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**In Search of the Building Blocks of a  
Human Rights Culture:  
Lessons from the Treatment of Irregular  
Immigrants in Malta**

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Submitted for the Degree of Doctor of Philosophy in Migration Studies

Department of Geography

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15 November 2011

## **Declaration**

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I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature: \_\_\_\_\_

## Abstract

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The treatment of irregular migrants in Malta is problematic from a human rights perspective, for it contravenes the principle of universalism that is intrinsic to human rights philosophy. This study investigates this treatment. Crucially, it identifies four elements of political practice in the absence of which it is contended a human rights culture cannot flourish, as well as underlying patterns in Maltese political culture which contravene these four elements. Its ultimate aim is to propose meaningful, effective and long-lasting human-rights-compliant solutions to the treatment of irregular immigrants in Malta.

Based on a reading of foundational documents of the modern human rights movement, especially the Universal Declaration of Human Rights, the thesis posits that human rights should be 'located' between the political and the cultural. The four basic principles of human rights identified as framing the optimal political conditions for the nurturing of a human rights culture are related to dignity, a cosmopolitan orientation, democratic practice and a commitment to equality.

This concept of a human rights culture is innovatively used as an analytical tool for examining Maltese responses to irregular migration. This is done in a two-way manner, with the examination of practice enriching the identified theoretical framework, and the theoretical framework then guiding the search for possible new human-rights-consistent policy directions which Malta could take.

Drawing on a range of ethnographic methods, including in-depth interviews and participant observation, this study brings to light the difficulties of putting into practice human rights principles within an already established local culture grappling with its own ghosts like occupations and colonial experiences. Although resistance to change is often difficult to identify since it is shrouded in 'modern' language, hidden under security arguments or bureaucratic explanations. Interviews and a range of documents illustrate the multi-layered misconceptions, stereotypes and fear that play out among the Maltese.

## Note on Gender/Interviews

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The researcher's responsibility to guarantee full anonymity to the interviewees is a challenge when writing about a small community. In addition, irregular migration in Malta is a highly charged and politicised field making the preservation of anonymity even more important. The reader is therefore being alerted to the following action that has been taken to avoid the identification of interviewees.

When referring to interviewees, gender has been deliberately mixed up. This means that when an interviewee is referred to as a 'he' or 'him', it can be either a man, or a woman, and vice versa. This was the most effective way to safeguard anonymity and avoid any negative repercussions on the interviewees. To this end the reader will note that very little information is given about the interviewees. This should not detract from the value of the interviews since the role of the interviews was not one of statistical analysis, but used to obtain collective wisdom, to give further depth to the discussions and to furnish the text with quotes.

Although this measure understandably removes some of the texture of the research, it was justified with the reasons given above but also because gender was not explored in this study. This should not, however, be taken to mean that the researcher believes gender is not significant or important. Ideally it would also have been explored, but the limitations of this study did not permit it. Similarly, there are other characteristics of the interviewees which could have been explored but were not referred to such as class and age.

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## List of Acronyms

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AFM	Armed Forces of Malta
AI	Amnesty International
ANDES	Advocacy Network on Destitution of Forced Migrants in Europe
ANR	Alleanza Nazzjonali Republikana
AVR	Assisted Voluntary Return
AWAS	Agency for the Welfare of Asylum-Seekers
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment
DS	Detention Service
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EMN	European Migration Network
ENAR	European Network Against Racism
EU	European Union
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	International Detention Coalition
IOM	International Organisation of Migration
JCHR	Joint Committee on Human Rights

JRS	Jesuit Refugee Service
LIBE	Committee for Civil Liberties, Justice and Home Affairs of the European Parliament
MEC	Malta Emigrants Commission
MFSS	Ministry for the Family and Social Solidarity
MJHA	Ministry for Justice and Home Affairs
MLP	Malta Labour Party
MSF	Médecins sans Frontières
NCPE	National Commission for the Promotion of Equality
NGO	Non-governmental Organisation
NP	Nationalist Party
NSO	National Statistics Office
RCC	Malta Rescue Coordination Centre
RefCom	Office of the Refugee Commissioner
SAR	Search and Rescue
SKOP	National Platform of Maltese Non-governmental Development Organisations
STV	Single Transferable Vote
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
US	United States
WGAD	UN Working Group on Arbitrary Detention

## List of Maltese Legislation and Case Law

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Laws of Malta, 'Constitution of Malta', Chapter 1, 1964.

Laws of Malta, 'Immigration Act', Chapter 217, 1970.

Laws of Malta, 'Refugee Act', Chapter 420, 2001.

Laws of Malta, 'Social Security Act', Chapter 318, 1987.

Laws of Malta, 'Territorial Waters and Contiguous Zone Act', Chapter 226, 1971.

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Maltese Legal Notice 131 of 2005, 'Temporary Protection for Displaced Persons (Minimum Standards) Regulations', 2005.

Maltese Legal Notice 150 of 2007, 'Family Reunification Regulations', 2007.

Maltese Legal Notice 278 of 2006, 'Status of Long-term Residents, Third Country Nationals Regulations', 2006.

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Maltese Parliamentary Question, 'Tfal minn immigranti illegali b'genitur wieħed', Legislature XI, No. 10571, 31 Aug 2009.

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Barboush, K. v. Commissioner of Police, Criminal Court, 2003.

Gebrezgabiher, K.A. v. Commissioner of Police, Magistrates' Court, 2006.

Maneh, E. et. v. Commissioner of Police, Civil Court, First Hall, 2009.

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Thank you to my family for their love and support.

Above all, I would like to express my sincere appreciation to all the migrants who willingly shared with me their experiences, often painful, in the fervent belief that change was possible. It is to them that this thesis is dedicated.



## Yakubu/Detention Centre Hal Safi

*By Karl Schembri, 2008, translation by Albert Gatt*

Ġiex passi bogħod  
 mill-ajruport  
 Yakubu  
 qed isewwi t-telewixin  
 biex flok ċorma linji w ross  
 ifiġġu  
 il-kuluri u l-istampi mxandra  
 mill-irkejjen kollha  
 w forsi anki  
 mill-irhula minn fejn ġew  
 Yakubu w shabu.  
 Minn ġot-tieqa  
 jidher ajruplan mimdud ġo hangar  
 qed jissewwa.  
 L-inġiniera bravi daqs Yakubu  
 izjed bjondi  
 izjed imlibbsin sabiħ  
 izjed fortunati.  
 It-turisti bl-ajruplan  
 mhux bhal tad-dgħajjes;  
 jaghtuhom l-ikla waqt il-vjaġġ  
 u il-biljett  
 ma jithallasx b'hajjithom,  
 ma jfittxulhomx għall-mard,  
 jehdulhom biss il-likwidi,  
 xi mus li jkun nsew  
 f'hand luggage,

Not far from the airport  
 Yakubu  
 repairs his television to replace  
 the lines and static  
 with the colours, pictures beamed  
 from every corner  
 his village too, perhaps,  
 where they grew up,  
 Yakubu and his mates.  
 Through the window he can see  
 a plane lies in a hangar  
 being repaired.  
 The engineers, as clever as Yakubu  
 seem fairer  
 better dressed  
 more fortunate.  
 Tourists on planes are different  
 from those who land in boats;  
 they get an in-flight meal,  
 tickets don't cost a life;  
 they won't be screened for illness, though  
 some liquids might be confiscated  
 a pen-knife or some lighter fluid  
 forgotten in their carry-on baggage.

u forsi xi bott gass  
 li jimla' l-lighter.  
 Yakubu le,  
 Yakubu harab  
 Yakubu ma kellux biljett  
 anki jekk hallas  
 elf dollaru biex jitla'  
 fuq id-dgħajsa  
 ma' sitta w għoxrin ruħ oħra  
 moħbijin bil-lejl  
 fit-trab ta' Tripoli.  
 Għal sitt ijiem il-mewġ  
 is-snien ta' haq il-baħar  
 ipprova jahtaf zaqq id-dgħajsa  
 taht ix-xemx indifferenti.  
 Il-pulizija ma hlewx hinhom  
 jistaqsu x'għandu x'jiddikjara  
 id-dazju diġa' thallas,  
 Yakubu w shabu l-irċevuti  
 hajjin u mitlufin  
 mixruba, mqarqa  
 miġburin f'tal-linja s-sewda  
 jħarsu ċassi minn ġot-twieqi  
 lejn id-dgħajsa sewda, tinten,  
 li minn fuqha raw il-holm qed jaq'  
 wahda, wahda,  
 jegħrqu fgati  
 f'qiegh il-baħar.

It's different for Yakubu.  
 Yakubu fled.  
 Yakubu had no ticket, though  
 he paid a thousand dollars for a place  
 among another twenty-six inside a boat  
 huddled in the dust-strewn night  
 of Tripoli.  
 Six days amid the waves  
 the sea trying to snatch  
 the hull between its teeth  
 beneath a heedless sun.  
 The police lost no time asking whether  
 there were goods to declare  
 the duty's paid, here's the receipt:  
 Yakubu and his mates  
 alive and lost  
 sun-blistered, drenched  
 huddled in the black bus  
 and staring blankly through its windows  
 at the stinking black boat  
 from which their dreams had fallen  
 one by one  
 to drown  
 at the bottom of the sea.

## Chapter 1: Introduction

### 1.1 The research: Human rights, irregular migration and Malta

Decades have passed since the Universal Declaration of Human Rights (UDHR) first saw the light of day in 1948.<sup>1</sup> The contemporary global community now boasts of a complex, relatively well-funded global human rights system which includes international and national laws, international and national institutions and a vibrant NGO community. More importantly, many people all around the world have used human rights to gain advances to their quality of life that have resulted in a re-articulation of the human person. Amongst these one can find the women's movement and the disability rights movement. Human rights, it would seem, are 'working'. The implementation of the human rights vision is on track. All this brings to mind Eleanor Roosevelt's famous quote:

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.<sup>2</sup>

The other side of the story is that, in spite of all these positive developments, human rights violations continue to occur. One particular group has been singled out as facing daunting issues of access to human rights, all around the world. These are irregular immigrants: immigrants who for some reason or another are outside their country of citizenship and have an irregular status in the country of residence. Given that irregular migration is defined by national immigration rules, and is not a fixed condition, irregular migrants are a mixed 'group' in terms of motivation for migration, mode of entry, country of origin, age and so on. Notwithstanding this, irregular migrants share

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<sup>1</sup> United Nations General Assembly. *Universal Declaration of Human Rights*, UNGA Res 217 A(III), adopted 10 December 1948.

<sup>2</sup> Eleanor Roosevelt, 'In your Hands', Speech at the Presentation of the booklet on Human Rights *'In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights'*, <<http://www.udhr.org/history/inyour.htm>>, 1958, (accessed online 23 April 2011).

two things which condition their relationship with human rights: the first is that they are *human beings* and the second is that they are *non-citizens*. The former gives them full entitlement to human rights, the latter maps out problematic access to these human rights.<sup>3</sup>

These issues are not new. The human rights researcher Stephanie Grant has shown that the affirmation of the human rights of non-citizens, including migrants, has been characterised in the early years firstly, by the 'failure' to protect non-citizens, with the exception of refugees for whom protection measures were enacted, and secondly, by the overall 'marginalisation' of issues surrounding irregular migration.<sup>4</sup> Grant shows that since the 1990s this situation has taken a more positive turn at the UN.<sup>5</sup> The 1990s also saw a striking increase in the number of international migrants worldwide, and a similar increase, albeit on a smaller scale, of irregular migrants. Amongst the global forces cited as leading to this situation are widening income inequality, civil strife in African, Asian and Arab countries and more generally factors associated with cultural globalisation. Irregular migration is a global phenomenon. Irregular migration from the global south to the global north is characterised by the following developments: the mushrooming of migration detention centres,<sup>6</sup> the construction of walls between countries,<sup>7</sup> and the numerous examples of alleged '*refoulement*' of migrants to their countries or origin when at risk of ill-treatment are examples of this. This situation has been continually (re)produced, in the last two decades, by an increasing securitisation of migration management. The factors leading to this situation are multi-causal and complex. The end result is that irregular migration appears more and more as an area

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<sup>3</sup> This theme is explored in a recent collected volume of works: Marie-Bénédicte Dembour & Tobias Kelly, eds. *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, Oxon, 2001.

<sup>4</sup> Stephanie Grant, 'The recognition of migrants' rights within the UN human rights system: The first 60 years' in *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, eds. M-B. Dembour & T. Kelly, Routledge, Oxon, 2011, p. 25.

<sup>5</sup> *Ibid.*, p. 39.

<sup>6</sup> The Global Detention Project aims to map 'the detention in response to growing global migration'. In Global Detention Project, 'About the Global Detention Project', <<http://www.globaldetentionproject.org/about/about-the-project.html>>, 2007 – 2011, (accessed 29 July 2011).

<sup>7</sup> The following are three examples of physical walls built with the intention of managing irregular migration: the planned construction of a wall between Greece and Turkey in Jean-Pierre Stroobants & Guillaume Perrier, 'Plans for a wall on Greece's border with Turkey embarrass Brussels', *The Guardian*, 11 January 2011; the walls/fences in Ceuta and Melilla erected in the 1990s (Spain – Moroccan border) BBC News, 'World's barriers: Ceuta and Melilla', BBC News, <<http://news.bbc.co.uk/1/hi/world/africa/8342923.stm>>, 5 November 2009, (accessed 26 April 2011); and the metal wall at the US – Mexico border erected in 1994, BBC News, 'World's barriers: US-Mexico', BBC News, <<http://news.bbc.co.uk/1/hi/world/americas/8343278.stm>>, 5 November 2009, (accessed 21 May 2011).

devoid of human rights. This is the fate of the majority of irregular immigrants in Malta.

Since 2002, this small island state in the Mediterranean Sea has seen a marked increase in the number of irregular immigrants, who arrive by boat or are saved at sea by the Maltese Armed Forces. All irregular immigrants are indiscriminately detained on arrival for up to eighteen months in deplorable conditions – unsanitary, overcrowded and for lengthy periods of time. Upon release, the vast majority are accommodated in open centres consisting of a ‘tent’ village, a hangar, depleted barracks in a remote part of the island, or an old school in a district notorious for its associations with prostitution, criminality and more recently severe pollution. Such a shocking situation stands in sharp contrast to the peaceful vision of ‘a world made new’<sup>8</sup> put forward by the UDHR and human rights treaties to which Malta has been an avid signatory since it gained independence.

The onus of responsibility for the safeguarding of the human rights of irregular immigrants, as with other peoples’ human rights, rests primarily with states. Living up to this responsibility has generally proven difficult in Western countries since irregular immigrants tend to be perceived by policy-makers and the public as an additional and unwarranted burden on the country and as transgressing a culture of ‘legality’ often associated with ‘civilisation’.

Why is the safeguarding of human rights of migrants problematic in a country which claims to be a member of the human rights system? Why has the human rights system not yet effectively addressed the ill-treatment of irregular immigrants? I argue that these are the result of a lack of a human rights culture and could be overcome by focusing on nurturing a human rights culture ‘on the ground’. This would complement the establishment of human rights as a legal and institutional system which has so far been the primary focus of the human rights movement. Are human rights in Malta ineffective? Or have human rights in contemporary societies become ineffective,

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<sup>8</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, 2001.

thereby reaching, as the philosopher Costas Douzinas put it, ‘the end of human rights’?<sup>9</sup>

This research project initially grappled with these questions, but concluded, and such is the basis of the argument of this thesis, that human rights still have the potential to be effective. What is needed is a re-articulation of the bridge between human rights ‘in theory’ and human rights ‘in practice’. What is being proposed here is that this can be done with the concept of a human rights culture, defined in this study as a culture which highly regards human rights principles.

## **1.2 Purpose of the research: Aims and research questions**

The aim of this research project is to investigate the phenomenon of irregular immigration in Malta using human rights culture as an analytical tool. The purpose of this research is to find meaningful, effective and long-lasting solutions to treatment of irregular immigrants in Malta in accordance with human rights principles. This thesis seeks to do this by first identifying some of the underlying patterns in Maltese political culture exposed by irregular migration which are not in tune with human rights principles. The assumption is that the ill-treatment of irregular immigrants would not happen if human rights principles were used to guide political decisions and behaviour.

The overarching research question is: What patterns in Maltese political culture could be identified as leading to the violation of human rights of irregular immigrants? And in what way can human rights guide political decisions that will lead to the improvement of the treatment of irregular migrants in Malta?

The central research question is followed by a set of other questions which can be considered critical to this research. They are addressed primarily in this introductory chapter as well as in Chapter 2 where the theoretical framework is outlined in more detail, and albeit to a lesser degree, in the subsequent chapters:

- What is a human rights culture? What can a human rights culture do?
- How can a human rights culture be ‘reconciled’ with local cultures?

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<sup>9</sup> Costas Douzinas, *The End of Human Rights: Classical Legal Thought at the End of the Century*, Hart Publishing, Oxford, 2000.

- Why are 'human rights' a solution to the problem?
- In what way is my contribution in this study different to the way human rights culture has been used so far?
- How is it possible to assess the gaps between contemporary local practices and a potential human rights culture?
- What are the building blocks of a human rights culture? How can one use this as a conceptual tool to analyse a situation?

The analysis of the case study of irregular migration in Malta, from Chapter 3 onwards, is led by the following generic questions:

- What is the nature of the ill-treatment of irregular immigrants?
- What are the main elements in contemporary Maltese political culture that hinder the establishment of the political vision of human rights?
- Why is the adoption of a human rights approach particularly problematic in relation to irregular immigrants in Malta?
- How does this understanding differ from mainstream interpretations of human rights?
- How can a human rights culture be nurtured?

This study will not give comprehensive solutions to the problem of irregular immigration in Malta, but will indicate what kind of paradigm shift needs to be made to find 'human rights friendly' solutions. It will not give a comprehensive analysis of the issue of irregular immigration in Malta, but focuses on those issues crucial to the nurturing of a human rights culture, which refers to a state of cultural internalisation or appropriation of human rights principles.

### **1.3 Significance and contribution of the study**

#### **1.3.1 The case study of irregular migration in Malta**

Reports by international authoritative bodies in the last decade suggest that the affirmation of the human rights of irregular migrants in Malta appears to be at a

stalemate.<sup>10</sup> The majority of developments in this field appear to be more from the pragmatic point of view of migration management, and take less into consideration human rights aspects. Indeed the dire situation that irregular immigrants are in, to which I can attest to from my own investigations, would support this view. Research in this area has tended to focus on specific areas or topics. This includes, amongst other works, Victor Martinelli's article investigating discrimination in education;<sup>11</sup> Ruth Farrugia's articles on legal developments and integration;<sup>12</sup> Mario Cardona's studies commissioned by the Centre for Faith and Justice on poverty in Malta;<sup>13</sup> Colin Calleja *et al* on education and ethnic minorities;<sup>14</sup> ENAR's empirical reports focusing on discrimination and racism.<sup>15</sup>

Apart from contributing to the existing literature on this topic, irregular migration is a good case study for this thesis. It has brought to the surface political forces in contemporary Maltese culture which hinder the nurturing of a human rights culture. It is not a coincidental choice. This should not, however, lead to the assumption that all other people in Malta are treated with respect, in line with human rights standards. Rather the lack of a human rights culture that emerges so clearly with irregular immigrants, strongly suggests that there must also be huge gaps in other fields. From my observations one of the differences is that whereas human rights violations in other fields for a variety of reasons are generally well-concealed, irregular migration issues are made public. A second reason, which many of my informants highlighted, is that traditional cultural and social structures provide the necessary protection and minimal well-being for other disadvantaged groups. The lack of a stable foundation built on human rights principles, means that any sudden changes in society would result in problems for other groups too. This study also overlaps, and could be seen as

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<sup>10</sup> This refers to reports by for example, the Commissioner for Human Rights of the Council of Europe, the Committee for the Prevention of Torture, the European Parliament, and other UN treaty-based committees.

<sup>11</sup> Victor Martinelli, 'Responding to the needs of the asylum-seeking child in the Maltese education system: Some proposals', in *The Family, Law, Religion and Society in the European Union and Malta: Civil Society Project Report*, ed. P. Xuereb, European Documentation and Research Centre - University of Malta, Msida, 2006.

<sup>12</sup> Amongst other words, Ruth Farrugia, *Local Communities and Refugees: Fostering Social Integration: National Report*, IntegraREF, Multi-partner EU Project, 2008.

<sup>13</sup> Mario Cardona, *You will always have the poor among you: A report about poverty in Malta*, Jesuit Centre for Faith and Justice, Valletta, 2010.

<sup>14</sup> Colin Calleja, Michael Grech & Bernard Cauchi, *Education and Ethnic Minorities in Malta*, The e-SPICES Learning Partnership, EU Project, 2010.

<sup>15</sup> ENAR Malta publish annual reports on racism and discrimination in Malta.

a contribution, with the broader literature on Maltese political culture and human rights which is often unrelated to irregular migration.

### **1.3.2 Why human rights?**

In the search for more humane and long-lasting solutions to the ill-treatment of irregular immigrants in Malta, why should one persist and have faith in human rights? I believe that human rights are best suited to address the problems that irregular migrants in Malta face, for the following reasons. First, human rights aim to ensure that everyone is treated with respect in view of their innate human dignity. Second, human rights promote a vision of a shared humanity which is all the more important when dealing with non-citizens. Third, the human rights system has been created to keep governments in check, generally promote human rights and provides tools to individuals and groups to claim such basic human rights. Fourth, human rights, by virtue of a widespread consensus they enjoy, are a legitimate tool. Finally, Malta is generally a keen (not reluctant) signatory of many international human rights treaties, in line with the declaration of human rights enshrined in the Constitution of Malta. This is taken to mean that in principle, the Maltese community is generally in favour of human rights principles.

### **1.3.3 Why culture?**

The concept of culture in this thesis is used in various ways to explain and analyse social practices and global phenomena. It is first used as a conceptual tool in the attempt to identify social and political customary practices and traditions that hinder the adoption of human rights principles in the irregular migration field in Malta. In this regards, the central influence is the cultural theorist Clifford Geertz who proposed that culture could be used by social scientists in their quest for interpreting patterns of behaviour. Geertz thus defined culture as:

...an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men [and



women] communicate, perpetuate, and develop their knowledge about and attitudes toward life.<sup>16</sup>

This understanding of culture marked a shift from former conceptualisations of culture which were broadly essentialist and projected culture as static, unchanging and having clear boundaries. Geertz's definition on the other hand, by presenting culture as fluid, changing and without rigid boundaries, paved the way for a broader usage of culture. In addition Geertz's focus on the interpretative techniques needed to discover and understand culture opened new avenues for social scientists concerned with understanding behavioural patterns of groups of people. Finally, Geertz's cultural tradition opened avenues, which were availed of in this thesis, of retaining the focus on social practices.

Culture is then used in a second way, most notably in the concept of 'human rights culture' in this thesis which is used to describe any culture which adopts and values human rights principles. A human rights culture is therefore not an end state, but remains a process by which local cultures engage with humanist values, cosmopolitan norms and global issues. An in-depth discussion of this concept is presented in Section 2.3. The process by which human rights principles are adopted by local cultures, that is how human rights principles gain cultural legitimacy, is discussed in a Section 2.2.2. Culture in this sense is still informed by the Geertzian understanding, and highlights cultures' capacity for including and reacting to both local and global developments. In spite of this constant adoption and negotiation of cosmopolitan and global norms, culture is still produced, reproduced and perpetuated at a local level.

### **1.3.4 Inadequacies of other views**

Most scholars' view of human rights is that they are entrenched in, what I call, the 'dominant paradigm', which views human rights as a legal-political system (re)constructed and (re)negotiated in diplomatic and legal arenas. The critical sociologist Kate Nash observes that even the concept of 'human rights culture' has been employed within this dominant framework, thereby divesting it of the added

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<sup>16</sup> Clifford Geertz, *The Interpretation of Cultures*, Basic Books, New York, 1973, p. 89.

richness and inclusion of social and political processes.<sup>17</sup> She draws on the approach undertaken by the cultural sociologist Jeffrey Alexander who makes a case for viewing culture not as causal but as constitutive of patterns of meanings. It is necessary to 'bring the unconscious cultural structures that regulate society into the light of the mind' according to Alexander.<sup>18</sup> The need to understand cultural structures better arises from the recognition that cultural structures are strong forces in society which can both constrain and enable. Alexander describes cultural structures as the result of socially constructed subjectivity which forms the will of collectivities. He says:

The secret to the compulsive power of social structures is that they have an inside. They are not only external to actors but internal to them. They are meaningful. These meanings are structured and socially produced, even if they are invisible. We must learn how to make them visible.<sup>19</sup>

For Alexander, the question of how to analyse and expose cultural structures theoretically lies in a combination of structuralism and hermeneutics:

We have suggested here that structuralism and hermeneutics can be made into fine bedfellows. The former offers possibilities for general theory construction, prediction, and assertions of the autonomy of culture. The latter allows analysis to capture the texture and temper of social life. When complemented by attention to institutions and actors as causal intermediaries, we have the foundations of a robust cultural sociology.<sup>20</sup>

In addition, by arguing for greater recognition of the concept of a human rights culture, this study shows that analyses using the proposed cultural paradigm generate different solutions which could complement those generated by the 'dominant paradigm' (See Figure 1 below: The Cultural Paradigm of Human Rights).

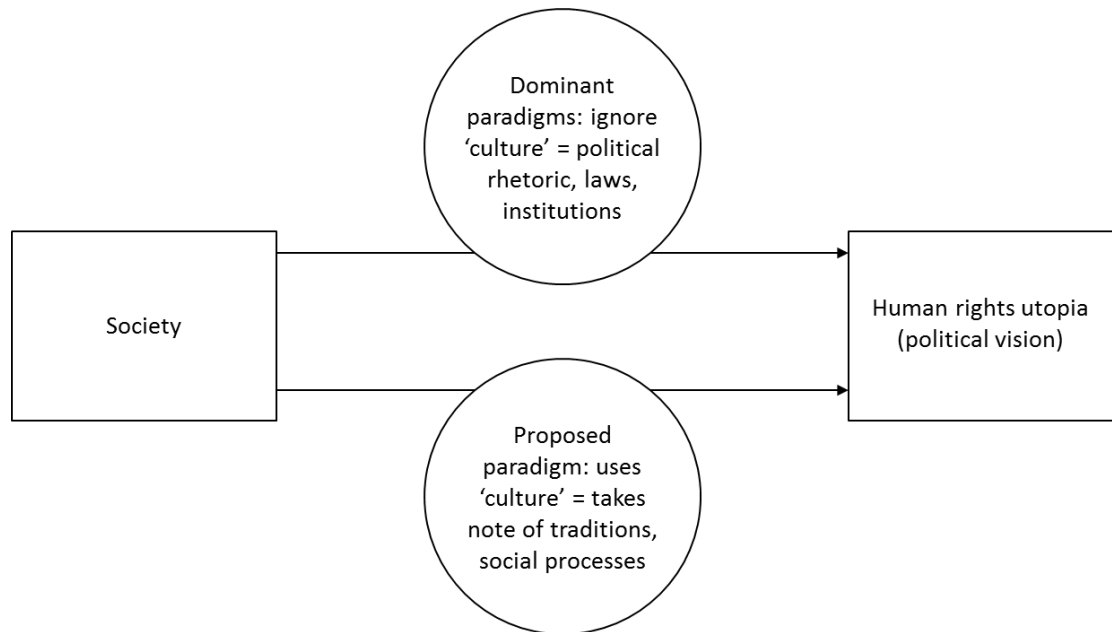
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<sup>17</sup> Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and the UK*, Cambridge University Press, Cambridge, 2009, p. 4.

<sup>18</sup> Jeffrey C. Alexander, *The Meanings of Social Life: A Cultural Sociology*, Oxford University Press, Oxford, 2003, pp. 3-4.

<sup>19</sup> Ibid, p. 4.

<sup>20</sup> Ibid, p. 26.



*Figure 1: The Cultural Paradigm of Human Rights*

The dominant legal-positivistic paradigm of human rights gives superior value to judicial interpretation and adjudication. Analytical methods within the human rights system tend to fall under this paradigm. For example, the majority of institutional monitoring is carried out by treaty-based bodies which analyse the developments or adherence of a state to its mother Convention or Treaty. This system of reporting, including the so-called civil society shadow reporting, focuses on legal, policy and institutional development. Value or reference to socio-cultural and political processes are limited and often absent. This is often problematic because proposals lack the cultural information that could produce solutions which are truly effective and long-lasting. This situation calls for an analytical tool which uncovers socio-cultural and political processes. The concept of human rights culture as a normative and discursive tool could, proposes this study, fill this gap. It will be explained in further detail in Section 1.5.

#### **1.4 Methods and Methodology**

Social research has been practiced in the last decades with increased sensitivity to the inbuilt dynamics of dominant practices and their effects on the social research process, which it is now recognised conditions the end results. This section demonstrates the awareness of the researcher in this regard.

#### **1.4.1 Human rights culture as an analytical tool (The Research Process)**

In order to establish how human rights culture in practice should actually operate, an analytical tool or (at least) a heuristic device is needed. This would enable a systematic analysis to expose those indigenous cultural processes of a social and political nature which hinder the adoption of human rights principles. Such a tool was not found. I therefore embarked on devising an original methodology to first construct a heuristic device with which I could then analyse the case study. I kept the awareness of 'culture' as the realm where activity and appropriation of political principles happened at the heart of my heuristic device. For this reason, I used the case study itself in two ways: a) to feed back and complete the heuristic tool, and b) to analyse the case study in itself by reference to the completed tool. (See Figure 2: The Research Process)

The aim of the first phase of analysis was to identify key aspects of the modern human rights movement which were constitutive of the political vision of human rights. This was done by conducting a broad research on human rights theory and analysing the UDHR, in particular its Preamble. The aspects identified were: person, state, international relations and political philosophy; they lead to the construction of a heuristic device I refer to as the 'Tetrahedron Model of Human Rights Culture'. The second phase involved going out into the field to identify key concepts in political culture which would feed back into the basic structure of the model. These resulted in the building blocks of a human rights culture: human dignity, cosmopolitanism, democracy and equality.

The third phase of analysis of the case study could then be conducted using the completed model, which allowed the usefulness of the model to be tested by attempting to generate possible solutions and policy directions to ensure that the human rights of irregular immigrants would be safeguarded. This would then bring Maltese society closer to the establishment of a human rights culture.

This section gives an overview of Phase 1 and Phase 2, whereas Phase 3 (the application of the completed model) is discussed in Chapters 4, 5, 6 and 7.

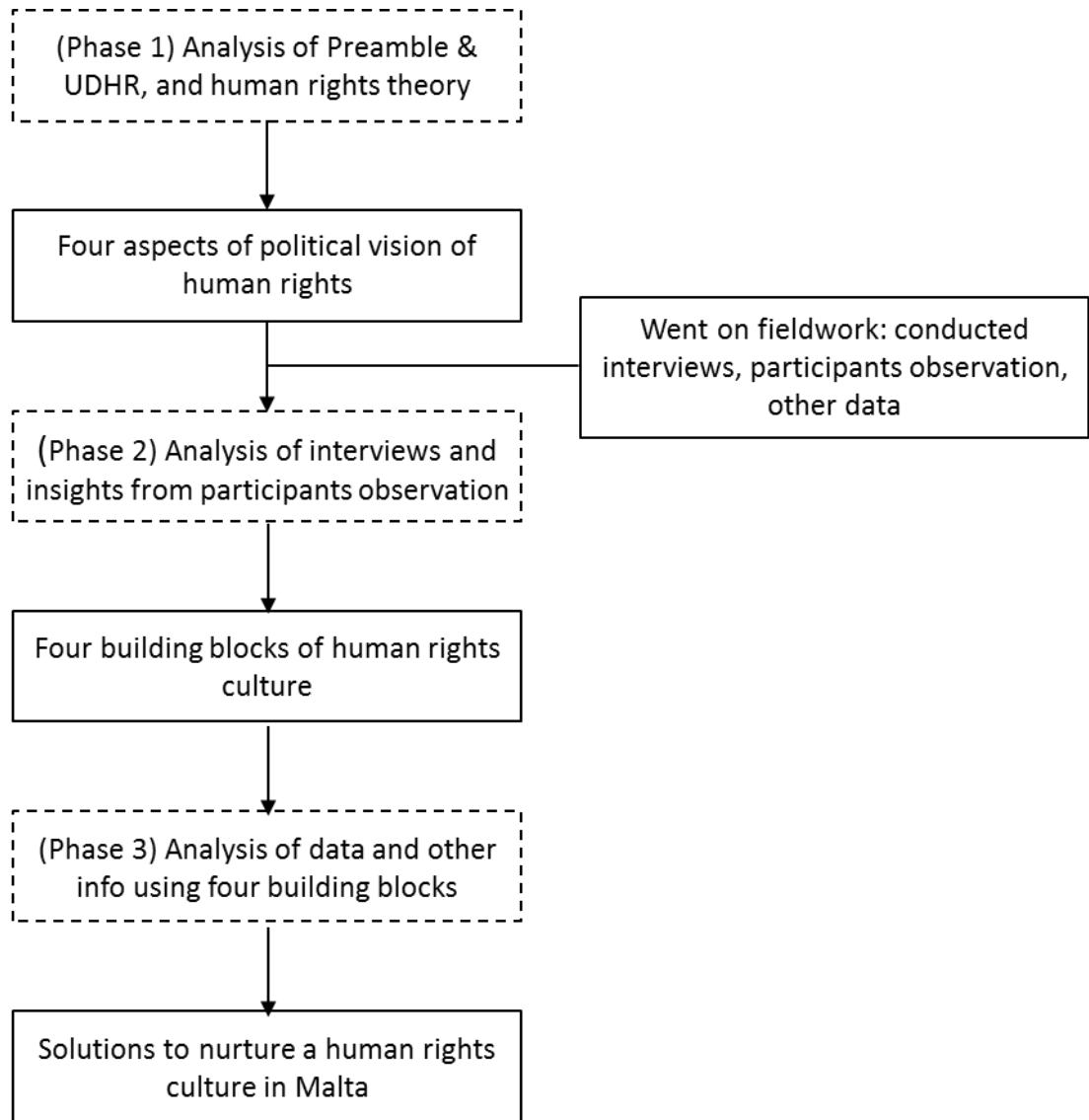


Figure 2: The Research Process

#### 1.4.2 Primary sources

Fieldwork in Malta was conducted between August 2008 and February 2009. A preliminary four week visit to the field was carried out between December 2007 and January 2008 to lay the groundwork and design the methodology. After fieldwork, contact by email and social networking sites like Facebook remained with some of my main informants. This contact and a few other short visits made it possible to keep updating my material.

The aim of my fieldwork was two-fold:

- a. Identification of issues in political culture: Following the first phase of analysis, the four characteristics of human rights had been identified and modelled on

the tetrahedron model. The exact concepts of 'political culture' were expected to arise out of the fieldwork. Fieldwork therefore entailed an investigation into the main elements of Maltese political culture which were hindering the adoption of a human rights approach.

- b. Data collection: Empirical data was collected about the situation of irregular immigrants. The nature of data had to address the investigation for underlying socio-cultural and political processes in Maltese society, which were problematic to the undertaking of a human rights approach in the field. Data collected therefore ranged from in-depth interviews, participant observation, reports, court cases and media articles.

The conduct of this research necessitated a flexible multi-method qualitative approach to gain a multi-layered understanding of the way human rights are implemented in Malta in the irregular migration field.

#### Open in-depth interviews

Interviews were conducted with around 20 informants, who occupied key and professional positions. The primary criterion for selection was a willingness to openly discuss one's ideas for addressing the challenges brought about by irregular migration in Malta. A cross-section of people working in different areas of the irregular migration field was ensured, as well as a number of people who could be considered independent experts (not affiliated to any institution). The intention of the interviews was to tune in to the 'collective wisdom' amongst as diverse a group of people as possible, all of whom were in contact with irregular immigrants or were highly conversant with developments in the field.

The age of the interviewees ranged between 27 and 78 years. Four of the interviewees were women, and 15 were men. References to interviewees by gender - 'he' or 'she' – have been mixed up in the thesis to avoid identification as explained in the 'Note' at the beginning of this study. Interviewees have been referred to by their main occupation. However all were selected on the basis of their experience with irregular immigrants. Typical of people living in small countries, most of them were occupying, or had occupied in the past, various roles. So for example, one of the government

officials volunteered with an NGO twice a month; one of the NGO workers had worked with a government agency and the refugees interviewed had experience working for NGOs and government agencies. In all the following were interviewed: seven NGO workers, four government officials and government agency employees, three academics and experts, two refugees, two international NGO workers and one Church agency employee. All are referenced throughout the thesis in self-descriptive references with the real date of interview and their role, for example, A, Personal Interview - NGO worker, 24 October 2008. Initials have been used to retain anonymity and are given randomly.

All interviews conducted were guaranteed anonymity. This was made clear at least twice: in the first contact email and reiterated just before the interview. Anonymity was of critical importance to the fieldwork as some participants made it very clear that they would have not participated had the study not been anonymous. For example, the following international NGO worker said:

I would never have this interview with you like this if you told me that I am going to be quoted, because I cannot be quoted.<sup>21</sup>

Special care has been taken to ensure that interviewees could not be identified in the text of the thesis. Reference to anything which put their anonymity at risk has been either partially or totally omitted.

Although around half the interviewees expressed a wish not to remain anonymous, it was still reiterated that anonymity would be preserved in order to ensure that other external factors which might have influenced the interviews would be removed. Such influences included:

- a. The sensitivity of the topic, at a time when violence and aggression against Maltese people perceived as pro-immigrant was rampant.
- b. The possibility that an interviewee could have used the research study as a platform to 'speak out' – an expectation that the interview or my research could not reach.

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<sup>21</sup> K, Personal Interview - International NGO employee, 5 January 2009.

- c. The risk that interviews lose the frankness that was needed in a time when public (and populist) discussions on irregular migration was common.

Interviews were conducted between October 2008 and January 2009. The languages of the interviews were Maltese and English, with most having a mix of both languages as is typical and common in Malta. During the translation into English, part of the authenticity of some of the expressions and idioms was lost, although being Maltese myself helped a great deal in grasping the actual meanings intended. All the interviews were recorded and transcribed. The lengths of the interviews ranged between one hour and three hours.

Interviews were conducted in a broadly exploratory perspective and interviewees were encouraged to lead the conversation. The following keywords were used during each interview: irregular immigrants, human rights, human rights culture, disadvantaged or vulnerable groups, detention, open centres, Maltese society's reaction, racism, universal, moral, state, person, cosmopolitan, equality, democracy and human dignity. Many of the interviewees were key informants throughout my fieldwork and offered me support afterwards too by inviting me to events, including me in e-groups, sending me publications and generally being available for clarifications and further discussions.

'Trust' was crucial to the success of my interviews. I took special care to nurture this trust by presenting the interview as an exploratory conversation to help me (the researcher) understand the way Maltese society and government interact with the issue of irregular migration. Using the word 'conversation' gave the sense of informality and intimacy that I wanted and dispelled anxieties that the word 'interview' provoked. In addition I made sure that the meeting place was informal and personal, that is, places where the interviewee felt comfortable like coffee shops, their own homes and common friends' houses. I avoided work offices to minimise association with their professional roles. I capitalised on my Maltese and immigrant networks. For example the majority of interviewees knew me personally and I made sure I approached those who did not with a 'reference', usually in the form of a greeting, from common trusted friends. This proved invaluable as I do not believe I could have otherwise managed to discuss such a sensitive and politicised topic. It is fair



to say that this accounted for the relaxed interviews. The rich narratives that emerged were full of personal information, anecdotes and at times, politically sensitive issues.

I generally felt that the willingness to help came partly from a burning need to discuss irregular migration in a 'safe space' and most interviews were intertwined with personal moral reflections. For example, one of the interviewees who was passionate on the safeguarding of the human rights of irregular immigrants, suddenly lapsed into a guilty account of her own fears when she encounters groups of African men walking on the street.<sup>22</sup> In another interview, with a person passionate against social injustices and very much in favour of diversity, there was another 'guilty' confession, which was that he would never allow his teenage daughters anywhere near the Marsa Open Centre – one of the large migrant open centres housing around 800 men.<sup>23</sup> In another interview full of disparaging remarks about immigrants' behaviour, the interviewee suddenly mentioned his own afflictions when he comes face to face with immigrants because 'these are people our age, and it's like you're denying them a future, and you feel bad, you know.'<sup>24</sup> Therefore what emerged from the interviews was that irrespective of their ideological and/or pragmatic beliefs, all were personally struggling to make sense of the situation. My interview was 'used' as a 'self reflexive vent' giving me precious and unique insights into individual's moral dilemmas on political issues.

The interviews generated key information for this research, generally conditioned by the interviewees own 'positionality' in the irregular migration field, which consisted of:

- the identification of underlying issues in Maltese political culture. This included the connections between seemingly under-related issues;
- understanding the different 'constructions' of reality. The interviewees' predominant view generally reflected that of their full time job;
- important leads with empirical value like the development of particular incidents, and other research in this field.

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<sup>22</sup> J, Personal Interview - Government agency employee, 20 December 2008.

<sup>23</sup> K, Personal Interview - International NGO employee, 5 January 2009.

<sup>24</sup> C, Personal Interview - Government official, 29 October 2008.

### Participant observation

Participant observation was carried out regularly, seven days a week. Given the nature of the research questions I felt it would be limiting to choose one spatial location to conduct participant observation. It was possible to conduct multi-sited observation due to the short distances involved in Malta. I chose to 'accompany' people working with immigrants, and immigrants themselves, as they moved between their location of work, official meetings, public seminars, informal meetings, their homes and so on. Participant observation was therefore mobile and the 'spatial' site was 'Malta'. The following key places featured prominently: NGOs offices and activities organised by NGOs, Hal Safi Detention Centre as a volunteer, Hal Far Open Centre, Marsa Open Centre, various Ministries and ministerial agencies. In addition I conducted visits to the following places for which I needed official authorisation: Hal Far Tent Village, Hal Far Open Centre for Women, Dar is-Sliem, Dar il-Qawsalla, Dar il-Liedna and Balzan Residence for Immigrants. I also attended social events and celebrations of migrants like weddings, funerals and parties.

The smallness of the island lent itself to ease of mobility and interaction with various actors, but is not the explanation for the high access and immersion I enjoyed throughout the fieldwork. This was due primarily to two sets of work experience (from my past history) which were of particular use to my fieldwork. The first was that of being Maltese, having worked closely with various government departments and also having been for many years active with (Maltese) youth and workers' associations. This experience meant that I knew how to frame requests to Government departments or which strings to pull, and when. My 'second' experience had to do specifically with my activism with immigrants in Malta. For several years prior to my fieldwork I was one of the few Maltese visibly active with immigrants: visiting detention centres and open centres, assisting with case work, collecting clothes, speaking on radio and TV programmes. This was a period when being seen around with an African or Asian immigrant, even just having a coffee or walking down the street, was generally enough to attract attention. This however meant that I had gained a lot of trust and access to the various immigrant groups.

Field notes were recorded both of incidents which appeared rich and interesting, but also in relation, in a broad sense, to the main inquiry: why were irregular immigrants ill-treated by Maltese society, and what role do 'human rights' play? The assumption, as mentioned before, is that if human rights were 'working' well and their implementation was in order, then irregular immigrants would not be ill-treated. The focus of the use of human rights in the irregular migration field was retained throughout. As in the interviews, the exploration uncovered people's 'construction' of the irregular migration field. Due to the wide scope of the field, the preferred method was detailed documenting of incidents which were out of the ordinary.

One recurring observation was that the small size of the Maltese community provided ample spaces in everyday social life for interaction between the Maltese 'actors': NGO workers, government officials, Detention Service (DS) staff and so on. These 'spaces' were often completely un-related to the irregular migration field and included: community village activities like the traditional *festas* or festivals, arts events like performances and exhibitions, (extended) family-related activities, their children's activities and so on. This kind of social interaction was important to note because it influenced relationships and interaction between irregular migrants, influential actors in the field and the host community.

As will be explained in Chapter 3, with over 40 different countries of origin the variety of languages is too much for anyone to master. I mainly communicated in English, but also used French, Italian, Maltese and rudimentary Arabic. In situations where I was desperate to ask something in detail, I never had problems in finding, at short notice, a member of their circle of friends who knew enough English to interpret. In Maltese circles, English and Maltese were enough, and presented no barriers. Overall, given that irregular immigrants were not my main focus, I do not consider this a significant limitation to the study.

During my fieldwork I was also invited to become a member of the National Contact Point of the European Migration Network (EMN) as a researcher.<sup>25</sup> This gave me access

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<sup>25</sup> Ministry for Justice and Home Affairs, 'European Migration Network – Malta National Contact Point', <<http://www.mjha.gov.mt/page.aspx?pageid=96>>, (accessed 12 August 2011). The EMN was set up by the European Commission to provide up-to-date, objective, reliable and comparable information on migration and asylum. The

to additional material, presentations as well as a professional network and other researchers. I was also invited to conduct two sessions on human rights and irregular migration on a course run by the Centre for Faith and Justice on the Catholic Social Teaching. The discussions during these sessions specifically on the human rights of migrants in Malta were particularly useful.

Participant observation generated rich information on socio-cultural and political processes and served in the 'construction' of my own perception of the interaction of human rights within the irregular migration field. This was of crucial importance because the intense politicisation of the irregular migration field combined with the highly charged reactions that mention of 'human rights' provokes, lead to complex and contradictory 'constructions'. In most cases I found I could not rely on what even my key informants were telling me but needed to visit a place or see for myself. Participant observation on the whole gave me additional sensitivity to the various complexities which the irregular migration field is made of, and external factors, equally complex, which condition it. Finally participant observation served to address my concerns of undue biases due to my previous involvement in the field (as will be explained below in the section on 'Researcher's positionality').

### **1.4.3 Secondary sources**

The strictly empirical data necessary to answer the more empirically-oriented questions was collected during fieldwork and throughout the writing up process. These consisted of reports by government agencies and departments, local NGOs, international NGOs, intergovernmental organisations and the National Statistics Office (NSO). The vast majority of these reports are posted online which largely facilitated the updating of data after fieldwork.

I had access to a printed collection of local media articles which mentioned irregular immigrants from 2004 – 2007. I pursued this online when I started this research project and collected media articles from 2007 to the present day from *The Times of Malta* and *The Sunday Times of Malta*. Both newspapers are published by Allied

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Maltese National Contact Point is the Ministry for Justice and Home Affairs, meets annually and encourages the sharing of research in this field.

Newspapers Limited and are the most popular and generally considered reputable English-language newspapers. This was possible because they have a good online version. Other articles from online versions of Maltese newspapers *L-Orizzont* and *In-Nazzjon* were also included even if these newspapers can largely be considered party propaganda. *MaltaToday* and *The Malta Independent* were also regular checked, as well as e-newspapers like *di-ve.com*, *maltarightnow.com*, *maltastar.com*.

I collected copies of the proceedings of a selection of local court cases involving irregular immigrants, generally contesting the length of their detention or their vulnerability. Finally, I gathered four collections of photos: a) taken by Reuters of irregular immigrants in detention; b) photos of irregular immigrants from the collection of a professional photographer; c) some photos downloaded from internet sites; as well as, d) my own collection of photos shot during fieldwork.

### 1.5 Researcher's positionality

The researcher Elizabeth Chiseri-Strater who focuses on ethnographic enquiry as a research tool, notes that the concept of positionality in research includes two aspects. The first is the researcher's 'given' attributes such as race, nationality and gender, which are fixed or culturally ascribed.<sup>26</sup> In my case, I was always conscious that most of my 'given' attributes gave me a distinct advantage. Being Maltese, white and female meant that I was free to mingle in different circles without standing out. During my preparatory visit, I met an Italian researcher who was faced with some covert hostility when interviewing key officials. He received snide remarks when going for interviews about 'his' country's interpretation of international maritime law, or 'his' 'cowboy-style' Prime Minister pushing immigrants 'our' way. These were allusions to the various international (and highly publicised) disputes with Italy on the rescue of irregular immigrants at sea and rumours that the Italian Prime Minister, Silvio Berlusconi, had ordered the Italian Coast Guard to redirect immigrants into Maltese waters. During my fieldwork, I also met an Austrian statistician gathering data on immigration for a

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<sup>26</sup> Elizabeth Chiseri-Strater, 'Turning In upon Ourselves: Positionality, Subjectivity, and Reflexivity in Case Study and Ethnographic Research' in *Ethics and Representation in Qualitative Studies of Literacy*, eds. P. Mortensen & G. Kirsch, 1996, p. 116.

European project, and he mentioned a similar problem. He was clearly told that instead of chasing statistics he would be more useful to the Maltese by ‘taking’ the immigrants to the EU. These incidents are not surprising given the nationalist overtones of debates on irregular migration at the time.

Overall I was perceived as an insider and this proved beneficial. It was often made clear during conversations. People would tell me things like *‘ha ngħidilek kif inhi, mhux se noqgħod indurlek mal-lewza’* – ‘let me tell it to you exactly the way it is, without beating round the bush’; *‘inti taf kemm hi diffiċli s-sitwazzjoni hawnhekk’* – ‘you know how difficult the situation is here’; *‘miegħek ma nistax nistaħba wara subgħajja’* – ‘with you I can’t conceal information’.<sup>27</sup> When I felt a risk that things may be skipped over, because they assumed that ‘I understand’, my gender and age, which in other situations may be considered unfortunate, in this regard came in useful. Maltese society is generally patriarchal and patronising. Being female, and ‘young’, meant that I could legitimately expect more patience and longer explanations to my inquiries. Fluency in both Maltese and English was extremely useful.

There were instances where these same fixed attributes made me stand out and could have been negative. This was in the migrant detention centres and open centres where the majority of residents are African and Asian and male, and so is the vast majority of staff. In this regard I was lucky that I was well known, or they had heard of me. This was true with the detention services personnel and people running some of the open centres, and in particular with several immigrant communities. For most of my adult life I have been heavily involved either through voluntary work or full time jobs in human rights-related activity both locally and internationally (Europe-wide and Commonwealth). This experience gave me a birds’-eye view of the development and implementation of human rights in Malta, and also an idea of differences and similarities with other countries. From a more ‘fixed’ point of view, people in key positions in Malta associated me with human rights, non-partisan politics and civil society. An active involvement with irregular immigrants primarily as a volunteer with the Jesuit Refugee Service (JRS) Malta built on the association of human rights, this time in relation to irregular immigrants. Whereas the former image was overall a

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<sup>27</sup> Free translations from Maltese.

positive one, the latter was rather more controversial. Luckily my concerns that this would create barriers to carrying out this research proved futile because people in authoritative positions knew I had moved country and presumably did not consider me a threat any more.

This brings me to the second aspect of 'positionality' which Chiseri-Strater refers to as 'subjective-contextual' factors such as personal life history and experiences.<sup>28</sup> I was very much aware that my personal experience as an activist could potentially not only have disrupting effects of a practical nature on this research project, but that my outlook and receptivity as a researcher would be negatively affected. A self-reflexive approach and outlook has helped counteract some bias although I am conscious that such biases are difficult to remove altogether and for this reason need to be stated by the researcher.

Moreover, relinquishing this role altogether was not possible because irregular immigrants had invested me with a lot of trust based on my activist background. I was generally accepted in most immigrant communities, and even though I had been away from Malta for a year, immigrants 'knew of me'. This was a role I could not easily belie in immigrant circles which are very small. In addition, my reputation with the immigrants afforded me unique access and a level of sincerity which I feel has only served to enrich this thesis. This is not to say that I did not inform them of my new 'role' and the fact that I was now investigating, writing and reporting on their situation. This information was however always met with a very positive reaction and often gratitude. I wanted to make sure that I was not giving them the impression that I was a journalist, and was very careful in explaining what the outcomes of such a research project could be - for example, a book or a lecture. Many immigrants were keen to show me their gratitude for choosing to write about their situation: 'it is by the Grace of God, that I am alive today, and it is by His Grace that you are writing about us'.<sup>29</sup>

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<sup>28</sup> Elizabeth Chiseri-Strater, 'Turning In upon Ourselves', 1996, p. 116.

<sup>29</sup> Ghanaian immigrant. My fieldnotes.

## 1.6 Outline of the thesis

This thesis is divided into 8 chapters. The opening two chapters are both of an introductory nature. This chapter - Chapter 1 – introduced the research project and describes the methods and methodology that have been utilised in this study. These combine immersion in the field and anthropological style fieldwork, in-depth interviews as well as the gathering of other data like reports, research studies, and statistics.

Chapter 2 outlines the theoretical and conceptual framework of human rights that will be used in this thesis which centred on a particular understanding of human rights that gives prominence to the concept of culture. This is the basis of the heuristic tool that I construct to expose socio-cultural and political processes in Maltese society, in particular in the approach to irregular migration, which hinder the cultural appropriation of human rights principles. This heuristic device I refer to as the 'Tetrahedron Model of Human Rights Culture'.

Chapter 3 introduces the case study by giving a broad overview of irregular migration in Malta. The structure of the chapter reflects the overarching view that the phenomenon of irregular migration would best be seen as a subsection of other forms of migrations into Malta. Chapter 2 therefore presents empirical data of a statistical, legal and sociological nature with the intention to familiarise the reader with the case study.

The next four chapters use the Tetrahedron Model of Human Rights Culture to analyse irregular migration in Malta. By using human rights culture as an analytical tool these chapters attempt to reveal embedded meanings and socio-cultural patterns in the way Maltese society relates to irregular immigrants. Each chapter will focus on one of the four constitutive elements of the Tetrahedron Model of Human Rights Culture which are human dignity, cosmopolitanism, democracy and equality. They will follow a common pattern:

- a. describing the 'element'/concept as understood within the philosophy of human rights;



- b. applying the 'element'/concept to the case study of irregular migration in Malta;
- c. proposing measures whose adoption would help to close the gap between the human rights understanding of the 'element'/concept and the contemporary practice in the irregular migration field in Malta. (These 'proposals' are not meant to present a 'comprehensive' solution but are meant to illustrate the kind of solutions that come out from this analysis);
- d. reflecting on what this means for the function of the 'element'/concept in human rights culture.

Chapter 4 analyses the detention policy for migrants from the perspective of human dignity. This Chapter will show how the predominant discourse employed by the Government of Malta on detention serves to perpetuate a system whereby irregular immigrants are stripped of their human dignity. By doing so, the Government is, inadvertently or otherwise, undermining human rights. The treatment of irregular immigrants in migrant detention centres in Malta and the upholding of the policy detention itself, are symptomatic of a greater malaise in the relationship of Maltese society and irregular migrants.

Chapter 5 moves on to analyse the cosmopolitan orientation necessary for the enactment of the human rights vision showing how the development of a selective and exclusive nationalism proves to be a barrier to the acceptance of a cosmopolitan norms, and negatively impacts on accepting minimum core obligations towards 'outsiders' and foreigners. The development of this radical kind of nationalism is traced back to the political consciousness present amongst the Maltese during the era when Malta was administered by the Knights of St. John in the 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> centuries, its suppression during the 200 years under British colonial rule and the limited narrative adopted in view of an unexpected 'independence'. Juxtaposing the often radical pseudo-nationalism in contemporary Malta with the historical reality of an island society brings out the tensions in a society which has not only experienced, but is also in many ways the result of a cosmopolitan environment. The remnants of such elements present avenues for addressing the insularity and the lack of a cosmopolitan approach that is detrimental to human rights.

The next chapter, Chapter 6, discusses the understanding of democracy within the human rights movement and the workings of the democratic system in Malta. The popular assumption that the notions of democracy and human rights are strongly related is far from self-evident. Indeed democracy, and in particular representative democracy, faces moral and theoretical difficulties to implement human rights. However, notwithstanding this, the human rights movement has been very clear on the choice of a democratic system which prioritises the 'will of the people'. Another aspect of democracy that will be analysed is bureaucracy, as the anthropologist Michael Herzfeld has pointed out, through the practice of 'indifference' can play an active role in creating insiders and outsiders. In fact, the interplay between the political elite and bureaucrats in Malta shows how disempowering and excluding the system could be in spite of the enactment of legal frameworks and the provision of services whose objective is to cater for immigrants. The final discussion in this Chapter focuses on why and what model of active citizenship is necessary for a democratic culture which respects human rights. In Malta one can see that civic engagement with regards to irregular immigrants is rather poor and this, in part, reflects the reluctance of civil society actors to adopt an overtly human rights approach.

Finally, Chapter 7 looks at the understanding and application of the concept of equality and social justice with regards to irregular immigrants in Malta. Human rights philosophy defines a multi-dimensional notion of equality which aims to ensure that the minimal core standards for the well-being of everybody are upheld. The analysis of the unequal treatment of irregular immigrants in Malta uses Nancy Fraser's theory of justice, which proposes action on the redistribution of wealth, the recognition of differences and representation in society. It is shown how the lack of 'presence' and empowerment of immigrants is due to forcefully excluding practices which are resulting in poverty and destitution. This is justified by the Government's discourse of a 'lack of resources', a discourse which is accepted but rarely questioned. The exclusion of immigrants is further reinforced by the notable absence of a national integration policy.

The concluding chapter, Chapter 8, gathers the conclusions of the previous four substantive chapters to describe the concept of human rights culture and reflect on

the importance of recognising this concept in efforts to bridge the gap between human rights in theory and human rights in practice. Furthermore the potential of the Tetrahedron Model of Human Rights Culture as a heuristic tool that exposes underlying forces responsible for resistance and resilience to change, calls for the dire need of a cultural appropriation of human rights principles. This Chapter muses on the advantages of such an approach which could be complementary to other more popular approaches.

## Chapter 2: The Tetrahedron Model of Human Rights Culture

### 2.1 Introduction

This Chapter presents the theoretical framework of human rights that is employed in this thesis. This includes a description of the Tetrahedron Model of Human Rights Culture, the heuristic device that I have constructed in order to facilitate the analysis of the case study of irregular migration in Malta from a human rights point of view. The Tetrahedron Model arises out of the epistemological framework of human rights put forward by the modern, or post-1948, human rights movement.

The modern human rights movement is epistemologically different to previous rights' movements. When Mary Ann Glendon wrote her book on how the UDHR came into being, she appositely entitled it *A World Made New*, clearly alluding to the post-war project of rebuilding the world on the foundations of peace and respect among nations, part of which was the United Nations project. The world was however 'made new' in another (epistemological) sense: the humanist project(s) of rights was conceptually re-conceived into a project which combined local and global interests and necessitated a cultural approach that would enable the internalisation of human rights principles. The process of internationalisation of universal rights, not only had a huge influence on international relations and the state, but also had a considerable impact on the construction or conceptualisation of the universal cosmopolitan community. Human rights therefore took on a different form.<sup>1</sup> This view contrasts with other widespread views of human rights which trace a linear development from the French or American Declaration of Rights, from the Magna Carta, or even 'from civilisation's first light'.<sup>2</sup> The historian Samuel Moyn gives an example of why it is misleading to present previous rights movements as the source of modern human rights:

...the *droits de l'homme* that powered early modern revolution and nineteenth-century politics need to be rigorously distinguished from the 'human rights' coined in the 1940s

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<sup>1</sup> Some proponents of this view are Samuel Moyn, Kirstin Sellars and Oliver Sensen. Mary Ann Glendon and Stephanie Grant would also probably fall into this group.

<sup>2</sup> This is taken from an address of First Lady Hillary Clinton in an address to the UN in December 1997 and quoted in Kirstin Sellars, *The Rise and Rise of Human Rights*, Sutton Publishing, UK, 2002, p. vii.

that have grown so appealing in the last few decades. The one implied a politics of citizenship at home, the other a politics of suffering abroad. If the move from the one to the other involved a revolution in meanings and practices, then it is wrong at the start to present the one as the source of the other.<sup>3</sup>

The watershed and symbol of this change is the UDHR which was passed unanimously by the General Assembly of the UN on the 10<sup>th</sup> of December 1948. The UDHR, the only international declaration that is now easily invoked as part of customary international law, is critically important to the movement because it constitutes the first articulation of this new human rights vision.<sup>4</sup> In addition it sets a precedence of intercultural and international dialogue and negotiation. For this reason the UDHR is often considered to be close to the genesis of the 'modern' human rights movement.

Modern human rights envisaged that human rights should not remain an intellectual, political or diplomatic project but would be equally, if not primarily, owned by people. Modern human rights philosophy is therefore imbued with an understanding that the driving force, or 'motor' of the modern human rights movement will be people themselves. This could only be realised in practice if human rights principles were valued and internalised by people. For this reason, culture, understood as the social aspect of the person, necessarily assumes a decisively significant role in the new human rights movement. This Chapter echoes the critique, made directly or indirectly by Ann-Belinda Preis, Jane Cowan, Marie-Bénédicte Dembour, Richard Wilson, Kate Nash and others that mainstream human rights theories generally fail to acknowledge or assign 'culture' the prominent role that it deserves.<sup>5</sup>

Since the rise in significance of culture within human rights is intrinsically tied to the post-1948 modern human rights movement, this Chapter starts by discussing three premises that inform some of the characteristics of the epistemological view of modern human rights. These premises implicitly make the case for a 'human rights

<sup>3</sup> Samuel Moyn, *The Last Utopia: Human rights in history*, Belknap Press, London, 2010, p. 12-13.

<sup>4</sup> The international lawyer Maarti Koskeniemi and Mary Ann Glendon write about this in: Maarti Koskeniemi, 'The Preamble of the Universal Declaration of Human Rights' in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. G. Alfredsson, Martinus Nijhoff Publishers/Kluwer International, London, 1999; and Mary Ann Glendon, *A World Made New*, 2001.

<sup>5</sup> Ann-Belinda Preis, 'Human Rights as Cultural Practice: An Anthropological Critique', *Human Rights Quarterly*, Vol. 18, No. 2, 1996, pp. 286-315.; Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, eds. *Culture and Rights: Anthropological Perspectives*, Cambridge University Press, Cambridge, 2001., Kate Nash, *The Cultural Politics of Human Rights*, 2009., Richard A. Wilson, ed. *Human Rights, Culture and Context: Anthropological Perspectives*, Pluto Press, London, 1997.

culture', a concept which, as will be discussed in Section 2.3, has only had limited use in human rights theory and practice. Finally Section 2.4 describes the details of the Tetrahedron Model of Human Culture, a heuristic device that will be used in this thesis to identify those cultural and social processes that are hindering the adoption of a human rights approach in the irregular migration field in Malta.

