

**PRESUMPTION OF INNOCENCE –
SUSPECT IN RESTRAINTS
(SIR)**

LEGAL REPORT

MALTA

1. Introduction

1.1. About the project; aim and methodology of the research

The presumption of innocence is the legal principle that any person accused of committing a crime is to be presumed innocent until they are proven guilty according to law. It has been described as a “golden thread” running through criminal law.¹ This broad principle includes a range of rights relating to how suspects are presented in public: public statements made by public authorities before the outcome of the case; the use of physical restraints in courtrooms or in public settings (such as at the time of arrest); and the content and tone of press coverage about ongoing criminal cases. The manner in which suspects are presented to the public can have severe consequences for the fairness of proceedings, the integrity of the justice system, and can undermine the dignity of people who have a right to be presumed innocent.

The Presumption of Innocence – Suspects in Restraint (SIR) project seeks to identify key threats to the presumption of innocence resulting from how suspects are presented in public. The project consisted of a number of different strands, including a content analysis of crime-related news stories in newspapers, online press and broadcast television news programmes, to assess compliance with the presumption of innocence. This was undertaken in seven countries, including Malta, between June and September 2018 and was coordinated by the Media Governance and Industries Research Lab, at the University of Vienna. Comparative research coordinated by Hungarian Helsinki Committee on the presentation of suspects before the courts in Hungary, France, Croatia, Malta and Spain was also carried out by the project partners. This national report was drafted as part of the comparative regional legal research.

1.2. Brief description of the national criminal justice system and criminal procedure

The Maltese legal system is a mixed legal system that reflects the historical evolutions of Maltese legal practice over the centuries. The Maltese legal system is a hybrid of continental and common law systems, and is largely based on Roman law, with French and British influences. The advent of British rule in Malta introduced new legal institutions and principles, such as trial by jury, rules of

¹ UK, *Woolmington v. DPP* [1935] UKHL 1.

evidence and the organisation of the courts. After independence in 1964, the hybrid system continued to develop and membership into the European Union in 2004 added another layer to the Maltese legal system.

It follows that Maltese criminal law is reflective of the fusion of continental and common law principles. Maltese criminal substantive law is a mix of both Italian and British criminal law traditions, having as its sources roman-civil law systems mixed together with common law principles.

From an institutional perspective the courts follow a two-tier system comprising of a court of first instance presided over by a judge or magistrate, and a court of appeal. Magistrates sit in the Inferior Courts, whilst Judges sit in the Superior Courts. In order to be appointed a Magistrate, the individual must have practised as an advocate in Malta for not less than seven years. Any person appointed as a judge must have practised as an advocate in Malta for not less than twelve years, or so practiced and served as a Magistrate for a period amounting in the aggregate to not less than twelve years.

The Courts of first instance are comprised either of the Court of Magistrates as a Court of Criminal Judicature or the Criminal Court. The jurisdictional division between the two courts is one that is based on the punishment that the alleged offence carries. Therefore, the Court of Magistrates as a Court of Criminal Judicature is presided over by a Magistrate and hears cases where the punishment for the alleged offence does not exceed six months imprisonment. However, the Court of Magistrates as a Court of Criminal Judicature may also determine those cases where the offence carries a punishment not exceeding ten years imprisonment. This may only be done with the consent of both the Attorney General and of the accused. The Criminal Court is presided over a judge or jury and hears criminal cases exceeding the competence of the Court of Magistrates. This means that if the punishment for the alleged offence is over 10 years imprisonment or if it is between six months and 10 years but neither the Attorney General nor the accused consented to the Court of Magistrate's jurisdiction, then the trial must be heard by the Criminal Court.

The Court of Magistrates, in its criminal jurisdiction, has a dual role. It has a role as a court of criminal judicature, as described above, and it also conducts preliminary inquiries in respect of criminal offences that exceed the jurisdiction of the Court of Magistrates as a court of criminal judicature. In its role as an inquiring Court, it has the competence to collect the evidence, including statements by experts or witnesses, brought by the police against the person charged with an offence. During this process the accused may make an admission of guilt and may also cross-examine the witness or experts brought by the police. The accused may also be assisted by an advocate during the course of the inquiry. Once the compilation of evidence is finalised, the Court of Magistrates as a Court of Criminal Inquiry will decide whether there are or not sufficient grounds for committing the accused for trial on indictment. In the first case, the court will commit the accused for trial, and, in the second case, it will order his discharge.

The second instance court is the Court of Criminal Appeal which hears appeals of decisions of the Court of Magistrates as a Court of Criminal Judicature and decisions from the Criminal Court. The Court of Appeal is presided over by one judge when it hears appeals from the Court of Magistrates. Three judges sit on the Court of Appeal when it is hearing appeals from decisions of the Criminal Court. The highest court is the Constitutional Court and as an appellate court, it hears appeals from decisions of all other courts, including the criminal courts, on questions relating to the interpretation of the Constitution, the validity of laws and also decisions on alleged breaches of fundamental human rights.

