# ELSA MALTA LAW REVIEW

*SEVENTH EDITION*

ELSA Malta
European Law Students' Association


Published in 2020 by
European Law Students' Association Malta
Students' House
University of Malta
Tal-Qroqq
MSD 2080, Malta

mt.elsa.org

Typeset and Cover by Sean Wismayer, Chris Grech, Gabriel DeBono and James Caruana
Printed by Kite Group

ISSN 2305-1949

**ELSA Malta Law Review ©**

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ELSA Malta Law Review – Edition VII

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## FOREWORD

A few months ago I was approached by ELSA Malta's Editorial Board in regard to its publication, the Elsa Malta Law Review (EMLR), which has been going strong for a number of years and indeed seems to go from strength to strength. I accepted, with little hesitation, out of conviction in Student Activism, and also out of conviction that any and all research is to be encouraged and supported.

Student Activism comes in many shapes and sizes. Even if we concern ourselves solely with the Faculty of Laws, it implies that while regular attendance of lectures is important, part of the budding Legal Professional's formation requires not isolating oneself to one's academic studies, and involving oneself in what is going on around them: if there is a seminar being organized, attend it because you just never know who you might meet in the coffee break, or what observation by a member of the panel or a member of the audience might strike a new chord in your mind; once invites to join moot court competitions are published, rise to the occasion not only to hone your skills, but also to mix with your peers and make new friends; you will find it extremely rewarding so put your name forward to join one of the many committees and boards or to represent the students, be of service to your peers too.

ELSA Malta with all its activities, is proof that sufficient Law Students are as active as one can possibly wish, and these people will look back in future years with pride, with many stories to narrate to the future, younger generations. Apart from the fun, they will also benefit personally from the skills they honed, which practical and management skills will serve them very well in future years. They will also undoubtedly make reference to these skills in their C.Vs, and I know from experience that prospective employers will be impressed.

Obviously, writing in early April 2020, we are all operating under the dark cloud of COVID-19, which has put a serious dent into all our activities, student activities included. Just one month ago an ELSA Malta team returned from Lithuania, where they made it to the final moot court round which was to be held this month (April). Who would have imagined what was to happen within weeks? All the conferences, all the events, all plans and preparations were put off indefinitely. A serious disappointment which nobody ever anticipated, because it arrived so quickly, and we have never experienced anything of the sort in our lifetimes. Yet, it goes to prove that life is short, that one must never take tomorrow for granted, and we must not put off things.

Hopefully, life as we knew it will resume relatively soon and we will start meeting in person again, and not just virtually. In the meantime, of course, there is no reason for the reading and research to halt. The libraries may be physically closed, but the internet is alive and kicking and online resources are still available. Our lecture halls may be

empty at the moment, but the online classes are as full as your Dean's Inbox. This is all very positive, and this edition of EMLR adds to it. In these difficult times, the fact that ELSA managed to continue to compile and edit quality articles, and to publish yet another edition of EMLR is definitely to their credit, and to our collective gain. The show must go on, the reading and research must never stop. Since we are compelled to remain indoors, I suggest you take the opportunity to do more reading and research than ever before. COVID-19 apart, once you embark on a legal career, you have entered a world in which knowledge is key: it is the key to winning that court case, it is the basis of the advice you give your coveted client, it is the foundation of the wise judgements and rulings you will one day deliver too.

We never know enough, and we must always keep abreast of developments. We are expected to be on the ball at all times, and we will not be forgiven for not knowing something. Indeed, the common maxim 'ignorance of the law is no excuse' has a more particular meaning for those who operate in the vast, ever-expanding Legal World. It is a fast-paced and competitive world, in which it is not always easy to find time for reading and research. However, it is important that we cater for this and allocate time to it no matter the stage of our legal careers we happen to have arrived at: the Law Student at 20, the legal professional at 40 and the Judge at 60 are all in the same boat and never know enough. I personally put down dates in my calendar, which I leave free under all circumstances, as time to read, to reflect and to absorb, and to write a little bit too despite the Deanship which occupies every waking moment of my day. The contributors to this edition of EMLR obviously did the same, or they would not have concluded and handed in their pieces. They are undoubtedly personally enriched by their research, and we are furthermore enriched by the work which they chose to share with us and for which I for one, am grateful. Keep it up Dear Students no matter your age and the position you hold, combine Activism and research to continue producing and sharing quality articles: it is a win-win formula.

Well done ELSA Malta and its contributors, you do your Faculty proud.

Ivan Mifsud
Dean, Faculty of Laws,
Universita' ta' Malta
4th April 2020

## EDITORIAL

In 2011, the ELSA Malta Law Review was conceived; it was the brainchild of Dr Anna Abela, who was at the time a law student at the University of Malta. A Law Journal edited by students in their final years of studies was a revolutionary concept. Months of toil, late nights and probably far too much coffee, cumulated in the first publication. Since then six more editions were published, each building on the previous years' successes. Most notable was the introduction of peer reviewers in 2012 by Dr Clement Mifsud Bonnici, who was the Editor in Chief at that time.

The fact that each article was subject peer reviewing took the ELSA Malta Law Review to the next level. It elevated the Law Journal from a student edited journal, to one with increased credibility. Peer reviewing ensured that each article gained the approval of at least two experts in the relevant field of law, prior to being published. It ensured a publication that adhered to high standards, one with a two-tiered approval system; first by the student editors and then later by a minimum of two practitioners or academics.

Throughout the last years the ELSA Malta Law Review has enjoyed the support of many in the University Law Faculty. This publication has also gained quite the reputation with both law students and practitioners in the legal field as a reliable and trustworthy source. The significance of this Edition of the ELSA Malta Law Review is that it marks the revival of this highly esteemed publication after three consecutive years during which no EMLR was published. For this we, as Editors in Chief, would like to extend our gratitude to this year's wonderful and hardworking board members, Philip Ellul, Gabriel Debono, Camille Pellicano, Jeanelle Mercieca Grech and Diane Cutajar, to design guru, James Caruana, to all the practitioners and academics that peer reviewed the articles within this publication, to Ganado Advocates for sponsoring the Law Review and making the revival of this publication possible as well as to Dr James Debono for his continuous support and guidance throughout the past year. It is truly humbling to see so many hands' work result in this final version.

This year's EMLR included a wide range of topics, ensuring that it caters for the ever-growing 'family' that law is. Particular effort was made this year to include articles that focused on relatively new legal topics such as Blockchain and Artificial Intelligence in an effort to ensure that they are given the attention that they currently demand. This year's edition includes nine articles and one case study.

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# AN ANALYSIS INTO THE NEWLY AMENDED SEXUAL OFFENCES, WITH SPECIFIC REGARD TO RAPE AND DEFILEMENT OF MINORS

Joanne Attard

**ABSTRACT**

As portrayed through the Istanbul convention, an extensive number of women and girls fall victims to sexual violence in particular rape and defilement of minors. Aiming to increase the protection afforded to such victims of sexual offences, national out-dated provisions have been eliminated from the Criminal Code, Chapter 9 of the Laws of Malta and were replaced by new provisions which mirror today's reality more closely. Such amendments were triggered by the setting up of the Istanbul Convention. As a result of this international instrument, a local Gender-Based Violence and Domestic Violence Act was incorporated; this eventually led to the said amendments. These amendments encompassed most notably a revision of the prosecution procedures and punishments given for each sexual offence, while an emendation to the definitions of such crimes was also accomplished. Specific importance is drawn to gender based violence upon the recognition that women are affected disproportionally by such sexual violence.

**KEYWORDS:** RAPE - SEXUAL OFFENCES - MINORS-DEFILEMENT

# AN ANALYSIS INTO THE NEWLY AMENDED SEXUAL OFFENCES, WITH SPECIFIC REGARDS TO RAPE AND DEFILEMENT OF MINORS

Joanne Attard[1]

## 1. Introduction

This article will briefly discuss the Istanbul Convention[2] and then move on to discuss the amendments made to various legislations such as the Criminal Code, the Civil Code and the Police Act as well as the emergence of the Gender-Based Violence and Domestic Violence Act in 2018. Furthermore, this article will make particular reference to the changes made to the offences of rape and defilement of minors and the implications of such changes. The Council of Europe's Istanbul Convention factsheet of 2016 exposes the expansive occurrence of sexual offences in member states. It illustrates that one in twenty women are victims of rape and one in three women have been victims to sexual violence since the age of fifteen.[3] As a result and in order to protect victims' human rights, international and national legislation emerged, developed or improved, as seen in the engagements by the Council of Europe in 2011 and in the local scenario where various action ensued from 2014 until the amending of legislation in 2018. While these amendments target the need to eradicate gender imbalance and inequality, since most victims of these types of offences are women and most offenders are males, they also pivot around the notion of pledging greater justice to victims while erasing or replacing any out-dated provisions which do not mirror today's reality and society.

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1 Joanne Attard is currently reading for her LLB (Hons). She is in the final year and has developed a special interest in criminal and human rights law. She has also been an intern for the past 2 years at a firm specialising in corporate and financial law.

2 The Council of Europe Convention on preventing and combating violence against women and domestic violence is based on the understanding that violence against women is a form of gender-based violence that is committed against women because they are women.

3 *Istanbul Convention: Combatting Violence Against Women, Fact Sheet* (European Commission 2016) <https://ec.europa.eu/info/sites/info/files/factsheet_istanbul_convention_web_en.pdf> accessed 5 March 2019,1.

## 2. The Istanbul Convention and its Transposition into Maltese Law[4]

The amendments of sexual offence laws in Malta were triggered through the devising of the Istanbul Convention by the Council of Europe in 2011, which was ratified by Malta in May 2014. As the first legally binding European instrument targeting gender-based violence[5], this convention is aimed to prevent and combat violence against women and domestic violence. In fact, its preamble italicises the recognition of women's and girls' exposure to grave forms of violence such as sexual harassment, rape and other types of violence, sexually, psychologically and physically, which lead to a gross violation of the individual's human rights as well as pressing on the existing inequality between men and women.[6] Ergo, this convention formed due to the identification that such sexual offences widely affect women disproportionately and results in a major gender imbalance, arising especially through evidence showing a male predominance of offenders in such crimes. [7]

As a result, this convention is directed towards a harmonised approach in Member States to prevent this violence, protect victims and prosecute perpetrators of gender-based violence and domestic violence. Therefore the necessary amendments of the Criminal Code, Chapter 9 of the Laws of Malta emerged from the need to bring national legislation in line and compliant with the Convention.

In consequence, a local Inter Ministerial Committee was formed to single out the provisions that needed to be changed or improved. By 2015, a list of proposed amendments was presented to the Ministry for Social Dialogue, Consumer Affairs and Civil Liberties who initiated a legislative process in 2016 by presenting a Bill labelled 'Gender-Based Violence and Domestic Violence Bill' which led to the amendments in various legislations such as the Criminal Code, the Civil Code and the Police Act as

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4 *Istanbul Convention: Combatting Violence Against Women, Fact Sheet* (European Commission 2016) <https://ec.europa.eu/info/sites/info/files/factsheet_istanbul_convention_web_en.pdf> accessed 5 March 2019,1.

5 Yanika Pisani, *'Redefining Rape: In Light Of The Istanbul Convention'* (Degree of Bachelor of Laws with Honours, University of Malta 2019), 30.

6 Istanbul Convention, Article 1.

7 Gender Equality Commission (GEC), *'Equal Access of Women to Justice'* (Feasible Study), 28 May 2013, Strasbourg, GEC (2013), page 12.

well as the emergence of the Gender-Based Violence and Domestic Violence Act in 2018.[8]

Determinatively, Article 22 of the aforementioned Act underlines that the convention has become part of the laws of Malta and is in fact reproduced and enforced through the Schedule to the Gender-Based Violence and Domestic Violence Act. In addition, it takes precedence in any inconsistency arising between the rights set out in the convention and those in the national ordinary laws, unless the latter provide more adequate protection and rights to the injured party.[9]

**3. The Gender- Based Violence and Domestic Violence Act**

This act pursued to revise the punishments inscribed in the Criminal Code for the relevant crimes including most notably the punishment of rape, defilement of minors, abduction and prostitution with violence. Additionally, it led to the review of the definitions of such *sui generis* crimes in order to adequately reflect the true realities of these offences. Furthermore, it introduces the power of the Police to institute the proceedings of sexual offences *ex officio* without the need of a complaint from the injured party as it was often being noted that the injured party refrained from instituting proceedings or retracted from proceedings after being instituted often out of fear and shame.[10] Moreover, it led to the reinforcement of the issuing of Protection Orders which can be requested by any party in the proceedings to further protect the victim while a 'multa' would be given in cases of infringement of the order. [11]

As noted by the then Minister for European Affairs and Equality, Helena Dalli at the presentation of the Annual Report of the Commission on Domestic Violence for 2017, this act fortified and created new provisions to further protect victims, prosecute perpetrators harsher and ultimately try to limit the occurrence of sexual offences. It was

8 Ministry for Social Dialogue, Consumer Affairs and Civil Liberties, *'Effective Laws Against All Forms Of Violence - Full Implementation Of The Istanbul Convention - Public Consultation'* (2016).

9 The Gender-Based Violence and Domestic Violence Act, Chapter 581 of the Laws of Malta.

10 Istanbul Convention, Article 55.

11 Vento, 'Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com' (*maltawinds.com*, 2017) <http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading> accessed 6 March 2019.

also enacted to strengthen existing mechanisms for the protection of victims while introducing new strategies.[12]

Conclusively, it is through the incorporation of this Act that further led to the national amendments of the sexual offence laws in the Criminal Code.

**4. General Alterations**

When discussions to amend the sexual offence laws commenced, the initial thinking was to double the term of punishment so that rape offenders can get up to twenty years imprisonment while persons involved in sexual activities with minors can get up to fifteen years of imprisonment, the terms of which can be increased if aggravated.[13] This was however concluded to lead to unnecessary trauma to the victims as the case would have to be tried in court by a trial by jury since the imprisonment sentence would exceed ten years.[14] Yet a general increase in punishment was still invoked in relation to all the sexual offence laws, where some of the terms of punishment were given double the period of imprisonment or even more.[15]

Moreover, the amendments led to the elimination of the solitary confinement tied to the punishments, which were seen as being contrary to the ideology of the rehabilitation of the offender and which in return results in no advantage to the victim, perpetrator or even society.[16] Consequently, the above mentioned act connotes the institution of treatment programmes to support and teach sex-offenders and hence prevent any

12 The Ministry of European Affairs and Equality, 'The Commission On Domestic Violence Assumes A Wider Remit Following The Enactment Of The New Gender-Based Violence And Domestic Violence Act' (2018) <https://meae.gov.mt/en/Pages/Media/Press_Releases/PR181010.aspx> accessed 6 March 2019.

13 Tim Diacono, 'Bill To Clamp Down On Domestic Violence, Rape Tabled In Parliament' *Malta Today* (2016) <https://www.maltatoday.com.mt/news/national/71885/bill_to_clamp_down_on_domestic_violence_rape_tabled_in_parliament_#.XH6s8i2ZNQJ> accessed 5 March 2019.

14 'Criminal Court' (*Judiciarymalta.gov.mt*) <http://judiciarymalta.gov.mt/criminal-court> accessed 6 March 2019.

15 Vento, 'Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com' (*maltawinds.com*, 2017) <http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading/> accessed 6 March 2019.

16 *ibid.*

relapse.[17] Thus, one can note a shift from a punitive ideology to one of rehabilitation and recuperation.

## 5. Rape

### 5.1. Introduction

People's lives, especially those of women, are to-date shaped by the persistent threats of rape. Being a grossly under-reported crime bearing shameful and dehumanising undertones, legislators across various jurisdictions have spurred to improve rape laws by altering them or introducing new articles and provisions in relation to such offence and affording greater justice to rape victims. As a matter of fact, rape laws have been subject to debate and legislative alterations for many years, especially in Europe, where organisations have lobbied for a change in the definition and prosecution of such crime, especially upon the recognition that rape is the crux of sexual violence and gender-based violence across Europe.

### 5.2. Changes in the *Mens Rea* of the Offence

Prior to the 2018 amendments of the Criminal Code, Article 198 defined rape as carnal knowledge achieved through violence. In 2018, the amendments to the definition sought to give more importance to the notion of consent and carnal connection rather than violence and carnal knowledge. This has therefore led to a shift in the formal element of the offence referred to as the *mens rea* or the intention of the offender. Before the amendments, the intention relied on the nexus existing between the violence and carnal connection meaning that the agent must intend both violence and carnal connection and that the carnal connection is the result of violence. Such importance given to the element of violence was also removed from the basis of other sexual offences, such as abduction and violent incident assault, for the same following reasons. In fact the latter offence was renamed as 'non-consensual act of a sexual nature' to extinguish any links with the element of violence.

Through the amendments, the Criminal Code now holds that the crucial element of the *mens rea* is the lack of consent. This connotes the perpetrator's intention of penetrating the victim knowing that she does not consent or else is reckless in finding out whether she consents to the act. This was held by the Court of Appeal in Il-Pulizija vs. Joseph

[17] Istanbul Convention, Article 16(2).

Magro;[18] *'Dan il-kongungiment karnali irid necessarjment isir minghajr il-kunsens tal-vittma'*[19]. Consequently, our law now reflects British common law, which emphasises that the essential element in rape is the lack of consent regardless if any real or presumed violence arises. In fact, according to Smith and Hogan the *mens rea* under English law consists either of the knowledge that the passive subject does not consent, or the awareness that there is a possibility that she does not consent.[20] This was also reflected by Lord Stewart in Barbour v. H.M. Advocate who noted that the lack of consent if critical and not the resistance of the victim due to the violence: 'The important matter is not the amount of resistance put up but whether the woman remained an unwilling party throughout. The significance of resistance is only as evidence of unwillingness'[21]. This perception can be summarised by Peter Western's words; 'Every consent involves a submission but it by no means follows that submission involves consent.'[22]

The UK Sexual Offences Act of 2003 defines consent as the 'freedom and capacity to make that choice.'[23] This means that consent needs to be given by a conscious and mentally capably individual who is able to understand and evaluate the situation and consequences of giving his or her consent.[24] Additionally, Aristotle notes that voluntariness arises when someone chooses something consciously.[25] Determinatively, the new amendments also added a provision in Article 198 regarding this notion in relation to consent. Subsection 3 of Article 198 confirms that consent needs to be given voluntarily and as a result of the person's free will. Assessment of such is done by considering the circumstances the person is in and their emotional and psychological state. Hence, the importance of the element of consent pivots around the notion of a person's sexual liberty and autonomy.

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[18] Criminal Appeal (Inferior), 29th November 2018, Judge Dr Edwina Grima.

[19] Carnal connection has to necessarily occur without the victim's consent.

[20] David Ormerod, *Smith And Hogan's Criminal Law* (13th edn, Oxford University Press 2011), page 716.

[21] Elizabeth Borg, *'Lack Of Consent: A Constitutive Element Of The Offence Of Rape'* (Degree in Doctor of Laws, University of Malta 2010), 16.

[22] *Ibid*, 33

[23] Sexual Offences Act 2003, Chapter 42 Laws of UK, Article 74.

[24] J. H. Bogart, *'Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,' The Yale Journal* 62 (December 1952), page 55-83.

[25] Elizabeth Borg, *'Lack Of Consent: A Constitutive Element Of The Offence Of Rape'* (Degree in Doctor of Laws, University of Malta 2010), page 34.

Nonetheless, the new amendments still acknowledge the notion of violence which is seen as a mode of undermining consent. While in the old law, where it was critical for such element to be present during the act for the offence of rape to arise, in the new law, the element was transferred from the definition of rape in subsection 1 and was introduced as a subsection of its own in subsection 2. This section underlines the elements of force, briery, deceit, deprivation of liberty, improper pressure and threats. Such violence can lead the victim to engage in the sexual act against his own will and the act will therefore still be considered as non-consensual. Accordingly, violence can be used to vitiate consent. In fact, J. H. Bogart advocates that compulsion, threat, force, fear, coercion and other forms of violence lead to non-voluntary behaviour even if consent is given and hence going against Article 198(3) aforementioned. [26]

Nevertheless, judgments are still to date making references and putting emphasises on the element of violence during the offence. This is seen in the latter mentioned case in the Court of Appeal and also in ir-Repubblika ta' Malta vs Omissis[27] where it was noted that *'Id-delitt ta' stupru taht l-artikolu 198 tal-Kodici Penali jikkonsisti essenzjalment f'kongungiment karnali bi vjolenza'*[28]

### 5.3. Changes in the definition of the *Actus Reus* - Carnal Connection

In Maltese law, carnal connection is the *acts reus* which differentiates the offence of rape from the offence of violent indecent assault.[29] Prior to the 2018 amendments, the offence of rape arose in the event of carnal knowledge of a person. Such term is defined in the Black Law dictionary as 'The act of a man in having sexual bodily connection with a woman,' where the term 'carnal knowledge' and the term 'sexual intercourse' are equivalent expressions[30]. This was also exhibited by the court in Il-Pulizija vs. Rhys Fiteni[31] et where it was stated that carnal knowledge exists when there is the penetration

[26] J.H. Bogart, '*Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law,' Canadian Journal of Law and Jurisprudence*, Jan, 1995, Vol.8(1), page 162.

[27] Criminal Court, 11th January 2019, Judge Dr. Consuelo Scerri Herrera.

[28] The offence of rape under article 198 of the Criminal Code must essentially consist of carnal connection with violence.

[29] Criminal Code, Chapter 9 of the Laws of Malta, Article 207.

[30] Black's Law Dictionary – 'Free Online Legal Dictionary' (*The Law Dictionary*) <https://thelawdictionary.org> accessed 6 March 2019.

[31] Court of Magistrates (Criminal Judicature), 10 April 2012, Magistrate Dr. Consuelo-Pilar Scerri Herrera.

of one's genital organ into another's genital organ. It was further reflected in Il-Pulizija vs. Joseph Magro[32] where the court noted *'essenzjalment ir-reat ta' stupru jikkonsisti fil-konġunġiment karnali ċioe l-introduzzjoni jew il-penetrazzjoni ta' l-organu ġenitali ta' persuna fl-organu ġenitali ta' persuna oħra.*[33]' This means that under the old law, the offence of rape would only arise upon the occurrence of vaginal penetration through penial penetration and therefore penetration in any other body part, by any another body part by any other object would not amount to rape but would have resulted in violent indecent assault or defilement of minors in cases were the victims were under eighteen.

The idea of rape only arising from vaginal penetration was entrained by various authors such as Antolisei while others including Manzini wrote about the possibility of anal and oral penetration. However, Manzini still held that penetration has to be one by a genital organ and thus excluded all possibility of penetration by objects or other body parts[34]. Subsequently, it was Manzini's ideology that was applied in the Maltese courts prior to 2018. The Maltese courts however, totally excluded the possibility of oral penetration amounting to carnal connection as seen in Il-Pulizija vs. Douglas James sive Jack Sheddon et.[35] Similarly, the accused in Il-Pulizija vs. Yulian Vasilev Iliev[36] was prosecuted for violent indecent assault[37] as it was proved that vaginal penetration only occurred by means of his finger and penile penetration occurred orally.

Through the new amendments however, other forms of unwanted sexual contact and other forms of sexual assault were included in the definition of rape and the term 'carnal connection' now encompasses anal and oral penetration by other body parts or objects. This parallels with the UK Sexual Offences Act of 2003 which defines the *actus reus* of rape as penile penetration of the vagina, anus or mouth of another person without their consent.[38] Oral penetration in the UK was included as part of the offence of rape

[32] Court of Magistrates (Criminal Judicature), 10 December 2012, Magistrate Dr. Doreen Clarke.

[33] Essentially, the offence of rape consists of carnal knowledge, that is, the introduction or the penetration of the genital organ of one person into the genital organ of the other.

[34] V. Manzini, 'Trattato di diritto penale italiano', VI, Milano-Torino-Roma, (1915), page 529.

[35] Criminal Appeal (Inferior Jurisdiction), 9th May 1959, Judge Dr W. Harding.

[36] Court of Magistrates (Criminal Judicature), 11 September 2013, Magistrate Dr. Doreen Clarke.

[37] Criminal Code, Chapter 9 of the Laws of Malta, Article 207.

[38] Sexual Offences Act 2003, Chapter 42 Laws of UK, Article 1.

on the basis that '... forced oral sex is as horrible, as demeaning and as traumatising as other forms of penile penetration.[39]

**5.4. Change in Punishment**

As evoked in the Istanbul convention, penalties for sexual offences had to be increased. As a result, through the amendments, punishment for this offence became harsher, with the minimum term of imprisonment being increased from three years to six years and the maximum term of imprisonment being increased from nine years to twelve years, if the offence is not aggravated.

The amendments also seek to provide greater justice to the rape victims as in subsection 4 of Article 198, the law holds that in addition to the aforementioned punishment, the offender is bound to restore to the victim any property stolen or obtained by fraud or unlawful gain as a result of the offence. The court may also order the perpetrator to pay the victim an amount equivalent to such loss or for any damages including moral and psychological harm caused by the offence. Such payments can be made in instalments as required by the Convention. The introduction of such damages is paramount as it compensates, partially and to a certain extent, for the torment the victims go through. [40]

**5.5. Advantages of the Amendments**

The change in the definition of carnal connection was a positive one, as it includes all the scenarios victims can be faced with and annihilates any doubts that might arise in court as to whether an act amounts to the offence of rape or not as it encapsulates all forms of intentional and sexual penetrations.

The alteration in the *mens rea* of the offence was also a favourable one. The reason for such change is due to the fact that victims in such situations react and behave differently and a 'one size fits all' approach is inappropriate in such crimes.[41] Studies have shown that rape victims suffer rape-induced paralysis or tonic immobility as they undergo

[39] Elizabeth Borg, 'Lack Of Consent: A Constitutive Element Of The Offence Of Rape' (Degree in Doctor of Laws, University of Malta 2010), page 29

[40] Vento, 'Gender-Based Violence And Domestic Violence Bill Passes To Second Reading - Maltawinds.Com' (*maltawinds.com*, 2017) <http://maltawinds.com/2017/11/08/gender-based-violence-domestic-violence-bill-passes-second-reading/> accessed 6 March 2019.

[41] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), page 23, para 191.

great levels of shock and freeze as a response to the imminent threat and fear they face.[42] Such studies were reinforced by Professor James W. Hopper, a psychology instructor in the Department of Psychiatry of Harvard Medical School, who stated that there is a scientific attribution accrediting to the reason why women show no reaction during such assault.[43] This arises due to a woman's vulnerability and embedded instincts of passivity and submissiveness.[44] This denotes that in such cases, violence would not be necessary for the offence to be perpetrated and that the violence requirement was outdated and contentious *in lieu* of reality and actual human behaviour. Additionally, a substantial number of rape crimes were being left unreported due the latter requirement of proof of violence. This is due to the fact that not all assaults leave physical proof or mark on the victim's body, even if violence was used during the execution of the offence.[45] Moreover, not all rape can result from violence especially when one bears in mind that a significant number of rape offences are consummated by acquaintances.[46] All in all, although the element of consent is harder to prove than the element of violence, this requisite is aimed at preventing or rather minimising the victim's trauma in proving that the assault occurred.

**5.6. Disadvantages of the Amendment**

The major problem with the notion of the lack of consent being the *mens rea* of such sexual offence is being able to establish when the consent has or has not actually been given. Ergo, proving lack of consent during rape is a tougher challenge than proving the presence of violence. This is especially so when the consent given by the victim is not genuine but vitiated by different types of violence as discussed above. There might also be other situations, for example when considering marital rape or date rape, where the parties would have previously participated in consensual sexual activities and hence consent is not asked for before the act as it is often taken for granted in such circumstances. This therefore suggests that the consent given for the performance of

[42] Avigail Moor and others, 'Rape: A Trauma Of Paralyzing Dehumanization' (2013) 22 Journal of Aggression, Maltreatment & Trauma, page 1051-1069.

[43] Yanika Pisani, 'Redefining Rape: In Light Of The Istanbul Convention' (Degree of Bachelor of Laws with Honours, University of Malta 2019), page 33-34.

[44] Ann J. Cahill, *Rethinking Rape* (Cornell University Press, 2001), page 201.

[45] Krista Tabone, 'Kick her while she's down: an exploration of rape myth acceptance amongst the University of Malta student body' (B.PSY(Hons.), University of Malta 2010), CH 5.

[46] Yanika Pisani, 'Redefining Rape: In Light Of The Istanbul Convention' (Degree of Bachelor of Laws with Honours, University of Malta 2019), page 34.

sexual activities, or rather the lack of it, should be assessed on a case by case basis and such cases should not be treated in the same way.[47]

### 6. Defilement of Minors

Children must be afforded the proper safeguards, care and legal protection as a result of their immaturity and vulnerability and this has been recognised both nationally and internationally through the enactment of conventions such as the United Nations Convention on the Rights of the Child, which oblige Member States to transpose such protection in their domestic laws. The Maltese Criminal Code holds a crucial role in such circumstances and therefore, lewd acts of a sexual nature committed on or in the presence of a minor have been continuously subject to amendments as it has nationally been recognised that the weak and vulnerable should be protected since, as Advocate Cerelli Vittori opined, they do not afford the capacity to protect themselves and oppose resistance against other's lustful needs.[48]

Moreover, minors are considered to lack the maturity necessary to consent and participate in such acts. Consequently, they have been protected in this way in our Criminal Code since the first promulgation of the offence in 1885. The provision has over the years been amended mainly to alter its punishment.

#### 6.1. Change in the Age

One of the prime changes detected in the amended laws relating to the defilement of minors is the shift in the definition of a minor from including persons under the age of eighteen to referring to persons under the age of sixteen.[49] This change of wording in Article 203 is a result of the lowering of the age of consent in Malta from eighteen years to sixteen years.

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[47] Elizabeth Borg, 'Lack Of Consent: A Constitutive Element Of The Offence Of Rape' (Degree in Doctor of Laws, University of Malta 2010), page 62-63.

[48] Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 15.

[49] hereinafter referred to as 'minor'

As the word indicates in itself, the age of consent is the age when a person is considered at law to be mature and capable to assent to sexual acts. An array of transnational agreements and conventions, such as the United Nations Convention on the Rights of the Child in Article 1, the Lanzarote Convention in Article 3(b) of its preamble and Article 2 of the EU Directive on Combating the Sexual Exploitation of Children and Child Pornography, define minors as individuals who have not attained the age of eighteen but they also allow member states to determine this at their discretion.

Many continental law jurisdictions pigeonhole any type of sexual offence as being committed against the individual's sexual liberty. This suggests that every person has a right to freely express his sexual inclinations as he deems fit. For this reason, the age of consent in these countries is lower than eighteen as minors of a certain age can be afforded with sexual freedom. Such reasoning was followed in Malta in 2018 when the parliament lowered the age of consent to sixteen.[50]

Such change in the age of consent also resulted from the realisation of the incoherence in the civil and criminal laws. Firstly, Malta's legal age of marriage was sixteen years[51] which begged the question: if an individual who attained the age of sixteen is capable of consenting to marriage, why cannot the same individual consent to perform in sexual relations, especially if sexual relations are crucial for the consummation of the marriage?[52] Another instigator for the lowering of the age of consent was due to the inconsistency in relation to the age of criminal responsibility and the age of consent. Minors between the age of sixteen and eighteen are held to be criminally responsible for their illicit acts.[53] Therefore it is paradoxical to considered a minor of such age to be capable of intending a criminal offence but incapable of consenting to sexual acts.[54] Lastly, one can argue that since the voting age in Malta was lowered to sixteen years in 2018 and thus, such individuals are considered to hold the adequate reason to vote,

[50] Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 17.

[51] Marriage Act, Chapter 255 of the Laws of Malta, Article 3.

[52] Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 17

[53] Criminal Code, Chapter 9 of the Laws of Malta, Article 37(2).

[54] Maria Magro Zammit Fioretino, 'Sexual And Lewd Acts Involving Minors: Suggested Amendments To The Criminal Code' (Degree in Doctor of Laws, University of Malta 2016), page 118

it is inevitable that they also hold the appropriate capacity to consent to sexual acts. As a result of these, if an individual is capable of fully and validly consenting to participate in sexual relations, prosecution of the mature person would be irrational.

**6.2. Punishment**

Furthermore, amendments to the defilement of minors laws centre around a substantial increase to the term of imprisonment given to offenders. One can note that while solitary condiment was eliminated for reasons discussed above, offenders can now be awarded with double the sentence for their offences, or at times even more. For example, in the instance of the performance of lewd acts to defile a minor, the offender's punishment increased from a set maximum of three years to a term ranging from a minimum of four years to a maximum of eight years[55]. Another change materialised in the punishment given to a person who aids and abets with the defilement of the minor which increased from a maximum of two years to a minimum of three years and a maximum of six years.[56]

**6.3. Instituting Proceedings *Ex Officio***

In Article 203 one finds a reflection of the notion of the institution of proceedings *ex officio* by the Police as emanated in The Gender-Based Violence and Domestic Violence Act. While the idea of the proceedings being instituted *ex officio* in cases where the offender is a parent or tutor already existed and continue to be reflected in the new code, Article 203(3) highlights the newly added idea of the continuation of proceedings even if the injured party withdraws their compliant which previously would have terminated the proceedings irrespective of the offender's guilt. [57]Significantly, it is only in such provision that such a conviction was introduced despite the fact that the aforementioned act seeks to include all the sexual offences. In fact, such provision is absent in Article 198.

**6.4. Aggravating Circumstances**

[55] Criminal Code, Chapter 9 of the Laws of Malta, Article 203(1).

[56] *ibid*, Article 203A.

[57] *ibid*, Article 203(3).

The amendments introduced the element of psychological violence perpetrated by the offender in Article 203 (1)(a), a notion absent in the previous Criminal Code. This emanates from Article 28 of the Lanzarote Convention, in which a list of aggravated circumstances is provided for the determination of the offender's punishment. If the offence damages the mental health of the victim, it would be considered as an aggravating circumstance in terms of Article 28(a) of the Lanzarote Convention and in terms of Article 203(1)(a) of the Maltese Criminal Code.

**7. Conclusion**

While it has often been argued that prior to local amendments of the Criminal Code, sexual offence laws were not conceived to protect victims adequately, but rather to hinder the perpetrator's punishment and exacerbate the inequality between male and females, one can contend that such gender imbalance and injustice have been successfully eliminated through the *prima facie* and technical portrayal of the law. However, whether such amendments have had an impact on judgments in the last few months since the amendments came into force is another debatable issue.

Nonetheless, through the amendments of the definitions of the respective sexual offences and of the punitive measures in our Criminal Code, the incorporation of the Istanbul Convention and the development of the Gender-Based Violence and Domestic Violence Act, there is no doubt that we have locally taken the first step towards a justice system which greatly favours sexual offence victims. Women and girls are now supposedly afforded greater protection against their male perpetrators who face serious punishments. While such punishments are more proportionate to the crime than what was set before, they are aimed at minimising the offences as offenders might be deterred by the longer term of imprisonment.

# THE POSSIBLE LEGAL IMPLICATIONS THAT ARTIFICIAL INTELLIGENCE POSES IN THE NEAR FUTURE

Therese Lia

**ABSTRACT**

With artificial intelligence, meaning the development of computer systems to perform tasks that would normally require human intelligence and judgment, now permeating many areas including healthcare, business, education and finance, its regulation has now become more vital. This is especially so in light of the risks it poses and the lack of current legislation dealing with such risks. In light of this, this Article seeks to examine two of the most salient issues which crop up in this regard, those being its personality and accountability. Besides such discussions, the author will also provide recommendations as to how a balance may be struck between not stifling AI innovation and protecting the public from the dangers AI poses. Finally, the author proposes the 'corporation approach' so that AI would be able to own property and be civilly and criminally liable like corporations, whilst ensuring that enough human oversight is present.

**KEYWORDS:** ARTIFICIAL INTELLIGENCE – ACCOUNTABILITY- COMPUTER SYSTEMS

# THE POSSIBLE LEGAL IMPLICATIONS THAT ARTIFICIAL INTELLIGENCE POSES IN THE NEAR FUTURE

Therese Lia[58]

## 1. Introduction

According to the Oxford Dictionary, artificial intelligence is defined as '*the theory and development of computer systems able to perform tasks that normally require human intelligence and judgment, such as visual perception, speech recognition, decision-making, and translation between languages.*'[59] Artificial intelligence is increasingly permeating every aspect of our society including areas such as:

- Healthcare: Examples include chatbots which help customers make appointments; virtual health assistants providing basic medical feedback; and IBM Watson[60] which examines patient data and other available data sources to form a medical hypothesis.

- Business: Machine learning algorithms are being integrated into analytics and CRM platforms [61]to uncover information on how to better serve customers. Furthermore, chatbots have been amalgamated into websites rendering immediate service to customers.

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[59] Dundas Lawyers and +Malcolm Burrows, 'Artificial Intelligence – Introductory Thoughts On The Legal Issues | Brisbane Lawyers | Dundas Lawyers' (*Brisbane Lawyers | Dundas Lawyers*, 2019) <https://www.dundaslawyers.com.au/artificial-intelligence-introductory-thoughts-on-the-legal-issues/> accessed 4 March 2019.

[60] Watson is an IBM supercomputer that combines artificial intelligence (AI) and sophisticated analytical software for optimal performance as a "question answering" machine. ('What Is IBM Watson Supercomputer? - Definition From Whatis.Com' (*SearchEnterpriseAI*, 2019) <https://searchenterpriseai.techtarget.com/definition/IBM-Watson-supercomputer> accessed 4 March 2019.)

[61] Customer relationship management (CRM) is the combination of practices, strategies and technologies that companies use to manage and analyse customer interactions and data throughout the customer lifecycle, with the goal of improving customer service relationships and assisting in customer retention and driving sales. ('What Is CRM (Customer Relationship Management)? - Definition From Whatis.Com' (*SearchCRM*, 2019) <https://searchcrm.techtarget.com/definition/CRM> accessed 4 March 2019.)

- Education: AI can automate grading, assess students, and adapt to their needs, whilst helping them work at their own pace. AI tutors can provide additional support to students, ensuring they stay on track.

- Finance: Personal finance applications, such as Mint or TurboTax, collect personal data and provide financial advice. Other programs such as IBM Watson have been applied to the process of buying a home. [62]

Since AI may be misused or behave in unpredictable and potentially harmful ways, questions on the role of the law, ethics and technology in governing AI systems are more relevant than ever before.[63] Surprisingly, despite its vast use and potential risks, there are few legal provisions governing its use. Moreover, where laws do exist, they typically relate to AI indirectly only; such as the US Fair Lending regulations[64] which require financial institutions to explain credit decisions to potential customers, and which limit the extent to which lenders can use deep learning algorithms. Another example is the EU GDPR[65] rules, which put strict limits on how enterprises can use consumer data, impeding on the training and functionality of many consumer-facing AI applications.[66]

This paper seeks to discuss the future of AI legislation with respect to these two interconnected issues:

A. Personality

B. Accountability

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[62] Margaret Rouse, 'What Is AI (Artificial Intelligence)? - Definition From Whatis.Com' (*SearchEnterpriseAI*, 2019) <https://searchenterpriseai.techtarget.com/definition/AI-Artificial-Intelligence> accessed 4 March 2019.

[63] Corinne Cath, 'Governing Artificial Intelligence: Ethical, Legal And Technical Opportunities And Challenges' (2018) 376 Royal Society Publishing <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6191666/> accessed 4 March 2019.

[64] Equal Credit Opportunity Act (ECOA)/Regulation B and the Fair Housing Act (FHA).

[65] EU General Data Protection Regulation (GDPR) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ 2 119/1

[66] Margaret Rouse, 'What Is AI (Artificial Intelligence)? - Definition From Whatis.Com' (*SearchEnterpriseAI*, 2019) <https://searchenterpriseai.techtarget.com/definition/AI-Artificial-Intelligence> accessed 4 March 2019

The first issue, meaning that of personality, relates to whether artificial intelligence should possess any legal status, and if so, what form this legal status should take - a natural person, a legal person, an animal or an object, or whether a new category should be created for the adequate attribution of its rights and responsibilities in society.

The second issue, that of accountability, is important for whilst artificial intelligence and machine learning algorithms continue to progress in their decision-making processes, they will not always be understandable to human beings, as is what happened in the Google Brain neural net case. Accountability will hence be explored in relation to the fields of civil liability and tort as well as criminal liability.

In Malta a document establishing an ethical framework for AI was published in October 2019 as part of Malta's AI strategy to ensure that AI development is ethically aligned, transparent and socially responsible.[67] In order to have trustworthy AI this document lays out a number of principles which need to be kept in mind;

1) Performance and safety – This includes accuracy, reliability and reproducibility, resilience to attack and security as well as a fallback plan and general safety.
2) Fairness and lack of bias – This includes stakeholder participation as well as accessibility and universal design.
3) Accountability – This centres around auditability, redress, minimization and reporting of negative impacts.
4) Wellbeing – It is important to have sustainable and environmentally friendly AI, with consideration to social impact as well as society and democracy.
5) Explainability and transparency – This includes elements of traceability, explainability and communication.
6) Privacy and data governance – Consideration must be had to privacy and data protection as well as access to data.
7) Human agency – This requires consideration to fundamental rights and human agency as well as an element of human oversight.

**2. Personality**

According to Bertrand Liard, *'We may get to a point where AI is as smart as a human and requests the same rights as people – as dramatized in the late Isaac Asimov's*

[67] Malta AI Taskforce, 'Malta Towards Trustworthy AI' (2019).

*novels.*'[68] In fact, one of the fundamental issues which AI poses, especially in light of its present developments and in light of its future anticipated developments is personality. The issue of personality, which will become more prevalent as technology moves from Soft AI to Hard AI[69], begs the question whether AI should possess any legal status, and if so, what form should this legal status take – that of a natural person, a legal person, an animal or an object, or whether a new category with its own specific features and implications should be created for the attribution of rights and duties.[70]

The issue of personality goes hand in hand with the issue of ownership, as without an established legal personality of some kind, AI cannot own property, or have rights in intellectual property, copyright or patent claims. As it currently stands, AI does not usually have rights in this regard as countries such as France[71] and the UK[72] stipulate that the author or creator must be a human being.[73] This means that if an AI in such countries was an author of some creative work or an inventor, it could not be protected by patents unless some human intervention took place in the process.[74] However, if the legal status of natural persons is granted to AI, it would be able to possess rights in such countries. AI's legal establishment as a natural or legal person would also mean that it could possibly sue or be sued or be a party in legal proceedings.

[68] Nick Ismail, 'The Legal Implications Of 'Creative', Artificial Intelligent Robots' (*Information Age*, 2019) <https://www.information-age.com/legal-artificial-intelligence-123476391/> accessed 4 March 2019.

[69] AI can be categorised as either weak, meaning AI systems designed and trained for a particular task (for example virtual personal assistants such as Apple's Siri), or strong, meaning AI systems with generalised human cognitive abilities.

[70] Mirjana Stankovic and others, 'Exploring Legal, Ethical And Policy Implications Of Artificial Intelligence'.

[71] See Article L111-1 and Article L111-3 of the French Intellectual Property Code 1992.

[72] See the Copyright Designs and Patents Acts 1988, Section 9(1).

[73] On the other hand, United States IP law has granted rights and legal responsibilities to non-human entities, namely corporations and it would thus be possible for AI to possess rights if it is granted the status of a corporation. Similarly, the World Intellectual Property Organization (WIPO)'s definition of intellectual property refers to "creations of the mind" but does not explicitly require that the "mind" be human.

[74] Nick Ismail, 'The Legal Implications Of 'Creative', Artificial Intelligent Robots' (*Information Age*, 2019) <https://www.information-age.com/legal-artificial-intelligence-123476391/> accessed 4 March 2019.

