of the lord who could not dispose of their property by will. The "right of mortmain" was the fee that the serf or vassal paid in order to be freed from the former incapacity; and the same expression also referred to the right of the landlord to succeed to the vassal who died without male heirs. "Mortmain entities" were those which did not pay succession duty [3].

The term "mortmain" was used also with reference to churches and ecclesiastical institutions. Ecclesiastical persons were prohibited from alienating their property. They were also exempt from the payment of taxes with the effect that the more land went to ecclesiastical entities the less income and advantages could be accrued in favour of the landlords and the nobility. As clerics were not bound to serve the lord in military endeavours the nobility regarded devises in mortmain with contempt. Coke was to summarise the effects of mortmain on the incomes of the nobility:

> "the lands were said to come to deceased hands, as to the Lords; for that, by alienation in mortmain, they lost wholly their escheats, and in effect their knights' services for the defence of the realme, wards' marriages, reliefes, and the like; and therefore was called a dead hand, for that a dead hand yieldeth no service" [4].

The subtraction of landed property from circulation had the inevitable effect of increasing the burdens on the serfs and vassals tied to the lands which remained in circulation and still bound with the obligations in favour of the

lords. Feeling against mortmain was generally widespread and relatively justified.

2. Proclamation XXIII of 1822 and the Background to it

One of the first things the British authorities on the Maltese islands were eager to do was to set the minds of the inhabitants at rest as to the matter of their Roman Catholic religion. On 15th July 1801 Charles Cameron issued a Proclamation assuring the Maltese of His Britannic Majesty's protection and above all respect and protection to their Churches, Holy Religion, persons and property [5]. General H. Pigott had issued a similar Proclamation on the 19th February 1801 and Thomas Maitland was to reiterate the contents in a Proclamation of the 5th October 1813.

It was an essential aspect of British policy in the early years of their rule not to show any sort of hostility to the Church in Malta since they reckoned that the thing would inflame the natives against them. One of the moves was to ensure and guarantee the *status quo* of the Church in the islands, and the Colonial Department was "most anxious...not to be a party directly or indirectly in despoiling the Church of Malta" [6].

Honouring the commitment with the Church did not mean that priorities of sovereignty and domination would fall second place [7]. The British were in Malta and they were here to stay. Any factor which would likely hinder their complete hold on the islands had to be dealt with. They could not help not tolerating the Roman Catholic Church but they were keen on not having a "very powerful" Church. In a era where ownership of landed property was still a guarantee of power, it was important for the British authorities on the island to ensure (i) that the *status quo* with regard to Church ownership of landed property be secured and (ii) that further increase in such ownership be drastically contained [8].

What was the British appraisal of the *status quo* with regard to the extent of Church property? In a memorandum sent to the Colonial Office by Major General Frederick Cavendish Ponsonby on 1st July 1830 the property of the Maltese bishopric was described as consisting of "two large farms, divided into several small portions" in Malta, and of "three fiefs in the neighbourhood of Lentini and in the Intendence of Syracuse" the latter property being heavily taxed by the Sicilian Government [9]. In the 1830 Blue Book ("Report upon the Islands of Malta and Gozo for 1830") the revenue of the (Roman Catholic) Church was stated at "about one-fifth of the property of the Islands" [10]. By 1890 the British estimate of the extent of Church property on the islands had officially grown to one-third from one-fifth [11]

The foregoing historical background is essential to a correct understanding of the motives behind Proclamation XXIII of 25th June 1822. The proclamation itself was promulgated by command of the Lieutenant Governor Major-General Sir Manely Power. As with many things of this world the proclamation was motivated by "a reason given and another hidden".

The "reason given" was sociological and economical:

"His Honour the Lieutenant Governor being aware that the acquisition of Landed Property in these Islands by Churches and other Pious Institutions has the effect of withdrawing such property from purposes of general utility and enterprise; and having been frequently solicited, by the Inhabitants themselves, to apply a remedy to the inconvenience resulting therefrom to Society at large, He has taken the subject into mature and deliberate consideration" [12] .

The "reason hidden" was political. The relevant proclamation was despatched to London with three others with a covering letter explaining each of them. The concise comment which the Chief Secretary to the Government, Richard Plasket, makes to Robert Wilmot of the Colonial Office (21st July 1822) is eloquent enough:

"Sir,
I have the honour to enclose, for the information of Earl Buthurst, copies of four Proclamations which have been issued since the last Packet sailed.

Two of these Proclamations (*Proclamation XXIII and XXIV*) relate to Church Lands and will speak for themselves – ***the one (The Mortmain Law) was intended to put a stop to the increasing influence of the Church in these Islands from their gradual accumulation of Landed Property.*** The other to prevent an abuse which had long since crept in, though without any right or authority, of Churchmen being exempted from the Duty levied on the transfer of Landed Property. These two Proclamations were settled when I saw Sir Thomas Maitland at Corfu in May [13] last.

3. The General Principle of Maltese Mortmain Legislation and its Interpretation

3.1 The Text of the Law

Articles I and III of Proclamation XXIII of 1822 contain the basic principle of Maltese Mortmain Legislation still extant today in Sections 3 and 5 of the Mortmain Act, 1967 (Cap. 201 of the 1984 Revised Edition of the Laws of Malta).

For the sake of completeness and in order to render the comparison more direct we reproduce the relevant articles and sections:

Proclamation XXIII of 1822:

Article I:

"No lands or Tenements in these Possessions, of whatsoever description, shall henceforth be considered as alienable to, nor shall they be, under any title, acquired by Churches or other Pious or Religious Institutions, excepting under the express and positive condition and understanding,

that such Lands or Tenements so acquired shall, within the term of one year from the date of such acquisition, be definitively and absolutely sold or disposed of, by such Churches or Pious Institutions, to some person or persons not subject to the above limitation and understanding''.

Article III:

''In case any Lands and Tenements, as aforesaid, acquired or to be acquired by Churches or other Pious Institutions, shall not be actually disposed of by alienation or transfer within the above limited period of one year as above enacted, at the expiration of such term such Lands and Tenements shall be considered *ipso facto* as having fallen into the possession of the Government, and the Crown Advocate shall proceed, without any other formality, to dispose of them at Public Auction, and deposit the net proceeds at the disposal of Government''.

The Mortmain Act, 1967:

Section 3:

''No immovable property situated in Malta shall be considered as alienable to, or shall, under any title, be acquired by, any Church or Pious or Religious Institution, except under the express condition that such property shall, within the prescribed period, be definitely and absolutely disposed of, by such Church or Institution, to some person or persons not subject to the above limitation''.

Section 5:

''Where any immovable property falling under the provisions of section 3 of this Act has not been absolutely sold or disposed of, as laid down in that section, within the prescribed period or, if such period has been extended, within the extended period, then, at the expiration of the prescribed period or of the extended period, as the case may be, such property shall *ipso facto* be forfeited to the Government''.

3.2.1 ''Immovable Property''

The following is an attempt at interpreting the wording of the Mortmain Act, 1967 with due reference to the text of the 1822 Proclamation and the contribution of the Courts to its clarification and application. When not otherwise specified the mention of ''Act'' and ''sections'' is to be understood as a reference to the Mortmain Act, Cap. 201 of the Revised Laws of Malta, and its respective sections.,

3.2.1 The ''Immovable Property''

One of the hard and fast rules of Mortmain Legislation in Malta is that it always has been applied for ''immovable property'' [14] . The original 1822 proclamation spoke of ''Lands or Tenements'' – ''Beni stabili di qualunque

siasi descrizione''. According to section 2: ''immovable property'' means any land or building, and includes the *dominium directum,* the *dominium utile,* and the *nuda proprietas* or the right of usufruct of any land or building.

This latter definition is not totally free from difficulties. There cannot be any doubt that for the purposes of Cap. 201 it is the operative definition of what kind of property falls under the control of the Mortmain Act. According to the principle laid down by the Court of Appeal in *Charles Gatt v. Alfred Bellizzi no.* (25th March 1960), the definitions proferred by other laws may not be conclusively used for the purposes of a special law if such use is not expressly sanctioned by the law itself or through an Interpretative Law of general application [15]

The Civil Court, First Hall, however, in *Ferris v. Reynaud* (30th April 1930), interpreting the law as it stood before 1967, had held that the expression ''lands or tenements'' without any addition or indication restricting its meaning included both immovables by their nature, as well as immovables by reason of the object to which they refer [16] . This is also the principle laid down by section 311 of the Civil Code. However, the interpretation given to the expression ''immovable property'' in section 2 is restricted to only one heading of the Civil Code list of immovables by nature – namely, ''lands and buildings'': section 308 (a) – ; and to one full heading and another part heading of the list of immovables by reason of the object to which they refer – namely, *dominium directum; dominium utile:* section 310(a); and *nuda proprietas* and rights of usufruct: part only of section 310 (b).

The definition of section 2 of Cap. 201 would seem to be exhaustive. If this opinion is accepted, the rights of use and habitation and praedial easements would not fall under the Mortmain Act. A wider interpretation should be excluded since we are dealing with a restrictive law which should be interpreted strictly. The fact that the Mortmain Act, 1967 has specifically opted for an *ad hoc* interpretation of the term, militates against any tendency to construct the phase ''and includes'' as merely illustrative. As may be deduced from a study of the history behind the Act, the scope of operation of Mortmain legislation in Malta has always been directed to the geo-physical extension of Church control and its curtailment. Rights of use and habitation do not necessarily infer such a sharp geo-physical and juridical dimension of control, and praedial easements are only relative and qualitative dimensions of property rights [17]

The immovable property must be situate ''in Malta''. This means that only land or buildings and the specified rights relative to land or buildings situate in ''the Island of Malta, the Island of Gozo and the other Islands of the Maltese Archipelago'' fall under the scope of the Act (section 2).

3.2.2 ''Any Church or other Pious or Religious Institution''

In the original 1822 Proclamation, the expression 'Churches or other Pious or Religious Institutions'' was wide enough to include a Church of any Christian denomination. Indeed exemptory acts were also passed in favour of Protestant

Churches since they also fell under the Mortmain Law [18]

The official interpretation of the 1933 Act amending the Mortmain Law (and introducing the concept of exemptions for specified purposes and of the general power to exempt) rendered it only applicable to the Roman Catholic Church in virtue of its definition of ''competent Ecclesiastical Authorities''. Exemptions for non-catholic Churches or Pious Institutions were still to be acquired by a legislative enactment.

In the 1942 Revised Edition of the Laws of Malta Proclamation XXIII of 1822 and the Mortmain (Exemption) Act, 1933 were consolidated in Cap. 2, the former taking Part I and the latter taking Part II. Whereas Part I was technically applicable to all Christian Churches, Part II referred to the competent authorities of Roman Catholic Church only.

The Mortmain Act, 1967, which consolidated the Mortmain Laws, was not divided in parts. The principles of the Mortmain (Exemption) Act, 1933 were incorporated in section 8 (alongside further extensions) and section 10. But the clause which determined who were the competent Ecclesiastical Authorities was moved to the general interpretative section (§ 2) while still referring to the authorities of the Roman Catholic Church only:

> '' ''competent Ecclesiastical Authorities'' means the Archbishop of Malta or the Bishop of Gozo according as to whether the immovable property is situated within the territorial limits of the diocese of Malta or of Gozo''.

In his LL.D Thesis (1983) the present author, basing himself on the wording and drafting of the law, presented three alternative positions as to the scope and consequent applicability of the Mortmain Act, 1967:

(a) the Act was intended to regulate mortmain with regard to the Roman Catholic Church only; or

(b) the Act applied to all Churches and Pious or Religious Institutions, irrespective of denomination, except for section 8 (Exemption for Specified Purposes) and section 10 (General Power of Exemption), which only apply to the Roman Catholic Church; or

(c) the Act applied to all Churches and Pious or Religious Institutions, irrespective of denomination, with the understanding that non-catholic Churches, Pious and Religious Institutions would have to submit a certificate of approval of the specific purposes issued by the Roman Catholic Ecclesiastical Authorities, under section 8, and would enjoy the benefits of the general power to exempt subject to the concurrence of the same Roman Catholic Ecclesiastical Authorities under section 10 [19] .

All three alternative positions had some serious shortcoming. Indeed all three positions discriminate against some Church in some way or another. The concrete proposal of the present author in 1983 was that the definition of ''competent Ecclesiastical Authorities'' in section 2 be changed in order to include the respective authorities in each Church or denomination [20]

The impasse seems to have been surpassed by the Mortmain (Amendment)

Act, 1991 which has substituted the definition of "competent ecclesiastical authorities" in section 2 of the Mortmain Act, Cap. 201 with the following:

> " "competent ecclesiastical authorities" means in relation to the Roman Catholic Church, the Archbishop of Malta or the Bishop of Gozo according to whether the immovable property is situate within the territorial limits of the diocese of Malta or of Gozo, and in relation to any other chuch or other pious or religious institution belonging to a denomination other than the Roman Catholic Church, the highest authority of that denomination in Malta as may be recognised by the Attorney General for the purposes of this Act;" [21]

After the foregoing amendment the Mortmain Law in Malta is clearly applicable, in all its sections, to churches or other pious or religious institutions belonging to the Roman Catholic Church and to churches or other pious or religious institutions belonging to all other denominations.

The 1991 amendment does not despell all uncertainties on the matter. What does "denomination" mean? The following two answers are equally possible and admissable:

(i) the term may refer to all *Christian* denominations which the legislator fully and clearly puts under the scope of the Mortmain Law and among which the legislator mentions the Roman Catholic Church by name for social and historical reasons. This interpretation is backed by the current use of the term "denomination" in the Christian milieu: there are various religious groupings which claim allegiance to the fundamental tenets of Christianity namely the belief in One God, the Father, the Son and the Holy Spirit and the Divine Nature of Jesus Christ in whom initiates are baptised. In the Christian context these various groupings are called "denominations".

(ii) the term may refer to all kinds of religious groupings irrespective of origin or belief with the practical result that non-christian religions such as Islam, Buddhism, Hinduism and non-christian sects such as the Jehova Witnesses would fall under the purview of the Mortmain Law. Albeit the use of the term "church" is improper in reference to such non-christian religions or sects, the legislator seems to have usurped this latter term in a very wide untechnical sense. After all, in today's world there are phenomena on the fringe of the religious which indeed call themselves "churches".

As to the concrete meaning of "church and pious or religious institution", case-law has never delved into the matter but institutes of charity like the Conservatorio San Giuseppe, Cospicua [22] and societies for catechesis like the *Societas Doctrinae Christianae (M.U.S.E.U.M.)* [23] have been considered as falling under the law by our Courts. Furthermore, the Court of Appeal in *Cremona v. Spiteri Maempel* (2nd March 1962) established the principle that for purposes of the Mortmain Law the (Roman Catholic) Church is not one universal entity but that each separate Church and pious or religious institution is considered individually, as a separate subject of the law [24]

3.2.3 *De Iure Acquirendi et Retinendi*

Iis is an established point that the Mortmain Act does not do away with vthe right of a church to acquire. The *ius acquirendi* of the church still subsists. But it subsists in a modified and limited way. The church may acquire, but it always acquires with the ''express'' condition that the immovable property acquired will be definitely and absolutely disposed of by such church within the ''prescribed period''. Such alienation by the church must be made in favour of a person which does not fall under the Mortmain Law. Therefore it is not the *acquisitio in fieri* (the punctilliar moment of the transaction) that is restricted by the law, but rather the *acquisitio in esse* (the definitive relationship between one owner and the thing). This latter concept of *acquisitio in esse* may be juridically translated into the *ius retinendi,* which in turn would imply the *ius utendi et frundi.* Every *acquisitio in fieri* is done, indeed conditionally. The condition need not be expressed at the particular moment in time. It subsists *ipso iure.* Anything contrary to it will be considered as if it was not written.

Therefore the Mortmain Law concerns more the law with regard to the enjoyment and the extension of the right of ownership than with regard to the question of capacity to contract., The actual wording of the law may give the impression that it is the rights of acquiring and alienating that are in a way directly involved with the restriction of the law. However, the grammatical 'subject' of section 3 is ''immovable property''. The use of the passive in its regards emphasises the ''express condition'' as a *sine qua non* to any contract or transfer of property where a church is involved. The right to alienate property to a church is also modified indirectly since it cannot be simple and unconditional but must always be conditional, irrespective of the will of the person alienating the immovable property [25]

3.2.4 Periods of Time

In the 1822 Proclamation the immovable property acquired by a church was to be definitively and absolutely disposed of ''within the term of one year from the date of such acquisition''. This term was too draconian. It was not until the Mortmain Act, 1967 that a more realistic attitude was taken with regard to the period of time available for disposal of the property.

The general term with regard to most titles is still that of ***one year from the date of acquisition*** (cf. section 2).

In the case of immovable property which is acquired by any church or pious or religious institution subject to the temporary right of usufruct in favour of one or more persons not being a church etc., the term is one year from the day of the cessation of such usufruct and its consolidation with the *nuda proprietas.*

In the case of immovable property which is acquired by any church etc. subject to the right of use in favour of a third party not in mortmain, or subject to the right of habitation in favour of one or more persons, the term is one

year from the day of the cessation of such right of use or habitation.

These provisions with regard to immovable property burdened with rights of usufruct and habitation were justified on the ground that it is generally very difficult to sell property so burdened. The law does not cater for the yet more difficult situation of property burdened by a contract of lease.

The question of title by legacy has also been given separate consideration. Immovable property, not burdened with the rights of usufruct, use and habitation, which is acquired by any church etc. by title of legacy must be disposed of within one year from the day on which such church etc. is given possession of such property or within two years from the day of the death of the testator, which ever of both terms is the earliest. Albeit this is a provision in the right direction one must state that it still falls short of an equitable solution to the problem of testamentary dispositions. It is not uncommon for the heirs not to inform the church etc. of any legacy left in its favour with the consequence that at the lapse of two years the legacy is *ipso facto* converted into a gift to Government. Such a complaint was already officially communicated to the British Authorities in the *Pro Memoria* which Cardinal Rampolla handed to Sir Lintorn Simmons on 9th April 1890:

> ''Some new law would be most useful regarding public notaries to oblige them to notify within a given time to the ecclesiastical authority the testamentary dispositions received in their acts which might be in favour of the Church, such as pious legacies, and thus to prevent that such disposals of property which are unknown should remain unexecuted after the death of the testators, when as too often happens, the heirs do not care to fulfill these legacies'' [26]

3.2.5 Forfeiture *Ipso Facto*

In default of absolute and definitive disposal within the prescribed or the extended period, the immovable property is *ipso facto* forfeited to the Government (section 5).