2. Legal framework

National Legal Framework

The provisions regulating the use of restraining measures in the Maltese criminal legal framework are sparse. The relevant provisions are found mainly in the Criminal Code² and supplementary provisions are found in the Police Act³ and the Prisons Regulations⁴. Although it is generally understood that the most common methods of restraint used are handcuffs, it should be noted that in response to a survey that the researchers carried out with members of the police force⁵, the use of cable ties was mentioned as being used in cases of emergency. One of the respondents stated that they “only use hand cuffs or in case of emergency cable ties still used as hand cuffs”.

Which are the typical measures of restraint used against defendants?

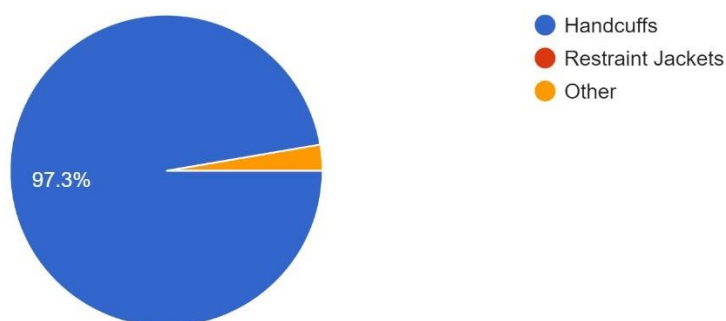


Table 1: The type of measures restraint that can be applied

| Measure of restraint: | Applied against: | Requirements for applying that measure: |
|--|--|---|
| Handcuffs and « other measures of restraint » ⁶ | All parties subject to or involved in the investigation and hearing ⁷ | The use must be proportionate and necessary ⁸ . During the court hearing the accused must be presented without any form of restraint, however if necessary, for reasons relating |

² Criminal Code CAP. 9 of the Laws of Malta

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 17th January 2018)

³ Police Act, CAP. 164 of the Laws of Malta,

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686> (last accessed on 18 January 2018)

⁴ Prisons Regulations, S.L. 260.03 of the Laws of Malta

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 18 January 2019)

⁵ The researchers carried out two surveys targeting lawyers and police officers. The survey questionnaire for the lawyers was distributed to all lawyers offering legal aid services by the State Legal Aid Agency and it was also sent to prominent criminal lawyers. The survey questionnaire intended for members of the police force was distributed to all officers by the CEO of the police force. In addition, telephone interviews were carried out with individual lawyers. The surveys could be completed anonymously, and the researchers have included the responses received and the results of the interviews in this national report.

⁶ It should be noted that Article 366D and Article 443 of the Criminal Code speak of “measures of physical restraint” and “all necessary measures” respectively, without specifying which physical measures are allowed.

⁷ Information given by the Malta Police Force in response to Freedom of Information Request 27418003915, 22 August 2018.

⁸ Information given by the Malta Police Force in response to Freedom of Information Request 27418003915, 22 August 2018.

| | | |
|---|-------------------|--|
| | | to security, escape or contact with other persons. |
| Hand cuffs, Restrain-jackets and other body restraints ⁹ | Persons in prison | <p>(i) As a necessary precaution against escape during the movement of a prisoners, however they shall be removed when appearing in Court.</p> <p>(ii) On medical grounds by direction of the medical officer of prisons.</p> <p>(iii) to prevent a prisoner from injuring himself or others or damaging property, and after which the director must consult with the medical officer and inform the Chairman of the Corradino Correctional Facility Monitoring Board.</p> <p>Measures must not be applied longer than is strictly necessary and for no longer than 24 hours without informing the Chairman of the Board. The Director before applying the measures in (i) and (ii) must first see the prisoner and after must visit the prisoner twice a day. In addition, the prisoner must be observed by a prison official at frequent intervals.¹⁰</p> |

Restraining measures during the court hearings

A recent amendment to the Maltese Criminal Code¹¹ introduced a new Sub-Title relating to the presumption of innocence and transposing the provisions of Directive (EU) 2016/343 of the European Parliament and the Council of the 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceeding proceedings (hereafter: Presumption of Innocence Directive)¹².

The new Article 366D of the Criminal Code provides that suspects and accused persons shall not be presented in court or in public as being guilty, through the use of measures of physical restraint¹³. Similarly, under the Title relating to the workings of the criminal court, Article 443 states that on

⁹ No specific definition given to "other body restraints" under Regulation 69 of the Prisons Regulations, S.L. 260.03 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

¹⁰ Regulation 69 of the Prisons Regulations, S.L. 260.03 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

¹¹ Criminal Code CAP. 9 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹² Act No. XXXII of 2018 An Act to amend the Criminal Code, CAP. 9, the Drug Dependence (Treatment not Imprisonment) Act, Cap. 537 and to provide for other matters dealing with them or ancillary thereto, 20th July 2018 <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29205&l=1> (last accessed on 10 September 2018)

¹³ Article 366D of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

the day and at the time set for the hearing of the cause or any question incidental to the cause, the accused “shall be put, without any restraint, in the place appointed for the purpose”¹⁴. Article 366D contains a proviso that nothing contained in Article 336D and in Article 443 shall prevent the police or any court from applying measures of physical restraint that may be required for reasons relating to security or to the prevention of suspects or accused persons from absconding or from having contact with other persons¹⁵.

