

repubblika

A CIVIL SOCIETY MOVEMENT



Aide Memoire

Briefing note by Repubblika for meeting with Commissioner Didier REYNDERS on 28 April 2023. Endorsed by SOS Malta, #occupyjustice, and PEN Malta.

During his visit Commissioner Reynders is likely to be told by the Maltese authorities that they have learnt the good governance lessons they need to learn after the assassination of Daphne Caruana Galizia in 2017.

Our view is that no such learning has happened and through the following survey we will show that the authorities have taken no initiatives that materially bring Malta closer to a state of the rule of law that is compatible with European and democratic norms.

Justice System

Independence

1. The position of Chief Justice is appointed by a vote in Parliament without consideration of the wishes of the judiciary. The system has introduced discretionary powers by the President of Malta in the appointment of other judges and magistrates. This may prove problematic as, if anyone were to seek to challenge the application of that discretion, under Maltese constitutional law decisions taken by the President in fulfilment of their duties are not subject to judicial review.
2. Repubblika has launched a human rights challenge on the system where decisions on calls for the recusal of a judge on grounds of conflicts of interest are decided by the same judge. This case has been brought after a challenge by Repubblika against the police challenging their decision not to charge individuals identified by a magisterial inquiry for having committed crimes at the now defunct Pilatus Bank was assigned to Magistrate Nadine Lia, daughter in law of Paul Lia (the personal attorney of former Prime Minister Joseph Muscat, who drew up terms of reference for a separate inquiry into allegations that Joseph Muscat received unlawful payments at Pilatus Bank).



Nadine Lia rejected three calls for her recusal and was then ordered off the case in an interim order given by the constitutional court hearing Repubblica's human rights complaint. That interim order has since been reversed by order of the Appeals Court. Repubblica's human rights challenge has been rejected in the first instance on the grounds that since it had no personal but only a public interest in the case, it was not eligible to the right to a fair hearing. Repubblica have appealed that decision.

3. The Commission for the Administration of Justice includes a person appointed by the government, the previously mentioned Paul Lia. He practises in the law courts arguing in front of judges who are then subjected to his authority in disciplinary proceedings.
4. Recent changes to the law governing the Commission for the Administration of Justice have abolished the right of private citizens or of members of the legal profession to file complaints for the consideration of the Commission. The right to recourse to the Commission has been restricted to two possible complainants: the Chief Justice and the Justice Minister who have therefore become filters themselves of any complaint from any private citizen. This has reduced the accountability of the means of public scrutiny of the judiciary.
5. A parallel challenge concerning Pilatus Bank is the first time that new provisions in Maltese law that empower persons with a juridical interest to challenge the prosecutor's decision not to prosecute are being tested. The attorney general has repeatedly appealed that she should not be forced to testify on her decisions on whether to prosecute someone. These pleas have been overruled by the court. However, her plea for her evidence to be given behind closed doors has been accepted by the court. The case is ongoing.
6. The Attorney General has sought and obtained a court order to force evidence given by Repubblica in the Pilatus Bank is also heard behind closed doors. Anticipating this Repubblica President Robert Aquilina published in a book the evidence he planned to give in court that includes internal correspondence showing that a decision not to prosecute was taken before reasons were sought to justify the decision. Other persons that are subjected to charges are the subject of international arrest warrants which the Maltese state has made no demonstrable effort to implement.
7. There is a lack of motivation to secure convictions that can only be explained by the fact that proper prosecutions in the Pilatus Bank case risk exposing illicit payments made to leaders of the ruling party or the ruling party itself.
8. On the 29th of January the prime minister admitted in a speech that he discussed what he considers as lenient decisions of the criminal court with an unnamed magistrate, explicitly breaking the magistrate's code of ethics. Robert Abela had worked as a lawyer for many years and would have understood he was compromising both the magistrate and him.



Quality of justice

9. Members of the judiciary habitually complain that they have an excessive caseload. Talk of digitisation has had limited impact in the real world. The duplicate function of magistrates who swap between judicial duties as judges in the lower courts to investigators conducting magisterial inquiries creates delays on both fronts.
10. Reforms that have been recently proposed by the government for consultation are limited to one stage of the criminal process and change it only in so far as they impose a time limit for its completion without addressing the causes of the delay which are mostly due to extremely limited resources in the judiciary, the prosecution service, and the police. Furthermore, the proposed reforms increase the workload for magistrates that are already stretched beyond their limits without any form of initiative to mitigate the lack of resources and time to do their work. We are concerned that the proposed changes will serve to give the mistaken impression that improvements are being made while the situation continues to get worse.
11. Malta provides no specialist training for judges and prosecutors beyond the formal law program given to all lawyers.
12. There is no accountability of performance of the court system given to court users or the public.
13. Length of proceedings remains excessive.