## **2.2 Human rights: Modern visions**

Three premises which characterise the modern human rights movement and shed light on its essentially different nature will be presented in this Section. The first premise, presented in Section 2.2.1, is that after 1948 human rights were conceived conceptually as a political utopia. This utopia envisaged the human being at the centre of political decisions and activity at both a local and a global level. For this to happen, human rights could not be relegated to the legal or diplomatic fields, but had to be understood and internalised by people, as well as politicians and other professionals. The effectiveness of human rights could only be achieved if they were recognised as targeting the nexus between politics and culture with culture being understood, as explained before, as patterns of meaning and not simply a 'causal' element. The issue of cultural legitimacy is therefore necessary for an effective internalisation of human rights and this constitutes the second premise discussed in Section 2.2.2. The third theoretical premise serves to explain how human rights could be made to operate in different cultural settings without foregoing the basic principles or imposing a separate 'culture'. Human rights would best be seen as empty signifiers as Section 2.2.3 describes in further detail.

### **2.2.1 Modern human rights are a global-local utopia**

Utopia is about how we would live and what kind of world we would live in if we could do just that.<sup>6</sup>

This is the opening sentence of a book on utopian studies by the sociologist Ruth Levitas. It can easily describe the motivation of the drafters of UDHR. This utopianism,

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<sup>6</sup> Ruth Levitas, *The Concept of Utopia - Second Edition*, Peter Lang, Bern, 1990/2010, p. 1.

‘the heartfelt desire to make the world a better place’<sup>7</sup> is what makes human rights such a powerful tool. It can also be considered a ‘shared’ sentiment amongst human rights theorists and practitioners. This appears to be common across the four different human rights schools presented by Marie-Bénédicte Dembour – the natural school, the protest school, the deliberative school and the discourse school. Moreover, even among sceptics or human rights ‘nihilists’ as Dembour defines herself, the realisation that there is no alternative to human rights at present, brings about some minimum respect for their contemporary functional uniqueness.<sup>8</sup>

One of the main distinguishing characteristics, between the modern human rights movement and previous rights’ movements, is that modern struggles – such as the disability rights movement, the LGB rights movement, and the children’s rights movement - could effectively contest the nation-state with potentially global implications. Modern human rights were reconceptualised as entitlements that might ‘contradict the sovereign nation-state from above and outside rather than serve as its foundation’.<sup>9</sup> The human rights movement was not an internal or domestic struggle for recognition, but it was re-constructed as a local struggle for the global re-articulation of the human. This universal aspiration of human rights and the separation from state citizenship gave a distinctly different character to the modern human rights movement. Using this argument the African-American civil rights movement (1955 – 1968), for example, was a pre-cursor to the modern human rights movement but not a human rights movement in itself.<sup>10</sup> It may have been inspired by human rights principles, but it was not a modern human rights movement because its struggles were of a ‘civil’ nature, and not of a universal nature. It involved more a re-making or refinement of the notion of an ‘American citizen’ rather than the notion of ‘human’.<sup>11</sup>

This universal quality of human rights is strongly present in the UDHR and makes the case for the human rights of non-citizens. The human rights scholar Stephanie Grant shows that in spite of the absence of a specific mention of non-citizens in the UDHR,

<sup>7</sup> Samuel Moyn, *The Last Utopia*, 2010, p. 225.

<sup>8</sup> Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge University Press, Cambridge, 2006, p. 2 & p. 14.

<sup>9</sup> Samuel Moyn, *The Last Utopia*, 2010, p. 13.

<sup>10</sup> Ibid, p. 159.

<sup>11</sup> The example of the African-American civil rights movement shows that the transition to the ‘modern human rights movement’ is an ongoing process and did not happen instantaneously when the UDHR was adopted.

the premise is that states are primarily responsible for safeguarding the human rights of everyone – citizens and non-citizens - within their territory. Grant identifies four reasons which make the case that non-citizens were clearly included in the UDHR. These are, first, the principle of universality which infuses so-called positive and negative rights in the UDHR:<sup>12</sup> “‘everyone’ has the right to recognition as a person ‘everywhere’”.<sup>13</sup> Second, the draft International Bill of Rights presented by Lord Dukeston, the representative of the British Government and an influential member of the Drafting Committee, had included in an article that ‘citizens, persons of foreign nationality or stateless’ should all enjoy human rights. This was articulated by René Cassin in the presentation of the Declaration to the General Assembly on 10 December 1948, and supported publicly by the Indian representative.<sup>14</sup> The third reason is that this inclusive approach generally reflected the position of aliens under international law. Paradoxically, at the time that the UDHR was adopted, aliens unlike citizens already enjoyed some protection under international law.<sup>15</sup> The fourth reason, according to Grant, is in the use of the word ‘dignity’ in article 1 which was used to refer to the equal worth of every human being, without distinction.<sup>16</sup>

In tracing the modern history of human rights, the historian Samuel Moyn argues that the survival of human rights in the politically turbulent Cold War decades could partly be attributed to a crisis in other political utopias. Moyn’s observation is that, ‘morality, global in its potential scope, could become the aspiration of humankind’.<sup>17</sup> Human rights, conceived as ‘neutral’ and ‘antipolitical’, had the potential for transcending traditional political structures in a way that could break through the ideological climate of the time.

After the 1970s human rights were increasingly expected to provide a ‘programme of action’, to become less ‘antipolitical’. Moyn implies that the challenges human rights

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<sup>12</sup> Normative theorists use this distinction between positive rights and negative rights to refer to the different nature of entitlement. The holder of a positive right is entitled to provision of a service, whereas the holder of a negative right is entitled to non-interference.

<sup>13</sup> Stephanie Grant, ‘The recognition of migrants’ rights within the UN human rights system: The first 60 years’ in *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, 2011, p. 26.

<sup>14</sup> Ibid, p. 27.

<sup>15</sup> Idem.

<sup>16</sup> Idem.

<sup>17</sup> Samuel Moyn, *The Last Utopia*, 2010, p. 213.



were facing to provide a political agenda and a programmatic vision stem from their 'suprapolitical' birth and the historical circumstances which drove the success of human rights as 'antipolitical' during the 1970s.<sup>18</sup> Moyn's restricted use of the term 'political' and 'politics' to refer to traditional political schemes and ideologies is at times misleading because human rights are part and parcel of political culture. Paradoxically therefore, the same characteristic which appeared to have led to the success of human rights in the 1970s was, and in some regards still is in contemporary times, the characteristic which is criticised most. Moyn describes this as such:

Because they [human rights] were born at a moment when they survived as a moral utopia when political utopias died, human rights were compelled to define the good life and offer a plan for bringing it about precisely when they were ill-equipped by the fact of their suprapolitical birth to do so.<sup>19</sup>

In brief, post-war human rights can be described as a utopia which derives some ideas from previous rights movements, but is paradigmatically different. Modern human rights are both local and global in vision and action. With this worldview no distinction in entitlements is made on the basis of citizenship. In this regard, this thesis can be seen as part of the project of equipping human rights by employing a constitutive definition of 'culture' as the space in which social and political processes imbue activity with significance and meaning.

### **2.2.2 Modern human rights need cultural legitimacy**

How are human rights 'internalised'? Or, in other words, how do human rights principles 'gain entry' into a culture? This question leads us to the concept of cultural legitimacy. A thorough understanding and appreciation of human rights culture is essential to bridge the gap between human rights in theory and human rights in practice. Without cultural legitimacy, human rights would be outright repudiated by a community. They would be perceived as an alien imposition or principle. One should not take membership of states in the human rights system, conducted by governments, as a sign that human rights have been adopted by society and local

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<sup>18</sup> Idem.

<sup>19</sup> Ibid, p. 214.

communities.<sup>20</sup> The philosopher Abdullahi An-Na'im rightly argues that 'the difficulties in implementing human rights effectively...derive from the insufficiency of cultural support for the particular right or claim.'<sup>21</sup> Moreover, cultural legitimacy is essential for a healthy human rights culture since it opens the way for people from different cultures to engage with human rights in their endeavours to make human rights relevant for their communities and for others.

Governments have for long focused their efforts on human rights in the international field as a diplomatic tool. This is limiting on the implementation of human rights, for which there needs to be an equally incisive focus on local development. This could partly explain why governments' relationship with human rights is often imbued with suspicion and the threat of external interference. States' perception of human rights is at times limited to a condition of their membership in the international community of states. This has, counterproductively, led to a situation where governments are reticent in making known, and let alone discussing, human rights issues locally and globally. With the exception of a few so-called rogue states, most states try and 'keep up appearances' with the international community through self-promotion which can take various forms, from using the accepted rhetoric at international meetings, to responding to international human rights reports in a *pro forma* manner. Such attempts to retain or achieve greater moral authority within the international community, do not always reflect the real situation on the ground. An-Na'im points this out:

With internal cultural legitimacy, those in power could no longer argue that national sovereignty is demeaned through compliance with standards set for the particular human rights as an external value.<sup>22</sup>

At a national level, once a human right becomes legitimate within a given culture, the same internal processes of change and adjustment which happen naturally within any

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<sup>20</sup> An interesting chapter which mentions issues in the process of cultural legitimization in law and policy in Australia with three different groups: the Anglo-Celtic English-speaking population of Australia, Aboriginal groups and new migrant groups, is the following: Patricia Hyndman, 'Cultural Legitimacy in Law and Policy in Australia' in *Human Rights in Africa: Cross-Cultural Perspectives*, eds. A. A. An-Na'im & F. M. Deng, The Brookings Institution, Washington D.C., 1990.

<sup>21</sup> Abdullahi A. An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights' in *Human Rights in Africa: Cross-Cultural Perspectives*, eds. A. A. An-Na'im & F. M. Deng, The Brookings Institution, Washington D.C., 1990, p. 333.

<sup>22</sup> Abdullahi A. An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights', 1990, p. 332.

given community would accommodate human rights. Cultural legitimacy may be seen as a politically-imbued process that serves as a channel for the interpenetration of ideas between 'local' cultures and human rights culture. Cultural legitimacy is therefore the process of cultural change by which an alien norm, whether simply perceived as such or otherwise, comes to be seen as making sense in the intricate webs of significance that make up a local culture. Once a norm is seen as culturally legitimate, actions based or motivated by such norms are given value and not discredited by the people who make up the culture.

In much the same vein, any discussion on human rights and culture will also undoubtedly provoke controversial questions on how a framework conceived by an international group in the UN ambit could come to be called a 'culture' and have such influence worldwide beyond the diplomatic circle it was originally conceived in. Human rights culture could well be seen as a transnational culture. An-Na'im makes reference to transnational cultures, made up of people 'who share a set of values, who subscribe to certain institutions' and are not 'bound to locality, either regional or national'.<sup>23</sup> He links the emergence of these transnational cultures to the processes of globalisation like the 'global business culture', 'technology culture' and 'security culture'.<sup>24</sup>

In this sense culture is most usefully conceptualised in a broad and dynamic Geertzian sense. The boundaries of culture and nation-states should not be reduced to each other. Rather one should view cultures, and sub-cultures, as different fields of contestation in their own right with their own dynamics of cultural politics. For this reason the Geertzian view of culture as a complex, multi-faceted system, which is constantly in flux, is very useful. In Geertz's words,

...an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men [and women] communicate, perpetuate, and develop their knowledge about and attitudes toward life.<sup>25</sup>

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<sup>23</sup> Abdullahi A. An-Na'im, 'Does Culture Matter?', *Human Rights Dialogue*, <[http://www.carnegiecouncil.org/resources/publications/dialogue/1\\_11/requisites\\_for\\_shared/598.html/pf\\_printable](http://www.carnegiecouncil.org/resources/publications/dialogue/1_11/requisites_for_shared/598.html/pf_printable)>, 1998, (accessed 10 July 2011).

<sup>24</sup> Idem.

<sup>25</sup> Clifford Geertz, *The Interpretation of Cultures*, Basic Books, New York, 1973, p. 89.

A political elite's endorsement of a human right acts as a facilitating factor for the acceptance of a norm but, contrary to the way it is popularly presented, it will not directly bring about automatic cultural legitimacy. The human rights historian Bonny Ibhawoh points out that, '...the cultural legitimacy of rights cannot be deduced or assumed from the mere fact that existing formal documents officially recognize the claim as a human right.'<sup>26</sup> Instead Ibhawoh indicates that cultural change comes about when individuals adopt and alter their ways of thinking,<sup>27</sup>

Cultural change can result from individuals being exposed to and adopting new ideas. Individuals are actors who can influence their own fate, even if their range of choice is circumscribed by the prevalent social structure or culture. In so doing, those who choose to adopt new ideas, though influenced by their own interest, initiate a process of change which may influence dominant cultural traditions. Culture is thus inherently responsive to conflict between individuals and social groups [here he quotes Rhoda Howard 1986]. It is a network of perspectives in which different groups hold different values and world views, and in which some groups have more power to present their version as the true culture.<sup>28</sup>

Cultural legitimacy happens at an intersection between the cultural and the political. This, as Karen Engle points out, is an argument put forward by the anthropologist Sally Merry '...Merry identifies human rights as a site for the intersection of the cultural and the political...'<sup>29</sup> For Merry 'by using this [human rights] discourse as a site for political resistance, indigenous groups have 'reinterpret[ed] and transform[ed] Western law in accordance with their own local legal conceptions.'"<sup>30</sup> Engle goes on to say that 'she is most sympathetic to Merry's understanding of the interpenetration of politics and culture. Whether done consciously or not, the continued appropriation of international law by those who have traditionally been subjugated by it might well have the potential for liberal, if not radical, reform.'<sup>31</sup>

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<sup>26</sup> Bonny Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State', *Human Rights Quarterly*, Vol.22 (3), 2000, p. 857.

<sup>27</sup> Civil society also challenges the segregation of politics and culture often endorsed by the political elite, once civil society contributes to the widening of the intersection, there is more space for human rights to operate and acquire legitimacy.

<sup>28</sup> Bonny Ibhawoh, 'Between Culture and Constitution', 2000, p. 842.

<sup>29</sup> Karen Engle, 'Review: Human Rights, Culture and Context: Anthropological Perspectives by Richard A. Wilson', *The American Journal of International Law*, 93 (1), 1999, pp. 279.

<sup>30</sup> Ibid, p. 279.

<sup>31</sup> Ibid, p. 857.

### 2.2.3 Modern human rights best seen as empty signifiers

Drawing on the previous section, it would follow that human rights principles can be appropriated by different cultural systems. But how can human rights claim to be normative and at the same time be adaptable to different cultural signifiers? In an attempt to address this dilemma, in this section I propose that human rights could be seen as 'empty signifiers'.

It is thus useful to view the human rights system as a discursive field in its own right, made up of smaller discursive fields of human rights struggles, such as (a) movements which have an international impact like the civil rights movement, the women's movement and the international disability rights movement; (b) movements of smaller magnitude which are country or group specific like the national movements of self-determination and the disability rights movement in Malta. Seen in this way one could conceive of different human rights discursive fields which are separate but overlap (at different axes) at the same time.<sup>32</sup> Each human rights discursive field consists of signifiers and signifieds (meanings) and includes an 'empty/master signifier'. The political scientist Claes Wrangel explains it thus:

In his well known *Course in General Linguistics* (1974) Saussure portrayed a linguistic structure as a system of difference where every sign gets its meaning from its relational position vis-à-vis other signs. In such a system meaning is only constituted through difference and every sign becomes non-essential in character, but on the other hand, the meaning of the system itself becomes essential – something in itself as it is not standing in relation to anything at all.<sup>33</sup>

The concept of the empty signifier, which was defined by Roland Barthes as a signifier with no definite signified, was of strategic importance to political philosophers Ernesto Laclau and Chantal Mouffe's 'field of discursivity'. The field of discursivity is characterised by unlimited combinations, that is, by the multitude of meaning that

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<sup>32</sup> This kind of approach would explain why policies which put all 'vulnerable' groups into one bag do not work, e.g. the EU Directive on equal treatment. There cannot be ONE human rights discursive field, because there is a plurality of groups with their own particularities at the same time. In a different way, and coming from a different starting point, Kate Nash refers to this as the inter-subjective understandings of human rights which are essential to the realisation of human rights. According to Nash, the concept of a human rights culture finds political and theoretical support precisely because of this: "'human rights culture' marks the importance of inter-subjective understandings of human rights to their realisation'. Kate Nash, *The Cultural Politics of Human Rights*, 2009, p. 5.

<sup>33</sup> Claes Wrangel, 'Towards a Modified Discourse Theory Pt. 1: Laclau's 'Empty Signifier'', *That's Not It*, <<http://thatsnotit.wordpress.com/2007/05/03/towards-a-modified-discourse-theory-pt-1-laclaus-empty-signifier>>, 2007, (accessed 23 March 2008).

every sign can take. This field conditions every discursively constituted sign, while at the same time prevents every attempt at fixing meaning, since new combinations are always possible leading to new meanings. However, there is always something outside every discursive structure which makes every discourse into a non-complete entity – and it is this which allows us to theorise about structural change and power. The political struggle, according to Laclau, consists of trying to enter the space created by the empty signifier, which has essentially no content but has universalising effects.

Human rights can be seen as playing that role of bringing together a system of signs and meanings. This can only be achieved through a hegemonising process. The role of the empty signifier acts as a nodal point. Therefore the appropriation of part of the nodal point of human rights means that boundaries are created by what is deemed acceptable or unacceptable by the particular mix and interrelation of signs and meanings in the particular discursive field. This means that the conceptual mix present in the discursive fields contributes to an interpretation of human rights for a particular group of people. Laclau and Mouffe go further and allude to the social effects of a discursive structure when they define it as,

...not a merely cognitive or contemplative entity: it is an *articulatory practice* which constitutes and organizes social relations.<sup>34</sup>

When applying this to the struggles of different ‘particularistic’ groups like disabled people, women, gay people, children or irregular immigrants, it means that the same human right of freedom of expression could, driven by their different contexts and countries, lead to a different interpretation. Despite these differences, the discursive fields significantly overlap. This is evidenced by some common shared meanings, which allow for meaningful communication across discursive fields or human rights of particular groups. However, the human rights discursive structure of disabled people is distinctly different to that of irregular immigrants as their placement within the local culture is different, the history of their struggle is different, and so on.

Laclau makes the concept of empty signifiers clearer and redefines the global emancipation by highlighting the difference between the foundation and the

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<sup>34</sup> Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics Second Edition*, Verso, London, 2001, p.96. Emphasis in the original.

horizon.<sup>35</sup> The ‘foundation’ is a relation of delimitation and determination; it is totalised and its operations are limited by the concrete argumentative practices existing in society. On the contrary, the ‘horizon’ is open-ended; it is a formation without foundation; and its very groundlessness ensures that argumentative practices operate over a backdrop of radical freedom.<sup>36</sup> The philosopher Richard Bernstein builds further on Laclau’s idea of an open-ended horizon and interestingly adds the qualities of ethical and political, ‘ethical-political’, to the horizon.<sup>37</sup> Human rights are therefore empty signifiers as well as an ethical-political horizon, towards which all the discursive fields aspire to reach.

### 2.3 The concept of a human rights culture

The concept of a human rights culture only started gaining popularity in the 1990s and signals an increasing awareness of the relevance of ‘culture’ to human rights practice and study. This was not an unexpected development given that, as has already been explained, culture achieves a more prominent role following the transition to the modern human rights. However, this popularity is deceptive because the term ‘human rights culture’ is used rather loosely in political rhetoric, academic literature and by NGOs. Moreover there has been no systematic study of human rights culture.<sup>38</sup> During the adoption of the UDHR in 1948, the need for ensuring the effectiveness of human rights and not allowing it to remain in the cosy bed of political rhetoric was brought up but no direct mention of a ‘human rights culture’ was made at the time. Notwithstanding this, Nash observes that there does appear to be a:

...fairly well-established understanding that culture is crucial to fostering the realisation of human rights in practice.<sup>39</sup>

‘Human rights culture’ has also been used in reaction to the heavy criticism that human rights have become an elitist enterprise, and to the growing criticism of an

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<sup>35</sup> Ernesto Laclau, ‘Politics and the Limits of Modernity’, *Social Text: Universal Abandon? The Politics of Postmodernism*, No. 21, 1989, p. 80.

<sup>36</sup> Ibid, p. 81.

<sup>37</sup> Richard J. Bernstein, *The New Constellation: The ethical-political horizons of modernity/postmodernity*, MIT Press, USA, 1992, p. 9.

<sup>38</sup> Kate Nash, *The Cultural Politics of Human Rights*, 2009, p. 5.

<sup>39</sup> Idem.

over-legalisation of the human rights field.<sup>40</sup> Human rights culture is thus proposed as the 'future' in that it would constitute the 'realisation' of human rights. This is captured in the following quote by UN Human Rights Commissioner Jose Ayala Lasso:

I am convinced that the development of a culture of human rights throughout the world is one of the most important contributions that can be made to future generations. The foundation for this culture is enshrined in the principles of the Universal Declaration. A culture of human rights would result in a profound change in how individuals, communities, States and the international community view relationships in all matters. Such a culture would make human rights as much a part of the lives of individuals as are language, customs, the arts, faith and ties to place. In this culture, human rights would not be seen as the job of "someone else", but the obligation and duty of all.<sup>41</sup>

The most comprehensive description of human rights culture, which is closest to what is used in this thesis, has been proposed by the Joint Committee on Human Rights (JCHR) of the UK House of Lords. The JCHR report broadly explains the origins and fundamentals of a 'human rights culture', used interchangeably with 'a culture of human rights' or even, a 'culture of respect for human rights'. The JCHR's definition advances the position undertaken by the 1998 UK Human Rights Act of mainstreaming human rights and human rights approaches in government institutions. It then moves beyond this call to emphasising the 'ethical dimension' inherent in human rights. Human rights culture therefore should not be limited to the legal or institutional fields, but should also involve the moral and personal. The following is the description of 'human rights culture' by the JCHR:

A culture of human rights has two dimensions – institutional and ethical. So far as the former is concerned, it requires that human rights should shape the goals, structures and practices of our public bodies....So far as the moral or personal dimension is concerned, a culture of human rights could be characterised as having three components. First, a sense of entitlement. Citizens enjoy certain rights as an affirmation of their equal dignity and worth, and not as a contingent gift of the state. Second, a sense of personal responsibility. The rights of one person could easily impinge on the rights of another and each must therefore exercise his or her rights with care. Third, a sense of social responsibility. The rights of one person could require positive obligations on the part of another and, in addition, a fair balance will

<sup>40</sup> Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes', *Columbia Law Review*, Vol. 102, 2002, p. 1832.

<sup>41</sup> Jose Ayala Lasso, 'A Culture of Respect for Human Rights', *UN Chronicle*, Issue 4, <<http://www.thefreelibrary.com/A+culture+of+human+rights.-a020518046>>, 2007, (accessed 29 July 2011).



frequently have to be struck between individual rights and the needs of a democratic society and the wider public interest.<sup>42</sup>

This description is also similar to Nash's understanding of human rights culture. Nash however prefers to use the term 'cultural politics of human rights'. She identifies two main problems with the concept of human rights culture. The first problem, she says, is that there seems to be an assumption of what she calls 'an essentialist understanding of culture as a "way of life"' where stability and coherence are more emphasised than the fluidity and the inherent ambiguity of any cultural life. According to Nash, advocates of human rights culture therefore risk falling into the trap of an essentialist definition of culture.<sup>43</sup>

Nash's second criticism is based on the observation that a human rights culture is generally understood as a point of arrival and not as a concept constitutive of practices. The example that she gives is an observation that human rights culture is often presented as the solution to human rights wrongs and not, as she proposes, a space of activity in itself. This does not enable the internal investigation of how culture effects change. Nash expresses grave reservations on the predominant use of the concept of human rights culture as providing a 'point of arrival' style answer to the problem of how human rights can be realised. As she says:

Rather than accepting that human rights culture is the ethical answer to the question 'how can human rights ideals be realised in practice?', it is important to think about how we might study the cultural politics of human rights and their effects on social institutions.<sup>44</sup>

The contemporary understanding of the concept of culture that Nash refers to above, which is that culture is all-encompassing, leads to another important assertion: human rights *are* cultural.<sup>45</sup> This observation has had a mention in other works too, amongst which there is a journal article by Ann-Belinda Preis,<sup>46</sup> and an edited volume by Jane

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<sup>42</sup> Joint Committee on Human Rights, *The Case for a Human Rights Commission, Vol. 1, 6th Report of Session 2002-03*, House of Lords and House of Commons, London, 2002, pp. 11-12.

<sup>43</sup> Kate Nash, *The Cultural Politics of Human Rights*, 2009, p. 7.

<sup>44</sup> Ibid, p. 5.

<sup>45</sup> Ibid, p. 8.

<sup>46</sup> Ann-Belinda S. Preis, 'Human Rights as Cultural Practice: An Anthropological Critique', *Human Rights Quarterly*, Vol. 18, No. 2, 1996, pp. 286-315.

Cowan, Marie-Bénédicte Dembour and Richard Wilson.<sup>47</sup> Nash advocates for this approach:

From the perspective of contemporary cultural theory, human rights are not just supported by culture: human rights are cultural. There is nothing meaningful in social life that is outside culture: human rights are cultural insofar as they are meaningful. Furthermore, there is also, then, no absolute distinction between practices of state and civil society...In so far as representations of human rights formed in civil society are influential on state practices, this is possible because human rights are meaningful on both sides of the analytic and socially sustained distinction between civil society and state. What links officially sanctioned state practices and public pressure from civil society is cultural politics.<sup>48</sup>

Human rights culture is not brought about by legal and institutional change only, but needs social, moral and personal change too. Human rights culture is not about a state of realisation of human rights, but a culture which appropriates human rights principles and is participatory in the modern human rights movement. The next section will demonstrate how this same concept can be used as a normative discursive tool to analyse a culturally-situated issue from a human rights point of view.

## **2.4 The Tetrahedron Model of Human Rights Culture**

The Tetrahedron Model of Human Rights Culture is a heuristic device that I constructed to facilitate my human rights analysis of irregular migration in Malta. The Tetrahedron Model is moulded out of the two arguments posited above: a) an awareness of the distinctiveness of the modern human rights movement; b) the prominence of the concept of culture to the realisation of the modern human rights vision. The underlying assumption is that in an ideal scenario where a human rights culture is present, irregular immigrants would not be subjected to inhuman and discriminatory treatment. More specifically, the Tetrahedron Model of Human Rights Culture is therefore a heuristic tool which aims to identify those socio-cultural and political barriers hindering the nurturing of a human rights culture.

### **2.4.1 Four basic elements of the modern human rights movement**

<sup>47</sup> Jane K. Cowan, Marie-Bénédicte Dembour & Richard A. Wilson, eds. *Culture and Rights: Anthropological Perspectives*, Cambridge University Press, Cambridge, 2001.

<sup>48</sup> Kate Nash, *The Cultural Politics of Human Rights*, 2009, p. 8.

The human rights movement in this thesis refers to all those individuals who believe in the post-1948 paradigm of human rights and act, together or individually, inspired by its philosophy. These are a diverse group of individuals active at local, national and global levels and in various areas of the human rights system. Members of the human rights movement would therefore include the original drafters of the UDHR, individuals working with inter-governmental organisations, individuals working with governments, individuals working with non-state organisations at a local or global level and simply anyone who believes and is inspired by the new human rights paradigm of the UDHR.

The use of the word ‘movement’ in this case has no deliberate links to the new social movements. Structurally, insofar as new social movements have adopted human rights as their highest aspiration, as Moyn has argued, social movements could constitute part of the modern human rights movement.<sup>49</sup> Indeed new social movements are characterised by such a human rights aspiration. However, not all social movements have contributed specifically to the human rights mission, and as such cannot all be considered ‘human rights movements’. An example which will be discussed at length in Section is the American civil rights movement. Due to the fact that its primary concern was a re-articulation of American citizenship rather than the ‘human’, it should not be considered as part of the human rights movement. The modern (post-1948) human rights movement is understood throughout this thesis as a broad umbrella category of human rights believers and activists, who knowingly or unknowingly, are adding ‘flesh, blood and sex to the pale outline of the “human”’.<sup>50</sup>

The above-given delimitation, albeit broad, of the modern human rights movement is not entirely novel. It builds on other understandings of ‘human rights movement’ but differs significantly by not sticking to the typical categorisations. For example in Glendon’s book on the Universal Declaration, where, surprisingly, a definition of ‘human rights movement’ is never found, there is an index entry entitled: ‘human rights groups and movement’.<sup>51</sup> A closer look at the referenced pages yields mention of international human rights activists and the new social movements starting from the

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<sup>49</sup> Samuel Moyn, *The Last Utopia*, 2010, p. 1.

<sup>50</sup> Costas Douzinas, ‘Who counts as ‘human’?’, *The Guardian*, Comment is free, 1 April 2009.

<sup>51</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, 2001, p.322.

1960s/1970s, some of whom had 'programs rooted explicitly in parts of the Universal Declaration.'<sup>52</sup> It would appear, although never expressly clear, that the 'human rights movement' for Glendon was a collective term to denote the new social movements.

On the same lines as Glendon, Jack Mahoney devotes a whole chapter to 'The Modern Human Rights Movement', again without giving a clear definition.<sup>53</sup> The UDHR is when the modern human rights movement was conceived with the second major landmark being the 1993 Vienna World Conference on Human Rights.<sup>54</sup> The addition of the latter is interesting because the World Conference was considered a huge milestone not only by the new social movements and international human rights activists but also by governments, by intergovernmental organisations, and others. From the point of view of a history of ideas, Douzinas clearly states that human rights are drawn from a 'combination of disparate events, ideas and traditions'. For him the creation of the human rights movement following the Second World War,<sup>55</sup> which was a preoccupation and priority of Western (predominantly American) politicians,<sup>56</sup> is one major event contributing to this idea of human rights.<sup>57</sup> Again, a similar scenario: no clear definition, an idea of the UDHR as the conception.

What is of concern in these three examples I have cited is that there is an uncritical acceptance as well as an unhelpful essentialisation of international human rights activists as somehow more authentic, presumably because they are deemed to be 'outside' the influence of states. I found this to be over-simplistic during my research for this thesis. Certainly not all individuals working with international organisations could be deemed 'authentic' or at any rate 'more authentic' than individuals working for intergovernmental or even governmental agencies. More pertinently, the success of human rights initiatives could never be attributed solely to one category but was usually the outcome of various individual actions, which were not all visible. Therefore while acknowledging the structural forces and typical ethos which pervades the

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<sup>52</sup> Ibid, p. 218.

<sup>53</sup> Jack Mahoney, *The challenge of human rights: origin, development, and significance*, Blackwell Publishing, Oxford, 2007, Chapter 2, pp. 42-70.

<sup>54</sup> Ibid, p. 56.

<sup>55</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, Routledge-Cavendish, Abingdon, 2007, p. 74.

<sup>56</sup> Ibid, p. 15.

<sup>57</sup> Idem.

various categories, with regards to the definition of ‘human rights movement’ I resist, on the basis of my own findings, singling out one of the categories as more ‘authentic’ than the rest. The human rights movement, Douzinas says, can be seen as ‘the ongoing but failing struggle to close the gap between the abstract man of the Declarations and the empirical human being.’<sup>58</sup> This struggle should not be seen as exclusively belonging to members of one category (eg. International organisations) because the picture of how things happen in practice. The human rights movement in this thesis refers to those individuals who are inspired by the post-1948 paradigm human rights and base their actions on it.

Four ‘elements’, I propose, are critical to the constitution and workings of the modern human rights movement. This hypothesis was informed by knowledge of human rights theory and supported by my practical experience of the human rights system. The interplay of these four intertwined strands stand out as critically important to the contemporary human rights movement. The following are the four elements I identified, followed by a brief introduction of each one:

1. The person or individual as beneficiary and actor;
2. A political philosophy or vision as the aim;
3. International relations between states as the facilitator;
4. The state as the guarantor/the place where it will have to happen

### Person

The first element identified is the ‘person’ as the beneficiary and thus primary motivation for human rights. In *A World made New* Glendon records discussions at the first meeting of the Human Rights Commission in which Charles Malik, one of the intellectual minds behind the UDHR, proposed four principles to guide the work of the Commission.<sup>59</sup> In brief his view was that philosophically it would be better to use ‘person’, rather than the individual, and that there should be a distinction between state and society. Although several representatives were openly against this, on the second day of the Commission meeting, Roosevelt endorsed these principles and put

<sup>58</sup> Costas Douzinas, ‘Who counts as ‘human’?’, 1 April 2009.

<sup>59</sup> Mary Ann Glendon, *A World Made New*, 2001, p. 39.

her weight as chair behind Malik's proposals and philosophy.<sup>60</sup> Yet, as Glendon has interestingly observed, Roosevelt (knowingly or otherwise) used the term 'individual' instead of Malik's preferred term 'person'. In so doing, Roosevelt had either not grasped Malik's intent fully or had purposely used 'individual' for other unknown reasons.<sup>61</sup> Malik, well-known for his insistence on rigorous thinking, had specifically used the term 'person' to 'emphasise the social dimension of personhood and to avoid connotations of radical autonomy and self-sufficiency.'<sup>62</sup>

Apart from this diversion, the focus on the individual retained its primacy throughout. Glendon recounts how during a particularly rough patch at the negotiations, when the Soviet representative Alexei P. Pavlov tried to insert references on the role of the state as the sole guarantor of human rights, there were successful efforts to reduce this emphasis. The UDHR makes clear that responsibility for protecting human rights belonged not only to nation-states, but to people and groups above and below the national level. A revealing part of the Declaration is the recognition of institutions (non-state actors) as partners and their endowment with a mission to ensure that the spirit and principles of the Declaration reach everyone. This is done not just in any way, but through teaching and education, recognising that a certain amount of formation is needed for the proper appreciation and implementation of human rights at grassroots level.

This was a major shift, and although the primary onus of responsibility remained on the state, it was highly significant that individuals and non-state associations were also singled out in the UDHR. The Preamble appeals to 'every individual and every organ of society' to 'strive by teaching and education to promote respect for those rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the member states themselves and among the peoples of territories under their jurisdiction.' In so doing, the UDHR transposes some of the power traditionally vested in governments onto individuals. This is a significant change in international law and international relations. Individuals' well-being and security are not only at the heart of

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<sup>60</sup> Ibid, p. 40.

<sup>61</sup> Ibid, p. 42.

<sup>62</sup> Idem.

this document and its primary motivation, but they are also called upon to ensure that these principles are adhered to.<sup>63</sup>

### Political philosophy

The lengthiest and most heated discussion at Lake Success involved political philosophy.<sup>64</sup>

The ideological side of human rights is immediately captured in the Preamble's opening sentence which states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' This inspirational side is supplanted by two articles in the actual text of the Declaration. Article 1 states that 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.<sup>65</sup> Immediately afterwards, article 2 states that all are to be equal before the law and have a right to protection against any form of discrimination.<sup>66</sup> Agreement on the insertion of articles of an inspirational nature in the main text was not easy. Glendon credits René Cassin's interventions during the negotiations with their inclusion. Cassin believed that article 1, article 2 and the article on limits and duties constituted the framework within which all rights were contained:

It was essential...for the United Nations to proclaim to the world the basic principles of freedom, dignity, equality, and responsibility that had come close to extinction during the preceding ten years.<sup>67</sup>

In so doing, however, states firmly rooted the basis of all human rights, the rationality of human persons and their obligation to deal fairly with everyone else, regardless of race, sex, wealth and so on. The eclectic mix of these two perspectives in one

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<sup>63</sup> In *Individual duty within a human rights discourse* (Ashgate Publishers, Aldershot, 2003), Douglas Hodgson makes the point that there are two different kinds of individual duties appearing in the UDHR in an explicit or implicit manner. First is the implied duty of individuals to adhere to the standards and spirit of the UDHR. Second is another explicit recognition of non-State duties is found in Article 29 (1) which states that 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' This provision lays down a general rule for individual behaviour in the community to which the individual belongs.

<sup>64</sup> Mary Ann Glendon, *A World Made New*, 2001, p. 38.

<sup>65</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, 1948, Article 1.

<sup>66</sup> *Ibid*, Article 2.

<sup>67</sup> Mary Ann Glendon, *A World Made New*, 2001, p. 148.

document signified the way ahead for the human rights movement and cosmopolitanism.

### International relations

International relations between states play a huge role in the human rights movement. The UDHR itself, just like its mother organisation the UN, is a product of international relations. Without any doubt the agreement on the text of the UDHR and the adoption, without a single dissenting vote, was a diplomatic feat.<sup>68</sup> The UDHR signalled and symbolised a change in international relations. Glendon writes that when the General Assembly of the UN adopted the UDHR, ‘the moral terrain of international relations was forever altered’.<sup>69</sup>

This aspect of international relations was an even greater achievement for the newly de-colonised independent states, like India, and the smaller and less powerful states, like Lebanon. Glendon further remarks on how the tensions leading up to the breakdown of the Soviet-US alliance could already be felt at the opening session of the UN Assembly in 1946, and even more so from 1947 onwards. By 1948, tensions between Russia and the US began to raise the fear of another war, and in the meantime civil war had erupted in China (the US-backed government forces against Mao Tse-tung’s Soviet-backed forces) and the Middle East was plunged into conflict. Amidst what can only be described as an international mayhem, the drafting and meetings of the Commission on Human Rights continued through to the UDHR’s adoption.<sup>70</sup> What is even more remarkable is that after 1948 the human rights movement continued to develop in spite of the difficult global climate. It is not a coincidence that human rights for a long time were primarily seen as a diplomatic tool. Although this study implicitly criticises this almost-entrenchment of human rights in

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<sup>68</sup> The following countries abstained: the Union of Soviet Socialist Republics, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, Socialist Federal Republic of Yugoslavia, People’s Republic of Poland, Union of South Africa and the Kingdom of Saudi Arabia.

<sup>69</sup> Mary Ann Glendon, *A World Made New*, 2001, p. xv.

<sup>70</sup> The UN Commission on Human Rights in subsequent decades was severely and publicly criticised for prioritising inter-state relations and interests over human rights issues. In a bid to address these concerns, in 1993 the Office of the UN High Commissioner for Human Rights was set up, and in 2006 the Commission on Human Rights was replaced by the Council for Human Rights.



international relations, one cannot but acknowledge the vital role that international relations carry in the modern human rights movement.

The tension between the value of national sovereignty – upon which the international community of states rests - and the emphasis on the individual's worth, remains a constant within international relations and the global system. In particular, state sovereignty had until then been considered sacrosanct and understood as the state's power to manage domestic affairs without interference. This essentially misconceived postulation depicted sovereignty as absolute and obscured the interdependency between states. Therefore just as the Treaty of Westphalia in 1648, which ushered in the global system made up of sovereign states, and international law are an expression of sovereignty, there is also the implicit awareness and acknowledgement of interdependency.<sup>71</sup> This will be discussed further in the section on the 'state' below.

The acute tension between sovereignty and human rights was revealed in an important report called *The Responsibility to Protect*, drafted by the International Commission on Intervention and state Sovereignty, an independent commission established by the Government of Canada in September 2000.<sup>72</sup> *The Responsibility to Protect* promotes the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. *The Responsibility to Protect* asserted the legitimate right, and duty, of humanitarian intervention in domestic affairs of the international community to protect individual citizens *from* the governing elite. This report was intended to serve as a basis for collective action against genocide, ethnic cleansing and crimes against humanity. The endorsement and adoption by the General Assembly of the UN took almost nine years. A Resolution adopting the responsibility to protect was finally passed by the General Assembly of the UN in 2009.<sup>73</sup> It has been said that the reason for the prolonged endorsement by the UN was its unfortunate timing a few months after the 11<sup>th</sup>

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<sup>71</sup> The Treaty of Westphalia stressed independence and autonomy, and is therefore most popularly referred to for its establishment of state sovereignty and the birth of international law. The focus on state sovereignty, however, should not obscure the mere fact that interdependence was always a necessary constant in this formula.

<sup>72</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

<sup>73</sup> United Nations General Assembly, 'The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty', Resolution 63/308, Sixty-third session, A/RES/63/308, 14 September 2009.

September attacks on the twin towers in New York. One could see, however, that the claim that it is legitimate for states to breach another state's sovereignty in defence of individuals is highly controversial as it hinges on the tension between state sovereignty and human rights.<sup>74</sup>

In brief, the international community of states is where the modern human rights movement was conceived and continues to develop through various forms of inter-state dialogue, enactment of international laws and international actions. This acknowledgement of the importance of international relations should not be taken uncritically as fundamental tensions remain which could undermine human rights.

### State

Within the human rights system, states occupy a singularly unique position encompassing two roles which can, at times, produce conflicting interests. On the one hand, states as members of the international community are direct participants in the upholding of the human rights system: states are responsible for both its modern reconstruction through the UN, its development in international law and policy as well as the day-to-day implementation of human rights within their domestic sphere. This was the case even during the drafting of the UDHR. Indeed a fact which is often overlooked, is the important and active role played by state representatives in the discussions, negotiations and facilitation of adoption of the final draft of the UDHR.<sup>75</sup>

On the other hand, human rights remain primarily a regulation of the relationship between states and individuals. This model assumes that states are willing to uphold human rights over and above state-centric interests. Examples however abound of governments and dictators in the last decades who have trumped the human rights of people whilst retaining membership (at times active) in the human rights system. Apart from this, the inevitable obligation of states to keep up appearances with the international community has lead to the anomalous situation whereby state have

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<sup>74</sup> There are other examples of human studies which address issues dealing with this tension. For example, professor of migration law Thomas Spijkerboer argues that according to human rights law and international law, States should be held responsible for deaths occurring as a result of pre-emptive measures of border control. (Thomas Spijkerboer, 'The Human Costs of Border Control', *European Journal of International Law*, Vol. 9, pp. 127-139, 2007).

<sup>75</sup> This is documented in Chapter 9 'The Nations have their say' in Mary Ann Glendon, *A World Made New*, 2001.

mastered the skill of compiling reports in a way which will not lead to incrimination or criticism. This is exacerbated by the 'name and shame' technique of human rights adopted in the absence and/or effectiveness of proper enforcement mechanisms. In addition, international institutions and Western countries generally posit respect for human rights as a condition for development aid. This use of human rights as ethical-moral principles of the international community and global society could be taken to indicate the 'success' of human rights. However, with economic revenues at stake, governments will do their best to avoid criticism and devise means to shroud their shortcomings.

Therefore the main tension in this element is the aforementioned issue of state sovereignty and human rights, which warrants another mention in this sub-section. By signing up to human rights treaties, states end up in the double role of agreeing to restrictions to their own power over internal affairs and taking on the role for safeguarding the human rights of all. Human rights treaties, like any other international law, can be seen both as an expression of sovereignty and a constraint on sovereignty. This is an uneasy tension much of which has been brought about by the enduring myth of the concept of so-called Westphalian sovereignty as a near-absolute value. State sovereignty was in fact put into question as from its inception by the 17<sup>th</sup> Treaty of Westphalia. This Treaty motivated by the awareness that war could be avoided if rules were established to govern the conduct of independent states, recognised sovereign states as the subject of international law. Therefore, what states fail to acknowledge is that the mere presence of international law, intended to govern the conduct of independent states, is brought about by the reality of global interdependence.

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In brief therefore, these four key elements – person, political philosophy, international relations and the state – are important to the construction of the contemporary human rights movement. These elements can also be seen to be present in the

Preamble and the UDHR.<sup>76</sup> The UDHR in René Cassin words was meant to be the 'portico' to another world, the putting into practice of a new vision for societies in the universal cosmopolitan community. The discovery that this 'new vision' included the four elements above serves to confirm my intuition of the importance of these elements to the modern human rights movement.

It is important to point out at this stage that the identification of these four elements is not in itself novel. Renowned studies which have focused on one or more of these aspects include the following: for example, Seyla Benhabib has highlighted the importance of political philosophy to human rights theory,<sup>77</sup> R. J. Vincent has explored the relationship between on human rights and international relations,<sup>78</sup> Louis Henkin and Richard Falk, amongst others, have focused on the singular role of the state when investigating state sovereignty and human rights by,<sup>79</sup> and Alan Gewirth and Pheng Cheah have highlighted the importance of the person in human rights theory.<sup>80</sup> It is however rare that studies focus on the four aspects. I wanted to provide an analysis which captured the equal importance of all four elements, an exercise which is difficult to do separately since the four elements are intertwined and mutually constitutive. This would reflect the complex and multi-faceted phenomenon of human rights. The attempt to combine the four elements in one analysis is an innovative aspect of this study.

The result is the *Tetrahedron Model of Human Rights Culture* which is best conceptualised as a three-dimensional model as depicted in Figure 1 – The Tetrahedron Model of Human Rights Culture (three dimensional). The Tetrahedron Model is made up of four regular triangles, with the sides being equal in length and having four points/apexes. Each apex stands for one of the four elements listed

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<sup>76</sup> The Preamble has been described by the international legal academic Maarti Koskenniemi as one that 'can be read and defended both as a human enactment, the result of actions of concrete and tangible "peoples", "nations" and "States", as well as the carrier of ahistorical moral-political "truths"'. (Maarti Koskenniemi, 'The Preamble of the Universal Declaration of Human Rights' in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, 1999, p. 31.)

<sup>77</sup> For example, the works of Seyla Benhabib like Seyla Benhabib, *The Rights of Others: Aliens, residents and citizens*, Cambridge University Press, Cambridge, 2004.

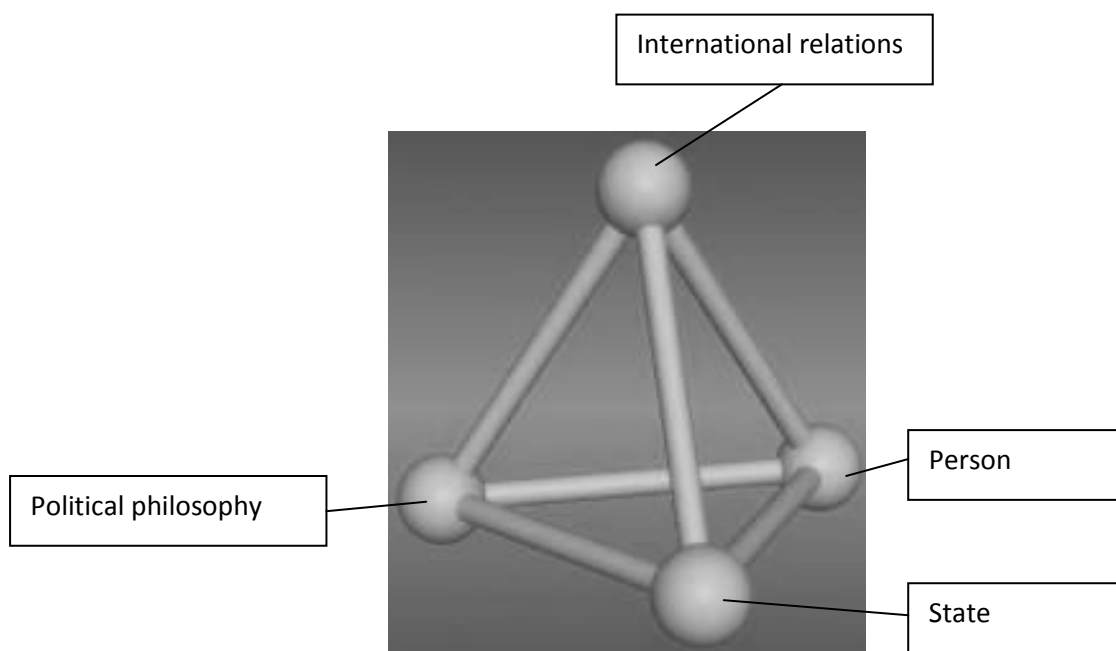
<sup>78</sup> R.J. Vincent, *Human Rights and International Relations*, Cambridge University Press, Cambridge, 1986.

<sup>79</sup> Louis Henkin, 'Human Rights and State "Sovereignty"', 25 *GA. Journal of International and Comparative Law*, Issue 31, 1995-1996; Richard Falk, *Human Rights and State Sovereignty*, Holmes and Meier Publishers, New York, 1981.

<sup>80</sup> Alan Gewirth, *The Basis and Content of Human Rights*, University of Chicago Press, Chicago 1982; Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights*, Harvard University Press, Cambridge, 2007.

previously, with the result that every surface/side appears as an equilateral triangle linking three different elements. The following are the four combinations:

1. Political philosophy – Person – International Relations
2. Person – International Relations – State
3. International Relations – State – Political philosophy
4. State – Political philosophy – Person



*Figure 3: The Tetrahedron Model of Human Rights Culture (three-dimensional)*

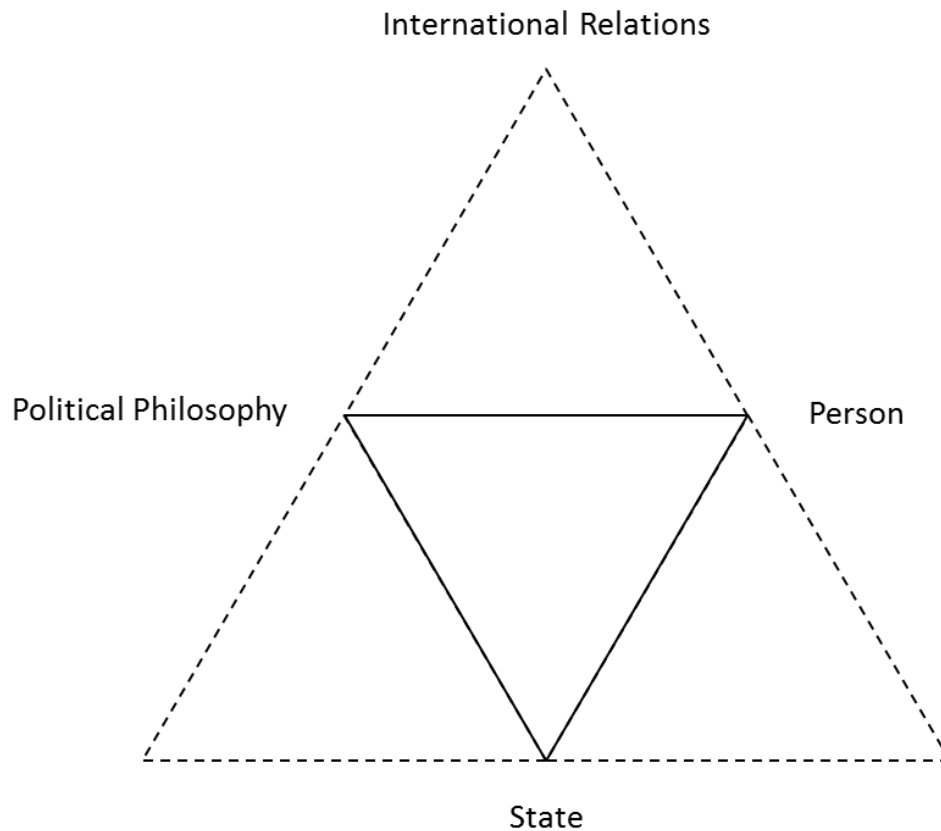


Figure 4: *The Tetrahedron Model of Human Rights Culture (unfolded)*

The four main elements that surfaced lead me to reflect on how different combinations of these same features shed light on a variety of approaches to human rights. The problem with these elements was that they were too abstract to work with, and in spite of producing greater clarity of thought, I realised that their usefulness was at best limited, as they lead to an undesirable abstraction of human rights which, albeit intriguing, I wanted to avoid. I therefore sought to engage more with this model in search for characteristics of political cultures. These would constitute not the political vision of human rights, but the *building blocks of a human rights culture*.

#### 2.4.2 Four building blocks of a human rights culture

Themes and patterns that emerged from fieldwork were categorised roughly according to each facet of the Tetrahedron Model. This represented different combinations of the inter-relation between four basic elements arising from the Preamble of the UDHR, as seen in Figure 4 above - The Tetrahedron Model of Human Rights Culture (unfolded).

Four broad themes in Maltese political culture were identified as hindering human rights culture. They completed the Tetrahedron Model as seen in Figure 5 below. The 'building blocks' of a human rights culture which emerged were the following (with their corresponding combination/facet):

1. Cosmopolitan Outlook --- Political philosophy – Person – International Relations
2. Equality ----- Person – International Relations – State
3. Democracy ----- International Relations – State – Political philosophy
4. Human Dignity ----- State – Political philosophy – Person

The strengths of this Tetrahedron Model are, first, the emphasis on the interconnectedness and inter-relation between the main elements of human rights *and* the building blocks of a human rights culture. Second, the three dimensionality of the model is a good representation of the risks of perceiving just one 'facet' of a complex system. All too often academic work focuses on tensions and relationships between concepts, without devoting enough time to limitations or assessing 'what is being left out'. Taking the Tetrahedron Model as an example, when looking at the two-dimensional 'human dignity' facet, which was construed from the interplay between person, political philosophy and state, the 'apex' of international relations is completely 'hidden' as well as the other three facets of cosmopolitanism, equality and democracy. The Tetrahedron Model therefore leads to further inquiry of the kind: is it possible to have a human rights culture in cosmopolitan, democratic and egalitarian setting in which human dignity is disrespected? Or, is it possible to have a human rights culture in a setting which is democratic, egalitarian and respectful of human dignity but not cosmopolitan? These questions might appear at once obvious and difficult to answer because of the overlapping nature of the concepts in question. However, they are not as far removed from reality as one might think. The first question is what Chapter 4, discussing the human dignity of irregular migrants in detention, revolves around. It will be argued that Government's understanding of human rights is one which appears to do away with the concept of human dignity. The second question, underlying Chapter 5, brings out a strong view in Maltese society that human rights can be ethno-centric to the Maltese.

The main risk in using this model is that dissociating concepts might lead to an undesirable conceptual essentialism. This is contrary to the underlying rationale of interdependency and interconnectedness. However, this study will hopefully demonstrate that the risks run by dissociating the concepts are more than counterbalanced by the benefits that singling out concepts brings along.

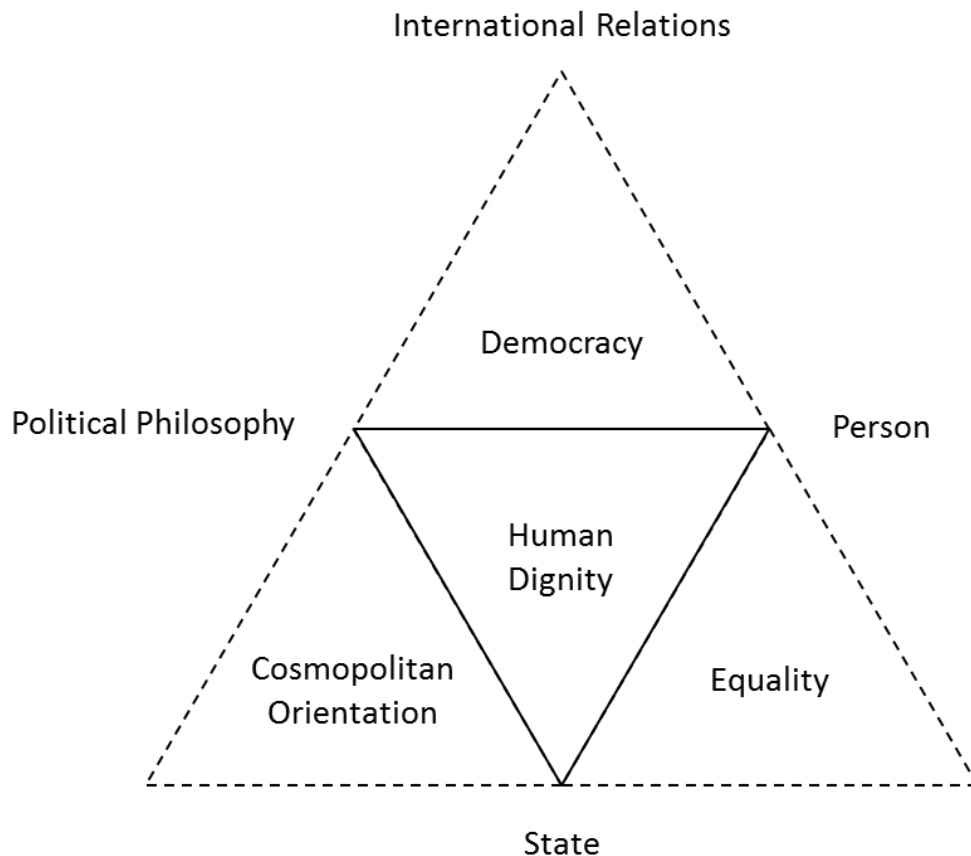


Figure 5: The Tetrahedron Model of Human Rights Culture (unfolded; complete)

## 2.5 Conclusion

The Tetrahedron Model of Human Rights Culture that I constructed arose out of the need for an analytical tool which would enable an investigation into those socio-cultural and political processes that are resulting in the ill-treatment of irregular immigrants in Malta. As a heuristic device its construction involved a dynamic interplay of theoretical and practical knowledge, from scholarly literature as well as information gathered from the field. The epistemological framework from which the Tetrahedron Model was conceived is the modern human rights movement, which amongst others gives more prominence to the concept of culture than previous rights' movements.



Without making a claim to comprehensive coverage of the field of human rights, the model proposed here has the merit of incorporating the four 'building blocks'. This study will explore these four building blocks of human rights culture: cosmopolitanism, equality, democracy and dignity. Each Chapter will start by outlining the understanding of the concepts in human rights philosophy before moving on to present the analysis of the case study from the perspective of the respective building block. This model serves to locate my approach and methodology in human rights praxis, or the intersection between theory and empirical studies. What emerges is a picture of the structures and processes of Maltese political culture which are at present obstructing the nurturing of a human rights culture in this field.

## **Chapter 3: Irregular immigrants in Malta: Context, facts and figures**

### **3.1 Introduction**

Since March 2002, Malta has seen a significant change in patterns and numbers of irregular migrants reaching its shores. Contemporary irregular migration in Malta must be viewed with sensitivity to the socio-historical and political context. Similarly to other Southern European countries, Malta witnessed a ‘migration turnaround’ since for the most part of the 20<sup>th</sup> century it was primarily a country of emigration.<sup>1</sup>

In addition, Malta has had, for centuries, an ambivalent relationship to foreigners. Suffice to say that Malta has only been independent since 1964, and before that had been occupied by different powers. The foreign population in Malta makes up only four per cent of the total population, and the majority are originally from Britain and other EU countries. The Maltese landscape does not, however, lack foreigners – Malta receives over one million tourists every year. All this serves as a background to understanding the reception of irregular migrants and the reluctance to extend hospitality.

This Chapter has been categorised systematically with the intention to give a situated picture of the contemporary phenomenon of irregular migration. Section 3.2 is an introduction to the larger context of Malta. The Chapter will then move on to focus on irregular migration and asylum in Malta. Sections 3.3, 3.4 and 3.5 follow the trajectory of an irregular immigrant arriving by boat: starting from detention and asylum, moving on to life in the community and finally describing the basic infrastructure and services available. In an attempt to paint as true a picture as possible, detailed facts and statistics as well as a description of the development of legal and institutional frameworks are given. The very final section describes five important incidents which again introduce the reader to the complexity of issues making up this field.

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<sup>1</sup> Russell King, Anthony Fielding & Richard Black, ‘The international migration turnaround in Southern Europe’, in *Southern Europe and the New Immigrations*, eds. R. King & R. Black, Sussex Academic Press, Brighton, 2007, pp. 1-25.

## 3.2 The Republic of Malta and foreigners: A snapshot

### 3.2.1 Physical geography

Malta is a small island state situated in the centre of the Mediterranean sea. It is located 93km south of the Italian island of Sicily, 288km east of Tunisia and 300km north of Libya.<sup>2</sup> The Maltese archipelago consists of six islands: Malta, Gozo, Comino, Cominotto, Filfla and St. Paul's Islet, of which only the first three are inhabited.<sup>3</sup> Malta is the largest island in the group accounting for 77 per cent of the islands' total area of 316 kilometres squared.<sup>4</sup>

The length of the shoreline round Malta is 136km, and 43km round Gozo. Malta has no mountains or rivers and few trees. No mineral resources have been discovered apart from salt. Malta only produces 20 per cent of its food needs. A strata of globigerina limestone provides the local building material. Fresh water is scarce, extracted from the aquifer below its layers of limestone and the islands are increasingly reliant on water produced by desalinating plants from the sea.

#### Malta's territorial waters and search and rescue zone

In addition to its physical territory, Malta also exercises full sovereignty over its territorial waters, which are 12 nautical miles out in the open seas. This is enshrined in the Territorial Waters and Contiguous Zone Act.<sup>5</sup> Malta's jurisdiction and powers extend, albeit to a lesser degree, also to the 'contiguous zone', which extends 24 nautical miles. With respect to immigration, the Act states that Malta may exercise the control necessary to prevent any contravention of any law relating to immigration and to punish such offences.

Irregular immigrants' vessels generally constitute 'suspect vessels' as per the Act mentioned above. This means that, in the territorial waters and the contiguous zone, the following actions can be taken against them: a) to hail a vessel, b) to stop a vessel, c) to board a vessel, d) to search a vessel, e) to arrest and detain any person suspected

<sup>2</sup> Department of Information – Malta, 'The Maltese Islands', <<http://www.doi.gov.mt/EN/islands/location.asp>>, 2010, (accessed 20 March 2011).

<sup>3</sup> Idem.

<sup>4</sup> Idem.

<sup>5</sup> *Laws of Malta*, 'Territorial Waters and Contiguous Zone Act', Chapter 226, 1971.

of being about to commit a criminal offence or of having committed such an offence, f) to seize anything on board a vessel suspected of having any connection with a criminal offence, g) to require the master of a vessel to take the vessel and crew out of Maltese waters or to a port or harbour in Malta.<sup>6</sup>

Whilst the extent of the territorial waters and contiguous zone follow customary measurements, Malta's Search and Rescue (SAR) Zone, in comparison to the country, is far bigger than usual. It extends from Tunisia to Crete, covering in excess of 250,000 kilometres squared.<sup>7</sup> The following map illustrates this.