Defendants who are not in custody are served with a summons to appear and if they fail to appear, an order for arrest will be made. Defendants in custody are required to be brought to court in such a manner as may be necessary to prevent escape¹⁶. Furthermore, if the defendant attempts acts of violence then all necessary measures may be taken to prevent such acts¹⁷.

Restraining measures on arrest

The Criminal Code also prohibits the use of “harshness, bond or other means of restraint unless indispensably required to secure” the arrest of a person¹⁸. However, the **Police Act** states that “Police officers may use such moderate and proportionate force as may be necessary to ensure the observance of the law”¹⁹. The Act²⁰ further states that during questioning no person may be bound by any rope, chain or other shackle, but may be handcuffed if this is reasonably justified for his own safety or that of others or to prevent his escape. This provision is found in Schedule 3 of the Police Act which contains the Code of Practice for Interrogation of Arrested persons. Importantly, paragraph 19 of the Code states that the lack of observance of any of the provisions of the same Code will not invalidate the statement taken, unless such non-observance nullifies the voluntariness of the statement.

The Police Code of Ethics, which is presented to all members of the Police Force²¹, states that the presumption of innocence is one of the principles guiding the police force and should be protected and respected²². However, there is no further detail on how this presumption should be protected nor what behaviour should be avoided in order to avoid a breach. The same Code of Ethics provides that police officers may use force only when strictly necessary and to the extent required for the performance of their duty²³. It should be noted that the Code of Ethics does not provide for guidelines on the use of measures of restraint nor whether the use of such restraint is considered as a use of force.

¹⁴ This provision is still in force and dates back to 1937. Article 443(1) of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹⁵ Proviso to Article 366D of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹⁶ Article 443(2) of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹⁷ Article 443(3) of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹⁸ Article 355AB of the Criminal Code, CAP. 9 of the laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

¹⁹ Article 75 of the Police Act, CAP. 164 of the Laws of Malta, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686> (last accessed on 10 September 2018)

²⁰ Paragraph 16(d) of the Third Schedule of the Police Act, CAP. 164 of the Laws of Malta, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686> (last accessed on 10 September 2018)

²¹ Information given by the Malta Police Force in response to Freedom of Information Request 27418003915, 22 August 2018.

²² Police Code of Ethics, 2002, <https://pulizija.gov.mt/en/police-force/Pages/Code-of-Ethics.aspx> (last accessed on 10 September 2018)

²³ Police Code of Ethics, 2002, <https://pulizija.gov.mt/en/police-force/Pages/Code-of-Ethics.aspx> (last accessed on 10 September 2018)

Restraining measures in prisons or during transfers

The **Prisons Regulations**²⁴ apply to Corradino Prison and to any other place that has been declared to be a prison under the Prisons Act²⁵, this includes the police headquarters and the lock-up in the building housing the Law Courts in Valletta²⁶. Regulation 69 of the Prisons Regulations prohibits the use of chains and irons and prohibits the use of handcuffs, restrain-jackets and other body restraints as a punishment²⁷. Handcuffs, restrain-jackets and other body restraints should not be used except, where the Director of prisons deems it necessary, as a precaution against escape during the movement of a prisoner, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority orders otherwise²⁸. The particulars of every case under Regulation 69 must be recorded by the Director in a register kept for the purpose²⁹. However, it should be noted that under Regulation 69, the Director may also order the use of restraints on medical grounds and in order to prevent a prisoner from injuring himself or others.

Vulnerable Persons

The Criminal Code defines vulnerable person as any person under the age of 15 or any person suffering from a physical or mental infirmity; or any other person considered by the court to be particularly at risk of being induced into cooperating with the offender or into surrendering to the offender's will when taking into account the person's age, maturity, health, pregnancy, disability, social or other conditions including any situation of dependence, as well as the physical or psychological consequence of the offence on that person³⁰. This definition is used in the code for reasons relating to the aggravating circumstances of crimes but also in relation to the rights of the accused³¹. The assessment would be made either by the judicial authorities or by the police, depending on the specific circumstances of the case.