Forfeiture means ''the loss of all interest'' in the property concerned. On general principles, a clause importing forfeiture must be construed strictly. Our Courts have repeatedly held that forfeiture, albeit it was the sanction of the law, was to be reconciled with the *mens* of the law itself which was intended to prevent the expansion of mortmain and not liberalities to the Church:

> ''Il testatore, Francesco Savarese disponeva a favore di un ente morale, il Conservatorio di San Giuseppe della Cospicua, nel modo che gli viene permesso col Proclama No. XXIII del 25 Giugno 1822, legge intesa ad evitare la sottrazione dei beni stabili al commercio ed agli oggetti di generale utilità, e non già intesa a privare le Chiese, ed altri luoghi più e mani morte dal vantaggio della liberalità e devozione dei cittadini disponenti'' [27]

In *Amato v. Grima* (1861) it was stated that forfeiture of immovable property under the Mortmain Law did not prejudice the rights of the Church to the fruits and income prescribed by the testator for pious purposes (e.g. pious burdens) [28]. This would imply that for our Courts forfeiture is not necessarily tantamount to "the loss of all interest" by the church in the particular immovable property.

Whereas under English Law a tenant could take advantage of forfeiture [29], the Maltese Courts have held that it is not for third parties to take advantage of the forfeiture and any action to be taken on such grounds appertains only to the Attorney General [30]

Forfeiture *ipso facto* operates in virtue of the law which provides this penalty immediately upon the verification of certain determinate facts. In the case of section 5, the relevant facts to be ascertained are the non-disposal of the particular determinate immovable property and the lapse of the period of time applicable to the case. There is no need for any official declaration to effect forfeiture. The sanction of the law is automatic.

4. A Concluding Remark

The foregoing has been a discussion of the general principle behind Mortmain Legislation in Malta. The history of this institute would be incomplete without a fair treatment of the various inroads into the general principle which have been developing in Maltese legislation during the last century. Another article will deal with the different exceptions to the general principle, contained in the Mortmain Act, Cap. 201.

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1. Cf. G. SANTACROCE, "Manomorta Ecclesiastica", *Digesto Italiano* XV, parte I (1905), 753 - 769 at 753 - 754.
2. Cf. G. LANDI, "Manomorta", *Enciclopedia di Diritto* XXV (1965), 542 - 545 at 543.
3. Cf. FALCHI, "Manomorta (Storia del diritto)", *Digesto Italiano*XV, parte I (1903 - 1907), 700.
4. Sir E. COKE, *Commentary on Lyttleton:* quoted by W. BURGE Q.C., *House of Commons Report on Mortmain (1844)* 164, par. 1378.
5. PUBLIC RECORDS OFFICE (Kew, England) (PRO). CO. 158.1: Despatches 1801 (January - October) pp.78v - 79v: Charles Cameron to Lord Hobart. Malta 29th July 1801: Enclosure: Proclamation by Charles Cameroon 15th July 1801:

   "Alla Nazione Maltese

   "Incaricato da Sua Maestà il Re della Gran Bretagna di reggere tutti gli affari, fuorché li Militari, di queste Isole di Malta e Gozo, col titolo di Commissario Civile della Maestà Sua, abbraccio con sommo contento questa occasione di assicurarvi che SUÀ MAESTÀ vi accorda piena protezione, e godimento di tutti i vostri più cari diritti proteggerà le vostre Chiese, la vostra Santa Religione, le vostre persone, e le vostre proprietà".
6. CF. PRO.CO.325.39 (40): Report: Vacant See at Malta 1830. Colonial Office, 16th October 1830.

   Reference is made to instructions to General Ponsonby in Malta and Sir Frederick Hankey in Rome from Sir G. Murray (8th October 1829).
7. Cf. P. DE BONO, *Sommario della Storia della Legislazione in Malta* (Valletta 1897) 346: "Il risconoscimento della Chiesa stabilita nell'isola non importava l'immutabilità del suo diritto pubblico ecclesiastico la modificazione del quale doveva essere anzi il naturale portato del nuovo governo e delle nuove relazioni fra i due poteri".
8. Cf. Great Britain: Parliamentary Papers: House of Commons 1844, Vol. X, p. 587: Select Committee appointed to enquire into the Operation of the Laws of Mortmain etc.: Report and Workings 24th July 1844: Richard Matthews explained why he was in favour of mortmain legislation to the 1844 House of Commons Select Committee on Mortmain in these terms:

   "The effect of vesting land in mortmain is, that the owner never dies, and the land becomes inalienable; consequently, if continual accretions are to be made to the quantity of land in mortmain, it may in time amount to any assignable quantity, or might swallow up the whole land of the kingdom; that is unless restrictions were imposed upon such alienations in Mortmain. I apprehend the possession of land at all times will give a proportionate influence to those who own and have the disposition of it and consequently, that if very large quantities of land were to come into the hands of particular classes of persons in mortmain, it might give to those classes a very great and undue preponderance, both politically and in many other relations of life. For these reasons, without going into very minute matters just now, I decidedly approve of the general policy of the laws of mortmain".
9. Cf. PRO.CO.158.66: Despatches 1830: F.C. Ponsonby to R.W. Hay ("Private"); Malta 1st July 1830.
10. Cf. PRO.CO.158.68: Despatches 1831 Vol. I (January - July): Ponsonby to Viscount Goderich (Blue Book) Enclosure 2: Report upon the Islands of Malta and Gozo for 1830: Ecclesiastical Establishment. Malta 3rd March 1831.
11. Cf. PRO.CO.537.8: Supplementary Correspondence 1876 - 1898 Vol. III: Simmons to Salisbury (Secret) 21st April 1890.

    Cf. etiam: DE BONO, *Sommario* (1897) p. 353, note 51b: "Si colcola che la proprietà immobiliare nell'isola appartenga per un terzo alla Chiesa, per un terzo al governo e per un terzo ai privati".
12. Cf. *Proclamations, Minutes, Official Notices* (Malta 1821 - 1822), 28th June 1822: Vol. II, pp. 48 - 49.
13. PRO.CO.158.31: Correspondence Malta 1822, Vol. I, No. 26: Richard Plasket to Robert Wilmot. 21st July 1822.
    (The bold italics in the text are ours).
14. The point was reaffirmed officially by Dr Vincenzo Frendo Azzopardi before the Royal

Commission on 9th December 1911.

Cf. MALTA ROYAL COMMISSION 1912, *Report*, Minutes9891 – 9897: p. 270.

15. Cf. *Kollezzjoni ta' Deċiżjonijiet* (KD.) XLIV.i.63.
16. Quoted in Appeal stage: *Ferris v. Reynaud:* KD. XXVIII.i.48 at 50.
17. "Servitus est qualitas rei imposita, qua quis ius suum deminuit, alterius auxit": ULPIANUS, 1.5 §9 D. de novi operis nuntiatio 39, 1.
18. Section 5 of the Anglican Church (Property and Administration) Ordinance (Ord. VI of 1876) (Cap. 19 of the 1984 Revised Edition of the Laws of Malta) states:

    "The said Anglican Church is in virtue of this Ordinance authorised to hold and enjoy the immovable property mentioned in the foregoing sections (sections 2, 3, 4) without being bound to sell or transfer the same notwithstanding any provision contained in the Mortmain Law".
19. Cf. C.J. SCICLUNA, *The Mortmain Act, 1967: Its Genesis and Interpretation* (Dissertation for the Degree of Doctor of Laws (LL.D.): University of Malta 1983) (unpublished) p. 69.
20. IBID., p. 126.
21. Section 2 of Act No. XIV of 1991 (passed by the House of Representatives at Sitting No. 541 of 2nd July 1991; assented to by the President on 12th July 1991): *Government Gazette,* 15,453 (12th July 1991) Supplement A, 352 – 356 at 355.
22. *Cf. Agius V. Dimech* (8th May 1866): KD. III.583.
23. Cf. *Cremona v. Spiteri Maempel* (2nd March 1962): KD. XLVI.i.133.
24. Cf. IDEM, at p. 137 per A.J. MAMO C.J.:

    "Issa, il-liġi, kif jidher mill-kliem tagħha, inklużi l-istess kliem tal-praembolu, mhux tikkunsidra l-Knisja bħala korp universali wieħed, iżda tikkunsidra l-Knejjes u l-istituzzjonijiet oħra piji jew reliġjużi bħala suġġetti ndividwali kapaċi li jagħmlu akkwist ta' proprjetà.
25. Cf. Court of Appeal (Sir A. MICALLEF C.J.), *Amato v. Grima* (1st March 1861): KD.II.348; Court of Appeal (Sir A. MICALLEF C.J.), *Agius v. Dimech* (28th May 1866): KD.III.583; Court of Appeal (Sir A. DINGLI C.J.), *Demajo Pisani v. Adami* (6th December 1889): KD.XII.343; Court of Appeal (Sir A. MERCIECA C.J.), *Ferris v. Borg* (13th June 1927): KD.XXCI.i.851.
26. PRO. CO.537.8: Supplementary Correspondence 1876 – 1898, Vol. III Enclosure Malta 89 (Secret) 10th May 1890: *Pro Memoria:* Cardinal Rampolla to Sir J.L. Simmons.
27. *Demajo Pisani v. Adami* (3rd July 1889): KD. XXI.283 per P. MIFSUD J.
28. Cf. KD. II.348 at 370.
29. Cf. *Morelle Ltd. v. Waterworth* (1954) (per Lord Justice DENNING): 3. W.L.R. 257 quoted in: R.E. MEGARRY, "Notes", *The Law Quarterly Review* XXX (1954) 454 – 456.
30. *Grech v. Vassallo* (15th December 1890): KD. XII.558 at 561 per Sir A. DINGLI C.J.

EFFECTIVE POLICE / COMMUNITY RELATIONS ARE THE CORNERSTONE OF THE PREVENTION AND DETECTION OF CRIME

Supt. Angelo Farrugia

The title of this essay certainly invites us first to understand mainly what is really meant by effective police, and community relations and how these together can work in harmony to achieve the best results in the prevention and detection of crime in today's society. There are certainly various ways how police effectiveness can be measured and one of them is by comparing the actual achievements of a force with the results it was seeking to achieve. In very simple terms, police effectiveness is a comparision between the results that the Chief Constable (Police Commissioner) hoped to achieve during the year and the results that were actually achieved by his officers. Therefore one can deduce a definition of effective police as the progress of the police which has been achieved towards a given objective. Now if the results are good then there is no point of trying to discuss this essay, however it is today quite true in many police departments that the results of the measurement of police effectiveness are invariably not particularly satisfactory.

On the other hand to have ideal community relations, the police department has first to understand its management and its surrounding society with all its intrigues and changes. Community relations involve both the relations of the police with the community at large and relations of the police between themselves as the latter are also part of the same community. At this stage it is desirable to evaluate why today's society is having more crime rather then say in 1950's after the last world war. Although many criminologists tried hard to understand this phenomena, yet the most convincing reason is mainly the price of freedom and democracy in today's society. The more the rights to individuals and groups, the greater is the crime rate. Moreover the police department is associated with the authority and power to implement law and order, and research showed that citizens are generally intimidated by laws and hence by the police. So what should be done? First "popularizing the law" that is to bring the law closer to the people. This would lead to develop awareness of the various human rights guarantees, provide citizens with basic knowledge to use the law for the protection and implementation of human rights, acquaint them with the fundamental procedure of the judicial and administrative system and develop a sense of active involvment and national development efforts.

The public today must know that the methods of combatting crime are to be agreed upon jointly with the police. This is only possible if the public is aware of its rights through the laws and conventions. The idea of educating the public at all levels has also been stressed in article 26 of the Universal declaration of Human Rights (1948), "Education shall be directed to the full development of the human personality and to the strenthening of respect for human rights and fundamental freedoms". Respect for human rights makes the community more aware in its voluntary right against crime, for crime in itself is a clear breach of human rights, besides being also a breach of a particular law of the laws of the land. This leaves no room that the police should be excused from not being fully aware of human rights. Infact one of the recommendations (3.3) in the final draft report of the International Congress on Human Rights, Teaching, Information and Documentation held in Malta between the 31st August and 5th of September 1987, "recommends to the Director - General to promote the training on Human Rights, such as magistrates, medical doctors, nurses, police officers, journalists, members of the armed forces, personnel of refuges camps, frontier police etc. by the intermediary of their national and interantional organisations and to promote human rights with senior executive of the mass media".

Another important point in making the public understand police work and inviting same to cooperate, in by informing regularly with our reported crimes and subsequent results. Historically 'the apostle of police-public relations' [1] in this respect is John Fielding, the son of Henry Fielding, the famous author of the books tome Jones (1749) and Amelia (1751). John like his father had great faith in the press as an agent to counter crime and he did everything in his power to publicize the proceedings of his court. He encouraged victims of crime to come to him. He published information sheets, showing how thieves attacked property. His contribution to police development was immense. He confirmed the value of detective branch, demonstrated the value of patrolling, exploited the crime preventive capacity of the press, and never lost sight of the social context of crime. Now if this proved right more then three hundred years ago, how even true it is today to improve even further our use of the mass media in a more convincing way than what Fielding managed at that very early stage to do himself. Very often the police blame television and the media, generally, for adding in their sea of troubles and occasionaly this may be so, but it has to be remembered that in one sense the media are neutral and are available to all. The Police therefore have to develop the ability to use the media for their own legitimate use.

Another consideration is the confidentiality of the community in the police. We cannot expect the public to trust the police when the latter is employing corrupt officers. Any smell of corruption must be fully investigated by an independent body and the findings of the inquiry is to be made public. The public must always be assured, and has a right to be kept informed. For example in Houston, USA, controversy arose during the year 1989 over the action of Houston police officers. On July 28, 1989, James Cebula, a former officer, was convicted of kidnapping and raping a woman while on duty in 1988. Cebula

personal file contained sixteen prior complaints from citizens. An investigation by the 'Houston Post' found at least 28 other active duty police officers who also had a high number of citizen complaints in their files. A number of similar incidents occurred in 1989. On October 31st 1989, for example, three off-duty police officers, driving an unmarked car followed a woman they said 'cut them off' in traffic. When the woman fired a gun at the car, the officers fired back. During the gunfire, the woman was killed and an officer was wounded. Again also in USA, Houston, on November 15, 1989, a police officer killed a security guard during an apparent routine traffic stop. In November and December 1989, three other officers were arrested on drug charges. In an other inquirty that took four years to conclude in Philadelphia, USA, it resulted that in the Philadelphia police Department [2] , extertion and bribary charges included twenty six officers, ranging from patrol officers to a deputy commissioner. These examples are ample proof that corruption in the police departments harm enormously the existent relations between the police and community. Thus the integrity of the police department must be kept at all costs.

The morality degree of society is also an important indication in trying to find a balance between police work and the requirements of that society. We know that certain crimes that are committed in our society, attract less condemnation by society itself and hence the police in this respect cannot receive a good response from the public to detect same. Other crimes since they are committed by people who appear to be "decent", often attracts less uproar than other crimes committed by "unpleasant" people. Thus the morality of the society plays an important part in both the prevention and detection of particular crimes. This change was notably remarked at the time of the Wolfenden Report 1957 which said, "it is not, in our view, the function of the criminal law to intervene in the pulic lives of citizens". It was of course referring specifically to interfering with private sexual morality of individuals, and it went on to say in relation to police action in detecting homosexual and similar acts in private. It seems reasonable, however to expect that excesses of permissiveness will gradually be checked by public opinion and that the law and those who enforce it will achieve a reasonable balance in the enforcement of morally based laws. Although most crimes are *per se* immoral and all societies look at them in that way, yet this balance of morality versus law and order should be maintained as finally it is always the public that has to answer back. This question of morality has even been since Plato [3] . From Plato's time it has been clear to all thinking men that laws are not necessarily just, and from the time of the Romans, that all that is thought to be normal need not necessarily be embodied in law. Keeping this important consideration in mind, one cannot ignore morality in discussing effective police and community relations, and so this situation leaves no choice but for the law and the police to move with great care and understanding and the police should not enforce laws in a roughshed fashion, merely because they exist. The Police have to learn to respect moral diversity and the pressure of moral freedom; nor should it be overlooked that all sin is crime. It is precisely in multi cultural societies, where there is particular disagreements on moral issues that the police should mostly strive

to reach an understanding of the relationship between law and morality and should understand that the enforcement of the law in a plural society which demands its moral choices is a very difficult activity requiring considerable skill. Thus if this understanding is present then society will respond to fight the obvious "immoral" crime. Then this will be the ideal atmosphere for preventing and detecting crime. Certainly such understanding depends on particular areas where the degree of morality varies. For example in a red light area, the presence of prostitutes is more tollerable than in another quiter area. This however does not always mean that certain crime should be left unnoticed. On the other hand once the crime is not reported then the tollerability of crime in a particular area increases.

Evidently materialism of today's society will reflect crime. The community will come closer to the police only if crime is present. The greater the crime rate, one would expect closer relations. Yet because it is man's apetite for materialism and for the acquisition of goods that society of his creation has organic characteristics of a criminogenic nature. The decriminalization of much private moral behaviour such as homosexuality, abortion, use of absene literature and so on, all in keeping with the growth of individual freedom, has liberated people from legal criminal guilt. Thus once no collective effort is made by all communities within a given society to decrease the quest for materialism, there could not result decrease in crime. This idea of decreasing the quest of materialism is an impossible mission, just as it is no point of eradicating crime, this too would be such another impossible mission. As recently as in 1977, after a lifetime in criminology, the world renowned Director of Cambridge Institute of Criminology, while considering the rise in crime, was unable to conclude on a note other than that, "for the time being, we shall have to live with it, and try to contain it" [4]

So with all these factors present in our complex society we have to continue to understand the change that continuously takes place in our society, in order to prevent and detect crime. In order to know the effectiveness of the police in relation to crime, a measurement should be carried out in every police corp to:-

(a) identify those crimes which the police, as a matter of policy do not actively seek to prevent and
(b) identify those crimes to be prevented by police action.

Such an exercise would show where the public have confidence. Thus where the public have confidence that reporting a crime to the police will have a positive result, for example the recovery of their property, they are more likely to make a report than in cases where they believe there is little action or no action the police can take. Thus, almost 100 per cent of the incidents of theft of cars are reported to the police, whereas probably less than 50 per cent of thefts from cars are reported.

The police investigations of the reported crime and their subsequent detection have to be examined to see how actually the offenders are detected.

