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Għaqda Studenti tal-Liġi

The Rights of Victims and Society in the *In Genere* Inquiry

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The Rights of Victims and Society in the *In Genere* Inquiry

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This policy paper is dedicated to all silent tears shed by victims of crime kept in the dark.

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Foreword

Judge Giovanni Bonello
Former Judge at the European Court of Human Rights

Malta should celebrate the enthusiasm and thoroughness of its Għaqda Studenti tal-Liġi. They are doing more for the rule of law and its supremacy than some of those very institutions that should be the promoters and the guardians of these values.

The rights of victims of crime have been persistently overlooked or undervalued over centuries of legislation. Entirely laudable build-ups in the armoury of the rights of accused persons and in those of the community have marked recent history of law-making. The suspect has rights, the accused has rights, the convict has rights. Sadly, the Cinderellas, those left-out, often seem to be the ones who had succumbed to the attentions of communal or individual criminals.

Society and offenders have no difficulty in raising their voice and making it heard. The victims have. They are vulnerable if targeted by malefactors and disadvantaged in asserting their right to redress. It would be unfair not to acknowledge that progress has been made and that the fate of casualties of criminals, both in procedural and substantive law, has not improved. It has. This position paper documents what has been achieved so far, what has not, and the way forward.

Very eye-opening is the updated review of the latest achievements in this sphere by the front-runner of European human rights protection – the Strasbourg Court. Its teachings would be the infallible road map to follow. We are not quite there yet, but knowing at leastmwhat is possible, achievable and desirable, is always a first step on the road to attainment and success.

Up to relatively recently, the police and the state prosecution services dismissed victims of crime and their next of kin as bothersome meddlers, if not as a source of unnecessary nuisance. The sufferers flaunted next to no legally-protected rights to information, to participate in the investigations and in the progress of the criminal charges. Papa state takes care of everything, keep your place, we may update you when it's all over.

Of course it may not always be as simple as that. The state must often reconcile the exigencies of confidential investigations into crime and criminals, with the exigencies of information and intervention by the victims of crime and their next of kin. Often not a straightforward balancing act. The state may have good reasons not to disclose what it is doing, and even better reasons to hide that it is doing nothing. Some legislative progress has been registered on the transparency front. This position paper identifies other areas where we can still learn.

One indispensable aspect of the rights of victims of crime is the consciousness that the supremacy of justice, skewed by the criminal, has been reestablished – the certainty that the state investigates crime, brings criminals to book, inflicts condign punishment and extracts reparation. The victim's trauma may be immense. Only with knowledge can wounds begin to heal. Victims of crime are entitled to all that - as of right.

Yet often they feel cheated because the system is weighted, perhaps too heavily, to favour the 'rights' of criminals. This applies both to the investigation stage and to the actual determination of guilt. This paper deals primarily with the first, but the second proves to be equally vital. How often has the victim, or the next of kin, felt duped and doubly penalized when accused persons, as guilty as hell, after years of anguish frustrating to the victim, are acquitted by the courts, walk free, cynically showing the middle finger to justice and to their victims?

Easy peasy, all it takes is a cunning well-greased defence counsel – the classic Dottor Azzeccagarbugli, the otherwise inconsequential 'lawyer' who abuses and trips the majesty of the law by petty stratagems. He clutches at some meagre formality and a complacent judiciary then rushes in to ease the malefactor off the hook. Congrats dott, irnexxilek twaħħalulhom, proset. Mission accomplished – the victim is guaranteed total unprotection by the courts, pop the champagne. This does not occur every leap year. It happens every day. For want of a better word, we continue to call it justice.

Once on the subject of victims' rights, may I extrapolate and gently remind those of the judiciary to whom it may concern, that the Constitution expects Malta to be a democratic republic based on the respect of fundamental human rights. They have turned it into a republic based on any threadbare procedural formality that ensures the triumph of impunity, the pulling inside out of the basics of justice and the entombment by the state of the sacred rights of victims.

One way to prevent this sorry participation of the state in the festival of criminals could possibly be to consider legislating that on the court falls the ultimate obligation to ensure the organic coherence of the criminal proceedings and that all procedural errors, lacunae and failings in the criminal process can be corrected or made good at any stage of the proceedings, concurrently giving the accused the amplest facilities to defend themselves.

This may help avoid the double punishment of victims of crime, first by the criminal and then by the state.

Judge Giovanni Bonello
30th March 2024

Opening Address

Andrew Drago
President - Għaqda Studenti tal-Liġi
2023 - 2024

Over the years, the Malta Law Students Society has taken on the formidable responsibility of publishing an annual paper on legal matters, aiming to encourage the Maltese legislature to revise aspects of the law that GħSL considers outdated or unjust. The GħSL policy paper is significant on two fronts: public engagement and education.

Policy papers have been used as study guides, have inspired law theses and research, and have been subjected to scholarly debate from legal professionals in Malta. Malta's legal literature is in its budding years, and the GħSL policy paper has earned its seat in the sphere as being an innovative piece of legal literature aimed at inspiring further study, research, and meaningful legal discussion.

The second and equally important task of an GħSL policy paper, is that of inspiring the Maltese legislator with a breath of new legal and political philosophy. In my opinion, university students shouldn't limit themselves to the confines of campus life; they should leverage their resources, education, and intellect to serve a society hungry for dedicated and principled professionals. The policy paper stands as GħSL's contribution to society. Its authors shoulder the responsibility of formulating concrete proposals for Malta's policymakers. Last year, GħSL's policy paper on Judicial Review, found its way on the table of the House of Representatives, where our proposals were presented as a private members' motion.[1] The Bill aims to empower citizens with the right to review unlawful acts of the administration, and to strengthen the Court's ability in ensuring the lawfulness of executive decisions.

This year's policy paper on the rights of victims and society in the investigation of crimes relating to the *in genere* inquiry covers an aspect of criminal law which has been subject to media coverage and public scrutiny. Particularly, in the weeks and months prior to the announcement of the public inquiry into the death of Jean Paul Sofia, the public eye was all on the pending magisterial inquiry. The differences between a public and magisterial inquiry was not debated in University lecture halls, it was talked about on every corner in Malta. This aspect of criminal law is not theoretical, it is not a niche legal issue subject to lawyer coffee-shop discussions, it is an area of criminal law which affects the lives of hundreds of people; victims of crime. The lack of information afforded to victims and the secrecy of the *in genere* inquiry, have contributed to growing discontent with Malta's criminal justice, which ought to be open, transparent and compassionate with victims of crime.

[1] Judicial Review Bill HR (XIV 2023) [1].

This policy paper is designed to strengthen the rights of victims, to address Malta's weak implementation of the Victims' Rights Directive[2], and to increase public trust in Malta's criminal justice system.

On behalf of GħSL, I would like to thank all the contributors, reviewers and advisors who have helped with this project from its inception. Credit is due to Laura Chetcuti Dimech who has courageously made this paper her mission. This paper is the product of days of research, discussion, writing and re-writing. I auger our policymakers to take cognisance of these efforts for the benefit of victims of crime.

Andrew Drago
President, Għaqda Studenti tal-Liġi
2023 – 2024

[2] Council and Parliament Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57.

Contents

List of Abbreviations

AG	Attorney General
COG	Council of Government
COCP	Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta
CPP	Code of Criminal Procedure
DPP	Director for Public Prosecutions
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FAI	Fatal Accident Inquiry
GħSL	Għaqda Studenti tal-Liġi
HRA	Human Rights Act 1998, United Kingdom
IRA	Irish Republican Army
PFD	Prevention of Future Death Reports
PIP	Properly Interested Persons
UK	United Kingdom
VCA	Victims of Crime Act, Chapter 539 of the Laws of Malta
VRD	Victims' Rights Directive, Directive 2012/29/EU

Introduction

Throughout the past decade, there has been more recognition of the fundamental rights of the victims of crime. In this policy paper, GħSL aims to analyse this recognition, to assess whether our current state of affairs is sufficiently addressing the needs and well-being of victims and to analyse the importance of public trust in the judicial system.

Nowadays, the term 'victim' is quite generic because it can be used in a wide range of situations. This paper will look at situations where the direct victim has died, and the circumstances justify the application of the right enshrined in Article 2 of the European Convention of Human Rights. GħSL felt the need to address the rights of victims in this regard as it is felt that this area has not yet been sufficiently addressed by our local penal law. Many situations arise where the *in genere* inquiry may take a long time to be concluded, or, once it is concluded, no formal criminal proceedings are instituted. Furthermore, victims are not granted automatic access to the conclusions of the inquiring magistrate's investigation. Without access to the *procès-verbal* the victims cannot institute civil proceedings for damages. Perhaps the legislator should enable a framework whereby victims may access justice in this interim phase of criminal proceedings in a speedy manner.

Moreover, in order to increase credibility in our justice system, there is a need for public accountability. On the one hand, judicial secrecy is important for the conduct of criminal investigations; however, on the other hand, transparency and accountability are essential requisites of good governance. GħSL believes that reform in this sector is long overdue in order to update our criminal laws to the exigencies of a functioning democratic society.

I

Development of Victim Rights under our Criminal Justice System

1.1. Brief History of Victim Rights in Malta

The recognition of victim rights within Maltese law has only come to the forefront in recent times. However, one should not underestimate the developments made by Article 410 of the Criminal Code.[3] The first two sub-articles were added by Act VIII of 1909, which gave the right to the complainant or his legal counsel to be present at the proceedings. Council of Government Debates reveal that the objective was to help the Executive Police throughout court proceedings since they often lacked legal qualifications; the Executive Police were the primary prosecutors at the time.[4]

The first modern legal reforms in Malta concerning the position of the victim in Maltese criminal law were introduced in 2002. They did not relate directly to the victim's right to information, rather their right to compensation, to be present in court sittings and to make submissions to the court on the appropriate sentence which should be given.[5]

In a publication Rev. Dr Mark F. Montebello wrote to commemorate the setting up of the Victim Support Malta Agency, the author noted the following:

> *Local research on the treatment of victims of crime in the criminal justice system, or on victim's right to information is scarce. Nonetheless, local researchers agree that in Malta there exists an entrenched cultural understanding that victims of crime should not expect much from the system [...] Victims of crime in Malta undoubtedly lack information, and also the opportunities for it.*[6]

Prior to the transposition of the Victims of Crime Directive (VRD)[7] there was no formal right for a victim to receive information on the case aside from occasional general statements by international bodies.[8] Therefore, a closer look at the implementation of the directive is necessary in order to assess whether the victim rights have been positively impacted.

[3] Chapter 9 of the Laws of Malta.

[4] COG Deb 23 June 1909 (Sitting 67) Vol XXXIII 1504.

[5] Rev. Dr Mark F. Montebello, *The Right to Information of Victims of Crime in Malta* (Union Print Co. Ltd 2006) 13–15.

[6] ibid 40.

[7] Directive 2012/29/EU (n 2).

[8] For more details kindly see Montebello (n 5)22–32.

1.2. A Commentary on the Victims of Crime Act

The Victims of Crime Act (VCA)[9] was presented in Parliament on the 13th of October 2014 by the Minister for Justice at the time, the Hon. Dr Owen Bonnici. The objective of the Act was the transposition of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. [10]

Article 2 of the VCA defines the 'victim' as:[11]

> *'victim' means:*
>
> *(a) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence including harm from terrorist activities;*
>
> *(b) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death.*
>
> *(c) minors who are witnesses to forms of violence.*

The definition of 'victim' was widened to include not only direct victims, that is to say somebody who is '*a natural person who has suffered harm*,'[12] but also indirect victims, meaning '*family members*'[13] who suffered as a result of the harm caused to the direct victim. The concept of 'indirect victim' in human rights cases was imported into Maltese law through the judgments of the European Court of Human Rights, even though Article 34 of the Convention (concerning individual applications) was not transposed in the European Convention Act.[14] Article 2 VCA requires that in order for family members to qualify as victims they must prove that (1) they are related to the direct victim as a family member, (2) the death of the direct victim must have been caused by a criminal offence, and (3) that they suffered some sort of harm as a result of the direct victim's death.[15]

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[9] Victims of Crime Act, Chapter 539 of the Laws of Malta, Article 2.

[10] Directive 2012/29/EU (n 2).

[11] Victims of Crime Act (n 9).

[12] ibid 2(a).

[13] ibid 2(b).

[14] 78/2013/1 *Lawrence Grech vs Tabib Prinċipali tal-Gvern (Saħħa Pubblika)*, Constitutional Court 29 May 2015.

[15] Victims of Crime Act (n 9) Article 2(b).

GħSL's first contention is that the definition in paragraph (b) only envisions a situation where the victim has died. It does not include situations of disappearances[16] which are included under the procedural limb of Article 2.[17] Moreover, it places an obligation on the family members to prove that they suffered some sort of harm as a result of the direct victim's death. Unlike paragraph (a) which states that the harm caused to the victim himself may be '*physical, mental or emotional harm or economic loss*', paragraph (b), which speaks about family members does not specify what type of harm must have been caused. However, if one were to apply the *eiusdem generis* rule of interpretation,[18] the family members must also prove that they suffered '*physical, mental or emotional harm or economic loss*'.

Article 4 of the VCA, which addresses the right to receive information from a competent authority, lays down that information shall be made available from the victim's first contact with a competent authority. It does not directly address the right of the victim to receive updates about the ongoing proceedings or the right to be informed about the closing of investigations. However, it can be argued that this type of information could be derived from paragraphs (g)–(i) which state as follows:

> *(g) if the victim is resident in a Member State other than that where the criminal offence was committed,* ***any special measures, procedures or arrangements, which are available to protect his interests in Malta****;*
>
> *(h) the* ***available procedures for making complaints where the victim's rights are not respected*** *by the competent authority operating within the context of criminal proceedings;*
>
> *(i) the* ***contact details*** *for communications about the victim's case;*[19]

This argument finds fuller support in the Opinion brought forth in the European Commission Staff Working Document published in 2022. It found that one of the problems encountered in the implementation of the VRD is that 'even if information is provided at the first contact, there is no follow-up.'[20]

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[16] *Tahsin Acar v Turkey* App no 26307/95 (ECtHR, 8 April 2004) § 209–234; *Lyanova and Aliyeva v Russia* App nos 12713/02 and 28440/03 (ECtHR, 6 April 2009).

[17] See Section 'The European Court of Human Rights: Procedural Limb of Article 2 and 13'" below.

[18] A Latin maxim meaning 'of the same kind'.

[19] (Emphasis added).

[20] European Commission, 'Commission Staff Working Document Evaluation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA' SWD (2022) 179 final.

GħSL submits that the spirit of the VRD is to facilitate some mode of communication of updates between the authorities and the victim throughout the course of criminal proceedings. Such procedures are not yet available under Maltese law.

The right to receive information on the case is regulated by Article 6:

> *6. (1) A victim shall be notified without unnecessary delay of his right to receive the following information* ***about the criminal proceedings instituted as a result of the complaint made by him*** *and* ***upon request****, the victim shall receive information on:*
>
> *(a) any decision not to proceed with or to end an investigation or not to prosecute the offender;*
>
> *(b) the time and place of the trial, and the nature of the charges against the offender;*
>
> *(c) any final judgment in a trial;*
>
> *(d) information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification.*[21]

GħSL has identified three shortcomings in this provision.

First, the victim is given information only upon request. Procedural updates ought to be automatic and should not require an additional bureaucratic procedure for a formal request. In fact, other jurisdictions such as Scotland[22] and France[23] provide victims with routine updates.

Second, although Article 6(1)(d) provides that victims shall receive information on the '*state of criminal proceedings*', it is not clear whether the *in genere* inquiry is included within the scope of this term.

[21] (Emphasis added).

[22] Crown Office and Procurator Fiscal Service, 'Guide to Fatal Accident Inquiries' (Crown Office and Procurator Fiscal Service, 9 June 2023) <https://www.copfs.gov.uk/services/bereavement-support/guide-to-fatal-accident-inquiries/> accessed 14 November 2023.

[23] Code de Procédure Pénale (Code of Criminal Procedure) Article 90-1.

The *in genere inquiry* is a special type of procedure, as during this inquiry there is no accused person. The Act itself does not provide a definition, therefore the default fall-back position must be the Criminal Code. In various instances, our Criminal Code refers to the term criminal proceedings as including events preceding the issue of the writ of summons,[24] in the context of the rights and suspects of the accused.[25] In fact, the proviso of Article 534A, added in 2014, states that '*criminal proceedings shall include investigations by the Executive Police and extradition proceedings*.'

In *Muscat Karl Heinrich vs L-Avukat Ġenerali*,[26] the Court concluded that the *in genere* inquiry does not fall under the right to a fair trial as no person is accused.[27] However, this judgment was delivered before the 2014 amendments. In *Mark Pace vs L-Avukat Ġenerali*[28] the Court stated that incidents which arise prior to the issuance of the bill of indictment are essential in considering the right to a fair trial, such as the right to consult a lawyer. The Court thus included the *in genere* within the meaning of 'criminal offence' in Article 39 of the Constitution.[29]

> *Illi fil-każ li l-Qorti għandha quddiemha llum, l-ilmenti tar-rikorrent fil-bidċa l-kbira minnhom jirreferu tassew għal żmien qabel ma nħarġu kontrih l-akkużi formali u kien mixli b'reati.* ***Imma dan ma jfissirx li dawk l-episodji jaqgħu 'l barra mill-ħakma tal-artikolu 39 tal-Kostituzzjoni.*** *Hekk, per eżempju, fejn l-ilmenti tar-rikorrent jirrigwardaw it-teħid tal-istqarrijiet tiegħu u n-nuqqas ta' għajnuna ta' avukat, il-fatt li dawk seħħew qabel ma kien imressaq quddiem qorti u mixli b'reati ma jfissirx li l-ilmenti jinqalgħu 'l barra mill-kunsiderazzjonijiet tal-artikolu msemmi. Li kieku kien hekk, l-ebda azzjoni ta' lment ta' ksur ta' jedd għal smigħ xieraq ma kienet tista' titressaq dwar stqarrijiet magħmula bi ksur tad-dispożizzjonijiet tal-liġi u bla ma ngħata lill-persuna l-aċċess għal għajnuna b'avukat.*[30]

[24] Criminal Code (n 3)Article 360.

[25] ibid Article 534A *et sequitur*.

[26] 757/2000 Civil Court (First Hall) 17 January 2002.

[27] Constitution of Malta, Article 39; European Convention on Human Rights, Article 6.

[28] 98/2017 Civil Court (First Hall) 7 April 2022.

[29] See Tonio Borg, 'Wrong interpretation of law' *Times of Malta* (Malta, 18 January 2019) <https://timesofmalta.com/articles/view/20190118/opinion/wrong-interpretation-of-law-tonio-borg.699529> accessed 17 January 2024.

[30] *Mark Pace v L-Avukat Ġenerali* (n 28) 10 (emphasis added)

Furthermore, a 2023 Council of Europe Recommendation[31] defined 'criminal proceedings' as the following:

> *the legal proceedings that enable the adjudication of substantive criminal law.* ***They include the moment when a formal complaint is made and situations in which authorities initiate criminal proceedings*** *ex officio. They end once a final decision on a suspect's criminal liability has been rendered.*

The same recommendation goes on to state that a Member State should ensure that victims be informed of their right to receive:

> *information enabling the victim to know about the* ***state of the criminal proceedings****, including, where available under national law,* ***inspection of the case file****, unless the proper handling of the case may be adversely affected by such notification*.[32]

Therefore, by way of extension it is reasonable to conclude that if the term 'criminal proceedings' is used to refer to events preceding arraignment in the context of the rights of the accused,[33] it must also be applied in the context of the rights of victims. It would be a complete non sequitur for the rights of one party to commence after the rights of the other party in the same legal action.[34]

Furthermore, Article 4 of the Act also lays down that the victim's right to information starts from the '*first contact with a competent authority*' and, according to Article 22 VRD:

> *the moment when a complaint is made should, for the purposes of this Directive, be considered as falling within the context of the criminal proceedings. This should also include situations where authorities initiate criminal proceedings ex officio as a result of a criminal offence suffered by a victim.*[35]

[31] Recommendation of the Committee of Ministers to member States on rights, services and support for victims of crime CM/Rec (2023) 2, 15 March 2023 (emphasis added).

[32] ibid Article 8 (emphasis added).

[33] *Brusco v France* App no 1466/07 (ECtHR, 14 January 2011) §47-50; for more information consult Susan Cassar, 'An Analysis into the institute 'Investigation Relating to the *In Genere* and the Right to a Fair Trial' (M.A. Law thesis, University of Malta 2023) 2.3.

[34] *Bandaletov v Ukraine* App no 23180/06 (ECtHR, 31 October 2013).

[35] Directive 2012/29/EU (n 2), Preamble 22.

Therefore, all the signs point towards the idea that our *in genere* inquiry is included in the term 'criminal proceedings' for the purposes of the VRD, even if the EU legislator did not foresee such an outcome. In any case, the directive is intended to lay down the minimum rules, therefore Member States are encouraged to expand on the rights outlined therein.[36]

GħSL recommends that perhaps it would be prudent for the legislator to remedy this shortcoming by defining and including the *in genere* inquiry in the term 'criminal proceedings' in Cap. 539 as done in other provisions of the Criminal Code.[37] If the intention of the legislator was to include the *in genere*, it means that Article 6(1)(d) should grant victims the right to request information on the status of the inquiry unless such information could prejudice the investigation.[38] To GħSL's knowledge, no such request has ever been made.