Schedule 3 of the Police Act which contains the Code of Practice for Interrogation of Arrested persons³² makes special provision for interrogations or interviews with juveniles (e.g. persons under the age of 18 should be interviewed with another person present) and for interrogations of persons with a disability and other vulnerable persons (persons under the influence of drugs, alcohol, medicine, or who are in a state of shock). In relation to the oppression and the use of measures of restraints, the Code states that the investigating officer "*must keep in mind the particular*

²⁴ Prisons Regulations, S.L. 260.03 of the Laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

²⁵ Prisons Act, CAP. 260 of the Laws of Malta
<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8753&l=1> (last accessed on 10 September 2018)

²⁶ Designation of Places as Prisons Order, S.L. 260.02 of the Laws of Malta
<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9673&l=1> (last accessed on 10 September 2018)

²⁷ Regulation 69(1) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

²⁸ Regulation 69(1)(a) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

²⁹ Regulation 73 of the Prisons Regulations, S.L. 260.03 of the Laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

³⁰ Article 208AC(2) of the Criminal Code, CAP. 9 of the laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

³¹ Article 355AUJ(1) and 534AB of the Criminal Code, CAP. 9 of the laws of Malta
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574> (last accessed on 10 September 2018)

³² Third Schedule of the Police Act, CAP. 164 of the Laws of Malta,
<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686> (last accessed on 10 September 2018)

circumstances of individual detainees and must take special care with particularly timid or frail persons that nothing is done that puts the voluntariness of the statement into doubt.”³³

Table 2: Authorities than may order the restraining measures

| Measure of restraint: | Ordered by: | Can the decision be overruled by the Court: |
|---|-------------------------------------|---|
| Handcuffs, restrain-jackets and other body restraints during Court hearing | Police or court | Law is silent on this matter |
| Handcuffs, restrain-jackets and other body restraints in prison or during the movement of prisoners | Director or prisons medical officer | Law is silent on this matter |
| Handcuffs during questioning | Investigating officer | Law is silent on this matter |

Legal Remedies Available

Persons being held at the Corradino Correctional Facility may make complaints to the Corradino Correctional Facility Monitoring Board³⁴, hereinafter “the Board”. The Board is tasked as the National Preventive Mechanism for the prevention of torture, as provided for in the Optional Protocol to the United Nations Convention against Torture³⁵. The Board is required to visit and inspect the prison between their monthly meetings and during these visits the Board is obliged to ask the prisoner if they wish to make any complaints about their treatment in prison. The Board is under an obligation to present a report to the Minister however this is not publicly available. There is no publicly available information on how to make a formal complaint or any contact details of the Board³⁶. A freedom of information request had to be filed in order to receive the contact details of the Board³⁷. In a recent report it was stated that no complaints had been filed with the Board in relation to mistreatment or torture³⁸. However, the lack of transparency and the lack of information makes the effectiveness of this particular remedy questionable.

The Independent Police Complaints Board³⁹ is tasked with inquiring into the conduct of the Police force on the basis of complaint. Similarly, there is no publicly available information on how to make a formal complaint or any contact details of the Independent Police Complaints Board. A freedom

³³ Paragraph 16 of the Third Schedule of the Police Act, CAP. 164 of the Laws of Malta, <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686> (last accessed on 10 September 2018)

³⁴ The Board was previously named Board of Visitors of the Prisons

³⁵ Regulation 104(f) of the Prisons Regulations, S.L. 260.03 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9674&l=1> (last accessed on 10 September 2018)

³⁶ The Corradino Correctional Facility Monitoring Board formerly The Board of Visitors of the Prisons <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Officially%20Appointed%20Bodies/Pages/Boards/Board%20of%20Visitors%20of%20the%20Prisons.aspx>

³⁷ The contact information was given as a response to FOI request-Reference No 31518060918, 3 August 2018. An email was sent to request information from the Board, however no response was received.

³⁸ Caruana S., *Enhancing best practice inspection methodologies for oversight bodies with an Optional Protocol to the Convention Against Torture focus*, Report to the Winston Churchill Memorial Trust of Australia showcasing learning from Greece, Switzerland, Norway, Denmark, UK, Malta and New Zealand, 2018 https://www.churchilltrust.com.au/media/fellows/Caruana_S_2017_Inspection_methodologies_for_oversight_bodies_with_an_OPCAT_focus.pdf

³⁹ Independent Police Complaints Board <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Officially%20Appointed%20Bodies/Pages/Boards/Independent-Police-Complaints-Board-.aspx> established by Article 35 of the Police Act, CAP. 164 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8686>, last accessed on the 18 January 2018

of information request had to be filed in order to receive the contact details of the Board⁴⁰. Again, the lack of information and transparency makes this remedy less than effective.

There are no specific remedies relating to the use of measures of restraint in relation to the breach of the presumption of innocence rules. Nevertheless, the suspect or accused could have recourse to constitutional remedies in the civil courts by claiming a breach of Article 39(5) of the Constitution which provides that "*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty*"⁴¹. This provision mirrors Article 6(2) of the European Convention on Human Rights. However, the researchers are not aware of any case in which this recourse was used as a remedy in relation to the misuse of the application of measures of restraint in relation to the presumption of innocence.

3. Statistical information

The relevant authorities have confirmed that no relevant statistical data relating to the use of restraining measures are kept by the Ministry for Home Affairs and National Security or the Malta Police Force⁴².

