

Malta's Debts to the European Court of Human Rights

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The achievements of the European Court of Human Rights (herein also referred as the 'ECtHR') are usually stealthy and unassertive; rarely loud, attention-seeking or ostentatious. Individually, they often tend to pass unobserved; cumulatively they have revolutionized the fate of human rights in Malta and in the rest of Europe.

We are here concerned with Malta, the very last state in democratic Europe to have allowed victims to apply for the protection of the European Convention on Human Rights (herein also referred as the 'ECHR') – as late as 1987. The difference between then and now, in so far as it relates to the judicial safeguarding of human rights is, to use a moderate word, impressive. I will try to profile summarily how that revolution happened, through direct interventions and indirect duress.

The ECHR is just as influential in what it determines, as it is through the mere fact that it is there. The reality of its existence, in itself, exercises enormous restraint on states subject to its jurisdiction. Since 1987, the three organs of the state – the legislature, the executive and the judiciary – are on notice that theirs is no longer the final word. They know they have to meter every step they take against the strictest parameters of respect for human rights. The awareness that a supranational authority will scrutinize all their activity, that it will condemn them in damages and expose them to international opprobrium should they be found lacking, has, in itself, had a tremendously salutary effect in keeping the courts, governments and parliaments on the straight and narrow.

One could call this the cautionary, pre-emptive role of the ECHR – influencing the power-wielders by just hovering barely in sight. What difference this awareness has made since 1987 is not quantifiable, but I believe that the courts, parliament and the executive are now manifestly more conscious than ever of their institutional obligations to respect human rights and less willing to end up at the bar of the ECHR. Since 1987, the health of human rights in Malta has improved dramatically.

The second 'indirect' way through which the ECHR has influenced the respect for human rights in Malta is the 'authoritative' nature of its judgements. The pronouncements of the ECHR only have coercive, binding force on the state which

was a defendant in the individual complaint. But besides that, they also have a highly persuasive authority on all the other state parties to the Convention. The judgement against one state cannot be directly enforced against other countries, but the judiciary of other European states usually keeps its ears well tuned to what is being determined in Strasbourg. Maltese authorities are not bound by judgements delivered in non-Maltese cases, but usually pick up those principles, as tools of persuasive interpretation, and courts often apply them to litigation in Malta to avoid having their judgements minced in Strasbourg.

Judges in courts of constitutional jurisdiction in Malta usually embrace the wisdom of implementing Strasbourg case-law. That case-law, established in litigation in which Malta was not a party, has revolutionized our perceptions of human rights and widened dramatically our rather insular horizons. Take *Salduz*,¹ a case against Turkey which set out the right of accused persons to legal assistance during police interrogation. Our courts have, generally, found inspiration in this judgement and, with some rather erratic flickering, applied its doctrines to Malta too. As happened to the various ECHR judgements on press freedom and on the protection of the sources of journalists – the Maltese courts have generally taken them on board and remodelled their old restrictive doctrines to bring them in line with the more human-rights-friendly Strasbourg philosophies.

When the local courts did not, Malta then paid a high price in the ECtHR such as when our courts failed to take up the teachings of *Hutten-Czapska*² about the rights of the owners of leased tenements to the enjoyment of, and a fair return on, their properties. Strasbourg soon disabused the Maltese courts of their complacency in assuming private property to be a social service enjoyed by the community, but paid for by the individual. The Strasbourg court repeatedly ‘revoked’ one Maltese judgement after another and slammed Malta with major damages.

But evidently it is the judgements delivered by the ECtHR in cases in which Malta was defendant that have most visibly impacted the quality of democratic life in Malta. From the very first Malta case, *Demicoli* in 1991,³ to *Brincat and others*,⁴ only a month ago, it has been one constant build-up of rights and freedoms for the individual in Malta, courtesy of the ECHR.