Rothenberg[75] identifies three ways AI could possess legal personality in the context of civil law:

1. Agency Status
2. Legal Corporation Status
3. Natural Person Status

**2.1. AI Recognised as Agents**

This kind of relationship would entail AI conducting deals on behalf of its employer, a relationship which would be governed by agency law of the respective jurisdiction. Weak artificial intelligent robots have already been acting as agents for their principals in numerous industries including as robo-bosses of human employees,[76] robo-guards in prisons[77] and robo-traders in the stock-market.[78]

This agency-employer relationship between AI and their agents has also been the subject of some US cases including, State Farm Mutual Automobile Insurance Company v. Bockhorst[79] and the McEvans v. Citibank, N.A.[80], in which the courts found that the respective companies were liable to a third party for errors caused by their robotic programs. The former case concerned the defendant, an insurance company, whose computer reinstated the plaintiff's insurance policy retroactively. Whilst the defendant argued that the computer error should not bind it, the defendant was still liable for the mistake. Similarly, in the latter case, the defendant was held to

[75] David Marc Rothenberg, 'Can Siri 10.0 Buy Your Home? The Legal And Policy Based Implications Of Artificial Intelligent Robots Owning Real Property.' (2016) 11 Washington Journal of Law, Technology & Arts

[76] 'Meet The New Boss: The World'S First Artificial-Intelligence Manager?' (*Finance.yahoo.com*, 2015) <https://finance.yahoo.com/news/meet-the-new-boss-the-worlds-first-128660465704.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIsDTCfxceXBoHAeKb3w2JPLrbrkIXOnP8LJdtWzhojbDtXgQYGtRRXoYEPAk-fX924IpibYk-YBhHQN9a-lNgvkFkeYIvHFWeWgLqiod9HVUjL53rduE-XGLcYk2YhKGv__g3NivajHSXxfAnYwQjnpZIMVvYAokdWfIT_DIGZl> accessed 4 March 2019.

[77] James Trew, 'Robo-Guard The South Korean Correction Service Robot Says 'Stay Out Of Trouble' (Video)' (*Engadget*, 2015) <https://www.engadget.com/2012/04/15/robo-guard-south-korean-robotic-guard/> accessed 4 March 2019.

[78] Rob Langston, 'Trading In The 21St Century - Raconteur' (*Raconteur*, 2014) <https://www.raconteur.net/finance/trading-in-the-21st-century> accessed 4 March 2019.

[79] *State Farm Mut Auto Ins V Bockhorst* [1972] 10th Cir, 453 F2d (10th Cir).

[80] *McEvans v Citibank* [1972] 10th Cir, 408 NA NYS2d (10th Cir).

be liable for the customer's lost funds, even though it was the ATM machine which made an error. This was because the ATM was acting as the defendant' agent, having the authority to receive money from third parties on the defendant's behalf.

Whilst these cases involved rudimentary robotic tools working for their companies and whilst AI has not yet been formally established as an 'agent', these cases may establish a framework for the future in which robots create duties and liabilities for their agents and in which an error by a robotic tool creates liability for the principal, in the case that no human agent caused the mistake. However, in order for AI to be able to formally act as an agent the definition of 'person' under agency law would need to be updated.[81] Furthermore, the question as to who should be liable if the agent acts fraudulently can be answered by looking at the agency law of the respective jurisdiction.[82]

**2.2. AI operating property in a manner similar to a corporation**

According to Rothenberg, corporations have seven common attributes:

i. They are a legal entity separate and distinguished from their shareholders.

ii. They have the capacity of continued existence independent of the lifetime or personnel of its shareholders.

iii. They have the capacity to contract.

iv. They have the capacity to own property in its own name;

v. They have the capacity to commit torts;

vi. They have the capacity to commit crimes, but only such crimes where criminal intent is not a necessary element of the crime; and

vii. They have the capacity to sue and be sued.

[81] For example Article 1856, Civil Code (1870), Chapter 16 of the Laws of Malta

[82] Maltese agency law can be found in Articles 49-56, Commercial Code (1857), Chapter 13 of the Laws of Malta, as well as Articles 1856-1872, Civil Code (1870), Chapter 16 of the Laws of Malta.

Willick recognises three other essential elements for corporations; that they exist as an organised whole, pursuing a legal interest; that they possess a definite aim and that society must place enough value in the pursued aim to warrant legal protection.[83] Regardless of which approach is taken, artificial intelligence would be able to satisfy all these elements. From this it follows that AI should be granted artificial personhood[84]; in the author's opinion, this should happen when AI possesses certain cognitive abilities, such as when it reaches Type 3 or Type 4.[85]

It is important to note that this approach is limited in some ways. This is because corporations are not as free as natural persons - there is an element of human guardianship which allows dual oversight by both the shareholders and the board. In order to do away with most of this human oversight, another approach would be needed, that is the approach that AI can own property like a human being.

**2.3. AI owning property like natural persons**

The third and most novel idea is that of AI owning property like natural persons. In this third hypothesis, AI may buy as much property as it can afford like any natural person and it would hold the rights and liabilities for it.[86] This approach may be difficult to implement due to the fact that real property law is not simply about ownership, and granting AI the right to own property like a natural person may go against the traditional view of property rights which entails that *'they promote and protect the self-respect and autonomy for individuals*.'[87]

[83] Marshal S. Willick, 'Artificial Intelligence: Some Legal Approaches And Implications' (1983) 4 AI Magazine.

[84] F. Patrick Hubbard, 'Do Androids Dream?: Personhood And Intelligent Artifacts' (2011) 83 Temp. L. Rev.

[85] Present AI has only yet reached the Type 2 Category, possessing memory of past experiences in order to inform their future decisions. Type 3 AI meaning AI with their own beliefs, desires and intentions as well as Type 4 AI involving AI systems with a sense of self and consciousness, do not yet exist.

[86] Gabriel Hellevy, '*"I Robot-1 Criminal" – When Science Fiction Becomes Reality: Legal Liability Of AI Robots Committing Criminal Offences,*' (2010) 22 Syracuse J. Sci & Tech L., 1.

[87] Larry May, 'Corporate Property Rights' (1986) 5 Journal of Business Ethics. Also Article 1 of protocol 1 **ECHR**: "Every natural or legal person is **entitled** to the peaceful enjoyment of his possessions".

However, the author argues that the argument that respect to property is based on respect to human beings should not exclude AI from owning property. This is because in many jurisdictions artificial persons possess the right to own property, despite being artificial persons. Moreover, the creators of AI, like the creators of legal persons, are natural persons.

There are several arguments which can be made in favour of AI owning property like natural persons. Whilst some argue against this hypothesis on the basis of AI's lack of cognitive abilities, this is not true for AI has developed cognitive abilities that are far beyond the minimum mental requirements. In fact, AI researchers tend to see the distinction between AI technology and human brains as merely formal and Dr. Frederick Hayes-Roth maintains that *'The brain is an existence proof for a gargantuan machine that we have yet to build*.'[88]Furthermore, mental capacities or the lack of them should not be a single deciding factor since children and disabled people can own property (with limitations),[89] despite the fact that their cognitive properties are not as developed.

Moreover, despite fears that granting AI the right to own property like natural people would be granting unhindered freedom, there will still be some form of human oversight, even if AI owns property like a natural person. This is because the Government could still oversee the property and it has the ability to seize any property as long as certain factors are met. This means that AI's property could be seized if a danger emerged, as long as AI was provided with just compensation.[90]

Another alternative argument made in favour of AI possessing such autonomy is that cited by Willick.[91] Willick states that in cases of severe injuries suffered by human beings, mechanical parts may be required for the person's loss. These leave his legal status untouched. Thus, in such a way, since a human being does not surrender his right to legal recognition when replacing a human part with a machine, machines should be granted recognition in the same way natural human beings are.

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[88] Technology Review, Jan 1981, p.82

[89] In the UK, a minor under the age of 18 cannot own land or property in the UK, so it would have to be owned in trust by trustees, e.g. parents, for the beneficial ownership of the 13-year-old. Under Maltese law, Article 967 (3) of the Civil Code, cited above, says that certain categories are incapable of contracting (i) Minors (ii) Persons interdicted or incapacitated (iii) Generally all those to whom the law forbids certain contracts. It is to be noted that this does not exclude the right to inherit property however.

[90] Under Maltese law this is found in Article 37 of the Constitution of Malta.

[91] Marshal S. Willick, 'Artificial Intelligence: Some Legal Approaches And Implications' (1983) 4 AI Magazine.

**3. Accountability**

Accountability is important as artificial intelligence and machine learning algorithms will continue to progress in their decision-making processes,[92] but will not always be understandable to human beings. This is because, though knowledge is inserted in machines by humans, machines are taught to think independently and on a scientific level, we may not be able to understand how they come to the decisions they make.[93] One such example is the Google Brain neural net, tasked with keeping its communications private, which independently developed its own encryption algorithm.[94] Realising the fact that AI-equipped computers can make economic, medical, legal and other judgements which may impact on people, Bobrow has stated *'We mustn't give machines authority without responsibility.'*[95]

One such area wherein liability/ accountability as regards to AI will be prevalent, will be in the field of autonomous vehicles. Whilst self-driving cars may seem like a faraway possibility, they are in actual fact a present reality, as autonomous car technology is being developed by the likes of Lexus, BMW and Mercedes, amongst others.[96] In response, four states in the US (Nevada, Florida, California and Michigan), Ontario in Canada, the United Kingdom, France and Switzerland have created rules for the testing of self-driving cars on public roads. However, these laws do not tackle issues about responsibility and assignment of blame for an accident for self-driving and semi self-driving cars[97], and it remains to be seen whether Courts will rely on the principles

[92] Keith Shaw and Editor-in-Chief Keith Shaw, 'Legal And Safety Issues Are Looming Around Ethics, AI And Robots' (*Robotics Business Review*, 2019) <https://www.roboticsbusinessreview.com/events/legal-and-safety-issues-are-looming-around-ethics-ai-and-robots/> accessed 4 March 2019.

[93] 'Artificial Intelligence: The Real Legal Issues - Osborne Clarke' (*Osborne Clarke*, 2017) <https://www.osborneclarke.com/insights/artificial-intelligence-the-real-legal-issues-an-article-by-john-c-buyers-osborne-clarke-llp/> accessed 4 March 2019.

[94] More information about Google Brain can be found on: Tiernan Ray, 'Google Brain, Microsoft Plumb The Mysteries Of Networks With AI | Zdnet' (*ZDNet*, 2018) <https://www.zdnet.com/article/google-brain-microsoft-plumb-the-mysteries-of-networks-with-ai/> accessed 4 March 2019.

[95] N.Y. Times Magazine, Dec. 14, 1980, p. 62.

[96] Curtis Moldrich and Victoria Woollaston, 'Driverless Cars Of The Future: How Far Away Are We From Autonomous Cars?' (*Alphr*, 2018) <https://www.alphr.com/cars/1001329/driverless-cars-of-the-future-how-far-away-are-we-from-autonomous-cars> accessed 4 March 2019.

[97] Some car designs sidestep this issue by staying in autonomous mode only when hands are on the wheel (at least every so often), so that the human driver has ultimate control and responsibility.

of *res ipsa loquitur* to attribute fault to the autonomous vehicle. Another area where revision of legal provisions will become necessary in the face of developing AI is data protection law. This is because AI requires access to data – machines cannot 'learn' unless they have large data sets from which to discern patterns.

### 3.1. Civil and Tort Accountability

The more autonomous AI becomes, the more difficult it may become to hold individual creators liable for their increasingly less foreseeable actions, rendering ordinary rules on liability insufficient. New rules are necessitated in order to determine whether the particular AI is responsible for its acts or omissions, and whether, for policy reasons it would be best for it to bear responsibility or whether it would be best for a strict liability system to be imposed on the creator. If the purpose is to incentivise due care, a strict liability regime backed by insurance may be most efficient.

Current US law traditionally finds liability, where the developer was negligent or could foresee harm. For example, the Court in the US case *Jones v. W + M Automation, Inc*,[98]did not find the defendant liable where a robotic gantry loading system injured a worker as the court found that the manufacturer had abode by regulations. Under US Law, in strict liability claims, it has to be proven that the product which the defendant had sold was defective and unreasonably dangerous at the time it passed on to the plaintiff, without enduring any substantial changes and that such defect was the proximate cause of the plaintiff's injuries. Under negligence claims, the plaintiff would be required to show how the manufacturer failed to exercise reasonable care in making the robot, which he had a duty to exercise – and as a result, the plaintiff suffered damages.[99]

Under the current EU legal framework, robots cannot be held liable per se for acts or omissions that cause damage to third parties. Liability rules cover cases where the cause of the robot's act or omission can be traced back to a specific human agent such as the manufacturer, the owner or the user and where the agent could have foreseen and avoided the robot's harmful behaviour.[100]

Manufacturers, owners or users could be held strictly liable for acts or omissions of a robot if, for example, the robot was categorised as a dangerous object or if it fell within

[98] *Jones v W + M Automation, Inc* [2006] NYS 2d App Div, 818 396 (NYS 2d App Div).

[99] These would be determined by state laws, and there may be variance between states.

[100] Mirjana Stankovic and others, 'Exploring Legal, Ethical And Policy Implications Of Artificial Intelligence'.

product liability rules. Regarding the latter, Council Directive 85/374/EEC[101] can cover damage caused by a robot's manufacturing defects and on condition that the injured person is able to prove the actual damage, the defect in the product and the causal relationship between damage and defect (strict liability or liability without fault).

In the scenario where a robot can make autonomous decisions, traditional rules will not suffice to bring about a robot's liability, since they would not make it possible to identify the party responsible for providing compensation and to require this party to make good the damage it has caused. Thus, despite the Liability for Defective Products Directive[102], current EU law would not suffice to tackle any damage brought about by robots which can learn from their past experiences and which experience the environment in an unforeseeable manner, for this would entail a certain degree of unpredictability in their behaviour.[103] Regarding contractual situations, the traditional contractual provisions will become inapplicable in the face of AI designed to negotiate and conclude contracts.[104]

Difficulties thus lie in the situation present under both US and EU law – which exclude AI bearing responsibility. This is because what if the manufacturer's conduct did not cause the damages in question? What if he exercised reasonable care or did not know what the robot or AI in question was capable of doing? Should liability be strict in such cases or should it rest on the victim?[105] These difficulties are amplified in the field of reinforcement learning, in which there is no fault by humans.[106]

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[101] Liability for defective products [1985] OJ 2 210/29.

[102] *Ibid*

[103] Mirjana Stankovic and others, 'Exploring Legal, Ethical And Policy Implications Of Artificial Intelligence'.

[104] For example, in the Maltese context, elements such as capacity, consent and vices of consent, would be rendered meaningless.

[105] See Section C. Conclusion and Recommendations for proposed solutions.

[106] Reinforcement learning shifts the focus to experience-driven sequential decision-making, rather than pattern recognition, moving AI into making actions in the real world. (Source: David Marc Rothenberg, 'Can Siri 10.0 Buy Your Home? The Legal And Policy Based Implications Of Artificial Intelligent Robots Owning Real Property.' (2016) 11 Washington Journal of Law, Technology & Arts pp. 6).

### 3.2. Criminal Accountability

Whilst a guilty robot appears to be fictional today, there is nothing unrealistic about such a possibility with the on-going technological progress.[107] In fact, CNBC reported an incident involving online 'bots', wherein an automated online shopping bot, set up by a Swiss art group, using its weekly allowance of $100 worth of Bitcoin, to purchase illegal items from the 'dark web'. Whilst the Swiss police confiscated the robot and its illegal purchases, no convictions were made.[108]

Whilst it is true that in cases wherein a robot 'commits' a crime' because it was deliberately programmed to do so, the person behind the robot can be held responsible according to existing criminal law.[109] The issue lies when a robot commits a crime with criminal intent, intent which cannot be traced back to a single programming operation.

In the author's opinion, the viable approaches which can be taken with reference to the notion of guilty robots are the following:

1. The traditional approach to criminal law which excludes the hypothesis that robots can ever be found guilty;
2. The notion that guilty robots may be a possibility if they ever evolve as moral beings;
3. A third route would be to avoid strict liability but to impose functional equivalents, which are free from academic debates pertaining to criminal responsibility but would still ensure that the aim of criminal law is satisfied.

According to existing traditional accounts, robots cannot be made criminally responsible. This, according to Gless, Silverman and Weigend, is due to the fact that they are not conceived as morally responsible agents and they cannot be the addresses of retribution in the form of punishment, meaning they do not have the capacity to understand the concept of punishment.[110]

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[107] Monika Simmler and Nora Markwalder, 'Guilty Robots? – Rethinking The Nature Of Culpability And Legal Personhood In An Age Of Artificial Intelligence' [2018] Criminal Law Forum.

[108] Arjun Kharpal, 'Robot With $100 Bitcoin Buys Drugs, Gets Arrested' (*CNBC*, 2015) <https://www.cnbc.com/2015/04/21/robot-with-100-bitcoin-buys-drugs-gets-arrested.html> accessed 4 March 2019.

[109] Sabine Gless, Emily Silverman and Thomas Weigend, 'If Robots Cause Harm, Who Is To Blame? Self-Driving Cars And Criminal Liability' [2016] SSRN Electronic Journal.

[110] *ibid*.

The reason why traditional criminal law denies the existence of a guilty robot is free will. A robot is not 'a person with free will' and the requirement of *mens rea* in criminal law which requires one to intend or knowingly risk whilst being aware of the consequences, cannot be satisfied for robots. However, it is to be said that this theory is flawed for it is not clear what distinguishes an intelligent system from a criminally responsible human being, and it is to be said that at a certain stage, especially at Level 4, robots will not substantially be different to human beings.[111]

Whilst Gless and Weigend argue that intelligent agents do not meet the criteria to qualify as a person because they are not aware of their freedom and they do not possess the capacity to grasp the concept of rights and obligations, the author contends that free will is a sociological concept, and not a biological one. Hence, it would not be possible to draw the line at which point technology has advanced to such an extent that robots possess such free will, and because of this a new determiner should be used such as a sufficient standard of mental capacity.[112]

Moreover, it cannot be said that criminal responsibility has been limited to human beings, for many legal systems have attributed criminal responsibility to legal persons.[113] Thus, non-human entities are already accepted as subjects of criminal law in many countries[114] and there should be no reason why criminal responsibility of robots cannot develop as a notion. Furthermore, whilst some argue that robots are not punishable this argument is flawed, seeing as legal persons are punished, and seeing as the focus of punishment nowadays is not merely as retribution but also as a form of rehabilitation.[115]

It is to be noted that the development of a robot with criminal responsibility would entail it being recognised as a person under law.[116] If a robot is judicially recognised under a person under criminal law, this means that it could be both the victim and the

[111] Monika Simmler and Nora Markwalder, 'Guilty Robots? – Rethinking The Nature Of Culpability And Legal Personhood In An Age Of Artificial Intelligence' [2018] Criminal Law Forum.

[112] *ibid.*

[113] Muller, 'Roboter Und Recht Eine Einfuhrung' (2014) 5 Aktuelle Juristische Praxis.

[114] Ibid. and T. Weigend, 'Societas Delinquere Non Potest ?: A German Perspective' (2008) 6 Journal of International Criminal Justice.

[115] Mike C. Materni, 'Criminal Punishment And The Pursuit Of Justice' (2013) 2 Br. J. Am. Leg. Studies pp. 263-304.

[116] Jakobs, Staatliche Strafe: Bedeutung und Zweck (2004), pp.40-41

perpetrator of a crime. Boundaries might need to be applied as to which AI would fall under such 'persons' and which AI (for example weak AI) fall out of such a scope.

Regarding functional equivalents of a 'personality', Simmler and Markwalder argue that the postulation of a robot as an 'e-person' can work in civil law but not criminal law. This is because unlike civil law, the function of criminal law is not merely to secure payment of damages, but to create stable expectations in the face of an uncertain future, containing foreseeable unavoidable disappointments.[117]

However, arguing once again on the basis of a comparison to a corporation, through the creation of a new personality for AI, it would be possible to attribute criminal responsibility to it where it is most necessary and where it would be feasible, whilst excluding it from crimes which it could not possibly commit. Whilst imprisoning AI for its wrongdoing may or may not make sense depending on the specific AI in question, like in the case of a corporation, other punishments may be attributed, such as heavy fines, loss of licenses, and so on. The author contends that whilst it may be difficult to fit AI in with the traditional theory of criminal responsibility, it does not mean that AI of a certain mental capacity is to be completely exempt from responsibility.[118]

**4. Reflections and Recommendations**

AI regulation may be hindered by the fact that whilst most technology develops very fast, laws and regulations addressing AI directly are slow. This may be tackled by having legislation which is flexible in interpretation and which provides the space to apply, well-known principles to new concepts.[119]

Choice of law and jurisdiction will definitely play a part in the regulation of the issue.[120] However, since the issue will probably be an international matter, it is suggested by the

[117] Monika Simmler and Nora Markwalder, 'Guilty Robots? – Rethinking The Nature Of Culpability And Legal Personhood In An Age Of Artificial Intelligence' [2018] Criminal Law Forum.

[118] For more details see: Artificial Intelligence and the External Element of the Crime An Analysis of the Liability Problem, Matilda Claussén-Karlsson.

[119] Hélène Beauchemin, 'The Key Legal Issues In AI' (*Stradigi*, 2018) <https://www.stradigi.ai/blog/the-key-legal-issues-in-ai/> accessed 4 March 2019.

[120] Dundas Lawyers and +Malcolm Burrows, 'Artificial Intelligence – Introductory Thoughts On The Legal Issues | Brisbane Lawyers | Dundas Lawyers' (*Brisbane Lawyers | Dundas Lawyers*,

author that an open and accessible task force on AI and ethical and legal issues is employed so as to develop guidelines and protocols on the international stage.[121]

The author further recommends that:

- In questions of both civil and criminal liability, where liability cannot be attributed to the AI agent, Courts should attribute liability to AI as its agent. This would avoid cases wherein no one is held liable, and ensures that the victim is given just compensation. In criminal cases, this can work for the time being for AI is not yet completely independent and unforeseeable and can be linked to its creator.

- As AI becomes more unforeseeable, jurisdictions should pave the way forward to implement the 'corporation approach' in that AI (Type 3 or 4) would be able to own property and be civilly and criminally liable, like corporations. Whilst affording AI a number of rights, this would ensure that AI would be held liable in civil and certain matters, as well as that sufficient human oversight is present.

- The third hypothesis – that AI should have the rights and duties of a human being – should be researched in more detail for the time being with respect to its long-term implications.

- An alternative possibility to solve the accountability problem posed by AI, which might result in accidents and compensation to be paid, is to have a strict liability system, which would be backed by a licensing fund and a certification agency such as Turing Registries[122] or the EU Agency for Robotics and Artificial Intelligence. This solution, which was suggested by the European Parliament Committee on Legal Affairs in its Report on Civil Law Rules on Robotics[123], as well as iTechLaw Conference (2016), would entail an assessment system for robotic devices creating a levy payment which would be necessary for the device to be released into the open market.[124] The

2019) <https://www.dundaslawyers.com.au/artificial-intelligence-introductory-thoughts-on-the-legal-issues/> accessed 4 March 2019.

[121] Keith Shaw and Editor-in-Chief Keith Shaw, 'Legal And Safety Issues Are Looming Around Ethics, AI And Robots' (*Robotics Business Review*, 2019) <https://www.roboticsbusinessreview.com/events/legal-and-safety-issues-are-looming-around-ethics-ai-and-robots/> accessed 4 March 2019.

[122] Curtis E.A. Karnow, 'Liability For Distributed Artificial Intelligences' (1996) 11 Berkeley Technology Law Journal.

[123] 'Civil law rules on robotics', JURI, 2015/2103(INL).

[124] 'Artificial Intelligence: The Real Legal Issues - Osborne Clarke' (*Osborne Clarke*, 2017) <https://www.osborneclarke.com/insights/artificial-intelligence-the-real-legal-issues-an-article-by-john-c-buyers-osborne-clarke-llp/> accessed 4 March 2019.

idea, taken from the New Zealand precedent in the shape of the Accident Compensation Act 1972[125], would be that a fund would be created to enable the payout of compensation in the event a risk transpired. [126]

- Regarding autonomous cars, inspiration may be taken from the UK Government's consultation document on driverless vehicles[127], in which the Government has chosen to address the issue of driverless cars from the perspective of gaps in current insurance coverage caused by fully autonomous driving. This proposal which entails the Motor Insurer Bureau paying out in the usual way and then seeking to recover the losses from the owner of the uninsured vehicle, would avoid a systemic change to the insurance industry in the case of a mixed demographic of driverless cars and human piloted ones. The problem with this proposal would be that it relies on the ability of insurers to subrogate and therefore bring claims of their own against other third parties, including manufacturers, which would prove problematic for insurers if the defect cannot easily be traced.

- In the business field, AI can be improved by having businesses collect more data and collaborating with the Government on figuring out betting regulations in terms of workplace safety in the AI field.[128] Companies should employ AI with the assumption that something will go wrong, so that preventative actions can be taken by business to ensure safety, and evade negligence claims.

- Regarding data protection laws, Governments, especially the EU should carefully assess whether existing data access laws should be updated to reflect the benefits of AI. In the author's opinion, policy frameworks must protect privacy without limiting innovation – this can be done for example through the development of anonymisation techniques. These enable analysis of large data sets without revealing individual

[125] This statutorily settles all forms of personal injury accidents including Road Traffic Accidents and has effectively abolished personal injury litigation in that country

[126] 'Artificial Intelligence: The Real Legal Issues - Osborne Clarke' (*Osborne Clarke*, 2017) <https://www.osborneclarke.com/insights/artificial-intelligence-the-real-legal-issues-an-article-by-john-c-buyers-osborne-clarke-llp/> accessed 4 March 2019.

[127] Pathway to Driverless Cars: Proposals to support advanced driver assistance systems and automated vehicle technologies, Centre for Connected and Autonomous Vehicles, July 2016.

[128] Keith Shaw and Editor-in-Chief Keith Shaw, 'Legal And Safety Issues Are Looming Around Ethics, AI And Robots' (*Robotics Business Review*, 2019) <https://www.roboticsbusinessreview.com/events/legal-and-safety-issues-are-looming-around-ethics-ai-and-robots/> accessed 4 March 2019.

identities. Moreover, to support useful research, governments should provide reasonable latitude in assessing whether data used for AI analysis is within the scope of its original purpose.

- Regard must be had to the principles set out in the 'Malta Towards Trustworthy AI – Malta's Ethical AI Framework, October 2019'[129], which requires that measures are established to ensure traceability, in the design and development phase and the testing and validation phase. AI systems are to be designed with explainability in mind from the outset, by researching and attempting to use the simplest and most interpretable model possible for the application in question, assessing whether it is possible to analyse, change and update training and testing data as well as assessing whether interpretability can be examined after the model's training and development or whether the model's internal workflow can be assessed.

Governments must also ensure the system is auditable, by ensuring that individuals can seek redress, by reporting negative impacts as well as by documenting trade-offs. Redress mechanisms must be established to provide clear information on these to users and affected individuals. A risk or impact assessment of the AI system must be conducted and should include training and education to develop accountability practices. There could also be an 'ethical AI Board' or similar mechanism to discuss overall accountability and ethics practices. Finally, procedures for third parties (e.g. suppliers, consumers, distributors and vendors) or workers must be established so as to report potential vulnerabilities, risks or biases in the AI system.

**5. Conclusion**

The aim of this article was to examine two of the most salient issues concerning AI – namely personality and accountability. The personality aspect is a building block for the accountability issue as the type of legal accountability AI will be subject to will be assessed depending on whether its legal status is that of a natural person, or a legal person, due to the fact that the former deals with the attribution of its rights and responsibilities in society.

As identified by Rothenberg, legal personality can be dealt with in three ways; agency status, legal corporation status or natural person status. Agency law status would entail

[129] Malta AI Taskforce, 'Malta Towards Trustworthy AI' (2019).

looking at the agency law of the respective jurisdiction in order to answer the question as to who should be made liable if the agent acts fraudulently. The corporation approach entails providing AI with artificial personhood which in the authors' opinion should happen when AI possesses certain cognitive abilities, such as when it reaches Type 3 or Type 4. Due to the fact that there is a human element to this, this approach may be more limited than the natural persons approach, wherein AI could buy as much property as it can afford, like any natural person and wherein it would hold the rights and liabilities for it. Such approach would naturally require a more modern interpretation of property law, especially the peaceful enjoyment of their possessions.

This accountability issue, important as AI and machine-learning algorithms continue to progress in their decision-making processes, especially when it comes to self-driving cars and vessels, will need to be tackled both with respect to the civil aspect as well as its criminal aspect. This is especially so in scenarios when it is not possible to identify the party responsible for providing compensation rendering the liability for the *Defective Products Directive*, insufficient. The traditional notion of free will and *mens rea* might need to be revisited with AI; so does the punishment to be doled out if AI could be found criminally responsible.

Accountability for AI depends on the legal personality AI will possess; whether it is viewed as an agent (as it more or less currently stands), whether it is given the rights and duties of a legal corporation or whether it is given the rights and duties of a natural person. Precisely how law and policy will adapt and advance in AI and how AI will adapt to values reflected in law and policy – depends on a variety of social, cultural, economic, and other factors, and is likely to vary by jurisdiction. A balance must be struck between not stifling AI innovation yet also finding a way to protect the general public from the possible danger AI would pose.

# THE EUROPEAN COURT OF JUSTICE'S JUDGMENT IN THE PIP BREAST IMPLANT CASE: AN OCCASION TO DISCUSS THE LIABILITY OF NOTIFIED BODIES

Dr. Jan De Bruyne & Prof. Dr. Cedric Vanleenhove

**ABSTRACT**

This Article discusses the liability of Notified bodies regarding the recent scandal that has arisen with defective silicone breast implants produced by the French company Poly Implant Prothèse (PIP).

**KEYWORDS:** NOTIFIED BODIES - LIABILITY - PIP BREAST IMPLANTS

# THE EUROPEAN COURT OF JUSTICE'S JUDGMENT IN THE PIP BREAST IMPLANT CASE: AN OCCASION TO DISCUSS THE LIABILITY OF NOTIFIED BODIES

Dr. Jan De Bruyne[130] & Prof. Dr. Cedric Vanleenhove [131]

## 1. Preliminary Considerations

This article shall focus on the legal implications of the recent scandal that has arisen with defective silicone breast implants produced by the French company Poly Implant Prothèse (PIP). As a starting point, it is pertinent to note that as from the year 2001, French law obliged manufacturers of breast implants to use one specific type of medical silicone gel for their products. However, PIP failed to comply with this requirement. As part of a deceitful scheme, this company continued to use sub-standard industrial silicone gel implants so as to lower its costs. The impact of PIP's fraud on the manufacturing process was quite disparate. Whereas some implants contained the required medical silicone gel, others held a mixture of medical and industrial silicone gel or only industrial silicone gel. The control on the quality of the breast implants was, therefore, made extremely difficult. After several reports from across the globe on the illicit silicone products produced by PIP, the implants were eventually taken off the market by the French public supervisory agency in early 2010.[132]

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[132] See for an extensive description and discussion of the facts: B. van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 European Journal of Risk Regulation, 339-340; B.M. Fry, 'A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy the Emphatic Failure of Notified Bodies in the Medical Device Industry' (2014) 22 Willamette Journal of International Law & Dispute Resolution, 169-170; J. De Bruyne & C. Vanleenhove, 'Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case' (2016) 24 European Review of Private Law, 834-840.

Indeed, hundreds of thousands of PIP implants filled with sub-standard silicone gel had been distributed around the world. Women who purchased these implants claimed compensation for the harm caused by their (potential) rupture. Lawsuits against the manufacturer PIP were, however, fruitless as the company went bankrupt in 2011. The plaintiffs, therefore, had to seek other targets to obtain compensation for the physical harm or the financial losses they incurred after buying the implants. One of their targets was the product certifier, namely, TüV Rheinland, who had been appointed as the 'notified body' to perform the conformity assessment procedures of the said breast implants. Notified bodies determine whether medical devices meet all the applicable requirements to be marketed in the European Union. TüV had indeed certified the distribution of the implants despite the devices being unsuitable for medical and cosmetic use. A number of victims brought proceedings against certifier TüV Rheinland. Claims were filed against the certifier in different European Union (EU) Member States and the European Court of Justice (ECJ) recently issued a preliminary ruling.

The aim of this article is to examine the legal implications of the recent decision by the ECJ in the PIP case. After a brief discussion of the role of notified bodies under EU law (part 2), the contribution summarises the main findings of the national procedures against TüV Rheinland in Germany and France (part 3).[133] More importantly, the central part of this contribution looks at the judgment by the European Court of Justice in the PIP case (part 4) and examines its implications with regard to the liability of notified bodies (part 5). In the last part, we shall be formulating some concluding thoughts (part 6).

**2. The Conformity Assessment Procedure**

Certifiers are generally those that are responsible to attest that products or services possess certain qualifications or meet particular safety or technical standards.[134] The certification process can take different forms. For instance, third-party certification is performed by organisations which are independent *vis-à-vis* the entity that is manufacturing the products or providing the service. Third-party certifiers establish whether the product complies with the applicable technical and safety standards or

[133] See for an earlier and in-depth discussion: J. De Bruyne & C. Vanleenhove, *'Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case'* (2016) 24 European Review of Private Law, 823-854.

[134] J. Barnett, *'Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?*' (2012) 37 Journal of Corporation Law, 476.

requirements.[135] Most certified products or services bear the certifier's mark to help consumers or other parties make decisions in relation to that particular product.[136] Third-party certifiers provide their services at the request of their client. The certificate they issue is the performance under the certification contract. However, the certificate can and will also be used by people with whom certifiers do not have any contractual relationship or by the public at large. In other words, third-party certifiers moderate informational asymmetries that distort or prevent efficient transactions by providing the public with information it would otherwise not have. This function is so important that one could say that without certifiers 'efficient trade would often be distorted, curtailed or blocked'.[137]

Third-party certifiers provide services in different sectors including the maritime industry (e.g. classification societies) and financial markets (e.g. credit rating agencies). More importantly, certifiers such as TüV Rheinland, SGS or Dekra also play a key role as so-called 'notified bodies' in the conformity assessment procedure of medical devices under EU law. Manufacturers can only place medical devices on the European market when they comply with the 'essential requirements' or 'general safety and performance requirement'.[138] To that end, the manufacturer has to perform a conformity assessment procedure. This assessment is conducted according to the procedures included in sectoral legislation dealing with a particular product.[139] EU legislation often prescribes the conformity assessment procedure that has to be followed by the manufacturer. In some cases, the assessment needs to be carried out by the manufacturer itself. The applicable legislation can also require that an independent

[135] American National Standard Institute, U.S. Conformity Assessment System: 3rd Party Conformity Assessment

[136] NSF International, What Is Third-Party Certification? www.nsf.org/about-nsf/what-is-third-party-certification.

[137] J. Barnett, 'Intermediaries Revisited: Is Efficient Certification consistent with profit maximization?' (2012) 37 Journal of Corporation Law, 476.

[138] See in this regard: Article 3 Council Directive 93/42/EEC of 14 June 1993 concerning medical devices, OJ L 169. Annex I of the Medical Device Directive contains the essential requirements. These requirements deal with the design and manufacture of medical devices to ensure the protection of the health and safety of patients, users and third parties. See also: Article 5 Regulation 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation 178/2002 and Regulation 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, OJ L 117. The article stipulates that a medical device has to meet the general safety and performance requirements set out in Annex I.

[139] See for more information: European Commission, 'Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016', 2016/C 272/01, 65-75.

third-party certifier is involved in the conformity assessment procedure of the product.[140] In this regard, Regulation 2017/745 on Medical Devices ('Medical Device Regulation' – 'MDR') taking effect mid-2020 and Directive 93/42/EEC ('Medical Device Directive' – 'MDD') refer to notified bodies that participate in the conformity assessment procedure of medical devices.

A notified body is an independent entity notified by a Member State's competent authority to assess the conformity of medical devices before being placed on the market.[141] The body determines whether devices meet all the applicable legislative requirements to get the CE marking. This marking is the manufacturer's declaration that a device meets the applicable safety and technical requirements.[142] Member States can choose notified bodies from the entities under their jurisdiction that comply with requirements set out in the MDR or the MDD and the principles laid down in Decision 2008/768.[143]
Notified bodies must operate in a competent, non-discriminatory, transparent, neutral, independent and impartial manner.[144] Manufacturers are free to choose any notified body that has been designated by Member States to carry out the conformity assessment procedure. [145]

Article 11 and Annexes II-VII of the MDD deal with the involvement of notified bodies in the conformity assessment procedure of medical devices.[146] The procedure involves an audit of the manufacturer's quality system and, depending on the classification of

[140] European Commission, 'Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016', 2016/C 272/01, 66-67.

[141] European Commission, 'Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016', 2016/C 272/01, 78.

[142] BSI Notified Body, 'Want to know more about the Notified Body?', medicaldevices.bsigroup.com/LocalFiles/en-GB/Services/BSI-md-notifed-body-guide-brochure-UK-EN.pdf; European Commission, 'Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016', 2016/C 272/01, 58-59.

[143] Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, OJ L 218/82; European Commission, 'Conformity assessment and Notified bodies'.

[144] Article R17 in Decision 2008/768.

[145] European Commission, 'Commission Notice. The 'Blue Guide' on the implementation of EU product rules 2016', 2016/C 272/01, 78.

[146] S.M. Singh, 'Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex-Ante and Ex-Post Regulation' (2013) European Journal of Risk Regulation, 465.

the medical device,[147] a review of technical documentation provided by the manufacturer. Once the notified body has determined that a manufacturer or the latter's devices comply with the applicable criteria, it issues a CE certificate.[148]

The MDR contains similar provisions as the MDD. The classification of devices will determine the conformity assessment procedure a manufacturer has to follow. The conformity assessment procedures for medical devices are further laid down in the Articles 52-60 and Annexes IX-XI of Regulation 2017/745. For medical devices of classes IIa, IIb and III, a notified body needs to be involved in the conformity assessment procedure depending on the risks and class of the device. Following the PIP breast implant scandal, the European Commission issued Recommendation 2013/473/EU on audits and assessments performed by 'notified bodies' in the field of medical devices.[149] The Recommendation contains requirements for conducting unannounced audits and stipulates the obligations for the notified body. Notified bodies already had the possibility to do unannounced audits under the MDD. Recommendation 2013/473 now obliges 'notified bodies' to perform such audits at least once every year. [150]

### 3. The PIP Breast Implant Case and National Procedures in EU Member States

It has already been mentioned that a number of victims brought proceedings against TüV Rheinland alleging that it certified the distribution of the implants despite the devices being unsuitable for medical and cosmetic use. Claims were filed against the certifier in various EU Member States.[151] Although an in-depth discussion of these

[147] The classification of medical devices in the EU is a risk-based system grounded on the vulnerability of the human body taking account of the potential risks associated with the devices (see in this regard Annex IX of the MDD and Annex VIII of the MDR). This approach allows the use of a set of criteria that can be combined in various ways to determine the classification of a device (e.g. duration of contact with the body, degree of invasiveness and local or systemic effect). There are four classes of medical devices, ranging from low risk to high risk: medical devices of class I, IIa, IIb, III. See for more information: European Commission, 'Medical Devices Guidance document. Classification of medical devices', MEDDEV 2. 4/1 Rev. 9, June 2010.

[148] BSI Notified Body, 'Want to know more about the Notified Body?'.

[149] Commission Recommendation 2013/473/EU of 24 September 2013 on the audits and assessments performed by notified bodies in the field of medical devices, OJ L 253/27.

[150] Annex III, Recommendation 2013/473/EU on the audits and assessments performed by notified bodies in the field of medical devices.

[151] B. van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 European Journal of Risk Regulation, 341-344; B.M. Fry, 'A Reasoned Proposition to a Perilous Problem: Creating a Government Agency to Remedy

cases does not fall within the scope of this article,[152] the proceedings in France and Germany illustrate that holding a notified body liable is by no means straightforward.

In France, the Court of Appeal of Aix-en-Provence reversed the first instance decision, which it held to be unfounded.[153] The court concluded that TüV Rheinland complied with its obligations under supranational law. TüV only had an obligation to examine the technical file and not the device itself. There were no elements in the file that should have warned the body that approved silicone products were replaced by other non-approved products. Consequently, it was not at fault and, therefore, not liable.[154] In addition, the MDD provided solely for the possibility to make unannounced visits. There was no obligation to do so. The decision on appeal dismissed the claims brought by foreign distributors of PIP implants, as well as over 3,000 persons who joined the case.[155]

Claims against the certifier in Germany were not successful either. A reason often invoked by the rejecting German courts is that EU law does not require the notified body to investigate specific implants or carry out unannounced inspections on the manufacturing site.[156] The District Court in Frankenthal, for instance, concluded that

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the Empathic Failure of Notified Bodies in the Medical Device Industry' (2014) 22 Willamette Journal of International Law & Dispute Resolution, 169-170; J. De Bruyne & C. Vanleenhove, 'Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case' (2016) 24 European Review of Private Law, 833-834.

[152] See in this regard: J. De Bruyne & C. Vanleenhove, 'Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case' (2016) 24 European Review of Private Law, 834-840.

[153] Commercial Court Toulon, 14 November 2013, n° RG 2011F00517, 2013F00567.

[154] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, 109, 113 & 119 and part II, A), 1/ in "Motifs de la décision" ('Contrairement à ce que prétendent les appelantes personnes physiques, les intimés et intervenantes, il résulte de la directive que lors de l'examen de la demande, l'organisme notifié n'avait pour obligation que d'examiner le dossier technique qui lui était soumis. Aucun élément ne pouvait laisser suspecter que le gel Nusil avait été remplacé par un gel non approuvé […] La société AM a donc respecté les dispositions de la directive dans le cadre de la certification'). This decision can be found on the online legal database Dalloz and is also available at www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085.

[155] Court of Appeal Aix-en-Provence, July 2, 2015, no. 13/22482, part II, B), 1) in "Motifs de la décision" ('Il ne peut donc être reproché à l'organisme certifié de ne pas avoir procédé périodiquement aux inspections prévues à l'article 5.3. de l'annexe II de la directive 93/42/CEE'). This decision can be found on the online legal database Dalloz and is also available at www.doctrine.fr/d/CA/Aix-en-Provence/2015/R544A062AC137538AB085.

[156] See for example: District Court Nürnberg-Fürth, 25 September 2013, 11 O 3900/13.

TüV had not breached its obligations under the MDD.[157] The court ruled *inter alia* that, although the notified body was required to examine the design dossier containing information on the content and design of the breast implants, TüV was not obliged to inspect the actual implants.[158]

The *Oberlandesgericht* (OLG) in Zweibrücken affirmed a first instance decision.[159] Certificates provided by notified bodies constitute a 'Baustein' for manufacturers to show they complied with the requirements in the MDD. Thus, the 'Sinn und Zweck' of the certification was not to protect third parties. Instead, it was only a requisite for the manufacturer to sell the implants on the European market. The purpose of the CE label given to a device is not to provide buyers with a right to claim compensation from a body involved in the conformity assessment procedure.[160] The conformity assessment procedure undertaken by TüV did not create a guarantee that the implants complied with essential requirements in the MDD. The manufacturer of medical devices remains responsible for the quality and safety of his products. Consequently, the manufacturer assumes the risks when the device turns out to be defective and causes injuries to patients.[161]

[157] Landgericht Frankenthal, 14 March 2013, 6 O 304/12, JurionRS 2013, 37376, (2013) Medizin Produkte Recht, 134-138; B. van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 European Journal of Risk Regulation, 343-344.