4. The practice

Existing guidelines, CPT report on Malta and jurisprudence

There are no specific policy guidelines on the application of measures of restraints issued by the Police Force, nor any publicly available internal rules issued by the Ministry of Home Affairs and National Security⁴³ in relation to persons in prison. Internal rules relating to the use of restraining measures Corradino Correctional Facility (including Young Offenders Unit, Forensic Unit at Mount Carmel Hospital and Valletta Law Courts Lock Up) were not made available to the researchers due to security issues⁴⁴. In relation to prison facilities, handcuffs are only used when escorting prisoners out the facilities in relation to all inmates, except vulnerable persons such as pregnant women or persons with disability, depending on the type of disability⁴⁵. It is in the discretion of the prison escort or warder if handcuffs are used or not, although the management of Corradino Correctional Facility suggest that handcuffs have to be used during escorts outside the Facility⁴⁶.

In its Report to the Maltese Government on the visit to Malta, the CPT commented in relation to male persons held in the forensic ward at Mount Carmel Psychiatric Hospital:

*"On the male Unit, the use of means of restraint was being applied by prison officers instead of healthcare staff and the recording of such measures was inadequate. The application of any means of restraint should only be carried out by adequately trained health-care staff and resort should never be had to the Special Response Team from the prison, and a systematic recording system should be put in place"*⁴⁷.

⁴⁰ The contact information was given as a response to FOI request-Reference No 31518060918, 3 August 2018. An email was sent to request information from the Board, however no response was received.

⁴¹ Constitution of Malta <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>

⁴² Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518018916, 22 August 2018. Information given by the Malta Police Force in response to Freedom of Information Request 27418003915, 22 August 2018.

⁴³ Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518028917, 14th September 2018.

⁴⁴ Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518028917, 14th September 2018.

⁴⁵ Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518028917, 14th September 2018.

⁴⁶ Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518028917, 14th September 2018.

⁴⁷ 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) from 3 to 10 September 2015, CPT/Inf (2016) 25

In the course of the research, no relevant case-law on the use of measures of restraint were identified. There have been no complaints received by the Office of the Ombudsman⁴⁸ and neither by the Corradino Correctional Facility Monitoring Board or the Independent Police Complaints Board⁴⁹.

Stakeholder feedback on practices

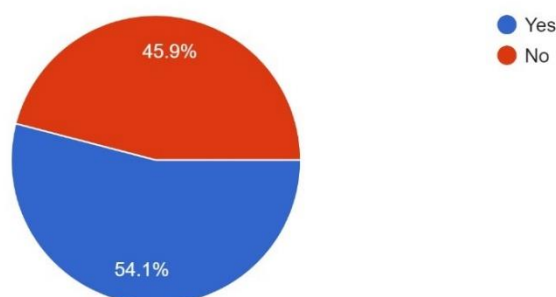
In practice, only handcuffs are used as a measure of restraint in relation to defendants, although in cases of emergency cable ties used as handcuffs. Although, one police officer stated that "*Handcuffs are only used when the suspect is a flight risk or is deemed to be dangerous to himself or to others*", 48.6% of police respondents claimed that only *sometimes* were the use of handcuffs justified on the basis of case-specific reasons. 48.6% claimed that the use of handcuffs was always justified on case-specific reasons, whereas 2.7% claimed that they are never justified on case-specific reasons. One police officer specified that handcuffs "*are taken off before entering the court room unless the accused is being violent*".

A significant majority of lawyers reported that defendants are rarely handcuffed during court sittings, however none of the lawyers felt that the use of handcuffs was ever justified on a case-by-case basis. Half of the respondents also felt that the legal remedies available to challenge the use of restraining measures are almost always ineffective or non-existent.

Discretion of the police officers

The majority of police officers, 70.3%, felt that it was up to their discretion to decide on whether or not to use restraining measures, whilst 18.9% felt that it was not in their discretion to decide. The other respondents felt that it was up to them together with their department, that the law required them to use any restraint necessary not to let suspects escape or turn violent, or due to specific regulations they were obliged to use such restraints. The respondents were split, almost by half, as to whether they had discretion in deciding what type of restraining measure should be applied.

Is it up to your discretion what type of restraining measure should be applied?



<https://rm.coe.int/16806b26e8>. Please note that only those instances were measures of restraint related to prisoners or accused persons were quoted.

⁴⁸ The Office of the Ombudsman also confirmed that it has never received a complaint in relation to measures of restraint by email dated 30 July 2018.

⁴⁹ Information given by the Ministry for Home Affairs and National Security in response to Freedom of Information Request 31518028917, 14th September 2018.

In deciding on which type of restraint to use, the respondents mainly based their decision on the character of the suspect (e.g. aggressive or violent), whether the suspect is cooperative, the criminal history of the suspect and the nature of the offence. One respondent stated that in cases where a restraining measure is chosen it should be "*necessary and proportional [and], the least restrictive form is chosen depending on the gravity of the situation but in 99.9% of cases involving restrains handcuffs are the preferred option*". 63.9% of police officers stated that they explain to the defendant why the application of the particular measure is necessary. In response to whether police officers ever had to reconsider the application of handcuffs, many mentioned the suspect turning aggressive when handcuffs were not applied and a good number mentioned health or age-related issues of the suspect when deciding to remove the handcuffs. One officer mentioned that "*yes.. once I chose to remove handcuffs to a detainee as his young children were present outside the courtroom and I didn't want them to see him wearing handcuffs. I do not regret it*".