Anti-Corruption Framework

The institutional framework capacity to fight against corruption

14. The Permanent Commission Against Corruption remains ill-resourced and its 30-year record of failing to secure even a single conviction in cases of corruption remains unbroken.
15. Findings of unethical conduct by government officials by the (former) Commissioner for Standards in Public Life have not led to appropriate action by law as his recommendations were stymied by the government control of the supervisory Parliamentary committee that overruled the Commissioner's recommendations in these cases. The position was vacant for an extended period. It has now been filled following legal amendments that removed the requirement for the government to seek



consensus with the opposition on the choice of appointee. The new appointment has been made unilaterally by the government over-ruling the opposition's objections.

16. Bribery and corruption are in the competence of the Financial Crimes Investigations Department within the police. There have been no new prosecutions addressing long-standing allegations of high-profile corruptions during the past year. The position remains as it was in 2016 as evidence, such as the leaks emerging from the Panama Papers, remain unused.
17. The only entity in Malta with the power to arrest and charge anyone for corruption is the police and the only entity with the power to prosecute these cases is the Attorney General. Both are in court pushing back on challenges by Repubblika urging them to prosecute people found to have committed crimes.

Prevention

18. The (former) Commissioner for Standards in Public Life published recommendations in July 2022, prepared after extensive public and civil society participation by the OECD and funded by the European Commission. The government boycotted the launch of these recommendations and has shown no intent to act on them.
19. Political party financing in Malta is extremely problematic due to the disproportionate influence on public policy of a small number of construction magnates on whom political parties depend for their daily functioning. Inexistence of any public funding of political parties is an underlying cause of most of the corruption in Malta. The government has ignored repeated calls to discuss a reform in this matter.
20. There have been no improvements to rules and measures to prevent conflict of interests in the public sector even though this is a key problematic area identified by GRECO (in 2018). Conflicts of interest are rampant and at every level.
21. Revisions to the Protection of Whistleblowers Act have sought to implement the recommendations of the most recent EU Directive. However, the entity responsible to decide whether an applicant for whistle-blower status is granted immunity in cases concerning the public sector is an appointee of the government who reports directly to and is subject to the authority of the prime minister. The law does not provide immunity to potential witnesses while they are providing evidence in support of their application for whistle-blower status which means that potential whistle-blowers face consequences (in some cases jailtime) merely for submitting evidence in support of their application for protection. Furthermore, the entity responsible to decide whether an applicant for whistle-blower status is granted protection in cases concerning the private sector is the Ombudsman who has year in year out declared he would not handle such cases in view of his interpretation of the limitations on his competence



imposed on him by the constitution. The Act has never been applied to meet its objective of protecting witnesses of corruption, before or after the transposition of the most recent Directive. Instead, it has been used to intimidate potential witnesses by threatening them with severe consequences should they attempt to reveal any secret in support of their application for whistle-blower status.

Repressive measures

22. Delays at the investigatory stage of high-level and complex corruption cases create obstacles. When evidence of corruption first emerges, months and years pass before any action happens, and this is often too late to gather material evidence necessary for prosecution. By way of example then Inspector Angelo Gafà in December 2012 recommended issuing charges based on evidence provided by OLAF that led to the October 2012 resignation of Commissioner John Dalli. But John Dalli was only charged in February 2022, more than 9 years later. It is, in our assessment, unlikely that a conviction will be secured.
23. Appointees to the police and other agencies and institutions often owe their jobs to the politicians they investigate. This leads to procedural or prosecutorial "mistakes" that lead to technical acquittals, procedural delays to push criminal complaints beyond the statute of limitations, or an unspoken guarantee of impunity. There has been no conviction secured in any high-profile case of corruption and the quality of the prosecution in all ongoing cases strongly suggests that a conviction is extremely unlikely.
24. Administrative sanctions issued by the Financial Intelligence Unit have focused almost exclusively on non-political actors. The administrative fines are consistently downscaled by the courts on appeal and have now been ruled unconstitutional for not providing the fined persons the opportunity to have a fair hearing. The financial intelligence agency has not applied its sanctioning powers in cases of corruption involving politicians. Asset recovery is poor to inexistent.