The third shortcoming is that in order for the right of information as listed in Article 6 of Cap. 539 to be available to the victim, the criminal proceedings must have been instituted *'as a result of the complaint made by him'* or in Maltese *'bħala riżultat tal-ilment magħmul minnha.'* This essentially means that a victim only enjoys the right to information and updates on their case if the procedure was instituted via the procedure contemplated in Article 538 of the Criminal Code, through the complaint (*kwerela*). This is because the procedure contemplated in Article 535 of the Criminal Code, the information (*denunzja*) or report (*rapport*), presupposes a scenario where it is not the victim who reports the crime, and Article 6 of the VCA requires that the victim makes the request to receive information.

This transposition does not include instances where the police institute proceedings *ex officio*. It is submitted that the wording of Article 6 of the VRD was not intended to be limited to cases that were initiated by a complaint (*kwerela*). In fact, the text included in the directive itself does not expressly limit the right to information in criminal proceedings to cases where they commenced *'as a result of the complaint made by him'*[39] but state that *'the criminal proceedings instituted as a result of the complaint* ***with regard to a criminal offence suffered by the victim***.'[40] Therefore, in the directive, the complaint need not have been made by the victim himself. Moreover, Section 22 of the Preamble states that criminal proceedings *'should also include situations* ***where authorities initiate criminal proceedings*** *ex officio as a result of a criminal offence suffered by a victim*.'[41]

[36] ibid 11.

[37] Chapter 9 of the Laws of Malta, Article 100.

[38] Victims of Crime Act (n 9) Article 6(1)(d); *'information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification'.*

[39] Victims of Crime Act (n 9) Article 6(1).

[40] Directive 2012/29/EU (n 2) 6 (emphasis added).

[41] ibid Preamble 22 (emphasis added).

One must keep in mind that the EU legislator sets out the general terms of the law and each Member State transposes the directive in a manner consistent with the spirit of the law and compatible with the domestic legal system. Within this legal framework, if the Executive Police commence an investigation, which was not spurred by a complaint of the injured party, the latter is deprived of the right to receive information, which undermines the entire spirit of the VRD and the objectives of Article 6.

The Act was subsequently amended by the Victims of Crime (Amendment) Act 2021.[42] These amendments mainly concerned the rights of the victim in relation to the manner in which they are treated by the system. The amendments include the mode of conducting interviews with victims,[43] not being subject to unnecessary delay[44] and secondary victimisation,[45] the right to interpretation and translation,[46] the right of data protection,[47] and the right to be informed of services they may seek for guidance.[48]

[42] Act XVII of 2021, Victims of Crime (Amendment) Act.

[43] Victims of Crime Act (n 9)Article 6(4)(c).

[44] ibid (a).

[45] ibid (b).

[46] ibid Article 7.

[47] ibid 10B.

[48] ibid 12.

II

The Relationship between the *In Genere* Inquiry and the Victim's Rights of Participation

2.1. History and Scope of the Inquiring Magistrate and the *In Genere* Inquiry[49]

The Inquiring Magistrate has been present in our Criminal Code since promulgated in 1854:

> *In cases of offences liable to the punishment of death, of hard labour, or of imprisonment, the inquest shall be held by a magistrate of judicial police. In all other cases it shall be lawful for the magistrate to commit the holding of the inquest to the registrar, and in slight cases to some officer either of the court or of the executive police who may possess the necessary qualification.*[50]

In the Egrant Inquiry,[51] the Inquiring Magistrate delved deeply into the history and scope of the *in genere* inquiry and the office of the inquiring magistrate. The latter is rooted in the continental, inquisitorial tradition, as seen in the Code de Rohan. Back then, the role was performed by the *Giudice Criminale della Gran Corte della Castellania* or in short *il Castellano*.[52] This Court was established with the founding of the Order of the Knights Hospitallers of St John in 1186. Given that the Order exercised jurisdiction not only over its own members but also over other individuals involved in its military and economic functions, the *Castellania* was competent to hear and determine both cases concerning the Order's members and those concerning other individuals under the Order's jurisdiction. When the Order, and the *Castellania* with it, came to Malta, the *Castellania* exercised this jurisdiction over the Maltese population, as the laws of the time provided.[53]

Besides presiding over the Court, the *Castellano* also exercised inquiries, as seen in Book 1, Chapter 3, Section V of the Code de Rohan. The provision reads as follows:

[49] For a brief on the topic, see Joe Brincat, 'Wrong interpretation of law?' *Times of Malta* (2 February 2019) <https://timesofmalta.com/articles/view/wrong-interpretation-of-law-joe-brincat.700862> accessed 17 January 2024.

[50] Order-in-Council of 30 January 1854, Criminal Laws for the Island of Malta and Its Dependencies, Article 461.

[51] *Procés-verbal* of the *in genere* inquiry 'EGRANTINC' per Magistrate Doctor Aaron Bugeja, 20 July 2018, available online at <https://www.maltatoday.com.mt/egrant>.

[52] *Del Dritto Municipale di Malta* (1784) (Code de Rohan) Lib 1 Cap 1 §1.

[53] Antonio Micallef, *Dritto Municipale di Malta compilato sotto de Rohan G.M. or nuovamente corredato di annotazioni* (1841) 2.

> *Dovrà [il giudice Criminale della Gran Corte della Castellania] portarsi personalmente negli accessi che si faranno, e procurerà di usare tutte le possibili diligenze tanto per verificare il corpo del delitto, di qualunque specie fosse, come rispetto alla scoperta dei delinquenti, e metterà tutto in chiaro, ancorchè fossero d'alieno foro i delinquenti, o gli offesi, e che perciò la cognizione della causa potrebbe spettare ad altro Tribunale.*[54]

As pointed out by Sir Antonio Micallef, upon the assumption of control by the British over Malta, the powers of the *Giudice Criminale della Gran Corte della Castellania* were transferred to a new juridical figure, now referred to as 'the magistrate.'[55]

As observed in *ir-Repubblika ta' Malta vs Jason Calleja*,[56] the *maġistrat inkwerenti* is also colloquially be referred to as *il-maġistrat tal-għassa*, though the latter term is never used by the legislator in the Criminal Code.

> *Is-sistema tagħna tal-Magistrat ta' l-Għassa (li fil-fatt il-liġi qatt ma ssemmieh bħala tali), tal-Maġistrat Inkwirenti, tal-in genere, u tal-proċès-verbal, għalkemm ispirata minn sistemi f'ċertu sens eżistenti f'pajjizi oħra, hija partikolari għal Gżiritna. Wieħed għalhekk irid joqgħod attent li japplika biss dawk ir-regoli li mil-liġi tagħna stess huma indikati bħala dawk li għandhom jiggvernaw il-materja.*[57]

As also mentioned in the aforementioned judgment, the Inquiring Magistrate is tasked with discovering the truth through the investigation of crime by preserving all possible evidence in order to give the *procès-verbal* probative value at a later stage throughout the criminal proceedings.

> *Il-Maġistrat Inkwirenti hu fdat lilu l-inkariku li fil-każijiet previsti mill-istess titolu, jinvestiga r-reat jew il-fatt rapportat lilu u/jew iżomm l-aċċess li l-liġi tipprevedi u fl-aħħarnett jirrediġi proċès-verbal li l-liġi stess tirregola u tattribwilu valur probatorju. Dan kollu jifforma parti integrali mill-proċess ġenerali tar-riċerka tal-verità u jikkonsisti prinċipalment fil-ġbir u preservazzjoni ta' dawk il-provi kollha, diretti u indiretti, li l-Maġistrat Inkwirenti jirnexxilu jidentifika bħala pertinenti għall-ġrajja jew reat li jkun qed jinvestiga.*[58]

[54] Translation: 'He [the Criminal judge of the Grand Court of the *Castellania*] must personally attend any on-site inspections conducted, and shall endeavour to use all possible diligence both to verify the material elements of the crime, whatsoever its form, and both with regards to the discovery of criminals, and he shall resolve everything, even if the criminals belong to a foreign forum, or if the victims so belong, and therefore another Court would be competent to take cognizance of the proceedings.'

[55] Micallef (n 53) 29.

[56] Court of Criminal Appeal 3 July 1997 Vol LXXXI.iv.27.

[57] ibid.

[58] ibid.

Another interesting point discussed is that in our legal system, the Inquiring Magistrate safeguards the separation of powers, as otherwise investigations would be carried out solely by the police and prosecution, which are both closely linked with the executive branch of government.

> *Bħala tali, u kuntrarjament għal dak li jiġri f'ċerti sistemi kontinentali, il-Magistrat Inkwerenti mhux parti mill-pulizija u wisq anqas, mill-prosekuzzjoni, anzi jidher ċar li fis-sistema tagħna huwa previst biex f'numru ta' każijiet serji li l-liġi stess tispeċifika, l-investigazzjoni ma ssirx biss, u l-provi ma jinġabrux u ma jiġux ippreservati biss mill-pulizija, iżda ukoll, anzi essenzjalment, minn persuni indipendenti mill-poter esekuttiv ta' l-Istat u li jiggarantixxu li r-riċerka tal-verità ma tkunx inkwinata minn xi interessi ħlief dak suprem li kollox isir skond il-ħaqq u l-ġustizzja. Rwol dan, li Lord Tucker, fl-appell quddiem il-Privy Council in re Reġina vs George Terreni, iddeskriva bħala a good way of preserving evidence.*[59]

There are no adversarial proceedings at this stage as it is not the function of the Inquiring Magistrate to attribute guilt in his conclusions. His terms of reference are to ensure whether there is sufficient proof that a crime occurred and whether such crime may possibly be attributed to an identifiable person in order for criminal proceedings to commence.

> *Ċertament mhix il-funzjoni tal-Magistrat Inkwerenti li jiddeċiedi li għar-reat investigat min huwa ċertament jew probabbilment responsabbli xi ħadd partikolari, għax kif ingħad huwa ma jaġixxix qua Qorti, la ta' Istruttorja u lanqas tal-Ġudikatura. Iżda hija ċertament il-funzjoni tiegħu illi jiddeċiedi l-ewwel hemmx provi suffiċjenti li verament sar reat u t-tieni jekk a bażi tal-provi indipendentament mill-apprezzament tagħhom – hemmx biżżejjed biex jingħad li xi ħadd partikolari jista' possibbilment ikun passabbli għal proċeduri kriminali.*[60]

Regarding the *in genere* inquiry, as outlined by Articles 546–569 of the Criminal Code, it is the principal responsibility of the Inquiring Magistrate to draw up a *procés-verbal* of the inquiry as a culmination of the investigation in search for the truth, to preserve evidence, and to give an opinion on whether there is sufficient evidence for criminal proceedings to commence against an identifiable person.[61]

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[59] ibid.

[60] ibid.

[61] 13/2003/1 *Visual and Sound Communications Limited vs Il-Kummissarju tal-Pulizija*, Constitutional Court 19 June 2006.

> *Taħt il-liġi Maltija, l-inkjesta In Genere hija eżerċizzju ta' investigazzjoni kompjut mill-Maġistrat Inkwirenti fejn l-iskop primarju ta' tali eżerċizzju huwa li tinġabar u tiġi preservata evidenza dwar avvenimenti li jkunu seħħew u li jagħtu lok għal investigazzjoni mill-Maġistrat Inkwirenti bl-iskop primarju jkun dak ta' preservazzjoni ta' evidenza ta' dak li jkun seħħ sabiex jekk jiġi stabbilit li jkun seħħ reat allura dik l-evidenza tkun tista' titressaq matul il-proċess ġudizzjarju penali relattiv.*[62]

As clarified by the publishing of the *in genere* inquiry of the collapse of a construction site in Kordin's Industrial Estate, an *in genere* inquiry commences if three requisites laid out in Article 546(1) are met:

> *Minn din id-disposizzjoni jirriżulta li t-tlett rekwiżiti sabiex tinfetaħ inkjesta in genere huma s-segwenti:*
>
> *1. Li jsir rapport, denunzja jew kwerela lil Maġistrat,*
>
> *2. Dwar reat li għalih tista' tingħata l-piena ta' aktar minn tlett snin priġunerija, u*
>
> *3. Is-soġġett materjali tar-reat ikun għadu jeżisti.*[63]

The concept of the *procès-verbal* is continental in origin.[64] In order for the *procès-verbal* to be deemed to have been regularly drawn up, it must contain a short summary of the report, information or complaint, a list of the witnesses heard and evidence collected, and a final paragraph containing the findings of the inquiring magistrate.[65] Once the aforementioned requisites are satisfied, the *procès-verbal* is received as evidence in the trial and there is no need for the experts or witnesses whose evidence is produced in the *procès-verbal* to re-appear before the court in the compilation stage.[66]

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[62] 81/2018 *Adrian Delia vs L-Avukat Ġenerali*, Civil Court (First Hall) 14 May 2019.

[63] *Procés-verbal* titled 'Fl-Atti tal-Inkjesta Fatali Ġewwa Sit ta' Kostruzzjoni Ġewwa Qasam Industrijali Kordin Nhar it-3 ta' Diċembru 2022 Fejn Tilef Ħajtu Jean Paul Sofia Detentur tal-Karta tal-Indentità 291502(L)' per Magistrate Marse-Ann Farrugia, 21 July 2023, 75 <https://www.maltatoday.com.mt/news/national/124159/breaking_prime_minister_publishes_jean_paul_sofia_magisterial_inquiry> accessed 13 December 2023.

[64] Joe Brincat (n 49).

[65] Criminal Code (n 3) Article 550(5).

[66] ibid (1).

This all goes to show that the *procès-verbal* is considered to be a very powerful piece of evidence. This notwithstanding, the conclusions of the *procès-verbal* cannot be likened to a judgment, and if its findings point towards a suspect whose presumption of innocence is still paramount. The findings may contain probative value, but never a stamp of guilt. It is evident that the *in genere* inquiry is a special type of procedure as there is no accused person, although there might be a suspect.

2.2. Accessibility of the *Procès-Verbal*

2.2.1. General Overview

Article 518 of the Criminal Code regulates the accessibility to acts and documents of the courts of criminal justice. Although the Inquiring Magistrate is not a court it is a sine qua non that the investigation is to be kept under wraps.[67] Article 518 holds that in order to gain access to an act or document, one must either be the Attorney General, a party concerned, or the concerned party's legal representative. In any case, these persons must obtain the court's special permission.

The proviso of Article 518 lays down that the distribution of the *procès-verbal* or any documents therewith is vested in the Attorney General. Therefore, in order properly to understand the secrecy of a criminal investigation, one must give due consideration to the powers of discretion conferred by law on the Attorney General. A historical analysis of the amendments to Article 518 will reveal that the Attorney General was not always considered to be an exempt party within the context of the same article.

2.2.2. A Historical Appreciation of Article 518

The following is a chronological history of the article from its inception in Proclamation I of 1854 up to the time of writing, mapping out the different amendments made to it along the timeline.

[67] *Ir-Repubblika ta' Malta vs Jason Calleja* (n 56).

Order-in-Council of 30 January 1854

Article 518 in its original version read as follows:

> *439. The acts and documents of the courts of criminal justice shall not be accessible, nor shall copies thereof be given, without a special permission by the court, except to the parties concerned; but all those acts which are pronounced in open court shall be accessible to all, and copies thereof shall be given, on payment of the usual fee.*

Ordinance VIII of 1909

This Ordinance introduced the parties' legal counsel's right to request the acts and documents of the Courts of Criminal Justice. Although, as apparent from the Council debates, the Crown Advocate already allowed requests made by legal counsel, the aim behind the amendment was to solidify the practice so that any parties who were ignorant or incapable of collecting copies themselves could trust their counsel to do so.[68]

Act XIII of 1980

This Act added a proviso to Article 518, which for the first time expressly provided for the power of the Attorney General to give out copies of the *procès-verbal*.

> *Provided that a procès-verbal shall be open to inspection and copies thereof shall be given only at the discretion of the Attorney General and on payment of such fees as he may, taking account of the expenses incurred, require.*

[68] COG Deb 30 June 1909 (Sitting 65) Vol XXXIII 1410.

Act XXIX of 1990

This simply added that the payment of fees indicated in the proviso of Article 518 must be prescribed by the Minister for Justice. The current amount of copy fees may be found at the Tariff Section annexed to the Criminal Code.

> *Provided that a procès-verbal shall be open to inspection and copies thereof shall be given only at the discretion of the Attorney General and on payment of such fees* ***as may be prescribed by the Minister responsible for justice as provided in section 695****.*[69]

Act IV of 1994

This Act added the Attorney General to the list of parties concerned that may request to inspect the acts and documents of the courts of criminal justice:

> *In section 518 of the principal law, for the words "except by or to the parties concerned" there shall be substituted the words "except by or to the Attorney General by or to the parties concerned."*

Act III of 2002

This Act added to the proviso of Article 518 in order to explicitly to state that permission to inspect the *procès-verbal* also includes any ancillary documents: *'Provided that a procès-verbal and any depositions and documents filed therewith.'*

This phrase is nowadays incorporated into the proviso of **Act XXIX of 1990**.

[69] (emphasis added).

Act XXIX of 2021

This Act added the second proviso of Article 518. Its aim was to transpose EU Directive 2019/1153 to facilitate the prevention, detection, investigation, or prosecution of certain criminal offences, mainly those relating to money laundering, tax crimes, and financial fraud. The general rule of secrecy must be derogated from in order to allow for effective correspondence between Financial Intelligence Units.[70]

> *Provided further that any designated competent national authority designated in terms of any Directive or Regulation of the European Union which has access to the acts and documents of the courts of criminal justice may, if the requirements established in the Directive or Regulation of the European Union are fulfilled, transmit copies of such acts and documents of the court of criminal justice to the requesting authority.*

Act VII of 2024

This amendment added the third and final proviso to Article 518, in view of setting up the European Public Prosecutor's Office which necessitated enhanced cooperation between the judicial systems of EU Member States.

Provided further that the European Delegated Prosecutors appointed in accordance with the provisions of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') shall have access to the acts and documents of the courts of criminal justice and to any procès-verbal and to any depositions and documents filed therewith, when these relate to matters which fall within the competence of the European Public Prosecutor's Office in accordance with the said Regulation.

Nowadays the provision stands as follows:

[70] Council and Parliament Directive 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA [2019] OJ L 186/122.

> *518. The acts and documents of the courts of criminal justice shall not be open to inspection, nor shall copies thereof be given, without the special permission of the court, except by or to the Attorney General, by or to the parties concerned or by or to any advocate or legal procurator authorized by such parties; but any act, which is pronounced in open court, shall be open to inspection by any person, and copies thereof may be given on payment of the usual fee:*
>
> *Provided that a procès-verbal and any depositions and documents filed therewith shall be open to inspection, and copies thereof shall be given, only at the discretion of the Attorney General and on payment of such fees as may be prescribed by the Minister responsible for justice as provided in article 695:*
>
> *Provided further that any designated competent national authority designated in terms of any Directive or Regulation of the European Union which has access to the acts and documents of the courts of criminal justice may, if the requirements established in the Directive or Regulation of the European Union are fulfilled, transmit copies of such acts and documents of the court of criminal justice to the requesting authority.*
>
> *Provided further that the European Delegated Prosecutors appointed in accordance with the provisions of Council Regulation(EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") shall have access to the acts and documents of the courts of criminal justice and to any procès-verbal and to any depositions and documents filed therewith, when these relate to matters which fall within the competence of the European Public Prosecutor's Office in accordance with the said Regulation.*

The most important amendments for the purpose of this section of the paper are Act XIII of 1980, which for the first time expressly provided for the power of the Attorney General to give out copies of the *procès-verbal* and Act IV of 1994 which allows the Attorney General to make a request to inspect the acts and documents of the courts of criminal justice. This demonstrates that the role of the Attorney General is not merely a passive one, as discussed below.

2.2.3. Powers of the Attorney General upon Termination of the Inquiry

In the Maltese criminal justice system, the moment the *procès-verbal* is written up and concluded, the powers of the Inquiring Magistrate cease[71] and the role of the Attorney General begins.[72] Once in possession of the *procès-verbal*, the Attorney General may exercise some of the most important judicial functions,[73] such as collecting and producing further evidence in the *procès-verbal* and ordering the police to institute criminal proceedings. The sole restriction imposed on the Attorney General is the inclusion of any offence in the bill of indictment that cannot be substantiated by some aspect of the inquiry.[74] Our courts made it very clear that the Attorney General could arrive to a completely different conclusion than that expressed by the Inquiring Magistrate in a *procès-verbal*. Nonetheless, it is the Attorney General who has the last say as to whether charges are issued or not.[75]

In the case of a delay throughout the compiling of the *procès-verbal*, the Attorney General is the only person that is entitled to be informed of the reasons for the delay. The law was amended in 1990[76] to require the Inquiring Magistrate to inform the Attorney General if the inquiry is not concluded within sixty days.[77] This time frame does not accommodate the increasingly complicated crimes requiring an *in genere* inquiry nowadays. After the first notification, the Attorney General is entitled to be informed for the reason of further delay after every passing month.[78]

The Attorney General may also be allowed access to the *procès-verbal* whilst it is still being written as indicated by the phrase 'at all times' in sub-article 4 of Article 550A.[79] This was added by Act VII of 2010:

[71] Criminal Code (n 3) Article 554 *et sequitur*.

[72] ibid 569.