All the lawyer surveyed experienced cases where measures of restraint were applied for cases relating to the prevention of suspects or accused persons from absconding or from having contact with third persons and in the majority of cases in the court building, followed by on arrest and the by the minority during court sittings. Only 25% of the legal practitioners surveyed ever had to face a situation where the use of restraints on a client could have had an effect on the presumption of innocence.

Vulnerable persons

In relation to vulnerable persons, the majority of the legal representatives surveyed felt that measures of restraint were rarely used on them which in part reflects the policy of the Ministry of Home Affairs and National Security. Nevertheless, some lawyers did report that at times restraints were used on vulnerable persons.

The vast majority of police officers who responded to the survey felt that they were not entitled to assess the vulnerability of the defendant and one respondent felt that "*In service no one is entitled to 'think'. After an issue arises you have to answer*". However, those that responded that they were entitled to carry out vulnerability assessments, stated that the criteria for the assessment are enshrined in law and that such assessment takes into account "*many factors like age, any different physical needs, behavior and attitude*".

5. Attitudes of relevant stakeholders

The majority of legal practitioners surveyed felt that the use of measures of restraints did not influence the perception of innocence by judges and magistrates, however the majority did feel that their use had a significant impact on the presumption of innocence of the defendant by the general public. Furthermore, half of the respondents felt that in the majority of cases defendants were shown in the media in handcuffs without their consent, this would of course effect the way the public or a jury would perceive their innocence or otherwise.

Although a significant number of lawyers felt that the use of restraining measures could effect the perception of guilt in relation to the public and that the media was not protecting the presumption of innocence, a slim majority of respondents felt that there wasn't a lacuna in the national legal framework in relation to the prevalence of the presumption of innocence when using measures of restraints. One lawyer stated that since "*Restraints are removed before being led into the court room*". However, another practitioner went in further detail and stated that although handcuffs are removed before entering the Court, "*in trial by jury. where there are jurors involved, the presence of 2/3 policemen placed around the accused probably influence the jurors and indicate that the accused is dangerous. There may be an element of precaution in certain cases, but in others it is over the top and could be done without. There is no lacuna, because the law provides that the judge regulates what takes place in the Court Hall, however, in many cases the judge does not interfere*".

The media

The Court Practice and Procedure and Good Order (Criminal Code) Rules of the Court Rules⁵⁰ prohibits any person from taking any photograph or film during the hearing of any case in any hall, unless where it has been ordered or authorised by the court or tribunal. This general prohibition also applies to the media. The judge or magistrate presiding over the case may find the person who breaches this provision in contempt of court and may issue or order a reprimand, expulsion, arrest not exceeding 24 hours or a fine⁵¹.

The Broadcasting Authority is the overseeing authority of the impartiality and accuracy of broadcasting services, including news and current affairs programmes, in Malta⁵². There are no specific legislative provisions that relate to the standards for the portrayal of suspects or accused persons in the media.

The *Requirements as to Standards and Practice applicable to News Bulletins and Current Affairs*⁵³ (the "Standards") cover the broadcasting of news and current affairs. The Standards are based on the principle of impartiality in respect of matters of political or industrial controversy or current public policy and the preservation of the right to private and family life, the right to freedom of expression and information⁵⁴. Section 8 of the Standards regulate the Rights of Respect and Privacy. In relation to persons accused of criminal matters, the Standards provide that such persons should not be projected as if they are already found guilty. In addition, they lay down that trial by the media before any court judgement is delivered should be avoided at all times and that care should be taken to avoid broadcasting repetitive footage that might prejudice the accused's right to a fair trial. Finally, they clearly provide that when reporting on arraignment, the principle of presumption of innocence must be fully respected⁵⁵.

The Institute of Maltese Journalists issued a set of guidelines which act as a self-regulatory framework for the guidance and discipline of those involved in the dissemination of information through various channels. Their Code of Journalistic Ethics (the "Code") contains guiding principles that journalists should follow in the carrying out of their work⁵⁶. In the section relating to the **Reporting of crimes and court procedures**, the Code provides that all reports of crimes and court proceedings should be strictly factual and a clear distinction should be made and explained between the facts and the expression of opinion. Furthermore, it lays down that once it is decided to report on any matter connected with judicial proceedings, that reporting should be complete in the sense that both the beginning and the conclusion of those proceedings should be given and treated with the same prominence⁵⁷.

