

Military, Martial, and Public Emergency Law

An Analysis of these three branches of law in relation to the Armed Forces of Malta

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In this article, **Andrew Drago** gives a thorough explanation of the main elements of military, martial, and public emergency law within Maltese law. A comparative legal exercise is conducted in referring to Indian, UK, and US jurisprudence, in light of the fact that Maltese public law is deeply rooted in the common law tradition. Moreover, it is submitted that military, martial, and public emergency law are three distinct bodies of law which respectfully regulate the Armed Forces of Malta. This article was submitted last year as part of PBL3002.

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1. Military Law

Mmilitary law is a branch of public law¹ which relates to the governance of the Armed Forces as established by the Malta Armed Forces Act, and the subsidiary legislation thereunder.²

The President of Malta is empowered by Chapter 220 of the Laws of Malta (Cap. 220) to ‘*raise by voluntary enlistment [thus prohibiting conscription] and maintain an armed force*’.³ Members of the armed forces, as per Article 124 of the Constitution,⁴ are not considered to be public officers, therefore the Public Service Commission is extraneous to the military.⁵ Moreover, Article 124 defines ‘public service’ within the meaning of ‘public office’ as ‘*the service of the Government of Malta in a civil capacity*’ indicating a distinction between civilian and military law.

The author submits that military law as contained in Cap. 220 may be classified into two: the administrative branch and the penal branch. Cap. 220 lays down the structure and hierarchy of the forces;⁶ conditions and duties of services;⁷ recruitment, appointment to corps, and discharge;⁸ training;⁹ salaries, forfeitures, and deductions;¹⁰ use of land and sea ranges,¹¹ and a method of redress of complaints.¹²

In this category of military law, namely the administrative branch, the Malta Armed Forces (AFM) is expected to act according to the principles of good administration, natural justice, and with the duty of care as expected from any other public authority and employer. In this aspect, their right of access to courts is not impeded. In this regard, the military is unquestionably answerable for human rights violations and private law infringements.

¹ Vide The Constitution, Articles 47(1), (5) and (6), 39(9); vide also 187/16 MCH *Andrew Mallia v Commander of the Armed Forces et*, Court of Appeal 30 January 2018.

² Malta Armed Forces Act, Chapter 220 of the Laws of Malta.

³ *ibid* Article 3(1).

⁴ The Constitution, Article 124.

⁵ Tonio Borg, *Maltese Administrative Law* (Kite Group 2021) 106.

⁶ Malta Armed Forces Act (n 2) Part II Title I.

⁷ *ibid*.

⁸ *ibid* Title II.

⁹ *ibid* Title III of the Territorial Forces and under Title IV concerning the Reserve Force.

¹⁰ *ibid* Part V.

¹¹ *ibid* Part VI.

¹² *ibid* Part VII.

1.1 Order and Discipline

Article 47(5) of the Constitution¹³ reads:

nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than articles 33, 35 and 36.

Order and discipline are essential values of the military, to the extent that this is recognised by our Constitution. Insofar as this ouster clause is relevant to members of the force, this author observes that this clause does not exempt military personnel from seeking human rights redress under the European Convention of Human Rights (ECHR) if they undergo discrimination in treatment in recruitment or promotion. In *Smith and Grady v The United Kingdom*,¹⁴ the ECtHR declared that dismissal from the military due to sexual orientation was inconsistent with the right to respect for private and family life.¹⁵ Although Article 47 of the Constitution makes exception only for the right to life, freedom from forced labour, and protection against inhuman treatment, Article 15 of the ECHR stipulates that the principles of *nulla poena sine lege*¹⁶ and double jeopardy¹⁷ are non-derogable rights, even in war-time and public emergency, and thus these apply to military law *mutatis mutandis*.

Cap. 220 establishes military offences and courts-martials. Jurisdiction in military law includes all the members of the armed forces¹⁸ and other members of the regular forces who may, under the conditions specified in the Act and the rules of procedure,¹⁹ be subject to military jurisdiction.²⁰

The three forms of courts-martials are: general courts-martials, having jurisdiction to try and award any punishment envisaged in the Act;²¹ district courts-martials, having jurisdiction to try offences not exceeding the punishment of two years imprisonment, yet are excluded from hearing cases against officers and warrant officers;²² and field general courts-martials, which shall not award sentences of more than two years imprisonment. Although the offences envisaged in Cap. 220 are specific to persons subject to military law and are tried in courts-martials, military law is not an independent and isolated body of law as its subjects still enjoy the right to

¹³ The Constitution of Malta, Article 47(5).