[73] *Rex vs Debono*, Court of Criminal Appeal 19 June 1933 Vol XXVIII.iv.34.

[74] Professor A.J. Mamo, *Notes on Criminal Procedure* (University of Malta 1954).

[75] *Muscat Karl Heinrich vs L-Avukat Ġenerali* (n 26).

[76] Act XXIX of 1990, Criminal Code (Amendment) Act, Article 26.

[77] Criminal Code (n 3)Article 550A(1).

[78] ibid (2).

[79] ibid (4).

> *(4) The Magistrate shall communicate to the Attorney General such information about the inquest as may be requested* ***by the Attorney General who moreover shall, at all times, have access to the record of the proceedings of the inquest*** *and to all documents and material objects exhibited in the course of the inquest including the reports of experts and depositions of witnesses.*[80]

For these reasons, the Attorney General has numerous obligations and discretion in handling the *procès-verbal* and having unfettered discretion to access, the Attorney General must be informed of delays and the reason for the delay. The Attorney General also has the power to deliver copies of the contents after its closure.[81]

In a recent case *Adrian Agius vs l-Avukat tal-Istat*,[82] the Court criticised the fact that the Attorney General refused to provide documentation to the State Advocate under the pretext of Article 518, when both were defendants to a claim concerning the breach of fundamental human rights. The Court noted the following:

> *Din il-Qorti tistqarr illi l-poteri tal-Avukat Ġenerali f'ċerti oqsma tal-kamp proċedurali kriminali jmorru ferm oltre dak li wieħed jista' jqis bħala raġjonevoli w ċertament l-intransiġenza tal-Avukat Ġenerali riżultat tal-poteri unilaterali lilha mogħtija qed jikkawżaw dewmien u staġnar inutili ta' proċeduri kriminali minħabba dilungar inutili, intransiġenza barra minn lokha w ineffiċjenza fit-tmexxija tal-proċessi kriminali [...]* ***tittama li fil-futur qarib, emendi legali jiġu varati b'mod ħolistiku sabiex, il-prerogattiva unilaterali u indisputabbli tal-Avukat Ġenerali f'varji oqsma tiġi aktar limitata,*** *u din is-sitwazzjoni tiġi rimedjata sabiex il-proċeduri anakronistiċi adoperati, illum il-ġurnata, unikament biex itawlu u jxekklu l-proċeduri kriminali, jiġu eliminati għal kollox.*[83]

For this reason, in the upcoming sections of this paper, the Office of the Attorney General is critically examined in order to determine whether there are sufficient checks and balances in place to ensure the adequate participation of victims and the general public in the administration of criminal justice.

[80] (Emphasis added).

[81] Criminal Code (n 3) Article 518.

[82] 670/2021 Civil Court (First Hall) 20 May 2022 15.

[83] ibid (emphasis added)

2.2.4. Independence and Impartiality of the Attorney General

The office of the Attorney General is set up by Article 91 of the Constitution, under Chapter VII: The Executive. Sub-article (3) was introduced in the 1964 Independence Constitution and lays down that the Attorney General not be subject to any external influence in making decisions. In fact, the Attorney General is granted security of tenure[84] and receives his salary from the Consolidated Fund.[85]

Before the 2019 amendments, the Attorney General had a dual role, as the adviser to the Government of the day and Public Prosecutor. The European Commission for Democracy Through Law (Venice Commission) Recommendations of 2018[86] flagged this as a breach of the principle of separation of powers. Act XXV of 2019 created the office of the State Advocate in order to take over the role of the adviser of the government, whilst the Attorney General retained the role of public prosecutor. Professor Kevin Aquilina has referred to these legislative changes as '*a parody*' of the Venice Commission Recommendations,[87] by reversing the roles of the Attorney General and creating an entire new office instead of adhering to the model used across all the Commonwealth:

> *Why does the Bill reverse what is commonly held in Commonwealth Constitutional Law when it entrusts prosecution duties to the Attorney General and creates a new totally alien concept of 'State Advocate' to carry out the duties of Chief Legal Advisor to Government?*[88]

Is the office of the Attorney General equipped with the desirable levels of independence and impartiality? If the method of appointment is examined, the Attorney General is appointed by the President on the Prime Minister's advice,[89] which essentially means that the chief prosecutor is selected by the government of the day. However, this power of appointment is qualified by the procedure contemplated in Article 2(2) of the Attorney

[84] Constitution of Malta, Article 91(5).

[85] ibid 107(5).

[86] European Commission for Democracy Through Law, 'Malta Opinion on Constitutional Arrangements and Separation of Powers and The Independence of The Judiciary And Law Enforcement', adopted at the 117th Plenary Session (Venice, 14-15 December 2018) 61.

[87] Kevin Aquilina, 'The State Advocate Bill No. 83 of 2019: Acting in Breach of Malta's International Obligations' (*Online Law Journal*, 11 June 2019) <https://www.ghsl.org/lawjournal/the-state-advocate-bill-no-83-of-2019-acting-in-breach-of-maltas-international-obligations/#:~:text=Advocate%20Bill%20No.-,83%20of%202019%3A%20Acting%20in%20Breach%20of%20Malta's%20International%20Obligations,Journal%2C%2011%20June%202019).&text=On%202%20May%202019%2C%20government,of%20legal%20advisor%20to%20government.> accessed 15 November 2023.

[88] ibid.

[89] Constitution of Malta, Article 91(1).

General Ordinance,[90] introduced in 2019. According to this procedure, the Minister for Justice appoints a Commission tasked with evaluating candidates for the Office and providing comments or recommendations after a public call. The removal of the AG requires a majority of two-thirds of the House of Representatives upon proved inability to perform functions or proved misbehaviour.[91]

GħSL submits that this method of appointment falls short of ensuring complete independence in the role of the Attorney General. It is recommended that, given that nowadays the Attorney General is no longer the chief advisor to Government and that his role is likened to that of a judge, as he exercises a quasi-judicial role,[92] legislative intervention should take place to ensure a reflection of the independence required to ensure the safeguarding of the rule of law. A solution is proposed under the sub-heading 4.1.1.2. 'Does Maltese Law Contemplate an Effective Remedy for Effective Access?'

2.2.5. Judicial Review of Decisions of the Attorney General

Lord Denning held that every public office should be subject to review by the Courts of Justice: 'to every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: "Be you ever so high, the law is above you"'.[93]

Article 91 of the Constitution precludes the Attorney General from being subject to the direction or control of any other person or authority. However, this does not mean that the Attorney General is exempt from judicial review, as is evident from a reading of Article 124(10) of the Constitution. Before the recent amendments, our Courts reserved the right to review acts and omissions of the Attorney General under Article 469A: *'Id-deċiżjoni tal-Avukat Ġenerali tista', f'każijiet kongruwi, tkun soġġetta għall- "review" fit-termini tal-artikolu 469A tal-Kap. 12 tal-Liġijiet ta' Malta'*.[94]

Act XLI of 2020 added Article 469B in our Code of Organisation and Civil Procedure. For the purpose of this paper, the relevant sub-article is (1)(b) which states as follows:

[90] Chapter 90 of the Laws of Malta.

[91] Constitution of Malta, Article 91(5).

[92] Joseph Izzo Clarke, 'The Attorney General: privileges, powers and functions under Maltese law' (B.A. thesis, University of Malta 1992) 23.

[93] *Gouriet v Union of Post Office Workers and Others* [1977] UKHL 5, [1978] AC 435.

[94] 16/2006 *Il-Pulizija vs Joseph Lebrun*, Constitutional Court 9 February 2007; 81/2018 *Adrian Delia vs L-Avukat Ġenerali*, Constitutional Court 16 December 2019.

469B. *(1) Where the Attorney General takes a decision:*

[...]

(b) not to allow the inspection or the issuing of copies of a procès-verbal or of any depositions or documents filed therewith in terms of the proviso to article 518 of the Criminal Code,

the courts of justice of civil jurisdiction, giving due account to the constitutional independence of the Attorney General, may enquire into the validity of the said decision and declare such decision null, invalid or without effect and consequently send back the matter to the Attorney General for review in accordance with the judgment of the court only in the case of a finding that the decision is not properly directed on legal considerations or is unreasonable in that it is not open to a reasonable prosecutor.

In 2018, the Venice Commission pointed out that the Attorney General ought to be subject to extensive judicial review.[95] Act XLI of 2020 was first tabled by Hon. Edward Zammit Lewis MP on the 1st of July 2020 and was promulgated shortly afterward. Its principal aims were to continue to facilitate the transfer of prosecutorial authority from the police to the office of the Attorney General and to create a strict distinction between investigations and prosecutions.[96]

The provision states that if a claimant requests a copy of the *procès-verbal* and such a request is declined, s/he may challenge that decision, within two months from when he becomes aware or should have become aware of such decision, before the Civil Court, First Hall.[97] As stated in previous policy papers,[98] it is regrettable that this period is not interrupted should the claimant wish to resort to the remedy provided by the Office of the Ombudsman.

Article 469B fails to distinguish whether the *procès-verbal* was concluded when the applicant made the claim. Given that Article 550A(4) allows the Attorney General to access the *procès-verbal* at any time, that the law should clarify whether an action under Article 469B may only be brought after the *procès-verbal* has been drawn up and concluded, given

[95] European Commission for Democracy Through Law (n 86) 73.

[96] HR Deb 27 July 2020 (XIII, 364) 125-126.

[97] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, Article 469B(2).

[98] Għaqda Studenti tal-Liġi, 'Judicial Review Act' (2023) <https://www.ghsl.org/our-publications/policy-papers/> accessed 15 November 2023, 90.

that the *in genere* inquiry is a secret and confidential process.[99] Nevertheless, the victim should be able to avail himself of a mechanism to request updates on the status of the investigation. This mechanism is elaborated on later in this paper under the heading 'Does Maltese Law Contemplate an Effective Remedy for Effective Access?'.

GħSL is of the opinion that Article 469B should be amended to empower the courts not only to nullify the Attorney General's decision not to provide copies of the *procès-verbal* but also to order the Attorney General to provide access to copies of same. This is addressed at a later stage.

2.2.6. Maltese Case Law

Prior to the introduction of Article 469B, the case of *Adrian Delia vs Avukat Ġenerali*[100] went into great detail about the issuing of copies of the *procès-verbal*. It was the first time that our courts had to consider whether the discretion given to the AG breached fundamental human rights, namely the right of freedom of expression.[101]

The Attorney General in that case selectively released segments of the inquiry in question to the general public, while providing the complete *procès-verbal* solely to the Prime Minister, as it was the latter who requested the magisterial inquiry. The plaintiff at the time argued that the Attorney General's discretion under Article 518 violated his fundamental right to receive and impart information as he could not fulfil his obligations of a public watchdog inherent in the role of Leader of the Opposition.

The Constitutional Court did not agree with the reasoning of the Court of First Instance that the fact that the document is a judicial act should impede the applicant's right to request the document. Furthermore, the Constitutional Court stated that the AG's decision to provide a copy of the finalised inquiry to the Prime Minister and not the Leader of the Opposition created an 'imbalance of constitutional powers.'

[99] Criminal Code (n 3) Article 518.

[100] 81/2018 Constitutional Court 16 December 2019.

[101] ibid 27.

However, the Court did not permit the publishing of the entire report, but accepted the plaintiff's plea to receive a copy of the *in genere* inquiry. The Court argued that the requirement of public scrutiny was satisfied if the Leader of the Opposition, as a 'public watchdog' over the powers of the Executive, received a copy, therefore removing the need to make the entire report public.[102]

It being a new provision, there are not many cases dealing with Article 469B. *Samira Borg vs Attorney General*[103] is one of such cases. Although the plaintiff succeeded in obtaining a copy of the *procès-verbal* from elsewhere, the Court nonetheless delved into whether the actions of the Attorney General were reasonable at law. Defendant erroneously contended that Article 469B does not specify the duty to give specific reasons and simply stated that it was in the best interest of justice that plaintiff is not granted a copy of the *procès-verbal* she requested.

The Court applied, for the first time in this context, the 'reasonable prosecutor test,' what would a reasonable prosecutor do in a similar case? In order to answer the latter question, the Court stated that it consequently had to delve into the reasons given by the Attorney General, which must at the very least be substantiated with enough information to justify why the plaintiff's request was being rejected, as otherwise the remedy provided in 469B would be rendered a superfluous one.

The Court of Appeal asserted that the standard plea used in practice by the Attorney General, i.e., that it cannot allow distribution due to public interest or because of the interests of justice, does not constitute sufficient grounds because '*element essenzjali tar-raġonevolezza ta' eżerċizzju diskrezzjonali huwa li l-awtorità li tkun eżerċitat dik id-diskrezzjoni tkun ħadet qies tal-konsiderazzjonijiet rilevanti tal-każ*.'[104] The case was decided in favour of plaintiff and the decision not to deliver a copy of the *procès-verbal* was declared null.

[102] ibid 42.

[103] 584/21/1 Court of Appeal 31 May 2023.

[104] ibid.

III

International Standards

3.1. The European Court of Human Rights: Procedural Limb of Article 2 and Article 13

3.1.1. Introduction

In this section, GħSL analyses the requirements laid down by the European Convention on Human Rights (ECHR) from two perspectives: the right to life,[105] and the right to an effective remedy.[106]

It has long been authoritatively established by the European Court of Human Rights (ECtHR) that the right to life is not merely a substantive right but also possesses a procedural dimension.[107] This precedent was initially established in *McCann* (1995),[108] where the Court elaborated on the principles enunciated in the earlier *Soering* (1989),[109] that the purpose of the Convention as an instrument for the protection of human rights requires that its provisions be interpreted and applied in a practical and effective manner. In order for this to be achieved, Article 2 must be read in conjunction with the State's general duty under Article 1 of the Convention to '*secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention*'.[110]

According to the Court, the joint reading of the two provisions implies that after the death of an individual implied that there must be some sort of effective official investigation. The effectiveness of an investigation extends to the prevention, suppression, and punishment of crimes, the proper investigation in and of itself and, also includes means of redress to victims. Essentially, as summarised by Judge Giovanni Bonello in his seminal Concurring Opinion in *Al-Skeini*, '*the duties assumed through ratifying the Convention go hand in hand with the duty to perform and observe them*'.[111]

[105] ECHR, Article 2.

[106] ibid 13.

[107] For more information about the relationship between the substantive and procedural limb, see: Krešimir Kamber, 'Substantive and procedural criminal-law protection of human rights in the law of the European Convention on Human Rights' (2020) 20(1) Human Rights Law Review 75.

[108] *McCann and Others v The United Kingdom* App no 18984/91 (ECtHR 27 September 1995) §161.

[109] *Soering v The United Kingdom* App no 14038/88 (ECtHR 7 July 1989) §87.

[110] ECHR, Article 1.

[111] *Al-Skeini and Others v The United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) 78.

Prior to *Šilih v Slovenia* (2009), doubts and conflicts abounded in the Court's case-law as to whether the procedural limb of Article 2 could be '*detached*'[112] from the substantive limb of Article 2. In this case, the State raised the preliminary plea of lack of jurisdiction *ratione temporis*, as the death of the applicant's son had occurred prior to the respondent State's ratification of the Convention, while parts of the investigation were ongoing after ratification. The Court ruled that the duty to carry out an '*effective investigation*' under the procedural limb of Article 2 is a '*separate and autonomous duty*',[113] which arises *ipso facto* when authorities are informed that a death had taken place[114] and is applicable throughout the period in which the authorities can reasonably be expected to take measures aimed at elucidating the circumstances of a death and establish responsibility for it.[115]

Therefore, in *Šilih* (2009) the Court still examined the procedural limb of Article 2, notwithstanding that it could not investigate the substantive limb as the incident occurred prior to Slovenia's ratification of the Convention. These principles were again reaffirmed in *Armani di Silva v the United Kingdom* (2016), where the Court stressed that it '*consistently examined the question of procedural obligations separately from the question of compliance with the substantive obligation*'.[116]

Traditionally, the procedural limb of Article 2 was only applied to instances where the victim died by excessive State force or in State custody. However, this changed with *Pereira Henriques v Luxembourg* (2006). The wife and children of the deceased, who was killed in an industrial accident, contended that there had not been an effective investigation into the circumstances of the deceased. The Court declared for the first time that '*the absence of direct responsibility of the State for the death of a person does not exclude the application of Article 2*'.[117]

[112] App no 71463/01 (ECtHR, 9 April 2009) §152.

[113] ibid §159.

[114] ibid §156.

[115] ibid §157; *Trufin v Romania* App no 3990/04 (ECtHR, 20 January 2010) §31–35.

[116] App no 5878/08 (ECtHR, 30 March 2016) §231; *Nicolae Virgiliu Tănase v Romania* App no 41720/13 (ECtHR, 25 June 2019) §138.

[117] App no 60255/00 (ECtHR, 9 May 2006) §56.

The recent case of *Nicolae Virgiliu Tănase v Romania* (2019) demonstrates the progress of the Court's case-law on Article 2. An effective investigation now extends to instances where the victim did not die but survived with life threatening injuries.[118] Furthermore, there is no exhaustive list of activities which warrant the applicability of Article 2. The general rule is that if the activity by its nature is dangerous and puts a person's life at real and imminent risk, then the principles of Article 2 must be applied.[119] The Court has applied Article 2 to a wide range of cases such as medical negligence,[120] (irrespective of whether the medical institution was public or privately run), management of dangerous activities, ensuring safety on board a ship, on a construction site,[121] at a school,[122] ensuring adequate road traffic regulations[123] and, in general *'any activity, whether public or not, in which the right to life may be at stake'*.[124]

Similarly, when Article 13 is read together with Article 1, its aim is to establish a mechanism within the national legal framework for redressing any violations.[125] Although the Court may find a violation of Article 13 as a stand-alone Article,[126] in order to bring a case claiming a right to an effective remedy, there must be an arguable complaint under another provision contained in the Convention.[127]

The Court has considered many cases in which an applicant brings forward a claim alleging a violation of both Article 2 and Article 13. When interpreted simultaneously, the two aforementioned articles should provide the victim, in addition to the payment of compensation where appropriate, with a remedy of a thorough and effective investigation capable of leading to the identification and punishment of those responsible which, more importantly for the purpose of this research, includes effective access to the investigation

[118] *Nicolae Virgiliu Tănase v Romania* (n 116) §139.

[119] ibid §140.

[120] *Powell v The United Kingdom* App no 45305/99 (ECtHR, 4 May 2000); *Eugenia Lazar v Romania* App no 32146/05 (ECtHR, 16 February 2010); *Lopes De Sousa Fernandes v Portugal* App no 56080/13 (ECtHR, 19 December 2017).

[121] *Pereira Henriques* (n 117); For more information read Dimitris Xenos, 'Asserting the Right to Life (Article 2, ECHR) in the Context of Industry' (2019) 8(3) German Law Journal CUP 231–253.

[122] *Nicolae Virgiliu Tănase v Romania* (n 116) §141.

[123] *Smiljanić v Croatia* App no 35983/14 (ECtHR, 25 March 2021).

[124] *Ciechońska v Poland*, App no 19776/04 (ECtHR, 14 September 2011) § 63.

[125] Bernardette Rainey, Elizabeth Wicks, Clare Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 130.

[126] *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1987) §63–65; *İlhan v Turkey* App no 22277/93 (ECtHR, 27 June 2000) § 91-92; *Šilih* (n 112) § 153-154.

[127] ibid.

procedure and public scrutiny of the same.[128] However, the Court's general approach is not to examine Article 13 separately, once the procedural limb of Article 2 has been examined.[129]

According to the ECtHR's comprehensive 'Guide to Article 2', the procedural limb of Article 2 consists of four criteria that have to be satisfied order to ensure that there has been an effective investigation: (i) Independence, (ii) Adequacy, (iii) Promptness and Reasonable Expedition, and (iv) Public Scrutiny and Participation of the Next-of-Kin. For the purpose of this publication, emphasis is placed on the latter; however, stakeholders should engage in discussions to improve all criteria, especially the third one. Unfortunately, it is a well-known reality that due to the lack of adequate resources, *in genere* inquiries take a long time to be closed,[130] far longer than the 60-day benchmark from when the Attorney General is entitled to be informed of the reasons for the delay.[131] Furthermore, the court, in assessing whether there has been a violation of the procedural limb of Article 2, will not analyse each category separately, as '*these parameters are linked to each other and do not constitute, taken in isolation, a purpose in themselves. They are all criteria which, taken together, make it possible to assess the degree of effectiveness of the investigation*'.[132]

[128] *Kaya and Others v Turkey* App no 158/1996/777/978 (ECtHR, 19 February 1998) § 87.

[129] David Harris, Michael O'Boyle, Ed Bates, Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (5th edn, OUP 2023) 771.

[130] Victor Paul Borg, 'Magistrates often fail to observe law on inquiries' (Times of Malta, 6 March 2018) <https://timesofmalta.com/articles/view/magistrates-often-fail-to-observe-law-on-inquiries.672245> accessed 11 November 2023.

[131] Criminal Code (n 3)Article 550A(1).

[132] *Gonçalves Monteiro v Portugal* App no 65666/16 (ECtHR, 15 March 2022) §126.

