The Impact that the Judgment of the European Court of Human Rights in *De Legé v The Netherlands* May Have on Maltese Tax Law

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This article was originally submitted as part of PBL3003 and is being reproduced with the author's permission. In it, **Jacob Gatt** examines the ECtHR judgment of *De Legé v The Netherlands*, focusing on the privilege against self-incrimination in the financial law sphere. The article also highlights the legal concerns and lack of clarity of Maltese law in this respect, anticipating potential pitfalls and the necessity for legal revision.

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1. *De Legé v The Netherlands*: Background

The crux of the European Court of Human Rights (ECtHR) judgment, ***De Legé v The Netherlands***, revolved around the privilege against self-incrimination, arising from Article 6(1) of the European Convention on Human Rights, within a financial law context.

In invoking this privilege, applicant Mr Levinus Adrianus de Legé claimed that upon his obligation to provide the requested information concerning foreign bank accounts and bank statements in this regard, his rights had been violated.[1]

The applicant claimed that due to the threat of substantial penalty payments, he had, as a result, been coerced into handing over self-incriminating information.[2]

2. The Privilege Against Self-Incrimination: Definition & Application

The main purpose of the privilege against self-incrimination is to safeguard a person's right to remain silent or preclude him from being compelled to disclose information which may be used against him.

The ECtHR has made it manifest that this right, like others protected under the European Convention on Human Rights, is not absolute and that the subject matter of the information sought determines the applicability and extent of this right.[3] Such right is not absolute since it may be taken advantage of in order for one to escape liability, and hence it is applicable only to relative situations.

Moreover, notwithstanding the fact that this privilege is not expressly mentioned under the Convention, it is generally accepted as an international norm and it is required for a fair hearing under Article 6.[4]

The ECtHR in *De Legé v The Netherlands* delineated the two requirements necessary for the privilege against self-incrimination to be applicable. These involve:

- the use of coercion or compulsion,
- on a person who is either already subject to criminal proceedings, or

[1] Registrar of the European Court of Human Rights, 'Forced Disclosure of Foreign Bank Account Documents Did Not Amount to Disrespect of Privilege Against Self-Incrimination', 4 October 2022 (Press Release) 1.
[2] ibid 2.
[3] Mark Berger, 'Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence' (2007) 5 European Human Rights Law Review 514, 515.
[4] *JB v Switzerland* App no 31827/96 (ECtHR, 3 May 2001) para 64.

to the anticipation thereof.[5]

The latter condition may also involve information obtained used in a subsequent criminal prosecution.

Moreover, due to the rule, or rather the exception, previously established in the *Saunders v UK* judgment, the Court determined that Mr De Legé wasn't deprived of a fair trial despite satisfying the necessary double requirement. The 'Saunders Exception' delineates that the privilege against self-incrimination, '*does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, but which has an existence independent of the will of the suspect*'.[6]

Moreover, despite the ECtHR not ruling in favour of the claimant relying on the privilege against self-incrimination, it certainly did not rule that such privilege cannot be successful in these types of cases, but rather that such right is not applicable with respect to documents previously existing and independent of the will of suspect, as was the relevant case.

The point, which is troublesome regarding the interpretation of this privilege in the financial law realm, is the fact that Maltese law does not even consider the possibility of applying this privilege as a defence when it comes to action relating to tax law, while the interpretation thereof has not yet been addressed in our national courts.

Hence, one anticipates that issues on this position are imminent, the extent thereof not certain until such privilege within this sphere is raised in a national court of law.

3. The Privilege Against Self-Incrimination: The Local Scene

Since Malta is a member of the Council of Europe, and consequently a signatory to the European Convention on Human Rights, the privilege against self-incrimination is generally protected.

Moreover, the extent of applicability and interpretation of such privilege is still not clear in every legal context. Prof. Ivan Sammut outlines that while the privilege against self-incrimination exists in the Maltese criminal law, in other legal matters this privilege is 'more blurred'.[7]

In the Criminal Code, Article 366E outlines the right to silence and not to incriminate oneself. Moreover, sub-article 2 of the same article, holds that the

[5] Sjors Ligthart, 'De Legé v The Netherlands: Clarifying the Privilege Against Self-Incrimination?' (*Strasbourg Observers,* 13 December 2022) <https://strasbourgobservers.com/2022/12/13/de-lege-v-the-netherlands-clarifying-the-privilege-against-self-incrimination/>.

[6] *Saunders v United Kingdom* App no 19187/91 (ECtHR, 17 December 1996) para 69.

[7] Ivan Sammut, 'Evidence in Civil Law - Malta' <https://www.pf.um.si/site/assets/files/3223/evidence_in_civil_law_-_malta.pdf> 33.

authorities may, despite this privilege, gather evidence which '*may be obtained through the use of legal powers of compulsion which exist independently of the will of the suspects or accused persons*'.[8] This seems to align with the latest interpretation of such privilege in *De Legé v The Netherlands*, resting on the 'Saunders Exception'.