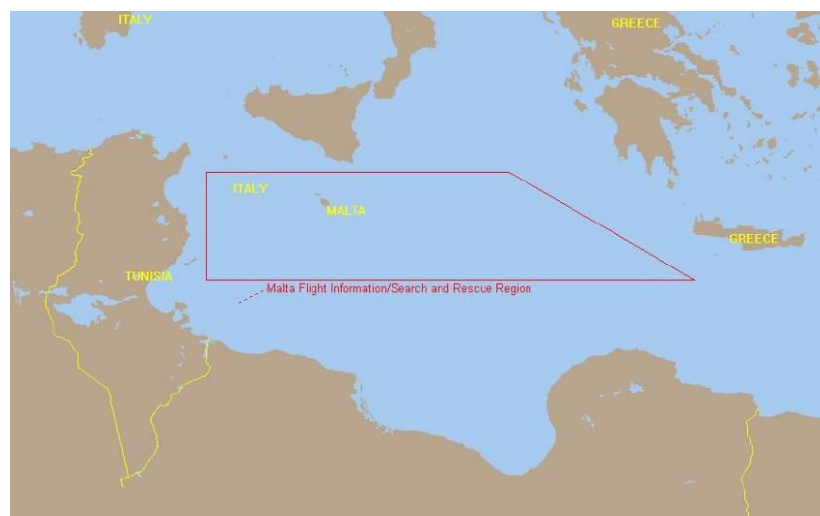


Figure 6: Malta Search and Rescue Region<sup>8</sup>

The SAR area was defined by Great Britain when Malta was still a British colony. The SAR area corresponds to Malta's Flight Information Region which constitutes a direct source of revenue since the payments of traffic passing the airspace go to Malta.<sup>9</sup> This revenue enables Malta's Air Traffic Control to be self-sufficient avoiding the need for state subsidies. Within the SAR Zone, Malta is responsible for the coordination of all search and rescue missions. This in part explains why irregular migration is seen as straining Malta's resources. The obligations of the country under international law have been the object of scrutiny by international organisations. They have also

<sup>6</sup> Ibid, Article 2.

<sup>7</sup> Search and Rescue Training Centre-Armed Forces of Malta, 'Search and Rescue in Malta', , *Search and Rescue Training Centre*, <[http://www.sarmalta.gov.mt/sar\\_in\\_Malta.htm](http://www.sarmalta.gov.mt/sar_in_Malta.htm)>, 2004, (accessed 20 March 2011).

<sup>8</sup> Fiona Texeira, *At the Gates of Fortress Europe – Irregular Migration and Malta*, Unpublished study, Institute for Political Studies of Rennes, France, <<http://www.alternattiva.org.mt/page.asp?p=5884&l=1>> (accessed online 14 March 2008), p. 6.

<sup>9</sup> Raphael Vassallo, 'Between a rock and a hard place', *Maltatoday*, 13 Sept 2009.

contributed to various diplomatic incidents with neighbouring countries, in particular with Italy. A description of one such incident can be found in 3.6.5.

### **3.2.2 Socio-historical, political and economic overview**

Malta has been occupied for centuries, making the description of ‘a serial colony’ particularly apt.<sup>10</sup> Malta has been under the foreign rule of: Phoenicians (800-480BC), Carthaginians (480-218BC), Romans (218BC-AD395), Byzantines (AD395 – AD870), Arabs (870-1090), Normans and Angiovinns (1090-1283), Aragonese and Castillians (1283-1530), the Knights of St. John (1530-1798), the French (1798-1800), and the British (1800-1964). Of particular significance, as will be seen in Chapter 5 in the discussion on the formation of a national identity, is that the Maltese enjoyed a degree of self-government since the Middle Ages.

Following independence on 21 September 1964, Malta’s acceptance and participation in the international community of states was immediate. Malta joined international organisations like the following: the Commonwealth, the UN, the Food and Agriculture Organisation, the World Health Organisation, the International Labour Organisation, the Universal Postal Union and the Intergovernmental Committee of European Migration (this subsequently became the International Organisation of Migration). In 1965, Malta joined the Council of Europe, and on the 12 December 1968, the Prime Minister signed the European Convention on Human Rights. In 1970, an Association Agreement was also signed with the European Community which through three financial protocols provided aid for development and infrastructural projects.

Under its 1964 Independence Constitution, Malta became a liberal parliamentary democracy within the British Commonwealth. Queen Elizabeth II was the sovereign of Malta, a governor general exercised executive authority on her behalf, while the actual direction and control of the Government and the nation's affairs were in the hands of the cabinet under the leadership of a Maltese prime minister. The Constitution safeguarded the fundamental human rights of citizens, established a separation between the executive, judicial and legislative powers, and ensured that regular

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<sup>10</sup> ‘A serial colony’ is used to describe Malta in Gary Armstrong & Jon P. Mitchell, *Global and Local Football: Politics and Europeanisation on the Fringes of the EU*, Routledge, Oxon, 2008, p. 6.

elections would take place based on universal suffrage. Malta had these three organs of the state, even before independence.

On 13 December 1974, the Constitution was revised, and Malta became a republic within the Commonwealth, with executive authority vested in a Maltese president. The president is appointed by parliament every five years. In turn, the president appoints as prime minister the leader of the party that wins a majority of parliamentary seats in a general election for the unicameral House of Representatives. The cabinet is selected from among the members of the House of Representatives. General elections are held every five years, and members of Parliament are elected by the Single Transferable Vote System. There are two major political parties, the Nationalist Party (NP) and the Malta Labour Party (MLP).

On 1 May 2004 Malta joined the EU. It joined the Eurozone in 2008.

### Socio-cultural facts

According to the Constitution, both Maltese and English are national languages. The 2005 Census states that the main language of verbal communication at home was Maltese - 90.2 per cent of the population. English followed by 6.0 per cent, multilingual 3.0 per cent and a very small fraction speak languages other than Maltese or English at home.<sup>11</sup> Maltese is descended from Siculo-Arabic (the Arabic dialect that developed in Malta and Sicily between the ninth and the fourteenth centuries). About half of the vocabulary is borrowed from Italian and Sicilian,<sup>12</sup> and English words make up as much as 20 per cent of the Maltese vocabulary. It is the only Semitic language written in the Latin alphabet in its standard form. This has led the Maltese language expert Manwel Mifsud to describe the language as 'a mixed language with a Semitic (in particular Arabic) substratum, a Romance superstratum and an English adstratum'.<sup>13</sup> Maltese subsequently became one of the official languages of the EU.

<sup>11</sup> National Statistics Office, *Census of Population and Housing 2005, Volume 1: Population*, National Statistics Office, Valletta, 2007, p. xiii.

<sup>12</sup> Joseph M. Brincat, 'Maltese-an unusual formula', *MED Magazine*, Issue 27, <<http://web.archive.org/web/20071105030202/http://www.macmillandictionary.com/MED-magazine/February2005/27-LI-Maltese.htm>> 2005, (accessed 31 July 2011).

<sup>13</sup> Manwel Mifsud, *Loan verbs in Maltese: a descriptive and comparative study*, E. J. Brill, Leiden, 1995, p. 25.

Ethnically the Maltese regard themselves and are often described as Mediterranean Caucasian. The estimated percentage of people adhering to the Roman Catholic religion is 95 per cent (2004 estimate), out of which 53 per cent regularly attend Sunday services (estimate of 2005).<sup>14</sup> Of an estimated 6,000 Muslims, approximately 5,250 are foreigners, 600 are naturalized citizens, and 150 are native-born citizens. There is one mosque (and two informal mosques) and a Muslim primary school. There is a Jewish congregation with an estimated 100 members.<sup>15</sup> There are a few other very small congregations: Coptic and Greek Orthodox Christians, the Bible Baptist Church, a union of 16 groups of evangelical churches comprising Pentecostal and other nondenominational churches, as well as Jehovah's Witnesses, The Church of Jesus Christ of Latter-day Saints (Mormons), Seventh-day Adventists, Zen Buddhists, and Baha'is.<sup>16</sup>

The Constitution establishes Roman Catholicism as the state religion and declares that the authorities of the Catholic Church have 'the duty and the right to teach which principles are right and which are wrong.'<sup>17</sup> Religious education is mandated by the Constitution and compulsory in all state schools; although, there are constitutional and legal provisions for the parent, guardian, or student to opt out of the instruction. The school curriculum includes general studies in human rights, ethnic relations, and cultural diversity as part of values education to promote tolerance. Marital divorce was not available in the country up until July 2011; however, the state generally recognized divorces of individuals who had completed divorce proceedings in a competent court abroad.

### Economy

The Gross Domestic Product (GDP) of Malta stood at an estimated 10.4 billion US Dollars in 2010. The services sector accounted for 80.9 per cent of national GDP, while

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<sup>14</sup> United States Department of State, *2010 Report on International Religious Freedom - Malta*, <<http://www.unhcr.org/refworld/docid/4cf2d081c.html>>, 17 Nov. 2010, (accessed 20 March 2011).

<sup>15</sup> Idem.

<sup>16</sup> Idem.

<sup>17</sup> Constitution of Malta, Article 2. The full article reads '2. (1) The religion of Malta is the Roman Catholic Apostolic Religion. (2) The authorities of the Roman Catholic Apostolic Church have the duty and the right to teach which principles are right and which are wrong. (3) Religious teaching of the Roman Catholic Apostolic Faith shall be provided in all State schools as part of compulsory education.'

industry and agriculture accounted for 17.2 per cent and 1.9 per cent of national GDP.<sup>18</sup> The major industries are semiconductors, beverages, electronics, food, information and communications, jewellery, shipbuilding, toys, rubber and plastic products. Agricultural products include fodder crops, vegetables, potatoes, Mediterranean fruits and onions. The primary markets that Malta interacts with are the Eurozone, the US and Singapore.<sup>19</sup>

Tourism is one of the main sources of revenue. It contributes directly to 12.0 per cent of the GDP but it indirectly supports in a substantial manner the services sector such as restaurants, transport, retail, financial services and to a lesser extent also the real estate sector. The annual number of tourists in 2009 was 1,182,490. The majority of tourists are from Western European countries, with the UK topping the list with 398,472 tourists in 2009. It was followed by Germany - 127,373, Italy - 161,737, France - 71,930, The Netherlands - 33,419, Libya - 14,281 and others - 375,278.<sup>20</sup>

### 3.2.3 Demographic details

As at 2009, the total resident population in Malta was estimated at 412,970. Children under 18 years of age comprised nearly 20.0 per cent of the total population, while persons aged 65 years and over made up 15.0 per cent of the population.<sup>21</sup>

Projections reveal an ageing population, with the share of older persons increasing in comparison to the share taken by the younger counterparts. In 2050, the percentage of persons aged less than 20 years is expected to decrease from 22.0 per cent, as recorded in 2009, to 17.0 per cent. On the other hand, the share of individuals aged 65 years and over is expected to increase significantly in the coming forty years to 24.0 per cent from the 15.0 per cent recorded for the year under review.<sup>22</sup>

<sup>18</sup> Central Intelligence Agency. 'The World Factbook', <<https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html>>, (accessed 20 August 2011).

<sup>19</sup> Economy Watch, 'Malta Economy', <[http://www.economywatch.com/world\\_economy/malta/](http://www.economywatch.com/world_economy/malta/)>, *Economy Watch*, 2011, (accessed 23 July 2011).

<sup>20</sup> National Statistics Office, *Malta in Figures 2010*, National Statistics Office, Valletta, 2010, p. 40.

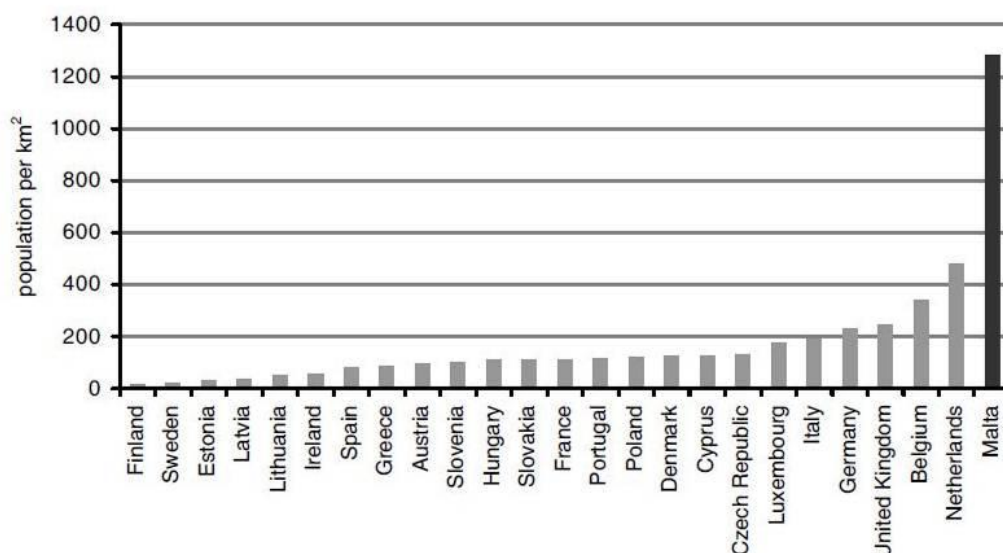
<sup>21</sup> National Statistics Office, *Demographic Review - 2009*, National Statistics Office, Valletta, 2010, p. vi.

<sup>22</sup> Ibid, p. vi-vii.



Malta, with 1,307 residents per square kilometre as at 2009, is by far the most densely populated Member State in the EU as the chart below shows.<sup>23</sup>

**Chart 8. Population density: a comparison of Malta with EU Member-States**



*Table 1: Population density: a comparison of Malta with EU Member-States<sup>24</sup>*

The proportion of the population under 25 years is 31.5 per cent when compared to 29.1 per cent across the EU. However, 20.3 per cent of the Maltese population is aged between 50 and 64 years, this being significantly higher than the EU average of 17.9 per cent. This means that within the next ten years, most persons in this age bracket will be over 65 years. Malta's population when compared to the EU is higher in the younger bracket, but also higher in the older bracket. Assuming that current socio-demographic trends continue in the future, the main characteristics being a declining fertility rate and a low immigration intake of young persons, a steady increase in the old-age-dependency ratio (measures the number of elderly people as a share of those of working age) is expected in the coming years.<sup>25</sup>

<sup>23</sup> National Statistics Office, *Demographic Review – 2009, 2010*.

<sup>24</sup> In fact, the main island is even more densely populated – 1,513 residents per square kilometres - than Gozo and Comino (only 452 residents per square kilometre). (National Statistics Office, *Census of Population and Housing 2005, preliminary report*, National Statistics Office, Valletta, 2006, p. xxiv).

<sup>25</sup> Idem.

### 3.2.4 Foreigners on the islands

According to the Demographic Review 2009, the total number of immigrants residing in Malta in 2009 was 16,692. Immigrants are defined as those individuals who establish their residence in Malta for a period that is expected to be, or is, to last a minimum of 12 months. This would include: a) foreigners with a permanent residence permit<sup>26</sup> (See Malta Permanent Residence Scheme); b) foreigners with a temporary residence permit<sup>27</sup>; c) refugees and asylum-seekers and d) other irregular immigrants in detention and outside in the community.

The migrant population in 2008 accounted for 4.4 per cent of the total population.<sup>28</sup> It shows a steady increase from 2005, when the migrant population accounted for 3.0 per cent,<sup>29</sup> and the increase becomes even starker when compared with 1995 when it accounted for 1.9 per cent of the total population.

A large number of migrants are of working age. In particular, foreign nationals in the 25-49 age bracket accounted for 47.0 per cent of new arrivals in 2008.<sup>30</sup> The majority of migrants are from the EU – 57 per cent. The remaining 43.0 per cent do not only

<sup>26</sup> For more on this see Malta Permanent Resident Scheme, which was originally set up in 1988 to attract non-resident individuals who would like to settle down or retire in Malta. It has, over the years, also generated interest amongst business people and high net worth individuals who benefit from an international tax point of view. (Foreigners who can satisfy the financial criteria (minimum global capital worth LM150,000 or minimum annual income from abroad LM10,000) can apply for a Permanent Residence Permit without being present in Malta. Our immigration consultants will help you determine whether you qualify and will handle the application process from beginning to end. Euro-Malta boasts a 100 per cent success rate to date.) The following short article entitled gives an overview of this. It can be found online at Fenech and Fenech Advocates, 'The 'Permanent Residence Permit Scheme': A Tax Residence Scheme', <<http://www.taxplanet.com/research/countries/malta/news-and-topics/2009-Malta-Permanent-Resident-Permit-Scheme.pdf>>, 2009, (accessed 23 July 2011).

<sup>27</sup> A temporary residence permit is granted to foreign nationals who enter Malta with an entry VISA. Any foreign national may proceed to Malta with an entry VISA (where required). Nationals from practically all European and Mediterranean countries may remain in Malta for a period of three months from their date of entry under the 'no employment' condition and such 'permit' is endorsed on their passport upon arrival in Malta. If a person desires to stay here for a longer period, he or she is required to apply for an extension of stay to the Principal Immigration Officer, Central Immigration Office, Police General Headquarters. Normally such requests are acceded to provided, amongst other conditions that the Principal Immigration Officer may require, the person concerned can satisfy the said officer that he or she has sufficient means at his/her disposal to subsist on. The foreign national concerned would have to follow this procedure each time he or she wishes to extend the permission that has been granted to him or her by the Principal Immigration Officer, if that person wishes to continue to reside in Malta.

The Central Immigration Office, which forms part of the structure of the Police Department, is responsible for all the administrative tasks related to temporary residence in Malta.

<sup>28</sup> National Statistics Office, *Census of Population and Housing*, National Statistics Office, Valletta, 2008.

<sup>29</sup> National Statistics Office, *Census of Population and Housing*, 2005. Also reported in Natalino Fenech, 'More foreigners living in Malta', *The Times of Malta*, 11 August 2007.

<sup>30</sup> Jean-Pierre Gauci, 'Malta: Migration trends' in *Part 1: Migration and the labour markets in the European Union (2000 – 2009)*, Independent Network of Labour Migration and Integration Experts, <<http://www.labourmigration.eu/research/report/15-part-1-migration-and-the-labour-markets-in-the-european-union-2000-2009>>, (accessed 24 July 2011).

constitute asylum seekers, but also other third country nationals, from countries like the US. Almost half (48.3 per cent) of EU migrants are women, whereas the majority of third country nationals are male (65.8 per cent).<sup>31</sup>

*Established ethnic groups of foreign origin currently present in Malta*

There are five main ethnic groups present in Malta. The most numerous is the British expat community, most of whom do not have Maltese citizenship. British expats number around 4,713 and constitute one third of foreigners in Malta.<sup>32</sup>

The Arab-Muslim community is another ethnic group made up of around 3,000 individuals, 'many of whom are now Maltese citizens and the majority of whom come from Libya.'<sup>33</sup> The existence of the Libyan community can partly be explained by the special political partnership that Malta and Libya enjoyed in the late 1970s and 1980s. The migrationist Katia Amore notes that:

Even at the time when Libya was in the international spotlight for its alleged involvement in terrorist attacks, Malta maintained friendly relations despite UN sanctions, and opened the door to cooperation. Overall, the number of Libyan tourists increased drastically in 1992, when the United Nations imposed a number of sanctions on Libya as a response to its refusal to surrender suspects wanted by the US and Britain in connection with the 1988 PAN AM plane bombing over Lockerbie. For many Libyans, Malta came to be considered as a stepping stone to the world and thousands of them travelled to Malta as a stopover to other destinations, or to buy essential foodstuffs, American cigarettes and other products that had been rendered scarce by the imposition of the sanctions.<sup>34</sup>

Another ethnic group present in Malta having Maltese citizenship is the Indian community. There are around 45 families, about 300 people, of Indian origin in Malta all from the town of Hyderabad in Singh. They have Maltese nationality. Amore comments:

The majority of *I-Indjani* (the Indians) as the Maltese call them, belong to a well-established and respected business community which has been part of Malta's

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<sup>31</sup> Idem.

<sup>32</sup> National Statistics Office, *Census of Population and Housing*, National Statistics Office, Valletta, 2005.

<sup>33</sup> Katia Amore, 'Malta', in *European Immigration: A sourcebook*, eds, A. Triandafyllidou & R. Gropas, Ashgate, Aldershot, 2007, p. 242.

<sup>34</sup> Idem.

commercial life for the last 115 years and has integrated fully into Maltese society while retaining its cultural roots.<sup>35</sup>

Another group of foreigners who came to Malta, this time as refugees, in the 1990s were Albanians (more about this can be found in section 3.3.1). Amore writes:

Over the years, some of them have settled, some have married Maltese citizens, others have moved to a third country or returned to Albania. Kosovo Albanian refugees arrived in Malta during the Kosovo crisis of 1999, when the country accepted 110 refugees through the UNHCR evacuation programme.<sup>36</sup>

Finally, there is the Nigerian community. This is a very small community, possibly the most visible and well-known due to their members' involvement with the fifty different football clubs in Malta. Amore reports that there is no statistical data concerning their presence in Malta.<sup>37</sup>

### Prison

A considerable group of foreigners is in the state prison facility. The statistics below raise a number of questions regarding foreigners relationship with the law in Malta and their treatment by the authorities. More importantly, however, it shows why public perception links some nationalities to criminal activity. This is reflected on irregular immigrants and contributes in part to the justification of migrant detention (non-criminal/reception centres).

Foreign inmates at the Corradino Prison Facility make up a considerable number since they were up to 40 per cent in November 2009, from 31 per cent in May 2008. In 2009, Libya, Nigeria and Somalia were the most represented foreign nationalities in prison. Eighty-five prisoners hail from sub-Saharan African countries, while 48 hail from North Africa. *Mid-Dlam għad-Dawl*, an NGO active among prisoners, says that many of these people end up in prison because they cannot pay their bail, generally because they do not have a fixed residence.<sup>38</sup>

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<sup>35</sup> Idem.

<sup>36</sup> Idem.

<sup>37</sup> Idem.

<sup>38</sup> James Debono, 'Foreign inmates represent 40 per cent of prison population: Detainees petition President on long detention without trial or sentence', *MaltaToday*, 17 November 2009.

In November 2009, the same NGO presented a petition to the President of Malta signed by 50 foreign inmates calling for a 'stop to the inhuman and unjust incarceration of foreign detainees without trial or sentence', and suggesting that a detainee must be tried within 12 months. On the subject of discrimination between foreign and Maltese inmates, the NGO wrote: 'If a detainee pleads guilty he must be sentenced immediately so that the correctional and reforming programme starts in earnest, for foreigners and Maltese alike.'<sup>39</sup> To support their plea, the detainees pointed out the example of Kalif Ahmed Eid, a Somali who was accused of importing the plant khat to Malta, and given a sentence of six months. Kalif Ahmed Eid spent 34 months detained before he was tried and sentenced. This, they claimed, is the norm rather than the exception as applied to foreigners.

### **3.2.5 Naturalisation and citizenship issues**

The citizenship regime is characterised by protectionism, and at times outright exclusion. Recent developments have facilitated citizenship acquisition to people of Maltese descent living abroad. This is a significant cohort since it approximates at least 200,000.<sup>40</sup> Importantly, citizenship does not translate into voting rights, which is dependent on residence. This is significant since general elections in Malta, which have a voting turnout of around 96 per cent, are highly contested by the two major political parties. The last elections were won by 1,600 votes.

#### Law

Acquisition of citizenship in Malta is regulated by the Maltese Citizenship Act of 1965 (as amended by Act IV of 2000 and X of 2007 and Legal Notice 410 of 2007). The Maltese Citizenship Act currently states that there are five ways of obtaining Maltese citizenship:

- a. citizenship acquired on the appointed day and by registration by certain other persons;

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<sup>39</sup> Idem.

<sup>40</sup> According to the Australian census of 1986 in which people were asked about their ancestry. One of the problems with these estimates was whether the descendants of Maltese migrants actually identified themselves as 'Maltese' down the generation line.

- b. acquisition of citizenship by birth or descent;
- c. citizenship acquired by registration after marriage;
- d. multiple citizenship;
- e. citizenship by naturalisation.

This Act has undergone considerable reform since Independence. Reforms in 1989, 2000 and 2007 brought about a radical change of policy regarding citizenship in three ways. First, there was the removal, in certain instances, even retrospectively, of the prohibition of dual/multiple citizenship. Dual citizenship was extended to those who had been Maltese citizens by birth in Malta and lost their Maltese citizenship by emigrating. It was also extended to first, second and subsequent generations of Maltese born outside Malta and living abroad whose Maltese citizenship derived from descent rather than birth in Malta. Second, by shifting to a rule based more on *ius sanguinis* than on *ius soli*. The third change was the removal of gender inequality.<sup>41</sup> In an attempt to address marriages of convenience, the amendments in 2000 also introduced the five year period of marriage for citizenship acquisition through marriage.<sup>42</sup> Dr Eugene Buttigieg, a legal expert on citizenship issues, explains that:

The main motive for the acknowledgement of dual and multiple citizenship was to do justice to the thousands of Maltese citizens who had lost their citizenship when, due to economic circumstances, they had been forced to emigrate to seek work overseas and thereby acquired foreign citizenship. By now extending citizenship to the third generation, the latest regime amendments have extended the link to the diaspora beyond former Maltese citizens.<sup>43</sup>

Buttigieg goes on to make a rather pertinent comment on how EU accession has increased the value of Maltese citizenship:

Following Malta's accession to the European Union in 2004, not only have the Maltese diaspora regained their legal ties to their or their ancestors' homeland but they may now also partake of the benefits of European citizenship.<sup>44</sup>

There are two instances where the acquisition of citizenship is not tied to clear criteria and a space for arbitrariness on how the granting citizenship is opened. The first is the

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<sup>41</sup> Eugene Buttigieg, *European Union Democracy Observatory*, European University Institute, Florence, 2010, <<http://eudo-citizenship.eu/docs/CountryReports/Malta.pdf>>, (accessed 22 July 2011).

<sup>42</sup> While before 1 August 1989 only the foreign wife of a Maltese man was eligible for citizenship by marriage.

<sup>43</sup> Eugene Buttigieg, 'Country Report: Malta', 2010, p.17.

<sup>44</sup> Idem.

acquisition of Maltese citizenship through marriage, and the second is naturalisation without marriage or descendant ties. In both cases, the final decision is at the sole discretion of the Minister. In the case of the latter, granting of citizenship should balance 'the public interest'. Indeed, article 6(2)(a) states that no person shall be entitled to be registered as a citizen of Malta in virtue of this article unless 'the Minister is satisfied that the grant of citizenship to such person is not contrary to the public interest'. The criteria are listed in article 10, which is reproduced below:

10. (1) An alien or a stateless person, being a person of full age and capacity, on making application therefore to the Minister in the prescribed manner, may be granted a certificate of naturalisation as a citizen of Malta if he satisfies the Minister:
- (a) that he has resided in Malta throughout the period of twelve months immediately preceding the date of application; and
  - (b) that, during the six years immediately preceding the said period of twelve months, he has resided in Malta for periods amounting in the aggregate to not less than four years; and
  - (c) that he has an adequate knowledge of the Maltese or the English language; and
  - (d) that he is of good character; and
  - (e) that he would be a suitable citizen of Malta.

An official document, issued by the Department for Citizenship and Expatriate Affairs and published on the Ministry of Foreign Affairs website to assist people in applying for citizenship acquisition, fails to mention these discretionary elements altogether.<sup>45</sup>

### Citizenship acquisition

A cursory look at the European Union Democracy Observatory on Citizenship gives an idea of how many people have acquired Maltese citizenship since 1991:

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
	246	187	249	237	277	318	239	221	133	587	1190	783	589	584	562	474	553	644

Table 2: *Eudo Citizenship Statistics: Total Acquisitions - Malta*<sup>46</sup>

<sup>45</sup> See Department For Citizenship & Expatriate Affairs, 'Acquisition Of Maltese Citizenship By Naturalisation', <<http://www.foreign.gov.mt/Library/Cit/CEA3-NAT.pdf>>, 2010, (accessed 22 March 2011).

<sup>46</sup> European Union Democracy Observatory on Citizenship, 'EUDO Citizenship Statistics', <<http://eudo-citizenship.eu/stat/index.php?stype=1&coun=Malta>>, 2008, (accessed 23 August 2011).

Note: no statistics were given prior to 1991.

From the 2,817 persons who gained Maltese citizenship between 2004 and 2008, it is reported that over 2,000 became Maltese citizens either by marriage or from birth to a Maltese parent.<sup>47</sup>

Since 2004, over 1,000 men and women married foreigners, who later went on to become Maltese citizens after five years of marriage. The top three countries of origin of foreign wives who gained citizenship were Britain (157), Australia (83) and Russia (55). While the top three countries of origin of husbands who gained citizenship were Britain (107), Australia (78), Italy (56) and Libya (49).<sup>48</sup>

Amendments to the Maltese Citizenship Act which came into force on 1 August 2007 made it possible for all persons of Maltese descent to obtain Maltese citizenship by registration. A direct line of descent is a requisite. Therefore the parents or grandparents of the applicant who are direct descendents and still alive also have to make applications for citizenship since the direct line of descent is a criteria for acquiring citizenship. The registration procedure may take place at any Maltese embassy or consulate, or the citizenship and expat department in Malta. Residence in Malta is not even required. In the first two years, 190 adult foreigners and 67 minors have claimed citizenship through Maltese descent after citizenship laws changed in 2007.<sup>49</sup> Those claiming Maltese descent were from Australia (121) and Great Britain (31), the United States (19), South Africa (18) and France (17). These numbers are expected to increase significantly.

This partly explains why Maltese citizenship acquisition is on the rise, when the overall EU citizenship acquisition is minimally but slowly decreasing. Malta records a total of 474 citizenship acquisition in 2006, 553 in 2007 and 644 in 2008; whereas the EU average is showing a decrease from 735,928 in 2006, 707,107 in 2007 and 695,875 in 2008.<sup>50</sup>

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<sup>47</sup> James Debono, 'Who wants to be Maltese?', *MaltaToday*, 16 August 2009.

<sup>48</sup> Idem.

<sup>49</sup> Idem.

<sup>50</sup> Fabio Sartori, 'Acquisitions of citizenship slightly declining in the EU', *Population and Social Conditions: Eurostat Statistics in Focus* 36/2010, <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-10-036/EN/KS-SF-10-036-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-10-036/EN/KS-SF-10-036-EN.PDF)>, 2010, (accessed online 24 Mar 2011).



Between 2004 and 2008 only 353 foreign residents living and working in Malta – with no ties by marriage or parentage – were given Maltese citizenship. This was considered a small number and led the local journalist James Debono to report that: ‘Few people get citizenship in Malta unless they marry a Maltese person or have a Maltese parent.’

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The highest number of naturalised Maltese from one country is 51 and they are from the UK. As seen in the previous section, the Citizenship Act specifies that one is ‘eligible’ to apply after five years of residency, but gives no indication of the criteria used to assess such applications and leaves the decision in the hands of the Minister in charge. This has bred allegations of discrimination. In addition, it appears that citizenship acquisition by naturalisation of this kind happens only after many years of residence. An indication comes from the same article in a local newspaper:

MaltaToday is informed that applications are only given a favourable consideration to persons who have resided in Malta for more than 18 years. Maltese-born children of non-naturalised foreigners are still treated as foreigners and are even asked to pay for university fees. Neither do these foreigners, some of which have lived in Malta for more than a decade, qualify for a Maltese pension. Persons applying for naturalisation also need two sponsors, one of whom must be an MP, a judge, a magistrate, a parish priest, a doctor, a lawyer, a notary public or an officer in the army, civil service or police.<sup>52</sup>

### 3.2.6 International adoptions

The Demographic Review of 2009 reports that out of 520 adoptions, 378 were international adoptions. The top four countries for international adoptions between 2001 and 2009 were Russia, Ethiopia, Pakistan and Romania. The rest of the adoptions during this period were from 20 other countries.<sup>53</sup>

During my fieldwork, practitioners mentioned that some teenage unaccompanied irregular migrants were adopted. However, these are not mentioned in an otherwise exhaustive report on unaccompanied minors published by EMN Malta.<sup>54</sup> In addition,

<sup>51</sup> James Debono, ‘Who wants to be Maltese?’, 2009.

<sup>52</sup> Idem.

<sup>53</sup> National Statistics Office, *Demographic Review - 2009*, 2010, p. 89 (See Table 6.1).

<sup>54</sup> Charles Pace, James Carabott, Andrea Dibben & Elaine Micallef, eds. *Unaccompanied Minors in Malta: Their Numbers and the Policies and Arrangements for their Reception, Return and Integration*, European Migration Network, Malta, 2009.

no mention of this occurrence is made in Victor Martinelli's report on asylum seeking children in education in Malta either.<sup>55</sup> No further information was found.

### 3.3 Reception, detention and asylum: A statistical overview

#### 3.3.1 Irregular immigration in Malta prior to 2002

A common assumption, reported in most official documents, that irregular migration only started in Malta in 2002, is not entirely precise. Up to the year 2000, Malta received approximately 50-60 migrants per year coming mostly through North Africa and generally claiming asylum upon arrival. These figures do not include EU citizens and returnees.<sup>56</sup>

There have occasionally been episodes of influx of migrants: for example in 1972 when hundreds of Ugandan Asians expelled by Idi Amin arrived in Malta and were temporarily hosted in Tigne' Barracks, Sliema.<sup>57</sup>

Between 300 and 600 people arrived from Iraq in 1992. They managed to obtain temporary visas to Malta.<sup>58</sup> This was around the time of the first Gulf War (1990-1991). They were later resettled in Canada, Sweden and Norway.<sup>59</sup> In a document sent by the Director of Multilateral Affairs on behalf of the Government of Malta to the UNHCR, it is found that there was yet another unprecedented influx of Iraqis into Malta in 1992 totalling some 900 persons. Resettlement departures from Malta took place during 1993 in a limited number for the US, Canada and Australia.<sup>60</sup>

<sup>55</sup> Victor Martinelli, 'Responding to the needs of the asylum-seeking child in the Maltese education system: Some proposals', in *The Family, Law, Religion and Society Civil Society Project report*, ed. P. Xuereb, European Documentation and Research Centre - University of Malta, Msida, 2006.

<sup>56</sup> Katia Amore, 'Active Civic Participation of Immigrants in Malta', *POLITIS – a European research project*, <<http://www.politis-europe.uni-oldenburg.de/download/Malta.pdf>>, 2005, (accessed 15 March 2011).

<sup>57</sup> Henry Frendo, 'An analysis and categorisation of the asylum appellants in Malta, 2005-2007', in *The Changing Relationships between the Accession Countries and their Neighbours in the Changing Landscape of Liberty and Security*, <<http://www.libertysecurity.org/article1766.html>>, 2007, (accessed 2 February 2011).

<sup>58</sup> Idem.

<sup>59</sup> Katia Amore, 'Active Civic Participation of Immigrants in Malta', 2005.

<sup>60</sup> Immigration and Refugee Board of Canada, 'Malta: Information on what rights the government of Malta would grant to a citizen of Iraq recognized as a refugee by the United Nations High Commissioner for Refugees', MLT23596.E, <<http://www.unhcr.org/refworld/docid/3ae6ab0574.html>>, 1996, (accessed 12 April 2011).

Another group of immigrants that arrived in the early 1990s were from the former Yugoslavia. After the crisis of 1999, a further group of Kosovar Albanians arrived.<sup>61</sup>

In January 1993, the Jesuit Refugee Service (JRS) Malta was set up in response to the arrivals of these asylum seekers who numbered up to a few hundreds. The following quote from the Jesuits in Malta website gives an idea of the dearth of services for asylum seekers in 1993:

With no national structures in place, the tiny office set out to address some of the pressing needs with the help of friends and volunteers. Initially, JRS Malta worked mostly with asylum seekers and beneficiaries of international protection in the community, providing legal assistance, pastoral care, psycho-social and material support.<sup>62</sup>

The absence of an infrastructure and basic services is reported by the Council of Europe's Committee for the Prevention of Torture, Inhuman and Degrading Treatment (CPT) in three reports published in 1990, 1995 and 2001. The conditions for immigrants in detention at the Police Headquarters in Floriana and the Ta' Kandja Police Complex are described as overall appalling. In addition, in 1995 the CPT reports that no improvements had been made in the time gap between the two reports. In reaction to this, the 1995 report proposed various recommendations of 'immediate measures' which it stated ought to be implemented 'as a matter of urgency'.<sup>63</sup> Six years later, in 2001, the CPT highlights that hardly any action had been taken in the six years between the 1995 report and the 2001 report. It reiterated that the conditions in the same detention centre were below acceptable human rights standards.<sup>64</sup> This shows that in spite of low numbers, irregular immigration before 2002 was already an area

<sup>61</sup> Katia Amore, 'Active Civic Participation of Immigrants in Malta', 2005.

<sup>62</sup> Jesuits in Malta, 'Our Work', *What we do – Jesuits in Malta*, <<http://www.jesuit.org.mt/content.aspx?id=225263>>, 2011, (accessed 26 Mar 2011).

<sup>63</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 16 to 21 July 1995*, CPT/Inf (96) 25 [EN], Council of Europe, Strasbourg, 1996, Article 115.

<sup>64</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Maltese Government on the Visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 13 to 18 May 2001*, Ref. CPT/Inf (2002) 16 Council of Europe, Strasbourg, 2002.

Comment by CPT: 'Given the plans for an imminent transfer of the immigration detainees from the Ta' Kandja Police Complex at Siggiewi to the new Hal Far Detention Centre, the remarks on the former shall be kept to a minimum. Suffice it to say that, on 15 May 2001, a miserable situation scarcely different from the one observed in 1995 (cf. paragraphs 19 to 22 of CPT/Inf (96) 25) was found to prevail: premises - particularly the sanitary facilities - characterised by filth and disrepair, as well as an utter absence of purposeful activities for detainees whose stays at the complex could range from a few days to periods longer than two years.'

whereby the Government was reluctant to follow recommendations made by international bodies to fulfil its human rights obligations.

This state of affairs replicates a trend in the Mediterranean which distinguishes the irregular migration flows of the 1990s with contemporary ones. First, irregular migration flows in the 1990s were homogeneous – coming from one or two countries, unlike contemporary migration flows which comprise many different nationalities. Secondly, there was a further diversity in these mixed nationality flows as they increasingly included both asylum-seekers and other immigrants moving together, partly but not only, brought about by the post 9/11 restrictions on legal routes.

In 2001, Amore reports that 2,204 people were refused permission to enter the country and about 60 immigrants arrived in Malta irregularly.<sup>65</sup> No more information was found.

The contemporary patterns of irregular migration started in March 2002, when a boat carrying 208 migrants drifted into Xlendi Bay in Gozo (see further down for a description of the event). This period – the context for this thesis – is radically different from the pre-2002 period due to a) the sudden increase in numbers; b) the mode of arrival; c) the diversity of, as well as the countries of origin, of the immigrants; d) the new obligations (set in law) that Malta had undertaken as part of the EU *acquis*.

### **3.3.2 Irregular migrant: Procedural trajectory and rights**

When a boat reaches Malta, the police are informed and are deployed to register the immigrants upon arrival. The police register the immigrants' personal details including name, country of origin, and age. The immigrants' personal belongings are collected in separate bags and deposited at the Police Headquarters (immigrants are given a receipt for their money).

On site, a medical team of nurses and medical doctors who are on call provide first emergency care and examine every immigrant individually in order to determine if the person can be transferred directly to one of the detention centres or needs immediate

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<sup>65</sup> Katia Amore, 'Active Civic Participation of Immigrants in Malta', 2005.

medical care in hospital. At this stage, immigrants are not assessed for possible medical vulnerabilities or chronic diseases.

All immigrants are then taken to one of the migrant detention centres on the island. At the detention centres they are given their registration number and given a bed. Since the year 2008 they have been given a booklet published by the Ministry for Justice and Home Affairs (MJHA) explaining their basic rights and obligations. They are also given soap, a towel and some other material for their personal hygiene. Immigrants inside detention centres are accommodated in large rooms, warehouses and sometimes tents. They make use of shared showers and toilets. Cleaning inside the centres is the responsibility of the immigrants themselves.

Immigrants do not have much access to any means of communication or news. All places of detention have more than one telephone point for the exclusive use of immigrants. The Government claims that immigrants are given phone cards on a regular basis and are allowed to receive unlimited phone calls.<sup>66</sup> In practice, phone cards are given according to migrant inflows. Five-euro phone cards, as is generally given, are often not enough to make international calls. Furthermore, since incoming calls are managed through a central office, it has not always been easy to get the connection through to the detention centre.

A few televisions are installed in the centres generally transmitting the basic Maltese and Italian channels. There is no internet access or computers. Immigrants are allowed outside in adjacent grounds for one hour a day to exercise.

Irrespective of whether immigrants apply for asylum or not, they remain in detention. Detained immigrants who do not apply for asylum are kept in detention for up to 18 months (according to the January 2005 government policy). When released in the community, they are registered and given temporary residence permits, but remain subject to deportation following the issue of a Removal Order. Unaccompanied minors and vulnerable individuals are released from detention as a matter of policy

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<sup>66</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Response of the Maltese Government to the report of the CPT on its visit to Malta from 19 to 26 May 2008*, CPT/Inf (2011) 6, Council of Europe, Strasbourg, 2011.

Asylum seekers in detention centres may register themselves as such with the Refugee Commissioner by filling the 'Preliminary Questionnaire'. This form is presented to them together with the relevant information regarding their right to apply for international protection. As from 2008, the Office of the Refugee Commissioner (RefCom) has taken a number of measures to assist immigrants who would like to apply for asylum. The Preliminary Questionnaire is made available in a number of languages and personnel from RefCom provide information to third country nationals about the asylum procedure, informing them of their rights and obligations during the entire process. Asylum applicants are assisted by interpreters provided by the RefCom to fill in the Preliminary Questionnaire adequately.<sup>67</sup>

The vast majority of irregular immigrants apply for asylum. They are released if their asylum application has been successful, or after 12 months, if a final decision has not yet been taken. The majority of first asylum interviews are done only around 9 to 12 months after arrival. This means that most asylum seekers are in reality released after around 10 to 12 months from detention.<sup>68</sup> Asylum-seekers go through the whole process of applying for asylum, which includes meeting a legal aid lawyer (provided only at appeals stage), trying to obtain evidence to support their asylum claim and attending the interview at RefCom whilst staying at the detention centre.

Irregular immigrants can be granted one of the following statuses, which denote different levels of protection:

### Asylum seeker

An asylum seeker is any third country national who has submitted his application for asylum and is pending a decision by the Refugee Commissioner or the Refugee Appeals Board.

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<sup>67</sup> Office of the Refugee Commissioner, *Annual Report*, Office of the Refugee Commissioner, Valletta, 2010, p. 2.

<sup>68</sup> Médecins du Monde, *Access to Healthcare and Human Rights of Asylum-Seekers in Malta: Experiences, Results and Recommendations*, Médecins du Monde, France, 2007, p. 9.

### Refugee

A person granted refugee status under the 1951 Refugee Convention in Malta is entitled to the following rights according to article 14 of Legal Notice 243 of 2008: (a) to remain in Malta with freedom of movement, (b) to be granted, as soon as possible, personal documents, including a residence permit for a period of three years, which shall be renewable; (c) to be given a Convention Travel Document entitling him/her to leave and return to Malta without the need of a visa (unless he/she is in custody awaiting judicial proceedings for the commission of a criminal offence, or is serving a term of imprisonment); (d) to have access to employment, social welfare, appropriate accommodation, integration programs, state education and training, and (e) to receive state medical care especially in the case of vulnerable groups of persons. Dependent members of the family of a person granted refugee status, if they are in Malta at the time of the decision or if they join him in Malta, enjoy the same rights and benefits as the refugee.

### Subsidiary protection

The subsidiary protection status was introduced in 2008 by Legal Notice 243 of 2008 'Procedural Standards in Examining Applications for Refugee Status Regulations' which transposed EU Council Directive 2004/83 EC 'On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted' into Maltese Legislation. Previously the Refugees Act provided for temporary humanitarian protection, defined as special leave to remain in Malta for those persons who could not have returned safely to their country of origin.

Subsidiary protection is given when an asylum seeker does not satisfy all the conditions for refugee status, but would still face a real risk of suffering serious harm should he be returned to his country of origin. According to the Refugees Act (article 17 (1)), the Commissioner shall continue to make this recommendation even in cases where the real risk of suffering serious harm arises after a decision not to grant subsidiary protection has been taken.

According to article 14 (1) (b) of Legal Notice 243 of 2008, a person enjoying subsidiary protection shall be entitled (a) to remain in Malta with freedom of movement and to be granted personal documents, including a residence permit for a period of one year, which shall be renewable; (b) to be provided with documents which enable him to travel especially when serious humanitarian reasons arise that require his presence in another state (unless compelling reasons of national security or public order otherwise require); (c) to have access to employment, subject to labour market considerations, core social welfare benefits, appropriate accommodation, integration programs, state education and training, and to receive core state medical care, especially in the case of vulnerable groups of persons. Dependent members of the family of a person granted subsidiary protection, if they are in Malta at the time of decision, enjoy the same rights and benefits as the person enjoying subsidiary protection status.<sup>69</sup>

### **3.3.3 A note on statistics and datasets**

This brief note serves to highlight the problems and limitations of statistics and datasets in the field of immigration. These observations are included particularly because Section 3.3 and Section 3.4 make ample use of statistics. The dominant view of the lack of pertinent statistics in this field is that put forward by Amore who says that this stems from the fact that irregular migration is still a new phenomenon.<sup>70</sup> Since 2008 and 2009, the period during which I undertook my fieldwork, there has been an attempt at more systematic collection by the NSO, which is tasked with feeding Eurostat with national data. Data, however, is not shared willingly, let alone systematically, between agencies. This has largely to do with the securitisation of the field and the fact that it involves in part illegal activity. However, when one views the array of authorities involved, this does not really come as a surprise since these are authorities who traditionally are unwilling to share information (for example, to name just a few: the AFM, the Police Forces, the MJHA, and welfare organisations). Just to give an example, at a EMN – Malta conference I attended in 2008, a set of statistics on

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<sup>69</sup> Another status of ‘temporary humanitarian protection’ has also been recommended by the Office of the Refugee Commissioner, as ‘an administrative procedure to be granted in special and extraordinary cases where applicants are found not to be eligible for recognition as refugees or beneficiaries of subsidiary protection, but who are considered to be nonetheless in need of protection due to special humanitarian reasons.’ From: Office of the Refugee Commissioner, *Annual Report*, Office of the Refugee Commissioner, Valletta, 2010.

<sup>70</sup> Katia Amore, ‘Active Civic Participation of Immigrants in Malta’, 2005, p. 9.



the number of irregular immigrants in Malta presented by the AFM and those of the Immigration Police varied widely, leading a monopoly of questions and concerns regarding statistics at every stage of the conference. This is a huge limitation to analysis. In addition, the risk of duplication of numbers, especially if collective numbers of receivers of different benefits are put together, is great.

Another problem stems from flawed design of data collection: based on misconceptions, or an inadequate awareness of the complexities in the field. For example, the number of immigrants living in open centres is often given as the sum total of irregular immigrants in Malta who are not in detention. This is incorrect since there are also immigrants living in the community in rented apartments. At times, figures of immigrants receiving some sort of social benefit are also included, but even this is problematic because immigrants without any claim to benefits would not be included. Another issue is that those immigrants who travel overseas on a travel document, and return back to Malta are not always included. In brief, even if there were reliable statistics of foreigners in Malta on temporary residence permits who have entered irregularly, this would not be the real number at any given time. (Note: even the Census and other data collecting systems have their own limitations, maybe to a lesser degree)

Another thing to keep in mind is that official agencies dealing with immigration assume citizenship (generally used interchangeably with 'nationality') to be the one that the immigrant claims upon arrival, even if this is not supported by documentation. This could be problematic when one considers that some immigrants are refused asylum on the basis that there is not enough evidence, or that the evidence runs counter, to their claimed citizenship.

Anyone who tries to make sense of the overall picture will find that statistics are problematic. During my fieldwork, none of the authorities I was in touch with ever questioned their statistics, even though they were aware that statistics varied across agencies. This shows an unwillingness to grasp the bigger picture which has huge ramifications on policy development. In an article on 18 March 2009 by Henry Frendo, who occupies the dual role of Chairperson of a Refugee Appeals Board and is a full

time academic, mentions some of these problems.<sup>71</sup> Frendo's article was a response to a previous article by Martin Scicluna, then government advisor on migration issues, in which Scicluna claims to give a picture of irregular migration in Malta using various statistical data.<sup>72</sup> In general, information on primary sources and how data is gathered is very difficult to access and this invariably conditions the reliability of data and explains the inconsistency of data from one institution to another. This poses substantial limitations to the data on irregular migration, including that presented in this Chapter.

### 3.3.4 Mode of arrival and migrant routes

The vast majority of irregular immigrants arrive by boat, or are intercepted at sea. There are also a few who are found to be residing illegally. The following is a map charting possible routes that migrants take, which brings out the complexity and length of these routes:

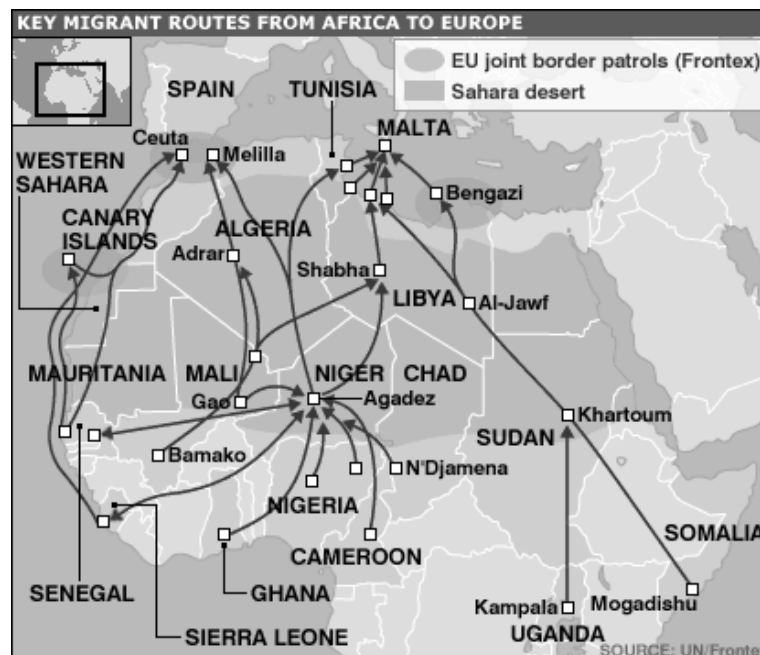


Figure 7: Key Facts: Africa to Europe migration<sup>73</sup>

According to interviews reported in the press, immigrants are generally charged between 600 US Dollars and 900 US Dollars to travel from Libya to Italy, which is their

<sup>71</sup> Henry Frendo, 'Immigrants, statistics, policies', *The Times of Malta*, 18 March 2009.

<sup>72</sup> Martin Scicluna, 'Immigration: The facts', *The Times of Malta*, 7 March 2009.

<sup>73</sup> BBC News Europe, 'Key Facts: Africa to Europe migration', *BBC News* 2 July 2007, <<http://news.bbc.co.uk/1/hi/world/europe/6228236.stm>>, 2007, (accessed 26 March 2011).

usual destination.<sup>74</sup> There appear to be different arrangements for their boat journey. Some immigrants claim that they had a driver on their boat. Others, with the help of a map, attempt to steer the boat themselves. The boats, or dinghies, are small and cannot transport big groups as seen in the figures in the table below. They are generally not seaworthy, which explains, together with the fact that they are always overcrowded, why many encounter problems once out at sea.

At times, larger boats arrive, as was the case in the first three months of 2009 when three boats carrying a total of 651 immigrants arrived in Malta. Interviewed for a local newspaper, Colonel Emanuel Mallia of the AFM dismissed this as an ‘accident’ and explained that larger boats are usually directed towards Lampedusa and sometimes Sicily. Moreover, and on the whole, larger boats tend to be more sturdy and seaworthy, encounter fewer problems at sea and are therefore less likely to require assistance and be brought into Malta.<sup>75</sup>

Boat arrivals reached a peak in 2008 with 84 boat arrivals and 2,775 people on board in total. This can be seen in the table below:

#### 5.2 Boats arriving in Malta with irregular immigrants: 2002-2009

Year	No. of boats arriving	No. of people on board	Average no. of people on board per boat
2002	21	1,686	80
2003	12	502	42
2004	52	1,388	27
2005	48	1,822	38
2006	57	1,780	31
2007	68	1,702	25
2008	84	2,775	33
2009	17	1,475	87

Source: Police General Headquarters - Immigration Section.

Table 3: *Boats arriving in Malta with irregular immigrants: 2002-2009*<sup>76</sup>

The frequency of boat arrivals per month is high and generally peaks in the summer months when the sea is less rough. The following table is a breakdown per month of arrivals between March 2008 and December 2008. It gives an idea of the frequency of

<sup>74</sup> The Times of Malta, ‘Man who ferried immigrants to Malta jailed’, *The Times of Malta*, 16 March 2011.

<sup>75</sup> Kurt Sansone, ‘Large boats may have tried to avoid Lampedusa: Traffickers’ intentions remain unknown’, *The Times of Malta*, 10 March 2009.

<sup>76</sup> National Statistics Office, *Demographic Review - 2009, 2010*, p. 77.

boat arrivals, the total number of people on the boats and the sex and age distribution. In July 2008 alone, there were 22 landings. There were no landings in January and February.

Month	Landings	Total Persons	Male	Female	Children	Babies
March	1	24	17	4	3	0
April	5	108	96	12	0	0
May	8	188	152	29	6	1
June	17	490	438	46	3	3
July	22	809	721	84	4	0
August	17	504	420	76	7	1
September	7	328	272	48	5	3
October	2	46	30	14	2	0
November	1	68	49	16	2	1
December	1	139	103	36	0	0
<b>Total</b>	<b>81</b>	<b>2,704</b>	<b>2,298</b>	<b>365</b>	<b>32</b>	<b>9</b>

Graph 1: Overview of the landings per month (March – December) in 2008<sup>v</sup>

Table 4: Overview of the landings per month (March – December) in 2008<sup>77</sup>

In addition, there are a group of immigrants who are caught residing illegally in Malta. The NSO numbered the total of third country nationals residing illegally in Malta and subject to an obligation to leave, at 3,013 in 2008.<sup>78</sup> In this year, the total number of arrivals by boat was of 2,775. This means that 238 persons were third country nationals (non-EU) who had overstayed their tourist visa, or residence permit. The report goes on to say that 1.0 per cent of third country nationals residing illegally were European, 2.0 per cent were Asian and 97.0 per cent were African. Apart from the European nationals, this means that there were a considerable number of Africans apprehended by immigration authorities who did not arrive by boat. Similarly, NSO reports that 87.0 per cent of overstayers were male, which suggests that the sex balance is likely to have followed a similar pattern.

<sup>77</sup> Médecins sans Frontières, *Not Criminals: Médecins sans Frontières exposes conditions for undocumented migrants and asylum seekers in Maltese detention centres*, Médecins sans Frontières, Brussels, 2009, p. 5. (Note: No data is given for January and February. However when compared to the table above one can deduce that up to three boats and an approximate number of 71 immigrants would have arrived in these two months.)

<sup>78</sup> National Statistics Office, *Migration and Asylum in Malta*; report prepared for the annual meeting of the European Migration Network – Malta, National Statistics Office, Valletta, 2009, p. 2.

### 3.3.5 Irregular migrant arrivals

Since 2002, irregular migrant arrivals have been more or less consistent, reaching a peak in 2008 with 2,775 immigrants as seen in the Table below:

2002	2003	2004	2005	2006	2007	2008	2009
1,686	502	1,388	1,822	1,780	1,702	2,775	1,475

Figure 8: Irregular entry in Malta: 2002 -2009<sup>79</sup>

The years 2009 and 2010 show a decrease in arrivals which has been unofficially attributed to the 2008 bi-lateral treaty between Libya and Italy, entitled the Libya-Italy Treaty of Friendship, Partnership and Cooperation. This treaty included a repatriation agreement and a patrol by mixed crews of the Libyan coastline, as well as land border satellite surveillance.<sup>80</sup> In 2010 there were only 57 arrivals, which meant that by the beginning of 2011 all detainees could be accommodated in the migrant centre at Hal Safi.<sup>81</sup> It is not clear how arrivals will be impacted by the suspension of this treaty due to the civil war in Libya in 2011.<sup>82</sup>

### 3.3.6 Nationalities of irregular migrants

The ethnic diversity of irregular migration flows is typical of what the migrationist Stephen Vertovec has called the modern phenomenon of the 'superdiversity' of irregular immigrant flows.<sup>83</sup> From January 2000 to August 2008, irregular immigrants arrived from 47 different countries.<sup>84</sup> The table below gives a clear picture of the distribution by country of origin:

<sup>79</sup> Jean-Pierre Gauci, 'Irregular entry in Malta 2002-2009', *Malta – Migration Trends*, International Organisation for Migration, Brussels, 2010, p. 207.

<sup>80</sup> For a review of this Treaty including the agreed cooperation on illegal migration, see Natalino Ronzitti, 'The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?', *Bulletin of Italian Politics*, Vol. 1, No. 1, 2009, pp.125-133.

<sup>81</sup> *Maltese Parliamentary Question*, 'Immigranti illegali - detention centres', Legislature XI, No. 23132, 26 Jan 2011.

<sup>82</sup> Tom Watkins, 'Italy suspends friendship treaty with Libya', *CNNWorld* – 28 February 2011, <[http://articles.cnn.com/2011-02-28/world/libya.italy\\_1\\_moammar-gadhafi-friendship-treaty-italian-ministry?\\_s=PM:WORLD](http://articles.cnn.com/2011-02-28/world/libya.italy_1_moammar-gadhafi-friendship-treaty-italian-ministry?_s=PM:WORLD)>, 2011, (accessed 26 March 2011).

<sup>83</sup> See Steven Vertovec, 'Super-diversity and its implications', *Ethnic and Racial Studies*, Vol. 29, Issue 6, 2007, pp. 1024 – 1054.

<sup>84</sup> *Maltese Parliamentary Question*, 'Immigranti illegali', Legislature XI, No. 2551, 14 Oct 2008.

	2000	2001	2002	2003	2004	2005	2006	2007	2008	Totals
Afghanistan							1		0	1
Algeria			1		2	1	9	1	1	15
Bangladesh			20		5				0	25
Benin						3	2	5	10	20
B.Faso					2	4	19	21	11	57
Botswana			1						0	1
Burundi						1			0	1
Cameroon			7	2	2		3		6	20
Chad			13	2	1	16	13	5	9	59
Congo			54	47	109	3	7	3	1	224
Djibouti	0	0	0	0	0	0	0	0	0	0
Egypt	8		307	198	208	381	312	4	12	1430
Eritrea			334	1	199	372	368	211	98	1583
Ethiopia			63		53	99	143	107	22	487
Gabon									3	3
Gambia			4				1	22	34	61
Ghana			115		2	24	85	84	127	437
Guinea			4	1			4	19	27	55
G.Bissau					1		2	8	5	16
India			1	4	8	4	1		4	22
Iraq			144		9	36	7	2	0	198
Iv.Coast			5	28	53	75	58	162	156	537
Kenya									1	1
Kurdistan			31				1		0	32
Lebanon			2			1			0	3
Liberia			73	4	10	29	5	7	5	133
Libya	1		1						1	3
Mali			7	1	1	2	40	123	185	359
Mauritania			2				2	1	1	6
Morocco	2	1	89	12	1	23	158	2	0	288
Niger					1	41	40	32	33	147
Nigeria			49		4	45	55	136	125	414
Pakistan			20	59	41		1	2	0	123
Palestine			17	4	67	44	4	3	1	140
Pap.N.Guinea							1		0	1
Polisaria					1				0	1
Senegal				1			2	19	8	30
Sierra Leone			10		3	11	15	7	1	47
Somalia			249	86	533	146	311	613	1266	3204
S. Africa			1				1		0	2
Sri Lanka									0	0
Sudan		56	25	42	64	420	67	46	42	762

<b>Syria</b>			11				1	1	0	<b>13</b>
<b>Tanzania</b>							1		0	<b>1</b>
<b>Togo</b>			2		2	18	22	44	26	<b>114</b>
<b>Tunisia</b>	13		24	10	6	23	17	12	1	<b>106</b>
<b>Zimbabwe</b>							1		1	<b>2</b>
<b>Total</b>	<b>24</b>	<b>57</b>	<b>1686</b>	<b>502</b>	<b>1388</b>	<b>1822</b>	<b>1780</b>	<b>1702</b>	<b>2223</b>	<b>11184</b>

Table 5: *Illegal immigrants with country of origin, 2000-2008*<sup>85</sup>

### 3.3.7 Legal framework for irregular immigrants and asylum seekers

The treatment and procedures which irregular migrants and asylum seekers go through are regulated by national laws, most of which are transposed EU Directives. Significantly, UNHCR notes that Malta's application to join the EU appears to have been the primary reason for establishing national legislation on asylum and for the lifting of the previous limitations.<sup>86</sup>

Under the Immigration Act of 1970,<sup>87</sup> all prohibited immigrants issued with a removal order are placed in detention until they can be removed from Malta (article 5 and 14 of the Immigration Act).<sup>88</sup> The Immigration Act regulates matters related to entry, visa regime and border control, as well as the granting of temporary and permanent residence permits and the granting of permission for foreigners to work in Malta. In 2002, Malta decriminalised the entrance without leave of its territory, but kept in place the detainment of all migrants upon arrival.

Malta ratified the 1951 Refugee Convention on 17 June 1971 and the 1967 Additional Protocol on 15 September 1971. Malta acceded to the 1951 Convention with a declaration of geographical limitation. This reservation was expressly maintained upon acceding to the 1967 Protocol in spite of the fact that one of the main intentions of the 1967 was to remove the geographic as well as the temporal limits of the 1951 Convention. This meant that nationals from any country outside Europe would not

<sup>85</sup> *Maltese Parliamentary Question*, 'Immigranti illegal', Legislature XI, Annexed Document, No. 2551, 14 Oct 2008.

<sup>86</sup> UNHCR, 'Country Operations Plan – Executive Committee Summary', <<http://www.unhcr.org/refworld/pdfid/3d941f5fe.pdf>>, 2003, (accessed 12 June 2011), p. 1. One of the major limitations lifted was that the geographical limitation.

<sup>87</sup> *Laws of Malta*, Immigration Act, Chapter 217, 1970.

<sup>88</sup> Detention has nothing to do with identification or status. Detention is an automatic consequence of the removal order issued by the Principal Immigration Officer (Commissioner of Police) who will issue any person who is liable to removal with a 'removal order'. Interesting to note that Article 5 has a list of people who are also prohibited immigrants, such as persons suffering from mental disorders or are mentally defective.

qualify in Malta as refugees under the relevant provisions of the Convention. In a response in 1996 to a query by UNHCR on Iraqi nationals the Maltese Government, reiterated this and stated that any concession which Malta 'decides to give beyond the formal commitment arising by virtue of this declaration is purely discretionary'.<sup>89</sup> As a consequence of the geographical limitation, refugees recognised as such by the UNHCR Branch Office Rome were in need of a resettlement solution since they were neither authorized to work, nor to settle in Malta.<sup>90</sup> The geographical limitation was lifted on 1 October 2001 when the Refugee Act entered into force.<sup>91</sup> All remaining reservations, by the time of accession to the EU, were lifted.

