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The European Institute for Crime Prevention and Control,
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Criminal Justice Systems in Europe and North America

MALTA

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1. Demographic Issues

Puzzled expressions on people's faces upon mentioning the word 'Malta' or the impression that Malta is some African or Middle East country are no rare occurrences.[1] In a way such a reaction is understandable for the simple reason that Malta is a relatively small country and therefore it seldom finds itself in the limelight of the major international media networks.

Malta is the biggest of an archipelago of islands situated exactly in the middle of the Mediterranean Sea. In fact the islands lie 93 km south of Sicily and 288 km north of Africa, thus making them the most southern tip of the European Union. On the other hand Gibraltar is 1826 km to the West whereas Tel Aviv is 1940 km to the East of the archipelago.[2] The Maltese archipelago consists of five islands: Malta, Gozo and Comino together with two other uninhabited islands or better islets of Cominotto and Filfla. Maltese territory (excluding the Maltese territorial waters) covers approximately 316 square kilometres, the longest distance being 27 km in a north west – south east direction and 14.5 km in an east-west direction.

The population of the Maltese Islands as estimated at the end of 2003 stood at 399, 867 persons of whom 198,099 were males and 201,768 were females. Out of these 399, 867 persons, 11,000 were non-nationals. This figure amounts to 2.75% of the population of the Maltese Islands.

As regards the two demographic aspects which determine population change, that is the difference between births and deaths and the migration balance, both were positive in 2003. There was a natural increase of 872 persons and a net inflow of 1,699 persons in the total population.

In so far as employment is concerned, the employment rate stood at 53.7%. On the other hand the rate of unemployment in 2003 hovered around 7.9%.

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[1] FL Scicluna 'Where on Earth is Malta?' Article available online at www.aboutmalta.com/ travelandtoursim/ guide01.shmtl

[2] Practical info from the Malta Tourism Authority's website www.visitmalta.com/en/actical_infos index.html

2. Criminal and Procedural Law Statutes

2.1 A Brief History of the Maltese Criminal Code

The Maltese Criminal Code can be said to be a *"happy blend of continental philosophical thought and the liberal principles of English common law."*[3] However, its conception and drafting was no easy process. In fact it took almost a three decade span to be formulated and numerous actors were involved, namely Maltese judges, advocates, English judges as well as a Scottish advocate. It should be pointed out from the outset that in Maltese law we do not have a separate code of Criminal Procedure as is the case with Civil Procedural law. Criminal Procedure is dealt with in the Criminal Code itself. Indeed Book Second of the Criminal Code is entirely devoted to Criminal Procedure.

Some of the basic principles which still underpin the current Maltese Criminal Code were introduced way back in 1814 at the time when Sir Thomas Maitland was Governor of Malta. On the 25th May 1814, Maitland issued a Constitution of the Criminal Court. Besides prohibiting and abolishing torture, the Constitution also introduced other basic principles:

> (a) in no case was a person to be detained for longer than 48 hours without being charged before the Magistrate of Judicial Police;
>
> (b) witnesses were to be examined *viva voce* in the presence of the accused, who had the benefit of cross-examination;
>
> (c) should the prisoner plead guilty, the court before recording the same was to admonish him, in the most serious manner, of the infallible consequences thereof;

[3] "Homage in Venice to the Maltese Criminal Code of 1854" – Part I, Article published in *The Sunday Times of Malta* on the 7th December 2003, 56

(d) the Governor alone had the power of mitigation of punishment or of pardon.

At the time, the introduction of these principles really constituted a milestone. However, it was only in 1823 that the first attempts were made at drafting a Maltese Criminal Code. Sir John Richardson, a distinguished Justice of the High Court of England came to Malta for health reasons. Dr Ignazio Gavino Bonavita, a Magistrate of Judicial Police, wrote a 115-page memorandum on the state of the Criminal Laws of Malta and submitted it to Richardson. Bonavita explained at length why the existing laws were unstable, uncertain and confusing, stressing that reforms could not be delayed further. He specifically disagreed with the adoption of English Criminal Law to the Maltese scenario on the basis that *"the laws governing a nation must be suitable for that nation, even on religious grounds."*[4] Following an exchange of correspondence between Richardson and the Colonial Secretary, Richardson was granted a commission on the 18th November 1824, to enquire into the administration of justice in Malta, to point out its defects and to suggest appropriate remedies.

Richardson's report made it clear that codification was a must. In line with this suggestion he started working on a preliminary draft. Unfortunately he only succeeded in completing the law of proceedings and that governing offences against the person. As regards offences against the public and offences against property, he only managed to pen one chapter to each title: the chapter relating to high treason offences and that relating to theft and fraud.

Sir John Stoddart, who was appointed Chief Justice of the Maltese Courts in 1826, and Ignazio Gavino Bonavita who was appointed Justice of the Superior Courts a year later, were also key players in this codification process. Bonavita suggested the appointment of a person or a committee composed of a few competent individuals to compile the Criminal Code.

[4] ibid p. 57

On the strength of this proposal, the Lieutenant Governor, Sir Fredrick Cavendish Ponsonby instructed Stoddart to finish off Richardson's draft in the same English spirit as the parts completed. Stoddart prepared a "Plan of Legal Reform" and advised that it be implemented by one or more British lawyers to be brought over from England for the purpose. The Colonial Secretary endorsed Stoddart's views and directed Stoddart to consult Barron Field, the First Judge of the Supreme Court at Gibraltar and John Kirkpatrick, the Chief Judge of the Ionian Islands. Kirkpatrick raised two objections. First of all he objected to the fact that no Maltese judge had been appointed to serve on this Commission. Secondly, he was also contrary to the wholesale introduction of English law in Maltese statute books for the simple reason that the Maltese scenario did not tally perfectly with the English one.

Following Kirkpatrick's objection two Maltese judges Dr Claudio Vincenzo Bonnici and Dr Ignazio Gavino Bonavita were asked to join this commission alongside. In 1832 Kirkpatrick had to leave for Corfu. He was replaced by Robert Langslow, who was eventually appointed Attorney General for Malta. The commission's terms of reference were to come up with two Maltese Codes one on substantive and the other one on procedural Criminal Law. Cognisance had to be taken of Richardson's drafts, local exigencies as well as the principles and rules underlying the codes of foreign countries.

This Commission managed to complete the first part of the Criminal Code. The Code was drafted in the Italian language, the official language of the Law Courts at that time. An English translation was drawn up simultaneously. The translation was however criticised by Stoddart and Langslow, so much so that at one point Stoddart even suggested that the original text of the Code be the English language. This language problem coupled with the English Commissioners' insistence to impose English Law precepts and definitions led to the dissolution of the commission. A new one was appointed instead, composed of five Maltese Judges. This commission came up with two complete drafts, one relating to substantive criminal law and the other to procedural criminal law.

These drafts were published in 1836. The plan was to have the drafts open for discussion and then eventually promulgated the following year.

Severe criticism was hurled at the two drafts. This led the Colonial Secretary to send out to Malta a Royal Commission, composed of John Austin and George Cornewall Lewis, to enquire among other things *"on the constitution, jurisdiction and procedure of the Maltese Courts."* The Royal Commissioners held that the codes required a most careful and skilful revision and put forward their own observations.

The English Governor of the time Sir Henry Bouverie submitted the codes to the surviving Maltese Commissioners who had drawn up the 1836 drafts. These commissioners were given instructions from time to time on particular matters and they used to carry out amendments accordingly. The two drafts were duly revised and consolidated in one Code entitled *Leggi Criminali di Malta e delle Sue Dipendenze*. A copy of this draft was forwarded to the English Government on the 14th February 1842. In transmitting this draft, Bouverie had commented that the code was practically a transcript of the Neapolitan Code adapted to take into consideration local exigencies and circumstances. Bouverie also suggested that the language of the colony of Malta should be English and not Italian and that at least the spirit of English law should be introduced. He noted that this aim could be secured by making the English version the authoritative text instead of Italian.

On the 2nd August 1842, the draft code was submitted to a Scottish advocate, Andrew Jameson. Jameson was to revise and examine the new code with a view of pointing out defects and more importantly to ensure that there were no substantial diversions or departures from the liberal spirit of English Criminal Law.

Jameson drew up a three-part report. The first part of the report focused exclusively on the sources of the Code itself. In the second part Jameson discussed the positive aspects whereas in the third part he identified the deficiencies. Jameson commented on each and every provision of the

draft code. Among the positive aspects of the code, Jameson enumerated the following:

> (a) the draft included a clear enumeration of the usual aggravations of some well-known crimes as well as the systematic attempt to proportion the gradation of punishment to the scale of crimes;
>
> (b) the draft was also in harmony with civilisation and the advanced jurisprudential tenets. In fact all revolting punishments were omitted, retaining only imprisonment and limiting the death penalty to certain dangerous and serious crimes.

In so far as deficiencies are concerned, Jameson identified six principal ones:

> (a) the severity of the scale of punishment;
>
> (b) the limitation of the court's discretion by fixing a high minimum of punishment and too limited a range between minimum and maximum;
>
> (c) the minute and numerous subdivisions of aggravations with proportional increase in punishment to each;
>
> (d) the admission of the doctrine of attenuating circumstances;
>
> (e) the omission of some substantive offences. These included for instance the offence of adultery, which was contemplated in the 1836 draft but left out in 1842 to comply with the express instructions of the local government;
>
> (f) the ancient laws were left in force in those cases where the code did not envisage any specific provision.

It is worth underlining Jameson's recommendation as regards the trial by jury procedure. Originally, the 1842 draft code had limited the trial by jury procedure to persons charged with offences punishable with death or life imprisonment. Jameson disagreed with this stance and suggested that the trial by jury procedure should be extended to apply to all persons tried by indictment before the Criminal Court, irrespective of the maximum punishment of the offences included in the indictment.

As regards the criminal procedure section, Jameson opined that its provisions were generally judicious, well arranged and clearly expressed. He specified that:

> *"if administered in the right spirit they seemed well calculated to secure the benefits of a free and fair trial to the accused, [whilst attaining] the ends of justice."*[5]

Following Jameson's report, the two surviving Maltese commissioners were once again asked to express their opinion. The crown advocate of the time, Dr Antonio Micallef, was also requested to give his feedback to Jameson's detailed report. All proposals and amendments were effected and another draft was published in 1844. Jameson's advice was again sought. Following another review by Dr Micallef, the draft code entitled *Leggi Criminali per l'Isole di Malta e Sue Dipendenze*, was finally published in 1848 for general information purposes. Section 1 of this latest draft specifically made it clear that all previous laws inconsistent with this code were to be abolished. Only Roman Law, customs and the local laws contained in the Code De Rohan (enacted way back in 1784) were to remain operative.

In 1849 the Maltese were granted a new Council of Government and the elected members had the opportunity to discuss each of the sections of the draft code. By mid-June 1850, the whole Criminal Code project (in-

[5] "The Maltese Criminal Code of 1854 – 2", Article published in *The Sunday Times of* Malta on the 14th December 2003, 54. (NB This article was a sequel to that published on the 7th December 2003, referred to above.) Cf. n 3.

cluding the procedural provisions) had been examined thoroughly by the Council of Government. However, its promulgation was delayed by a four-year period.

This delay was due to religious reasons. Malta was an avid catholic country governed by a Protestant nation. One of the titles contemplated in Book II of the project dealt with *Delitti contro il rispetto dovuto alla religione* (Of Crimes against the Religious Sentiment). For the purposes of punishment, the title distinguished between the Roman Catholic religion and other religions. Jameson labelled this as discriminatory and recommended that all religions be placed on an equal footing. Obviously this did not go down well with the Maltese Council of Government Members who were staunch Catholics. Attempts to calm down the waters were made by the Council of Government itself. The Council approved an amendment whereby the Roman Catholic Apostolic Church was declared the dominant one on the island (*"dominante in queste isole")* whereas the other religions were labelled as *"qualunque altro culto dissenziente."* (other different religious cults). But again this amendment was not to the liking of Protestant believers. More vociferous discussions followed. The issue however was definitely settled with the suppression of this title. This suppression paved the way for the promulgation of the Code, which took place on the 10th March 1854 by order of the Queen in Council. It came into force three months later.

Over the years there have been numerous amendments but all in all the mainframe of the Criminal Code has remained the same. The various amendments have only been limited to the inclusion or the suppression of particular offences and to the fine-tuning of procedural provisions. Undoubtedly, one of the major reforms was that carried out in 2002 to bring the Code in line with present-day needs and expectations. Besides introducing a number of new offences, the 2002 amendments tried to strike a balance between the Attorney General's (AG) and the Police procedural rights and the rights of the accused. The new amendments have also put the *locus standi* of the injured party on a sound legal basis. The injured party has been granted the right to be present throughout the

whole criminal proceedings, notwithstanding the fact that he would be a principal witness.

Among the new offences which were introduced, one can refer to the offence of conspiracy. Prior to 2002, only conspiracy to commit crimes against the safety of the Government and conspiracy to commit drug offences attracted criminal liability. Other new offences include participation in a criminal organisation, the fomenting of racial hatred, the ill-treatment and neglect of children, the commercial exploitation of child pornography, the wilful and negligent transmission of infectious diseases, culpable miscarriage, the possession of stolen property without informing the police, the trafficking in human beings and conspiring and assisting in the illegal entry in Malta or departure from Malta of foreigners.

In so far as procedural amendments are concerned, it is important to pinpoint the following:

(a) a general right of appeal has been granted to the Attorney-General from judgements of the Court of Magistrates;

(b) it has been made clear that a plea of prescription cannot be decided in the course of the criminal inquiry before the Court of Magistrates for the simple reason that this touches upon the merits and the Court of Magistrates as a Court of Criminal Inquiry is not empowered to decide on the merits of the case;

(c) the plea of insanity at the time of the offence may only be raised at the preliminary stage of the trial;

(d) the Court of Magistrates has been empowered to pass sentence on the party charged when such party pleads guilty, even if the charges exceed its competence as a Court of Criminal Judicature;

(e) a person acquitted of theft may be found guilty by a jury of misappropriation or receiving stolen property or vice-versa;

(f) the Magistrate's Court has been empowered to hear witnesses in Malta upon a request to this effect made by foreign authorities. The request procedure has been simplified to facilitate mutual legal assistance in criminal matters.

The introduction of the rule of inference has also been an important development. If the Police, under caution, interview any criminal suspect, and such person fails to mention any fact, which he subsequently uses as a defence in his trial, the Court may draw inferences from such initial silence or omission. These inferences can constitute corroborative evidence of guilt.

In addition to the above, new procedural rights for the accused were also introduced. The provisions relating to bail, habeas corpus and redress against unlawful detention were given an overhaul to bring them in line with the dicta of the European Court of Human Rights.

The Criminal Code, Chapter 9 of the Laws of Malta, (including the procedural provisions) has been published in English and Maltese, the two official languages of the Republic of Malta. However, it is worth noting that in case of a discrepancy between the two versions, the Maltese version is to prevail. This rule does not emerge from the Criminal Code itself but from article 74 of the Maltese Constitution.[6]

2.2 Other Criminal Law Statutes

Criminal offences and procedural provisions are not only confined to Chapter 9 of the Laws of Malta. There are other special laws which lay

[6] Article 74: *"Save as otherwise provided by Parliament, every law shall be enacted in both the Maltese and English languages and, if there is any conflict between the Maltese and the English texts of any law, the Maltese text shall prevail."*

down a whole array of offences. In some particular instances, different procedural mechanisms may even apply. A case in point is definitely the **Dangerous Drugs Ordinance**,[7] introduced way back on the 1st September 1939 and amended numerous times. This prohibits "dealings" in narcotic drugs. Besides prescribing the various offences and their respective punishments, the ordinance also provides for the issue of investigation orders to enable the competent authorities to identify the proceeds resulting from drug offences. These investigation orders are intended to facilitate the enforcement of any subsequent freezing and confiscation orders which may be issued by the competent court.

Unlike the Criminal Code, where competence between the various courts of criminal judicature is determined with reference to punishment, in the case of drug offences the AG has the discretion to determine whether to have the case tried by the Criminal Court or the Court of Magistrates, irrespective of the quantum of punishment. The AG's ultimate decision would normally be based on the gravity of the particular offence.[8]

Quite akin to the Dangerous Drugs Ordinance, we have the **Medical and Kindred Professions Ordinance**,[9] enacted on first 1st June 1901. This Ordinance deals exclusively with psychotropic substances.

The **Prevention of Money Laundering Act**[10] can also up to a certain extent be classified as a criminal law statute. The Act, promulgated on the 23rd September 1994, lays down a whole array of money laundering offences. Originally the Act only punished the money laundering of proceeds derived from drug-trafficking activities. However, nowadays, the Act covers the laundering of proceeds resulting from a wider range of offences.

[7] Chapter 101 of the Laws of Malta
[8] Section 22(2) of the Dangerous Drugs Ordinance
[9] Chapter 31 of the Laws of Malta
[10] Chapter 373 of the Laws of Malta

Other laws having a substantial criminal law content include the **Arms Ordinance**[11] and the **Traffic Regulation Ordinance**.[12] The former enacted by virtue of Proclamation No. IX of 29th June 1931, provides for weapon offences, particularly the illegal use and possession of weapons. The latter, which dates back to the 31st March 1931, exclusively deals with traffic offences, like for instance driving without a car licence and driving at an excessive speed.