Media Freedom & Pluralism

Media Authorities & Bodies

25. The Institute of Maltese Journalists (IGM) is a voluntary body grouping together several journalists from various media. It is generally unable to fulfil its duty as a representative body as it works with close to zero financial resources and no staff.



26. The Broadcasting Authority (MBA) is a constitutionally appointed autonomous body that is required to oversee broadcasting and to ensure impartiality in news and current affairs. Its management board is appointed by the leaders of Parliamentary political parties and excludes any representation from civil society or any other entity. A recent court ruling has forced the MBA to consider reversing its 30-year policy of refusing to regulate or oversee the content of news services provided by broadcasting media owned by political parties.

Safeguards against government or political interference and transparency & concentration of media ownership

27. Government advertising and government funding of media organisations is decided behind closed doors. It is not accounted for separately and there are no rules governing value for money or media budgeting according to objective criteria. It is normal for the government to use its spending budget to reward favourable reporting and to withhold spending as a form of retaliation.
28. There are no safeguards to prevent political interference in both the editorial decisions and the recruitment / dismissal policies in public broadcasting. Constitutional safeguards exist to ensure that on matters of political controversy the views of the Parliamentary opposition are included in the reporting. Outside of that scope other voices in society are excluded from public broadcasting. The two parliamentary parties own two of the three TV stations in Malta that carry a news-service while the third station is state-owned and largely controlled by the government.
29. Media ownership is transparent, but the two main political parties own and operate multimedia outlets which include TV, radio, print and online platforms. There is also a lack of transparency when it comes to the publication of revenues since party-owned media structures have failed to publish audited accounts as required by law.

Framework for journalists' protection, transparency & access to documents

30. The physical protection of journalists is at the discretion of the police. The police have appointed a person to act as liaison with journalists, but she does not appear to be part of the decision on whether journalists require protection. All manner of protection provided to a limited number of journalists because of credible threats to their safety was withdrawn following the most recent general election and not replaced despite continuing threats.



31. The police have privately acknowledged that their capabilities in completing investigations concerning threats made to journalists on a regular basis using electronic media are very limited and they have proven unable to conclude any investigations in this regard.
32. A draft legal notice published last year but not adopted to law empowers a committee composed of the chief of police, the head of the army, the head of the security services, and the permanent secretary in the home office to decide what measures need to be taken to protect the security of journalists. Such measures can include the monitoring of the journalist's movements or communications without their knowledge. The committee has no judicial or parliamentary oversight, nor does it involve any representatives of journalists or civil society. Though the law has not been adopted the government has publicly announced the committee already exists and is operating.
33. Personal security that was provided outside the homes of journalists and activists who have been threatened was withdrawn with the explanation that this was partly due to severe limitations on police resources. Journalists' complaints about physical assaults or aggression in public spaces are regularly investigated and prosecuted by the police and regularly result in protection and anger management orders handed down by the courts.
34. The Freedom of Information Act is entirely dysfunctional. The government will not provide responses to questions from the press or the public unless it's forced to.
35. Proposals made by the government regarding abusive lawsuits against journalists in draft laws published in 2022 are still very limited. The proposals fall short of the standard set by the draft EU directive. No penalties are proposed to dissuade corporations from using SLAPPs. The proposal does not include the possibility of requesting the dismissal of vexatious lawsuits. They do not allow judicial initiative in dismissing unfounded claims during proceedings.
36. A proposed constitutional amendment to declare the free press as essential to democracy is proposed for inclusion under article 2 of the constitution which excludes its application by any court in case of even the most egregious violations of the principles contained therein. Changes to the constitutional provision on the protection of free expression extended existing exemptions and exclusions of this right ruling out the protection of free expression in matters concerning national security. Other new exclusions are added making the proposed revised version of the constitution less protective of free speech than it currently is.



Other Institutional Issues Related to Checks & Balances

The process for preparing & enacting laws

37. Outside the practice of consulting social partners in the preparation of the national budget, policy consultation in the legislative process is nearly non-existent. Stakeholder's calls for public consultation ahead of anticipated legislation is nearly always ignored. There is close to no effort to provide data or evidence that support legislative changes.
38. Laws can be challenged for their constitutional compliance by any citizen in the constitutional court. The court has declarative powers, but any law declared unconstitutional remains in force until the legislature decides to remove or replace it. In cases concerning the unlawful expropriation and reallocation to third parties of private properties, including especially the allocation of private property to the Labour Party, the government forces victims to go through the judicial process to obtain compensation. The process normally lasts around a decade and the outcome, given the repeated decisions of the European Court of Human Rights, is inevitably in favour of the complainant.