The Refugee Act of 2001 establishes national provisions and procedures for asylum seekers and refugees. The Refugee Act incorporates the obligations that Malta assumed when it signed up to the 1951 Refugee Convention and the 1967 Protocol. It provides that individuals who have been recognised as Mandate refugees and those who are given humanitarian protection are granted a residence permit and a work permit when requested. The Refugee Act also set up the Office of the Refugee Commissioner, which meant that Malta started carrying out the refugee status determination procedure. Article 25A of the same Act states that appeals against removal and deportation orders can be made to the Immigration Appeals board. Release may be granted where the length of detention is considered unreasonable and deportation is considered unlikely.<sup>92</sup>

In November 2001, the Maltese Government adopted the Social Security Order which meant that for the first time the provisions of the Social Security Act also started applying to refugees (previously all foreigners were excluded).<sup>93</sup>

The Dublin II Regulation had a direct impact on Malta. It was adopted in 2003, one year before EU enlargement. The Dublin II Regulation was set up to determine which EU Member State was responsible for examining the application of an asylum seeker seeking international protection under the Geneva Convention and the EU

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<sup>89</sup> Immigration and Refugee Board of Canada, *Malta: Information*, 1996.

<sup>90</sup> *Idem*.

<sup>91</sup> The lifting of the geographical limitation was publicly announced at the UNHCR Ministerial Meeting which took place in Geneva on 12-13 December 2001.

<sup>92</sup> *Laws of Malta*, Refugee Act, Chapter 420, 2001, Article 25A, para. 8-10.

<sup>93</sup> UNHCR, 'Country Operations Plan – Executive Committee Summary', 2003, p. 1.



Qualification Directive. One of the principal aims of the Dublin Regulation was to prevent asylum-seekers from submitting applications in multiple Member States, and also to curtail states from shuttling asylum-seekers from one state to another. This system has however put a lot of pressure on Malta and other border Member States. The Maltese Government had lobbied, unsuccessfully, for derogation from the Dublin II regulation.<sup>94</sup>

In February 2005, the Ministries for Justice and Home Affairs, and Family and Social Solidarity, issued a Policy document entitled 'Irregular Immigrants, Refugees and Integration'. This Policy Document reiterated the need for the detention of all irregular immigrants: 'In the interest of national security and public order they are still kept in detention until their claim to their country of origin and other submissions are examined and verified.'<sup>95</sup> The Policy Document stipulates a policy of administrative detention with a maximum length of 18 months for irregular immigrants. Asylum seekers are however released after 12 months as the Regulations enacted in terms of the Refugee Act state that every asylum seeker (namely all those who have been either accepted as refugees or whose case is still pending or processed for an appeal) should be granted access to the labour market after 12 months. A significant development in the same policy document states that vulnerable individuals 'by virtue of their age and/or physical condition' will be exempt from detention and accommodated in alternative centres.<sup>96</sup>

Malta is responsible for the implementation of EU Directives that directly impact on the treatment and procedures with regards to irregular immigrants and other third country nationals. The first, Council Directive 2003/9/EC on minimum standards for the reception of asylum seekers, was transposed in 2005 with an amendment to the Refugees Act by Legal Notice 320 'Reception of Asylum Seekers (Minimum Standards) Regulations, 2005'.<sup>97</sup> The aim of this Directive is to ensure that asylum seekers have a

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<sup>94</sup> Committee on Civil Liberties, Justice and Home Affairs. *Report by the LIBE Committee Delegation on its Visit to the Administrative Detention Centres in Malta*, <[http://www.jrsmalta.org/LIBE\\_Malta\\_Report\\_2006.pdf](http://www.jrsmalta.org/LIBE_Malta_Report_2006.pdf)>, European Parliament, Brussels, 2006, (accessed 02 August 2011), p. 6.

<sup>95</sup> Ministry of Justice and Home Affairs & Ministry for the Family and Social Solidarity, *Irregular Immigrants, Refugees and Integration*, Ministry of Justice and Home Affairs & Ministry for the Family and Social Solidarity, Valletta, 2005.

<sup>96</sup> Idem.

<sup>97</sup> *Maltese Legal Notice 320 of 2005*, 'Reception of Asylum Seekers (Minimum Standards) Regulations', 2005.

dignified standard of living and that comparable living conditions are afforded to them in all Member States. This Directive also limits asylum applicants' secondary movements.<sup>98</sup>

In 2005, another amendment to the Refugees Act was published as Legal Notice 131, 'Temporary Protection for Displaced Persons (Minimum Standards) Regulations', in order to transpose EU Directives 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons.<sup>99</sup> The aim of this Directive is to harmonise temporary protection for displaced persons in cases of mass influx on the basis of solidarity between Member States. The Directive envisages a number of obligations towards beneficiaries of temporary protection. These include: a residence permit for the entire duration of the stay (article 8), access to employment (article 12), access to suitable accommodation (article 13), access to education for minors (article 14) as well as the possibility of family reunification (article 15). The temporary protection mechanism established by the Directive has not been used yet.

The transposition of Council Directive 2003/109/EC, on the status of long-term resident third-country nationals, was effected in 2006 with Legal Notice 278 of 2006 (Status of Long-term Residents (Third Country Nationals) Regulations, 2006).<sup>100</sup> This Directive grants additional rights to non-EU nationals residing legally and continuously for five years in the territory of a Member State. Some immigrants are excluded from its scope because their situation is precarious or because they are resident on a short-term basis (refugees, asylum seekers awaiting a decision on their status, seasonal workers or workers posted for the purpose of providing cross-border services, persons who have been granted temporary protection or a subsidiary form of protection, persons residing in order to pursue studies or vocational training)

In 2007, Council Directive 2003/86/EC, which deals with family reunification, was also transposed into Maltese law with Legal Notice 150 of 2007 (Family Reunification

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<sup>98</sup> For a summary of this see: *Ewropa – Summaries of EU legislation*, 'Minimum standards on the reception of applicants for asylum in Member States', <[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33150\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33150_en.htm)>, 2008, (accessed 24 July 2011).

<sup>99</sup> *Maltese Legal Notice 131 of 2005*, 'Temporary Protection for Displaced Persons (Minimum Standards) Regulations', 2005.

<sup>100</sup> *Maltese Legal Notice 278 of 2006*, 'Status of Long-term Residents, Third Country Nationals Regulations', 2006.

Regulations).<sup>101</sup> The rationale behind this Directive is to facilitate the integration of third country nationals through the promotion of family life. This Directive, however, explicitly excludes asylum seekers, and persons residing on grounds of temporary or subsidiary protection. It is only refugees that have a right to apply for family reunification. The more favourable conditions proposed by the Directive have not been incorporated into the Legal Notice, meaning that refugees must fulfil all of the criteria like any other third country national.

In 2008, Legal Notice 243 of 2008 'Procedural Standards in Examining Applications for Refugee Status Regulations' transposed Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals. This Directive sets out a common definition of who is a refugee and who is otherwise entitled to international protection. It also sets minimum standards for the entitlements of those who qualify for asylum status.

### 3.3.8 Migrant reception or detention centres

In 2009, there were three migrant detention centres on the main island – Lyster Barracks, Ta' Kandja, and Safi Barracks.<sup>102</sup> These centres, previously run by the Police and AFM, are run by the Detention Services (DS), a department falling under the responsibility of the MJHA. It is made up of personnel seconded from the Police Force and the AFM under one command (a further description of the role of the DS is given in 2.4.1). At the end of December 2009, they had an estimated capacity of 1,900.<sup>103</sup> If additional space is needed, migrants can also be detained in correctional facilities and police headquarters are established by the authorities.<sup>104</sup>

<sup>101</sup> *Maltese Legal Notice 150 of 2007, 'Family Reunification Regulations', 2007.*

<sup>102</sup> *Maltese Parliamentary Question, 'Dhul ta' Immigranti Illegal', Legislature XI, No. 1647, 02 Jul 2008.*

<sup>103</sup> Global Detention Project, 'Malta Detention Profile', *Global Detention Project*, <<http://www.globaldetentionproject.org/countries/europe/malta/introduction.html#c2688>>, 2009, (accessed 19 July 2011).

<sup>104</sup> The list of all designated detention places (not exclusively for migrants) is outlined in Subsidiary Legislation 217.03 of 2005 (Places of Detention Designation Order): 1) Ta' Kandja; 2) Victoria Police Station, Gozo; 3) the lock up in the building housing the Courts of Justice at Valletta; 4) the lock up at the Police Headquarters at Floriana; 5) the approved place of Police Custody at the Malta International Airport; 6) The approved place of Police Custody at the Seaport, Valletta; 7) the approved place at Lyster Barracks, Hal Far; 8) the approved place of the Police Complex at Fort Mosta, Mosta; 9) the Hal Far Immigration Reception Centre; and 10) the approved place at the Safi Barracks, Safi.

The total annual expense incurred to manage irregular migration in 2007 (not limited to the expenses incurred by the DS) was €12,956,802. When €1,357,189 capital expenses are added, the total expense for 2007 amounts to €14,313,991.<sup>105</sup>

### 3.3.9 Statistics concerning asylum applicants and status granted

UNHCR reports that 84.0 per cent of people arriving by sea in Malta between 2002 and 2010 have sought asylum.<sup>106</sup> In the last years, UNHCR has consistently ranked Malta high on the world list of asylum applications per inhabitants. Between 2004 and 2008 Malta together with Cyprus were ranked first in the world.<sup>107</sup>

From January 2002 until December 2009, RefCom concluded 10,361 cases. Of these, 232 were granted refugee status, 5,677 were granted humanitarian/subsidiary protection, 4,452 were rejected.<sup>108</sup> That means that refugee and humanitarian/subsidiary status were given to around 57.0 per cent of all applicants. Eurostat reports, that among EU Member States, Malta had the highest rates of refugee recognition (this includes humanitarian protection and subsidiary protection) in the first instance in 2009.

The following chart shows the applications by citizenship of asylum seekers in 2008. Typical of other years, the largest group of asylum applicants was from Somalia, and the vast majority were Africans from the sub-Saharan region.

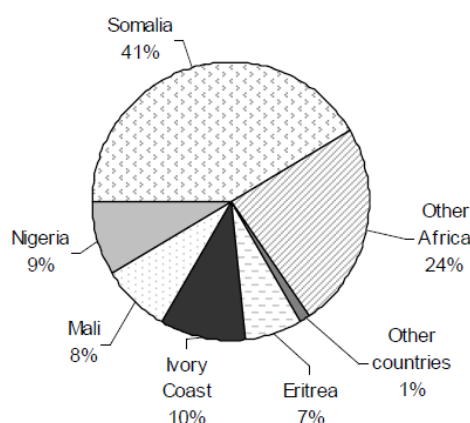
<sup>105</sup> *Maltese Parliamentary Question*, 'Dħul ta' Immigranti Illegali', 2008.

<sup>106</sup> UNHCR News, 'UNHCR urges EU and FRONTEX to ensure access to asylum procedures, amid sharp drop in arrivals via the Mediterranean', *Press Release*, 10 December 2010.

<sup>107</sup> UNHCR, 'Asylum level and trends in industrialised countries - 2008', <<http://www.unhcr.org/49c796572.html>>, 2009, (accessed 20 July 2011), p. 8.

<sup>108</sup> Office of the Refugee Commissioner, *Annual Report*, 2010, p. 4.

Applications by citizenship: 2008



Source: Office of the Commissioner for Refugees

Table 6: Applications by Citizenship: 2008<sup>109</sup>

### 3.3.10 Deportations and Assisted Voluntary Returns (AVR)

According to Immigration Police statistics, in 2009, there were 1,691 persons subject to an obligation to leave. Of these, 530 returned to a Third Country (a non-EU country).<sup>110</sup> The breakdown by continent is shown in the table hereunder.

Number of deportations among those with an obligation to leave for 2009					
Country	Europe	Africa	America	Asia	Unspecified
Obligation to leave	47	1422	2	145	5
Actually left	31 (66.0%)	416 (29.3%)	2 (100.0%)	81 (55.9%)	N/A

Table 7: Number of deportations among those with an obligation to leave for 2009<sup>111</sup>

The Maltese Police Force indicate that there is an increasing number of rejected asylum applicants liable to be deported who cannot be deported for a variety reasons, notably, lack of ID documents. In practice, Maltese authorities issue a removal order together with a suspension of deportation.

Assisted Voluntary Return (AVR) programmes are one of the core strategies employed by the Government to relieve the burden of the number of migrants in Malta in as cost effective way as possible, while ensuring that this is done in a humane and dignified

<sup>109</sup> National Statistics Office, *Migration and Asylum in Malta: A statistical overview, report prepared for the annual meeting of the European Migration Network – Malta, 2009*, Table 2, p. 2.

<sup>110</sup> National Statistics Office, *Demographic Review - 2009*, Valletta: NSO, 2010, Table: 5.9, p. 82.

<sup>111</sup> Idem. The following categories are listed under Europe: Republic of Moldova, Serbia, Turkey, Ukraine and 'other European countries'. The African countries mentioned were: Algeria, Egypt, Eritrea, Ethiopia, Ghana, Guinea-Bissau, Ivory Coast, Libya, Mali, Morocco, Nigeria, Somalia, Tunisia and 'other African countries'. American countries were simply listed as 'other American countries', and Asian countries listed were Bangladesh, China (including Hong Kong), India, Iran, Pakistan, Syrian Arab Republic, Uzbekistan, 'other Asian countries'.

way. This is mentioned in the February 2005 Policy Document which states that for those irregular immigrants not eligible for refugee or humanitarian protection, voluntary return will always be preferred to forced return.<sup>112</sup> In spite of this, the political and legal framework surrounding assisted return remains rather scant and Maltese legislation makes no reference to assisted return per se. Only an indirect reference is made to this in the Immigration Act. In 2011, Legal Notice 81 of 2011 transposed Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.<sup>113</sup>

From 2004, there have been four AVR projects implemented and specifically targeted towards rejected asylum seekers who lack a basis for legal stay, mainly from Sub-Saharan Africa.<sup>114</sup> The first AVR project in Malta was implemented by the International Organization for Migration (IOM) in 2006. Funded under the ERF II 2005, the objective of the project was to introduce the schemes necessary for establishing and offering AVR. The project itself resulted in returning one Somali man.<sup>115</sup> Notwithstanding this, the project was positively assessed since for the first time AVR had been introduced as an option. Upon completion of this project, the Government continued to offer ad-hoc assistance to enable a small number of migrants to return home voluntarily.<sup>116</sup>

The second was the DAR - Comprehensive Return Programme Including Re-Integration Financing Programme project funded by the EU Return programme, was developed by the Ministry of Foreign Affairs of Malta (Lead Partner) in collaboration with the International Centre for Migration Policy Development (ICMPD), SOS Malta and Med Europe (Italy). The project commenced in August 2007 and was concluded in May 2009. The main objective of the DAR project was to contribute to the development of a comprehensive voluntary return programme with special emphasis on reintegration.

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<sup>112</sup> Ministry of Justice and Home Affairs & Ministry for the Family and Social Solidarity, *Irregular Immigrants, Refugees and Integration*, 2005.

<sup>113</sup> *Maltese Legal Notice 81 of 2011*, 'Common Standards and Procedures for Returning Illegally Staying Third-Country Nationals Regulations', 2011.

<sup>114</sup> Maria Pisani & Anna Giustiniani, eds. *Programme and strategies in Malta fostering assisted return to and re-integration in third countries*, EMN, Valletta, 2009, p. 6.

<sup>115</sup> *Ibid*, p. 14.

<sup>116</sup> *Idem*.

The DAR programme (which included two phases – Dar I and Dar II) assisted 170 people to return.<sup>117</sup>

The project RESTART, funded under the Return Fund 2008-2013, commenced in January 2009 and aimed to provide assisted voluntary return to up to 25 migrants. In addition, the project aimed to support the efforts of the Maltese authorities to improve its integrated return management by facilitating voluntary return and sustainable reintegration for migrants in need of return assistance.<sup>118</sup>

Finally, IRRiCO is another project which does not implement AVR in itself, but facilitates the improvement of return and reintegration measures. It is an 18-month IOM project financed by the EU Return Fund. The project aims to gather and consolidate return and reintegration information on countries of origin, in order to provide migrants considering the AVR option to return home with reliable and up-to-date information on issues such as education, health care, housing, employment possibilities, transportation and social security.<sup>119</sup>

The following table gives an idea of the numbers involved and the breakdown by project:

**Table 1: Assisted returnees by AVR scheme 2005 -2009 (August 09) – Frequency Distribution by status**

	Asylum Seekers	Rejected	THP/SP	Refugees	Withdrawn/ Inadmissable	Unknown	Total
<b>IOM</b>	0	0	1	0	1	0	2
<b>RESTART (IOM)</b>	2	17	0	1	4	0	24
<b>DAR I</b>	1	33	4	0	23	10	71
<b>Dar II</b>	0	54	11	0	28	6	99
<b>Total</b>	3	104	16	1	56	16	196

**Table 8: Assisted returnees by AVR scheme 2005-2009 (August 09) – Frequency Distribution by status**<sup>120</sup>

<sup>117</sup> Ibid, p. 15.

<sup>118</sup> Ibid, p. 16.

<sup>119</sup> Idem.

<sup>120</sup> Ibid, p. 17.

### 3.4 In the community

#### 3.4.1 Migrant accommodation following release from detention

Following release from detention, migrants are accommodated in open centres which fall under the administrative arm of Agency for the Welfare of Asylum-Seekers (AWAS). Open centres aim at providing temporary lodging before immigrants can move out into independent accommodation in the community, return home, or are resettled. It is the Government's position that the centres should not be considered as permanent residences but merely as a transition space for people between detention and their durable solutions.<sup>121</sup> In practice, the majority of migrants remain in open centres.

There are 11 open centres, which host different target groups. NSO reports that in December 2008, there were 1,895 persons residing in open centres and other institutional households.<sup>122</sup> Those open centres catering for vulnerable groups are very small. To get an idea, a table from 'Housing Asylum Seekers report' which categorises the open centres into three categories (large, medium-sized and small), has been reproduced below.

Large	Medium Sized	Small
Hal Far Hangar	Hal Far Open Centre	Peacelab
Hal Far Tent Village	Hal Far Reception Centre	Dar il-Liedna
Marsa Open Centre	MEC: Houses	Dar il-Qawsalla
	MEC: Balzan Centre	Dar is-Sliem

Table 9: Provision of accommodation for irregular migrants<sup>123</sup>

The conditions of the open centres vary greatly. The small centres, or homes, enjoy very good conditions and generally round-the-clock support of residential officers and care workers. The two medium sized centres run by the Malta Emigrants' Commission (MEC), which is the Church Commission responsible for migrants, enjoy consistent standards and also receive additional support from the community or other Church-based organisations.

<sup>121</sup> Jean-Pierre Gauci, *Housing Asylum Seekers*, commissioned by Fondazzjoni Suriet il-Bniedem, unpublished report, 2010, p. 25.

<sup>122</sup> National Statistics Office, *Migration and Asylum in Malta*, 2009, p. 6.

<sup>123</sup> Jean-Pierre Gauci, *Housing Asylum Seekers*, 2010, p. 25.



The conditions in the large centres are not good. The 'best' out of the three large centres is the Marsa Open Centre, which due to its central location (close to Valletta and major bus routes) also unofficially doubles up as a community centre. It is a converted old school. Bedrooms are equipped with a number of bunk beds all stacked close to each other and each migrant is given a small locker to keep his/her personal belongings. Showers and toilets are communal, and are characterised by overflowing showers and a strong stench which can be smelt from outside. They are clearly not cleaned often enough for the large numbers using them. The Marsa Open Centre was initially set up to cater for a few hundreds, but as the pressure of arrivals mounted, the number of residents grew up to 800. This Open Centre is located in a notorious area associated with prostitution and criminal activity.

The Ħal Far Hangar and the Ħal Far Tent Village are located close to each other, in an uninhabited part of the island in the midst of fields. They are not well connected by public transport. As can be deduced from the names of these Open Centres, the former is a converted hangar which used to store planes, whereas the latter consists of a group of large army tents (usually housing twenty migrants each). The Ħal Far Open Centre and Ħal Far Reception Centre have been described by the Council of Europe Human Rights Commissioner as 'clearly sub-standard' and inappropriate accommodation, even for a few months.<sup>124</sup> The conditions in these centres are not conducive to facilitating the integration of immigrants into the Maltese community since they pose problems for job searching, education and general contact with the Maltese.

### **3.4.2 Social benefits and health care**

Irregular immigrants receive social benefits in accordance with the asylum status they have been granted. The following table is reproduced from the Advocacy Network on Destitute Forced Migrants (ANDES) report:

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<sup>124</sup> Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, CommDH(2011)17, Council of Europe, Strasbourg, 2011, pp 21-22.

## Benefits

Status	Allowance per diem	Allowance per month
Refugee status	€4.08 until they start receiving social security benefits	€114.24
Subsidiary protection	€4.66	€130.48
Asylum seeker	€4.66	€130.48
Rejected asylum seeker	€3.49	€97.72
Returnee	€2.91	€81.48
In employment	€0.00 and has to pay €1.16 contribution for living in the open centre	€0
Termination of employment	€4.08	€114.24
Minors	€2.33	€65.24
Maltese household of only one eligible member	€12.53 minimum	€350.84 minimum

Table 10: *Benefits' provision for irregular migrants*<sup>125</sup>

Health care entitlements are dependent on the status enjoyed by the immigrant. Refugees are entitled to general healthcare similar to that enjoyed by citizens, which is both comprehensive and free. People with subsidiary protection are entitled to 'core care'. None of these terms are however defined. No migrant health policy is currently in place which outlines these entitlements. In practice, some people have been granted full access to healthcare, others have been refused.<sup>126</sup>

### 3.4.3 Job opportunities and entry into the labour market

Work permits are issued to various categories of migrants depending on their status. Refugees and people with temporary humanitarian or subsidiary protection are issued work permits in their own name. This is valid for a maximum of one year, which is renewable upon application.<sup>127</sup>

<sup>125</sup> Advocacy Network on Destitution, *A report on a pilot study on destitution amongst the migrant population in Malta*, Jesuit Refugee Service Malta, Birkirkara, 2010, p. 13.

<sup>126</sup> Jean-Pierre Gauci, *Reporting Asylum: A manual for journalists*, The People for Change Foundation, Malta, 2010.

<sup>127</sup> Employment and Training Centre, 'Employment Licences Unit Guidelines for Clients', <<http://www.etc.gov.mt/docs/ELU%20Guidelines%20101110.pdf>>, 2010, (accessed 17 April 2011).

Asylum seekers and rejected asylum seekers, on the other hand, can receive work permits but this is applied for and issued to their employer and not in their own name. In practice, this means that it is more difficult for them to change jobs. Permits are issued for a maximum validity period of six months in the case of asylum seekers and three months in the case of rejected asylum seekers. Both are renewable upon application. Only recognised refugees are entitled to be on the unemployment register and receive unemployment benefits.

There is little information about the integration of third country nationals into the Maltese labour market.

#### **3.4.4 Unaccompanied minors and children**

The Refugee Act defines ‘unaccompanied minor’ as a person below the age of eighteen who arrives in Malta unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not taken into the care of such a person. This includes minors who enter Malta accompanied but whose status changes to unaccompanied. The 2005 Government’s Policy Document identifies the vulnerability of unaccompanied minors and attempts to address it by means of various legal and practical measures, such as the Care Order Act, fast release from detention, appointment of a legal guardian, the inception of Residential Homes, and various integration practices.

In practice, although the February 2005 Policy Document states that unaccompanied minors and vulnerable individuals are not to be detained, the assessment procedure takes some time. They are only released from detention once their identity has been ascertained, their vulnerability or age has been assessed, and medical clearance is issued. There is no time limit set in the national policy, but in practice, often under the pretext that there is no space within open centres or because the assessments take longer than expected, such release takes place after a few weeks from their arrival.<sup>128</sup> The Reception Regulations stipulate that where the provisions on reception conditions are applied to minors, the primary considerations shall be ‘the best interests of the child’.

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<sup>128</sup> Jean-Pierre Gauci, *Housing Asylum Seekers*, 2010, p. 24.

In the case of minors they undergo age assessment, which consists of the bone density test and an interview. Vulnerable individuals also undergo an assessment. The most difficult stage is generally identification of vulnerability which, in many cases, may be hidden. Although not designated by the authorities, JRS, who maintain a regular presence in detention centres, refer vulnerable individuals to AWAS, the Agency entrusted with vulnerability assessment.

Unaccompanied minors are placed in the children's home, Dar is-Sliem. Accompanied children and their mothers, are generally placed in Dar il-Liedna, which houses only migrant women and their children; or in one of the flats owned by the MEC.

Regarding placement, the Reception Regulations provide that accompanied minors shall be lodged with their parents or the adults responsible for them by law or by custom. In practice, however, in assessing the family link, responsibility by custom is not always acknowledged by the authorities resulting in the splitting of an alleged family. Finally, the Reception Regulations stipulate that an unaccompanied minor aged sixteen years or over may be placed in accommodation centres for adult asylum seekers.

Regarding education, Maltese laws provide that minor asylum seekers or children of asylum seekers shall have access to education on equal grounds as Maltese nationals for so long as an expulsion measure against them or their parents is not enforced. Such access shall not be postponed for more than three months from their date of application of asylum and thereafter extended to one year for specific education. State schools in Malta are free of charge to Maltese citizens and foreigners alike and children are not required to take any tests for entry into these schools.

Most migrants can enter post-secondary education (including University) on the basis of the maturity clause, which exempts them from needing any qualifications to enter. Furthermore, fees for asylum seekers are generally waived.<sup>129</sup>

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<sup>129</sup> Jeannine Vassallo & Jean Pierre Gauci, *ENAR Shadow Report 2009-2010: Racism and Discrimination in Malta*, The People for Change Foundation, Malta, 2011, p. 4.

Table 1: *UMs, claiming and accepted, among Asylum Seekers*

Year	Overall number of Asylum Seekers	Number of Asylum seekers claiming to be UM	Number of Accepted UM	Percentage of Accepted UM Over total number of Asylum seekers	Percentage of Accepted UM over AS so claiming to be
2002	1686	14	14 (no age assessment)	0.85%	100%
2003	502	16	16 (no age assessment)	3.19%	100%
2004	1388	Unknown	Unknown	Unknown	Unknown
2005	1822	141	23	1.27%	16%
2006	1780	219	58	3.25%	26%
2007	1072	397	84	7.84%	21%
2008	2223	*400	28	1.26%	7%
Sources: Overall number of Asylum Seekers: European Commission 2004; Number of Asylum seekers claiming to be UM and Number of Accepted UM: 2002 to 2005 DAPHNE country report (Schlenzka 2007) citing APPOGG; 2007 to 2008 according to Age Assessment Team, AWAS.					

\* 40 of the 400 have not been through the age assessment process since they escaped from detention

Table 11: *Unaccompanied minors, claiming and accepted*<sup>130</sup>

As from 2002 until 2008, a total of 1,197 unaccompanied minors' status claims were investigated. Of these, 223 (18.6 per cent of claimants) were accepted. In 2008, 400 out of 2,223 asylum claimants (out of 2700 immigrants) claimed to be unaccompanied minors. Of these, 28 (7.0 per cent of the claimants) were accepted to be so.<sup>131</sup>

At least two 'Parliamentary Questions' (PQ) have requested the Minister for data on children of irregular immigrants. One asked for the number of children of illegal immigrants registered as having only one parent, that is, where the father is unknown. The Minister replied that that kind of information is not collected.<sup>132</sup> The second PQ asked whether statistics are collected on the number of births to irregular immigrants. The Minister responsible explained that data is collected for the overall number of births in Malta, but this is not disaggregated to include irregular immigrants.<sup>133</sup>

<sup>130</sup> Charles Pace et al, *Unaccompanied Minors in Malta*, EMN, Valletta, 2009, p. 11.

<sup>131</sup> Idem.

<sup>132</sup> *Maltese Parliamentary Question*, 'Tfal minn immigranti illegali b'genitur wiehed', Legislature XI, No. 10571, 31 Aug 2009.

<sup>133</sup> *Maltese Parliamentary Question*, 'Immigranti illegali - twelid ta' tfal', Legislature XI, No. 10570, 31 Aug 2009.

### 3.5 Structures and services available

#### 3.5.1 State entities

##### Armed Forces of Malta: Search and Rescue

The AFM operates the Malta Rescue Co-ordination Centre (RCC), which is internationally recognised as the SAR Point of Contact in Malta, but also deploys maritime and air assets on a daily basis to respond to a variety of cases. Resources available are not enough for the huge area the RCC is responsible for. This has led the AFM to seek international liaisons and collaborate in multi-national operations.<sup>134</sup>

##### Police Force: Immigration Section

The Malta Police Immigration Section is responsible for border activities. It is responsible for border control at the airport, seaport, freeport and yacht marinas. It is also responsible for liaising with other authorities on issues related to third country nationals, initial asylum screening at points of entry, field and enforcement of immigration breaches, liaison with Consular Offices, repatriation arrangements, organisation of repatriation flights and other duties related to immigration and illegal immigration.<sup>135</sup>

##### Detention Service: Administration of detention centres

Detention centres, previously run by the Police and the AFM, are now under the management of the DS. The DS was set up in August 2005 and entrusted with the tasks of holding in custody persons attempting to enter or staying illegally on the Maltese islands and providing all services necessary for accommodating them, while ensuring EU and international obligations and standards are met.<sup>136</sup> The role of the DS is to maintain security at the migrant detention centres and to provide adequate accommodation; the necessary toilet and shower facilities; food; clothing; a hygienic and safe environment; access to medical care; access to the Commissioner for

<sup>134</sup> Search and Rescue Training Centre-Armed Forces of Malta, 'Search and Rescue in Malta', 2004.

<sup>135</sup> GDISC – General Directors' Immigration Services Conference, 'Malta', <[http://www.gdisc.org/index.php?id=187&no\\_cache=1&tx\\_gdiscdb\\_pi3\[showUid\]=28](http://www.gdisc.org/index.php?id=187&no_cache=1&tx_gdiscdb_pi3[showUid]=28)>, (accessed 19 July 2011).

<sup>136</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Response of the Maltese Government to the report of the CPT on its visit to Malta from 19 to 26 May 2008*, 2011.

Refugees for asylum processing; access to non-governmental organisations; and access to means of contacting home or country representatives.

The DS employs 50 members of the AFM and Police Force (who are on secondment) and 176 temporary officers.<sup>137</sup> During 2009, the DS needed €3.9 million for the running of the detention centres, which was taken out of the MJHA Budget. The DS are also supported by the budget allocated to the AFM.<sup>138</sup>

### *Ministry of Justice and Home Affairs: National policy*

The MJHA is responsible for illegal immigration, asylum and border control issues. In the field of asylum, the Office of the Refugee Commissioner, and the Refugee Appeals Board, and the Agency for the Welfare of Asylum Seekers (AWAS) fall under this Ministry's portfolio.

### *Immigration Appeals Board*

The Immigration Appeals Board is a decision making body or tribunal set up by virtue of the Immigration Act. It is composed of a single chamber having three members, one of whom is required to have a legal background and acts as a Chairman. The Board has the power to hear and determine appeals in relation to detention and removal orders.

### *Office of the Refugee Commissioner*

This Office was established as an independent body in the year 2002 by virtue of the Refugees Act whereby responsibility for refugee determination passed from UNHCR to this entity. The Office of the Refugee Commissioner's main responsibility is to receive, process and determine applications for asylum, as stipulated by the Refugees Act, amended in July 2008, and Legal Notice 243 of 2008 (Procedural Standards in Examining Applications for Refugee Status Regulations). This Office is also bound by the obligations assumed by Malta under the 1951 Geneva Convention relating to the status of Refugees and the 1967 Protocol, as well as its obligations under Council Directive 2004/83/EC, Council Directive 2005/85/EC and the Dublin Regulation.

<sup>137</sup> *Maltese Parliamentary Question, 'Dhul ta' Immigranti Illegal', 2008.*

<sup>138</sup> *Idem.*

### Refugee Appeals Board

The Refugee Appeals Board is the decision-making authority established by the Refugees Act to receive and determine appeals lodged against a negative decision of the Refugee Commissioner. The Board is composed of two separate chambers. Each Chamber has a Chairman and two other members.

Free legal aid is provided at the appeals stage. The provision of this service is organised by the Third Country Nationals Unit under the direct responsibility of the MJHA. Asylum seekers have access to free legal assistance and counselling during the appeals stage within asylum procedure.

### Agency for the Welfare of Asylum Seekers: Welfare, benefits, and housing

AWAS and its functions were established by Legal Notice 205 of 2009. It replaced the Organisation for the Welfare and Integration of Asylum Seekers which had been set up in June 2007 to respond to the ever growing needs of asylum seekers and protected persons in particular vis-à-vis accommodation, social welfare and integration.

AWAS is entrusted with the implementation of the Government's obligations and offers professional social welfare services in specialised areas; providing support to asylum seekers and protected persons generally in the context of open centres, assistance with accessing community services and providing the basic tools to enable participation in society of persons under protection involving training, financial support and links with education and employment. AWAS is also responsible for the social welfare situation of closed centres. AWAS also caters for the needs of vulnerable persons and is responsible for the identification and support of unaccompanied children in the asylum procedure. AWAS manages directly or through contractual arrangements most Open Centres.

The definition of 'integration' for AWAS is not a conventional one. It includes resettlement and relocation outside Malta. In addition, it has been acknowledged by the director of the Agency that detention centres could only support some pre-



integration measures, whilst integration measures ended at the open centre stage.<sup>139</sup> The director of AWAS has been reported as saying that over the past eight years, AWAS provided a service to some 13,000 immigrants.<sup>140</sup>

### **3.5.2 Local non-governmental organisations**

Local NGOs contribute by giving legal assistance, humanitarian assistance, language training, housing, research, advocacy and supporting immigrants. The main NGOs active in this field are: the JRS, the Malta Emigrants Commission (MEC) and the Red Cross. Other organisations include the Jesuit Centre for Faith and Justice, Integra Foundation, Migrant Rights Network, People for Change Foundation.

Non-governmental organisations, particularly the JRS and to a lesser extent the Red Cross, thus play a crucial role. The JRS Malta offers legal aid and other forms of support for migrants' asylum cases (like, for example, sending emails, receiving emails or faxes with basic documentation or testimonies, and providing telephone cards), a social work service and spiritual support. The Red Cross supplies clothes and other basic personal hygiene amenities. Both organisations are privately funded and do not receive funds, or deliver services, on behalf of the Government.

### **3.5.3 International Organisations**

International organisations present in Malta are UNHCR, International Organisation for Migration (IOM), Médecins sans Frontières (MSF). They collaborate with the Government, offer services and/or run projects.

## **3.6 Key incidents**

This section gives a snapshot of five different incidents which, in more ways than one, help to give an idea of the complexity of the phenomenon for Malta and Maltese society.

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<sup>139</sup> The Times of Malta, 'Immigrants' Welfare System needs revision – JRS Director', *The Times of Malta*, 28 May 2010.

<sup>140</sup> Idem.

### 3.6.1 March 2002: First major landing of irregular immigrants at Xlendi

In March 2002, a boat carrying 208 immigrants drifted into a bay in the second and smaller island of Gozo. The immigrants made it to the bay unnoticed but were immediately reported by a number of tourists. This first group was made up of 128 men, 42 women and 38 children coming from Eritrea, Bangladesh, Ethiopia, Sudan, Morocco and Iraq.<sup>141</sup> The Police Force and the AFM immediately made it to the spot to control the situation.

The novelty of the incident was captured in the media reports, which generally highlighted the difficulties of the authorities to deal with the situation in the absence of clear procedures, and the kindness of the locals, the Gozitans. This is clearly seen in the following excerpt from an article entitled 'Driven by despair':

The ongoing tragedy of clandestine migration in the Mediterranean, which we read and hear about so often, especially in neighbouring Italy, hit us home last Monday with the arrival of 208 illegal immigrants packed on a 13-metre fishing boat. It had apparently run out of fuel before drifting into Xlendi Bay in Gozo... The police, Armed Forces and Red Cross volunteers did an excellent job, considering that this was the largest number of clandestine immigrants to land on our shores at one time - at least since the arrival of the Albanians about 10 years ago... Many Gozitans rushed to the scene carrying food, water and blankets in yet another display of hospitality and solidarity for which these islands are renowned.<sup>142</sup>

The reception by the locals and tone of the media articles lies in stark opposition to that of a few months later when more boats had arrived and irregular immigration had become highly politicised.

### 3.6.2 September 2002: Eritrean deportation

A few months after the 'first' boat arrived, the now infamous Eritrean incident took place. This incident is of crucial importance because it attracted the attention of the international human rights movement, primarily, but not only, by means of the condemnation by Amnesty International (AI). Between 30 September and 3 October

<sup>141</sup> Maltamedia, 'A year in review', <<http://www.maltamedia.com/news/2002/gozo.shtml>>, 2002, (accessed 25 July 2011).

<sup>142</sup> Sunday Times of Malta, 'Driven by despair', *Press Commentaries*, <<http://www.doi.gov.mt/en/commentaries/2002/03/tim10.asp>>, 10 Mar. 2002, (accessed 23 July 2011).

2002, up to 223 Eritreans (out of 400 new arrivals from March 2002) were forcibly deported by Malta. They were immediately arrested upon their arrival in Asmara, taken to a military camp, and detained incommunicado. AI, in a public statement, brought this to the attention of the Government and asked for action on the following three points: a) an assessment of the safety of deportees to Eritrea; b) ensuring that excessive force was not used during forcible deportation operations; c) an investigation into the alleged claim by some Eritreans that they wanted to apply for asylum when faced with the prospect of deportation, but were denied the possibility of application.<sup>143</sup> These allegations were challenged by the Government. However, the Government's response proved of little importance to the larger development of events and by the time of the publication of the inquiry, Malta's actions concerning the treatment of irregular immigrants were being closely monitored by international organisations.

The Eritrean incident is important, firstly, because the Maltese Government was brought to international scrutiny. Following the huge international media attention that this incident brought about, other human rights entities also came to investigate the situation of irregular immigrants in Malta. Secondly, the way the Government diplomatically handled the situation, its highly charged and confrontational reactions to AI and subsequent criticism from other organisations on the Eritrean incident, evolved into a pattern which is now typical of any criticism on activity in this area. This defensive approach, in international circles, is often deemed unprofessional and undiplomatic.

### **3.6.3 January 2005: Hal Safi beating**

The incidents that took place at the Hal Safi detention centre on 13 January 2005 were probably the most shocking mass case of violence that took place in the last decade. Immigrants housed in B Block held a demonstration to protest the conditions of their

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<sup>143</sup> Amnesty International, 'The government should suspend deportations of Eritreans', *Press Release, Ref. EUR 33/001/2002*, Amnesty International, London, 2002.

detention centre, the length of their detention and the lack of information about the progress of their applications for refugee status and humanitarian protection.<sup>144</sup>

One hour after the start of the demonstration a large number of soldiers in law-enforcement gear took up position around the demonstrators. When the demonstrators refused to return quietly to their barracks, an order was given to force them back inside. The soldiers charged them and violently put down the demonstration. Some of the soldiers were reported as having uttered racist slurs in encouraging their colleagues to beat the detainees.<sup>145</sup>

In the mayhem that ensued, 26 foreigners were injured and had to be taken to hospital for examination and treatment, 12 of them being kept in hospital for more than a day because of the severity of their injuries. Concussion, injuries to lower and upper limbs, and multiple fractures were found. Two soldiers were likewise taken to hospital, found to be suffering from light injuries and were released on the day.<sup>146</sup>

The incidents took place in full view of the soldiers' superiors and of the media, who reported the incidents extensively. Maltese society and the immigrants themselves were shocked at what was an apparent manifestation of hatred. The following photos appearing in *The Times of Malta* show six–seven soldiers surrounding an immigrant already on the floor who is being wildly beaten up by a soldier:

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<sup>144</sup> Commissioner for Human Rights, *Follow-up Report on Malta (2003-2005) Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights*, CommDH(2006)14, Council of Europe, Strasbourg, 2006.

<sup>145</sup> Charles Muscat, 'L-armata tintervjeni b'forza waqt protesta mill-klandestini', *In-Nazzjon*, 14 January 2005.

<sup>146</sup> Council of Europe Commissioner for Human Rights, *Follow-up Report on Malta (2003-2005)*, 2006.



Figure 9: Immigrants beaten in peaceful protest at Safi Barracks, January 2005<sup>147</sup>

Reactions were immediate. AI,<sup>148</sup> UNHCR,<sup>149</sup> as well as various local organisations called for a prompt, impartial and thorough investigation into allegations that excessive force was used. Several MPs also raised the incidents in Parliament.<sup>150</sup>

Four days after the events, on 17 January 2005, the Prime Minister expressed shock at the photographs of soldiers striking migrants. He appointed a retired judge,

<sup>147</sup> The Times of Malta, 'Immigrants beaten in peaceful protest', *The Times of Malta*, 14 Jan. 2005. Photos Alfred Giglio.

<sup>148</sup> Christian Attard, 'ENAR Shadow Report 2005: Racism in Malta', *ENAR Malta*, <[http://cms.horus.be/files/99935/MediaArchive/pdf/Malta\\_2005.pdf](http://cms.horus.be/files/99935/MediaArchive/pdf/Malta_2005.pdf)>, 2006, (accessed 15 March 2011), p. 14.

<sup>149</sup> Kurt Sansone, 'Army's behaviour 'deplorable' and 'disproportionate' – UNCHR official', *MaltaToday*, 16 January 2005.

<sup>150</sup> James Debono, 'Nationalist MP condemns AFM attack', *MaltaToday*, 13 February 2005.

Franco Depasquale, to conduct a public enquiry into the events.<sup>151</sup> This inquiry had to examine all the circumstances leading to the use of force, establish whether the use of force was justified and whether it was proportionate, and make recommendations. Although the decision was welcomed, the Green Party lamented the fact that no magisterial inquiry in the normal course of criminal justice was being carried out which would indicate criminal responsibility and described this as a dereliction of duty on the part of magistrates.<sup>152</sup>

On 12 December 2005, the Maltese Government published Mr Depasquale's 97-page report. It concluded that the order to use force so that the immigrants would return indoors was justified but that the force applied by several soldiers 'was exaggerated and out of proportion in the circumstances.' The report clearly identifies one soldier for undue violence, having hit an immigrant with a truncheon when the immigrant was on the ground and under the control of other soldiers. The board of inquiry recommended that the soldier's superiors re-examine the way he conducted himself. There were other culprits whom it was not possible to identify. The report also suggested that the Government should pay for the special medical care needed by the one immigrant. Among the causes of the violent episode, Mr Depasquale's report mentions that the soldiers were ill-trained in dealing with situations of that kind, the lack of clear orders, and a degree of disorganisation.<sup>153</sup> The judge held that the rebellion was in no way tied to animosity between the army and the detainees. This contradicted reports by NGO officials, who held that some soldiers were blaming their poor working conditions at the centres on the migrants.

The report's publication, 11 months after the events, and the content of the report met with both approval and criticism from national and international organisations and triggered debate in Maltese society. The delay in its conclusion was also the subject of widespread criticism, with some claiming that this would dilute the effect of its findings. Political leaders also cited the inquiry in refusing to comment on the incidents. The Prime Minister was criticised for appointing a retired judge to

<sup>151</sup> Council of Europe Commissioner for Human Rights, *Follow-up Report on Malta (2003-2005) Assessment*, 2006.

<sup>152</sup> Matthew Vella, 'Delayed Safi Inquiry risks dilution as AFM struggle with influx', *MaltaToday*, 7 August 2005.

<sup>153</sup> Franco Depasquale, *Rapport tal-Bord ta' Inkjesta* nominat mill-Onorevoli Prim Ministru fis-17 ta' Jannar 2005 skond l-Artikolu 4 tal-Att dwar l-Inkjesti (Report by the Inquiry Board nominated by the Honorable Prime Minister on the 17<sup>th</sup> January 2005 according to Article 4 of the Inquiries Act), 2005.

investigate the beatings when he could have resorted to the Ombudsman. The law setting up the Office of the Ombudsman allows the Prime Minister to ask the parliamentary official to investigate particular cases of maladministration and breach of human rights. With an administrative set-up already in place and the necessary funds at his disposal, the Ombudsman could have probably speeded up proceedings.<sup>154</sup>

The scope of the report, and in particular the need to justify government policy on immigrant detention and its length on return procedures were much commented upon. The report was criticized on the way it describes migrants or on the responsibility put on NGOs, media and even UNHCR regarding the events. The Council of Europe's Human Rights Commissioner called on the Maltese authorities to take administrative measures as speedily as possible, prosecute those already identified as responsible for the use of excessive violence and conduct a thorough investigation with the view to persecuting any additional culprits which have not yet been identified. In addition, training and supervision of members of the AFM in dealing with detention of foreigners, had to be provided by the authorities.<sup>155</sup> Certain aspects of the report were denounced by various organisations. In particular, the judge held that individuals who visited the detainees provoked the protest by telling them that, had they been in another country, they would not have been detained. He also regretted comments by a UNHCR representative following the incidents. He described the protest as 'certainly neither peaceful nor legitimate.' More controversially, the judge went beyond his terms of reference in supporting the detention policy and the ban on media entering the detention centres.

#### **3.6.4 2005: Racism and the rise of the right-wing**

Irregular immigration provided a platform for the development of extreme right-wing political parties and movements in Malta. In 2005, there was a marked increase in hate speech against immigrants and racist attacks on immigrants. This coincided with the rise of two right-wing political parties – *Imperium Europa*, which was founded in 2000 and the *Alleanza Nazzjonali Repubblikana* (ANR), which was founded in 2005. Mass meetings were held by both parties. Considerable online activity on websites and

<sup>154</sup> Kurt Sansone, 'Hal Safi incidents could have been investigated by Ombudsman', *MaltaToday*, 3 July 2005.

<sup>155</sup> Council of Europe Commissioner for Human Rights, *Follow-up Report on Malta (2003-2005)*, 2006.

YouTube videos were regularly seen, leading European Commission against Racism and Intolerance (ECRI) to comment that these instances of incitement to racial hatred posted on the Internet on sites connected with extreme right-wing movements and groups, had not been prosecuted.<sup>156</sup>

Following the January 2005 beating, Norman Lowell, a fascist militant heading an organisation called *Imperium Europa*, called a national manifestation in Safi, where the incidents took place, in support of the AFM. About 200 persons gathered to hear Lowell saying that immigrants constituted a 'sanitary, cultural and genetic' threat and that we had to 'annihilate the black coal.' Banners were displayed with the words 'To AFM: Well done boys' and 'Ratio: 2 Maltese babies born, 1 African invades.' Lowell praised the armed forces and called the crowd in front of him 'the new iron soldiers'.<sup>157</sup> Amongst those present there were a number of soldiers in civilian clothes (to hide their identity), relatives of soldiers and young people all dressed in black, as well as two local councillors from Safi and Valletta.<sup>158</sup> Both were eventually made to resign after it was revealed that they had also been active on far-right websites.<sup>159</sup> Later on in the year, Lowell's movement, *Imperium Europa*, began a campaign against illegal immigrants, distributing flyers in Valletta and speaking to people in a locality where there was an Open Centre and in which residents had complained about the presence of immigrants.<sup>160</sup>

The 2005 European Network Against Racism (ENAR) report lists a number of violent racial attacks that happened that year. In May, a Somali man was stopped by a woman in the street and then approached by a man who proceeded to stab him and kick him in the face. Before leaving, he took the victim's mobile phone and diary. He was arraigned in court a few days later and charged with the attack. In June, four Eritreans were surrounded by a group of between eight and ten young men who punched them repeatedly in the face, whereas in another incident an Eritrean was attacked by four men who also robbed his mobile phone and the Lm200 (€460) salary that he had just

<sup>156</sup> European Commission against Racism and Intolerance, *Third report on Malta*, CRI(2008)22, Council of Europe, Strasbourg, 2008.

<sup>157</sup> Christian Attard, 'ENAR Shadow Report 2005', 2006.

<sup>158</sup> Kurt Sansone, 'Racist rally attracts soldiers in civilian clothes', *MaltaToday*, 23 Jan 2005.

<sup>159</sup> Kurt Sansone, 'Far-right councillor throws in the towel', *Maltatoday*, 30 Jan 2005.

<sup>160</sup> Christian Attard, 'ENAR Shadow Report 2005: Racism in Malta', 2005.



collected. In June, posters were put up and fixed to lamp posts in three localities by unknown far right activists. These posters read, 'Let's defend our country' and 'No to the invasion of clandestines'. The posters were removed by the police on the same day. In July, flyers were left at the Hal Far Open Centre reading: 'Illegal Immigrants bummers we don't want you in Malta. Get out or we will start killing you. K.K.K.' These words were printed between two lines depicting skulls and bones. In another locality, the same group dumped thousands of leaflets in the main street saying that 'the hunting season on land and on the sea' for illegal immigrants was open all year round. They also said 'Stop immigration' and carried the hallmark 'KKK', skulls and bones.<sup>161</sup>

In October 2005, during a demonstration against illegal immigration organised by the newly formed right wing group the ANR, inflammatory remarks were also abundant. The ANR's top official said that releasing migrants would present a danger to Maltese people of a 'social, moral and medicinal nature' and that 'we just don't want to become the toilet of the Mediterranean.' Just as the march started, demonstrators were confronted by a small group of anti-racism activists, including a priest, who were subjected to insults and violence at the hands of some demonstrators. After the event, the media took comments from those present, which in most cases clearly showed a profound dislike of immigrants in general or of blacks in particular. Norman Lowell was also present at the activity, although ANR officials denied any connection to his group. The ANR stood out for the resources that seemed to be at its disposal. In particular, the demonstration was publicised via a billboard campaign which, given the cost, pointed to considerable financing.<sup>162</sup>

After the demonstration, it was reported that in the bus terminus about ten young commuters began harassing the six to eight immigrants on the bus. While the majority of those present were visibly upset, others greeted the taunts with outbursts of laughter. The immigrants remained silent although they were obviously agitated. At one point, as one of them was getting off the bus, he turned to two immigrants seated

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<sup>161</sup> Idem.

<sup>162</sup> Idem.

at the front and told them, 'Niggers go home.' Others pounded loudly on the side of the bus where the immigrants were seated as they got off.<sup>163</sup>

Far-right militants also turned up at activities organised by NGOs working with refugees, evidently to intimidate and provoke those present, mainly by taking pictures.<sup>164</sup> This was intimidating since various Maltese were also being targeted at the time. These included individuals and organisations who worked against racism and for the protection of the rights of immigrants, including those who publicly exposed and denounced racist attitudes in Maltese society.<sup>165</sup>

In the 2004 elections for Malta's European Parliament representatives, Norman Lowell, an independent candidate of extreme right and neo-nazi views managed to gather over 1,600 votes, a feat hitherto unheard of in Malta's bi-partisan political system.<sup>166</sup> In 2008, Norman Lowell ran for the general elections on two districts garnering 84 votes on the first count. Following the elections, the party was not as militant or visible, but *Imperium Europa's* website <http://www.imperium-europa.org/index.asp> and [www.vivamalta.org](http://www.vivamalta.org) are still active and updated regularly.

### 3.6.5 March 2009: Pinar incident

Malta's international obligations within the SAR area have become an object of diplomatic tension with Italy to such a degree that the Italian Foreign Affairs Minister Franco Frattini has insisted that Malta give up its SAR area. This proposal was put forward following one such diplomatic incident known as the 'Pinar incident'. This was just one in a series of disputes, and followed another internationally much publicised incident in 2007 when migrants were left hanging on a tuna pen.

On 16 April 2009, the RCC in Malta was informed that there was a small boat at risk of sinking 45 nautical miles away from Lampedusa. Following normal procedures, Malta contacted a Turkish cargo ship, MV Pinar E, which was closest to the location and the MV Pinar E rescued the immigrants. A few hours later, the MV Pinar E informed the

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<sup>163</sup> Idem.

<sup>164</sup> Idem.

<sup>165</sup> European Commission against Racism and Intolerance, *Third report on Malta*, 2008.

<sup>166</sup> European Network Against Racism, 'Responding to racism in Malta', *ENAR Malta*, <[http://cms.horus.be/files/99935/MediaArchive/pdf/malta\\_en.pdf](http://cms.horus.be/files/99935/MediaArchive/pdf/malta_en.pdf)>, 2006, (accessed 16 April 2011).

RCC that there was another boat with immigrants heading towards it. The RCC told the master of the MV PINAR E that according to international law, if the immigrants were in danger, the merchant ship was obliged to offer the necessary assistance and to take the rescued people to the closest port. The MV Pinar E ended up with 154 immigrants on board. According to the PINAR's captain, there were 154 people rescued, amongst whom there was a pregnant woman, 25 injured people, of whom seven required urgent medical treatment, and a corpse. There were also some cases of fractures.<sup>167</sup>

The ship was prevented from reaching either a Maltese or an Italian port because neither country would accept responsibility for the people rescued. Italy's interpretation of the concept of 'safe port' in international maritime law differed from the Maltese interpretation as it included the capacity of the 'port' to process and manage the people saved – Lampedusa, according to Italy, did not have this capacity. The individuals were left stranded for four days without adequate food and water, and forced to sleep on the deck of the ship. Between Friday 17 and Sunday 19 April, Italian medical staff went on board the vessel to give the required treatment. A 15 year old girl, and two other persons were taken to a medical centre in Lampedusa, while Italian ships supplied the MV PINAR E with food and water for the immigrants and the crew. In the meantime, the ship had anchored 17 miles to the South of Lampedusa. The migrants were eventually allowed to disembark at Porto Empedocle, Southern Italy, on 20 April.

The Pinar incident drew international condemnation and accusations from Italy that Malta was unable to handle the illegal immigration problem effectively. The Government of Malta however ruled out the possibility of shrinking Malta's SAR area.<sup>168</sup>

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<sup>167</sup> Lawrence Gonzi, 'Ministerial Statement regarding the immigrants who were rescued by the M/V Pinar-E off Lampedusa', <<http://www.foreign.gov.mt/default.aspx?MDIS=455&NWID=362>>, 2009, (accessed 16 April 2011).

<sup>168</sup> A short report of the debate can be found in Herman Grech & Kurt Sansone, 'Shrinking Malta's search and rescue area is 'not an option'', *The Sunday Times of Malta*, 26 April 2009.

### 3.7 Conclusion

Overall, the picture that emerges is that of a very small country attempting to manage a phenomenon for which it is unprepared. The irony is that a global phenomenon with root causes which are far bigger than anything a small country like Malta can address, hits Malta proportionally harder than bigger and more powerful countries. This constitutes the thrust of the message that the Government of Malta is conveying to the international community. Irregular migrants in this picture clearly emerge as powerless actors caught in a complex sea of global-local contentions. The focus on a local case study should not obscure this reality.

On a local level, the statistics and facts presented in this Chapter, at times, seem to indicate discernible patterns of development. They do also however convey stories of a different nature which portray a contradictory picture. Certainly, this is the case when one views irregular migration from a human rights point of view. In some regards, irregular migration in Malta is very good: for example, the fact that Malta is the country which in the first instance gives protection to the largest number of refugees. On the other hand, there are distinct areas which show appalling practices. This can be seen in the lengthy and mandatory detention policy for all immigrants, including asylum seekers, and the sub-standard conditions of detention centres, which places Malta unequivocally on a human rights black list. Questions which arise from this Chapter are: Why has there been so much development in the legal infrastructure and not on the conditions of detention? Why are the conditions in the open centres getting progressively worse when patterns clearly indicate that irregular migration will continue? These questions will be addressed in the subsequent chapters.

## Chapter 4: ‘Less than human’: Why dignity is at the core of human rights

### 4.1 Introduction

While endless discussions were underway between professional bodies, like human rights organisations, the law courts and the Government on whether migrant policies were in line with human rights or not, immigrants in migrant detention centres were going through a desperate existence. Some just could not take it and escaped. Others needed psychiatric treatment and were admitted only to be segregated in the Irregular Immigrants’ Ward at Mount Carmel Hospital described as the ward with the worst living conditions.<sup>1</sup> Altogether life in the overcrowded rundown centres was terrible. The confined space with chicken wire all around drove even the strongest characters into a disillusioned apathy after a few months. Detention became a profoundly dehumanising experience for immigrants, which as the following Moroccan immigrant comments, leaves an indelible mark on the migrants:

Detention has never left me. I was treated like a dog, but I also became a dog, an animal. And when you become an animal once, you are ashamed for life.<sup>2</sup>

This Chapter shows that the displacement of the concept of human dignity from the core of human rights produces very different practices of human rights. Detention serves to exemplify the division between two main schools of thought – exemplified in this Chapter by the Government and NGOs – which produce different interpretations of human rights. It is proposed that the ill-treatment of immigrants in detention centres is not restricted to detention but is symptomatic of the way irregular

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<sup>1</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 19 to 26 May 2008, CPT/Inf (2011)6, Council of Europe, Strasbourg, 2011, pt. 170. In addition, the Irregular Immigrants’ Ward is actually the maximum security adult male ward ‘Ward 10’. Ward 10 is notoriously known, particularly in social work circles in Malta, for the inhumane design and conditions. One of my informants who had been an advocate for drug users’ rights, expressed shock and horror at the news that the infamous ‘Ward 10’ had been re-opened and was accommodating irregular immigrants. She explained that it had taken years of lobbying to close that Ward and she never thought anyone would be accommodated there again. My impressions of the ward following a few visits are truly disturbing. The design of the Ward, the maximum security and the segregation are exacerbated by linguistic and cultural barriers which were not being addressed by the staff or authorities at the time

<sup>2</sup> A Moroccan immigrant (failed asylum seeker) living at the Marsa Open Centre, from field notes.

immigrants are perceived in Malta. In addition detention centres are, not least due to their confined space, the space in which dehumanising processes are most shockingly visible.

The concept of human dignity is very powerful and can be clearly seen as the main motivation for NGO workers. Indeed their analysis of the practices of detention is that they are only possible because immigrants are perceived as 'less than human'. The following quote, shrouded in a spirit of indignation, illustrates this. It is from one of my interviews held with an NGO worker:

When I speak to people who are taking decisions about migrants at different levels, mostly my contact is about detention issues, I can't help concluding that in addition to one massive stereotyping – all liars, all abusers – there's also, somehow, they are perceived as less than human, and that is why, even talking about rights is almost – you are almost being '*qisu wiċċek tost*' [*ungrateful*] that you are talking about rights. But if I truly believe that he's a human being how can I ever imply that he shouldn't be talking about rights, that he should be grateful for what he gets. If I believe that he's as human as me, with as much rights as me, why would I lock him up and in those conditions?<sup>3</sup>

This Chapter will show that ultimately it is precisely this perception of immigrants as 'less than human' that has made migrant detention a possible reality. Migrant detention in Malta is referred to as a phenomenon, because the policy and conditions of detention are the singular most observable occurrence that conditions the lives and well being of irregular migrants in Malta. It also has a direct influence on the asylum seeking process, since irregular immigrants who apply for asylum go through the whole process and if necessary, the appeal, whilst living in these detention centres. I shall argue that the Government is not embracing a human rights approach by allowing a situation which has become dehumanising. The policy of detention is a short-sighted approach and one which is not protective of Maltese society, because there is a direct and significant 'spillover' in creating an institution which encourages dehumanising practices.

This Chapter shows that the respect for human dignity should underlie all governmental efforts to enact human rights based policy. The first section will briefly outline two paradigms of human rights which differ on the importance given to the

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<sup>3</sup> L, Personal Interview - NGO worker, 11 January 2009.

role of human dignity. I will make a case for retaining human dignity at the core of the human rights movement. The second section will show these two paradigms in practice by describing the Maltese scenario in which the Government and NGOs have made contrasting claims on whether there has been a violation of the human rights of irregular immigrants. This has produced a 'human rights stalemate' in Malta. The third section uses the concept of human dignity as an analytical lens to look at the situation of migrant detention, which is the most contentious issue in the irregular immigration field. The question of whether the enactment and practice of migrant detention in Malta is morally acceptable will be asked and answered. It will be argued that the catastrophic effects of detention on migrant detainees, who are treated and become 'less than human' show that the Government, and the human rights paradigm it locates itself within, are problematic. Migrant detention is a clear example of a direct affront to human dignity, and as such, poses an unsurpassable barrier to the nurturing of a human rights culture.

#### **4.2 The 'human' in human rights: The case for human dignity**

Is there any need to 'make a case for human dignity'? To the extent that human rights theorists expose different understandings of the function that the concept of human dignity plays in the human rights movement, there is. Although differences might appear subtle, I argue that the issue of human dignity within human rights philosophy is so fundamental that it has created two very distinct movements. The implications in practice are radical and explain why situations which are not conducive to ensuring respect for the human dignity of immigrants do paradoxically receive support from some parts of the human rights system.

What is understood by human dignity in contemporary times?<sup>4</sup> The philosopher Oliver Sensen sums up the contemporary conception of dignity as:

Today dignity is widely conceived of as an inherent value property on the basis of which one can claim rights from others: one has rights because of one's intrinsic and objective preciousness. In justifying human rights, the good (dignity) is prior to a principle stating

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<sup>4</sup> Oliver Sensen shows that the contemporary paradigm of human dignity cannot be explained by referring to the history of philosophy because they are based on different patterns of thought.

what is right; and human rights as entitlements – which are justified by the good – are prior to the duties of the agent.<sup>5</sup>

This definition arises out of the usage of human dignity in UN documents where it is clearly stated that human dignity is the justification for human rights. For example: 'Recognizing that these rights derive from the inherent dignity of the human person...'<sup>6</sup> Human dignity is at the core of the modern human rights philosophy and movement.<sup>7</sup>

The concept of human dignity occupies a functionally important role within human rights because it is the bridge, or as the philosopher Jurgen Habermas refers to it, the 'conceptual hinge' on which modern human rights was constructed on, a link between neo-Kantian morality and positive law.<sup>8</sup> Habermas describes this moral-legal nature of human rights in the following quote:

Because the moral promise of equal respect for everybody is supposed to be cashed out in legal currency, human rights exhibit a Janus face turned simultaneously to morality and to law. Notwithstanding their exclusively moral content, they have the form of enforceable subjective rights that grant specific liberties and claims. They are designed to be spelled out in concrete terms through democratic legislation, to be specified from case to case in adjudication, and to be enforced in cases of violation. Thus, human rights circumscribe precisely that part (and only part) of morality which can be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights.<sup>9</sup>

Only this internal connection between human dignity and human rights gives rise to the explosive fusion of moral contents with coercive law as the medium in which the construction of just political orders must be performed.<sup>10</sup>

In a nutshell, although human dignity can be described without reference to human rights, the prominence and significance of human dignity in contemporary settings is intrinsically tied to the modern human rights movement. This new human rights paradigm has made human rights the easiest way to make claims for human dignity.