3.1.2. Next-of-Kin's Effective Access to the Investigation Procedure

The Court has recognised that the right of the deceased's family to participate in proceedings may be in direct conflict with the interests of the police or security forces implicated in the events.[133] Nonetheless, the victim's next-of-kin must be involved enough to '*safeguard their legitimate interests*' in order to be compatible with the requirements of Article 2.[134] Given that the latter phrase is quite ambiguous and is subject to the characteristics of every Contracting Party's legal system of each Contracting Party, a closer read of individual cases is required in order to assess why and when the ECtHR found a violation of Article 2 and/or 13. Unlike the domestic courts, the ECtHR enjoys the benefit of hindsight, as they may evaluate the entire case.

3.1.2.1. Exhaustion of Ordinary Remedies

Under this sub-heading, GĦSL explores whether the remedy available under the domestic legal system to facilitate effective participation in criminal proceedings was adequate enough for the ECtHR to decline jurisdiction under Article 35 of the Convention.

The Court has considered that in order to ensure effective access, victims have to file a formal complaint to lodge separate criminal proceedings to join the latter proceedings as a civil party, then there is a violation of the procedural limb of Article 2.[135]

In *Selmouni v France* (1999),[136] the victim had been subject to torture while in police detention after being arrested for drug-related offences. Although this was an Article 3 case, meaning the applicant himself was the direct victim, the Court considered that effective access to investigations in Article 2 cases should be applied similarly to Article 3 cases.[137] This is also seen in various other ECtHR cases.[138]

[133] *McKerr v The United Kingdom* App no 28883/95 (ECtHR, 4 May 2001) §148; *Hugh Jordan v The United Kingdom* App no 24746/94 (ECtHR, 4 May 2001) §134.

[134] *Al-Skeini and Others v The United Kingdom* (n 111) §167; *Slimani v France* App no 57671/00 (ECtHR, 27 October 2004) §47; *Hugh Jordan v The United Kingdom* (n 133) §109; *Anguelova v Bulgaria* App no 38361/97 (ECtHR, 13 September 2002) §140; *Giuliani and Gaggio v Italy* App no 23458/02 (ECtHR, 24 March 2011) §303.

[135] *Hugh Jordan v The United Kingdom* (n 133) §105. In contrast, see *Penati v Italy* App no 44166/15 (ECtHR, 11 May 2021) where although the applicant instituted criminal proceedings, no violation was found as the perpetrator died and subsequently the applicant requested proceedings to be opened against state agents for negligence.

[136] App no 25803/94 (ECtHR, 28 July 1999).

[137] ibid §79.

[138] European Court of Human Rights, 'Guide on Article 3 of the European Convention of Human Rights' (last updated 31 August 2022) §122; *Akhmadova and Sadulayeva v Russia* App no 40464/02 (ECtHR, 12 November

Throughout domestic proceedings, the applicant alleged inhuman treatment before the investigating judge. Subsequently, after the applicant lodged a criminal complaint on the abuse he suffered, together with an application to join the same criminal proceedings as a civil party, the Public Prosecutor opened a **new** investigation in which the applicant was allowed to make submissions as the direct victim. When police officials were committed to trial, the Criminal Court allowed Mr Selmouni to join the criminal proceedings as civil party.[139] The respondent State argued that there had been a failure to exhaust domestic remedies as the applicant had access to an effective remedy: to join the criminal proceedings as civil party.[140] The Court stated that the rule in Article 13 is based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system,[141] and that in order for domestic remedies to be exhausted, the available remedies must be available at the time of the breach and sufficient, both in theory and in practice.[142]

The Court noted that an investigation into the alleged abuse was only conducted after the applicant submitted a request to institute criminal proceedings together with a request to participate as civil party, despite clear indications during the initial investigation, which implicated him in drug-related offences, that he had been subjected to abuse. Accordingly, the remedy to lodge criminal proceedings himself could not be considered to be *'effective and adequate'* to afford him redress. Thus, the Court still went into the merits of the case.[143]

The Court observed that although in this particular case it did not find that the remedy afforded by domestic law was appropriate, this should not be seen as a blanket statement suggesting that lodging a criminal complaint along with a request to participate in the proceedings as a civil party could never provide redress,[144] as in this case the Court took into consideration the applicant's personal circumstances and a number of delays into the investigation.[145]

2007) §117; *Oleksiy Mykhaylovych Zakharkin v Ukraine* App no 1727/04 (ECtHR, 24 June 2010) §65.

[139] *Selmouni v France* (n 136) §62.

[140] ibid §71.

[141] ibid §74.

[142] ibid §75.

[143] ibid §81.

[144] ibid.

[145] *Slimani v France* (n 134), partly dissenting opinion of Judge Loucaides, joined by Judge Mularoni §6.

A similar legal point was raised in *Slimani v France* (2004).[146] The victim had died in state custody after being admitted into a mental institution which was not equipped to cater for his needs. Upon the victim's death, an inquest was opened under Article 74 of the Code of Penal Procedure (CPP) in order to establish the cause of death.[147] The applicant, the victim's partner, requested access to the autopsy and toxicology report but was denied access and was never interviewed by the investigating judge.[148] Subsequently, the public prosecutor discontinued proceedings.[149]

As seen in *Selmouni*,[150] the respondent State argued that the applicant, the direct victim's partner, had an ordinary remedy under Article 85 of the CPP; that is, to lodge a criminal complaint herself and join the same criminal proceedings as civil party. In this case, unlike the preceding one, the Court accepted that the applicant had failed to exhaust ordinary remedies, as an investigation into the harm suffered by the deceased had already been carried out and the remedy under Article 85 of the CPP, which would have allowed the applicant to apply to become the civil party in front of the investigating judge (*le juge d'instruction*), was available both in practice and in theory.[151] Therefore the Court examined neither the merits of the breach of the substantive limb of Article 2 nor the right to an effective remedy.

However, the Court still examined the way the respondent State conducted the inquest under the procedural limb of Article 2. It noted that the applicant was not allowed to participate in the inquest as she was not given any information on its progress or on the decision to discontinue proceedings.[152] The Court held that requiring victims to lodge a criminal action to later join as civil party in order to receive updates on the investigation contravenes the principles of the procedural limb of Article 2, as an 'effective and official investigation' should automatically include the next-of-kin to the extent necessary to protect their legitimate interests to be considered effective, and consequently found a violation.[153] Subsequently, the French CPP was amended to allow victims to participate in criminal proceedings as civil party without having to lodge a complaint themselves allowing *'the members of the family or the close relatives of the deceased or missing person may*

[146] ibid.

[147] Translation: In the event of the discovery of a corpse, whether a violent death or not, but if the cause is unknown or suspicious, the judicial police officer who is notified, or under his supervision, shall immediately inform the public prosecutor to go to the scene without delay and make the first observations.

[148] *Slimani v France* (n 134) §16.

[149] ibid §18.

[150] *Selmouni* (n 136).

[151] *Slimani v France* (n 134) §41.

[152] ibid §44.

[153] ibid §47-49.

apply to join the criminal proceedings as a civil party seeking damages'.[154]

The Court also considered a legal scenario under Russian law where the respondent State raised the preliminary plea of non-exhaustion of ordinary remedies as there was a civil remedy available.[155] Russian law provides both a civil and a criminal procedure of recourse for the victims of illegal and criminal acts attributable to the State.[156] The civil procedure available under the Code of Criminal Procedure (CPP) prior to the 2003 amendments stated that recovery of damages could only be sought if the criminal procedures have been terminated.[157] The Court ruled that in the context of alleged breaches of the procedural limb of Article 2, even if for argument's sake, the Russian Court did not decline jurisdiction as criminal proceedings were still pending and awarded damages, a civil court is unable to commence an independent investigation to establish criminal guilt.[158] Therefore, civil proceedings are not effective for the purposes of Article 2 as their *raison d'être* is different.[159] Nonetheless, as proclaimed in *Perez v France* (2004), the State's duty to initiate criminal proceedings is indissociable from the victim's right to recourse in civil proceedings, as safeguarded by Article 6.[160]

3.1.2.2. Absence of a Procedure to Grant Access Throughout the Investigation

With regard to accessibility to the investigation, in *Lyanova and Aliyeva v Russia* (2009), the victims had disappeared while in state detention and the public prosecutor opened a criminal investigation on the grounds of abduction. The investigation was subsequently suspended and reopened various times. The applicants, the victims' mothers, sent several requests to be updated about the investigative measures being taken. Access to the case file was never granted, even though the investigations had been suspended and reopened several times, and the updates provided were very scarce.[161] Under Russian criminal law, disclosure of information of the preliminary investigation is considered a crime.[162]

[154] Code de Procédure Pénale (n 23) 80-4.

[155] *Lyanova and Aliyeva v Russia* (n 155) §75; *Akhmadova and Sadulayeva v Russia* (n 138) §70; *Estamirov and Others v Russia* App no 60272/00 (ECtHR, 12 January 2007) §70.

[156] *Estamirov Others v Russia* (n 155) §75.

[157] ibid §69, 77.

[158] ibid.

[159] ibid §78; *Akhmadova and Sadulayeva v Russia* (n 138) §78; *Fountas v Greece* App no 50283/13 (ECtHR, 3 January 2020) §50-53.

[160] *Perez v France* App no 47287/99 (ECtHR, 12 February 2004) §70.

[161] *Lyanova and Aliyeva v Russia* (n 155) §107.

[162] Criminal Code of the Russian Federation No 63-FZ of 13 June 1996 <https://www.legal-tools.org/

However, Article 161 of the CCP allows for partial or full disclosure if authorised by the investigating authorities, if such disclosure does not run counter to the interests of the preliminary investigation or violate rights of persons involved in the criminal proceedings. Therefore, if a victim makes a request for the documents of an investigation and is denied access, they may challenge such decision under Article 125 of the CPP, as the latter article contemplates a remedy for any decision of the investigative authorities '*which can inflict damage upon the constitutional rights and freedoms of the participants in criminal court proceedings or can interfere with the citizens' access to administration of justice*.'[163]

In practice, the Russian system does allow for a procedure for victims to have access to case materials throughout the investigation. In this case, the Court found a violation as although the applicants were informed of the suspensions and resumptions of the investigation and granted victim status, they were not given any information on its progress nor access to the documents contained in the case file, or provided any justification for the lack of disclosure.[164] The respondent State went as far as to refuse access of the investigation file to the ECtHR itself.[165]

In *Anguelova v Bulgaria* (2002), which concerned the death of the applicant's son following arrest, the fact that the applicant was granted access to the case file more than a year after her son's demise was considered to breach her interests.[166] Therefore, from the above two cases it follows that the updates given by respondent States cannot be redundant and must be systematic in nature.

Recently the Court has adopted a more assertive position concerning the effective accessibility of the investigation, surpassing the precedents set in *McKerr* (2001)[167] and *Ramsahai* (2007).[168] In the aforementioned cases, the Court ruled that Article 2 does not provide an automatic requirement that next-of-kin must be granted access to the investigation as it goes along. The rationale underpinning this is obvious, as investigations may involve sensitive information the disclosure of which could jeopardize the entire investigative process. However, the next-of-kin may be granted access in other available

doc/8eed35/pdf/> accessed 20 December 2023.

[163] ibid Article 125.

[164] *Lyanova and Aliyeva v Russia* (n 155) §107

[165] *ibid* §102; *Akhmadova and Sadulayeva v Russia* (n 138) §152.

[166] *Anguelova v Bulgaria* (n 134) §134.

[167] *McKerr v The United Kingdom* (n 133) §129.

[168] *Ramashai and Others v The Netherlands* App no 52391/99 (ECtHR, 15 May 2007) §347: '*It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next-of-kin be granted access to the investigation as it goes along*'.

procedures.[169] However, the Court's recent case-law seems to indicate a trend towards permitting certain forms of access, even during ongoing investigations, as discussed below.

The description of the involvement of the next-of-kin as an important guarantee was proclaimed in *Fountas v Greece* (2020).[170] Following his son's death in a shootout with the police, the applicant requested access to both investigative and administrative case files multiple times. With regard to access to the criminal case file, the applicant alleged that although the Greek CCP does not grant access to documents in a preliminary inquiry, in order effectively to challenge the public prosecutor's decision to close the inquiry, he must have access to the same documents.[171] The Court agreed with this reasoning:

> *the applicant was only partially able to exercise his right to lodge an appeal against the order closing the investigation, as at the time he did not have access to the case file and was thus not able to rebut effectively the conclusions referred to in that order.*[172]

The Court also found a breach of the procedural limb of Article 2 as it was not convinced that the respondent state took all reasonable steps to inform the next-of-kin of the victim's demise. In fact, they were informed of his death only after the autopsy had taken place, even though the victim had been identified before.[173] This requirement has also been identified in case-law on Article 8 (right to private and family life).[174]

In *Tagiyeva v Azerbaijan* (2022),[175] the applicant alleged that the investigation into the death of her husband, a journalist known for addressing sensitive subjects in his articles, had not been effective. Investigations had commenced in 2011, immediately after he was stabbed, and the direct victim was interviewed before his condition deteriorated and he passed away.[176]

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[169] *McKerr v The United Kingdom* (n 133) §129; *Ramashai and Others v The Netherlands* (n 168) §347-350.

[170] *Fountas v Greece* (n 159).

[171] ibid §40.

[172] ibid §93.

[173] ibid §95.

[174] ibid §70.

[175] App no 72611/14 (ECtHR, 2 July 2022).

[176] ibid §19-21.

Following the victim's death, the applicant was interviewed by investigating authorities and sometime later, the applicant made a formal request to the prosecuting authorities to gain access to relevant documents on ongoing investigations. This request was declined but she was assured that she would gain access after the investigation was closed.[177] Subsequently, proceedings were discontinued in 2013 as the prosecuting authorities were not able to identify the perpetrator, and the applicant reiterated her request for access; however, it was declined as proceedings had not been discontinued but suspended.[178]

The Azerbaijanian CPP provided that victims may have access to the case file after the termination or discontinuation of criminal proceedings.[179] However, in this case the Court went a step further to state that it was unacceptable that there was no procedure under domestic law which granted the applicant access to the case materials throughout the investigation. Here the Court went a step further to describe the involvement of the deceased person's family as '*an important guarantee*'.[180]

The aforementioned case was preceded by *Huseynova v Azerbaijan* (2017),[181] which also concerned the unlawful death of a journalist. In response to the wife's requests to access the case file three years after the investigation had started, the respondent State stated that access could only be granted after the termination or discontinuation of proceedings. As opposed to *Tagiyeva*, the proceedings were not suspended but were still ongoing,[182] and the applicant had been provided with a 12-page letter underlining all the measures taken from the start of criminal investigations in 2005 until the applicant's request to access the file in 2009.[183] Nonetheless, the Court still found that the applicant had not been involved in proceedings enough to safeguard her legitimate interests and that it was unacceptable that under the relevant domestic law there was no procedure to provide access to the relevant case materials during the investigation. [184]

In *Penati v Italy* (2021)[185] the applicant's son was shot dead by her husband as the State allegedly did not take the necessary measures to protect the victim in a meeting organised by the social services. The applicant presented a criminal complaint in which she requested

[177] ibid §28-30, §37-38.

[178] ibid §44-45.

[179] *Huseynova v Azerbaijan* App no 10653/10 (ECtHR, 13 July 2017) §61-62.

[180] *Tagiyeva v Azerbaijan* (n 175) §73–74.

[181] *Huseynova v Azerbaijan* (n 179).

[182] ibid §60.

[183] ibid §58.

[184] ibid §133.

[185] *Penati v Italy* App no 44166/15 (ECtHR, 11 May 2021).

the prosecution of three social workers who were in charge of organising the meeting and all those who may have been responsible her son's death.[186] The applicant joined the proceedings as civil party. The Court of Cassation found that the social workers were only responsible for the educational and psychological wellbeing of the child and could not be found responsible for his death.[187]

The applicant Instituted proceedings at the ECtHR claiming a breach of both substantive and procedural limbs of Article 2. For the purposes of this paper, the focus shall exclude the substantive limb, namely, whether the State did all it could to protect the victim; instead it will focus whether the outcome of the criminal proceedings, stemming from the applicant's complaint wherein no one was held accountable for her son's death, constituted a breach of the procedural limb of Article 2 of the Convention. Due to the peculiar circumstances of the case, the Court likened the facts of the case with deaths in State custody, as the victim was murdered while under the responsibility of the national authorities.[188]

Interestingly, the Court stated that for the purposes of Article 2, the responsibility of a respondent State could arise when the victim (1) is placed in a life-threatening situation due to the behaviour of a public authority, (2) died in suspicious circumstances, or even (3) when private parties have deliberately contravened obligations placed by legislation.[189] The Court also implied that the duty of judicial systems to conduct effective investigations must have a deterrent effect in order to prevent further violations.[190] Given that the applicant was given effective access to the proceedings and the national court's conclusions were not based on arbitrariness, the Court found no violation since the positive obligation imposed by article 2 'are of means and not of results.'[191]

[186] ibid §85.

[187] ibid §126.

[188] ibid §158–159.

[189] ibid §175-176, §179.

[190] ibid §178.

[191] ibid §185-192.

3.1.2.3. Duty to Give Reasons

In the case of *Oğur v Turkey* (1999), the victim was shot after being mistaken for a terrorist. Given that the area in which the incident occurred was considered to be under a state of emergency, the public prosecutor relinquished jurisdiction to the Administrative Council.[192] The latter concluded that no action should be taken as the perpetrator could not be identified. Apart from the numerous procedural inadequacies, such as the omission of a post-mortem examination of the victim's corpse and the lack of impartiality on the part of the investigating authority given that the members of the Council answer to the Executive,[193] the case file was inaccessible to the relatives.

The Court considered that this hindered the applicant's ability to appeal the decision of refusal to initiate proceedings by the Supreme Administrative Courts, as the decision was based on the reasoning contained in the aforementioned case file. In fact, the only reason the case went to appeal stage was because Turkish law required that if the Administrative Council concludes that no prosecution should take place, an appeal is automatic.[194] Therefore, the applicants could not sufficiently appeal the decision and a breach of their rights was found.[195]

The remedy to challenge a decision not to prosecute must also offer an '*effective challenge*'.[196] Therefore, if the information provided by prosecuting authorities does not contain important details for the reasons of the decision not to prosecute, it fails to satisfy the requirements of Article 2.[197] For example in *Anik v Turkey* (2007), which concerned the death of two individuals by security forces, after a *nolle prosequi* was issued, the applicants were only granted statements given by the applicants themselves.[198]

This was also seen in the admissibility decision of *Huseynova* (2017),[199] where the respondent State alleged non-exhaustion of ordinary remedies as the applicant did not file an action for review contemplated under the CPP. However, the wording of the law made it clear that there must be a decision to suspend or terminate investigations, and in that particular investigation case, investigations were still ongoing. Furthermore, the

[192] *Oğur v Turkey* App no 21594/93 (ECtHR, 20 May 1999) §12, 52.

[193] ibid §90-91.

[194] ibid §52.

[195] ibid §92.

[196] *Mustafa Tunç and Fecire Tunç v Turkey* App no 24014/05 (ECtHR, 14 April 2015) §210.

[197] ibid.

[198] App no 63758/00 (ECtHR 5 September 2007) §76.

[199] *Huseynova v Azerbaijan* (n 179).

court considered, even if the applicant had attempted review, she would not have access to the case file therefore she could not effectively challenge the investigating authorities' actions.[200]

In *Mustafa Tunç and Fecire Tunç v Turkey* (2015) the victim died while on watchguard duty and an administrative inquiry concluded that the incident had been caused by the victim himself and a *nolle prosequi* was issued.[201] As opposed to *Anik v Turkey* (2007), the relatives were given full access of the case file after the closure of the investigations and in fact they challenged the investigation not to prosecute. Consequently, the Court found no breach as the applicants had been granted access to the investigation to a degree sufficient for them to participate effectively in the proceedings thus satisfying the 'effective challenge' criterion.[202]

In *Trufin v Romania* (2010), the victim was found dead with blood and bruises in a town suburb. After the case being thrown off-course due to an incorrect post-mortem analysis and twelve years of no progress, the authorities decided to close the investigation. All correspondence sent to the applicant by authorities; namely, the decision to discontinue investigations and the decision to change the legal classification of the crime from homicide to assault and battery, were limited to informing the applicant of the decision taken, without providing any justifications and all communications were delayed.[203] Consequently the Court found a breach.

[200] ibid §80-83.

[201] *Mustafa Tunç and Fecire Tunç v Turkey* (n 196) §58-59.

[202] ibid §216.

[203] *Trufin v Romania* (n 115) §52.

3.1.2.4. Disappearances

According to the Court, the obligations to investigate a disappearance of an individual differ slightly from the normal obligations to investigate a suspicious death as the latter is an instantaneous act or event while the former is a continuing situation. Therefore, failure to hold an effective investigation which includes inter alia involving the next-of-kin enough for them to secure their legitimate interests constitutes a continuing violation,[204] even if the victim is presumed to be dead.[205]

As stated in *Gonçalves Monteiro v Portugal* (2022), relating to the disappearance of the applicant's daughter who suffered from mental disorders, a disappearance is:

> *a distinct phenomenon, which is characterized by a situation where loved ones are continuously confronted with uncertainty and a lack of explanations and information about what happened, the relevant elements in this regard being able to sometimes even be deliberately concealed or obscured. This situation often lasts a very long time, thereby prolonging the torment of the victim's loved ones.*[206]

In this case, the Court found a violation as the police did not search the victim's house nor conduct an interview with the family of the victim until three years after her disappearance.[207]

[204] *Gonçalves Monteiro v Portugal* (n 132) §125

[205] *Varnava and Others v Turkey* App no 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR, 18 September 2009) §148.