¹⁴ *Smith and Grady v The United Kingdom*, App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999).

¹⁵ European Convention on Human Rights, Article 8.

¹⁶ *ibid* Article 7.

¹⁷ *ibid* Article 4 protocol 7.

¹⁸ Malta Armed Forces Act (n 2) Article 178.

¹⁹ Rules of Procedure, S.L. 220.04.

²⁰ Malta Armed Forces Act (n 2) Article 179.

²¹ *ibid* Article 93.

²² *ibid* Article 91(2).

a fair hearing²³ and additionally, any decision of a courts-martial may be appealed to before the Court of Criminal Appeal.

Peculiarly, Article 39(9) of the Constitution gives leeway for military personnel to be tried twice for the same offence: ‘*notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force*’.²⁴

As argued by Professor Borg,²⁵ this provision is unaligned with the ECHR, as *ne bis in idem* is non-derogable. Nonetheless, military discipline characterises military law as it seeks to ‘enable operational effectiveness’ of the military.²⁶ In *Engel and Other v Netherlands*,²⁷ the ECtHR established how the classifications of criminal and disciplinary offences within national law are irrelevant to the human rights enjoyed by the accused, if the characteristic of the punishment is of a criminal nature. Nevertheless, the Court held that:

*Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation [...] A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman.*²⁸

2. Martial Law

Martial law is a non-statutory body of law which empowers the military to take control of an area or a state in distress, to ‘preserve order’.²⁹

The Bombay High Court in *Chanappa Shantirappa and Ors. v Emperor*,³⁰ defined martial law as:

no law at all: the ordinary Courts ex hypothesi are not functioning except under military protection, and the effect of martial law [...] is to substitute for the ordinary law of the land the will of the Military Commander.

²³ European Convention on Human Rights, Article 6; Constitution, Article 39.

²⁴ The Constitution of Malta, Article 39(9).

²⁵ Tonio Borg (n 5).

²⁶ Human Rights of Members of the Armed Forces, Recommendation CM/Rec (2010) 4 and Explanatory Memorandum, Directorate General of Human Rights and Legal Affairs, Council of Europe, Strasbourg.

²⁷ *Engel and Others v Netherlands*, App no 5100/71 (ECtHR, 8 June 1976).

²⁸ *ibid* para 59.

²⁹ Abhishek Singhvi and Khagesh Gautam, *The Law of Emergency Powers a Comparative Analysis* (Springer Singapore, 30 October 2020) 25.

³⁰ *Chanappa Shantirappa and Ors. v Emperor*, 129 Ind Cas 596 Bombay High Court, 1 September 1930.

Martial law is proclaimed out of necessity. Dicey asserts that martial law is a:

*power, right and duty of the Crown and its servants [...] to maintain public order [...] at whatever cost of blood or property may be in strictness necessary for that purpose.*³¹

Whereas military law is a statutory body of laws which regulates the armed forces, martial law is an unwritten body of law proclaimed for the necessary protection of the State. Military law seeks to distinguish itself from the civilian body of law, whilst under martial law, the distinction between civilians and military personnel ends as the effective control of the land is vested to the head of the military. In *Chanappa Shantirappa*,³² the Judge questioned whether the handing of control of Sholapur to the military was ‘*necessary*’ as to whether ‘*it would have been possible for the civil authorities to have got the situation under control by calling in the military in aid of civil authorities.*’

A requisite of a proclamation of martial law is that the civil authorities cannot effectively handle the situation under the normal and expected body of law. This position was adopted in *Duncan v Kahanamoku*³³ by the US Supreme Court. Following the bombing of Pearl Harbour, the Governor of Hawaii declared a state of martial law and through a proclamation, suspended the privilege of the writ of *habeas corpus*, a suspension specifically catered for by the US Constitution in time of rebellion or invasion.³⁴ The plaintiff in this constitutional suit was a civilian shipfitter who was accused of engaging in a brawl with two military personnel in 1944, two years after the Pearl Harbour Attack. Notwithstanding that the courts had been authorised to continue exercising their normal function, certain regulations under martial law had still been in place, particularly with regard to the sentencing and trying criminal prosecutions for violations of military orders. The US Supreme Court, which was asked to examine the constitutionality of these military tribunals and martial law, held that ‘*since the courts were open and able to function, the military trials of the petitioners were in violation of the Constitution.*’

A fundamental principle of martial law thus ingrained, proclamation and continuation of martial law is valid so long as the civilian courts are unable to operate and give judgment. Moreover, the case of *Duncan vs Kahanamoku* highlights that once the necessity of martial law ceases, the proclamation of martial law ceases *ipso jure*. Attesting to this, is the ruling of the Court in *Ex parte Milligan*: ‘martial rule can never exist where the courts are open,

³¹ Albert Von Dicey, *Introduction to the Study of the Law of the Constitution* (LF ed. Liberty Fund, 1915) 185.