The courts of Malta have what is probably the poorest record of success in Strasbourg among all the other European jurisdictions. About 85% of Maltese cases which are examined and determined on the merits by the ECtHR see the judgements of the Maltese courts being overturned. This means that human rights victims had failed to obtain redress in the domestic system. It means that it had to be the ECtHR that saved the situation by asserting the claims of individuals against human rights breaches committed by Malta and not restrained by the Maltese courts. If it were not

¹ *Salduz vs Turkey*, App No 36391/02 (ECHR, 2008)

² *Hutten-Czapska vs Poland*, App No 35014/97 (ECHR, 2008)

³ *Demicoli vs Malta*, App No 13057/87 (ECHR, 1991)

⁴ *Brincat and Others vs Malta*, App No 60908/11 (ECHR, 2014)

for the ECHR, 85% of Maltese violations of human rights which were not redressed in Malta would have remained just that: cancerous violations of human rights.

A quick and anything but exhaustive run through the Maltese cases decided by the ECtHR will demonstrate the enormous contribution of that Court to the consolidation of human rights in Malta. I will try to highlight the more important 'revolutions' Malta is enjoying through its operation.

Take 'fair trial' for instance. Up until 1991, the press, and individuals, laboured under the constant fear of being 'tried' by Parliament for 'breach of privilege'. The Maltese Parliament then claimed the right to haul before it any person who the majority of the Members of Parliament believed to have shown lack of respect towards the institution or any of its honourable members. The majority in Parliament could imprison any political opponent for two months after a sham trial in which the injured party was also the judge. *Demicoli* put an end to all that, finding that a criminal 'trial' by Parliament to be anything but a fair trial, as Parliament manifestly lacked the very basics of independence and impartiality.

*San Leonardo Band Club*⁵ put an end to another bizarre anomaly: that the same judges who delivered a judgement, could then sit again in the same case when their own judgement came up for 'retrial'. The law then empowered judges to judge themselves – to decide whether they had blundered by applying the wrong law in their previous judgement. The issue of right to access to a court, necessarily implied in the right to a fair hearing, came up to be decided in *Maurice Mizzi*.⁶ A married man who had irrefutable DNA proof that he was not the father of his wife's daughter, was denied by the Constitutional Court the right to challenge his daughter's legitimacy, both by operation of the Civil law and because the Constitutional Court refused the applicant the possibility to institute an action to disavow paternity – the Constitutional Court holding, in substance, that the legal fiction of presumption of paternity overruled biological truth. The ECtHR found this to be a negation of the fundamental right of access to a court to determine all controversies that have a reasonable factual basis.

Another significant principle in favour of the fair administration of justice was established by the Grand Chamber of the ECtHR in *Micallef*.⁷ This blasted the Maltese legal system that allowed judges to determine cases defended by advocates who were their close next-of-kin. The denial, in practice, of a right of appeal from a preliminary judgement, was found to be a violation of the fair hearing guarantee in *Mercieca and others*.⁸

⁵ *San Leonardo Band Club vs Malta*, App No 77562/01 (ECHR, 2004)

⁶ *Mizzi vs Malta*, App No 26111/02 (ECHR, 2006)

⁷ *Micallef vs Malta*, App No 17056/06 (ECHR, 2009)

⁸ *Mercieca and Others vs Malta*, App No 21974/07 (ECHR, 2011)

*Curmi*⁹ raised a peculiar issue insofar as the Constitutional Court had failed to order the Commissioner of Lands to initiate the procedures that would lead to expropriation and compensation to conclude very long-protracted expropriation proceedings. The finding of the Constitutional Court had left the applicant a victim as she was still disallowed access to a court to determine the compensation due to her for the taking of her property. Similarly, in *Frendo Randon and others*¹⁰ the ECtHR identified a violation in the fact that expropriated owners have no direct access to the Land Arbitration Board, and that the authorities, after thirty-one years' inaction, demonstrated a lack of due diligence in determining the claims of the applicants. In *M.D. and others*¹¹, the ECtHR found a violation by Malta insofar as there was no access to a court for anyone who had a legal interest to challenge a care order that removed minor children from the custody of their mother.