Worth a mention is also the **White Slave Traffic (Suppression) Ordinance**,[13] promulgated by virtue of Proclamation No. XVII of 1st August 1930. It is geared towards curtailing prostitution-related activity. The Ordinance punishes the inducement of persons who leave Malta for the purposes of prostitution as well as the managing of brothels and living on the earnings of prostitution.

2.3 The Statutes Regulating the Persons and Entities Involved in the Criminal Process

Apart from the Bench, you have two key players in the criminal process: the Executive Police and the Attorney General. The **Police Act**[14] delineates the structure of the Police Force whereas the **Attorney General and Counsel of the Republic (Constitution of Office) Ordinance**[15] defines the structure of the Office of the Attorney General. The two acts however do not go into the specific roles, functions and powers of the Police and the AG, although the **Police Act** does to a limited extent outline certain powers and duties of police officers in relation to investigations and prosecutions.[16] The Police and the AG's roles, functions and powers principally emerge from the Criminal Code.

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[11] Chapter 66 of the Laws of Malta
[12] Chapter 65 of the Laws of Malta
[13] Chapter 63 of the Laws of Malta
[14] Chapter 164 of the Laws of Malta
[15] Chapter 90 of the Laws of Malta
[16] Cf. Part III of the Police Act entitled **Investigations and Prosecutions**.

Following a conviction by a court of law and the imposition of a punishment, two other entities come into play: the probation agency or alternatively the prison or correctional facility, depending on the type of punishment imposed. Probation is regulated by the newly revamped **Probation Act**.[17] As regards prisons, the main regulatory Act is the **Prisons Act**.[18] This Act was enacted on 20th April 1976 to provide for matters relating to prisons. The Prison Act is supplemented by the Prison Regulations,[19] which are quite extensive in nature.

2.4 The Court System and the Enforcement of Criminal Justice

2.4.1 The Courts of Criminal Jurisdiction

Unlike the Civil Courts whose classification and competence emerges from the Code of Organisation and Civil Procedure (COCP), the classification and competence of the Courts of Criminal Jurisdiction is dealt with in the Criminal Code itself. The Courts of Criminal Jurisdiction are divided into two: the Inferior and the Superior Courts. The Inferior Courts are the Court of Magistrates as a Court of Criminal Judicature. As the name itself implies, this Court is presided by a magistrate. There are two Courts of Magistrates, one based in the island of Malta and the other based in the island of Gozo.

Competence between the two Courts of Magistrates is determined either by the place where the offence is committed or by the place of residence of the accused.[20] However, Judge William Harding argues that the criterion of residence of the accused is subordinated to the criterion of the place where the

[17] Chapter 446 of the Laws of Malta Its salient aspects will be examined when discussing probation.

[18] Chapter 260 of the Laws of Malta

[19] Subsidiary Legislation 260.03 A detailed reference to these regulations will be made at a later stage when discussing the Prison System and the After-Care of Prisoners.

[20] Section 372 of the Criminal Code

offence is committed. He considers the criterion of the place where the offence is committed to be more practical. Justice is facilitated if the trial takes place in the forum of the crime.[21]

The Criminal Court is the Superior Court. This Court, presided by a judge, decides the most serious cases. It is important to underline the fact that cases which have to be determined by the Criminal Court would first be preceded by a pre-trial phase, in Maltese legal jargon known as *"il-kumpilazzjoni."* During this pre-trial phase, the Court of Magistrates as a Court of Criminal Inquiry would compile all the evidence. At the end of this phase, the presiding Magistrate is to decide whether there exists sufficient evidence to commit the person charged for trial before the Criminal Court.

The rules delimiting the competences of the Court of Magistrates and the Criminal Court will be delved into at a later stage.

As regards appeals, there are two Courts of Criminal Appeal: the Court of Criminal Appeal (Inferior Jurisdiction) and the Court of Criminal Appeal (Superior Jurisdiction). The former is presided by a judge and it determines appeals from the Court of Magistrates as a Court of Criminal Judicature. On the other hand, the latter is presided by three judges and it determines appeals from the Criminal Court. The functions of the Courts of Criminal Appeal are clearly delineated in section 498(4) of the Criminal Code:

> *"The Court of Criminal Appeal shall for the purposes of and subject to the provisions of this Title have full power to determine, in accordance with this Title, any questions necessary to be determined for the purpose of doing justice in the case before the court."*

This implies that the role of the Appeal Court is not simply limited to the issues appealed but it extends even to controlling the due process and the fairness of the procedure adopted.

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[21] W Harding *Recent Criminal Cases Annotated*, Case No. 88

In theory, decisions of the Court of Criminal Appeal are not binding as in Malta we do not have the theory of binding precedent. However, in practice they are. There must exist serious and sound reasons to justify a departure from a previous pronouncement of the Court of Criminal Appeal.

We also have a Juvenile Court. The Maltese Juvenile Court was established by virtue of Act XXIV of 1980.[22] This Act was significantly amended by Act XI of 1985. This Court is presided by a magistrate and it is granted the same powers as the Court of Magistrates as a Court of Criminal Judicature and the Court of Magistrates as a Court of Criminal Inquiry, depending on the charges preferred. The magistrate is assisted by two other persons who have experience in tackling juvenile problems. At least one of the two assistants appointed has to be a woman. In terms of section 3 of the Act this Court is to hear:

> *"charges against, or other proceedings relating to, a child or young person in accordance with this Act and for the purpose of exercising any other jurisdiction conferred on juvenile offenders by or under this Act."*

For the purpose of this Act a child or young person is deemed to be a person below the age of sixteen years.[23] In case the child or young person charged attains sixteen years of age during the course of proceedings, the Juvenile Court can still proceed to hear and determine the case unless it considers it desirable to have the case transferred to the competent Court of Judicial Police (i.e. the Court of Magistrates).

Due to the age of the persons charged, Juvenile Court hearings are not public. In fact in terms of section 7 of the Act, no person other than the officials of the Juvenile Court and of the prosecution as well as other persons directly involved in the case can attend for the sittings. The Act also prohibits the reporting of proceedings taking place before the Juvenile Court so as to protect the identity of the person charged.

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[22] Chapter 287 of the Laws of Malta
[23] Section 2 of the Juvenile Court Act, Chapter 287, Laws of Malta

2.4.2 The Basic Jurisdictional Rules

The Jurisdiction of the Maltese Criminal Courts is outlined in section 5 of the Criminal Code. The first three sub-paragraphs are practically based on the extended territorial principle doctrine. This doctrine has it that a State has the jurisdiction to try not only those offences which are committed on its own soil but also those offences which are committed in the territorial seas, on board aircraft bearing its national flag and on board its registered ships even if at the time of the crime they would be sailing the high seas. In fact in terms of the first three paragraphs a criminal action may be prosecuted in Malta according to Maltese Laws:

> (a) against any person who commits an offence in Malta, or on the sea in any place within the territorial jurisdiction of Malta;
>
> (b) against any person who commits an offence on the sea beyond such limits on board any ship or vessel belonging to Malta;
>
> (c) against any person who commits an offence on board any aircraft while it is within the air space of Malta or on board any aircraft belonging to Malta wherever it may be.

In terms of paragraph (d), the Maltese Courts can also prosecute a criminal action against any citizen of Malta or permanent resident in Malta who in any place or on board any ship or vessel or on board any aircraft wherever it may be shall have become guilty of any of the following offences, namely:

(i) offences against the safety of the Government;
(ii) torture;
(iii) terrorism offences as long as these are committed or directed against or on a state or government facility, an infrastructure facility, a public place or a place accessible to the public or a public transportation system;
(iv) forgery of Government debentures

(v) bigamy
(vi) offences against the person of a citizen or permanent resident of Malta, including offences against the good order of families and illegal arrest and detention.

This paragraph is an application of the self-preservation jurisdiction principle. However it is somewhat diluted with the active personality principle. In fact in terms of this paragraph, the Maltese Courts will only have jurisdiction over specific offences which directly target the unity and integrity of the State, provided that they are committed by a Maltese citizen or permanent Maltese resident.

Paragraph (e) of section 5(1) specifies that the Maltese Courts are also competent to try offences against the safety of protected persons and terrorism offences committed by any person, even if the act attracting liability would have taken place outside Malta. This jurisdiction rule rests upon one sole condition: the presence of the alleged offender within Maltese territory.

Paragraph (f) enables the Maltese Courts to determine cases involving persons who would have committed offences outside Malta in a building enjoying diplomatic immunity or who would have committed an offence outside Malta when such persons would enjoy diplomatic immunity.

In terms of paragraph (g), Maltese Courts can try principals, accomplices or conspirators who would have been involved in certain specific offences,[24] even if the offence or offences as such would have been committed outside Malta. Once again this jurisdictional rule will be set in motion provided that the principal, accomplice or conspirator would happen to be in Malta.

[24] The reference to specific offences is to the crimes referred to in sections 87(2), 139A, . 198, 199, 211, 214 to 218, 220, 249 to 251, 298, 311 to 318 and 320 of the Criminal Code.

Paragraph (h) encompasses the *aut dedere aut judicare* maxim. Maltese Courts are competent to try offenders, whose extradition would have been turned down either because the offence would be considered a political offence or due to the fact that the offence the person is accused of is subject to the death penalty in the requesting State.

The last paragraph to section 5(1), paragraph (i), makes it possible for the Maltese Courts to exercise jurisdiction over offences, which though committed outside Malta or by any person not being a Maltese national or permanent resident, are deemed to be offences under Maltese Law. There is one curious proviso to this section. In terms of this proviso no criminal action shall be prosecuted against the President of Malta in respect of acts done in the exercise of the functions of his office.

3 The Fundamental Principles of Criminal Law and Procedure

3.1 The Principle of Legality

The well-known Italian jurist Carrara defines a criminal wrong as:

> *"The violation of the law of the State promulgated for the protection of the safety of the subjects, by an external act of man, whether of omission or of commission for which an agent is morally responsible."*[25]

Carrara's definition brings to the fore the maxim *nullum crimen sine lege* – no conduct can be classified as a criminal wrong unless it is so declared by the law of the State. Nor can a punishment be imposed unless there is a law to this effect. Although these principles are upheld by Maltese Criminal Law, they are not explicitly spelt out by a particular section of the Maltese Criminal Code. However, they emerge as a corollary to article 39 (8) of the Maltese Constitution which specifies that:

> *"No person shall be held guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed."*

[25] The original Italian version of the definition is*: "l'infrazione della legge dello stato promulgata per proteggere la sicurezza dei cittadini risultante da un atto esterno dell' uomo posittivo o negattivo, moralmente imputabile."* As reported in A Mamo *Lectures in Criminal Law – First Year* (Law Students Society University of Malta 1965) 9.

3.2 The Distinction between Crimes and Contraventions

Maltese Criminal law classifies offences into two main categories: crimes and contraventions. This distinction emerges from section 2 of the Criminal Code. Unfortunately however this section fails to indicate what should be classified as a crime and what should be classified as a contravention. What is clear though is that by rule of thumb crimes are more serious in nature than contraventions.

Distinguishing between crimes and contraventions is of quite practical importance and not merely and purely of academic interest. Four principal reasons or consequences may be identified which make it imperative to distinguish between the two:

(a) the forfeiture of the *corpus delicti* – this is a consequence that necessarily ensues upon the infliction of punishment for a crime. In so far as contraventions are concerned, forfeiture of the *corpus delicti* is not automatic. Forfeiture will not ensue in respect of contraventions unless expressly provided for by law.[26]

(b) an attempt to commit a contravention is not punishable except in those cases expressly identified by law. This is explicitly laid down in section 41(2) of the Criminal Code which provides that: *"An attempt to commit a contravention is not liable to punishment, except in the cases expressly provided for by law."* Only attempts to commit a crime attract criminal liability.

(c) the previous conviction of a person for a contravention will not render a person a recidivist if subsequently convicted for a crime;[27]

(d) the prescriptive period, that is the time within which the criminal action can be instituted, varies considerably between crimes and con-

[26] Section 23 of the Criminal Code, Chapter 9 of the Laws of Malta
[27] ibid section 50

traventions. In so far as contraventions are concerned, the criminal action is barred by the lapse of three months. On the other hand, the prescriptive period for crimes ranges from two to twenty years depending on the term of imprisonment prescribed for the particular crime.[28]

In so far as offences contemplated by the Criminal Code are concerned it is not that difficult to distinguish between crimes and contraventions. This is so because the two are dealt with under separate headings. In fact crimes are dealt with under Part II of Book First of the Criminal Code whereas contraventions are dealt with under Part III of Book First.

Problems may arise vis-à-vis the special laws. There are special laws which determine the nature of the offence there under. For example section 88 (1) of the **Spirits Ordinance**[29] provides that:

> *"Every offence under this Ordinance shall, to all legal intents and purposes, be considered as a crime within the meaning of the Criminal Code and shall, subject to the special provisions of this Ordinance, be dealt with as such."*

However this stance is not adopted in every special law which is penal in nature. Therefore reference has to be made to particular criteria to help us distinguish between crimes and contraventions. Numerous theories have been propounded in this respect. One of the major theories refers to the intrinsic character of the act itself forming the subject matter of the incrimination. In terms of this theory conduct which is inherently wrongful and which produces an actual harm is labelled as a crime. On the other hand acts which are in themselves harmless and which are committed without malice, but which are nonetheless made punishable to prevent an apprehended danger, are deemed to be contraventions. This theory however is not *per se* conclusive as there

[28] ibid section 688
[29] Chapter 41 of the Laws of Malta

have been instances where for reasons of social expediency or utility the legislators have felt the need to depart from this rule.

The most reliable test is the nature of punishment test. According to Profs A. Mamo, a Maltese criminal law commentator, this test is based on:

> *"the reasonable assumption that the legislature has imposed the harsher penalties on those offences which are more serious and the less heavy punishments on those offences of a venial nature or slight importance."*[30]

In terms of this test an offence is deemed to be a crime or a contravention depending on the nature of the punishment imposed by the legislator. For this purpose, reference has to be made to section 7 of the Criminal Code which establishes the respective punishments for crimes and contraventions. The first sub-section to section 7 specifies that:

> *"Saving the exceptions laid down in the law, the punishments that may be awarded for crimes are –*
>
> (a) imprisonment;
> (b) solitary confinement;
> (c) interdiction;
> (d) fine (multa).

The second sub-section concerns explicitly contraventions and provides that:

> *"Subject to the provisions of section 53 or of any other special law, the punishments that may be awarded for contraventions are –*

[30] A Mamo (n 25) 15-16

(a) detention;
(b) fine (ammenda);
(c) reprimand or admonition.[31]

3.3 The Principle of Strict Liability

Strict or absolute liability is a derogation to the fundamental criminal law maxim that *actus non facit reum nisi mens sit rea*. As a rule nobody can be deemed to be criminally liable unless the material act is accompanied by the required guilty mind. However, there are instances whereby the commission of a prohibited act automatically attracts liability, irrespective of the fact whether the offender would have known that what he was doing was criminally wrong or of any culpable negligence on his part. Various reasons are adduced for the adoption of such an approach vis-à-vis particular conduct, namely the pettiness of the penalty incurred and the fact that it could be particularly difficult to obtain adequate evidence of the ordinary *mens rea.*

In the context of Maltese criminal law, the principle of strict liability is as a rule applied vis-à-vis contraventions, both to contraventions emanating from the Criminal Code and also to contraventions emanating from other laws. It appears that the *ratio* for this approach lies in the fact that contraventions are generally deemed to be less serious criminal conduct. It is pertinent to underline that this principle does not emerge from any particular section of Maltese law. Rather it is well enshrined in our case-law which is based on continental legislation, doctrine and practice. A very good exposition of the application of this principle in Maltese criminal law is provided by Mr Justice Harding in his

[31] The punishment test applies in the majority of cases. However, there have been instances where the Maltese Courts have opted for a conclusion which is different from that arrived to via the application of this test. A case in point is **Police vs Anthony Mallia**, decided by the Criminal Court in its Appellate Jurisdiction on the 24th Febraury 1980. Mallia was charged with failing to comply with the conditions laid down in an import license. Though the punishment laid down for the offence was that normally awarded for crimes, the Appeal Court labelled the offence a contravention. The Court arrived to this conclusion taking into account the lack of gravity of the offence, the quantum of punishment as well as the applicability of section 24 of the Criminal Code, which establishes vicarious liability in respect to contraventions. Reported in Vol. XLIV Part IV pg 818.

commentary to the appeal case **Police vs C Gauci** decided on 4th November 1936:

> *"the doctrine now generally accepted is that liability for a contravention is incurred if only the fact in contravention is voluntary. It is sufficient that the accused was the voluntary efficient cause of such fact, and it is not necessary to show that he knew that the fact was unlawful. If the accused voluntarily committed the act then, once that that act constituted a contravention he is answerable to it."*[32]

However, there exist exceptions to this rule. A case in point is section 339(1)(d) of the Criminal Code which provides that:

> *"Every person is guilty of a contravention against the person who – attempts to use force against any person* ***with intent to insult****, annoy or hurt such person or others, unless the fact constitutes some other offence under any provision of this Code."*

In this case liability for the above-described conduct will only ensue provided that sufficient proof is brought showing that the person charged acted with intent to insult.