[158] Landgericht Frankenthal, 14 March 2013, 6 O 304/12, (2013) JurionRS, 37376, (2013) Medizin Produkte Recht, 134-137; B. van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 European Journal of Risk Regulation, 344.

[159] District Court Frankenthal, 14 March 2013, 6 O 304/12, (2013) JurionRS, 37376.

[160] Court of Appeal Zweibrücken, 30 January 2014, 4 U 66/13, (2014) JurionRS, 10232. See for a translation and discussion of the case: W. Rehmann & D. Heimhalt, 'Medical devices: liability of notified bodies?', TaylorWessing, May 2015, united-kingdom.taylorwessing.com/synapse/may15.html.

[161] Court of Appeal Zweibrücken, 30 January 2014, 4 U 66/13, (2014) JurionRS, 10232, Part II, 2. d); B. van Leeuwen, 'PIP Breast Implants, the EU's New Approach for Goods and Market Surveillance by Notified Bodies' (2014) 5 European Journal of Risk Regulation, 344-345; W. Rehmann & D. Heimhalt, 'Medical devices: liability of notified bodies?', TaylorWessing, May 2015.

**4. Ruling of the European Court of Justice**

Because of the public importance of this case and the fact that a number of German courts were dealing with the same issues, the OLG Zweibrücken gave permission to appeal to the German *Bundesgerichtshof* (BGH). On the 9th of April 2015, the BGH referred three questions on the interpretation of the MDD to the European Court of Justice (ECJ).[162] The first question was whether it follows from the objective and intention of the MDD that 'notified bodies' act with the purpose to protect all potential patients or users of breast implants. This would imply that notified bodies may be directly and fully liable towards patients when they negligently perform their obligations. The second question was whether Annex II of the MDD imposes a general or at least a for-cause obligation for the notified body to test the product. The third question concerned the extent to which Annex II of the MDD imposes a general or at least a for-cause obligation on the notified body to view business records of the manufacturer and/or to carry out unannounced audits. [163]

With regard to the second and third question, the ECJ held that a notified body is not under a general obligation to carry out unannounced inspections, to examine medical devices and/or to examine the manufacturer's business records.[164] However, in the face of evidence indicating that a medical device may not comply with the requirements laid down in the MDD, the notified body must take all necessary steps, to ensure that it complies with its obligations under the Directive.[165] Notified bodies must be given an appropriate degree of discretion in view of the stringent requirements they must satisfy under the applicable legislation regarding their independence and scientific expertise.[166] A notified body is not under a general obligation to carry out unannounced inspections, to examine devices and/or to examine the manufacturer's business

[162] BGH, 9 April 2015 - VII ZR 36/14.

[163] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, request for a preliminary ruling from the Bundesgerichtshof lodged on 13 May 2015.

[164] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 38.

[165] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 47-48. These obligations are included in Article 16(6) of the MDD and Sections 3.2-3.3, 4.1-4.3 and 5.1 of Annex II.

[166] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 45.

records.[167] However, they have to act with all due diligence when determining whether the certification may be maintained.[168]

More importantly, the ECJ held that the aim of the MDD is not only the protection of health *stricto sensu* but also the safety of persons. The Directive does not only affect patients and users of devices, but also 'third parties' and 'other persons'. The actual aim of the MDD is to protect end users of medical devices.[169] To that end, the MDD does not only impose obligations on the manufacturer of the device but also on Member States and notified bodies.[170] With regard to the involvement of the notified body in the procedure relating to the EC declaration of conformity,[171] it is apparent from the wording and overall scheme of the MDD that the purpose of that procedure is to ensure protection for the health and safety of persons.[172]

At the same time, however, it does not necessarily follow from the fact that the MDD imposes surveillance obligations on certain bodies or the fact that one of its objectives is to protect injured parties that the Directive also seeks to confer rights on such parties, in the event that those bodies fail to fulfil their obligations. The MDD does not contain any express rule granting such rights.[173] The Directive is also silent regarding the manner in which liability of notified bodies may be incurred. Therefore, it cannot be maintained that the purpose of the MDD is to govern the conditions under which end

[167] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 48.

[168] C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraphs 38-48.

[169] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 50 referring to C-288/08, Nordiska Dental, 19 November 2009, paragraph 29.

[170] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 51.

[171] The EC declaration of conformity is the written statement and the declaration drawn up by the manufacturer to demonstrate the fulfilment of the EU requirements relating to a product bearing the CE marking he has manufactured. See in this regard: www.ce-marking.com/required-content-for-CE-marking-EC-declaration-of-conformity.html.

[172] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 53.

[173] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 55; C-222/02, Paul and Others, 12 October 2004, paragraphs 38-40.

users of devices may be able to obtain compensation for a culpable failure by notified bodies to fulfil their obligations.[174]

In any event, the mere fact that notified bodies are required to take out civil liability insurance without any further information[175] is not sufficient to conclude that the MDD requires Member States to confer on end-users of medical devices, who have suffered injury as a result of culpable failure of notified bodies to fulfil their obligations, a right to turn onto those bodies for compensation.[176] Against this background, the ECJ concluded that the conditions under which a notified body's culpable failure to fulfil its obligations under the procedure relating to the EC Declaration of Conformity may give rise to its liability *vis-à-vis* the end users of medical devices are governed by national law, subject to the principles of equivalence and effectiveness.[177] The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness, or effective judicial protection, obliges domestic Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.[178]

**5. Implications of the PIP Decision on the Liability of 'Notified Bodies'**

The ECJ's ruling in the PIP case thus emphasises the importance of national law with regard to the question whether, and to which extent notified bodies can be held liable. Two elements are briefly discussed in the following paragraphs. On the one hand, we will examine to which extent a notified body might be held liable under Belgian law, taking into account the limitations set out by the ECJ. Belgium is an interesting case study in this regard as third parties have already filed suits against other certifiers such as auditors and classification societies to claim compensation for the damage they

[174] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 56.

[175] See in this regard Section 6 of Annex XI Directive 93/42 on medical devices.

[176] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 57.

[177] C-219/15, *Elisabeth Schmitt v TÜV Rheinland LGA Products GmbH*, 16 February 2017, paragraph 59

[178] Opinion of Advocate General Jääskinen in Case C 536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, 7 February 2013, paragraph 3.

suffered due to the reliance on an incorrect certificate. Moreover, an analysis of Belgian case law might be an added value from a legal comparative approach as well. Based on an analysis of these Belgian cases, the conclusion seems to be that notified bodies might indeed be held liable towards third parties such as women that purchased the defective implants (part 5.1.). On the other hand, some issues of private international law with regard to the liability of notified bodies can also arise. The PIP scandal is a complex case with connections to several countries around the world. The now insolvent company PIP was located in France. Certifier TüV Rheinland, responsible for the conformity assessment of the breast implants, has its seat in Cologne, Germany. Furthermore, women from different nationalities and with various domiciles are affected by the defective and substandard implants. In such multi-jurisdictional cases, the rules of private international law come into play to determine which court or courts have jurisdiction to adjudicate the dispute (part 5.2.).[179]

### 5.1. The Liability of Notified Bodies Under National Law- Belgium as a Case Study

Certifiers, such as notified bodies, can face liability towards third parties under Articles 1382-1383 of the Belgian Civil Code (BCC). These provisions oblige the person who is guilty of a wrongful act that caused damage to someone else to compensate for this harm. Thus, claimants will have to demonstrate the certifier's wrongful act, the harm they suffered and the causal link between both elements.[180] To the authors' knowledge, there have not been any cases against notified bodies in Belgium. Third parties, however, have already filed suits against other certifiers such as auditors and classification societies, in Belgium so as to claim compensation for the damage caused by their reliance on an incorrect certificate. Based on an analysis of these cases, the conclusion seems to be that notified bodies might indeed be held liable towards third parties such as women that purchased the defective implants.

To start with, a third party will have to establish that a certifier committed a wrongful act. The wrongful act can either be a breach of a specific legal rule of conduct or a negligent act, which means a lack of compliance with an unwritten general duty of care.[181] According to the Belgian Court of Cassation (*Cour de Cassation*), the violation

[179] See for an extensive discussion: J. De Bruyne & C. Vanleenhove, 'Liability in the medical sector: the 'Breast-taking' Consequences of the poly implant prothèse case' (2016) 24 European Review of Private Law, 841-845.

[180] M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 248.

[181] H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 89; T. Vansweevelt & B. Weyts, Handboek

of a statutory or regulatory legal rule of conduct committed without a ground of justification is *per se* wrongful. Any form of negligence is thus, not required to be proved in court.[182] The rationale behind this is that a rule prescribing or prohibiting a specific conduct constitutes an autonomous criterion to assess the wrongfulness of a particular act. Indeed, even a reasonable breach of such a rule is wrong.[183] This also means that no foreseeable harm is required to be proved by the plaintiff in the case proceedings.[184] Victims can also claim recovery from the certifier if they prove that the latter's careless behaviour caused the damage. Negligence is generally defined as not taking the amount of care that a normally prudent person would have taken to protect the interests of others.[185]

Classification societies have already incurred third-party liability at several occasions for violating the general duty of care.[186] In these decisions, courts concluded that classification societies do not benefit from the personal immunity of a contracting party's performance agent (*agent d' exécution*).[187] This doctrine developed by the Belgian *Cour de Cassation* implies that an agent performing the contractual duties of a principal can only be liable in tort *vis-à-vis* the contracting party of the principal in

buitencontractueel aansprakelijkheidsrecht (Intersentia, 2009) 125; Court of Cassation, 25 March 2010, AR C.09.0403.N, (2010) Arr. Cass., 920.

[182] Court of Cassation, 10 April 2014, (2015) Revue Générale des Assurances et des Responsabilités, 15206 and (2015) Rechtskundig Weekblad, 338; Court of Cassation, 8 November 2002, (2002) Arr. Cass., 2417; Court of Cassation, 13 May 1982, (1981) Arr. Cass., 1134. See also: M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 250 with further references.

[183] M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 250.

[184] H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 92-93; T. Vansweevelt & B. Weyts, Handboek buitencontractueel aansprakelijkheidsrecht (Intersentia, 2009) 137-138; M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 250.

[185] M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 249.

[186] See for example: Court of Appeal Antwerp, 14 February 1995, (1995) Rechtspraak Haven van Antwerpen, 321-331; Court of Appeal Antwerp, 10 May 1994, (1995) Rechtspraak Haven van Antwerpen, 301-331.

[187] See in general: I. Claeys, Samenhangende overeenkomsten en aansprakelijkheid: de quasi-immuniteit van de uitvoeringsagent herbekeken (Intersentia, 2003) 143-239.

cases where the principal himself could be held liable in tort by his contracting party.[188] Considering the strict requirements for the concurrence of liability in contract and liability in tort between contracting parties in Belgium,[189] a performance agent will most likely not incur such liability. Taking into account that the performance agent cannot be held liable based on the contract between his principal and the latter's co-contractor as the agent is not a party to that contract, Belgian case law and doctrine consider performance agents to be 'immune' from liability towards the contracting parties of their principals.[190]

Courts repeatedly held that by classifying a vessel, classification societies do not perform the ship-owner's contractual obligations. A classification society is not an agent acting on behalf of the shipowner but is considered to be a 'normal' third party. Consequently, they cannot rely on the personal immunity principles developed by the Court of Cassation.[191] There is thus, no legal or procedural barrier preventing co-contractors of the shipowner and the public at large from proceeding in tort against classification societies under Belgian law.[192]

Arguably, the same conclusion applies to notified bodies. Once notified bodies are 'designated' by the authority responsible for notified bodies, they can provide services to the manufacturer during the conformity assessment of medical devices.[193]

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[188] Court of Cassation, 8 April 1983, (1984) Rechtskundig Weekblad, 163; Court of Cassation, 7 December 1973, (1974) Rechtskundig Weekblad, 1597; Court of Cassation, 3 December 1976, (1978) Rechtskundig Weekblad, 1303. The agent is the person to whom a contracting party confides the actual performance of his own contractual duties (H. Cousy & D. Droshout, 'Liability for Damage Caused by Others under Belgian Law' in J. Spier & F.D. Busnelli, Unification of Tort Law: Liability for Damage Caused by Others (Kluwer Law International, 2003) 50.

[189] See in this regard: H. Bocken, 'Samenloop contractuele en buitencontractuele aansprakelijkheid. Verfijners, verdwijners en het arrest van het Hof van Cassatie van 29 september 2006' (2007) 169 Nieuw Juridisch Weekblad, 722-731; I. Boone, 'Samenloop contractuele en buitencontractuele aansprakelijkheid verfijnd' (2006) Nieuw Juridisch Weekblad, 947; E. Dirix, 'Rechterlijk overgangsrecht' (2009) Rechtskundig Weekblad, 1756.

[190] H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 42-44.

[191] See for example: Court of Appeal Antwerp, 14 February 1995, (1995) Rechtspraak Haven van Antwerpen, 321-329.

[192] E. van Hooydonk, Eerste Blauwdruk over de Herziening van het Belgisch Scheepvaartrecht (Maklu, 2011) 195-196.

[193] J. O'Grady, I. Dobbs-Smith, N. Walsh & M. Spencer, Medicines, Medical Devices and the Law (Cambridge University Press, 2011) 7.

Manufacturers are free to enlist the services of any notified body that has been designated to carry out the conformity assessment procedure.[194] The relationship between the notified body and the manufacturer is based on a contract, even though certain notified body's actions might have regulatory authority.[195] This regulatory authority stems from the specific relationship between notified bodies and the national authority responsible for notified bodies. The national authority remains responsible for setting up and carrying out the necessary procedures for the assessment, designation and notification of conformity with assessment bodies.[196] It needs to continuously monitor notified bodies to ensure ongoing compliance with the applicable requirements.[197] The national competent authority can withdraw the notification if it finds that a notified body no longer meets the applicable criteria.[198] Due to this relationship, some argue that a notified body performs delegated regulatory functions.[199] Nevertheless, notified bodies cannot rely on the personal immunity of a performance agent as they do not perform any part of the obligations of the national authority responsible for notified bodies, nor any obligation of the manufacturer of the devices. Whereas the notified body certifies the devices during the conformity assessment procedure, it has been shown that the national authority has other obligations. There is no actual 'delegation' of power but only a 'designation' of a notified body.[200] Notified bodies do not become part of the public administration.[201]

[194] S.M. Singh, 'Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex-Ante and Ex-Post Regulation' (2013) 4 European Journal of Risk Regulation, 465.

[195] J. O'Grady, I. Dobbs-Smith, N. Walsh & M. Spencer, Medicines, Medical Devices and the Law (Cambridge University Press, 2011) 7.

[196] Article 28 Proposal for a Regulation on medical devices, and amending Directive 2001/83/EC, Regulation 178/2002 and Regulation 1223/2009.

[197] Article 35 Proposal for a Regulation on medical devices, and amending Directive 2001/83/EC, Regulation 178/2002 and Regulation 1223/2009.

[198] Article 16 Directive 93/42/EEC concerning medical devices; Article 36 Proposal for a Regulation on medical devices, and amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009.

[199] J. O'Grady, I. Dobbs-Smith, N. Walsh & M. Spencer, Medicines, Medical Devices and the Law (Cambridge University Press, 2011) 7.

[200] Article 34 Proposal for a Regulation on medical devices, and amending Directive 2001/83/EC, Regulation 178/2002 and Regulation 1223/2009.

[201] S.M. Singh, 'Symposium on the EU's New Medical Device Regulatory Framework What Is the Best Way to Supervise the Quality of Medical Devices? Searching for a Balance between Ex-Ante and Ex-Post Regulation' (2013) 4 European Journal of Risk Regulation, 465; S. Frank, 'An

Notified bodies only need to suspend or withdraw certificates when they find that a manufacturer or medical device no longer complies with the essential requirements.[202] Notified bodies also do not perform any part of the manufacturer's obligations. Notified bodies have to remain independent towards the manufacturer during the conformity assessment procedure of medical devices.

It is difficult to match this notified body's independence with the requirement that a performance agent assists or replaces a principal in the performance of the latter's contractual obligations.[203]

Certifiers, such as notified bodies that negligently issue a certificate can thus, violate the general duty of care, potentially leading to their third-party liability. However, there seems to be no consensus on the question relating to 'when' exactly is a certifier deemed to have negligently issued a certificate. In this regard, reference can be made to cases dealing with the liability of classification societies. In the *Paula* case, for instance, the Antwerp Court of Appeal held that a classification society acts negligently when issuing a certificate to a vessel with (major) shortcomings in its construction.[204] This comes close to a so-called *obligation de résultat* (obligation to achieve a given result) and implies that a classification society will act negligently when it certifies a vessel with (major) defects. As such, a classification society that carefully surveys the vessels and subsequently issues the certificate still faces the risk of liability when it later turns out that the ship had (major) shortcomings.[205]

Things were different in the *Spero* case, before the same Antwerp Court of Appeal. The Court of Appeal held that surveyors of the classification society applied insufficient attention and time to the examination of the vessel's (heavily corroded) water pipe. The inability to identify this defect in the construction of the vessel was a professional fault, which also constituted a breach of the classification society's general

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Assessment of the Regulations on Medical Devices in the European Union' (2001) 56 Food & Drug Law Journal, 112.

[202] L. Hancher & M.A. Földes, 'Revision of the Regulatory Framework for Medical Devices in the European Union: The Legal Challenges. Symposium on the EU's New Medical Device Regulatory Framework' (2013) 4 European Journal Risk Regulation, 429.

[203] Article R17 Decision 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, OJ L 218.

[204] Court of Appeal Antwerp, 10 May 1994, (1995) *Rechtspraak Haven van Antwerpen*, 313-317.

[205] J. De Bruyne, 'De aansprakelijkheid van classificatiemaatschappijen in België en enkele (recente) ontwikkelingen en pijnpunten vanuit een rechtsvergelijkend perspectief' (2014) 4 Tijdschrift Vervoer en Recht, 85.

duty of care.[206] Such a wording corresponds with an *obligation de moyen* (obligation to perform to the best of one's ability): a classification society will only be held liable if it negligently surveys and certifies the vessel and not merely because it later turns out that the vessel was defective.[207] Based on this analysis, a judge might thus decide that a notified body can be held liable on two grounds. On the one hand, the notified body might incur liability because it issued a certificate for a medical device that later caused damage regardless of the way in which it performed the conformity assessment procedure (cf. *Paula* case). On the other hand, the notified body might be held liable only when it did not carefully perform the conformity assessment procedure, regardless of the question whether the medical device causes damage after the certification process (cf. *Spero* case).

Another element interesting to examine is the extent to which the certifier's violation of an obligation contained in the certification agreement (the contractual setting) can also lead to liability towards third parties (the extra-contractual setting).

Third parties often suffer damage following a certifier's violation of the certification agreement with the entity that requests for the certification services, such as the manufacturer of the medical devices. For instance, women that purchased PIP breast implants did not have any contract with notified body TüV Rheinland. Nonetheless, those women were victims of TüV's violation of its contractual obligations with the manufacturer Poly Implant Prothèse. In other words, the question arises whether a notified body's violation of the agreement with the manufacturer also constitutes a wrongful act towards third parties for which it can potentially face liability in tort. Pursuant to the doctrine of the *coexistence passive* under Belgian law,[208] the certifier's improper performance of the contract will only lead to its liability towards third parties

[206] Court of Appeal Antwerp, 14 February 1995, (1995) *Rechtspraak Haven van Antwerpen*, 321-329.

[207] J. De Bruyne, 'De aansprakelijkheid van classificatiemaatschappijen in België en enkele (recente) ontwikkelingen en pijnpunten vanuit een rechtsvergelijkend perspectief' (2014) 4 Tijdschrift Vervoer en Recht, 85.

[208] See for more information on the doctrine of *coexistence passive*: H. Vandenberghe, 'Contractuele en delictuele aansprakelijkheid-Co-existentie' (2011) 2 Tijdschrift Privaatrecht, 639-656; A. De Boeck, 'De schade bij samenloop en co-existentie. Een verkenning van de grens tussen contractuele en buitencontractuele schade' in A. De Boecke, I. Samoy, S. Stijns & R. Van Ransbeeck, Knelpunten in het buitencontractueel aansprakelijk- heidsrecht (Die Keure, 2013) 21-54.

on the ground of Articles 1382-1383 BCC if the certifier's behaviour on which the claim is based also constitutes a breach of a general duty of care.[209]

Not every breach of a contractual obligation automatically results in a violation of a general duty of care.[210] However, some contracts can also impose a general duty of care towards third parties, especially when a professional's violation of the contract also endangers the safety of the wider public.[211] In this regard, it has already been mentioned that decisions dealing with the liability of classification societies illustrated that violation of the general duty of care can occur when a certificate has been given to a vessel with major shortcomings in its construction.[212] For instance, the issuance of a certificate to a vessel whose water pipe is heavily corroded is a professional fault (contractual setting), which also constitutes a breach of the society's general duty of care (extra-contractual setting).[213] Therefore, classification societies do not only have a contractual duty of care towards the shipowner under the certification agreement but can also be held to have a general duty of care towards everyone who can be affected by their services. This includes parties to whom classification societies are not contractually bound.[214]

It is conceivable that the same reasoning applies to notified bodies. The violation of a contractual duty of care towards the manufacturer of the devices might thus also constitute a violation of a notified body's general duty of care. This especially seems

[209] Court of Cassation, AR C.08.0546. N, 22 June 2009, (2011-2012) Rechtskundig Weekblad, 1003; Court of Cassation, AR C.12.0079.F, 25 October 2012, (2012) Arr. Cass., 2332 and (2013-2014) Rechtskundig Weekblad, 934; H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 41-42; H. Vandenberghe, 'Contractuele en delictuele aansprakelijkheid-Co-existentie' (2011) 2 Tijdschrift Privaatrecht, 650-651.

[210] H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 42; H. Vandenberghe, 'Contractuele en delictuele aansprakelijkheid-Co-existentie' (2011) 2 Tijdschrift Privaatrecht, 650 with further references; J. Limpens, 'Responsabilité du contractant envers les tiers du chef de la violation du contrat' (1954) Revue de droit international et de droit comparé, 101-102.

[211] An example is the duty of care owed by elevator installers-repairers to third parties: Court of Appeal Ghent, 8 March, 1983, (1986) Rechtskundig Weekblad, 32; Court of Appeal Ghent, 15 May 1995, (1996) Tijdschrift voor aannemingsrecht, 369; H. Bocken, I. Boone with cooperation of M. Kruithof, Inleiding tot het schadevergoedingsrecht (Die Keure, 2014) 42.

[212] Court of Appeal Antwerp, 10 May 1994, (1995) Rechtspraak Haven van Antwerpen, 313-317.

[213] Court of Appeal Antwerp, 14 February 1995, (1995) Rechtspraak Haven van Antwerpen, 321-329.

[214] J. De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives' (2014) 45 Journal of Maritime Law & Commerce, 194.

to be the case when certifiers have a so-called 'public role'. In this regard, Belgian courts already took into account the public role and position of auditors (another type of certifier, next to classification societies and notified bodies) when deciding on their third-party liability.[215] A decision of the Brussels Court of First Instance, for example, focuses on the public role of the auditor[216] to deduct conclusions regarding the latter's liability towards investors. The auditor performs a legal duty, namely the certification of the annual account, for which it has a monopoly. This influences the liability towards third parties.

The auditor does not solely act in the interest of the audited company but also in the interest of the general public. If the auditor issues an unqualified opinion, a third party may assume that the certified accounts comply with the applicable legal provisions and fairly reflect, in all material aspects, the economic position of the company. If it later turns out that the auditor, for whatever reason, fails to make a reservation regarding the annual accounts and by doing so does not draw the attention to bookkeeping irregularities or illegal acts, he commits a wrongful act (*faute*) towards third parties.[217] Arguably, notified bodies also have such a public role. They do not only act in the interest of their clients, the manufacturers of medical devices, but also have to take into account that third parties will rely on certificates to make decisions. Such a public role is not only identified in the applicable legislation[218]but also acknowledged in the ruling of the ECJ in the PIP case.[219]

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[215] See for more information: K. Aerts, Taken en aansprakelijkheden van commissarissen en bedrijfsrevisoren (Larcier, 2002) 62-70; N. Thirion & C. Balestra, 'De burgerrechtelijke aansprakelijkheid van de commissaris' in C. Balestra, L. Dupont, N. Thirion, B. Tilleman & S. Van Dyck, De aansprakelijkheid van de bedrijfsrevisor, (Studies I.B.R., Recht, 2003) 14-17; A. Benoit-Moury, 'Les pouvoirs et les responsabilités des commissaires' (1986) Revue pratique des sociétés, 43; P.A. Foriers & M. Von Keugelgen, 'La responsabilité civile des reviseurs et experts comptables' (1992) 26 Revue de Droit ULB, 43-44; A. Van Oevelen, 'De rol en de civielrechtelijke aansprakelijkheid van de commissaris-revisor' in M. Storme, E. Wymeersch & H. Braeckmans, Handels- economisch en financieel recht (Mys & Breesch, 1995) 273.

[216] The auditor's public role has also been accepted by several scholars: P.A. Foriers & M. Von Keugelgen, 'La responsabilité civile des reviseurs et experts comptables' (1992) 26 Revue de Droit ULB, 21-23; K. Aerts, Taken en aansprakelijkheden van commissarissen en bedrijfsrevisoren (Larcier, 2002) 9-10.

[217] Court of First Instance Brussels, 12 December 1996, (1997) Tijdschrift voor Rechtspersoon en Vennootschap, 41-42.

[218] The Regulation on Medical Devices as well as Recommendation 2013/473 on Unannounced Audits stipulate that the proper functioning of notified bodies is crucial for ensuring a high level of health and safety protection and citizen's confidence in the regulatory system.

[219] See the discussion *infra* in part 4.

With regard to the required causal link between the notified body's wrongful act and the damage incurred by women, in accordance with the generally accepted theory, Belgian law adheres to the doctrine of equivalence of conditions (*théorie d'équivalence des conditions*). Under this theory, a court has to accept causality if it has been established that the fact was necessary in the given circumstances for the damage to occur (the so-called *conditio sine qua non* or 'but for' test).

The fact that *in concreto* was necessary for the harm to occur constitutes a cause even if a later intervening fact was also necessary.[220] The existing cases dealing with the liability of classification societies can be used to examine how the court evaluates causality in the context of certifiers. In the *Spero* case, the causal link between the damage to the plaintiff and the classification society's negligent act was established as the issuance of the class certificate allowed the vessels to be retained in maritime transport.[221] In the *Paula* case, a similar conclusion was reached. The society's negligence and issuance of a certificate made it possible for the shipowner to continue using the vessel for maritime activities. The certificate created a false appearance of safety. The commercial use of the vessel depended on the existence of a class certificate.[222] Against this background, a causal link between a notified body's wrongful act and the harm suffered by women that purchased the defective breast implants can be established to the extent that the issuance of a certificate by the body was a necessary condition for the device to be marketed.[223]

### 5.2. The Liability of the Notified Bodies- Private International Law Aspects

In the European Union, the Brussels I Recast Regulation (also known as the Brussels *Ibis* Regulation) regulates the competence of the EU courts in civil and commercial cases.[224] It has replaced the Brussels I Regulation as of 10 January 2015.[225] The basic

[220] See in this regard: M. Kruithof, 'Tort Law' in M. Kruithof & W. De Bondt (eds.), Introduction to Belgian Law (Kluwer Law International, 2017) 273-275 with references to case law.

[221] Court of Appeal Antwerp, 14 February 1995, (1995) Rechtspraak Haven van Antwerpen, 329.

[222] Court of Appeal Antwerp, 10 May 10 1994, (1995) Rechtspraak Haven van Antwerpen, 314.

[223] See more extensively: J. De Bruyne, Third-party certifiers: an inquiry into their obligations and liability in search of legal mechanisms to increase the accuracy and reliability of certification, Doctoral Dissertation, Ghent University Faculty of Law and Criminology, 2018, 353-361.

[224] Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351.

[225] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12.

rule of the Regulation is included in Article 4 (previously Article 2 Brussels I Regulation): jurisdiction is to be exercised by the EU Member State in which the defendant is domiciled, regardless of his nationality. Pursuant to Article 63.1 Brussels *Ibis* Regulation (previously Article 60.1 Brussels I Regulation), the domicile of companies is located in the place where the corporation has its statutory seat, central administration or principal place of business. In the context of the liability of third-party certifiers, the application of this general ground of jurisdiction in Article 4 Brussels I*bis* Regulation does not pose any great difficulties. In the PIP case, TüV Rheinland falls under the ambit of the Brussels *Ibis* Regulation as it has its domicile within the European Union. The overview of German case law illustrates that the certifier was indeed sued in Germany on the basis of Article 4 as it has its headquarters in Cologne.

In addition to this general ground of jurisdiction, the Brussels *Ibis* Regulation also contains, as did its predecessor the Brussels I Regulation, grounds of special jurisdiction. These grounds make supplementary venues available to prospective litigants. On the basis of Article 7.2 Brussels *Ibis* Regulation (previously Article 5.3 Brussels I Regulation), for instance, tort actions can be brought before the courts of the place in a Member State where the harmful event occurred or may occur. For this ground to apply, it is required that the defendant of the tort claim is domiciled in the EU.

In *Bier*, the European Court of Justice established the rule of the double forum, which states that Article 5.3 Brussels I Regulation (now Article 7.2 Brussels *Ibis* Regulation) grants jurisdiction to the courts of the place where the damage occurred (*locus damni* or *Erfolgsort*), as well as to those of the place of the event giving rise to that damage (*locus acti* or *Handlungsort*).[226]

In other words, under Article 7.2 Brussels *Ibis* Regulation the plaintiff has the choice to bring his case in the courts of the place where the damaging event took place or in the place where the damage was sustained. Contrary to the general ground of jurisdiction, the determination of the place of the damaging event and the place of the damage in terms of Article 7.2 Brussels *Ibis* Regulation is often far more complex when it concerns third-party certifiers.

In this regard, it should be noted that the type of wrongdoing TüV Rheinland has committed is completely different from the one committed by PIP. The latter has produced breast implants filled with an illicit mixture instead of the legally required silicone gel. PIP's actions have caused real damage (in the form of leakages and

[226] C-21/76, Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA, 30 November 1976, paragraph 25.

ruptures) to several women. TüV Rheinland, on the other hand, has allegedly failed to comply with its certification duties as a notified body. Various women have relied – in many cases probably through their doctors – on TüV Rheinland's erroneous certification of the implants when making their decisions. This difference in the inherent nature of the tort has ramifications for the application of Article 7.2 Brussels *Ibis* Regulation.

As to the place of the damaging event, two possible interpretations can be formulated. First, it could be argued that La Seyne-sur-Mer, the commune in France where PIP was located, can be seen as the place of the event giving rise to the damage. After all, TüV Rheinland performed its (very limited) inspections/controls at PIP's factory and it failed to discover PIP's fraud there. On the other hand, TüV Rheinland granted the certification from its offices in Cologne, Germany. It is there that it applied the rules in force to the material findings and subsequently approved the CE marking.[227]

The existence of these two viewpoints is not academic but, on the contrary, rather crucial as it leads to the opening of different fora. In case the first interpretation is followed, victims cannot only litigate in Germany but they can also bring their claims against the German certifier in France. If the second stance is preferred, this option is (at least for the 'place of the damaging event' prong of the double forum test) not available. The plaintiffs can only sue in Germany as TüV Rheinland is located in Cologne and takes its certification decisions there.
The *Tribunal de Commerce* of Toulon, the commercial court for the region in which La Seyne-sur-mer is located, accepted its own jurisdiction by supporting the first way of reasoning. It held that the place where the fabrication of the implants was inspected constituted the place of the damaging event and that this place could totally be separated from the place of subsequent certification and CE authorisation.[228]

As to the place of the damage, it should be remarked that TüV Rheinland's alleged wrongdoing did not cause the harm suffered by the women. Any (past or future) physical damage suffered due to the defective breast implants is a direct consequence of the fraud committed by the French company PIP. The damage sustained by the unfortunate women as a consequence of their own (or their doctors') reliance on TüV Rheinland's assessment and subsequent granting of the CE marking cannot be equated to the damage resulting from the fraudulent use of unauthorised silicone gel. It would,

[227] For a similar analysis in the context of the third-party liability of classification societies, another type of certifier: J. De Bruyne & C. Vanleenhove, 'An EU perspective on the liability of classification societies: selected current issues and private international issues' (2014) 20 Journal of International Maritime Law, 116-117.

[228] Commercial Court Toulon, 14 November 2013, n° RG 2011F00517, n° 2013F00567, 139.

therefore, be incorrect to assert that the damage caused by Tüv Rheinland manifests itself at the place where the adverse physical or other effects of the faulty implants were, or will be felt.[229] Instead, one has to locate the place of the damage resulting from the inadequate inspection and certification. It should be underlined that only places within the European Union will be validated in that regard as Article 7.2 Brussels *Ibis* Regulation only gives jurisdiction to the courts of EU Member States.[230]

Detecting the place where a harmed woman has relied on TüV Rheinland's work seems to require an analysis of the mind of the patient. Such a subjective method of establishing jurisdiction is to be avoided. In the authors' opinion, the connecting factor of the place of the breast implant operation can be put forward as a reasonable alternative. It is there that the woman's reliance culminates and this location also has the benefit of being an easily determinable place. Furthermore, the location will usually coincide with the women's domicile. The place of the operation, therefore, also contributes to the Brussels *Ibis* Regulation's objective of providing predictable jurisdictional rules.[231] Consequently, claims might (still) be filed against certifier TüV Rheinland in those EU Member States where women had the breast implant surgery (e.g. England or Sweden).

The exercise naturally becomes more complex when the affected woman participated in medical tourism, *i.e*. travelling from one country to another with the sole or main objective to obtain medical treatment in that country. It could be said that the reliance in such cases is constant and ubiquitous in the sense that the female patient relies on the certification throughout the whole process. Such a woman has perhaps taken the decision to trust PIP implants – inspired by TüV Rheinland's conformity evaluation and subsequent approval – in her domicile and has continued to rely upon the German certifier's green light during her stay abroad to undergo surgery.

[229] See for a contrasting view on this matter: S. Fulli-Lemaire, 'Affaire PIP: Quelques réflexions sur les aspects de droit international privé' (2015) 1 Revue Internationale de Droit Economique, 117.

[230] It is of course possible (and even highly likely) that the national rules of private international law of the non-EU country provide for a basis of jurisdiction for the courts of that country.

[231] See in this regard Recital (15) of Regulation 1215/2012.

Depending on the circumstances (e.g. the length of the medical stay), the place of the operation as the place of the damage might be too accidental or marginal and thus, warrant a correction.

**6. Concluding Remarks**

Through a discussion of the global PIP breast implant scandal, this article demonstrated the complexity of the liability of notified bodies, both in terms of substantive law, as well as in terms of private international law considerations. The recent European Court of Justice ruling in the PIP case underlines the importance of national law to settle questions surrounding this liability. The article used a Belgian law perspective to attempt to lay bare the most prevalent issues by drawing comparisons with other certifiers such as classification societies and auditors, has shown that the outcome of domestic courts' analysis remains unpredictable. Equally, with regard to the international jurisdiction of courts dealing with similar cases, it remains to be seen how the appropriate grounds of jurisdiction will be interpreted in the future.

# NEW TECHNOLOGIES, NEW LAWS? A CASE STUDY OF ROBOTS AND SOCIAL MEDIA

Dr. Jan De Bruyne* & Prof. Dr. Cedric Vanleenhove**

**ABSTRACT**

This Article discusses the implications of certain new technological developments on legislators and it seeks to answer the question of whether some of the existing long-standing legal principles are compatible with technological evolutions or whether new legislation will need to be adopted.

**KEYWORDS:** SOCIAL MEDIA – TECHNOLOGY - ROBOTS

# NEW TECHNOLOGIES, NEW LAWS? A CASE STUDY OF ROBOTS AND SOCIAL MEDIA

Dr. Jan De Bruyne* & Prof. Dr. Cedric Vanleenhove**

## 1. Introduction

Society has changed tremendously in the last decade. It still is in a transitional phase because of different technological developments. These evolutions affect our way of thinking, doing business, communicating, interaction and the work/life balance. It is, therefore, not surprising that several aspects related to those technological evolutions are increasingly being studied in academia,[232] and addressed by policymakers.[233] The question that arises from a legal point of view is whether some of the existing long-standing legal principles are compatible with technological evolutions or whether new legislation will need to be adopted. In this regard, it is often argued that the law lags

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See in general: R. Brownsword, E. Scotford & K. Yeung, The Oxford Handbook of Law, Regulation and Technology (Oxford University Press, 2017) 1339p.

[233] Reference can be made to the working of the EU High Level Group GEAR 2030. The Group discussed the main challenges for the automobile industry in the next fifteen years and made recommendations to ensure that the relevant policy, legal and public support framework is in place for the roll-out of highly automated and connected vehicles by 2030 (High Level Group on the Competitiveness and Sustainable Growth of the Automotive Industry in the European Union (GEAR 2030), 'Ensuring that Europe has the most competitive, innovative and sustainable automotive industry of the 2030s and beyond', October 2017). The European Parliament has also adopted a resolution on the 16th of February 2017 with recommendations to the Commission on civil law rules on robotics (European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103INL)).

behind technological development.[234] Technological evolutions may expose gaps in the existing legal framework or may give rise to undesirable conflicts and call for changes.[235] We will try to provide an answer to these fundamental issues through a case-study of recent evolutions in two different fields of law, namely the introduction of self-driving cars (SDCs) in the area of liability law (part 2) and the use of social media for notice of court proceedings in the area of procedural law (part 3). We will briefly summarise the main findings of our article in a conclusion (part 4).

## 2. Robots and Self-Driving Cars

A first example that is analysed in this article are autonomous vehicles. The increased use of such vehicles needs to be seen in a broader perspective of robots and artificial intelligence (part 2.1). Once some preliminary considerations have been discussed, we will proceed with an analysis of aspects related to the liability for damage caused by self-driving cars (part 2.2).

### 2.1. The Increased Use of Artificial Intelligence and Robots

Finding an appropriate definition of a 'robot' is not straightforward due to its 'a-technical nature, both from an engineering and a legal point of view'.[236] Professor Calo concludes that a robot is a machine with three qualities: (1) a robot can sense its environment, (2) a robot has the capacity to process the information it senses, and (3) a robot is organised to act directly upon its environment.[237] Defining artificial intelligence (AI) might be even more challenging as there is no consensus on this concept.[238] Artificial intelligence has been the subject of much discussion and has

[234] See for example: B. Moses, '*Agents of Change: How the Law "Copes" with Technological Change'* (2011) 20 Griffith Law Review, 764.

[235] R. Leenes *et al, 'Regulatory challenges of robotics: some guidelines'* (2017) 9 Law, Innovation and Technology, 7.

[236] A. Bertolini, *'Robots as Products: The Case for a Realistic Analysis of Robotic Applications and Liability Rules'* (2013) 5 Law, Innovation and Technology, 219.

[237] R. Calo, *'Robots in American Law',* University of Washington School of Law Research Paper no. 2016-04, 6; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2737598; R. Calo, 'Robotics and the Lessons of Cyberlaw' (2015) 103 California Law Review, 529.

[238] See for more information: A.M. Turing, 'Computing Machinery and Intelligence' (1950) 49 Mind, 433-460.

caused a lot of confusion.[239] AI is an umbrella term comprised of many different techniques[240] and is best understood as a set of techniques aimed at approximating some aspect of human or animal cognition by using machines. In this regard, the concept of machine learning is important. Machine learning implies that a system does not only rely on predefined instructions to determine its behaviour but also on the independent analysis of large amounts of collected data. It refers to the capacity of computer algorithms to automatically learn or improve in performance on a task over time.[241]

Regardless of the precise definition of both concepts, robots are becoming increasingly important in our daily social and professional lives.[242] Collaborative robots or 'CoBots', for instance, have been designed to cooperate and interact with humans in a shared workspace.[243] Prototypes of these robots, such as *RIBA*, can operate in the health sector to perform heavy physical nursing tasks that are normally carried out by humans.[244] Robots have also been used to run hotels[245] or a pharmacy,[246] and even to sell products.[247] They are increasingly being relied upon in the legal profession as well.

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[239] J.N. Kok, *Artificial Intelligence* (EOLSS Publications, 2009) 2.

[240] R. Calo, '*Artificial Intelligence Policy: A Primer and Roadmap'* (2017) 51 U.C. Davis Law Review, 405.

[241] R. Calo, '*Artificial Intelligence Policy: A Primer and Roadmap'* (2017) 51 U.C. Davis Law Review, 405; H. Surden & M.A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars' (2016) 38 Cardozo Law Review, 147.

[242] R. Leenes *et al*, 'Regulatory challenges of robotics: some guidelines' (2017) 9 Law, Innovation and Technology, 2; G. Hallevy, 'Criminal Liability of Artificial Intelligence Entities - From Science Fiction to Legal Social Control' (2010) 4 Akron Intellectual Property Journal, 172.

[243] C. Preimesberger, *'Why CA Technologies is Moving into Collaborative Robotics'*, eWeek, 17 January 2018.

[244] T. Mukai *et al.*, *'Development of a Nursing-Care Assistant Robot RIBA That Can Lift a Human in Its Arms'*, IEEE/RSJ International Conference on Intelligent Robots and Systems, 18-22 October 2010, 5996.

[245] M. Rajesh, *'Inside Japan's first robot-staffed hotel'*, The Guardian, 14 August 2015,

www.theguardian.com/travel/2015/aug/14/japan-henn-na-hotel-staffed-by-robots.

[246] A. Zaleski, *'Behind pharmacy counter, pill-packing robots are on the rise'*, CNBC, 15 November 2016,

www.cnbc.com/2016/11/15/duane-reades-need-for-speed-pharmacy-robots-are-on-the-rise.html.

[247] X, *'Nestlé employs fleet of robots to sell coffee machines in Japan'*, The Guardian, 1 December 2014, www.theguardian.com/technology/2014/dec/01/nestle-robots-coffee-machines-japan-george-clooney-pepper-android-softbank.

Lawyers might to a certain extent be replaced by algorithms,[248] while artificial intelligence applications could be used by judges.[249] Saudi Arabia recently gave robot *SOPHIA* citizenship,[250] while Facebook had to shut down an experiment with robots *BOB* and *ALICE* because they started to develop their own language humans no longer understood.[251] In the Belgian city of Hasselt, the humanoid robot *FRAN PEPPER* has been registered in the birth register.[252] A more prominent example, is the rise of self-driving cars. According to some predictions, autonomous vehicles could already be available within five to twenty years.[253] In sum, we 'are in the midst of a robotics revolution',[254] which is poised to be the next transformative technology.[255]

This increased use of robots will have several advantages. Robots are more accurate and efficient because they are faster and can process information better than humans.[256] As a consequence, they can perform many tasks better than their human counterparts.[257]

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[248] R. Hall, 'Ready for robot lawyers? How students can prepare for the future of law', The Guardian, 31 July 2017, www.theguardian.com/law/2017/jul/31/ready-for-robot-lawyers-how-students-can-prepare-for-the-future-of-law; D. Remus & F.S. Levy, 'Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law' (2017) 30 Georgetown Journal of Legal Ethics, 501.

[249] N. Aletras *et al.*, 'Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective' (2016) 2 PeerJ Computer Science.

[250] C. Weller, 'Meet the first-ever robot citizen — a humanoid named Sophia that once said it would 'destroy humans'', Business Insider, 27 October 2017, www.businessinsider.com/meet-the-first-robot-citizen-sophia-animatronic-humanoid-2017-10.

[251] M. Field, 'Facebook shuts down robots after they invent their own language', The Telegraph, 1 August 2017, www.telegraph.co.uk/technology/2017/08/01/facebook-shuts-robots-invent-language.