⁵⁰ Rule 3(g) of the Court Practice and Procedure and Good Order (Criminal Code) Rules of the Court Rules, S.L. 9.11 <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8982&l=1>

⁵¹ Article 990 of the Code of Organisation and Civil Procedure, CAP. 12 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>

⁵² Article 118 of the Constitution of Malta <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>;
See also the Broadcasting Act, CAP. 350 of the Laws of Malta <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8820&l=1>

⁵³ Requirements as to Standards and Practice applicable to News Bulletins and Current Affairs Programmes, S.L. 350. 14 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10169&l=1>

⁵⁴ Preamble to the Requirements as to Standards and Practice applicable to News Bulletins and Current Affairs Programmes, S.L. 350. 14 of the Laws of Malta <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=10169&l=1>

⁵⁵ Paragraph 8.9 of the Requirements as to Standards and Practice applicable to News Bulletins and Current Affairs Programmes op.cit.

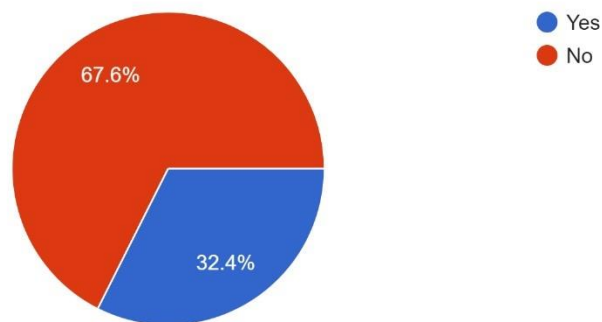
⁵⁶ Code of Journalistic Ethics, Institute of Maltese Journalists <https://igm.org.mt/resources/code-of-journalistic-ethics/>

⁵⁷ Paragraph 7 and 8 of the Code of Journalistic Ethics, Institute of Maltese Journalists <https://igm.org.mt/resources/code-of-journalistic-ethics/>

75% of the legal practitioners surveyed felt that the presentation of the defendant in the media has relevance on the presumption of innocence and all the respondents felt that Maltese journalists are not protecting the presumption of innocent when reporting on suspects or accused persons. One legal practitioner when asked to give an example or send a link of any particular story in which the media could have prejudiced the presumption of innocence stated *"no link required. All reports seem to provide an undertone of clear guilt"*. Another lawyer stated that the Maltese media is simulating the sensationalist *"Italian style of court journalism, especially online comments"*. All the respondents agree that there should be sanctions for transgressions by reporters that could have an effect on the presumption of innocence when reporting or broadcasting on accused persons or suspects pending trial.

Only 13.5% of the members of the police force interviewed felt that journalists were doing a professional job when reporting on suspects or accused persons, whilst 40.5% felt that they were not doing a good job.

Have you ever had a specific problem with a journalist or journalists in the context of reporting on suspects / accused persons?



As seen above, 32.4% of police respondents felt that they had problems with the media in the context of their reporting on suspects or accused persons. One respondent felt that *"Its always a problem whenever you are photographed while detaining a person, would be better if Officers faces are blurred, also those arrested especially since they are innocent until proven guilty"*. Many echoed the concerns of one of the defence lawyers and felt that the media when reporting are *"sometimes ... exaggerated even totally wrong"*, that they use *"[e]xaggerated headlines with weak articles or false information"* and *"that they should be more careful not to be sensational"*. Many police officers felt that the media many times used misleading titles and photos and that they reported incorrect details and information. One officer felt that at times the *"accused persons are described by the media as monsters where in fact the accused persons are the victim. Then after the sentence given from court, the suspect is released when found not guilty and the media doesn't apologize for the wrongful report"*.

One legal practitioner commented that police actions and the reporting of a recent homicide was particularly worrying⁵⁸. A prominent Maltese entertainment mogul was stabbed and died a few days later in hospital. A man was arrested the same evening of the stabbing, he was taken up to Court the next day wearing a white forensic suit with his hands handcuffed behind his back. He was made to walk in a busy pedestrian area and enter the Court through the front doors (which is the entrance the general public uses) as opposed to through the back entrance as is normal procedure. Due to

⁵⁸ Male lawyer, aged 39, interviewed on the 2nd October, 2018

the prominence of the case, the photos and footage have been repeatedly shown on print, online and television broadcasts⁵⁹.



⁵⁹ Hugo Chetcuti was knifed twice, One News, 7 July 2018, https://www.youtube.com/watch?v=38Jv9_Gxfzq

Although the media is precluded from taking photos in Court, journalists can be present and report online on court sittings as they happen. This particular lawyer, reiterates the concern that was flagged in relation to the presence of policemen near the defendant, one particular journalist reported on the same case that:

*"Cmelik enters the court, wearing navy blue shorts and a T-shirt. He is handcuffed and wearing a bullet proof vest. He was accompanied into the court by six armed officers, also in bullet proof vests - and two are now standing on either side of him in the dock. This is a clear indication of how high-profile this case will be. Four more police officers enter the court, taking up the last few places."*⁶⁰

This particular case is still at inquiry stage and therefore could proceed to trial which could be decided by judge or jury, depending on the choice of the defendant⁶¹.

