



DAPHNE
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FOUNDATION

Input

Special Rapporteur on the independence of judges
and lawyers for thematic report on safeguarding the
independence of judicial systems in the face of
contemporary challenges to democracy

aditus foundation

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The Daphne Caruana Galizia Foundation

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Judges

Role in safeguarding democracy and upholding fundamental democratic rights

In recent years, the system of the appointment of judges has been strengthened after recommendations by the Venice Commission in its [2018 Opinion](#) and [June 2020 Opinion](#). However, the Venice Commission has called on the government to further strengthen the appointment system by making shortlisted candidates's names public before appointment by the President, who is appointed by the Parliament and thus has a purely political role.

The Maltese government has not addressed the need to involve the judiciary in the appointment of the Chief Justice, a role that must be need depoliticised to its wide-ranging and critical roles withing the Maltese justice system. We also note that no female Chief Justice has ever been appointed.

The Courts have generally been held to be conservative and not particularly active in their role to protect fundamental democratic rights. The Maltese constitutional court was famously [criticised](#) by former European Court of Human Right's judge Justice Giovanni Bonello who noted that "*85% of the judgments of our Constitutional Court had been found to be human rights garbage by the Strasbourg Chambers*" and were overturned. In his book, *Misunderstanding the Constitution*, he controversially explains how, in his opinion, the Maltese judiciary undermines human rights by being subservient to the human rights perpetrator, the Government, as opposed to the victim.

In a similar vein, another former Chief Justice and Strasbourg judge, Justice Vincent Degeatano [stated](#) that "... *it is much easier to obstruct justice surreptitiously and not in violation of the law – by... appointing incompetent or politically subservient people to certain key posts*".

Furthermore, a crucial issue is that the Maltese Constitutional Courts have enshrined the principle, through their jurisprudence, that their judgements **do not** apply *erga omnes*. They rely on Parliament to amend, revoke or modify the law to bring it in line with the Constitution. By law, the Constitutional Court is obliged to send any such judgement to Parliament; however, Parliament is not obliged to amend, revoke or modify the law within a stipulated timeframe. There is no data on what action has been taken on the basis of this procedure¹.

We believe that, to ensure the supremacy of the Constitution and the European Convention of Human Rights, and to strengthen the certainty of rights protection, legislative provisions should introduce the concept of *erga omnes* application of Constitutional Court judgments².

¹ See pg 36 of [Joint Submission 2023 Rule of Law Report](#), aditus foundation, Daphne Caruana Galizia Foundation, 2023 and 18 of [2024 Rule of Law Submission Malta](#), aditus foundation, 2024;

² See pg 18 of [2024 Rule of Law Submission Malta](#), aditus foundation, 2024; and the Venice Commission [2018 Opinion](#) and [June 2020 Opinion](#).

Obstacles, risks, or challenges when fulfilling this role

On the opening of the Forensic Year 2023, the Chief Justice said that the Courts were barely afloat due to their increased workload. He stated that the number of judiciary members, the human resources in court, the available space and procedural laws are not equipped to cope³. These concerns have not been addressed. In a November 2023 statement, the Association of Judges and Magistrates of Malta warned that the judicial system was on the brink of collapse due to a persistent lack of resources, staff and investment.⁴

In 2023, the Chamber of Advocates issued three statements expressing concern in relation to what it perceived as the Prime Minister's attacks on judicial independence and impartiality. In January 2023, the Prime Minister [reportedly](#) spoke directly and informally to a member of the judiciary on matters relating to the magistrate's work. In a [statement](#), the Chamber of Advocates said this is contrary to the judiciary's Code of Ethics. In July 2023, the Chamber [expressed](#) worry at the Prime Minister attacking the judiciary during a press conference relating to a public inquiry and in his having access to a confidential report that the Inquiring Magistrate had passed on to the Attorney General. In October 2023, the Chamber again issued a [statement](#) that the Prime Minister used Parliamentary Privilege to undermine the independence and impartiality of the Courts when he implied that they are biased towards the Opposition party when they ruled that the corrupt hospitals privatisation deal was null and void.

Role played by the judiciary in democratic elections

The Venice Commission's guidelines on elections from 2002 (the "guidelines") require a recourse to a court for a final appeal against the Electoral Commission's decisions. The Maltese Constitutional Court, however, ruled on 23 March 2022 that it lacked the jurisdiction to do so after it rejected the Opposition's plea for the early electoral vote conducted inside the prisons to be cancelled and redone⁵.