[252] ANP, 'Robot in Belgisch geboorteregister', Gemeente.nu, 30 January 2017,

www.gemeente.nu/dienstverlening/burgerzaken/robot-belgisch-geboorteregister.

[253] J.M. Anderson *et al.*, Autonomous Vehicle Technology. A Guide for Policymakers, California, RAND, 2016, 4.

[254] R. Calo, 'Robots in American Law', University of Washington School of Law Research Paper no. 2016-04, 3.

[255] R. Calo, 'Open Robotics' (2011) 70 Maryland Law Review, 571.

[256] S.G. Tzafestas, Roboethics: A Navigating Overview (Springer, 2015) 147.

[257] H.M. Deitel & B. Deitel, Computers and Data Processing: International Edition (Academic Press, 2014) 434. See in this regard, for example, the experiment with supercomputer *WATSON* and the identification of lung cancer cases (I. Steadman, 'IBM's Watson is better at diagnosing cancer than human doctors', Wired, 11 February 2013, www.wired.co.uk/article/ibm-watson-medical-doctor).

Companies from various economic sectors already rely on robots and artificial intelligence applications to decrease costs, generate revenues, enhance product quality and improve their competitiveness.[258] Robots can also have advantages for the specific sector in which they are to be used. Take the example of self-driving cars. Transport will become more time-efficient with autonomous car technology. Self-driving cars will also enable people currently facing restrictions in operating a vehicle – such as the elderly, minors or disabled people – to fully and independently participate in traffic. Traffic will become safer as well. The number of accidents will decrease as computers are generally much better drivers than humans.[259]

At the same time, however, the introduction of robots will present many challenges. These will only become more acute in light of the explosive growth of the robotics industry over the next decade.[260] Robots will have implications on various facets of our society such as the labour market.[261] The commercialisation of robots will pose several challenges from a legal and regulatory point of view as well.[262] Without going into further detail, robots will affect human rights,[263] decision making processes,[264] tax

[258] S.H. Ivanov, 'Robonomics - Principles, Benefits, Challenges, Solutions' (2017) 10 Yearbook of Varna University of Management, 283-285.

[259] J.R. Zohn, 'When Robots Attack: How Should the Law Handle Self Driving Cars That Cause Damages?' (2015) 2 University of Illinois Journal of Law, Technology and Policy, 471; J. Gurney, 'Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles' (2013) 2 University of Illinois Journal of Law, Technology & Policy, 250-252; J.M. Anderson *et al.*, Autonomous Vehicle Technology. A Guide for Policymakers, California, RAND, 2016, xv & 16-17.

[260] R. Calo, 'Robots in American Law', University of Washington School of Law Research Paper no. 2016-04, 3.

[261] D. Acemoglu & P. Restrepo, 'Robots and Jobs: Evidence from US Labor Markets', MIT Department of Economics Working Paper No. 17-04, 17 March 2017; C.B. Frey & M.A. Osborne, 'The future of employment: How susceptible are jobs to computerisation?' (2017) 14 Technological Forecasting and Social Change, 254.

[262] R. Leenes *et al*, 'Regulatory challenges of robotics: some guidelines' (2017) 9 Law, Innovation and Technology, 2.

[263] R. Calo, 'Robots and Privacy', in P. Lin *et al.*, Robot Ethics: The Ethical and Social Implications of Robotics (MIT Press, 2011) 187-203; T.M. Massaro & H. Norton, 'Siri-ously? Free Speech Rights and Artificial Intelligence' (2016) 110 Northwestern University Law Review, 1169.

[264] C. Coglianese & D. Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105 Georgetown Law Journal, 1147.

law,[265] transport law[266] and the law of armed conflicts.[267] More importantly, robots will also raise liability issues as they will inevitably cause damage. The development of robots will affect the current allocation of responsibility between their manufacturers, suppliers of components, owners, users, keepers and/or operators.[268] It has, for instance, been reported that a worker was killed by an industrial collaborative robot at a Volkswagen plant in Germany.[269] In July 2015, a maintenance technician performing routine duties in a factory in Michigan was trapped by robotic machinery and crushed to death.[270] A robot also attacked and injured a man at a tech fair in China.[271] Finally, a surgical robot at a hospital in Philadelphia malfunctioned during a prostate surgery, thereby severely injuring the patient.[272] The next part will show that accidents can also occur with autonomous vehicles.

### 2.2. Liability for Damage Caused by Self-Driving Cars

Vehicles will not suddenly become fully autonomous or self-driving. Instead, technology will gradually take over a user's control over the vehicle. Technology has already partly taken over some of the user's tasks in controlling the vehicle. Examples

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[265] R. Abbott & B. Bogenschneider, 'Should Robots Pay Taxes? Tax Policy in the Age of Automation' (2018) 12 Harvard Law & Policy Review, 145.

[266] B.A. Browne, 'Self-Driving Cars: On the Road to a New Regulatory Era' (2017) 8 Case Western Reserve Journal of Law, Technology & the Internet, 1.

[267] V. Kanwar, 'Post-Human Humanitarian Law: The Law of War in the Age of Robotic Warfare' (2011) 2 *Harvard National Security Journal* 2011, 616

[268] G. Wagner, 'Robot Liability', Paper presented at Münster Colloquium on EU Law and Digital Economy, Liability for Robotics and the Internet of Things, 12 March 2018, 1,

papers.ssrn.com/sol3/papers.cfm?abstract_id=3198764.

[269] G. Nichols, 'Worker death draws attention to next gen collaborative robots', ZD Net, 8 July 2015, www.zdnet.com/article/worker-death-draws-attention-to-next-gen-collaborative-robots.

[270] C. Brennan, 'Michigan woman killed by robot with defect, suit says', New York Daily News, 14 March 2017, www.nydailynews.com/news/national/suit-michigan-woman-killed-robot-defect-article-1.2997763.

[271] X, 'Robots v Humans: AI machine 'attacks' visitor at Chinese tech fair', RT News, 8 November 2016, www.rt.com/viral/367426-robot-attack-china-technology.

[272] United States Court of Appeals for the Third Circuit, *Mracek v. Bryn Mawr Hospital*, 363 Fed. Appx. 925 as reported in T.N. White & S.D. Baum, 'Liability for Present and Future Robotics Technology', in P. Lin *et al*., Robot Ethics 2.0: From Autonomous Cars to Artificial Intelligence (Oxford University Press, 2017) 66-79.

thereof are adaptive cruise control, lane keeping assistance and automatic parking systems. These forms of partial vehicle are covered by the umbrella term Advanced Driver Assistance Systems (ADAS).[273] Vehicles will eventually be able to take persons from one place to another without any human interference.[274] In that case, one can speak of a fully autonomous or driverless vehicle.[275] Today, only prototypes of such vehicles exist. They are currently being tested on the road by companies such as Google and Tesla. [276]

Despite the increased safety as a result of SDCs, road accidents will not suddenly disappear. Autonomous vehicles will share the road with 'regular' non-autonomous cars and other road users during a long transition period. Recent accidents show that the technology used in autonomous vehicles is indeed not entirely flawless. Technological sensors do not work perfectly in exceptional circumstances such as stormy weather or heavy rainfalls. The autopilot sensors of a Tesla car, for instance, were not able to distinguish a white tractor-trailer crossing the highway from the bright sky above, leading to a fatal crash.[277] In February 2016, an autonomous vehicle hit a bus because it did not know that long vehicles are less inclined to stop and give way.[278]

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[273] See for more information: H. Surden & M.A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars' (2016) 38 Cardozo Law Review, 134-135; K. Van Wees, 'Vehicle Safety Regulations and ADAS: Tensions Between Law and Technology' in X, IEEE International Conference on Systems, Man and Cybernetics (The Hague, 2004) 4011-4016.

[274] See for an overview of the technology used in autonomous vehicles: H. Surden & M.A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars' (2016) 38 Cardozo Law Review, 129-150; J.M. Anderson *et al.*, Autonomous Vehicle Technology. A Guide for Policymakers, California, RAND, 2016, 55-74.

[275] H. Surden & M.A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars' (2016) 38 Cardozo Law Review, 132-133.

[276] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 324-371; J. De Bruyne & C. Vanleenhove, 'The Rise of Self-Driving Cars: Is the Private International Law Framework for non-contractual obligations posing a bump in the road?' (2018) 5 IALS Student Law Review, 14-26.

[277] See in this regard: Tesla's Blog, 'A Tragic Loss', 30 June 2016, <https://www.teslamotors.com/blog/tragic-loss.>

[278] See in this regard: N. Bowles, 'Google self-driving car collides with bus in California, accident report says', The Guardian, 1 March 2016, https://www.theguardian.com/technology/2016/feb/29/google-self-driving-car-accident-california.

More recently, several newspapers reported an accident with a Tesla autopilot vehicle, which resulted in the driver's death.[279]

Against this background, the question arises whether the legal framework dealing with the liability for damage caused by SDCs will need a fundamental make-over[280] or instead minor changes might be sufficient. In other words, one has to assess 'whether tort liability rules – as they are currently shaped – are suited to govern the 'car minus driver' complexity, while simultaneously holding on to their theoretical basis'.[281] In any case, some changes to the legal framework will be inevitable. The Belgian Highway Code, for example, is not yet adapted to the introduction of autonomous car technology as it still requires that each vehicle has a 'driver'.[282] The driver must at all times be able to perform the necessary driving actions and must have his vehicle under control.[283] It is conceivable that the situation in other EU Member States will be quite similar. The existing liability rules might also need some changes with the commercialisation of Self Driving Cars. Reliance on fault-based liability will become uncertain in the context of autonomous vehicles. It will, for instance, not be easy to determine who the 'driver' is in an autonomous vehicle and whether he can be held liable for a violation of the law that is actually committed by the vehicle itself (e.g. crossing a red light). Research also showed that it is by no means straightforward to

[279] See for example: D. Hull & T. Smith, 'Tesla Driver Died Using Autopilot, With Hands Off Steering Wheel', Bloomberg Technology, 31 March 2018, https://www.bloomberg.com/news/articles/2018-03-31/tesla-says-driver-s-hands-weren-t-on-wheel-at-time-of-accident; N. Boudette, 'Fatal Tesla Crash Raises New Questions About Autopilot System', New York Times, 31 March 2018, <www.nytimes.com/2018/03/31/business/tesla-crash-autopilot-musk.html>, read on 1 May 2018.

[280] H. Surden & M.A. Williams, 'Technological Opacity, Predictability, and Self-Driving Cars' (2016) 38 Cardozo Law Review, 136.

[281] A. Davola, 'A Model for Tort Liability in a World of Driverless Cars: Establishing a Framework for the Upcoming Technology', 1 February 2018, 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120679.

[282] Art. 8.1. Koninklijk besluit van 1 december 1975 houdende algemeen reglement op de politie van het wegverkeer en van het gebruik van de openbare weg, *Stb*. 9 December 1975 (Highway Code).

[283] Art. 8.3. Highway Code. See in this regard also the decision by the Belgian Court of Cassation, 17 January 1989, (1988) Arr. Cass. 599 & (1989) Verkeersrecht-Jurisprudentie, 181.

hold the user of an autonomous vehicle liable for a negligent act in supervising the technology.[284]

Liability in traffic-related matters will, therefore, evolve from a fault-based mechanism towards forms of strict liability. This means that victims will have to target other parties. There are different alternatives in national law. In Belgium, for instance, a party could sue the custodian of a defective object under Article 1384, first paragraph, of the Belgian Civil Code (BCC). That article imposes a strict liability regime for the custodian of a defective object for the damage caused by that object.[285] Another more interesting possibility is to file a claim against the manufacturer of the vehicles or the software under the EU Product Liability Directive.[286] Article 1 of the Directive stipulates that the producer will be held liable for damage caused by a defect in his product.[287] The question arises whether the Product Liability Directive is adapted to the reality of self-driving cars. In this regard, the GEAR 2030 High Level Group concluded that the motor insurance and product liability directives are sufficient at least for those systems expected by 2020. After that date, however, the application of the Product Liability Directive risks to create a number of problems.[288] Against this background, we will examine whether this framework is inadequate and out of tune with the reality of SDCs by focusing on two elements,[289] namely whether software can be qualified as

[284] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 344-347.

[285] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8. Journal of European Tort Law, 348-354.

[286] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210. See for a discussion of product liability and self-driving cars in the United States: B.W. Smith, 'Automated Driving and Product Liability' (2017) 1 Michigan State Law Review, 1-74; J. Gurney, 'Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles' (2013) 2 University of Illinois Journal of Law, Technology & Policy, 257-277.

[287] Article 1 Product Liability Directive. According to Article 5, a product is defective if it does not provide the safety that a person is entitled to expect, taking all circumstances into account.

[288] High Level Group on the Competitiveness and Sustainable Growth of the Automotive Industry in the European Union (GEAR 2030), 'Ensuring that Europe has the most competitive, innovative and sustainable automotive industry of the 2030s and beyond', October 2017, 43-44.

[289] A. Davola, 'A Model for Tort Liability in a World of Driverless Cars: Establishing a Framework for the Upcoming Technology', 1 February 2018, 2.

product (part 2.2.1) and the moment when the vehicle is put into circulation (part 2.2.2.).[290]

### 2.2.1. Software as a Product?

Article 2 of the Product Liability Directive defines a product as all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. There is a debate on the question whether software qualifies as a product or not. There are several reasons why software cannot be seen as a product. For instance, software might be qualified as a service and not as a product. In addition, the Directive only mentions 'movables'. Therefore, it relates to tangible goods only. It would otherwise make no sense to explicitly include electricity in the scope of the Directive.[291] This requirement is problematic for software products. Software is a collection of data and instructions that is imperceptible for the human eye. A software system is thus, often regarded as intangible. Accordingly, it might not fall within the scope of the Product Liability Act.[292]

At the same time, however, there are also some reasons why software should fall within the scope of the Product Liability Directive. Software might be seen as the *object* of a service. It is, therefore, covered by the Directive. Software can also be qualified as a product because it is captured on a tangible medium or device (e.g. CD-ROM or USB). This has been affirmed by the European Commission.[293] Software *an sich* might be considered as a material good as well. The Directive could apply to software even if it is qualified as an intangible good. After all, the inclusion of electricity clarifies that the drafters of the Directive aimed at a wide material scope. Legislators did not think of software in the early 1980s as personal computers only became commercially widespread during the second half of the 1980s. It is thus, conceivable that software, in a teleological interpretation of the Directive, falls within the scope of the Directive. The European Court of Justice might come to a similar conclusion in the future. The

[290] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 355-364; 367-370.

[291] Article 2 *in fine* Product Liability Directive.

[292] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 355-357.

[293] See in this regard: Written Question no. 706/88 of 5 July 1988 and Answered by Lord Cockfield on behalf of the Commission on 15 November 1988, OJ 114/42, 8 May 1989.

inclusion of software in the Directive would also reflect the current economic reality in which software is a commercial product just as any other product that may entail risks for users and third parties.[294]

### 2.2.2. Putting the Self-Driving Car into Circulation

Pursuant to Article 7(b) of Product Liability Directive, the manufacturer of the product can escape liability when he proves that it is probable that the defect causing the damage did not exist at the time when the product was put into circulation or that this defect came into being afterwards. If software is qualified as a product, any update thereof could be considered an act by which the producer brings a new product into circulation. However, it becomes more difficult with so-called self-learning systems. These systems are not periodically updated but continually improve themselves. For defects that are created in this way, a moment of putting the product into circulation cannot be indicated as the manufacturer did not perform an act to that end. The same reasoning also applies to the liability of the manufacturer of the vehicle. The changes made by a self-learning system and the updates performed by the software producer can create defects for which the car manufacturer is no longer liable. Indeed, those defects did not exist at the time when he put the vehicle into circulation. Although the vehicle meets the definition of a product, its manufacturer might thus, easily escape liability if the damage is caused by a dysfunction in the software. One could argue that Article 7(b) Product Liability Directive should be inapplicable in those circumstances. This makes it possible for victims to file a claim against the manufacturer of the software even when the defect is created through the continuous self-development of the software.[295]

## 3. The Use of Social Media in Service of Process

After some preliminary considerations on the use of social media in services of process (part 3.1), we will describe the current common law trend of effecting service of process through social networking sites (part 3.2). We then give a short overview of how service of process is effectuated in Belgium, as an example of a civil law country (part. 3.3). Finally, having taken note of the service of process framework in Belgium

[294] See for an extensive discussion and further references: J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 355-357.

[295] J. De Bruyne & J. Tanghe, 'Liability for Damage Caused by Autonomous Vehicles: a Belgian Perspective' (2018) 8 Journal of European Tort Law, 362-363 & 370.

and the absence of social media as a form of acceptable notice, we reflect on the possible introduction of such service within that jurisdiction (part 3.4).

### 3.1. Preliminary Considerations

Imagine you open the Facebook Messenger app and you see the new message notification. It is a message informing you that you have been sued and that you are to appear in court as defendant in a family law case involving proof of paternity. Or: you are browsing through Instagram when you suddenly receive a DM (Direct Message). There is a lawsuit pending against you. You have been served in an insurance matter through the DM. Or: you often use LinkedIn to keep track of your contacts' occupations and achievements. One day your LinkedIn inbox indicates that you have a new message. The LinkedIn message contains a summons and a claim form. A foreign company is taking you to court for trademark infringement. Are these scenarios of the future? Think again! These situations have actually taken place in the last decade in Australia[296], Canada[297] and the United States of America[298] respectively.

In a number of common law jurisdictions around the world, courts have allowed plaintiffs to notify the defendant of the commencement of legal proceedings (*i.e.* service of process) through the use of social networking platforms. The list of social media is long but the ones most often used for service of process are Facebook, Twitter, LinkedIn, and Instagram. When mentioning this relatively recent line of private law cases to lawyers with civil law backgrounds, reactions ranging from mild amused surprise to utter shock and disgust can be observed. In civil law nations effecting service of process through social media is completely unknown.[299] Whereas the use of e-mail for service purposes seems to have become increasingly more well established, the use of social media as an avenue for notification of the commencement of proceedings appears to be in a whole different ballpark. As such, scholars in continental

[296] Federal Magistrates Court of Australia, Byrne & Howard, 21 April 2010, [2010] FMCAfam 509.

[297] A report of the case is available here: A. Robinson, 'Toronto lawyer serves claim with Instagram', 2 February 2018, <http://www.canadianlawyermag.com/legalfeeds/author/alex-robinson/toronto-lawyer-serves-claim-with-instagram-15294/>.

[298] United States District Court, Eastern District of Virginia, Alexandria Division, WhosHere, Inc. v. Gokhan Orun, 20 February 2014, 2014 WL 670817.

[299] There is, to our knowledge, only one example where social media were used in the transmission of judicial documents. In order to initiate Dutch court proceedings Stichting BREIN (Bescherming Rechten Entertainment Industrie Nederland) served the Pirate Bay (a website registered in Sweden) through Twitter and Facebook, in addition to the conventional methods of service (Rechtbank Amsterdam, 30 July 2009, no. 428212 / KG ZA 09-1092 WT/RV).

EU Member States (by which we refer to those EU countries that belong to the civil law tradition) have not yet addressed this relatively new development within the common law world. This is unfortunate, as getting insight into the practice might prove valuable for enhancing our own service rules. This contribution, therefore, undertakes an analysis of the reported cases to subsequently contemplate on a general level whether social media service will ever form part of the service methods on the EU continent.

### 3.2. Social Media Service: a Common Law phenomenon

As mentioned, common law countries are the laboratory in which service through social media platforms has been allowed to flourish. After a brief discussion of the origin of the use of social media in service of process (part 3.2.1.), we will examine the conditions laid down by the case law more thoroughly (part 3.2.2.).

#### 3.2.1. Emergence

The actual cradle of social media service is to be situated in Australia (at least judging by the reported cases). The ball began rolling with a case between a mortgage provider and a couple that no longer made its repayments.[300] In *MKM v. Corbo & Poyser* the defendants had taken out a home refinancing loan with MKM Capital but had failed to keep up with payments. They did not respond to emails from MKM's attorneys and did not appear in court. MKM obtained a default judgment permitting seizure of the property. Before the judgment could be executed it had to be served on the defendants. However, defendants had moved away, had switched jobs and had changed their phone numbers. Repeated efforts at personal service as well as service by mail and publication did not lead to the desired result. MKM therefore made the ground-breaking move of seeking permission to effect service through the defendants' Facebook accounts. The lawyers had handily located both defendants on the biggest social networking site. To that end they used the personal information the couple had supplied themselves during the loan application process. They were able to link the defendants' date of birth and their email addresses to the Facebook profiles (which were, fortunately for the plaintiff, not protected by stringent privacy settings). Furthermore, they found that both defendants were friends on Facebook. Master Harper of the Supreme Court of the Australian Capital Territory therefore gave plaintiff MKM the green light to inform defendants of the entry and terms of the default judgment via a private Facebook

[300] Supreme Court of the Australian Capital Territory, *MKM Capital Pty Ltd. v. Corbo & Poyser*, 16 December 2008, case no. SC 608, text on file with the authors.

message. In addition, the order had to be served via e-mail and by leaving a sealed copy at their last known address.

Although the germ of social media service lies Down Under, the current centre of gravity for this rather contentious method of service has arguably shifted to the United States. The first approval by an American court came in the case of *Jessica Mpafe v. Clarence Mpafe*.[301] A wife wished to divorce her husband but it was believed he had left the territory of the United States.[302] She had a suspicion that he had moved back to Ivory Coast. As she had no physical address for her soon-to-be ex-husband, she petitioned the court for approval to send notice by general delivery, where the post office holds mail until the recipient comes to the post office to pick it up.[303] Judge Kevin S. Burke noted: 'While the Court considered publication in a legal newspaper, it is unlikely that Respondent would ever see this. It is more likely that the Respondent could receive notice on the internet. The traditional way to get service by publication is antiquated and is prohibitively expensive. Service is critical, and technology provides a cheaper and hopefully more effective way of finding the Respondent.'[304] The judge is further quoted as stating that: 'Nobody, particularly poor people, is going to look at the legal newspaper to notice that their spouse wants to get divorced.'[305] He ordered service to include, but not be limited to, contact via any Facebook, Myspace, or other

[301] Fourth District Family Court of Minnesota (Hennepin County), Jessica Mpafe v. Clarence Mpafe, 10 May 2011, No. 27-FA-11-3453.

[302] H. Van Horn, 'Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants' (2013) 26 Global Business & Development Law Journal, 566; A. Eisenberg, 'Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants' (2014) 51 San Diego Law Review, 790.

[303] S. Ward, 'Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants' (2011) 97 American Bar Association Journal, 14.

[304] Fourth District Family Court of Minnesota (Hennepin County), *Jessica Mpafe v. Clarence Mpafe*, 10 May 2011, No. 27-FA-11-3453.

[305] S. Ward, 'Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants' (2011) 97 American Bar Association Journal, 14.

social networking site, contact via email and contact through information that would appear through an internet search engine such as Google.[306]

### 3.2.2. Requirements

State court litigation is governed by state law provisions whereas the Federal Rules of Civil Procedure (FRCP) determine the service regime for federal cases. For domestic service Rule 4(e)(1) FRCP refers to state provisions as it permits following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made. Under state law more unconventional methods of service are available in comparison to the federal rules. In some states catch-all provisions are in place. §308(5) of the New York Civil Practice Law and Rules (N.Y. CPLR), for instance, states that the court may order service in any manner, if the other (traditional) methods of service provided by § 308 N.Y. CPLR are impracticable. Impracticability, however, 'does not require proof of due diligence or of actual prior attempts to serve a party under the other provisions of the statute'.[307] For service abroad, Rule 4(f)(3) FRCP gives the judge the possibility to order any method he deems appropriate, as long as the method is not prohibited by international agreement. The provision offers this option without any need for the plaintiff to first attempt service via the other methods listed in Rule 4(f) FRCP.[308]

A scrutiny of the available cases reveals that the majority of courts have approved of social media service in combination with another form of service. In *Mpafe v. Mpafe*, for example, service through social networking platforms was ordered together with *inter alia* email service.[309] In *Ferrarese v. Shaw*, the plaintiff, began proceedings against his ex-wife who had disappeared with their daughter. The woman remained elusive and could not be served. The federal court decided that service on the ex-wife should be effected via email, Facebook message and certified mail on defendant's last

[306] Fourth District Family Court of Minnesota (Hennepin County), *Jessica Mpafe v. Clarence Mpafe*,10 May 2011, No. 27-FA-11-3453.

[307] *District Court for the Southern District of New York, Fortunato v. Chase Bank*, 7 June 2012, 2012 WL 2086950; *District Court for the Southern District of New York, S.E.C. v. HGI, Inc*., 8 November 1999, 99 Civ. 3866, 1999 WL 1021087.

[308] United States Court of Appeals, *Ninth Circuit, Rio Properties, Inc. v. Rio International Interlink*, 20 March 2002, 284 F.3d, 1015.

[309] Fourth District Family Court of Minnesota (Hennepin County), *Jessica Mpafe v. Clarence Mpafe*, 10 May 2011, No. 27-FA-11-3453.

known address and on defendant's sister.[310] In *Federal Trade Commission v. PCCare247 Inc.* the Federal Trade Commission brought suit against five, foreign defendants who were involved in a fraudulent organisation trying to extract money from American citizens by deceiving them into believing that their computers were infected. On the basis of Rule 4(f)(3) FRCP the New York District Court granted the FTC's request for permission to serve documents on the defendants via e-mail and Facebook.[311] The Family Court decision in *Noel Biscocho v. Anna Maria Antigua* is an excellent example of the judicial hesitance to completely step away from traditional methods of service in favour of the newly discovered service channel offered by social media. A father who was seeking to modify an order of child support for his son based on the alleged emancipation of the boy was allowed to serve the mother via Facebook. However, he also had to follow up with a mailing of the summons and the petition to the mother's last known address, even though the court recognised that prior service at that address had been unsuccessful (the mother had moved without leaving a forwarding address) and her physical whereabouts uncertain.[312]

This cautious attitude is, however, not shared by all courts. *Baidoo v. Blood-Dzraku* appears to be the first reported case in which the court approved service by Facebook message as the sole method of service. The plaintiff was a married woman who wanted to divorce her husband. She had no physical address for him and he could not be served in person. Therefore, the wife petitioned the court for service via Facebook. The court did not require service via publication as a backup method to Facebook, deeming the former to be '*essentially statutorily authorized non-service*'.[313] Similarly, in *St. Francis Assisi v. Kuwait Finance House* the matter to be decided was whether the plaintiff was entitled to damages from a number of defendants in connection with the financing of terrorist organisation ISIS and the subsequent slaying of Assyrian Christians in Iraq and Syria. The plaintiff attempted to serve one of the defendants, a Kuwaiti-born Salafi sheikh, but came up empty. It, therefore, turned to the United States District Court for the Northern District of California, seeking permission to effect service via Twitter, the

[310] United States District Court, Eastern District of New York, *Giovanni Ferrarese v. Vinda Shaw*, 19 January 2016, 164 F.Supp.3d 361.

[311] District Court for the Southern District of New York, FTC v. PCCare247 Inc., 7 March 2013, 2013 WL 841037.

[312] Family Court of the State of New York (County of Richmond), *Noel B. v. Anna Maria A.*, 12 September 2014, case no. F00787-13/14B, 2014 N.Y. Misc. LEXIS 4708; K. Coleman, 'Beyond Baidoo v. Blood-Dzraku: Service of Process Through Facebook and Other Social Media Platforms Through an Indiana Lens' (2017) 50 Indiana Law Review, 660.

[313] Supreme Court of New York County, *Baidoo v. Blood-Dzraku*, 27 March 2015, 48 Misc 3d 316.

American social networking platform used by the defendant to collect money to fund terrorist activities. The court agreed with service through Twitter as the only method to be used.[314]

The available case law tends to impose two requirements regarding the social media account to be served. First, the plaintiff has to provide the court with evidence that the account actually belongs to the defendant (authentication requirement). Second, the plaintiff needs to demonstrate that the defendant makes regular use of his account (evidence of use requirement). Both are logical conditions given the fact that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution imposes that notice should be 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'.[315]

In *Baidoo v. Blood-Dzraku* the plaintiff was aided by the existence of conversations between her and her husband on Facebook. She submitted an affidavit to which she annexed copies of the exchanges between her and the defendant on Facebook and in which she identified the defendant as the subject of the photographs on the Facebook page in question. While such statements do not constitute absolute proof, the court was satisfied that the account did belong to the untraceable defendant. As to evidence of regular use, the court was equally satisfied as the exchanges between the plaintiff and the defendant indicated that the latter regularly logged into his account, countering the risk of him not seeing the summons until the time to respond had passed.[316] Conversely, in *Fortunato v. Chase Bank* the defendant wanted to bring the plaintiff's daughter into the litigation. The request for service through the Facebook account of the daughter was denied for reasons of uncertainty regarding the authenticity of said account. The court argued that: 'anyone can make a Facebook profile using real, fake, or incomplete

[314] *United States District Court for the Northern District of California, St. Francis Assisi v. Kuwait Finance House*, et al., 30 September 2016, 2016 WL 5725002.

[315] *U.S. Supreme Court, Mullane v. Central Hanover Bank & Trust Co*., 24 April 1950, 339 U.S. 314 (1950).

[316] *Supreme Court of New York County, Baidoo v. Blood-Dzraku*, 27 March 2015, 48 Misc 3d 314-315.

information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the investigator found is in fact the third-party defendant to be served.'[317]

### 3.3. Belgian Legislative Framework of Service of Process

In Belgium civil proceedings are initiated either by a writ of summons or by means of a petition. The most common method is the delivery of the writ of summons to the defendant by the bailiff.[318] The Belgian Judicial Code lists a number of methods to affect this service of process (art. 33 *et seq*.). The bailiff will respect a certain order and will try to serve the defendant in person first. Service in person means that the bailiff hand delivers the writ of summons to the defendant. It can take place wherever the defendant can be found. If the defendant refuses to accept service, this refusal will not prevent service in person from being accomplished. The bailiff makes a note of this refusal on the writ.[319]

If service in person is not possible, service can be effected at the domicile or, in absence of a domicile, the place of residence of the defendant, by leaving a copy of the writ with a relative, servant or agent, provided that the person is 16 years old or above.[320] If the previous method of service is not possible, the bailiff can leave a copy of the writ in a sealed envelope at the domicile or, in absence of a domicile, the place of residence of the defendant. The next business day at the latest the bailiff will send a letter to the defendant via registered mail, informing him of the date and time of the bailiff's visit and of the possibility to obtain a copy of the writ at the bailiff's office during a period of three months.[321] The sending of the registered letter is a precautionary measure, without any effect on the service.[322]

Since 31 December 2016, the date of the entry into force of the so-called Potpourri III Act of 4 May 2016, the possibility for the bailiff exists to serve through email. In civil matters the bailiff may choose the method of service (personal service or electronic

[317] *District Court for the Southern District of New York, Fortunato v. Chase Bank*, 7 June 2012, 2012 WL 2086950.

[318] *P. Taelman & C. Van Severen*, Civil procedure in Belgium (Wolters Kluwer, 2018) 89.

[319] Belgian Judicial Code, Art. 33.

[320] Belgian Judicial Code, Art. 35.

[321] Belgian Judicial Code, Art. 38, §1.

[322] Court of Cassation, 17 December 1998, (1998) Arr. Cass., 1155.

service via email) depending on the circumstances specific to the case.[323] The bailiff can either use the '*gerechtelijk elektronisch adres*' (a unique email address, issued by the government[324]) of the defendant or, for people who do not have such an address, the '*adres van elektronische woonstkeuze*' (a regular e-mail address, not issued by the government)[325]. In the latter case explicit consent needs to be obtained from the defendant each time the bailiff wishes to serve him through that e-mail address.[326] To that end the bailiff will send a request for consent to the '*adres van elektronische woonstkeuze*' of the defendant.[327] In both cases the email sent by the bailiff does not contain the actual document to be served. Rather, the content of the documents can only be consulted on the digital platform (the Registry) created for that purpose. The defendant can only gain access to the content of the document after having identified and authenticated himself using his electronic id card (eID) and pin code or a technical equivalent method.

Within 24 hours of sending the service or the request for consent, the bailiff will receive a confirmation message from the Registry, indicating that service has actually been affected. If no such confirmation is received within that time frame, electronic service is not possible and needs to be affected in person.[328] When the defendant opens the email message, the Registry notifies the bailiff. If no notification of opening is received within 24 hours of sending the service or the request for consent, the bailiff will notify the defendant the next business day through regular mail that electronic service has been affected.[329]

In case the defendant does not have a known domicile or place of residence in Belgium, service abroad will have to take place. Service in another EU Member State will be regulated by the EU Service Regulation.[330] For service in non-EU states that are a

[323] Belgian Judicial Code, Art. 32quater/3, §2.

[324] Belgian Judicial Code, Art. 32, 5°.

[325] Belgian Judicial Code, Art. 32, 6°.

[326] Belgian Judicial Code, Art. 32quater/1, §1, second sentence.

[327] Belgian Judicial Code, Art. 32quater/1, §2, first sentence.

[328] Belgian Judicial Code, Art. 32quater/1, §2, first and third sentence *iuncto* art. 32quater/3, §3.

[329] Belgian Judicial Code, Art. 32 quarter/1, §2, *in fine*.

[330] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, OJ L 324.

member of the Hague Service Convention, that Convention will apply. If the non-EU country where the defendant is domiciled or resides, is not bound by the Hague Convention, service is affected by registered letter through air mail.[331]

If the defendant does not have a known domicile or place of residence at all (neither in Belgium nor abroad), the bailiff will serve the writ on the public prosecutor of the jurisdiction of the court which will deal with the claim.[332]

### 3.4. Predicting the Future: Social Media Service in Belgium?

In this part, we will not attempt to forecast whether the Belgian legislator will ever decide to incorporate social media service as a service method. We will, however, set out which choices can be made and will signal some of the issues that will have to be dealt with.

First of all, one can wonder which advantages social media offers. One distinct advantage of social media service lies in the fact that it is able to achieve a high likelihood of actual notice. Users of social media platforms typically access their accounts on a regular basis.[333] A recent press release by Facebook, for instance, showed that there were 1.32 billion daily active users on average worldwide for June 2017 and 2.01 billion monthly active users as of 30 June 2017.[334] Social media platforms are oftentimes accessed on mobile devices. On these devices users run applications that push instant notifications alerting the account holder of activity on his profile.[335] Besides, if service is performed via a private Facebook message or via a post on the defendant's Facebook wall, the likelihood of actual notice is even amplified. Under the

[331] Belgian Judicial Code, Art. 40, first paragraph.

[332] Belgian Judicial Code, Art. 40, second paragraph.

[333] K. Knapp, '#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century' (2014) 2 Louisiana Law Review, 564.

[334] See in this regard: https://investor.fb.com/investor-news/press-release-details/2017/Facebook-Reports-Second-Quarter-2017-Results/default.aspx

[335] A. Upchurch, '" Hacking" Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process' (2016) 38 UALR Review, 601.

default settings, the defendant will receive a notification through e-mail of the message or of the post and any subsequent comments.[336]

Compared to the second-newest kid on the block, email service, social media holds a few trump cards. In case of service via email there is no possibility to determine whether the email address belongs to the defendant unless the defendant states so himself.[337] A social media account, on the other hand, can be scrutinised to verify the identity of the holder if the privacy settings allow it. Additionally, e-mail is more prone to spam attacks.[338] In that regard, social media networks fare better.[339] Spam messages are less common on social media platforms and malicious messages are less problematic because users can often view the sender's profile without opening the message or they can adjust their settings to disallow messages from individuals who they have not added as 'friends'.[340]

Having argued that service through social media platforms can have an added value, a subsequent question would be whether there is a need for this type of service to be implemented in Belgium. It is unlikely that the Belgian legislator will introduce social media service as a self-standing independent method. For Belgium, where e-mail service is still in its infancy, this would be too radical and controversial. In our opinion, there could nevertheless be a place for this innovative method in the Belgian system.

In part 3.3 it was explained that service on defendants who do not have a known domicile or place of residence is replaced by service on the public prosecutor of the jurisdiction of the competent court.[341] In Belgium the '*Nationale Kamer van Gerechtsdeurwaarders*' (the National Chamber of Bailiffs) does not keep statistics on the number of times service is in that regard effected on the public prosecutor. In the Netherlands, on the contrary, such figures are available. The Dutch service rules also

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[336] *District Court for the Southern District of New York, FTC v. PCCare247 Inc.*, 7 March 2013, 2013 WL 841037, 5.

[337] K. Knapp, '#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century' (2014) 2 Louisiana Law Review, 569.

[338] J. Wolber, '*Opening a Can of Worms and Viruses: The Impact of E-Service on E-Mail Users Everywhere'* (2016) 61 New York Law School Law Review, 450, footnote 1.

[339] A. Shultz, *'Superpoked and Served: Service of Process via Social Networking Sites'* (2009) 43 University of Richmond Law Review, 1525, footnote 205 (statement made in the context of Facebook).

[340] J. Wolber, *'Opening a Can of Worms and Viruses: The Impact of E-Service on E-Mail Users Everywhere'* (2016) 61 New York Law School Law Review, 450, footnote 1.

[341] Belgian Judicial Code, Art. 40, second paragraph.

require that a defendant without a known domicile or place of residence be served through the office of the public prosecutor at the court where the claim will be heard. In addition, an abstract of the writ must be published in the '*Staatscourant*'.[342] The '*Staatscourant*' is an official online gazette containing *inter alia* different types of judicial announcements.[343] An Act of 11th February 2015 made the use of this online tool compulsory since 1st July 2015.[344] Before that date these so-called 'public writs' were published in daily newspapers. According to the Explanatory Memorandum accompanying the Act 45.000 public writs are served each year.[345] Additionally, it is stated that bailiffs receive little or no response to public writs published in newspapers.[346] The Dutch legislator considered that the publication of these writs on a public site on the internet would increase the odds that the defendants would see it, leading to the putting into use of the '*Staatscourant*'.[347]

There is no reason why these findings cannot be transposed to Belgium. It is extremely likely that the 'artificial' service on the prosecutor does not inform the persons in question, given the results in the Netherlands, where service on the prosecutor is even combined with service by publication. It is here that social media service could play a role. Belgian lawmakers could make it obligatory for plaintiffs to undertake a reasonable attempt to serve the elusive defendant via his social media channels, if any. In the Netherlands this idea has already been suggested by the '*Adviescommissie Burgerlijk Procesrecht*' (Advisory Committee on Civil Procedural Law) in the build-up to the adoption of the Act of 11 February 2015.[348] It can be expected that such a subsidiary place for social media service will prompt less resistance than embracing it as a full-blown mechanism. Furthermore, because social media service is deployed as a supplement to an established method, it will alleviate at least some of the sceptical concerns raised by its opponents. In that way, the policy choice would correspond to

[342] Dutch Code of Civil Procedure, Art. 54.2.

[343] See for more information: https://zoek.officielebekendmakingen.nl/zoeken/staatscourant.

[344] Wet van 11 februari 2015 tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en enige andere wetten in verband met bekendmakingen aan personen zonder bekende woon- of verblijfplaats, *Stb*. 2015, 82.

[345] Memorie van Toelichting, 4.

[346] Memorie van Toelichting, 2.

[347] Memorie van Toelichting, 2.

[348] Letter of 19 September 2013 concerning consultatiedocument Wijziging van het wetboek van burgerlijke rechtsvordering en enige andere wetten in verband met bekendmakingen aan personen zonder bekende woon- of verblijfplaats, 2, no. 3.

the U.S. example where social media service is, in most instances, offered in combination with another more conventional method.

As to the concrete organisation of social media service, the Belgian legislator will face further issues. Certain safeguards relating to the authentication and regular use of the account will need to be construed. The American experience might serve as a source of inspiration. A further specific difficulty that can be identified relates to the bailiff who has to effect the service. Does the bailiff have to use an official account or can he use the account of the plaintiff or can he even send the notice via a fake account?[349] In case social media service is used as a supplementary method for defendants without a known address, service could perhaps be entrusted to the plaintiff (or his lawyer). Time will tell, to what extent, Belgium will 'connect' with social media, if at all.

**4. Conclusion**

The article examined whether some of the existing legal principles in two different fields are compatible with technological evolutions. With regard to self-driving cars, some legal changes at the national level are inevitable. Legislation dealing with road safety is not yet adopted to the introduction of autonomous vehicles. We have also shown that the application of some of the concepts used in the EU Product Liability Directive might become problematic when SDCs will be commercialised. For instance, the moment of putting the product into circulation might be incompatible with autonomous systems. In any case, when policymakers would change the legal framework, they should take into account that a minor modification of one aspect (e.g. qualification of software) can have major consequences on the liability of the manufacturers of software or of the self-driving vehicle. Therefore, we suggest a balanced and well-considered approach when it comes to adapting the existing legal framework to technological evolutions.[350]

As to service of process via social media, the article explored the remarkable finding that some courts in common law countries have allowed the notice of the commencement of civil proceedings to be effected via one or more social media accounts belonging to the defendant. In contrast, in continental EU jurisdictions this phenomenon does not exist. The article laid the conditions imposed by American courts

[349] In the United States a similar discussion exists in relation to the ethical rules governing the conduct of lawyers performing social media service. See for example: H. Van Horn, 'Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants' (2013) 26 Global Business & Development Law Journal, 570-574.

[350] See in this regard also: J. De Bruyne & J. Werbrouck, *'Merging self-driving cars with the Law'* (2018) 34 Computer and Security Law Review, 1150-1153.

for this type of service bare and subsequently gave an overview of the Belgian procedural framework. Even though it remains to be seen whether the Belgian legislator will ever be tempted by this novel method of service, it is submitted that social media service could be useful as a second layer of subsidiary notice when the defendant does not have a known address.

# THE 2020 CONSTITUTIONAL AMENDMENTS: A LEGAL ANALYSIS

**Dr. Tonio Borg**

## ABSTRACT

In this article the author discusses constitutional amendments that took place in Malta in the year 2020 through Act No. XLIII of 2020, on a factual and legal basis. The author goes on to create a comparative analysis of the new amendments with the old legislation and seeks to identify key changes which maybe advantages over their predecessors, while also pre-empting any difficulties that may arise in the future, whether it be in the short-term or the long-term.

**KEYWORDS:** CONSTITUTIONAL LAW – LEGAL AMENDMENTS – PRESIDENT – JUDICIARY – ADMINISTRATION OF JUSTICE – ATTORNEY GENERAL – STATE ADVOCATE – CHAMBER OF ADVOCATES

# THE 2020 CONSTITUTIONAL AMENDMENTS: A LEGAL ANALYSIS

**Dr. Tonio Borg**

## 1. Introduction

A series of amendments to the Maltese Constitution were introduced through Act No. XLIII of 2020. These came into effect on their publication in the Government Gazette on 7th August 2020.

Mostly these amendments were a reaction to the conclusions of the December 2018 Report of the Council of Europe's Venice Commission. In that Report the Commission had criticized the concentration of powers in the hands of the Prime Minister and the method of appointment of members of the judiciary amongst other things. A Steering Committee for Constitutional reform[351], presided over by the President of Malta, which had convened in early 2018 had discussed proposals to satisfy the Venice Commission recommendations and some of these were included in the Bill amending the Constitution which eventually became law. In this article, the more salient of the amendments will be discussed.