The examination will establish the contribution made by the citizens who identify and name the offender, the number of detections achieved through the admissions made by persons arrested for another offence, and the contribution made by other sub-divisions or police forces who arrest offenders who admit offences in the area under consideration. It is also important to establish the contribution made by various sections of the force. "For example, the quality of the initial police response to the call from the public to the scene of a crime is a very important factor in determining whether or not the offence will be subsequently detected" [5]. Only after such an examination, one could tell whether there is a strong increase of prevention and detection of crime through closer relations with the community or not. By doing these exercises, then the police corp could re-organise itself to plan and evaluate better. In the past the emphasis has been on conducting business as usual, with changes to pollcing methods occurring almost spontaniously to individual problems. This approach will not be adequate in the future because the success of this method as a means of improving police performance is extremely suspect.

Thus as rightly commented by the former Secretary of State for the Home Departman in UK, the Hon. Douglas Hurd that "effective action against crime requires the police and all sections of the community to work together in partnership. In the inner cities where crime problems are most acute, there is an urgent need to involve local statutory services, local firms, voluntary organizations and concernced individuals in concerted and well targeted preventive action" [6], it is of considerable importance for police to develop studies of victim / offender relationships since policies for allocation of resources and investigative procedures may be more accurately resolved from a better understanding of such phenomena. It is well known that the majority of murders are committed not by strangers but by members of the same family or circle of friends and acquaintances. Consequently all sections of this society have to be convinced that they all have a share in police work. For example if we take stores, the police may be called to advice their owners to put prominent notices warning shoppers that ditectives are in action. The detterrent value of store detectives may bear little relation to the numbers on duty, but can certainly be enhanced by such notices. Again in a survey reported in a Home Office publication [7], regarding crime in Hospitals, it has been noted that the physical design features of the hospital that is its building and grounds may also contribute to be preventive measure to combat the crime (for example the location of the car parks). On the other hand the police, too, need to be aware of the increased risk of victimisation at certain hours in particular areas, so that they can consider arranging patrols to coincide with these periods. Certain important questions have also to be asked by the police to the public when investigating particular crimes like theft say of merchandise, so that the answers would lead us to the detection of the crime. Not infrequently those carrying out thefts (particularly if) they are in a position of authority or intend to continue the practice will attempt to conceal the loss in order to avoid inevitable enquiries when their branch or department of the business is next audited. Identifying the means by which they do this (for example by claiming particular items on

a delivery never arrived) can prove to be an invaluable means of detecting the offenders.

The suggestions that are fruitful in preventing crimes most come out from the same public (community) after continuous dialogue with the police. The latter are always in better position to give the right advice. Unfortunately this is not always the case. In a survey carried out by Paul Ekblon and Francis Simon's book, 'Crime and racial harrassment in Asian-run shops' in UK, the majority of shop keepers (81%) said they had not received advice on crime prevention from anyone. Those who had had, nearly all been adviced by the police; other advisers such as insurers, security companies, or fellow shop keepers were rarely mentioned. This is not satisfactory when in addition to the national police training system in UK, the Home Office also provides a crime prevention center for the training of crime prevention officers. Moreover the importance of getting closer to the community at all levels, was stressed as far as Willink Commission which examined among other things the Police / Public relations. For example in 1970, in UK, a race relations officer was appointed in Leeds. One can have a community constable if there are a lot of vandalism, high crimes, groups, anti-police feelings, in a particular area. The importance of keeping closely in touch through communication, which has been stressed earlier in this essay, could only be achieved through direct contact with the people and complemented with the assistance of the press and the media. Certainly the media is run by the community itself for the community and thus is of a major and subtle influence on police opinion. It needs to influence people and cultivate opinion. The mass media on the other hand needs the police for its bread and butter. So cooperation can only prosper if there is true goodwill on both sides and both have an insight and understanding of the other. It is now obvious that the prevention and detection of crime needs certainly more professionality than just hue and cry to catch the offender in the old times. The introduction of neighbourhood watches even on experimental basis, is certainly a step in the right direction. In Malta for example this idea has just started and its results will have to be analysed within the next few years. In UK, recently there was the introduction of other challenging project like the safer Cities Programme. This is operating through the local projects and there are already sixteen projects till this year in operation. Four more will be introduced next year (1991). The idea behind these programmes, is theat local cooperation and local initiative are discovering new ways of preventing crime and making communities safer. "Local people are the decision makers, enablers, and implementors in each case. The Home Office rule is to support them"[8] . This programme deserves follow up in other densely populated cities, in other countries where crime is high. Its objectives behind these initiatives are clearly to reduce crimes, lessen the fear of crime, and create safer cities where economic enterprise and community life can flourish.

Police and society must come in terms in the financing of their fight against crime. The commercial and business world undoubtedly suffers much from

crime against property. It may insure against losses through crime but the higher the losses the higher the insurance premiums until the point is reached where the cost of insurance against crime is too high. Therefore if prevention is introduced crime drops, insurance premiums are reduced and when the cost of prevention is accounted for, the balance of crime costs is reduced. Such a consideration clearly exerts new pressures on policing policies and the day may come when a socio-economic cost-effective approach to law enforcement will need to be carried out by police. The options available would be put to the public for their consideration. They would be faced with a list of options. How much of the limited budget for example, should be spent on prevention of crime and how much on its detection? Therefore society itself should be in my opinion the main chooser between the two approaches against crime. The detection approach is more costly while the preventive approach present always preferable results. Therefore while both approaches have to be applied to a certain degree, and while the detection approach is sound, indispensable and essential for society's survival, it is also true that too heavy a reliance on it, to the neglect of prevention, leave society less well served than it otherwise may be. The pursuit of preventive policies will help to create a more cooperative community through a heightening of its own potential for crime control. Prevention through the organisation of the community against crime to reduce fear of crime, the greater is the success of preventive policies in organizing communities against crime and the greater is the contribution on enforcement goals. A successful strategy will very greatly depend on the successful fusion of both the preventive and detection approach.

There is need (and there will be a greater one) for community involvment in social action to head off delinquency; and this should become a keystone of local strategy. Communities should then be educated in the importance of social concern for crime reduction. The police might be expected to offer leadership, advice, and information, but the independence of police in their constitutional and legal functions should of course remain unimpared. On the other hand the police should constantly search for a philosophical base on their actions and since their primary function is not the suppression of crime and disorder after it has taken place, but the prevention of crime by action before it takes place, this is largely a social concept. It is true that the new management philosophy of the force must accept the need to examine new methods of policing. The present illness of our society is the very product of society's past mistakes. In fact as has been remarked in the Ecologist [1] that, "there is every reason to believe that the social live at present afflicting our society – increasing crime, delinquency, vandalism, alcoholism as well as drug addiction – are closely related and are the symptoms of the breakdown of our cultural pattern, which in turn is an aspect of the disentegration of our society",. Yet both the police and its community in any area of the world have still the duty to work together to produce a better society. A Maltese minister of Education & Interior Dr. Ugo Mifsud Bonnici LLD rightly remarked in an interview he gave to a Maltese [9] that "the drug problem (in Malta) is not only a problem of the police but is also a cultural problem". Thus the need to have a partnership of understanding all our cultures and sub-cultures in the surrounding society,

is today an asset in the prevention and detection of crime. I would like to conclude with the following dialogue taken from the children's book "Alice in Wonderland"[10] which I have also case across in other texts:-

Alice said to the cat, "Would you tell me please which way I ought to go from here?"
"That depends a good deal on where you want to go" said the cat
"I don't much care where" said Alice.
"Then it doesn't much matter which way you go" said the cat.
Unlike Alice who travelled alone, the police have the community as its companion and hence a responsibility of not ending in the Wonderland.

1. 'A House in Bow Street' by Anthony Babington, p. 86.

2 World Book year Book 1986, p. 455.

3 Law & Morality by Clem-Cooper and Brewry.

4 Sir Lean Radzinowitz and Joan King 'The Growth of Crime' Chapter 9.

5 Police Management by A J I Butler (Cower) 1984, p. 35.
6 Home Office publication "Safer Cities Progress report" 1988 / 89.

Home Office's "Crime in Hospitals Diagnosis and Prevention" by Lorna J. Smith.

8 The Ecologist (Penguin 1972) Chr. 1.
9 Maltese Weekly "Il-Ħelsien" of the 24.9.90 p. 1 and
10 Alice in Wonderland by Lewis Carroll.

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THE ENVIRONMENT PROTECTION ACT, 1991 AND THE RIGHT OF FUTURE GENERATIONS TO A HEALTHY ENVIRONMENT

Kevin Aquilina

Act No. V of 1991, the Environment Protection Act, recognises in section 2 thereof future generations so much so that it imposes certain burdens therein defined on the Government of Malta to safeguard the interests of future generations. Although the Government of Malta has to fulfil certain duties, no adequate machinery is set up by Act No. V of 1991 to provide for safeguarding the interests of future generations.

Future generations, like animals, cannot defend their interests at the present moment in time for they lack the necessary structures to do so. Indeed, Maltese Law does not impose any obligation on present generations to bequeath to future generations a healthy environment. Again, future generations, due to their physical inexistence, cannot protect or safeguard their interests by, say, instituting court proceedings against the Government of Malta or any individual whomsoever it may be who may be contravening their right to a healthy environment. In the same way that animals cannot put pressure on the government of the day to enact into Maltese Law the Universal Declaration of Animal Rights, future generations presently have no vote to cast so as to induce political parties to formulate and implement a charter of intergenerational rights of humankind into Maltese law when in government.

Contrary to Act V of 1991 which leaves the matter in suspended animation, I intend to show that it is possible to create legal structures to enforce and safeguard the right of future generations to a healthy environment, and I shall do so by exploring five different ways of attaining such a goal.

The Right of Future Generations to a Healthy Environment

I have singled out only one particular right which ought to be granted to future generations and which is directly related to the subject matter of Act V of 1991 – the right to a healthy environment. By this I mean that future generations should inherit a sound, self-regenerating physical environment together with the necessary resource endowment which can sustain development which meets the needs of present generations without development. Furthermore, by sustainable development I understand compromising the abilities of future generations to meet their own needs. As a corollary to this

right, one can also include the right to freedom from prior environmental burdens and the right to improved security from environmental hazards.

Exploring some Legal Structures

In the Civil Law tradition, there is an institute known as that of the Curator. This institute has been in existence for a considerable amount of time both in our law as well as in Roman Law from where Maltese Civil Law is ultimately derived. Indeed, Roman Law and Maltese Civil Law provide for the safeguarding of certain rights (property rights, inheritance rights, etc.) which unborn children acquire but cannot exercise precisely because either they are still unborn or because they are still immature and have not reached the age of majority – they are legally speaking still **incapax.** Thus, section 170 of the Civil Code provides for the curator **ad ventrem** –

"If, at the time of the death of a husband without issue, the wife declares that she is pregnant, the court may, upon the demand of any person interested, appoint a curator **ad ventrem** with a view to preventing any supposition of birth, or substitution of child, and administering the property up to the day of birth, under such directions as the court may deem it proper to give."

Again, section 172 of the Civil Code outlines the duties of a tutor. A tutor has the care of the person of the minor and represents the said minor in all civil matters. He furthermore administers the property of the minor as a **bonus pater familias.**

Another type of curator contemplated by the Civil Code is that concerning absent persons. Section 194 thereof provides that –

"The presumptive heirs of an absentee, or any other person interested, may apply to the court of voluntary jurisdiction in the island in which the absentee last resided, for the appointment of a curator to manage the property of such absentee, and for any other requisite directions for the preservation of his property."

Section 929 of the Code of Organization and Civil Procedure, on the other hand, provides for the appointment of a curator **ad litem** so that such curator may appear in and defend proceedings in any civil court when a person is absent from Malta, or he is presumed to be dead, etc.

Then there is Chapter 299 of the Laws of Malta, the Public Curator Act, which unfortunately has not yet been brought into force and still has to see the light of day.

The inevitable question which now arises is whether provision can be made in Maltese Law for the appointment of a curator to represent future generations. Of course, the right which has to be contemplated here is not one relating to property or inheritance rights but to a healthy environment.

1. Curator in the Strict sense of the word

In the same way that the above-mentioned provisions provide for the office of a curator or tutor for a particular class of persons, amendments to Act V of 1991 can provide for the constitution of an public officer to be designated "The Curator of the Right of Future Generations to a Healthy Environment" who shall be entrusted in safeguarding the environment for the benefit of future generations, i.e. to assure himself that sustainable development is being carried out by government. Such officer should be given the necessary powers to institute legal proceedings against any person – including the Government of Malta – whose action does not promote sustainable development as defined above. If the Curator proves in Court that the act or omission of the defendant is one that will cause irreparable damage to the environment or that it is likely to do so in such a manner that it will prejudice the enjoyment of the said right, then the court could inhibit defendant from performing such act or, alternatively, as the case may be, the court could order him to do that particular act which it deems expedient for safeguarding the right of future generations to a healthy environment.

Although this approach seems, at least on the theoretical level, to be conducive to an efficient machinery which implements such right, on a practical level this implies that the Curator has to go to Court each and every time he desires to safeguard such a right and that he will have to institute a considerable amount of law suits. In addition, this also means that he must have a considerable amount of staff to deal with all these law suits, he must pay registry fees (unless he is exempted by law from doing so, in the public interest), he has to have a trained legal section in environmental litigation, etc. When all this is coupled with the exorbitant number of cases pending in court, this remedy seems to exclude an expeditious enforcement of such a right.

Thus a slight variation of this model could be that recourse is had to and administrative tribunal on the lines of the proposed Planning Authority rather than to the Courts of Civil Jurisdiction.

2. Commission of Inquiry which reports to the Executive

Alternatively, the Curator could, instead of going to court, communicate with the Minister responsible for the environment. The latter could then take all those measures which he deems appropriate so that the right of future generations to a healthy environment will not be prejudiced. However, the problem with this latter approach is that if it is left in the discretion of the Minister to take action as aforesaid, it may happen that pressure is put on the said Minister – by other Cabinet Ministers, including the Prime Minister, his political party, canvassers, constituents or even developers – which may convince him to either delay or even take no action at all. So even this latter approach poses certain difficulties.

A slight variant of this model is that where the Curator reports directly to the Cabinet (or to a Cabinet Committee) so that this organ would see to it that the necessary steps are taken to safeguard such a right. However, what happens if the Cabinet has, during a preceding meeting, authorised a project (or some other measure) which the Curator has categorised as one which is a menace to sustainable development? Or where the Minister responsible for the environment has exempted a particular government project from the need of an environmental impact assessment under Act V of 1991 simply because he knows that if such assessment were to take place the project would have to be halted? Will Cabinet or the Minister responsible for the environment reverse their previous decisions in these two cases or will they simply ignore the Curator's recommendation which is not binding upon them?

3. Commission of Inquiry which reports to Parliament

Another structure which can be adopted is that of having the Curator reporting directly to Parliament on any act or omission which he considers as prejudicing the right of future generations to a healthy environment. However, if this approach is implemented, it should be made quite clear that when the Curator refers such a case it has to be deliberated upon and dispensed of with utmost urgency. If the Government does not agree with the Curator's recommendation, the Leader of the House may place it as the last item on the agenda of the House so that it will never be discussed, thus frustrating any chance of enforcing such a right. Again this model may create another problem in the sense that Parliament is already burdened with a considerable amount of legislative work and so it would be quite difficult to fit in a lengthy discussion on the Curator's report. And even if a discussion takes polace, there is no guarantee that a remedy is going to be granted by the Honourable Members of the House due to the fact that Parliament has lost its sovereignty and is basically an instrument in the hands of the executive. One may argue that a select committee may be appointed for this task and empowered to take quick remedial action without the need of referring back its decision to the House of Representatives for ratification but if the government of the day is still obdurate in pursuing its course, the Curator's recommendation will be vetoed.

4. Judicial Organ

Another solution that may be offered is that the Curator may be granted judicial powers similar to those given to the Court of Magistrates sitting both as a Court of Inquiry and as a Court of Criminal Judicature. In other words, the Curator may be empowered to receive complaints from any person who alleges that a particular act or omission is not conducive to sustainable development. In such case, the Curator will have to conduct a preliminary investigation, compile evidence, examine such evidence as well as that which may be produced by the complainant or brought by any person who may be effected or who may have an interest in the inquiry. The Curator can also opt

for a public hearing. He will then have to decide what orders he should give so that the right of future generations to a healthy environment would be safeguarded.

In this structure, the Curator is acting in a judicial capacity and delivers orders which have to be enforced by some other machinery, e.g. the Police or the Courts. In this case, provision should be made so that his orders be deemed to be an executive title for the purposes of the Code of Organization and Civil Procedure so that they can, therefore, be enforced by the Courts of Civil Jurisdiction.

Furthermore, the Curator will have a considerable amount of power so much so that he could change any decision taken by a Minister or even by the Cabinet and, consequently, the politicians will surely not favour this option as they will consider it to be a curtailment of their power. No Minister would favour having an independent authority – apart from Parliament where he knows that his political party in power can always muster a majority of the members of the House to support him – ordering him to change decisions taken by him that are labelled as not being conducive to sustainable development. We still have to wait to see that Minister who will propose this option in Parliament!

On the other hand, the advantage of this model is that the Curator can provide the complainant with an expeditious remedy because until he investigates the complaint he may take all those conservative measures which he may deem fit and he may do this without prejudice to his final order. A slight variant to this model would be to permit an appeal on a point of law to the Court of Appeal.

5. Administrative Tribunal

A variation on the previous model is that of creating an Administrative Tribunal (or utilising the proposed Planning Appeals Tribunal, if and when it comes into being) to perform the adjudicative functions of the Curator mentioned above without prejudice to his right to grant conservative measures until he reaches a final order (i.e. an appeal will lie only from his final order and not from the conservative measures if such measures are not accompanied with a final order). An appeal on a point of law may also be logded from the Tribunal to the Court of Appeal. If this model is adopted it will be the Tribunal which will usually decide the issue rather than the Curator.

CONCLUSION

Although in this study I have contemplated only five structures which may be utilised so as to recognise and enforce the right of future generations to a healthy environment, I would like to point out that other models may be conceived or a combination of two or more of these models may be concocted.

I only want to demonstrate in this article that not even the slightest effort was made in Act V of 1991 by Parliament to create some type of adequate machinery capable of enforcing the right of future generations to a healthy environment mentioned in section 2 thereof.

Further reading:

Dr. Kevin Aquilina. **Analiżi Kritika Dwar l-Abbozz Propost ta' Liġi dwar il-Protezzjoni ta' l-Ambjent,** February, 1990 (Cf., especially, Appendix I, pp. 1 – 16 thereof, entitled ''Recognition and Enforcement of Future Generations (Healthy Environment) Act, 1990.

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Notes

THE ELEMENTS OF THE 'ACTIO MANUTENTIONIS', TO WHAT EXTENT IS THIS ACTION AVAILABLE ALSO TO MERE DETENTORS?

