



Feedback to DG Justice on the Malta Country Chapter – Rule of Law Report

25 April 2021

aditus foundation is pleased to present summarised feedback to DG Justice in view of the upcoming Rule of Law Report, specifically in relation to the Malta Country Chapter and on the points discussed in our virtual meeting of 19 April 2021.

We have drafted our feedback based on the questions sent to us prior to the meeting as this will facilitate the review of the document by the respective divisions drafting the Malta Chapter.

Should you require further details or information please do not hesitate to contact Carla Camilleri on carlacamilleri@aditus.org.mt.

1. Could you briefly provide feedback on the 2020 rule of law report, in particular on the Malta Country Chapter?

- 1.1. We find that the Malta Chapter failed to mention the fact that the Government adopted the first 6 reform bills without consultation, with publication only after being laid in Parliament and without waiting for the opinion of the Venice Commission. This process was severely criticised by the Venice Commission and is related to our second point.
- 1.2. Whilst it is true that there is increased engagement of civil society organisations on a variety of issues, this is happening in spite of Government actions and not due to them. Civil society is facing an increasingly hostile atmosphere typified by a general lack of consultation and dialogue with Government actors, the promulgation of draconian anti-money laundering legislation, and a backlash from authorities and the public due to the work some NGOs carry out.
- 1.3. The report states that there was a problem with securing convictions of corruption. However, the issue is far broader than this, and we see problematic the lack of investigations, prosecutions and also convictions. Notably, there is the added concern relating to the lack of concrete action by Government to address allegations of corruption from within its own highest ranks¹. In

¹ Some examples include:

Electrogas and Panama Paper scandal:

<https://www.documentcloud.org/documents/20573713-timeline-of-corruption>;

Ex-Parliamentary Secretary Rosianne Cutajar has a pending ethics investigation due to links with Yorgen Fenech. This was followed by a call from Mr. Omtzigt, rapporteur for the CoE's PACE inquiry on rule of law in Malta, for an inquiry into MP Cutajar over statements made in defence of Mr. Fenech made to PACE. She remains a Government MP:

summary, there is no real fight against corruption and the few actions taken spurred on by external investigations of journalists or foreign jurisdictions.

2. What are the main challenges regarding the enabling framework for civil society organisations in Malta?

2.1 The Government last year approved a number of changes in relation to NGOs and the laws regulating donations and charity shops.

In particular:

- Voluntary Organisations (Public Collections) Regulations, S.L. 492.03:
<https://legislation.mt/eli/sl/492.3/eng>
- Voluntary Organisations (Charity Shops) Regulations, S.L. 492.04:
<https://legislation.mt/eli/sl/492.4/eng>

2.2 According to Government, these rules were put into place in order to promote transparency, good governance and accountability amongst NGOs, and in particular as anti-money laundering and anti-terrorist financing measures. However, these draconian measures place a disproportionate burden on NGOs and have the consequence of State authorities having control over the operations and independence of NGOs, both of which will hinder the voluntary operations of such organisations. These concerns were voiced by the Malta Council for the Voluntary Sector² and NGOs independently³.

2.3 The implementation of these rules creates unnecessary Government control over the operations of NGOs. Under the new legislation NGOs are (i) required the permission of the authorities every time they intend to seek funding; (ii) required to use sealed containers and tags for collection given to them by the Commissioner for Voluntary Organisations; (iii) required to count the money collected in the presence of a CVO representative and a warranted professional. Furthermore, certain thresholds for donations in the law make the operation of NGOs impossible. Under S.L. 492.03, all crowd funding donations exceeding €20 each day made by the same donor are not permissible.

2.4 Additionally, it should be noted that under Article 41 of the [Voluntary Organisations Act](#), the Minister responsible for voluntary organisations has wide powers to make regulations to further regulate NGOs. The Minister may thus ‘secretly’ issue regulations such as S.L. 492.03 and S.L. 492.04 without the need for Parliamentary scrutiny or approval. We consider that the promulgation of such detailed and onerous regulations such be carried out by an Act of Parliament which would allow for the scrutiny of the House, the affected sector and the public.

2.5 We are also concerned that, despite legislation and attentive regulation requiring organisations seeking ‘Voluntary Organisation’ (NGO) status to show to be not-for-profit, Malta’s fiscal

<https://www.maltatoday.com.mt/news/national/109154/peter-omtzig-rosianne-cutajar-conflict-yorgen-fenech#.YIPuq5AZZPY>;

Minister Ian Borg:

<https://timesofmalta.com/articles/view/ian-borgs-testimony-found-to-be-lacking-credibility-by-court.835835>;

Reinstated Minister Justyne Caruana:

<https://theshiftnews.com/2021/03/27/second-request-for-investigation-reaches-standards-commissioner-as-justyne-caruana-silent-on-e5000-a-month-contract-to-partner/>. She had resigned from her previous role as Minister for Gozo following revelations that her husband, ex-Police Commissioner Valletta, had links to Yorgen Fenech:

<https://timesofmalta.com/articles/view/ex-deputy-police-chief-silvio-valletta-faces-daphne-inquiry.829000>.