## 2. The amendments

### 2.1 Method of appointment of the President

The most significant amendment from a political point of view was the change in the method of election of the President of Malta; when Malta became a Republic, through the December 1974 constitutional amendments to the 1964 Independence Constitution, the idea was to change as little as possible in the transition from Governor-General to President. Consequently, the ease with which a Maltese Government could request and obtain the substitution of a Governor General[352], was adopted in the establishment of the office of President. He would be appointed by a Resolution of the House of

[351] The Committee was composed of Deputy Prime Minister Mr. Louis Grech, Minister Owen Bonnici, Parliamentary Secretary Julia Farrugia Portelli, on the Government side; Dr. Chris Said, Dr Tonio Borg and Dr Amy Camilleri Zahra representing the Opposition . In 2020 Minister Edward Zammit Lewis and Dr. Stefan Zrinzo Azzopardi substituted Minister Bonnici and Ms Farrugia Portelli.

[352] In June 1971 Governor-General Sir Maurice Dorman was substituted by Sir Anthony Mamo, former Chief Justice, by a simple request to that effect to Buckingham Palace. See Ugo Mifsud Bonnici: *Il-Manwal tal-President Government Printing Press* p. 7 : "the fact that the appointment depends on a simple majority was the result of agreement between Government and Opposition in the sense that in the same way that the Governor General was chosen by the Government of the day and submitted to a formal approval by the Queen, similarly the prerogative of choice remains in the hands of whoever enjoys the support of a majority in the House of Representatives.

Representatives, and similarly removed on alleged (not proven) misbehaviour or incapacity. Since article 72(1) of the Constitution provides that, unless otherwise specified, matters brought before the House, including a Resolution shall be passed by a majority of those present and voting, (simple majority), the Head of State in Malta for the past 46 years did not need anything more than a majority of one of those voting, which in practice meant he was chosen and elected depending on the will of the government of the day. [353]

In its proposals to the Venice Commission the party in opposition had proposed that the President be elected by Parliament through a Resolution supported by at least two-thirds of all the members of the House. Later, Cabinet declared that it would be proposing that the Head of State be chosen with the approval of two thirds support in Parliament. When the Bill on the matter was published, it transpired, however, that Government was proposing a fall-back position should the two- thirds majority of the legislature be not obtained; namely that in such case a mere majority of one would be sufficient after two rounds in which the two thirds majority would not have been achieved . This meant that ultimately in the case of a stalemate, the appointment in such case would be still made by the government of the day. Following declarations by the Opposition to the effect that it would not vote in favour of such clause,[354]- and such change required a two thirds majority- the two sides in Committee stage, at the very last moment, agreed that there should be no fallback position which would depend on the whim of the Government of the day, but that the holder of the position would continue in office until the two thirds majority is obtained. It also made sense that the President should only be removed from office by the same majority which elected him. A novelty in this respect is that while previously the President could be removed even on a mere allegation of misbehaviour, in the new amendments, apart from the fact that a two-thirds majority is needed for such removal, any incapacity or misbehaviour alleged has to be proven.

**2.2 Appointment of Members of the Judiciary**

Up to 2016 the members of the judiciary were appointed by the President acting on the advice of the Prime Minister. In virtue of the Commission for the Administration of Justice Act, (Ch. 369 Laws of Malta) the Prime Minister in his discretion could seek

[353] In 2009, 2014 and 2019 the appointment of a President was supported by both political parties represented in Parliament. In April 2009, a Nationalist Government proposed George Abela who had just unsuccessfully contested for the leadership of the Labour Party. In 2014 and 2019, Marie Coleiro Preca and George Vella, two former Ministers of a Labour-led Government were supported by the Nationalist Party parliamentary group.

[354] **See Newsbook online 15 July 2020:** ***PN set to vote down judicial appointment reform, but open to solution***

the advice of the Commission – in which members of the judiciary enjoyed a majority in membership - prior to giving advice to the President.[355]

In 2016, Act No. XLIV was enacted. This constitutional amendment which was approved by a two-thirds majority in the House, provided for a newly established Judicial Appointments Committee, being a sub-committee of the Commission for the Administration of Justice (CAJ), which would give advice to the Government prior to the appointment of a judge except that of Chief Justice. The Committee was composed of the Chief Justice, the Attorney General. The Auditor General the Commissioner for Administrative Investigation (Ombudsman) and the President of the Chamber of Advocates.

One should note that the ultimate decision on the appointment of a judge still remained in the hands of the government of the day. The Prime Minister in fact could ignore the advice given by the Committee ; but in such case, the reasons had to be publicly declared , not only through the publication of statement in the Government Gazette but also in a statement to the House of Representatives.

Under these 2016 amendments the power of initiative for the appointment of a judge remained exclusively in the hands of the Prime Minister. The Committee could not propose a candidate itself but only give its non-binding opinion on names of candidate/s submitted to it by the Government of the day.

The composition of the Committee remains a bit anomalous. Including the Auditor General and the Ombudsman as ex officio members, in the selection of judges and magistrates was probably due to the fact that, at that time, these were the only two offices for which a two-thirds majority of the members of the legislature was needed for a person to be elected to such office. However, it is doubtful whether the Auditor-General and the Ombudsman are the most competent persons to decide on the eligibility and suitability for a candidate for the office of judge or magistrate. The Committee also had the function:

a) to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice) or of magistrate of the Inferior Courts, except from persons to whom paragraph (e) applies;

b) to keep a permanent register of expressions of interest mentioned in paragraph (a) and to the acts relative thereto, which register shall be kept

[355] Art 101A(11)(c ) of the Constitution used to provide that : "The functions of the Commission for the Administration of Justice shall be (…) (c) when so requested by the Prime Minister, to advise on any appointments to be made in terms of articles 96, 98 or 100 of the Constitution."

secret and shall be accessible only to the members of the Committee, to the Prime Minister and to the Minister responsible for justice;

The fact that a register of expressions of interest exists means as indicated in paragraph(b), that any suitable person could under the 2016 amendments "apply" to become a member of the judiciary by privately expressing his interest, and his name, if suitable, be kept in a" secret "register.

Following the 2020 amendments, the entire selection method has been changed. Government no longer has any say in the initiative relating to, or approval of an appointment of a member of the judiciary. The important changes are the following:

a) whenever a vacancy arises on the Bench, a call for applications is issued by the Ministry of Justice (96B);

b) members of the judiciary shall be appointed by the President, acting on recommendations of the Judicial Appointments Committee in which the judiciary has a majority of members. The latter Committee proposes three candidates, and the President chooses one.

c) the Chief Justice shall be appointed by a resolution supported by a two-thirds majority of the members of the legislature.

d) the composition of the Appointments Committee was changed so that the members of the judiciary would enjoy a majority in such Committee; so that now the Committee is composed of the Chief Justice, two judges chosen by the judges of the superior courts, one magistrate chosen by his colleagues, the Auditor-General, the Ombudsman and the President of the Chamber of Advocates.

e) a list of criteria and qualifications has been inserted for the first time ever regarding the appointment of members of the judiciary, such as "being able to work in a collegial environment " " being industrious, able to work under pressure", "diligent, analytical" and "able to make decisions" apart from the traditional requirement of having the "number of years of practice of the profession of advocate in Malta " established by article 96 (appointment of judges ) or 100 of the Constitution (appointment of magistrates,) as the case

may be.

The issues which might arise in the future, or which are debatable, are the following:

1. It is not clear whether the Appointments Committee is only entitled to choose candidates who have "applied" or expressed an interest following the issuing of the call for applications by the Ministry of Justice. A logical interpretation of the relative article would seem to suggest so. It would also seem that for a Magistrate to be appointed as judge, he would also have to "apply" like any other candidate .Another indication that the Committee can only propose candidate who have expressed an interest, is the provision found in the proviso to art. 96A (6)(f) wherein it is stated that "the evaluation on the suitability of candidates for appointment as members of the judiciary is to be made not later than 60 days from when it received the expression of interest."

   The entire question of applying to be appointed as member of the judiciary raises some issues which are not clear. For although there is a fresh call for applications each time there is a vacancy on the Bench, the Appointments Committee is entrusted with the task of keeping " a permanent register of expressions of interest"(art 96A(6)((b), so secret that it is only accessible to the members of the Committee and the President of Malta . Prior to the 2020 amendments this secret register was accessible to the Prime Minister and Minister of Justice as well. While under the 2016 amendments it made sense to keep such a secret register, for the power of initiative in the appointment of members of the judiciary lay with the Prime Minister, and there was no need for a public call of applications, what is the purpose of this register today? ..unless, of course, it is still possible, without or in spite of a public call for applications, for the Committee to select one or more candidates from the secret register – whether they have applied or not- and propose them to the President .

   However, the entire question of applying creates practical difficulties. A person in public or political office might find it difficult to apply, and then not be selected, and possibly his name, if it has not been leaked before, will certainly be made public if he is one of the two unsuccessful candidates, short-listed by the Committee but not chosen by the President. This discourages competent persons in various fields from applying or expressing an interest. It also defeats one of the tasks of the Committee introduced in 2016 and confirmed in 2020 that of "approaching with a view of eliciting interest amongst qualified persons for the office of judge or magistrate" (art 96A(6)(f) .

2. The ultimate choice remains in the hands of the President, but he can only choose from amongst the three candidates submitted by the Committee and

considered by them to be suitable. This provision raises two questions: why allow the President to choose from amongst three candidates? Once the Committee contains a majority of members who are judges or magistrates and at least one more legally qualified person, why should the choice be made by the President? ; the more so when he not only chooses one out of three but in his decision he is obliged by law to publish the names of the two candidates whom he does not choose! It seems that the Committee has washed its hands of the difficult decision to choose one out of three, even though it is the most competent organ to make such decision and shifted such delicate responsibility to the President.

3. The composition of the Judicial Appointments Committee remains anomalous. The Attorney General has been excluded from its membership. The members of the judiciary in the Committee have increased from one to four, but the Auditor General and the Ombudsman still retain their position within the Committee along with the President of the Chamber of Advocates. If the reason for doing so was that two of these offices are appointed by a two-thirds majority of the legislature, it should be noted that since the establishment of the Committee in 2016, the Commissioner for Standards in Public Life is today also appointed by a two-thirds majority but does not form part of the Committee . It would have made more sense to retain only the members of the judiciary in the Committee along with the President of the Chamber of Advocates.

4. The Chief Justice is to be appointed, for the first time, by a Resolution of the House supported by at least two thirds of the members of that House. In the original Bill, Government had retained the right, through its majority in Parliament, to appoint the holder of that office itself in case the two-thirds majority would not be achieved. Towards the final stages of the approval of the Bill, Government withdrew this proposal, and a compromise was found: the previous holder would remain in office until the two -thirds majority is achieved. This means that, for the very first time it could possibly happen that a Chief Justice continues in office until the stalemate is resolved, even beyond the compulsory retirement age of sixty-five. This is borne out by the wording of the law which states that when such qualified majority is not immediately reached, then "the person occupying the office of Chief Justice shall, in any circumstance remain in office until the Resolution is supported by the votes of not less than two-thirds of all the members of the House."(art 96(3) (emphasis added) .

5. The Constitution, as has been stated, lists a number of criteria and qualifications for a person to be appointed as member of the judiciary which are found in article 96B (2). The wording of this sub-section is clear: "no person shall be entitled to be appointed to the office of judge or magistrate" if for instance he is " not able to communicate in a clear and concise manner

" or does not "possess integrity, correctness and honesty in public and private life" or is not "impartial and independent " . He must have "knowledge of the law, of court procedures and profession experience and possess knowledge of the Code of Ethics for members of the judiciary" and must be "willing to undertake continuing professional development."

It is doubtful how wise it was to include such detailed – though not so well defined- matters in the supreme law of the land. These are matters which could have been included in a Manual published by the Committee. The moment however that these criteria and qualifications have been included in the suprema lex, the question arises: are they justiciable? The fact of the matter is that in my view there are no parts of the Constitution which are superfluous. Even those articles where it is expressly stated that they are non-justiciable, they still have a purpose and a meaning at least in the interpretation of the Constitution itself. So, the question arises: are these merely indicators to assist the Committee, or can they be enforced in a court of law? Can any interested person, institute legal action, presumably before those of constitutional jurisdiction, alleging that a person who has expressed an interest and applied does not satisfy any one of the requirements; or can a person not chosen to be one amongst the three candidates to be submitted to the President by the Committee, allege that he was more qualified according to these criteria, than those whose names were submitted to the President. After all the wording is clear in art 96B (2) "No person shall be entitled to be appointed …" "These are pleasures yet to come. Even though it is too early to speculate, the error of including these criteria and qualifications in the supreme law of the land, and their wording, will certainly have some legal consequences in the future.

**2.3 Composition of the Commission for the Administration of Justice**

Up to the 2020 amendments, the Commission for the Administration of Justice (CAJ) was composed of the President of Malta who however, had no original vote but only a casting vote, and nine voting members, namely the Chief Justice and two judges elected by their colleagues, the Attorney General, two members elected by magistrates, two

members one appointed by the Prime Minister and the other by the Leader of the Opposition.

Following the 2020 amendments, the Attorney General no longer forms part of the Commission; and the President has been given an original vote.

No mention is made, as before, of a casting vote, even though in virtue of article 121 (3) made applicable to the CAJ in virtue of article 101A(8), the presiding officer, in this case the President of Malta, still enjoys a casting vote. This means that the President will fully participate in matters relating to the appointment, discipline and also removal of members of the judiciary, and discipline on members of the legal profession. When it comes to the removal of the Attorney General and the State Advocate, since as shall be seen, the procedure for their removal has been established as being that previously applicable to the removal of members of the judiciary, namely through an Address to the President by the House supported by a two-thirds majority, the President in such case, would probably have to abstain.

**2.4 Removal of judges and magistrates from office**

An important change was made in 2020 to the method of removal from office of members of the judiciary. However, one has to trace the history of this matter in order to understand the recent amendments.

Up to 1994, the Constitution provided that members of the judiciary could be removed from office by an Address to the President, supported by no less than two-thirds of all the members of the House of Representatives on the basis of proven incapacity of misbehaviour. (art. 96(2)
The Constitution also stated in art. 97(3) that Parliament could by law "regulate the procedure for the presentation of an Address and for the investigation and proof of the inability or misbehaviour of a judge of the Superior Courts or a Magistrate."

This is what happened in 1994 when, through Act No. IX of 1994, the Commission for the Administration of Justice (CAJ), with an inbuilt majority of membership in favour of members of the judiciary was set up. Any motion presented in the House for the removal of a judge or magistrate had to be sent under confidential cover to the Commission. If the Commission gave the green light after hearing evidence and submissions, then the matter was sent to the House where, if two-thirds of all the members of the House supported the charges against the judge or magistrate, the address would be sent to the President for his removal. If, however, the Commission decided that there was no prima facie case, the matter conveniently stopped there; even

if there existed a two-thirds majority in the House in favour of his removal from office of the member of the judiciary.

All attempts at removal from office of a judge or magistrate have failed; either because the Commission ruled that there was no prima facie case,[356] or because though it gave the green light, there was no two-thirds majority in favour,[357] or as in one case, in spite of the fact that the Commission and two political partis represented in Parliament were in favour of removal, a constitutional action was instituted by the judge concerned, and the House did not proceed with the case; when constitutional case was decided against the judge, the latter had reached the age of sixty-five and went into compulsory retirement.[358]
The 2020 amendments were a reaction to a comment by the Venice Commission in its 2018 Report to the effect that:

> The Venice Commission recommends: The removal of a judge or magistrate from office should not be imposed by a political body; There should be an appeal to a court against disciplinary decisions directly imposed by the Commission for the Administration of Justice.[359]

This recommendation is debatable. The system adopted in 1994, and confirmed in the 2016 amendments, was a strong guarantee in favour of members of the judiciary; for apart from securing a majority in the Commission for removal, the motion for removal had to be supported by two-thirds majority in the House of Representatives . Conversely, if the Commission decided that there was no prima facie evidence of wrongdoing or incapacity, the matter stopped there. It is difficult to imagine a firmer and stronger security of tenure.

With the 2020 amendments which have faithfully followed the opinion of the Venice Commission in this respect, only the Commission has been entrusted with the task of deciding on the removal from office. Its decision does not need any qualified majority.

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[356] The Commission ruled that there was no prima facie case against Magistrate Peralta in 1995.
[357] The Commission unanimously approved that there was prima *facie* case against Judge Anton Depasquale. However, a motion in the House of Representatives in September 2001 did not achieve a two thirds majority. The vote was only 36-29 in favour of removal.
**[358] See Malta Independent 21 August 2014:** ***Farrugia Sacco to escape impeachment through retirement tomorrow.***

[359] Report by European Commission for Democracy through Law (Venice Commission ) Malta Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018) pp 12-13.

A majority of one is enough though according to article 101A (8), read along with article 121 (3), an absolute majority namely a majority of one of all the members of the Commission is needed for any decision. But there is no need of any qualified majority, though there lies an appeal by the member of the judiciary to the Constitutional Court. The House of Representatives has been completely excluded at any stage of the removal proceedings.

This new amendment- apart from being less protective of the rights of the members of the judiciary than before- has the following shortcomings:

(a) The Chief Justice will now in virtue of the 2020 amendments be appointed by a resolution of the House supported by a two-thirds majority of all its members. However, for the Chief Justice to be removed from office, a mere ordinary majority of the CAJ is enough. This is the only office in the land whose holder is appointed by a two-thirds majority in the House but can be removed not by a two thirds majority but by an ordinary majority. In fact, all other officers who require a two-thirds majority to be appointed viz the President of Malta, the Auditor General, the Deputy Auditor General, the Ombudsman and the Commissioner for Standards in Public Life, require a two- thirds majority of all members of Parliament to be removed.

(b) The two thirds majority rule has been abolished for the removal from office of judges and magistrates, but has been retained for the offices of President of Malta, the Auditor General and his deputy, the Ombudsman, the Attorney General, the State Advocate and the Commissioner for Standards in Public Life . This creates an anomalous situation to say the least.

The remark by the Venice Commission that the intervention of a political organ in the removal from office of a member of the judiciary is something necessarily irregular is greatly debatable. The Constitution of at least two leading countries in the Western world allow such intervention. The United States Constitution provides that the removal of the holder of any federal office, including therefore that of a federal judge, can only be made by a vote in favour of at least two-thirds of members of the US Senate present and voting[360]. In the United Kingdom, High Court judges, as with all judges in England and Wales, hold office during good behaviour and a High Court judge can only be removed by the Queen upon an Address of both Houses of Parliament. No qualified majority is needed. In the Commonwealth alone, apart from the United Kingdom and Malta (up to 2020), Australia[361],

[360] Article 1 Section 6 Paragraph 6: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation...and no person shall be convicted without the concurrence of two-thirds of the members present."

[361] Art 72 of the Constitution: "The Justices of the High Court and of the other courts created by the Parliament (i) shall be appointed by the Governor-General in C(ii) shall not be removed except

New Zealand[362], India[363] adopt a parliamentary procedure for removal. The matter is more one relating to guaranteeing a fair trial. Does article 39 of the Constitution of Malta and article 6 of the European Convention on Human Rights apply to proceedings relating to the removal from office of a judge or Magistrate?

The answer seems to be in the affirmative. In the case of Farrugia Sacco v. Prime Minister et (CC)(20 May 2015)(16/14), the Constitutional Court ruled that the norms relating to a fair hearing enshrined in article 39(2) "in the determination of the existence or extent of civil rights and obligations" applied to removal from judicial office proceedings. 364 The question therefore arises whether a parliamentary procedure for removal of a judge from his office per se is in violation of article 6. It is submitted that, unless it is shown that those who are going to decide to have expressed a clear opinion on the guilt or otherwise of the judge charged with misbehaviour, there is no a priori conclusion that Parliament is not an impartial and independent adjudicating authority, the more so that now the power of initiative has been taken away from the hands of members of Parliament. Why is the Auditor General or the President of the Chamber of Advocate necessarily considered more impartial and independent than an ordinary elected member of Parliament, the more so when the verdict on the question of address of removal requires a two thirds majority of all the members of the legislature? In the Demicoli case365 the European Court of Human Rights, in striking down a breach of privilege case against applicant had done so only because the proceedings were of a criminal nature and the alleged victims of libel was also going to participate in the parliamentary

by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity"

362 A judge may not be removed, from office except by the attorney-general upon an address of the House of Representatives (Parliament) for proved misbehaviour. See Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. See also Benajmin Suter: *Appointment Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries* (Victoria University of Wellington (2014) (LLM Research Paper ). Indeed, in the case of Switzerland removal of judges is done by the Federal Assembly, and in the case of judges of the Federal Supreme Court they are not subject to any kind of discipline procedure, let alone removal.

363 Art 124(4): "A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity ."

364 In an elaborate judgment the Court referred to European Court jurisprudence regarding the application of article 6 of the Convention to proceedings relating to the removal of judges: including the case of *Zalli v Alabania* (European Court of Human Rights (EcrtHR): 8 February 2011 (52531/07): "Since the adoption of the *Vilho Eskelinen* judgment, the Court has found Article 6 to apply to disciplinary proceedings against judges (see *G. v. Finland*, no. 33173/05, §§ 31-35, 27 January 2009; and *Olujić v. Croatia*, no. 22330/05, §§ 34 and 44, 5 February 2009."

365 *Demicoli v. Malta* (EcrtHR 27 August 1991 13057/87).

vote.

(a) Although the appeal to the Constitutional Court by a judge or magistrate who is removed from office or disciplined is a positive step, it also creates some practical procedural difficulties. The Chief Justice is ex officio a member of the CAJ and also presides over the Constitutional Court. In case of an appeal, he would have to inevitably abstain. If the two judges elected by their colleagues to represent them in the CAJ are also members of the Constitutional Court they would also have to abstain.

**2.5 Removal from office of the Attorney General and the State Advocate**

In the original 1964 Constitution, it was already provided under article 91 that the removal procedure then applicable to the removal of judges and magistrates, namely an address to the President supported by not less than two-thirds of all the members of Parliament, applied also to the office of the Attorney General.

Following the 2020 amendments, this provision has been retained but amplified by adopting the previous method of removing the holders of judicial office to the office of Attorney General and the office of State Advocate which was inserted in the Constitution in 2019. 366

The point arises: if the intervention of a political organ was done away with in the proceedings for the removal of a holder of judicial office, probably out of fear that such proceedings might be in breach of the right to a fair hearing, how come this procedure has been applied to the two abovementioned constitutional positions? This argument applies also for the removal by the House of Representatives, a political organ, of the holders of the office of President, Auditor-General, Deputy Auditor-General, Ombudsman and the Commissioner for Standards in Public Life.

366 In virtue of Act No. XXV of 2019 the duties of the Attorney General were split in two. The Attorney General retained the powers relating to the institution, undertaking and discontinuance of criminal proceedings, while the State Advocate assumed the powers of advising Government on matters of law, and legal opinion .

**2.6 Court review of CAJ actions**

Article 101A (14) of the Constitution provides that:

Subject to the provisions of sub-article (1) of article 101C of the Constitution, the question whether the Commission for the Administration of Justice has validly performed any function vested in it by or under this Constitution shall not be enquired into in any court.

This provision was initially contained in the 1994 amendments. It has been kept under the 2020 amendments apart from an exception being made to the newly introduced appeal which lies for a decision of the CAJ to remove a member of the judiciary, to the Constitutional Court. However, in several judgments it has been decided by the Constitutional Court that such provision- which incidentally is similar almost identical to one applicable to the Public Service Commission in article 115, does not protect the Commission from court scrutiny on such matters as alleged breaches of fundamental human rights, or of any law or regulation; but protects only the Commission for error within jurisdiction. This was decided amongst other matters in the case of Farrugia Sacco, where a specific plea was raised by respondents based on this sub-article but rejected by the Court.[367]

**3. Conclusions**

There is no doubt that, in spite of these shortcomings, the 2020 constitutional amendments were a step in the right direction and the result of mature political decisions. Certainly, more needs to be done to prevent abuse of power, fight corruption, and make the institutions more credible, forceful and accountable. In this contribution I have limited myself to the procedural and substantial flaws of these amendments, and the problems which might arise in implementing them. Time will tell whether these amendments will achieve the purpose for which they were introduced.

[367] See *Hon. Judge C Farrugia Sacco v Prime Minister et* (CC)( 27 January 2014); *Hon. Judge A. Depasquale v. Prime Minister et* (FH) (29 January 1999)(Mr. Justice G. Caruana Demajo); *Grace Sacco v. Prime Minister* (CC)( 17 September 2013; and *Architect V. Galea v Chairman PSC et* (CC)(21 January 1985).

# GLOBAL CONSTITUTIONAL LAW

Laura Aquilina[368]

**ABSTRACT**

In this article, the author tackles two different legal aspects of the developing area of Global Constitutional law. The first essay draws a comparison between the varying theories and opinions of two authors in the field; Dieter Grimm and Mattias Kumm. The work of these two authors is outlined and compared. The second essay deals with the way in which a US Supreme Court judgment (Roper vs. Simmons) addresses a problematic facet of Global Constitutional Law. The case itself is outlined, along with its dissenting opinions.

**KEYWORDS:** GLOBAL CONSTITUTIONAL LAW- ROPER VS SIMMONS

[368] This contribution was developed within the Global Constitutional Law course headed by Professor Diletta Tega which the author attended at the University of Bologna

**Table of Abbreviations**

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

EU: European Union

GCL: Global Constitutional Law

GFCC: German Federal Constitutional Court

MS: Member State/s

UK: United Kingdom

UN: United Nations

US: United States

WTO: World Trade Organisation

## GLOBAL CONSTITUTIONAL LAW

Laura Aquilina[369]

**Part I**

In this part, the author draws a comparison between the varying theories and opinions of two authors in the field of global constitutional law; Dieter Grimm and Mattias Kumm. The work of these two authors is outlined and compared, resulting in a determination of which position is the most persuasive in the author's view.

### 1. 'Grimm on the Issue of the 'Global Constitutional Law'

*'After 225 years, constitutionalism seems now to have reached the peak of its development.'* - Grimm

#### 1.1. External Culmination vs. Internal Erosion

Dieter Grimm, a professor at Humboldt and Yale universities and former member of the German Federal Constitutional Court, holds a traditional position on the issue of the 'Global Constitutional Law' (GCL), saying that the 'external success' of constitutionalism, through the development of international law and actors, has brought along with it an 'internal erosion' of national constitutional law. States have lost the monopoly of public power over their territory, hindering the achievement of constitutionalism altogether.[370] Internal erosion arises due to the fact that the Constitution and the State Powers are no longer the only powers on the scene, but other actors begin to feature, such as the European Union (EU), which interfere with the serenity of Member States (MS).

Developments at international level do not concern a constitution with legal force, but acts which eventually end up in the constitutions of MS. In Europe, for example, the European Convention of Human Rights (ECHR) and EU primary law are analysed in terms of constitutional law. Authors also view public international law (such as the United Nations (UN) Charter and texts of other international organisations such as the

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[370] D. Grimm, *The achievement of Constitutionalism and its Prospects in a Changed Word, in The Twilight of Constitutionalism?,* M. Loughlin and P. Dobner (ed), Oxford University Press, 2010.

World Trade Organisation (WTO)) as acquiring constitutional status and are being interpreted as constitutions. Even global public policy networks and self-organisation processes of private global actors are discussed in terms of constitutionalism. All of these were previously not regarded as constitutions.

### 1.2. Definition of Constitutionalism

To appreciate the effect of this development on national constitutions[371], a clear definition is necessary. Grimm defines 'constitutionalism' by reference to history, starting from before the two revolutions against Britain and France, through the Reformation and French Revolution and into the modern day. He outlines 5 characteristics of constitutionalism: (a) the modern constitution is a set of legal norms emanating from a political decision; (b) the purpose is to regulate the establishment and exercise of public power; (c) the regulation is comprehensive as there are no extra-constitutional means of exercising public power; (d) constitutional law finds its origin with the people as the only legitimate source of power; and (e) constitutional law is a higher law, enjoying primacy over all other laws and legal acts.

This gives a different definition of a constitution to that which we are accustomed to (democracy, rule of law, separation of powers and fundamental rights). Yet, Grimm mentions two elements of constitutionalism: the democratic element and the rule of law element. He adds that the constitution could only emerge through two preconditions. Firstly, there must be an object (a state) capable of being regulated. Secondly, the state's public power is without an external competitor within the territory. Consequently, the state's legal force ends at the border of the territory, and no foreign power can bind the domestic sphere. This highlights the importance of the boundary between the internal and external. Nevertheless, he adds that 'above the state was no lawless zone', and rules of public international law apply, limited to external relations of states and cannot interfere with internal affairs. Thus, constitutional law (internal law) and international law (external law) could exist independently of each other.

### 1.3. The Present and Future: The Blurring of Two Boundaries

Grimm maintains that we live in a period of erosion of statehood, with the blurring of two traditional boundaries. The boundary between public and private has become porous due to expansion of State tasks which require the State to seek help from private

[371] Grimm defines a 'constitution' as a coherent and comprehensive regulation of the establishment and exercise of public power. See reference in (n 1).

actors and rely on negotiations with them rather than legal orders addressed to them. Thus, agreements replace laws. Private actors have a share in public power without the requirements of legitimation and accountability that the constitution establishes for public actors.

The boundary between inside and outside became permeable when States began to establish and transfer sovereignty to international organisations to enhance their problem-solving capacity. A classic example of this would be the UN and international courts. As a result, states did not remain as sovereign as they had previously been.

The shift is particularly clear on a European level, where one finds the Council of Europe and its judicial acts through the European Court of Human Rights (ECtHR), binding all 46 MS. Above all, the power of the EU has a bigger effect on MS sovereignty as it encompasses legislative, administrative and judicial acts. Regardless, MS retain the power of self-determination. However, EU law claims primacy over domestic law, and hence the state is no longer the exclusive source of law within the territory. On this note, reference can be made to the recent Swiss Referendum. The primacy of constitutional law is no longer exclusive, and although it prevails over ordinary domestic law, it does not prevail in general. Furthermore, although the constitution still emanates from the people, not all public power taking effect within the state finds its source within the democratic legitimation of the people any longer. For this reason, Grimm maintains that statehood is eroding, that the constitution has shrunk in importance, and that only when national constitutional law and international law are seen together is one able to obtain a complete picture of the legal conditions for political rule in a country.

The question which arises is whether the loss of importance which the constitution suffers at national level can be compensated for at international level. Grimm brings up 'constitutionalisation' as a constitution-building process beyond the state which applies to international political entities and international legal documents and is even extended to rule making of public-private partnerships on the international level and of globally active private actors. Grimm also wonders whether there exists an object capable of being constitutionalised at international level. Although certain entities, such as the EU, may come close, certain elements still lack, such as, *inter alia*, how the Treaties are not an expression of self-determination of a people or society, and how the Treaties lack democratic origin. Grimm further states that a constitution could possibly originate from a treaty should the test of provision for amendments be satisfied, since if amendment power rests not in the hands of the MS but in the hands of the newly created state which has gained power of self-determination, then the legal foundation would have turned into a constitution. However, this of course is not the case.

At a global level, Grimm also refers to institutions such as the WTO, International Monetary Fund (IMF) and International Labour Organisation (ILO) which although are of great importance, are limited in competencies and have a non-democratic structure, all of which keeps them from being called 'constitutions.

## 2. Kumm on the Issue of the 'Global Constitutional Law'

*'The language of constitutionalism has become widespread among international lawyers.'* - Kumm

Mattias Kumm, a professor of Law at New York University, holds an opposite position to Grimm and could be identified as one of the strongest supporters of GCL. He speaks about the cosmopolitan turn in constitutionalism.

### 2.1. 'Constitutionalism' vs. 'constitutionalism'

Kumm differentiates between constitutionalism with a 'big C' and 'small c'. The former depicts traditional domestic constitutionalism, linked to a written Constitution's ultimate legal authority in the service of the democratic people governing themselves ('We the People'), as embodied in Grimm's position. The latter describes constitutionalism in respect of international law, a coherent legal system with some structural features of domestic constitutional law, but not connected to establishment of an ultimate authority, coercive powers of state institutions or self-governing practices of a people. Regardless of this clear distinction, when constitutional vocabulary is used beyond the state, the aura of legitimacy and authority associated with 'big C' Constitutionalism is often conferred on intentional practices, creating an illusion upon a deeply fragmented global arena. This, says Kumm, is 'the core of the skeptic's challenge'.[372]

### 2.2. Statist Paradigm vs. Cosmopolitan Paradigm

*'Cosmopolitan constitutionalism establishes an integrative basic conceptual framework for a general theory of public law that integrates national and international law.'* - *Kumm*

The statist, traditional paradigm seeks to ensure that international law remains firmly grounded in state consent. Thus, international law matters only if and to the extent that the national Constitution so determines, without acknowledging constitutionalism beyond the State. This reflects Grimm's traditional idea.

[372] M. Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and beyond the State, in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, Jeffrey L. Dunoff and Joel P. Trachtman (eds), Cambridge University Press, 2009.

Contrarily, Kumm advocates for the cosmopolitan paradigm, encouraging the progressive development of international legal authority, in which arrangements are assessed in terms of public reason (where legal authority rests on formal, jurisdictional, procedural, and substantive principles) rather than the people's democracy. It is worth noting that Kumm does not claim that international law is inherently legitimate, nor does the cosmopolitan paradigm embrace a simple international legalism that suggests that everyone has an innate disposition to follow international law. The cosmopolitan paradigm uses a holistic cognitive frame to establish and identify an internal connection and common basic structural features between national and international law, which connection extends to the development of legal authority, procedural legitimacy, and the practice of human and constitutional rights.

Cosmopolitan constitutionalism views national constitutional practice as an integral part of a global practice of law and conceives public international law in light of basic constitutional principles. Ultimate authority is thus, vested in the principles of constitutionalism that inform legal and political practice nationally and internationally.

**2.3. Constitutional Pluralism**

Cosmopolitan constitutionalism creates a third position to describe the relationship between national and international law, that of Constitutional Pluralism, which goes beyond the traditional monism and dualism. Kumm feels that it is a mistake to imagine the world of law as a hierarchically integrated whole, as monism does, and that it is also a mistake to imagine national and international law as strictly separate legal systems, as dualism does. Rather, common principles underlying both national and international law provide a coherent framework for addressing conflicting claims of authority in specific contexts. These principles may favour the application of international rules over national rules, or vice versa. This is a very different approach to that of Grimm, who would not accept international rules taking primacy over national rules, and possibly even over the national Constitution.

Nevertheless, although Kumm maintains that international legal sources can prevail over national ones; this is limited by the guarantee to protect countervailing constitutional principles relating to jurisdiction, procedure, or substance.

### 3. Brief Overview of Other Perspectives

#### 3.1. Anne Peters: Compensatory Constitutionalism

Anne Peters is a constitutional and international lawyer whose ideologies oppose Grimm's, yet have some common features, showing that there are objective elements in GCL. She discusses de-constitutionalisation on the domestic level, an idea similar to Grimm's erosion of sovereignty.

State Constitutions can no longer regulate the totality of governance in a comprehensive way and are thus, no longer self-sufficient 'total Constitutions'. For this reason, Peters asks for compensatory constitutionalism, since only the various levels of governance, taken together, can provide full constitutional protection. For a traditional constitutional lawyer like Grimm, it is difficult to agree that international rules and principles deserve the label of 'constitution', and thus, this is where Peters differs from Grimm. A traditional constitutional lawyer is unable to agree with the continuing process of the emergence, creation and identification of constitution-like elements in the international legal order as he would have to admit that there is a legal order above the Constitution.

Peters also shows how international actors can effect constitutional national sources for the best, using the example of the South African apartheid system. International law can help legal orders which diverge from basic fundamental principles of human rights, democracy and rule of law to readdress them. Thus, the international and national can no longer be neatly separated and the relationship between them cannot be described as a clear hierarchy, but rather as a network.

Peters identifies three democratic deficiencies within nation States: (1) due to global interdependence, State activities became far reaching and extraterritorial, political decisions on environmental and nuclear subjects affect people in other states which have not elected the decision-makers making these decisions. This leads to an indirect decline of democracy; (2) mobility and the transnational character of issues diminish the nation state's power to solve problems by itself; (3) lack of democratic mandate for or control of non-state international actors. In order to regain control, States have to cooperate with international organisations, through bilateral and multilateral treaties. In conclusion, if we want to preserve a minimum level of democratic governance, we

must move 'beyond the State' and establish compensatory, transnational democratic structures.[373]

### 3.2. Teubner: Societal Constitutionalism

Teubner highlights that constitutional theory's challenge today is both privatisation and globalisation. Constitutionalism must move 'beyond the nation state' in a double sense: into the transnational sphere and into the private sector. He brings in sociological aspects: sectors of world society begin to develop step by step their own constitutional norms. Pressing social problems that accrue within autonomous world systems produce social conflicts resulting in legal norms of a constitutional quality, these norms then become aggregated, over time, into sectoral constitutions of world society. His analysis is based on empirical observations.

### 3.3. Maduro: Global Governance

Maduro argues that constitutionalism is applicable to global governance, which is the ensemble of the public, private, formal, informal, regulatory bodies to which the national states devolve part of their power for regulatory norms. He draws a line between constitutionalism and national constitutions, saying that constitutions are sources of law and that constitutionalism is both a philosophical and normative theory. Traditionally, constitution and power coincided in the same locus: the state. Contemporary constitutionalism advances a shift of power from inside national borders to outside. To move constitutionalism to the arena of global governance is to move it beyond a normative theory of social decision making. Having constitutionalism without a constitution. Even if such a move is necessary and possible it does not mean that such a form of constitutionalism can and should overcome constitutionalism linked to national political communities.

## 4. The Most Persuasive Position: a Personal Opinion

Following an objective overview of various positions, I will now seek to determine which position persuades me the most. Grimm is strongly hesitant about the construction of a constitution at a global level. In fact, in his opinion, the EU Treaties, the WTO, etc., cannot be considered constitutions. He maintains that strengthening the International level could only happen if the international order could develop into an object capable of being constitutionalised and which has a democratic governance on

[373] A. Peters, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, *Leiden Journal of International Law*, 19, 2006.

the global level, which he sees as highly unlikely. Thus, Grimm finds it preferable to drop the notions of constitutionalism and constitutionalisation altogether, since they are misleading in that the loss national constitutions suffer from internationalisation and globalisation could not be compensated for on the supranational level. International actors are not a solution for this erosion. He refers to this as an illusion.

Kumm outlines three main negative elements of the statist paradigm: (a) it exaggerates ideals of coherence and legitimacy of domestic constitutional practices; (b) casts suspicion over legal practices 'beyond the state'; (c) neglects the connection between domestic legitimacy and the global legal context in which these practices take place. Furthermore, the conceptual structure of the statist paradigm, with its sharp and basic distinction between State law and international law, distorts complex legal and political realities, making it no longer satisfactory.

On the other hand, the cosmopolitan paradigm provides a unifying framework for the analysis of at least four phenomena: (a) the interface between national and international law; (b) expansion of governance structures within international law (such as global administrative law); (c) functional reconceptualisation of sovereignty; and (d) basic structural features of contemporary human rights practice.[374] Cosmopolitan constitutionalism presents a legal argument and not just an ideal one. It deals with a basic conceptual framework to organise legal materials and structure legal debates. Although the cosmopolitan paradigm might not be morally attractive since people think of themselves primarily as national citizens, using an example of religion, Kumm maintains that just as religion can flourish in a country without an official religion, so national patriotism and democratic self-government can flourish within a national constitutional framework that is conceived within a cosmopolitan paradigm. Kumm also states that the idea of self-governing free and equals cannot be developed within absolute nationalism, as this goes against the horizon of a liberated humanity.

A traditional position (depicted by Grimm) has a tendency to be more structured and possibly more convincing since it is based on established constitutional law practice. However, we must acknowledge that as the world evolves, legal elements must evolve too, and the world is evolving in a globalised way, meaning that our laws, values and norms will evolve similarly, requiring authors such as Kumm to begin to draw up theories to ground the developing global practices. For this reason, I believe that the traditional position deserves reconsideration in the light of globalisation. I thus,find Kumm's theory more persuasive, albeit avant-garde. Lastly, I would like to add that the international and national already complement each other and should do so even more in the future.

[374] This latter point can be understood through Roper vs. Simmons.

**Part II**

**1. Roper vs. Simmons: Case Summary**

In this article, the author explores the way in which a US Supreme Court judgment (Roper vs. Simmons) addresses a problematic facet of Global Constitutional Law by outlining the case itself, along with its dissenting opinions.

**1.1. Facts of the case**

Simmons, the defendant, planned, detailed and committed the robbery and murder of Shirley Crook at age 17. On turning 18, he was sentenced to death. The case revolved around the death penalty for minors.

The Court at first sentenced him to death; however he filed numerous petitions arguing for his minor status. Although rejected at first, soon enough, the Court in Atkins v. Virginia (2002) held that the Eighth Amendment[375], applicable through the Fourteenth Amendment, prohibits the execution of a mentally retarded person. Simmons then argued that, with the same reasoning, the Constitution also prohibits the execution of a juvenile who was under 18 when committing murder, putting mentally retarded people in a comparable position to the immature development of a minor.

**1.2. The Verdict**

The case was decided in 2005 by the US Supreme Court. The Court agreed with Simmons' arguments, sentencing him to life imprisonment without eligibility for release, although Stanford v. Kentucky (1989) rejected the idea that the Constitution bars capital punishment for juvenile offenders under 18.

The US Supreme Court referred to positions of other States to extract that a national consensus has developed against the execution of minor offenders, where it saw the rejection of the juvenile death penalty in the majority of States, the infrequency of its

[375] The Eighth Amendment of the United States (US) Constitution prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishments. It is worth noting the contradiction between the Eighth Amendment and allowing for the death penalty.

use even where it remains on the books, and the consistency in the trend toward abolition of the practice, concluding that today's society views juveniles as, in the words of the Atkins case describing the mentally retarded, 'categorically less culpable than the average criminal.'

The Court also concluded that according to the Eighth Amendment of the Constitution, and keeping in mind the instability and emotional imbalance of young people, sentencing a minor to death is cruel and unusual punishment.

The US Supreme Court confirmed this verdict by reference to foreign precedents and sources of law which do not apply the death penalty against juvenile offenders. The judgement highlights the importance and supremacy of the American Constitution then goes on to say that 'It does not lessen our fidelity to the constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.'[376]

Previous cases, such as the Atkins case and Thompson v. Oklahoma (1988), also make reference to foreign laws. The Court in Roper v. Simmons mentions Article 37 of the UN Convention on the Rights of the Child, which every country in the world has ratified save for the US and Somalia. It contains an express prohibition on capital punishment for crimes committed by juveniles under 18. The Court states that the US stands alone in a world that has turned its face against the juvenile death penalty. Reference is made to United Kingdom (UK) legislation, due to historic ties and origins of the Eighth Amendment. The Court explicitly says that '[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.'

**2. Dissenting Opinions**

**2.1. Justice O'Connor**

Justice O'Connor is not convinced of a national consensus being reached about abolishing capital punishment for under-18 offenders, let alone an international consensus, and thus, feels that 'the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases.'[377]

[376] *Roper v. Simmons* (2005)

[377] ibid.

Yet she disagrees with Justice Scalia's opinion that foreign and international law have no place in American Eighth Amendment jurisprudence. She admits that the Court consistently refers to relevant foreign and international law when assessing evolving standards of decency. She feels that the Eighth Amendment draws its meaning directly from the maturing values of civilised society, which are neither wholly isolated from, nor inherently at odds with, values of other countries. Therefore, although she sees congruence between American and international values, in her opinion, the case at hand presents no domestic consensus and the recent emergence of otherwise global consensus cannot change that.

**2.2. Justice Scalia**

*'To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.'* - Justice Scalia

Justice Scalia starts off his dissenting opinion by reference to Alexander Hamilton. He outlines the mockery which the opinion in this judgement makes of Hamilton's expectation as he points out how the Court concluded that the meaning of the American Constitution has changed over the previous 15 years since the Stanford v. Kentucky judgement, and not that the Court's decision had been wrong.