PAUL DEBONO

The 'actio manutentionis' is one of the four 'actiones possessoriae' which defend and protect possession both if it is joined and if it is separate from the right, defending possession against any person, and even against the owner himself. The rational basis behind them is the necessity of forbidding violence and arbitrary molestations against the possessor, and also in protecting public order where no one can take the law into one's own hands. This nature of public order was enunciated by the Court of Appeal in **Muscat versus Farrugia (1956) – Volume XL.II.897,** where the possessory action is founded on the necessity of social utility, rather than any absolute principle of justice, to prevent the private citizen from taking justice into his hands. In fact Galgano says:

"Si sogliono addurre, per giustificare questa protezione, superiore esigenze attinenti all'ordine pubblico: se chiunque potesse liberamente impossessarsi di çio che altri possiede senza esserne (o senza poter provare di esserne) proprietario, si legittimerebbero spoliazioni a catena, e l'ordine pubblico ne sarebbe gravemente pregiudicato". The inherent limitations in these possessory actions, being restricted to molestations and aggressions of possession, distinguish them from the 'actionis petitoriae' which can be exercised by persons having the right of ownership or other real rights over the thing against a usurper. In **Ersilia Zahra versus Aurelia Carabott (1955) – Volume XXXIX.I.315,** the Court of Appeal said that in the possessory judgement, it is only the 'jus possessionis' that is decided upon, and not the 'jus possedendi', without prejudice to the issue in the substantive actions.

The action for the maintenance of possession, together with the 'actio spolii' can be said to be the real possessory actions, because they can be exercised **only** by the possessor, who may be the owner, whereas the other two can be exercised **also** by the owner even if he is not the actual possessor. In Italy, the position seems to be similar where Galgano says:

"Le azioni possessorie spettano al possessore, anche se non proprietario, ma di esse puo avvalersi, e normalmente si avvale, anche il proprietario, che sia stato spogliato del possesso o molestato nel godimento del bene. In tal caso egli non agisce come proprietario ma come possessore;

e le azioni possessorie gli offrono una protezione assai più rapida di quella che otterrebbe con le azioni petitorie, essendo dispensato dall'onere della prova, spesso difficile, della proprieta del bene''.

Section 534 defines the actio manutentionis as:

''Where any person, being in possession, of whatever kind, of an immovable thing, or of a universitas of movables, is molested in such possession, he may, within one year from the molestation, demand that his possession be retained, provided he shall not have usurped such possession from the defendant by violence or clandestinely, nor obtained it from him precariously''.

This is a derivation from the 'interdictum uti possidetis' under Roman Law, where the plaintiff, being the molested possessor, exercises the action against the defendant who is the person causing the molestation. In France it is known as the complaint. The elements of this action may be said to be the conditions under which it can be exercised The 1st element is:

Being in Possession, of whatever kind

Possession is defined in Section 524 (1) as, **''the detention of a corporeal thing or the enjoyment of a right, the ownership of which may be acquired, and which a person holds or exercises as his own''.** The operative part is the latter, where one is not merely detaining, but possessing in terms of law as will be subsequently shown. Possession is a state of fact which is recognized and protected by law, inspite of its not being a right. We find its genesis in Roman Law where the praetor, in case of conflict as to who was in possession, issued the possessory interdict 'uti possidetis – vi. clam. precario ad adversario'. The person now in possession should not be molested unless he has gone into occupation through violence by any unlawful act, clandestinely, or by precarious title vis-a-vis his adversary, that is, as between the parties to the action.

The elements of possession are the material element, **corpus,** the fact, and the mental element, the **animus,** the intent. Savigny's subjective theory postulates the **animus domini,** the intent of holding as owner. Ihering's objective theory does not postulate such a high intent, it is merely that of keeping the thing to oneself to the exclusion of others, hence deriving its economic utility, provided there is no negative element.

Savigny –	Possession	=	Corpus + Animus
	Detention	=	Corpus + Animus detenendi
Ihering –	Possession	=	Corpus + Animus
	Detention	=	Corpus + Animus – negative element

Under the objective theory, both possession and detention have the same animus, but there exists the negative element in detention. This latter view seems to be closer to the Roman Law approach especially in protecting the

possession of the motive property devolving on the children born of a **matrimonium liberum.** As they were not her agnates, they could not inherit her, yet the praetor protected their possession. From the definition of possession under Section 524 (1), it seems that our law is closer to Ihering's approach. In his **Fonte,** Sir Adrian Dingli did not adopt the Italian concept because it applied to legitimate possession which was only necessary for prescription and because detention and possession were confused:

"Confondono la detenzione col possesso, il cui carettere principale è quello di tenere la cosa come propria".

Possession of whatever kind implies legitimate, illegitimate, in good faith and in bad faith. In **Azzopardi versus Farrugia (1930) Volume XXVII.I.622,** the Court of Appeal confirmed that:

"La differenza fra le due azione, è marcato, mentre quella di manutenzione è data per proteggere il possesso che possa essere turbato, ed anche eventualmente violato o distrutto, l'altro di reintegrazione viene fondata nel punire la violenza o la clandestinità dello spoglio"...."Il nostro legislatore, concede l'azione di manuntenzione *a qualunque possessore, sia esso legittimo o illegittimo, di buona o male fede, purché però la illegittimità, cioé la violenza, la clandestinità e la precarietà, non sia stata operata contro il convenuto,* il quale deve essere difeso come contro un ingiusto spogliatore".

Possession is legitimate if the elements of **iusta causa usucapionis** exist - Section 2107 (1): Civil Code:

Continuous, when the possessor has not willingly desisted from exercising acts of possession to which the thing is subject according to its kind. Thus, there has been no act of omission;

Uninterrupted, when not given up through an act either of the possessor himself or of a third party. There can be civil interruption by the possessor himself by acknowledging a right of ownership in another person, or natural or civil acts by a third party or by the owner. Natural interruption would be deprivation of possession for a term exceeding one year (Section 2127) whereas civil interruptions are measures laid down under Section 2128 to Section 2132 in favour of the owner to protect his right against prescription. If these acts are performed by a non-owner, possession remains uninterrupted.

Peaceful and Public, when possession has been acquired without physical or moral violence and by means of visible acts. These 'uitia' are relative to the person suffering them, because in terms of Section 527, initial violence and clandestinity do not perpetually nitiate possession as it can be recommenced when they have ceased.

Unequivocal. Possession is equivocal when through the conduct of the possessor and other circumstances, it is not clear that the possessor detains the thing as his own. In terms of Section 526, equivocal possession results also from the exercise of facultative rights or based on tolerance. Equivocal title

implies also a precarious title being relative to the person by whom possession has been so obtained. It is a permanent vitiation because it is to be found at all times. Any vitiation in any of the elements renders possession illegitimate and in certain instances turns it into detention or holding thus important with reference to the time required for prescription and also as regards the exercise of certain possessory actions.

It is a question of fact as to whether possession is in good faith or bad faith, but under Section 532, good faith is presumed, and the party alleging bad faith is bound to prove it. Good faith means the conviction, justified by probable grounds, which the possessor has, that the thing possessed by him is his or that the right which he exercises belongs to him. Section 531 (1) says that a person who, on probable grounds, believes that the thing he possesses is his own, is a possessor in good faith. A possessor in bad faith is the person who knows or who ought, from circumstances, to presume that the thing or right possessed by him, belongs to others – Section 531 (2). The legitimacy of possession is here not affected, it only affects the rights and obligations between the possessor and the owner and the time necessary for prescription – (Section 2140 – Section 2142).

In terms of what has been said above, it therefore appears that only the possessor, admittedly of whatever kind, can exercise the actio manutentionis, but in terms of the wording in 8004, there appears to be an inherent conflict because it depends on who the defendant is. In fact Section 534 continues, **"provided that he shall not have usurped such possession from the defendant by violence or clandestinely nor obtained it from him precariously"**. This indicated the defences available to the defendant, however, the problem that arises is that it appears that in certain instances, where the above **vitia** do not exist vis-a-vis the defendant, simple holders or detentors may also exercise the **actio manutentionis.**

What does a precarious title mean? Does it mean precarium, that is, holding gratuitously at the pleasure of the owner, or does it mean also holding or detaining onerously or gratuitously in the name of another? In both instances, there is no possession as there is the negative element, or absence of animus. Indeed, the lessor may be an indirect possessor because he is holding through the lessee who, in terms of Section 524 (3) is a mere holder. If a person has begun to hold the thing in the name of another person, he cannot, in terms of Section 525 (2) detain in a different way, for the simple reason that he wishes so to do. In fact Section 525 (2) states that where a person has commenced his possession in the name of another person, he shall be presumed to possess upon the same title unless the contrary be proved.

It therefore appears that **"possession of whatever kind"**, implies that precarious holders, detentors or holders do not fall within the legal meaning thereof, and therefore cannot exercise the actio manutentionis. Section 2118 as regards prescription states that persons who hold a thing in the name of others or the heirs of such persons, **cannot prescribe** in their own favour, such are tenants, depositaries, usufructuaries and generally, persons who hold the

thing not as their own. There are only three exceptions to the principle of the indelibility of the vitiation of precarium, or of detention found under Section 2119 and Section 2120 under the title of prescription.

These are:

(a) When the cause of the detention is changed by virtue of an exterior act of a third party, who transfers to the holder of the thing, the property thereof.

(b) When the cause of detention is changed by virtue of exterior oppositions made by the holder himself against the right of the owner. In this respect, Torrente says:

"Per mutare la detenzione in possesso è necessario un atto di opposizione contro il possessore; atto che, comunque esplicato, deve inequivocabilmente manifestare l'intenzione di tenere la cosa per proprio conto esclusivo".

This was also confirmed by the Corte di Cassazione in Italy in 1954.

(c) When the person who formerly held the thing in the name of another person alienates it in favour of a third party in virtue of a particular title capable of transferring ownership.

Dingli himself, commenting on his inclusion of the phrase under Section 2118 **"who hold a thing in the name of others"**, said that he did not use the words **"holding precariously"** because **"secondo la giurisprudenza Francese, queste parole significano ogni detenzione in nomi altrui, mentre secondo le nostre idee tolte dal diritto Romano, significano soltanto *una detenzione a piacere del proprietario*".** It therefore appears that the word 'precariously' under Section 534 has a very restricted meaning, that is, solely as defined under Section 1839.

Taking the above as a starting point, 'precarium' can never found possession, because there is absence of animus and the negative element. Furthermore, although lease which is usually onerous, usufruct and other titles do not fall under the definition of 'precarium', yet due to the definition and presumptions of possession, they are not possessors as they hold in the name of others, which is of wider application. This was confirmed in **Azzopardi versus Farrugia (1962) – Volume XLVI.I.381** where the Court held:

"Huma skond id-dritt modern, possessuri prelearji dawk li jkunu jgawdu minn xi dritt, anke ta' natura rrevokabbli, li ma jirrivertax assolutament lill-proprjetarju imma jimmantjenu fih id-dritt u li l-possessuri jridu bil-fors jirrispettaw".

In Appeal it was also held that even the emphyteuta and the usufructuary are precarious possessors but only as regards the rights of the direct and the bare owner respectively.

It is here where the inherent conflict appears. Section 534 starts by saying that only possessors of whatever kind can exercise the 'actio' yet its proviso states that the 'iritium' of precariousness shall operate only if the possessor,

being the plaintiff, had usurped possession from the defendant. The presumption under Section 525 (2) that one who has commenced his possession in the name of another person shall be presumed always to possess under the same title unless the contrary be proved, and the rule under Section 2121 (1) that no one can change in regard to himself the cause for which he holds the thing, reinforce the view that a detentor or holder always remain so. In **Grixti versus Ellul (1939) – Volume XXX.I.457** the Court of Appeal in this context said that it is evident that those who, as the usufructuary, hold precariously in the name of another, for the purpose of their precarious rights, it would be immoral, if **insciente domino,** they would invert their title and possess 'animo domini'. Zachar quoted in Dingli's Fonti says:

"La clandestinita e la violenza devono essere riguardo al convenuto per escludere l'azione possessoria, *ma la precarita è un vizio generale ed esclude sempre l'azione,* anchorche l'attore abbià avuto la cosa precariamente da un terzo".

This reasoning seems to be similar to Italian Law except for one exception where Galgano states:

"Per regola generale, al detentore non spetta invece l'azione di manutenzione, perciò il detentore dovrà rivolgersi al possessore perchè sia lui ad esercitare l'azione di manutenzione, se ha subito uno spoglio non violento o clandestino o se è stato solo molestato nella detenzione. La regola generale trova però una importante eccezione: il conduttore che sia stato da terzi molestato nel godimento della cosa può esercitare egli stesso l'azione di manutenzione, senza bisogno di rivolgersi al locatore".

Carbonnier is of the same opinion, **"enfin, le principe est qu'il ne peut (en matierè immobiliere) escercer les actions possessoires".** He continues that vis-a-vis the owner or from whom he holds precariously, the detentor does not need this possessory action because he is already adequately protected under the criminal code as regards violation of one's domicile or forced entrance and also by the terms of his own contract. With regard to molestation by a third party, the detentor can denounce to the owner / possessor, who may then in turn exercise the complaint. However, in certain instances, Carbonnier says that one can sometimes come across clauses where certain detentors are delegated with the power of making the complaint in the name of the possessor.

In so far as local jurisprudence is concerned, there have been cases where our courts have expressed their opinion that detentors cannot exercise the Actio Manutentionis. In **Azzopardi versus Farrugia (1930) – Volume XXVII.I.622** plaintiff was a tenant of some enclosed tenement, but he used to exercise a right of way over defendant's fields. The First Court held:

"L'azione possessoria non compete che all possessore di un fondo che tiene per sè ed in suo nome, e non compete al conduttore che tiene la cosa non per sè, ma in nome di altri, e quindi l'attore, che e conduttore, non può invocare in suo favore la disposizione di detto Art 229 (S 534) ..... La disposizione applicabile sarebbe quella contenuta nell'Articolo 230 (S 535)".

In Appeal, besides confirming the above, it was held that had the legislator wanted to include also detentors under Section 534, he could have included also the words **"or of the detention" which** are found under Section 535. **"Non intende riferirsi al possesso di fatto, *ma solamente di diritto*".**

The above line of argument was also followed in **Mamo versus Camilleri (1962) – Volume XLVI.162** besides others. Here the Court of Appeal held that the action exercised by plaintiff was not the actio manutentionis, **"għas-sempliċi raġuni illi l-attur hu biss kerrej tal-fond, cioè sempliċi detentur, mentri dik l-azzjoni tikkompeti biss lil min hu possessur fis-sens veru tal-Artikolu 561 (1)** (Now 524 (1)) [11]. The court gave the plaintiff an alternative remedy only because he left a discretion to the court so to do. Had plaintiff exercised the actio manutentionis only, the court would have thrown out his case.

From all the above, it therefore appears that before entering into the merits of the molestation to grant a remedy, the court must first enter into an examination as to whether the plaintiff is a possessor or not. However, in a 1967 judgment, **Vella versus Boldarini et – Volume LI.I.100** in my opinion, the Court of Appeal seems to have disregarded the above arguments and concentrated its findings on the proviso to Section 534 which has created a contradiction to what has been said before.

Plaintiff used to receive a percentage of rent on some premises in Senglea, but defendants unilaterally contested this right and therefore stopped paying her. Although defendants pleaded the precariousness of plaintiff's possession, because only her husband was the administrator, the court in refusing this line of argument, said that **ius terzi** cannot be pleaded. Quoting from a very early judgment (IX.291) it said:

"Non è lecito a chiunque, benchè munito di un titolo di proprietà *di molestare il possessore di un immobile anche con titolo precario,* a meno che l'attore non metta per base della sua istanza la domanda da provarsi di essere egli il proprietario della casa da altri posseduta".

In deciding in favour of plaintiff, the court did not go into the merits of what type of possession she had, and interrupted the legal position that the actio manutentionis cannot be exercised only if any of the 'vitia' already mentioned, exist vis-a-vis the defendant:

"Il-vizzju tal-prekarjetà jeskludi l-azzjoni biss meta jkun rigward il-konvenut u dan jirriżulta ċar mill-kliem *minn għandu*" (nor obtained it **from him** precariously).

To strengthen its reasoning, the court also quoted Sir A. Dingli in having suppressed the word 'legitimate' from the definition of possession, however, in my opinion, it appears that he was quoted wrongly, because 'legitimate' was not included for reasons already cited as regards the prescriptive period required. Admittedly, pleas of ownership are excluded in possessory actions, as their object is to maintain the status quo, but, in my opinion, the proviso to Section 534 should be read in the context of the whole section, and not on

its own. Therefore it appears that the court should have entered into the merits as to whether the plaintiff was a possessor or not.

There seemed to be a hint on the same line of reasoning in **Agius versus Cutajar (1959) – Volume XLIII.I.97.** Plaintiff was the owner and possessor of an alley in Zabbar and was molested by defendant. The Court of Appeal held that:

"Peress illi l-prova ta' dan l-element tmiss lill-attriċi, l-appellant issostni illi huma ma ppruvawx ebda element ta' pussess fuq l-isqaq in kwistjoni. *Iżda din il-pretenzjoni mhix ġustifikata.* Appena hemm bżonn jingħad illi anki jekk dan il-pussess tal-attriċi kien komuni, huwa kien l-istess manutenibbli galadarba l-konvenuta permezz tal-mandatarju tiegħu menomat l-eżerċizzju tiegħu b'att ta' molestija".

One may perhaps reconcile the apparent contradiction that, in spite of perhaps being able to exercise this possessory action, the detentor or holder only do so in the name of the possessor. In fact Section 524 (1) says that, **"a person may possess by means of another who holds the thing or exercises the right in the name of such person".** Nonetheless, as our courts are not bound by the doctrine of precedent, it still remains to be seen whether the argument posed in **Vella versus Boldarini** will be upheld in the future.

On the other hand, the actio spolii is granted also to the simple holder, even if the defendant is the owner of the thing which the plaintiff has been given under a precarious title, or whose possession is vitiated through violence or clandestinity. Except for dilatory pleas, the defendant, unlike under the actio manutentionis, cannot plead any of the above mentioned 'vitia'. In **Falzon versus Bonello et (1916) – Volume XXIII.II.82,** the court held:

"Nelle cause di spoglio l'esame della corte deve versare semplicimente sul fatto del possesso, o della detenzione, alla quale la legge estende anche l'azione di spoglio o dello spoglio, ed al convenuto spogliante non è lecito allegare alcun eccezione che non fosse dilatorio, prima di avere reintegrato nel suo possesso, lo spogliato".

This was confirmed in Appeal a year later (Volume XXIII.I.366).