<sup>5</sup> Oliver Sensen, 'Human dignity in historical perspective: The contemporary and traditional paradigms', *European Journal of Political Theory*, 10(1), 2011, p. 73.

<sup>6</sup> United Nations, *International Covenant on Civil and Political Rights*, adopted by the General Assembly 16 December 1966, entered into force 23 March 1976; United Nations, *International Covenant on Economic, Social and Cultural Rights*, adopted by the General Assembly on 16 December 1966, entered into force 3 January 1976. Same wording in both Covenant's Preambles.

<sup>7</sup> For a clear presentation of this argument, see Oliver Sensen, 'Human dignity in historical perspective', 2011.

<sup>8</sup> Jurgen Habermas, 'The concept of human dignity and the realistic utopia of human rights', *Metaphilosophy*, Vol. 41, No. 4, 2010, p. 470.

<sup>9</sup> Idem.

<sup>10</sup> Ibid, p. 479.



What kind of different ‘understandings’ can arise from such a simple explanation? A debate described by Mary Ann Glendon that occurred during the negotiations of the UDHR serves to highlight the two different positions I have mentioned with regard to the concept of human dignity. The following is the excerpt from Glendon’s book of the proceedings of the discussion on article 1 - ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’ - which took a total of six days to get through the Third Committee:

...C.T. Te Water [*the South African representative*] produced a brief show of solidarity among the rest of the delegates when he moved to replace ‘dignity and rights’ with ‘fundamental rights and freedoms.’ [...] Nor, he insisted, was there any universal standard of dignity. Te Water’s motion ‘so electrified the meeting,’ Humprey wrote, that everyone there, including Mrs Roosevelt and Pavlov, ‘united in protest.’ Malik reminded Te Water that the word *dignity* had been inserted in the UN Charter on the suggestion of Field Marshal Jan Smuts, who had led the South African delegation to the San Francisco conference. The next day Te Water stated that he wished to clarify his government’s position: The Declaration ought to be devoted to statements of fundamental rights, and since ‘dignity’ was not a ‘right,’ South Africa questioned the advisability of the reference to ‘dignity’ in article 1.

Mrs Roosevelt, when her turn came, said that the word *dignity* had been considered carefully by the Human Rights Commission, which had included it in order to emphasize that every human being is worthy of respect. In the scheme of the Declaration, Article 1 did not refer to specific rights because it was meant to explain why human beings have rights to begin with.<sup>11</sup>

The central role of human dignity to human rights was not negotiable in spite of Te Water’s, and his supporters’, evident resistance. On the other hand, the behaviour of Mrs Roosevelt and Malik by refusing to enter into a discussion on the concept of human dignity itself, would suggest an assumption on behalf of the drafters of the un-negotiable role of human dignity. This Chapter supports this assumption on the basis that it is the concept of human dignity that gives a moral bearing to the human rights movement, making it a truly humanist movement. When human dignity loses its place at the core, human rights become just another set of discussed and agreed to standards between states.

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<sup>11</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, 2001, pp. 145-146. Italics in original text.

Secondly, Te Water's point that there was no 'universal standard' of dignity is still a point of contestation today. By distinguishing the function of 'human' as a word and 'human' in human rights, Douzinas demonstrates how human dignity could be endowed with universality while remaining open to different nuances in meaning. The former he argues can be seen as an empty signifier which can be endowed with any number of meanings. The latter however (which amounts to what I refer to as human dignity) should be seen as a floating signifier. Endowed as it is with symbolic capital, the boundaries of meanings it could encompass, are set. Douzinas' argument is reproduced hereunder:

...one can argue that the 'man' of the rights of man or, the 'human' of human rights functions as a floating signifier. As a signifier, it is just a word, a discursive element that is not automatically or necessarily linked to any particular signified or meaning. On the contrary, the word 'human' is empty of all meaning and can be attached to an infinite number of signifieds. As a result, it cannot be fully and finally pinned down to any particular conception, because it transcends and overdetermines them all. But the 'humanity' of human rights is not just an empty signifier; it carries an enormous symbolic capital, a surplus of value and dignity endowed by the Revolutions and the Declarations and augmented by every new struggle for the recognition and protection of human rights. This symbolic excess turns the 'human' into a floating signifier, into something that combatants in political, social, and legal struggles want to co-opt to their cause, and explains its importance for political campaigns.<sup>12</sup>

Te Water's proposal to limit the scope of human dignity to that of an inspirational concept by leaving it only in the Preamble, would have closed the opportunity to use human dignity in a 'normative' way. If human dignity is seen as the 'human' in human rights, or as that benchmark of behaviour and actions which are morally unacceptable, below which humanity is at risk – then human dignity can be viewed as a normative concept. It is not clear if the drafters had this in mind, however the inclusion of human dignity as an article in its own right makes sense when seen in this light. In fact, the term a 'violation of human dignity' has been used officially in the 1993 Vienna Conference on Human Rights to describe extreme situations in which human rights are not upheld. It was enshrined in article 25 of the Vienna Declaration which states that,

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<sup>12</sup> Costas Douzinas, 'Identity, Recognition, Rights of What can Hegel Teach Us About Human Rights?', *Journal of Law and Society*, Vol. 29, No. 3, 2002, p. 399.

The World Declaration on Human Rights of 1993, affirms that extreme poverty and social exclusion constitute a violation of human dignity...<sup>13</sup>

Human dignity is a 'normative' principle of a particular type since as a floating signifier it can only be endowed with meaning within a particular setting. In extreme situations the concept of human dignity can be a useful analytical tool to help us understand if and what irreducible standards have been surpassed in a given situation. Putting it in another way, human dignity can be seen as that which allows what is unacceptable to emerge. It is about giving a voice to the vulnerable and victims, those who need it most. As Jeff Malpas and Norelle Lickiss say:

...the voices of all of those for whom the loss of dignity constitutes a real and immediate threat—the voices, for instance, of asylum seekers in leaky boats or in detention centres, persons in situations of destitution, individuals whose lives and communities have been uprooted by the cataclysms of nature, those in captivity, those on death row, women trafficked as commodities, mothers watching children dying of hunger, abused child soldiers, those who are the victims of malice or culpable ineptitude, those deemed disposable or unworthy of life, those whose powerlessness leaves them prey to the strong.... Dignity remains a vital and significant concept if for no other reason than that it directs our attention to just these voices, insisting that they be heard, that they be recognized and that they be responded to.<sup>14</sup>

In brief, the negotiations of the UDHR reveal a schism between two groups: those for whom human dignity was nothing more than an inspirational concept, and those who envisaged that apart from the inspirational qualities the concept must also carry a functional and normative value. As a normative concept it could also be used to benchmark treatments which are morally unacceptable, and as will be seen later on, the application of human dignity as a benchmark to migrant detention in Malta yields a clear message that the practice is morally unacceptable. Before that however, the following section will look at the two schools of thought in practice – what understandings of human rights do they yield? And what are the implications of these understandings of human rights in practice?

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<sup>13</sup> United Nations General Assembly, *Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights, 12 July 1993, endorsed by the General Assembly 20 December 1993, Article 25.

<sup>14</sup> Jeff Malpas & Norelle Lickiss, 'Introduction to a Conversation' in *Perspectives on Human Dignity: A Conversation*, eds. J. Malpas & N. Lickiss, Springer, The Netherlands, 2007, p. 5.

### 4.3 The Government vs NGOs: Where are human rights?

In light of the previous section, and the evidence of the dehumanising effects of detention it is surprising to see that two clear and distinct human rights discourses have developed within the immigration field in Malta. On the one hand, there are various international and local organisations claiming a violation of human rights on various fronts and calling for a removal of the blanket detention policy of all migrants, in particular asylum seekers. On the other hand, the Government by positing an interpretation of human rights law claims that detention does not constitute a violation of human rights. The latter is reinforced by the Maltese law courts and to some degree by the European Court of Human Rights (ECHR). These two discourses can be seen as the result of the two theoretical paradigms discussed above.

#### *The position of non-state actors: a human rights discourse*

This discourse is closest to the UDHR original drafters 'paradigm' in which the concept of human dignity was understood as being functionally important. The UDHR paradigm yields a strictly person-centred approach where situations are scrutinised and judged according to the effects it has on individuals. Independent and non-governmental organisations are the main producers of this discourse.

Non-state actors' criticism of Malta's detention policy has been forceful. The most common critique found in these reports focuses on the deprivation of liberty of nearly all irregular immigrants and the alleged arbitrariness of detention as well as the fact that the positive developments that have been implemented are not set in law, and so can easily be changed or repealed. An example of this can be found in a Press Release issued by the UN Working Group on Arbitrary Detention which panned the whole system and openly stated that:

The detention regime [that] immigrants in an irregular situation are subjected to, falls far short of international human rights law.<sup>15</sup>

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<sup>15</sup> UN Working Group on Arbitrary Detention, 'Annex to the Press Release', *UN Working Group on Arbitrary Detention concludes visit to Malta*, United Nations, Geneva, 26 Jan 2009, p. 3.

Another series of complaints that have been generated by human rights organisations are those regarding the conditions of detention. The UN Working Group on Arbitrary Detention expresses shock at the abysmal conditions in detention centres. The conditions of detention are:

...appalling to the extent that the health, including the mental health, of the detainees is affected. This situation, in turn, affects their ability to properly understand their rights and to follow the legal proceedings related to them...The sub-standard closed centres of Safi and Lyster Barracks are overcrowded. At Lyster Barracks, families are not separated from men, women, including pregnant and nursing mothers, and children, including unaccompanied minors. Although the Government applies a fast track procedure for the release of vulnerable groups in administrative detention, the procedures may take several months and be in vain for those who are considered a health risk. Many dwell in tents and the Working Group notes with serious concern that 59 inmates do not even find a place to sleep in these tents at present.<sup>16</sup>

The conditions inside the migrant detention centres, despite various positive developments over the years, have for long now been criticised on the following points:

- a. The (almost) permanent overcrowding;
- b. An almost complete lack of privacy (both in sleeping/living areas and in showers etc);
- c. No separation of female from male immigrants;
- d. No protection from abuse from staff or other immigrants, especially for female immigrants;
- e. Unhygienic conditions;<sup>17</sup>
- f. Difficulties accessing basic healthcare;<sup>18</sup>
- g. Mental health considerations;<sup>19</sup>
- h. The denial of information about rights as potential asylum seekers.<sup>20</sup>

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<sup>16</sup> Ibid, p. 4

<sup>17</sup> Médecins du Monde, *Access to Healthcare and Human Rights of Asylum-Seekers in Malta: Experiences, Results and Recommendations*, Médecins du Monde, France, 2007.

<sup>18</sup> Idem.

<sup>19</sup> Idem.

<sup>20</sup> Alvaro Gil-Robles, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Malta 20-21 October 2003*, Office of the Commissioner for Human Rights, CommDH(2004)4, Council of Europe, Strasbourg, 2004; UN Working Group on Arbitrary Detention, 'Annex to the Press Release', 2009; European Commission against Racism and Intolerance, *Third Report on Malta*, CRI 2008(22), Council of Europe, Strasbourg, 2008; Committee on Civil Liberties, Justice and Home Affairs, *Report by the LIBE Committee Delegation on its Visit to the Administrative*

The same reports cited above also included a series of recommendations and proposals to the Government to help in addressing the issues highlighted above. These recommendations were various and range from minimising the length of detention to the least possible period, to improving the conditions inside detention centres, speeding up the asylum review and empowering immigrants by way of access to legal channels. The same reports have often documented developments in the field: legislation, infrastructure, conditions within detention centres, and access to health. Notwithstanding this, the overall situation still falls short of required standards as seen in Section 4.4 of this Chapter, and has also been highlighted by the aforementioned report *Becoming Vulnerable in Detention*.

In brief, the overall message is clear: the policy and practice of detention falls below acceptable standards as it is inhumane. According to these non-state actors, the current practice of detention of all irregular immigrants, including asylum seekers, constitutes a violation of human rights. In addition, the conditions of detention in themselves need to be ameliorated.

#### *The position of the Government: another (and contradictory) human rights discourse*

This discourse is the one adopted primarily by the Government and law courts. It is closer to 'Te Waters' approach in that human rights are perceived from a state-centric point of view, and give less centrality to the concept of human dignity. More importance is thus given to a positivistic interpretation of human rights law and state interests.

The Government of Malta defends its practices and policies by taking a legalistic stand to show that it is not violating international human rights standards. Bringing to the case the particular issues of the country's size, population density and the inability to manage or provide any long-term solutions to irregular migrants, the Government argues that its actions are within the country's capacity and it is therefore living up to

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*Detention Centres in Malta*, <[http://www.jrsmalta.org/LIBE\\_Malta\\_Report\\_2006.pdf](http://www.jrsmalta.org/LIBE_Malta_Report_2006.pdf)>, European Parliament, Brussels, 2006, (accessed 02 August 2011); Médecins du Monde, *Access to Healthcare and Human Rights of Asylum-Seekers in Malta*, 2007; and International Federation for Human Rights, *International Fact-Finding Mission: Locking up Foreigners, Deterring Refugees, Controlling Migratory Flows in Malta*, No. 403/2, International Federation for Human Rights, Paris, 2004.

its international obligations. The position of the Government is clear and has been consistent throughout the years: Malta cannot cope with the enormity (or potential enormity) of irregular immigration and therefore needs to implement a mandatory policy of detention to manage the situation. This rationale underpins national laws, and it therefore does not come as a complete surprise that law court judgements have not ruled against any aspects of detention. The following excerpt from the Prime Minister's address to the United Nations General Assembly is a good example of Malta's stance:

. . . the small size of Malta, our financial and human resources make it extremely difficult to cope with such a huge number of these unfortunate people to be accommodated in Malta . . . Notwithstanding the severe difficulties faced by Malta, we continue to honour our international obligations *vis-à-vis* genuine refugees and persons qualifying for humanitarian protection. Malta has featured as one of the countries, in proportion to its size and population, with the highest number of awards to asylum-seekers...For years we have insisted on measures of international solidarity, beginning with effective action at EU level...Malta has always dealt with these situations with great responsibility, humanity and benevolence paying due respect to every human being without exception and will continue to do so. At the same time, the problem of illegal immigration is an international phenomenon driven by external factors which cannot always be prevented or even mitigated by the countries affected by this problem. . . . My Government hopes that other countries would come forward to assist in alleviating the burden which Malta carries – a burden so acutely disproportionate to Malta's population, land size and population density.<sup>21</sup>

The Government's position on the detention policy has been widely supported by the local Maltese courts. For example, the following three cases - two asylum seekers and one rejected asylum seeker - invoked article 409A of the Criminal Code.<sup>22</sup> This article provides any detainee with the possibility of applying to the Magistrate's Court to challenge the lawfulness of detention. If the court chooses to release the applicant, the Attorney General may apply for the person's re-arrest if he is of the opinion that the continued arrest was founded on any provision of the code or any other law.<sup>23</sup> All three cases were rejected as the Court held that since the Immigration Act authorises

<sup>21</sup> Lawrence Gonzi, *Statement by the Hon Dr Lawrence Gonzi Prime Minister at the Sixty-fourth session of the United Nations General Assembly, Permanent Mission of Malta to the United Nations, New York, 24 Sep 2009.*

<sup>22</sup> *Napoleon Mebrahtu v. Commissioner of Police*, Magistrates Court, 26 June 2003; *Karim Barboush v. Commissioner of Police*, Criminal Court, 5 Nov 2003; *Kinfe Asmelash Gebrezgabiher v. Commissioner of Police*, Magistrates' Court, 27 June 2006.

<sup>23</sup> The law imposes very strict timelines for the determination of such applications, which are usually vigorously observed by the courts.

detention and imposes no limit on the amount of time an immigrant may spend in detention, such detention is lawful. According to the Court, the scope of article 409A does not include an examination of circumstances of the lawfulness of detention, such as, if the detention itself violates the individual's fundamental human rights.

Other attempts challenged the lawfulness of detention in terms of article 34 of the Constitution of Malta (which is also article 5 of the ECHR) which protects from arbitrary arrest or detention. In *Essa Maneh et. v. Commissioner of Police*, the Court justified detention on the basis of national security concerns as the Court highlighted the need to 'avoid a flood of 'irregular' people running around in Malta'.<sup>24</sup> In the interpretation of the law, overall, the local judges and magistrates have reproduced, and thus further legitimised, the Government's line of argument.

There has been one exception in the case of *Barboush v. Commissioner of Police*. Karim Barboush, an Iraqi asylum-seeker, had been detained for fourteen months. On 25<sup>th</sup> October 2004 Magistrate Vella ruled that, although it was understandable that an illegal immigrant would be detained on arrival at Malta, the detention of Barboush went beyond the limits of what was considered reasonable and lawful. The Act stipulates that applications for refugee status were to be dealt with as quickly as possible and within a relatively reasonable time.<sup>25</sup> It is worth reproducing a few questions Magistrate Vella poses when reading out the sentence:

How could one accept that a person, with fundamental human rights like anybody else, is held in detention for 14 months when there is no disposition in the law that requests the arrest? How could one accept that the Board of Appeal, that determines refugee status, was not composed for months so that applicants were left waiting in detention for nothing...The court feels that 14 months was not a short or reasonable time in the circumstances. The court understands and appreciates the efforts and limited resources with which the authorities work and is in no way condemning anyone's actions but the fact is that situations where a person is denied his freedom arbitrarily and unreasonably cannot be accepted.<sup>26</sup>

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<sup>24</sup> *Essa Maneh et. v. Commissioner of Police*, Civil Court, First Hall, 16 Dec 2009.

<sup>25</sup> Claudia Calleja 'Asylum seeker's release contested...again', *The Times of Malta*, 5 Nov 2004.

<sup>26</sup> Claudia Calleja, 'Asylum seeker's detention ruled illegal', *The Times of Malta*, 3 Nov 2004.



Are we to expect that these people, who have fundamental human rights like everybody else, should remain in detention until someone remembers to constitute the Board of Appeal, hear the applicants' case and decide it?<sup>27</sup>

Magistrate Vella's person-centred approach contrasts sharply with the state-centric approach undertaken by the Government and the rigid positivistic interpretation of the law by the Courts. His comments, rightly so, make us question the fairness of the phenomenon of detention. Three issues are brought out in his argumentation: a) that the lack of resources and lack of administration do not constitute 'reasonable' and so the Government is not acting within its legal right (Immigration Act) to detain people arbitrarily; b) the change of status of the immigrant to an asylum seeker, needs to be taken into consideration; c) freedom is a fundamental human rights, and a person cannot be kept in detention due to maladministration issues. Magistrate Vella's ruling was revoked by the Criminal Court on procedural grounds and it was ordered that the case be heard again. This is typical of an approach in which human dignity is not the primary consideration.

In brief, the position adopted by the Government and largely reinforced by the law courts is dictated by a strict interpretation of human rights law. The end result is radically opposed to that undertaken by non-state actors who claim, as seen above, that violations of human rights of irregular immigrants are ongoing. This also has significantly different implications on the state which is primarily responsible for safeguarding the human rights of all people within its territory. Non-state actors claim that the state should be held accountable. Whereas the Government's arguments, supported by the law courts, absolve the state from any responsibility of a human rights violation for a situation that it claims it is not equipped to handle.

On the one hand one can say that the human rights system is 'working', and has made a difference by calling the Government to account for the ill-treatment of irregular immigrants in Malta. On the other hand, it can be equally argued that in spite of the activity spurred by the human rights system, it has not been effective enough because irregular immigrants in Malta have been and are still being subjected to a dehumanising experience. Ironically the 'ineffectiveness' is justified by an iron wall of

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<sup>27</sup> Claudia Calleja, 'Migrant detained despite release order', *The Times of Malta*, 27 Oct 2004.

international human rights law and its interpretation. The paradox is that both camps have usurped the moral high ground of human rights to put forward contrasting claims. Both camps cannot be right, because they hold opposing views. This situation has increasingly become, not only a difficult situation for irregular immigrants and the Government to manage, but a peculiar human rights conundrum or stalemate. The following section will focus on the practice of detention using the concept of human dignity as an analytical lens and a normative tool.

#### **4.4 Dehumanising detention: The reality of a ‘less than human’ space challenges the Government’s position**

Migrant detention in Malta is officially a policy embarked on by the Government to manage the administrative aspects of irregular migration: from asylum applications, to health checks, to removals. It is an indirect result of the enactment of several EU laws and regulations which are part of the EU *acquis* (as seen in Chapter 3). These laws have served to bring Malta’s legal framework in line with international human rights standards and ironically, as this Chapter seeks to show, are intended to provide greater protection to asylum seekers. In practice, the phenomenon of detention in Malta is a complex institutional set up designed to facilitate the removal of people without a permit to stay and accommodate those immigrants whose removal order is suspended, pending a decision on their asylum application. Immigrants emerge from this experience claiming that they feel ‘less than human’. Detaining people for a short and reasonable period of time in decent conditions for administrative reasons might be considered justifiable. The dehumanising practices that arise as a consequence of detention are however much more difficult to justify and, this Chapter argues, are unacceptable.

What is the effect of detention on immigrants? During my fieldwork, I wanted to understand how immigrants articulated their experience of detention. In a way I also wanted some reassurance that I was not projecting my own horror and shock at the ongoing practices and policy of detention. I asked an Eritrean immigrant during one of our conversations, what he felt was the worst thing about detention. Having just spent months reviewing human rights reports on migrant detention in Malta, part of me was

expecting: the overcrowding, the food - which everyone complains about, or the stinky toilets getting blocked every other day, or the unhygienic showers. Following a pregnant moment of silence, which I can now recognise as typical however long after their release from detention you ask immigrants about their experience, he replied:

It isn't easy to be in a situation that kills the internal soul.<sup>28</sup>

This is what I set out to understand in an attempt to make sense of the two contradictory discourses of human rights used by the Government and NGOs. Using the concept of human dignity as a lens, I ask: in what way is detention in Malta a situation that 'kills the internal soul'? A Congolese immigrant, who spent over 18 months in detention and failed his asylum application, sheds some more light onto answering this question. He described his experience of detention in Malta, making the characteristic (also seen in the opening quote of this Chapter) allegory to animals, as 'dehumanising'. He says:

Detention dehumanizes the human being. The detainee is reduced to the state of an animal. One wakes up, eats, sleeps, wakes up...as in a stable. What is the difference between cows in a stable and an inmate at Safi Barracks? The cow sleeps, the inmate sleeps, the cow is fed, the inmate is fed, the cow goes out for a few minutes under the supervision of its master, the detainee also goes out into the courtyard for a few minutes, under the surveillance of the soldiers...<sup>29</sup>

The sense of emptiness and loss of meaning shows part of the pain of going through a dehumanising experience. The gravity of the experience is expressed by the continual invocation of God. An often heard phrase among West Africans is: 'it is only by the Grace of God that we can get over/forget detention'.<sup>30</sup> The same Congolese migrant expresses his wish that the Maltese understand that migrants' suffering starts before detention and it is compassion that they seek on their arrival to Malta. It is interesting to note that the Congolese migrant chooses to present detention as an issue of justice. Justice here is used in the broader sense of 'fairness', but it also alludes to a common perception by immigrants that detention is a 'punishment'. He says:

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<sup>28</sup> An Eritrean immigrant, living in the community, field notes.

<sup>29</sup> A Congolese immigrant, living in the community, field notes. Free translation from French.

<sup>30</sup> West African (Ghanaian, Nigerian) immigrants, field notes.

The victims of this detention have no other consolation except for their tears. All these people who were abused, bullied and maltreated, and all those who continue to be abused, bullied and maltreated because they fled their respective countries are the forgotten members of our society. They escaped from the frying pan into the fire. To experience the bullying misery of detention, one must have been there and lived through it. It's like I said one day to the judge who was in charge of the enquiry regarding the suppression of the demonstrations carried out by detainees in Safi Barracks: 'Coming to Malta, we committed the same stupid mistake as the crocodile who was walking in the bush one day, when he suddenly saw that it was going to rain, so he rushed into the river to escape the rain. We were trying to escape abuse and violations of human rights, but in Malta we found out that these were not milder here than in our countries! And the big question will always remain unanswered: Should we really have fled?'<sup>31</sup>

This explains why the effects on the detainees is not simply one of frustration at the bad conditions, or lack of liberty, but a delivery of subjugation and humiliation which all together converge into a dehumanising experience. The following is a quote from my own field notes which helps to shed light on how I arrived to this conclusion:

I learnt more about the effects of detention on two separate occasions when I met with the managers of the Hal Far Open Centre and the Marsa Open Centre. Both gave me a tour of the centres they were responsible for. I noticed that as they were taking me around both took on a 'monitoring' role; and their gaze would linger on any activity between migrants in the centre, no doubt registering who was befriending whom, and so on. In almost identical automatic gestures, both continuously drew my attention and commented non-stop on new residents. These migrants, just released from detention, walked with their heads bent, huddled in groups and when not looking furtively over their shoulders they had a sheepish, almost empty fixed gaze. To show me how 'slow' the new immigrants were, one of the managers in a joking, almost jeering move, shouted at the top of his voice 'Good morning!' to a group of three new Nigerian migrants. The reaction was immediate, their bodies tensed, they looked back almost defiantly but expressionless, and walked away. The other manager, in a similar gesture, moved quickly towards a group where he had spotted new residents. He extended his hand with a smile and a good morning. The reaction again was telling: the Eritrean immigrant took a quick step back, bending his head, awkwardly staring at the manager's extended hand. Not before stealing a quick look up to check if the gesture was friendly did he slowly extend his hand back. As we left the group, the manager under his breath told me, in a concerned tone: 'It will take time...' 'freedom' doesn't automatically come with release from detention...freedom comes when they manage to work detention out of their system.'<sup>32</sup>

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<sup>31</sup> Written note from a Congolese immigrant, living in the community, field notes/material. Free translation from French.

<sup>32</sup> Visits to Marsa Open Centre and Hal Far Open Centre, field notes.

The effects of detention on immigrants are also the subject of a Europe-wide report entitled *Becoming Vulnerable in Detention*. As can be gleaned from the title, the report investigates immigrants' vulnerability in detention. The country report on Malta concludes that there a number of factors, related to or resulting from, their detention in Malta which are at the root of a marked deterioration in immigrants' physical and mental health/well-being. These are: complaints from detained immigrants of increased stress, frustration, loss of appetite, sleeping problems and feelings of powerlessness. Significantly the causes identified, which are often aggravated by past traumas experienced in their country of origin or on the journey to Malta, are various: the fact that they are deprived of their liberty, the lack of information about their situation, their inability to do anything about their situation, the poor conditions in detention, incommunicado with family and friends and the lack of possibilities to engage in gainful activities.<sup>33</sup>

One of the more apparent manifestations of inhuman treatment is in the infrequent, but regular occurrences of physical violence. The most public example of this is the incident described in Chapter 3 whereby immigrants were beaten up during a peaceful demonstration at Safi Barracks. But taunting and bullying by a few soldiers was commonplace and rarely went punished. Violence on immigrants by other immigrants, at times the result of mental health problems but also due to the lack of security in the centres, were regular occurrences. In one incident during my fieldwork, following a dispute, an immigrant poured hot water from the water boiler onto another immigrant while he was asleep on his mattress on the ground at night. The aggressor was given a warning and moved to another centre. A few years back, an Egyptian immigrant was brutally murdered by another immigrant. This time it happened in the afternoon while he was sleeping in the room he shared with another 15 detainees. The aggressor used iron bedposts to smash his head. The site of the crime splattered in large quantities of blood could not be cleaned until the evidence was collected. This was an additional trauma for the other detainees as it meant that the dried blood remained there for around a week.

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<sup>33</sup> JRS Europe/DEVAS, *Becoming Vulnerable in Detention*, JRS Europe, Brussels 2010, p. 282.

The dehumanising experience affects greatly NGO workers and soldiers too. In a way it is detention's 'collateral damage'. For the few NGO workers, who have a permit to enter detention centres, the deterioration of immigrants inside detention and the feelings of helplessness, are often exhausting experiences. The lack of understanding from other Maltese adds to their frustration. Detention is hardly visible, a fact brought about partly by a policy not to allow media representatives inside detention centres. This policy was very slightly relaxed from 2008. Amidst these frustrations, an NGO worker still complains that it is not enough and goes on to describe her experience of detention:

I think that somehow it's one thing to read a write-up in a newspaper and see some photos, you know. Somehow it's so different to actually go inside: to sit there and smell that horrible fetted air, slight smell of drains, to be in that crowded environment, with beds all on each other and all those people all vying for attention, all – 'please, please help me', 'you must listen to my story', 'mine is the worst'... All individuals literally... That is something you can't really get through media coverage. I think that the full horror of detention is difficult to portray, but I do think that if there was more openness and we had journalists who were willing to go inside and speak to people, it could make some difference.<sup>34</sup>

The immigrants are not alone in viewing detention as a punishment. Although the criminalisation of illegal entry was removed from Maltese laws in 2002, it was clear to me that in spite of rhetoric and official documents stating otherwise, it was still the dominant mentality amongst policy makers.<sup>35</sup> During my fieldwork, I once found myself in the midst of a group conversation with various Ministry (including other associated agencies) officials in a canteen. This came at a time when I had had a series of conversations with them about the administrative necessity of detention centres. Detention was always presented in businesslike and managerial terms - establishing identity, health checks, processing asylum claims – all for the good of Maltese society and immigrants themselves. The following conversation showed me that the processes entailed in the phenomenon of detention were not as apolitical as they appear on the surface.

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<sup>34</sup> L, Personal Interview - NGO worker, 11 January 2009.

<sup>35</sup> Illegal entry was decriminalised on 8 December 2002. This decriminalisation is in line with Article 31 of the 1951 Geneva Convention on the Status of Refugees (which Malta is party to) stipulating that: 'No penalties shall be imposed on persons seeking international protection coming directly from a country of persecution on account of their illegal entry or presence, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

Out of the blue, one of the guys asked: What was my 'problem' with detention? Heads turned to listen to my reply, making it clear that this was something that they had been discussing before, in relation to me. I decided to be tactical and avoid being controversial, without being dishonest since I suspected that they were less interested in my reply, but had something to tell me. So I made reference to an incident which involved violence against immigrants in the community and said that my concern lies with the effects that detention might have on immigrants' integration and Maltese attitudes towards immigrants. They were quick to respond. The problem is that these people will find gullible souls (I am not sure if this was a direct reference to me) or vulnerable people like prostitutes and older unmarried women amongst the Maltese and start making their way 'in'. They went on to explain to me that once the Maltese start 'mixing' with immigrants, that's when the big problems will begin – detention ensures that this situation is kept under control. That is what we have to avoid at all costs. Detention is needed, because the immigrants need to know that 'we mean business'. That law and order is valued in Malta and those who break the rules get punished.<sup>36</sup>

This is a completely different version to what I had been given before. It strongly suggests that the practice of subjugation and humiliation is not unintentional but is the manifestation of evil and deeply entrenched beliefs. The root causes of the administrative mayhem and the irrational policies surrounding detention is a form of structural violence found in underlying social forces like racism and social inequality. The most serious is that of 'humane inequality', considering people as 'less than human' which manifests itself as a lack of respect for human dignity. In brief, looking at detention through the lens of human dignity shows us that basic irreducible standards have been surpassed. The lack of freedom and 'appalling' conditions reported by human rights organisations have made possible the creation of a space where dehumanising practices are commonplace and immigrants are reduced to mere existence, 'less than human'.

In further support of the notion that deep underlying social forces are manifest in detention practices is the shame of people working within the system when they realise that they have stopped resisting the system. Nurturing a perception that immigrants are really 'less than human' may be what allows the system to continue operating. But this same perception may be rather difficult to keep in place for those

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<sup>36</sup> Field notes.

people, like NGO workers and some detention officers, who are in direct contact with the immigrants:

You have all the ugliness of humankind that could possibly happen, is happening there. And somewhere along the line we came to accept it. I think it really hit me towards the end of last year, 2008, when I actually said to my staff, somewhere along the line we've stopped trying to fight this, we've accepted it.<sup>37</sup>

This is the kind of situation that human rights set out to change and eradicate from society. A situation in which 'the ugliness of humankind' is present ought to be the kind of situation in which the human rights machinery sets to work! This is the proof that the position adopted by the Government must be flawed.

Human dignity points to two major shortcomings which have lead to the human rights failure to protect irregular migrants in Malta. The first, the Government policy on detention does not place human dignity at the centre of its efforts. This is because the Government embraces a flawed understanding of human rights which is over-legalised and positivistic, and therefore fails to identify, let alone address its root causes. Human rights considerations ought to start from the situation on the ground – how are people being treated? What does this experience mean for them? Instead the Government has chosen the legalistic route which is essentially an impersonal choice and a top-down approach both of which are not human rights based approaches. Reminiscent of the approach of Te Waters, it is an approach which not only lacks depth but in practice derails human rights from what it set out to achieve. It is understandable that the Government seeks to manage irregular migration in a way which fits with the national scenario. This should not, however, be done at the expense of the human rights of irregular migrants. In brief, the Government is right in its endeavours to seek long term solutions to irregular migration, but this should not mean that human rights can be foregone in detention.

#### **4.5 Towards a human rights culture**

My analysis strongly suggests that at the root of the human rights conundrum – which has restrained the potential of human rights to bring about positive change for

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<sup>37</sup> K, Personal Interview - International NGO employee, 5 January 2009.



immigrants - are different understandings and paradigms of human rights. As seen in the first section, the role afforded to the concept of human dignity lends to the construction of different paradigms of human rights, which is subsequently seen in different practices. Human rights can only deliver respect for human dignity if the 'right' paradigm of human rights is used.

Human rights discourses that fail to retain human dignity at their core are intrinsically flawed. Detention in Malta is an example of an incongruous situation whereby human rights, conceived with the 'inherent dignity' of every human being, in practice are indirectly supporting a situation which has dehumanising effects. The production and reproduction of 'human rights' by the different discourses has fashioned the dominant interpretation put forward by the Government which establishes that no human rights are being violated even if the treatment of immigrants in detention is morally unacceptable. This is the result of deeply embedded social forces which the human rights movement has a mandate to change. Looking at detention through the concept of human dignity, gives us the boldness to denounce the practice as morally unacceptable, and to assert that any interpretation of human rights which supports it (or does not consider it a violation of human rights) is flawed.

The phenomenon and practices of detention in Malta are morally unacceptable. In this case, the Government of Malta and the law courts need to reform their flawed understanding of human rights. The Government's policies in this field should be person-centred and ensure that the treatment of immigrants does not fall below acceptable standards. It is within the framework that Malta cannot always offer opportunities and life choices for migrants, that the Government must sustain its efforts at building international solidarity and finding long term solutions. Locally, the first step towards achieving change in the treatment of irregular immigrants is a review of the whole system of detention. In parallel to this, immigrants should be empowered to speak out – in various ways, through legal channels, media and so on – and to be in a position to challenge their situation in an independent court, thus ensuring the implementation of the rule of law.

The Government would do well to heed the advice of human rights organisations which appear to uphold a much closer understanding of the proper paradigm of human rights. The recommendations put forward by human rights organisations are generally clear and succinct, and attempt to take into consideration local particularities in the interest of the host population. The implementation of recommendations by human rights organisation all depends on the political will of the Government. Detention needs to be kept to the barest minimum, since in practice it is difficult to envisage an institution which intrinsically deprives people of their liberty to be humane. In addition, as demonstrated in this Chapter, detention creates a space where there is a huge risk of manifestations as well as constructions of systemic or structural violence.

The importance of human rights organisations – national human rights institutions, local and international non-governmental organisations, intergovernmental organisations and treaty-based monitoring bodies – cannot be highlighted enough. Overall, their approach theoretically shows effort at retaining human dignity at the core of their activity. Evidence of this is the general thrust of their recommendations which can be overall classified as concerned with protecting immigrants and empowering them. Of equal importance human rights organisations feed debates and discussions in the public sphere with informed material using a human rights approach. In addition, human rights organisations have played a crucial role in highlighting the plight of irregular immigrants. Without their contribution and the media interest they generated, one could cautiously conclude that the conditions of irregular immigrants in Malta would have been much worse.

Human rights education is key to addressing the root causes of undignified treatment and in particular the perception of immigrants as ‘less than human’. Such human rights education in relation to migration needs to target different groups, starting from ministry officials, detention officers, professionals working in the field as well as Maltese society at large. The changes that human rights organisations propose are important but the social forces producing structural violence will still be there. One could have the most modern and up-to-date detention centres, but if immigrants are perceived as ‘less than human’, that will be reflected in everyday practices. As the

Eritrean immigrants mentioned at the beginning of this Chapter, drove so powerfully home, the death of the 'internal soul', the desperation, the 'horror' of detention are not brought about by the overcrowding, the cold food, or the lack of access to lawyers, but by the fact that nobody seems to care.

Finally the need for a human rights culture is paramount. It is only the popular internalisation of human rights principles which can bring about the necessary social change in which the current practice of detention would not be possible. The above recommendations would be a step towards this, although the nurturing of a human rights culture, as this study argues, requires action at other levels too.

#### **4.6 Conclusion**

The creation and maintenance of detention, as a direct action by the state, which is devoid of respect for human dignity is evidence of a flawed understanding of the modern human rights doctrine. These violations of human rights cut to the core of human rights by putting into question the very concept of human dignity which from the construction of the modern human rights movement has unquestionably been at the heart of human rights. Using the concept of human dignity as a lens to critically assess a situation, helps to get us back on track. It takes the analysis back on focus – to the person, the human being. Without such focus it is very easy to get lost in issues of fairness, legalities, and political interests. The real focus is the person and that is why I refer to the concept of human dignity as the 'human' in human rights.

The lack of understanding of the role of human dignity and its role in grounding human rights philosophy, is possibly the biggest indication that human rights is on the wrong track, and that as Douzinas commented contemporary societies may be heading towards the 'end of human rights'. On the same lines but with less pessimism, Habermas aptly likens the concept of human dignity to a seismograph.<sup>38</sup> Just like a seismograph records tremors, and seismic waves, and acts as a warning to the coming of earthquakes, the concept of human dignity serves to warn us that laws, policies, actions are not prioritising and respecting human beings. The phenomenon of

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<sup>38</sup> Jurgen Habermas, 'The concept of human dignity and the realistic utopia of human rights', 2010, p. 465.

detention in Malta is one such example which should be taken as a warning of a great malaise. It is allowed to happen because immigrants are perceived as 'less than human'.

The importance of the 'ethnographically visible' to understanding situations like the ones described here is made evident by this Chapter. The anthropologist Paul Farmer explains it thus:

I will argue here that keeping the material in focus is one way to avoid undue romanticism in accomplishing this task. An honest account of who wins, who loses, and what weapons are used is an important safeguard against the romantic illusions of those who, like us, are usually shielded from the sharp edges of structural violence. I find it helpful to think of the 'materiality of the social,' a term that underlines my conviction that social life in general and structural violence in particular will not be understood without a deeply materialist approach to whatever surfaces in the participant-observer's field of vision—the ethnographically visible.<sup>39</sup>

Without registering the 'ethnographically visible', the 'horrors of detention', it would have been impossible to progress in this debate since human rights reports and the Government's arguments were proposing two different truths, informed by two different human rights paradigms.

This is why international human rights organisations have been right in focusing on the detention policy and the conditions within detention. It shows that their priorities are right. Detention is indicative of a grave problem with regards to human rights, and a major obstacle to the fostering of a human rights culture. Clearly, the removal of the detention policy, which is indeed a pressing issue, would be a huge step ahead but would not solve the problem of ill-treatment of irregular immigrants. Various other problems which could not be developed in this Chapter will be developed and discussed in the subsequent chapters. Dehumanising centres like migrant detention centres serve as a barrier to human rights culture. This is because they become generators of dehumanising practices. This should be as much a concern of the international community, as of the society of the host country.

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<sup>39</sup> Paul Farmer, 'An anthropology of structural violence', *Current Anthropology*, Vol. 45, No. 3, June 2004, p. 308.

## Chapter 5: ‘Human rights for the Maltese first’: Why a cosmopolitan orientation is needed

### 5.1 Introduction

In its simplest form, cosmopolitanism is best captured by Diogenes the Cynic’s self-identification in classical Greek times as a ‘citizen of the world’. From this reactionary stance to the dominant political culture of the time in which a man identified himself first and foremost as a citizen of a *polis* or city, cosmopolitanism has come a long way. An increasingly popular school of thought now understands the cosmopolitan agenda to be *not* anti-partial but intrinsically accommodating of partialities like different identities and nationalities. Despite the development of myriad conceptual forms of cosmopolitanism, it remains grounded in the notion of one global moral community. It is precisely the lack of this notion that has been identified as posing problems for the internalisation of human rights in Malta. As the following typical comment by an NGO worker illustrates:

The idea that Somali, Maltese and Greeks are part of the same community is very remote...this is very closed-minded.<sup>1</sup>

Echoing a common contemporary conceptualisation, the philosopher Kwame Appiah describes cosmopolitanism as providing the framework that builds on the powerful ties that connect people across religions, cultures and nations. Cosmopolitanism challenges particular understandings of the world that construct barriers between people. Appiah says that there are two intertwining strands in the notion of cosmopolitanism:

One is the idea that we have obligations to others, obligations that stretch beyond those to whom we are related by the ties of kith and kind, or even the more formal ties of a shared citizenship. The other is that we take seriously the value not just of human life but of particular human lives, which means taking an interest in the practices and beliefs that lend them significance.<sup>2</sup>

The importance of cosmopolitanism, and therefore the adoption of a cosmopolitan approach, for human rights has not been the focus of much academic discussion. This

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<sup>1</sup> F, Personal Interview - NGO worker, 15 December 2008.

<sup>2</sup> Kwame A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, Allen Lane, London, 2006, p. xv.

might stem from the fact that ‘cosmopolitanism’ is never directly mentioned in human rights law, though it could also partly be due to the fact that the academic interest in cosmopolitanism, by and large, was only re-ignited in the late 1990s. Interestingly, a search for the understanding of cosmopolitanism within the human rights framework yields as much about cosmopolitanism as about nationalism. Human rights are best seen, in Nash’s words, as ‘intermestic’:

The cultural politics in which human rights activists are engaged to realised human rights in practice from within states is ‘cosmopolitanism-from-below...using intermestic human rights in the national context, they aim to persuade state officials of the government and judiciary, but also, through the mediated public, the ordinary people, the votes and taxpayers in whose name state officials act, to think and act as global citizens with rights and responsibilities towards individual human beings regardless of nationality.’<sup>3</sup>

A complex picture emerges out of Maltese society’s cultural history of cosmopolitanism, one which is intimately related to ideas of nation, state-building as well as incoming and outgoing migration and contact with foreigners. On the one hand, since the time of the Order of St John, there has been constant and significant contact with foreigners. The Maltese historian Carmel Cassar describes Malta during the period of the Order as a ‘cosmopolitan hub’ due to the continuous presence of large numbers of foreigners with whom the Maltese engaged regularly. This was also a time when the Maltese elite enjoyed increased political autonomy. On the other hand, it would seem that during colonial times, Malta lost that ‘cosmopolitan edge’ due to the subservient role that was imposed on the Maltese by the colonisers. In addition, the island’s function as a fortress for the British Empire meant that for security reasons Maltese autonomy, of the empowering kind that was enjoyed under the Knights, had to be limited. Maltese people’s contact with foreigners was still retained, however, as imperial migratory flows were very much a reality, but to a lesser extent and different in nature. However the cosmopolitan idea of being part of a larger, global whole appears to have been slowly eroded.

Malta emerged from the British colonial experience insecure, insular and inward-looking. The responsibilities that came with sovereignty needed a fair degree of

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<sup>3</sup> Kate Nash, *The Cultural Politics of Human Rights: Comparing the US and the UK*, Cambridge University Press, Cambridge, 2009, p. 166.

allegiance, loyalty and patriotism which were not self-evident at the time of Malta's independence. Little did it seem to matter that after centuries of occupation, the Maltese could finally put their 'national' interest first, in the absence of a clear 'national' identity. The creation of a nation takes time, with some scholars like sociologist Godfrey Baldacchino, only identifying signs of a *nascent* nationalism in Malta in this last decade. Moreover, sporadic attempts at nation-building after independence have selectively ignored the contribution of foreigners to the formation of the Maltese state and society. The imaginary detachment from 'others', fuelled by insularity, led to the creation of a selective and exclusive nationalism which in turn led to a selective and exclusive understanding of moral obligations towards 'others'.

This cultural history sheds light on the adoption and contemporary use of human rights in Malta. The clearest example is the widespread use of the maxim 'Human rights for the Maltese first', one of the most commonly used sayings that came up during my fieldwork. Many referred to it as a 'proverb' and although I have not found any evidence of its use in the past, it is considered and treated as such – a traditional piece of wisdom. The resonance it carries is significant because it exposes the dominant cultural political outlook which shows a lack of accommodation of cosmopolitan norms by national culture. It shows the dominant and ethnocentric understanding of human rights. This is an inherent contradiction since it incorrectly implies that human rights can be prioritised according to a person's nationality, ignoring the universalistic and non-discriminatory foundations of human rights. The fact that the contradiction goes largely unnoticed and to make matters worse is used by people intent on showing their 'support' for what they understand as human rights, exposes a misconception of human rights.

This Chapter will explore cosmopolitanism by discussing three aspects identified as important to understand the kind of cosmopolitanism needed for human rights: the definition of a *partial* cosmopolitanism, the coexistence of cosmopolitanism with nationalism, and the Kantian right to hospitality. Using these insights, the next section will shed light on some reasons why the Maltese passively negate their moral obligations towards irregular immigrants. This will be done by looking at three elements: first the cultural exposition that the Maltese have had to foreigners in the

past;<sup>4</sup> second, the separate processes of nation-building and statehood both of which were thrust onto the Maltese with independence without having yet reached a point of convergence, which suddenly found a vent with irregular migration in the 2000s; and third, the relationship with the EU, which one might have been led to believe would present greater opportunities for an appreciation and adoption of cosmopolitan norms, while it has had the opposite effect. The final section will propose generic action that needs to be undertaken by the global community, the Government and non-governmental organisations to steer Maltese society towards the cosmopolitan approach necessary for a human rights culture.

## 5.2 Cosmopolitanism underpins human rights

There is not one single definition of cosmopolitanism. In its most minimal form however, cosmopolitanism is a political orientation built on the conception that all human beings are members of one global community, an 'imaginary' community that should be nurtured. By questioning assumptions of 'us' and 'them', cosmopolitans are able to transcend differences and to morally include the 'Other'.<sup>5</sup> In practice, a cosmopolitan view requires primarily, a belief in universal values, that one's moral obligations are directed to all human beings, and that political arrangements should faithfully reflect this universal moral obligation.

The construction of an imaginary community – comprised of even people in geographically distant countries who do not know each other but share moral connections - might sound unrealistic but is not an exercise exclusive to cosmopolitanism. The world's religions, various interest groups and nation-states operate in the same way. The idea of an 'imaginary community' was specifically coined by the anthropologist Benedict Anderson to describe a nation through which 'in the minds of each [member] lives the image of their communion'.<sup>6</sup> The nation is described

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<sup>4</sup> 'History, as the sociologist John Hall has argued, is essential to the interpretation of cultural systems and the understanding of shared meanings since 'culture does not float amorously; it is tied to its bearers, their predecessors and successors.' (John R. Hall, 'Cultural Meanings and Cultural Structures in Historical Explanation', *History and Theory*, Vol. 39, No. 3, 2000)

<sup>5</sup> Robert Post, ed. *Seyla Benhabib: Another Cosmopolitanism*, Oxford University Press, Oxford, 2006; Jacques Derrida, *On Cosmopolitanism and Forgiveness*, Routledge, Oxon, 2001; Kwame A. Appiah, *Cosmopolitanism*, 2006.

<sup>6</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism Revised Edition*, Verso, London, 1991, p. 6.



by Andersen as ‘...an imagined political community, imagined as both inherently limited and sovereign’.<sup>7</sup>

A cosmopolitan community is a different kind of community to a national community not least because of its sheer magnitude, as well as its inclusionary qualities. However cosmopolitanism and nationalism are primarily distinguished by the various forms of delimitation, borders and boundaries which are an intrinsic part of the make-up of nations, together with the powerful concept of sovereignty. It is along this nexus that tensions arise and the continual renegotiation of the two political orientations needs to take place.

The cosmopolitan vision which underlies human rights has three characteristics which will be discussed in this Chapter. The first is the presentation of cosmopolitanism and its co-existence with other ‘partialities’. The second is the partiality of nationalism and the conflicting moral obligations it could present from a human rights point of view. The third is the Kantian right to hospitality essential for the cosmopolitan architecture of the global order.

### 5.2.1 Human rights ‘partial cosmopolitan’ philosophy

The cosmopolitan orientation of human rights arises out of their anthropocentric focus and humanistic approach which is the foundation of the moral global community. The understanding of cosmopolitanism within human rights goes beyond a global or political order. It specifically alludes to a political culture built on what Douzinas has persuasively argued derives out of a ‘cosmopolitan ontology’:

Each cosmos is a point of *ekstasis*, of opening up and moving away, of being outside ourselves in our exposure to and sharing with others, immortals in our mortality, symbolically finite but imaginatively infinite; existence, our only essence. The other as a singular, unique finite being puts me in touch with infinite otherness. In this ontology, community is not the common belonging of communitarianism, a common essence given by history, tradition, the spirit of the nation. Cosmos is being together with one another, ourselves as others, being selves through otherness.<sup>8</sup>

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<sup>7</sup> Ibid, p. 6.

<sup>8</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, Routledge-Cavendish, Abingdon, 2007, p. 294.

Before addressing partialities, nation-states and inter-state relations, cosmopolitanism must be seen as grounding human rights in such an existential humanist philosophy. Cosmopolitanism, therefore, is just as much about the relationship and recognition of the 'Other' as it is about 'Ourselves'. Cosmopolitanism is about nurturing an attitude or a disposition. The migrationists Steven Vertovec and Robert Cohen describe the cosmopolitan as a person:

...who develops 'habits of mind and life' through which he or she can end up anywhere in the world and be 'in the same relation of familiarity and strangeness' to the local culture, and by the same token 'feel partially adjusted everywhere'. Such an outlook or disposition is largely acquired through experience, especially travel. It entails not only respect and enjoyment of cultural difference, but also a concomitant sense of 'globality' or global belonging that can be integrated into everyday life practices.<sup>9</sup>

Notwithstanding this, as pointed out before, Diogenes' reply might have been motivated less by the 'cosmos' and was more a reaction against the particularity, or rather the partiality expected towards one's city-state.<sup>10</sup> In contrast to this anti-partial understanding of cosmopolitanism, Appiah recalls his father's understanding of layered cosmopolitanism. His father 'never saw a conflict between local partialities and a universal morality – being part of the place you were and a part of the broader human community'.<sup>11</sup>

A cosmopolitan's scope of tolerance of others must be wide and broad, and not limited.<sup>12</sup> Anti-partial cosmopolitans, Appiah warns, risk becoming exclusive and radical by failing to view partiality as an anthropological reality. To address this, Appiah proposes what he calls a 'partial cosmopolitanism':

And the one thought that cosmopolitans share is that no local loyalty can ever justify forgetting that each human being has responsibilities to every other. Fortunately, we need take sides neither with the nationalist who abandons all foreigners nor with the hard-core cosmopolitan who regards her friends and fellow citizens with icy

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<sup>9</sup> Steven Vertovec & Robert Cohen, 'Introduction' in *Conceiving Cosmopolitanism: Theory, Context, and Practice*, eds. S. Vertovec & R. Cohen, Oxford University Press, Oxford, 2002, p. 13.

<sup>10</sup> Diogenes was well-known for his anti-conformism in other matters, a characteristic which might have been nurtured by the fact that he was himself a foreigner in Athens.

<sup>11</sup> Kwame A. Appiah, *Cosmopolitanism*, 2006, p. xviii.

<sup>12</sup> Ibid, p. 144.

impartiality. The position worth defending might be called (in both senses) a partial cosmopolitanism.<sup>13</sup>

Although a rigid essentialist definition of cosmopolitanism which at its most radical disregards partialities, is unfeasible and unrealistic, a nuanced definition of cosmopolitanism informed by praxis which includes partialities, is preferable in modern societies. It is this nuanced perspective of cosmopolitanism that the UDHR puts forward by juxtaposing the idea of a global community built on 'sameness' with a respect for 'differences' – religious, cultural, nationality, and so on. The 'sameness' and 'difference' shows an anthropological sensitivity to human beings and human behaviour. The human rights movement promotes universal standards but not sameness, making a cosmopolitan orientation necessary in dealings with other people.

The political theorist Andrew Dobson, by using the example of the parable of 'The Good Samaritan' who assists a stranger with whom he had no connection, argues that cosmopolitanism requires empathy or some form of association which creates enough of a sense of obligation for people to act upon.<sup>14</sup> Similarly, Appiah says cosmopolitanism involves the capacity to identify with others in different groups, cultures or nations, and a 'narrative imagination' that helps to understand and empathise with others. Appiah explains it as such:

Cosmopolitanism shouldn't be seen as some exalted attainment: it begins with the simple idea that in the human community as in national communities, we need to develop habits of coexistence: conversation in its older meaning, of living together, association.<sup>15</sup>

On the same lines, Nussbaum argues that cosmopolitanism can also lead to greater reflexive self-understanding which is needed in the contemporary world in which the co-existence of diverse cultures is increasingly a reality.<sup>16</sup> Human rights philosophy could be seen as one requiring a partial cosmopolitanism, which accepts differences by

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<sup>13</sup> Ibid, pp. xvi-xvii.

<sup>14</sup> Andrew Dobson, 'Thick Cosmopolitanism', *Political Studies*, Vol. 54, 2006, p. 171.

<sup>15</sup> Ibid, pp. xviii-xix

<sup>16</sup> Costas Douzinas, *Human Rights and Empire*, 2007, p. 175.

renegotiating boundaries and encompassing a sensitivity to the principle that common aims are differently realised in different circumstances.<sup>17</sup>

### 5.2.2 Renegotiating partial cosmopolitanism and nationalism

Cosmopolitanism requires a sense of moral obligations towards 'Others' which includes citizens of other countries and people of different cultures. By encompassing all human beings, it opens avenues for obligations which could compete with those traditionally expected by the nation-state. Partial cosmopolitanism, by being open to renegotiation, should be open to this. In this way nationalism can be a constitutive part of cosmopolitanism and best seen as part of the logical continuum that links the person with the global community. However, nationalism's association with the powerful notion of sovereign states also presents unique challenges to partial cosmopolitanism. In addition, nationalism in the form of the nation-state, unlike religious groups or interest groups, is a protagonist in international society.

Although the contemporary dominant view of nationalism would not concur, nationalism has at times been invoked as an essential component of cosmopolitanism. One of the foremost champions of this view is the 19<sup>th</sup> century Italian nationalist Giuseppe Mazzini who believed that national sentiment was essential to leverage universal sentiment towards a just world. His argument is based on the assumption that the bonds that can be produced by a global community are weaker than those produced by a national community. They should, however, be enough to create a sense of obligation and respect for the humanity of the other. The scholars Stefano Recchia and Nadia Urbinati show that Mazzini's nationalist thought was intrinsically cosmopolitan.<sup>18</sup> Indeed in this political vision nations not only had to grant civil and political rights to all its citizens but education had to consist of a combined ethos of republican duties and international brotherhood.<sup>19</sup> For Mazzini a nation could accomplish its own mission only if its actions were in line with the universal 'law of

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<sup>17</sup> Idem.

<sup>18</sup> Stefano Recchia & Nadia Urbinati, 'Introduction' in *A Cosmopolitanism of Nations: Giuseppe Mazzini's Writings on Democracy, Nation Building and International Relations*, eds. G. Mazzini, S. Ricchia, N. Urbinati, Princeton University Press, Princeton, 2009, p. 13.

<sup>19</sup> Idem.

Humanity'. This, Recchia and Urbinati point out, make his nationalist political vision very similar to Kant's cosmopolitan one<sup>20</sup>:

...for Mazzini, any legitimate patriotic pursuit always needs to be limited by reference to a universal maxim that bears some striking resemblance to Kant's categorical imperative: 'Always ask yourselves...: If what I am now doing were done by all men, would it be beneficial or harmful to Humanity? And if your conscience tells you it would be harmful, desist from acting; desist even though it might seem that an immediate advantage to your country...would be the result.'<sup>21</sup>

Therefore just as people negotiate various loyalties and identities simultaneously in everyday life, they should also be able to uphold and accommodate partial, national and cosmopolitan identities. The problem arises when any of these identities come into conflict with one another. The solution can either be a denunciation of one of the identities, or a renegotiation of one of the identities. In a similar way, cosmopolitanism and nationalism could either annihilate the other or accommodate each other through a process of renegotiation of their boundaries and definitions.

This challenge comes, not so much in the promotion of partial nationalistic moral obligations, but in those conflict areas between cosmopolitan and national obligations in which renegotiation is not considered. This can be seen when nationalism is constructed, in a radical way as selective and exclusive. I am not referring to 'nationalism' in the literal sense of the word, as a partiality towards one's ethnic group, nor am I referring to the role and function of the state to administer the territorially-defined community and manage international relations. The latter is necessary for a cosmopolitanism which accommodates human rights, as will be seen in the next section. What I am referring to as a challenge for cosmopolitanism and potentially problematic is the ideology of 'nationalism' as the combination of the forces of the '*ethnos*' and the '*demos*' in nation-states.

One can argue, at this stage, that the same potentially conflicting processes are present in any other imagined group with the potential to mobilise. Any partial, delimited group can potentially furnish opportunities for conflicting obligations. There

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<sup>20</sup> Recchia and Urbinati point out that Mazzini had never read any of Kant's work and was only superficially familiar with his ethics.

<sup>21</sup> Stefano Recchia & Nadia Urbinati, *A cosmopolitanism of nations*, 2009, pp. 12-13.

is however a fundamental difference between religious groups, cultural groups, interest groups and nations: this is the bond between nationalism and 'states'. Nationalism, since the American and French Revolutions has played an intrinsic role in the creation of the notion of the nation-state and the development of modern states. Benhabib demonstrates that sovereign states wield considerable power in the construction of the global order. Sovereign states, she asserts, 'often nurture and guide the very transformations which curtail or limit their powers'.<sup>22</sup> Indeed, the human rights system is an example of this: it is created and enacted by states primarily to protect people from states, it curtails states' own powers but entrusts the same states with the implementation of human rights. Human rights are part of a global order which bestows a unique and powerful role to the nation-state. Therefore, accepting partiality to the nation-state could possibly constitute far greater conflicts of interest than any other particular group due to its ubiquitous power.

Nationalism can easily be instrumentalised by states which are typically preoccupied with demarcating borders, boundaries, insiders and outsiders. Exclusive nationalism is therefore inward-looking and essentialist. The political scientist Anthony Marx discusses the dangers of exclusive nationalism:

...nationalism has been constructed exclusively, not according to fixed categories but instead demarcated by emergent states seeking to manage diversity by manipulating and reinforcing difference.<sup>23</sup>

What is clear is that the process of (re)negotiation happening between cosmopolitanism and nationalism is a tension best seen as continually in flux. It would be wrong to assume that exclusive and harmful nationalism is *passé*. Indeed, Michael Billing has persuasively argued that nationalism, even when invisible, retains a latent presence because it is part of the motor of state formation. He calls this 'banal nationalism' which is the investment into retaining visible symbols of latent nationalism which can at the call of a group/s suddenly become meaningful enough to mobilise.

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<sup>22</sup> Seyla Benhabib, 'Reply to Commentators' in *Seyla Benhabib: Another Cosmopolitanism*, ed. R. Post, Oxford University Press, Oxford, 2006, p. 176.

<sup>23</sup> Anthony W. Marx, 'The Nation-State and Its Exclusions', *Political Science Quarterly*, Vol. 117, No. 1, 2002, p. 103.

Modern nation-states, as Benhabib observes, are constructed on the social solidarity of an *ethnos*, which is a 'community bound together by the power of shared fate, memories, solidarity and belonging'.<sup>24</sup> Renegotiating the boundaries between the *demos* and the *ethnos* is the first step towards reconstituting the nation in universalistic terms.<sup>25</sup> The scholar of constitutional law Robert Post comments:

The *ethnos* endows the legal construction of the state with intangible unity of nationhood. In contrast to the a *demos*, which possesses boundaries that can be stipulated and manipulated by positive law, an *ethnos* 'does not permit free entry and exit'. For this reason, Benhabib regards the national solidarity of the *ethnos* as essentially contradicting the universalist ethical principles to which she is otherwise committed.<sup>26</sup>

The incongruity between universalist principles and nationalist ones, as illustrated by Benhabib above, are what the partial cosmopolitanism that imbues human rights seeks to address. This 'new form of cosmopolitanism', which he claims has been gaining popularity since the second half of the 1990s, the historian David Hollinger describes as such:

The new cosmopolitanism begins by trying to keep in single focus at all times both a universalist insight that a nationalist tend to deny, and a nationalist insight that universalists tend to deny. The universalist insight, which drives Nussbaum and her non-modified comrades, is that even the least blood-intensive and least chauvinistic of national solidarities threaten to inhibit any transnational project strong enough to serve the interests of a wider human population. The nationalist insight, which communarians grasp better than some liberals do, is that the primal need for belonging is poorly satisfied by solidarities large enough to act effectively on challenges that are global in scope. This is the contradiction – the contradiction between the needs of the *ethnos* and the needs of the species – that the new cosmopolitanism faces, rather than ignores.<sup>27</sup>

The relationship between cosmopolitanism and nationalism is conditioned by the overwhelming power of state sovereignty, which is a commanding player in the international community as well as the human rights system. The form of

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<sup>24</sup> Seyla Benhabib, 'Democratic Iterations: The Local, the National, and the Global' in *Seyla Benhabib: Another Cosmopolitanism*, ed. R. Post, Oxford University Press, Oxford, 2006, p. 65.

<sup>25</sup> Seyla Benhabib, 'Reply to Commentators', 2006, p.174.