² <https://maltacvs.org/wp-content/uploads/2021/04/MCVS-Report-on-Public-Collections-and-Charity-Shops-Regulations-Final-Draft-with-recommendations-2.pdf>.

³ <https://timesofmalta.com/articles/view/withdraw-controversial-fundraising-rules-or-well-go-to-council-of.866571>;

<https://newsbook.com.mt/en/withdraw-legal-notice-immediately-79-ngos-tell-government/>;

<https://repubblika.org/wp-content/uploads/2021/04/EN-MCVS-memo-new-regulations.pdf>.

legislation gives authority to the Minister for Finance to grant tax exemptions to particular NGOs, without there being clear guidelines as to which NGOs or which activities are eligible for such an exemption. There are no publicly available guidelines on the rules regulating the granting of the exemptions. The list of NGOs that were granted tax exemptions is not publicly available.

2.6 Finally, we see an increased use of publicly funded social media for political advertising⁴ and a substantial increase in trolling activities against political opponents, activists and NGOs that show disagreement with government policy.

3. What are your views on the functioning of the Office of the Commissioner for Voluntary Organisations (CVO)? What are your views on its independence, including as regards its appointment, its investigative powers and the safeguards concerning the measures adopted by the Commissioner?

3.1 The CVO is appointed by the Minister responsible for voluntary organisations⁵ after consultation with the Social Affairs Committee of the House of Representatives⁶. The method of removal from offices is similar, in that on proven inability to perform the duties of CVO or misbehaviour such person may be removed by the Minister after consultation with the Committee. This obviously calls into question the independence of the CVO and its office due to the strong political interference in the appointment and removal system. In this process, there is no active role stipulated for NGOs.

Furthermore, the law does not require the person to be appointed to have any qualifications or relevant experience in the sector. The lack of academic and/or professional experience as requirements laid down in legislation is a recurrent problem in the Maltese administrative framework.

3.2 The CVO has broad monitoring and investigative powers.⁷ There is no question that NGOs should abide by clear standards relating to operations, accountability and professionalism, however we reiterate that this needs to be carried out by an independent body that is run by a qualified Commissioner and staff. We have recently seen that the CVO has been accused by the NGO Repubblika of being “*highly involved in political matters and is instigating a political propaganda and publicity*”⁸, and of being in breach of the laws regulating voluntary organisations. Interestingly we have not seen similar treatment from the CVO of NGOs headed by persons known to be close associates of, and family members, of politically exposed persons⁹.

⁴ <https://standardscommissioner.com/commissioner-for-standards-finds-that-minister-carmelo-abela-misused-public-funds/>; <https://standardscommissioner.com/using-public-resources-to-maintain-a-ministers-personal-facebook-page-is-an-abuse/>; <https://standardscommissioner.com/ministers-to-stop-using-public-resources-to-produce-content-for-their-personal-social-media-accounts/>.

⁵ See Articles 5 and 6 of the Voluntary Organisations Act on appointment and removal of Commissioner.

⁶ The Standing Committees are composed of a selection of members of the House of Representatives in proportion to the Government and Opposition members. This means that the Government has a majority of seats in all Standing Committees: <https://legislation.mt/eli/sl/const.2/eng/pdf>.

⁷ Article 7 of the Voluntary Organisations Act.

⁸ View correspondence:

<https://repubblika.org/press-release/government-wants-ban-repubblika/>; <https://repubblika.org/press-release/repubblikas-letter-to-the-cvo/>.

⁹ Notably, Marigold Foundation (VO/0942) co-founded by Michelle Muscat, the wife of disgraced former Prime Minister Joseph Muscat, in 2014. Its 2018 audited accounts show net assets close to €1 million, and it was revealed that the Marigold Foundation received donations by golden passport applicants in order to provide genuine links to Malta to bolster their application, following advice by official entities involved in the passport scheme:

https://www.facebook.com/marigoldmalta/?ref=page_internal;
<https://timesofmalta.com/articles/view/michelle-muscats-charity-got-passports-donations-push.867163>;
<https://theshiftnews.com/2020/10/06/bov-says-marigold-foundation-was-always-michelles-they-just-got-it-wrong/>;
<https://www.maltatoday.com.mt/news/national/105091/all-that-glitters-at-marigold#.YIPf4pAzZPY>;

4. Could you please elaborate on the main challenges as regards the effectiveness of the justice system in Malta? What are your views on the implementation of the reforms adopted in 2020 as regards the judiciary and the Office of the Attorney General? What are your views on challenges regarding access to justice in Malta, also concerning the costs of litigation, legal aid, length of proceedings and digitalisation? What are your views on the functioning and independence of specialised tribunals?

- 4.1 The procedure of the reforms carried out by Government in June and July 2020 presented serious concerns relating to the lack of transparency and consultation with stakeholders and the public. Although the Venice Commission insisted, in its [2018 Opinion](#) and in its [June 2020 Opinion](#), that constitutional changes of this importance should be a result of wide consultation, this did not result in the 2020 process.