[206] *Gonçalves Monteiro v Portugal* (n 132) §125.

[207] ibid §127-134.

3.1.3. Publicity of Documents and Public Scrutiny of Investigations

The requirement to involve the next-of-kin in an effective investigation under Article 2 is closely linked to public scrutiny of the investigation and its results.[208] The Court recognises that disclosure or publication of police reports and/or other investigative materials could prejudice the findings of the investigation, as they may include sensitive issues which may affect private individuals, and further investigations.[209] In order to balance the secrecy of investigations (an important factor to the success for same) with the safeguard of the rights of the public and the victims, the Court held that while the next-of-kin must always be involved in the investigation to the extent necessary to safeguard their interests, the degree of public scrutiny may vary from case to case.[210]

The Court did not find a violation of the next-of-kin's interests in *Ramsahai v The Netherlands* (2007). This case concerned a decision not to prosecute a police officer because the Public Prosecutor deemed that it was an act of self-defence. Given that the applicant was granted full access to the investigation file and was allowed to participate in the hearing before the Court of Appeal, the criterion of allowing the victims to safeguard any legitimate interest was satisfied.[211] Interestingly, with regard to public scrutiny, the Court held that since the applicant was not prevented from making the decision public himself, this satisfied the element of public scrutiny, consequently placing the elements of public scrutiny and access of the case file by the next-of-kin in the same basket.[212]

This approach was implied in *Tangiyeva* and other cases,[213] where the Court stated that lack of a domestic procedure to allow victims to access the case materials also prevented public scrutiny of the investigation.[214] This reveals the Court's willingness to accept that if a document is presented to the victims, the document can be considered to be in the public domain.

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[208] Vincent A De Gaetano, 'The Definite Article 2: A brief overview of Art. 2 of the ECHR' [2023] 33 Id-Dritt 362, 373.

[209] *McKerr v The United Kingdom* (n 133) §129; *Hugh Jordan v The United Kingdom* (n 133) §121; *Ramashai and Others v The Netherlands* (n 168) §347.

[210] *Anguelova v Bulgaria* (n 134) §140.

[211] *Ramsahai and Others v The Netherlands* (n 168) §349.

[212] ibid §353–355.

[213] *Anik v Turkey* (n 198) §77.

[214] *Tagiyeva v Azerbaijan* (n 175) §73.

Giuliani and Gaggio v Italy (2011) concerned the discontinuing of investigations on the demise of an individual who was fatally shot by a law enforcement officer subsequent to a heightened confrontation during a public demonstration.[215] Throughout the investigation there were doubts as to whether the officer killed the victim in self-defence or due to negligence. The public prosecutor discontinued proceedings, concluding that the perpetrator had acted in self-defence. The applicants, father, mother and sister of the deceased, alleged that the lack of a public hearing deprived them of scrutiny of the circumstances surrounding their relative's death, resulting in a breach of the procedural obligation of Article 2.[216]

The Court ruled that the requirement to hold public hearings is not part and parcel of the procedural obligations and Article 2 does not prohibit the discontinuation of the proceedings at the preliminary investigation stage.[217] While the applicants did not contest that they were granted access to the investigation, they objected to the public prosecutor's request to discontinue the proceedings. Following that objection, a hearing was held before the investigating judge.[218] The Court noted that under Italian law the injured party may not apply to join the proceedings as civil party until the preliminary hearing.[219] Nevertheless, under Italian law, the applicants may exercise privileged rights during the investigation such as the inclusion of evidence,[220] and in the case of a *nolle prosequi*, victims are given the possibility to indicate additional investigative measures. Given that sufficient reasons had been provided by the investigating judge in refusing the applicant's requests for further investigations,[221] no procedural breach was found.

In *Lopes De Sousa Fernandes* (2017)[222] the alleged violation consisted of medical negligence. The applicant complained that her husband's death was caused by a hospital-acquired infection, that the medical treatment provided did not reach the standard of care required, and that the authorities failed to indicate the exact cause of her husband's deterioration. Under the procedural limb, the Court found that delays and the absence of a procedure to examine how the deceased contracted the hospital infection breached the procedural limb.[223] However, the Court remarked that factual issues relating to the

[215] *Giuliani and Gaggio v Italy* (n 134) §284.

[216] ibid §283.

[217] ibid §320.

[218] ibid §285.

[219] Similar to the Maltese standpoint.

[220] Codice di Procedura Penale (Code of Criminal Procedure) 90.

[221] *Giuliani and Gaggio v Italy* (n 134) §104.

[222] *Lopes De Sousa Fernandes v Portugal* (n 120).

[223] ibid §225-238.

death of a person and responsibility of State authorities should not only be disclosed to the applicant, but also towards the public in general, as only then can effective accountability take place.[224]

3.2. Comparative Perspective

3.2.1. England and Wales[225]

Due consideration must be given to cases concerning the UK in relation to victim participation.[226] The England and Wales has a unique system of handling the participations of victims in the administration of justice,[227] which is foreign to most continental systems. However, as will be seen under the sub-heading 3.2.1.1. 'The Court's Reaction to the Inquest Procedure,' the ECtHR has held that it is an effective way of satisfying the procedural limb of Article 2.

The institute of the coroner is central to the English system. It is long entrenched in English law and central to the determination of how a person died and is one of the oldest surviving judicial offices in England and Wales.[228] It is not a national service but a collection of local services,[229] whereby England and Wales are divided in multiple '*coroner areas*'.[230] As of today there are 83 coroner areas.[231]

The Coroners and Justice Act 2009 (hereinafter referred to as 'the Act')[232] outlines the coroners' jurisdiction in their area: to investigate deaths in which the victim died '*a*

[224] ibid 172.

[225] For a brief overview, please consult Crown Prosecution Service, 'Coroners' (*CPS*, 2 February 2021) <https://www.cps.gov.uk/legal-guidance/coroners> accessed 29 December 2023.

[226] *Hugh Jordan v The United Kingdom* (n 133) §6.

[227] This system is also available in other countries in modified versions such as Australia, New Zealand, Gibraltar, the United States, Canada, and Hong Kong.

[228] Courts and Tribunals Judiciary, 'Lecture by the Chief Coroner: Death and Taxes – the past, present and future of the coronial service' (*Courts and Tribunals Judiciary*, 23 November 2023) <https://www.judiciary.uk/speech-by-the-chief-coroner-death-and-taxes-the-past-present-and-future-of-the-coronial-service/#related_content> accessed 15 January 2024.

[229] Report of the Chief Coroner to the Lord Chancellor: First Annual Report 2013-2014 <https://www.gov.uk/government/publications/chief-coroners-annual-report-2013-to-2014> accessed 19 January 2024.

[230] Paul Matthews and others, *Jervis on Coroners* (14edn, Sweet & Maxwell 2019) 2-30.

[231] Courts and Tribunal Judiciary, 'Coroners' (*Courts and Tribunal Judiciary*, 1 January 2024) <https://www.judiciary.uk/courts-and-tribunals/coroners-courts/coroners/> accessed 19 January 2024.

[232] Coroners and Justice Act 2009.

violent or unnatural death, the cause of death is unknown, or the deceased died while in custody or otherwise in state detention'.[233] The aforementioned duties are kept separate and distinct from any criminal or civil court processes. In *R v South London Coroner*,[234] Lord Cane delineated their differences as follows:

> *Once again it should not be forgotten than an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial procès, a procès of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.*

Therefore, one may draw a comparison between the coronial inquest and our *in genere*, as there is no attempt to apportion blame. However, while the *in genere* inquiry is a secret procedure, the coroner's inquest is a public one. In *R v South London Coroner*, it was held that '*the function of an inquest is to seek out and record as many of the facts concerning the death as public interest requires*.'[235]

The coroner's traditional investigations are known as Jamieson Inquests.[236] As seen in Section 5 of the Act, such an investigation is restricted '*to who the deceased was and how, when and where the deceased came by his or her death*'.[237] Much contemplation has been given to the phrase '*how the deceased came by his death*'. It is more restrictive than '*how the victim died*'. Jurisprudentially, the interpretation of how a victim came by his death is limited to '*by what means*' the deceased died.[238]

It is only in certain types of cases (for example deaths in State detention) i.e. when there is an arguable breach of Article 2 of the ECHR, that the question of '*how the deceased came by his death*' must be expanded to a wider context, '*as including the purpose of ascertaining in what circumstances the deceased came by his or her death*'.[239] In the English and Welsh coroner's courts a consideration of whether Article 2 applies to the case and should be 'engaged'

[233] ibid Section 1.

[234] *R v South London Coroner Ex parte Thompson* (1982) 126 S.J. 625, DC.

[235] ibid.

[236] *R v HM Coroner for North Humberside and Scunthorpe, Ex parte Jamieson* [1994] 3 All ER 972.

[237] Coroners and Justice Act 2009, Section 5(1).

[238] *R v HM Coroner for North Humberside and Scunthorpe* (n 236).

[239] Coroners and Justice Act 2009, Section 5(2).

will be undertaken. This is a decision to be taken and reasoned by the Coroner. If Article is engaged then these are commonly referred to as 'Article 2 Inquests'[240] or Middleton Inquests, coined by *R (on the application of Middleton) v HM Coroner for Western Somerset*.[241] This necessarily means that such inquests allow for conclusions addressing a wider range of issues and can be critical in nature.[242] Such an obligation is triggered when there must be arguable grounds for thinking that the death may have resulted from a wrongful act attributable to the State.[243] As explained in the recent case of *Boyce*:[244]

> *There is no dispute that a Jamieson inquest is limited to an enquiry as to how in the sense of by what means the deceased came by her death. A Middleton inquest applies to those inquests where the Article 2 procedural obligation is engaged and requires the expression 'how' the deceased came by his/her death to be read as meaning 'by what means and in what circumstance'. This is often referred to as the enhanced investigative duty.*

The most notorious examples of Article 2 inquests are when the deceased was in State custody, such as detention under the Mental Health Act, a care home, or imprisonment. However, in the aforementioned judgment, Judge Belcher concurred that many a time one should not give importance to the classification of the inquest *per se*. Rather a coroner should address *'the broad circumstances leaving open the possibility of reverting to an Article 2 inquest verdict if it becomes necessary to do so.'*[245]

[240] Health and Safety Executive, Coroners Inquests (*Health and Safety Executive*, undated) <https://www.hse.gov.uk/enforce/enforcementguide/wrdeaths/chronology.htm#footref6> accessed 15 January 2024.

[241] *R (on the application of Middleton) v HM Coroner for Western Somerset* [2001] EWHC Admin 1043.

[242] Paul Matthews and others (n 230) 21-20.

[243] Health and Safety Executive (n 240) quoting *R (on the application of Takoushis) v HM Coroner for Inner North London & Others* [2005] EWCA Civ 1440.

[244] *Boyce* [2022] EWHC 107 (Admin).

[245] ibid 73-74.

The rationale behind this is that under English law, the ECHR Article 2 criterion of having an effective investigation, capable of safeguarding the legitimate interests of the bereaved and subject to public scrutiny by an independent body, is satisfied by a coronial inquest.[246] The fact that, as seen above, the coronial inquest does not determine questions of criminal or civil liability does not reduce the effectiveness of the investigation, *'as it is not for the Court to decide what form such an investigation should take and under what conditions it should be conducted'*.[247] However, in certain cases against the UK, the Court has found a breach, as inquests conducted in Northern Ireland, as opposed to those held in the England and Wales, could not produce an 'unlawful killing' verdict.[248]

If an inquest engages Article 2, the family may be able to obtain funding for legal advice, although options are extremely limited. Furthermore, the conclusions open to a Coroner sitting alone or by a Jury may be necessarily wider than those that can be returned in a non-Article or Jamieson inquest.[249] Nevertheless, even if an inquest is not an Article 2 inquest as described above, the representatives of the bereaved still appear to have enhanced rights of participation and to an investigation which are foreign to most continental system and the causation test must still be satisfied. This test aims to answer the question whether '*an event or conduct said to have caused the death... contributed more than minimally, negligibly or trivially to the death*.'[250]

An inquest process must first and foremost identify those who are entitled or permitted to play a part in the inquest process. They are known as properly interested persons (PIPs) and a definition of this can be found in Section 47 of the Act,[251] those with automatic PIP status in the Act automatically qualify to:

1. Receive notification of the coroner's decision to begin an investigation,[252]

2. Receive notification any suspensions or resumptions of the coroner's investigation,[253]

[246] *R (Middleton) v HM Coroner for Western Somerset* (n 241).

[247] *McCann and Others v The United Kingdom* (n 108) §162.

[248] ibid; *Hugh Jordan v The United Kingdom* (n 133) §129; *Finucane v The United Kingdom* App no 29178/95 (ECtHR, 1 October 2003) §47.

[249] Coroners and Justice Act 2009, Section 7.

[250] *Tainton v Preston and West Lancashire Coroner* [2016] EWHC 1396 (Admin).

[251] ibid Section 47.

[252] Coroner (Investigation) Regulations 2013, Section 6.

[253] ibid Section 10.

3. Receive notification of the post-mortem examination,[254]

4. Receive the report on action to prevent other deaths, and[255]

5. Disclosure of all documents in the coroner's possession.

Another interesting feature made compulsory by the 2009 Act and associated regulations, is the duty to draw up a report to prevent future deaths (PFDs or Regulation 28 reports). Where during a coronial investigation:

> *Anything revealed by the investigation gives rise to a concern that circumstances creating a risk of other deaths will occur, or will continue to exist, in the future and in the coroner's opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances*[256]

the Coroner must draw up such a report and send a copy to the PIPs,[257] the Chief Coroner, who may publish the report or a summary of it,[258] and any person who has the power to prevent the reoccurrence of such circumstance.[259] These documents are publicly accessible.[260] Studies have shown that the PFD reports can assist bereaved friends and family members throughout the grieving process because where any omissions or failures in a state system or the operation of the same caused or contributed to the death in question, then the knowledge of future improvements to prevent any further fatalities may be a source of comfort for the bereaved as well as an indication that justice is being done. In traditional criminal proceedings, which are concerned with preserving evidence for a conviction, there is no mechanism for the judicial authority to set out concerns to prevent future deaths.[261]

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[254] ibid Section 13,

[255] ibid Section 28.

[256] Coroners and Justice Act 2009, Schedule 5 Section 7.

[257] Coroner (Investigation) Regulations 2013, Section 28(4)(a).

[258] ibid Section 28(5)(a).

[259] Coroners and Justice Act 2009, Schedule 5 Section 7.

[260] Courts and Tribunal Judiciary, 'Prevention of Future Death Reports' (*Judiciary UK*, 19 January 2024) https://www.judiciary.uk/?s=&pfd_report_type=&post_type=pfd&order=relevance accessed 19 January 2024.

[261] Ngo Mark, Matthews Lynda R, Quinlan Michael, Bohle Philip, 'Bereaved Family Members' Views of the Value of Coronial Inquests into Fatal Work Incidents' (*Sage Journals*, 20 December 2018) <https://journals-sage-pub-com.ejournals.um.edu.mt/doi/full/10.1177/0030222818819344> accessed 19 January 2024.

Furthermore, the authority who has the power to prevent the reoccurrence of a similar event has an obligation to respond to such a report, indicating either the details of any action or measures that shall be taken or an explanation as to why no action is proposed.[262] Upon receipt of such a response, the Coroner must send a copy to the Chief Coroner and PIPs.[263] Subsequently, the former may publish in such a manner as he deems fit[264] and the latter may make representations to the Coroner on the publication of such a report.[265]

Unlike criminal investigations, which concern themselves with securing a conviction, coronial inquests place the interests of the bereaved at the heart of the process.[266] In a lecture delivered last November,[267] the Chief Coroner of England and Wales, the Honourable HHJ Thomas Teague KC, reflected on the modern purpose of a coronial investigation by quoting the 2006 Commons Select Committee on Constitutional Affairs:

> *The death certification and investigation systems have essential roles, providing each person who dies with a last, posthumous service from the State; they serve families and friends by clarifying the causes and circumstances of the death; and they contribute to the health and safety of the public as a whole by providing information on mortality and preventable risks to life.*

In fact, several reforms in the manner coronial inquests are conducted have been spurred by the participation of families in the inquest. Such an example is the Shipman Question: the obligation on the coroner to ask the bereaved if they have any concerns about the death that may warrant further investigation.[268] This was inspired by the Harold Shipman Inquiry.[269] Another example is the introduction of narrative verdicts, whereby the coroner or jury may deliver a longer explanation on the main issues arising in the surrounding circumstances of the death.[270] In the context of an inquest which did not engage Article 2, the narrative verdict may be *"brief, neutral, factual statement"* of how the deceased came by their death,' whilst if the inquest engages Article 2, the narrative verdict must contain *'an expression, however brief, of the jury's conclusion on the disputed factual issues*

[262] Coroner (Investigation) Regulations 2013, Section 29(3) (a-b).

[263] ibid Section 29(4).

[264] ibid Section 29(7).

[265] ibid Section 29(8).

[266] Courts and Tribunals Judiciary, 'Lecture by the Chief Coroner' (n 228).

[267] ibid.

[268] Paul Matthews and others (n 230) 3-04.

[269] Harold Shipman Inquiry <https://webarchive.nationalarchives.gov.uk/> accessed 19 January 2024.

[270] Crown Prosecution Services (n 225) accessed 16 January 2024; *R (on the application of Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46.

at the heart of the case.'[271]

Nowadays, the Coronial system remains a means of administering local justice, removed from the national judiciary.[272] The United Kingdom and Ireland are the only States party to the Convention with fully developed coroner systems, so there have been a relatively a small amount of cases before the ECtHR dealing with the subject.[273] In addition it is a procedural requirement that a coronial inquest is sufficient to satisfy the procedural limb of Article 2, as the latter is applied to a pre-existing coronial system structure.[274]

3.2.1.1. The Court's Reaction to the Inquest Procedure

The Coroner's Inquest is the normal way to satisfy the procedural obligations incumbent on England and Wales.[275] The majority of Article 2 cases concerning the UK where the Court found a violation with regards to the procedural limb were those which deviated from the coroner's ordinary procedure.

In *McCann v The United Kingdom* (1995),[276] widely known in the UK as the *Gibraltar Shootings Case*,[277] was pivotal in reforming the manner in which inquests are carried out. One must keep in mind the political climate in which the events unfolded, when tensions between Ireland and England were at their peak. In brief, the English authorities obtained intelligence that the IRA were planning a terrorist attack on Gibraltar by using a car-bomb. Three individuals were murdered, on the premise that they were going to detonate the bomb in question. An inquest was opened by the Gibraltar Coroner, and the jury's verdict was that of a lawful killing.

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[271] *Dove v Assistant Coroner for Teesside* [2023] EWCA Civ 289.

[272] Bridget Dolan KC, 'Are presumptions and burdens of proof relevant in inquests? Insanity and unlawful killing considered' (UK Inquest Law Blog, 15 January 2024) <https://www.ukinquestlawblog.co.uk/ > accessed 15 January 2024.

[273] Paul Matthews and others (n 230) 21-14.

[274] Baker David, 'Deaths after police contact in England and Wales: the effects of Article 2 of the European Convention on Human Rights on coronial practice' (2016) Vol 12 Issue 2 International Journal of Law in Context, 162.

[275] Paul Matthews and others (n 230) 28-18.

[276] *McCann and Others v The United Kingdom* (n 108).

[277] June Tweedie and Tony Ward, 'The Gibraltar Shootings and the Politics of Inquests' (1989) 16(4) Journal of Law and Society 464.

In its assessment, the Court agreed with the Respondent State that it is not within its remit to decide what form such an investigation should take and under what conditions it should be conducted, and it did not contest that public inquest proceedings did in fact take place.[278] In fact, the Court found no shortcoming with the coroner's inquest in and of itself, as the procedure is capable of delineating the facts and is conducted in the public realm.[279] However, because the anti-terrorist operation was not planned to minimise lethal force as much as possible, such as conducting an arrest operation at the border, the Court found a breach of the substantive limb.

The proceedings of *McKerr* (2001),[280] *Hugh Jordan* (2001),[281] *Kelly* (2001),[282] and *Shanaghan* (2001)[283] were conducted simultaneously on the account of their similar nature and provided additional insights into the Court's perspective on the coroner's inquest procedure. Similar to *McCann*, the cases related to deaths caused by lethal force used by British authorities. In all four cases, the ECtHR held that in an investigation in which there are concerns of the State's responsibility to safeguard life under Article 2, '*there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory*.'

In *McKerr*, the Court accepted that '*there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require wider examination*,' as a criminal trial by itself cannot adequately reassure the public and the family members of the lawfulness of killings.[284] The Court concluded that the independent police inquiry by itself was not sufficient to address concerns of public scrutiny as required by Article 2, given that the findings were not published.[285] This demonstrates that certain cases require that the investigating authority's conclusions are published in order to comply with Article 2.

In the assessment relating to whether the coroner's inquest satisfied Article 2, the Court agreed that whilst the inquest provided an adequate level of public scrutiny, its effectiveness was still hindered due to case-specific circumstances.[286] These included the fact that the

[278] *McCann and Others v The United Kingdom* (n 108) §162.

[279] ibid §163.

[280] *McKerr v The United Kingdom* (n 133).

[281] *Hugh Jordan v The United Kingdom* (n 133).