<sup>26</sup> Robert Post, 'Introduction' in *Seyla Benhabib: Another Cosmopolitanism*, ed. R. Post, Oxford University Press, Oxford, 2006, p. 8.

<sup>27</sup> David A. Hollinger, 'Not Universalists, no pluralists: the new cosmopolitans find their way' in *Conceiving Cosmopolitanism: Theory, Context, and Practice*, eds. S. Vertovec & R. Cohen, Oxford University Press, Oxford, 2002, p. 230.

cosmopolitanism promoted by human rights presents cosmopolitanism as an end of the continuum between the person and the global community. It is on this continuum that nationalism should be located. This lesson is driven home by the Mazzinian argument that a national community can involve a sentiment or affective relationships which are generally more difficult to achieve in a cosmopolitan community. The bonds formed in a cosmopolitan community, albeit weaker than in a national one, ought to be sufficient to help create a sense of dignity. Forms of nationalism which are selective or exclusive do not, however, fit in this paradigm, and moreover hinder the adoption of cosmopolitan norms like human rights.

### 5.2.3 The Kantian cosmopolitan right to hospitality

Apart from being an existential, cultural or political ideology cosmopolitanism is also an ordering principle of global society, of which human rights is an intrinsic part. Indeed it is Kant's vision of federal cosmopolitanism which above all informs the creation of the modern human rights vision. As Robert Fine has pointed out, Kant 'recognised that no sooner were the rights of man articulated than they entered into conflict with the national organisation of political communities that underwrote their existence.' This is what led Kant to seek a concrete realisation of the universality of the rights of man, and what motivated the transition to the modern human rights movement.

Kant's cosmopolitan vision of a world order was one organised into a voluntary federation of 'bounded communities', or states, with porous borders regulated by the cosmopolitan right to hospitality. In *Perpetual Peace* Kant argues that true and world-wide peace can be constructed when the following three conditions are met. The first entails that states are organized internally according to republican principles. The second condition is that states are organized externally in a voluntary association for the sake of keeping peace. And the third condition is 'the right to hospitality', that is, that the state not only respects the human rights of its citizens but also of foreigners.<sup>28</sup> The following is a detailed description of the right to hospitality by Kant:

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<sup>28</sup> Immanuel Kant, *Perpetual Peace*, Cosimo Inc., New York, [1795], 2005.



This right to hospitality, however – that is to say, the privilege of strangers arriving on foreign soil – does not amount to more than what is implied in a permission to make an attempt at intercourse with the original inhabitants. In this way far distant territories may enter into peaceful relations with one another. These relations may at last come under the public control of law, and thus the human race may be brought nearer the realization of a cosmopolitan constitution... We are speaking here, as in previous articles, not of philanthropy, but of right; and in this sphere hospitality signifies the claim of a stranger entering foreign territory to be treated by its owner without hostility. The latter may send him away again if this can be done without causing his death; but, so long as he conducts himself peaceably, he must not be treated as an enemy. It is not a right to be treated as a guest to which the stranger can lay claim – a special friendly compact on his behalf would be required to make him for a given time an actual inmate – but he has a right of visitation. This right to present themselves to society belongs to all mankind in virtue of our common right of possession of the surface of the earth on which, as it is a globe, cannot be infinitely scattered, and must in the end reconcile ourselves to existence side by side: at the same time, originally no individual had more right than another to live in any one particular spot.<sup>29</sup>

In brief therefore, the ‘right to hospitality’ includes the following four characteristics which guide the obligations that states have towards aliens on their territory: a) it is limited to friendly intentions as this will result in peoples engaging with each other; b) it is not a charitable enterprise, since it is based on the premise that the ownership of ‘territory’ by a state is false, the earth belongs to all; c) strangers should not be treated with hostility; and d) strangers have the right to visitation but further agreements would need to be made for the right to settle.

The right to hospitality, albeit limited, is critical to Kantian cosmopolitanism because it is the systemic vent that regulates the porosity of the borders necessary for a cosmopolitan order. The right to hospitality in addition guides discussions on immigration and on what reciprocal moral obligations people have towards each other. What role do foreigners or ‘aliens’ occupy within a democratic nation-state? What claims could they make within the Kantian cosmopolitan framework? As Benhabib has pointed out, it is not clear what degree of obligations towards ‘aliens’ Kant would have supported. The principle of the right to hospitality is however critical for discussions on the rights of immigrants, as Nussbaum points out:

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<sup>29</sup> Ibid, pp. 17-18.

...protections for the rights of immigrants are necessary. Patriotism always risks veering into xenophobia, and xenophobia often takes new immigrant groups as its targets. In addition to protections for minorities who already enjoy citizens' rights, a purified patriotism needs to be advanced in conjunction with firm protections for the rights of legal immigrants who are not (or not yet) citizens, and decent arrangements for illegal immigrants.<sup>30</sup>

The right to hospitality regulates solidarity with strangers. Using the same cosmopolitan logic however, such solidarity is extended also beyond the territorially bound state. Kantians like Benhabib are reluctant to extend their discussion beyond the state, but cosmopolitanism's existential thrust indisputably nurtures the notion of solidarity. Within this framework states have certain obligations towards 'alien others' on their territory, and other obligations, of a different nature but still necessary, to 'others' outside their territory.

In the next section, using the above discussions as guidance, Maltese cultural history and cosmopolitan approach will be analysed to shed light on the contemporary reception of irregular immigrants in Malta.

### 5.3 'Human rights for the Maltese first': An account of cosmopolitanism in Malta

Taking my cue from the customary phrase 'Human rights for the Maltese first', repeated in a quasi-proverbial way in discussions about both legal and illegal immigration, this section explores cosmopolitanism in Malta.<sup>31</sup> This popular maxim refers to the common perception held by the Maltese that there is a moral superiority

<sup>30</sup> Martha C. Nussbaum, 'Towards a globally sensitive patriotism', *Daedalus*, Vol. 137, No. 3, 2008, p. 86.

<sup>31</sup> Explanatory note: In everyday usage the Maltese often mix English and Maltese. The proper translation of 'human rights' is '*drittijiet (fundamentali) tal-bniedem*' – this is hardly ever used in common everyday language. During my fieldwork I generally used 'human rights' in English since it facilitated comprehension which meant that people would either say 'human rights for the Maltese first' or 'human rights *għall-Maltin l-ewwel*'. I have searched for the origin of the maxim, but it does not appear to feature in any prominent literary work. It could however be related to the popular phrase '*Il-Malti l-ewwel*' (literally, 'the Maltese first') which evokes the immediate pre-Independence and post-Independence era when the Maltese parties were trying to negotiate a deal with the British that would have best served the interests of the Maltese. This phrase was revived in the wake of irregular migration and is used throughout the main website of the far right exponents in Malta [www.vivamalta.org](http://www.vivamalta.org). It might also be a twist on '*Malta l-ewwel u qabel kollox*' (Malta first and foremost), a phrase made famous by the former Prime Minister of Malta, Dominic Mintoff and which became a battle cry for nationhood and severing ties with the monarchy by becoming a Republic during the tumultuous post-Independence period. For more on the latter see: Mario Cardona & Stephen Bonnici, '*Il-Patria l-ewwel u qabel kollox. L-Itra ta' Don Lorenzo Milani lill-Kappillani Militari tat-Toskana*', (The Fatherland first and foremost. Don Lorenzo Milani's letter to the military chaplains of Tuscany) in *Lorenzo Milani Bejn Ilbieraħ u Illum*, ed. C. Borg, Horizon Publications, Malta, 2010.

of duties to compatriots over and above duties owed to non-nationals. ‘Human rights for the Maltese first’ or ‘Human rights *għall-Maltin l-ewwel*’ is a strong leitmotif whose recurrence was not limited to one group of people. As an expression, it would typically come out as a retort to my introduction of the term ‘human rights’ to a conversation on some aspect of irregular migration. It was generally presented in a semi-righteous tone in order to convey the message: ‘you ought to know *where* your primary obligation lies’. Its wide acceptance and acclaim during my fieldwork indicated that this rationale could underlie political and public consciousness in Malta. Whilst this is in part understandable: migrants as foreigners, unlike the Maltese, are not members of the polity and therefore might be subject to differentiated treatment. This rationale becomes harmful when the differentiated treatment attacks basic tenets of human dignity, that is, human rights. It points to a lack of a cosmopolitan approach and becomes a significant barrier deterring the respect of human rights of ‘foreigners’ in Malta. Indeed my own fieldwork and interviews have yielded a similar concern with the lack of a cosmopolitan approach. A government agency employee reiterates this, and to explain, focuses on the exclusively and selectively ethnocentric, and that is, fundamentally misconceived, view of human rights:

It’s as though the absorption of the discourse of human rights has been *selectively* digested. Human rights exist – but for the Maltese and for those who are like the Maltese.<sup>32</sup>

This comment does not only demonstrate a lack of internalisation and appreciation of human rights, but also a mistaken conception that human rights can be, and are, *selective* and *exclusive*. What appears to be missing is a cosmopolitan political culture, which at its core has the idea that all human beings, regardless of their political affiliation, nationality, legal status and so on, belong (or at least can belong) to a single community, and that this community should be cultivated.

This section will show how the Maltese people have come to the understanding that ‘Human rights [are] for the Maltese first’ by looking at the social and cultural history of the Maltese. Questions that will be asked will reflect the three categories that are constitutive of the understanding of cosmopolitanism which underpins human rights:

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<sup>32</sup> J, Personal Interview - Government agency employee, 20 December 2008.

a) how has Maltese society's relationship with foreigners over the years impacted on cosmopolitanism in Malta?; b) what does the dominant form of nationalism adopted by the Maltese say about cosmopolitan orientations?; c) how has EU membership influenced cosmopolitanism in Malta?

### 5.3.1 Maltese society's relationship with foreigners

The 259 years (1530 – 1799) under the Order of the Knights of St John and the 162 (1802-1964) years under British colonial rule were very different periods in Maltese history. These left a huge impact on the formation of the Maltese state and society, not least from a cosmopolitan point of view, because they influenced the political culture and conditioned emigration and immigration.

Of great significance is that the first mention of cosmopolitanism in Malta is during the time of the Knights between 1530 and 1799. One of the most powerful political organizations in the late Middle Ages was the Order of St. John of Jerusalem, the Knights Hospitallers, whose ranks were filled by scions of the richest aristocratic families of Europe.<sup>33</sup> Cassar demonstrates that the Knights made Malta a high profile cosmopolitan hub.<sup>34</sup> This was consolidated with the building of the capital city Valletta which attracted foreigners and Maltese but was mainly brought about by the nature of the Order of St. John which in itself had, uniquely for its time, a cosmopolitan make-up. The religious and military Order with a mandate which was supranational or ethnic, since they were charged with the protection of the Holy Land and provided care for poor, sick or injured pilgrims. It was internally organised on the basis of nationality, with the Knights being placed under one of the following eight Langues (Tongues): Aragon, Auverne, Castile, England (with Scotland and Ireland), France, Germany, Italy and Provence<sup>35</sup> In addition, the Order's cultural and economic presence attracted peoples (not only European), providing greater scope for the Maltese to interact with foreigners.

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<sup>33</sup> Formed in Jerusalem in the 11th Century to provide hospital care and protection to Christian pilgrims visiting the Holy Land, the Knights soon became one of the foremost military powers in the region.

<sup>34</sup> Carmel Cassar, *Society, Culture and Identity in Early Modern Malta*, Mireva Publications, Msida, 2000.

<sup>35</sup> Joseph Attard, *The Knights of Malta*, PEG Ltd, San Gwann, 1992, p. 4.

Cassar also relates how Malta benefited from a continual in-flow of people, particularly after the 1565 Great Siege. Migration in early modern times became a staple feature of life in the Mediterranean, facilitated and supported by the increased urbanisation and mix of ethnic groups in cities. The demographic trends of sixteenth century Malta between 1524 and 1590 show an approximate net population increase of about 50 per cent, from 20,000 to 30,000. This was brought about by the presence of the Knights and their dependents, and a steady in-flow of immigrants attracted by rapid urbanisation. This happened in spite of a rapid demographic decrease with the arrival of the Order which led to many Maltese losses in various battles like the Djerba debacle of 1560, the tragedy of de Saint Clemens in 1570 and the 1565 Great Siege. In addition, fear of a return of a larger Ottoman Armada led to an exodus of Maltese people from the island usually to neighbouring Sicily. According to Antonio Bosio, the Order's historian who wrote *Dell'istoria della sacra religione*, these emigrants were from Maltese leading families, including the noblest and the wealthiest.<sup>36</sup> This outward trend continued into the 17<sup>th</sup> century spurred particularly by the 1592-1593 plague and food shortages. Grand Master Garzes in 1600 recorded that in the previous four years, 2,000 Maltese had left the island due to food shortages. This was 1/5<sup>th</sup> of the Maltese population, which Cassar comments was a situation which the Government could ill-afford. Efforts to sustain immigration at this stage were therefore crucial to maintain manpower. All this would suggest that the social impact must have been considerable. Cassar points out the important function of immigration for the Order:

Immigrants were, above all, a source of supply to meet the Harbour's labour demands. This mechanism enabled the Order to maintain its vast construction programmes, and to man and fit its fleet.<sup>37</sup>

Cassar also narrates how large-scale immigration was a necessity due to the demographic make-up of the island:

...a large island community, with a high infant mortality rate, could only be sustained by large scale migration, thanks to the ever-expanding trade and business activities

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<sup>36</sup> Carmel Cassar, *Society, Culture and Identity in Early Modern Malta*, 2000, p. 98.

<sup>37</sup> *Ibid*, p. 106.

brought about as a by-product of the cosmopolitan environment created by the Knights Hospitallers.<sup>38</sup>

The huge activity in the Harbour area left its impact on the rural areas of Malta since people, as well as goods, travelled between villages and towns. Villagers returning back from towns took with them some influences, habits and tastes and Cassar notes that a demonstration of this is the new style of village churches that emerged in the early seventeenth century.<sup>39</sup> Official urban attitudes to immigration were ambivalent and although it was understood that without the flow of new blood the towns would have declined, a number of restrictions kept control on the inflow of new settlers to the Harbour towns while continuing to entice peasants from the surrounding countryside. Many immigrants came to the island as slaves captured during raids in North Africa. However, Cassar notes that slaves were relatively free to mix with all strata of Maltese and resident society and were even allowed to take part time jobs to earn money for their redemption. Interestingly, some of these slaves got integrated into Maltese society through conversion to Christianity and local marriages.

This era, under the rule of the Order of St John, also coincides with the first roots, or construction, of a Maltese political identity.<sup>40</sup> The Professor of Law and President Emeritus of Malta, Guido De Marco sums up the predominant and over-zealous nationalistic narrative in Malta:

...existing since when we were a Roman *municipium*, realising itself in the uprising against Monroy under Spanish domination, asserting itself as a sovereign entity with the Order of St. John, realising itself in revolt and victory over the French occupation between 1798 and 1800; the Maltese then aimed at national independence under the protection of Great Britain, only to be dispossessed by the imposition of colonial rule by the 'protecting power' putting an end of '*Melitensium amor*' and substituting thereto military occupation by cession.<sup>41</sup>

Overall, this turn of events found fertile ground among the Maltese elite who, even prior to the Order's arrival, had already been exposed through residence and studies

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<sup>38</sup> Ibid, p. 119.

<sup>39</sup> A considerable innovation in the structural development of these churches was the introduction of the cruciform plan – a device that was predominant in late sixteenth century Italy.

<sup>40</sup> This is one of the major arguments made in: Carmel Cassar, *Society, Culture and Identity in Early Modern Malta*, 2000.

<sup>41</sup> Guido De Marco, 'Foreword' in *The Origins of Maltese Statehood: A case study of decolonization in the Mediterranean*, 2nd edition, H. Frendo, Interprint Ltd, Malta, 2000, p. 7.

to European 'high culture'. By 1799, when the Order was forced out of the Islands, Maltese society had undergone a massive social, political and economic upheaval. The deliberate role of the Maltese in contriving with the French to overthrow the Order demonstrates that the Maltese did not succumb peacefully to a secondary political role, but that they took a lot from their interaction with the Order and ultimately used it in their own interest.

The *Dichiarazione dei Diritti degli Abitanti di Malta e Gozo* (Declaration of Rights of the Inhabitants of Malta and Gozo) of 1802, drafted for the British colonisers is another example of the political and educated characteristics of the Maltese elite. Chief Justice Emeritus Joseph Said Pullicino, in a paper outlining the history of human rights in Malta, marks the *Dichiarazione* as a demonstration of the Maltese commitment to the Constitution as an inviolable charter.<sup>42</sup> The Maltese, he states in a triumphant tone, just out of a short but tyrannical French rule, had embraced the philosophy of rights. Said Pullicino however holds an over-legalistic understanding of 'rights', and in contrast I would argue that the *Dichiarazione* says more about the way power relations were perceived and constructed by the Maltese than about the development of a legal culture based on 'human rights'. This notwithstanding however, the *Dichiarazione* signalled a watershed between the enjoyment of relative self-autonomy of the Maltese under the Order to oppression under the British which gradually lead to a militant stance borne out of a lack of engagement and respect.

The relationship of the Maltese with the British started on shaky premises and empty promises. It was only in the 20<sup>th</sup> century when the sensitive global political situation and the need for loyalty to the Empire was crucial, that the British considered giving the Maltese some autonomy. The British, like the French, had entered Malta 'as friends, to establish themselves as masters'.<sup>43</sup> The Maltese delegation which had sought the help of the British to overthrow the French, was under the impression that Malta would be assigned the special status of a protectorate and therefore that the Maltese would be virtually autonomous. The Maltese thus sought to differentiate

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<sup>42</sup> 'That no man whatsoever has any personal authority over the life, property and liberty of another. Power resides only in the law, and restraint, or punishment, can only be exercised in obedience to the law (Maltese Congress, 1802)'.

<sup>43</sup> Victor Mallia-Milanes, ed. *The British Colonial Experience, 1800-1964: The Impact on Maltese Society*, Mireva, Msida, 1988, p. 2.

themselves from the other colonies from the start. However, one of the first things the British did, when they took over the islands, was dissolve the Maltese Congress. This action carried significant political and economic repercussions for the Maltese. It was a powerfully symbolic way of asserting dominance by putting the Maltese elite down. This quick unfolding of events illustrates both the Maltese high perception of themselves in sharp contrast to the insignificant value they seemed to have to the British Empire.<sup>44</sup>

Colonialism undid quite a lot of what had been achieved in terms of political emancipation. With the focus on the faltering political relations with the British, the Maltese resorted to constructing a national narrative borne out of suppression. This inward-looking stance worked against any cosmopolitan approach that had been adopted before. Two significant changes served to enhance this process of de-cosmopolitanisation and the concurrent rise of nationalist ideas: a) socio-economic changes and geopolitical influences; and b) the relationship with the colonisers and the construction of a colonial identity.

By the turn of the 20<sup>th</sup> century Malta's economy had already started taking the form of a fortress economy. Mallia-Milanes asserts that changes to the economic and social structures of Malta, following the revolution of 1798, were slow and protracted. This happened:

...because the British had not come to Malta, as they had done in India, in search of markets, but to gain a strategic and military advantage over their rivals.<sup>45</sup>

Malta had by then become a hub for business related to the Empire. The dockyards in particular were very well known. Notwithstanding the amount of wealth this was probably generating, the relationship with the colonisers remained essentially a conflictual one. Frendo's analysis of the refusal to delegate power to the Maltese, an issue which would have long-term implications in the nationalist movement, was intrinsically tied to Britain's view of Malta as a fortress and not as an ordinary colony:

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<sup>44</sup> '...Malta was acquired in the course of the interminable international struggles of the period before 1815 and then retained mainly to keep France out, rather than because Britain wanted or needed it. In the course of time, however, a function was found for Malta as the main Mediterranean naval base west of Alexandria, and it retained this function and utility into the 1950s.' Quoted from Victor Mallia-Milanes, ed. *The British Colonial Experience, 1800-1964*, 1988, p. xxvi.

<sup>45</sup> Victor Mallia-Milanes, ed. *The British Colonial Experience, 1800-1964*, 1988, p. 15.



The conflict between civil rights and military needs was at the heart of Maltese politics: every time the Maltese petitioners invoked the '*Melitensium Amor*' argument – the idea that Malta had been freely ceded to Britain by the Maltese – the British reiterated the fortress formula, the strategic value of Malta made it unlikely that it could be treated like an ordinary colony. Mistrust was fomented on both sides because of this preoccupation...<sup>46</sup>

The inward-looking trait of the Maltese mentioned earlier, by this time had taken root and gradually gave way to nationalistic aspirations.<sup>47</sup> In the 1870s, the Maltese Congress, made up of Maltese elite and nobility, which had gained a lot of autonomy under the Knights (and had been dissolved immediately by the British) was finally reconstituted, albeit with much lesser powers. At around this time a number of anti-colonialists and nationalists, strongly influenced by the unification of Italy, started contributing to a nationalistic movement. The colonialists were very much aware that the Maltese Italianate leanings could post a threat to their management. In addition, it was also a time when there was an increasing recognition of the importance of Malta for the Empire. Following the opening of the Suez Canal in 1870 and the unifications of Italy and Germany, Malta's strategic value, as Winston Churchill said, grew into, 'one of the master keys of the British Empire' during the first half of the 20<sup>th</sup> century and the Second World War. However, in an ironic twist, the experience of the Maltese population became more negative as the colonial management became increasingly dictatorial. Frendo writes:

Gradually the nature of colonial government also changed from a relatively easy going routine into a businesslike, intrusive, more authoritarian rule.<sup>48</sup>

By independence in 1964, following the two World Wars, there were serious doubts whether the economy could support a sovereign state. Maltese society under British rule was mismanaged and neglected, and no long terms plans for economic regeneration were put in place. Frendo eloquently put it:

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<sup>46</sup> Henry Frendo, *Party Politics in a Fortress Colony: The Maltese Experience 2<sup>nd</sup> Edition*, Midsea Publication, Valletta (1979 – 1<sup>st</sup> edition), 1991, p. 5.

<sup>47</sup> These nationalistic aspirations were not homogenous. The pro British favoured more assimilation; whereas the pro Italians favoured, at some point annexation to Italy, but eventually independence. See Henry Frendo, *Party Politics in a Fortress Colony*, 1991, Chapter 1, for a good discussion of the different aspirations.

<sup>48</sup> Henry Frendo, *Party Politics in a Fortress Colony*, 1991, p. 6-7.

...misgovernment was inevitable because generals usually had little knowledge of representative institutions and civil affairs: the head of government was often not the man in charge of running the country.<sup>49</sup>

The development of the 'nation' and the 'state' in Malta appears to have been formed under two distinct influences. On the other hand, the 'nation' or '*ethnos*' can trace its roots to the cosmopolitan era of the Knights of St. John when the Maltese political elite enjoyed a good degree of self-governance and autonomy. On the other hand, the idea of 'statehood' and 'independence' emerged from a colonial period characterised by oppression and severe losses in terms of self-governance. This has had an effect on the contemporary national identity leading to an ambivalent relationship with foreigners and the development of an insular nationalism. These socio-political developments run counter to a cosmopolitan culture and could be seen as informing the nationalist sentiments that recently re-surfaced in discussions on irregular immigration.

### 5.3.2 Nationalism, insularity and independence

The manifestation of nationalism reached a peak right after the Second World War. The anthropologists Jon Mitchell and Gary Armstrong in their research on nationalism in Malta identified three football matches which show the development of nationalism in this period. The first was a match of the Maltese football team against the Yugoslavs of Hadjuk Split on the 25<sup>th</sup> March 1945. The British 'God Save the Queen' was played for the Maltese team before the game, in spite of an officially adopted Maltese national anthem (adopted in 1941 but written and first performed in the 1920s). Armstrong and Mitchell comment thus:

The perversity of this, particularly following four years of intense Maltese suffering and hardship, was recognised by the crowd, which protested...Midway through the British anthem, the crowd spontaneously launched into *L-Innu Malti* [the Maltese anthem]...<sup>50</sup>

The second match mentioned was the first international match that Malta played against Austria in 1957. In a reflection of the political climate of the time when the Malta Labour Party (MLP) had only just narrowly lost a referendum in which they had

<sup>49</sup> Ibid, 1991, p. 5.

<sup>50</sup> Gary Armstrong & Jon P. Mitchell, eds. *Global and local football: Politics and Europeanization on the Fringes of the EU*, Routledge, Oxon, 2008, pp. 26-27.

proposed Malta's integration into the United Kingdom, the team did not enjoy unanimous support. Mitchell and Armstrong go on to describe yet another match, which saw 'a form of nationalism manifested'. This was a 1971 World Cup qualifier against England. It attracted around 30,000 people and was the largest ever attendance for a match at the Empire Stadium in Gżira. Comments in the British media before the game proclaiming that the England side should not be troubled by 'a team of waiters', infuriated the Maltese, who came up with a chant for the game; 'We are the waiters, you are the bastards.' The British military authorities still on the island confined all service personnel to barracks during and after the match, fearing disorder. These incidents are significant because they are rare – both in Malta's past and present.

The political shift to independence appears to have led to a rigid and exclusive nationalism. The effects of an exclusive nationalism on a society physically and geographically already prone to insularity, was huge. This 'insular nationalism' was deliberately nurtured by Maltese politicians who had to make the significant shift from 'middlemen', representatives of the Maltese population to an outside occupier to 'leaders' and convince the masses. Nationalist activity when selective and exclusive, as seen earlier, does not leave space for cosmopolitan ideals and therefore it is safe to conclude that during the period when the idea of Malta as an independent state was being formed, the cosmopolitan outlook was severely lacking. The focus was totally inwards and directly linked with keeping the nationalistic momentum that had been achieved just prior to Independence, to nurture a sense of heightened cultural self-esteem and ensure consistent political participation. This was no easy task at a time when Malta's economy was still very poor but it also brought to the fore a related issue, that of national identity. Speaking about this period, Frendo comments:

...the self-identity question 'what is Malta?' needs to be all the more seriously and meaningfully addressed culturally, historically and politically, just as it needs and deserves to be more widely recognised and appreciated.<sup>51</sup>

The historical background of emigration is an important part of Malta's political and cultural fabric, and intimately tied to the country's national identity and state-building

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<sup>51</sup> Henry Frendo, *Party Politics in a Fortress Colony*, 1991, p. viii.

endeavours. The period of massive and rapid outflow migration took place during the post-war period between 1945 and 1979 when the total of emigrants numbered 140,000.<sup>52</sup> The Government managed mass emigration programmes mainly to Australia, Canada and the UK. This followed a pattern common with the other Southern Mediterranean countries which quickly became countries of emigration in the post-war era.<sup>53</sup> The 'safety valve', as this outflow migration was aptly labelled by Fr Lawrence E. Attard, an authority on Maltese emigratory movements and a returned emigrant himself, differed to the other south European states, in scale and intensity when compared to the actual population of Malta. Consequently this had a larger cultural impact on Malta, one which, it could be argued, had a considerable influence on the Maltese perception of migration. Gradually though, with increasingly stable economic development, emigration became a thing of the past. In 1991, the newly re-established Department of Labour and Social Services was re-constructed without the Emigration Division, which had previously been responsible for emigration policy and research, signalling that emigration policy was no longer a government policy – prompting Attard to mark it as 'the end of an epoch'.<sup>54</sup>

Large-scale emigration served to sustain the sense of insularity amongst the Maltese left behind. Moreover the fact that the destination countries were so far away meant that if the emigrants were absorbing cosmopolitan influences from new host countries, little if any was reaching the population left on the islands. It was only in the late 1980s, with better economic prospects and a newly achieved political stability, that return migration became a significant phenomenon. With this backdrop the Nationalist Party (PN) took office in 1987 and started working towards EU membership by liberalising the economy and steering the country back to Western allegiance. The PN built a narrative of modernisation and Europeanisation, a narrative which is strong in Malta for various reasons not least due to their long stay in government.<sup>55</sup>

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<sup>52</sup> Katia Amore, 'Active Civic Participation of Immigrants in Malta', *POLITIS – a European research project*, <<http://www.politis-europe.uni-oldenburg.de/download/Malta.pdf>>, 2005, (accessed 21 July 2011), p. 6.

<sup>53</sup> Russell King, Anthony Fielding and Richard Black, 'The international migration turnaround in Southern Europe', in *Southern Europe and the New Immigrations*, eds. Russell King & Richard Black, Sussex Academic Press, Brighton, 2007.

<sup>54</sup> Lawrence Attard, *Beyond Our Shores: A Panorama of Maltese Migration*, PEG Ltd, San Gwann, 2007, pp. 230-233.

<sup>55</sup> The PN has been in government since 1987, except for a short stint between 1996 and 1998, when the MLP were in government.

On the 1<sup>st</sup> May 2004 Malta together with another nine countries joined the EU becoming the smallest and southern-most Member State of the EU. In the accession period, considerable structural and economic reform had to take place resulting in the ratification of the *acquis* in 2003. Long-standing fears over sustainability seemed to have been definitely buried. Accession to the EU was also seen as a way out of insularity, as the Eurobarometer author Robert Micallef comments:

For most Maltese, the EU mostly means freedom to travel, study and work, as well as a stronger say in the world. This reflects the wish to overcome some of the drawbacks of living on a small island state through EU membership.<sup>56</sup>

One would have expected EU accession to have a cosmopolitan influence on Malta. The debates were dominated by the similarity of 'Maltese' and 'European' identities, and many made recourse to various cultural and historical arguments to show how the Maltese are 'historically' and 'culturally' European. Carmel Attard, a former director of the Malta Information Centre, interestingly marks the beginning of the relationship between Malta and the EU to 1964 'immediately' after independence. In his paper he charts the laborious trajectory that Malta followed to gain membership into the EU, claiming that:

...the entry of Malta in the EU marks the culmination of the best relations that the island has had over the past three decades or so.<sup>57</sup>

In spite of this, the post-independence, and as Frendo calls it the 'self-identity' question, surfaced again in the years leading to EU accession. The intensification of the identity debate brought to the surface a new and sharp sense of a selective nationalism. As the scholar on European Politics Michelle Cini points out in her concluding observations on the EU Referendum in Malta:

...the referendum was also about understandings of Malta's identity as a European and/or Mediterranean state...it is a factor which pervades all others. It is perhaps difficult to treat this as a source (or cause) of the referendum outcome, but it does underpin any explanation of Malta's vote in the referendum. The narrowness of the 'yes' vote only serves to demonstrate that this aspect of Malta's identity remains

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<sup>56</sup> Robert Micallef, *Eurobarometer, Executive Summary*. European Union, Brussels, 2004.

<sup>57</sup> Carmel Attard, 'The long road to Malta's accession to the EU 1970-2004' in *Roots of a Nation: The development of Malta from an Island People to an Island Nation*, ed. K. Gambin, Heritage Malta & EU Accession Celebrations Committee, Valletta, 2004, p. 133.

contested. Is Malta a European or a Mediterranean state? Most in Malta would accept that the answer is 'both'. Yet some might still place the 'Mediterranean' before the 'European'. To an outsider this might seem a matter of semantics, but it reflects the old divisions in Maltese society, divisions that take a more contemporary political form in the cleavage that separates traditional MLP and PN families.<sup>58</sup>

The inability of the Maltese to accept additional partialities to their national identity points to the selectivity and exclusivity of nationalism in Malta. The picture that emerges is that of a community with too many unresolved issues regarding their national identity, to be able to assume easy 'layering' of identities. One of the issues, which will be discussed again in Chapter 5, is what Cini refers to as the 'old divisions in Maltese society'. This is an old debate. In fact, the political philosopher Peter Serracino Inglott wrote how after 1964 when Malta became independent:

...there seems to have occurred a sharp polarization of the Maltese people into two groups and, it is very tempting to say, almost two 'nations'. Superficially, it might seem as if two socio-cultural networks have come into being, with different economic, religious and moral values.<sup>59</sup>

Serracino Inglott goes on to say that this was a false perception:

I think that there was real danger of this happening for a number of years, but the very fact that the danger was averted, in the sense that nothing like a civil war broke out, is a strong piece of evidence in support of the judgement that the people of Malta firmly assumed the mantle of nationhood in 1964.<sup>60</sup>

Serracino Inglott's thesis has been strongly contested by the sociologist Godfrey Baldacchino. In two papers aptly entitled 'A Nationless State' and 'Pangs of Nationalism' Baldacchino lays out his argument for the lack of development of one nation amongst the Maltese and goes to show the reverberations of a lack of national identity in contemporary Malta.<sup>61</sup> According to Baldacchino, it is only with the advent of mass irregular migration that Malta, for the very first time, was presented with a unified front by both political parties, which up till then had acted as leading two

<sup>58</sup> Michelle Cini, 'Culture, Institutions and Campaign Effects: Explaining the Outcome of Malta's EU Referendum' in *EU enlargement and referendums*, eds. A. Szczerbiak & P.A. Taggart, Routledge, Oxon, 2005, p. 42.

<sup>59</sup> Peter Serracino Inglott, 'Was Malta a 'Nation' in 1964?' in *The British Colonial Experience 1800-1964*, ed. V. Mallia-Milanes, Mireva Publications, Msida, 1988, p. 370.

<sup>60</sup> Idem.

<sup>61</sup> Godfrey Baldacchino, 'Pangs of nascent nationalism from the nationless state? Euro coins and undocumented migrants in Malta since 2004', *Nations and Nationalism*, Vol. 15 (1), 2009, pp. 148–165; and Godfrey Baldacchino, 'A Nationless State? Malta, National Identity and the EU', *West European Politics*, Vol. 25, No.4, 2002, pp.191–206.

'nations'. Baldacchino calls these new revelatory political processes, motivated by an identification of a 'significant Other', as constituting a 'nascent nationalism' in Malta. Baldacchino says:

While one should not discount the influence of EU membership on the Maltese psyche in the medium to long term, the 'significant other' so far has not been a diffident Brussels bureaucracy but the Sudanese migrant who entered Maltese waters seeking safe refuge in Europe. Mind you, the two referents may yet combine as the complementary facets of a tragic narrative, if the EU is felt by an increasingly racist xenophobic Maltese to be avoiding, or even obstructing, an adequate response to the 'immigrant threat'. Being part of the EU has encouraged the evolution of a secular, national character in Malta from a somewhat unlikely quarter.<sup>62</sup>

It is not surprising that an increase in an exclusionary nationalist sentiment, or a 'nascent nationalism', has been triggered by irregular migration. The choice that has to be made is between a partial cosmopolitan political culture that includes nationalism, and an exclusionary nationalist one that shuns cosmopolitan ideals. The latter appears to be on the increase and this does not augur well for cosmopolitanism and human rights.

### **5.3.3 The right to hospitality, international solidarity and the Dublin System<sup>63</sup>**

Cosmopolitanism certainly illustrates a picture of Malta as a country with sovereignty thrust upon it in the absence of a national identity. Awakening to nationalism only half a decade later with the arrival of boatfuls of 'significant Others' from 47 different countries. If these 'cosmopolitan' paradoxes were not enough, this section proffers another two paradoxes this time related to EU and inter-state solidarity: the first is how the rescue of people at sea is being increasingly criminalised, and the second is the Dublin System which is set up to regulate immigrants into the EU but puts unfair burdens on border Member States.

One of the noble and less-mentioned acts of humanitarianism that Malta has always expressed a commitment towards in both rhetoric and in practice, is the rescue of

<sup>62</sup> Godfrey Baldacchino, 'Pangs of nascent nationalism from the nationless state?', 2009, p. 161.

<sup>63</sup> According to the European Union, the 'Dublin System' comprises the Dublin Regulation, which lists the criteria to determine responsibility and establishes mechanisms to transfer asylum seekers, and the EURODAC Regulation, which establishes a technical tool for comparison of fingerprints as support to the application of the Dublin Regulation.

migrants at sea. This activity could be seen as an implementation of the cosmopolitan right to hospitality. In practice, there have been instances, as described in Chapter 3, where immigrants' rescue at sea was delayed due to differing interpretations of maritime law with neighbouring Italy and problematic issues with Libya. In general, however, the principle is well respected and the accompanying rhetoric from both the Government and society, advocate this as a moral obligation.

EU laws in this regard are seen as acting against this principle. The researcher and deputy director of the Institute of Race Relations Liz Fekete shows how EU governments are increasingly seeking to criminalise acts of solidarity like the rescue of migrants stranded at sea. She recounts an incident which took place in August 2007.<sup>64</sup> A group of seven Tunisian fishermen rescued a group of 44 Eritrean, Sudanese and Ethiopian migrants whose inflatable dinghy was about to sink. The fishermen were arrested when they landed on the Italian island of Lampedusa, and subsequently moved to a prison in Agrigento in Sicily where they faced prosecution. The charges brought were of aiding and abetting illegal immigration. This is an offence that carries a maximum sentence of fifteen years imprisonment in Italy. Following a petition signed by a 100 MEPs, five fishermen were released and allowed to return back to Tunisia, whereas the other two were still in prison at the time Fekete was writing.<sup>65</sup> Fekete uses this example to show how the new approach of criminalising those who, for humanitarian reasons, assist asylum seekers or undocumented migrants is 'putting in jeopardy the oldest of all humanitarian laws, that of rescue at sea'.<sup>66</sup> Fekete goes on to explain the situation that sailors find themselves in:

The constant demonisation of the boat people means that every sailor knows that a sea rescue brings with it unpopularity, hardship for the entire crew and possible imprisonment. They know fully well what kind of leadership to expect from elected politicians who are more concerned with how to stop the survivors landing on their shores than how to prevent their deaths. This has led UNHCR representative Laura Boldrini to conclude that, between them, the various Mediterranean countries are

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<sup>64</sup> Liz Fekete, 'Crimes of solidarity', *Race & Class*, Vol. 50, No. 4, 2009, pp. 83-97.

<sup>65</sup> I have been unable to find further information to this incident, and what has been recounted is Liz Fekete's description.

<sup>66</sup> Liz Fekete, 'Crimes of solidarity', 2009, p. 94.



turning the sea into a 'Wild West in which human life has lost its value and people in danger are left to fend for themselves'.<sup>67</sup>

Another cosmopolitan paradox brought about by the EU's reaction to irregular migration is the Dublin System. The EU, an institution which claims as one of its founding pillars the principle of solidarity, enacts a system to regulate asylum seekers applications which puts undue pressures on border Member States. On the one hand, the Dublin System as a set of regulations to process asylum applicants could be seen as a modern day implementation of the Kantian norm of hospitality, regulating the reception and management of a specific group of non-EU immigrants. On the other hand, the internal structure and unfairness of the system on border Member States, appears to blatantly eschew the principle of solidarity. Malta, like most of the other new Member States, feels that it is being treated unfairly in this area.

Malta's situation, due to the small size and dense population, is even worse than that of other border Member States. This has led the Government of Malta to lobby incessantly with the international community, but particularly within the EU. The following excerpt is a popular presentation by the Maltese Government of the extent of the phenomenon of irregular migration for the country:

The Minister Tonio Borg focused on how difficult it is for a country such as Malta, with a surface area of 316km<sup>2</sup> and a population of 400,000 people, to cope with the influx of migrants and asylum seekers arriving on the island... The average annual number of arrivals is equivalent to 45% of Malta's annual birth rate. One person arriving illegally in Malta is equivalent, in terms of population, to 140 in Italy, 150 in France or 205 in Germany. On the basis of the country's size, the numbers are even larger: one immigrant would be equivalent to 953 in Italy and 1129 in Germany.<sup>68</sup>

Under the premise of human rights and global justice, EU accession forced Malta to take on additional responsibilities for outsiders, by taking a role in the asylum process and more crucially taking on full responsibility for irregular migration under the Dublin Regulation.<sup>69</sup> Initially therefore EU membership appeared a hopeful beacon for irregular migrants' rights. The Dublin Regulation's aim to determine rapidly the

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<sup>67</sup> Ibid, p. 95-96.

<sup>68</sup> Committee on Civil Liberties, Justice and Home Affairs, *Report by the LIBE Committee Delegation on its Visit to the Administrative Detention Centres in Malta*, <[http://www.jrsmalta.org/LIBE\\_Malta\\_Report\\_2006.pdf](http://www.jrsmalta.org/LIBE_Malta_Report_2006.pdf)>, European Parliament, Brussels, 2006, (accessed 02 August 2011), p. 3.

<sup>69</sup> As seen in Chapter 3, prior to EU accession all asylum claims were handled by UNHCR's office in Rome in the absence of a Maltese Refugee Act.

Member State responsible for the asylum claim and prevent applicants from submitting applications in multiple Member States is commendable. However, by putting the responsibility on the country of first arrival, an arguably unfair and excessive burden is put on border countries. For this reason Malta, by being at the EU's southern-most border and the smallest and most densely populated Member State, is particularly disadvantaged. In addition, not being part of mainland Europe means that immigrants have no easy way of moving on from the island and relieving the 'burden', even if on a temporary basis. The EU has instated rectifying measures to help balance the situation like the European Refugee Fund. The Government has however insisted that in the case of Malta 'burden-sharing' mechanisms for moving on immigrants need to be institutionalised. Without inter-state solidarity, the success of any actions implementing the cosmopolitan norm of hospitality can only be limited and of a temporary nature. Inter-state solidarity should be seen as part of the cosmopolitan vision

In view of the perception of unfairness with regards to the Dublin System and the increasing difficulties that Malta is facing with respect to rescue at sea, it is not surprising that the dominant discourse of international solidarity in Malta is framed in terms of the lack of solidarity with Malta. This situation has largely brought about the belief that irregular migration is not a 'Maltese problem', but one brought about by international circumstances and the Dublin System. It has also served to confirm the pre-existing bias that cosmopolitanism is an alias for larger, foreign states seeking their own interests, against which the Maltese need to fight in order to secure their own national interests. It certainly has not helped in the adoption of cosmopolitan norms and if anything has only fuelled a form of exclusive nationalism. The cosmopolitan right to hospitality and international solidarity are two sides of the same coin. The EU appears to have contributed to their separation in Malta.

#### **5.4 Towards a human rights culture**

Layers of different historical, social and political processes all contribute towards a predominant approach which hinders cosmopolitanism in Malta. The mere resilience of such an approach in a developed country which hosts over one million tourists a

year, where holidays abroad are commonplace and where the internet is widely and easily accessible by all, demonstrates how powerful the forces are that need to be addressed.

Key to bringing about the necessary cultural shift is education. Maltese historiography, which is present in school textbooks but also conditions public debate, should include the role of foreigners and migration in the construction of the Maltese nation and the state. Special consideration should be given to review the dominant independence approach to history which depicts the Maltese as helpless, oppressed victims prior to independence and as triumphant and successful thereafter. The cultural approach to history is not mainstreamed into Maltese studies. The leading historian, Henry Frendo, has widely published accounts of Maltese history in the tradition of history as a grand narrative of events and leading people. The adoption of this conventional style by Frendo runs counter to the insights afforded to us by postcolonial theory which have demonstrated the plethora of information that such 'grand narratives' leave out. The leading proponents of postcolonial theory asserted that by failing to depict a full picture of history, grand narratives also run the risk of being reified in popular myths that were essential in nation-building processes. The risks are that these constructions only serve to reproduce the logic of colonialism. It is only in recent years that the historical anthropologist Carmel Cassar introduced a different approach to Maltese history by writing a history of culture, more than a history of people and events. This approach should be promoted and will serve as a good complement to Frendo's reading of history. Overall greater care should be taken to present historical narratives in a way which is fair and properly contextualised.

The launch of a project to set up a 'Migration Museum' on the lines of other Migration Museums in different countries has been recently inaugurated.<sup>70</sup> Reports on the media would suggest that the idea behind this project is to document the post-war history of emigration of the Maltese in recognition of the emigrants' contribution to the 'patria' and their preservation of Maltese culture. It would be good if the Migration Museum's rationale was extended to encompass the unique role that several waves of

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<sup>70</sup> Charles Buttigieg, 'State of the Art Migration Museum', *The Times of Malta*, 28 Oct 2010.

immigration played in the construction of Maltese society and nation over the years and in contemporary times.

On a more generic level, a conscious political choice needs to be made to reconstruct nationalism in a way that allows the accommodation of cosmopolitan norms. This would entail the renunciation of the dominant selective and exclusive nationalist movements. The risk and dangers of allowing these movements to flourish without contestation in the contemporary globalised world is political and cultural isolation. Following on this, specifically in the irregular migration field there should be awareness-raising amongst policy makers of what constitutes a cosmopolitan political culture to ensure that this approach underpins all policies and projects undertaken by state bodies. The Government should strive to support non-governmental organisations' activity supporting a cosmopolitan approach. Human rights campaigns should take special care to put forward the idea of one global moral community and portray it as a source of strength and not vulnerability.

Addressing the negative effects of nationalism is more difficult. However ways need to be found to challenge the justification that exclusivity and prioritisation of Maltese citizens is always desirable and morally right. Public rhetoric which poses the basic needs of irregular immigrants in competition with the basic needs of the Maltese runs counter to human rights. Human rights education is particularly useful in this regard because it introduces basic cosmopolitan norms, equality and non-discrimination. The Government should endeavour to provide different avenues for such human rights education both for school children and also the general public.

Finally, the lobbying efforts of the Maltese Government in EU circles need to be sustained. The cosmopolitan norm of hospitality requires inter-state solidarity. This cosmopolitan norm ought to be exercised by the EU as a block in various areas: rescue at sea, asylum applications, migration management, visa regulations and so on. The mere notion of an inaccessible, selective and exclusive 'Fortress Europe' is singularly against the philosophy of human rights. It is within this larger agenda that the Dublin System needs to be reframed to ensure that it reflects the principle of solidarity.

## 5.5 Conclusion

The human rights understanding of cosmopolitanism, similar to Appiah's 'partial cosmopolitanism', presents a cosmopolitanism which is constantly developing. This definition of cosmopolitanism is supported by a perception of human beings as adaptable, flexible and able to connect to different communities simultaneously. It views different identities and partialities as a normal part of life in a cosmopolitan system. Partialities or biases are the strategic tensions which bring about flux and change by encouraging a continual renegotiation of boundaries.

By exploring Maltese society's cosmopolitan orientations, a picture emerges of a country which as a result of various historical, social and political processes has embraced stringently a selective and exclusive nationalism. The necessary re-articulation of nationalism that should occur to accommodate social and global changes is hampered. This explains the lack of incorporation of cosmopolitan norms. This analysis has served to explain the symbolic significance of what is perceived as being put 'under threat' in the wake of irregular immigration. The independence of Malta and then EU membership, ostensibly might have been seen as opportunities for promoting a cosmopolitan approach, in contrast to the propensity to insularity. The cultural history and recent developments indicate that these two events served to de-cosmopolitise Maltese society and radicalise the notion of an exclusive nationalism. Such trends hinder the internalisation of the cosmopolitan norms of human rights. It serves to explain why irregular immigrants in Malta are perceived not only as non-citizens, but as outsiders to the political community and as such, as individuals with whom there is no moral connection.

Irregular migration happens at converging points of several paradoxes concerning cosmopolitanism in Malta. Clearly, irregular migration emerges as a useful 'concern' for nationalist processes attempting to construct a national identity against a 'significant other', without discounting at this stage a possible perception of a threat of being subsumed into a larger European identity. These forces are so intense that the remaining political space for any cosmopolitan ideas almost becomes irrelevant. Human rights however require the Maltese to consider that there are also moral

obligations towards irregular immigrants. An existential sense of the *cosmos* and the moral obligations binding the global community justify the need for a cosmopolitan system.

A human rights culture clearly requires a cosmopolitan approach which rises out of its universalistic aspirations, its belief in the moral connection between all people and its vision of peaceful coexistence of peoples. Cosmopolitanism provides a political culture which incorporates local particularities with an inclusive global vision. Human rights lay the basis for a partial cosmopolitanism and a cosmopolitan nationalism.

## **Chapter 6: 'A disempowering system': Which kind of democratic practices should be encouraged for the realisation of human rights**

### **6.1 Introduction**

Democracy has been presented by the modern human rights movement as the political system best suited to accommodate human rights principles. In 2005, the UN declared that 'democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing' and that 'while democracies share common features, there is no single model of democracy.'<sup>1</sup> The former asserts the relationship between human rights and democracy, the latter shows an interestingly liberal and nuanced view of democracy. The human rights movement concerns itself with both formal aspects of democracy, like the rule of law, and substantive aspects of democracy which show that the state is functioning as a democracy.

The notion of democracy, across centuries, has served to raise hopes that oppression by the rulers, or those in political office, would be eradicated. The democratic philosophy of political freedom entails a conviction that by giving people a say in government, societies would be more fair and just, and the risk of oppression and exploitation by a privileged few would be minimised. The sociologist Craig Calhoun says:

It was democracy, and more generally the rise of a way of thinking that said governments get their legitimacy from the people and not from divine right, ancient inheritance or sheer power, that transformed relations among the different groups of citizens. Democratic thinking depended on notions such as 'the will of the people', which in turn depended on constituting or discovering some such common will.<sup>2</sup>

The historical convergence of the rise in popularity of democracy as a political system and the idea of individual rights in the 19<sup>th</sup> and 20<sup>th</sup> centuries, has led many to assume

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<sup>1</sup> United Nations General Assembly, *2005 World Summit Outcome Document*, E/CN.4/1998/53/Add.2, annex., adopted by the General Assembly on 15 September 2005, pt. 135.

<sup>2</sup> Craig J. Calhoun, ed. *Social theory and the politics of identity*, Blackwell Publishers, Oxford, 1994, p. 2.

an intimate relationship between the two. This is however not self-evident. The contemporary association might very well be due more to the product of historical coincidence, and less to theoretical similarities. Indeed, the philosopher Hans Köchler has argued that representative democracy in particular, by allowing a delegation of the exercise of power, creates an 'empirical political will' which strips the individual of the right of sovereignty, in the political sense, and is therefore not compatible with human rights.<sup>3</sup> Only a system of direct democracy, Köchler asserts, could theoretically concur with human rights since it does not allow a 'delegation' of the political will.<sup>4</sup> Direct democracy is however impossible to implement in practice in complex societies. For this reason modern societies have opted for representative democracy making it currently the most popular system. The human rights scholar Jack Donnelly alludes to this when he writes: 'Democracy and human rights have very different, and often competing, theoretical and moral foundations.'<sup>5</sup> There are therefore innumerable perils that come with the assumption that democracy is 'naturally' the best political system for human rights to flourish.

This Chapter explores why and how democracy and democratic institutions in Malta have hindered the inclusion of irregular immigrants. The following quote by an international NGO worker identifies several issues related to the democratic political system, like the relationship between the Government and the public, the lack of an informed public, the externalisation of hatred on public sites, and the election of political representatives. Change is unlikely, according to this interviewee, because the political system 'disempowers' the public (or the masses) and actively militates against the recognition of irregular immigrants' human rights:

I think the situation will remain as it is, because the Government is led by public opinion. In such a case the need for an informed public is paramount: a public that takes stands, knows how to campaign, that protests, and is active and alive and believes in the fundamentals of democracy, and understands that detaining people is against their human rights. When I read those nasty and racist comments on the online newspapers I get very angry. I mean, there aren't only a couple or two extremists – that I could handle – but it's the average, overall sentiment. If you see the comments left by

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<sup>3</sup> Hans Köchler, *Democracy and human rights: do human rights concur with particular democratic systems?*, International Progress Organisation, Vienna, 1990, p. 20.

<sup>4</sup> *Ibid*, p. 21.

<sup>5</sup> Jack Donnelly, *International Human Rights, Second Edition*, Westview Press, Oxford, 1998, p. 154.



people on The Times of Malta website - it's sad, it's very sad, shocking. And if I am the Minister why would I dare do otherwise, if I risk losing my position in the next election.<sup>6</sup>

This suggests that the theoretical tensions between democracy and human rights are also reflected in the substantive aspects of democracy. For this reason the social scientist Nicolas Guilhot's approach to democracy as a 'field' of practices is particularly useful:

In writing this book, the approach that I have found most useful was certainly to think of human rights and democracy as constituting a 'field', in the sense of sociologist Pierre Bourdieu. This means considering that democracy and human rights do not exist outside a dense network of activists, practitioners, institutions, bureaucrats, documents, monitoring technologies, normative practices, legal documents, styles of activism and learned credentials, and that the task of the research is not only to describe these various elements, but also to analyze their mutual relationships to the extent that they form a distinct, coherent and relatively autonomous sphere of social activity, a 'field' of practices.<sup>7</sup>

The overall question being pursued in this Chapter is: What aspects of substantive democracy (or democracy in practice) are hindering the improvement of the situation of irregular immigrants in Malta? The Chapter is divided into three sections. The first section will focus on how democracy is presented by the modern human rights movement to ensure minimum standards of respect for all people – or, in other words, what are the necessary and sufficient conditions of democracy necessary for a human rights culture? This will be followed by a discussion on three constitutive aspects of democracy which have an impact on the implementation of human rights. As in the other Chapters, the choice and identification of these three aspects was informed by theoretical debates as well as by issues arising out of my own fieldwork. These are: a) the tension between the Government and the 'masses'; b) the role/characteristics of bureaucratic machinery within a democracy, and c) the idea of active citizenship. The second section will apply these aspects to the case study of irregular immigrants in Malta. Since formal democratic structures are largely in place the discussion will focus on understanding the gaps in the practice of democracy that need to be addressed to facilitate a human rights culture. The third section will offer concrete proposals to

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<sup>6</sup> O, Personal Interview - International NGO employee, 19 January 2009.

<sup>7</sup> Nicolas Guilhot, *The democracy makers: human rights and international order*, Columbia University Press, New York, 2005, p. 23.

address these gaps. The Chapter concludes with a confirmation that the forces of democracy need to be moulded in a way that ensures that a human rights culture can take root.

## **6.2 The challenge of democracy for the human rights movement**

The need of a democratic culture and the rule of law for the implementation of the human rights vision is evident in the first international human rights treaties. In these early documents, the continuous mention of the ‘will of the people’ clearly refers to democracy even though the term ‘democracy’ itself is not used. No other political system is ever mentioned. Democracy is accepted as the best available system because the maintenance of human rights would be inconceivable in any other political system which constrains the participation of individuals - ‘the will of the people’ - in governance. In fact, the direct contribution of citizens to governance is stated as a human right, as the following two examples from the UDHR and the ICCPR illustrate:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held in secret vote or by equivalent free voting procedures.<sup>8</sup>

Every citizen shall have the right and opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.<sup>9</sup>

In the last decade, the global human rights movement shifted away from an exclusive focus on two processes tied to global democratisation - the promotion of the right to democracy and the consolidation of democracy – to an attempt to identify the constitutive elements of democracy and democracy in practice. The dominant policy

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<sup>8</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, UNGA Res 217 A(III), adopted 10 December 1948, Article 21.

<sup>9</sup> United Nations, *International Covenant on Civil and Political Rights*, adopted by the General Assembly 16 December 1966, entered into force 23 March 1976, Article 25.

now views the concepts of democracy and human rights as interdependent in unequivocal terms. This can be seen in a resolution passed by the UN Commission on Human Rights in 2003 entitled 'Interdependence between democracy and human rights' which calls upon the Office of the United Nations High Commissioner for Human Rights to take action by engaging further with the topic. Article 2 of the Resolution states that the UN Commission:

Reaffirms its conviction that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing...<sup>10</sup>

This document lays out a clear vision of democracy as an all-encompassing system of governance which is not restricted to official state structures. Human rights are presented as a fundamental constitutive element of democracy. This is seen in Articles 4 and 7 which state:

Recognizes the comprehensive nature of democracy as a system of governance that encompasses procedures and substance, formal institutions and informal processes, majorities and minorities, mechanisms and mentalities, laws and enforcement, government and civil society.<sup>11</sup>

Notes that international human rights instruments enshrine many of the principles, norms, standards and values of democracy and may guide the development of domestic democratic traditions and institutions.<sup>12</sup>

However, these declarations should not be taken to mean that the theoretical and moral foundations of democracy and human rights are similar. As already introduced in the previous section, the self-evident presentation of this relationship has been meaningfully contested. The following are three 'fault lines' that appear in the relationship between democracy and human rights:

- A systemic aspect of democracy: Spinoza's concept of 'the fear of the masses' which refers to the fear felt by the masses, which in turn induces fear in rulers. His belief was that the principal danger of the state is always internal. By

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<sup>10</sup> United Nations High Commissioner for Human Rights, 'Interdependence between democracy and human rights', Commission on Human Rights resolution 2003/36, Article 2, <<http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.RES.2003.36.En?Opendocument>>, (accessed online 12 July 2011).

<sup>11</sup> Ibid, Article 4.

<sup>12</sup> Ibid, Article 7.

proposing an attitudinal way of life which is respectful of all, a human rights culture could address these fears.

- The need for empowerment: The primary means of implementation of democracy in complex states is public bureaucracy. The anthropologist Michael Herzfeld demonstrates that 'indifference' is used in bureaucracies to establish 'insiders' and 'outsiders'. This can have a strong disempowering role for outsiders who might not even have other social support alternatives to turn to, and ultimately creates problems for the enactment of a human rights culture.
- The notion of participation: Democracy is by definition 'governance of the people' and therefore active citizenship plays an important role. I propose that Hannah Arendt's concept of citizenship as *vita activa* is a good prototype for the kind of active citizenship needed for healthy democracy and a human rights culture.

### 6.2.1 The 'fear of the masses'

Whereas scholars like Köchler concentrated on the competing moral political claims of the popular will and the individual within a democracy, the philosopher Baruch Spinoza (1632-1677) focused interestingly on another inherent contradiction in democracy. This was the ambivalent relationship between the 'masses' and the 'ruler' which is critical to any discussion on democracy and human rights because it could have a direct influence on minorities' access to human rights. Spinoza could be seen as an unlikely choice in this discussion because for him, in complete contrast to, for example, Köchler, 'an absolute reduction of individuality to the mass' is not unthinkable, leading to Étienne Balibar's labelling of Spinoza's approach as 'anti-Orwellian'.<sup>13</sup> For Spinoza the rule by the 'masses' is looked upon uncritically in relation to individuality since he believes that 'individuals alone do not possess sufficient power to preserve themselves and as a consequence unite with others out of necessity to survive'.<sup>14</sup> Notwithstanding this contrast with human rights, Spinoza's focus on the masses, 'the rule by the people'

<sup>13</sup> Étienne Balibar, *Masses, classes, ideas: Studies on politics and philosophy before and after Marx*, Routledge, London, 1994, p. 36.

<sup>14</sup> Warren Montag, *Bodies, masses, power: Spinoza and his contemporaries*, Verso, London, 1999, p. 91.

as opposed to a monarchy, tyranny or political elite, is essential to understanding what makes democracy distinctly different to any other political system.

The shift of responsibility from governance by a small political elite to governance by the people entails a significant endowment of responsibility to the masses (a collective of individual subjects). However, Spinoza points out that the relationship between the power of the masses and the power of the ruler or 'dominion' is an inverse relationship. The more power amassed by the masses, the less is available to the dominion, and the more power that accrues to dominion, the less is available to the masses (and by extension to individuals). Spinoza attempts to find the equilibrium between the power of the masses and the power of those who govern in his *Political Treatise*.<sup>15</sup> This continual shift in power creates the two-way 'fear of the masses', which is the fear felt by the masses and instilled in the rulers by the same masses. Balibar explains this concept in the following way:

'The fear of the masses' should be understood in the double sense of the genitive, objective and subjective. *It is the fear that the masses feel. But it is also the fear that the masses inspire* in whoever is placed in the position of governing or acting politically, hence in the State as such. So that, arising in the context of the power (*puissance*) of the masses and their movements, the problem of the constitution or reform of the State is first posed in the context of fear – which may be as extreme as panic or may remain rationally moderated, but which never purely and simply disappears.<sup>16</sup>

In spite of this 'vertical' tension that Spinoza identifies as arising out of the shift of power from the rulers to the masses, Spinoza suggests that democracy is the best political system to safeguard the interests of the individual. Democracy, or popular governance, serves to balance individual and popular right, since it more closely guarantees that the beliefs of the masses will correspond with the belief and actions of

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<sup>15</sup> Étienne Balibar, *Masses, classes, ideas*, 1994, p. 15.

<sup>16</sup> Ibid, p. 5. Italics in original text.

the dominion.<sup>17</sup> This will make states more stable, since states have always been in greater danger from their citizens, that is, internally, than from external enemies.<sup>18</sup>

Citizens have the potential and responsibility to address the ‘fear of the masses’ continually produced by a tension inherent in democracy. Individuals, for Spinoza, carry the responsibility for enacting a space of freedom from ‘fear and violence’. The following is Balibar’s interpretation of Spinoza:

No collective means or political practice corresponds to the practical task that is imposed on the citizens: to conserve or develop for themselves the constitution, the form of agreement or mutual relation which liberates them to the greatest degree from fear and violence. Democracy is desirable, but it is unarmed.<sup>19</sup>

Citizen’s role in democracies and their task of upholding the Constitution will be presented in further details in the discussion of the concept of active citizenship.

### 6.2.2 Bureaucracy and ‘indifference’

The modern democratic state relies heavily on public bureaucracy for its realisation. The complex interaction and interdependence of public bureaucracy and political institutions is now well acknowledged in literature on governance.<sup>20</sup> Bureaucracies, more specialised and technocratic, have developed in response to the increasing complexity of societies. Commonly-held definitions of bureaucracy fall into two categories, which are inter-related but nonetheless distinct, and which I argue are best seen as two sides of the same coin. The first can be described as ‘rule by officials’ and the second is ‘a particular form of organisation’.<sup>21</sup> ‘Rule by officials’, coined by the political scientist Harold Laski in the 1930s, reflected his ongoing concern with safeguarding liberty. For Laski bureaucracy constrained citizens’ liberties, and therefore is:

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<sup>17</sup> I am aware that the concept of democracy for Spinoza, writing in the 17 century, included any system of popular governance in which the governing members acquire the right to participate by virtue of their civil status rather than by election. Unfortunately his model also excludes all those who are not *sui iuris*, for example women, servants, and foreigners, as well as those who do not lead a “decent life”, making it an elitist and non-inclusionary model of democracy. Notwithstanding this, his idea of ‘the fear of the masses’ is something easily overlooked in democratic theory.

<sup>18</sup> Warren Montag, *Bodies, masses, power*, 1999, p. 92.

<sup>19</sup> Étienne Balibar, *Masses, classes, ideas*, 1994, p. 15.

<sup>20</sup> Kenneth J. Meier & Laurence J. O’Toole, *Bureaucracy in a Democratic State: A governance perspective*, The John Hopkins University Press, Maryland, 2006, p. 34.