Primarily, Government pushed through 6 important pieces of legislation before a requested opinion from the Venice Commission could be finalised and before such Commission could engage with local stakeholders. Secondly, the Bills were presented to Parliament on 1 July 2020, however such Bills were not yet in the public domain. The Bills were published on 17 July 2020 and approved on 29 July 2020, almost a national record. This effectively extinguished any opportunity for discussion and consultation with civil society and with citizens as a whole. We also feel that the Opposition's approval of this process further underlines that lack of democratic spirit in Malta, where both sides of Parliament seem to be only interested in self-satisfying measures.

As the Venice Commission stated in its [October 2020 Opinion](#): *“the rushed process through Parliament comes not only as a surprise but also a disappointment, despite the Government's assertions that the dialogue in Parliament was structured and broadcast in television. Confining the discourse to political parties in parliament without meaningful public consultation is akin to denying citizens their democratic entitlement to have a say in the shaping of the constitutional order.”*

- 4.2 As also pointed out by the Venice Commission, we find it preferable that names of the proposed members of the judiciary would be made public on transfer to the President by the JAC, and not merely after appointment. Although we are not entirely comfortable with the President having a deciding role in the process of appointment, this could be balanced refining the composition of the JAC. The new appointment procedure is already subject of local litigation where it is being claimed that the JAC was not constituted according to the new provisions in the Constitution¹⁰. It is being claimed that a magistrate who sits on the JAC applied for a judgeship and abstained from all appointment hearings. Allegedly, this magistrate was not replaced, and therefore the composition of the JAC breached Article 96A of the [Constitution](#).

Furthermore, we feel it is important for the law to list stringent requirements for persons to be appointed as members of the judiciary, instead of criteria which are vague and focus on the number of practising years. In most Common Law systems, constitutions lay down explicit personal and professional qualifications required from anyone aspiring to become a judge¹¹. Adding these criteria would not only ensure strong profiles but also increase the procedure's transparency levels.

<https://theshiftnews.com/2020/09/27/michelle-muscat-grabbed-control-of-the-marigold-foundation-for-just-e100/>.

¹⁰ <https://timesofmalta.com/articles/view/lawyer-challenges-nomination-of-four-new-judges.866043>.

¹¹ *Feedback on Malta's Proposed Legislative Changes further to the Venice Commission Report on Malta*, May 2020. This note was submitted prior to seeing the text of the Bills that were eventually adopted: https://aditus.org.mt/Publications/feedbacktovenicecommission_21052020.pdf.

The calls for application do not specify the Court in which the appointed magistrate or judge will sit and, therefore, there cannot be a concrete skills-set matching to a particular vacancy within a particular Court. It should also be noted that, in order to retain one's warrant as advocate there is no requirement for any continuous professional development training. Furthermore, there is no mandatory training for magistrates or judges in order to progress in rank.

This may account for the low number of requests for preliminary rulings from the Maltese Courts to the European Courts, with a total of 3 requests in 17 years of EU membership.

It may also account for former Human Rights Court Judge Giovanni Bonello stating that “*of the judgments examined on the merits by the Court's Chamber or Grand Chambers, Malta is the country with the highest percentage overturned and rubbished by the Strasbourg Court...85% of the judgments of our Constitutional Court had been found to be human rights garbage by the Strasbourg Chambers...The Constitutional Courts of Malta only get right 15 out of a hundred cases examined*”¹².

4.3 Access to Justice issues:

- a. The **length of proceedings** remains a problem in both civil and criminal cases. The length of proceedings is amongst the longest in the EU. These raise serious issues both for the rights of the general public in securing their rights, but also more worryingly for defendants and victims of crime¹³. Malta also has the lowest number of judges per capita. This has been recognised by the Association of Judges and Magistrates, calling on Government to appoint more magistrates¹⁴.
- b. We are not aware of any improvements in the use of **IT tools** in Courts. E-filings are not available, except for filings in the Small Claims Tribunal. The public can access the acts of cases in relation to civil proceedings, but not criminal. Although we understand issues of data protection for criminal cases, we are not aware of any possibility of legal professionals being able to view the acts of criminal cases online.

Furthermore, through recent criminal cases the courts were shown to be completely lacking in any audio-visual technology. During the first Covid-19 lockdown, the Courts were closed and sittings deferred, and although more recently lawyers requested sittings to be carried out online these requests were in the most part rejected by the judiciary. Although the Chamber of Advocates proposed a number of solutions, one year of Covid-19 and the situation remains dire¹⁵.

- c. In 2014 Malta allocated a mere €0.16 per inhabitant in its national budget to **legal aid**¹⁶ (2016 EU Justice Scoreboard). In 2018, the annual budget implement for legal aid was reported to be €304,137, whilst in comparison that of public prosecution €2,656,005¹⁷.

¹² Judge G. Bonello, *Misunderstanding the Constitution: How the Maltese judiciary undermines human rights*, BDL Books, 2018.