[282] *Kelly and Others v The United Kingdom* App no 30054/96 (ECtHR, 4 May 2001).

[283] *Shanaghan v The United Kingdom* App no 37715/97 (ECtHR, 4 May 2001).

[284] *McKerr v The United Kingdom* (n 133) §137.

[285] ibid §142.

[286] ibid.

coroner's investigation did not extend to the circumstances of the death, even if legitimate and serious concerns have arisen,[287] in Northen Ireland Inquests, a person suspected of causing death may not be compelled to give evidence, which detracts the inquest's capacity to establish the facts relevant to the death,[288] and the jury cannot reach an 'unlawful death' verdict.[289] Nevertheless, the public nature of the inquest proceedings were disputed by the ECtHR and the reasons for finding a violation were cases specific. The amendments to the Middleton inquests which allow the coroner to look into the circumstances which caused the deceased to come by his death have remedied this gap.[290]

Hugh Jordan revolved around a decision not to prosecute by the Director of Public Prosecutions (DPP). The Court found that if the investigation procedure itself raised doubts, and the authority empowered to take decisions to prosecute decides to refrain from doing so, the latter's decision must be based on informed reasons, even if he is not required to do so by law.[291] This is essential in order to maintain public confidence in the judicial system and reassure the public that the rule of law has been upheld.[292] Furthermore, the reasons for a decision not to prosecute are vital to the next-of-kin, as apart from providing redress, it allows them to challenge such a decision.[293] A violation was also found due to the similar case-specific circumstances mentioned in *McKerr* above [294] and reiterated in *Kelly*[295] and *Shanaghan*.[296]

In the context of deaths whilst in State custody, in *Keenan v the United Kingdom* (2001), the Court noted that the inquest procedure satisfies the need for scrutiny required in certain cases, making it compliant with Article 2.[297] However, the Court agreed that the inquest was incapable of providing an effective remedy as it does not allow the applicant the possibility of establishing responsibility.[298] However, as discussed above, the nature of the inquest does not allow any apportionment of guilt.

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[287] Coroner and Justice Act 2009, Section 5(2).

[288] *McKerr v The United Kingdom* (n 133) §144.

[289] *Finucane v The United Kingdom* (n 248) §47.

[290] Chief Coroner, 'Guidance No.5 Reports to Prevent Future Deaths' (14 January 2016) 41.

[291] *Hugh Jordan v The United Kingdom* (n 133) §122.

[292] ibid §123.

[293] ibid.

[294] *ibid* §142.

[295] *Kelly and Others v The United Kingdom* (n 282) §136.

[296] *Shanaghan v The United Kingdom* (n 283) §122.

[297] *Keenan v The United Kingdom* App no 27229/95 (ECtHR, 3 April 2001) §91.

[298] ibid §122.

In *Hemsworth v the United Kingdom* (2013), a breach was found as the inquest procedure began 13 years after the applicant's death. Therefore, because of the unreasonable delay, the inquest process itself was not structurally capable at the time it was held of providing the applicants with access to an effective investigation.[299] This was also seen in *McCaughey*, where the inquest was held over 20 years after the deceased had died,[300] and more recently in *McDonnell*[301] with a 17-year delay. However, one must note that as a general principle, the Court does not tolerate any unwarranted delays into the investigative procedure.

One of the reasons why the ECtHR considers that the inquest procedure is a strong safeguard of lawfulness is the fact that judicial review lies from the procedural decisions of coroners in respect of any mistaken directions given to the jury.[302]

The number of cases concerning procedural obligations concerning the UK which have made it to Strasbourg are few and far in between since the closure of the several inquests relating to the Troubles. The general sentiment, as seen in *McCann* is that the '*promptness and thoroughness of the inquest leaves no doubt that the important facts relating to the events are examined with the active participation of the applicants*'.[303] Furthermore, the English Courts have interpreted Section 2 of the HRA[304] in a manner which places an obligation on national courts to keep pace with the case-law of the ECtHR.[305] The doctrine of precedent used in the England places a further obligation on lower courts to comply, making the coroner's inquest an effective method of discharging the procedural obligations incumbent on the State under Article 2 of the Convention.

However, the recent authorities in the English higher courts are keen to limit the application of Article 2 to appropriate cases. Not all cases engage Article 2 and either way the expectation is that there will be a thorough investigation. In *Morahan*[306] which concerned the suicide of a woman with a history of drug abuse, the coroner refused to hold a Middleton Inquest as she concluded that the authorities did not know or ought to have known of '*a real and immediate risk of death*.'[307] This was confirmed on Appeal, as the Court ruled that '*it is only where the death falls into a category which necessarily gives rise to the*

[299] *Hemsworth v The United Kingdom* App no 58559/09 (ECtHR, 16 July 2013) §73.

[300] *McCaughey and Others v The United Kingdom* App no 43098/09 (ECtHR, 16 October 2013) §131.

[301] *McDonnell v The United Kingdom* App no 19563/11 (ECtHR, 9 March 2015) §87.

[302] *Finucane* (n 248) §77.

[303] ibid; *Hugh Jordan v The United Kingdom* (n 1337) §133.

[304] Interpretation of Convention Rights, Article 2 of the Human Rights Act 1998.

[305] Paul Matthews and others (n 230) 21-03.

[306] *R (Morahan) v Assistant Coroner for West London* [2021] EWHC 1603 (Admin).

[307] ibid §38.

possibility of a substantive breach that the automatic investigative obligation arises'[308] because the coroner's inquest is not *'a surrogate public inquiry.'*[309]

Article 2 is an important safeguard but the system overall works to ensure that all deaths that should be investigated are done so by the Coroner and that this is done in a way that satisfies the principles of open justice which lay at the heart of English law.

3.2.2. Scotland

Scotland is a mixed legal system with continental roots, similar to Malta, has developed its own version of *ad hoc* investigations in cases where there are concerns that the State failed to discharge its positive obligations conferred by Article 2, known as Fatal Accident Inquiries (FAI). This type of inquiry has been developing in Scotland since its inception in 1895. [310]

The Scottish Inquiries into Fatal Accidents and Sudden Deaths Act has recently undergone legislative overhaul in 2016.[311] Under this regime, there is no requirement to hold an *ad hoc* inquest into every death which is violent, natural or the cause of death is unknown.[312] The law states that a mandatory inquiry will be held if the death was a result of an accident, the deceased was acting in the course of the person's employment or occupation, the deceased was in legal custody, or a child required to be kept or detained in secure accommodation.[313] The inquiry procedure in the Sherrif's Court is very similar to the coroner's inquest described earlier.

[308] ibid §49.

[309] ibid §7.

[310] National Records of Scotland, 'Fatal Accident Inquiry Records' (*National Records of Scotland*, 3 February 2024) <https://www.nrscotland.gov.uk/research/guides/fatal-accident-inquiry-records#:~:text=They%20were%20introduced%20into%20Scotland,in%20industrial%20employment%20or%20occupations.> accessed 3 February 2024.

[311] Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

[312] Coroners and Justice Act 2009, Section 1(2).

[313] Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, Section 2.

FAIs are presided over by a member of the Scottish judiciary known as a Sheriff.[314] A Sherrif is much more similar in nature to the figure of the magistrate under domestic law than the coroner. For the purposes of administration of justice, Scotland is split into six Sheriffdoms, to which a Sherrif Principal is assigned.[315] Each Sheriffdom is further divided into sheriff court districts and the Sheriff Principal provides *'for the allocation of business among the judiciary of the sheriffdom'*[316] and *'designate[s] one or more sheriffs of the sheriffdom as specialists in that category of cases.'*[317]

FAIs are investigated and prepared by the Crown Office and Procurator Fiscal's Service (COPFS) Death Unit and are conducted by either an advocate or Procurator Fiscal before a presiding Sheriff. There may be many parties with an interest in the FAI and they are entitled to take part in and be legally represented. However, the main difference to criminal proceedings is that they are not adversarial but more inquisitorial. The object of the FAI, akin to the coroner's inquest is to establish the facts rather than establish guilt or fault.[318]

However, the Sheriff has wide to powers to make findings in fact which may indicate the one or more parties is at fault or at least contributed to the death. COPFS wait until the outcome of an FAI before deciding on whether criminal proceedings are appropriate. Witnesses can be warned that they do not have to give evidence if there is a risk they might incriminate themselves. COPFS can give immunity from prosecution to witnesses before giving evidence if it is more important to establish facts and the causes of deaths rather than bring criminal prosecutions in the public interest. Sheriff's have wide powers to make recommendations about and improvements in systems and processes to ensure or minimise a death happening in the future in similar circumstances.[319]

Sheriffs have jurisdiction over all cases, civil and criminal. Regarding the latter, the Scottish criminal justice system is adversarial. The Lord Advocate, the senior Scottish Law Officer, is head of the COPFS and is responsible for all criminal prosecutions. Prosecutions in the Sheriff Court are investigated, prepared and prosecuted in Court by the local Procurator Fiscal and their Deputes in the Lord Advocate's name.

[314] ibid Section 1.

[315] Scottish Courts and Tribunals, 'About the Sheriff Courts' (*Scottish Courts and Tribunals*, 4 February 2024) <https://www.scotcourts.gov.uk/the-courts/sheriff-court/about-sheriff-courts> accessed 4 February 2024.

[316] Courts Reform (Scotland) Act 2014, Section 27(3)(a).

[317] ibid Section 35(2)(a)(b).

[318] Email from Dr John Mulholland to author (18th April 2024).

[319] ibid.

COPFS decides whether criminal proceedings in the Sheriff Court will be solemn or summary. Solemn proceedings take place on indictment before a Sheriff and Jury. Summary proceedings take place on a complaint before a Sheriff sitting on their own. In summary proceedings, the sheriff may impose an imprisonment sentence not exceeding 12 months,[320] whilst in solemn proceedings, the maximum imprisonment sentence is 5 years.[321]

This competence is comparable to the original jurisdiction of our magistrates, laid down in Article 370 of the Criminal Code. Initially, under the original Criminal Code of 1854, the competence of the Court of Magistrate was limited to offences liable to a maximum of 3 months' imprisonment.[322] Prior to the amendments of Act XIII of 1987, the Court of Magistrates could only take cognizance of cases involving offences that carried a base punishment of imprisonment not exceeding four years,[323] similar to the sheriff's jurisdiction. This competence has steadily increased along the years[324] and nowadays the Court of Magistrates may, subject to certain conditions, adjudicate an offence that carries a maximum base punishment of 12 years' imprisonment.[325] However, Malta and Scotland both being mixed jurisdictions, a similarity can be observed in these two contexts.

[320] Criminal Procedure (Scotland) Act 1995, Section 5(2)(d).

[321] ibid 3(3).

[322] Order-in-Council of 30 January 1854, Criminal Laws for the Island of Malta and Its Dependencies, Article CCCXXXV.

[323] Act XIII of 1987, Criminal Code (Amendment) Act, Article 2.

[324] Maxilene Cassar, 'The Court of Magistrates as a Court of Criminal Inquiry' (LL.D. thesis, University of Malta 2007) 19.

[325] Criminal Code (n 3)Article 370(3)(a).

3.2.3. France[326]

France is a continental legal system *per excellence*. Article 11 of the Code *de procédure pénale* maintains that the criminal investigation is secret. This stems from the inquisitorial nature of French Criminal Procedure.[327] Nevertheless, this secrecy is not unconditional, and exceptions may be made to protect the rights of the victim or suspect, or to uphold the public interest.

Article 85 of the CPP states the procedure for the constitution of the civil party: *'Any person who claims to have been injured by a crime or misdemeanour,'*[328] may file an application to the *juge d'instruction* at any time during the investigation.[329] The civil party has the option to either file the complaint independently if the public prosecutor decides to dismiss the case, or to provide evidence that a three-month period has passed since the complaint was filed. Furthermore, in order to join the case a civil party, the individual must forfeit any civil proceedings initiated on the same facts.[330]

In France the civil party may participate in the *juge d'instruction's* search for the truth. According to Article 82-1, they can request specific investigative actions, such as a medical examination or to order that a specific item relevant to the investigation is produced. The investigating judge must, if he does not intend to grant it, issue a reasoned order no later than one month from receipt of the request.[331]

Interestingly, before 2011, parties could only access documents in their case file through their legal representatives. In *Menet v France* (2005),[332] the ECtHR ruled that this practice did not violate Article 6. The Court reasoned that the restriction, in lieu of the preservation of secrecy of the investigation, was justified, as civil parties, unlike lawyers, were not bound by professional confidentiality rules, thereby falling squarely within the provisions of Article 6§1 of the ECHR. However, in 2011, the French Constitutional Court deemed the restriction to be contrary to the Constitution and the law was amended to

[326] For a detailed account on the French investigation process, kindly consult Angèle Agius, 'The "*In Genere*": Is It An Effective Tool For The Investigation And Prosecution Of Crime?' (LL.D. thesis, University of Malta 2010) 5.2.

[327] Coralie Ambroise-Castérot, Chantal Combeau, 'Criminal procedure in the balance: between secrecy and transparency' (*Cairn.Info*, 2014) <https://www.cairn.info/revue-les-cahiers-de-la-justice-2014-3-page-373.htm#re8no8 > accessed 11 March 2024.

[328] Code de Procédure Pénale (n 23) 85.

[329]ibid 87.

[330] ibid 5, 85.

[331] ibid 81, 82-1.

[332] App no 39553/02 (ECtHR, 14 June 2005).

allow the civil party to request access to documents.[333]

Article 90-1 of the CCP specifies that if the investigation pertains to an offense against a person or an offense against property accompanied by an offense against a person, the civil party has the right to request updates from the *juge d'instruction* every six months. The suspect does not benefit from this right.[334]

Article 77-2 of the CCP grants discretion to the public prosecutor to inform the suspect, the victim, or their legal representatives that a copy of the entire procedural file or specific parts of it is accessible to their lawyers. In cases where individuals are not represented by a lawyer, the files are made available directly to them. This provision also allows the suspect, victim or their counsel, the opportunity to provide any observations they deem relevant, as long as such actions do not pose a risk to the effectiveness of the ongoing investigation.

Article 114 lays down the procedure to be followed if a party to the proceedings is called for interrogation by the *juge d'instruction*. Lawyers must be notified at least five working days prior to the interrogation and the procedural file (*dossier*) must be provided to them no later than four working days before each interrogation. Following such hearing, the file must also be made available to the respective legal representative, as long as it does not disrupt the proper functioning of the investigating office. This copy must be provided within one month from the request.

With regards to public scrutiny of the *dossier*, in 2000, following several prominent individuals being implicated in financial scandals,[335] legislators enacted a provision allowing for exceptions to the general rule of secrecy in Article 11 of the CPP. This provision enables the public prosecutor to disclose objective elements from the proceedings, excluding any assessment of the merits of the charges, when necessary to prevent the dissemination of incomplete or inaccurate information, subdue public disorder, or meet other requirements of public interest. [336]

[333] Code de Procédure Pénale (n 23) 175.

[334] Jean Baptiste Thierry, 'L'information des droits de la défense dans le procès pénal' (*Actu Juridique* 30 April 2019) <https://www.actu-juridique.fr/civil/linformation-des-droits-de-la-defense-dans-le-proces-penal/> accessed 11 March 2024.

[335] Jacqueline Hodgson, *French Criminal Justice, A Comparative Account of the Investigation and Prosecution of Crime in France* (Hart Publishing 2005) 41.

[336] Code de Procédure pénale (n 23) 11.

IV

Assessment of the Maltese Legal System

This section summarises the ECtHR principles previously discussed and assesses whether Malta's current legal framework is compatible with the general principles developed by the ECtHR in respect of the procedural limb of Article 2.

4.1. Next-of-Kin's Effective Access

4.1.1. At What Stage is the Victim Recognised in our Criminal Procedure?

GħSL contends that with the current legislative position, victims are recognised at a later stage than the suspect/accused. As discussed above Article 518 lays down that the *in genere* inquiry remains confidential until it is concluded. It was only thanks to Act III of 2002 that victims were given the right to attend all court sittings, even if they are witnesses,[337] as per Article 410(4)-(6).[338]

> *(4) Without prejudice to the provisions of sub-article (3) and subject to the provisions of sub-article (6), any party injured having an interest in being present during any proceedings instituted by the Executive Police shall have the right to communicate that interest to the police giving his or her particulars and residential address whereupon that injured party shall be served with a notice of the date, place and time of the first hearing in those proceedings and shall have the right to be present in court during that and all subsequent hearings even if he is a witness.*
>
> *(5) Without prejudice to the provisions of sub-article (3) and subject to the provisions of sub-article (6), any person not served with the notice referred to in sub-article (4) and claiming to be an injured party may apply to the court to be admitted into the proceedings as an injured party and if his claim that he is an injured party is allowed by the court that person shall thereupon have the right to be present at all subsequent hearings even if he is a witness.*
>
> *(6) The failure to serve the injured party with the notice of the date of the first hearing after an attempt has been made to that effect or the absence for any reason of the injured party at any sitting shall not preclude the court from proceeding with the trial or inquiry until its conclusion.*

[337] Act III of 2002 Criminal Code (Amendment) Act, Article 88.

[338] Criminal Code (n 3) Article 410(4)–(6).

According to Article 534AF introduced as a transposition of an EU Directive,[339] the accused has a right to access '*any documents*' and '*all material evidence*' of the case in order to challenge a detention at any stage of the criminal proceedings, including pre-trial proceedings such as the police investigation[340] as the documents and evidence are a part of the disclosure. GħSL finds difficulty in understanding why the accused may receive access to the police investigation[341] in order to safeguard their rights whilst the injured party is not offered equivalent protection for their rights.

Therefore, unlike the French system where the family of the victim could apply to join at the information stage where there is no suspect or accused,[342] in the Maltese legal system the family of the victim may be formally recognised as a party, when criminal proceedings have commenced. Article 410(4) allows the injured party to be present in court during sittings, in 'any proceedings instituted by the Executive Police.'

Notably, unlike articles 410(1) and 410(3), articles 410(4) and 410(5) do not specify whether proceedings should have been instituted on the complaint of the injured party[343] or by the Executive Police *ex officio*.[344] Consequently, it is safe to assume that a victim can apply to join court sittings irrespective of how the proceedings came about under our Criminal Code. As stated in *Il-Pulizija vs Piju Camilleri et*:

> *Il-Parti ċivili hi ammessa mil-liġi kemm jekk l-azzjoni titmexxa fuq kwerela di parte kif ukoll jekk immexxija ex officio. Immexxija kif immexxija l-azzjoni, il-parti ċivili għandha d-drittijiet tagħha sanċiti bil-liġi, u l-ammissjoni tal-parti ċivili f'kawża b'ebda mod ma tbiddel l-azzjoni penali ex officio jew tiżnaturaha.*[345]

This can be contrasted with the wording of the law with regard to the victims' right to information under the VCA, where the law specifies that the proceedings should have been instituted as a result of the complaint made by the victim.[346]

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[339] European Parliament and Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

[340] Criminal Code (n 3)Article 534AF.

[341] Note that the police may hold an investigation which is parallel to the *in genere* inquiry under our law as per Article 346.

[342] Code de procédure pénale (n 23) 80-4.

[343] Criminal Code (n 3) Article 410(1).

[344] ibid 410(3).

[345] *Il-Pulizija vs Piju Camilleri et*, Court of Criminal Appeal (Inferior) 5 June 1986 Vol LXX.v.669.

[346] Victims of Crime Act (n 9) Article 6(1).

In order to be admitted to proceedings and have the right to attend all sittings, one must not merely have an interest in the case but must qualify to be considered an 'injured party' or '*parti offiża*'. The injured party may attend court sittings either by communicating his/her interest to the police[347] in order to be served with the summons or by applying to the court to be admitted into proceedings if s/he satisfies the court that s/he qualifies as an injured party. [348]

4.1.1.1. Notion of the 'Injured Party'

Parliamentary debates explicitly clarified that a codified definition of the term 'injured party' was purposefully left out:

> *Għall-ewwel darba l-vittma tar-reat, minkejja li tkun xhud tal-prosekuzzjoni, se tkun tista' tkun preżenti matul il-proċeduri kriminali kollha. [...]*
>
> *Hawnhekk ma rridux nikkumplikaw l-affarijiet iż-żejjed għall-pulizija u allura qegħdin ngħidu li **mhux se nagħmlu definizzjoni ta' injured party** imma se nħalluh kif inhi llum. Illum jeżisti l-konċett ta' injured party fil-Kodiċi Kriminali però m'hemmx definizzjoni tiegħu u se ngħidu li l-qorti tapplika dik id-definizzjoni ta' x'inhu injured party [...]*
>
> *Però d-drafting innifsu ma sarx abbażi ta' xi mudell partikolari, għalkemm dan jeżisti f'ġurisdizzjonijiet oħrajn li jgħidu li x-xhud għandu jkollu d-dritt li joqgħod hemmhekk.*[349]

As indicated in *Il-Pulizija vs Jonathan Ferris*,[350] the concept of the 'injured party' has never been defined by our Courts. However, although a distinction has to be made between the complainant and the injured party, they are both colloquially referred to as *'il-parti ċivili'*, and used interchangeably.[351] However the latter term is never used in our Criminal Code.[352] Article 410 only refers to the *'injured party'* or *'il-parti offiża'*.

[347] Criminal Code (n 3)Article 410(4).

[348] ibid 410(5).