<sup>21</sup> Michael Nelson, ‘Bureaucracy’ in *The Social Science Encyclopedia 2<sup>nd</sup> Edition*, eds. A. Kuper & J. Kuper, Routledge, London, 2003, pp. 101-102.

A system of government, the control of which is so completely in the hands of officials, that their power jeopardizes the liberties of ordinary citizens.<sup>22</sup>

The sociologist Max Weber, on the other hand, sought to highlight the benefits of bureaucracy. Weber seems to have been provoked by the dominance of Laski's approach to bureaucracy which reduced the organisation to the aforementioned 'rule of the officials'. He contested Laski's concerns and argued that bureaucrat officials were not ruling, but simply obeying the rulers. They were vested with the authority to govern but lacked the legitimate political power that rulers enjoyed.<sup>23</sup> Weber's definition of bureaucracy is summarised by Kenneth Meier and Gregory Hill as characterised by the following:

1. Fixed and official jurisdictional areas ordered by rules, laws, or regulations.
2. The principle of hierarchy whereby structures are established with superior and subordinate relationships.
3. Management of the office entails reliance on written files.
4. Occupation of offices based on expertise and training.
5. Full time employment of personnel who are compensated and who can expect employment to be a career.
6. Administration of the office follows general rules that are stable and can be learned.<sup>24</sup>

The contrasting perceptions of bureaucracy put forward by Weber and Laski still constitute an important debate in contemporary times. This can be seen in the political scientist Eva Etzioni-Halevy's work which combines the insights of both perceptions in her analysis of bureaucracy. In line with Weber she points out that the growing power of bureaucracy has actually 'favoured democracy' or is at least 'indispensable for it'.<sup>25</sup> At the same time, drawing on Laski's approach she says that although bureaucracies have not become more powerful than politicians, bureaucrats in most modern states have become sufficiently powerful to pose a threat to democracy. This is due to the

<sup>22</sup> Harold Laski, 'Bureaucracy' in *Encyclopedia of the Social Sciences*, Vol. 3, eds. E.R.A. Seligman & A. Johnson, The Macmillan Company, New York, 1930.

<sup>23</sup> Michael Nelson, 'Bureaucracy', 2003, pp. 101-102.

<sup>24</sup> Kenneth J. Meier & Gregory C. Hill, 'Bureaucracy in the Twenty-first Century' in *The Oxford handbook of public management*, eds. E. Ferlie, L.E. Lynn & C. Pollitt, Oxford University Press, Oxford, 2005, p. 52.

<sup>25</sup> Eva Etzioni-Halevy, *Bureaucracy and Democracy: a political dilemma (revised edition)*, Routledge and Kegan Paul plc, London, 1985, p. 2.

ability that bureaucrats have to allocate resources, to influence outcomes (through administrative decision-making) and to control positions of power.<sup>26</sup> Bureaucracy seen as an internal threat to the practice of popular governance, is a worrying trend for the human rights movement.

Another study of bureaucracy exposes an additional threat to human rights from bureaucratic practices. This study, on the cultural and social processes of public bureaucracy in Greece by the anthropologist Michael Herzfeld, demonstrates that bureaucracy is in fact far from apolitical, objective and fair. This undermines Weber's reading of bureaucracy in which bureaucrats are reduced to impersonal 'cogs in the wheel'.<sup>27</sup> Herzfeld finds that indifference within bureaucratic structures is not an automatic result of the system, but a process whereby insiders decide who the outsiders are. He shows how societies with proud traditions of hospitality may paradoxically produce at the official level some of the most calculated indifference. This happens due to the excessive reliance of bureaucratic practices on the symbols and language of the moral boundaries between insiders and outsiders. Herzfeld argues:

I have challenged explanations of bureaucratic indifference as the more or less automatic outcome of bureaucratic structures. Such arguments being hopelessly teleological, are far too close to the predestinations advocated by some of the more totalitarian forms of nationalism. If social boundaries emerge in social interaction, where they are constantly negotiated and redefined, blaming 'the system' is implicitly to accept the argument of those who defend their territories, and who excuse their less laudable actions on the grounds that these were dictated by the system or by its supreme guards. We would do well to remember that this was the defence argument at Nuremberg.<sup>28</sup>

It would therefore be mistaken to view bureaucracy as apolitical. Herzfeld's argument goes by asserting that state bureaucracy *creates* social indifference, which not only disempowers, but denies 'selfhood' – does not even take the person into account. Herzfeld says:

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<sup>26</sup> Ibid, p. 33.

<sup>27</sup> I do not want to imply that this reading of Weber is the correct one. For example, Paul du Gay rightly points out that Weber's description of the profession and vocation of the bureaucrat show that Weber never had in mind an inhuman or impersonal system. (Paul du Gay, *In praise of bureaucracy: Weber, organisation and ethics*, SAGE, London, 2000).

<sup>28</sup> Michael Herzfeld, *The Social Production of Indifference: Exploring the Symbolic Roots of Western Bureaucracy*, The University of Chicago Press, London, 1992, p. 159.



Indifference is the rejection of common humanity. It is the denial of identity, of selfhood.<sup>29</sup>

For the purposes of this discussion, this ultimately means that bureaucracy needs to be treated with the utmost caution since bureaucrats have an active role in determining or perpetuating the moral boundaries of who is an insider and who is an outsider. Since bureaucracy is at the implementation end of democracy, this, in effect means that in spite of rules, regulations and laws passed by parliamentarians, service provision might not be reflecting the same agreed-to responsibilities towards outsiders that are enshrined in laws.

### 6.2.3 '*Vita activa*' as the prototype of democratic citizenship

Active citizenship is the third aspect which strongly links human rights and democracy. Arendt's participatory concept of *vita activa*, although it is inspired from a society founded on hierarchies which is far from the vision of human rights, presents a good framework to understand the vision of democratic citizenship put forward by the human rights movement.<sup>30</sup>

Based on the direct participatory models of the city-states of antiquity, the concept of *vita activa* is the basis of political life requiring: a) a public sphere where citizens act together through the medium of speech and persuasion, and constituted of 'sameness in utter diversity'<sup>31</sup> and; b) an understanding of local cultures which provides the context of the public sphere.<sup>32</sup> For Arendt *vita activa* could not happen in a totalitarian state or a liberal capitalist state, since the public sphere – the freedom for citizens' deliberation and action - is limited or altogether missing. Arendt gives importance to civic engagement and collective deliberation about all matters affecting the political community. This political activity is valued not because it may lead to agreement or to

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<sup>29</sup> Ibid, p. 1.

<sup>30</sup> A common critique of the participatory models of antiquity is that strict advocacy of direct and universal participation in politics was only made possible by an exclusionary social structure, whereby several groups of people – women, slaves, etc. - through their service and labour enabled citizens to engage in full time politics. This does not de-value the concept of *vita activa*, or even its value for the purposes of this discussion since a direct application of *vita activa* is not being promoted. However, it serves to show that the concept was conceived in an intrinsically un-equal society.

<sup>31</sup> Hannah Arendt, *The Human Condition*, Second Revised Edition, The University of Chicago Press, Chicago, 1999 [1958], p. 57.

<sup>32</sup> Idem.

a shared conception of the good, but because it enables each citizen to exercise his or her powers of agency, to develop the capacities for judgment and to attain by concerted action some measure of political efficacy.

As an extension of her belief in direct and universal participation in politics, representation was also problematic for Arendt. She viewed it solely as a substitute for the direct involvement of the citizens, and as a means whereby the rulers and rules could reassert themselves. For Arendt even the idea of voting, as independent and anonymous, according to private opinions, runs counter to citizen's empowerment. People should be able to see and talk to one another in public, to meet in a public-political space, so that their differences as well as their commonalities can emerge and become the subject of democratic debate. In this way, citizenship would be reaffirmed and political agency effectively exercised by engaging in common action and collective deliberation.

Arendt argues that the state should create space and structure for the model of citizenship of *vita activa*. According to her, modern liberal democracies fall short of this, and although her primary criticism is towards totalitarianism, she suggests that in a similar way liberal democracies might not give enough space for the empowerment of the individual. Liberal democracies in embracing capitalism have, not unlike totalitarian states, limited the national public sphere in a way which is detrimental to active citizenship. The international relations scholar Kimberly Hutchings comments on this when she says that for Arendt:

...the kind of shrinking of public space that is carried to its extreme in totalitarian regimes is characteristic...of the development of the modern capitalist state in general and that therefore her view of politics is not only set against Nazism and Stalinism but the trend of liberal democratic rule as well.<sup>33</sup>

As an alternative to a system of representation based on bureaucratic parties and state structures, Arendt proposed a federated system of councils through which citizens could effectively determine their own political affairs. Such a federation would ensure that everyone has the space to participate directly in politics. The human rights movement's support for the active participation of non-state actors embodies a similar

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<sup>33</sup> Kimberly Hutchings, *Kant, Critique and Politics*, Routledge, London, 1996, p. 84.

rationale. States are also expected to encourage political engagement by non-state actors. The UDHR also gave a clear role to non-state actors in the education of people about human rights, reinforcing the argument that the drafters believed in the role that non-state actors could play. Inbuilt in the human rights system are now specific mechanisms by which non-state actors and civil society are encouraged to take a more active role.

Based on these forces which characterise the relationship between democracy and human rights, the following section will look at formal and substantive aspects of democracy in Malta and how these influence the treatment of irregular migrants.

### **6.3 The setting: Democratic practices and structures in Malta**

Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.<sup>34</sup>

This, the opening article of the Constitution of Malta, introduces democracy as the political system of the state. The major democratic institutions are regulated by the Constitution. Executive authority is vested in a President who is appointed by the House of Representatives every five years. The President in turn generally appoints as Prime Minister the leader of the party that wins a majority of seats in a general election for the unicameral House of Representatives. The President also nominally appoints, upon recommendation of the Prime Minister, the individual ministers to head each of the government departments. The cabinet is selected from among the members of Parliament, the number of which may vary between 65 and 69 members elected on the basis of proportional representation. The Constitution provides for general elections to be held at least every five years. Candidates are elected by the Single Transferable Vote (STV) system, where the surplus votes of an elected candidate are transferred to the candidate receiving the second preference votes. Malta's judiciary is independent. It is appointed by the President upon recommendation by the Prime Minister, who is required to take a decision based on consultation with the leader of the Opposition. The highest court which is the Constitutional Court hears

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<sup>34</sup> *Laws of Malta*, Constitution of Malta, 1964, Article 1.

appeals in cases involving violations of human rights, interpretation of the Constitution and invalidity of laws.

The Local Councils Act, enacted in 1993, was drafted in line with the European Charter of Local self-government and divides Malta and Gozo into 68 localities. Councillors are elected every three years by inhabitants who are registered as voters in the Electoral Register. Provisions in the law allow for the establishment of 'communities' (hamlets), with elected representatives, within localities and for an elected chairperson to sit in on Council meetings. Local Council elections are held by means of the system of proportional representation using the STV. The Mayor is the head of the Local Council and the representative of the Council for all effects under the Act. The Executive Secretary, who is appointed by the Council, is the executive, administrative, and financial head of the Council. All decisions are taken collectively with the other members of the Council. Local Councils are responsible for the general upkeep and embellishment of the locality, local wardens, and refuse collection; they carry out general administrative duties for the central government, such as collection of government rents and funds and answering government-related public inquiries.

Malta passes the tests of formal democracy successfully.<sup>35</sup> In addition the Maltese people participate enthusiastically in elections, with general elections consistently having a near-universal turnout. This is complemented with participation in political debates and activities. Most of the merit of this is attributed to the two major political parties who, Professor Edward Warrington says 'set the tone of political life in Malta'. Paradoxically, Warrington argues, it is not the formal democratic structures that pose a threat to the political order in Malta, but the political parties who are not 'even mentioned in the Constitutional document'. He describes this in the following quote:

...the two major political parties, equipped with pervasive grassroots organisations, data bases, newspapers, radio stations and television channels, and increasingly networked with powerful business interests. Every one of these political resources is utterly opaque to independent external scrutiny. It is these powerful interests, fronted by and also manipulated by, the political parties, which set the tone and agenda of

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<sup>35</sup> Edward Warrington, 'Maltese Constitutional Reform: The Fallacy of Rewriting the Constitution', *E-Orbis Electronic Journal*, <[http://www.jesuit.org.mt/index.php?option=com\\_content&view=article&id=213:maltese-constitutional-reform-the-fallacy-of-re-writing-the-constitution-of-malta-&catid=82&Itemid=87](http://www.jesuit.org.mt/index.php?option=com_content&view=article&id=213:maltese-constitutional-reform-the-fallacy-of-re-writing-the-constitution-of-malta-&catid=82&Itemid=87)> September 2008, (accessed 7 September 2010).

political life in Malta. It is here that threats to the constitutional order are most likely to be generated — threats to the values of multi-party democracy; to human rights and freedoms; to parliamentary, judicial and independent scrutiny of the Executive; threats to the integrity of elections; threats to the peace, order and good government of Malta.<sup>36</sup>

The omnipresence, polarisation and totalising discourse of politics brought about by the two political parties characterises Maltese politics and largely conditions the practice of democracy in Malta.<sup>37</sup> Both parties have treated irregular migration as a security and foreign relations matter, positing the issue in political discourse as a burden on the nation. In addition, the two parties have presented a united front on irregular migration. This is not a typical situation since they generally take different approaches and disagree on almost all major issues. The following sections will analyse the democratic practice in Malta according to the three theoretical issues discussed previously.

### **6.3.1 The strength of the masses or brainwashing/loyalty to the political elite?**

The power of the masses is most clearly seen in how the right to vote is exercised. In fact, decreasing levels of voting worldwide have created huge debates and controversies on the effectiveness and legitimacy of democratic systems. Not so in Malta where there is a near-universal turnout. Voting in general elections, although not compulsory, is consistently very high. Malta's voter turnout in the last four general elections in 2008 was 98 per cent, in 2003 – 95 per cent, in 1998 – 95 per cent and 1996 – 98 per cent.<sup>38</sup> Indeed Malta has the highest turnout of all democratic nations, including those countries, like Australia, where voting is compulsory.<sup>39</sup> Echoing the aforementioned observations made by Warrington, the political scholar Wolfgang Hirczy writing on political engagement in Malta puts this down to:

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<sup>36</sup> Idem.

<sup>37</sup> Godfrey Baldacchino, 'A Nationless State? Malta, National Identity and the EU', *West European Politics*, Vol. 25, No. 4, 2002, pp. 197–198.

<sup>38</sup> International Institute for Democracy and Electoral Assistance, 'Voter turnout data for Malta', *Country View*, <[http://www.idea.int/vt/country\\_view.cfm?CountryCode=MT](http://www.idea.int/vt/country_view.cfm?CountryCode=MT)>, 2010, (accessed 24 July 2011).

<sup>39</sup> Wolfgang Hirczy, 'Explaining near-universal turnout: The case of Malta', *European Journal of Political Research*, Vol. 27, 1995, pp. 255–272.

...intense two-party competition for highly centralized governmental power, grounded in strong and pervasive partisanship in the population at large.<sup>40</sup>

The competition is not only between parties, but is present at a local level between candidates of the same party. Taking into consideration that the electoral system runs on an STV system, the resulting situation is anomalous when compared to other countries which use STV. Although the STV electoral system allows voters to cut across party lines, this rarely happens in Malta. In addition, each of the two main political parties fields a relatively big number of candidates per district to appeal to as many voters as possible. However, the high voter turnout is probably exacerbated by what Hirczy identifies as two types of competition which happen simultaneously and mutually support each other. He says:

Two types of competition are relevant to turnout, competition between and within parties. Candidates mobilizing voters to boost their own chances of winning in turn make the parties more competitive. Where in a single election voters exercise choice among candidates of the same party, the candidates will have an additional incentive to see to it that their constituents cast their ballots because they face a more competitive environment. Hence turnout will be higher. Malta's electoral system makes the candidates the direct beneficiaries of their own electioneering efforts. The participation-enhancing effect of dual competition is likely to be affected by the desirability of the offices at stake in the election.<sup>41</sup>

This explains why Ministry officials in Malta often told me that they 'ultimately work for the electorate' and why they claim they are almost held to ransom by the electorate. Ministry officials' concern was that the electorate would turn against their Minister, and many examples were described of Ministerial plans being scrapped in the field of irregular migration either due to a public outcry, or resistance by a significant group of people. The officials stopped short of using the word 'blackmail' although the examples they gave me were akin to that. In addition the language used and the widespread concern, reinforces this initial comment that the perception is one of blackmail. The following is an example from an interview with a Ministry official:

The Government doesn't have a problem with purchasing and investing in a centre for migrants. The problem is that you need to find a property where the people living around will not create problems. Because first you have to start with the Maltese: are

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<sup>40</sup> Ibid, p. 268.

<sup>41</sup> Idem.

you ready to have an immigrant living next to you? I mean, it's one thing having them in Hal Balzan with the nuns, at least there are the nuns. The people say, 'it's okay, I live next to the nuns'. But if one fine day you throw a few immigrants in a house right next to your house, how would you as a Maltese feel about it? And this is something the Maltese don't want to answer, because the reality is that they do not want them next door. And they start telling us: 'it's because they stink...because they don't wash...because they steal'. Is it true? At the end of the day it doesn't matter, nobody wants them.<sup>42</sup>

This attitude could also be interpreted as shunning responsibility and hiding behind 'the wishes of electorate'. Indeed, this kind of concern was hardly acknowledged and generally treated dismissively within the NGO sector where the lack of leadership for social change was attributed to politicians and Ministerial officials. No sympathy was extended in this regard. People working in the NGO sector often mentioned that the 'political will' was missing. No 'political mileage' could be gained out of immigrants, they explained to me over and over again. By this they meant that immigrants did not hold votes, and in addition, that any pro-immigrant activity might entail a loss of votes. People working in NGOs repeatedly came back to the point that politicians' primary focus is to 'appease their electorate':

I think that essentially politicians have – let's put it this way, the human rights aspects of their policies are only one consideration, and they would probably at least, officially, they would pay lip service to human rights and the importance of human rights. But at the end of the day it's not necessarily even the top priority. It's fair to say that there are a lot of competing interests, including how they are perceived by their electorate...<sup>43</sup>

The dominant view amongst NGO workers is that politicians carry a higher moral responsibility in 'educating' the public in this field by virtue of the privileged position they occupy in Maltese society. Indeed as the anthropologists Jeremy Boissevain and Jon Mitchell, amongst others, show in their respective studies on patron-client relations and nationalism in Malta, politicians have great importance in Maltese society.<sup>44</sup> This explains why Maltese NGOs have very high expectations of politicians to

<sup>42</sup> C, Personal Interview – Government Official, 29 October 2008.

<sup>43</sup> L, Personal Interview – NGO Worker, 11 January 2009.

<sup>44</sup> The anthropologist Jeremy Boissevain wrote amply about patron-client relations in Malta. The following are some examples: Jeremy Boissevain, *Friend of friends: Networks, Manipulator and Coalitions*, Basil Blackwell, Oxford, 1974; Jeremy Boissevain, 'When the Saints go Marching Out: Reflections on the Decline of Patronage in Malta' in *Patrons and Clients in Mediterranean societies*, eds. E. Gellner & J. Waterbury, Duckworth, Michigan, 1977. More recently, the anthropologist Jon Mitchell also discussed the system of Maltese patronage in his works, among which is the

live up to their responsibility of addressing widespread populist concerns - like the fear of invasion, fear of contracting untreatable tropical diseases, and so on – which foment deep insecurities amongst various sectors of society. This theme of political irresponsibility was an issue that created deep anguish amongst my informants, since they believed that fears were intentionally fuelled, if not at times constructed, by politicians and high-level officials with the intention to gain political mileage. The NGO workers often recalled the frequent presence of the then Minister for Justice and Home Affairs, the then respective Shadow Minister and the Police Commissioner during the peak of international criticism by human rights organisations, defending detention as necessary for security purposes, public health reasons and as a deterrent to other immigrants. This lack of action could also be interpreted as a manifestation of conservative politics which typically demonstrates an aversion to risk and social change. The following quote depicts this sentiment of prioritising preservation. It also demonstrates the previous point which is seen when the interviewee blames the politicians and mentions the complacency of the ‘people’. He says:

...they [politicians] already have an idea of what the people want. It’s a huge vicious circle. The Government is happy with keeping things as they are because it doesn’t want a more informed public, therefore it is not going to get involved in any public awareness; the people are therefore fine with the situation as it is, and they’re never going to change, they are going remain as they are. Nothing is going to make it change: not the crappy situation, not an NGO, because no one takes it seriously any more, and no one really cares.<sup>45</sup>

The high voter turnout, usually considered one of the democratic virtues of Malta, was often mentioned by my informants as a counterproductive measure for the respect of the human rights of irregular immigrants. The criticism was that this encouraged more populist policies and less space for lobby groups, since the voter turnout is intimately linked with the political culture. This appears to be a well-founded criticism, but apparently contradictory to democracy, for which voting is always presented as one of the essential mechanisms that safeguard the principle of popular governance. Moreover, the finger pointing between the Government/politicians and NGOs is unhelpful when trying to make sense of the situation. Spinoza’s concept of ‘the fear of

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following: Jon P. Mitchell, *Ambivalent Europeans: ritual, memory and the public sphere in Malta*, Routledge, London, 2002.

<sup>45</sup> O, Personal Interview – International NGO Employee, 19 January 2009.



the masses' sheds a little more light. Seen within this framework one can better understand that what is going on is a 'tug of war' between the two equally legitimate foci of political power within a democracy. The argument goes beyond both one-sided 'blackmailing by the electorate' and also irresponsibility by politicians who 'should know better', but that as a little bit of both it is part of the democratic process.

### **6.3.2 Fearing the bureaucrats? 'Indifference' to irregular immigrants**

Ministries are composed mainly of public officers, with each Minister having at his disposal a personal fund to employ their own staff. One can visibly see within each Ministry a complex power game between the bureaucrats and the politicians (and their personal staff). Ministers clearly have a lead since they retain the power to choose public officers appointed to represent the Government in leading agencies, or boards. A much-cited, by now infamous, pre-election promise by the current Government made in response to calls for greater transparency in governance, states: 'Pt 258. Appointments on government boards will be made following a public call.'<sup>46</sup> One would have thought this would in essence be a straightforward electoral promise to implement, albeit a courageous step in a political setting in which politicians rarely put themselves or their actions up for public scrutiny. Notwithstanding this, it does not look set to be implemented soon. When brought up in Parliament by the party in Opposition, Parliament Secretary Chris Said on behalf of the Government tried to avoid the question altogether, but finally relented. The following is an excerpt from his reply:

...this is not a straightforward issue that one can just take a decision from one day to the next. It is a complicated issue that needs time to be implemented. Electoral promise 258 is clear, that appointments on government boards will only be done after a public call. The government has a legislature of five years ahead and in this period will implement a number of promises made in the electoral programme.<sup>47</sup>

This quote is particularly revealing of the typical reluctance of any Maltese Government to let go of any privileges intrinsically tied to a political culture still heavily reliant on clientelism and patron-client relations. In the last years, particularly with EU

<sup>46</sup> Partit Nazzjonalista, *Iva, flimkien kollox possibbli: Programm Elettorali 2008-2013*, Publikazzjonijiet Indipendenza, Pietà, 2008, p. 62.

<sup>47</sup> Malta's House of Representatives Debates, The Eleventh Parliament, Session no. 13, House of Representatives, Valletta, Malta, 4 June 2008.

accession, the reluctant reliance of politicians on bureaucrats and experts has been evident, even in areas of governance traditionally the stronghold of politicians. Notwithstanding this shift in power however, the overall balance still tips onto the politicians' side.

Although Maltese society is overwhelmed by a 'crisis of trust' akin to an observation made by the philosopher Onora O'Neill about modern societies, bureaucrats appears to fare better in this regard than politics. O'Neill argues that the 'crisis of trust', whether real or perceived, has a debilitating impact on society and democracy. Public services, institutions and the people who run them, and professionals, are all treated with suspicion. O'Neill questions whether trust can be restored by making people and institutions more accountable, or whether these same systems of accountability and control themselves damage trust. This is undoubtedly true of Maltese society. However popular rhetoric suggests that there is greater trust in bureaucracy than in politicians or at least in the motivations of bureaucrats than politicians. This is because the dominant perception is informed by the Weberian concept of a bureaucrat being nothing more than a helpless cog in the administrative machine at the whim of the politician. A perception which works in bureaucrats' favour, because politicians are generally seen as scheming, dishonest and generally ready to do anything for a few votes.<sup>48</sup> The notion that bureaucrats might also be non-partisan political agents in their own right is largely missing. Even if the bureaucrat is active in partisan politics outside of work, it is not seen as a matter of choice, he is still perceived as 'a helpless cog' in the party machinery. Baldacchino and Scicluna write about this totalising discourse of bi-partisan politics:

Technocrats, professionals and intellectuals are not perceived to be able to exist separately from (political) parties. It is not deemed possible for individuals to place national interests before party affiliation, wrote Pirotta, who suggested that as a result individuals often find it more beneficial to take sides. Similarly, Baldacchino noted that whoever declines to adopt a political profile has less 'social credit facilities'.<sup>49</sup>

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<sup>48</sup> Mitchell in one of his ethnographic texts on Malta suggestively entitles one of the Chapters: 'All politicians are bastards' in Jon Mitchell, *Ambivalent Europeans*, 2002.

<sup>49</sup> Baldacchino and Scicluna quoted in Alex Grech, 'Taking sides: Malta's politicised media & society', *Malta Inside Out*, <<http://www.maltainsideout.com/13474/taking-sides-maltas-politicised-media-society/>>, 2010, (accessed 13 July 2011).

Many of my interviewees aired their frustration at how not only the basic services, but even services geared specifically towards irregular immigrants, were not delivering. Many of the people I interviewed had first-hand experience of the difficulties that irregular immigrants faced when trying to access services. The stories of lethargic responses by public servants, complete inactivity and techniques like foot-dragging, or shifting of responsibility, were common themes. More worrying are the clear reasons behind the inefficiency. One of the NGO workers I interviewed explained it in this way:

The problem in this field is that the whole concept of people, the mentality of people towards this client group is quite widespread, so you find even people working within the field - so social workers working for asylum-seekers for example – having the wrong idea, and having the mentality of the government and the mentality of the other people...Even them thinking that these people should not be here: ‘what are these people doing here?’; ‘Detention? Just fine, leave them in there. And agreeing with certain policies that are being taken that are detrimental to the clients...we’re going wrong somewhere.’<sup>50</sup>

One of my informants, working with an NGO providing a service in collaboration with a government department for irregular immigrants, recounted an incident when applications of a serious nature were not being processed. The way it happened demonstrates how bureaucracy is used to make immigrants’ lives difficult. The incident, which stretched over weeks, started by a phone call my informant received from the government department asking him to slow down the processing of applications. The reason given was that since immigrants needed to go in person to collect the document, too many were showing up at the department and they ‘stank’ (bad smell). It was a period of time when there was quite a high demand for the service. My informant told them that there was nothing he could do to stop the flow of applications. A few days later, on being told by the immigrants that they were not being given their documents, he called again and was told that the special paper, on which the documents had to be printed, was out of stock. This excuse was, to say the least, highly suspicious. The situation stretched on, reaching a crisis point where immigrants were at risk of losing their right to the document as well as a lot of money they had invested in the application procedure. Immigrants were spending long hours outside the government department, waiting. Although highly visible, this occurrence

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<sup>50</sup> F, Personal Interview – NGO Worker, 15 December 2008.

appeared to be left unquestioned and ignored, and put down to immigrants' arrogance and their uncivilised ways. My informant, a front office volunteer, decided to take the matter in hand and informed his superiors, who in turn contacted the director. Paper was miraculously back in stock less than an hour after the director held a meeting with the Minister responsible.<sup>51</sup> The meaning of this incident is rich on a number of levels, but it is particularly interesting to see what appears to be a bureaucracy working independently of politicians. The Minister only acted when a crisis point was reached, which is typical in the field, leading many workers in the field to come to the conclusion that the reason behind 'inefficiency' is:

The problem is that the political drive behind it isn't clear, and if it's disorganised, it just brings more disorganisation.<sup>52</sup>

Whether brought about by a breakdown of trust or an intense power game between politicians and bureaucrats, or inefficiency, the overall question remains here: to what extent is the bureaucratic machine working towards upholding democracy and human rights? Or, in other words, which bureaucratic practices are hindering democracy and the safeguarding of human rights principles? And the crux of the matter here is a common concern voiced by people working with immigrants in Malta: that the system 'disempowers' immigrants. One of the NGO workers I interviewed speaks at length about this disempowerment. This quote captures a mention of detention but he is referring to the totality of the structures and services that cater for irregular immigrants. He says:

One of the biggest obstacles that we face, even in persuading people to take action when their rights are violated and take their case to court for example, that the people we work for are totally disempowered and the system disempowers them. Part of the reason, it's not the only reason, is that the system disempowers. The whole message of detention is that you are the outsider and we are locking you up. Yes, I choose to believe it's not too much to ask because I think it's essential and as long as it's only us talking it's not half as effective, and we can't – alone, if we are speaking on behalf of, or if I'm speaking as a Maltese national to my Government saying that I want my Government to respect my rights including migrants, ok I can, but there's a limit to how far I can go. As a lawyer I can only go to court if I have a victim who's ready to complain,

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<sup>51</sup> Details changed to ensure anonymity.

<sup>52</sup> O, Personal Interview - International NGO employee, 19 January 2009.

and I can't give up on it, but it does remain one of our biggest stumbling blocks. But the tragedy is that there's a limit to how far we can go.<sup>53</sup>

Disempowerment hits at the very soul of democracy and cuts through democratic principles and human rights. Disempowerment of irregular immigrants in Malta happens through some bureaucratic practices, including institutionalized indifference, which constrain the participatory, deliberative and liberal democratic principles in the irregular migration field. Blaming inefficiency is an easy way out. But disempowerment does not come by with inefficiency.

Clearly, in my fieldwork I also came across 'bureaucrats' who were more humane and sympathetic to immigrants, but even then the struggle to escape the pressures of the system are usually easily identified in contradictory statements they come up with. One of the Ministry officials shared how difficult he found it to be in his position at times:

I am not the one to blame, but at the same time you feel bad because these are people our age and it's like you're denying them a future, and you feel bad you know. Sometimes it is not easy and I think that's why, maybe egoistically, I spent some time volunteering in open centres because I wanted to feel that I'm doing something for them, because in here I used to feel: what good am I doing to them? I might have done it for purely for myself. I don't know. I felt I had to do it and I felt I had to hear the other side of the story.<sup>54</sup>

This same person, right after sharing this went on to describe a totally fabricated story, one of many that circulate in Ministries, depicting immigrants as uncivilised, ungrateful and dangerous. This contradictory behaviour suggests that sympathy is just a facade to look good and used to achieve a footing in some moral high ground to be able to talk down to, and about immigrants. This reinforces Herzfeld's theory that the indifference created by bureaucracies contributes to making societies well-known for hospitality become utterly hostile.<sup>55</sup>

<sup>53</sup> L, Personal Interview – NGO Worker, 11 January 2009.

<sup>54</sup> C, Personal Interview – Government Official, 29 October 2008.

<sup>55</sup> Michael Herzfeld, *The Social Production of Indifference*, London, 1992, p. 1.

### 6.3.3 The difficulties of *vita activa* in a restricted public sphere

Citizens in Malta have ample opportunities for civic engagement particularly in the third sector (voluntary organisations). A national report on volunteering in Malta mentions the key role that volunteering has historically played in Maltese society and the important role it now carries in democratic processes. The following is an extract from the report:

The NGO sector on the islands of Malta and Gozo is regarded as vibrant and diverse, with organisations and associations stemming from political and cultural groups, sport organisations and band clubs, as well as from foundations of different kinds. A rich culture of volunteering is a long established tradition (about one century), which is especially rooted in the activity of the Church organisations, particularly their missionary work....With the substantial growth of the third sector over recent years, voluntary organisations play an important role in the democratic processes in Malta and contribute to the formation of a robust civil society. An increasing number of people are now working in the non-profit sector, which is generating more income and investing more money to help a greater number of people than ever before. The sector attracts new donors and hundreds more regularly volunteer.<sup>56</sup>

However this is not the model of civic engagement envisaged by Arendt. For Arendt the concept of *vita activa* necessitated a national public sphere in which ‘collective deliberation’ of issues of the state would take place. Arendt presupposed that citizens would act in loyalty to the state, driven by a sense of responsibility towards their polity. The public sphere in Malta is however driven by other motivations. Whether it is loyalty to a political party, or some other form of allegiance, the motivation is not the state. Different and complex motivations therefore inhibit transparency in deliberation.

The public sphere is present and active in Malta but is limited by the characteristics of a small community. These characteristics include: a) the pervasiveness and loyalty expected by the political parties; b) the fear of speaking out leading to the saying that everybody should mind their own business; c) the fear of retribution. This clearly is nowhere close to Arendt’s concerns with the lack of freedom and restriction of the public sphere in a totalitarian state, or by liberal capitalism. However in a similar way,

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<sup>56</sup> European Commission, ‘National Report – Malta’, *Study of Volunteering in the European Union Country Report Malta*, <<http://ec.europa.eu/citizenship/eyv2011/doc/National%20report%20MT.pdf>>, 2001, p. 1, (accessed 13 June 2011).

the public sphere is not restricted by one central authority but by several, smaller, different entities. The result is a lack of freedom.

In brief, civic engagement can be found but in a particularly limited way. This approach is supported by the widespread presence of charity-based NGOs, which eclipse the few human rights NGOs. A policy advisor within the Ministry says that the lack of a rights-based culture and of citizen empowerment is due to the strength of the traditional ethic of charity which he links to the Catholic Church, and in particular the presence of the Catholic Church in the NGO sector. This, he says, works counter to the ideas of human rights:

I think the strength of today's emerging civil society has its roots in Christian charity and therefore this idea of dialectical debate and argumentation about human rights and this and that, it hasn't really emerged from our history of what today we call the NGO world. This is our own blend of NGOs or voluntary organisations, and it might never change, because the influences are still there. You can have an elite understanding of NGOs or import a foreign model and try to impose it on the Maltese people – but it will never kick off. What ultimately is more successful is what emerges from the grassroots and what emerges from the grassroots is ultimately a charitable understanding of civil society. So if you ask me whether the human rights dimension will ever be very strong in Malta, I would say no, I would say only the local branches of foreign NGOs of international NGOs, will ever in Malta, have a very large, significant voice on human rights. Which is a pity but which is also understandable, you cannot fight your history and your traditions in a short period of time. It will take ages.<sup>57</sup>

Not only is it difficult for civil society – voluntary activity, social and civic organisations - to embrace human rights, but in the irregular immigration field those who do take on a human rights approach have been targeted with violence. In fact, between 2004 and 2006, during a peak of debates on irregular migration, several acts of violent vandalism took place against a church-linked (Jesuit) NGO, individual activists and journalists who stood up for the safeguarding of the human rights of irregular migrants.<sup>58</sup> On the

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<sup>57</sup> N, Personal Interview – Government Agency Employee, 19 January 2009.

<sup>58</sup> The following quote from a report by ECRI lists some of the violent attacks on Maltese citizens which took place in 2005 and 2006: 'Attacks against individuals or organisations who are active in anti-racist work or who have been vocal in denouncing racism are, on the other hand, well documented. ECRI is seriously concerned that a spate of attacks of this type took place in 2005 and 2006. These have included arson attacks against the property of Jesuit anti-racist organisations in November 2005 and March 2006 and the personal property of persons working for these organisations in April 2006. They have also included arson attacks on the private homes of people who had spoken out against racism: in March 2006, that of a writer who had just published his latest poetry book that included works on racism and immigration; in May 2006, that of the editor of a weekly newspaper, who had published an editorial on racism and immigration just shortly before the attack; and also in May, that of a journalist who had spoken out against the Maltese extreme-right movements and written about racism and immigration. In this last

whole, irregular immigrants have been visibly absent from debates about irregular migration itself. The media expert Carmen Sammut comments on this:

Up to now some immigrants were heard in relation to human-interest media stories that focus on the drama of their personal accounts. However, they still remained absent and voiceless in broader debates that affect their fate. On many occasions they fell into a spiral of silence or else were analysed as voiceless 'others'.<sup>59</sup>

Active citizenship and the national sphere are therefore conditioned by the largely bi-partisan political agenda. This explains why public discussions and debates have not managed to cut away from the dominant discourse of irregular migration as a national threat and burden. The targeting of pro-immigrant activists and lack of presence of immigrant-run NGOs means that the negotiation and re-negotiation of national identity, which according to the Arendtian model should take place in the national public sphere, does not really take place in Malta.

#### 6.4 Towards a human rights culture

Although Malta's political system is formally a democracy with a solid rule of law, a number of issues arising from democracy have been identified which disempower irregular immigrants and hinder a human rights approach to irregular migration in general. The two main political parties are the strongest threat to democracy in Malta due to their obsession on control as a mode of operation and a form of aggressive competitiveness. The parties are a strong divisive force in society and demand loyalty which often takes precedence over the national interest. Addressing this situation directly, when it is so deeply entrenched in the social fabric of Maltese society, is very difficult. Several proposals have been made by small political parties to amend the Constitution so as to allow smaller parties a fair possibility to elect their representatives in Parliament. This might partially address, but only in a minimal way.

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incident, the arsonists put five burning tires filled with petrol against the backdoor of the journalist's house and spread smashed glass and petrol on the road in front of the house, in an apparent attempt to prevent the family from escaping and hinder the provision of help.' European Commission against Racism and Intolerance, *Third Report on Malta*, CRI 2008(22), Council of Europe, Strasbourg, 2008.

Further reporting can be found in Herman Grech, 'Migrants' lawyer's car set alight', *The Times of Malta*, 12 April 2006; Herman Grech, 'Show of solidarity with the Jesuits', *The Times of Malta*, 3 April 2006; Massimo Farrugia, 'Jesuits' cars 'torched'', *The Times of Malta*, 16 March 2006.

<sup>59</sup> Carmen Sammut, 'Migrants need to be seen and heard too', *MaltaToday*,

<<http://www.maltatoday.com.mt/blogs/carmen-sammut/migrants-need-to-be-seen-and-heard-too>> Blog entry: 30 July 2010, (accessed 13 June 2011).



In the eventuality of such amendments, the likelihood is that the same voting patterns would be reproduced. Drawing primarily on the analysis above, what I am proposing are changes to empower immigrants and to encourage a human rights culture that will target the political culture in a more holistic manner to encourage a human rights culture.

### *Changes to the system*

The right to vote comes along with the right to correct information. The two key entities that can ensure this are politicians and the media. Since politicians occupy such a privileged position in Maltese society, they should embrace the accompanying moral responsibility that comes along with it. Public speeches about irregular immigrants and any innuendos which create insecurity should not be used to gain political advantage. The role of an independent media in responsible reporting also cannot be over emphasised since it has a huge influence on public perceptions of immigrants. Reporting should be fair and correct to ensure that voters are presented and have access to information.

Malta's non-mandatory high voter turnout results, at times, in short-term populist policies which are in the interests of the majority and put vulnerable groups at a further disadvantage. The global human rights system has been actively encouraging states to set up independent human rights institutions or 'Ombudsperson institutions', to address this issue. Malta has undertaken this approach in several fields of disadvantaged groups like that of disability, children, and women. With regards to non-discrimination on the basis of race, nationality and ethnicity, the responsibility has been entrusted to the NCPE. There appear to be various shortcomings in this field. The most urgent however are the independence of this entity from the influence of the Government and the facilitation of access to it by immigrants.

Some bureaucratic practices by acting 'indifferently' to irregular immigrants are (re)producing the boundaries between insiders and outsiders. The bureaucratic system is also burdened with inefficiency because Ministers abuse the system to ensure that their clients/electorate is prioritised, however foot dragging techniques by the bureaucrats themselves can also be seen as a show of power in reaction to the

often repressive leadership styles of the Ministers. Codes of ethics need to be strictly adhered to as well as monitoring and complaints mechanisms. A person-centred and efficient public bureaucracy would address the general feeling of helplessness and disempowerment amongst irregular immigrants. The Office of the Ombudsman which deals with complaints of injustice and inefficiency within the public service should be more accessible to irregular immigrants.

### *Encouraging participation*

Education on the benefits and obligations of all citizens to take an interest and participatory role in politics which goes beyond their immediate interests should be at the centre of government policy. It is however the current system of patronage which hinders such an approach. This needs to be tackled in a more systematic way by ensuring a fair, efficient and accessible public bureaucracy. Citizenship education in secondary schools is part of the National Minimum Curriculum. This is a laudable activity.

In view of the current dominance of charity-based NGOs, government policy should support human rights NGOs and those associations which embrace a human rights approach. This could be done by specifically funding projects which are human rights based. In addition transparent investigations and protection of activists who are targeted is essential.

### *Empowering irregular immigrants*

Irregular immigrants need to be supported in organising themselves and speaking out. Apart from their participation and contribution to the national public sphere, this would have several corollary positive ripple effects particularly for immigrants' integration which is the topic of the next Chapter.

Irregular immigrants are not tolerated, and are therefore not visible, in the national public sphere. As such they cannot contribute to the debates and regeneration of ideas that feed into the national imaginary. Given the current state of affairs and an increase

in irregular migrants, the active participation of immigrants, including irregular migrants, in the national public sphere must be facilitated and encouraged.

## 6.5 Conclusion

The overwhelmingly uncritical presentation and acceptance of the relationship between human rights and democracy as almost a natural liaison, is problematic for human rights. This relationship is far from being self-evident. For this reason the assumption that a democratic political culture would automatically include a human rights culture is wrong. An understanding of the inner workings of democracy and how this, in practice, can be very different to the formal structures is thus essential for the enactment of a human rights culture. Viewing democracy as a 'field of practice' brings out the continual negotiation that is going on between human rights and democracy. This happens at different levels and between different actors. More crucially, it can have serious implications for the basic well-being of immigrants. Liberal representative democracies, in which the Constitution not only ensures due process and the rule of law, but also establishes the protection of human rights as one of the major tenets, face such challenges. This Chapter should be seen as providing a contribution to this challenge

In the Maltese case, irregular migrants are at the unfortunate end of these tensions. Endeavours to establishing a human rights culture must take into consideration the political force that 'the fear of the masses' plays in the democratic arena. This works against the interest of minorities or disadvantaged groups which are numerically small. Irregular migrants, by not even holding any votes, are disadvantaged in a more extreme way.

In addition, some bureaucratic practicesacerbate the politics of exclusion and produce a 'disempowering system' which negates immigrants' access to basic services. Although such practices are less visible, they constitute an important part of the human rights praxis and ought to be identified and discussed more. It is unfortunate that there are not enough significant forces from within civil society acting as a lobby for irregular migrants. On the other hand, NGO activity appears to be embedded in a

dominant overarching framework of charity that does not allow a human rights approach. The expectation of political engagement from civil society on governance issues from a human rights point of view is therefore curtailed. This needs to be addressed together with the responsibility of citizens to participate in popular governance. Both must be framed in the broader democratic rationale of warding off the negative forces of oppression and tyranny. Finally, this should include the realisation that the empowerment of irregular migrants is crucial to establishing a human rights culture within a democratic setting. Human rights philosophy therefore requires a particular democratic culture which consciously accommodates and prioritises human rights principles.

## Chapter 7: ‘After the roads’: How equality in human rights translates into a model for social justice

### 7.1 Introduction

So you do not give me first priority, but excuse me, if you’re not going to give me first priority, where are you going to put me on your scale of priorities? Are you going to put me at the very bottom, after the roads? It’s a question of setting social priorities. I think there’s a reason behind the fact that we don’t give enough support to these foreigners coming to our country. It could be due to a lack of will, or that we don’t recognise their rights – and equally the reason for this could be that our resources are limited and that we are not able to manage them well. But at the end of the day, it’s a question of values also, scale of values.<sup>1</sup>

This quote is taken from a personal interview with a Church Agency employee who commented on the lack of equality and fairness that characterises the treatment of irregular migrants in Malta. The state of the roads in Malta is a constant in political rhetoric and popular jokes due to the persistent presence of pot holes. The pot-holed roads are therefore associated with public goods which are not adequately maintained. This quote should not be taken as a libertarian comment, in contrast to a communitarian stance, focusing on the common good and public goods. Rather the interviewee, perplexed by the lack of care for human beings, uses this allegory to explain how irregular immigrants fail to feature in Malta’s list of social priorities as they are relegated to some obscure place after the maintenance of public goods.

This Chapter asks: how is it possible to safeguard civil and political rights when satisfactory economic and social conditions are not in place? How can irregular immigrants in Malta express their humanity if they are destitute or lack the basic means for subsistence? Placing irregular immigrants’ issues ‘after the roads’ would suggest that the Government feels justified in not meeting the minimal standards required for basic needs. As a result, many irregular immigrants in the community are excluded, living almost in segregation, vulnerable to destitution, at risk of absolute poverty, with many living in tent villages ‘infested by rats’, and more, as this Chapter

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<sup>1</sup> Personal Interview Q – Church agency employee, 23 January 2009.

will illustrate.<sup>2</sup> In addition to the suffering caused to the immigrants themselves, widespread intelligence that the creation of such ghettos is hardly ever in the national interest, seems to be ignored. Ghettos risk becoming hubs of illegal and criminal activity, and generally play a significant part in exacerbating negative sentiments and contempt between the host community and the migrants. This Chapter also confirms the assertion made in Chapter 4 that the ill-treatment of immigrants in detention is abominable but it is also indicative of the presence of deeper structural problems. This kind of unequal treatment is not acceptable from a human rights point of view. Indeed, the concept of equality was identified earlier in the introductory chapter as the fourth building block of a human rights culture.

Equality in the human rights movement is presented in a multi-dimensional, albeit delimited, way. The human rights logic is based on the principle of 'moral equality', which is derived from a shared humanity and expressed in the concept of human dignity, and promotes a dualistic understanding of 'social equality'. Social equality is important for two reasons, firstly to counter cultural domination and discriminatory practices through policies and a provision of services that ensure 'equality of opportunity'. Secondly, equality is also used in an economic sense to denote a fair distribution of resources which prioritises the most vulnerable. These different aspects, or dimensions, of the same concept present in the UDHR should not be seen as separate, but as two interdependent characteristics of the same concept.

The critical theorist Nancy Fraser makes a strong argument for a multi-dimensional understanding of equality. She argues that a theory of justice needs to be just as sensitive to socio-economic injustices as to cultural injustices. The former, she says, necessitates 'redistribution' of resources, the latter can be addressed through 'recognition'. Addressing both these forms of injustice, or dimensions of equality, will enable 'representation', or 'parity of participation' to occur in society, which apart from being a means of addressing injustice in itself, also demonstrates the structural position of disadvantaged groups in a given society. This Chapter will use these three

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<sup>2</sup> Advocacy Network on Destitution, *A report on a pilot study on destitution amongst the migrant population in Malta*, Jesuit Refugee Service Malta, Birkirkara, 2010; Mario Cardona, *You will always have the poor among you: A report about poverty in Malta*, Jesuit Centre for Faith and Justice, Valletta, 2010; Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, CommDH(2011)17, Council of Europe, Strasbourg, 2011.

constitutive elements of equality (redistribution, recognition and representation) to identify the gaps between the kind of ideal-type equality presented by human rights and the current practice of equality with irregular immigrants in Malta. The aim is to demonstrate how the notion of social equality as presented by human rights is a powerful concept that serves to highlight the multiple and subtle ways in which irregular immigrants are treated unequally in Malta. This leads me squarely into the central questions of this Chapter: How are social priorities set in Malta? What does this say about social equality and social justice in Malta? What possible directions are suggested when using the notion of social equality as presented by human rights to analyse the situation?

This Chapter will show how the concept of social equality in human rights philosophy should guide political decisions on a state's redistribution of resources. The main message that this Chapter imparts is that *first* everybody's human rights need to be safeguarded and only once this is attained could decisions be made on other forms of social and public spending. In practice this might mean a decrease to the general standard of living of the polity (Maltese citizens in this study), insofar as this decrease in the standard of living does not threaten the basic livelihood of this polity. This reasoning could be seen as an *internal* application by states of the principle of universality. In other words, human rights logic promotes a redistribution of resources that caters first for the basic needs of all. The Professor of Public Policy and Philosophy, Allen Buchanan, notes with regret a lack of engagement between theories of egalitarianism and human rights literature. He says:

Recent philosophical theories of egalitarianism have generally proceeded as if there were no human rights movement or as if the idea of human rights was not an important expression of the commitment to equality. Human rights lawyers and activists have generally not drawn on recent philosophical egalitarian theories to help ground the conventional conception of human rights....<sup>3</sup>

This Chapter could also be seen as an attempt to contribute to this gap. It is divided into four sections. In the next section, the multi-dimensional notion of equality necessary for a human rights culture, as informed by Fraser's theory, is outlined. The following section demonstrates how irregular immigrants' needs are excluded from

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<sup>3</sup> Allen Buchanan, 'Equality and Human Rights', *Politics, Philosophy & Economics*, Vol. 4, no. 1, 2005, p. 87.

the national list of social priorities. Furthermore, two issues stand out for their use in justifying unequal treatment and exclusion. These are, the discourse of a 'lack of resources' and the absence of an integration policy. I argue that this leads to rampant unequal treatment, best described as exclusion, and to the positioning of immigrants' basic needs to 'after the roads'. The following section puts forward some proposals towards addressing this situation. The final section asserts the need for a cultural shift towards an egalitarian society for the nurturing of a human rights culture.

## **7.2 The concept of equality in human rights theory**

The concept of equality is mentioned no less than thirteen times in the UDHR (either as 'equality' or as 'equal'). This gives an indication of the importance of the concept for the modern human rights movement. Buchanan has unequivocally stated:

The modern human rights movement is arguably the most salient and powerful manifestation of the commitment to equality in our time.<sup>4</sup>

The concept of equality in the modern human rights movement is understood in a multi-faceted way. Equality is first used as an overarching moral-philosophical principle of universal human dignity. It asserts the Enlightenment idea that all human beings are equal in worth and have equal human rights. This can be seen in the UDHR Preamble and article 1 which state:

Preamble: Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Article 1: All human beings are born free and equal in dignity and rights...

Its second use is more substantive and more clearly geared towards the achievement of social and global justice. This includes articles which promote non-discrimination and ensure equality of opportunity. The concept of equality thus cuts across the traditional categorisation of human rights into civil and political rights (associated with 'freedom from'), and economic, social and cultural rights (associated with 'freedom to'). For example, in the UDHR equality as negative rights would include article 7 the

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<sup>4</sup> Ibid, p. 69.



right to non-discrimination and article 10 the right to a fair hearing. Equality as positive rights would include article 21(2) the right to access to public services, article 23(2) the right to equal pay for equal work and article 26(1) the right to education.

Fraser makes no claims to put forward specifically a human rights view, however her theory is grounded in a similar nuanced understanding of equality which is the reason why her theory is amply used in this Chapter. Fraser can be seen as articulating the message inherent in the UDHR, that the practice of social equality, or addressing societal inequalities, requires appropriate political, cultural and economic conditions. The following quote explains the inter-relation of representation, recognition and redistribution, the three main characteristics of Fraser's theory of justice. She says:

It is my general thesis that justice today requires both redistribution and recognition. Neither alone is sufficient, as soon as one embraces this thesis, however, the question of how to combine them becomes paramount. I contend that: the emancipator aspects of the two paradigms need to be integrated in a single, comprehensive framework. Theoretically, the task is to devise a two-dimensional conception of justice that can accommodate both defensible claims for social equality and defensible claims for the recognition of difference. Practically, the task is to devise a programmatic political orientation that integrates the best of the politics of redistribution with the best of the politics of recognition.<sup>5</sup>

Fraser supports a dualistic view of social justice. She points out that the two aspects are increasingly and misleadingly portrayed as antithetical, mutually exclusive and even, at times, polarised by theorists.<sup>6</sup> Therefore, in much the same way as the politics of recognition and difference are not properly acknowledged by theories of poverty reduction and wealth redistribution, the politics of recognition also tends to put aside redistribution concerns. According to Fraser this failure is based on two false assumptions: a) that inequality in modern capitalist societies is solely conditioned by the market whereas; b) in pre-state societies inequality was based on kinship.<sup>7</sup> Fraser argues, on the other hand, that inequalities in modern capitalist societies are generally produced by a combination of so-called traditional hierarchy-setting mechanisms, like kinship, and also by market forces. In other words, inequalities are never the result of

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<sup>5</sup> Nancy Fraser, 'Social justice in the age of identity politics: Redistribution, recognition, and participation' in *Geographic Thought: A Praxis Perspective*, eds. G. Henderson & M. Waterstone, Routledge, Oxon, 2009, p. 73.

<sup>6</sup> *Ibid*, pp. 72-73.

<sup>7</sup> *Ibid*, p. 82.

one or the other but are usually a combination of both. Fraser also laments the decreasing interest in egalitarian redistribution which she considers crucial to a proper theory of justice. She explains it thus:

The demise of communism, the surge of free-market ideology, the rise of ‘identity politics’ in both its fundamentalist and progressive forms—all these developments have conspired to de-centre, if not to extinguish, claims for egalitarian redistribution.<sup>8</sup>

Fraser’s main argument is that justice requires social arrangements that permit all members to participate in social interaction on a par with one another in all spheres of life – politics, the labour market, family life and so on. Parity of participation is a demanding requirement for the state to implement because the creation of effective conditions for participation requires more than the elimination of legal discrimination, it also demands positive action. Fraser describes the different dimensions of justice as such:

The redistribution paradigm focuses on injustices it defines as socio-economic and presumes to be rooted in the political economy. Examples include exploitation, economic marginalization, and deprivation. The recognition paradigm, in contrast, targets injustices it understands as cultural, which it presumes to be rooted in social patterns of representation, interpretation, and communication. Examples include cultural domination, non-recognition, and disrespect.<sup>9</sup>

The following sections will explore social inequalities from the Fraserian perspectives of ‘recognition’, ‘redistribution’ and ‘representation’ to facilitate the subsequent analysis of irregular migrants in Malta. By dissociating the three concepts I am aware that I might appear to be falling into the trap that Fraser herself warned against. However, this is not a conceptual dissociation but is pursued purely with the intention of ease of analysis, as can be seen in the resulting conclusions which combine the three aspects.

### **7.2.1 Redistributing wealth**

In Fraserian terms, ‘redistribution’ refers primarily to the socio-economic dimension of equality, which Fraser describes as such:

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<sup>8</sup> Ibid, p. 72.

<sup>9</sup> Ibid, p. 73.

The redistribution paradigm focuses on injustices it defines as socio-economic and presumes to be rooted in the economic structure of society.<sup>10</sup>

In this way, it is understood as the transfer of a nation's wealth from those who have more to those who have less. The most typical examples are mechanisms like taxation and the welfare system. 'Maldistributions' of goods and resources in societies are therefore corrected to ensure that those most in need have their basic needs met.<sup>11</sup>

Discussions around the implementation of the concept of equality have been ongoing for a long time. Theories of social justice were introduced into political discourse in the 19<sup>th</sup> century by progressive social philosophers and social economists.<sup>12</sup> Their aim was the inclusion of the poor and disenfranchised as equals within a given society because they could see that the poor were suffering as a consequence of unequal treatment. In a similar vein, the concern of human rights is to ensure that enough resources are directed towards disadvantaged individuals and groups in society to enable them to live in a way that is respectful of their dignity. Although this is not a mainstream approach, and may appear controversial, the ICESCR by reiterating that the ideal of human beings is to enjoy freedom from fear and want, clearly indicates the approach to be taken. The following is an excerpt from the Preamble of the ICESCR:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.<sup>13</sup>

In addition, the argument of resource constraints, from a human rights point of view, does not immediately justify and absolve any state from its obligations. Interestingly, article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates the obligation of state parties to take the necessary steps 'to the maximum of its available resources' to ensure the upholding of the human rights of all.

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<sup>10</sup> Nancy Fraser & Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange*, Verso, London, 2003, p. 13.

<sup>11</sup> Nancy Fraser, *Social justice in the age of identity politics*, 2009, p. 73.

<sup>12</sup> David Miller, *Principles of Social Justice*, Harvard University Press, USA, 1999, p. 24.

<sup>13</sup> ICESCR, Preamble.

This was explained in General Comment 3 of the UN Committee on Social, Economic and Cultural Rights.<sup>14</sup> Point 11 of this General Comment states:

...even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.<sup>15</sup>

States' obligation to ensure the conditions for the enjoyment of economic, social and cultural rights is however not unlimited. Equality is limited to the minimal conditions which are necessary for one to be able to seek and build a decent life. This is in line with Buchanan's minimalist view, or what he calls the 'Modest Objectivist View' of human rights, the essence of which is described in the following quote:

...according to the Modest Objectivist View, honoring the commitment to human rights does not require anything approaching equality of condition or outcome for all human beings, nor even that all human beings actually have decent lives; instead, it only requires that all have the opportunity for a decent life.<sup>16</sup>

Buchanan does not resolve the difficulty of defining exactly what constitutes a decent life although the articles in the ICESCR and ensuing treaties, as well as General Comments by the Committee on Economic, Social and Cultural Rights (CESCR), give clear directions. What is not negotiable is the prime value given to the concept of equality. The human rights logic decrees that the concept of equality comes first before status differences, citizenship, difficulties in management and so on. This can be seen in the following quote from the CESCR:

...the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.<sup>17</sup>

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<sup>14</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment 3, 'The nature of States parties obligations, Art. 2, para. 1, of the Covenant'*, Fifth session, United Nations, Geneva, 1990, pts. 10 - 13.

<sup>15</sup> Ibid, Point 11.

<sup>16</sup> Allen Buchanan, 'Equality and Human Rights', 2005, p. 74.

<sup>17</sup> CESCR, General Comment 3, 1990, Pt. 12

It would appear that the problem in Western developed countries is the infiltration of rights-talk into spheres of needs which do not constitute basic needs. An example of this is the right to education. The right to education in the UDHR, as well as in the UN Convention on the Rights of the Child of 1989, states that all children have the right to primary education. However, taking into account that primary education is a basic right, it would be inconceivable for a human rights approach to be made for all children to have access to a privileged school, like for example Eton College. And yet, it is common knowledge that education at such a school, for a variety of reasons, generally enhances the life chances of a child. Should all children have a 'human right' to attend Eton? No. According to human rights, states are under no more than the 'minimal core obligation' to ensure that children have access to quality education. Granting anything beyond this would be a state's decision. For example, in Malta, as part of a policy to encourage young people to further their education by reading for a University degree, every student is supported by a maintenance grant. Students from low-income families are supported by a higher grant, and it is expected (according to the politics of recognition embraced by the state) that particular needs like impairments are to be taken into account. Are these human rights? Not necessarily; one could talk about human rights only if they are deemed to be indispensable for creating the right conditions for basic minimal standards.<sup>18</sup> They are however inspired by the same principles like human rights but are essentially state concessions, policies or if enshrined in law, civil rights. 'Expecting' more than basic needs from human rights can be dangerous partly because it could lead to political contestations and the watering down of rights talk. More crucially, such higher expectations obscure the main message of human rights: that the very basic needs need to be prioritised by governments. As Henry Shue, professor of ethics masterly put it, human rights are the 'minimum core obligations' for 'a decent chance at a reasonably healthy and active life

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<sup>18</sup> I am aware that this is a controversial statement, and I am also aware of the following article, amongst others: UN, *ICESCR*, 1966, Article 13, 2(c) 'Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education'. Although this article could be interpreted, as it often has been, that the State has an obligation to provide services that ensure accessibility to all, it does not detract from my main argument deriving from the spirit of human rights that policies should aim first to ensuring the basic minimum standards.

of more or less normal length'.<sup>19</sup> The creation of the discourse of a 'lack of resources' discussed below must be seen against this backdrop.

Wealth redistribution is a central tenet of every state, in both the global north and the global south. It requires complex mechanisms not least because fraudulent activity could jeopardise the whole system. In addition, it has been pointed out, by feminists and others, that the reliance of vulnerable people on state benefits does not necessarily lead to emancipation, but at times helps the reproduction of oppressive societal structures.<sup>20</sup> In spite of these problems, wealth redistribution remains one of the keys to achieving social justice insofar as the focus remains on basic standards and therefore minimum core obligations owed by the state.<sup>21</sup> It is worth noting that in spite of high economic development no country in the world has yet managed to achieve this for all the people on its territory.

### 7.2.2 Recognising differences

'Recognition' refers to the politics of identities and differences. Redress of injustices of this kind would be sought when a hegemonic culture is imposed as the norm.<sup>22</sup> The increasing multiculturalism of modern societies can be seen as both a product (and reproducing) increasing differentiation between people. This, unfortunately, can give way to unequal treatment and injustices based on different stereotypes and roles. The politics of recognition are not just a socio-political issue but also a moral and personal one because by undermining people's sense of selfhood and self-worth the harm inflicted can be personally damaging.<sup>23</sup> This explains why injustices of this kind have been presented as a form of oppression.<sup>24</sup> Fraser describes this dimension of equality in the following manner:

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<sup>19</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy 2<sup>nd</sup> Edition*, Princeton University Press, New Jersey, 1996, p. 23.

<sup>20</sup> Carol Pateman, 'The Patriarchal Welfare State' in *The Welfare State Reader 2<sup>nd</sup> Edition*, eds. C. Pierson & F.G. Castles, Polity Press, Cambridge, 2006, p. 145.

<sup>21</sup> 'Minimum core obligations' appeared in literature on economic and social rights in the 1980s and was authoritatively used in CESCR General Comment no. 3.

<sup>22</sup> Nancy Fraser, 'Social justice in the age of identity politics', 2009, p. 74.

<sup>23</sup> This is the argument that is made in Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (trans. Joel Andersen), Polity Press, Cambridge, 1995.

<sup>24</sup> Charles Taylor, 'The politics of recognition' in *Multi-Culturalism and 'The Politics of Recognition'*, eds. C. Taylor & A. Gutmann, Princeton University Press, Princeton, 1992.; Ruth Lister, 'A politics of recognition and respect: involving people with experience of poverty in decision-making that affects their lives' in *The Politics of Inclusion*

The recognition paradigm...targets injustices it understands as cultural, which it presumes to be rooted in social patterns of representation, interpretation and communication.<sup>25</sup>

Equality before the law is one way in which these kinds of injustices can be addressed. Indeed, laws can support social change by addressing existing hierarchies within societies. Furthermore modern capitalist societies incorporate other distinct patterns of ordering and patterns of subordination which cannot be eradicated by legal reform. These processes of hierarchy-setting linked to status and role are often overlooked and wrongly perceived as remnants of 'traditional' practices and societies which have not been eradicated by capitalism.