¹³ Magistrate Monica Vella has all cases reassigned. It is not known whether she has been assigned to another court: <https://timesofmalta.com/articles/view/magistrate-monica-vella-has-all-cases-re-assigned.856747>.

¹⁴ <https://timesofmalta.com/articles/view/government-urged-to-issue-a-call-for-more-magistrates.866604>.

¹⁵ <https://www.avukati.org/wp-content/uploads/2020/05/Report-on-Remote-Work-for-the-Courts-002-1.pdf>;

<https://theshiftnews.com/2020/06/01/time-to-challenge-court-practices-chamber-of-advocates/>;

<https://timesofmalta.com/articles/view/judiciary-calls-for-more-use-of-video-for-witnesses.846723>.

¹⁶ aditus foundation, *Access to Legal Assistance in Malta - Mapping the availability of legal assistance for the protection of fundamental rights in Malta*, 2017,

https://aditus.org.mt/Publications/atlas/atlasreport_2017.pdf.

¹⁷ Evaluation of the judicial systems, COE,

<https://rm.coe.int/en-malta-2018/16809fe317>.

Every person suspected or charged with a criminal offence has the right to a legal aid lawyer. This right starts from the moment the person becomes a suspect and before they are questioned by the police or other authority. The Legal Aid Agency states that no means test is applied in criminal cases from the time when the person is held in police custody up until trial. However, the absolute right to a legal aid lawyer without a means test during criminal proceedings remains unclear. It was reported that during an arraignment before the Court of Magistrates an accused requested the appointment of a legal aid lawyer which was denied by the Magistrate due to the fact that the accused was gainfully employed¹⁸.

Legal aid in civil proceedings may be granted to any person:

- (i) who is a party to a civil dispute or who has good grounds for commencing civil legal action. Therefore, there must be a *probabilis causa litigandi* and legal aid does not cover any pre-litigation legal advice or provision of significant information. Furthermore, it is not offered for legal advice on issues that do not involve litigation, such as legal advice on any civil, commercial or administrative matter and the filing of complaints in other fora, including quasi-judicial tribunals. This is further exacerbated by the fact that most local equality bodies, such as the NCPE and the Ombudsman, do not provide legal advice, although their officers assist in the formulation and lodging of complaints in the respective bodies.; and
- (ii) whose maximum income did not exceed the national minimum wage (approx. € 784.67 p/m or € 9,400 p/a in 2021) and total assets did not exceed €6,988.12. No provision is made for a calculation of expenses faced by the individual such as services, rent, education, and food. We are also concerned that the threshold assesses the availability of funds and not their accessibility, such as in situations of abusive relationships. It was suggested that the threshold should be increased by €3,000 over the national minimum wage¹⁹.

The lawyers on the legal aid roster are not organised into specialised lists of lawyers to cater for the different needs of the client, such as area of law. We propose that at least two lists of lawyers should be established: one list covering civil cases, administrative and cross-border cases; another for criminal cases. Alternatively, Malta could consider replacing the list approach with an individualised approach where private lawyers are able to provide legal aid that is then billed to public funds against pre-determined rates

We also note that the small number of NGOs offering free legal aid to the most vulnerable struggle to cope with demand.

There is a feeling amongst lawyers that foreign defendants are treated differently to local ones, both in relation to police actions and also in relation to court proceedings. It was felt that the use of restraints in public and the escorting of prisoners through the front doors of the Court building was more likely to happen to foreign defendants, whereas Maltese defendants are usually escorted through the back entrance of the Courts²⁰.

We note that, generally, after group arrests of migrants, including children, these are brought to Court in vans parked in the main pedestrianised street in Valletta, tied

¹⁸http://www.maltatoday.com.mt/news/court_and_police/71014/romanian_arraigned_on_domestic_violence_charge

¹⁹ Commission for the Holistic Reform in the Field of Justice, Final Report of the Commission for the Holistic Reform in the Field of Justice, November 2013,

<https://tinyurl.com/udp8hfd2>.

²⁰ https://aditus.org.mt/Publications/sir_maltalegalleport_2019.pdf;

https://aditus.org.mt/Publications/sir_maltamediareport_2019.pdf.

together with cable ties, sometimes barefoot and not in appropriate attire. Furthermore, we note that these groups are usually given one legal aid lawyer for the whole group, as opposed to one lawyer per accused.

- e. The [Juvenile Court Act](#) only applies to children under the age of 16 and that this falls beneath the standards required by ICCPR. This results in children between 16 and 18 years of age being subject to criminal proceedings as adults and not as juveniles. Furthermore, the safeguards found within the Juvenile Court Act, such as restrictions on reporting, would not be applicable to children between 16 and 18 years of age.
- 4.4 Several Acts of Parliament grant individual Ministers the authority to appoint members of quasi-judicial bodies, committees, commissions and similar entities, these having the mandate to decide on appeals or applications presented to them by any person. These include the Independent Police Complaints Board, the International Protection Appeals Tribunal, the Immigration Appeal Board, Board of Visitors for Detained Persons, Information and Data Protection Tribunal and the Board of Inquiries established under the Inquiries Act. These issues were flagged a number of times²¹ and also in commission complaint CHAP(2018)3699 filed by aditus in 2018.