[349] Kumitat Permanenti Għall-Konsiderazzjoni Ta' Abbozzi Ta' Liġi, *Criminal Code (Amendment) Bill* (HoR, 27 November 2001) 1.

[350] 6501/2022 Court of Magistrates (Criminal Judicature) 5 October 2022.

[351] 334/95 *Il-Pulizija v Paul Cauchi*, Court of Criminal Appeal (Inferior) 16 May 1997 2 (not published).

[352] *Il-Pulizija vs Jonathan Ferris* (n 350).

A comparative appreciation of the concept of the injured party reveals that Italian authors, such as Antolisei, have created a distinction between the two terms: the parte civile is the party who has suffered pecuniary damage,[353] whilst the injured party is *'il soggetto passivo del reato'*,[354] defined by the same author as the holder of the interest whose offence constitutes the essence of the crime[355] or simply put, the direct victim. Therefore, a comparative, albeit strict, interpretation of the term injured party under our Criminal Code is that it is referring to the direct victim of the crime, and not the family members of a person as indicated in the VCA or next-of-kin as identified Article 2 case-laws.

However, in certain instances the concept of the 'injured party' has been given a wider interpretation. In *Il-Pulizija vs Kirsten Mifsud*, the Court stated that the application of an NGO to join criminal proceedings as 'parte civile' was in line with Article 410(4) and (5):

> *Fil-fehma ta' din il-Qorti jista' jitqies bħala parti ċivili f'kawża kriminali mhux biss il-kwerelant iżda ukoll kull persuna li b'mod dirett jew indirett tista' tarreka preġudizzju bl-allegata azzjoni antiġuridika tal-imputat.*[356]

In this case, the Court did not conduct any analysis of the comparative significance of Article 410. Although this is in direct conflict with what was decided in the *Ferris* decree discussed above, it does not necessarily mean that one interpretation or the other is right or wrong, as by virtue of the law, the burden to determine whether the applicant is indeed an injured party is placed on the Courts.[357]

In practice, the concept of the 'injured party' is not limited to *'il soggetto passivo del reato'* but to a wide range of persons. Therefore, although the wording operated by Article 410(4) and (5) might seem restrictive, it has consistently been interpreted in a wide manner. Nevertheless, this does not change the fact that Article 410 is only applicable when court sittings have commenced.

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[353] The Italian Code of Criminal Procedure still maintains a disctinction between the '*parte civile (Titolo V)*' and '*persona offesa del reato (Titolo VI)*'.

[354] Francesco Antolisei**,** *Manuale di Diritto Privato: Parte Generale* (16th edn, Giuffre 2003) 848: '*Deriva a quanto si è detto che la figura del danneggiato civilmente non coincide con quella del soggetto passivo del reato. Costui non e dannegiato civilmente se non ha subito un danno risarcibile, mentre i congiunti dell'ucciso sono dannegiati civilmente, pur non essendo possgetto passive del reato che è stato commesso*'.

[355] ibid 188: '*Il soggetto passivo, pertanto, puo definirsi: il titolare dell'interesse la cui offesa costituisce l'essenza del reato*'.

[356] 198/2015 Court of Criminal Appeal (Inferior) 25 February 2019.

[357] Pauline Lanzon, 'The Institute of 'Parte Civile': A Sidelined Injured Party in Criminal Proceedings?' (LL.D. thesis, University of Malta 2013) 60.

The Article 2 case-law reviewed shows that it is not a breach of fundamental rights to require that next-of-kin apply to join the criminal proceedings instituted *ex officio* as a civil party seeking damages.[358] However, it is a breach to require next-of-kin to institute a criminal complaint simply to receive information, as the right to access information is conferred by the status of being next-of-kin.

Therefore, *multo magis*, it follows that as argued earlier on, Article 6(1) of the VCA should be amended in order to allow the next-of-kin, i.e. 'family members' as defined by article 2 of the VCA, the right to receive information on the case regardless of whether the proceedings were instituted because of a complaint by the injured party or *ex officio*. Perhaps, as done in Article 410(4), the legislator may opt to use terminology which does not specify whether proceedings were instituted *ex officio* or on the injured party's complaint.

4.1.1.2. Does Maltese Law Contemplate an Effective Remedy for Effective Access?

Firstly, it is important to clarify that the remedy under consideration pertains to the involvement of next-of-kin in the investigation to safeguard their legitimate interests. Consequently, this examination excludes the debate on whether our law permits the awarding of moral damages and whether their absence constitutes a violation of Article 13.[359]

As established in *Šilih v Slovenia*, the procedural limb of Article 2 starts to run when authorities are informed that a death has taken place and is applicable throughout the period in which the authorities can reasonably be expected to take measures aimed at elucidating the circumstances of a death and establish responsibility for it.[360] This should include pre-trial scenarios such as our *in genere* inquiry, which is held precisely because there has been the discovery of a death, within the circumstances mentioned in Article 551.[361]

Therefore, the obligation to hold an effective investigation, which automatically includes the right of the next-of-kin to be routinely updated, must start from the *in genere* inquiry. In France this was implemented in 2002 by amendments done to the CPP,[362] which gave

[358] *Slimani v France* (n 134); *Selmouni v France* (n 136).

[359] For detail on this please consider Claude Micallef-Grimaud, 'Article 1045 Of the Maltese Civil Code: Is Compensation for Moral Damage Compatible Therewith?' (2011) 4 J Civ L Stud 481; 33/2014 *Jane Aguis vs L-Avukat Ġenerali*, Civil Court (First Hall) 15 January 2015, 32.

[360] *Šilih* (n 112) § 156-157.

[361] Criminal Code (n 3) Article 551.

[362] Code de Procédure Pénale (n 23) 80-4, which was added to the Code of Criminal Procedure by Law No. 2002-1138 of 9 September 2002 (Official Journal of 10 September 2002).

the family the right to be recognised at the *information* stage of proceedings, not committal stage and subsequent amendments which contemplate an updating procedure.[363]

The instances whereby the next-of-kin instituted proceedings under the procedural limb of Article 2 regarding effective access to the investigation in Malta have been few and far in between. Maltese jurisprudence relating to Article 2 mostly focuses on the positive obligation of the State to act as *a bonus paterfamilias* and not the procedural limb *per se*.[364] However, in *Av Peter Caruana Galizia vs Commissioner of Police et*,[365] the central question was whether allegations regarding the Deputy Commissioner of Police's lack of impartiality were sufficient to compromise the independence and effectiveness of the *in genere* inquiry. The Constitutional Court noted that in the particular circumstances of the case, wherein the Deputy Commissioner was subject harsh criticism in articles written by the plaintiff's mother and was also the spouse of a Member of Cabinet, could taint the investigation as the Inquiring Magistrate depends on the information given to him/her by the police, thus breaching the procedural limb of Article 2 of the Convention.

In the public inquiry into Daphne Caruana Galizia's murder, the Board made a brief comment that is of relevance to Article 2:

> *Il-Bord ma jidhirlux illi hemm xi kontroversja dwar dawn l-elementi speċjalment bl-involviment tal-familja ta' Daphne Caruana Galizia li minn barra d-dritt illi jirċievu r-rapport sħiħ tal-Inkjesta skont l-Artikolu 7 tat-Termini ta' Riferenza* ***ingħataw id-dritt li jipparteċipaw bis-sħiħ f'dawn il-proċeduri kif fil-fatt għamlu.*** *Huma kienu* ***involuti f'kull stadju tas-smigħ tax-xhieda inkluż dawk li nstemgħu bil-magħluq u kellhom l-opportunità illi jagħmlu kull domanda pertinenti għal din l-Inkjesta lix-xhieda konċernati.***[366]

In a hypothetical situation, if a Maltese applicant initiates legal action under the procedural limb of Article 2, for the lack of effective access to the investigation, the Respondent State might argue that the remedy outlined by Article 410(4) and (5) and Article 469B of the COCP provides an effective remedy, thus rendering the complaint inadmissible. Therefore, one must assess the effectiveness of the current legislative framework in order to determine whether victims could effectively challenge derogations from the principle that they should be involved enough in the pre-trial stage to safeguard their legitimate interests.

[363] ibid 90-1.

[364] 708/86 *Elvira Abela vs Onorevoli Prim Ministru et*, Court of Appeal 30 December 1994 (unpublished).

[365] 95/2017 Constitutional Court 5 October 2018.

[366] Onor. Imħallef Michael Mallia, Prim Imħallef Emeritus Joseph Said Pullicino, Onor. Imħallef Abigail Lofaro, 'Bord ta' Inkjesta- Daphne Caruana Galizia' (29 July 2021) 21 (emphasis added).

The point of departure is that the next-of-kin acquires a juridical role under Maltese Law from the moment court sittings commence, whereby they may apply to be present in court using the procedure contemplated in Article 410(4). The right of victims to be kept informed of the investigation in the eventuality that the *in genere* inquiry takes longer than expected to be concluded is unheard of in Maltese Law, due to the requisite of secrecy rooted in Article 518. However, as pointed out earlier in this paper, it is submitted that the implementation of the VRD necessitates that a procedure be put in place to facilitate updates unless *'exceptional cases'*[367] dictate otherwise. Furthermore, as seen in *Adrian Agius*[368] the pretext of secrecy may not be used in an unreasonable manner.

The ECtHR requires that for a remedy to be regarded as effective, it must be available at the time of the alleged breach, both in theory and in practice.[369] Furthermore, it must be capable of providing redress with *'reasonable prospects of success and the general legal and political context in which they operate as well as the personal circumstances of the applicants.'*[370]

Given that the rights set out in Article 410(4) and (5) are only available when a person is charged in court, it cannot be regarded as an effective remedy if the applicant's complaint is based on the inadequate access to the investigation. In many instances, the disparity between the closure of the *in genere* inquiry and the start of committal proceedings is well over a year.

A viable alternative is Article 469B(1)(b) of the Code of Organisation and Civil Procedure. Although it is not a criminal law remedy, the Strasbourg Court has held that there are different avenues for ensuring the application of Convention rights, therefore when different legal remedies are available, the State could fulfil its obligations under one of the other remedies.[371] However, as seen in the *Samira Borg*,[372] the Attorney General has consistently maintained a policy whereby denials of access to the *procès-verbal* is not based on a thorough examination of the individual circumstances of each request, but on a practice adopted in general for all cases. Our Courts have decided that this is unlawful.

[367] Victims of Crime Act (n 9)Article 6(1)(d).

[368] *Adrian Agius vs L-Avukat tal-Istat* (n 82).

[369] *Slimani v France* App (n 134) §32; *Selmouni v France* (n 136) §75-76; *Nicolae Virgiliu Tănase v Romania* (n 116) §170; *Estamirov and Others v Russia* (n 155) §73.

[370] *Selmouni v France* (n 136) §76-77.

[371] *Nicolae Virgiliu Tănase v Romania* (n 116) §169.

[372] *Samira Borg vs Attorney General* (n 103) 16.

GħSL condemns such a policy decision as it fails to fulfil the standards expected from a prominent constitutional office. Such policy is not compliant with the spirit of the VRD nor the requirements of Article 13 highlighted above; it is not sufficient to state that a remedy exists if there is no potential of an effective advantage being obtained.[373]

Public officials are under the duty properly to examine a claim before refusing it, whilst giving well-founded reasons for doing so. In *Aksoy v Turkey* (1996), the Court found that the unwillingness of the public prosecutor properly to investigate a claim of degrading treatment brought before it as a violation, highlighting that the authorities' attitude *'was tantamount to undermining the effectiveness of any other remedies'*.[374] Similarly, taking into consideration the legal and political context, the AG's attitude of favouring an archaic policy also undermines the effectiveness of the remedy provided in Article 469B of the COCP.

In any case, the procedure contemplated under Article 469B to allow the inspection or the issuing of copies of the *procès-verbal* should be treated like appeals made to the Information and Data Protection Appeals Tribunal from decisions of the Commissioner of Information and Data Protection.[375] It is submitted that scenarios of making the *procès-verbal* available to the next-of-kin are not very different in nature from an information request made under the Freedom of Information Act, Chapter 496. Under that regime, if the Tribunal considers that a decision notice given by the Commissioner is unlawful or incorrect use of discretion, the Tribunal has the power to accept the appeal and substitute the notice.

Similarly, if during judicial review proceedings of the AG's decision not to allow inspection or distribution of the *procès-verbal*, the Court observes that the AG's decision *'is not properly directed on legal considerations or is unreasonable'*,[376] it ought to be able to grant a concrete remedy and order access to the *procès-verbal* not simply declare it *'null, invalid or without effect'.* [377]

[373] DJ Harris M O'Boyle and C Warbrick, *Law of the European Convention of Human Rights* (Butterworths London 1995) 456 quoted by David Camilleri Podestà, 'The Right to an Effective Remedy' (LL.D. thesis, University of Malta 2004).

[374] *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) §99.

[375] Freedom of Information Act, Chapter 496 of the Laws of Malta, Article 39.

[376] Code of Organisation and Civil Procedur (n 97) Article 469B(1).

[377] ibid Article 469B.

An effective remedy also requires that the national authority be independent and impartial.[378] As already discussed,[379] as matters stand, the independence and impartiality of the AG is not guaranteed, given that s/he is chosen on the binding advice of the Prime Minister and not through an independent body such as the Judicial Appointments Committee of the Commission for the Administration of Justice. This lack of independence may reduce the effectiveness of the remedy stipulated in Article 469B or should be all the more reason why judicial scrutiny of the role should be augmented.

Admittedly, in *Klass v Germany* (1987),[380] the ECtHR has held that where an appeal from a decision of an authority which is not entirely independent is done to an independent body, such as a court of law, such appeal has the requisites to satisfy Article 13.[381] Nevertheless, ensuring the independence of such a significant constitutional office would be in line with the Recommendation of the Venice Commission which suggested a reduction of the powers of appointment vested in the Prime Minister.[382] Furthermore, a fully independent prosecuting authority would help overcome lack of confidence in the judicial system.[383]

A possible remedy to this *impasse* would be to shift the power of appointment from the Prime Minister to the Judicial Appointment's Committee, after issuing a public call, due to the similarity between the role of the AG to that of as 'Chief Magistrate'.[384] In the Bonello Report,[385] the Commission proposed the creation of an 'Authority of Selection of Judicial Services'.[386] Such an Authority would have been a sub-committee of the Commission for the Administration of Justice,[387] responsible for appointing all the judiciary and other roles contemplated in the report, including the AG.[388]

[378] European Court of Human Rights, 'Guide on Article 2 of the European Convention of Human Rights' (last updated 31 August 2022) §154.

[379] See Heading 'Independence and Impartiality of the Attorney General.'

[380] *Klass v. Germany* (n 126) §70.

[381] David Harris et al (n 123) 763.

[382] European Commission for Democracy Through Law (n 80) §106.

[383] *McKerr v The United Kingdom* (n 133) §128.

[384] *Rex vs Debono* (n 73).

[385] Judge Emeritus Doctor Giovanni Bonello, Judge Emeritus Doctor Philip Sciberras, Professor Kevin Aquilina, Doctor Ramona Frendo, 'Rapport tal-Kummissjoni għal Riforma Ħolistika fil-Qasam tal-Ġustizzja' (30 November 2013).

[386] ibid Measure 13.

[387] However, please note that the scope of the Commission was wider, and it proposed further recommendations, therefore its proposals must be read in the context provided.

[388] Judge Emeritus Doctor Giovanni Bonello and others (n 385) Measure 16 and 290.

All in all, whether a breach is found by the Constitutional Court or ECtHR depends on many case-specific circumstances such as the position of the applicant, how the victim's death or serious injury came about, the handling of the case itself, duration of the investigative process, etc. However, as seen in recent cases, the ECtHR has harshly condemned Contracting Parties which fail to have a procedure under domestic law capable of granting next-of-kin access to the case materials **throughout** the investigation.

While GħSL does not wish to imply that all investigations must involve the next-of-kin in every step of the way, as the *in genere* inquiry must be held in secret in order not to prejudice the investigation, there should be a procedure in place whereby the family of the victim is periodically informed of steps taken throughout the investigation, unless the Inquiring Magistrate or Executive Police have reason to believe that the next-of-kin themselves are a suspect, potentially involved, or if reasoned justifications indicate that disclosing information could compromise the criminal investigation. Such a remedy is not contemplated under our domestic penal law.

Whilst in England, Wales and Scotland, a separate procedure ensures that the bereaved are informed of any updates, in France, where there is a system similar to our secretive *in genere*, an amendment was introduced in 2004 whereby if the crime concerns a crime against the person or property, the investigating judge notifies the civil party of any updates every six months. [389] The notification generally contains information on the progress of the investigation. It therefore involves providing the civil party with information on the actions taken as part of the investigation, the evidence gathered, the people heard, any difficulties encountered, the timeframes set for the rest of the proceedings, etc. [390]

Furthermore, although the scope of this policy paper is the protection of the rights of victims in pre-trial proceedings, the Criminal Court delivered judgment *Ir-Repubblika ta' Malta vs Elliot Paul Busuttil*,[391] whereby the Court stated that the '*parte civile*' should be allowed to participate throughout trial. GħSL agrees that the amendments proposed in this paper must be done holistically, taking into consideration the rights of victims in subsequent criminal proceedings.

[389] Code de Procédure Pénale (n 23) 90-1.

[390] WhatsApp Message from Dr Clara Friess to author (20th March 2024).

[391] 61/2023/1 Criminal Court 5 March 2024.

4.2. Public Scrutiny

4.2.1. Where a Positive Obligation under Article 2 Arises

The requirement that certain investigations be conducted within the public realm goes hand in hand with the positive obligation of the State to ensure the safety of individuals, as it ensures accountability. Under ECtHR case-law, the procedural limb of Article 2 is considered to be an obligation of means and it is often reiterated that the choice of means for ensuring the positive obligations under Article 2 is in principle a matter that falls within the Contracting State's margin of appreciation.[392] However, various considerations must be made about the applicability of the requirements of public scrutiny in the Maltese context.

From a Common Law perspective, an observable jurisdictional lacuna exists within our system, and every civil law system for that matter. As summed up by Jervis:

> *The civilian approach is to see death investigation merely as part of the investigation of possible criminal activity, rather than (as in the common law world) as a worthy object of investigation in its own right. There is no sense that the civilian systems are trying to discover causes of death for public health or policy purposes, only for those of criminal justice. It is also reasonably clear that, with a very few exceptions, death in custody or through state agency is not given special attention, again unlike the common law system, which treats such a death as justifying a full inquiry even though on the face of it the death was perfectly natural.*[393]

Maltese law requires the magistrate to conduct an *in genere* inquiry in cases of sudden, violent, or suspicious deaths or deaths in custody (including in the State mental hospital or correctional facility).[394] In the Scottish and English system, these cases would be classified to attract Article 2 obligations, and as such the requirement to not only identify the cause of death but also any recommendations to prevent future deaths and the publication of the results of the inquiry. Maltese law does not provide for this. However, our *in genere* is still an effective manner of establishing the principal facts of a case as its primary objective is ensuring the preservation of evidence to be used in a subsequent criminal trial.

[392] *Lopes De Sousa Fernandes v Portugal* (n 120) §216.

[393] Paul Matthews and others (n 230) 22-77.

[394] Criminal Code (n 3) Article 551.

However, it notably falls short of the requirement of public scrutiny in cases where there are concerns that the State failed in its positive obligations of Article 2. Whilst it is not the objective of the *in genere* inquiry to examine whether there were administrative or legislative shortcomings at play,[395] the *procès-verbal* can easily provide a full picture of the principal facts of the case in order to allay any suspicions or rumours.

In Malta, only a very small number of cases result in the publishing of the *procès-verbal* and this normally follows a public outcry. This phenomenon was recently seen in the Inquiry in the Collapse of the Building in Korradino Industrial Estate and the Egrant.Inc Inquiry. However, there were also instances in the past where the *procès-verbal* was laid on the table of the House.[396] This demonstrates that the principal findings of such cases must be placed in the public forum and the publishing of the *procès-verbal* effectively addresses any legitimate concerns. As summed up in the *Hugh Jordan v The United Kingdom*:

> *The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations*.[397]

As discussed under the heading, 'The Court's Reaction to the Inquest Procedure', the Coroner's Inquest does an excellent job at ensuring public scrutiny of the judicial process. However, practical realities must be taken into consideration. Malta lacks the resources to open an ad hoc inquest for every death that occurs. Furthermore, the Coroner's office is indigenous to Common law legal systems, whilst Malta has retained its continental roots in this regard.

Therefore, it would be unwise simply to import a system which is extraneous and, in practice, incompatible with our legal system. To borrow from the All-Souls Review of Administrative Law in the United Kingdom, in the context of the proposal to introduce in that country a body similar to the French *Conseil d'Etat*:

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[395] Mag. Dr Marse-Ann Farrugia (n 63) 78.

[396] *Procès-verbal* titled 'Fl-atti ta' l-inkjesta dwat il-mewt ta' Jeannette Mifsud tfajla ta' 19-il sena, wara waqgħa minn fuq is-sur fi Triq il-Mediterran, Valletta, fil-31 ta' Diċembru, 2005' per Magistrate Lawrence Quintano Paper Laid No. 5663, 30 October 2006 available at <https://www.parlament.mt/en/paper-laid/?id=5573&page=1&criteria=inquiry&itemsPerPage=10> ; 'A copy of part of the Magisterial Inquiry about bendy buses that caught fire' Paper Laid No. 2051', 13 January 2014 available at <https://www.parlament.mt/en/paper-laid/?id=21176&page=1&criteria=2051&itemsPerPage=10>.