4. The Income Tax Management Act (ITMA) in light of *De Legé v The Netherlands*

Nevertheless, the aforementioned interpretation refers to cases of staunch criminal law, and as Dr Ligthart delineates, this privilege should be interpreted differently in the sphere of financial law.[9]

So, whilst the ECtHR did not rule in favour of the claimant on the privilege against self-incrimination, it certainly took such defence into account. Furthermore, this established the requisites which could, in future cases related to taxation, serve as a basis for the defence of this right.

4.1 Article 10A ITMA

Moreover, in this respect, the ITMA, not only fails to mention such privilege in the event of the request of information or documents, such as in Article 10A, but even more so makes it manifest that such article is applicable '***notwithstanding***' any restriction to disclose information. Hence, whether or not the legislator by the phrase '***restriction relating to the disclosure of information***'[10] is including the possibility of the invocation of this privilege, it is made clear that this article shall nonetheless take effect.

Hence, it seems evident that the legislator under Article 10A(2) made explicit the obligation to disclose the requested information, no matter the defence which one may bring against it.

This naturally comes about at a stark contrast with what the courts have held in the *De Legé* ruling, where it manifested that the defendant may in fact be relieved of his obligation to hand over documents, bank accounts or any other books, if he satisfies both requisites of the relevant privilege, and that such information was not pre-existing or independent of the will of the subject.

4.2 Article 50 ITMA

On the same vein, Article 50 of the ITMA, delineating the penalties for failure to comply with notice or request of such documents, bank statements,

[8] Criminal Code, Chapter 9 of the Laws of Malta, Article 366E(2).
[9] Sjors Ligthart (n 5).
[10] Income Tax Management Act, Chapter 372 of the Laws of Malta, Article 10A.

etc, similarly fails to address whether there can be the restriction, or rather defence, of non-self-incrimination in order for one to be free of such penalties.

The legislator uses the wording '***without sufficient cause***'[11] which, however, is a wide term that is not quantifiable, and whether the use of one's privilege falls under this term remains uncertain. Moreover, if the legislator wanted to delineate the possibility of such defence, he would have probably made it manifest.

Moreover, the lack of clarity within this sub-article, due to its broadness, is also considering the judgment in question 'incorrect', or rather incomplete, incoherent, and unclear.

Therefore, the lack of applicability of this privilege in relation to income tax matters brings about a certain sense of incongruity in relation to the ECtHR's interpretation of this privilege, namely in the *De Legé* judgment, where it made evident the importance of considering this privilege as a possible avenue even in the realm of financial law.

It may be argued that the explicitness of such privilege may not be necessary in this particular context, since such right should be typically presumed in a State signatory to the Convention. Nonetheless, the lack of clarity and interpretation put doubt in the mind of the decision-makers. Even more so given that the ITMA provisions in this regard seem to dismiss any possibility of the individual invoking a defence opposing the request to furnish the Commissioner with any documents or bank statements.

Hence, one can argue that while Maltese law caters for this privilege under the Criminal Code, being seemingly in line with ECtHR judgments, in the context of financial law, the legislator fails to address this potential consideration, whilst the *De Legé* judgment, as others which preceded it, made it clear that such privilege can very much be successful in this realm.

Moreover, it is pivotal to note that, although our law and jurisprudence address the privilege against self-incrimination in the criminal law realm, this does not render such definition directly applicable to financial law matters. Berger delineates that when information or documents are sought by the state for purposes not strictly or solely criminal, the analysis is different from when they are so.[12]

Hence, in light of this statement, one would be naïve to assume that in the Maltese realm, the privilege underlined in the Criminal Code is to be applied in the same manner in situations of financial law. This idea was also echoed in the *De Legé* judgment which, as aforementioned, also made clear the distinction of applicability of this privilege in strict criminal law matters versus in other

[11] ibid Article 50.

[12] Mark Berger (n 3).

realms of law.

This further highlights the urgency for national law in this context to undergo a revision, to keep in line with the standards of the ECtHR and not leave such situations uncatered for, which would nonetheless have to be dealt with in the future.

5. The Effects of ECtHR Rulings on Council of Europe Member States

In light of Malta's membership in the Council of Europe, decisions taken by the ECtHR have, in turn, an indirect impact on our case law, and possibly on our law.

Although ECtHR judgments are exclusively binding and enforceable on the party of the concerned state, they may nevertheless establish precedent on human rights, which in turn influences the way Council States interpret such rights. Moreover, Article 46 of the Convention delineates that ECtHR rulings are not binding *erga omnes*, but *inter partes*,[13] and hence, not directly binding on the states not party to the judgment.

However, one can argue that the ECtHR's rulings may result in national legislative change within those states not directly involved, as outlined by the Court in the *De Legé v The Netherlands* judgment that its ruling '*will provide national jurisdictions with guidance as to the applicability and scope of the privilege against self-incrimination*'.[14]

On this vein, the principle established by the ECtHR of '*res interpretata*' connotes the idea that the outcome from a ruling is to be taken into account, whether or not it was party to the relevant case,[15] and should serve as impetus for reform of national law and practice in order to prevent such issue from being raised again in a national court.

This principle is of much relevance. It will not be beneficial for either party if the national courts do not take a clear position in pursuance of this principle on points of law which may not be entirely clear and cohesive in regard to their national law and practices.