3.4 The Notion of Corporate Responsibility

Prior to Act III of 2002 which, as already pointed out amended substantial parts of our Criminal Code, an association of persons could not be held criminally liable for any act committed in breach of criminal law. A rather embryonic form of the notion of corporate criminal liability only featured in section 13 of the **Interpretation Act.**[33] This section vests vicarious

[32] W Harding *Recent Criminal Cases Annotated*, § 44
[33] Chapter 249 of the Laws of Malta

responsibility for a company or association of persons on the director, manager, secretary or other similar officer. In order to be exempt from criminal liability, the officer/s of the company have to prove that the offence was committed without their knowledge and that they exercised all due diligence to prevent the commission of such offence.

With the 2002 amendments corporate criminal responsibility has been introduced vis-à-vis a number of particular offences, namely offences concerning participation in an organised criminal group,[34] unlawful exaction, extortion and bribery offences and money laundering offences.[35] The sections all follow the same pattern in establishing corporate criminal responsibility. Generally speaking two essential elements have to be satisfied so that the corporate entity can be deemed to be criminally responsible. First of all the person found guilty of the relative offence must either be:

(i) the director, manager, secretary or other principal officer of the body corporate; or else
(ii) he or she must be a person having the power of representation, having the authority to take decisions on behalf of that body or having an authority to exercise control within that body.

Secondly, the offence for which the person was convicted must have been committed for the benefit, in part or in whole, of that body corporate.

Obviously, as the body corporate would lack corporeal existence, it is inconceivable to sentence it to imprisonment. Just as his foreign counterparts, the Maltese legislator has had to resort to the only available remedy: the imposition of fines. The fines imposed are quite hefty and in practical terms they are tantamount to a 'seizure' of the proceeds or other benefits which the body corporate would have derived from the commission of the particular offence.

[34] Chapter 9 Laws of Malta, section 83A(4)
[35] Chapter 373 Laws of Malta, section 3(4)

3.5 The Grounds of Justification under the Maltese Penal Code

The notion of justifiability of offences entails that no offence is deemed to have been committed at law by virtue of a *fictio juris* due to a peculiar circumstance/s specifically identified in the law. Justifiability is completely different from excusability. In the latter case an offence is deemed to have been committed. However due to the particular circumstances prevailing at the time of commission of the offence, the applicable punishment is mitigated. In some particular cases punishment is even done away with completely. Thus the non-imposition of punishment is not always indicative of justifiability.

In so far as Maltese criminal law is concerned, the grounds of justification all emanate from the Criminal Code. Section 223 of the Code identifies those instances where homicide or bodily harm is deemed to be justifiable:

> *"No offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority, or is imposed by actual necessity either in lawful self-defence or in the lawful self-defence of another person."*

The underlying implication of justifiability emerges from the opening part of the section itself where the legislator is expressly declaring that: *"No offence is committed when . . ."* Three important requisites must be satisfied so that this section can be successfully pleaded to a charge of wilful homicide or bodily harm. The evil threatened to justify homicide or the infliction of bodily harm must be unjust, grave and inevitable. Inevitability implies that the danger has to be sudden, actual and absolute.

Cases of actual necessity feature in the subsequent section (i.e. section 224) and these include cases:

(a) where the homicide or the bodily harm is committed in the act of repelling, during the night-time, the scaling or breaking of enclosures, walls, or the entrance doors of any house or inhabited apartment, or of appurtenances thereof, having a direct or an indirect communication with such house or apartment;

(b) where the homicide or bodily harm is committed in the act of defence against any person committing theft or plunder, with violence or attempting to commit such theft or plunder;

(c) where the homicide or bodily harm is imposed by the actual necessity of the defence of one's own chastity or of the chastity of another person.

There exist other instances where a person would be exempt from criminal responsibility. However, vis-à-vis these instances the Maltese legislator does not use the term "justifiability", thus signifying that in spite of this exemption an offence is still deemed to have been committed. The Maltese legislator opts to use the word "defences". The following is a very brief overview of the main defences under Maltese Law:

(a) **Lack of Age –** In terms of section 35 (1) of the Criminal Code, minors under nine years of age are exempt from criminal responsibility for any act or omission. This is a *juris et de jure* presumption and no proof to the contrary can be adduced. This exemption also extends to deaf-mutes who at the time of the offence would have attained the age of fourteen years. Minors under fourteen years of age are also exempt from criminal liability, provided however that they would not have acted with mischievous discretion. Mischievous discretion is defined as *"the consciousness of the wrongfulness of [an] act and of its consequences."*[36] This exemption also applies to deaf-mutes over fourteen years of age who would have acted without a mischievous discretion.[37]

[36] A Mamo (n 25) 79

[37] Minors who would have attained 14 years of age but who would be under 18 years of age are considered fully criminally responsible and in this respect they are at par with adults. However, in terms of section 37 of the Criminal Code the applicable punishment is to be diminished by one or two degrees.

However, it is pertinent to note that the parents of the minor may be held responsible instead if the fact alleged is proved to have been committed. In terms of section 35 (3), the court has the option to bind over the parent to watch over the conduct of the minor under penalty for non-compliance. Alternatively, if the fact committed by the minor is punished with a fine (ammenda), the Court may opt to award the punishment against the parent. This indeed reveals that that exemption of criminal liability vis-à-vis the minor is not tantamount to the fact that no offence has been committed.

(b) **Insanity –** In determining whether a person can be classified as insane and therefore exempt from criminal liability, it has to be decided *"whether the defendant had a mental disease and, if so, whether it was of such a character and degree, as to take away the capacity to know the nature of his act and to help doing it."*[38]

(c) **Physical and Moral Coercion –** Whereas an act done under physical coercion is not imputable as a criminal offence, an act done under moral coercion will only exclude criminal responsibility provided that it completely suppresses the possibility of a normal determination on the part of the person doing or omitting the act. This moral coercion must have as its source an irresistible external force. Such a force cannot proceed from within the individual.

(d) **Mistake of Fact** – a mistake of fact which is essential and inevitable can form a defence to a criminal charge and lead to an exemption of criminal liability. This defence does not emanate from a specific provision of the Maltese Code but has been established by case-law. A mistake of fact is to be distinguished from a mistake of law. The latter can never be pleaded as a defence to a criminal charge.

[38] A Mamo (n 25) 87

(e) **Accident** – Akin to mistake, we have accident. Accident provides a total exemption from criminal responsibility (*nullum crimen est in casu*). Again, this defence as such does not emanate from a specific provision of Chapter 9 of the Laws of Malta but it is commonly recognised as such by legal systems as a whole.

(f) **Intoxication** – As a general rule this cannot be pleaded as a defence to a criminal charge. It can only be pleaded in certain specific circumstances identified by section 34 (2) of the Criminal Code. This section provides that:

"Intoxication shall be a defence to any criminal charge if –

(a) by reason thereof the person charged at the time of the act or omission complained of was incapable of understanding or volition and the state of intoxication was caused without his consent by the malicious or negligent act of another person;

(b) the person charged was by reason of the intoxication insane, temporarily or otherwise, at the time of such act or omission."

In so far as the first exception is concerned, two important requisites have to be satisfied. First of all the intoxication must be **accidental** in the sense that it must be caused without the consent of the accused by the malicious or negligent act of another person. Secondly, it must also be **complete**, that is rendering the person for the time unconscious of his acts or incapable of understanding and volition. If notwithstanding that the agent was drunk and that drunkenness was accidental, he nevertheless was still capable of controlling his conduct, of knowing what he was doing, and of knowing that what he was doing was wrong, the drunkenness will not afford him any defence.

The second exception practically follows the defence of insanity. Therefore what has been said with reference to the defence of insanity finds its application here as well.

3.6 *Prescription of Criminal Offences*

Prescription is dealt with in section 688 of the Criminal Code. The section lays down the various time-limits within which the criminal action is to be exercised. These time-limits are intimately tied to the gravity of the offence: the graver the offence, the longer the prescriptive period:

"Save as otherwise provided by law, criminal action is barred –

> (a) by the lapse of twenty years in respect of crimes liable to the punishment of imprisonment for a term of not less than twenty years;
>
> (b) by the lapse of fifteen years in respect of crimes liable to imprisonment for a term of less than twenty but not less than nine years;
>
> (c) by the lapse of ten years in respect of crimes liable to imprisonment for a term of less than nine but not less than four years;
>
> (d) by the lapse of five years in respect of crimes liable to imprisonment for a term of less than four years but not less than one year;
>
> (e) by the lapse of two years in respect of crimes liable to imprisonment for a term of less than one year, or to a fine (multa) or to the punishments established for contraventions;
>
> (f) by the lapse of three months in respect of contraventions, or of verbal insults liable to the punishments established for contraventions.

Doubts have arisen as to whether an offence whose maximum punishment would be that of one year imprisonment would be governed by the prescriptive rule established under paragraph (d) or that under paragraph (e). The issue was tackled in the case **Police vs Lawrence Galea**, decided by the Court of Criminal Appeal on the 31st May 1984. The case concerned an offence which carried a maximum punishment of one-year imprisonment. The defence raised the plea of prescription. It argued that the criminal action had become time barred as the applicable prescriptive period in terms of section 688 (e) was that of two years and this had already lapsed. However, the Criminal Court of Appeal rejected this line of thought, arguing that one year is not less than one year and that therefore the five year prescriptive period stipulated in paragraph (d) was to apply.

In determining the applicable prescriptive period, reference is to be made to the punishment of the offence in the abstract sense, that is the particular punishment which the offence carries *per se* and not to the punishment which should be awarded to the person concerned due to the prevailing circumstances. This aspect emerges from section 689 of the Criminal Code which lays down that:

> *"For the purpose of prescription, regard shall be had to the punishment to which the offence is ordinarily liable, independently of any excuse or other particular circumstance by reason of which the offence is, according to law, liable to a lesser punishment; nor shall any regard be had to any increase of punishment by reason of any previous conviction."*

The above time-limits will apply provided that no different prescriptive time period is laid down in the special laws. In simple words, the prescriptive time periods laid down in the special laws will supersede those enunciated in the Criminal Code. In fact the opening phrase of section 688 stipulates that: *"Save as otherwise provided by criminal law . . .. . ."* For example section 32 of

the **Press Act**[39] makes it clear that the criminal action for any offence under Part II of the Act is to be instituted within one year.

3.7 The Structure of the Criminal Code

In line with continental codes, the Maltese Criminal Code is divided into a general part and a special part. Part I of Book First is the general part and it enunciates the general criminal law principles applicable to all offences. It includes provisions as to punishments as well as the general defences. Part II of Book First then identifies the crimes and their respective punishments whereas Part III entirely focuses on contraventions. Book II identifies the various criminal procedural rules.

The following is the table of contents of Book First of the Maltese Criminal Code which caters for the substantive law aspects:

[39] Chapter 248 of the Laws of Malta

ARRANGEMENT OF CODE

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OF CONTRAVENTIONS AND PUNISHMENTS

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3.8 Legal Definitions of the Traditional Crimes

Wilful homicide is defined in section 211(2) of the Code:

> *"A person shall be guilty of wilful homicide if, maliciously, with intent to kill another person or to put the life of such other person in manifest jeopardy, he causes the death of such other person."*

Bodily harm is tackled in section 214. This section specifies that:

> *"Whosoever, without intent to kill or to put the life of any person in manifest jeopardy, shall cause harm to the body or health of another person, or shall cause to such other person a mental derangement, shall be guilty of bodily harm."*

Bodily harm is deemed to be grievous:

(a) if it can give rise to danger of –
  (i) loss of life; or
  (ii) any permanent debility of the health or permanent functional debility of any organ of the body; or
  (iii) any permanent defect in any part of the physical structure of the body; or
  (iv) any permanent mental infirmity;
(b) if it causes any deformity or disfigurement in the face, neck, or either of the hands of the person injured;
(c) if it is caused by any wound which penetrates into one of the cavities of the body, without producing any of the effects mentioned in section 218;
(d) if it causes any mental physical infirmity lasting for a period of thirty days or more; or if the party who is injured is incapacitated, for a like period, from attending to his occupation;
(e) if, being committed on a woman with child, it hastens delivery.

If the bodily harm does not produce any of the above-mentioned effects, it is deemed to be slight.

As regards theft, the Maltese Criminal Code does not provide us with a definition. The Maltese Courts have opted to refer to the definition propounded by the Italian jurist Carrara which holds that theft is:

> *"la contrattazione dolosa di cosa altrui fatto invito domino con animo di farne lucro." (the taking or removal of a thing belonging to others made fraudulently without the consent of the owner with a view to make a gain)*

Section 261 specifies that theft may be aggravated by violence, means, amount, person, place, time, and by the nature of the thing stolen.

(i) Theft is aggravated by violence:

> *"(a) where it is accompanied with homicide, bodily harm, or confinement of the person, or with a written or verbal threat to kill, or to inflict a bodily harm, or to cause damage to property;*
> *(b) where the thief presents himself armed, or where the thieves though unarmed present themselves in a number of more than two;*
> *(c) where any person scouring the country-side and carrying arms proper, or forming part of an assembly in terms of article 63, shall, by a written or verbal request, made either directly or through another person, cause to be delivered to him the property of another, although the request be not accompanied with any threat."*[40]

Section 262 (2) stipulates that:

> *"In order that an act of violence may be deemed to aggravate the theft, it shall be sufficient that such act be committed previously to, at the time of, or immediately after the crime, with the object of facilitating the completion thereof, or of screening the offender from punishment or from arrest or from the hue and cry raised by the injured party or by others, or of preventing the recovery of the stolen property or by way of revenge because of impediment placed or attempted to be placed in the way of the theft, or because of the recovery of the stolen property or of the discovery of the thief."*

[40] Section 262(1) of the Criminal Code

(ii) Theft is aggravated by means:

> *"(a) when it is committed with internal or external breaking[41], with false keys,[42] or by scaling;[43]*
>
> *(b) when the thief makes use of any painting, mask, or other covering of the face, or any other disguise of garment or appearance, or when, in order to commit the theft, he takes the designation or puts on the dress of any civil or military officer, or alleges a fictitious order purporting to be issued by any public authority, even though such devices shall not have ultimately contributed to facilitate the theft, or to conceal the perpetrator thereof."[44]*

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[41]Breaking is defined in section 264 as including the *"throwing down, breaking, demolishing, burning, wrenching, twisting, or forcing of any wall, not being a rubble wall enclosing a field, roof, bolt, padlock, door, or other similar contrivances intended to prevent entrance into any dwelling-house or other place or enclosure, or to lock up or secure wares or other articles in boxes, trunks, cupboards, or other receptacles, and the breaking of any box, trunk, or other receptacle even though such breaking may not have taken place on the spot where the theft is committed."* The breaking twisting, wrenching, or forcing of the pipes of the public water service or of the gas service, or of the wires or cables of the electricity service, or of the meters thereof, or of any seal of any meter, made for the purpose of effecting an unlawful communication with such pipes, wires, or cables, or the existence of artificial means also constitute "breaking".

[42] A false key is taken to include: *"Any hook, picklock, skeleton-key, or any key imitated, counterfeited, or adapted, and any genuine key when procured by means of theft, fraud or any kind of artifice, and, generally, any other instrument adapted for opening or removing fastenings of any kind whatsoever, whether internal or external."*

[43] The term scaling is deemed to cover: *"The entry into any of the places mentioned in article 264 by any way other than by the doors ordinarily intended for the purpose, whether the entry is effected by means of a ladder or rope or by any other means whatsoever, or by the bodily assistance of any other person or by clambering in any way whatsoever in order to mount or descend, as well as the entry by any subterraneous aperture other than that established as an entrance."* The law goes on to specify that for the purposes of punishment, there shall also be deemed to be scaling where *"the offender, although he shall have entered into any of the places aforesaid by any way ordinarily destined for the purpose, shall get out of the same by any of the means aforesaid."*

[44] Section 263 of the Criminal Code

(iii) Theft is aggravated by amount when the value of the thing stolen exceeds one hundred liri.[45]

(iv) Theft is aggravated by person:

> *"(a) when it is committed in any place by a servant[46] to the prejudice of his master, or to the prejudice of a third party, if his capacity as servant, whether real or fictitious, shall have afforded him facilities in the commission of the theft;*
>
> *(b) when it is committed by a guest or by any person of his family, in the house where he is receiving hospitality, or, under similar circumstances, by the host or by any person of his family, to the prejudice of the guest or his family;*
>
> *(c) when it is committed by any hotel-keeper, innkeeper, driver of a vehicle, boatman, or by any of their agents, servants or employees, in the hotel, inn, vehicle or boat wherein such hotel-keeper, innkeeper, driver or boatman carries on or causes to be carried on any such trade or calling, or performs or causes to be performed any such service; and also when it is committed in any of the above-mentioned places, by any individual who has taken lodgings or a place, or has entrusted his property therein;*
>
> *(d) when it is committed by any apprentice, fellow workman, journey-man, professor, artist, soldier, seaman, or any other employee, in the house, shop, workshop, quarters, ship, or any other place, to which the offender has access by reason of his trade, profession, or employment."*[47]

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[45] ibid section 267

[46] The term "servant" shall include every person employed at a salary or other remuneration in the service of another, whether such person lives with his master or not.