³² *Chanappa Shantirappa and Ors. v Emperor* (n 30).

³³ *Duncan v Kahanamoku*, 327 US 304, 25 February 1946.

³⁴ US Constitution Article I, Section 9, Clause 2.

and in the proper and unobstructed exercise of their jurisdiction.’³⁵

This is a key distinction between courts-martial as established by Cap. 220, whereby these exist alongside civilian courts and are subject to appeal to the civilian Court of Criminal Appeal, and the decisions of military courts as established by martial law which are distinct from civilian courts. This to the extent that in *Ex parte Vallandigham*,³⁶ the Court asserted that civilian courts can never have appellate functions from decisions of Military tribunals as these are extraneous to the judiciary.

Common-law jurists have argued that the proclamations of Martial law are merely declaratory.³⁷ Maitland asserts that a proclamation of martial law is ‘a proclamation [...] announcing that a state of things exists in which it has become necessary that force shall be repelled and suppressed by force.’³⁸

Martial law is *jus neccessitatis*; necessity is not created or declared by a proclamation. Lord Halsbury, in *Tilonko v AG of the Colony of Natal*,³⁹ asserted that ‘The right to administer force against force in actual war does not depend upon the proclamation of martial law at all’.⁴⁰

Maitland notes that although the courts may have the power to judge whether there is legal justification for martial law and acts committed thereunder, the court ‘in appropriate circumstances would, take into consideration the fact that those who suffered by such acts had had full notice that they were about to be done’.⁴¹

Proclamations of martial law serve as a warning to the public on the Government’s plan to resort to martial measures, while also accounting as evidence in cases where the line between martial law and military action assisting civil government is obscure.⁴²

³⁵ *Ex parte Lambdin P. Milligan et al*, 71 US 2 Supreme Court of the United States, 3 April 1866.

³⁶ *Ex parte Vallandigham*, 68 US 243 Supreme Court of the United States, 22 January 22 1864.

³⁷ Abhishek Singhvi and Khagesh Gautam (n 29).

³⁸ Frederic William Maitland, *The Constitutional History of England: A Course of Lectures Delivered* (1st edn, 1908) 492.

³⁹ *Tilonko v Attorney General of the Colony of Natal*, App. Gas. 93, 94, 1907.

⁴⁰ *ibid*.

⁴¹ Frederic William Maitland (n 38).

⁴² Abhishek Singhvi and Khagesh Gautam (n 29).

3. Public Emergency Law

The Constitution defines ‘period of public emergency’ as any period during which Malta:

- A. is engaged in war;
- B. has a proclamation by the President declaring that a state of public emergency exists;
- C. when the democratic institutions of the State are threatened by subversion as declared by a resolution of the House of Representatives supported by two-thirds of all the members of the House.⁴³

These three scenarios comprise Maltese Public Emergency Law. When Malta is engaged in war, the President need not proclaim a state of public emergency, as it is considered to be a period of public emergency *ipso jure* through the Constitution. This aligns with the notions discussed in martial law, whereby proclamations do not constitute the validity of martial law.

In the second scenario of public emergency law, proclamations of emergency by the President on advice of the Prime Minister are to be communicated to the House of Representatives. The Constitution in Article 47(3)(b) provides that a proclamation of emergency is valid for 14 days beginning on the date on which it was made ‘*but without prejudice to the making of another proclamation of emergency at or before the end of that period*’. The Proclamation may continue to be in force through a resolution passed by the House, approving its continuation for a ‘*further period, not exceeding three months beginning on the date on which it would otherwise expire*’. This author submits that it is within this section of public emergency law (“B”) that the Emergency Powers Act applies. Chapter 178 empowers the President, on advice of the Prime Minister, to make proclamations declaring public emergency and pass regulations which are ‘*necessary or expedient for securing the public safety*’.⁴⁴

The Act further states that such a proclamation is to be communicated to the House within seven days when in session, and ‘*as soon as practicable*’⁴⁵ when not. The Constitution provides that when the House is not in session, the President: ‘*shall by proclamation summon it to meet within five days and it shall accordingly meet and sit upon the day appointed by the proclamation.*’⁴⁶

⁴³ The Constitution of Malta, Article 47.

⁴⁴ Emergency Powers Act, Chapter 178 of the Laws of Malta, Article 4(1). Act X of 2020 introduced the words ‘*public health*’ bringing pandemics within the purview of public emergency law.