Influenced by Canon Law, **"spoliatus ante omnia restituendus"**, where there must first be reintegration of the possessor or detentor with the thing, and it is only after the court order is obeyed that the owner is then allowed to commence the actio manutentionis provided the elements exist (Section 536), or an 'actio petitoria', to prove his right over the thing. Section 532 (2) in fact states:

"Such reinstatement shall be ordered by the court even though the defendant be the owner of the thing of which the plaintiff has been despoiled".

As was upheld in **Vella versus Boldarini,** the court expelled from the records of the case, questions of ownership produced by the defendant that the plaintiff was not the owner. Ownership is therefore irrelevant because the

possessory remedies are limited to the aspect of possession, subject to the proviso mentioned by me as regards possession under the actio manutentionis. In this regard, Galgano says:

"Il convenuto nel giudizio possessorio non può difendersi eccependo di essere il proprietario della cosa: ne può iniziare il giudizio petitorio finche il giudizio possessorio non sia stato definito e la decizione non sia stata eseguita. La ragione del divieto è evidente: il proprietario, che sia stato privato del possesso della cosa, ha tutto il diritto di riottenerlo, ma deve, per realizzare questo risultato, esercitare in giudizio quella opposita azione che è l'azione di rivendicazione, e deve attendere la sentenza che, accertato il suo diritto di proprieta, ordini al possessore di restituirgli la cosa".

The **second element** of the actio manutentionis is that **the subject matter must be either an immovable, corporeal or incorporeal or a universality of movables** as for example a herd. This is one of the divergencies from the actio spolii because the latter is of a wider application as it can be exercised in case of spoliation of whatever kind, whether of an immovable or a moveable thing. This reveals that the actio manutentionis cannot be exercised in respect of particular moveables, as confirmed in **Gauci Forno versus Gravina (1931) – Volume XXVIII.I.188** where the court held:

"Traendo l'azione di manutenzione ..... essendo così un azione reali e non accordata per i casi di turbativa nel possesso di cose mobili che non costituiscono una universalita di mobili".

As regards this element, Sir A. Dingli did not include **"diritti reale"** with immovables as it was then in Italy e.g. usufruct, usus and praedeal easements, because these are already included under the definition of immovables found under Section 310. **"Universalita di mobili"** was adopted from France (Pothier) such as **"eredita di mobili, un fondo di commercio"**, however in this regards Torrente raises an interesting point on the business concern. He says that the actio manutentionis does not apply to the business concern because the universality of movables, as defined in the Italian Code, must be of the same genus and must belong to the same person. The complexity of the goodwill belonging to the business concern does not have the nature of a **res** and therefore the subject matter of a possessory action, **"non ha tuttavia natura di res, suscettibile di formare oggetto di un diritto reale, o di una corrispondente tutela possessoria, nel caso di suiamento o di concorrenza sleale".** The Corte di Cassazione in Italy has agreed to this proposition.

The third element is the Molestation. The possessor must have been molested in his possession either by a molestation of law or by a molestation of fact which must persist. In **Cachia Zammit versus Barbara (1959) – Volume XLIII.II.822** defendant had molested plaintiff by building a room on his land, but which was subsequently demolished. Here, the actio manutentionis was not accepted because the very subject matter of molestation, that is the room, no longer existed. This seems to be similar to Italy where Torrente says:

"Spetta dunque, alla parte, che lamenta di essere stata molestata, di specificare in che cosa consista la molestia sofferta, essendo evidente che la domanda di manutenzione o di remissione in pristino, anche se formulata in termini più ampi, non può essere accolta senza un preciso riferimento alla molestia indicata ed ai suoi effetti preguidizievoli all'esercizio del possesso, che devono appunto essere eliminati da chi se ne sia reso responsabile".

A molestation of law is based on a claim of right of another person contrary to the possessor's possession, whether such allegation is made judicially or extra-judicially and whether the molestor is claiming in his favour or not. A molestation of fact has been interpreted very widely, including also spoliation which is the greatest violation against possession. The meaning of molestation was elaborated upon in **Vella versus Boldarini et** cited before, **"Molestation, whether of fact or of law, always implies the 'contradictio' to possession, of whatever nature. It manifests itself externally in an act, made against the possessor's will, accomplished with the 'animus contrarius'. The molestor acts against the possession, he hinders the possession or changes the enjoyment, without the molestor necessarily affirming for himself a contrary possession".**

This element is not similar to that found under the actio spolii which mentions only violent or clandestine spoliation. In **Mifsud versus Cassar (1943) – Volume XXXI.I.296** the Court of Appeal confirmed this:

"L-azzjoni ta' spoll ..... bażat fuq il-konsiderazzjoni ta' ordni pubbliku illi dak li jiġi spoljat vjolentement, jew klandestinament, għandu jiġi difiż mit-tribunali, u min ikun għamel dak l-ispoll ma jkunx jista' jġib ebda difiża".

As regards the actio manutentionis the court continued:

"Tista' tkun eżerċitata anki f'każ ta' spoll li ma jkunx vjolenti jew klandestin" whereas under the actio spolii, **"dik il-molestija jew spoll trid tkun permezz ta' vjolenza jew klandestinità".**

As to the term 'violence' under the actio spolii, it is enough that violence is exerted on the thing itself. In **Zahra versus Carabott,** mentioned earlier, the Court of Appeal in fact said:

"Sabiex jiġi sodisfatt dan ir-rekwiżit, ma hemmx bżonn il-'vis atro' cioè xi vjolenza fiżika jew morali fuq il-persuna tal-possessur, imma biżżejjed, il-vjolenza fuq il-ħaġa".

Therefore molestation of fact may amount to private force against the will of the possessor, being physical or moral violence against the person of the possessor, or violence against the thing itself such as displacement of boundary marks, or even clandestine spoliation which is carried into effect without the knowledge of the possessor.

However in **Agius versus Gauci (1923) – Volume XXV.II.220,** the court did not accept that a wall built to stop one from passing was a molestation,

because the plaintiff used to be allowed to pass only on tolerance and therefore he could have been stopped any time. This reasoning appears to apply also to the actio spolii as upheld in **Pace versus Cilia (1966):**

M'hemmx pussess ġuridikament reintengrabbli fejn il-vantaġġ gawdent mill-pretiż spoljat jistrieħ fuq is-sempliċi tolleranza tal-pretiż spoljatur ..... jeħtieġ li din it-tolleranza tirriżulta prontament, cioè mingħajr il-ħtieġa ta' indaġini inoltrata".

Torrente says:

"Alla nozione di molestia non è, pertanto, inerente l'esistenza di un danno attuale, essendo sufficiente che lo stato di possesso sia posto in dubbio o in pericolo, perchè il soggetto passivo della molestia sia legittimato a chiedere la tutela possessoria". Molestation can exist also as between co-possessors where Torrente continues, **"in tema di compossesso si verifica molestia allorchè uno dei compossessori, ampliando la sfera del proprio possesso, renda più incomodo o restringa, a proprio vantaggio, il precedente modo di esercizio del possesso dell'altro o dagli altri compossessori".**

The will to molest, **l'animus turbandi,** exists in the voluntariness of molesting, that is, with the knowledge that what one is doing is in some way changing the state of fact that exists. Here, Torrente says:

"L'animus turbandi consiste nella volontarietà del fatto, compiuto a detrimento dell'altriu possesso, nella consapevolezza e nella coscienza di contraddire, modificare o limitare l'esercizio del diritto del possessore contro la volontà espressa o presenta di costui. La volontarietà della turbativa, quale elemento essenziale della molestia possessoria, ai fini dell'azione di manutenzione, è normalmente insita nello stesso volontario compimento di un atto che modifichi o alteri lo stato preesistente dell'altrui possesso".

The last element is the time limit. The period of one year from molestation applicable to the plaintiff to make the action existed also in Roman Law. It is rather short because the protection given by law, of a state of fact may perhaps be contrary to law. After one year, this action cannot be instituted, saving perhaps an action on the merits, the **actio petitoria,** wherein, the plaintiff who was molested has to prove the right claimed by him, that is for example, that he is the owner. Galgano says, **"trascorso l'anno, il possesso si consolida nelle mani dell'autore dello spoglio, e la restituzione della cosa potrà essere ottenuta, con l'azione di rivendicazione, solo da chi si dimostri proprietario".** Under the actio spolii, the time limit is even more rigid, because it can only be exercised within two months from the spoliation.

The limitation that the plaintiff must have possessed for one year, which exists in France and Italy was not included by Sir A. Dingli, because this did not exist under Roman Law. Torrente says that possession must not have been acquired violently or clandestinely. In such cases, the actio manutentionis can only be exercised after one year from when the violence or clandestinity cease.

This is similar to the presumption under Section 527 with the exception of the applicability of the one year duration of possession. As regards repeated molestations Torrente, quoting from a court judgment says, **"in presenza di più atti successivi di turbativa, il termine di un anno per la proposizione dell'azione di manutenzione deve essere computato dall'atto iniziale, se si tratti di atti collegati obiettivamente tra loro, mentre computato dall'ultimo, quando le turbative siano discontinue ed autonome".**

Although Section 534 says, **"demand that his possession be retained"**, the purpose of the actio manutentionis is both of a conservative function, and also of a recuperative function, in either bringing the molestation to an end if the molested person is still in possession or in giving back to him that possession of which he has been deprived. A characteristic common to possessory actions is that they all tend to obtain the maintenance of a 'status quo' to protect public order. They are a sort of a transitory judgment, paving the way for a definitive judgment in favour of the owner when he exercises his rights under the actiones petitoriae. Questions of ownership or other rights are not prejudiced, so that possessory actions have the effect of defining the position of the parties in an actio petitoria in which the plaintiff is the one who lost the possession, in such a way that the **onus probandi** rests on him, to prove his rights. I will conclude by quoting Galgano:

"Nei confronti del proprietario, la protezione del possessorio è solo provvisoria: vinto il giudizio possessario e ottenuta la restituzione della cosa, il possessore soccomberà nel successivo giudizio petitorio, e dovrà definittivamente consegnarla al proprietario".

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Tonio Ellul

In the aftermath of the devestation of the last World War, a new political will surged through the world community as a first step in the collective enforcement of a lasting peace for mankind, to safeguard the individual from the scourge of oppression. A renewed attempt was made to set standards of behaviour, to which all people and nations should aspire, in the **Charter of the United Nations,** signed by the member states in 1945. Signature was a clear manifestation of the reaffirmation of their faith in fundamental human rights and freedoms, disregard of which had resulted in barbarous acts that had outraged the conscience of mankind.

A historic document adopted by the General Assembly of the United Nations on the 10th December, 1948, was the **Universal Declaration of Human Rights** which, in its Preamble, states that the "Recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family is the foundation of freedom, justice and peace in the world". Therefore, in laying down standards to be observed by all nations, the Universal Declaration proclaimed that all individuals were born free and equal in dignity "regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Such were the ideals that all leaders and people had to strive for to recreate a society based on peace and stability.

This goal led to the foundation in May, 1949, of the **Council of Europe** as the first European political institution. Its aims were, besides that of achieving a greater unity, that all members were to safeguard and realise the ideals and principals of common heritage, that of working for the "maintanence and further realisation of human rights and fundamental freedoms".

No sooner was the Council established that it set to work to attain this crucial objective and, in fact, we witnessed the creation of the **European Conventiion on Human Rights,** which was founded on the belief that fundamental freedoms – "the foundation of justice and peace in the world" – were best maintained by an effective political democracy and a "common understanding and observance of the human rights upon which they depend".

Governments of European countries which were "likeminded and had a common heritage of political traditions, ideals, freedom and the rule of law" were therefore taking the first steps for the collective enforcement of these rights.

Malta, too, pertaining to this common heritage, joined the rest of Europe with its support in the major breakthroughs made in the field of human protection, firstly through its 1964 Independence Constitution and, lately, by signing the European Convention and adopting it into domestic law in 1987.

Of stark importance is that the individual, through the Strasbourg machinery, has a **locus standi** whereby persons, groups of individuals or non-governmental organisatiions may petition the European Commission even against their own State, so long as this has recognised the competence of the Commission. Never has the individual and his rights been so protected by the rule of law.

It is in the light of these developments that the study of human rights has continued to find new breeding ground. This is what has, in fact, inspired a group of University law students, under the guidance of Prof. David J. Attard, to found the "Human Rights Research Unit (Malta)" within the Faculty of Laws.

Aims

The aims of this Unit are based on the need for a greater awareness of the rights and freedoms of the individual, particularly on the basis of an analysis of both local and foreign jurisprudence:

> "To promote, in complete autonomy, the protection and development of Fundamental Human Rights – respect for such rights being an indispensable condition for the preservation of peace" (Rene Cassin – International Institute of Human Rights – Strasbourg)

Structure

The unit operates through by a Committee composed of seven students elected during the Annual General Meeting as well as by a Board of Advisors composed by persons who have distinguished themselves in the promotion of, or research in human rights, both in Malta and abroad.

Membership

All students within the Faculty of Laws are automatically members of the Unit. Membership is also open to all persons having a professional interest in human rights, as well as to all those students attending the University of Malta who agree with and can contributed to the furtherance of the aims of the Unit.

Activities

Since the Human Rights Research Unit (Malta) was only founded recently, one can only mention those activities to be organised in the near future. These will include the setting up of a well-equipped Human Rights Documentation Centre housing material published by the Unit as well as by local and international authorities in the field of human rights and which will be made accessible to all members; the organisation of seminars and fora with both local and foreign participants together with the organisation of courses in human rights at various academic levels.

International Relations

Contact has been established with various international human rights organisations which have already forwarded a number of their publications which will go to furnish the Unit's Documentation Centre. These include the Human Rights Information Centre of the Council of Europe; the Inter-American Institute of Human Rights; the British Institute of Human Rights; the International Institute of Human Rights.

Publications

Over the past months, the Unit has translated into English all local judgements in the field of human rights delivered since 1964. These will be published in the near future together with their original Maltese text. This task, which is the first of its kind to have been undertaken and completed locally will be supplemented by the publication of a complete list of these judgements and an analytical index.

For further information kindly contact any member of the Committee at the Faculty of Laws, University of Malta, Tal-Qroqq.

Tonio Ellul Dip.Not.Pub., General Secretary of the Human Rights Research Unit (Malta) is a fifth year law student at the University of Malta.

A BRIEF REPORT ON THE INTERNATIONAL COLLOQUIUM ON NEUTRALITY AND NON-ALIGNMENT IN THE POST-COLD WAR ERA – MALTA 4 – 8 NOVEMBER 1991

Michael A. Tanti [1]

INTRODUCTION

1. For this International Colloquium, organised by the Mediterranean Academy of Diplomatic Studies [2] with the cooperation of the Foundation for International Studies, distinguished experts were invited from various countries including Austria, Egypt, France, Malta, Sweden, Swtizerland and Tunisia. Also taking an active part in the Colloquium were the High Commissioner of India and the Ambassador of Palestine. Among the observers from the various diplomatic missions in attendance, were those of United States and Germany.

Also in attendance were students presently following the Master in Diplomacy course at the Mediterranean Academy of Diplomatic Studies who hail from Albania, Egypt, Malta, Palestine, Rumania, Tunisia and Yugoslavia. Their active participation throughout the Colloquium was greatly appreciated by one and all.

2. In the welcome speech to the participants and guests, Professor Dietrich Kappeler, Director of the Mediterranean Academy of Diplomatic Studies, noted that "the very notions of neutrality and non-alignment have been profoundly affected by the developments of the last three years".

Whereas neutrality as non-participation in a given armed conflict remains certainly an option also in the future, permanent neutrality as a lasting policy needs re-thinking and may have to be adjusted to changing circumstances in Europe and worldwide. On the other hand, with the disappearance of the cold

1. During this International Colloquium the author acted as Rapporteur. He was also appointed as Secretary of one of the Working Groups and participated in the drafting of the recommendations and conclusions of the Colloquium.

2. A detailed Report containing the national experiences with neutrality and non-alignment may be obtained from this Academy, University of Malta.

war, the concept of non-alignment has given rise to the query whether in present and future international relations there is still the need for it. He highlighted the fact that at the **Accra Meeting** a few weeks ago, the Non-Aligned Movement decided not to change its name but failed to answer the question of what should be now its purpose.

3. Professor Guido De Marco, Deputy Prime Minister and Minister of Foreign Affairs and Justice of Malta, was invited to open officially the International Colloquium.

On analyzing the situation arising after the end of the Cold War, he said that in his view the concept of neutrality in Europe has to evolve into what can be a common security policy in terms of the charter of the United Nations.

Referring to the **Bush – Gorbachev Malta Summit** which marked the end of the Cold War, **Professor De Marco,** highlighted the fact that it affected not only the relations between the two superpowers but also the relations in the whole international community. Indeed, one can realise that the **Malta Summit** affected the very concept of defence and within the European context, the role of N.A.T.O. today and in the future. We are experiencing the coming of Central and Eastern European countries onto the International scenario which gives rise to certain questions with regards to the status of these countries following the dissolution of the Warsaw Pact.

Professor De Marco emphasised that today, the very concepts of neutrality and non-alignment require a re-assessment and a re-evaluation of their meaning.

When Malta amended the Constitution in 1987, the concepts of neutrality and non-alignment were enshrined within the parameters of the country's supreme law. Malta's neutrality is conceived as being an active neutrality and not a passive one. He recalled the discussions leading eventually to the adoption of the policy of neutrality and non-alignment particularly his intervention to draw a distinction between the concept of juridical neutrality, even though qualified by the active part which was more political than juridical, and the policy of non-alignment which is political.

He then examined the concept of Maltese neutrality and non-alignment within the parameters set by the Constitution which "we believe has always to be interpreted not in a static approach but with a dynamic approach of history".

When he referred to the European Community in connection with Malta's status of neutrality and non-alignment, **Professor De Marco** said that this must not be looked upon as something static.

The intergovernmental conferences which are taking place at the moment, are intended to bring about a common political and monetary union. Within this concept, the notions of common defence and security are being quite actively considered. It is very difficult at this stage to know what will be the outcome of these meetings. "We believe that countries which opted for neutrality did

so within the concept of the policital situation existing then, and that the concept of neturality necessarily calls to be revalued and reconsidered in the light of the events of the day''.

He recommended that Malta's neutrality ''should not be that of hard security, as N.A.T.O. itself is, but should evolve into a process of soft security as the CSCE process''. Undoubtedly, a policy of isolation for any country would be considered to be against what is indicated for in the future: a future of peace and cooperation. The new concept which has arisen from the end of the Cold War means that isolation will be a complete mistake.

The Concepts of Neutrality and Non-Alignment

NEUTRALITY

4. Although neutrality has been practised by several countries and has been recognised by various international institutions, there is no single definition of the concept of ''neutrality''.

One must distinguish between ''active'' and ''passive'' neutrality.