[47] Section 268 of the Criminal Code

(v) Theft is aggravated by place, when it is committed:

> *"(a) in any public place destined for divine worship;*
> *(b) in the hall where the court sits and during the sitting of the court;*
> *(c) on any public road in the country-side outside inhabited areas;*
> *(d) in any store or arsenal of the Government, or in any other place for the deposit of goods or pledges, destined for the convenience of the public;*
> *(e) on any ship or vessel lying at anchor;*
> *(f) in any prison, or other place of custody or punishment;*
> *(g) in any dwelling-house or appurtenance thereof."*[48]

(vi) Theft is aggravated by time, when it is committed in the night, that is to say, between sunset and sunrise.[49]

(vii) Theft is aggravated by the nature of the thing stolen:

> *"(a) when it is committed upon things exposed to danger, whether by their being cast away or removed for safety, or by their being abandoned on account of urgent personal danger arising from fire, the falling of a building, or from any shipwreck, flood, invasion by an enemy, or any other grave calamity;*
> *(b) when it is committed on beehives;*
> *(c) when it is committed on any kind of cattle, large or small, in any pasture-ground, farmhouse or stable, provided the value be not less than one lira;*
> *(d) when it is committed on any cordage, or other things essentially required for the navigation or for the safety of ships or vessels;*

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[48] ibid section 269
[49] ibid section 270

(e) when it is committed on any net or other tackle cast in the sea, for the purpose of fishing;
(f) when it is committed on any article of ornament or clothing which is at the time on the person of any child under nine years of age;
(g) when it is committed on any vehicle in a public place or in a place accessible to the public, or on any part or accessory of, or anything inside, such vehicle;
(h) when it is committed on nuclear material as defined in article 314B(4).”[50]

Simple theft is defined as theft not accompanied by any of the aggravating circumstances listed above and is subject to a term of imprisonment from one to six months.

[50] ibid section 271

4 The Organisation of the Investigation and Criminal Procedure

4.1 General Issues

4.1.1 The Criminal Action under Maltese Criminal Law of Procedure

Section 3(1) of the Criminal Code specifies that every offence gives rise to a criminal action and a civil action. The second sub-section to this section goes on to specify that the criminal action is prosecuted before the courts of criminal jurisdiction, and the punishment of the offender is thereby demanded.

The criminal action is essentially a public action. Being a public action it is vested in the State and prosecuted in the name of the Republic of Malta through the Executive Police or the Attorney General (AG), as the case may be, according to law.[51] In so far as the inferior courts are concerned (i.e. the Court of Magistrates), it is the Executive Police who have to initiate proceedings. The AG is precluded from initiating proceedings before the Court of Magistrates and can at most assist the Executive Police.[52] In fact before the inferior courts the *occhio* (name of the case) would read Police vs X. The Police do not have any discretion to prosecute. In fact in their oath of attestation when they take up service, they promise to apply the law without fear or favour. If from their investigations it transpires that an offence has been committed and the identity of the alleged offender or offenders is known, the Police are bound to arraign the person/s concerned.

The AG only comes in as a prosecutor at a later stage in proceedings. In fact he only acts as a prosecutor before the superior criminal courts.

[51] ibid section 4
[52] ibid section 410(3)

Section 430(1) of the Code lays down that: *"The AG shall be the prosecutor before the Criminal Court."* He is to indict in the name of the Republic of Malta and shall proceed *ex officio* independently of any complaint of the injured party, except in cases, where, according to law, no prosecution may be instituted without the complaint of the injured party. Indeed the occhio in such a case would read the *Republic of Malta vs X*.

It is important to note that in certain exceptional cases the private party also has the right to institute criminal proceedings and conduct the prosecution. Two important conditions have to be satisfied for this to ensue. First of all the offence in question must be one falling within the original competence of the Court of Magistrates. These offences are identified in section 370 (1) of the Criminal Code which specifies that:

> *"The Court of Magistrates shall be competent to try –*
>
> *(a) all contraventions referred to in this Code;*
>
> *(b) all crimes referred to in this Code which are liable to the punishments established for contraventions, to a fine (multa) or to imprisonment for a term not exceeding six months with or without the addition of a fine (multa) or interdiction;*
>
> *(c) all offences referred to in any other law which are liable to the punishments established in the preceding paragraph, unless the law provides otherwise."*

Secondly the offence must be one which would require the complaint of the injured party for the institution of proceedings.

In cases where the prosecution would be in the hands of the private party, the Executive Police are not completely ousted out of the picture. They still have a role to play, though minimal. They are to issue the summons.

Obviously, the authority or party who would have the right to initiate criminal proceedings must know that an offence has been committed. Our law envisages three methods whereby notice of the offence can be given: (a) report; (b) information; and (c) complaint.

A report is an information given to the appropriate authorities by whoever has a legal duty to give that information.

The information is the act whereby an individual spontaneously gives notice to the Executive Police of an offence, being one which can be prosecuted *ex officio*, howsoever the person may have become aware of it. As a general rule there is no duty imposed on private individuals to give information of offences committed. The law generally leaves it in their discretion to give or to forbear from giving such information. However, there are instances where failure to give such information may amount to an offence. A case in point would be the failure to inform the competent authorities of any crime against the safety of Government about to be committed[53] or of offences against the person or property.[54] There are other special laws which impose a duty upon a particular class of persons to forward information of an offence or suspicion of an offence coming to their knowledge.

The complaint is the representation to the police of a personal damage or injury suffered as a result of an offence, moved by the desire of obtaining satisfaction through the instrumentality of the Courts of Criminal Justice. The complainant, therefore unlike the informer, would have a personal interest, in filing the complaint. In so far as certain offences are concerned, the complaint is an essential requisite for the filing of the

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[53] Section 61 of the Criminal Code: *"Whosoever, knowing that any of the crimes referred to in the preceding sections of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months."*

[54] Section 338 of the Criminal Code: *"Every person is guilty of a contravention against public order, who (e) not being one of the persons referred to in section 62, is present at any attempt against the life or property of any person and fails to give information thereof to the Executive Police."*

criminal action and the police would not be in a position to prosecute unless the complaint is filed. In the case of the offences of rape, abduction, defilement of minors, slight bodily harm, involuntary bodily harm, defamation, misappropriation, spoil, damage or injury in general and involuntary fire or damage, the complaint is a *sine qua non* condition required for the initiation of proceedings.

4.1.2 The Pre-Trial and the Trial Phases in Maltese Criminal Procedure

An analysis of the pre-trial and trial phases necessarily requires an overview of the functioning of the Courts of Magistrates. There are two important corollaries or branches of the Court of Magistrates. We have the Court of Magistrates as a Court of Criminal Judicature and the Court of Magistrates as a Court of Criminal Inquiry. The former decides on the issue of guilt or otherwise of the person charged whereas the latter merely compiles evidence.

(a) The Court of Magistrates as Court of Criminal Judicature

The Court of Magistrates as a Court of Criminal Judicature has a two-fold competence: an original competence and an extended competence. The parameters of the original competence are delineated by section 370(1) already quoted above. In terms of this section the Court of Magistrates has the competence to determine:

> (a) all contraventions listed in the Criminal Code;
> (b) all crimes featuring in the Criminal Code, the punishment of which does not exceed the six months imprisonment;
> (c) all the offences mentioned in other laws, other than the Criminal Code, the punishment of which does not exceed six months imprisonment;
> (d) all the offences mentioned in other laws, other than the Criminal Code, where the law stipulates that the offences are to be de-

termined by the Court of Magistrates as a Court of Criminal Judicature.

The extended competence of the Court of Magistrates enables this Court to try offences the punishment of which exceeds six months imprisonment but does not exceed the ten-year imprisonment term. A distinction is to be drawn between those offences whose punishment exceeds six months imprisonment but not the four-year term and those offences whose punishment exceeds the four-year term but not the ten-year term. This distinction is important for the simple reason that a different procedure applies for each of the two cases.

As regards those cases where the offence is liable to a punishment exceeding four years imprisonment but not the ten-year term, there has to be the criminal inquiry first. This inquiry cannot be dispensed with. The Court of Magistrates as a Court of Criminal Inquiry would proceed to hear all the witnesses *viva voce* in open court. Following the compilation of evidence, the acts of the case are transmitted to the AG's office. In case the AG is of the opinion that all the evidence necessary has been compiled, he can re-send the acts back to the Court of Magistrates as a Court of Criminal Inquiry and ask it to take cognisance of the charges listed and to determine the case itself. This would require the Court of Magistrates as a Court of Criminal Inquiry to transform itself into a Court of Criminal Judicature in order for it to be able to determine the case. However, for this transformation to take place there has to be the no objection of the accused to have the case determined by the Court of Magistrates as a Court of Criminal Judicature. In case the accused objects to this, the acts are re-sent to the AG's office and the latter would proceed to issue the bill of indictment. Eventually the case would be determined by the Criminal Court.[55]

The procedure applicable to those cases where the offence is liable to a punishment exceeding six months but not the four-year term varies

[55] Section 370 (3) of the Criminal Code

slightly. Proceedings start with the sworn statement of the prosecutor. This is followed by the examination of the accused. A number of standard questions are asked to the accused, the last one being if and what he wishes to reply to the charge brought against him. The person charged is also asked whether he would have any objection to have the case tried summarily. If the person charged does not object to have the case tried summarily, the court will ask the prosecuting officer whether the AG would have consented to the case being heard summarily. If the AG's office would have consented to have the case tried summarily, the Court shall note this fact in the records of the proceedings and thereupon it shall become competent to try the accused and shall proceed accordingly. Therefore, unlike the other variant of extended competence the consent and no objection of the accused are given at the initial stage of the proceedings and the criminal inquiry is dispensed with.

(b) The Court of Magistrates as a Court of Criminal Inquiry & The Trial Before the Criminal Court

In the case of offences whose punishment exceeds the ten-year imprisonment term, the Court of Magistrates as a Court of Criminal Judicature cannot determine the case. The Court of Magistrates as a Court of Criminal Inquiry will have to proceed with the necessary inquiry. As the name itself implies, this is not a trial court which decides on the guilt or otherwise of the accused. It is simply a court which has an investigative function: it collects the evidence to serve as a basis for the trial before the Criminal Court. The inquiry starts with the confirmation of the report of the police on oath. Subsequently the examination of the accused takes place. The Court is then to hear the evidence in support of the report. Witnesses are heard *viva voce* in the presence of the person charged so that the latter would have the opportunity to cross-examine them.

In the course of the inquiry, the Court of Magistrates has wide ranging powers, which are akin to the inquisitorial system rather than the accusatorial system. Indeed in terms of section 397(1) of the Criminal Code:

> *"The court may order the attendance of any witness and the production of any evidence which it may deem necessary, as well as the issue of any summons or warrant of arrest against any other principal or accomplice whom the court may discover. The court may likewise order any inquest, search, experiment or any other thing necessary for the fullest investigation of the case."*

The criminal inquiry is to be concluded within the term of one month. However, upon good cause being shown, it may be extended by the President of Malta for further periods of one month each, provided however that the term for the conclusion of the inquiry shall not exceed three months in aggregate.

Following the compilation of evidence, the Court is to decide whether there are sufficient grounds to place the person charged under indictment. This decision or rather declaration marks the end of the pre-trial stage. If it results that there are sufficient grounds to place the person charged under indictment, the acts are transmitted to the AG's office for the formulation of the bill of indictment, the formal accusation for bringing a person to trial before the Criminal Court.[56] It is pertinent to note that a decision that there are sufficient grounds to indict the person charged is not tantamount to a pronouncement on the merits of the case. In fact only a prima facie level of proof is required to place the person charged under indictment. In the words of the Maltese Court of Criminal Appeal *"a prima facie decision does not imply any more examination than that of a perfunctory consideration of the records of the case."*[57]

Eventually, the accused would have to stand trial by jury before the Criminal Court unless he opts to have the case heard without a jury. This

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[56] The bill of indictment is to state the facts constituting the offence with such particulars as can be given relating to the time and place in which the facts took place and to the person against whom the offence was committed, together with all such circumstances as, according to law and in the opinion of the AG, may increase or diminish the punishment for the offence.

[57] Extradition Proceedings Colin John Trandell – 27th February 1971

option can be availed of for the trial of all offences which fall within the competence of the Criminal Court, provided that the punishment demanded in the indictment is not imprisonment for life. In that case, the accused cannot opt for this procedure.[58]

If there are not sufficient grounds to indict the person charged, the Court of Magistrates as a Court of Criminal Inquiry will proceed to discharge the person arraigned. However, this discharge is not tantamount to an acquittal and therefore the *ne bis in idem* rule does not apply. This also entails that proceedings can be re-instituted once again if new evidence comes to the fore. The term new evidence or fresh evidence refers to evidence which at the time of the discharge of the person charged did not exist or was not known to those who were entitled to prosecute.

The trial before the Court of Magistrates as a Court of Criminal Judicature and the Criminal Court is more of an accusatorial character. This is so because first of all the right of instituting proceedings pertains to the citizen as a whole. This right is exercised via the Executive Police or the AG. It is only in particular instances that the citizen himself is granted the right to prosecute. The judge or magistrate cannot act out of his own accord to initiate proceedings. Secondly, the production and the discussion of evidence is left in the hands of the parties, that is the prosecution and the person charged or accused. The adjudicator would then examine the evidence presented and pronounce judgement depending on whether the prosecution or defence would have managed to prove their case.

The judge or magistrate can only adjudicate on the charges preferred by the prosecution, unless the resulting offence would be comprised and involved in the offence charged. If for example the person is charged with the offence of grievous bodily harm but it results that the person is only guilty of slight bodily harm, the judge or magistrate can find the person guilty of slight bodily harm as the latter offence would be comprised and involved in the offence of grievous bodily harm. However if a person is charged of wilful homicide but it transpires from the evi-

[58] Section 436(6) of the Criminal Code

dence presented that he is only guilty for theft, the judge or magistrate cannot find him guilty for theft because the latter offence is not comprised and involved in a charge of wilful homicide.

Throughout the whole process there is a marked distinction between the parties and the adjudicator. The two are entirely distinct and this ensures the independence and impartiality of the person who is going to adjudicate. The judge sits neutral until he pronounces judgement. All communications between the parties and the adjudicator have to take place in open court. This is clearly laid down in section 8(1) of the **Code of Organisation and Civil Procedure (COCP)**,[59] which also finds its application in criminal proceedings:

> *"Saving the cases expressly provided for in this Code, the judges shall not, except in open court, either directly or indirectly, hold any communication with any suitor in any of the courts, or with any advocate, legal procurator, or other person on behalf of such suitor, in regard to any suit which is pending at the time, or is about to be commenced or prosecuted. Nor shall they, without the permission of the President of Malta, first had and obtained on an application to that effect, act as advocates or in any case give counsel or advice in regard to any suit, which they know to be already commenced, or which they foresee as likely to commence."*

Although this section specifically refers to judges, its application also extends to magistrates by virtue of section 15 of the COCP.

Once a judgement is pronounced by the competent court, its execution, observance and enforcement is inevitable so that there can be no interference with the course of law. It is only in exceptional circumstances that an amnesty or pardon is granted.

[59] Chapter 12 of the Laws of Malta

4.1.3 The Role of the Inquiring Magistrate

Under Maltese criminal procedural law we have what is referred to by the Code as the inquiry relating to the *in genere*. This is a form of investigation which is carried out by the magistrate in his own individual capacity and its ultimate aim is to preserve under the magistrate's control the evidence found on the scene of the crime.

Prior proceeding to specifically examine the role of the inquiring magistrate, it would be pertinent to identify those conditions which have to be met so that an inquiry relating to the *in genere* may be held.

First of all, it is important to note that the magistrate cannot start the inquiry on his own initiative. There must be a report, information or complaint to trigger off the inquiry. Secondly, the offence which would have been committed or suspected to have been committed must be liable to the punishment of imprisonment exceeding three years. Thirdly, the subject matter of the offence must still exist. This is so because as already pointed out the aim of the inquiry relating to the in *genere* is the preservation of the evidence. All this emerges from section 546(2) of the Criminal Code:

> *"Saving the provisions of the next following sub-sections, upon the receipt of any report, information or complaint in regard to any offence liable to the punishment of imprisonment exceeding three years, and if the subject-matter of the offence still exists, the state thereof, with each and every particular, shall be described, and the instrument, as well as the manner in which such instrument may have produced the effect, shall be indicated."*

Nonetheless, a failure to hold the inquiry when supposedly it should have been held will not prejudice the initiation of criminal proceedings

at a subsequent stage. Nor will it affect the admissibility of the evidence presented in the course of proceedings:

> *"Provided that where it results that the fact in respect of which an investigation was not held under this sub-article constituted an offence liable to the punishment mentioned in this sub-article the failure to hold an investigation under this sub-article shall not, for that reason alone, prejudice in any way whatsoever the institution or continuation of criminal proceedings for that offence or the admissibility of any evidence of that offence in those proceedings."*

However, there is no doubt that the probative value of the evidence will be somewhat dented.