It should be noted that, although the basic principles of natural justice apply to all deciding boards and quasi-judicial tribunals, there is no conformity or uniformity on the composition of such bodies, on their basic rules of procedure and on the remedies available after the decision is taken. Here are some problematic commonalities:

- a. In the majority of cases the members of the tribunals are not members of the judiciary and are not bound by any code of ethics that members of the judiciary are. Generally, the only requisite for the tribunals to be validly constituted is for one member to have had a number of years exercising a profession, most commonly an advocate, and for the other members to have shown some form of capacity in matters deemed appropriate for the purpose.

The appointment of persons who lack any specific qualification and experience on boards that examine particularly sensitive issues, such as the International Protection Appeals Tribunal and the Immigration Appeal Board, deny individuals the right to an effective remedy.

Furthermore, most are appointed to the tribunals as part-time members. This means that they often have regular day jobs, usually in the private sector, and perform their Board functions for some hours during the week. This can raise serious conflict of interest issues, besides effecting the efficiencies of the tribunals.

- b. Members of these quasi-judicial bodies are either appointed and removed by the Prime Minister or by the responsible Minister under the relevant Act. Whilst not automatically assuming that such an appointment would lead to political interference, it is clear that the system could have an impact on independence and impartiality, and could strengthen Government's agenda on any particular issue. It must be underlined that these boards or quasi-judicial tribunals examine decisions taken by Government bodies.
- c. The manner in which many of the boards conduct their proceedings is not publicly available through published guidelines. In many of the boards we have experience with, we have noted a lack of procedural transparency: proceedings are not

²¹ https://aditus.org.mt/wp-content/uploads/2020/09/Submission-ICCPR_Malta_aditus_2020-1.pdf;
https://aditus.org.mt/Publications/feedbacktovenicecommission_21052020.pdf.

appropriately recorded, the minutes of the hearing are poorly done (if done at all), and the method of receiving submissions from parties is not formalised. The decisions of most quasi-judicial tribunals are not published and are not publicly available.

- d. In most cases, the Board's decision is final and no further appeal is possible on substantive issues. Whilst judicial review on administrative action might be possible, as also a Constitutional case alleging human rights violations, there is rarely the possibility to bring substantive elements before the Courts of law.

5. Could you please elaborate on the main challenges as regards the anti-corruption framework in Malta? What are your views on the updated National Anti-Fraud and Corruption Strategy, which was finalised in March 2021?

We are not aware of any National Anti-Fraud and Corruption Strategy finalised in March 2021.

6. Could you please elaborate on the main challenges as regards media pluralism and the safety of journalists in Malta?

- 6.1 The Broadcasting Authority is the overseeing authority of the impartiality and accuracy of broadcasting services, including news and current affairs programmes, in Malta. The lack of transparency in the appointment of the [Broadcasting Authority](#) and the ownership of newspapers, television and radio stations by the two main political parties only serve to stifle and form of real dialogue and critique by civil society and dissenting voices²².

The Public Broadcasting Services Ltd (PBS) provides public broadcasting services in Malta and board members are nominated by Government, being the sole shareholder. It was proposed that the governance of PBS should be distanced from Government in order to guarantee editorial independence²³. PBS has been accused of bias in favour of the ruling party and against the Opposition and smaller parties throughout the years²⁴.

The commercial sector has failed to own popular television stations, mainly due to lack of funding, advertisers support and audience following.

We find that the existence of strong media houses owned by political parties tends to suffocate independent media and journalists, whilst at the same time draining the limited available financial resources and advertising revenue²⁵.

Furthermore, we see an increased use of publicly-funded social media for political advertising and a substantial increase in trolling activities against political opponents, activists and NGOs that show disagreement with Government policy.

²² <https://lovinmalta.com/opinion/analysis/we-filed-complaints-with-the-broadcasting-authority-about-one-and-net-heres-what-happened/>

²³ *Navigating the Maltese Mediascape*, Editors: Joseph Borg & Mary Anne Lauri, Kite Books, 2019.

²⁴ <https://timesofmalta.com/articles/view/pbs-defends-journalist-from-pn-accusations-of-bias.848130>;
<https://www.independent.com.mt/articles/2015-05-17/newspaper-opinions/Dissecting-PBS-s-lack-of-impartiality-6736135645>;
<https://newsbook.com.mt/en/cassola-accuses-pbs-of-censoring-him/>;
<https://www.maltatoday.com.mt/news/elections2013/24480/broadcasting-authority-has-endorsed-pbs-s-myopic-two-party-vision-20130205#.YIQtpAzZPY>;
<https://www.maltatoday.com.mt/news/national/21672/ad-decry-exclusion-from-pbs-programmes-as-unacceptable-20121009#.YIQp85AzZPY>.

²⁵ International Freedom of Expression Mission to Malta, Statement of Findings, 19 October 2018, <https://ecpmf.eu/news/pressreleases/the-final-statement-of-the-malta-mission>.