Policies or institutional arrangements limiting the role of judges

The Maltese legal system, is a mixture of both continental and anglo-saxon systems. However its administrative law is largely based on the British legal system imposed during colonial rule and draws on a system of administrative tribunals. These tribunals are set-up under specific laws either to examine the validity of particular administrative acts decided under the establishing law or as an appeals body of decisions taken under the same law.

Members of these boards or tribunals are not members of the judiciary and are not bound by any judicial code of ethics. They are appointed and removed by the Prime Minister or by the responsible Minister without any particular procedure. There is a lack of independence and

³ Times of Malta, [Three courts 'barely afloat' because of heavy workload, chief justice warns](#), October 2023.

⁴ Newsbook, [On the brink of collapse': Judiciary association issues stern warning over resource shortage](#), November 2023.

⁵ See Pg 4 of [Report on the 2022 General Elections in Malta](#), Daphne Caruana Galizia Foundation, 2022.

impartiality in the process, which could strengthen the government's agenda on any particular issue.

In particular, there isn't always a guaranteed review of these tribunals' decisions by a court of law. For example, the Immigration Appeals Board (IAB) established under the [Immigration Act](#) establishes that there are no further appeals to a Court, except for EU nationals and their dependents and for migrants who are lawfully in Malta. Appeals to the Court are not allowed for immigrants who are residing irregularly in Malta, such as asylum-seekers whose claims were finally rejected. The IAB can decide on detention orders, on return and removal orders, and on age assessment. The same can be said of the [International Protection Appeal Tribunals](#) whose decisions are final, conclusive, and may not be challenged before any court of law. This lack of appeal excludes a very specific section of the population from the protection of the Courts and relegates their rights to a lower status⁶ than that of ordinary citizens.

Under the [Mental Health Act](#), any person found to be insane at the time of an offence can be ordered by the criminal court to be held indefinitely in custody in a mental health institution. The individual can only be released on application to the criminal court and on the submission of a report by three specialists to the same court. There is no inbuilt legal mechanism of a court review of such detention. The review is kickstarted by the individual's lawyer on application to the court, if the person is lucky enough to have access to a lawyer. Migrants with mental health issues are at a particular disadvantage and at risk of being forgotten in the system.

Approaches taken to protect judges

None to report.

⁶ See pg 6 of [2024 Rule of Law Submission Malta](#), aditus foundation, 2024

Prosecutors

Role in safeguarding democracy and risks in fulfilling role

The appointment of the Attorney General – the Chief Prosecutor – remains predominantly within the power of the Prime Minister. While the new procedures for the appointment of the Attorney General see the setting up of an Appointment Commission, the Minister responsible for justice handpicks as members of the Commission individuals who, in his opinion, are respected and trusted by the public. The current AG continues to be kept under public scrutiny for alleged blunders, with civil society constantly [calling](#) for her resignation.

There are no public guidelines on standards to appoint senior or chief prosecutors besides the Attorney General, although it is recognised by Council of Europe bodies that there is a need for clear criteria defined by the law, reflecting the specific competencies and experience required for a chief prosecutor that must be higher than those for ordinary prosecutors. Concerns on conflict of interest have been raised about prosecutors working for the Attorney General who then moved to the private defence of the accused⁷.

Role played by the prosecutor's office in democratic elections

The Attorney General has decision-making power over whether to prosecute serious crimes. To date there have been no prosecutions on politicians' alleged vote-buying crimes and high-level corruption that potentially affected the outcome of an election.

In October 2023 the European Parliament approved a Resolution on the Rule of Law in Malta⁸ which refers to a benefits-for-votes scandal, revealed in 2023, involving the buying of votes of government supporters using forged official documents, including fake medical certificates. Another vote-buying scandal [revealed](#) a few weeks later centered on a driving licence racket involving Transport Malta, the ex-Transport Minister (now Minister for Foreign Affairs), and high-ranking government officials in the Prime Ministers office, among others. The Transport Malta director involved in the racket was eventually charged in 2022. The racket whistleblower further [alleged](#) that the governing Labour Party was assigning residence cards of foreign deceased residents to other foreign residents in exchange for their vote. No implicated member of parliament or minister has been arrested or prosecuted for any of these revelations.

During the 2022 general election, several episodes that could amount to corrupt practices, treating, and bribery came to light; however, no politician or any other person has been prosecuted⁹. The ODIHR Election Expert Team Final Report¹⁰ highlighted these problematic practices.

⁷ See p. 9 of [2024 Rule of Law Submission Malta](#), aditus foundation, 2024.

⁸ [European Parliament Resolution on the rule of law in Malta: six years after the assassination of Daphne Caruana Galizia, and the need to protect journalists](#), P9 TA(2023)0374, 19th October 2023.

