

Practical Aspects of Independence of Justice

Replies from

MALTA

I- Protection of Independence

1. What is the legal basis (constitutional, statutory, customary, judicial precedent) of the statutes or other statutory instruments safeguarding the independence of judges?

A. The independence of the judiciary is guaranteed principally by the provisions of the 1964 Constitution of Malta (as subsequently amended). Certain other provisions contained in the Code of Organisation and Civil Procedure (Chapter 12 of the Revised Edition of the Laws of Malta) and subsidiary legislation made under that Code further underscore the “institutional”, as opposed to the merely “constitutional” independence of the Judiciary from the two other organs of Government: the Executive and the Legislature. The Constitution guarantees the security of tenure of judges and magistrates and their salaries, and also provides for the allocation of judges and magistrates to particular courts; the Code of Organisation and Civil Procedure and subsidiary legislation guarantee a wide measure of self-regulation in the way judges and magistrates are subrogated to sit in a particular court whenever there is an abstention or challenge (recusal) according to law, and in the distribution of cases as between judges or magistrates sitting in the same court. See **Documents A to E**, attached. **Documents C, D and E** are taken from the Website of the Judiciary of Malta: www.judiciarymalta.gov.mt

2. What are the requirements applying to the appointment (for example appointment by the Government or by an independent body) and the guarantees regarding termination of the judicial function?

A. See **Documents C, D and E** referred to in answer to question 1.

3. What are the requirements applying to the appointment of the President of the Supreme Court and what is the duration of his/her term of office?

A. In Malta there is technically no Supreme Court, but three separate courts – the Constitutional Court, the Court of Appeal and the Court of Criminal Appeal. The Constitutional Court is composed of the Chief Justice as President and two other judges. The Court of Appeal, when hearing appeals from the Superior Courts (that is from decisions

delivered by a judge) is composed of the Chief Justice as President and two other judges. The Court of Appeal thus composed, that is of three judges, is further divided into two chambers or sections: the first section and the second section. Each section is presided by the Chief Justice (only the other two judges of each section being different). When hearing appeals from decisions of the Inferior Courts (that is from decisions delivered by a magistrate) the Court of Appeal is composed of one judge (who may be either the Chief Justice or any other judge). The Court of Criminal Appeal may also be composed of either one judge or three judges. When hearing appeals from decisions of the Inferior Courts it is composed of one judge (who may be either the Chief Justice or any other judge); when hearing appeals from the Criminal Court (which is normally composed of a judge and nine jurors) it is composed of the Chief Justice as President and two other judges. It is only in this sense that the Chief Justice can be regarded as President of the “Supreme Court”, that is because he presides in the Constitutional Court and in the Court of Appeal and the Court of Criminal Appeal when these two latter courts are composed of three judges. For the appointment of the Chief Justice, see **Document C**, referred to in answer to question 1. The Chief Justice remains in office and continues to preside in the abovementioned courts until he retires at the age of 65, like any other judge or magistrate.

4. What are the conditions for voluntary, temporary suspension of a judicial career and for the return of a judge to court? In particular, may a judge return to the bench after joining the Bar or after holding a political mandate (for example: as an elected or unelected member of the legislature or the executive) or after working for the prosecution?

A. The matter is regulated by Article 16 of the Code of Organisation and Civil Procedure. This article provides that “It shall not be lawful for any judge or magistrate to carry out any other profession, business or trade, or to hold any other office of profit whatsoever, even though of a temporary nature, with the exception of any judicial office on any international Court or Tribunal or any international adjudicating body, and the office of examiner at the University of Malta.” Therefore if a judge (or magistrate) in Malta wants to work for the prosecution or be a member of the legislature or of the executive, he must resign from the office of judge (or magistrate). He can then only return to the Bench if he is reappointed as a judge or magistrate.

5. How and by whom are the ethics of judges defined?

A. The ethics of members of the judiciary are defined by the Commission for the Administration of Justice established pursuant to Article 101A of the Constitution (see **Document A**, above), and, to a lesser extent, by guidelines issued by the Chief Justice and approved by the said

Commission – see **Document F** – Code of Ethics for members of the Judiciary, attached.