The magistrate is to carry out an on-site inspection in the place where the offence was allegedly committed. Besides he is also to hear the witnesses on oath and take down their depositions. This will help him to establish the relevant facts. The depositions taken during the course of the inquiry have the same effect as depositions given by witnesses before of the Court of Magistrates as a Court of Criminal Inquiry. As depositions given before the Court of Magistrates as a Court of Criminal Inquiry are admissible before the trial court, it follows that depositions taken at the inquest will also be admissible as evidence before the trial court.

If necessary, experts have also to be employed to help the Magistrate in conducting the inquiry. For example, the law makes it mandatory to have the *"in genere"* examined by persons of the competent profession. It is pertinent to point that in certain specific cases, if he deems it so expedient, the Magistrate may even empower the experts to receive documents, to examine witnesses on oath and to take down their depositions in writing. This authorisation has to be express and it can in no way be

presumed. However, no expert shall be appointed solely for the purpose of examining the witnesses on oath and taking down their depositions.

The magistrate is also to draw up a *procès verbal.* The *procès verbal* is the act of the proceedings of the inquiry relating to the *in genere*. It would normally contain the report, information or complaint which would have triggered off the inquiry, the nomination of the experts, the experts report and the conclusion of the Magistrate. The *procès verbal* is evidence in itself. It carries the same strength as any other evidence and can be rebutted just as any other evidence.

4.1.4 The Classification of the Maltese Criminal Procedure Provisions

The part referable to criminal procedure in the Criminal Code cannot be said to be divided into a general and a special part. Rather the legislator has opted for a three-fold classification which is more subject based. The first part of Book Second of the Criminal Code deals with the authorities to which the administration of justice is entrusted. The second part refers to matters relating to certain modes of procedure and to certain trials whereas the third part is concerned with matters applicable to all criminal trials. The following is the table of contents of Book Second of the Maltese Criminal Code:

BOOK SECOND
LAWS OF CRIMINAL PROCEDURE
PART I

OF THE AUTHORITIES TO WHICH THE ADMINISTRATION OF CRIMINAL JUSTICE IS ENTRUSTED

PART II
OF MATTERS RELATING TO CERTAIN MODES OF PROCEDURE AND TO CERTAIN TRIALS

PART III
OF MATTERS APPLICABLE TO ALL CRIMINAL TRIALS

SCHEDULES

Schedule A	Fees payable to the Executive Police in Cases instituted on the Complaint of the Injured Party.
Schedule B	Fees payable in the Registry in Cases instituted on the Complaint of the Injured Party.
Schedule C	Fees payable to Legal Practitioners before the Court of Magistrates - Criminal Jurisdiction.

4.2 Special Issues

4.2.1 Arrest and Detention Pending Trial

A very good definition of arrest is that provided by Lawrence Pullicino, an ex Police Commissioner in his LL.D thesis entitled *The Rights of the Criminal Suspect*. He maintains that *"simple intimidation, as a result of which the person arrested is not free to do what he wants, is enough to constitute arrest."* Another definition of arrest is provided by Mario De Marco in his LL.D thesis entitled *A Reappraisal of Police Powers and the Remedies Available for their Misuse*. Arrest is defined as:

> *"the total restraint of the liberty of another whether by containing or by compelling him to go to a particular place, or by confining him to a place, or by detaining him in a particular public place."*

In terms of Maltese Law, an arrest can take place by the police with or without a warrant. In some peculiar instances even private persons are entitled to arrest.

In case there exist lawful grounds for the arrest of a person, the Police may request a warrant of arrest from a Magistrate.[60] However, it is also possible for the Police to proceed to an arrest without a warrant. Section 355X of the Criminal Code specifies that:

> *"Any police officer may arrest without a warrant anyone who is in the act of committing or has just committed a crime punishable with imprisonment, or whom he reasonably suspects to be about to commit or of having just committed such a crime."*

A person is deemed to be detected in the very act of committing an offence, if he is caught, either in the act of committing the offence, or while being pursued by the injured party or by the public hue and cry.[61]

It is clear from the wording of this section that a reasonable suspicion is required. A suspicion would be classified as reasonable when either the course of events or the behaviour of the individual concerned gives rise to the likelihood that he or she may be involved in the commission of an offence. It is neither a moral certainty nor a prima facie evidence. The fact that criminal proceedings are not instituted following the arrest does in no way imply that the suspicion was not reasonable at that time. The institution of criminal proceedings is in no way related to the reasonableness of the suspicion.

A police officer may even proceed to the arrest of any person who knowingly, or after due warning, obstructs or disturbs him in the execution of his duties, or disobeys his lawful orders.[62]

As regards contraventions or crimes which are not subject to the punishment of imprisonment, a Police can proceed to arrest a person without a warrant provided that:

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[60] Section 355V of the Criminal Code
[61] ibid section 355X(4)
[62] ibid section 355X(2)

(a) the person is detected in the very act of committing the offence; or
(b) the arrest is necessary to prevent the commission of an offence in respect of which the Police may institute criminal proceedings without the complaint of the injured party.

In either case at least one of the general arrest conditions has to be present as well. The general arrest conditions are listed in section 355Z:

(a) that the identity of the person is unknown or cannot be readily ascertained by the police officer; or
(b) there is a doubt whether the particulars furnished by the person are true; or
(c) that the person has not furnished a satisfactory address for service, or there are doubts about whether the address provided is satisfactory for service, or that at least some other person may according to law receive service on his behalf at the address given; or
(d) that the arrest is necessary to prevent the person:
(i) causing physical harm to himself or to any other person; or
(ii) suffering physical injury; or
(iii) causing loss or damage to property; or
(iv) committing an offence against public decency; or
(v) causing an unlawful obstruction on any public road; or
(e)that the police officer has reasonable grounds for believing that the arrest is necessary to protect a child or any other vulnerable person.

As already pointed out, even private persons can proceed to arrest a suspect. This right only applies to the circumstances delineated in section 355W (1):

"Any person not being a police office may arrest without a warrant anyone who is in the act of committing or has just committed any crime concerning the peace and honour of families and morals, any crime of wilful homicide or bodily harm, or any crime of theft or of wilful unlawful entry or damage to property."

The Maltese legislator also makes it clear that the private person is to exercise these powers only until it is strictly necessary for the Police to take over the person arrested.

On being arrested, a person is to be informed that he is under arrest, even though the arrest is obvious. The person has also to be informed in a language that he understands of the reasons for his arrest or detention. Non-compliance with any of these two important requirements will render the arrest unlawful. In case the arrest is carried out by a private person, the obligation to provide reasons for the arrest can be delayed until the police take over.[63]

In effecting the arrest the Police are bound not to use any harshness, bond or other means of restraint unless indispensably required to secure, or rendered necessary by the insubordination of the person arrested.[64]

Once arrested, a person is to be brought before a court so that the arrest can be convalidated. The court would be presided by a Magistrate. Unless this takes place, the arrested person will have to be released upon the lapse of a forty-eight hour period.[65] This forty-eight hour period starts running as soon as the subject is not free to go where he wants. Way back in the 1980s this rule used to be circumvented by having the person released upon the lapse of the forty-eight hour period and re-arrested as soon as he would have set pace outside his place of detention. This practice has been vehemently condemned by the Maltese Courts. In its de-

[63] ibid section 355AC
[64] ibid section 355AB
[65] ibid section 355AJ (3); Refer also to article 34(3) of the Constitution of the Republic of Malta.

cree to the case **Police vs John Borg**, the Court has made it clear that a proper release has to be effective and manifest. Otherwise it cannot be deemed to be a proper release.

The 2002 amendments have also properly codified an important remedy which can be availed of by the arrested person in case he considers that he is being unlawfully detained. Originally the remedy, often referred to as the *habeas corpus* remedy, was deemed to be a corollary to section 137 of Criminal Code which stipulates that:

> *"Any magistrate who, in a matter within his powers, fails or refuses to attend to a lawful complaint touching an unlawful detention, and any officer of the Executive Police, who, on a similar complaint made to him, fails to prove that he reported the same to his superior authorities within twenty-four hours, shall, on conviction, be liable to imprisonment for a term from one to six months."*

However, this article was far from being satisfactory. Section 137 is simply laying down an offence and not the procedure which can be resorted to in case of an alleged unlawful detention. Problems have now been surmounted with the introduction of section 409A which specifically delineates the procedure to be adopted in such a case:

> *"Any person who alleges he is being unlawfully detained under the authority of the Police or of any other public authority not in connection with any offence with which he is charged or accused before a court may at any time apply to the Court of Magistrates, which shall have the same powers which that court has as a court of criminal inquiry, demanding his release from custody. Any such application shall be appointed for hearing with urgency and the application together with the date of the hearing shall be served on the same day of the application on the applicant and on the Commissioner of Police or on the*

public authority under whose authority the applicant is allegedly being unlawfully detained. The Commissioner of Police or public authority, as the case may be, may file a reply by not later than the day of the hearing."[66]

4.2.2 Bail

Once that the arrest is convalidated, a person can be remanded in custody indefinitely until the criminal proceedings filed against him are brought to an end. Maltese law does not lay down time-frames or parameters within which proceedings are to be concluded. However, in terms of section 574(1) a person charged or accused who is in custody can request to be granted temporary release from custody. The granting of bail is made subject to the giving of sufficient security which guarantees the presence of the person charged or accused during proceedings and compliance with the conditions which the court may deem appropriate to impose.

The Court will normally proceed to grant bail if a request to this effect is made by the person charged or accused provided that it is satisfied that the release will in no way prejudice the ends of justice. A refusal for temporary release has to be based on purely precautionary grounds. It cannot be resorted to as a punitive measure.

Bail can also be granted by the President of Malta in certain special circumstances. Just like the Courts, the President can subject the temporary release of the person charged or accused to certain particular conditions which he may deem fit.[67]

A good exposition of the concept of bail and its implications is provided by the Criminal Court in the **Application of H. Vella** decreed on the 29th November 1898. The Criminal Court argued that unless there are good

[66] ibid section 409A(1)
[67] ibid section 574(2)

and sufficient reasons to withhold this benefit from the accused, then the respect of the liberty of the individual ought to prevail and the power which the law gives to the Court in such cases becomes a duty and creates a right in favour of the accused. If however, the Court feels upon considering all circumstances that bail does not offer sufficient guarantees in the interests of the community, then the Court must use its discretion in the sense of refusing to allow it.[68]

As a rule the Court cannot grant bail *ex officio*. There has to be a request to this effect by the person charged or accused. This however does not apply to those cases where the President can grant bail.[69] The President can act *ex officio* if the circumstances so require, without there being the need for such request.

Pre-trial detention is also taken into consideration when computing the exact prison term a person is to serve following a conviction by the competent court. The issue is dealt with in section 22 of the Criminal Code, under the part specifically referable to punishments. Pre-trial detention is not taken into account where you have a sentence of imprisonment for life or in cases where you have imprisonment or detention in default of payment of a fine (*multa* or *ammenda*). Moreover, if the person convicted would have been previously subject to a probation order, an order for conditional discharge or to a suspended sentence in respect of such offence or offences, any such period of imprisonment or detention falling before that order was made or suspended sentence passed is also to be disregarded. It is also essential to note that this pre-trial detention must not be time in prison in execution of a sentence.

Once computed as part of the term of imprisonment or detention in respect of a particular conviction, this pre-trial detention is not to be counted as part of the term of imprisonment or detention under any other sentence.

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[68] Law Reports Vol. XVI P IV, pg 19
[69] Section 582(1) of the Criminal Code

4.2.3 Appeals from Judgements of the Courts of First Instance

As already pointed out above, under Maltese Law we have two criminal courts of First Instance: the Court of Magistrates as a Court of Criminal Judicature and the Criminal Court. The former is competent to hear and determine cases the punishment of which does not exceed the ten-year term whereas the latter determines all the other cases. Different rules apply when it comes to appealing from the sentences pronounced by these two first instance courts.

4.2.3.1 Appeals from Judgements of the Court of Magistrates as a Court of Criminal Judicature

In this case an appeal can be lodged either by the party convicted, or the Attorney General or else the complainant.

(a) Appeals by the Party Convicted

In terms of section 413(1)(a) the party convicted has a general right of appeal. It has been held that the phrase "party convicted" is not to construe as referring to any person who has been declared guilty of an offence but also any person charged who feels aggrieved by a decision given by an inferior court. Thus for example a person charged who is deemed insane and ordered by the Court of Magistrates as a Court of Criminal Judicature to be kept in a mental hospital would be an aggrieved person. Hence, he has a right of appeal in terms of this section.[70] It is important to stress that the right of appeal only lies in the case of a conviction. In the case **Police vs Face Spiteri**, decided on the 26th July 1965, the Court of Magistrates rejected a plea of prescription raised by the person charged. The accused appealed from the Court's pronouncement. However, the appeal was turned down for the simple reason that section 413(1)(a) only grants a right of appeal to the party convicted. At

[70] Police vs Joseph P. Cassar, Decided on the 10th May 1939

the point in time the plea of prescription was rejected, there had been no conviction as yet. Therefore, the right of appeal could not be availed of.

(b) Appeals by the Attorney General

As regards offences which exceed the original competence of the Court of Magistrates as a Court of Criminal Judicature, the Attorney General enjoys a general right of appeal.[71] In so far as offences which fall within the original competence of the Court of Magistrates are concerned, the AG's right of appeal is limited only to points of law. The points of law upon which an appeal can be lodged are listed in section 413(1)(b) of the Criminal Code:

> *"Any judgement of the Court of Magistrates may be appealed against:*
>
> *(b) in cases relating to summary proceedings for offences within the jurisdiction of the Court of Magistrates as a Court of Criminal Judicature under sub-article (1) of article 370, by the Attorney General, and, in the cases mentioned in article 373, by the complainant where:*
>
> *(i) the inferior court rules that it has no jurisdiction to take cognisance of the offence;*
>
> *(ii) the fact of which the party accused has been convicted is liable to the punishment exceeding the jurisdiction of that court as a court of criminal judicature;*
>
> *(iii) the punishment awarded by the inferior court, is, by reason of its quality or quantity, different from that prescribed by law for the offence for which the party convicted has been sentenced;*

[71] Section 413(1)(c) of the Criminal Code

(iv) the accused or defendant is acquitted on the ground:

i) that the fact does not contain the ingredients of an offence;

ii) of extinguishment of action;

iii) of a previous conviction or acquittal;

(v) the defendant, in a case in which he has been allowed to prove the truth of the fact attributed to the complainant in accordance with the provisions of article 253, is declared to be exempt from punishment;

(vi) the Police, or, as the case may be, the complainant has not been allowed at the trial to produce, in support of the charge, some indispensable evidence which was admissible according to law;

(vii) the party accused was released from any of the obligations referred to in article 321 of the Code of Police Laws or in article 377 of this Code, or from the observance of any of the prohibitions made, or from the observance or execution of any of the prohibitions or orders made or given, by the Police or by any other public officer, under the Code of Police Laws or any other law"

It is important to note that this restriction of the AG to appeal not only applies to offences found in the Criminal Code but also to other offences which emerge from other laws and which fall within the original competence of the Court of Magistrates. This being said however, there are special laws which grant the AG an unlimited right of appeal vis-à-vis particular offences notwithstanding the fact that such offences would

fall within the parameters of the original competence of the Court of Magistrates. Section 88 of the **Customs Ordinance**[72] is a case in point.

This section specifies that:

> *"Notwithstanding the provisions of the Criminal Code, the AG shall always have a right of appeal to the Court of Criminal Appeal from any judgement given by the Court of Magistrates of Judicial Police in respect of criminal proceedings arising out of the provisions of this Ordinance."*

(c) Appeals by the Complainant

The complainant does not enjoy a general right of appeal. He is only granted this right provided that four basic conditions are met:

(a) first of all the offence must fall within the original competence of the Court of Magistrates as court of criminal judicature;

(b) secondly, proceedings which would have returned the sentence the complainant would like to appeal from, must have been instituted at the instance of the complainant himself;

(c) the injured party must have conducted proceedings before the Court of Magistrates himself in terms of section 374;

(d) the ground of appeal must be one of the grounds listed in section 413(1)(b) already quoted above.

