

Council Of Europe – Venice Commission.

Questionnaire For The UniDem Seminar Of Brno On
The “**Right of a Fair Trial**” (23 – 25th September, 1999).

Malta

I. Definition and Legal Force of the Right To a Fair Trial.

1. *Is the right to a fair trial enshrined in a legal instrument ? The Constitution ? A law ? A regulation ? If so, since when ? On what occasion was it introduced ?*

The right to a fair trial is enshrined in the Constitution of Malta which was enacted by the Malta Independence Order, 1964. This instrument actually incorporated the Independence Constitution which contains a bill of rights enforceable by local courts.

Even before the enactment of the Constitution, fundamental rights were guaranteed to an individual charged with a criminal offence. The Criminal Code was promulgated in 1854, and is remarkable for the liberal protection afforded to the person charged or accused. In this respect reference is made to the following provisions of the Criminal Code by way of example:

- (i) **Article 454(4)**: Where the accused does not simply plead that he is guilty to the charges, another answer, or his silence, shall be deemed as a plea of not guilty. This provision is in line with the rule that the prosecution has to prove the facts alleged against the accused, and the

latter on his part need not even utter a word in his own defence as he does not have to prove anything;

- (ii) **Article 489:** During a trial, previous convictions of the accused are not to be disclosed to the jury;
- (iii) **Article 518:** The acts and documents of the courts of criminal justice shall be accessible to the accused;
- (iv) **Article 519:** It is the duty of the courts of criminal justice to see to the adequate defence of the parties charged or accused;
- (v) **Article 527:** A person cannot be tried more than once for the same fact;
- (vi) **Article 531:** Sittings are to be held in open court except if conducted in public, they might be offensive to modesty, or might cause scandal;
- (vii) **Article 570:** An accused who does not have the financial means to defend himself may request that he be assisted by the Advocate for Legal Aid, who shall gratuitously undertake the defence of the accused.
- (viii) **Article 634:** The accused may give evidence at his own request. The failure of the accused not to tender evidence shall not be made the subject of adverse comment by the prosecution.
- (ix) **Article 639:** Evidence tendered by an accomplice against the accused shall not suffice on its own, unless the

evidence of the accomplice is corroborated by other circumstances;

- (x) **Article 646:** Witnesses are to be examined in court and *viva voce*.

On the 19th August 1987, the European Convention on Human Rights became part of Maltese law when the **European Convention Act** came into force. This legislation was, “*An Act to make provision for the substantive articles of the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, to become and be enforceable as, part of the law of Malta*”.

It is pertinent to note that the Constitution does not define what constitutes a fair trial. However, there are a number of requirements which are to be observed:

- (i) *Nemo iudex in causa propria* and *audi alteram partem*;
- (ii) Equality of Arms;
- (iii) A judgment has to be reasoned and must contain motivations;
- (iv) The right of the parties to the proceedings to be present.

2. – If this right is not mentioned in the Constitution, is it nevertheless upheld by the courts ?

The Constitutional Court ? Civil Courts ? Criminal Courts ? Administrative Courts ?

Since when ?

Is there any opposition to this right ?

On what ground(s) have the courts upheld this right ?

Not applicable as the right to a fair trial is enshrined in the Constitution.

3. – *What is the legal force of the right to a fair trial ?*

Is the principle of the right to a fair trial a fundamental principle ? Does it have force equal, superior or inferior to that of statutory legislation ? Is it an ideal which needs defending ?

The principle is so fundamental that it is enshrined in Article 39 of the Maltese Constitution. The Constitution is the supreme law of the law and, “*if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void*” (Article 6). Thus, the provision has force which is superior to that of statutory legislation. Furthermore, an amendment to this provision may only be introduced by the House of Representatives where at the final voting on a bill for an Act of Parliament is supported by the votes of not less than two-thirds of all the members of the House.

So fundamental is the right to a fair trial, that in a judgement delivered by the Constitutional Court in the case **Lawrence Cuschieri v. Hon. Prime Minister et al** (6th April, 1995), the Court envisaged the possibility that the Constitutional Court commits a breach of an individual’s right to a fair hearing. The Court declared that Article 6(1) of the European Convention not only contains procedural guarantees in relation to judicial procedure, but also grants a right to judicial procedure. This Article creates a substantive right for a fair trial, which must necessarily be protected in all proceedings in any court, which is determining an individual’s civil rights and obligations. This judgement did away with the notion that the Constitutional Court did not determine an individual’s civil rights and obligations, and that it is only concerned with constitutional rights, in that it decides on issues as to the compatibility with the Constitution of any acts or measures by public authorities in the exercise of public power.