II – Working Conditions

6. How is the salary, including pensions, fixed, increased or decreased and by whom? Are judges awarded bonuses or any other advantages (car, lodging, etc...) and by whom? What is the annual salary (including pensions and bonuses) of a Supreme Court judge? How does this compare with the salary (including pensions and bonuses) of other state officials?

A. Salaries, including pensions and allowances, are determined by the Executive. Salaries and pensions may not be decreased – see Article 107 of the Constitution, **Document B**, above. Judges (and magistrates) are awarded fixed bonuses and other specified advantages. In practice these bonuses and advantages have never been decreased or withheld in respect of any judge or magistrate. As for salaries (that is to the exclusion of allowances and other advantages) see **Document G** – Legal Notice 34/2006 – Judges and Magistrates (Revision of Salaries) Order 2006. This may be compared with **Document H** – Legal Notice 33/2006 – President of Malta and other Officers (Revision of Salaries) Order 2006. Please note that the figures in these two Legal Notices are given in Malta Liri and not in Euros. The latter Legal Notice includes the salary of the Attorney General (the chief legal adviser to Government and chief prosecutor, whose office is also established by the Constitution and who enjoys security of tenure like judges and magistrates). Judges and the Attorney General are offices in Salary Scale 1 in the Civil Service pay scale. Moreover members of the judiciary (judges and magistrates) have the following bonuses and other specified advantages: (1) a non-pensionable allowance of €8,152.81 per annum; (2) a non-pensionable allowance equivalent to 15% of their salary per annum; (3) a petrol allowance of €1,980 per annum (slightly higher for the Chief Justice); (4) a fixed office expense and hospitality allowance; (5) use of mobile phones up to a certain limit; (6) fixed telephone line at place of residence with no limit on local calls, and on overseas calls made on official business; (7) car for official and personal use, and the provision of a driver for official use; (8) ADSL facility at place of residence; (9) fax machine at place of residence; (10) a laptop computer, which may be used anywhere; (11) three local newspapers daily (all local newspapers in the case of the Chief Justice); (12) subscription to the *Collection of Decisions of the Superior Courts*. **Document I**, attached, shows, in Euros, the total emoluments (inclusive only of (1) and (2)) payable to members of the judiciary in 2010 linked on the basis of fixed percentages to Salary Scale 1 (Lm16,392 = €38,184).

7. How are cases allocated among the different divisions of the Supreme Court and among the judges? What are the conditions or criteria for modifying the allocation of cases?

A. Reference is made to the answer to question 3, above. Cases go to the Constitutional Court, to the Court of Appeal and to the Court of Criminal Appeal depending on the subject matter and in accordance with what is provided in the Constitution, the Code of Organisation and Civil Procedure and the Criminal Code. As to the allocation of cases between the two sections of the Court of Appeal, this is in part regulated by Rules of Court and in part left to the discretion of the Chief Justice. When the Courts are composed of three judges, it is the Chief Justice (or whoever is presiding, if the Chief Justice is precluded from presiding according to law) who determines who is to be the *rapporteur* judge with regard to a specific case.

8. Daily working hours, including preparation of cases? Who has the authority to fix working hours for judges and, if so, what is the number of hours? Who controls?

A. Although the law provides for the time during which the various registries of the courts are open for the filing of documents, and also provides that no sittings are to be held on certain days (e.g. Saturdays, Sundays, Public Holidays, during the recess between one session of the judicial year and the other) except for special reasons, there are no fixed daily working hours for judges and magistrates. Most sittings are held in the morning from 9.00 am to 1.00 pm or 1.30 pm, with the rest of the day dedicated to the paperwork and the preparation of cases. Judges and magistrates are not expected to hold sittings every day, but as may be required. Judges and magistrates work on reserved judgments mostly at home. For example, the Constitutional Court and the First Section of the Court of Appeal generally hold hearings on Monday from 9.00 am to 1.30 pm. The Second Section of the Court of Appeal meets on Tuesday morning, while the Court of Criminal Appeal composed of three judges meets on Thursday afternoon between 3.00 pm up till 5.00 pm or 6.00 pm as may be necessary. The Criminal Court (composed of a judge and nine jurors) is by far the exception in all this. Once a trial by jury commences, the trial continues uninterrupted over successive days (other than Saturdays, Sundays and Public Holidays). The normal working hours of the Criminal Court are from 9.00 am to 1.00 pm and from 2.30 p.m. to 6.30 p.m. (with coffee and other minor breaks in between). In other words, it is generally left up to individual judges and magistrates to determine the number and length of sittings per week necessary to deal with their workload, subject to the general supervision of the Chief Justice and of the Commission for the Administration of Justice.