[72] Chapter 37 of the Laws of Malta

4.2.3.2 Appeals from Judgements of the Criminal Court

In the case of judgements pronounced by the Criminal Court, the convicted person has an unlimited right of appeal. This is laid down in section 500(1):

> *"A person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction in all cases or against the sentence passed on his conviction unless the sentence is one fixed by law."*

The Attorney General's right of appeal here is only limited to one sole ground. The AG can appeal if he considers that the sentence given in the case of a conviction was unduly lenient.[73] The AG is not granted a right of appeal in case of an acquittal of the accused. In the latter case, the AG is only granted a possibility to request the Court of Criminal Appeal to give its opinion on a point of law which would have arisen in the case. This request however is not to affect the trial in relation to which the reference is made or any acquittal in that trial.[74]

The injured party is not granted a right of appeal from judgements of the Criminal Court. However, if an appeal is lodged either by the person convicted or the AG, he can request the Court of Criminal Appeal to be granted leave to make submissions either personally or through his legal counsel as to the appropriate sentence to be passed on the accused. Thus, the right of the injured party to request the Court of Criminal Appeal to make submissions as regards the punishment inflicted ultimately depends on whether the person convicted or the AG would have lodged an appeal.

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[73] ibid section 500(2)
[74] ibid section 500B

4.2.4The Presence of the Accused at the Trial

The general rule prescribed by the Maltese Constitution is that the trial of a person charged with a criminal offence cannot take place in his absence. This rule can be waived only in two particular situations:

> (a) the accused himself would have consented to have the trial take place in his absence; or
> (b) where the person charged or accused conducts himself in a way as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.[75]

4.2.5 Evidence

Simply defined evidence is the information presented in court with a view to assist the judge, magistrate or jury in deciding on the innocence or guilt of the person charged or accused. Five main rules of evidence can be identified:

> (a) All evidence which is relevant to the fact in issue can be brought. It is however important to underline that what is relevant need not necessarily be admissible as evidence. It could be excluded by law. For example evidence tendered by a co-accomplice against another co-accomplice is surely relevant. However, under our law such evidence is not admissible unless corroborated by other evidence.
>
> (b) In any trial, it is imperative to produce the best evidence. In case the evidence presented would not be the best evidence, and it eventually transpires that evidence with a higher probative value could have been put forward, the evidence so presented will be struck out.

[75] Article 39(6) of the Maltese Constitution

(c) Hearsay evidence, which can either be documentary or verbal, is not admissible in court for the purpose of establishing the guilt of the person charged. However, it can be admissible in so far as it is used to proof the truthfulness of a statement or document.

(d) Every person of sound mind is admissible as witness provided there are no objections to his competency. A person cannot be excluded from giving testimony for want of age. As long as the Court is satisfied that the witness is aware that it is wrong to give false testimony, the witness can testify irrespective of his age. Nor can a person be excluded from giving evidence on the premise that the witness was the person who laid the information, report or complaint or because the witness had been previously convicted of the same or a different offence. Age, previous convictions and the fact that the witness had lodged the information, report or complaint will however have a bearing on the credibility or otherwise of his testimony.

(e) All persons of sound mind are as a rule compellable witnesses, that is he or she can be made to give evidence if so requested. The Courts are entitled to take all actions necessary, including personal arrest, if a person refuses to give his or her testimony if requested. Exception to compellability is however made vis-à-vis persons who would be related to the accused and who would be reluctant to testify and the accused himself. Indeed the accused or person charged has a right to refuse to testify in criminal proceedings so as not to incriminate himself. The accused's refusal to testify can in no way be made the subject of adverse comment by the prosecution.[76]

[76] Proviso to section 634(1) of the Criminal Code

4.3 The Organisation of Detection and Investigation of Offences

The detection and investigation of offences is in the hands of the Executive Police. This is specifically laid down in section 346(1) of the Code:

> *"It is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities."*

In terms of this section the Police have not only the duty to detect and investigate offences, but they also have a duty to bring the suspected offenders to justice.

Police investigations would normally be triggered off following a report, information or complaint of the injured party. There may also be instances where the Attorney General himself instructs the Police to initiate proceedings before the Court of Magistrates against a third party for some particular offence. This request would be necessary for the simple reason that the AG is not the prosecutor before the inferior courts. A lawyer from the AG's office can lend a helping hand to the Police in fulfilling the corps' role as prosecutor. However, the AG or his representative cannot prosecute themselves before the Court of Magistrates.

In the majority of cases, the Police can prosecute *ex officio*. However, in particular instances the police can only initiate proceedings following the complaint of the injured party. In such cases the police would be completely precluded from prosecuting the suspected offenders, unless the complaint is filed.

The Executive Police is headed by the Police Commissioner. In terms of section 5 of the Police Act,[77] the Commissioner is to have *"the command, direction, management and superintendence of the Force"*.[78] He is to be assisted by such Deputy Commissioners and Assistant Commissioners and other Police officers of such ranks as may from time to time be approved by the Prime Minister.[79]

From the structural /administrative point of view the Maltese Police Force is sub-divided into three main Units. Each unit is responsible for specifically assigned tasks. Unit 1 comprises the Criminal Investigation Department, the Security Branch, the Drugs Squad, and the Vice Squad / Fraud Squad. The second unit includes the Special Assignment Group, incorporating personnel performing duties at the Civil Prison whereas the third unit is made up of the Traffic Department, the Administrative Law Enforcement Branch, the Mechanical Transport Branch and the Mounted Police Branch. It is also important to highlight that for the purposes of Law Enforcement Malta and Gozo are divided into ten separate police districts.

4.4 The Office of the Attorney General

The AG's office is established by virtue of article 91(1) of the Constitution:

> *"There shall be an AG whose office shall be a public office and who shall be appointed by the President acting in accordance with the advice of the Prime Minister."*

It would be quite an impossible feat for the AG to appear in all court cases himself and to sign all the relative documents. Therefore the Maltese legislator has granted the opportunity to the AG to delegate his func-

[77] Chapter 164 of the Laws of Malta
[78] Chapter 164, section 5(1)
[79] ibid section 5(2)

tions to other legal officers. Section 3(1) of **The Attorney General and Counsel for the Republic (Constitution of Office) Ordinance**[80] provides that:

> *"There shall also be an officer to be styled 'Deputy Attorney General' and officers to be styled respectively 'Assistants to the Attorney General', 'Senior Counsel to the Republic' and 'Counsel for the Republic' who shall exercise and perform all such powers, functions and duties as may be delegated or assigned to them by the Attorney General."*

As already indicated at an earlier stage of this report, the AG is the prosecutor before the Criminal Court[81] and he is to indict in the name of the Republic of Malta. He is to proceed *ex officio* independently of any complaint of the injured party, except in cases where, according to law, no prosecution may be instituted without such complaint.[82]

Following a declaration by a Court of Magistrates as a Court of Criminal Inquiry that there exists sufficient evidence to indict the person charged, the AG is to proceed to formulate the bill of indictment. The AG's functions are however not limited solely to this stage of criminal proceedings. He is also involved up to a certain extent in the pre-trial stage. He is to give his consent to have the case tried summarily before the Court of Magistrates as a Court of Criminal Judicature. When the police arraign a person under arrest and this person files a request for bail, the AG also has a duty to declare whether he opposes to such a request. The AG has also other important functions in relation to the inquiry relating to the *in genere*.

In the exercise of his powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him by law which authorise him to exercise that power in his individual judgement, the AG shall not be

[80] Chapter 90 of the Laws of Malta
[81] Section 430(1) of the Criminal Code
[82] ibid section 430(2)

subject to the direction or control of any other person or authority.[83] This clearly defined immunity as regards the powers of undertaking, instituting and discontinuing criminal proceedings has been strengthened recently due to the fact that as from May 2005, the AG is no longer a government office in the strict sense of the word. It has acquired an independent status, though it is still funded by the Government of Malta.

4.5 The Bar and Legal Counsel

Article 39(6) of the Constitution specifies that every person who is charged with a criminal offence:

> *"shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense."*

It is clear therefore that as soon as a person is charged with a criminal offence, he has the right to be assisted by a lawyer of his own choice. This point is also affirmed in the Criminal Code itself. The Code makes it clear that it is incumbent on the courts of criminal justice to see to the *"adequate defence of the person charged or accused."*[84] Indeed, section 445 which features under the Title governing the Criminal Court provides that: *"If the accused appears without counsel, the court shall inform him that he has the right to be assisted by counsel."*

In case the person would not be in the financial position to seek the services of a lawyer of his own choice or he would not have briefed any other lawyer, the advocate for legal aid is to gratuitously undertake the defence of the accused.[85] The request to be assisted by the advocate for legal aid or to be admitted for the benefit of legal aid is to be made either by

[83] Article 91(3) of the Constitution of Malta
[84] Section 519 of the Criminal Code
[85] Section 570(1) of the Criminal Code

application or orally to the advocate of legal aid. In case of summary proceedings before the Court of Magistrates acting as a Court of Criminal Judicature, the Court is to appoint the advocate whose turn it is from the panel of advocates designated by the Minister of Justice to perform the duties of advocates *ex officio* and experts in the Courts of Malta. The advocate so appointed would assist the accused in those proceedings as well as in any appeal which the person charged may wish to lodge following the decision given. If for some reason or another, the advocate of legal aid refuses to assist the person charged, Maltese Criminal Law provides that the Court is to appoint another lawyer to take over the defence of the accused. This really reveals that the right of the person charged to be assisted by a lawyer is of utmost importance and it can only be waived by the person charged himself.

Throughout the course of the proceedings, be them before the inferior or the superior courts, the lawyer is granted the full possibility to cross-examine witnesses and to present all the evidence admissible by law to prove the innocence of the person charged. At the same time the defence lawyer is also to ensure that the prosecution discharges the onus of proof placed upon it by law (i.e. proof beyond reasonable doubt) to prove the guilt of the accused.[86]

In order to be able to practise as a lawyer before the Courts of the Republic of Malta, the person concerned has to have the authority of the President of Malta granted by warrant under the Public Seal of Malta.[87] To be eligible to attain this warrant the individual has to fulfil a number of conditions:

(a) he must be of good conduct and good morals;

(b) he must be a citizen of Malta or of a Member State or is otherwise permitted to work in Malta under any law;

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[86] Refer to Rule 10 Chapter 1 Part Four of the Code of Ethics and Conduct for Advocates, Published by the Commission for the Administration of Justice

[87] Section 79 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta)

(c) he must have obtained the academic degree of Doctor of Laws (LL.D) in accordance with the provisions of the statute of the University of Malta, or a comparable degree from such other competent authority in accordance with the principles of Mutual Recognition of Qualifications, after having studied law in Malta or in a Member State of the European Union;

(d) following the completion of the LL.D course or at any time after the commencement of the last academic year of the said year, he must have regularly attended at the office of a practising advocate of the Bar of Malta and at the sittings of the superior courts;

(e) he must possess a full knowledge of the Maltese language as being the language of the Courts;

(f) he must have 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 abovementioned and that he is competent to exercise the profession of advocate in the courts of Malta.[88]

4.6 Participation of Lay Persons in the Criminal Process

The participation of lay persons in the Maltese criminal process is confined to trials before the Criminal Court, the Court which determines the most serious criminal cases including offences which are liable to life imprisonment. In fact the Criminal Court is made up of a judge sitting with a nine-member jury. The jury is competent to decide questions of fact (i.e. the guilt or innocence of the accused) whereas issues of law are to be left to the judge alone. So much so that when it comes to preliminary pleas and issues relating to the admissibility of evidence, these are decided by the judge alone before the empanelling of the jury. The functions of the judge and jury are clearly delineated in section 436(2):

[88] ibid section 81

> *"The jury shall decide on any matter touching the issue as to whether the accused is guilty or not guilty and on any collateral issues referred to in Title VII of Part II of Book Second of this Code: and the Court shall decide on the application of the law to the fact as declared by the jury, as well as on all other points of law or of fact relative to the proceedings."*

The reference to Title VII of Part II of Book Second of the Code refers to the allegation of insanity and other collateral issues. This is so because in terms of Maltese law a jury may even be empanelled for the purpose of determining whether an accused is insane or not, in case this plea is raised by the accused. The functions of a jury empanelled for this purpose differ from those of a jury appointed in the course of a normal trial by jury. First of all the jury in this case will not go into the merits of the case, i.e. the innocence or guilt of the accused, but it would simply limit itself to determining whether the accused is insane or not. Secondly, whereas in a normal trial by jury, there must be a minimum 6-3 vote to declare a person guilty or innocent, in the case of insanity a 5-4 vote would suffice for a declaration of sanity/insanity.

4.7 The Position of the Victim under Maltese Criminal Law

Up to 2002, the victim had no *locus standi* before the Maltese Criminal Courts or any rights whatsoever. He was deemed to be at par with any other witness to the case. Such a stance did not make sense and the 2002 amendments partially rectified the situation, by granting the victim or the injured party[89] certain rights in the course of criminal proceedings. These rights however only extend to proceedings before the Court of Magistrates, be it a Court of Criminal Judicature or a Court of Criminal Inquiry. They do not extend to proceedings before the superior courts.

[89] Unfortunately the Maltese legislator has stopped short from indicating what the term "victim" or "injured party" is to construe

Section 410(1) of the Criminal Code provides that in any proceedings instituted by the Executive Police on the complaint of the injured party, it shall be lawful for the complainant to be present at the proceedings, to engage an advocate or a legal procurator to assist him, to examine or cross-examine witnesses and to produce, in support of the charge, such other evidence as the court may consider admissible. This right of the victim to be assisted by a lawyer also extends to those cases where proceedings are initiated *ex officio* by the Executive Police.[90] To this effect section 410(4) provides that any party injured having an interest in being present for such sittings:

> *"shall have the right to communicate that interest to the police, giving his or her particulars and residential address where upon that injured party shall be served with a notice of the date, place and time of the first hearing in those proceedings and shall have the right to be present in court during that and all subsequent hearings even if he is a witness."*

Maltese Law also grants a remedy to the injured party in case the Executive Police refrain to institute proceedings following the complaint lodged by such party. This remedy is termed as **challenge proceedings** and its salient tenets are outlined in section 541. This section enables the complainant to lodge an application with the Court of Magistrates demanding the Court to order the Commissioner of Police to take action against a particular person. The Court will require the applicant to confirm the contents of the application on oath. Subsequently it will hear the evidence tendered by the applicant and the Commissioner of Police and if it transpires that the complaint is prima facie justified, it will allow the request. The Attorney General is granted the right to appeal before the Criminal Court if the Court of Magistrates allows such a request. Even the applicant is granted a right of appeal before the Criminal Court in case the Court of Magistrates turns down his request.[91]

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[90] Section 410(3) of the Criminal Code
[91] ibid section 541(3)

It is imperative to underline that this procedure applies only to crimes and not to contraventions. Moreover, a third party who would have lodged a report or information can even resort to this procedure in case the police fail to institute proceedings, even though strictly speaking he would not have been aggrieved by the offence.

The victim does not have any right to State compensation for injuries or loss caused by crime. However, he is entitled to institute civil proceedings against the offender for the payment of damages. In fact section 3(1) of the Criminal Code specifies that: *"Every offence gives rise to a criminal action and a civil action."* Moreover, section 26(1) of the Code also provides that: *"Any sentence to a punishment established by law shall always be deemed to have been awarded without prejudice to the right of civil action."*

The civil action is completely independent from the criminal action. Indeed the fact that a person has been found guilty of a particular offence will not necessarily lead to an automatic award of damages. Nor will on the other hand a pardon committing or remitting a punishment lawfully awarded operate as to bar civil action.[92] The victim will have to adduce proof to justify his claim for damages and the quantum demanded. The victim may however ask the court to have the evidence heard in the course of the criminal proceedings transcribed in the civil process to avoid having to hear the same evidence once again.

In claiming compensation from the offender, the victim is not assisted by the State. State victim support schemes are also unheard off. There only exists a victim support scheme coordinated by a non-governmental organisation named the Criminal Justice Bureau. It is also important to note though that the probation officer entrusted to compile the pre-sentencing report is to interview the victims of the crime. Thanks to these interviews, the probation officer does not only gather the victims' version of events but comes to terms with their reaction to the crime and its repercussions on their daily life. Unfortunately however these interviews are not intended to help the individual surmount the trauma; they are merely intended to help the probation officer frame his recommendations for sentencing.

[92] ibid section 26(2)

5 Sentencing and the System of Sanctions

5.1 The Classical Forms of Punishments

Section 7 of the Criminal Code lists the types of sanctions applicable vis-à-vis crimes and contraventions. Sub-section (1) provides that:

> *"Saving the exceptions laid down in the law, the punishments that may be awarded for crimes are –*
>
> (a) imprisonment;
> (b) solitary confinement;
> (c) interdiction;
> (d) fine (multa).

(a) Imprisonment – Imprisonment is defined in section 8 of the Code. The section specifies that persons sentenced to imprisonment are to be confined in the prison or in that part of the prison appointed for persons sentenced to that punishment, and they shall be subject to the restrictions prescribed in the prison regulations lawfully made. The section, however, does not indicate the maximum and minimum terms of imprisonment as the maximum and minimum terms to be applied are established in respect of each particular offence. Vis-à-vis certain particular offences, namely wilful homicide and drug trafficking, the punishment of life imprisonment can be imposed.[93] Capital punishment is no longer on Maltese statute books.