The media landscape, by its nature and the recent events in particular, have led to a climate of self-censorship due to the real fear of defamation and SLAPP lawsuits, online harassment and trolling, and a marked lack of access to information from public officials and institutions.

- 6.2 The members of the Broadcasting Authority are appointed by the President, acting in accordance with the advice of the Prime Minister given after he has consulted the Leader of the Opposition.
- 6.3 In Recently, the Court of Magistrates acting as a Court of Criminal Inquiry, issued a prohibition over a popular TV show which planned to air an interview of the accused following the filing of a judicial protest by the victim's parte civile lawyers²⁶. This ban drew the criticism of four major news outlets who felt that *"this extreme measure endangers the freedom of the press and broadcasters to discuss matters of national importance"*, and was *"unprecedented in the recent history of journalism"*. More recently, during the compilation of evidence against Yorgen Fenech, the presiding Magistrate ordered contempt of court proceedings to be instituted against the specific journalists following a complaint by Fenech's defence team. The newsrooms concerned issued a joint statement stating that it is *"worrying that a magistrate presiding over the case of a journalist's murder, is choosing to err on the side of silencing the Fourth Estate while giving undue protection and comfort to public officials who abused their positions"*²⁷.

In 2018, during the criminal proceeding against Claus-Peter Reisch, Captain of NGO vessel MV Lifeline, the Magistrate issued a warning in Court to Reisch's defence lawyers not to continue to hold press conferences outside Court. The Magistrate warned them not to talk to the press and stated *"(I) f there's someone in favour of freedom of expression it's me, but we must be fair and let the courts decide... it's not fair on the people to give a certain impression when processes are underway"*²⁸.

7. Could you elaborate on the access to public information? Did you experience difficulties during the pandemic?

- 7.1 We would like to note that there is a general lack of access to public information across all sectors: pre-pandemic and during pandemic. A quick glance at most Ministry websites will confirm the observation that important information, such as statistics, finances, policies, and procedures are hardly ever listed.

Importantly under the [Freedom of Information Act](#) (FOIA), residents of Malta who are not citizens or citizens of EU Member States are only deemed to be eligible persons after 5 years of residence²⁹. The FOIA stipulates that a document is an exempt document if its disclosure would be contrary to the public interest by reason that it would have a substantial adverse effect on the ability of the Government to manage the Maltese economy; or that it could reasonably be expected to result in an undue disturbance of the ordinary course of business in the community, or an undue benefit or detriment to any person or community.

²⁶ Magistrate puts gagging order on Xarabank's interview with Liam Debono, 26 October, 2018 https://www.maltatoday.com.mt/lifestyle/television/90440/magistrate_puts_gagging_order_on_xarabanks_interview_with_liam_debono#.YIQrX5AzZPZ.

²⁷ <https://theshiftnews.com/2021/04/11/maltese-newsrooms-unite-against-contempt-of-court-charges-over-public-interest-stories/>

²⁸ https://www.maltatoday.com.mt/news/court_and_police/89852/lifeline_lawyers_ignore_magistrates_warning_not_to_hold_press_conferences#.YIQwLJAzZPZ.

²⁹ <https://theshiftnews.com/2020/03/18/european-organisation-challenges-maltese-governments-refusal-of-freedom-of-information-request/>

Only 54% of FOI requests on average were upheld in full or in part between 2015 and 2017. The frequent rejections of FOI requests was flagged to the UN Human Rights Council by PEN International³⁰.

A recent FOIA request aditus filed was rejected on the basis of the fact that the FOIA only applies to a document and “*where a request is made for a public authority to collate data, none of the provisions of the Act apply*”³¹.

8. What are your views on developments made both in the criminal proceedings and the public inquiry looking into the assassination of Daphne Caruana Galizia?

We believe that this will be addressed in detail by the Daphne Caruana Galizia Foundation.

9. Could you please elaborate on the main challenges as regards checks and balances in Malta?

9.1 As mentioned above, there is a general lack of investigations and prosecutions of corruption and money-laundering activities involving public officials and politicians. There is no legislation providing law enforcement with the tools to combat unexplained wealth, although there is are serious problems relating to the existence of such in Malta³².

9.2 In 2020, Judge Bonello stated that the Maltese judiciary “(A)ll showed an admirable consistency: they all sided with the human rights predator. They all left the victim unprotected. Not one of them wanted to be accused of being out of step. No greater fear among them than being suspected of upholding human rights. They all achieved the most admirable unanimity in error.”³³

9.3 The Maltese Courts have through their jurisprudence enshrined the principle that Constitutional Court judgements, including when the Constitutional Court declares that a specific law violates the Constitution or the European Convention, do not have *erga omnes* application. We feel that the principle that seems to have been enshrined by our Constitutional Courts goes against the principle of Article 6 of the Constitution, which proclaims the supremacy of the Constitution and that any law to the extent of its inconsistency with the Constitution, is null and void. Nowhere in the Constitution does it say that a declaration of inconsistency with the Constitution should only be effective between the parties to the suit.