9. Has each judge an office of his/her own in the court building?

A. Yes. Until some time ago these offices were connected directly with a particular court room, on the assumption that a particular judge (or magistrate) would always be using that court room. With the increase in the number of judges and magistrates this arrangement proved unworkable. Today judges and magistrates in Malta (but not in the Island of Gozo) have offices which are separate from the court room, so that that court room may be used by more than one judge or magistrate during the week, or even during the same day if necessary.

10. Has each judge the possibility to use a portable PC, also out of office?

A. Yes. See also answer to question 6, above.

11. Is each judge assisted by legally qualified clerks or research assistants?

A. Judicial Assistants assist judges in civil work. Judicial Assistants, however, are not available for judges doing criminal work. See **Document J** on Judicial Assistants, attached.

12. Is there a library reserved for judges and other court staff? What are the opening hours? Is the assistance of a librarian possible?

A. A small library is available at the law courts in Malta (but not in the court building in Gozo). This library is staffed by two library assistants. It can be used also by lawyers, but only members of the judiciary may take out books. In practice judges and magistrates do not work in this library, preferring their offices instead.

13. In case the judge works at home: has he/she access to data bases, provided by the court, containing, for example, the Supreme Court's case law, legislation and legal periodicals?

A. Yes. A judgment database, as well as all legislation (main and subsidiary) is available for access from home. See (as for judgment database) <http://www2.justice.gov.mt/sentenzi/default.asp?lng=ENG> and (as for legislation) <http://www2.justice.gov.mt/lom/home.asp>. No legal periodicals, however, are available on this site. A judge or magistrate may also access the LECAM system, where all minutes of civil court cases are available, as well as lists of pending cases, dates to which cases have been adjourned and other information necessary for case management purposes.

14. Any further information for assessing the working conditions of judges and court/chambers' presiding judges?

A. No.

III – Relationship with Outside Partners

15. To what extent may judges socialize with attorneys?

A. Since all judges and magistrates in Malta are appointed from among practising advocates, a certain degree of socialisation is inevitable. Apart from rules 11, 12, 13, 19 and 20 of the Code of Conduct for Members of the Judiciary (and the Chief Justice's Guidelines under the heading "Termination of professional and business contacts" in the same Code) – see **Document F**, above mentioned – judges and magistrates in Malta are also enjoined to abide by the rules and principles laid down in the Commentary on the Bangalore Principles of Judicial Conduct. In particular paragraphs 114 to 127 of the said Commentary are to be observed. See **Document K** – paras. 114 to 127 of the Commentary on the Bangalore Principles.

16. Can complaints against a judge be filed with an ombudsman? Is the judiciary controlled by the ombudsman?

A. The answer to both questions is in the negative. Complaints against a judge or a magistrate may, however, be lodged with the Commission for the Administration of Justice as established by Article 101A of the Constitution.

17. Do decisions of international courts have a bearing on the national organisation of the judiciary? Examples?

A. It is possible that such decisions have a bearing on the organisation of the judiciary. A case in point is the decision of the ECHR in the **Case of San Leonardo Band Club v. Malta** (29/7/2004). The law provided – and still provides to this day in Article 814 of the Code of Organisation and Civil Procedure – that the demand for a re-trial "shall be made to the court by which the judgment complained of was given, and the same judges and magistrates may sit." A re-trial may be demanded on one of a number of limited grounds specifically mentioned in Article 811 of the said Code. Some of these grounds refer to the behaviour of the parties or