He justifies his dissent in this case by saying that the Court, as the sole arbiter of America's moral standards, discharges such immense responsibility by taking guidance from the views of foreign courts and legislatures, and he does not believe that the meaning of the Eighth Amendment and any other provisions of the American Constitution, should be determined by such views. He further comments that the views of American citizens themselves and of national legislatures are irrelevant or frivolous to the current Court verdict, while the views of other countries and of the international community 'take centre stage'.[378]

Scalia mentions the Court's reference to the International Covenant on Civil and Political Rights, which the Senate ratified subject to a reservation regarding capital punishment. He sarcastically comments that, '[u]nless the court has added to its arsenal the power to join and ratify treaties on behalf of the United States,' this evidence does not favour, but rather refutes, the position taken in this judgement. It goes to show that the US has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. Scalia further notes the inconsistency in the Court's reference to the UN Convention on the Rights of the Child, as it also

[378] ibid.

prohibits punishing under-18 offenders with life imprisonment without the possibility of release, and therefore the Court is still not in line with the international community.

Scalia maintains that foreign law should also not be considered because foreign authorities do not speak about issues typical to the US, such as how the sentencing authority can withhold the death penalty from an under-18 offender and mitigate the punishment.

More fundamentally, Scalia believes that the Court's basic argument, that American law should conform to the laws of the rest of the world, ought to be outright rejected, as in many imperative respects such laws differ from American national law. Scalia goes on to give examples of important differing laws, such as abortion, where he further says that 'although the Government … urged the Court to follow the international community's lead, these arguments fell on deaf ears.'

Scalia expresses how the Court's special reliance on UK laws is probably the most indefensible, as although it is true that the US shares a common history with the UK, and that English sources are often consulted in regard to the meaning of a 18th century constitutional text, the Court has long rejected a purely originalist approach to the Eighth Amendment. Rather, the Court seeks to determine current standards of decency within the nation. In Scalia's opinion, this gives all the more reason not look to a country (UK) that has developed in tandem with European continental influences and whose positions have changed over the years, such as allowing all but the most serious offenders to be tried by magistrates without a jury, which, if taken into consideration, would curtail the American right to jury trial in criminal cases.

Lastly, Scalia comments on the Court's attempt to praise the Constitution and assure that reference to foreign law underscores the centrality of the same issues within the American heritage of freedom. The strong-minded judge believes that the foreign sources were cited to set aside centuries-old American practice, a practice which a large number of States still adhere to, and that the foreign sources, rather, only affirm the Justices' own opinion as to how the world, America and this case ought to be.

**3. Problematic Facet of 'Global Constitutional Law': Use of Foreign Law**

It becomes evident that the problematic facet of 'Global Constitutional Law' is the use of foreign law in the above judgement. The statements outlined by Justice Scalia contrast greatly with the decision of the Court, and serve as effective food for thought. Although the above dissenting opinions perfectly outline the issue at hand, I would like to discuss this facet further.

### 3.1. Transnational Judicial Dialogue

The US Supreme Court did not only rely on its interpretation of the American Constitution, but also on foreign sources of law in its constitutional analysis. The transnational dialogue which constitutional courts of the world engage in is legal, but a large role is also played by the culture and attitude of the constitutional judges. In fact, this case engaged in a deep world-wide discussion, allowing for a transnational dialogue. For this reason, global constitutionalism can be created through formal channels but also through cultural channels. Constitutional courts all around the world are increasingly citing and referring to foreign legal precedents in a wide range of legal issues, mainly constitutional and fundamental rights issues. These interactions among world courts have thus developed a transnational judicial dialogue where courts use comparative public legal analyses to foster cross-fertilisation of ideas and practices. Anne-Marie Slaughter describes this as a 'process of collective judicial deliberation on a set of common problems.[379] This statement is bold and revolutionary as she speaks of something outside the traditional national judicial deliberation, which a scholar such as Grimm (see discussion in Part I above) would be accustomed to, as judicial deliberation in a national constitutional order takes place among nationally elected judges. A collective global judicial deliberation fosters the idea of a world-wide deliberation among judges appointed in different countries, an idea which seems peculiar at first glance and which has created a lot of discussion and contradicting opinions.

The increasing reference to foreign sources of law on the part of several constitutional court judges indicates a desire to participate in this transnational judicial dialogue. This phenomenon attracted many American scholars but there is great division on this topic among US constitutional court justices. This is clearly seen in the Roper vs. Simmons case as although the majority opinion refers to foreign law, Justice Scalia, one of the greatest constitutional scholars with a traditional and conservative outlook, strongly dissents. Scalia, the father of originalism[380], has stated that 'I probably use more foreign legal materials than anyone else on the court… of course they are all fairly old foreign legal materials, and they are all English,'[381] referring to the foundations of the US

[379] Anne-Marie Slaughter, *A Typology Of Transjudicial Communication* (1994) <https://scholarship.richmond.edu/cgi/viewcontent.cgi?referer=https://www.google.it/&httpsredir=1&article=2120&context=lawreview> accessed 3 December 2018.

[380] Interpreting the US Constitution as the founding fathers would have done.

[381] Melissa A. Waters, Justice Scalia On The Use Of Foreign Law In Constitutional Interpretation: Unidirectional Monologue Or Co-Constitutive Dialogue (2004)

Constitution. Scalia believes that foreign materials are irrelevant to an interpretation of the US Constitution. However, he has also said that the use of foreign legal materials is legitimate in certain cases, such as when federal courts interpret a treaty to which the US is a party.[382] In his remarks at the American Society of International Law Conference in March 2004, Scalia concluded that '[c]omparative study is useful ... not as a convenient means of facilitating judicial updating of the U.S. Constitution, but as a source of example and experience that we may use, democratically, to change our laws - or even, if it is appropriate, democratically to change our Constitution.'[383] The emphasis on 'democratically' here indicates that the legislator is better suited to change the interpretation of national legislation than the judge is, since the legislator is 'democratically' elected. The use of the word 'democratically' can also show how constitutional judges of foreign countries cannot form a legitimate source of interpretation for other countries.

### 3.2. Foreign Law Debate: Moshe Cohen-Eliya and Iddo Porat

Moshe Cohen Eliya and Iddo Porat, professors at the University of Israel, speak of a culture of authority and a culture of justification.[384] A difference between the two is represented by the role of text and its interpretation in constitutional law. In the case of the former, the court is an institution which must base its legitimacy on the authority of the constitutional text authorising the court to review governmental action. While in the latter culture, the judiciary's role is to demand that the government justify its actions, downplaying the importance of the text.

On this note, we can compare originalism to anti-textualism. Originalism is a very American concept where the judges recognise that they are not governing the state and that their only role is to interpret the constitution in the manner in which the founding fathers originally intended. Anti-textualism, on the other hand, does not pay very close attention to the text as it believes that values change over time.

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<https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1222&context=tjcil> accessed 3 December 2018.

[382] Scalia, Antonin. "KEYNOTE ADDRESS: FOREIGN LEGAL AUTHORITY IN THE FEDERAL COURTS." *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 98, 2004, pp. 305–310. *JSTOR*, JSTOR, www.jstor.org/stable/25659941.

[383] (n 7)

[384] M. Cohen-Eliya, I. Porat, Proportionality and the Culture of Justification

It is also worth mentioning the divide between conservatives and liberals. Conservatives believe that each country is unique with its own culture and characteristics and feel that interpreting a constitution by relying on foreign sources of law would lead to illegitimacy. Liberals, however, see themselves as citizens of the world, finding no reason why not to refer to experiences of other countries.

The use of foreign law is not without its flaws. Many identify the concept of a 'race to the top' where judges refer to cases in which a bigger protection of human rights was adopted. Another is that of 'cherry picking', a practice of picking a reference which best suits the case at hand and best fulfils the result the judge wishes to achieve.

Another useful point is Justice Breyer's attempt to introduce proportionality into American constitutional law in the Heller Case, which may be problematic since it disregards the different cultural meanings that are associated with proportionality in Germany and balancing in the US. Justice Scalia in fact rejected Breyer's suggestion, arguing that adopting the proportionality approach would water down the rights enumerated in the Constitution.[385] In one of their writings, Cohen-Eliya and Porat concluded that 'The use of the term proportionality may help to open the door for European influences on American constitutional law. Arguably, such a move should have been done more openly by making the reference to foreign law explicit rather than implicit.'[386]

**4. Concluding Remarks**

By way of conclusion, although the majority of Justices in Roper vs. Simmons looked towards foreign sources of law to base their judgement, the use of foreign law remains hotly debated with many contrasting viewpoints. Nevertheless, when taking into consideration the current ongoing globalisation which the world is facing, reference to foreign law will become increasingly more inevitable.

[385] M. Cohen-Eliya, G. Stopler, Probability Thresholds as Deontological Constraints in Global Constitutionalism

[386] M. Cohen-Eliya, I. Porat, The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law

# A REVIEW OF LEGAL INTERVENTIONS IN SEVERE PARENTAL ALIENATION CASES

Sylvana Brannon, BSc, BA(Hons)

**ABSTRACT**

Parental alienation is central in child custody litigation, with false allegations of abuse by the alienating parent against the target parent dominating the family court system, to ensure custody or residency court rulings in their favour. After a brief description of the symptoms of parental alienation, this study moves to a review of the various interventions employed by courts in cases of parental alienation, backed up by literature discussing case studies that review the different court responses. The review concludes that changes in custody or residency favouring the targeted parent are the most effective means of combating parental alienation, coupled with specialised family therapy that tackles the alienation.

**KEYWORDS:** PARENTAL ALIENATION – CUSTODY – RESIDENCY – ALIENATED PARENT – INTERVENTION – TARGET PARENT – CHILD ABUSE

# A REVIEW OF LEGAL INTERVENTIONS IN SEVERE PARENTAL ALIENATION CASES

Sylvana Brannon, BSc, BA(Hons)[387]

## 1. Introduction

Parental alienation occurs when a child is unreasonably brainwashed by one parent against the other parent, leading to the child refusing a relationship with the target parent while strongly aligning with the alienating parent. This behaviour occurs for no justifiable reason, and is often driven by false beliefs about the target parent, with whom the child previously enjoyed a healthy relationship. This contrasts with estrangement, where the child's negative reactions are justified as a result of a parent posing a real threat.

Parental alienation is a very real concern in our family courts in the context of separation and divorce proceedings, as it results in the loss of a previously positive parent-child relationship, with ensuing long-term negative effects on the child's psychological and emotional well-being, to the extent that it has been termed a form of child abuse. As such, Courts have an obligation to nip parental alienation in the bud when faced with it, but the Courts generally do not have enough evidence-based information on which to base their decisions.

Very little literature exists addressing effective judicial interventions that are available to the Courts in supporting the alienating parent, the target parent, and the child victim in families exhibiting symptoms of parental alienation. The interventions reviewed can be grouped into five categories: (i) change in custody accompanied by individual or family therapy, (ii) change in custody only, (iii) multi-modal family intervention, (iv) parallel group therapy, and (v) various forms reunification programs. This paper reviews case studies of these common evidence-based interventions to parental alienation and recommends best practices for Courts faced with cases involving parental alienation.

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**2. The Nature of Parental Alienation**

'Parental alienation' was first defined by Dr Richard Gardner, a forensic and child psychiatrist, as a syndrome in which one parent (the alienating parent) teaches the child to reject the other parent, (the target parent) via conscious and subconscious techniques like brainwashing.[388] Additionally, the child is consciously or unconsciously taught to be scared around the target parent and avoid contact with them. Parental alienation results in the breakdown of the child's relationship with the target parent. The child will also be noted to contribute to the vilification of the allegedly hated parent.[389] False allegations of abuse may also form a component of parental alienation, and can thus, be a powerful technique used by the alienating parent to achieve the elimination of the target parent from the child's life. [390]

Table 1 shows the symptoms displayed by children who are victims of parental alienation.[391] The defining feature of parental alienation is that the alienating parent will attempt to eradicate the relationship between the child and the target parent without reasonable justification.[392] In spite of opposition, there is professional consensus that parental alienation is very real and does, indeed occur.[393]

[388] R. A. Gardner, *The parental alienation syndrome: a guide for mental health and legal professionals* (Creative Therapeutics 1992).

[389] Glenn F. Cartwright. 'Expanding the parameters of parental alienation syndrome' (1993) 21(3) The American Journal of Family Therapy 205.

[390] ibid.; D. C. Rand. 'The spectrum of parental alienation syndrome: Part II' (1997) 15(4) American Journal of Forensic Psychology 39; Kenneth H. Waldron and David E. Joanis. 'Understanding and collaboratively treating parental alienation syndrome' (1996) 10(3) American Journal of Family Law 121.

[391] R. A. Gardner. 'Should courts order PAS children to visit/reside with the alienated parent?' (2001) 19(3) The American Journal of Forensic Psychology 61.

[392] Joan S. Meier. 'A Historical Perspective on Parental Alienation Syndrome and Parental Alienation' (2009) 6(3-4) Journal of Child Custody 232.

[393] Joan B. Kelly and Janet R. Johnston. 'The alienated child: A Reformulation of Parental Alienation Syndrome' (2001) 39(3) Family Court Review 249; Meier (n 7); C. A. Rueda. 'An Inter-Rater Reliability Study of Parental Alienation Syndrome' (2004) 32(5) The American Journal of Family Therapy 391; Lenore E. Walker and David L. Shapiro. 'Parental Alienation Disorder: Why Label Children with a Mental Diagnosis?' (2010) 7(4) Journal of Child Custody 266; R. A. Warshak. 'Current controversies regarding parental alienation syndrome' (2001) 20 American Journal of Forensic Psychology 31.

*Table 1: Gardner's differential diagnosis of the three types of parental alienation*

| PRIMARY SYMPTOMATIC MANIFESTATION | MILD | MODERATE | SEVERE |
|---|---|---|---|
| The Campaign of Denigration | Minimal | Moderate | Formidable |
| Weak, Frivolous, or Absurd Rationalizations for the Depreciation | Minimal | Moderate | Multiple absurd rationalizations |
| Lack of Ambivalence | Normal ambivalence | No ambivalence | No ambivalence |
| The Independent-Thinker Phenomenon | Usually absent | Present | Present |
| Reflexive Support of the Alienating Parent in the Parental Conflict | Minimal | Present | Present |
| Absence of Guilt | Normal guilt | Minimal to no guilt | No guilt |
| Borrowed Scenarios | Minimal | Present | Present |
| Spread of the Animosity to the Extended Family of the Alienated Parent | Minimal | Present | Formidable, often fanatic |
| ADDITIONAL DIFFERENTIAL DIAGNOSTIC CONSIDERATIONS | | | |
| Transitional Difficulties at the Time of Visitation | Usually absent | Moderate | Formidable or visit not possible |
| Behavior During Visitation | Good | Intermittently antagonistic and provocative | No visit, or destructive and continually provocative behavior throughout visit |
| Bonding with the Alienator | Strong, healthy | Strong, mildly to moderately pathological | Severely pathological, often paranoid bonding |
| Bonding with the Alienated Parent | Strong, healthy, or minimally pathological | Strong, healthy, or minimally pathological | Strong, healthy, or minimally pathological |

Parental alienation is nowadays central in child custody litigation, with false allegations of abuse by the alienating parent against the target parent dominating the US family court system, to ensure custody or residency court rulings in their favour.[394] Furthermore, alienating parents pressure their children, consciously and unconsciously,

[394] Meier (n 7).

to reject the target parent during court proceedings, resulting in additional distress for the child.[395]

Cases of parental alienation require a synergistic combination of legal and clinical management, if families are to be helped to function better. Judicial intervention will depend on the severity of the alienation rather than on the commonly applied yet ill-defined notion of an appropriate outcome for the child, as is often the unfortunate case.[396]

Based on the differing opinions of various mental health professionals, the court decisions taken in the US and UK have included any of the following:

a) Leaving the child with the alienating parent while the parents undergo individual and/or family therapy.[397]
b) Putting strict visitation schedules in place, while imposing court sanctions to force the alienating parent to comply with court orders.
c) Ordering that the victim child reside with the target parent.[398]
d) Take no action, expecting that the alienation will be resolved in time by itself.[399]

Children exposed to parental alienation experience various negative outcomes and their symptoms have even been likened to those of individuals exposed to cults.[400] Effective therapeutic intervention is an absolute necessity in parental alienation, with the ultimate aim to restore the child-target parent relationship and achieve positive outcomes for the

[395] Douglas Darnall PhD. 'The Psychosocial Treatment of Parental Alienation' (2011) 20(3) Child and Adolescent Psychiatric Clinics of North America 479..

[396] Matthew J. Sullivan and Joan B. Kelly. 'Alienated Children in Divorce: Legal and Psychological Management of Cases With an Alienated Child' (2001) 39 Family Court Review 299; Darnall (n 14).

[397] Sullivan and Kelly (n 15).

[398] Darnall (n 14); Gardner (n 6).

[399] William Bernet and others. 'Parental Alienation, DSM-V, and ICD-11' (2010) 38(2) The American Journal of Family Therapy 76; Darnall (n 14); D. Darnall and B. F. Steinberg. 'Motivational methods for spontaneous reunification with the alienated child' (2008) 36 American Journal of Family Therapy 107.

[400] Amy J. L. Baker and Naomi Ben-Ami. 'To Turn a Child Against a Parent Is To Turn a Child Against Himself: The Direct and Indirect Effects of Exposure to Parental Alienation Strategies on Self-Esteem and Well-Being' (2011) 52(7) Journal of Divorce & Remarriage 472; Bernet et al (n 20); J. R. Johnston. 'Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child' (2005) 38(4) Family Law Quarterly 757; Gardner (n 6).

child and the whole family.[401] Both psychological and legal interventions should take into account the severity of alienation, and treatment should be guided by three principles:

1) a healthy redirection of the needs of the alienating parent,
2) restoring the victim child's healthy relationship with the target parent and hence the child's appropriate role within the family, and
3) avoiding blame.[402]

**3. Review of recommended responses to severe parental alienation**

Dunne and Hedrick[403] studied 21 children from 16 families who displayed behaviours consistent with Gardner's definition of parental alienation syndrome. The study aimed to analyse parental alienation cases and explore the characteristics of each case and how parental alienation was addressed. *Parental alienation was eradicated in cases when custody was changed in favour of the target parent and became worse in cases engaged in traditional therapy with no change in custody*.

Multi-Modal Family Intervention (MMFI) is a form of therapy involving the alienated child and both parents, and includes individual psychotherapy, case management, education, and targeted intervention to reduce parental alienation.[404] 55 cases consisting of children who were considered at risk of parental alienation on the basis of clinical judgement, and who completed MMFI experienced *a reduction in parental alienation after an increase in time that the alienated child spent with the target parent*.

Gardner[405] compared outcomes of parental alienation cases where custody was changed in favour of the target parent, to those cases where the alienating parent had residential custody. His study involved 99 children with behaviours consistent with Gardner's

[401] Paz Toren and others. 'Sixteen-Session Group Treatment for Children and Adolescents With Parental Alienation and Their Parents' (2013) 41(3) The American Journal of Family Therapy 187; Darnall (n 14).

[402] Benjamin D. Garber. 'Parental alienation and the dynamics of the enmeshed parent-child dyad: adultification, parentification, and infantilization' (2011) 49(2) Family Court Review 322.

[403] John Dunne and Marsha Hendrick. 'The Parental Alienation Syndrome: An Analysis of Sixteen Selected Cases' (1994) 21(3/4) Journal of Divorce & Remarriage 21.

[404] Steven Friedlander and Marjorie Gans Walters. 'When a child rejects a parent: tailoring the intervention to fit the problem' (2010) 48(1) Family Court Review 98.

[405] Gardner (n 6).

parental alienation symptoms from 55 families, and their target parent.[406] Recommendations regarding custody were made to the court, and the target parent was followed up 3 months to 19 years after. *In all the 22 cases where custody was changed in favour of the target parent, parental alienation was decreased and even eliminated. In 70 cases where custody remained with the alienating parent, parental alienation increased*.

In order to examine the efficacy of therapeutic intervention in severe parental alienation, 45 children (from 25 families) who displayed behaviours consistent with Gardner's parental alienation symptoms were divided into three outcome groups – interrupted alienation, mixed outcome, and completed alienation.[407] *Alienation was interrupted when custody was changed in favour of the target parent. Complete alienation or minimal reduction in alienation occurred when custody remained with the alienating parent and visitation with the target parent was not enforced*.

The Family Reflections Reunification Program (FRRP) aims to reconcile alienated children with their target parents, and it is specifically designed for the treatment of children who have been severely alienated, and their families. 21 out of 22 children (from 12 families) who attended FRRP re-established and maintained contact with the target parent. *Having been separated from the alienating parent was not observed to be harmful to children*.

'Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships'™ is a program that draws on social science research to help severely and unreasonably alienated children and adolescents adjust to court orders that place them with the target parent while suspending contact with the alienating parent.[408] 23 children (from 12 families) who refused to spend time with one parent and who completed the Family Bridges workshop were followed up. *22 of these children experienced a decrease in parental alienation post intervention. Out of these 22, the decrease in parental alienation was observed even 4 years later. The other 4 cases had resumed contact with the alienating parent, at which point there was an increase in parental alienation*.

[406] Richard A. Gardner, 'The parental alienation syndrome and the differentiation between fabricated and genuine child sex abuse' (Creative Therapeutics 1987).

[407] ibid.; Deirdre Rand, Randy Rand and Leona Kopetski. 'The spectrum of parental alienation syndrome part III: the Kopetski follow-up study' (2005) 23(1) American Journal of Forensic Psychology 15.

[408] Richard A. Warshak. 'Family Bridges: using insights from social science to reconnect parents and alienated children' (2010) 48(1) Family Court Review 48.

**4. Practical Recommendations**

It is clear that parental alienation can only be eliminated or improved by bestowing primary parental responsibility, including custody and residency, of the alienated child on the target parent.[409] Separation of the target child from the alienating parent was not proven to harm the child.[410] In addition, specialised and targeted family therapy can address the damage done to the target parent-child relationship by parental alienation. Such therapy has been shown to have the following aims:

1) Protect the target child from further harm caused by alienation.
2) Improve the child's psychological well-being.
3) Address the target child's distorted thinking while strengthening their critical thinking skills.
4) Improve the target parent-child relationship.
5) Prepare the alienating parent for an improvement in the quality of the target parent-child relationship and support them through this change.
6) Repair the co-parenting relationship.
7) Strengthen family communication and healthy boundaries within the family structure.

Despite previous suggestions, no study recommends or supports waiting for parental alienation to spontaneously resolve itself, or allowing the target child to decide custody or residency.[411] Actually, the weight of evidence suggests that leaving the child under the care of the alienating parent was found to aggravate parental alienation and has been shown not to be effective.[412] Such a strategy appears to enable the alienation to continue and even become more severe. This continued alienation causes further damage to the target parent-child relationship and negative psychological and social outcomes for the target child, such as major depressive disorder, low self-esteem, and insecure attachment styles as adults.[413]

[409] Dunne and Hendrick (n 30); Gardner (n 6); Rand et al (n 35).

[410] Kathleen M. Reay. 'Family Reflections: A Promising Therapeutic Program Designed to Treat Severely Alienated Children and Their Family System' (2015) 43(2) The American Journal of Family Therapy 197.

[411] Darnall and Steinberg (n 22).

[412] Gardner (n 6); Rand et al (n 35).

[413] Gardner (n 6), Naomi Ben-Ami and Amy J. L. Baker. 'The Long-Term Correlates of Childhood Exposure to Parental Alienation on Adult Self-Sufficiency and Well-Being' (2012) 40(2) The American Journal of Family Therapy 169.

A change in custody and residency in favour of the target parent is the only effective strategy supported by evidence to improve targeted relationships and reduce distress in the alienated child, especially since, separating the child from the alienating parent was not observed to be harmful to the child.[414] These findings coincide with previous literature suggesting that courts should implement strict visitation schedules and changes in custody and residency to the target parent.[415]

Court-ordered therapy was only effective in resolving parental alienation when implemented before parental alienation reaches the severe stage and becomes compounded by the adversarial court process.[416] However, traditional therapy in isolation does not address parental alienation effectively, and in these situations a change in custody and residency in favour of the target parent is warranted. [417]

Interventions for parental alienation should include both a legal and psychotherapeutic response to facilitate restoration of family relationships when parental alienation is evident, especially when the parental alienation is moderate or severe. [418]

**5. Discussion**

A family therapy approach including all members, supported by legal interventions is recommended in cases where a child is refusing contact with a parent as a result of parental alienation.[419] A change in custody or residency in favour of the target parent can reduce and even eliminate parental alienation, as evident by current literature. The literature very clearly shows that assigning primary parental responsibility to the target

[414] Dunne and Hendrick (n 30); Gardner (n 6); Rand et al (n 35); Reay (n 40).

[415] Darnall (n 14).

[416] L. Lowenstein. 'Parent Alienation Syndrome: A Two Step Approach Toward a Solution' (1998) 20(4) Contemporary Family Therapy 505; Janet R. Johnston and Judith Roth Goldman. 'Outcomes of family counseling interventions with children who resist visitation: an addendum to Friedlander and Walters (2010)' (2010) 48(1) Family Court Review 112.

[417] Dunne and Hendrick (n 30); Rand et al (n 35).

[418] Sullivan and Kelly (n 15); Richard A. Gardner. 'Recommendations for Dealing with Parents who Induce a Parental Alienation Syndrome in their Children' (1998) 28(3-4) Journal of Divorce & Remarriage 1.

[419] Friedlander and Walters (n 31); Lowenstein (n 51); Reay (n 40); Matthew J. Sullivan, Peggie A. Ward and Robin M. Deutsch. 'Overcoming barriers family camp: a program for high-conflict divorced families where a child is resisting contact with a parent' (2010) 48(1) Family Court Review 116; Toren et al (n 27); Warshak (n 36).

parent in parental alienation cases of a severe nature is an important step towards its elimination.

Research further indicates that removing the target child from the care of their preferred parent does not harm them, in spite of the transient distress experienced. Rather, such a step will protect the child from further harm and allow for an improvement in the target parent-child relationship without further interference from the alienating parent.[420]

Needless to say, all family members will need to adjust to changes in custody or residency, and need to be supported therapeutically during this transition. Since traditional family therapy has been shown to be ineffective and may actually result in further damage, specialised family therapy targeted to the needs of families going through parental alienation is an important requisite, and such therapy should occur as soon as parental alienation is identified, be court-ordered, and noncompliance needs to be sanctioned to encourage alienating parents to attend therapy. [421]

The various forms of specialised family therapy programmes in use share similar objectives. To begin with, any parental alienation intervention must involve the targeted child, target parent and alienating parent. Additionally, parental alienation family therapy should:

- provide each family member with psycho-education about parental alienation and its consequences;
- protect the targeted children from harm caused by the alienation;
- use therapeutic intervention that reduces the targeted child's distress and improves psychological well-being;
- use techniques that challenge the targeted child's distorted thinking and teach them critical thinking skills;
- work to improve the targeted parent-child relationship;
- prepare the alienating parent for an improvement in the quality of the targeted parent-child relationship and challenge their distorted thinking;
- employ conflict resolution tactics aimed at repairing the co-parenting relationship; and
- establish healthy boundaries and communication within the family.

A non-judgemental approach must be adopted by mental health practitioners working with families going through parental alienation, who must strive to build rapport with

[420] Dunne and Hendrick (n 30); Gardner (n 6); Reay (n 40); Rand et al (n 35).

[421] Reay (n 40); Warshak (n 36); Johnston and Goldman (n 52).

all family members.[422] Therapy sessions with family members all together and individual sessions should be offered so that individual as well as family concerns are tackled.[423] The ultimate intention of family therapeutic interventions is an achievement and maintenance of healthy parent-child relationships, and a facilitation of a new environment within the family allowing parents to maintain healthy boundaries with respectful interactions as required.[424]

The main difficulty of implementing such specialised family therapy interventions will be presented by the averseness of the alienating parent to participate in a process that intends to change the nature of the parent-child relationships in a way contrary to his/her wishes. However it is a requisite that the alienating parent is motivated to engage in such therapy aimed to improve their child's mental health, as the degree of their engagement will determine the success, or otherwise of the intervention. The motivation for alienating parents to participate might have to be externally driven, by courts adopting a strategy for managing non-compliance.
Non-collaboration with court orders aimed at improving the child's situation should be met with sanctions that are clearly defined and implemented. This is based on the concept that it is more beneficial for the child to be under the care of the target parent with limited contact with the alienating parent, than to continue living with an alienating parent who is not willing to make a genuine effort to achieve the best interests of the child.

[422] Douglas S. Rait. 'The therapeutic alliance in couples and family therapy' (2000) 56(2) Journal of Clinical Psychology 211.

[423] J. Lebow and K. Newcomb Rekart. 'Integrative Family Therapy for High-Conflict Divorce With Disputes Over Child Custody and Visitation' (2007) 46(1) Family Process 79.

[424] ibid.

**6. Conclusion**

This paper analysed a number of peer-reviewed case studies of outcomes from various evidence-based judicial interventions that are commonly used by Courts in cases of parental alienation. Based on this analysis, best practices that ought to be applied by the Courts when faced with such cases are recommended. The studies analysed consistently suggest that the negative effects of parental alienation are effectively reduced when custody of the victim child is switched in favour of the target parent, and furthermore that when such a switch is accompanied by family therapy with the involvement of the Court any ensuing distress in the victim child is significantly reduced while the relationship between the child and the target parent is re-established.

Such an approach is rarely applied by Malta's family courts, and it may be necessary that judges rethink the way they address cases of parental alienation, especially of the severe kind. In pursuit of what is truly in the victim child's long-term best interest, judges must have the courage to take the seemingly more challenging option of switching custody to the target parent rather than maintaining the status quo "because the child wishes it to be so". When hearing a child who is a victim of parental alienation, the Courts must keep in mind that the voice they are hearing is not that of the child, but that of the alienating parent who is using the child for his or her purposes. Judges should feel confident in taking such an approach since it is the approach backed by evidence-based research.

# A COMPARATIVE APPROACH TO THE LEGALISATION OF MARIJUANA IN MALTA - AN ANALYSIS OF POLICIES AND ECONOMIC EFFECTS OF REGULATION.

Liam Axisa

**ABSTRACT**

The global movement of decriminalisation of marijuana has in recent years transitioned into one of legalisation of the drug for recreational use. This submission seeks to engage in a comparative analysis of a number of jurisdictions which have, to varying degrees, legalised recreational marijuana so as to provide for a foundation on which the discussion on legalisation of recreational marijuana in Malta may be had. The analysis is one of policy and its social, as well as, economic impact.

**KEYWORDS:** LEGALISATION OF RECREATIONAL MARIJUANA – MALTA – ECONOMIC POLICY

# A COMPARATIVE APPROACH TO THE LEGALISATION OF MARIJUANA IN MALTA- AN ANALYSIS OF POLICIES AND ECONOMIC EFFECTS OF REGULATION

Liam Axisa[425]

## 1. Marijuana Legislation

With the recent legalisation of medical marijuana in Malta, it is likely that discussions on the recreational use of cannabis will follow in the near future.[426] The aim of this paper is to provide for all those interested in having and participating in said discussion, a detailed and comparative analysis of the laws of foreign jurisdictions on the recreational use of marijuana. The jurisdictions which shall be analysed are two U.S states; California and Colorado, Portugal and the Netherlands. While it is important to keep in mind that the aforementioned jurisdictions are all distinct in their own right, they will all undergo an analysis based on three main aspects; the purchase and sale, the possession and consumption, and the cultivation of marijuana. Along with said analysis, importance will also be given to the economic benefits which arise directly from the recreational marijuana industry; namely those from sales, taxation, jobs and tourism.

### 1.1. Malta

#### 1.1.1 Laws relating to Cannabis for Recreational Use

Maltese drug laws were last updated in 2018 through the amendments of the Drug Dependence (Treatment not Imprisonment) Act, Chapter 537 of the Laws of Malta (hereinafter the "Drug Dependence Act". First promulgated in 2015, this act sought to

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[426] Allied Ltd, 'Cabinet Approves Medical Cannabis' (*Times of Malta*, 2017) <https://www.timesofmalta.com/articles/view/20171113/local/cabinet-approves-medical-cannabis.662957> accessed 4 March 2018.

replace punishment and incarceration for the possession of small quantities of illicit drugs for personal use with treatment and rehabilitation.[427]

The sale of marijuana in Malta remains a criminal offence as per the Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta (hereinafter the "Drug Ordinance"). The Drug Ordinance calls for prison sentences and fines to be given to those found guilty of the offences outlined within it, with the different types of punishments being listed under Article 22. For the sale of drugs under this ordinance, the punishments range from imprisonment of between 4 to 30 years and a fine between €2,329.37 and €116,468.67.[428] This being said, such jail time would only be given if the court determines that for reasons ranging from quantity of drugs to the age of the offender, that life imprisonment would not be appropriate.[429] With regard to all other drug related offences under the Drugs Ordinance,[430] the sentence to be given if guilty would include imprisonment for a period between 12 months and 10 years as well as a fine between €465.87 and €23,293.73.[431]

Following the promulgation of the Drug Dependence Act, the laws surrounding the possession of all drugs for personal use were greatly overhauled. Under this act, anyone caught in possession of an illicit drug[432] shall be liable to fines ranging between €75 and €125, or between €50 and €100 in the case of cannabis.[433] Such people will not appear in front of a Court, rather, they will appear before the Commissioner for Justice.[434] If, however, a person is convicted of subsequent crime of simple possession within two years of the previous conviction, the Commissioner for Justice shall order

[427] Drug Dependence Act, Chapter 537 of the Laws of Malta.

[428] Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, Article 22(2)(a)(i)(aa).

[429] ibid Article 22(2)(a)(i).

[430] Such offences include but are not limited to the sale of equipment meant for use in drug production and the transport of illicit drugs

[431] ibid Article 22(2)(a)(ii).

[432] The maximum allowed quantities of illicit drugs for qualification under this provision are as follows: 3.5 grams of cannabis, 2 grams of other drugs and 2 pills of ecstasy

[433] Drug Dependence Act, Chapter 537 of the Laws of Malta, Article 4.

[434] Established by the Commissioners for Justice Act, Chapter 291 of the Laws of Malta.

the person to appear in front of the Drug Offenders Rehabilitation Board.[435] This being said, if the drug possessed was cannabis, then the Commissioner for Justice shall only send the person convicted in front of the aforementioned board if they believe that said person is also abusing or is likely to also abuse other prohibited drugs.[436] Nonetheless, the police will still be able to detain people caught with small quantities of drugs for up to 48 hours, so as to extract information related to drug trafficking.[437]

On the issue of cultivation, the Drug Dependence Act instituted a system whereby if a person is found guilty of cultivating not more than one cannabis plant for personal use, then said person will not have to face the mandatory prison sentences as laid out in the Drugs Ordinance.[438] If however, the person in question was cultivating more than one plant or if the court determines that any cultivation was for the purpose of sale, then Article 22 of the Drug Ordinance applies with the person being liable to the same punishments as someone guilty of selling cannabis.[439]

While recent amendments have made strides in decriminalising personal use of recreational marijuana, this is not to say that more cannot be done. In fact, Magistrate Dr Natasha Galea Sciberras noted that while the reforms were welcome, some laws in place were still "draconian" in nature.[440] One of her concerns is related to the issue of cultivation of cannabis, whereby if someone is found to be growing two plants for personal use, this would still amount to "aggravated possession" under the current laws and make that person liable to a prison sentence.

[435] Drug Dependence Act, Chapter 537 of the Laws of Malta, Article 5.

[436] ibid.

[437] 'New Drugs Reform Law Into Force Today– What Has Changed?' (*MaltaToday.com.mt*, 2015) <https://www.maltatoday.com.mt/news/national/51881/new_drugs_reform_law_into_force_today_what_has_changed> accessed 4 March 2018.

[438] Drug Dependence Act, Chapter 537 of the Laws of Malta, Article 7.

[439] Dangerous Drug Ordinance, Chapter 101 of the Laws of Malta, Article 22(2)(a)(i).

[440] Allied Ltd, 'Two Years After Drugs Law Reform' (*Times of Malta*, 2017) <https://www.timesofmalta.com/articles/view/20170520/editorial/Two-years-after-drugs-law-reform.648442> accessed 4 March 2018.

A recent notable analysis of the drug situation in Malta can be found in the EU 2017 Drug Report, which gives an overview of said situation up to the year 2015.[441] One of the things noted in this report is that out of the 472 drug related offences which happened in 2015, an overwhelming 76% were related to simple possession (possession for personal use) while only the remaining quarter were offences related to supply.[442] The majority of the simple possession offences were related to cannabis, the most commonly used drug for people aged 18-65, the majority of whom are male.[443]

When it comes to drug use by 15-16 year olds, Malta ranked above the EU average in the percentage of alcohol use and heavy episodic drinking, with almost half Maltese respondents confirming they had done the latter in the 30 days prior to the survey.[444] On the topic of hard drugs, the report found that Malta has a relatively high percentage of high-risk opioid use at 6 per 1000 population, the most prevalent of which being heroin. The number of persons entering heroin treatment for the first time is the lowest from the three most commonly used narcotics (cannabis, cocaine and heroin) at 66 people in 2015, although it is the drug with the most number of entrants at 1296, eight times greater than those seeking cannabis treatment.[445] It is 30-34 year olds and 45-49 year olds who are the most likely to die due to overdose, although it should be noted that a total of 8 people died from drug related overdoses in Malta in 2015.[446] From the almost 500 drug seizures in 2015, the most common drug seized was cannabis resin at 70 kg followed by cocaine at 21 kg. The report also noted the low potency/purity of Maltese illicit drugs when compared to the EU range while the price of drugs ranged from cheap to medium relative to the same range.[447] The potency of cannabis resin was found to be between 4-11%, very low on the spectrum with the highest potency in the EU being that of 87%.[448]

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[441] *Malta Country Drug Report 2017* (2017) <http://www.emcdda.europa.eu/system/files/publications/4513/TD0616154ENN.pdf_en> accessed 4 March 2018.

[442] ibid, p.4

[443] ibid, p.5

[444] ibid.

[445] ibid, p.6

[446] ibid, p.8

[447] ibid, p.15

[448] ibid.

### 1.1.2 Laws relating to Cannabis for Medicinal Use

The Drug Dependence Act as amended through Act No. V of 2018 allows for medical practitioners to prescribe, if no other option is viable, medical preparations of cannabis.[449] To this end, the promulgation of the Production of Cannabis for Medicinal and Research Purposes Act, Chapter 578 of the Laws of Malta (hereinafter the "Production of Cannabis Act") allowed for procurement of licences to produce cannabis. Such licences are given by the Malta Enterprise, with strict control over the entire production process.[450]

The legality of medicinal cannabis neither precludes nor necessitates the legality of recreational cannabis. Nonetheless, the trend of legalisation of recreational use post legalisation of medical use of cannabis is to be noted, with the legalisation of medical cannabis often indicating a shift in public opinion with regards to cannabis in general.[451] This shift can be seen in Malta, with recently appointed Parliamentary Secretary for Equality and Reforms Hon. Rosianne Cutajar attesting to the need for implementation of cannabis reform.[452]

## 1.2. The United States of America

### 1.2.1. Colorado

The first state in the United States of America to pass comprehensive legislation on the legalisation of recreational marijuana was Colorado in 2012 through a referendum. With the passing of Amendment 64, adults 21 or older in Colorado can legally possess

[449] Drug Dependence Act, Chapter 537 of the Laws of Malta, Article 10.

[450] ibid

[451] 'How Medical Marijuana Is Opening The Door To Recreational Cannabis' (Forbes.com, 2018) <https://www.forbes.com/sites/jordanwaldrep/2018/09/12/how-medical-marijuana-is-opening-the-door-to-recreational-cannabis/#a0ea784cc76e> accessed 20 February 2020.

[452] '[WATCH] New Parliamentary Secretary Rosianne Cutajar Says It's Time To Implement Cannabis Reform' (MaltaToday.com.mt, 2020) <https://www.maltatoday.com.mt/news/national/99767/watch_rosianne_cutajar_says_its_time_to_implement_cannabis_reform#.Xk62ApNKhQI> accessed 20 February 2020.

one ounce (28.5 grams) of marijuana, with any more resulting in legal penalties.[453] Despite legalisation on a state-wide level, the law allows for cities, counties, schools, universities and employers to impose their own rules and consequences.[454]

On the topic of buying marijuana, it should be noted that one must present a valid identification card (ID) proving they're 21 or over to purchase cannabis.[455] It is illegal for anyone under 21 to buy, have or use marijuana with the giving, selling or sharing of marijuana to such persons constituting a felony.[456] While only licensed retailers can sell marijuana, it is possible for individuals over 21 to share up to an ounce of marijuana with other persons over 21.[457] These aforementioned retailers can only conduct the sale of marijuana in a 'restricted portion' of their store; its name due to the fact that no one under the age of 21 is allowed there.[458] Under state laws, retail marijuana businesses can be open only between 8:00 a.m. and 12:00 a.m., although different municipalities can require stricter hours of operation; such as Denver only allowing marijuana retailers to stay open till 10:00 p.m.[459] State Law also provides that marijuana businesses are required to sell all marijuana products in packaging that's resealable, child-resistant and non-see-through.[460] Another protective measure applied by this state is that all retail marijuana products are required to be labelled with a red *THC* symbol.[461]

Despite legalisation of the drug, public use of marijuana remains illegal and this includes both indoor and outdoor venues inter alia; parks and amusement parks, ski

[453] 'Marijuana Laws In Colorado' (*Colorado Pot Guide*, 2017) <https://www.coloradopotguide.com/marijuana-laws-in-colorado/> accessed 5 March 2018.

[454] ibid.

[455] ibid.

[456] ibid.

[457] ibid.

[458] ibid.

[459] 'Marijuana Laws In Colorado' (*Colorado Pot Guide*, 2017) <https://www.coloradopotguide.com/marijuana-laws-in-colorado/> accessed 5 March 2018.

[460] 'Laws About Marijuana Use | Colorado Marijuana' (*Colorado.gov*, 2017) <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> accessed 5 March 2018.

[461] ibid.

resorts, concert venues, businesses, restaurants, cafes or bars and common areas of apartment buildings.[462] Due to the fact that marijuana remains listed as a Schedule I Drug under federal law,[463] use on federal land (i.e. national parks and national forests) also remains illegal. Marijuana can up till now only be used on private property, however property owners can ban the use and possession of marijuana in their properties.[464] Consumption of recreational marijuana by pregnant women may also have legal consequences, with Colorado law requiring hospitals who come across babies who test positive for THC to notify child protective services.[465]

According to the law, Coloradans can legally grow marijuana in their homes for personal use as long as home grown marijuana products are not sold.[466] Up until the end of December 2017, a total of six plants were allowed per adult over 21 in a Colorado household, with a maximum of three plants flowering at a time.[467] As of January 2018 however, a cap of 12 cannabis plants per residence was set with such cap applying irrespective of how many people reside in the household.[468] Such plants should be grown in an enclosed and locked area so as to prevent any minors from accessing it.[469]

It should be also noted that Colorado Law still allows for employers to test for marijuana and make employment decisions based on drug test results, with this only affecting recreational marijuana users as medical marijuana users are exempt from any

[462] 'Laws About Marijuana Use | Colorado Marijuana' (*Colorado.gov*, 2017) <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> accessed 5 March 2018.

[463] '21 U.S. Code § 812 - Schedules Of Controlled Substances' (*lawschool.cornell.edu/*, 2017) <https://www.law.cornell.edu/uscode/text/21/812> accessed 5 March 2018.