9.4 We are also of the belief that in order to ensure the supremacy of the Constitution and the European Convention of Human Rights, and to strengthen the certainty of rights, there is need to introduce legislative provisions to that effect.

9.5 This is also linked to the legal standing of the parties and the Courts’ strict notion of juridical interest even in cases involving breaches of fundamental rights or provisions of the Constitution. This has resulted in a situation where, in order to challenge an executive action or law on human rights grounds, one is required to prove direct, immediate and juridical

³⁰ <https://timesofmalta.com/articles/view/frequent-rejection-of-freedom-of-information-requests-flagged-to-un.691434>.

³¹ FOI Request Ref. No: 428200921964 addressed to the Superintendence of Public Health requested the provision of a number of documents ordering the detention of migrants under public health regulations with the signature of the Superintendence of Public Health or the number of such documents.

³² <https://theshiftnews.com/2021/03/03/unexplained-wealth-orders-why-edward-zammit-lewis-shot-them-down/>.

³³ <https://timesofmalta.com/articles/view/courts-human-rights-massacre-giovanni-bonello.767545>.

interest. This has extremely serious consequences for individuals and also for civil society organisations that work in the sector.

10. What are your views on the planned Constitutional Convention?

- 10.1 We remain concerned with the Constitutional Convention and the lack of effective participation by civil society and citizens as a whole. A Constitutional Convention headed by the President who is chosen by Government in power is not ideal, and a long-term more inclusive approach is needed. This is imperative as these constitutional changes will have a long-term impact on Maltese society.
- 10.2 Furthermore, the call for submissions to the Convention by the public was short and gave stakeholders 3 months within which to submit online recommendations or comments.
- 10.3 We propose a consultation approach that is based on community outreach, information provision and facilitated sectoral workshops all targeting various groups in Malta, including the most marginalised.

11. What are your views on the rules/practices as regards the Government's preparation of impact assessments for legislative proposals and the consultation of stakeholders in this regard?

- 11.1 As pointed out by the [Venice Commission](#), the most important reforms in recent years lack structured dialogue and were almost done in secret... *"It seems that at no stage of the process there was any serious consultation of civil society or possibility for wider public debate."*
- 11.2 There are no legal provisions relating to the obligation to consult or to notify the public before or during the legislative process in Malta, saving publication in a Government Gazette. It should be noted that in order for a proposed Bill to be adopted it must pass through three readings in Parliament. After the second reading, the bill is committed to a committee of the whole House or referred to a Standing or Select Committee³⁴. During the [Select Committee stage](#) members appointed from the House discuss the contents of the Bill and may propose amendments. This process does not automatically involve the public, however an MP from either side could recommend that persons from the public are invited to discuss a particular issue with the Committee Members. There is no formal procedure as to how this takes place and the participation of 'outsiders' requires the permission at the discretion of the Committee.

In view of the part-time status of Maltese Parliamentarians and their general lack of technical knowledge of all aspects of life, we feel that a more open, transparent and inclusive approach to law-making is necessary to ensure higher standards of legislation, public trust in the procedure and outcomes and a more non-politicised approach to governance. During our last attempt to provide extremely technical input to a complex law on asylum procedures, before a Parliamentary Committee that lacked the expertise necessary to understand the notions being legislated upon, we were graciously allocated 3 minutes to present our views.

- 11.3 There is no obligation under Maltese law to carry out impact assessments of proposed legislation and no procedure involving national institutions for the checking the legal

³⁴ The Standing Committees are composed of a selection of members of the house of representatives in proportion to the Government and Opposition members. This means that the Government has a majority of seats in all Standing Committees for the reviews of laws presented to Parliament and in procedures as prescribed by law.

compatibility of Bills tabled in Parliament³⁵. Legal scrutiny is possibly carried out internally by the Ministries proposing the legislation or by the Advocate of the State, yet this process is not public. The only mandated impact assessment that needs to be carried out is that laid down in the [Small Business Act](#).

- 11.4 The problem is further exacerbated by the almost unfettered power of Ministers to pass subsidiary legislation under delegated power given to them by the principal Act. There is no public scrutiny of the adoption of such legislation, which in many cases is just as far-reaching as the provisions in the main Act.

Impact of COVID-19 pandemic

12. How has the COVID-19 pandemic impacted the functioning of the judiciary?

- 12.1 As mentioned above, the COVID-19 pandemic had a significant impact on the functioning of the judiciary. A Court analysed Legal Notices [61](#) and [65](#), through which the Superintendent of Public Health had suspended legal time-limits indefinitely and ordered the closure of the Courts. The Court held that this had led to a situation of detention for an unlimited and unpredictable period and had fallen foul of safeguards against arbitrary detention³⁶.
- 12.2 Furthermore, the Immigration Appeals Board and the Refugee Appeals Board were also closed. The closure of the former impacted the possibility of migrants to challenge their Detention Orders. This resulted in a large number of asylum-seekers and migrants being deprived of their liberty for months on end without any judicial scrutiny.