Active neutrality is practised by a country which tries to use its neutral position in order to act as conciliator in times of conflict and tension. In this respect, a participant noted that neutrality was a process that limited the disasters of war whilst another participant was of the opinion that active neutrality existed only when a neutral country worked positively to be granted its neutral stance, as opposed to passive neutrality attained through abstention of participation. Hence, passive neutrality means that a country feels constrained in the conduct of its foreign policy. However, one should point out that whether to act actively or passively is a matter for each nuetral country to decide.

It was explained that the concept ot ''neutrality'' was also affected by ''the relativisation of the concept of war as when force is used without declaring war''. Today we still have to live with this concept of ''relative neutrality'' that was still valid, even in connection with collective security measures. ''Collective security does not dampen the concept of neutrality''.

Referring to the Swiss case, one of the experts mentioned that in Switzerland there are strong internal differences; for example there are various and different cultures. However, today, one also finds that even Switzerland has taken part in economic sanctions during the recent Gulf War against Iraq. Within this context, he made a distinction between military sanctions and economic sanctions. The latter sanctions are not incompatible with neutrality.

The questions whether neutrals can afford to be neutrals in the absence of a balance of power and whether such must exist in terms of power or interests, were raised.

From a judirical point of view, there is only one concept of neutrality: not to be involved in armed conflict. In this contect, a question was posed

whether a U.N. member state can afford to abstain from joining in mandatory sanctions imposed by the Security Council. All agreed that the answer was in the negative.

Within the European context one of the experts claimed that there are three aspects for neutrality in Europe; first is neutrality in Europe, second is neutrality between Europeans and others and third is neutrality of Europe. This third aspect reflects a tendency towards keeping away from far away conflicts and this was experienced in the European reluctance to give a clear stance on the Kuwait – Iraq conflict.

Neutrality in the present day Europe can be best described as being in a period of transition since the familiar security structures have disintegrated while new ones have not as yet been created. We are experiencing the emergence of a unipolar world (U.S.) or as some participants opined, a possible tripolar world (U.S., E.C. and Japan).

The recent conflict in the Gulf has shown that neutrality in economic terms is no longer an option once the U.N. Security Council decrees economic sanctions. Within the European context, neutral countries considering joining the European Community have realised that membership would mean renunciation of economic neutrality whenever the Community decides to boycott a country. Neutrality may still be possible as abstention from partecipation in military operations as long as neither the U.N. nor a future European security structure rule this out.

One participant was of the opinion that since neutrality did not adhere to any political situation but it came to the fore in armed conflicts, "neutrality lost much of its meaning in Central Europe as East-West conflict faded away".

NON-ALIGNMENT

5. The idea of non-alignment developed from the concepts of "positive neturalism" and "positive peaceful coexistence". The original aim of the Non-Aligned Movement was rather anti-colonialistic and anti-imperialistic in nature, avoiding to be involved in the East-West confrontation. In this respect, one participant asked whether there was a need to examine the nature of non-alignment: whether non-alignment was an East-West confrontation derivative.

Then the Non-Aligned Movement attempted to bridge the gap between rich and poor in international economic relations and to improve the members' economic status. This economic dimensions of the Non-Aligned Movement should survive the end of the Cold War. The general feeling among the participants was that such pursuance might lead to a fusion of the Non-Aligned Movement with the Group of 77 although such a development is being resisted by countries which are members of the latter but have not joined the Non-Aligned Movement.

Referring to the Yugoslavian experience, a participant explained that in his country, the concept of non-alignment was adopted as the political framework for its foreign policy which was a policy of active non-alignment.

Non-Alignment for Yugoslavia was adopted as a doctrine and eventually, it effected the policies of the country.

Indeed, the Non-Aligned Movement is not only a matter of concept and uniform rules but there exists a spirit of non-alignment that has attracted countries from all over the world. One speaker explained that although Rumania had been a member of Warsaw Treaty, it was also fully committed to this spirit and for that reason it was admitted with the status of a guest, within the Non-Alignment Movement.

The contribution of the Non-Aligned Movement to **Liberation Movements** was also highlighted.

The Non-Aligned Movement enhanced international status of liberation movements and supported their political platforms. It also provided untraditional diplomatic links for other international contacts; for example, the Arab League was paralysed both before and during the Gulf War and the Non-Aligned Movement, in absence of the Arab League's action, proposed certain solutions which were supported by many Arab countries. Also mentioned was the importance of economic as well as other kinds of cooperation among non-aligned-countries, most often within the framework of South-South cooperation.

Today, the Non-Aligned Movement groups more than 100 countries the majority of which are economically weak. More than ever, there is the need to discuss and determine the future of the non-aligned.

North-South divide

6. Neutral countries seem to belong to the North, enjoying a different economic situation from that which exists in the South, of which most of the non-aligned countries form part. Hence the conflicts of interest between the North and South.

Referring to Malta which is both neutral and non-aligned, it has been pointed out that Malta has been trying to play a positive role as a mediator between countries of the Northern and Southern shores of the Mediterranean basin. Whether she will be able to continue playing such a role once she is a full member of the European Community was seen as doubtful by several foreign participants.

Fundamental change

7. Neutral and the non-alignment philosophies have changed from time to time. In fact, there exists a very fundamental change in these philosophies. In the first stage, they completely refused any military relation with both the super powers. In the second stage, they accepted a kind of closed relation with one of the two superpowers. Finally they have reached a point where many of those countries participated in the super power alliance especially throughout the military conflicts scenarios.

Is there a future for neutrality and non-alignment?

8. As one expert put it, we can only speculate on various scenarios.

A. The Global Scene

1. The downfall of the Soviet Union has resulted in a loss of the balance of power. The Soviet Nuclear arsenal is still intact and does present a problem but with the economic dependence of the Soviet Union on the West, there is cooperation rather than confrontation.

2. The United States is the only power left for the time being. It is the only state capable of shouldering a massive operation like the one needed for the liberation of Kuwait. However the situation in Yugoslavia still illustrates a tendency in the U.S. of a disengagement in European Affairs.

   To this, one must add the following questions. How long will the U.S. remain a world power, especially in view of its massive outstanding debts and how will the American public opinion react to these domestic repercussions? Will the European Community and Japan be tempted to compete with the U.S.? Or is a European Market Doctrine more likely to be successful, with the Community managing European affairs whilst the management of global affairs undertaken on a cooperation basis?

B. The European Scene

1. It seems that future conflicts will involve ethnic problems. One can see such a potential in Yugoslavia, Czechoslovakia and Hungary.

2. The problem is further compounded by the economic and social factor since the situation in the ex-Eastern European countries is precarious and politicians could be tempted to direct the attention of the population to ethnic minorities.

3. What is essential is an organisation designed to cover the whole of Europe. (Hence, a problem arises as to which part of the U.S.S.R. to include).

4. This organisation must be able to enforce collective security, protect fundamental human rights and minority rights and prevent civil strife. In this later concept there is the need to introduce **peace making** forces rather than peace-keeping forces because the latter presupposes peace, which is not always possible. Such an organisation must also cater for the economic and social development of Eastern Europe.

5. Unfortunately the United Nations is not the ideal organisation for this job and a reform of the U.N. is not really possible. The assistance of the U.S. is necessary and we cannot take such assistance for granted.

6. The economic organs of the U.N. cannot concentrate on the development of the Eastern European countries because of the problems faced by Third World Countries.

Thus we have the following prospective candidates:

1. **The C.S.C.E.:** This organisation is not the ideal one as illustrated by its weakness in managing the Yugoslav crisis. The consensus rule practically

undermines the effectiveness of the C.S.C.E. process whilst the lack of sanctions is another problem. Substitute sanctions like economic embargoes and world public opinion are present but their effectiveness is relative.

The economic and social problems are not envisaged.

2. **N.A.T.O. and the W.E.U.:** Both these organisations were created with the aim of collective self-defence in mind. This aim presupposes an outside aggression. Whether these organisations can now be reformed so as to deal with inside problems arising after the Eastern European countries have been absorbed is a moot point.

   Obviously, no economic and social assistance programmes are envisaged under the statute of these organisations.

3. **The E.C.:** The Community is economically strong but politically weak. This can be determined from the various rebuffs it suffered during the Gulf War and in the Yugoslav crisis.

   However, the high level of economic integration argues well for future political union. This could also lead to geographical expansion.

   Here one must keep in mind that the draft for European Union proposes a system of collective self-defence rather than a system of collective security. All security matters would be referred to the W.E.U. and thus, whilst neutral status would be possible, a non-aligned status would not (since the W.E.U. is a military alliance).

   Thus to conclude, the position of neutrality in present day Europe can be described in two consecutive stages: A) the **transitional period** and B) the **final scenario.**

A. The Transitional Period

For neutrals this period is characterised by the following features:

1. East-West conflict has disappeared. Future conflicts will probably have an ethnic component and may be international or national in character.
2. The prevention / termination of such conflicts by a collective security system is doubtful. The U.N. is restricted by the reservation of domestic jurisdiction and by the necessity of sufficient interest on the part of the U.S.
3. No realistic prospect that a European Security System will materialise in the real future seems to exist.
4. In this transitional period, if the neutrals wish to maintain a basic level of security, joining a military alliance would seem to be the only alternative, but such a reversal of policy might lead to serious domestic difficulties.
5. From one that lacks a balance of power in Europe and in the World to a growing economic independence on the E.C., the neutrals' ability to practice an independent neutral policy will be severely limited (so as to avoid isolation).

6. If the neutrals joined the EC / European Union, the situation would not change radically. Participation would imply a chance to influence decisions but there would be no compulsion to participate in military operations.

B. The Final Scenario

1. The situation would radically change if the end result is the establishment of an all-European organisation of collective security. Should this happen, neutrality would not only lose its function as a security strategy but could become a rather dangerous policy, leading into isolation.

2. Depending on the mandate of this organisation, neutrality may or may not be possible in out-of-Europe conflicts. One may suppose, however, that the economic, political and security interdependence of the "neutrals" with the rest of Europe, will then presumably have raised the concurrance of interest to a level where neutrality will no longer be an option.

9. With reference to the future of the Non-Aligned Movement one of the participants, comparing declarations of the Non-Aligned Movement issued at Belgrade in 1989 and at Accra in 1991, stressed the difference between them with regards to the perception of the world political situation.

The Belgrade declaration pointed out – as a reflection of optimism of that time – the need for changes in the movement towards taking an important role in forthcoming multipolar world structure.

However in Accra this year, it was noted that there are some tendencies towards unipolar world which could affect to a large extent, the position of non-aligned countries. These differences are a reflection of changes which have happened in the world in the last two years.

10. What options are available for the future Non-Aligned Movement? A participant believed that it would continue "as a multi-issue movement, as it has done in the past, and taking new issues or concentrating on issue-oriented groups (ad hoc groups) for example on environmental." He opined that the role of regional groups would be strong; "Third World countries need at least the Non-Aligned Movement as a club or as an umbrella". The Non-Aligned Movement could serve as a Third World *think-tank* to discuss and seek ways for the various problems. Indeed, political pluralism, the environments and human rights are amongst new subjects on the Non-Aligned Movement's agenda.

Since both the Non-Aligned Movement and the Group of 77 are faced with a crisis of identity, the idea of merging them could be plausable. However even the question of finding a common denominator for the members of this proposed creation would complicate matters; there would be countries whose GNP is very high whilst the GNP of other countries would be rating extremely low.

CONCLUSIONS OF THE COLLOQUIUM

A. Neutrality

1. The Colloquium found that at present it is difficult to make any precise forecasting of the future evolution of the concept of neutrality. But it also found that one can imagine a limited number of likely scenarios and that with regard to these scenarios, it is possible to predict what the future of neutrality would be.

2. Whatever scenario one considers, neutrality in the case of mandatory economic sanctions by the UN Security Council is no longer possible. The same is likely to be true of the decisions of the European Community.

3. The Colloquium further found that there may still be a situation where neutrality can be practised in the military sense. During a transitory period, whose length is difficult to determine, it is most likely that the permanently and / or traditionally neutral States of Europe are better off practising neutrality rather than joining a military arrangement with non-neutral States.

4. In the longer run, should the European Community become fully integrated in political and security matters, neutrality and membershing would no longer be compatible.

B. Non-alignment

1. The Colloquium held that the original intentions behind the formation of the Non-Aligned Movement in 1961 have undergone some change, and the concept itself of 'non-alignment' (Tito), 'positive neutralism' (Nasser) or 'positive peaceful coexistence' (Nehru) is dynamic rather than static. This is so especially in the light of the radical changes that have taken place in the world since 1961 in general and since 1989 in particular.

2. In view of the end of the Cold War and the decline in importance of the post-colonial context, two of the original concerns of the Movement have declined or disappeared, but the concern with economic development and other aspects of internal and external relations remains and needs to be addressed. These changes have resulted in the need to emphasise not only the political-ideological postures but also the socio-economic ones such as democratisation, multi-party systems, respect of human rights, development and environmental issues. This may need an adjustment in the **Non-Aligned Movement's**'s orientation that allows it to consider internal affairs of its members by offering guidelines to improve their conditions.

3. Given the **Non-Aligned Movement's NAM**'s declarations at Belgrade in 1989 and Accra in 1991, it is clear that the Movement itself is conscious of an identity crisis and of the need to reorient its raison d'être. Its modus operandi also needs improving and updating so that it would become more business-like, if necessary including political stands being taken about

internal affairs of member states when these go against the fundamental beliefs of the movement itself. A change of name is not called for at this transitional and rather uncertain stage in international relations, especially because Non-Aligned Movement has an important role to play in South-South co-operation, and when the movement itself is undergoing an exercise to respond effectively to the new challenges.

4. Perhaps the Movement's greatest achievement has been to act as an influential force in the United Nations, as well as to offer its good offices among member States and to refuse being pressurized out of existence by the superpowers. It should now adjust to the new role the United Nations is likely to play in the future. It could become a 'think-tank' for the Third World.

5. The re-defined and re-oriented Movement could indicate its readiness to ensure a consistent implementation of United Nations resolutions, participate more readily in peace-making and peace-keeping roles and in acting as a monitory force for peace and cooperation in the world. There was also agreement that disarmament and peaceful settlement of regional conflicts should be encouraged.

Participants

Profs. David J. Attard (Malta), Profs. Rafaa Ben Achour (Tunis), Mr. Anthony Borg (Malta), Mr. Saviour Borg (Malta), Miss Jennifer Cassingena (Malta), Profs. Philippe Chapal (France), Profs. Ludwik Dembinski (Switzerland), Ambassador Dr. Mokhtar El Gammal (Egypt), Dr. Dominic Fenech (Malta), Profs. Henry Frendo (Malta), Profs. Dietrich Kappeler, Ambassador Winfried Lang (Austria), Ambassador K.P. Rama Iyer, High Commissioner of India (Malta), Hon. Dr. Alex Sceberras Trigona, M.P., (Malta), Profs. Dietrich Schindler (Switzerland), Dr. Mostafa Elwi Seif (Egypt), Profs. Jerzy Sztucki (Sweden), Mrs. Noha Tadrous, Ambassador of Palestine (Malta), Mr. Michael A. Tanti (Malta), Mr. Tarcisio Zammit (Malta) and Profs. Karl Zemanek (Austria).

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SUMMARY OF CASES

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15. 14 December 1988, Martin Fenech vs The Commissioner of Police

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Constitutional Court
1988
13th January, 1988
Joseph Mary Vella et
vs
Commissioner of Police et

Evidence –
Witnesses – Hearsay – Evaluation of – Admissibility – Plea concerning same – Professional Secret

Section 37 of the Constitution
Section 598(1) – Chapter 21

This is an appeal from an interlocutory decree on the admissibility of a witness. In the course of proceedings pending before the First Hall of the Civil Court concerning an alleged breach of the fundamental rights of applicants, by their illegal arrest and subjection to threats, beatings and torture, these prayed to produce as a witness a legal procurator to give evidence on certain relevant facts which he had heard from a third party in the course of the exercise of his professional activity, without actually revealing such person's identity. The Court of First Instance allowed this witness to give evidence; the Constitutional Court confirmed this decree.

The witness could not reveal the name of the person who had given him the information since he was bound by professional secret. He was only allowed by that person to give evidence on the facts as related to him. The evidence is "hearsay". However the rule that prohibits such evidence is not an absolute one but is subject to various exceptions. The Court may, according to circumstance, allow evidence on what was said by others and take note of it when the evidence in itself has substantial bearing on the merits of the case or part thereof, or when such other person cannot be brought to give evidence and the facts would be such that they cannot be proved with certainity in any other way. Therefore, the witness in this case was admissable.

17th February, 1988

Adv. Tonio Borg et
vs
The Minister of Foreign Affairs
and Culture AND the Director of Museums

Judgement – Nullity of – Plea – Absence of decision of – Discrimination – Protection from – Fundamental Rights of a moral entity – Physical person – Fundamental Rights, and Award of Remedy

Section 45 of the Constitution

Applicants had asked for permission to be able to organise an exhibition on the Movement they represented in the Museum of Archeology and such was refused. Applicants alleged that this was discriminatory in their respect, and that consequently they were entitled to a remedy.

The first Hall of the Civil Court upheld their request by declaring the behaviour of the respondents discriminatory in respect of the applicants; but decided that there was no other remedy to be provided. Respondents appealed on the main issue whilst the applicants appealed incidentally. The Constitutional Court rejected the appeals and confirmed the first judgement.

The absence of a decision on some of the pleas in the dispositive part of the judgement does not lead to its nullity when such a decision results in a clear and univocal way from the judgement itself.

The respondent, the responsible Minister, had asked to be non suited as he was not the proper defendant. The Court decided that the Minister in question was a proper defendant in the proceedings and this, since the decision not to hold the proposed exhibition by the applicant, depended on him.

Moreover, the respondents had also pleaded that the applicants, as an association, did not enjoy the fundamental right claimed as such only pertained to them individually. This plea was also turned down.

The right for protection against discrimination pertains not only to physical persons but also to any association of which such physical persons form part.

On the merits, the Court found that there was discrimination against the applicants when these were not granted the permit to hold the proposed exhibition, especially when other political entities were granted such permit. Moreover, it resulted that there was no factual justification for the denial of such a permit.

With respect to the incidental appeal filed by the applicants regarding the absence of a remedy, the Court rejected this appeal since it found that in the special circumstances of the case it should not disturb the discretion of the court of First Instance.

20th April, 1988

The Police (Inspector A. Borg Caruana)
vs.
Victor Caruana et.

Evidence
Witnesses – Admissibility of
– Court of First Instance – Discretion of – Fair Hearing – Absence of law
– Protection of the – Fundamental Human Rights

Sections 89(6), 40(6), 46(3) of the Constitution
Section 513(b) – Criminal Code
Section 627 – Chapter 21

An appeal from a judgement about the admissibility of a witness.