[464] 'Laws About Marijuana Use | Colorado Marijuana' (*Colorado.gov*, 2017) <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> accessed 5 March 2018.

[465] ibid

[466] 'Home Grow Laws | Colorado Marijuana' (*Colorado.gov*, 2017) <https://www.colorado.gov/pacific/marijuana/home-grow-laws> accessed 5 March 2018.

[467] ibid

[468] ibid

[469] ibid

sort of such discrimination.[470] Laws have also been updated to include marijuana DUI, setting the limit to 5 nano-grams per millilitre of blood.[471]

### 1.2.2. California

Recreational marijuana was legalised in California by popular vote via the Control, Regulate and Tax Adult Use of Marijuana Act [AUMA] (also known as Proposition 64), which took place on the 8th of November 2016, after being the first state to legalise medical marijuana in 1996.[472] The current legislation allows for the sale, use, possession, share and home cultivation of cannabis by all adults over 21.[473]

Up until January 1st, 2018, there were no operating marijuana dispensaries as the state government had not yet issued the respective licences. So as to address this limbo period, legislators pushed for the establishment of a sharing economy while the legal market was being set up.[474] Upon being given a license, pot shops will be prohibited from the sale or consumption of alcohol or tobacco within their stores.[475] AUMA provides that upon the creation of the legal market, individuals over 21 will be able to engage in the purchase and sale of cannabis as long as they provide the required ID. It also requires all shops selling recreational cannabis to adhere to distributional industry standards on testing, packaging and labelling, which are to be phased in throughout 2018.[476] Marijuana packaging is now required to provide the net weight, origin, age,

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[470] 'Laws About Marijuana Use | Colorado Marijuana' (*Colorado.gov*, 2017) <https://www.colorado.gov/pacific/marijuana/laws-about-marijuana-use> accessed 5 March 2018.

[471] 'Marijuana Laws In Colorado' (*Colorado Pot Guide*, 2017) <https://www.coloradopotguide.com/marijuana-laws-in-colorado/> accessed 5 March 2018.

[472] 'What To Know About Marijuana Legalization In California' (*Time.com*, 2017) <http://time.com/4565438/california-marijuana-faq-rules-prop-64/> accessed 5 March 2018.

[473] 'Know Your Rights Post-Prop. 64' (*Times-standard.com*, 2017) <http://www.times-standard.com/article/NJ/20161107/NEWS/161109826> accessed 5 March 2018.

[474] 'What To Know About Marijuana Legalization In California' (*Time.com*, 2017) <http://time.com/4565438/california-marijuana-faq-rules-prop-64/> accessed 5 March 2018.

[475] ibid.

[476] 'Everything To Know About California Marijuana Laws Kicking In Jan. 1, 2018 - The Cannifornian' (*The Cannifornian*, 2017) <http://www.thecannifornian.com/cannabis-culture/everything-know-california-marijuana-laws-kicking-jan-1-2018/> accessed 5 March 2018.

and type of the product, as well as the milligram amount per serving of tetrahydrocannabinol, cannabidiol, other cannabinoids, and also if any pesticides were used during cultivation.[477] Further regulation also requires licensed marijuana businesses to post a copy of their permits in public view, with consumers being able to look up said business on state government registries like the Bureau of Cannabis Control.[478] Also of note is that the penalty for unlicensed sale of marijuana is now reduced from four years in state prison to six months in county jail.[479]

When it comes to possession, AUMA allows adults over the age of 21 to possess up to an ounce (28.5 grams) of marijuana flower or 8 grams of marijuana extract.[480] Smoking marijuana in public remains illegal and whoever does so is subject to a $100-$250 fine. The State's policy towards marijuana and driving is similar to its take on alcohol and driving; with driving under the influence of marijuana, consuming marijuana while driving and having an open container of marijuana in the vehicle being illegal.[481] If underage persons are found in possession of marijuana, the new law establishes the act as an infraction and punishable by a compulsory drug counseling program and community service.[482]

On the topic of cultivation, adults over the age of 21 are allowed to cultivate up to six cannabis plants per household.[483] Cultivation however, is only allowed in an indoor or outdoor enclosed and locked area of a residence with any marijuana grown in excess of the 1 ounce legal for adults to carry having to be hidden in a secure place away from

[477] ibid.

[478] ibid.

[479] 'Control, Regulate, And Tax Adult Use Of Marijuana Act (Amendment #1).' (*Lao.ca.gov*, 2015) <http://www.lao.ca.gov/BallotAnalysis/Initiative/2015-103> accessed 5 March 2018.

[480] 'What To Know About Marijuana Legalization In California' (*Time.com*, 2017) <http://time.com/4565438/california-marijuana-faq-rules-prop-64/> accessed 5 March 2018.

[481] '6 Ways Recreational Pot Will Change California — And 7 Ways It Won'T' (*KQED News*, 2016) <https://ww2.kqed.org/news/2016/11/08/6-ways-recreational-pot-would-change-california-and-7-ways-it-wouldnt/> accessed 5 March 2018.

[482] 'Control, Regulate, And Tax Adult Use Of Marijuana Act (Amendment #1).' (*Lao.ca.gov*, 2015) <http://www.lao.ca.gov/BallotAnalysis/Initiative/2015-103> accessed 5 March 2018.

[483] 'What To Know About Marijuana Legalization In California' (*Time.com*, 2017) <http://time.com/4565438/california-marijuana-faq-rules-prop-64/> accessed 5 March 2018.

public view. [484] The law also says that while different cities and towns within California can prohibit the outside growing of marijuana, these cannot keep the person from growing marijuana inside their home. As long as the cultivation remains personal, it remains legal.[485]

The newly instituted Bureau of Marijuana Control's purpose is to provide a fully transparent seed-to-sale tracking system to consumers.[486] Other state agencies which regulate cannabis include: the California Department of Public Health (to license and monitor manufacturing of marijuana edibles) and the California State Water Resources Control Board (to regulate the environmental impacts of marijuana growing on water quality).[487] Other state bodies include the California Department of Pesticide Regulation[488], the California Department of Fish and Wildlife[489] and the California Department of Food and Agriculture[490].[491] In addition, there will be phased in a 15% excise tax together with $9.25 per ounce of flower or $2.75 per ounce of leaf while such revenue paid into the new California Marijuana Tax Fund will be allocated to youth programs (60%), to environmental damage clean-ups (20%) and to public safety (20%).[492]

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[484] ibid.

[485] 'Control, Regulate, And Tax Adult Use Of Marijuana Act (Amendment #1).' (*Lao.ca.gov*, 2015) <http://www.lao.ca.gov/BallotAnalysis/Initiative/2015-103> accessed 5 March 2018.

[486] 'Faqs | Cannabis' (*Cannabis.ca.gov*, 2017) <https://cannabis.ca.gov/faqs/> accessed 5 March 2018.

[487] 'Prop 64 Analysis | Official Voter Information Guide | California Secretary Of State' (*Voterguide.sos.ca.gov*, 2017) <http://voterguide.sos.ca.gov/en/propositions/64/analysis.htm> accessed 5 March 2018.

[488] to regulate nutrients and pesticides utilised for marijuana cultivation

[489] to regulate cultivation-related impacts on local environments

[490] to license and regulate marijuana cultivation

[491] 'Prop 64 Analysis | Official Voter Information Guide | California Secretary Of State' (*Voterguide.sos.ca.gov*, 2017) <http://voterguide.sos.ca.gov/en/propositions/64/analysis.htm> accessed 5 March 2018.

[492] 'Bill Text - AB-1135 California Marijuana Tax Fund.' (*Leginfo.legislature.ca.gov*, 2017) <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1135> accessed 5 March 2018.

### 1.3. Portugal

In 2001, Portugal overhauled its drugs policy to allow for a system based on treatment rather than punitive penalties, making possession of personal quantities of all drugs, including cannabis, a non-criminal offence.[493] It was a world first and, since then, Portuguese society has experienced both benefits and drawbacks, leading to a present-day stalemate on an area which was not properly dealt with; cultivation.

Both the purchase and sale of cannabis in Portugal remains illegal.[494] Under Portuguese law cannabis related trafficking crimes are punishable by custodial sentences of between 4 and 12 years.[495] Portugal is also one of the few European nations to criminalise cannabis seeds as sale and possession of non-European hemp seeds is banned and so is equipment for cultivation.[496]

Law 30/2000 formally decriminalised the consumption and possession of all illegal drugs as long as they are found in small quantities and for personal use.[497] Consumption and use are both still considered to be civil offences, and may be punishable by fines or rehabilitation orders, but in practice many cases are suspended.[498] In cases where the amount in question exceeds that deemed necessary for personal use, that is, three days' worth of cannabis to an individual user (i.e. cannabis at 2.5g per day, hashish at 0.5g per day and delta-9-THC at 0.05g per day), those found guilty may be subject to up to one year's imprisonment and a fine.[499] In cases which people are found with small quantities of drugs, the drugs will be seized and the case transmitted to a local

[493] *Drug Policy Profiles - Portugal* (2011) <http://www.emcdda.europa.eu/system/files/publications/642/PolicyProfile_Portugal_WEB_Final_289201.pdf_en> accessed 5 March 2018.

[494] 'Legal Status Of Cannabis In Portugal – An Overview' (*Sensi Seeds Blog*, 2017) <https://sensiseeds.com/en/blog/legal-status-cannabis-portugal-overview/> accessed 5 March 2018.

[495] ibid.

[496] ibid.

[497] ibid.

[498] ibid.

[499] ibid.

Commission charged with implementing a rehabilitation strategy with the latter not being compulsory.[500]

Cultivation of cannabis is also illegal in Portugal, even a few plants intended for personal use.[501] In fact, Law 30/2000 specifies that while custodial sentences for drugs were to be repealed, cultivation was to be exempted from this. Motions to decriminalise the cultivation of small amounts of cannabis for personal use have been rejected by the Government and this has forced consumers to rely on criminal means of supply.[502]

**1.4. Netherlands**

Despite having a reputation as Europe's go to place for a legal high, cannabis is currently illegal in the Netherlands. Nonetheless, as of February 2017, Dutch lawmakers approved legislation that would legalise cultivation of marijuana for commercial purposes. The highly popular coffee shops currently operate in a grey area of the law.

In the Netherlands, marijuana retailers ('coffee shops') are permitted to sell cannabis under certain strict conditions.[503] Such shops are allowed to store a maximum of 500g of cannabis at any given moment but are only permitted to sell up to 5g of marijuana in a single transaction.[504] Nonetheless, cultivation of marijuana remains illegal, and as such coffee shop owners employ third party buyers who source the cannabis and bring it into the shop.[505] While this act remains illegal, once the cannabis enters the coffee

[500] ibid.

[501] ibid.

[502] 'Home-Grown Cannabis Law Rejected' (*Theportugalnews.com*, 2017) <http://www.theportugalnews.com/news/home-grown-cannabis-law-rejected/28438> accessed 5 March 2018.

[503] 'Toleration Policy Regarding Soft Drugs And Coffee Shops | Drugs | Government.Nl' (*Government.nl*) <https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> accessed 5 March 2018.

[504] ibid.

[505] Gavin Haines, 'Everything You Need To Know About Smoking Marijuana In The Netherlands' (*The Telegraph*, 2017)

shop the authorities tolerate it as long as the 500g limit is adhered to.[506] The term 'toleration' is key to understanding the Dutch cannabis situation from a legal perspective, as while the sale of soft drugs in general remains a criminal offence, the Public Prosecution Service does not prosecute as long as said coffee shops abide by the set 'toleration criteria'.[507] Coffee shop owners are only permitted to sell cannabis products to adults aged 18 or older who, depending on the municipality, might also have to be residents of the Netherlands.[508] Interestingly, coffee shops are also forbidden from advertising any soft drug, in hope of reducing the appeal this might have to both locals and drug tourists.[509] Municipalities also determine whether to allow coffee shops to even operate, along with any other rules they would want to impose.[510]

On the topic of possession, the Public Prosecution Service doesn't prosecute citizens for possession of small quantities of soft drugs, these being up to 5g of cannabis and up to 5 cannabis plants.[511] The consumption of cannabis is also tolerated by the Dutch authorities as long as this is done either in coffee shops or in one's home albeit without any children present.[512]

It should be noted however that it is currently against the law to grow cannabis plants throughout the Netherlands. However, due to the presence of the aforementioned toleration policy, in cases where no more than 5 plants are grown for personal

<http://www.telegraph.co.uk/travel/destinations/europe/netherlands/amsterdam/articles/everything-you-need-to-know-about-smoking-marijuana-in-the-netherlands/> accessed 5 March 2018.

[506] ibid.

[507] 'Toleration Policy Regarding Soft Drugs And Coffee Shops | Drugs | Government.Nl' (*Government.nl*) <https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> accessed 5 March 2018.

[508] ibid.

[509] ibid.

[510] ibid.

[511] ibid.

[512] 'Where You Can Smoke And Where You Can'T – Amsterdam Coffeeshops FAQ' (*Amsterdam Travel Guide*) <http://www.amsterdamlogue.com/amsterdam-coffeeshops-faq-where-you-can-smoke-and-where-you-cant.html> accessed 5 March 2018.

consumption, the police will generally only seize the plants.[513] Nonetheless, if more than 5 plants are found, the police may prosecute.[514]

As of February 2017, the lower House of Parliament passed a law which would legalise cultivation of cannabis if this was done for commercial purposes. This law is still awaiting approval by the Senate.[515] If it becomes legal to cultivate marijuana, coffee shops will no longer have to worry about employing buyers to sneak it through the back door for them. Essentially, the new law would make it cheaper, easier and safer to run a coffee shop.[516]

Many authors believe that the merciful policy regulating the use of marijuana derives from the Constitution of Netherlands, specifically Article 10(1)[517] which states that '*Everyone shall have the right to have respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament*.' This emphasises the fact that the Constitution of Netherlands promotes individual choosing, self-sovereignty and liberty and verifies why possession of marijuana is not a serious crime under Dutch law. Furthermore, one of the main aims for the Netherland's current drug policy is to safeguard the population's health. In fact, the government is trying to step away from severe punishments due to drug possession and instead upholds rehabilitation facilities and treatment.

**2. The Economic Benefits of Legalisation**

In order to thoroughly assess the effects of legalising marijuana, one must also look at its effects on the legislating country's economy. Through the case studies below, one

513 'Toleration Policy Regarding Soft Drugs And Coffee Shops | Drugs | Government.Nl' (*Government.nl*) <https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops> accessed 6 March 2018.

514 ibid.

515 Gavin Haines, 'Everything You Need To Know About Smoking Marijuana In The Netherlands' (*The Telegraph*, 2017) <http://www.telegraph.co.uk/travel/destinations/europe/netherlands/amsterdam/articles/everything-you-need-to-know-about-smoking-marijuana-in-the-netherlands/> accessed 5 March 2018.

516 ibid

517 The Constitution of the Kingdom of the Netherlands, 2008

notices an ongoing positive trend with regards to revenue, as well as job creation within the affected economy. While Malta's limited size and population hamper its economic options, one must not overlook Malta's economic potential, as well as its already significant yearly influx of tourists, reaching 2.8 million during 2019.[518] With the tourism industry accounting for 27.1% of GDP,[519] in 2017, it would be interesting to note how this major sector of the Maltese economy would react to a newly introduced cannabis industry.[520] One must also note the significant increase in demand, wherein by 2020 marijuana sales are predicted to overtake cigarette sales in Colorado. It could be assessed that such growth is not necessarily the result of more people consuming marijuana, but rather, a shift from the illegal market to the legal one. Therefore, underground sales which were undocumented and untaxed before may now be traced while producing revenue for the country or state at hand. For the purposes of this paper, only the economic effects of legalisation of marijuana for recreational use in Colorado and California shall be expanded upon.

### 2.1. Colorado

The economic effects of legalisation in the state of Colorado produced results which exceeded expectations, producing circa $2.4 billion for the economy, as well as creating 18,000 jobs. The Marijuana Policy Group's report on Colorado states that the marijuana industry creates 'more output and employment per dollar spent than 90 percent of Colorado industries' while being projected 'to grow by 11.3 percent, per year through 2020.' Since the industry is a localised one, most of the spending within said industry is reintroduced into the state. The Marijuana Policy Group noted that as a result of this, the industry 'generates more local output and employment per dollar spent than almost any other Colorado sector.'[521] This would also be the case in Malta,

[518] National Statistics Office - Malta, 'Inbound Tourism: December 2019' (2020).

[519] This metric includes the wider effects from investment in tourism, with the direct contribution for the year 2017 being 14.2%.

[520] World Travel & Tourism Council, 'Country Report 2018 Malta' (2018) <https://www.wttc.org/economic-impact/country-analysis/country-reports/> accessed 20 February 2020.

[521] The Economic Impact Of Marijuana Legalization In Colorado (2016) <http://www.mjpolicygroup.com/pubs/MPG%20Impact%20of%20Marijuana%20on%20Colorado-Final.pdf> accessed 6 March 2018.

wherein the industry would be able to run without the need of huge imports of raw materials, as they could be cultivated locally.

One of the problems within Colorado is that the majority of cultivation is exclusively indoors, as a result of which, a great amount of spending goes into electricity and other agricultural products. It would be interesting to note that this problem would not be present within the Maltese scene, as the Mediterranean climate is scientifically proven to be one of the most ideal for the cultivation of the cannabis plant. This would mean that even less money would need to be spent on such items, increasing the output per dollar spent. It is stated in the Marijuana Policy Group's report that 'each dollar spent on retail marijuana generates $2.40 in state output.'[522] One may therefore also logically predict a higher input in Malta's case, as a result of the fewer costs of production.

The growth in demand for marijuana is driven by past black market buyers slowly turning to the legal licensed stores for their cannabis and not in fact an inherent growth in marijuana demand. Simply put, the transition consumers will make from the illicit trade into the legal one will, for the few years following legalisation, lead to the increased demand for marijuana until the regulated market dominates the industry. Growth is also seen in the legal marijuana industry itself, becoming larger than numerous traditional commercial sectors in Colorado, growing at a faster speed than any other sector in the State of Colorado. The activities associated with legal marijuana in Colorado have generated $2.39 billion in state output, as well as 18,005 new full-time jobs, and $996 million in sales in 2015, according to the comprehensive study issued by the Marijuana Policy Group in October 2016, conducted on behalf of the Colorado Department of Revenue.

On the topic of excise, marijuana became the second largest source of excise revenue at $121 million in 2015. It was three times larger than those of alcohol, and also 14% larger than casino revenues. The Marijuana Policy Group predicts that marijuana tax revenues should overcome cigarette excise revenues by 2020, as cigarette sales continue to dwindle. Cigarette revenues still remained the most significant excise source during 2015, however a negative trend suggesting a decline in cigarette sales might show that within the next few years, marijuana tax revenues might surpass those of cigarettes, provided that the trend in its own sales continues. Said total sales value has been projected to reach around $1.52 billion dollars by the year 2020, for a population of almost 6 million people, and state demand will be said to reach the 215.7

[522] ibid.

metric ton mark. Market values, however, are diminished somewhat by a decline in prices from competitive elements within the market. 2014 saw $699 million worth of marijuana being sold, while in the following year, sales increased by 42.4%.

The Marijuana Policy Group predicts that cannabis demand, as well as sales, shall increase in the coming years, but at a much lower rate than upon initial commencement of the legal retailing of marijuana products. By 2020, the Colorado market will most likely be wholly saturated, and will grow at a similar pace to other sectors, which rely on the increase of population. The product value is likely to grow at a slower pace, caused by decreasing prices from increased market competition and economies of scale.

On jobs, the legalisation of marijuana created 18,005 full-time jobs in 2015. 12,591 of those jobs dealt directly with the cannabis trade, in retail, cultivation, or product manufacture. The rest came into being through indirect means, as necessitated by the purchase of general business products and services, and through general spending by those involved in the sector.[523]

Focusing now on the tourism aspect of legalisation, demand models in the tourism sector are now adapting to include tourists whose purpose for visiting is legal marijuana. This visitor fraction is growing; however, this segment could also underperform if other states legalise marijuana in the near future.[524] In 2015, the Colorado Tourism Office commissioned a survey of 3,250 tourists and it found that 8% of the respondents had visited a recreational marijuana store. 85% of those 8% further stated that marijuana was the primary motivator for the trip.[525]

**2.2. California**

First and foremost, one should point out that California is the sixth largest economy in the world, with an economic output of $2.46 trillion in 2015. The state of California charges $9.25 per ounce of flower and $2.75 dollars per ounce of leaves, with a retail

[523] ibid.

[524] ibid.

[525] Patrick McGreevy, 'Legal Marijuana Could be A $5-Billion Boon to California's Economy' Los Angeles Times (2017) accessed 6 March 2018.

tax of 15% subject to amendments in accordance with inflation.[526] It should be noted that since licensed shops began operating as of January 2018, little to no data exists on the actual situation although various studies and speculations have been put forward by researchers and economists. Though a 5 billion dollar boom is predicted for California's economy, it is also stated that roughly 29% of marijuana users may stay away from the legal market at first because of the stricter regulations.[527] A study conducted by the University of California Agricultural Issues Centre notes that illegal marijuana sales are predicted to drop by a staggering 45.5 points, while legal medical marijuana sales are predicted to drop by 14 points with legal recreational marijuana sales predicted to take up 61.5% of the market.[528]

The Marijuana Policy Group estimates that the legal marijuana market in California will be somewhere around $7.2 billion annually. With a Maltese excise tax on cigarettes at 23.4%, making €98 million in 2016 alone, it would not be impossible to perceive an economic benefit of notable significance within the Maltese Islands themselves, would a marijuana policy similar to California's be implemented.

Legalisation is also posed to affect the job market positively, generating between 81,000 and 103,000 full-time positions each year; with around 56,000 to 71,000 in direct relation, around 9,000 to 12,000 in indirect relation, and around 16,000 to 20,000 in induced and peripheral positions. These range from those involved in cultivation, to those involved in legal advice, and to those involved in the construction of new homes and facilities for those employed in the industry.

Much like Malta, California is well sought after by tourists. In Colorado, the Marijuana Policy Group calculated that visitor demand accounts for 7.3% of annual cannabis sales. Using a percentage proportional to the larger size of California, and keeping in mind that the state is the most popular one to visit in the United States, ICF International has estimated that between 95.4 million and 121.3 million grams will be in demand by visitors annually. The study went on to state that legalisation may attract visitors towards the state, the sole purpose of whose visit would be to purchase and

[526] Ben Gilbert, 'California Just Legalized Marijuana, And It's Going To Have A Huge Impact On The Economy' Business Insider (2016) accessed 6 March 2018.

[527] Patrick McGreevy, 'Legal Marijuana Could be A $5-Billion Boon to California's Economy' Los Angeles Times (2017) accessed 6 March 2018.

[528] ibid.

consume recreational marijuana, thus,increasing tourism within the state.[529] The study then went on to predict that the same pattern would be present in California, which would logically mean that it would also be present in Malta, with it already being a popular tourist destination.

**3. Conclusion**

Noting the above trends, the legalisation of marijuana for recreational use in Malta would seem like the next inevitable step in the civil liberties expansion started in the 2010s. The aim of this paper was to conduct a comparative analysis of jurisdictions which have already in some form or another legalized marijuana for recreational use. Through the review of jurisdictions with diverse conditions, it follows that there is no single appropriate structure for the legalization of recreational cannabis. If Malta is to follow in the steps of these jurisdictions, as is indicated by certain members of the Executive branch, it would have to be a system catered for the needs of the country.

Through the review of the economic benefits of legalization of marijuana for recreational use, it is clear that while the cannabis industry would likely be a small contributor to the economy, its positive effects cannot be ignored. Nonetheless, and perhaps not tackled due to the fact that it was not in the remit of this paper to do so, the elimination of the black market is a key motive in the process of legalization.

The writer hopes that in the inevitable discussion for the legalisation of recreational cannabis, the talking points stem from points of fact, as noted in the various reviews above, rather than opinion. Any movement towards legalisation should not be done for the sake of such, but with clearly outlined expectations which will benefit the Maltese economy as a whole.

[529] ibid.

# AN INSIGHT INTO THE APPLICATION OF BLOCKCHAIN TECHNOLOGIES IN THE MARITIME AND SHIPPING INDUSTRY

Nina Fauser

**ABSTRACT**

This Article focuses on the manner in which blockchain technologies can be applied to the Maritime and Shipping industry, in particular taking a look at Malta's perspective. With the increase of the use of blockchain technologies across the globe, it is evident that it has the potential of impacting one's life in numerous ways. This Article seeks to identify how blockchain may be applied in the field of Shipping and Maritime Law, including logistical, contractual and traceability aspects. Its potential in this field of law is an extensive one, which could completely revolutionise the way in which things are currently being done.

**KEYWORDS:** BLOCKCHAIN TECHNOLOGIES – MARITIME INDUSTRY – SHIPPING – BILLS OF LADING – RAISING FINANCE - DIGITALISATION

# AN INSIGHT INTO THE APPLICATION OF BLOCKCHAIN TECHNOLOGIES IN THE MARITIME AND SHIPPING INDUSTRY

Nina Fauser[530]

## 1. Introduction

By definition, a blockchain is a system, within which transactions made in a cryptocurrency are recorded and maintained across several computers, which are linked in a peer-to-peer network. These records are referred to as 'blocks' and are linked using cryptography. Each 'block' contains a cryptographic hash of the previous block and transaction data and once recorded, the data in a block cannot be changed without affecting and changing the subsequent blocks. Thus, this quality ensures that a blockchain is secure and is based on decentralisation, eliminating any risks associated with the reliance on one central authority to transact with other users. A blockchain is '*an open distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way*'. [531] This phenomenon was invented by Satoshi Nakamoto back in 2008, in order to serve as the public transaction ledger of a particular cryptocurrency, Bitcoin. In simple terms, blockchain is a digital platform which is used for recording and verifying transactions which cannot be reversed at a later stage; it serves as an anonymous peer-to-peer system which is based on cryptography.

When understanding blockchain, it is also important to define the terms 'cryptography' and 'cryptocurrency'. Cryptography refers to the practice of techniques used in secure communication networks, in the presence of adversaries. This deals with the construction and analysis of protocols which prevent adversaries (third parties) from accessing private communication. Modern cryptography consists of data integrity, authentication and confidentiality, and is involved in various disciplines such as computer and communication science and engineering. [532] A cryptocurrency on the other hand, is a digital asset used as a means of exchange, which uses cryptography to secure financial transactions and verify the transfer of an asset. Cryptocurrencies are based on a decentralised concept, through the use of distributed ledger technology

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[531] The Truth About Blockchain", Harvard Business Review <https://hbr.org/2017/01/the-truth-aboutblockchain.> [Accessed 24 Feb. 2019].

[532] DeMuro, J. (2019). *What is cryptography?* [online] TechRadar. Available at: https://www.techradar.com/news/what-is-cryptography> [Accessed 24 Feb. 2019].

which serves as a database for financial transactions. [533] 'Bitcoin' is the original cryptocurrency, which was released in 2009 as the first decentralised cryptocurrency. It is the most widely used cryptocurrency which has experienced immense growth; however, critics often discuss the potential limit to its growth due to its slow speeds, energy usage and high transaction fees. Following the release of bitcoin, various alternative cryptocurrencies were created. These include 'litecoin', 'dogecoin', 'ethereum', 'BAT', 'NEO', 'Stellar (XLM)' and 'Cardano (ADA)'.[534] This Article intends on analysing the legislative framework which has been adopted in Malta in terms of blockchain and cryptocurrencies, whilst also considering some possible applications and uses in the Maritime Law Industry. Noticeably, the application of blockchain technologies in the field of Shipping and Maritime Law, could truly revolutionise a number of aspects including logistical, contractual and traceability elements. This Article will be focusing on a number of these, including discussions on claims handling, raising finance, risk assessment and Bills of Lading.

**2. Discussion**

Blockchain has the potential of impacting various aspects of one's life, both in personal and professional terms. The use of blockchain has increased in recent years, and this may be due to a number of factors. Primarily, blockchain provides greater transparency for transactions. Due to the fact that it is a type of distributed ledger, all participants share the same documentation, and everyone must agree on that shared version. Data which is saved on a blockchain is accurate, consistent and transparent and once a block is linked, it cannot be reversed. Additionally, the use of blockchain provides a more secure system, whereby transactions are agreed upon and then are recorded through encryption. Blockchain also provides a faster and more efficient manner of completing transactions, and this is done at a reduced cost, without the need for third parties and other intermediaries. Furthermore, blockchain improves traceability, making it easier to identify the item's origin and historical transaction data. [535] Ultimately, blockchain

[533] Cointelegraph. (2019). *What is Cryptocurrency? Guide for Beginners*. [online] Available at: <https://cointelegraph.com/bitcoin-for-beginners/what-are-cryptocurrencies> [Accessed 24 Feb. 2019].

[534] The Telegraph. (2019). *What are the top 10 cryptocurrencies?* [online] Available at: <https://www.telegraph.co.uk/technology/digital-money/top-10-popular-cryptocurrencies-2018/> [Accessed 24 Feb. 2019].

[535] Hooper, M. and Hooper, M. (2019). *Top five blockchain benefits transforming your industry - Blockchain Pulse: IBM Blockchain Blog.* [online] Blockchain Pulse: IBM Blockchain Blog. Available at: <https://www.ibm.com/blogs/blockchain/2018/02/top-five-blockchain-benefits-transformingyour-industry/> [Accessed 24 Feb. 2019].

provides a practically instant and borderless transfer of value or information in a secure manner.

Distributed ledger technology, commonly referred to as DLT, is a digital system whereby the transaction of assets is recorded in multiple places at the same time. Each party has access to the whole database, and each party can verify the records of its transaction partners, without the involvement of any intermediaries. Each transaction would be linked to the previous block, thus, forming the 'chain'. This ensures that once a transaction is completed and the blocks are linked, then it cannot be altered or erased. A blockchain is a type of DLT, that is a decentralised database which is managed by various different participants. [536]

Under Maltese Law, DLT means '*a database system in which information is recorded, consensually shared, and synchronised across a network of multiple nodes*'. Similar definitions have been adopted by other jurisdictions. DLT assets refer to virtual tokens (means a form of digital medium recordation whose utility, value or application is restricted solely to the acquisition of goods or services, either solely within the DLT platform on or in relation to which it was issued or within a limited network of DLT platforms), virtual financial assets, electronic money or financial instruments.

In Malta, the legislative framework of blockchain has been divided into three acts, the Virtual Financial Assets Act (VFA Act, Chapter 590 of the Laws of Malta), [537] the Malta Digital Innovation Authority Act (MDIA Act, Chapter 591 of the Laws of Malta), [538] and the Innovative Technology Arrangements and Services Act (ITAS Act, Chapter 592 of the Laws of Malta [539]). The VFA Act seems to be the primary act which regulates the field of initial virtual financial asset offerings and virtual financial assets, whilst making the relevant provisions for matters ancillary or incidental thereto. The VFA Act defines the term 'initial virtual financial asset offering' or 'initial VFA offering' as '*a method of raising funds whereby an issuer is issuing virtual financial assets and is offering them in exchange for funds*'. The VFA Act also sets out the necessary regulatory framework for ICOs and VFAs, and regulates the type of VFAs which may be issued. Additionally, the Act provides a set of general guidelines on the

[536] NEWS BBVA. (2019). *What is the difference between DLT and blockchain?* [online] Available at: <https://www.bbva.com/en/difference-dlt-blockchain/> [Accessed 24 Feb. 2019].

[537] *Virtual Financial Assets Act,* Chapter 590 of the Laws of Malta.

[538] *Malta Digital Innovation Authority Act,* Chapter 591 of the Laws of Malta.

[539] *Innovative Technology Arrangements and Services Act,* Chapter 592 of the Laws of Malta.

structure of white papers, the process of due diligence and the use of collected funds.[540] The second Act, the MDIA Act establishes the Malta Digital Innovation Authority, defining its role, objectives, composition and powers. This Authority aims at developing the sector of innovative technology in Malta, whilst increasing the promotion of transparency in the use of innovative technology arrangements.[541] Lastly, the ITAS Act provides for the recognition or certification of an arrangement which would be awarded according to a number of criteria.[542]

The use of blockchain technologies may be applied to a number of different legal spheres. When it comes to Maritime and Shipping Law, Malta is a key player in this field, due to its strategic position and maritime diversity. Noticeably, Malta has one of the deepest natural harbours in the world, together with the largest shipping register in Europe and the 6th largest in the World. Furthermore, the Malta Freeport is one of the most successful transhipment centres in Europe.

When analysing the application of blockchain in the field of Shipping and Maritime Law, it is evident that it could impact a large number of aspects, including logistical, contractual and traceability aspects. It could also impact the manner in which ships are registered, and the way in which documentation is stored. Effectively, it could impact the entire process involved in transactions, making each transaction more efficient and possibly even cheaper. Its potential in the field of Shipping and Maritime Law is an extensive one, which could completely revolutionise the way in which things are currently being done and would provide a more secure and tamperproof platform for transactions to take place. A bill of lading, for example, is a document which is issued by the master of the ship and given to the person consigning the goods, entailing a detailed list of the ship's cargo. This proves that the cargo has been loaded and creates a 'contract of carriage' between the carrier and shipper.

Very often, due to the delay of bank procedures and postal services, the cargo is often delivered to the port, before the Bill of Lading arrives and therefore, the cargo remains on board unnecessarily, until the Bill of Lading is delivered. In this case, the use of

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[540] Grant Thornton Malta. (2019). *The Malta Virtual Financial Assets Act.* [online] Available at: <https://www.grantthornton.com.mt/industry/fintech-and-innovation/The-Malta-Virtual-FinancialAsset-Act/> [Accessed 24 Feb. 2019].

[541] GANADO Advocates. (2019). *An overview of the Malta Digital Innovation Authority Bill*. [online] Available at: https://www.ganadoadvocates.com/practice-news/an-overview-of-the-malta-digitalinnovation-authority-bill/ [Accessed 24 Feb. 2019].

[542] GANADO Advocates. (2019). *Snapshot Summary Of Three Bills Related to Blockchain 12 Technology.* [online] Available at: <https://www.ganadoadvocates.com/practice-news/snapshotsummary-of-three-bills-related-to-blockchain-technology/> [Accessed 24 Feb. 2019].

cryptographic signatures and smart contracts could be used in order to eliminate distrust and improve the overall efficiency, transparency and security of such a transaction. This area of application to the maritime industry has been somewhat researched, due to its potential in revolutionising the process. 'Wave', an Israeli start-up company, focused on the concept of paper trade in the shipping industry, by applying blockchain to create and to track Bills of Lading. [543]

In terms of Bills of Lading, blockchain technology can improve the process involved in registering and transferring the ownership of goods, facilitating the process of trade for all parties involved, increasing efficiency, reducing costs and reducing paperwork. CargoX, is an independent supplier of blockchain technologies used for logistical purposes, in order to impact and change the global supply chain industry. One of their projects has been that of the 'CargoX Smart Bill of Lading', which replaces the traditional paper-based Bills of Lading. In terms of the carrier, this would entail the creation of a draft Bill of Lading, the signing of the Bill and its issuance on the blockchain, the transfer of such to a shipper and the proof of ownership. On the other hand, in terms of the shipper, this process would entail the listing of documents, the transfer of the required documents and arranging payment guarantees with the carrier. CargoX identify four main benefits which would arise from the use of this technology in Bills of Lading. Firstly, it would provide a secure trading platform with no central storage system. Secondly, it would also make the entire process faster and more efficient, as it would create an instant and immediate transaction, without any couriers or middle-men. Moreover, Smart Bills of Lading would create a paperless system, whilst also reducing the costs of couriers. [544]

There have been a number of recent developments in the blockchain-Maritime law industry. Certain shipping platforms have started opting to use blockchain when carrying out the sale and registration of a vessel. One such example is in the case of the 'British Maritime Society' [545] which has developed a blockchain tool to be used in the registration of vessels. The immutable and secure qualities of blockchain have shown immense potential in this field, allowing for more efficient transactions. Another

[543] Fenechlaw.com. (2019). *Fenech and Fenech Advocates | Maritime Malta – Legal Perspective.* [online] Available at: <https://fenechlaw.com/maritime-malta-legal-perspective/> [Accessed 6 Mar. 2019].

[544] Wavebl.com. (2019). Wave. [online] Available at: <http://wavebl.com/#about> [Accessed 10 Mar. 2019].

[545] Cargox.io. (2019). CargoX | *Reshaping the Future of Global Trade with the World's First Blockchain Bill of Lading.* [online] Available at: <https://cargox.io/welcome/> [Accessed 10 Mar. 2019].

example is in the case of '***shipowner.io***', [546] which is said to be the first DLT platform which allows for the financing of assets in the shipping industry. This platform aims at breaking down investments to smaller amounts, and thus, increasing the possibilities of a wider range of ship-owners.[547] Another network, the 'ZIM Shipping Line Network' has also opted to convert its processes from using the traditional Bills of Lading to blockchain technology when transporting containers from China to Canada. [548]

Another example is in the case of 'A.P. Moller-Maersk' who have recently teamed up with IBM in order to establish a DLT system, 'TradeLens'. TradeLens is a blockchain based shipping system, aimed at promoting more efficient and secure trade, establishing digital supply chains and empowering traders to trade in real-time. [549] IBM is currently also in collaboration with MOL (Mitsui OSK Lines), [550]in order to set up a blockchain system providing for cross-border trade.[551] Furthermore, such developments have also been taken up by the Danish Maritime Authority, aiming at digitising the ship trade and registration processes in Denmark. This is said to be one of the first projects based on blockchain in the Danish public sector. [552] The majority of the Maritime-blockchain initiatives have been based on information-sharing, however, a particular start-up company in Hong Kong, '300Cubits', aims at removing

[546] Home | Anyone Anywhere Anytime Can Be A Shipowner | Ship Owner Yet?' (*Shipowner.io*, 2019) accessed 3 July 2019.

[547] Hand, M. (2019). *Finance your ship with blockchain via Shipowner.io. [*online] Seatrademaritime.com. Available at: <http://www.seatrade-maritime.com/news/europe/shipowner-iolaunching-blockchain-financing-platform-to-open-shipping-investment-to-anyone.html> [Accessed 6 Mar. 2019].

[548] International Shipping Lines, C. (2019). *International Shipping Lines, Container Shipping, Cargo Services*. [online] ZIM. Available at: <https://www.zim.com> [Accessed 6 Mar. 2019].

[549] Wagner, S. and Linnet, M. (2018). *Maersk and IBM Introduce TradeLens Blockchain Shipping Solution*. [online] Available at: <https://www.maersk.com/news/2018/06/29/maersk-and-ibmintroduce-tradelens-blockchain-shipping-solution> [Accessed 6 Mar. 2019].

[550] Mitsui O.S.K. Lines' *(Mitsui O.S.K. Lines, 2019)* accessed 3 July 2019.

[551] Kang, T. (2019). *MOL joins IBM for blockchain cross-border trade operations test - Lloyd's Loading List.* [online] Lloydsloadinglist.com. Available at: <https://www.lloydsloadinglist.com/freight-directory/news/MOL-joins-IBM-for-blockchain-cross-border-trade-operations-test/70955.htm#.XIArfS2ZPs0> [Accessed 6 Mar. 2019].

[552] Dma.dk. (2019). *Blockchain technology set to renew and ease ship registration.* [online] Available at: <https://www.dma.dk/Presse/Nyheder/Sider/Blockchain-technology-set-to-renewand-ease-ship-registration.aspx> [Accessed 6 Mar. 2019].

the lack of contractual discipline between ship-owners and carriers, with the launch of a cryptocurrency for the shipping industry.[553]

Another aspect of the Maritime field which may be heavily impacted by the use of blockchain is in terms of raising finance. By applying the use of blockchain in crowd funding for example, this decentralises the process and increases the opportunities for growth. An ICO, or Initial Coin Offering, is generally said to be the most popular way of raising funds within the blockchain field. This concept is becoming increasingly popular and provides a number of advantages in this regard. One of the benefits of using blockchain is that it is borderless and thus, facilitates cross-border trade, creating a global platform for trade. Additionally, through methods such as crowdfunding, blockchain has the potential to make the process of raising finance much easier, particularly for start-up companies[554]. In terms of financing methods, blockchain also has the potential of removing the need for traditional banking and financial institutions, by replacing this with a P2P (peer-to-peer) network. 'Securitize' is a new start-up which is providing a platform for running an ICO within the required legal framework. One of the projects being carried out by 'Securitize' is referred to as '22X', which is a fund which offers tokenised equity in 30 start-ups. The aim of 22X is to raise approximately $35 million, where $1 million would be distributed to each start-up, with the remaining funds being used to cover the costs related to the ICO. 22X is also allowing the start-ups to gain access to foreign capital without the need of establishing direct contact with foreign individuals. [555]

In terms of the marine insurance industry, the application of blockchain technologies could impact both claims handling, and also risk assessment. When it comes to claims handling, blockchain would enable all parties to have access to the data (for example bills of lading), which would make the process more efficient and would also reduce the risk of human errors. In terms of risk assessment, blockchain could streamline processes by connecting brokers, insurers and 3rd parties to DLT platforms, and integrate this information with insurance contracts. This would reduce the need of administrative processes, and would also reduce the costs incurred. It is important to

[553] TEU Tokens - Bitcoin for the shipping industry. (2019). *Hong Kong fast developing as a cryptocurrency centre - TEU Tokens - Bitcoin for the shipping industry.* [online] Available at: <https://www.300cubits.tech/hong-kong-fast-developing-cryptocurrency-centre/> [Accessed 6 Mar. 2019].

[554] Blockchain-council.org. (2019). *How can Blockchain help you raise to money*?. [online] Available at: <https://www.blockchain-council.org/blockchain/how-can-blockchain-help-you-raise-money/> [Accessed 6 Mar. 2019].

[555] Inc.com. (2019). *There's a New Way to Fund Startups: Selling Equity on the Blockchain*. [online] Available at: <https://www.inc.com/sonya-mann/securitize-x-cryptocurrency-startup-fund.html> [Accessed 6 Mar. 2019]

note however, that from a legal point of view, there are still some issues which need to be clarified in terms of the use of blockchain technologies across the globe. Due to the fact that blockchain ledgers do not have a specific location, one issue which may arise would be that it would be difficult to identify the legal jurisdiction of any given node in the network, which is also due to the lack of physical connection to any given jurisdiction. [556]

When discussing the application of blockchain technologies to the Shipping sphere in Malta, it would also be necessary to analyse whether there is the willingness of the authorities to actually shift from using traditional methods of carrying out transactions, to the use of blockchain platforms. Although blockchain has a number of benefits, there are also certain risks which may discourage authorities and individuals (such as ship-owners) from wanting to convert from traditional methods, to blockchain technologies. First of all, decentralisation is sometimes difficult to guarantee, and is often expensive due to the large amount of electricity which is required. Users of the blockchain use a cryptographic key in order to define their identity, however, this key could easily be copied, which could lead to the impersonation of the user. Furthermore, if the key is lost, then all the other users would also lose control over the assets on the blockchain [557]. According to Prakash Santhana, a Managing Director at Deloitte, and a US Blockchain Leader, the risks of blockchain could be classified into 3 categories. Primarily, there are 'standard risks', which refer to those common risks which are similar to those associated with current business processes. The second category of risks is referred to as 'value transfer risks', which refers to those risks which the interacting parties in the blockchain transaction are exposed to, which used to be managed by central intermediaries. The final category of risks is referred to as 'smart contract risks', which focus on those risks which arise when shifting from the physical to the digital framework. [558]

In the Maritime and Shipping industry, all transactions are still being made through intermediaries. If blockchain technology were to start being applied in Malta's shipping

[556] Mavrias, N. and Lin, M. (2019). *Blockchain: some potential implications for marine insurance - SAFETY4SEA*. [online] SAFETY4SEA. Available at: <https://safety4sea.com/blockchain-somepotential-implications-for-marine-insurance/> [Accessed 6 Mar. 2019].