The ECHR has also repeatedly condemned Malta for breaches of the 'hearing within a reasonable time' requirement, in both civil and criminal proceedings.

Closely linked to the fair hearing guarantees was *Camilleri*¹² which condemned the unfettered discretion enjoyed by the Attorney General to decide in which particular criminal court an accused person was to be tried, thereby pre-determining arbitrarily the range of penalties an individual would be facing - in breach of the guarantee of non-retroactivity of criminal laws, '*nullum crimen sine lege*'.

Some important judgements of the ECtHR fortified the enjoyment of freedom of expression, particularly that which should be enjoyed by the press. *Lombardo and others*¹³ established that a conviction of journalists for libel by a Maltese court ran counter to their freedom of expression, which should suffer little restriction in political debate. Once a factual basis for an allegation had been established, free political discourse required that value judgements consequent on those facts should be protected.

*Aquilina and others*¹⁴ overturned a judgement of the Constitutional Court against journalists who had published the news that a named lawyer had been found guilty of contempt of court. In condemning the newspaper for libel, the Maltese court had relied on the written record of the case which failed to mention the lawyer's conviction, while all the evidence showed that he had. The ECtHR found a violation of freedom of expression of the journalists who had followed best practice in reporting the lawyer's contempt conviction. Similarly, in *John Anthony Mizzi*¹⁵, the fact that the allegedly defamed person had been a leading political figure, then deceased, and that the impugned statement was capable of more than one

⁹ *Curmi vs Malta*, App No 2243/10 (ECHR, 2011)

¹⁰ *Frendo Randon and Others vs Malta*, App No 2226/10 (ECHR, 2011)

¹¹ *M.D. and Others vs Malta*, App No 64791/10 (ECHR, 2012)

¹² *Camilleri vs Malta*, App No 42931/10 (ECHR, 2013)

¹³ *Lombardo and Others vs Malta*, App No 7333/06 (ECHR, 2013)

¹⁴ *Aquilina vs Malta*, App No 28040/08 (ECHR, 2011)

¹⁵ *John Anthony Mizzi vs Malta*, App No 17320/10 (ECHR, 2011)

interpretation, had been disregarded by the Maltese courts in finding the journalist guilty of libel. This constituted a violation of freedom of expression.

A number of judgements against Malta delivered by the ECtHR have enriched the notion of protection of private and family life. *Maurice Mizzi*¹⁶ already mentioned under fair hearing, additionally found a violation of the right to family life in so far as the Maltese Civil Code did not allow a husband to establish in law the illegitimacy of his wife's daughter already scientifically established. A foreigner who had obtained Maltese nationality by marriage, *Dadouch*¹⁷ had, for over two years, been denied registration in Malta of a second marriage contracted abroad after the annulment of his first marriage, without reasons being given and despite the fact that he had Maltese citizenship and a passport, in violation of his right to private life.

In *Genovese*¹⁸ the ECtHR found a violation of the right not to be discriminated against in conjunction with the right to family life, because of discriminatory provisions in the Citizenship Act in regards to persons born out of wedlock. *M.D. and others*¹⁹, mentioned above as a violation of fair trial, also found a breach of the right to family life. *Brincat and others*²⁰, the very latest Maltese judgement of the ECtHR, dealt with dockyard workers whose health had been placed at risk by exposure to asbestos. The ECtHR ruled that the failure of the authorities to protect their health and of the courts to give them redress had violated their right to family life.

These are alarmingly brief summaries of some leading ECtHR cases that have changed the panorama of human rights law in Malta. Due to word-count restrictions I had to exclude some really fundamental judgements regarding illegal detention and arrest, rights to life and to non-discrimination, and many about the protection of private property, among others.

¹⁶ *Mizzi vs Malta* (n 7)

¹⁷ *Dadouch vs Malta*, App No 38816/07 (ECHR, 2010)

¹⁸ *Genovese vs Malta*. App No 53124/09 (ECHR, 2011)

¹⁹ *M.D. and Others* (n 12)

²⁰ *Brincat and Others vs Malta* (n 5)