Independent Authorities

39. The Human Rights Directorate is an integral unit of the public service and has no policy autonomy from the government whatsoever. It reports to the Ministry for Home Affairs which is itself the subject of several human rights criticisms.
40. The (former) Commissioner for Standards in Public Life has also completed several high-profile investigations. However, the Committee for Standards in Public Life that has a majority of MPs from the ruling party has consistently blocked the implementation of the recommended findings.
41. During 2021 no less than 16 reports by the Ombudsman and his Commissioners were sent to the House of Representatives and laid on the Table of the House by the Speaker. There has been absolutely no reaction from Members on either side and the injustices determined the Ombudsman persist without consequence.



Accessibility & judicial review of administrative decisions

42. Accessibility to the courts for judicial review of administrative decisions (469A) is limited by tight requirements on juridical interest of the complainant. Repubblika is testing the new law concerning accessibility to the courts for judicial review of decisions by the Attorney General not to prosecute (469B) in a case brought against the AG for a decision not to prosecute persons identified by a Magisterial inquiry for crimes committed at the former Pilatus Bank. However, there is no legal requirement on the attorney general to inform victims that they have taken the decision not to prosecute, making even the use of the law unlikely to begin with.

The enabling framework for civil society

43. Anti-SLAPP legislation proposed by the government in September 2022, and currently frozen pending the start of public consultations, introduces protective provisions that are restricted to journalists and exclude activists, NGOs, and other human rights defenders.
44. The government has recently proposed Bill no.35, which concerns the Malta College for Arts, Science and Technology. It states “A member of the board of governors (of MCAST) may at any time be removed by the minister,” that the minister will have the authority to sack any board member “if such member is disruptive and or a source of frequent conflict causing hindrance to the proper functioning of the board” or “for any other reason due to which the member would no longer be fit to occupy such office, which shall include a breach of confidentiality”. This in effect grants the government total control over the board and therefore functioning of the college. MCAST is a degree-awarding institution, making it an alternative to the university but deprived of the basic academic freedoms expected of any university in a democracy.
45. Civil society organisations that act as watchdogs on the public administration particularly if they are concerned with issues such as human rights, free speech, the rule of law, and similar enjoy no public funding and no financial support measures.

Implementation of recommendations of Daphne Caruana Galizia public inquiry

46. The recommendations of the inquiry have not been implemented. There has been no public discussion in which the government has participated on the implementation of the recommendations. The government has rejected parliamentary bills proposing to implement the measures.



47. The government has publicly dismissed the notion of implementing anti-racketeering laws to combat organised crime describing the proposal as intended to discredit Malta as a country captured by organised crime.
48. The government has withdrawn its own Parliamentary bill to introduce unexplained wealth orders.
49. The government has dismissed the inquiry's recommendations to criminalise obstruction of justice and abuse of power.
50. The government has appointed a 'committee of experts' and gave it to task to "review" the government's draft changes to the law ostensibly intended to improve the safety of journalists. The committee has rejected the drafts and its alternative recommendations have so far been substantially ignored.

Migration

51. While the rule of law on land is in a state of erosion, the rule of law at sea is effectively inexistent. Whether using its directly held resources or the hired engagement of private assets, the Maltese State is systemically responsible for illegal actions in its area of SAR responsibility. There is consistent evidence of wilful abandonment of souls at sea, delayed rescue operations for the purpose of political negotiations with the authorities of neighbouring countries, unlawful pushbacks including to areas that are unsafe for the persons concerned, unlawful push-forward in breach of international agreements, and systemic denial of even the most basic evaluation of possible eligibility to the recognition of a refugee status.
52. Malta effectively criminalises voluntary rescue at sea.
53. Three young men who were juveniles at the time of their arrest continue to be prosecuted for terrorism because they happened to be the only people able to translate between the language spoken by other migrants travelling with them and the boat that rescued them.
54. On land migrants are treated to extensive periods of detention, erratic access to representation, systemic discrimination, and unsatisfactory conditions of accommodation.