⁴⁵ *ibid* Article 3(3)(b).

⁴⁶ The Constitution of Malta, Article 47(3)(a).

Chapter 178 allows the President to pass regulations which allow the detention of persons; authorise the taking of possession of any property; authorise the entry and search of any premises; suspend any law; impose fees; provide compensation for persons affected by the said regulations (charged upon the Consolidated Fund); and to make regulations which provide for the maintenance of supplies and services which are ‘*essential to the life of the community*’.⁴⁷ The proviso to Article 4(2) states that nothing within Chapter 178 may authorise ‘*the making of provision for the trial of persons by military courts*’.⁴⁸ This is indicative of the distinction between public emergency law and martial law, wherein the State has no option but to convene and try individuals by military courts. It is also indicative of the fact that whilst the civil government and civilian courts are operative, a period of martial law may not be effected. Moreover, regulations may never provide for the ‘*deportation or exclusion of persons from Malta*’⁴⁹ and death penalty.

Regulations may empower authorities to ‘*make orders and rules*’⁵⁰ for the purposes envisaged in the regulations. These regulations and any order or rule thereunder have to be approved by a resolution passed by the House within two months.⁵¹ Moreover, the House has the power to amend or revoke any order, rule or regulation.⁵²

The Constitution allows for derogation from certain fundamental rights during periods of public emergency. Protection against arbitrary arrest may be curtailed when Malta is engaged in war and when a resolution in the House declares threat of subversion.⁵³ In this respect, Cap. 178 is contradictory as it allows the President to make regulations providing for the detention of persons while the Constitution specifically excludes curtailment of such right in the cases of proclamations of public emergency by the President. Thus, for the purposes of proclamations as empowered by Article 47(2)(b) of the Constitution and Cap. 178, any regulations making provision for the detention of persons must be aligned with the constitutional protections of lawful arrest.

Article 35(d) of the Constitution⁵⁴ provides for the curtailment of the freedom against forced labour and Article 45(4)⁵⁵ provides for the curtailment of protection from discrimination in periods of public emergency.⁵⁶ In these instances, as the Constitution does not specify, it is

⁴⁷ Emergency Powers Act (n 44) Article 4(2).

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid* Article 5.

⁵¹ *ibid* Article 6(1).

⁵² *ibid* Article 6(2).

⁵³ The Constitution of Malta, Article 34 (5).

⁵⁴ *ibid* Article 35(d).

⁵⁵ *ibid* Article 45(4)(e).

⁵⁶ Besides, Article 35 allows exceptions to protection from forced labour in cases of an ‘*emergency or calamity that*

interpreted that this curtailment is applicable to all three scenarios of public emergency envisaged in Article 47(2)⁵⁷ of the Constitution and to the proclamation of public emergency as envisaged in Cap. 178.

Despite the ‘inconsistency clause’ envisaged in Cap. 178, which states that every regulation made under the proclamation of public emergency shall be superior to any inconsistent law, and any such law is suspended until the regulation remains in force,⁵⁸ the interpretation of the word ‘law’ in Cap. 178, according to Article 2 of the Act, excludes the Constitution.⁵⁹ This implies that, excluding the exceptions provided by the Constitution to the right against forced labour and to the freedom against discrimination, regulations made under Cap. 178 are to be compliant with the provisions of the Constitution. In this aspect, the ECHR in Article 15 gives a much wider margin of appreciation to signatory States as only the right to life, prohibition of torture, prohibition of slavery, and no punishment without law are non-derogable.⁶⁰ Thus, the ECHR allows for the curtailment of the right to enjoyment of property in cases of public emergency, yet the Maltese Constitution does not provide for such exception, and thus proclamations made by the President as empowered by Cap. 178 may not curtail the right against expropriation without adequate compensation.⁶¹ This is indicative of the fact that public emergency law is a body of law which is existing during a time in which the institutions of the State are functioning and courts are able to convene and adjudicate.⁶²

threatens the life or well-being of the community. In *George Mula vs The Minister for Trade*, Civil Court (First Hall) 21 March 1977, the First Hall ruled that a strike by bakers amounted to such an emergency.

⁵⁷ The Constitution of Malta, Article 47(2).

⁵⁸ Emergency Powers Act (n 44) Article 7.

⁵⁹ *ibid* Article 2.

⁶⁰ European Convention on Human Rights, Article 15.

⁶¹ The Constitution of Malta, Article 37.

⁶² *Vide Ex parte Lambdin P. Milligan et al* (n 35).



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