

## **Bribery and Genocide**

### *The Same?*

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I am pleased to note that the Government has announced new measures to fight corruption. Legislation ‘*to remove the applicability of prescription to the offence of corruption*’ committed by a Minister, Parliamentary Secretary, Member of the House of Representatives, Mayor or Local Councillor.<sup>1</sup> In other words, the criminal offence of corruption by some officers in the public service will henceforth never be time-barred.

As far as I am aware, the only other offences that are never time-barred in Malta are genocide, war crimes and crimes against humanity which, too, was a relatively recent amendment which found its way into our law-books in the wake of do-gooder international-law fashionistas. Even multiple, aggravated murder is subject to prescription in Malta, but baksheesh, if the Bill goes through, is not.

For a citizen this may be great news, for a human rights addict, a perplexing one.

Laudable as any anti-corruption initiative undoubtedly is, this one raises a series of human rights concerns. I emphasize that much of what follows are my personal reflections, not extracts from the Strasbourg bible.

If the House approves the Bill, the persons targeted can be tried and convicted of bribery - say, sixty years after the crime was committed. How does this square up with the human rights guarantees enshrined in the Constitution of Malta and the European Convention of Human Rights?<sup>2</sup> Problematically, I suggest.

Trying a person for an offence allegedly committed many years before may place a difficult burden on the prosecution and an impossible one on the defence. With the long passage of time, witnesses die or become untraceable, memory fades and documents are lost. A criminal trial should not be a game played with old counters, some broken, others missing. It is meant to be a battle for truth, fought with state-of-

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<sup>1</sup> Civil Code, Chapter 16 of the Laws of Malta, Article 1051A (8)

<sup>2</sup> Herein also referred as the ‘ECHR’, formally the Convention for the Protection of Human Rights and Fundamental Freedoms

the-art weapons on either side. Anything else and it is unsafe for the prosecutor, injurious to the defendant.

One of the most fundamental of all human rights is that of a fair trial within a reasonable time.<sup>3</sup> How fair can a trial be if held, scores of years after the commission of the facts? The institute of criminal prescription was hardly devised to protect criminals. It was conceived to safeguard a far more precious and universal value – that of a fair trial within a reasonable time. Prescription of crimes favours the proper and fair administration of justice. It also serves as a stimulus to ensure that the state acts against crime in a timely, energetic and punctual manner. Prescription combines the respect for the fundamental rights of individuals with the protection of the community that is entitled to a rapid and efficient prosecution of criminal offences.

In the USA judges throw out ‘cold’ murder cases that are prosecuted long after the crime was committed, not by virtue of the statute of limitations, but in virtue of the exigencies of due process, which may become weakened with the passage of very considerable time.

It is true that the Strasbourg Court, in general, considers the periods of criminal prescription to be the prerogative of each state. But the Court may well take a more proactive view when the interval between the commission of the alleged crime and the actual trial is so long that it manifestly defeats the essential fairness of the trial, when that long passage of time prevents the defendant from mounting a full defence.

The ECHR has not condemned long prescriptive periods – but has not, so far, dealt with crimes with no prescriptive period at all.

The requirement that an accused person should be tried ‘*within a reasonable time*’ has been held to mean that the actual trial should not last too long. I believe this should also mean that the trial should be held ‘*within a reasonable time from the commission of the offence*’.

Besides raising these ‘fair hearing’ concerns, the new measure may also not square up with another fundamental right: that of persons not to be tried in accordance with ‘retroactive’ criminal norms.<sup>4</sup> Every democratic country cherishes this guarantee. Under this aspect, I have no problem with the new law regulating crimes of corruption committed *after* the Bill becomes law. However, I do have severe reservations if the present amendment were to apply to crimes already time-barred under the existing law.

I question a law enacted with retrospective effect to resuscitate a dead offence, to make it prosecutable again after it had already become legally extinct.

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<sup>3</sup> European Convention of Human Rights, Article 6

<sup>4</sup> European Convention on Human Rights, Article 7; International Covenant on Civil and Political Rights (ICCPR), Article 15(1)

The ECHR has expressly reserved this very issue. It neither dismissed nor accepted this concern outright, but has put governments on the alert by reserving to rule about it when the proper case arises.

I also see a third concern – one related to discrimination. The Strasbourg court has ruled that unacceptable discrimination exists not only when equals are treated differently, but also when persons in substantially different situations are treated in a similar manner.

In Malta, a person accused of bribery is now being placed on the same legal plane as a person accused of genocide and of crimes against humanity. A person charged with grabbing a brown envelope has been put in a worse legal situation than a serial murderer. The Bill is treating similarly persons who are in gigantically different situations. It is dealing with a bleak backhander exactly like this was the extermination of a nation prompted by punitive racial hatred. We really must keep a sense of perspective. We should avoid being intimidated by political vigilantes into worshipping at the shrine of what may be populist dysfunctional norms.

By all means, let us promote good governance in every way we can, and then some more. Nevertheless, always keeping in mind that the very first Article of our Constitution, makes the respect for fundamental human rights the imperative basis of good governance.