[397] *Hugh Jordan v The United Kingdom* (n 133) §144.

> *'It is not possible, as it were, to pick up an institution, set it down in alien soil, and expect it to flourish'.*[398]

One could consider creating an entire new office, such as a Commissioner or Ombudsman, in order to take up the functions of the coroner. However, after taking into consideration that the coroner has developed in its own respective legal system and, the demands of our legal system, GħSL holds that it is not the most effective option. As already stated, the *in genere* inquiry could be a very effective method of discharging our Article 2 obligations. Furthermore, with the recent reassignment of duties to shift all the inquiries onto a select few magistrates, the proposals would be kept within a defined number of magistrates. [399]

The proposed procedure by GħSL, in order to accommodate the changes consistent with our legal traditions, **would be as follows**:

Upon a sudden death or other circumstances mentioned above, an inquest commences in accordance with Article 551 of the Criminal Code. Whilst drawing up the *procès-verbal* as required by law,[400] the Inquiring Magistrate may include a section addressing preventive measures for similar future incidents with the 'final paragraph containing the findings' required by law.[401] The Inquiring Magistrate must also make recommendations for publication i.e. anonymisations to protect the identity of a witness or the wellbeing of the victim. In cases where the victim's cause of death is suicide, the decision regarding the publication must be made jointly with the next-of-kin.

Once completed, the *procès-verbal* is passed on to the Attorney General, who would evaluate the content, while considering the public interest, and make any necessary redactions or anonymisations for purposes of publication. The Attorney General must provide justifications for such decision relating to content, such as in the interests of national security or in order not to jeopardise the right to a fair trial. Such justifications must also be published.

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[398] Report of the Committee of the JUSTICE – All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice Some Necessary* Reforms, (Oxford Clarendon Press, 1988) 169.

[399] Matthew Xuereb, 'Four new magistrates to focus entirely on magisterial inquiries' (*Times of Malta*, 22 September 2023) <https://timesofmalta.com/articles/view/four-new-magistrates-focus-entirely-magisterial-inquiries.1056619> accessed 3 February 2024.

[400] Criminal Cod (n 3) Article 550(5).

[401] ibid.

The revised document is returned to the Inquiring Magistrate. The ultimate decision regarding the specifics of publication would rest with the Inquiring Magistrate, as s/he is best positioned to consider the needs of the next-of-kin and to mitigate potential external influences.

Publication of the findings would be made available to the public on an electronic platform, such as the court's official website[402] or an ancillary platform and, sent to the Speaker of the House of Representatives. A copy would also be made available to the next-of-kin and any other interested persons as the Inquiring Magistrate deems appropriate while taking into consideration the necessary safeguards for a possible subsequent criminal trial. For example, in the context of a death which occurred in Corradino Correctional Facility, a copy could be sent to the Director of Prisons and Minister for Home Affairs.

4.2.1.1. The Public Inquiry

To address any concerns regarding the potential overlap with the Inquiries Act, the following considerations are made. As stated in the recent Public Inquiry, *'għad-differenza ta' inkjesta maġisterjali, inkjesta pubblika għandha finalità diversa'*.[403]

The Inquiries Act lays down when the Prime Minister or Minister (as case may be),[404] may appoint a public inquiry, while the *in genere* inquiry is mandatorily held by an independent and impartial magistrate when the conditions contemplated by Article 546 of the Criminal Code subsist. The Attorney General's Report on the Inquiry concerning the Foundation for Tomorrow's Schools, highlights the difference between the two:

> *The purpose of in genere proceedings is the judicial of criminal facts or events to determine the precise nature of the offence that has been committed, preserve the material evidence available for future use in any eventual criminal proceedings and the possible of any person against whom further criminal could be taken.*

[402] Currently <https://ecourts.gov.mt/onlineservices/>.

[403] Chief Justice Emeritus Doctor Joseph Zammit McKeon, Charles Deguara, Architect Mario Cassar, 'Rapport tal-Inkjesta Pubblika Jean Paul Sofia li miet fit-3 ta' Diċembru 2022' (28 February 2024) 14.

[404] Inquiries Act, Chapter 273 of the Laws of Malta, Article 3.

> *Other mechanisms (police investigations, internal inquiries, inquiries under the Inquiries Act, by the Auditor General, Parliamentary inquiries, etc) are provided for other inquiries into facts to determine what has actually happened* ***when it is not quite clear whether any wrongful conduct has actually taken place or where it is unclear what the legal nature of that conduct is.***[405]

What our system lacks is that the Inquiring Magistrate's conclusions on cases which are of public concern are never made public. No recommendations are made with regard to prevention of future deaths. This state of affairs does not allow for the requirements of effectiveness and public scrutiny required by Article 2. Moreover, stakeholders often find themselves in a protracted struggle to compel the government to initiate a public inquiry.

4.2.2. Where No Positive Obligation under Article 2 Arises

In other cases, where concerns on the State's compliance with Article 2 do not arise, granting access to the *procès-verbal* to next-of-kin is sufficient enough to satisfy the requirement of public scrutiny. The leading authority in this regard is *Ramsahai v the Netherlands*:

> *Article 2 does not go so far as to require all proceedings following an inquiry into a violent death to be public. As stated in, for example, Anguelova (cited above, see paragraph 321), the test is whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. It must be accepted in this connection that the degree of public scrutiny required may well vary from case to case [...]*
>
> *In addition, given that the applicants were not prevented from making the decision public themselves, the Court takes the view that the requirement of publicity was satisfied to an extent sufficient to obviate the danger of any improper cover-up by the Netherlands authorities.*[406]

[405] Office of the Attorney General, 'Re: Inquiry following a report filed by the Hon. Carmelo Abela M.P. concerning the Foundation for Tomorrow's Schools' Paper Laid No. 2851, 28 February 2005 available from <https://www.parlament.mt/en/paper-laid/?id=2760&page=1&criteria=inquiry&itemsPerPage=10> (emphasis added).

[406] *Ramsahai and Others v The Netherlands* (n 168) §353–354.

The latter paragraph accurately reflects realities which may even be observed in Malta.[407] In order for this requirement to become a reality, the AG's outdated policy on requests made under Article 469B(1)(b) to access the *procès-verbal* addressed above must be abolished, and the legislator should engage in serious discussions on the review procedure outlined above.

4.2.3. Considerations on Crimes Against the Public Interest

This policy paper has focused on the position of victims throughout the judicial process. However, there are instances where there is no injured party proper, as is the case of crimes against the administration of justice or crimes against public trust. These include instances where persons occupying important roles of administration or persons employed in the public service or public sector, abuse of their position for personal gain, or are accused of bribery, corruption, embezzlement of public funds and money laundering, etc.

Although they do not fall under the procedural limb of the right to life, such crimes are still considered to be of public interest. An example of such an occurrence would be the EgrantInc. Inquiry.[408] These should also be subject to the requirement to publish the *procès-verbal*, as it is necessary to maintain public trust and reassure citizens that the rule of law is being upheld –a fundamental pillar of a democratic society. Given that the subject-matter concerns the conduct of public officials, the publishing of this category of *procès-verbal* should not benefit from any anonymisations to ensure public scrutiny.

Furthermore, in cases of public controversy, where the AG issues a *nolle prosequi*, as in the Pilatus Bank Inquiry,[409] the public would have the opportunity to have access to the full picture, including the considerations made by the inquiring magistrate. Thus ensuring that if the Attorney General's determinations differ from the conclusions of the *in genere* inquiry, they were based on relevant considerations at law.

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[407] Semira Abbas Shalan, 'Rizzo Naudi family finally receives magisterial inquiry conclusions' *Malta Independant* (11 August 2023) <https://www.independent.com.mt/articles/2023-08-11/local-news/Rizzo-Naudi-family-finally-receives-magisterial-inquiry-conclusions-6736254042> accessed 27 January 2024; Karl Azzopardi, 'Miriam Pace magisterial inquiry: Magistrate highlights clear negligence by project's architects and developer' *Malta Today* (24 January 2021) <https://www.maltatoday.com.mt/news/national/107239/miriam_pace_magisterial_inquiry_magistrate_highlights_clear_negligence_by_projects_architects_and_developer_> accessed 27 January 2024.

[408] Mag. Doctor Aaron Bugeja (n 51).

[409] Robert Aquilina, *Pilatus: A Laundromat Bank in Europe* (Midsea Books 2023); Marc Galdes, 'Updated: Robert Aquilina alleges 'cover-up' after Pilatus Bank officials protected from prosecution' *Independent* (15 April 2015) <https://www.independent.com.mt/articles/2023-04-15/local-news/Full-Pilatus-Bank-magisterial-inquiry-published-in-Robert-Aquilina-s-new-book-6736251111> accessed 28 January 2024.

Given that Article 469B only allows for the injured party to institute such proceedings, our legislator should expand the notion to allow for persons with sufficient interest to institute such proceedings. As stated in GħSL's previous policy paper, sufficient interest would allow for NGOs and pressure groups to 'proceed with a judicial review case, if it proves that as an association it has an interest in the case which could be either a representative interest or one related to the public interest.'[410] The definition proposed is reproduced below:

> *"sufficient interest" shall not only include personal interest in the proceedings but any representative interest, that is to say where the plaintiff represents a social group or the public interest.*[411]

[410] Għaqda Studenti tal-Liġi (n 98) 20.

[411] ibid 3; For more detail on the notion of sufficient interest, kindly consult 'The Judicial Review Act' (n 98) 68–71.

Proposals

Throughout this paper, GħSL has proposed various amendments. For ease of reference and for completeness' sake, they are reproduced below:

Victims of Crime Act

The Victims of Crime Act (VCA) came into force in 2015 in order to implement the Victims' Rights Directive. While its provisions enunciate important principles that safeguard the rights of victims, the Act was not drafted in a manner consistent with the spirit of the Directive and was not tailored to the context and needs of our criminal law proceedings.

Thus, GħSL Proposes:

1. **The in genere inquiry should be included within the ambit of 'criminal proceedings' under the VCA.**

2. **Victims under the VCA should be able to benefit from the right to receive information without having to prove that they suffered some sort of harm as a result of the direct victim's death.**

3. **In relation to Article 6 of the VCA, victims should benefit from the right to receive information automatically, without a complaint having to be instituted as a result of a complaint made by the victim and the term 'criminal proceedings' should encompass the in genere inquiry.**

4. **In relation to Article 8 of the VCA, the Attorney General should also have the obligation to inform victims of a decision not to prosecute and give reasons therefor.**

Criminal Code

The Criminal Code has not seen any substantive amendments in relation to victims' rights for more than 20 years. Given that the Maltese system of the investigation of crime is based on the inquisitorial system, investigations are kept confidential until court sittings commence.

However, the case-law on the European Court of Human Rights (ECtHR) demands that the next-of-kin are furnished with enough information to safeguard their legitimate interests and that there is an element of public scrutiny when there are concerns that the State failed to fulfil its positive obligations under Article 2 of the European Convention of Human Rights. Other jurisdictions such as England and Wales, Scotland and France have had legislative intervention in order to ensure that their criminal justice system keeps up with the times and safeguards the rights of victims and the public.

While this paper focuses on the rights of victims and society in relation to the *in genere* inquiry, the legislator should introduce amendments in a holistic manner, looking at subsequent stages of criminal proceedings:

5. **Next-of-kin should be furnished with documents and materials from the police investigation once disclosure is provided to the accused as per Article 534AF of the Criminal Code.**

6. **Next-of-kin should receive routine updates about the ongoing magisterial inquiry or police investigation including the measures taken so far and timeframes set for the rest of the proceedings, as long as this does not prejudice the effectiveness of the criminal investigation itself.**

7. **The procès-verbal drawn up as indicated in Article 550(5) of the Criminal Code as a result of a scenario contemplated in Article 551 of the Criminal Code should be published.**

8. **Publication of the procès-verbal when the subject matter of the in genere are crimes which involve the abuse of important roles of administration or persons employed in the public service or public sector.**

Constitution and The Attorney General Ordinance

The Attorney General plays a very important role in the administration of criminal justice. In order to reflect his/her quasi-judicial role, allow for an effective remedy and help address lack of confidence in the judicial system, the method of appointment should be altered:

9. **The Attorney General's appointment should reflect the constitutional independence imposed by Article 91 of the Constitution and therefore should be made by the Judicial Appointments Committee within the Commission for the Administration of Justice.**

Code of Organisation and Civil Procedure

Article 469B of the Code of Organisations and Civil Procedure is a relatively new addition. Judicial review of decisions taken by the Attorney General is important as the latter exercises some of the most important public functions. However, as the article stands today, it is incapable of providing a concrete remedy to those persons wishing to access the *procès-verbal*:

10. **Given that Article 550A(4) allows the Attorney General to access the procès-verbal at any time, it ought to be clarified that an action under Article 469B may only be brought after the procès-verbal has been drawn up and concluded, given that the in genere inquiry is a secret process.**

11. **Article 469B(1)(b) should be subject to an extensive review procedure whereby if the Court observes evidence of manifest bad faith or unlawfulness, it ought to be able to grant a concrete remedy i.e. order the procès-verbal to be published and not simply declare it 'null, invalid or without effect.'**

12. **Article 469B should expand the notion of juridical interest to allow for persons with sufficient interest to institute such proceedings.**

Concluding Remarks

The aim of this paper is to assess the development of our domestic law in relation to the investigation of crime. Given that the *in genere* inquiry has evolved within the framework of the Maltese legal system, GħSL reviewed international benchmarks set by the European Court of Human Rights (ECtHR) and how other legal systems sought to protect the rights of victims and society, in order to propose well-researched solutions for the legislator's consideration.

Although the exercise of the criminal action is vested in prosecutorial bodies, it is nonetheless a public action. The field of criminal law must be dynamic in order to respond to changing societal norms. In 1909, when our laws were undergoing several amendments by the British administration, Crown Advocate Vincenzo Frendo Azzopardi stated the following:

> *I am sure all the members of this Council, especially members who belong to the profession to which I have the honour to belong, will readily admit that the nature of Criminal Laws is such that it must move with the times and such laws accordingly require very often revision. These laws, as generally all other laws, are made for the times not the times for the law.*[412]

Criminal justice strikes in the very heart of society, as harm against one individual has repercussions across all society. GħSL believes itis time to reconsider how criminal justice is carried out, to acknowledge that administration of justice is not simply the relationship between the suspect or accused and the Courts of Justice, but also includes the victim, their family and society as a whole.

GħSL is looking forward to engaging in meaningful discussions with all stakeholders to review the above proposals.

[412] COG Deb 30 June 1909 (Sitting 65) Vol XXXIII 1410.

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English Translation of Maltese Quotes

Footnote 30

That in the case that the Court has before it today, the complaint of the applicant mostly related to the time before the formal charges were issued against him and he was charged. But this does not mean that those episodes fall outside the scope of article 39 of the Constitution. So, for example, where the applicant's complaints relate to the lack of a lawyer's assistance when taking of his statement, the fact that they occurred before he was brought before court and charged with crimes does not mean that the complaints arise out of the considerations of the mentioned article. If it were so, no action of complaint of a violation of the right to a proper hearing could be brought regarding statements made in violation of the provisions of the law and without giving the person access to assistance with a lawyer.

Footnote 57

In our system of the Duty Magistrate (that the law never refers to as so), the Inquiring Magistrate, of the *in genere* and *procès-verbal*, although inspired by other existing systems, is particular to our country. Therefore, one must be careful to apply only the rules indicated in our law to this subject matter.

Footnote 58

The Inquiring Magistrate is trusted with the tasks delineated by law, to investigate a crime or the facts reported to him and/or to keep access to what the law foresees and finally, to compile the *procès-verbal* regulated by law and give it its probative value. All of this forms an integral part of the general process of searching for the truth and consists primarily in the gathering and preservation of all evidence, direct and indirect, that the Inquiring Magistrate manages to identify as relevant to the facts or crime that is being investigated.

Footnote 59

As such, and contrary to what goes on in continental systems, the Inquiring Magistrate is not a part of the police and much less the prosecution, actually it is clear that in our system forsees that in a number of serious cases specified by law, the investigation, gathering and preservation of evidence are not only done by the police, but also from persons who are independent from the executive power of the State and that guarantee that the search for the truth was not interfered with by any interest except the national interest and that everything is carried out according to what is right and in a just manner. Lord Tucker, in an appeal in from of the Privy Council in R vs George Terreni, described this institute as a good way of preserving evidence.

Footnote 60

It is definitely not the function of the Inquiring Magistrate to decide the who is definitely or probably responsible for the investigated crime, because as said he is not a court, neither as a Court of Judicial Police nor as a Court of Criminal Judicature. However, it is certainly his function to decide whether firstly if there is sufficient evidence that a crime has occurred and secondly if there is enough evidence to prove that someone particular may possibly be liable to criminal proceedings, independent of the appreciation of facts.

Footnote 62

Under Maltese law, the *in genere* inquiry is an exercised completed by the Inquiring Magistrate where the primary scope of said exercise is to collect and preserve evidence about the facts which occurred and that give rise to an investigation from the same, to establish whether a crime occurred, thus said evidence can be brought forth throughout the pertinent criminal proceedings.

Footnote 63

From this article it is clear that there are 3 requisites so that an *in genere* inquiry commence:

1. That a report, information or complaint is made to the Magistrate.

2. For an offence liable to the punishment of imprisonment exceeding three years, and

3. the subject-matter of the offence still exists.

Footnote 83

This Court acknowledges that in certain areas of criminal procedure, the powers of the Attorney General go far beyond what one considers to be reasonable and certainly as a result of said powers, the stubbornness of the Attorney General is causing useless delay of criminal proceedings because of unnecessary delay, obstinacy which is out of place and inefficiency in the management of criminal proceedings… this Court hopes that in the near future, legal amendments are carried out in a holistic manner so that the unilateral and indisputable prerogative of the Attorney General in various areas are limited and this situation is remedied so that the archaic procedures utilised nowadays to delay and disturb criminal proceedings are removed once and for all.

Footnote 94

The decision of the Attorney General in analogous cases is subject to "review" within the parameters of Article 469A of Chapter 12 of the Laws of Malta.

Footnote 104

An essential element of exercise of discretion is that the authority who exercised discretion would have taken into consideration all relevant considerations of the case.

Footnote 343

The civil party is admitted into the court proceedings if the action is initiated on complaint of the injured party as well as if it is initiated *ex officio*. Either way, the civil party has its rights safeguarded by law, and the admission of the civil party into proceedings does not change the action *ex officio* or disnature the case.

Footnote 347

For the first time, although the victim of the crime is a witness of the prosecution, she will be able to be present throughout the entire criminal proceedings.

We do not wish to overcomplicate things for the police; therefore, we are saying that we should not create a definition of the 'injured party' however we shall leave things as they are. Today there exists the concept of the 'injured party' in the Criminal Code, however, there is no definition, and the court should apply the definition of who is the injured party.

Although in other jurisdictions a witness is allowed to remain in court, the drafting itself was not based on a particular model.

Footnote 354

This Court believes that the civil party in a criminal case is not only the complainant but also any person who directly or indirectly may suffer a prejudice from the alleged illegal action of the defendant.

Footnote 365

The Board is not under the impression that there exists some controversy, especially with the involvement of the family of Daphne Caruana Galizia, whom apart from receiving the full report in accordance with Article 7 of the Terms of Reference, were given the right to fully participate in this procedures, which is what they did. They were involved in every stage of examination of witnesses, including those that were heard in camera, and they were given the opportunity to make every question relevant to the Inquiry to the witnesses involved.

Footnote 401

As opposed to the magisterial inquiry, the public inquiry has a different scope.

The Rights of Victims and Society in the *In Genere* Inquiry

A Policy Paper published by the

Għaqda Studenti tal-Liġi

In this policy paper, the Għaqda Studenti tal-Liġi interrogate the situation of victims of crime in relation to magisterial inquiries to determine how the rights of these victims can be improved. To arrive at a list of proposed suggestions, the Law Students' Society traces the development of victims' rights in Malta, mainly in the Criminal Code and in the Victims of Crime Act, and outlines the current state of play in so far as victims of crime's rights are concerned as to their limited participation in the in genere inquiry, minimal access to the acts of the magisterial inquiry whilst the inquiry is still ongoing and after its conclusion, the locus standi of the Attorney General in the inquiry especially once the inquiry is concluded, and the latter officer's power to take further action in the proper interest of criminal justice and of victims of crime. Sometimes the interests of the Attorney General do not tally with those of victims who will then have to call upon the courts – through an action for judicial review of the Attorney General's decision – to hold the latter accountable. The policy paper further reviews pertinent case law on the subject.

The policy paper examines pertinent international standards on victims' rights, especially the case law of the European Court of Human Rights. It also evaluates similar laws in England and Wales, Scotland, and France to learn from the experience of these foreign jurisdictions, in particular, the improvements made in their criminal justice system to enhance victims' rights. The policy paper then examines Maltese Law on victims' rights from the perspective of Article 2 of the European Convention on Human Rights and concludes by making valid proposals on how Maltese Criminal Law can be ameliorated in the light of the foreign law surveyed in this study, the case law of the European Court of Human Rights, and the deficiencies extant in Maltese Law. The law maker is provided in this policy document with pertinent and valid food for thought to charter the way ahead for the Maltese criminal justice system.

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