The actual term of imprisonment imposed by the Court would depend upon a number of factors. There could be circumstances which justify the aggravation of punishment or which would require the imposition of a lesser punishment. The scale of punishments is laid down in section 31 of the Criminal Code.

[93] In the case of trials by jury involving offences punished with imprisonment for life, the Court may award a sentence of imprisonment for a term of not less than 12 years in lieu of the punishment of imprisonment for life if the jury would not have been unanimous in its verdict. (Section 492(2) of the Criminal Code)

(b) Solitary Confinement – Solitary confinement is an order under which a prisoner is isolated for several days (not exceeding ten continuous days) throughout his term of imprisonment. The Criminal Code prescribes particular rules which are to be adhered to when applying this type of punishment.[94]

(c) Interdiction – Interdiction entails prohibiting the person from entering into civil and commercial transactions. Interdiction can be either general or special. Interdiction is said to be general when it disqualifies the person sentenced from any public office or employment, generally. It is special when it disqualifies the person sentenced from holding some particular public office or employment, or from the exercise of a particular profession, art, trade, or right, according to the law in each particular case.[95]

(d) Fine (*Multa*) – Unless otherwise specified, the maximum of a fine (*multa*) shall be five hundred liri (Lm 500) and the minimum ten liri (Lm 10). In case the maximum of a fine (*multa*) prescribed in the Criminal Code or in any other law is less than ten liri (Lm 10), the maximum shall be ten liri (Lm 10) and the minimum shall be five liri (Lm 5). Default in payment of a fine (*multa*) within the period stipulated by the court is to be converted into imprisonment at the rate of one day for every five liri (Lm 5).[96]

The second sub-section to section 7 concerns the punishment for contraventions and it stipulates that:

> *"Subject to the provisions of section 53 or of any other special law, the punishments that may be awarded for contraventions are –*

[94] Section 9 of the Criminal Code
[95] ibid section 10
[96] ibid section 11

(a) detention;
(b) fine (ammenda);
(c) reprimand or admonition.

(a) Detention – Although detention may appear to be similar to imprisonment, there are some notable differences between the two forms of punishment. First of all the detainee is held in prison at his own expense and normally he or she would be kept separate from other prisoners. Secondly, no term of detention is to exceed the two-month period.[97]

(b) Fine (*Ammenda*) – Unless otherwise specified, the maximum of a fine (*ammenda*) is not to exceed the twenty-five Maltese liri (Lm 25) mark whereas the minimum is fixed at three Maltese liri (Lm 3). Default in payment of a fine (*ammenda*) is to be converted into detention at the rate of one day for every five liri or fraction thereof.[98]

(c) Reprimand / Admonition – A reprimand is a rebuke for the offence committed, whereas the admonition is an exhortation not to commit another offence. Both are administered in open court by the Judge or Magistrate who has tried the case and any person who receives the same in a manner of evidencing contempt or want of respect may be sentenced to detention or to an *ammenda*.

5.2 Alternative Modes of Punishment

Besides the forms of punishment laid down in section 7 of the Criminal Code, it is also possible to identify other alternative modes of punishment, namely:

(a) suspended sentence;
(b) probation order;
(c) community service order;

[97] ibid section 12
[98] ibid section 13

(d) combination order;
(e) conditional and unconditional discharge.

Whereas the suspended sentence punishment is specifically dealt with in the Criminal Code, the other alternative forms of punishment all emerge from the Probation Act.

5.2.1 Suspended Sentence

A suspended sentence is actually a sentence of imprisonment. In fact any person who is awarded this punishment may become a recidivist in terms of law if he commits another offence. An order for the suspension or execution of a sentence of imprisonment is regulated by section 28A(1) of the Criminal Code:

> *"Subject to subsections (2) to (7) of this section and to sections 28B to 28I, a court which passes a sentence of imprisonment for a term of not more than two years for an offence may order that the sentence shall not take effect unless, during a period specified in the order, being not less than one year or more than four years from the date of the order, the offender commits another offence punishable with imprisonment and thereafter a court competent to do so orders under section 28B that the original sentence shall take effect . . . ."*

It is clear from this section that a suspended sentence can only be awarded provided that the term of the sentence of imprisonment actually imposed does not exceed the two-year term. The execution of the sentence awarded can be suspended for a term ranging from one to four years. It is pertinent to underline that the Court has a discretion to decide whether to award this form of punishment. The fact that the offender has been given a maximum two-year imprisonment term does not automatically entail

that the execution of the judgement is to be suspended.[99] Section 28A(1) does not grant such a right. In fact there are circumstances where the court is outrightly precluded from imposing a suspended sentence, namely where:

> (a) the person sentenced is already serving a sentence of imprisonment;
> (b) the person sentenced is a recidivist;
> (c) the offence has been committed during a period of probation or of conditional discharge under the Probation of Offenders Act;[100]
> (d) the term of imprisonment would have been awarded as a result of a failure of the payment of a fine (*multa*) or of costs.[101]

Where a sentence of more than six months imprisonment is suspended, the court may also issue a suspended sentence supervision order, which would have the effect of placing the offender under the supervision of a supervising officer for a period specified in the order. This period is not to exceed the operational period of the suspended sentence.[102]

In case an offender proceeds to commit an offence punishable with imprisonment during the operational period, and the offender is so convicted, the suspended sentence shall take effect.[103] Nonetheless there are circumstances where the court enjoys a discretion not to issue an order for the execution of a suspended sentence. The court may refrain from issuing such an order in case the subsequent offence of which the offender is convicted is of an involuntary nature or if the Court is of the opinion that it is unjust for it to issue such an order. In such a case the original operational period may be left intact or else it may be varied, provided however that its term of duration cannot exceed the four-year limit from the date of the variation.[104]

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[99] Section 28A(2) of the Criminal Code
[100] ibid section 28A(6)
[102] ibid section 28G(1)
[103] ibid section 28B(1)
[104] ibid section 28B(2)

In terms of section 28C an offender may be dealt with in respect of a suspended sentence either by the Court of Criminal Appeal or the Criminal Court or, where the sentence was passed by the Court of Magistrates, by such court. In case the offender would have been convicted by the Court of Magistrates of an offence punishable with imprisonment and the court is satisfied that the offence was committed during the operational period of a suspended sentence passed by the Criminal Court, the court shall commit the offender on custody or on bail before the Criminal Court for the purpose of being dealt with in respect of the suspended sentence.[105] If the suspended sentence would have been passed on an offender on appeal, it is deemed to have been passed by the court from which the appeal was made.[106] If for some reason or another the Court would not be aware of the existence of the fact that a person would have already been awarded a suspended sentence and hence fails to deal with the offender accordingly, either the AG or the Executive Police as the case may require, may issue a summons ordering the offender to appear before the competent court so that the suspended sentence issue be dealt with.[107]

5.2.2 The Alternative Forms of Punishment Stipulated in the Probation Act

Prior to proceeding to examine these alternative forms of punishment, it would be pertinent first to skim through the functions of the Maltese Probation Services Department. The Probation Service plays a pivotal role when it comes to probation, community service and combination orders. The service falls within the ambit of the Maltese governmental department of Correctional Services and is headed by a Director of Probation Services. Among other things, the director is to manage and direct the Department to organise and supervise the probation services, to supervise probation officers and periodically receive verbal or written reports on probationers from the probation officers, and to

[105] ibid section 28C(2)
[106] ibid section 28C(3)
[107] ibid section 28D(1)

decide whether a probationer is to be arraigned in Court following a breach of any condition of a community sanction.[108] The department is also responsible for drafting pre-sentencing and social inquiry reports. A pre-sentencing report would contain extensive information as to the offender's background and present situation, as well as recommendations as to the appropriate punishment to be imposed. A social inquiry report would focus solely on the social background of the offender.

A supervisory board appointed by the Minister responsible for probation services monitors the performance of the probation services department.

(a) The Probation Order

Whereas a suspended sentence is a judgement for all intents and purposes, a probation order is no judgement at all. This order is simply an order requiring the offender to be under the supervision of a probation officer for a period to be specified in the order of not less than one year and not more than three years. Such an order will only be issued by the Court provided that:

> (a) the offender is convicted of an offence, not being an offence punishable only with a fine (*multa* or *ammenda*), and not being an offence which apart from any increase of punishment in view of continuity or of previous convictions, is punishable with imprisonment for a term not exceeding seven years; and
>
> (b) the court is satisfied that the supervision of the offender by a probation officer is desirable in the interest of securing the rehabilitation of the offender and, or protecting the public from harm from the offender or preventing the commission of further offences; and

[108] Section 3 of the Probation Act (Chapter 446 of the Laws of Malta)

(c) having regards to the circumstances of the case, including the nature of the offence and the character of the offender, the issue of such order is appropriate.[109]

In case the punishment for the offence exceeds the seven-year term but not the ten-year term, the court may proceed to issue a probation order provided that there exist circumstances which merit the placing of the offender under such order.[110]

The Probation Act also enables the court to issue a provisional order for the supervision of the accused by a probation officer pending criminal proceedings in case this would be in the best interest of the accused.[111]

(b) The Community Service Order

The community service order may be given to an offender aged sixteen years and over who would have been convicted of an offence for which, in the opinion of the Court, the appropriate punishment would be one of imprisonment. The offence the offender is convicted of, must not be punishable simply by a fine (*multa* or *ammenda*). But it must be punishable by a term of imprisonment, not exceeding seven years.[112] Such an order would require the offender to perform unpaid work for a number of hours as specified. In any such case however, no order shall require the offender to perform less than 40 hours of work or more than 240 hours.[113]

This community service order is not to be issued unless the following conditions are met:

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[109] Section 7(2) of Chapter 446
[110] ibid proviso to section 7(2)
[111] ibid
[112] Chapter 449, section 11(1)
[113] ibid section 11(2)

(i) the court is satisfied, after considering the offender's circumstances and the pre-sentencing report, that the offender is suitable to perform work under such an order;

(ii) that arrangements can be made for such work;

(iii) the offender has agreed to the order; and

(iv) the offender has signed the community service work order agreement form.[114]

(c) The Combination Order

As the name itself reveals, a combination order involves an amalgamation of the probation and community service orders. Section 18 of the Probation Act specifies that a combination order shall require the offender to be placed under probation supervision and to perform at the same time community service work. Such an order shall not however require the offender to perform less than 40 hours of work or more than 100 hours in addition to any number of hours of work still to be performed under any previous community service order.

(d) Conditional and Unconditional Discharge

Conditional / unconditional discharge is regulated in section 22 of the Probation Act. This section specifies that where a court, following a conviction of a person of an offence,[115] is of the opinion that due to the circumstances of the case (including the nature and character of the offender), it would be inexpedient to issue a probation, community or combination orders or to inflict some other form of punishment, it can issue an order discharging the accused. This discharge, which is in itself a finding of guilt, can be unconditional or else it can

[114] ibid section 11(3)
[115] The offence must not be one which is only punishable by a fine (*multa* or *ammenda*). Nor must it be an offence which apart from an increase in punishment in view of continuity or previous convictions, is punishable with a term of imprisonment not exceeding seven years.

be made subject to the condition that the offender is not to commit another offence within a specific period of time. A conditional discharge is quite akin to a suspended sentence. In fact if the offender would commit another offence during the period of conditional discharge, he would expose himself to punishment even for the original offence. However, whereas in the case of a suspended sentence the quantum of punishment for the original offence would be known, this is not the case in a conditional discharge.

5.3 Other Consequences Pursuant to a Finding of Guilt

Apart from the imposition of the various punishments listed, other consequences may ensue following a conviction of an offence. Disqualifications from holding or obtaining a warrant, licence, permit or authority can be imposed in addition to sentencing. For example if a person is convicted of a traffic offence (ex. driving negligently), he can have his driving licence suspended for a specific period of time. A conviction of one of the offences under the Arms Ordinance can lead to the confiscation of the weapon involved.

The Court can even order the forfeiture of the proceeds resulting from the offence or the forfeiture of property the value of which corresponds to the value of the proceeds resulting from the offence.[116] Forfeiture of the *corpus delicti*, (i.e. the instruments used or intended to be used in the commission of an offence) also takes place automatically in the case of a conviction for a crime.[117] As regards convictions for contraventions, forfeiture of the *corpus delicti* will only ensue as long as the law would provide for such forfeiture.[118]

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[116] Section 23B of the Criminal Code. It is pertinent to note that whereas forfeiture of the proceeds is mandatory in the case of money-laundering offences, it is not mandatory in the case of drug offences. In the latter case, the Court will only proceed to order the forfeiture of such proceeds provided that a request to this effect is made by the prosecution.

[117] ibid section 23(1)

[118] ibid section 23(2)

Another important consequence is that laid down in article 58(b) of the Constitution. A person who is sentenced to an imprisonment term exceeding the twelve-month duration (be it effective or suspended) is automatically disqualified from voting at an election.

5.4 Punishments for Specific Classes of People

As regards policemen and armed forces members, the law prescribes different types of punishment. For the purposes of punishments, the Malta Armed Forces Act[119] distinguishes between officers and men in the force. An officer who is declared guilty of an offence by sentence of a court-martial can be awarded any of the following punishments, namely imprisonment for life; imprisonment for a term not exceeding 25 years; cashiering (dismissal from service with dishonour); dismissal from the service; forfeiture in the prescribed manner of seniority of rank; fine; severe reprimand or reprimand; and where the offence has occasioned any expense, loss or damage, stoppages.[120] Men of the force[121] who are found guilty of an offence by sentence of a court-martial can be awarded any one of the following punishments:

(a) imprisonment for life;
(b) imprisonment for a term not exceeding twenty-five years;
(c) dismissal with disgrace from the service;
(d) dismissal from the service;
(e) detention for a term not exceeding two years;
(f) where the offender is on active service on the day of the sentence, field punishment for a period not exceeding 90 days;
(g) in the case of a warrant officer or non-commissioned officer, reduction to the ranks or any less reduction in rank;
(h) in the case of a warrant officer or non-commissioned officer, forfeiture in the prescribed manner of seniority or rank;

[119] Chapter 220 of the Laws of Malta

[120] Section 76(2) of Chapter 220

[121] The term 'man' in relation to the force includes a warrant officer, a non-commissioned officer and a soldier.

(i) where the offence is desertion, forfeiture of service;
(j) where the offender is on active service on the day of the sentence, forfeiture of pay for a period beginning with the day of the sentence and not exceeding 90 days;
(k) fine;
(l) in the case of a warrant officer or non-commissioned office, severe reprimand or reprimand;
(m) where the offence has occasioned any expense, loss or damage, stoppages.[122]

In so far as policemen are concerned, the following punishments may be awarded in proceedings before the Commissioner of Police, namely a fine not exceeding seven days' pay; stoppage of weekly rest days, not exceeding seven days; severe reprimand; reprimand; and caution.[123] The punishments of dismissal, requirement to resign, reduction in rank or seniority and a deferment of an increment or the reduction in the offender's rate of pay can only be awarded following a recommendation to this effect by the Public Service Commission.[124]

Civil servants who are found guilty of a criminal offence by the competent criminal court can, apart from the punishment imposed, be dismissed with immediate effect.[125]

[122] Section 77(2) of Chapter 220
[123] Section 42 of Chapter 164 (The Police Act)
[124] ibid section 43
[125] Refer to section 10.7.3.2 of the Public Service Management Code

6. The Prison System and After-care of Prisoners

The Prison Administration forms an integral part of the department of Correctional Services which falls under the auspices of the Maltese Ministry for Justice and Home Affairs. The department is headed by a Director for Correctional Services, aided by an Assistant Director Administration. The director together with the assistant director are responsible for the administration and operation of the department, the correctional facility development and expansion project as well as the probation services section They are in turn aided by four Assistant Managers who are responsible for particular aspects of prison administration. A security officer is in charge of all the security issues including the transfer of prisoners. Prison Policy is however determined by the Board of Visitors of Prisons set up by virtue of article 8 of the Prisons Act.[126] Regulation 104 of subsidiary legislation 260.03 specifies that the Board is to have the following functions:

> (a) to satisfy itself as to the treatment of prisoners, the state of prison premises and the administration of the prison;
>
> (b) to monitor the administration of the prison disciplinary system and inform the Minister of its findings; this includes the authority to attend disciplinary hearings of prisoners;
>
> (c) to advise the Minister on any matter relating to the care and rehabilitation of prisoners, as well as to the organisation and improvement of the prison and the prison service, which the Minister may refer to it or any ancillary matter on which the Board deems it opportune to tender its advice to the Minister;
>
> (d) to advise the Minister on matters relating to work and activity to be performed by prisoners;

[126] Chapter 260 of the Laws of Malta

(e) to inquire into and report upon any matter which it deems proper, or the Minister requests it, to enquire into.