The case was referred to the The First Hall of the Civil Court by the Magistrate's Court on an alleged breach of the right to a ''fair-hearing'' by the accused. The accused wanted to produce witnesses to prove what had taken place before the Magistrate's Court. The Court of First Instance turned down such a request; the Constitution Constitutional Court confirmed this decree.

The witnesses were not needed to give evidence in connection with the matter being contested since no lack of agreement existed between the parties about what had happened before the Magistrate's Court. Moreover, the Court observed, in such matters the discretion of the Court of First Instance should not be disturbed except for grave reasons and when there is prejudice to the parties; this was not the case.

13th June, 1988

Rose Anne Galea
vs
The Hon. Prime Minister et.

Fundamental Human Rights – Violation of – Remedy for – Discrimination – Fair Hearing – Board of Inquiry – Impartiality of – Independence of the Disciplinary Board – Public Service Commission

Sections 39(1), (2), (3), (6), (7), (8), (9), (10), 45(1), (2) and (3), 46 (2), 115 of the Constitution
Sections 4, 6(1), 9, 10, 11, and 14 of the 1st Schedule of Act XIV of 1987
Act XIX of 1977
Section 589 of Chapter 12
Sections 643 and 647(3) of Chapter 9
Legal Notice 37 of 1988

The facts which led to this case were as follows: on the 21 July 1987, a Board of Inquiry was set up to investigate certain allegations about the behaviour of the applicant, an administrative nurse at Craig Hospital, Gozo.

As a result it was decided that disciplinary measures should be taken against her and she was given ten days within which to state in writing her defence. The applicant was informed that the first sitting of the Board of Discipline was going to be held on December 28, 1987.

The applicant alleged that her fundamental rights had been violated as the said Board of Inquiry was neither independent nor impartial, and it had

not given the applicant a fair hearing. Moreover, she alleged, the questions put to her by the Board could incriminate her, and such had been put without here even being informed of her right to choose, in the circumstances, not to give evidence. She also alleged that she had been politically discriminated against.

Therefore, she requested that the procedures, the decisions and the conclusions of the Board of Inquiry be annulled and that the respondents be inhibited from continuing with their actions against her.

The First Hall of the Civil Court disposed of the case by declining to exercise its jurisdiction as the applicant had other remeides available and therefore stopped short of dealing with the application, each party bear his own costs.

The applicant appealed and the respondent appealed incidentally from the order regarding the costs. The Constitutional Court rejected the incidental appeal, declared insufficient the remediés available to the appellant and sent back the case to the Court of First Instance to deal with the merits.

The duty of the Disciplinary Board is to investigate the case and submit its conclusion to the Public Service Commission. The fact that the Board could ignore the conclusions of the Board of Inquiry does not mean that in this way it is not allowed to take them into consideration, whilst the purpose of the action was to prevent the Disciplinary Board from being able to take same into consideration since these could be annulled on the basis of the alleged reasons.

21st June, 1988

Darryl Francis Grima pro et noe
vs
The Hon. Prime Minister et noe.

Fundamental Human Rights – Right to Life – Neutrality – Maltese Constitution and Decree – Precautionary Warrant – Inhibition – Appeal from – Form of – Nullity of.

Sections 1(3), 33(1), 95(2) (d) and (f), and 116 of the Constitution.
Section 2 of the First Schedule of Act XIV of 1987
Act VIII of 1981
Sections 846, 873, 876 of Chapter 12

Applicants requested the issue of warrant of prohibitory injunction against the respondents so that these would not allow the entry of foreign naval vessels into the harbours of Malta. Such entry, it was alleged, constituted a breach of Malta's neutrality and of the fundamental right to life of the applicant. The First Hall of the Civil Court rejected the request of applicants. Applicants appealed. The Constitutional Court declared the appeal null and void.

The decision of the Court of First Instance was neither a judgement nor an interlocutory decree. Infact, the decision by which the request for the issue of a prohibitory injunction is turned down, is neither an interlocutory nor a definitive order, and therefore, an appeal from such a decision cannot be entertained. The order could only be questioned by way of writ in front of the same Court delivering it.

26th Setempber, 1988

The Police (Ass. Commissioner Anthony Mifsud Tommasi L.P.)
vs
The Hon. Michael Falzon B. Arch., A&CE., M.P.

In Criminal proceedings pending in front of the Magistrate's Court, the accused was assisted by a lawyer who was also a Member of Parliament. The court decided that the accused could not be so assisted since this would be in breach of section 79 of the Code of Organisation and Civil Procedure. The accused raised the matter of the constitutionality of this section since he felt that this violated his fundamental right to a fair hearing; the Magistrate's Court referred the matter to the First Hall of the Civil Court for its decision.

The Court of First Instance disposed of the merits by holding that there existed no conflict between Section 79 of the Code of Organisation and Civil Procedure and Section 39 of the Constitution. On appeal, the Constitutional Court revoked and found that Section 79 mentioned above was unconstitutional.

The Court held that the Constitution gives the accused the right to choose himself his legal representatives. The words "by a legal representative" as found in the Constitution cannot but mean the same as the words "through legal assistance of his own choosing" as found in the European Convention.

After what has been said, the Court dealt with the issue whether Section 79(2) of the Code of Organisation and Civil Procedure violates Section 39(6) (c) of the Constitution. Section 39(6) of the Constitution, like Section 6 (3) (c) of the European Convention, deals with persons who are only accused of a criminal offence. The Court concluded that under no circumstances, can one say that Section 39(6) (c) is in conflict with the cases mentioned in Section 79 (3) (a) since these do not expressly deal with criminals proceedings. Indeed, in the judgement ARTICO vs. ITALY, the European Commission held that Section 6(3) (c) of the European Convention "guarantees a right recognized as an essential feature of the concept of a fair trial. That provision guarantees to an accused person that proceedings against him will not take place without an adequate representation of the case for the defence. It guarantees the right to an effectual defence either in person or through a lawyer....."

The Court was of the opinion that the principles above quoted, as established by the European Commission, apply to criminal matters even in

the case of Section 39 (1) of the Constitution of the Republic of Malta. Whosoever is accused of a criminal offence, has the right to a fair hearing under Section 39 (1) and hence, he has the right for "adequate representation"; he has the right "to an effectual defence", and if such a right is being denied by legislation, such legislation would be violative of the Constitution."

In this way, the Court arrived at the conclusion that the said Section 79 (2), as far as it effects the choice of a lawyer in criminal proceedings in the circumstances indicated in the following sub Section (i.e. 3(b) (c)), is in violation of the Constitution.

The Court emphasised that it is well known that the number of the members of the legal class practicing as lawyers is somewhat small and amongst such lawyers, few are those who practice in crimincal proceedings, especially in cases of a grave nature like those mentioned in Section 79 (3) (b) (c). It is also noted that most of these lawyers who practice in criminal cases of this kind and gravity, are members of the Maltese Parliament.

A consequence of this is that as an effect of Section 79 (2) as far as it concerns the Criminal cases contemplated in Section 79 (3) (b) (c), the right of choice of a lawyer given to the accused by Section 39 (b) (c) as interpreted above, is restricted in such a way that in the court's opinion, he can in effect, not have an adequate and effective legal representation, which is so necessary in order to have that fair hearing which our Constitution in Section 39 (1) as well as the European Convention in Article 6 (1), wants to guarantee to him.

26th September 1988

Doris, wife of Emmanuel Spiteri
vs
The Commissioner of Police

Fundamental Human Rights – Protection from Discrimination.
Decree – Interlocutory – Prohibitory Injunction – Appeal from – Form of – Nullity of.

Sections 36, 37, and 45, k 46(2) of the Constitution
Section 873 of Chapter 12
Sections 14 and 3 of the First Schedule of Act XIV of 1987

The applicants alleged in the First Hall of the Civil Court that an order given by the respondent so that these close down a kiosk maintained by them, was discriminatory in their respect and went against their fundamental rights. The applicants requested the issue of a warrant of prohibitory injunction, as well as a remedy for the breach of their fundamental rights. The Court of First Instance upheld the request for the issue of a warrant of prohibitory injunction

and ordered that the hearing of the case continue according to law. The respondent appealed; the Constitutional Court declared the appeal null and void.

The decision of the Court of First Instance was a decree for the issue of a precautionary warrant and as such it was neither definitive nor interlocutory; therefore such a judgement could only be attacked by means of a writ brought before the same court that ordered the issue of the warrant in question.

5th October 1988

Charles Spiteri
vs
The Minister for Public Works
and the Director of Public Works

Fundamental Human Rights – Freedom of Expression – Freedom of Association – Protection from Discrimination

Section 41, 42(1), 45(2) and 47 of the Constitution
Section 18(4) Act regarding Industrial Relations

Case concerning an allegation of a breach of the fundamental rights of the applicant, amongst which those of freedom of association, expression and protection from discrimination. The First Hall of the Civil Court upheld the request of the applicant. The Constitutional Court confirmed the judgement on appeal.

The facts which gave rise to this case were the following: the applicant, a Gozitan was employed with the Public Works; since a long time the Gozitan governmental employees had a concession that every Friday they could leave earlier from work and every Monday report a bit late for work. After Industrial action was taken by these governmental employees such a concession was withdrawn. After two days the same concession was again granted to these employees with the exclusion of the applicant, who was the President of one of the unions which took part in the industrial action.

The Court held that this amounted to a breach of sections 42(1) and 45(2) of the Constitution in respect of the applicant, and that is, a breach of his right to freedom of association and protection from discrimination. The exclusion of the concession above mentioned with respect to the applicant, was hindering him in the enjoyment of his right to freedom of association. The word "hindering" as used by the law contains in itself a broad not a restricted meaning.

17th October, 1988

Antonio Pace
vs
The Minister of Housing et.

Fundamental Human Rights – Property – Protection from Inhuman or Degrading Treatment – Requirements of – Privacy – House, of – Protection of – Reasonably Justifiable in a democratic society

Requisition – Order of – Housing Secretary

Sections 32, 36, 38, 46(a) of the Constitution
Article 4 of Act II of 1949

The applicant had a property which was taken away from his possession by the Housing Secretary by means of a requisition order. The applicant alleged that this order was unjust and senseless since the property in question not only was his only habitation but also his means of livelihood. Therefore, he alleged that Sections 36, 38 and 32 of the Constitution were breached in his respect and requested a remedy. The First Hall of the Civil Court refused the request of the applicant; the Constitutional Court upheld the appeal, revoked the first judgement, declared the applicant's request legally sustainable and sent back the case to the Court of First Instance for its continuation according to law.

Section 36(1) of the Constitution which prohibits punishment or inhuman or degrading treatment, does not have a punitative connotation. The words ''punishment'' and ''treatment'' have distinct connotations. So as to have inhuman treatmnent there needs to be: 1. ''severe suffering'', 2. ''minimum level of suffering dependant on the circumstances of each case, and 3. the suffering can be either mental or physical. The removal of a family from its only house which constitutes its place of living, certainly amounts to inhuman treatment.

About the protection of the privacy of the applicant's house it was argued by the respondents that the requisition in force under Act II of 1949 could not have been in breach of the Constitution since it fell under one of the exceptions contemplated under Article 38 and that is, that it was made in the public interest according to law.

The Court however observed that in order for such an order not to have been in breach of the Constitution, it is necessary that the order not only was made in the public interest according to law but also that such a behaviour be reasonably justifiable in a democratic society.

The behaviour in question, if the allegations mentioned in the application are proved correct, was not justifiable in a democratic society.

19th October 1988

Adv. Dr. Lawrence Pullicino
vs
Commander-in-Chief of the Armed Forces noe et

Appeal Nullity Mistake - Note - Application - Correction

Section 175(2) of Chapter 12
Section 789(1) of Chapter 12
Sections 184, 174, 176, 178 - Chapter 12

A case concerning the nullity of an appeal.

The appeal application was corrected in such a way that the word "note" at the heading, was substituted with the word "application" without the Court Registrar's authorisation being sought. The Constitutional Court rejected the plea of nullity and ordered the correction.

The violation of such a form leads to the nullity of the act if such a violation brought prejudice to the party requesting the nullity. In this case no prejudice was suffered by the other party. Moreover, such a mistake could in any case be corrected and the court ordered such.

19th October 1988

Superintendent Carmel Bonello et.
vs
The Hon. Prime Minister et.

Constitutional Application - Form of - Nullity of - Facts, Description of - Fundamental Human Rights - Discrimination

Section 45 of the Constitution - Reg. 3(2) of Legal Notice 48 / 1964
Section 14 of the First Scheme of Act. No. XIV of 1987

The applicants employees with the Police Corps, had recourse to the First Hall of the Civil Court because they alleged that they had suffered discrimination as a result of their political belief when disciplinary measures were taken against them before the Public Service Commission and not against others. In a judgement "in parte" the Court of First Instance rejected the plea of the respondents of nullity of the procedure commenced by the applicants. On an appeal by the Prime Minister, the Constitutional Court confirmed the first judgement.

The application briefly contained a list of the facts on which the constitutional remedy was being sought; there was no need for the same facts to be put down in detail but a generic indication of same was sufficient.

31st October 1988

Martin Fenech
vs
The Commissioner of Police

Appeal – Application for – Error – Correction of – Wrong Indication of the Court – Constitutional Court

Legal Notice 49 / 1964
Section 175(2) of Chapter 12

This was an appeal from an application for the breach of the fundamental human rights. In the appeal application the court was indicated as the Court of Appeal and the person against whom the appeal is being made claimed this as a ground of nullity.

The person making the appeal requested a correction in the sense that the words "Court of Appeal" be susbstituted by the words "Constitutional Court".

The Court upheld the request, ordered the correction, and refused the plea of nullity. Such a correction was within the power of the court to make. The court had the power to correct any mistake in appeal.

4th November 1988

Adv. Silvio Camilleri noe
vs
Comptroller of Customs

Fundamental Human Rights – Property – Right to – Confiscation – Temporary Importation – Duty, exclusion from – Comptroller of Customs.

Section 16(2) (d)(ii) – Act XI of 1964
Act XLIII of 1974
Sections 37 and 37(2)(a) of the Constitution

The applicant had imported a car in Malta under a 'temporary import licence'. The Comptroller of Customs confiscated this car under Section 16(2)(d)(ii) of Act XI of 1964 when the same person failed to re-export it. The applicant alleged that the said section breached her fundamental rights as protected under section 37 of the Constitution and therefore was unconstitutional.

The First Hall of the Civil Court rejected applicant's request. The

Constitutional Court found that the alleged breach subsisted and declared the section in question unconstitutional.

According to Section 16(2) (d) (ii) of Act XI of 1964 the Comptroller of Customs can confiscate objects imported to Malta temporarily when such are not exported from Malta within the expected period. This provision is of a confiscatory nature and does not contemplate the removal of objects for which custom duty must be paid. This confiscation takes place without the need of any judicial process. Therefore it breaches the fundamental right to property of the applicant as protected under Section 37 of the Constitution and such is not safeguarded by the exception in Section 37(2)(a) of same.

9th November 1988

Lucien Stafrace noe
vs
Acting Registrar of the Courts et.

Constitutional case – Reasonable time – Fair Hearing – Fundamental Right to – Legitimate Defence – Registrar of Courts – Minister – Commissioner of Police – Separation of Powers – Judge – Independence of Judiciary.

Sections 41, 42, 39(2), 46(1)(2) of the Constitution.
Reg. 4 of 48 / 1964
Section 6(1) of the First Schedule – Act XIV of 1987
Section 4(1) – Section 57(1)(2) – Chapter 12.

The applicants requested a remedy before the First Hall of the Civil Court since, in their opinion, the procedures pending before the same court concerning the breach of their fundamental rights had been pending for an unreasonable length of time. The First Hall of the Civil Court upheld the applicants' request by declaring that the length of time of the procedures mentioned breached the relevant sections of the Constitution and of the European Convention, but rejected the request of the applicants for a just financial satisfaction.

On appeal both of the applicants as well as of the respondents the Constitutional Court revoked the first judgement and non-suited the respondents, the Registrar of Courts, the Minister of Justice and the Commissioner of Police since such were not the legitimate respondents in such proceedings.

The Registrar of Courts was not the proper person to reply to applicants' claim since as a head of department he represents the government in matters which relate to the ordinary running of public administration connected with that department, and the present matter was not such.

The Minister represents his department, but the present case was not one which dealt with the duties of the Minister of Justice or of Internal Policy. The same thing could be said for the Commissioner of Police.

14th December 1988

Martin Fenech
vs
The Commissioner of Police

Witness – Compellibility of – Self-Incrimination of – Presidential Pardon – Fundamental Human Rights – Protection of the Law

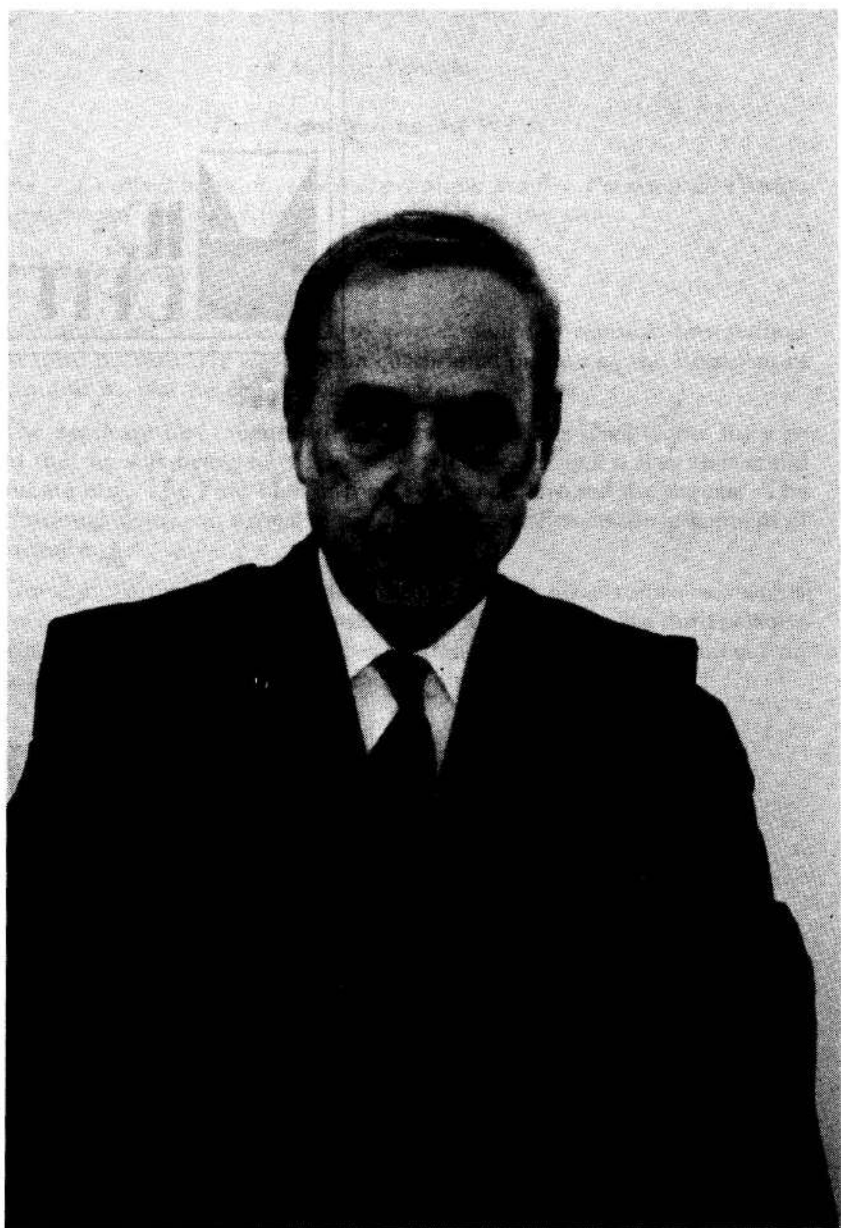
Section 39(10) of the Constitution

The applicant was summoned to give evidence in criminal proceedings against third persons. He was given a conditional pardon by the President of the Republic so that he could give evidence.