This is because future situations, which have already been dealt with by the ECtHR, arising in national courts would have already been adhered to and amended to be in line with the application and interpretation of such Court, if the principle is complied with initially.

[13] G Ress, 'The Effect of Decisions and Judgements of the European Court of Human Rights in the Domestic Legal Order' [2005] Texas International Law Journal.

[14] *De Legé v The Netherlands* App no 58342/15 (ECtHR, 4 October 2022) para 53.

[15] Oddný Mjöll Arardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgements of the European Court of Human Rights' (2017) 28(3) European Journal of International Law 820, 827.

Moreover, one could argue that similarly, in light of the *De Legé* judgment, Malta should, in following the principle of *res interpretata*, either make such amendments in order to comply with the ECtHR's rulings, or else convey such interpretation of privilege in the financial realm once it is brought up in a court of law.

Unfortunately, knowing the slow-moving rate at which a law in Malta usually takes to change, one feels that the route taken will be that, either the national courts will invoke such change in practice while initially leaving the law as is, or eventually face a judgment directly concerned in the ECtHR, which will then eventually lead to a binding *inter partes* obligation to comply with such ruling.

6. The Repercussions on Maltese Tax Law

The fact that the ECtHR's ruling, in consideration of one's claim of non-self-incrimination in such financial law situations, is in contrast to what is found in Maltese law, in which it is not even considered, but rather, the law specifically opposes any such possibility, may lead to a potential situation where the courts will have to address this discrepancy between what the ECtHR's position is on this point, and our local law's position which one can consider as incorrect in this respect.

The question is 'when', rather than 'if', the incorrectness of our law will come to light. Eventually, once a national law case arises and the plaintiff will in turn file a case in front of the ECtHR alleging that his privilege has been breached, there will be the recognition that, having satisfied all the requisites of such privilege, such defence may have been utilised in order to restrict oneself from giving out such information, leading to a situation where the ECtHR in such ruling against the State of Malta, outlines a violation of its Convention.

In turn, this would put Malta under pressure to reform its legal provisions, by amending or repealing the relevant provisions, and change the judicial practice in order to remain in conformity with the standards set by the ECtHR.

Furthermore, the ECtHR is not empowered to overrule or annul national laws or decisions,[16] since it is not a court of appeal. However, judgments are binding on the countries concerned in the specific case who have an obligation to comply with the ruling.

The change of legislation in this regard stems from the fact that, once a violation has been ruled against a State, the latter has to ensure that no such violation occurs again, as the ECtHR may bring further judgments against it.[17]

[16] Council of Europe, 'European Court of Human Rights Questions & Answers' <https://www.echr.coe.int/documents/d/echr/questions_answers_eng> 11.

[17] Council of Europe, 'The ECHR in 50 Questions' <https://www.echr.coe.int/documents/d/echr/50questions_eng> 10.

This is testament to the very possible situation in the future, wherein due to an ECtHR judgment finding the State in violation of this right in regard to the articles under the ITMA, the State will have to eventually amend its legislation in order to be aligned with the Convention.

An ECtHR decision versus the State usually results in change, typically through the implementation of more extensive 'general measures',[18] including legislative amendments, or else change within the practice of the national courts in order to prevent similar human right violations in the future.

The scenario where a State chose to change its judicial practice, rather than the law itself, was depicted in the aftermath of ***Heaney and McGuinness v Ireland***, wherein the ECtHR held that the State had violated the applicant's privileges, particularly under Article 6(1) of the Convention,[19] where despite initially not repealing the offending section in the law, it was no longer invoked in practice.[20]

Moreover, one may remark that while other States within the Council, such as the UK, are commonly held to have a good record in implementation of ECtHR judgments,[21] one contrasts this with the position in the local scene. Here, as aforementioned, it is argued that change in legislation is often slow and hence, once a judgment of this sort comes to the fore concerning Malta, one would be correct in assuming that it would probably rather follow in the lines of Ireland, as in the case of *Heaney and McGuinness v Ireland*, where the change is done in practice, rather than in the law itself.

7. Conclusion

The extent of the effects of the *De Legé* ruling in regard to the sphere of Maltese Tax Law is nonetheless uncertain, and so is the possible response of the national courts. Moreover, one surely anticipates that the lack of coherence which namely the ITMA has in light of this ruling, will most certainly be a topic of discussion within the next decade, and it will be interesting to see what steps are taken once this issue is brought to light.

[18] Alice Donald, Jane Gordon, Philip Leach, *The UK and the European Court of Human Rights*, (2012) Equality and Human Rights Commission Research Report 83
<https://www.equalityhumanrights.com/sites/default/files/83._european_court_of_human_rights.pdf> 31.

[19] Registrar of the European Court of Human Rights, 'Judgements in the Cases of: Heaney and McGuinness v Ireland and Quinn v Ireland', 21 December 2000 (Press Release) 1.

[20] James MacGuill, 'The Impact of Recent ECHR Changes on the Constitution' (2007) 2 Judicial Studies Institute Journal 50, 69.

[21] Alice Donald, Jane Gordon, Philip Leach (n 18) 164.

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