The main Maltese prison is the **Corradino Correctional Facility** situated in Paola. Prisoners serving prison sentences and persons awaiting trial are detained here. However, subsidiary legislation 260.02 identifies seven places which for all intents and purposes are deemed to be prisons for the purposes of the Prisons Act: the Police Headquarters in Floriana, the lock-up building housed within the Law Courts at Valletta (used for persons awaiting to be arraigned in Court), the lock-up at the Police General Headquarters at Floriana (used for persons undergoing investigations), the lock-up at Paola Police Station, St Michael's Ward at St Luke's Hospital in Guardamangia, the former primary school at Imtahleb (which is used as a Substance Abuse Therapeutic Unit) and Ward 10 at Mount Carmel Hospital (used for mentally ill prisoners).

In terms of regulation 19 (1) of subsidiary legislation 260.03 enacted on the 1st October 1995, every prisoner is to be lodged in an individual cell, unless due to lack of sufficient number of cells or other special circumstances, it would be necessary to place more than one prisoner per cell.

In allocating prisoners to the different sections or divisions of the Corradino Correctional Facility, due account is to be taken of the prisoners' judicial and legal situation and due distinction shall be made, as far as practicable, between the following:

(i) male and female prisoners;
(ii) unconvicted and convicted prisoners;
(iii) prisoners sentenced to detention and other prisoners;
(iv) prisoners under twenty-one years of age and prisoners over that age;
(v) prisoners sentenced to imprisonment for the first time and those sentenced more than once; and
(vi) short-term and long-term prisoners.

Regulation 29 of the Prison Regulations specifies that subject to the needs of security, discipline and good order, prisoners sentenced to imprisonment are required to do useful work for not more than 50 hours a week in accordance with the treatment of objectives of the prison regime and their training programme, regard always being had to their age, sex, fitness and, so far as practicable, their personal skills and wishes in relation to the type of work available at the prison. The regulation also makes it clear that arrangements are to be made to allow prisoners to work, where possible, outside cells and in association with one another. In case a prisoner would not be engaged in outdoor work, he is to be given exercise in the open air for not less than a total hour, each day, weather permitting.[127]

The Regulations also ensure that every prisoner able to profit from educational facilities is encouraged to do so. For this purpose, the pursuit of education by a prisoner is regarded as an activity of the prison regime, attracting the same status within that regime as work, provided that it takes place in the normal working hours and is part of an authorised individual training programme. In order to facilitate the education process, the same regulations provide that an adequately stocked library containing books and periodicals of a suitable instruction range is to be provided.[128] It is also possible for prisoners to attend educational courses offered outside the prison premises, subject however to the conditions which the Minister responsible for Justice may deem necessary. It is also important to note that three months before their effectual release prisoners are granted the possibility of attending educational courses or undergoing training with a view to enable them to engage in employment upon final release.[129]

Prison leave may be granted by the Director of Prisons in certain specific and humanitarian cases, provided that a number of basic conditions are satisfied. First of all the person must have already been sentenced by the competent court. Secondly he must be of regularly good conduct in prison

[127] Subsidiary Legislation 260.03, regulation 28(1)
[128] ibid regulation 47
[129] ibid regulation 61(1)(f) & (g)

and must not be considered as posing a danger to society. Last but not least he must have shown satisfactory progress in the course of his programme of treatment. The various cases when prison leave can be granted are listed in regulation 60 and include special family occasions, serious illness of a near relative, and death of a member of the family. In all situations the regulations prescribe the maximum amount of time a prisoner can stay out of prison. In no case however the prisoner is to stay longer than that which is strictly necessary.

Prison leave may even be granted to a prisoner to be able to carry out community work, or to embark on drug rehabilitation programmes or in the case of young prisoners to attend some other rehabilitation institution. As already pointed out, even educational commitments may justify the granting of prison leave. On particular occasions the Minister may even allow groups of prisoners outside the prison in order to enable them to attend or participate in sports or other cultural activities.

It goes without saying that prison leave is granted subject to a number of specific conditions, namely that the prisoner is to reside at a particular address and return thereto daily at such time as he may be ordered. Moreover, he is to remain in daily contact with or under the direct supervision of a competent officer. Any breach of the conditions imposed would expose the prisoner to disciplinary proceedings. If the prisoner is found guilty of such a breach, the Director can impose one or more of the punishments listed in regulation 78 (1). These include caution, forfeiture of any privileges he might have, forfeiture of remission, forfeiture to wear his own clothing, stoppage of earnings or allowance and cellular confinement.

There are a number of aliens serving convictions in the Maltese prison, the majority of them hailing from Northern African countries. Attempts have been made over the years to conclude agreements with North African states so as to have their respective nationals serving their sentences in their home countries. So far agreements have been entered into with Libya and Egypt.

Absconding from prison is deemed to be an offence against discipline. Just as in the case of a breach of a condition attached to prison leave, the prisoner may be awarded one or more of the punishments listed in regulation 78 (1).

After-care of prisoners tops the prison administration's agenda. In fact, as soon as the prisoner starts serving his sentence, the prison authorities are obliged to give consideration to the prisoner's future and to the assistance to be provided on and after release.[130] In this respect the prison authorities liaise with social welfare officers as well as with members of the NGO *Mid-Dlam ghad-Dawl* (literally translated as 'From Darkness to Light'). The latter is an organisation aimed at supporting prisoners and their families. It also helps prisoners to reintegrate into the societal framework following their release from prison.

An amnesty or pardon can only be granted by the President of the Republic of Malta, following the advice of the Minister for Justice. This power is bestowed upon the President by virtue of article 93 of the Constitution. Besides enabling the President to grant pardons, the article also makes it possible for the President to grant a respite, either for a definite or indefinite period of time (this is akin to prison leave), to substitute a less severe form of punishment for any punishment imposed or to remit the whole or part of any sentence passed on any person.

[130] Regulation 62 of the Prison Regulations

7 Proposals for Reform

In January 2005 the Maltese Ministry of Justice and Home Affairs published a white paper entitled *Towards a Better and More Expeditious Administration of Justice.* This white paper contains a number of proposals both in the civil and the criminal law fields. The proposals are currently being discussed on a national level and will be submitted to Parliament hopefully this year. For the purposes of our discussion of the Maltese Criminal Justice system, I think it would be pertinent to have a glance at the latest series of fine tunings which are being proposed in the criminal law field.

7.1 Tariffs in Connection with Certain Criminal Cases

So far the Maltese penal system has been operating on the premise that expenses for criminal proceedings are to be borne exclusively by the State since these proceedings are primarily undertaken in the public interest. However, as expenses relating to criminal trials have increased drastically over the years, it is being suggested that judicial expenses in a criminal case should be classified as damages caused by the offender and that as a consequence of a declaration of guilt, the offender should be made to fork out part of the expenses incurred in his trial.

7.2 Divulging the Names of Accused Persons

As a general rule criminal proceedings are public in nature. The public at large has a right to be informed who is undergoing criminal proceedings in court. Nonetheless, the Criminal Code envisages certain cases where the publication of the name of the accused is to be prohibited so as to protect the identity of the victim. This prohibition is normally resorted to in cases where minors are involved, either as witnesses or as

victims. This prohibition however is not always respected and it does not appear that such a breach presently attracts some form of sanction.

It is being suggested that the law should list all those cases where the names of the persons undergoing trial should be divulged. Appropriate penalties for breach of an order prohibiting the publication of the names of persons involved in the criminal proceedings, be they accused, victims or witnesses, should also be established.

7.3 Magisterial Inquests and Procès Verbaux

Another amendment in the pipeline concerns the conclusion of *procès verbaux*. It has been noted that a good number of these *procès verbaux* tend to be left pending for a number of years. So far there exists no legal mechanism which would enable any interested party to ask the court to inquire into the delays for concluding an inquest. Attempt will be made to rectify this situation by granting any interested party the right to request the Court by means of an application to have the inquest concluded. In order not to prejudice the investigations themselves, it is being suggested that these proceedings be held in camera and not in open court.

The need has also been felt to clearly delimit the precise role of the Police officers and the inquiring magistrate vis-à-vis inquiries relating to the *in genere*. Our Criminal Code is silent on this point. It is not clear who of the two is ultimately responsible for the investigation of the suspected offences. This could potentially dent the investigate process itself as it could lead to competition instead of corroboration, thus giving an undue advantage to offenders.

7.4 Scrutiny and Control in the Appointment of Jurors

The present system whereby persons are selected to serve as jurors is also in need of some modifications. Currently a number of jurors are selected for a particular month. This could potentially lead the prosecution or the defence to postpone the trial by jury so as to avoid the list of jurors for that particular month. In order to bypass this difficulty, it is being proposed that a list of jurors be drawn up by lot for a group of trials by jury, rather than for a month.

Even the selection process of individual jurors should be revamped. As things stand today, the prosecutors and the defence lawyers have the right to challenge the appointment of three jurors without giving the reason for such a challenge. In case however, the prosecution and defence lawyers would want to challenge more jurors they would have to specify the reason underlying such challenge. Both the prosecution and defence have to find the reasons themselves. This could prove to be a rather arduous task in view of the fact that the only information given as regards the prospective jurors is simply their occupation and home address. It is therefore being suggested that the parties should be provided with more information as regards prospective jurors or at least be granted the opportunity to ask pertinent questions to jurors. In addition a longer time period should be devoted to the jury selection process.

Serving as a juror requires at least a certain basic and minimal understanding of the legal system. Unfortunately, however, the majority of the persons chosen would have no idea as to the role they would be called to fulfil in the course of criminal proceedings. The legislator is therefore pondering on the idea of obliging prospective jurors to undergo *ad hoc* courses. These courses would help them familiarize themselves with the workings of the whole system and would provide them with the legal background necessary to enable them to carry out their duties in the most meticulous manner. It is also being proposed that civic studies in secondary and post-secondary schools include specific modules of study which would help students become acquainted with the workings of a jury.

7.5 Corroboration of Evidence

The Maltese Criminal Code specifies that evidence tendered by an accomplice is deemed to be inadmissible unless corroborated by other evidence. The underlying rationale for this rule can be traced to the principle that an accused should not be found guilty only on the basis of evidence given by a person who would have been involved directly in the preparation or execution of the offence itself. This rule has led to situations where no probatory value could be attached to evidence given by accomplice, in spite of its detail and accuracy. The Maltese legislator is considering revising this rule so as not to have the evidence of an accomplice *a priori* excluded. It is also being specified that in the case of a trial by jury, the judge should be legally obliged to warn jurors that although they may declare a person guilty on the basis of evidence of an accomplice, it is dangerous to rely on uncorroborated evidence.

7.6 Compensation to Victims of Offences

In line with EU policy, the Maltese legislator is also working on the introduction of a victim compensation scheme, which would indemnify victims of crimes for injuries and losses sustained. Three main proposals are being put forward in this respect:

(a) that the State should grant compensation in those cases where the person found guilty cannot pay, and in that case the State would be subrogated into the rights of the victim;

(b) that the quantum of compensation to be granted is to be determined by the courts of criminal jurisdiction in line with a schedule issued by the Minister responsible for Justice;

(c) that the compensation be considered as part of the civil damages and not as a separate and distinct item.

7.7 Evidence Given by Children in Criminal Cases

There may be situations where children would be required to give evidence in court, particularly in those cases where the children themselves would be the victims of the offence. Sometimes, in the course of the same proceedings children could be required to give evidence more than once and this has proved to be quite traumatic for them. Therefore Maltese authorities are suggesting that in cases involving minors as witnesses, the minors should be admitted to give evidence only once in the course of the criminal inquiry, the examination and cross-examination taking place on the same day. The evidence would be recorded on tape and then be viewed at a later stage, if need be, without having to call the minor to testify once again.

7.8 Harsher Penalties For Prostitution Crimes (Chapter 63 and Article 205 of Chapter 9 of the Laws of Malta)

Traffic of persons for prostitution purposes is emerging as a high-profile criminal activity and the Maltese legislator has also deemed it necessary to specifically address these emerging trends. The following amendments to the above-captioned laws are being proposed:

(a) Articles 2 and 3 of Chapter 63 (The White Slave Traffic Suppression Ordinance) should classify as a crime the conduct of a person who aids or abets in bringing over to Malta persons for the purpose of prostitution and who takes part in the "transfer" of these people from one person to another. The penalties prescribed in these two articles should also be augmented.

(b) A new presumption should be added to alter the concept of "loitering". It is being suggested that whoever is found to be present in streets or other places where it is well known that activities connected with prostitution take place and is dressed in a provocatively indecent manner, shall be deemed to be guilty of the offence of loitering without the need of adducing any further proof. The White Paper also makes it

clear that the maximum term of imprisonment for the offence of loitering should be increased to six months.

(c) Another proposal concerns the aggravation of punishment in case the person arraigned for an offence under section 209 of the Criminal Code or Chapter 63, would have already been convicted of the same offence on a previous occasion.

(d) As regards persons who allow prostitution to take place in houses, shops, other localities and hotels, the Maltese Legislator is specifying that the current fines should be further augmented and that confiscation of the property where the offence/s would have taken place be also possible. Besides where suspension of the licence is possible, a three-month suspension term should at least be imposed.

7.9 A Quicker System for the Conclusion of the Compilation of Evidence Stage

Under Maltese law of Criminal Procedure, the compilation of evidence is to be concluded within a month's time. The President of the Republic may extend this one-month time limit for further periods of one month each, provided that the aggregate term does not exceed the three-month limit. Once that the inquiry is concluded and the records of the case are sent to the AG for examination, the AG has the option of resubmitting the records of the case to the Court of Magistrates as a Court of Criminal Inquiry to re-examine certain witnesses or else to have new witnesses summoned to give evidence. If the AG opts to avail himself of this option, months may elapse between the resubmission and the court hearing, thus delaying the conclusion of the whole process. It is therefore being proposed that in such a case Maltese law should specify that no more than six weeks are to elapse between the date of resubmission of the records to the Court of Magistrates and the date of the new hearing.

7.10 Powers of the Commissioner of Police

Another proposal concerns the powers of the Police Commissioner vis-à-vis the suspension of licences. A 1985 Constitutional judgement had interpreted the power of the Commissioner of Police to suspend a licence in such a manner so as to render it practically useless. It is being suggested that the general power of the Police Commissioner to suspend licences be framed in the same terms as that existent under Chapter 63, i.e. the Commissioner should be granted the power to close or suspend with immediate effect licences of premises which would in some way or another be suspected of being connected with the organisation and preparation of criminal activities. This power is however to be made subject to review by the court. The Court should be given the possibility of confirming or cancelling the order issued by the Commissioner.

7.11 Abolition of the Punishment of Imprisonment in Article 11 of Chapter 248

Article 11 of Chapter 248, the Press Act, lays down the offence of defamatory libel. Paragraph (a) to this section specifies that if the libel contains specific imputations against such person tending to injure his character and reputation, or to expose him to public ridicule or contempt, the offender can be sentenced to imprisonment for a term not exceeding three months. The White Paper is suggesting having the punishment of imprisonment vis-à-vis this offence abolished. The prevailing unstable political climate at the time when the Chapter came into force had justified the imposition of this form of punishment. However, nowadays circumstances have changed and the pecuniary punishment coupled with the victim's right to claim civil damages from the offender should provide an adequate deterrent.

7.12 Decentralisation and Depenalisation

Over the past years traffic contraventions have been depenalised and these contraventions are nowadays being heard by Local Tribunals attached to Local Councils rather than by the Court of Magistrates. Besides, the fines inflicted are now being considered as a civil debt. As the system appears to have worked well, the Maltese legislator is pondering on the idea of having public health contraventions and other contraventions depenalised and transferred to Local Tribunals. This will definitely result in a reduction in the Court's work-load, in such a way that the Courts will be able to focus on the more serious cases.

8 Bibliography

Unfortunately, Maltese criminal law textbooks are non-existent. The only academic material available in so far as Maltese criminal law is concerned is that found in the theses, which have to be presented in partial fulfilment of the Doctor of Laws degrees. From an academic point of view, these theses are quite interesting for the simple reason that in the majority of cases they would not only contain a detailed elaboration of the particular concept under Maltese law but they would also include a comparative analysis. An updated list of all the criminal law theses carried out by Maltese law students is given hereunder. These theses can be viewed either at the Law Library or at the Main Library of the University of Malta or else at the Law Courts Library housed within the Law Courts Buildings in Valletta.

LL.D THESES (UNIVERSITY OF MALTA)

1 Diminished responsibility.*Jonathan Phyall* 2005

2 The right to a fair trial and the presumptions of innocence in the light of decisions of the Maltese Courts *Rita Mifsud* 2005

3 The processing of personal data collected by the executive police during the course of criminal investigation *Dominic Micallef* 2005

4 State responsibility in the light of recent occurencies in the international community *Emma-Louise Psaila* 2005

5 Child abuse with particular reference to procedure in a criminal court *Margaret Mifsud* 2004

6 Human rights, criminal justice and crime prevention
Claude-Anne Zammit 2004

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14 Civil and criminal liability arising out of the transmission of sexually transmitted *Pamela Vassallo* 2004

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18 The notion of infanticide and its development under Maltese criminal law, 1784-2004 *Naomi Mugliette* 2004

19 Contraventions (an analytical and comparative study)
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36 Insanity: a case of punishing the mentally ill? *Charmaine Zammit* 2001

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