The applicant had recourse to the First Hall of the Civil Court since he alleged that he was being forced to give evidence in such a way that could incriminate him. The First Hall of the Civil Court rejected the request. The Constitutional Court, on appeal of the applicant, confirmed the judgement of first instance.

The right pertaining to an individual not to give his evidence exists only in those criminal cases pending against him. In other cases against third persons, the witness does not enjoy a fundamental right to refuse to give evidence on the basis that in this way he could incriminate himself.

Interview



Professor René Cremona, LL.D.

INTERVIEW WITH PROFESSOR RENÉ CREMONA, LL.D.

Dean of the Faculty of Laws, at the University

by Neville Gatt & Christopher Spiteri

Professor, what are your recollections of pre-War Malta?
I am not that old to have too many recollections of pre-War Malta. I was about to be ten years old when Italy declared war. I lived a rather sheltered life in Valletta [1]. I remember Valletta as a true capital city [2] as the fulcrum of the entire island, as a residential city throbbing with life [3]. This is exactly what it ceased to be. What struck me over the years is the fact that Valletta has degenerated.

Which do you consider to be the major changes which have occurred in Maltese society from your childhood till the present day?
The one change which strikes me most of all is that within a relatively short period of time the Maltese have changed from an eminently thrifty race into a practically spendthrift one. What our forefathers saved we are now dissipating. From persons who were always preparing themselves for the rainy day we have now become utterly consumerist. There has been a change from one extreme to the other. We are now relying on social services, on a benevolent government that will see us through instead of relying on our own resources. There is also a change in values. I was brought up to believe that you have to be a gentleman, that if you are a gentleman you cannot be better. There is nothing higher than a gentleman. Today being a gentleman is something which is soon becoming ridiculous, something to be laughed at. The traditional values which have kept us together are being jettisoned and they are not being replaced by anything comparable. There are also changes for the better, people are better, more people are more educated though not necessarily better educated because we used to take education more seriously. We did not rely on the media but read a lot of books. Today's youngsters only read the essential textbooks.

You entered University at a relatively young age. What led you to choose the legal career from any other and what made you so sure of your choice at such a tender age?
I never had any real choice. I was conditioned to consider that I had to go to university. At fourteen I had to choose which course to take. At the time there were four possible professions which I could pursue, the medical, the

1. We used to go to Sliema for the Summer holidays but I remember Valletta most of all.
2. As a hive of activity.
3. It used to be dignified, but it is no longer so.

ecclesiastical, the legal, and architecture. I did not have the calling for an ecclesiastical career. I used to associate architecture with going into building sites and getting muddy, so while I liked to draw plans I didn't like the idea of going into the countryside in boots; I didn't like it at all. I was acquainted with the medical profession since my father was a doctor and my brother was studying medicine and so our discussions during lunch time were always related to diseases and similar topics. I was very much interested in this work but on the other hand I saw that my father worked literally day and night. I remember him coming home very tired late at night and after two hours the phone rings and he had to go out again. This did put me off a bit especially since I did not realize that even the legal profession takes so much of your time to such an extent that it hardly leaves you any leisure time. So by elimination I chose the legal profession, also because it was a fairly common profession in my family. My eldest brother had already become a lawyer and two uncles of mine were a judge and a magistrate respectively, so it seemed as good as any other. However I cannot say that I was in the least sure that I was making the right choice, though it turned out to be the right choice.

What memories do you have of your student days at university?
I have lovely memories which will always remain with me, so much so that I have always remained a student at heart. I have always associated myself with the students rather than with the academic staff. It is not something I do consciously. I feel myself as a student possibly because I harp back to those days when we were carefree and respected as a body. We just used to study which is in itself interesting – and the rest was seen to by others. My line of study was fascinating and since it was a smaller university we were more united.

What differences do you see in the mentality of the students of your time as compared to that of today's students? Do you believe that the priorities have remained essentially the same?
What strikes me particularly is that for us university was a privilege for which we paid and therefore we took it very seriously. Today the average student considers university as a right for which he deserves payment. We were certainly more motivated than some of today's students who are hardly ever seen on campus and in the lecture room themselves. On the other hand today's students are more adventurous and more at grips with reality and less starry-eyed than we used to be. I do not know whether they have kept the same priorities. In my time the first priority was to learn while I suspect that today the first priority is to pass the examinations.

Did you carry out any research abroad? If yes, what did it consist in and how was it connected to the subjects you teach at university?
When I graduated I was still too young to expect clients to have confidence in me so my father suggested that I should undertake some postgraduate studies. I went to the University of London and had the privilege to carry out research under Sir David Hughes-Parry at the London School of Economics and under Professor Raphael Powell at University College, London. I also used to meet

Professor Jolowicz who was a brilliant man who gave me a thorough insight in Roman Law. I also spent some time in Rome where I got to know another famous Romanist, Vincenzo Arrangio – Ruiz and where I carried out research in Roman Law, Intermediate law and modern Civil law. It was obviously very relevant to what I teach at university and it has given me an additional training to examine legal matters in a historic perspective.

Roman Law is considered by many students as a subject which is perhaps far removed from today's world. What attracted you so much to this area of study?

Students who consider Roman law far removed from today's world are making a terrible mistake. Roman law is still part of today's world because the law of most European countries has evolved from Roman law. For Europe and for us our law is a natural development of Roman law. When you are dealing with a law that is so vital that it has developed naturally, adopting itself and making allowance for local custom, but essentially retaining its characteristics, you have a living law. Time and again you find that only by going to the sources would you be able to understand a particular provision of the law. I was attracted to Roman law when I realized during my studies in the law course how advanced the Romans were. Through their casuistic approach they enunciated rules which were valid for all times because they sought the intentions of the parties which remain substantially the same even though centuries have passed.

Latin is no longer a compulsory subject for entry in the law courses. Do you think that a basic knowledge of Latin is no longer as essential today as it was in the past, or was it perhaps a wrong decision to remove this subject from the compulsory curriculum of prospective law students?

For a lawyer and a law student Latin is still very important. Latin had traditionally always been the *lingua franca* of lawyers. Moreover the Romans had the capacity of enunciating complex legal principles in a few well chosen words: Maxims which have become famous and if you use these maxims lawyeres all over the world understand exactly what you are saying. We are using Latin all the time and we lawyers and law students need to know Latin. I do not know whether the removal of Latin as a compulsory subject was a correct decision. In point of fact what actually happened was that we were overtaken by events. Latin was traditionally taught by priests, so when Vatican Council II did away with Latin it removed our base. Latin cannot be compulsory if there are not enough teachers to teach it. I am in favour of reintroducing Latin as a compulsory subject but only if I am sure that there are enough qualified teachers to teach the subject.

What obstacles did you encounter as a young lawyer in the early fifties. Do you believe that these obstacles have increased for today's law graduands?

The only problem I had was that I was so young but that was overcome since I spent some time doing postgraduate studies. Otherwise I think that I was fortunate since I did not find any obstacles in my path. I found some clients,

I found the greatest help from my senior colleagues and things went very smoothly. There was enough work for those who really wanted to work. The atmosphere in Court was a pleasant one with excellent camaraderie. Today's lawyers have plenty of opportunities. There should not be any serious obstacles even if at the moment our profession seems to be attracting large numbers. The training which our law students receive makes them a very good acquisition not only in law offices, but it will also be attractive to people in industry, business and government departments. Even the young lawyers manage quite nicely. We have not yet reached saturation point.

You were married at a relatively late age. Do you believe that your constant contact with your children who are still teenagers enables you to maintain a youthful attitude to life?
I believe that I was married at the right age. Probably it is the contact with my students which has enabled me to maintain a youthful attitude to life, if I have such an attitude. When I started to lecture at university I was not much older than my students. My children have also helped me to remain young but unfortunately I had to sacrifice constant contact with my children because my work load especially university and my other responsibilities which are not directly connected with legal work take a lot of my time. Still I tried to utilize as best as I could the time I could give to my children.

We all know that you are a very busy person. Do you consider yourself as a workaholic or do you consider it important to dedicate a substantial amount of time to leisure? Moreover what are your extra legal interests?
I am certainly not a workaholic. I have always looked for free time but somehow I never find it. Every year that little time which I was hoping to keep for myself, I have to give up for some cause or other. Nowadays I seem to be the obvious choice for those jobs also which have to be done and which nobody particularly wants to do. Due to lack of time I cannot say that I have any particular extra legal interests due to lack of time. I have always been interested in reading but most of what I read is to a larger or smaller extent connected with the law. I have always been interested in art and architecture and I have also managed to instill this interest in my children.

You have lectured in Family law for a very long period of time. It is generally held that Family law is a field which is in dire need of reform. Which do you consider to be the area where change is most urgent?
Family law has to change as the socio-economic conditions change. However reform should never anticipate the wishes of the people and should wait for those wishes to be expressed and ascertained. Time enough has now been given to get the people accustomed to the changes which must be brought about to establish equality between the spouses and equality between the parents. This is something which has to be done now and such changes are appropriately incorporated in the white paper on the reform of the Family law which has been recently published. Other changes which will have to be considered will be in eliminating the distinction between legitimate and illegitimate children. In fact the judgements of the European Court have been pointing out towards

this direction. However this will necessitate a reform of our law of Succession in particular in regard to the capacity to inherit. Also, the preference which is given to the children over the spouse in regard to the legitim and the reserved portion are no longer justifiable. It is somewhat shocking that in the present circumstances there are so many limitations on what the wife can receive upon the death of her husband since very often this means that the wife's standard of living is reduced drastically at a time when she is too old to do anything about it. There should be more freedom of testation when dealing with the spouses, possibility of leaving property to each other. Eventually we will also have to tackle what has been traditionally termed concubinage. The legal position of the parties living together has to be clarified but we must maintain some kind of distinction between marriage and concubinage. We would also have to establish what constitutes a permanent union outside marriage and differentiate it from a substantially ephemeral union. Here again there are pointers that the matter must soon be tackled.

In 1988 you were elected President of the Chamber of Advocates. In which way does this body achieve its aim of safeguarding the interests of lawyers and their clients? In which field would you prefer your main personal contribution to be towards the achievement of these aims?
Much to my surprise I was elected president of the Chamber of Advocates in 1988. The Chamber of Advoeates seeks to maintain and keep high the dignity and honour of the profession. It looks after the interests of lawyers and takes up grievances with the appropriate government departments and ministries. It also seeks to ensure that lawyers follow the due professional ethic in their relations among themselves and tawrds their clients. As President of the Chamber I have to deal with complaints which are sometimes made by clients against their lawyers. I have always sought to settle these matters prudently and fairly. I hope that my own personal contributions towards the attainment of these aims is that I have always tried to behave honourably. I have always sought to be loyal towards my colleagues and clients and I hope that I have set a good example.

By far the greatest number of politicians in Maltese political history have come from the legal profession. Do you think that a legal career is intrinsically bound with the political reality? Why do you think that the electorate gives such a consistent support to lawyers in elections? Do you believe that this phenomenon is healthy for Maltese society?
The legal profession gives you a certain freedom of action which enables you to go in many directions. Politics is undoubtedly one of them but I know many lawyers who have not at any time been attracted to a political career. I am one of the latter. However the training we receive at university and in the Law Courts makes us particularly good as politicians. At the university we are basically taught to reason things out. In Court while pleading our cases we reason things out and we also speak in public. Moreover it is a truism to say that the job of a politician is to make laws. So undoubtedly lawyers are suitable for this purpose. Legal practice also puts you in the limelight and that helps you to obtain the all important quota. I do not think that the fact that you

have a large number of lawyers in Parliament is in itself unhealthy for the Maltese society. There is nothing unhealthy abouth lawyers and indeed they are in a position to understand and to tackle certain situations better than anyone else.

Despite all this it is commonly held that lawyers are not to be trusted. Do you think that this belief contains any grain of truth or is it perhaps a traditional prejudice against the legal profession?
I think it is very much a traditional prejudice against the legal profession. It goes back to the beginning of the profession itself. Perhaps it is due to the fact that lawyers speak a rather strange language. We are cautious in what we say and use a jargon which is unfamiliar to our clients and we go so far as to wear a gown to make us different from non-lawyers. Consequently we are looked upon as almost persons to be distrusted. In point of fact however you may find that lawyers are amongst the most honest persons you may come across. It is very rarely that you find a lawyer who abuses the trust placed in him.

You have for a number of years been a prominent critic of the excessive delays which occur in Court proceedings. Briefly which suggestions would you offer for the solution of this problem?
Rather than a prominent critic it has been my unpleasant duty to criticize excessive delays. Delays have always been with us but over the years they have increased. What bothers me is that the matters can be controlled if tackled seriously. Various factors could combine to avoid delays. A simplified procedure where substance is made to prevail over form, a sound and modern infrastructure for the Law Courts, a will to tackle the problems as they arise and above all hard work can do a lot to alleviate and eventually solve the problem. Indications are that at the moment certain measures which can actively decrease the delays are being taken in hand. A most welcome development would be the hearing of cases by appointment.

It is commonly acknowledged that the local system of legal aid has a variety of lackings. Which are in your opinion the main shortcomings present in the system as it is currently organized?
Firstly, the means test is utterly absurd for today's world. It was last amended way back in 1971 and since then what was money in 1971 is less than pocket money in 1991 after two successive world economic crises. Apart from this, the most serious shortcoming is that it does not allow the litigant who cannot pay the right to choose a lawyer whom he trusts. The poor litigant is not given equality of arms when he is saddled with a lawyer whom he does not not trust. This is as important a social service as any other and should be treated as such. Requests for legal aid should be examined by a central authority and if such a request is found to be justified the applicant should be allowed to choose his own lawyer who would be then paid by the state. I am confident that in the circumstances, lawyers would accept from the government a reduced fee for their services so that they would be making their own contribution.

Which do you consider to be the essential attributes which a judge must possess if he is to execute his duties in the best manner and to the satisfaction

of all parties in a suit, so that justice would not only be done but would also be seen to be done?

A judge should be wise and conscientious. Being wise is much more than having a knowledge of the law. It means being learned not only in the ways of the law but also in the ways of the world. Being conscientious means being honest, impartial and being willing to listen rather than to speak, being ready to listen to your conscience and being ready to work even if you would rather do something else. Finally a judge should not allow a case to last one minute more than is strictly necessary.

In 1990 you have been elected Dean of the Faculty of Laws. Which are the most pressing problems which you have encountered in this post? Which reforms and changes would you like to introduce in order to make the faculty more efficient and its courses more relevant to the needs of modern society?

The most pressing problem at the moment is finding enough lecture rooms. We also need some more adequate sort of infrastructure. We are now dealing with a student body approaching 400 students. The faculty is being serviced by part-timers and although there are distinct advantages in having part-timers who remain in constant contact with the practical side of law, it is also true that the amount of time they can give to the administrative work at university is extremely limited. I find that I am giving in the faculty much more time than I can really afford and as a result I have in one day more hours of work than I can really take. I would like to have one or two full-time lecturers preferably teaching subjects which are not directly connected with legal practice who would carry out research and who would also assist in the administration of the faculty. We will have to put more emphasis on European law and we have to encourage our students to carry out more research. I would like to introduce a purely research degree, like a masters in socio-legal studies and I would also like to see our students putting more effort in their thesis which very often is the only research work they will ever produce and at least they should ensure that it is of a sufficiently high standard. If this continues perhaps we would have to make arrangements which would restrict the LL.D. to those students who produce a thesis of a sufficiently high standard, and with the necessary amendments to the law, we would grant an LL.M. which would still allow them to practice law in Malta.

One of the commonest problems met by our law student is the virtual inexistence of local legal literature. How could this situation ever be improved? What contribution do you propose to give towards the solution of this problem?

It is certainly a problem which has always existed. It is partly due to the fact that our laws have been modelled on the laws of other larger countries and so we have found legal literature ready made by others and utilisable by us for purposes of interpretation. Another reason is that our lawyers have never commanded high fees. Our tariffs have traditionally been on the low side and to make a decent living a lawyer has to take more cases than he can deal with comfortably and put in a considerable number of hours of work. This leaves

him hardly any time for the research which is necessary to produce good legal literature. If tariffs were to be considerably increased the situation could be improved since there are quite a few lawyers who are interested in doing research work if their living standards are not jeopardized in the process. I myself have done quite a bit of research on various matters. I have begun various works some of which are in a relatively advanced stage but I have never found the time to finish them and as time passes instead of finding more time to finish what I have started I am finding myself with less and less time.

Lawyers are not bound by any retiring age. Do you intend to continue practising till your health permits or do you plan to pursue a different and perhaps more fruitful path in the immediate future?
One of the attractions of the legal professions is that you do not have to retire so long as you are in sufficiently good health to remain active in the profession itself. As you grow older you find that you are no good for anything else but work and I certainly would like to continue with my work as long as I can. I have no plans at all to move on to something different and indeed it would have to be something very attractive to induce me to do so. All I can say is that if I were to be given a choice again to start afresh I would still choose what I have been doing so far, the two things which I have been enjoying most, the combination of exercising the legal profession and teaching at the university. It has always struck me as a pleasant surprise that for doing something which I enjoy so much I am sometimes also paid.

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