4. – *Is the right to a fair trial an autonomous right or does it depend on other rights, such as the right to access to the courts, the right to independence and impartiality of the courts, the right to object to a particular judge, etc ?*

*Are these rights inferred from the right to a fair trial and, if so, by whom ?
Or do they exist as such in a legal instrument and, if so what kind of legal
instrument ?*

The right to a fair trial is an autonomous right. However, it absorbs other elements explicitly mentioned such as:

- (i) Independent and impartial court - **Article 39 of the Constitution.**
- (ii) Reasonable Time – **Article 39 of the Constitution.**
- (iii) Proceedings of every court and proceedings which relate to the determination of the existence or the extent of a person’s civil rights or obligations are to be held in public – **Article 39 of the Constitution.**
- (iv) Being informed in writing, in a language which one understands and in detail, of the nature of the offence charged; granting of adequate time and facilities for the preparation of one’s defence; facility to examine in person or by one’s legal representative witnesses called by the prosecution before any court – **Article 39 of the Constitution.**
- (v) Objecting to a particular judge – **Articles 733 – 740 of the Code of Organization and Civil Procedure** (Chapter 12 of the Laws of Malta).

II- The Right to a Fair Trial In Practice.

1. Is the right to a fair trial frequently claimed before the constitutional, administrative, criminal or civil courts ?

Is it a ground involving public policy, which the court may raise of its own motion during proceedings ?

There have been various judgments which dealt with the principle of the right to a fair trial. In this respect reference is made to a number of principles established by the local courts:

- (i) The House of Representatives is not an independent and impartial court or tribunal to try individuals for contempt in its respect;
- (ii) Members of the police force are not to be appointed as court experts to give opinions to the court as they form part of the Prosecution.
- (iii) In extradition proceedings the principle of the right to a fair trial is applicable;
- (iv) A procedural irregularity by the Criminal Court of Appeal which delivered judgment when the case was postponed for the parties to make their final submissions.
- (v) A provision of law barring lawyers, who were also Members of Parliament, from assisting an accused in certain cases was held to be unconstitutional. The Court held that this provision constituted a breach of the accused's right to a fair hearing since it prohibited him from being represented by the lawyer of his choice.

The right to a fair trial is a ground of public policy and may be raised by the court of its own motion. Thus, there were instances where the Court of Appeal annulled judgments due

2. – *What is the scope of the right to a fair trial ?*

Does it apply to all cases or only to certain cases and, if the latter, which ones ?

Article 39 of the Constitution guarantees a fair trial with respect to proceedings concerning the determination of the existence or the extent of civil rights or obligations which are instituted before “*a court or other adjudicating authority*”. An important feature of an adjudicating authority is that it must be competent to take legally binding decisions; the capacity to make recommendations or give advice is not enough. Although such authority has other functions (example – administrative) does not prevent it being an adjudicating authority when exercising a judicial function.

Thus, for example in the case **Antonia Bartolo proprio et nomine v. The Hon. Prime Minister et al** (29th April, 1996), a board of inquiry was set – up by the Minister of Transport following the disappearance of an a Maltese registered aeroplane en route to Malta. Applicants alleged that the tribunal was not impartial and independent, and alleged a breach of their fundamental human rights as protected by Article 6(1) of the European Convention and Article 39(2) of the Constitution. The Board of Inquiry was set in terms of the **Civil Aviation (Investigation of Accidents) Regulation** 1956. The Constitutional Court argued that the functions of the Board of Inquiry were merely investigative. The final report could not affect any of the interested parties, and the Minister could very well ignore the conclusions reached therein. However, the report could be relevant where the Minister decides to take certain measures on the conclusions reached, either personally or on an administrative level through one of the organs of the State. However, in such an eventuality, the interested party would still be entitled at law to request the judicial review of such administrative action. This in itself was considered as a safeguard for ensuring a fair hearing in front of an impartial and independent tribunal. The same would apply if following the report criminal proceedings are instituted against any party. The report can in no way prejudice the accused who enjoys all the necessary safeguards entrenched in the Constitution, the Convention and the Criminal Code. The Court held that the tribunal did not have the attributes of delivering a binding decision which could be altered by a non – judicial authority

3. – *Does the right to a fair trial apply to all stages of the case (committal proceedings, trial) ?*

The law does not distinguish between the committal stage and the trial. Thus, the principle of the right to a fair trial applies to all stages of the proceedings.