13. What are your views on the News Media COVID-19 support scheme introduced by the government in April 2020?

We believe that the other NGOs have a better view of this situation.

14. How has the COVID-19 pandemic impacted the media landscape?

We believe that the other NGOs have a better view of this situation.

15. What are your views on the use of emergency measures in the context of the COVID-19 pandemic? What are your views on the framework provided by the Public Health Act and the powers granted to the Superintendent for Public Health?

- 15.1 During this lockdown period, the Superintendent for Public Health issued a legal notice restricting the right of persons to gather in [private residences](#). The Superintendent for Public Health stated that she had delegated authority to enforce the measures to officers from LESA, Transport Malta, the Malta Tourism Authority, the AFM, and environmental health, which enforcement powers included the power to enter and search private property.

Under the [Criminal Code](#), police officers can only enter houses with a warrant issued by a Magistrate or under specific circumstances. We have not seen the document that grants this

³⁵ This includes impact assessments of the compatibility of Bills with the European Charter of Fundamental Rights, the European Convention on Human Rights and other international covenants.

³⁶ Rikors Kostituzzjonali Numru 67/2020 LM, *Yorgen Fenech vs. L-Avukat tal-Istat u s-Suprintendent tas-Sahha Pubblika*, 29 May 2020. Confirmed on Appeal by the Constitutional Court of Appeal Numru 7, Rikors numru 67/20 LM, *Yorgen Fenech v. L-Avukat tal-Istat u s-Suprintendent tas-Sahha Pubblika*, 23 November 2020.

delegated authority, and the rules under which they can enter private residences³⁷. In this regard, we have doubts as to whether this is in conformity with the law and the right to privacy.

- 15.2 On 9 April 2020 the Maltese authorities issued a statement that, in light of Covid-19 and the logistical and structural problems for health services associated therewith, Malta could no longer “*guarantee the rescue of prohibited immigrants on board of any boats, ships or other vessels, nor to ensure the availability of a “safe place” on Maltese territory to any persons rescued at sea.*” With this statement, Malta effectively shut its sea borders to those who arrive by sea and are in need of international protection.

On 15 April 2020, the International Organisation for Migration (IOM) confirmed that 5 people were found dead in a boat left stranded in Maltese waters, with survivors saying that another seven people were missing and presumed dead. The boat had been left floating in Malta’s (SAR) zone for several days before it was intercepted by a commercial vessel on 14 April 2020 on orders by the Maltese authorities and handed over to the Libyan coast guards.

- 15.3 In April 2020 the Maltese government placed over 400 rescued persons on 4 chartered vessels (Captain Morgan) just outside national and, by consequence, European Union territory. Further to the rescue, the migrants were not allowed to disembark, they had no access to lawyers and were denied entry. This is the subject of a complaint filed by aditus, JRS Malta and Integra Foundation to the Commission CHAP(2020)01452.

It should be noted that, although Government publicly stated that this was COVID-19 measure, we however believe it to be based in other political considerations.

- 15.4 During the first lock-down period, starting in March 2020, open centres were subject to a circular quarantine from 6 April for 38 days³⁸, and the Armed Forces of Malta was called in to ensure that the quarantine rules were adhered to.

Furthermore, for a period of time, detention centres were closed to lawyers and other visitors and associations. The long lock-down and quarantine of migrants of all ages, along with poor conditions, have resulted in mass neglect and instilled a deep frustration in migrants, at times exploding into violent riots³⁹. In its report on the situation, the CoE CPT noted that certain rights cannot be violated – these rights include access to adequate hygiene, daily access to outside exercise of at least one-hour, regular access to communication with the outside world and meaningful human contact every day, among other things.

A CPT delegation found that persons who had previously been identified as Covid-19 positive had not been separated from other migrants, thus facilitating the spread of the virus throughout the closed and overcrowded environment.

In our visits to the centres, once opened, we noted that detainees were not provided with sufficient quantities of appropriate PPE.

- 15.5 Lastly, it was reported that that incoming prisoners to the Corradino Correctional Facility were being placed in Division 6 solitary confinement as form of quarantine, which at times

³⁷ <https://www.independent.com.mt/articles/2021-04-01/local-news/Police-officers-authorized-to-enter-residences-to-see-if-Covid-measures-are-followed-Gauci-confirms-6736232246> ; <https://timesofmalta.com/articles/view/covid-rules-police-lesa-agencies-have-authority-to-inspect-private.861919>.

³⁸ <https://lovinmalta.com/news/after-38-days-quarantine-at-hal-far-open-centre-will-be-lifted-at-midnight/>.

³⁹ *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, CPT/INF (2021) 1, 2021; <https://rm.coe.int/1680a1b877>.

exceeded the mandatory 14-day quarantine period.⁴⁰ It should be noted that Division 6 is a high-security unit within Corradino Correctional Facility.

⁴⁰ <https://timesofmalta.com/articles/view/largest-covid-19-cluster-so-far-detected-at-prison.846711>.