⁹ See [Report on the 2022 General Elections in Malta](#), Daphne Caruana Galizia Foundation, 2022

¹⁰ OSCE, [Final Report - Early Parliamentary Elections](#), Malta, 2022.

Policies or institutional arrangements limiting the role of prosecutors

None of note.

Approaches taken to protect prosecutors

The Venice Commission deemed the removal of the Attorney General by a 2/3 majority in Parliament to be inadequate protection and¹¹ recommended that an expert body should have the power to decide on the grounds for removal or that there would be the possibility to appeal to the Constitutional Court about the removal.

¹¹ See [Venice Commission](#)'s Opinion CDL-AD(2020)019

Lawyers

Role in safeguarding democracy and upholding fundamental democratic rights

The legal aid system in Malta has been criticised for not being accessible enough in terms of the income requirements, and also in terms of the merit test applied.

To be eligible for legal aid a person must satisfy an **asset threshold** of not more than €13,000 for the preceding 12 months to be eligible for legal aid. Furthermore, the calculation of the net asset value takes account of any rent payable for property used as main residence and of any maintenance paid to applicant's spouse and children. However, the applicant must also satisfy a yearly **income threshold** equivalent to the national minimum wage (€11,100, at the time of writing).

To be eligible for legal aid for civil or administrative proceedings the individual has to show that they have a probable cause for litigation. This restriction on the provision of legal aid means persons who are at an economic disadvantage are unable to access any pre-litigation advice or assistance without charge. Legal aid is free for criminal cases, although there have been some instances where legal aid has been refused because it was believed the accused has access to substantial funds to pay a lawyer¹². This could be considered as abuse of power because the national system does not allow the Court to reject such a request on the grounds of wealth or income.

In the latter case, private lawyers and lawyers working with NGOs carry out paid or free legal work, filing cases with the aim of protecting fundamental rights or ensuring a remedy for breaches of such rights. [aditus foundation](#), [Jesuit Refugee Service Malta](#) and the [Women's Rights Foundation](#) all provide free legal support to their beneficiaries. In addition, the Daphne Caruana Galizia Foundation set up the [Public Interest Litigation Network](#), an independently-governed network of private lawyers in Malta who offer their legal services to deliver broader access to justice.

Risks, obstacles, or challenges when fulfilling this role

To date Maltese legal professionals remain generally unregulated, bar a few haphazard provisions at law and a code of ethics published by the Chamber of Advocates. The Chamber of Advocates has lobbied for a Lawyers Act, a request so far ignored by the Ministry for Justice. In 2022 the Chamber called for "*A serious regulatory structure for our profession is in the public interest more so than it is in the interest of legal professionals themselves*". More recently, the President of the Chamber of Advocates alluded to "competing interests" as the cause of the delay¹³.

¹² [Man arraigned on domestic violence charge](#), 2016; [Magistrate to find out if man can afford lawyer](#), 2012.

¹³ Newsbook, [Justice system needs an audit, Chamber of Advocates president says](#), December 2023.

At times, lawyers working with NGOs have been subject to [harrasment](#) and [threats to life](#), including [violent acts](#) against their lives and families.

Role played by the Bar association in democratic elections

The Bar association does not have a role in democratic elections.

Policies or institutional arrangements limiting the role of lawyers or the bar association

The Bar Association is run by private lawyers on a voluntary basis. Their funding source is annual membership fees and revenue from activities and seminars. There is no public funding for it to function sustainably with fulltime board members and sufficient non-administrative employee capacity.

Approaches taken to protect lawyers

None to report.

Community justice workers

Role in safeguarding democracy and upholding fundamental democratic rights

Traditionally, community justice workers do not form part of the Maltese system. Legal procurators, who carry out some paralegal work, hold a university degree and can appear in lower courts as established in law.

Much of the work with different communities is done by NGOs that employ a lawyer or engage an external lawyer or legal aid. The NGOs often provide legal information and other services, to various communities. At times, access to places of detention, such as prisons and immigration detention centres, is restricted for non-lawyers and journalists¹⁴. Closed immigration detention centres, where all asylum-seekers who arrive in Malta by sea and irregular migrants are held for varying durations, are only accessible to lawyers who also face difficulty when trying to gain access¹⁵.

There is no government operational funding available for NGOs providing grass roots justice work.

¹⁴ [Maltese Court rules that Access to Detention Centres by Public Watchdogs is key to holding authorities to account](#), aditus foundation, 2023.

¹⁵ AIDA Report, [Malta Update](#), 2023.