to the discovery of new documents; other grounds, however, imply that the court had somehow erred in its judgment. Up to the time of this judgment and in order to avoid abusive applications for re-trial, Article 814 had been interpreted to mean that when a re-trial was applied for on one of the stated grounds which implied that the court had erred in its judgment, the same judges of the Court of Appeal would first assess whether or not there was a *prima facie* case based on that ground; if there was, then they would withdraw and the case would be heard by another three judges; if there was deemed to be no *prima facie* case, the application would be rejected outright. The ECHR found that this procedure did not fully satisfy Article 6(1) of the European Convention. As a result, although domestic law has not been changed, the judges of the Court of Appeal immediately withdraw, and three other judges are subrogated in their place, whenever the application for re-trial invokes a ground implying an error of judgment by the court. This has, in fact, not led to any serious abuse of the re-trial procedure (less than 1% of appeal judgments are re-tried), although the extension, in 2007, of the double costs rule to frivolous or vexatious re-trials (formerly applicable only to frivolous or vexatious appeals) has also helped in containing the number of such applications. From an organisational point of view, the ECHR judgment has meant that more judges who normally sit in first instance must now be prepared to be subrogated to sit in the Court of Appeal to hear specific cases of re-trials.

18. What is the influence of international networking on the protection of the independence of the judiciary?

A. The Maltese experience has been that international networking, whether at EU, Commonwealth or Council of Europe levels, has enabled the Judiciary and the Executive to adopt what can be regarded as “best practices” in ensuring the “institutional” independence of the former from the latter. In Malta this is particularly important since the court “administration”, headed by the Director General, Courts Division, is in theory answerable to the Minister for Justice, and not to the Chief Justice or to any other judicial organ. As explained in **Document C**, above, it is for this reason that Regulation 12 of L.N. 139/2004 was added in 2008, enabling the Chief Justice to overrule any decision of the Director General which is seen to interfere in the exercise of judicial functions.

19. May judges engage in extra-judicial activities such as arbitration?
May judges render expert opinions on behalf of clients?

A. The answer is no to both questions.

20. May judges engage in politics or run for a political mandate?

A. No. To do so the judge (or magistrate) must first resign from his judicial office.

21. How is the independence of judges protected in case of criticism or attacks from the outside environment, in particular from the “Unions”/representative bodies of Judges, the Bar/Law Societies/practising professional legal bodies, politicians or the press?

A. In Malta judges (and magistrates) are not unionised. There is, however, an Association, to which judges and magistrates may belong – see **Document L**, attached. Rule 2 of Section B of the Statute of this Association, however, provides that “The Association shall represent its members but shall not represent the judiciary, and shall not replace the meetings of judges and magistrates convened by the Chief Justice according to law.” In practice, and given the small size of the jurisdiction, there has never been any conflict between the Association and the “judiciary”. As to unjustified criticism or attacks from other quarters, the Chief Justice and/or the Minister responsible for Justice are expected, in appropriate cases, to rebut publicly such criticism.

22. In what way do you think that government action or inaction may risk, directly or indirectly, undermining the independence of the judiciary.

A. It is difficult to answer this question in the abstract. However the Maltese experience has shown that unjustified and systematic criticism of the judiciary by the government (i.e. the Executive) in the late seventies and early eighties did have a “chilling effect” on judicial activism, particularly in the field of public and constitutional law, although the “constitutional” independence of the judiciary was not directly affected.

23. Does criticism from the media, government or parliamentarians made either generally or in relation to particular cases risk compromising the independence of the judiciary?

A. Again, it is difficult to answer this question in the abstract. Broadly speaking criticism, even if robust, and even if the result of misconceptions or insufficient information (for example, about what was actually decided in a particular case and/or why it was so decided), should not be seen as compromising such independence. Criticism, particularly if forthcoming after careful examination of factual situations, can be useful to pinpoint certain practices which may require corrective measures.

24. Does the judiciary respond publicly to criticism, and, if so, what means and mechanisms are used to do so?

A. In Malta individual judges (and magistrates) do not respond individually to unjustified criticism. Such responses are made through the Office of the Chief Justice.

25. Is the relationship between the court and the media organised? If yes, in what way?

A. Apart from the fact that court reporters have an office in the court building and copies of court judgments are made available to them as soon as they are delivered, there is no organised relationship.

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Attached documents: A to L