4. *Does the right to a fair trial apply only to courts or does it also apply to any other authority which, although it is not an official court, carries out judicial function ?*

The principle is not only applicable to courts. It is a fact that many decisions that are determinative of an individual's civil rights and obligations are taken by the executive or some other body. In such instances the principle of the right to a fair trial is applicable.

Practical Example.

(i) **Composition of the Court:** The Maltese Constitution stipulates that a person shall not be eligible to be appointed as a judge if he has not practised as an advocate in Malta for a period of twelve years (Article 96(2)). Thus, if the judgment was delivered by judges who were not “*professional judges*”, the judgment would certainly be null and void. The possibility of having a foreign judge is, excluded by law. Article 81 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) stipulates that no person is entitled to obtain the warrant to exercise the profession of advocate unless he is a citizen of Malta. Since judges are appointed from practising advocates in Malta, a foreigner is not eligible for appointment to this office.

(ii) **Language:** Maltese is the official language used in judicial proceedings. However Article 39(6) of the Constitution guarantees that every person charged with a criminal offence is to be “*permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge*”.

Similarly, Article 516 of the Criminal Code (Chapter 9 of the Laws of Malta) provides: “*Where any person charged does not understand the language in which the proceedings are conducted or any evidence is adduced, such proceedings or evidence shall be interpreted to him either by the court or by a sworn interpreter*”.

Where the applicant proves that the court did not permit him to give evidence in his mother language, although not being fully conversant with the Maltese language, that could very well be a feature of the trial which would lead the Constitutional Court to conclude that there had not been a fair hearing. Such an order would not necessarily mean that the court was not independent and impartial. Furthermore, emphasis would also be placed on whether or not during the trial the applicant had expressly requested to submit his evidence in his mother language.

However, where the accused understands and speaks the language used in court, he cannot insist upon the services of an interpreter to allow him to conduct his defence in another language, for example the language of an ethnic minority of which he is a member.

(iii) **Independence of Judges:** Under Maltese law judges are appointed by the President acting in accordance with the advice of the Prime Minister (Article 96). However, this does not mean that a judge’s independence is tainted and appointment by the executive is permissible, indeed normal. Once a judge is appointed he enjoys security of tenure till the age of sixty-five, and may only be removed by the President upon an address of the House of Representatives supported by the votes of not less than two-thirds of all the members. Removal from office is restricted on the ground of proved inability to perform the functions of his office (infirmity of body or mind or any other cause) or proved misbehaviour.

This provision serves as a guarantee against outside pressures. The law ensures that the court can base its decision on its own free opinion about facts and legal grounds, without any commitment to the parties or the public authorities. Furthermore, its decision is subject to review by an authority which is independent in the same sense.

(iv) **Racist remarks**: The passing of racist remarks by a judge in private, if proved, may serve as a basis for declaring the judgment null and void due to lack of impartiality. The presumption is in favour of impartiality, and the aggrieved party is to prove actual bias on the part of the judge. It will be possible to conclude that a judge is biased when this becomes quite clear from his attitude during the course of the proceedings or from the content of the judgment. It would also be necessary to prove that the judge passed such remarks. Furthermore, it is an established principle that justice must not only be done but it must also be seen to be done. Surely, the confidence which courts should inspire in the public and the accused, will be seriously tainted under such circumstances. Although the view of the accused party is relevant as to whether the court was impartial, such is not a decisive factor. It would appear that the complaint would not be upheld where there is no correlation between the extradition proceedings and the racist remarks which the judge made in private.

Furthermore, if the applicant was aware of these remarks prior to the judgment, it was open to him to challenge such remarks. The fact that applicant did nothing, and disregarded the problem at that stage, substantially weakens his submissions.

(v) **Legal Representation**: In terms of Maltese law the fact that a lawyer is the husband/wife of a presiding judge, is a valid reason for a judge to abstain or be challenged from sitting in a cause. In this regard Article 734 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) stipulates that a judge may be challenged or abstain, “*if the advocate or legal procurator pleading before a judge is the son or daughter, spouse or ascendant of the said judge*”.

The same principles applicable under paragraph (iv) would apply in this case.

Chief Justice Joseph Said Pullicino B.A. LL.D.

Brno, Czech Republic.

September, 1999.