[557] TechBeacon. (2019). *The hidden dangers of blockchain: An essential guide for enterprise use | TechBeacon*. [online] Available at: <https://techbeacon.com/security/hidden-dangers-blockchainessential-guide-enterprise-use> [Accessed 7 Mar. 2019].

[558] Deloitte United States. (2019). *Blockchain Security Risks for Financial Organizations | Deloitte 28 US*. [online] Available at: <https://www2.deloitte.com/us/en/pages/risk/articles/blockchain-securityrisks.html> [Accessed 7 Mar. 2019].

industry, this would allow firms to transact directly between each other, without the need of using intermediaries, and still ensuring secure transactions. Furthermore, the industry in Malta is currently very paper-heavy, which also involves more administrative work. All this could be avoided with the application of smart contracts, which would not only reduce the amount of paperwork, but would also make the process faster and more efficient. Additionally, digitalisation also has the potential of changing the manner in which environmental conservation is traditionally being done. It is often said that Maritime transport activities are very polluting in nature, however through the process of digitalisation, this could provide for more sustainable development in the industry. This is still a very controversial issue since there are researchers stating that shipping is one of the cleanest means of transport. Blockchain technology is a highly-researched and frequently discussed topic at the moment, however when it comes to the application of blockchain technology in the maritime sector, there is a lot which is yet to be done.

When it comes to the concept of digitalisation in the shipping industry, the main focus has been on maritime transport and logistics in the application of data-driven technologies. Another area in which blockchain technologies could be applied in the Maritime industry is in relation to port operations. In the port of Hamburg for example, the data-sharing problem has been solved by requiring all parties to connect to a single data system. Back in 2017, the shift to digitalisation already began appearing in certain countries. In Singapore for example, the Maritime and Port Authority (MPA) launched the 'Smart Port Challenge 2017', in order to encourage start-ups and organisations to begin collaborating in order to promote the concept of digital transformation in the industry. In the case of one particular start-up, 'Onboard', the Internet of Things (IoT) was introduced to the maritime industry, whereby an open platform linked to other internal systems was provided, allowing full insight of vessels and operations. [559]

When it comes to identifying the different possible manners in which blockchain can be used to change and enhance the processes involved in the maritime industry, it is also important to take a look at the response of the authorities and whether they would be willing to adopt this technology or not. In 2018, a study was carried out in Norway, in order to analyse whether Norwegian maritime companies would be willing to adopt the blockchain technology, or whether they would prefer to stick to the 'traditional' methods. The results of the study indicated that there is a need for innovation in the maritime industry, and that there is also a need for a reduction in costs. However, there were also a number of hesitant responses, since this would lead to the need for further consultants and 3rd parties, and also due to the fact that there is a lack of training in

[559] Onboard. (2019). *The IOT platform - Onboard*. [online] Available at: https://contactonboard.com [Accessed 10 Mar. 2019].

this field.[560] An important factor to note is that the shipping industry is in fact a global, and not a national industry, and therefore it is highly standardised. Thus, if a DLT system were to be put in place in the shipping industry, it would need to be a global system, which would allow for more efficient and cheaper trade mechanisms, reflecting the global industrial model. In this regard, a commercial blockchain alliance has been set up, known as 'Blockchain in Transport Alliance', which establishes certain standards for the application of DLT in the shipping industry. [561]

**3. Conclusion**

The future of blockchain is definitely an uncertain one, with many opposing views on the matter. Although it is currently very topical, and its application seems to be on the rise in a number of countries and also in Malta, certain critics and high-profile individuals do not see a positive future in this regard. Noticeable, Jeff Schumacher, the founder of BCG Digital Ventures, said that blockchain is '*a great technology but [he doesn't] believe it's a currency. It's not based on anything*'. [562] On the other hand, there are also a number of individuals who believe in the potential of blockchain, and the many opportunities in which this technology can revolutionise and impact a number of industries and processes.

As mentioned earlier, this Article intended to analyse the Maltese legislative framework which is currently in place, in terms of blockchain and cryptocurrencies, together with focusing on its application in the Shipping and Maritime Law sphere. One of the findings of this Article was that with the correct application of blockchain technologies, this could have a deep impact on the Maritime Industry and completely revolutionise the manner in which things are currently being done. Furthermore, the use of blockchain could provide a great amount of transparency of transactions occurring in the Maritime industry, together with providing a faster and more efficient manner of completing transactions. Various advantages were discussed in the Article, including the reduction in costs, improved traceability, instantaneous nature of transactions and the borderless transfer of value and information in a secure manner. A discussion on Smart Bills of Lading highlights the manner in which a paperless system could be adopted in this field, by providing a secure trading platform with no central

[560] Czachorowski, K., Kondratenko, Y. and Solesvik, M. (2019). The Application of Blockchain Technology in the Maritime Industry

[561] BiTA: Blockchain in Transport Alliance. (2019). Standards — *BiTA: Blockchain in Transport Alliance.* [online] Available at: https://www.bita.studio/standards [Accessed 6 Mar. 2019].

[562] Chepicap.com. (2019). *"Bitcoin will go to zero" says prominent investor Jeff Schumacher.* [online] Available at: <https://www.chepicap.com/en/news/6849/-bitcoin-will-go-to-zero-saysprominent-investor-jeff-schumacher.html> [Accessed 11 Mar. 2019].

storage system and improving the overall process, by providing for faster and more efficient transactions.

Another discussion focused on the manner in which the Maritime Law field may be heavily impacted by the use of blockchain, when it comes to raising finance. One such example which was discussed above includes the application of blockchain in crowd funding initiatives, which would in turn, decentralise the process and increase the opportunities for growth. Blockchain has a great amount of potential and could truly impact various aspects of one's life, both in personal and professional terms. With the increase of the use of such technologies in recent years, it is evident that various legal fields, such as that of Maritime Law, will also be affected.

# REDUCING THE EU'S DEMOCRATIC DEFICIT: WHAT ROLE CAN THE EUROPEAN PARLIAMENT PLAY AND WHAT FURTHER REFORMS COULD BE CONSIDERED?

**Jurgen Micallef**

**ABSTRACT**

A fact pertinent to the current European Union's stand on democracy by many individuals is that it is highly contextualised as being separate from politics at a European level and thus, inaccessible by the ordinary European citizen; hence creating what is called a democratic deficit. Although the complex structure of the EU's institution is often the main contributing factor to such democratic deficit, there have been ways and means to reduce and ameliorate this, as evidenced by the Treaty of Lisbon. Nonetheless, these 'ways and means' may not always be effective when imposed by law, hence the central question to this essay. The opinions of renowned authors will be resorted to at particular instances in order to highlight the contrast which emanates from their writings, the current reality and any legislative references which have attempted to find a balance. Subsequently, an important remark highlighted by the author is made which questions whether there should be the complete elimination of democratic deficit, or if such deficit should remain present for the sake of adopting certain measures which promote the main objectives of the EU. In consideration of the central question, it is suggested that the European Parliament adopts a more flexible position which does not undermine any of its competences albeit making it more accessible.

**KEYWORDS:** EUROPEAN UNION LAW - DEMOCRATIC DEFICIT - EUROPEAN PARLIAMENT

# REDUCING THE EU'S DEMOCRATIC DEFICIT: WHAT ROLE CAN THE EUROPEAN PARLIAMENT PLAY AND WHAT FURTHER REFORMS COULD BE CONSIDERED?

Jurgen Micallef[563]

## 1. The Inception of a Politico-legal Monster?

The European Union (hereinafter, the 'EU') is often attributed as a mere supranational political entity whereby an ordinary citizen of the European Union is a very small cog of a very large wheel. Taking into account the multiple institutes of the EU and their complex mechanisms, the decision-making process is often just as complex; hence, creating what is known as a 'democratic deficit'.

Although the decision-making processes and various EU competences are dominant in the field of policy affecting the ordinary citizen, it is still rather difficult for one to fathom that certain decisions are left to be decided by the ordinary citizens and not by their elected representatives. With that being one of the main arguments concerning the EU's democratic deficit, one must not overlook the European Parliament's ("EP") role and position which potentially allows it to ameliorate such democratic deficit.

As pointed out by Follesdal and Hix in response to Majone and Moravcsik,[564] the rudimentary function of decision-making is evidently causing the majority of such democratic deficit. The main concerns are, they argue, that the EP which is granted barely any '*legislative amendment powers',*[565] and that the decision-making process is dominated by executive actors of the Member States, who are beyond the control of

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[564] Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A response to Majone and Moravsik*, (European Governance Papers, No. C-05-02, 2005).

[565] Ibid p. 4

national parliaments.[566] Taking into account these two indisputable current circumstances, a reconsideration of certain fundamental principles which the EP could implement would inevitably benefit the alleviation of the EU's democratic deficit. The question remains, could this ever-growing matter be subjugated?

**2. Recognising the European Parliament's Inapt Position: The Lisbon Treaty & Beyond**

Evidently, the EU had attempted to address the EP's inefficacy by means of the Lisbon Treaty which entered into force in 2009. The treaty's principal purpose was to render a more democratic Europe namely by granting more power to the EP, change of voting procedures in the Council and creating the European Citizens' Initiative, amongst other means.[567] In fact, Articles 10(1) and the following sub-article of the Treaty under the Title concerning 'Provisions on Democratic Principles' read that:

> "1. The functioning of the Union shall be founded on representative democracy;
> 2. Citizens are directly represented at Union level in the European Parliament."[568]

At this point, it should be questioned as to whether these are simply mere words of convenience in order to accommodate the treaty's theoretical purpose. The fact that citizens are directly represented at Union level in the EP is not a contested fact, however, what weight should this provision be given taking into consideration that the EP is still not considered to be as powerful as the other two legislative bodies of the EU?

One of the minor changes made by the Lisbon Treaty in an attempt to balance out the discrepancy between the EP and the Council was that made by means of the election of the President of the Commission, who was a candidate for an EP party. This was a move towards mitigating, albeit not eliminating, the EU's democratic deficit.[569] Thus, this slight shift of power to the EP, as most democratic deficit advocates argue, resulted

[566] Ibid p.5

[567] Treaty of Lisbon, European Union <https://europa.eu/european-union/law/treaties_en>

[568] *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.*

[569] Paul Craig & Gráinne De Búrca, *EU Law: Text, Cases and Materials,* (Oxford University Press 2015) 152.

that the three institutions of the legislative power, that being the Council, Commission and Parliament, have a more representative front.[570]

Moreover, Moravcsik argues that the system of checks and balances should be enforced thoroughly as he deems it to be one of the main elements in reducing the democratic deficit. Although this should be considered as an indisputable statement of an obvious fundamental function, Moravcsik further states that this should be achieved by:

> *'indirect democratic control via national governments and* ***increasing powers of the European Parliament*** *(…) sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens'.* [571]

However, at this point emanates the fact that advocates for the reduction of the EU's democratic deficit tend to focus their arguments on the theoretical side rather than employing a more empirical and plausible strategy. Nonetheless, placing more focus on the system of checks and balances and the powers allotted to the European Parliament, other institutions such as the Council and the Commission, will in fact ultimately become less dependent and require equal contribution of the other two bodies.

The Lisbon Treaty has nonetheless created new opportunities for the EP in virtue of reducing the heavily debated democratic deficit. For instance, the 'ordinary legislative procedure' has been created specifically for the EP to gain further legislative powers. In light of this, the 2009 amendments also provided the national Parliaments more access to such ordinary legislative procedure.

However, despite such an invention, the ordinary legislative procedure still did not provide a complete solution in adhering to utmost democratic legitimacy. In expediting the procedure, representatives of the EU Council, EP and Commission hold what are called 'trilogues' — which are essentially informal closed meetings whereby the main objective is to produce an agreed text to be presented and voted upon by their respective committees and plenaries into law. In light of this, the 2018 *De Capitani* case decided by the General Court of the European Union held that the omission of information from a tabled document that reports the compromise(s) reached or any recommendation(s)

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[570] *ibid.*

[571] Andrew Moravcsik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the EU,* (Harvard University, JCMS 2002 Volume 40. Number 4. pp. 603–24) 605.

thereto during the trilogues violates the principles of democratic legitimacy. It further stated that:

> "…in a system based on the principle of democratic legitimacy, co-legislators must be held accountable for their actions to the public. **If citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information** …
> Thus, the expression of public opinion in relation to a particular provisional legislative proposal or agreement agreed in the course of a trilogue and reflected in the fourth column of a trilogue table forms an integral part of the exercise of EU citizens' democratic rights, particularly since … such agreements are generally subsequently adopted without substantial amendment by the co-legislators."[572]

### 3. The European Parliament's Evolution: A Shortcut to Democracy?

Evidently, the European Parliament is no longer considered as a dispensable institute whereby its significance is minimal. Being the only democratically elected institution, the EP slowly became a "central mainstream part of the EU's governing system"[573]. However, how could the EP be an ***effective*** *'central mainstream part of the EU'* when, despite the EP's advancement, the voting turnouts remain significantly low?

Notwithstanding that the EP has gradually gained more significance throughout the evolution of the EU — whether its greater budgetary power, gaining the right of consultation[574], approval power over a nominated Commission[575] or the formal right to veto Commission President-nominee[576] — the EP still employs a sense of autonomy in the sense that it is not entirely representative of the European citizens. Nonetheless,

[572] Emilio De Capitani v European Parliament, Judgment of the General Court (Seventh Chamber, Extended Composition) of 22 March 2018, Case T-540/15

[573] Roger Scully, Becoming Europeans Attitudes, Behaviour, and Socialisation in the European Parliament (Oxford University Press, 2005) p. 24

[574] Refer to the Isoglucose Case (1975)

[575] Introduced by the Maastricht Treaty

[576] Introduced by the Amsterdam Treaty

fault in this regard could not be solely imputed to the EP, but also to the structure of the Union and its reach to the European citizens.

In virtue of this, it should not be expected that the EP should reach out and involve the European citizens in any pre-legislative processes, as this would be deemed almost impossible in practice. However, it is suggested that the EP allows the national Parliaments further accountability to influence the decision-making put forward by the Member State in the European Parliament. Through the MS, the discrepancy between input democracy and output legitimacy would be, to a certain extent, mitigated and the EP will adjust to a more precise representation which the parliamentary elections sought to alleviate through universal suffrage.

Such reformative approach from the EP will play a vital role in empowering certain democratic features which tend to lack in specific areas; such as transparency — as the national parliament would be involved furthermore within the EP, thus, disseminating further information to the regular citizen. Consequently, the EU's democratic legitimacy would alter a different projection upon those who protrude the skeptical idea of the EU as a supranational entity — a projection which would lay down the fact that the EU — as Menon & Weatherhill argue — is not trying to become a state. [577]

This reflection was also suggested by Kalypso Nicolaïdis, who suggested a '***European Democracy***'[578]. In her thesis, Nicolaïdis is suggesting that the European Democracy would be a *'Union of People, understood both as states and as citizens, who govern together but not as one.*'[579] Hence, the relationship previously suggested would interlink the citizens to the European Parliament through the influence of national Parliaments without having to enforce input democracy as matters discussed by the EU are transnational.

[577] Anand Menon & Stephen Weatherhill, Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union, (LSE Law, Society and Economy Working Papers 13//22007, London School of Economics and Political Science Law Department) 1.

[578] The term 'democracy' is derived from demoi, meaning peoples, and kratos, meaning power— or to govern oneself with strength. Peoples here are understood both individually, as citizens who happen to be born or reside in the territory of the Union, and collectively as states, that is the separate political units under popular sovereignty which constitute the Union; as per below citation

[579] Kalypso Nicolaïdis, '*The Idea of European Democracy.'*

Nicolaïdis lays down a total of 10 principles constructing a European Democracy, which all stress a '*horizontal and mutual opening between peoples in a shared polity'*[580] . However the main issue with having a complete shared opening between '*people-as-citizens*' and '*people-as-states'* would be that the '*comitology*', i.e. the complex committee structure whose power is delegated from the Commission — referred to by Craig & De Búrca[581] — would be highly mitigated. Although they speak of it as one of the main features which brings a democratic deficit, it is argued by others that in a horizontal setting which Nicolaïdis speaks of, there is *'no fixed place for the people in Europe'.*[582] Therefore, the EP should sustain a vertical setting in respect of the EU's democratic legitimacy, whilst disseminating further accountability to national parliaments.

Giandomenico Magione, an Italian scholar specialising in regulatory governance within the EU expresses that: '*(a)rguments about Europe's democratic deficit are really arguments about the nature and ultimate goals of the integration process.'*[583] Magione continues to explain that the EU should act as a regulatory state which should produce policy outcomes for other institutions at EU level; rather than focus on the ultimate goal which the integration process projects — stating that however, '*some form of democracy at the EU level is necessary to make good the loss of democratic control at the national level'*[584] — a contrary perspective against which Nicolaïdis highly envisages. Therefore, through this argument that the limits of the EP are what defines democracy at a higher European Level, the EP is able to embrace its powers which derive from the fact that unlike the democracy at a national level, the European Parliament has all the freedom to legislate without following orders from a government, but simply regulated by the Commission and the Council.

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[580] *ibid.*

[581] Craig & De Búrca (2015) 152.

[582] Beate Kohler-Koch & Berthold Rittberger, *Debating the Democratic Legitimacy of the European Union,* (Rowman & Littlefield Publishers, 2007) 168.

[583] Giandomenico Magione, *Europe's Democratic Deficit: The Question of Standard,* (European Law Journal, Vol. 4, No. 1, March 21 1998, pp. 5–28) 5.

[584] Nicoleta Laşan, Journal of European Affairs (2008) 21.

**4. Concluding Remarks**

The idea that the European Parliament is one of the main institutions may result from the fact that it carries with it certain important powers which were granted by several treaties. It also, however, carries with it the misconception that diminishing these powers will lead to a mitigating democratic deficit — which does not appear to be the case.

Whilst many writers consider the EP as 'under construction', some also claim it is 'democracy in the making'. Although there is still a clear democratic deficit, it should be taken into consideration that perhaps a constant rate of democratic deficit must be present in order to differentiate the powers of the institutions, and maintain a stable system of checks and balances whilst the drawbacks are still being addressed, representation is being aligned and the other institutions maintain their stability in areas which affect the average EU citizen.

Ideally therefore, the European Parliament allocates funding, certain methods, mechanisms and implements a process in aid of bridging its gap with the national parliaments of Member State. The citizens, in return, are provided with a wider look at what the European Parliament (and ultimately, the European Union) has to offer, subsequently allowing their respective elected representatives to act as a medium.

# THE IMPLICATIONS OF *AV. PETER FENECH NOE VS DIPARTIMENT TAL-KUNTRATTI* ON THE DOCTRINE OF *CULPA IN CONTRAHENDO* UNDER MALTESE LAW

Tessa Schembri

**KEYWORDS:** CULPA IN CONTRAHENDO - PRE-CONTRACTUAL LIABILITY

# THE IMPLICATIONS OF *AV. PETER FENECH NOE VS DIPARTIMENT TAL-KUNTRATTI* ON THE DOCTRINE OF *CULPA IN CONTRAHENDO* UNDER MALTESE LAW

Tessa Schembri

## 1. Introduction

The doctrine of *culpa in contrahendo* was first propounded by Jhering who advanced the notion that damages should be recoverable from the party whose blameworthy conduct during contractual negotiations brought about the contract's invalidity or prevented its perfection.[585] The term, which in Latin means '*fault in conclusion of a contract'*, recognises a clear duty on prospective contracting parties to negotiate with care, and in general to refrain from doing anything which may lead the other negotiating party to act against his own interests before the conclusion of the contract.

The theory further provides that liability for the loss suffered by a party to a prospective contract is to be considered as a form of pre-contractual liability. *Culpa in contrahendo* has nowadays spread to almost all the Continental legal systems, yet this remains unrecognised in Common law jurisdictions. The reason underpinning this may be attributed to the different theories adopted by each system; whereas the former follows *la teoria dell'affidamento*.[586] The latter is strictly concerned with the theory of the autonomy of the will.[587]

Maltese Law is traditionally classified as a mixed jurisdictional system of Civil Law and Common Law. A more appropriate classification has been propounded by Kevin Aquilina who contemplates a 'Common Law system with a Civil Law underlying layer.'[588] Consequently, the predominance of the will theory, a core feature of the

[585] Rudolf von Ihering, *Culpa in contrahendo oder Schadenersatz bei nichtigen order nicht zur Perfection gelangten Vertriigen, 4 Jahrbucher fur die Dogmatik des heutigen romischen und deutschen Privatrechts 1 (1861), reprinted in 1 von Ihering, Gesammelte Aufsiitze 327 (1881),* cited in Friedrich Kessler and Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study* [1964] 77(3) Harvard Law Review 401-403.

[586] According to this theory the declaration of the will prevails and bestows upon the person to whom it is addressed a legitimate expectation. He who makes a declaration is responsible for honouring that which he has declared.

[587] Also known as *la teoria della volonta* or *Willenstheorie*, the starting point of which is the freedom of the individual and that a fair balance of the contracting parties' interests is struck upon conclusion of a contract.

[588] Rethinking Maltese Legal Hybridity: A Chimeric Illusion or a Healthy Grafted European Law Mixture? Kevin Aquilina [2011] Journal of Civil Law Studies Vol 4 Art 5

Maltese Civil Code, brought with it an increase in the possibility of abuse in the sphere of contractual negotiations.[589] This to the detriment of the party who had relied on the good faith of the other negotiating party in relation to the conclusion of a contract; but who at the end of strenuous negotiations found himself with no remedy.[590] As a result, the Maltese courts have started to give greater importance to the *affidamento* theory and accordingly to the notion of good faith.

While the Maltese Courts have slowly veered towards the Continental school of thought on this issue, we have still not seen any legislative changes being made to provide for the protection offered in the Italian and German legal systems, which have regulated pre-contractual liability through the promulgation of provisions in their respective Civil Codes. The Maltese system is seemingly more akin to the French position, with the difference that the latter has made up for the lacuna in its law through jurisprudence which has upheld that pre-contractual liability clearly exists. On the contrary, Maltese jurisprudence has provided persisting conflicting views on the matter, clearly illustrating that the move towards a more good-faith centred Civil law approach has been less readily accepted and that the existence of pre-contractual liability under Maltese law is rather thorny.[591]

The divergent views expounded by our Courts range from expressly ruling out the possibility of pre-contractual liability,[592] to fully recognising the concept and awarding damages,[593] and even in one case, feeling that there was no need to decide on the issue.[594] Furthermore, in cases of alleged pre-contractual liability involving the government or an administrative authority, the Courts have been consistently even less ready to accept the notion either wholly or in part. However, on the 29th of April 2016

<http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1042&context=jcls> accessed on 2 July 2017

589 Justice Tonio Mallia, 'Pre-Contractual Liability in Malta' [December 2000, Issue 1] Law and Practice, 26-27

590 Miguel DeGabriele 'Pre-Contractual Liability in the Maltese Mixed Jurisdiction: a Comparative Analysis' (LL.B Honours Research Paper, University of Malta 2015) 97.

591 Dr. Paul Micallef Grimaud, *The offer and acceptance in contract law: a comparative legal analysis in the light of modern developments* (1st, University of Malta, Malta 2002) 170.

592 *Cassar vs. Campbell Preston noe* 1971 Commercial Court and *Busuttil vs. Muscat noe*, [28/10/1998] First Hall Civil Court. (Cassar vs Campbell Preston; Busuttil vs Muscat).

593 John Pullen vs. Manfred Gunter Matysik [26/11/1971] Civil Court, First Hall. (Pullen vs Matysik)

594 Dr. Biagio Giuffrida pro et noe. vs. Onor. Dr. George Borg Olivier et [3/3/1961] 131 Court of Appeal, Civil, Superior. (Giuffrida vs Borg Olivier).

the matter was finally put to rest by the Court of Appeal in the case ***Av. Peter Fenech noe vs Dipartiment tal-Kuntratti***[595] when it positively upheld the existence of *culpa in contrahendo* under Maltese law and consequently went on to find a governmental body liable for pre-contractual damages. The judgement has been hailed a landmark which will shape commercial relations for years to come and which will surely pave the way for further recognition by Maltese courts of the contractual basis of the notion of pre-contractual liability.[596]

## 2. The facts of *Av. Peter Fenech noe vs Dipartiment tal-Kuntratti*

### 2.1. Case 972/2005/1

The Civil Court, First Hall, on the 3rd of March 2006, established that a specifically formed consortium, on whose behalf the case had been brought, had been unreasonably disqualified from the tendering process for the provision and installation of a Traffic Management Information System. The Court ordered that the Department of Contracts reinstate them in the tender process as though they had never been disqualified. Aggrieved by the decision, the governmental department filed an appeal and on the 27th of June 2008 the Court of Appeal confirmed the First Hall's decision.[597]

### 2.2. Case 977/2009/1

Distraught by the Department of Contracts' conduct, the consortium initiated a new set of proceedings in front of the Civil Court, First Hall claiming that they suffered pre-contractual damages as the defendant had negotiated with them in bad faith. The plaintiff contended that the defendant's liability arose from the fact that notwithstanding that the court in the abovementioned judgement had found in favour of the consortium,[598] the defendant still failed to re-establish it in the tender process as should have been done, and to make matters worse, as the case remained pending in front of the ordinary courts; the tender was adjudicated in favour of another bidder.

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[595] Av. Peter Fenech, ghan-nom u in rappresentanza tal-Consortium Norcontrol IT Limited Ericsson Microwave Systems AB vs. Dipartiment Tal-Kuntratti, [29/04/2016] 977/2009/1 Court of Appeal, Civil, Superior. (Norcontrol IT Limited Case).

[596] Dr Peter Fenech 'Court of Appeal delivers Landmark Judgement: Right to Pre-Contractual Damages Recognised' [2016]<http://www.independent.com.mt/articles/2016-05-23/local-news/Court-of-Appeal-delivers-landmark-judgment-right-to-pre-contractual-damages-recognised-6736158187> accessed on 2 July 2017.

[597] Norcontrol IT Limited Case (n 11).

[598] ibid.

When examining the nature of the case, Judge McKeon explained that '*m'hijiex azzjoni ghal danni kontrattwali proprju ghaliex il-partijiet qatt ma waslu ghal relazzjoni ex contractu bejniethom.'* He then expressed certain reservations as to the existence of *culpa in contrahendo*, especially in the field of governmental liability:

> *'In kwantu jirrigwarda pre-contractual liability, irid jingħad li l-eżistenza ta' dan l-istitut fil-liġi tagħna għadu dubbjuż u mhux ben definit. Dan l-istitut ma ġiex introdott fil-Kodiċi Ċivili tagħna bħal ma sar f'pajjiżi oħra bħall-Italja u l-Ġermanja. Kien hemm kawżi fejn il-qrati tagħna daħlu f'din il-materja iżda ma jistax jingħad li l-qrati tagħna ħadu posizzjoni ċara, netta, definita u inekwivoka għaliex tidher b'mod ġenerali r-riluttanza tal-qrati tagħna li jaċċettaw b'mod inkondizzjonat materja li mhix kodifikata.'*[599]

The Court then proceeded to quote almost all previous local judgements dealing with the issue of pre-contractual liability in an attempt to extrapolate the principles that had been propounded by local judges over the years. Starting with ***Giuffrida vs Borg Olivier***,[600] the first case generally understood to have introduced the idea of pre-contractual liability in Malta, the judge explained that the burden of proof in such cases is on the plaintiff who must bring evidence of bad faith on the defendant's part. It was held that were *culpa in contrahendo* to be accepted in the Maltese legal system, the liability of the Government would have amounted to *'dik biss tar-rifuzjoni ta' certi danni konsistenti fil-mizura ta' dak li jissejjah interess negativ.'*[601] All the same, the Court went on to conclude that the doctrine had no bearing on the case in question as governmental discretion when negotiating contracts could not be questioned unless by a judge sitting in an administrative tribunal.

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[599] As with regards to the pre-contractual liability, it must be said that the existence of this section of the Maltese Law is still dubious and not clearly defined. This section was not introduced in our Civil Code as was done in other countries like Germany and Italy. There nearly were instances where the Maltese Courts got involved in this matter but no clear, definite and unequivocal position was taken by the Maltese courts, because it is clearly conveyed that they do not accept, in an unconditional way, material that is not codified in the Laws of Malta.

[600] (Giuffrida vs Borg Olivier) (n 10).

[601] The general principle that an unjust or capricious revocation makes its author liable for damages incurred by the counterparty in the measure of 'negative interest.'

Judge McKeon then proceeded to explore the decision by the Court of Appeal in ***Pullen vs Matysik***[602] where the plaintiff's request for pre-contractual damages was accepted. It was decided that the defendant's conduct as he entered negotiations with the plaintiff for the lease of a boutique located on the former's hotel premises and allowed negotiations to reach an advanced stage to the extent that the agreement was almost finalised, yet then went on the rent out to third parties; illustrated bad faith on his part. The defendant's actions had led the plaintiff to acquire a legitimate expectation that he was to obtain the lease and was thus found liable in tort for his conduct which amounted to culpa as envisaged under Article 1031 of the Civil Code.[603] The Court held that compensable damages '[…] are those flowing from the breach by the defendant of his obligation arising from a valid agreement *de ineundo contractu*.' Damages given were limited to the actual losses incurred by the plaintiffs up to the time that the negotiations broke down, consisting in actual expenses incurred or depreciation of material or otherwise however, they did not include any profits which would have been derived from the concession of the boutique.

*A contrario*, Judge McKeon even explored the *rara avis* judgements of ***Cassar vs Campbell-Preston*** and ***Busuttil vs Muscat***[604] in which the Courts had rightly held that the concept of pre-contractual liability did not form part of the Maltese legal system as this would amount to an impediment to trade.

The most nuanced approach to pre-contractual liability as afforded in the landmark judgement ***Grixti vs Grech*** was also discussed.[605] According to this case, two-pronged requirements present the ideal scenario whereby *culpa in contrahendo* can develop and find consistent application in Maltese law. Firstly, one party must have incurred, in good faith, certain expenses with the expectation of a formal agreement between him and the other contracting party. Secondly, the other party must have, capriciously or almost in bad faith, but not necessarily maliciously or fraudulently, terminated negotiations at a stage where the reciprocal consent of the parties were identical as to the essential conditions of the contract and that the contract was not perfected because of this conduct. Notwithstanding this seminal reasoning, the court dismissed the action of the plaintiff because none of the requisites for the action were met.

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[602] (Pullen vs Matysik) (n 9).

[603] Chapter 16 of the Laws of Malta, Civil Code, Article 1031, "Every person, however, shall be liable for the damage which occurs through his fault."

[604] (Cassar vs Campbell Preston; Busuttil vs Muscat) (n 8).

[605] *Elia Grixti vs. Mark Grech* [3/04/1998] 222/98 Civil Court First Hall.

Moreover, in ***Portelli vs Falzon*** it was established that whoever enters into negotiations with another with the intention of concluding a contract can allege that he has been 'unfairly treated' and then request damages under the notion of pre-contractual liability. In this case however, the request was not made and the circumstances also did not point towards misconduct on the part of the defendant. In order for one to request pre-contractual damages he must prove the unjustified termination of negotiations in a manner whereby '*l-aġir ta' min waqqaf innegozjati irid ikun ekwivalenti għal dolus.*'[606]

By contrast, in ***Seguna vs Kunsill Lokali Zebbug***[607] the First Hall, Civil Court, found the Government to be pre-contractually liable on the same approach as it held in the ***Grixti* case**. Notwithstanding this forward way of thinking, the Court of Appeal agreed that even though there was abuse by the Local Council, this could not amount to pre-contractual liability since the issue was to be dealt with under administrative law. The Court hence, distinguished between pre-contractual liability and abuse of administrative power:

> *'[…] f'każ ta' abuse of administrative discretion, kif inhu l-meritu ta' dan il-każ, il-materja mhix waħda ta' pre-contractual liability, iżda ta' abbuż ta' poter minn min ikollu funzjoni amministrattiva. Meta persuna tigi mċaħda minn kuntratt jew possediment iehor bi ksur tal-ligi minn korp jew uffiċjal amministrattiv, dan ta' l-aħħar ikun responsabbli ta' delitt jew kważi-delitt u jrid jirrispondi għad-danni kollha reali li l-aġir tiegħu jkun ikkaguna. Ir-responsabbilita` pre-kuntrattwali topera meta tnejn minn nies jidħlu f'kuntratt direttu f'negozjati għal ħolqien ta' kuntratt, u wieħed minnhom iwaqqaf dawk il-kuntratti mingħajr ġustifikazzjoni. Is-sitwazzjoni hi differenti meta organu jew ufficjal munit b'poter amministrattiv hu moghti diskrezzjoni fl-ezercizzju ta' dak il-poter, jaġixxi b'mod abużiv bi 'ksur' tal-poteri diskrezzjonali tiegħu.'*[608]

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[606] The behaviour of he who founded the negotiations for the contract must equivalently amount to dolus.

[607] *Phillip Seguna vs. Kunsill Lokali Zebbug* [03/10/2008] 934/1998/1 Court of Appeal Civil, Superior.

[608] In the case of abuse of administrative discretion, as was the case here, the dispute was not on the matter of pre-contractual liability, but on the abuse of power from a person of administrative functions. When a person is denied from another contract or possession through a breach of law from an administrative body or official, the latter of which would be responsible for having committed a crime or quasi-crime, and must be answerable for all damages caused through his behaviour. Pre-contractual responsibility operates on the grounds of when people enter a

In ***Vassallo Builders Limited vs Serracino Inglott*** the Court highlighted the importance of differentiating between a call for offers or that known as the tendering process and the contract of works. The juridical relations between the two are not the same, and thus, should not be considered as such.

> *'... cioè waħda li tikkonsisti fil-proċedura determinata li twassal għall-konklużjoni tat-trattattivi dwar is-sejħa għall-offerti u l-oħra sostantiva li tikkonsisti fin-negozju proprju li jwassal għar-relazzjoni ġuridika attwali u l-kuntratt finali bejn il-partijiet dwar ix-xogħol, servizzi jew forniturita' oġġetti rikjesti.'*[609]

After analysing all of the above Judge McKeon went on to decide that the case in question did not result in *culpa ex contractu* or *extra contractu*, nor did it result in *culpa aquiliana*, *culpa ex delicto* or *dolo* or even abuse of administrative discretion on the part of the Department of Contracts. Moreover, neither could the defendant be found liable for damages in favour of the plaintiff for being excluded from the tender process *de qua*.

On the other hand, the Court of Appeal on the 29th of April 2016 drew on the observations of the Commercial Court in ***Pullen vs Matysik*** and overturned the decision of the First Hall, holding that when parties enter into negotiations with the intention of binding themselves by means of a contract, a contract is created. This is not the contract being negotiated by the parties but an agreement *de ineundo contractu* which binds the parties to negotiate in good faith and not to withdraw from negotiations for a reason not valid at law.

> *'Ġà ngħatat dikjarazzjoni ġudizzjarja, fis-sentenza li temmet il-kawża numru 972/2005, illi ma kienx hemm raġuni tajba u illi d-Dipartiment mexa ħażin meta warrab l-offerta tal-Konsorzju, għax warrabha għal raġuni li ma tiswiex fil-liġi. Dan huwa in-nuqqas, waħdu, għax huwa ksur ta' patt kuntrattwali, inissel responsabilità mingħajr*

negotiations for the creation of a contract and one party cancels the contract without reasonable justification. The situation is different when a body or official, bestowed with administrative power and is given discretionary power in the carrying out of his duties,acts in an abusive manner by breaking such power of discretion that he has.

609 The conclusion reached by the court was that no liability existed.

> *il-ħtieġa ta' dolus jew culpa proprji għal responsabilità ex delicto vel quasi li fittxet u ma sabitx l-ewwel qorti.'* [610]

The Court went on to explain how in cases involving a call for offers for a public contract, a valid reason to refuse or reject tender applications would be due to a lack of observation of tender conditions, unfavourable conditions or more advantageous offers by third parties. If either party does not comply with these obligations, the party at fault will need to make good the damages suffered by the other party:

> *'Il-kejl tad-danni fil-każ ta' culpa in contrahendo huwa dak magħruf bħala 'l-interess negativ', i.e. mhux dak li kien jikseb l-attur li kieku ngħata l-kuntratt, iżda dak li ma kienx jitlef li kieku ma ressaqx l-offerta.'*[611]

The Court substantiated its decision on the basis of the contractual nature of *culpa in contrahendo* as developed by the German courts in the 1911 judgement ***Reichsgericht - Linoleumrollen-Fall***. In this case a person had entered a store to purchase a carpet and was knocked down by a roll of linoleum, which a store employee had carelessly dropped on her. This action could not be successful if it were to be classified as arising out of a tort since the applicable provisions of the B.G.B. [612] At the time stipulated that an employer cannot be found liable in tort for the damage caused by his employee in absence of proof of *culpa in eligendo*. The German court avoided this obstacle by explaining that a legal relationship came into existence between the parties in preparation for a purchase and that this relationship bore a character similar to a contract which produces legal obligations.

The Court of Appeal explained how even though the facts of the case were different:

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[610] It has already been judicially declared in the sentence which decided case number 975/2005 that there was no justifiable reason for such action and that the Department acted wrongfully when the offer of the Consortium was disregarded. Such disregard was deemed to be not in accordance with the Laws of Malta. Therefore, such negligence on its own is enough to be considered as a breach of the contractual pact and bring about legal responsibility without the requirement of *dolus or culpa* which normally are needed for responsibility of *ex delicto vel quasi*, which the First Court did not find.

[611] The measurable damages in the case of *culpa in contrahendo* are those known as 'the negative interest', i.e. not that which the actor would have gained in the case of the success of the contract, but rather the damages which would have been lost had the contract never been offered in the first place.

[612] Bürgerliches Gesetzbuch (German Civil Code).

> *'is-sisien loġiċi tal-azzjoni tallum huma l-istess: hekk kif il-Konsorzju fuq stedina tad-Dipartiment għamel offerta, inħolqot relazzjoni kunsenswali fiehim taċitu de ineundo contractu – bejn il-partijiet fis-sens illi l-offerta titqies kif imiss u ma tiġix imwarrba jekk mhux għal raġunijiet li jiswew fil-liġi. Ir-responsabilità ta' min jonqos li jħares il-kondizzjonijiet ta' dan il-patt taċitu hija r-responsabilità ta' min jonqos li jħares patt kuntrattwali, u għalhekk hija ex contractu.'*[613]

**3. Comments**

Forty years after the ***Giuffrida*** **judgement**[614] which seemed to imply that it is difficult for pre-contractual liability to arise when the case involves an administrative authority or the Government itself, the Court in the ***Fenech noe*** **judgement** finally shut the door on this very conservation approach and categorically found the Department of Contracts, a governmental body, liable for pre-contractual damages. While wholly in line with the doctrine of *culpa in contrahendo* as found in the Continental school of thought, a closer look at the outcome of the Court of Appeal's decision as to the quantification of pre-contractual damages illustrates how the application of the doctrine under Maltese law remains faint-hearted.

Originally, the consortium claimed that it was owed seven hundred and fourteen thousand and eight hundred and fifty-one Euro (€714,851) by way of damages. However, on the 5th of November 2015 the applicant reduced its request to the amount of damages due only by way of negative interests: those pertaining to 'sales activities' and 'technical activities' which amounted to a total of seventy-one thousand nine hundred and forty Euro (€71,940). Notwithstanding this, the Court still went on to further reduce the amount of compensable pre-contractual damages to thirty-eight thousand three hundred and forty Euro (€38,340)[615] basing itself on the argument that the applicants had not provided sufficient proof.

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[613] The logical foundations of today's actions are the same: by invitation of the Department, the Consortium made an offer, and a consensual relationship was created, through a tacit '*de ineundo contractu',* between the parties on the grounds that the offer remains as is and will not be disregarded, unless there are reasons due to law present. He who fails to carry out the conditions of this tacit agreement is responsible for breaking the contract and is thus, '*ex contractu.'*

[614] (Giuffrida vs Borg Olivier) (n 10).

[615] '*Taht dawn il-Konsorzju jqis is-sigħat ta' xogħol ta' erba' diriġenti tiegħu sabiex ħejjew l-offerta, spejjeż sabiex ivvjaġġew lejn Malta, spejjeż ta' lukandi u spejjeż sabiex intbagħtu d-dokumenti tal-offerta b'courier. Il-Konsorzju jgħid illi b'kollox dawn is-sales activities ġew jiswew tmienja u tletin elf, tliet mija u erbgħin euro (€38,340).'*

Dr Fenech contends how, while bearing in mind the unpredictable manner in which the Maltese courts had dealt with cases of pre-contractual liability, especially ones which had involved the Government, his focus at appeal stage shifted onto primarily the procuring of 'negative interests' by way of pre-contractual damages for his clients. Notwithstanding the grave reduction in requested damages, the Court still deemed it fit to further minimise these, in what is very likely to be an attempt not to open the floodgates to the institution of court cases suing the government for its wrongdoings.

The judgement remains significant nevertheless. While it is true that the ***Pullen*** and ***Grixti*** **judgements** may have illustrated that *culpa in contrahendo* already had a place in Maltese law, the cases that followed demonstrated that this was not applied in cases where the Government was a party to the suit. In the ***Fenech noe*** **case** the Court did in fact, for the very first time, expressly confirm the existence of *culpa in contrahendo* under Maltese law and went on to find the Government pre-contractually liable for its bad faith during contractual negotiations.

Of further significance is the fact that the Court of Appeal referred to the ***Linoleumrollen-Fall*** **judgement**. The German jurisprudential rule circumvents a quasi-tort rule which is often regarded as undesirable policy wise as even under Maltese law, employers can only be found indirectly liable for the acts of their employees in for *culpa in eligendo*.[616] By classifying the relationship as *ex contractu* and not as *ex delicto* the Maltese Court finally rendered it possible to find a governmental department liable for pre-contractual damages. While the damages awarded may be deemed unsatisfactory, the Court's approach cannot be considered as anything other than a step in the right direction.

**4. Concluding Remarks**

The term equity in Maltese law bears a dual meaning as a gap-filling device and as a tool to correct the injustice or unfair results flowing from the literal application of law. As to pre-contractual liability, this is to be interpreted in accordance with the former understanding of the word. As a pertinent issue within the realm of private law pre-contractual liability as under Maltese law seems to support the assumption that local judges play an essential role in driving the development of the Maltese legal system and contribute to its mixed nature.[617] While the doctrine of pre-contractual liability was

[616] Kühne, Günther, Promissory Estoppel and Culpa In Contrahendo, in: 10 Tel Aviv University Studies in Law, Tel Aviv 1990, at 279 et seq. <https://www.trans-lex.org/114700/_/k%C3%BChne-g%C3%BCnther-promissory-estoppel-and-culpa-in-contrahendo-in:-10-tel-aviv-university-studies-in-law-tel-aviv-1990-at-279-et-seq/> accessed on 2 July 2017.

[617] B Andò, The Mélange Of Innovation and Tradition in Maltese Law: The Essence Of The Maltese Mix? <https://www.ajol.info/index.php/pelj/article/view/82488> accessed on 2 July 2017. 81.

once seen as an interesting example of the 'pragmatic' attitude of Maltese judges to have recourse to solutions drawn from different traditions in their fulfilment of their gap-filling function, the ***Fenech noe* judgement** has ensured that the existence of the Continental *culpa in contrahendo* no longer remains controversial and fully applies in cases of governmental liability.