Another case that was flagged by a legal practitioner⁶² relating to criminal proceeding against a group of migrants charged with rioting in a detention centre in 2011. The group of migrants were taken up to Court and escorted through the front doors of the Courts which is situated on a pedestrian street, as opposed to being driven through the back entrance.



The group of migrants were led into the Court building tied together with plastic ties or handcuffs and some of them were barefoot⁶³. They all had their names written on a piece of paper and stuck to their t-shirts in the courtroom, one of the defence lawyers requested the Court to order the removal of the names during the testimony of the Detention staff when they were asked to identify the defendants.

Another legal practitioner⁶⁴ felt that the use of restraints in public and the escorting of prisoners through the front doors of the court was more likely to happen to foreign defendants. In normal cases the defendants that were escorted under arrest were usually escorted by car through the back entrance of the court. There are a number of examples of this⁶⁵ and although it does happen, it was significantly more difficult to find cases where the police escorted Maltese defendants to court

⁶⁰ 'Why did he do this to me? I didn't even know him' - Hugo Chetcuti before his death:

<https://www.timesofmalta.com/articles/view/20180718/local/live-court-hears-first-evidence-about-hugo-chetcutis-killing.684717>

⁶¹ The case was still at inquiry stage at the time of writing.

⁶² Male lawyer, aged 39, interviewed on the 2nd October, 2018

⁶³ <http://www.independent.com.mt/articles/2011-08-18/local-news/Court:-Migrants-Charged-over-Safi-riot-297358>. Video footage: <https://www.youtube.com/watch?v=tBuesMwrbDQ>

⁶⁴ Male lawyer, aged 40, interviewed on 12th October, 2018

⁶⁵ <https://www.tv.mt/news/2-rumeni-maghrufa-fl-ewropa-jinzammu-arrestati-ghax-jiffrumaw-parti-minn-grupp-kriminali/>; <https://www.tv.mt/news/is-sieheb-ta-lourdes-agius-se-jigi-akkuzat-bil-qtil-taggha-llum/>; https://www.youtube.com/watch?v=Hpt6XmGD_G4

through the pedestrian areas⁶⁶. The point came across in one of the lawyer responses to the survey question on whether there was a lacuna in the legal framework. This lawyer stated that *"Some defendants are taken directly from the secure area in the Court building directly to the courtroom. Other defendants, especially foreigners, and particularly black defendants, are 'paraded' around the outside of the Court building. Regulations regarding the transportation and passage of defendants to and from courtrooms should be more closely defined"*.

This was reiterated by another lawyer who stated during the interview: *"lets say that it is almost always the foreign defendants who are paraded through the Republic Street entrance"* and that in many cases, these foreign defendants are represented by legal aid lawyers who *"have no incentive to fight for this stuff"*⁶⁷. This same lawyer complained of the way foreign defendants were also presented in Court without being given any change of clothes or a suit, which could impinge on the way the judge or jury could perceive the defendant's guilt or innocence. This lawyer concluded by stating that the handcuff issue *"is symptomatic of much deeper problems with our entire justice system"*.

6. Recommendations

In view of the above, a number of recommendations are proposed:

- The issuance of clear guidelines for police officers and prison escorts on the use of restraining measures, which types of measures may be used, the assessment of vulnerability and the use of discretion;
- There should be specific regulations regarding the transportation and passage of defendants to and from the Court buildings and places of detention, including prisons;
- A review of the practice of the police escorting certain persons accused or charged with a crime through the front entrance of the courts, which is normally used for the general public, needs to be made;
- Training on the use of restraining measures and the appearance of suspects in public and in the court and how this effects the presumption of innocence should be given to the police and to prison escorts;
- Further awareness needs to be raised with legal practitioners how the use of restraining measures and how the appearance of suspects in public and in the court, including in the media could effect the presumption of innocence and the legal remedies available;
- Encourage the Institute of Maltese Journalists and media houses themselves to update and enforce guidelines on crime reporting and bolster the procedures for self-regulation in cases of malpractice and of breaches of such guidelines with a specific emphasis on the reporting of suspects and accused persons and the impact this may have on the presumption of innocence.

⁶⁶ <https://www.tvm.com.mt/en/news/video-man-detained-after-14-thefts-of-jewellery-from-elderly-persons/>;
<http://netnews.com.mt/2018/08/11/tisraq-minhabba-d-droga-mistennija-tinghata-sentenza-ta-habs/>

⁶⁷ Male lawyer, aged 41, interviewed on the 1st November, 2018

This report is produced as part of the project "The Importance of Appearances: How Suspects and Accused Persons are Presented in the Courtroom, in Public and in the Media", coordinated by the Hungarian Helsinki Committee (the "Project") with partners aditus foundation (Malta), Fair Trials, Human Right House, Zagreb (Croatia), Mérték (Hungary), Rights International Spain, and the University of Vienna.

Coordinated by:



Hungarian Helsinki Committee

Funded by the European Union's Justice Programme (2014-2020)