'Modern' and 'democratic' societies striving for equality also create groups of people who are considered inferior to such an extent that they are excluded.<sup>26</sup> Exclusion, although a contested term, is generally taken to refer to those who are administratively excluded by the state, and as such, denotes an extreme case of inequality.<sup>27</sup> It is with such cases that human rights are concerned and necessary. Returning back to the argument made in the previous section, by proposing a limited equality, human rights are indirectly reasserting their mandate to safeguard *all* peoples' dignity. The human rights approach is not about safeguarding a particular standard of living, which may be already higher than the minimum necessary for a decent life, it is about finding the minimal standard which enables the politics of recognition to be implemented. In practice, one would expect the Government to invest first in eradicating gender discrimination at the workplace, before, for example, gender discrimination at luxury casinos.

Given the severe and extreme nature of discrimination that some groups face, the temptation to treat the case study in isolation is greater. The risk, in doing so, is that social research becomes implicated in justifying the 'difference'. In the case of non-citizens, this is often the case. In such cases it is important to view groups according to

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*and Empowerment: Gender, Class and Citizenship*, eds. J. Andersen & B. Siim, Palgrave Macmillan, Hampshire, 2004; Terry Lovell. 'Introduction' in *(Mis)recognition, Social Inequality and Social Justice: Nancy Fraser and Pierre Bourdieu*, ed. T. Lovell, Routledge, London, 2007.

<sup>25</sup> Nancy Fraser & Axel Honneth, *Redistribution or Recognition*, 2003, p. 276.

<sup>26</sup> Charles Taylor, 'The Dynamics of Democratic Exclusion', *Journal of Democracy*, Vol. 9, No. 4, 1998, p. 143.

<sup>27</sup> John Hills, Julian Le Grand & David Piachaud, 'Introduction' in *Understanding Social Exclusion*, eds. J. Hills, J. Le Grand & D. Piachaud, Oxford University Press, New York, 2002, p. 2.

their structural position in society. This is the argument put forward by the feminist scholar Mariam Martínez whose research focuses on disenfranchised immigrants in contemporary societies. She writes:

From a social justice perspective it does not matter if the source of the subordinate position of immigrant social groups in European societies is a different set of practices, conventions, music, language, or visual images. What matters instead is that because of this difference they stand in a structural position in which they find more obstacles to the pursuit of their interests and skilled professions; a structural position in which they have a small range of opportunities to achieve and develop autonomy or exercise their capacities.<sup>28</sup>

Martínez's approach is useful because it exemplifies how the human rights approach in the analysis of a social situation should look for the obstacles, or structural position, to use Martínez's words, that cause inequality. In addition it is also inclusive because it maps immigrants' disadvantage within the same parameters of other disadvantaged groups.

### 7.2.3 Representation or 'participation parity'

The third dimension of Fraser's theory of justice is political 'representation', or participation parity. This dimension is different to the others in that it can also function as a normative tool to identify gaps in the system.<sup>29</sup> Fraser proposes that this idea of participative parity should lead us to identify the existing disparities in participation as a consequence of asymmetries of power and barriers to participation. In an ideal world, 'participative parity' is a state in which all the barriers to participation in society are removed and in which people voluntarily participate out of their own free will. Participation parity, or political representation, can be achieved by ensuring redistribution of wealth and recognition of differences. She explains it as such:

According to the norm [of parity of participation], justice requires social arrangements that permit all (adult) members of society to interact with one another as peers. For participatory parity to be possible, I claim, at least two conditions must be satisfied. First, the distribution of material resources must be such as to ensure participants'

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<sup>28</sup> Mariam Martínez, 'On Immigration Politics in the Context of European Societies and the Structural Inequality Mode' in *Dancing with Iris: The Philosophy of Iris Marion Young*, eds. A. Ferguson & M. Nagel, Oxford University Press, Oxford, 1999, p. 214.

<sup>29</sup> Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World*, Columbia University Press, UK, 2009. p. 61.



independence and 'voice.' I call this the *objective condition* of participatory parity. The second condition requires that institutional patterns of cultural value express equal respect for all participants and ensure equal opportunity for achieving social parity. This I shall call the *intersubjective condition* of participatory parity. ... either burdening them with excessive ascribed 'difference' or by failing to acknowledge their distinctiveness.<sup>30</sup>

Apart from their normative use, the principles of 'participation' and 'representation' also need to be qualified from a human rights point of view. Retaining the ideal of a barrier-free society in which every member responsibly participates out of his own free will is laudable, but is no more than a guiding principle. Misguided assumptions, like that legal citizens automatically feel part of the political community and voluntarily take up their obligations, including participation in governance, should be contested. Examples easily come to mind of both citizens who are alienated or politically irresponsible, as well as non-citizens who are socially and politically committed to their host community. A more controversial area is when the political participation of migrants, who are by definition external to the polity, should be allowed. Just as participation in the labour market is often justified as necessary for the country, participation in governance and politics is an altogether completely different matter. An extreme example like the right to vote serves to highlight both some of the qualifications and at the same time, limitations of equality. Does everybody have the human right to vote? The ICCPR presupposes (official) political membership, as article 25 states:

Every citizen shall have the right and the opportunity....:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.<sup>31</sup>

To take the discussion further, two hypothetical examples are proposed. The first is an immigrant who has been living and working in a country for fifteen years. He rents an

<sup>30</sup> Nancy Fraser & Axel Honneth, *Redistribution or Recognition?*, 2003, p. 36. Italics in original.

<sup>31</sup> United Nations, *ICCPR*, adopted by the General Assembly 16 December 1966, entered into force 23 March 1976, Article 25.

apartment and has a long-term residence permit which is renewed every ten years. The second example is of another immigrant who has been living in the country for two years. He has just managed to secure a temporary job. He spent the first eighteen months in a migrant detention centre and has been living in a migrant open centre for the last six months. He has a 'temporary leave to remain' permit. Understandably, the right to vote of the first immigrant would be more positively looked upon than the right to vote of the second immigrant. However, although giving the second immigrant the right to vote presents practical and moral difficulties the result is non-representation which is likely to put the immigrant at a disadvantage and this might have serious implications if it affects his basic human rights or minimal core entitlements. Buchanan goes further and argues that if the link between democratic participation and representation of interests leads to the minimal conditions necessary if an individual is to have an opportunity for a decent human life, then democratic participation should be considered a human right for all. Below is his argument:

Voting or otherwise participating in governance may not be a constituent of a minimally good life for all human beings, but there is considerable evidence that various constituents of a minimally good life are typically at risk when those who are governed are not able to participate in governance. Thus it is said that even if the right to democratic governance is not itself a human right, it provides the most reliable protection for human rights.<sup>32</sup>

The starting point of human rights logic is the principle of equality. It is then followed, in a secondary instance, by considerations arising from the principle of difference. Citizens and non-citizens (including irregular migrants) as members of one universal cosmopolitan community should therefore have the right to become members of any polity. Human rights does not establish precise criteria - how long that should take, or under which conditions – but one can utilise human rights logic to arrive to a decision on what criteria would be legitimate and justifiable in a given context.<sup>33</sup> The argument therefore is that any limitations should be made within a larger human rights framework which values moral equality and inclusion above difference and exclusion. In other words, the understanding of the concept of equality in human rights

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<sup>32</sup> Allen Buchanan, 'Equality and Human Rights', 2005, p. 73.

<sup>33</sup> For example, EU citizens resident in other EU countries generally have the right to vote in MEP and/or local council elections.

philosophy cannot be compromised but it is 'delimit-able' under certain conditions. One can presume that attaining agreement on the justifiability of these conditions will create controversy.

To sum up, the understanding of equality necessary for a human rights culture is distinctive because it is both multi-dimensional and limited. It is multi-dimensional because it demands the principles of recognition, redistribution, participation as the foundations for an egalitarian society. In addition, and most importantly, equality in human rights is understood as limited because it focuses on achieving minimum core obligations and action is therefore directed *first* to the most disadvantaged in society, that is to say, to those whose opportunity to live a decent life is under threat even if they happen to be non-citizens.

The following section will analyse the situation of irregular immigrants in Malta. The allegation that irregular immigrants are not treated equally will be investigated and subsequently analysed using the Fraserian concepts of representation, redistribution and recognition.

### 7.3 The structural exclusion of irregular immigrants in Malta

Although this section will show how the majority of irregular immigrants are generally structurally excluded, the situation is somewhat appeased by charitable institutions. Paradoxically, the logic of this charitable approach might run counter to a human rights approach because it does not arise out of an egalitarian culture of entitlements.<sup>34</sup> In Malta rights-talk is widely felt to 'put peoples' backs up', and many Maltese feel much more comfortable employing a charitable approach. As one Maltese employee of an international NGO put it:

Yes, we are very happy to be charitable because it makes us feel good as human beings, but if we recognise ourselves as superior, we do not recognise their right to work. 'Jaħasra' [poor thing] is a common way of referring to immigrants which is highly pejorative. It still remains an issue of power. It is one thing if I willingly give you

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<sup>34</sup> Two works which make the case for the disempowering practices of the charity approach in the respective fields of development and disability: Brian K. Murphy, 'International NGOs and the Challenge of Modernity', *Development in Practice*, Vol. 10, No. 3 & 4, pp. 330-347; and Colin Barnes, *Disabled People in Britain and Discrimination: A Case for Anti-Discriminating Legislation*, Hurst & Company, London, 1991.

something, because it's nice to do this kind of thing, but as soon as you start demanding rights that's a totally different matter. A lot of people have this kind of attitude... 'I'll help you, of course, I'll surely help you. But don't come speaking about rights.' Rights then are a different issue altogether. It puts peoples' backs up.<sup>35</sup>

From this perspective, being charitable and benevolent sustains the power imbalance which keeps outsiders firmly out. It would explain the reluctance to deal with issues of equality of non-citizens. Another NGO worker highlights this power imbalance:

So let's find them [immigrants] a small job, let's help them, and with little pay but at least we're [Maltese people] doing a lot because we're helping them to have this job. Or else, there are a lot of them and we put them in detention centres and we give them food and 'all they need', and this is what we understand by helping them. As long as we feel that they're inferior to us, we can leave them in that category. But we are helping them '*jaħasra*' [poor things]. When we start seeing that they are trying to become like us – then we don't accept it at all, then we become angry and fearful...<sup>36</sup>

This is the dominant societal attitude and is unfortunately supported in large part by the lack of action by the Government to address these issues in a meaningful way. The 'inferior' treatment, negative societal attitudes and stereotypes that irregular immigrants regularly have to endure are not being addressed systematically by governmental policies. This brings about a situation whereby it is acceptable that immigrants are treated unequally, and where they are not included in discussions of fairness and justice.

The rest of the analysis will follow the Fraserian representation, recognition and redistribution. The presentation of the analysis will start by drawing on 'participation parity'. This section will demonstrate that the inequality gap is huge and that this makes it difficult to think of the level of 'emancipation' of irregular immigrants, or as Martinez had said, the structural disadvantage. With this in mind, the focus on the following two sections, drawing on wealth redistribution and the politics of recognition, will focus on two dominant discourses which condition any initiatives in this regard.

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<sup>35</sup> Personal Interview K – International NGO employee, 5 January 2009.

<sup>36</sup> Personal Interview A - NGO worker, 24 October 2008.

### 7.3.1 The unequal treatment of irregular immigrants as a barrier to 'participation parity'

If representation and participation parity are the yardstick by which to measure irregular immigrants' equality and emancipation in society, then what could be said of a group of people who are not represented or allowed to participate in any way? It is not possible to give a full description of the political, socio-economic and cultural exclusion that immigrants face, I have chosen to describe a few issues which depict unequal treatment.

Irregular immigrants have been identified as a new category of people living on the poverty line and at risk of destitution in a report entitled *You will always have the poor among you* published by the Centre for Faith and Justice.<sup>37</sup> However this is not acknowledged by the authorities. For example, the Maltese Parliament, in July 2009, declared that there was 'no absolute poverty' in Malta.<sup>38</sup> Both sides of Parliament were in agreement on the presence of relative poverty. Member of Parliament Joe Cassar noted that the report did not make enough reference to immigrants because according to him, 'It was also relative poverty when people resorted to waylaying an immigrant, beat him up and leave him helpless at the side of a road.'<sup>39</sup> This assertion that there was no absolute poverty in Malta was heavily contested and serves to show that parliamentarians are far removed from the reality. Just a few days later the National Platform of Maltese Non-governmental Development Organisations (SKOP) publicly urged the Maltese authorities to acknowledge the existence of absolute poverty and to implement policies to support vulnerable people. The SKOP spokesperson was reported as saying:

At the same time that the parliamentary debate rejecting the existence of absolute poverty in Malta, a number of social activists were holding meetings with a group of African women residing in the north of Malta and currently benefiting from humanitarian protection. This group of around 30 women, all with children, lack basic needs including food and nappies for their children. This amounts to absolute poverty

<sup>37</sup> Mario Cardona, *You will always have the poor among you*, 2010, pp. 35-39.

<sup>38</sup> The Times of Malta, 'No absolute poverty in Malta', *The Times of Malta*, 9 Jul 2009.

<sup>39</sup> Idem.

by any definition...Refusing or failing to acknowledge such categories of people was a sure way to guarantee that their needs would not be met.<sup>40</sup>

SKOP's statement is corroborated by another study conducted by ANDES which found that migrants in Malta fall into destitution because the benefits given to them are not enough to cover subsistence costs, not to mention accommodation and medical services.<sup>41</sup> The following extract from a 2010 report issued by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights sums the present situation up:

...progress in this area should be matched by...efforts on the part of the Maltese authorities to establish viable, long-term avenues for local integration, which should be supported by an adequate integration programme and eventually lead to family reunification and citizenship. To this end, the Commissioner finds that the system in place to support migrants, including beneficiaries of subsidiary protection, currently perpetuates their social exclusion and leaves them at serious risk of destitution. The Commissioner believes that in order to favour the gradual development of migrants' self-reliance and integration into society, the system which currently makes financial support for migrants dependent on residence in the open centres should be discontinued. Also, financial support and social assistance should be available to all beneficiaries of international protection.<sup>42</sup>

Apart from the parliamentarian's comment mentioned above, the utter lack of awareness of the plight of irregular immigrants by Maltese Parliament attests to the political invisibility of irregular migrants and supports the usefulness of the concept of 'participation parity'. This sheds further light on the opening quotation that irregular immigrants' needs are placed 'after the roads', and paves the way for the discussion below on the lack of resources and the absence of an integration policy. Certainly it exemplifies the scale of structural inequalities and as a result the gravity of human rights violations.

Apart from the provision of services and benefits, those persons who live below the poverty line in Malta are supported by the Non-Contributory Scheme regulated by the

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<sup>40</sup> The Times of Malta, '30 migrant mothers living in 'absolute poverty'', *The Times of Malta*, 14 Jul 2009.

<sup>41</sup> Joseph M. Sammut, 'Malta - Poverty and Social Exclusion in Malta', *European Social Watch Report 2010*, <<http://www.socialwatch.eu/wcm/documents/Malta.pdf>>, 2011, (accessed 24 July 2011).

<sup>42</sup> Commissioner for Human Rights, Report by Thomas Hammarberg, *Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, 2011.

Social Security Act.<sup>43</sup> Yet, irregular immigrants' benefits do not fall under this scheme and the financial allowance they receive is the responsibility of another Ministry. Once released from detention, irregular immigrants receive an allowance which varies according to their status. The rates are outrageously low. On average, migrants receive approximately €130 a month, and those returned under the EU's Dublin System (described in Chapter 3) receive around €80 a month. This support is received on the condition that they are residing at one of the migrant open centres. Just to get an idea of how little this sum is, it is worth comparing it to the weekly national minimum wage which itself is referred to as a 'poverty wage' by sociologists Angela Abela and Charles Tabone.<sup>44</sup> In 2008 it was €142.70 per week, which is already more than immigrants get per month. If €142.70 is a 'poverty wage', one can only imagine how miserly the immigrants' allowance is when it amounts to less than one fourth of the national minimum wage. Abela and Tabone explain it thus:

In 2008, the minimum wage in Malta was a mere €142.7 per week and has been referred to as a 'poverty wage'. Caritas Malta Director, Monsignor Grech, has called for the minimum wage to be redefined to an adequate amount, pointing to the rising cost of living and medicine and the high cost of property as factors causing hardship among the poor.<sup>45</sup>

In addition, the provision and access to social services for immigrants can be difficult. There are indications that this maybe be due to a lack of clear policies between government departments, a lack of training of professionals, the persistence of deeply entrenched prejudices and negative attitudes or a combination of the three. The following quote from an interview with a Ministry official shows the lack of collaboration between Ministries, and the quibbling over responsibilities and funding of services:

Unfortunately some officials do not understand that illegal migration is not a Ministry for Justice and Home Affairs issue – it's also a Ministry for Social Policy issue, and a Ministry for Health issue, and all the other Ministries...but what is their contribution? Close to nil, honestly, because financially the money has to come out all from the

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<sup>43</sup> Ministry of Education, Employment and the Family – Social Policy, 'Social Security: State Benefits in Malta', <[https://secure2.gov.mt/socialpolicy/SocProt/social\\_benefits/dss\\_state\\_benefits.aspx](https://secure2.gov.mt/socialpolicy/SocProt/social_benefits/dss_state_benefits.aspx)>, (accessed 12 July 2011); and *Laws of Malta*, 'Social Security Act', Chapter 318, 1987.

<sup>44</sup> Angela Abela & Charles Tabone. *Family poverty and social exclusion with a special emphasis on children*, Kummissjoni Nazzjonali Familja, Malta, 2008, p. 4.

<sup>45</sup> Joseph M. Sammut, 'Malta - Poverty and Social Exclusion in Malta', 2011.

Ministry for Justice and Home Affairs. Is that fair, or not? At a certain point the money finishes, even here!<sup>46</sup>

At the other end, NGO workers lamented the lack of coordination between government agencies. This has very serious implications when the most vulnerable immigrants - minors, immigrants with a disability, victims of violence and so on – are in need of a service. The following quote from an interview with an NGO worker demonstrates the difficulties he faces when trying to access services for his vulnerable immigrant clients:

In the social work field for example, there is a lack of knowledge as well. For example we take an African irregular immigrant who's being beaten by her husband to APPOGG. We're told, 'sorry, we don't know about these people, we can't work with them', and we're referred back to OIWAS. At OIWAS we're told that they're not there to work with victims of domestic violence. The message that I get is that because the victim is from a different country, from a different culture, they won't work with them. Even amongst social workers there's a lot of fear...And then there is the problem that some social workers won't work with them because they are refugees not Maltese, because 'they shouldn't be here and they shouldn't be taken care of'. And 'I have a long list, a waiting list and our Maltese clients come first'. But usually the policy is that victims are treated according to the priority of the case, not by who came in first – in units like child protection, in units like domestic violence, priority is given to high risk cases. When we go with an immigrant case they would say 'sorry we have a lot of Maltese waiting and they come first', even though in reality they have the same rights for those social services like anyone else in Malta has. If it's a priority and if it's serious they should be treated like other victims.<sup>47</sup>

These institutionalised practices have a disempowering effect on the immigrants not least because they reinforce the attitude that immigrants are a burden on the nation and undeserving of being served. What avenues for appeal, recourse or contestation do immigrants have? Not many. When I was on fieldwork, Malta had just transposed the Equality Directive into Maltese law, entrusting an existing body, the then National Commission for the Equality between Men and Women (which subsequently became the National Commission for Equality – NCPE) with its implementation. However due to a variety of reasons, with the lack of funds being the one most cited by my informants, this body was not delivering, immigrants hardly knew of its existence and those who did displayed a general diffidence in the whole institution. This is not

<sup>46</sup> Personal Interview C - Government official, 29 October 2008.

<sup>47</sup> Personal Interview F - NGO worker, 15 December 2008.



altogether surprising since diffidence in state structures is widespread amongst immigrants coming from countries in conflict or who have been traumatised by migrant detention in Malta (or on their journey). Those few migrants, who tried to access services, or to contest decisions, were faced with impenetrable barriers.

At the time that I conducted fieldwork, the situation was indeed dire and characterised by a general sense of hopelessness. The following quote from an interview with a refugee confirms this:

I never saw an immigrant who wants to stay in Malta...Most of the people they don't have any skill, most of them they have families in their home countries. In Malta there is no chance of getting reunited with one's family, there isn't training either in language, in skill, or in anything - so here it is just like someone stays floating on the Island, without having any clear future.<sup>48</sup>

The use of the term 'floating on the Island' strongly denotes powerlessness. This shows that the absence of an egalitarian approach has a direct negative effect on immigrants because they fail to see the possibility of taking control of their life in their hands. Commissioner for Human Rights Thomas Hammerberg comments:

Migrants I spoke to really show a high level of frustration and feel stuck in a limbo – unable to move to other European countries which return them to Malta because they are fingerprinted here; unable to return home; and unable to integrate in Malta. Measures enhancing migrants' integration should be accompanied by determined action to eliminate manifestations of intolerance and xenophobia.<sup>49</sup>

The above case study showing irregular immigrants' access to a public service gives an idea of the extent of unequal treatment. The complexity of the issues clearly demonstrates Fraser's point that it is not possible to separate the cultural politics of recognition and the economic politics of redistribution. The 30 migrant women in SKOP's Press Release quoted above, invisible to the authorities, are the victims of both economic and cultural injustices. In practice, the concerns that irregular migrants had over basic subsistence often left little time for indulging in the politics of recognition, although theoretically both should be tackled to properly address the injustice.

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<sup>48</sup> Personal Interview G - Refugee, 17 December 2008.

<sup>49</sup> Commissioner for Human Rights, 'Malta: European solidarity needs to be matched by strong efforts at national level to protect the human rights of migrants', *Press Release, 268(2011)*, Council of Europe, Strasbourg, 28 Mar 2011.

Despite clear indications of immigrants' exclusion, the overall attitude of the Government is unfortunately one of complacency. The vast structures and laws of formal equality that have been enacted are mostly motivated by EU accession as seen in Chapter 3. However the enjoyment of substantive equality for irregular immigrants remains elusive. There is not a framework which values 'equality' for irregular migrants. The way the Government approaches this issue starts from the principle of difference and inequality, and not a shared humanity and equality as human rights requires. This situation, or 'structural position' as Martinez calls it, is very far removed from the Fraserian 'parity of participation'. Nonetheless this goal should remain foremost because there is the tendency, even for the social analyst, to replicate these structures of inequality by focusing on positive developments however remote and unsatisfactory they may be deemed in the larger social scheme. It is in this spirit, using Fraser's 'participation parity' as a normative tool, that the analysis in the next section will be conducted.

The description above only skims the surface and does not convey the extent of inequality that seriously affects immigrants' position within Maltese society and leads to a situation of social injustice and exclusion. What has the Government's overarching position been so far? Two issues stand out in the Maltese case: a) the argument that Malta does not have enough resources to meet the human rights of irregular immigrants, and b) the lack of positive integration policies. In the spirit of Fraser's 'perspectival dualism', the following discussions should be taken as looking at the problem of inequality from two perspectives and not as two disassociated problems. Both issues are examples of the dominant logic starting from difference – immigrants are different and it is therefore justified to use another set of standards for them. This contrasts sharply with the rationale of human rights which starts from the principle of universal humanity – we are all morally equal – and only then moves on to the discussion on how to manage the situation.

### 7.3.2 'Maldistribution' or a 'lack of resources': Is it a good enough excuse?

Since 2004, the official position of the Government of Malta on irregular migration has included a statement that Malta lacks the resources to manage irregular migration effectively and to take care of irregular immigrants' basic needs.<sup>50</sup> Reference to the absence of natural resources in the country, to the size and population density, abound. This argument is used by the Government, first, in relation to calls for international solidarity and 'burden-sharing' with the international community and the European Union. The Government also uses this discourse, in a second way, to justify substandard conditions, unequal provision of services and generally any other alleged or stated human rights violation with human rights entities. This section is a critique of the latter and not the former.

In international fora, the lack of resources argument when presented by Malta, a very small island state without significant natural resources, appears particularly believable and therefore evokes sentiments of sympathy. Across the board, the Government, international organisations, NGOs and academics, uncritically acknowledge the resources challenge that Malta faces. Indeed the resources argument is often used unquestioningly by larger and smaller, richer and poorer countries. The objective economic disparity indicates that the scope of this argument encompasses more than simply economic limitations.

The argument is that human rights 'cost money' to uphold and if faced with a choice, one will prioritise one's own people. As a Church Agency employee put it, the general attitude is that: 'I already have lots of problems of a social nature in the country which I cannot keep up with...and now you come to my country and I have to cater for you too?'.<sup>51</sup> Resources are always finite, but as this Chapter is trying to illustrate, human rights should direct us to work towards safeguarding everyone's minimal basic rights. As the philosopher, known for his writings on social economy, Leslie Armour points out, human rights advocate the 'sharing' of resources:

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<sup>50</sup> Lawrence Gonzi, *Statement by the Hon Dr Lawrence Gonzi Prime Minister at the Sixty-fourth session of the United Nations General Assembly, Permanent Mission of Malta to the United Nations*, New York, 24 Sep 2009.

<sup>51</sup> Personal Interview Q – Church agency employee, 23 January 2009.

People may be entitled to rights that no society can provide. The answer seems obvious – what there is has to be shared. We can at least accept the logic of this situation. Because people may not be able to carry out their citizenly duties, moral and political rights of individuals are apt to be a sham. We cannot think of a society that possesses effective political rights and yet denies economic rights.<sup>52</sup>

In a country ranked by GDP as 145 in the world, 83 per cent of the EU average in 2011, how can one justify that immigrants are accommodated in substandard tents, a hangar and containers for several years?<sup>53</sup> In addition Malta is an international donor country. Raising taxes to cater for the ‘new’ disadvantaged group would have been in line with the Government’s social policy of ensuring that the most vulnerable live a decent life. This does not appear to have ever been taken into consideration.

If the issue really were financial then there would not be such a long and costly detention policy! In fact, a recent report by the International Detention Coalition (IDC) stated that cost-effective and reliable alternatives to detention are being used in a variety of settings and have been found to benefit a range of stakeholders affected by this area of policy.<sup>54</sup> The IDC reports that the Toronto Bail Program, a leading alternative to detention in Canada, has given the Government a cost saving of 93 per cent.<sup>55</sup> This is a popular argument by NGOs who at times challenge dominant discourses about lack of resources. This comment by an NGO worker highlights this:

...detention itself is costing them loads of money, all those months in detention is costing them loads. So if detention were shorter, they [irregular immigrants] would be out before, they could work properly, they could have a work permit at least until their interview is done, then they would contribute to the economy. It would be a win-win situation. But it is not what the people want.<sup>56</sup>

This reinforces my argument that the problem is not one of finiteness of resources, but of a political choice on how and on whom to spend them, and it would seem, irregular

<sup>52</sup> Leslie Armour, ‘Economic Rights and Philosophical Anthropology’ in *Philosophical Theory and the Universal Declaration of Human Rights*, W. Sweet, University of Ottawa Press, Ottawa, 2003, p. 66.

<sup>53</sup> Economy Watch, ‘Malta GDP (PPP), US Dollars Statistics for year 2010’, <[http://www.economywatch.com/economic-statistics/Malta/GDP\\_PPP\\_US\\_Dollars/](http://www.economywatch.com/economic-statistics/Malta/GDP_PPP_US_Dollars/)>, 2011, (accessed 24 July 2011); and The Times of Malta, ‘Malta’s GDP between 10 and 20% below EU average’, *The Times of Malta*, 21 Jun 2011.

<sup>54</sup> International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention*, International Detention Coalition, Victoria, 2011.

<sup>55</sup> Jesuit Refugee Service - Detention in Europe, ‘Detention is unnecessary, says new study’. <[http://www.detention-in-europe.org/index.php?option=com\\_content&view=article&id=302%3Adetention-is-unnecessary-says-new-study&catid=3%3Anewsflash&Itemid=242](http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=302%3Adetention-is-unnecessary-says-new-study&catid=3%3Anewsflash&Itemid=242)> Press Release, 16 May 2011, (accessed 24 July 2011).

<sup>56</sup> Personal Interview F - NGO worker, 15 December 2008.

immigrants' well-being is ranked low on the list of social priorities. In addition human rights principles in this regard are clear, as article 10 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights entitled 'Availability of Resources' states:

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.<sup>57</sup>

It is in this spirit that Magistrate Anthony Vella had criticised the 'lack of resources' argument in his ruling on the case *Barboush v. Commissioner of Police* in which the legality of detention was contested. In his judgement he specifically stated that the argument of a lack of resources does not constitute a 'reasonable' issue. Indeed, the same Maastricht guidelines also make it clear that states are responsible for ensuring that 'minimum core obligations' are met. Point 9 of the Guidelines states:

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.... Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the Covenant.' Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.<sup>58</sup>

Although many NGO workers I spent time with during fieldwork questioned passionately the discourse of an objective lack of resources, they also found it difficult to think beyond this model. The farthest they arrived at was in identifying different instances where services were being duplicated and resources had been mismanaged. But few were aware, for example, that they were carrying out a service for which the

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<sup>57</sup> International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, <<http://www.unhcr.org/refworld/docid/48abd5730.html>>, 1997, (accessed 5 July 2011).

<sup>58</sup> Idem.

ultimate responsibility lay with the Government.<sup>59</sup> The majority of NGOs ‘thought’ like the Government and on the whole, accepted the argument of a lack of resources as something fixed which cannot be changed. Note this quote from an interview with a Church Agency employee:

As a people we acknowledge human rights however I’m afraid that we are not adequately resourced to implement certain human rights in particular sectors.<sup>60</sup>

This discourse of resources fails to mention the EU funds that the Government has been receiving.<sup>61</sup> Malta was however voted €126 million EU funds for migration – asylum, immigration and borders – for the timeframe 2008-2013, not including additional payments for emergency measures under the refugees and borders fund. Out of this sum, €500,000 are from the integration fund.<sup>62</sup> During my fieldwork this was a common concern amongst NGOs. The Government, they claimed, appeared to be only embarking on those projects which were heavily financed by the EU. The repercussions of this is that the influence of the projects is limited since they are not part of a larger framework of supporting services and created huge frustration among immigrants, service providers and programme implementers. In addition, the Council of Europe’s Human Rights Commissioner has recently flagged this reliance on EU funds as a matter of concern, because it fails to take into account the issue of long term sustainability of such projects.<sup>63</sup>

The suggestion here is that the resources argument should not be taken at face value. The indications are that Malta does not want to take responsibility for irregular immigrants. The finiteness of the nature of the resources argument is politicised to create a distinct sense of panic among Maltese society which feeds the stereotype of the irregular migrant as a ‘burden’ and here to ‘take my daily bread’. Even in the case

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<sup>59</sup> Models of welfare systems: In some countries the Government assumes that the family, social networks and charities have a caring role, so Government does not feel the obligation to ‘care’. This is very different to, for example, the Scandinavian model of welfare.

<sup>60</sup> Personal Interview Q – Church agency employee, 23 January 2009.

<sup>61</sup> In my research Government officials never gave me a total of the funds that Malta has received from the EU. I presume the total which incorporates funds received under different programmes, by different Ministries, has never been fully quantified.

<sup>62</sup> MaltaToday, ‘Only €18 million spent from €126m in EU migration funds’, *MaltaToday*, 18 Mar 2009. It was reported in this same article that the sum of €126 million included €112 million from the External Borders Fund, €3.7 million from the European Integration Fund, €4.8 million from the European Refugee Fund, and €4.7 million from the Return Fund for the years covering 2007-2013.

<sup>63</sup> Malta receives considerable funds from the ‘European Refugee Fund’, and the ‘European Fund for the Integration of third country nationals’.

of Malta, with its particular size and population density, such an argument coming from a developed country is rather weak and should be seen less as an economic answer and more as a political one. It indicates a lack of belief in the minimum core obligations that each state has towards irregular immigrants, and a persistence of an exclusively nationalist rationale that irregular migration is against the national interest.

### **7.3.3 Misrecognition: Integration policies conspicuous by their absence**

Apart from the discourse of a lack of resources, the other prevailing discourse used by the Government is one that relates to integration. The overall consistent patterns of arrivals since 2002 call for a comprehensive integration policy which addresses all aspects of life and ensures minimum standards for a life of dignity for immigrants including the widening of life opportunities. This is not the case, primarily because there is still the denial that immigration is ‘here to stay’ and not a temporary phenomenon. According to the Government, immigrant integration is not preferable, or even possible, given Malta’s small size, high population density and small labour market prone to saturation. Indeed, long-term integration for the beneficiaries of international protection has been identified by the Government as the biggest challenge that Malta is facing.<sup>64</sup> This overarching anti-integration rationale partly stems from the fact that Malta views itself as a ‘transit country for immigrants’ towards the rest of Europe.<sup>65</sup> This brings about a denial of irregular immigrants continuing presence and the fact that some are settling down. The persistence of this rationale is impressive in light of clear signs that immigration to Malta will continue and that many migrants are not moving on to another destination.

The mention of integration of immigrants, in unofficial Government circles, also provoked the sentiment that integration programmes leading to more immigrants settling down was not wanted. Not surprisingly rhetoric, as well as efforts, were directed towards resettling immigrants in the US and EU Member States, or

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<sup>64</sup> The Times of Malta, ‘Malta’s biggest immigration challenge is integration – ministry’, *The Times of Malta*, 23 Sep 2010.

<sup>65</sup> Katia Amore, *Active Civic Participation of Immigrants in Malta*, <<http://www.politis-europe.uni-oldenburg.de/download/Malta.pdf>>, 2005, (accessed 21 July 2011), p. 20; and European Commission against Racism and Intolerance, *Third Report on Malta*, CRI 2008(22), Council of Europe, Strasbourg, 2008, p. 19.

repatriating them to their country of origin or a third country (transit). In the meantime, most irregular immigrants are living in 'clearly sub-standard' conditions in open centres 'with lack of adequate bedding, dirty floors...insufficient lighting and the presence of rats' in a segregated area in tents, containers and hangars, as was also illustrated in Chapter 3.<sup>66</sup> Clearly this is a reality which stunts the social process of integration. But since the Government does not believe in integrating immigrants, this is not seen as a problem.

Instead the Minister for Justice and Home Affairs blames the conditions in the open centres on the 'prolonged stays' of the immigrants, brought about by the country's innate limitations of integration. A situation which clearly requires positive integration efforts by the Government, is twisted and made to appear as unavoidable. The Minister says:

The difficulties faced by beneficiaries of international protection in integrating, mainly in view of the country's innate limitations, translate into prolonged stays at the Centres by significant numbers of migrants.<sup>67</sup>

Throughout the speech there appears to be an unwritten, underlying assumption that integration, should it happen, would happen naturally. This is also a common belief amongst government policy makers in Malta. I was often told that integration cannot be forced, that it could only happen 'naturally'. In addition the dominant understanding of 'integration' is not one which is respectful of differences, but more akin to the concept of assimilation into a homogeneous whole. In practice this would mean that *only* if irregular immigrants become 'like Maltese' – white, Catholic and speaking the Maltese language - and abandon their cultural practices, could they be accepted within society. This accounts for the patronising rationale behind any small efforts at integration:

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<sup>66</sup> The Council of Europe's Commissioner for Human Rights' Press Release states that the conditions of the open centres were substandard and needed to be improved 'as a matter of urgency'. Adding that the Marsa Open Centre and, in particular, the tent village in Hal Far offered 'clearly inadequate conditions of accommodation for short or long periods of time'. (Commissioner for Human Rights, 'Malta is urged to ensure effective protection of migrants', *Press Release, COMMDH005(2011)*, Council of Europe, Strasbourg, 9 Jun 2011.)

<sup>67</sup> Department of Information, 'Speech by the Hon. Carmelo Mifsud Bonnici, Minister for Justice and Home Affairs, during the conference on the occasion of World Refugee Day, Sliema', *Press Release, No. 1156*, Government of Malta, 14 Jun 2011.



...there came a point where I stopped teaching English, but I started teaching manners, how to behave, because they had no idea how to, they have no idea how to eat. I know it's their culture to eat using their hands, but there's still a way and a way how to eat.<sup>68</sup>

It is therefore not surprising that Malta ranks low on anti-discrimination policy and programmes when compared to its European peers. In fact in MIPEX reports Malta scores lowest on anti-discrimination measures:

By far the most conspicuous statistic arising from the chart regards the 'field of application' of Malta's anti-discrimination measures, where Malta scores a very low 8/100. This suggests that while adequate anti-discrimination laws do exist on paper, the areas to which they can be applied in practice remain too vaguely defined for the legislation to be effective.<sup>69</sup>

Another common response to explain why the Maltese found it difficult to accept and integrate irregular immigrants was that of 'illegality'. This referred both to the illegal mode of entry and also to the criminalisation of immigrants that the policy of detention brings with it. These associations with illegality are such that the Maltese do not want to mix with irregular immigrants. This popular response is contestable since barriers to integration are not limited to irregular immigrants but appear to afflict other resident legal foreigners in the country. An indication of this is the results of MIPEX which have shown that even British expats in Malta face barriers towards integration into Maltese society.<sup>70</sup> British expats, in contrast to irregular immigrants, are generally financially stable, have moved to Malta out of choice and are therefore overall more empowered. If British expats experience such difficulties, one can imagine how much worse this would be for irregular immigrants. These results suggest that the integration of foreigners into Maltese society needs a comprehensive framework.

Within this anti-integration rationale, projects undertaken by the Government with an alleged aim of bringing about integration appear completely paradoxical. According to

<sup>68</sup> Personal Interview C - Government official, 29 October 2008.

<sup>69</sup> Raphael Vassallo, 'Malta's integration policy falls well below EU average', *Maltatoday*, 7 Nov 2007.

<sup>70</sup> Shelter Offshore, 'New Integration Report Highlights Expat Challenges When Moving Abroad', *Expatriate News*, <<http://www.shelteroffshore.com/index.php/living/more/integration-report-expat-challenges-moving-abroad-10983>>, 2011, (accessed 25 July 2011).

the Government's response to the Commissioner for Human Rights' report, integration measures constituted of the following:

These involved an employment-support initiative, the provision of language teaching, as well as Project Sparklet, which supported closed and open centres through the profiling of migrants, action research and knowledge transfer. The Mare Nostrum Project, organised by the Institute of Health Migrants and Poverty (Rome), Migrant Health Unit Primary Health Department and Department of Diseases Prevention, is still in progress and a screen programme for all migrants in open centres for communicable diseases is being conducted.<sup>71</sup>

However, in this case, it is legitimate to ask if the presence of such projects is a sign of change from the dominant non-integration stance or if it is simply a matter of one-off initiatives set up to attract EU funding. This question is being asked because of the incongruity noticed between the lack of a political will to support integration based on the belief that Malta has innate limitations in this regard, and the presence of some integration projects mostly funded by the EU funds. Either way, without a framework of a national integration policy, the success of these one-off, uncoordinated projects is severely limited. The following quote is from a research project managed by NCPE:

Although a number of periodic projects have been undergone to improve the living conditions, as well as the employability and educational standards of asylum seekers, it is evident that Malta still lacks an overarching integration policy. Maltese authorities have so far adopted a reactive stance – identifying problems and working towards solving them – rather than a pro-active stance with regards to discrimination on the grounds of race and ethnicity.<sup>72</sup>

During my fieldwork there was a lot of hype on the appointment of NCPE as the race equality body (for the non-employment aspects) as mentioned earlier. NCPE's remit was widened to cover Legal Notice 85 of 2007 'Equal Treatment of Persons Order' which prohibits any form of discrimination in the provision of goods and services based on the ground of race and ethnicity. With regards to the provision of goods and services, this Legal Notice transposed the non-employment provisions of Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. However, complaints registered are few (less

<sup>71</sup> Commissioner for Human Rights, *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Malta from 23 to 25 March 2011*, Appendix.

<sup>72</sup> National Commission for the Promotion of Equality, *Lehen għal Kulhadd: Voice for All*, VS/2007/0477, National Commission for the Promotion of Equality, Valletta, 2007, p. 14.

than 20 in 2009 according to the FRA Annual Report) and do not reflect the pressing reality described above.<sup>73</sup> This would suggest that immigrants might not have enough access and/or trust in NCPE yet. The following is a quote from a Press Release issued by NCPE during its 7<sup>th</sup> Annual Conference, the brevity of which also belies the effectiveness of NCPE:

As to racial discrimination, NCPE during 2010 received complaints that involved allegations of racial discrimination in access to visa and in access to bars and clubs.<sup>74</sup>

In October 2010, following the reporting of a series of incidents allegedly arising out of racial discrimination, the NCPE published a Press Release in which the illegality of discrimination on the grounds of race and ethnicity in all areas of social life was highlighted, as well as the role of NCPE to investigate such complaints. The NCPE stated:

NCPE emphasises that it is illegal to violate the dignity of a person or treat a person less favourably on the ground of race/ethnic origin. This means that the race/ethnic origin of an individual should not determine their treatment in relation to social security, healthcare, education, financial services and the provision of other goods and services.<sup>75</sup>

The limited impact of NCPE due to limited human and financial resources was picked up on by the Fundamental Rights Agency of the European Union.<sup>76</sup> Dr Simon Busuttil, a Maltese Member of the European Parliament, sheds light on its restricted budget as one possible limitation of the NCPE. This also supports Fraser's thesis that the economic and cultural cannot be disassociated:

A second problem area highlighted in the report is equality, where it says that Malta's national competent authority that deals with racial equality lacks adequate human and financial resources and had effectively dealt with too few cases to allow a proper study. This is a pity because public authorities cannot deliver if they are starved of resources.<sup>77</sup>

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<sup>73</sup> European Union Agency for Fundamental Rights, *Annual Report*, Conference Edition, Fundamental Rights Agency, Vienna, 2010, p. 34.

<sup>74</sup> National Commission for the Promotion of Equality, 'NCPE's 7<sup>th</sup> Annual Conference', *Press release*, National Commission for the Promotion of Equality, Valletta, 23 Mar 2011.

<sup>75</sup> National Commission for the Promotion of Equality, 'Promoting Inclusion and Diversity: Combating Racial Discrimination', *Press Release*, National Commission for the Promotion of Equality, Valletta, 20 Oct 2010.

<sup>76</sup> European Union Agency for Fundamental Rights, *Annual Report*, 2010, p. 28.

<sup>77</sup> Simon Busuttil, 'Malta's human rights record', *The Times of Malta*, 8 Sep 2010.

Media reports show that research activity in this area might be picking up. NCPE launched a project called 'Think Equal' in 2011, estimated to cost some €250,000, co-funded by EU PROGRESS funds. The 'Think Equal' project will include qualitative studies on discrimination experienced by LGBT (lesbian, gay, bisexual and transgender) and racial groups in Malta.<sup>78</sup>

The resources argument and the lack of a comprehensive integration policy are self-fulfilling prophecies which serve to maintain the status quo. Migrants feel that they are 'in limbo', powerless and without any hope for the future. The aim of this Chapter was not to conduct a comprehensive review but to show the structural disadvantage of irregular immigrants and the lack of a pro-active political will. of the institutional violence that irregular immigrants are subjected to on a daily basis.

#### **7.4 Towards a human rights culture**

What does Malta have to do to steer towards participation parity or social justice for all? The proposals below would help in bringing about the necessary institutional changes that would enable integration efforts to take root. At the moment the framework is largely conditioned by governmental policies or, at times, the lack of such policies. This Chapter strongly suggests that in the absence of clear and directed policies, any smaller projects or programmes designed for the integration of migrants will only have limited success. A comprehensive integration policy is necessary to spearhead institutional changes, which will in turn provide a framework with a coherent rationale within which civil society can also contribute. Such a policy needs to address economic, cultural and political inequalities. This will also ensure that irregular immigrants are included in practice within the country's social priorities as a disadvantaged group.

Irrespective of the fact that irregular migration is a relatively new phenomenon in Malta, or any misguided beliefs that it will end soon, there is now a sizable cohort of irregular immigrants living in the community on the poverty line, or even in poverty and excluded from social life. The indications are that this community will grow as

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<sup>78</sup> Miriam Dalli, 'Equality Commission to study LGBT and racial groups discrimination', *MaltaToday*, 12 Apr 2011.

more immigrants arrive. This increases the likelihood of the formation of social ills which will then be more difficult to eradicate. Indeed allegations of illegal activity, criminality, prostitution, drug trafficking and others were already being made during my fieldwork. The call for action is therefore of an urgent nature.

Relying on charity, laudable and virtuous as it may be, unfortunately serves to cement power imbalances between the Maltese and the immigrants which is counteractive to any long-term solutions. Being deeply entrenched in Maltese culture, the charity approach can only be addressed if rights-based approaches are encouraged by formal legal and institutional action 'from above' as well as encouraging informal civil society and grassroots activity.

As part of a national integration policy it is necessary to have an independent equality watchdog to make sure that the core dimensions of equality - representation, participation and recognition - are safeguarded both before the law and in practice. The NCPE, currently the equality body entrusted with this mandate, needs to be adequately resourced and trained to meet the needs of a sector which have been characterised by neglect. Given that the issues of immigrants and particularly irregular immigrants are particularly susceptible to being instrumentalised by politicians, the independence of the institution which is entrenched in law needs to be safeguarded at all costs.

The rhetoric surrounding the resources argument should be exposed in the public sphere because it only serves to foment panic among society and reinforces negative attitudes towards immigrants. In this regard, high-standing officials and politicians should avoid at all costs unnecessarily using apocalyptic jargon of resource finiteness. Arguments of a lack of resources should be presented by the authorities for what they are, political choices. This would open a space for discussion and proper engagement, in contrast with the resources argument which presents decisions as inevitable.

Wealth redistribution and social priorities need to be set according to a state's minimum core obligations with respect to safeguarding basic human rights. These should include irregular immigrants, with further due consideration given to vulnerable irregular immigrants. There ought to be no double standards between Maltese citizens

and immigrants on meeting basic needs like food, shelter and so on. Institutionalisation and clear policies are necessary to ensure a fair and just distribution. The aim should be to increase the life opportunities of irregular immigrants and support them should they decide to settle in Malta temporarily or otherwise.

Irregular immigrants' allowances are placing immigrants in a structurally disadvantaged position of poverty where they cannot meet their basic needs and are unable to improve their situation. These allowances should be raised to meet those of Maltese vulnerable groups. Other issues which do not encourage independence, like making the immigrants allowance dependent on being resident in an open centre would also need to be addressed.

Various human rights movements and champions of equality of opportunity have demonstrated that the direct participation and contribution of members of disadvantaged groups is crucial in securing long-term solutions. Drawing on this, the contribution of irregular immigrants in the drafting of policy and the design of services should therefore be sought and institutionalised.

### **7.5 Human rights culture requires a cultural shift towards an egalitarian society**

In Chapter 4 the concept of human dignity is described as a seismograph. The disrespect of human dignity in Maltese detention centres is presented as a warning that an earthquake in the form of momentous social problems is on the way. The above discussion suggests that the lack of an egalitarian society and the absence of social justice are the first tremors of this earthquake. It is in fact not surprising that mention of irregular migrants in Malta provokes a sense of unease and insecurity, a sensation that the pressure is mounting. There is clearly a limit to how much and how long you can oppress a group of people. Indeed the growing numbers of immigrants and the decreasing conditions of welfare only adds further pressure.

The concept of equality necessary for a human rights culture has to be multi-faceted, bridging the so-called theories of recognition with egalitarian theories, but also limited

to prioritise those who lack opportunities of a decent life. The priority of human rights activity, as proposed by human rights theory, should focus on those areas where recognition and redistribution have failed people. Such individuals are economically and culturally disadvantaged, but are also less empowered and have limited life opportunities, and therefore establishing minimal standards which will enable them to live a dignified life, is essential.

Unfortunately, the inability of the authorities in Malta to view the irregular migration situation for what it is, a long-term social phenomenon, is perpetuating and reinforcing the unequal treatment and exclusion of irregular immigrants in Malta. With regards to minimal standards, unequal treatment is unacceptable from a human rights point of view. The concern, shared by many in Malta, that if more than the 2000 to 3000 immigrants a year arrived, the country might not be in a position to manage without external help, is very real. Whilst it is understandable that the management of a state requires long term planning, from a human rights point of view, in the current situation, it is not acceptable to treat immigrants so meagrely that they are unable to live a minimal decent life. At the same time, the same philosophy of human rights calls for action and change not only by Malta but also, and this is perhaps just as pressing, at a global level.

This Chapter has implicitly argued for the interdependence of civil, political, economic, social and cultural rights, which is still an issue in contemporary times. Leslie Armour reminds us of the negative impact of the lack of economic rights on the expression of humanity. She says:

The theory that we can choose widely and freely on an empty stomach is empty. Sick men and women are a problem to society as much as to themselves. The situation is worse than it appears. A whole social complex is necessary for civil rights to be organised. My argument is that economic rights are the correlative of duties, but are also necessary conditions for the expression of humanity in the world. Without them people must live pinched lives, something less than the full humanity of which they are capable. They may surmount the barriers, and many do, but they are marked and scarred by the process.<sup>79</sup>

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<sup>79</sup> Leslie Armour, 'Economic Rights and Philosophical Anthropology', 2003, p. 66.

This study is arguing that a possible solution is establishing a human rights culture. This would serve both as a short-term safety valve and a long-term solution. A human rights culture requires an egalitarian society in which all members, including its newest or temporary members, are treated similarly. Human rights covenants have been clear that states are responsible for ensuring that the minimum core obligations towards everyone is met, particularly in their own country. This Chapter is also a stark reminder that human rights remain a call for change. Change, of a social, local and global nature, which needs to be continuously rearticulated.



## Chapter 8: On embracing a human rights culture

### 8.1 Introduction

This study set out to understand why irregular immigrants are ill-treated in Malta, despite the fact that Malta considers itself, and is considered, a member of the human rights community. Sheer frustration at the ineffectiveness of human rights in the Maltese situation was one of my main motivations for this study. It was however largely counteracted by an equally strong sentiment, a fervent belief, that human rights could still make a difference. Nothing prepared me for the realisation that human rights are also being used to create and reproduce abominable structures in which human rights violations are inevitable. The most typical example is that of 'detention' as described in Chapter 4. In what I call an 'absurd' situation the Government of Malta sustains its argument that the practice of detention is *acceptable* by human rights standards, even in the face of evidence of inhumane practices and a violation of human dignity. Notwithstanding such inconsistencies, this study has shown that human rights are still relevant and can be effective in addressing the grave injustices that irregular immigrants face on a daily basis. The Introductory Chapter suggests that a cultural *paradigm* shift might be needed. This study demonstrates that nothing short of that will do.

In Chapters 1 and 2 it was ascertained that the legal and institutional focus of the human rights movement needs to be broadened in such a way so as to enable the internalisation of human rights principles. This study shows that the concept of a human rights culture can serve as a tool which leads to a deeper understanding of the local social and cultural processes that need to be addressed for this to take place. The Tetrahedron Model of Human Rights Culture is a useful heuristic tool which systematises and facilitates analysis that identifies those hidden processes that should be addressed for a human rights culture to be established.

The Tetrahedron Model of Human Rights yields four concepts that are considered basic building blocks of a human rights culture. These are: human dignity,

cosmopolitanism, democracy and equality. This Model was used to analyse the case study of irregular migration in Malta. It highlighted those areas where action needs to be directed for the cultural paradigm shift to take place in Malta. In this concluding Chapter, the implications and contributions of this study for the broader research context will be outlined. Human rights culture as arising from this study will first be described. This will be followed with a summary of the main findings that the study yields about the case study of irregular migration in Malta. The Chapter ends with some reflections on the Tetrahedron Model of Human Rights Culture and possible ways forward for the human rights movement to achieve its mission of constructing ‘a world made new’.<sup>1</sup>

## 8.2 Understanding human rights culture

The main argument of this study is that humane solutions towards the better treatment of irregular immigrants in Malta can be found by nurturing a human rights culture. This would serve both as a short-term safety valve and a long-term solution. The concept of a human rights culture is composed of the following four building blocks: human dignity, cosmopolitanism, democracy and equality. These concepts are not easy to define because they are used in different ways, across different disciplines and are all contested concepts. For this reason the focus on the human rights praxis, the nexus where human rights theory and human rights practice meet, was retained throughout. The discussions of the case study and how the four building block concepts translate into practice enrich the theoretical understanding as well as provide possible solutions to the case study in question. The result is an overall better understanding of the concept of a human rights culture, and how this can be nurtured in Malta.

The first building block, or characteristic, is the concept of human dignity. Human dignity serves to give a bearing to human rights and retains the focus on the human person. For this reason, human dignity is referred to as the ‘human’ in human rights. As Chapter 4 demonstrates, human dignity is of such critical importance to human

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<sup>1</sup> Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York, 2001.

rights that when it is put aside, human rights risk turning against human beings. The surprising lack of understanding of the critical role of human dignity in grounding human rights philosophy is possibly the biggest indication that human rights is on the wrong track.

Cosmopolitanism, the second building block necessary for a human rights culture, rises out of universalistic aspirations of human rights. An existential sense of the *cosmos* and the moral obligations binding the global community justify the need for a cosmopolitan system. The tacit assumption that human rights norms are cosmopolitan has meant that cosmopolitanism as a concept remains under-explored in relation to human rights. This is unfortunate because, as Chapter 5 shows, human rights present a particular conception of cosmopolitanism which embraces different and contesting partialities and is therefore in a constant state of flux. This contrasts sharply with the more popular definition of cosmopolitanism which is often presented as a rigid global structure related to world governance. Cosmopolitanism in human rights culture provides a framework for the incorporation of local particularities within an inclusive global vision.

Democracy is the third building block necessary for the enactment of a human right culture. The relationship between democracy and human rights is often erroneously taken to be self-evident, and this obscures the dangers that democracy presents to human rights. Chapter 6 discusses various instances in which the inner mechanisms of democracy can themselves work against human rights principles. In addition, the limits of the democratic polity and its emphasis on membership can pose grave problems for the safeguarding of the human rights of immigrants. What human rights culture requires is a particular democratic culture which accommodates and prioritises human rights principles.

The fourth building block of a human rights culture is equality, understood not simply as the promotion of an egalitarian culture but primarily as the implementation of social justice. A human rights culture therefore requires a society in which the treatment of all members, including its newest or temporary members, is subject to minimum core obligations. The concept of equality necessary for a human rights

culture is multi-faceted bridging the so-called theories of recognition with egalitarian theories, but is also delimited since it prioritises those who lack opportunities of a decent life. The priorities of human rights are those areas where recognition and redistribution have failed people. It is these particular gaps that minimum core obligations of human rights aim to address. Individuals suffering economic and cultural disadvantage are less empowered and have restricted life opportunities and within a human rights culture would be the priority.

In addition to the above, three horizontal themes arose. The first is the perception of the *human being*. Apart from the centrality of the human person to human rights philosophy as articulated in further depth in Chapter 4 when human dignity was discussed, a particular idea of the human person emerges. The human person is perceived as adaptable, sociable and willing to change. Therefore, the human person is seen as able to connect to different communities simultaneously and is an active agent in negotiated boundaries and conflicts which may arise. This is particularly seen in Chapter 5 in the presentation of partial cosmopolitanism. The human person is primarily perceived in the Aristotelian sense of a political animal. This comes out most strongly in the presentation of active citizenship and the responsibility that citizens carry towards their political group, as seen in Chapter 6.

The second horizontal theme is a reassertion of the *interdependence* of civil, political, economic, social and cultural rights which are popularly known as the five pillars of human rights. This age-old debate which has characterised the modern human rights movement since its inception is between ‘freedoms to’ and ‘freedom from’, or ‘negative rights’ and ‘positive rights’. The development of the discussion of human rights culture in this study clearly reinforces the critical importance of keeping the five pillars equally in focus. This is most clearly seen in the nature of Chapter 4 where the main issues related to detention issues constitute ‘freedoms from’ and Chapter 7 which discusses issues related to social justice categorised as ‘freedoms to’.

The final horizontal theme is that human rights ultimately remain a *call for change*. This should be considered the mandate of human rights culture. Human rights can never be a conservative agenda used for retaining the *status quo*. As each chapter has

shown, but best articulated at the end of Chapter 7, human rights are about facilitating change, 'of a social, local and global nature, which needs to be continuously rearticulated.'

### 8.3 Nurturing a human rights culture in Malta

The case study of irregular migration in Malta was analysed using the Tetrahedron Model of Human Rights Culture. By taking one building block at a time, the case study was explored from four different perspectives in order to find patterns in Maltese political culture which are leading to the violation of the human rights of irregular immigrants. Various trends and issues were exposed which need to be addressed. The collection of findings shows that human rights have the potential to guide political decisions for the improvement of the treatment of irregular migrants in Malta. More importantly, action on the identified issues serve to nurture a human rights culture.

The creation and maintenance of detention, as a direct action by the state, which is devoid of respect for human dignity is evidence of a *flawed* understanding of the modern human rights doctrine. By putting into question the very concept of human dignity which from the construction of the modern human rights movement has unquestionably been at the heart of human rights, detention is indicative of a grave problem with regards to human rights. Clearly, the removal of the detention policy, which is indeed a pressing issue, would be a huge step ahead but would not solve the problem of ill-treatment of irregular immigrants. Dehumanising centres like migrant detention centres serve as a barrier to human rights culture. This is because they become generators of dehumanising practices. Without a focus on the human person, as Chapter 5 has shown, it is very easy to get lost in issues of fairness, legalities, and political interests.

Another issue that came out of the analysis of case study, this time from a cosmopolitan point of view, is related to the ubiquitous and predominant nationalism in Malta. Chapter 6 shows how as a result of various historical, social and political processes Maltese society has assumed a selective and exclusive nationalism. A *re-articulation* of nationalism is needed to accommodate global changes and

cosmopolitan norms. Irregular migration emerges as a useful 'concern' for nationalist processes attempting to construct a national identity against a 'significant other' and when facing a perceived threat of being subsumed into a larger European identity. Human rights require the Maltese to consider that they have moral obligations towards irregular immigrants, even though irregular immigrants are non-citizens.

Irregular migrants in Malta are also at the unfortunate end of tensions that 'the fear of the masses' creates in the democratic arena. In a country which boasts of a near-universal turnout at general elections, not holding a vote effectively means exclusion. Chapter 6 goes on to identify bureaucratic practices as exacerbating the politics of exclusion by creating a 'disempowering system'. Although not highly visible, this practice needs to be addressed because it encumbers immigrants' access to basic services. In addition civil society, a precious space for citizens' participation, is dominated by a traditionally entrenched framework of charity which currently hampers human rights-based approaches and does not facilitate the participation of irregular immigrants. The tensions inherent in the relationship between democracy and human rights need to be addressed for a human rights culture.

Finally the predominant mentality that immigration is not a long-term phenomenon, as evidenced by the lack of a national integration policy and the lack of resources argument, is proving detrimental to irregular immigrants and perpetuates their unequal treatment and exclusion. The mentality, which can best be described as *self-preservative* and *protectionist*, puts superfluous needs of Maltese people over and above basic needs of irregular immigrants. Malta should endeavour to meet the *basic core minimal obligations* towards irregular immigrants, in a bid to nurture a human rights culture.

There are two other issues which have come up in this study several times. These are human rights education and the concept of an independent human rights institution. Human rights education is one such issue which has been mentioned in various chapters in this study as key to the acculturation of human rights principles as well as an authentic basis for human rights based social change. One is led to ask however: what kind of human rights education? Is it enough to have 'human rights' inserted in a

secondary school's curriculum? How can human rights education be tailored to be truly effective in the Maltese setting? As part of mainstreaming human rights and a human rights approach in Malta, another issue mentioned but which would require further exploration is the concept of an Independent Human Rights Institution. The dearth of human rights culture in Malta, partly brought about by intense partisan politics and traditional customs, appear to make a good case for such an institution.

The practices described above are the result of social and cultural processes which are less visible than formal practices, institutions or laws. This does not however make them less important because they constitute a significant part of human rights praxis. More significantly they are critical for the nurturing of a human rights culture.

#### **8.4 The Tetrahedron Model of Human Rights Culture: The way forward**

The Tetrahedron Model of Human Rights Culture served a dual role of providing structure to the analysis and facilitating a 'human rights' logic. This was made possible by highlighting the inter-connections, tensions and interplay between the original four elements and the four building blocks of human rights culture. This is the strength of this model. It also makes the model an adequate representation of a complex system which is continually being (re)produced as a result of the intricate interplay of the various elements and actors involved.

This study shows that the Tetrahedron Model is useful as a heuristic device but might also carry potential as an analytical tool. It has certainly served to provide new insights into the complex phenomenon of irregular migration in Malta. More importantly, it has generated a set of proposals and policy directions that complement existing ones.

It is unfortunate that the links between the building blocks, which can be indirectly gleaned from the discussions, could not be explored in further depth in this study. This is the most exciting element of the Tetrahedron Model of Human Rights Culture that should be further explored. The potential of the Model to analyse complex human rights situations has been demonstrated in this study, but it can clearly be taken to different levels with more emphasis on the 'links'. The following kind of questions could be asked:

- How do the concepts of human dignity and cosmopolitanism relate to each other? Can a sharper conception of human dignity contribute towards the enactment of a partial cosmopolitanism?
- How are the concepts of equality and partial cosmopolitanism to be accommodated? Wouldn't the acceptance of a partiality risk leading to inequalities?

These kinds of questions would enrich the analysis and pave the way for further research.

Finally, there appears to be scope for further research on the applicability of the Tetrahedron Model. The Tetrahedron Model has worked for Malta, but would it work on larger countries too?

### **8.5 Towards a human rights culture: The global responsibility to make the world anew**

This study has focused on the local. However, a human rights culture *cannot* be nurtured in isolation. This is clear from the discussion on the implementation of the cosmopolitan right to hospitality by Malta presented in Chapter 5. The norm of hospitality, however, is part of a greater global vision. Malta's efforts at implementation of this norm would need to be matched by other states' action in this regard. In a similar spirit, *inter-state solidarity* is indispensable, particularly in those cases when a state cannot effectively implement this norm any longer. The global 'suspension' of such norms which involve human lives and life chances can only be justified as a very last resort. Maltese governmental action in this regard is conditioned by the *realpolitik* of international relations where inter-state solidarity is not institutionalised in the migration or asylum field. Even attempts to lobby for an EU system of 'burden-sharing' or 'responsibility-sharing' in the case of asylum-seekers have not, as yet, registered success.

Secondly, the responsibility for nurturing a human rights culture is truly global in the sense that it is universal. The local practice and horrors of detention in Malta, for example, are the shared concern of the local community and global society, both of



which include Maltese and non-Maltese citizens. On a deeper level, the urgency of eradicating the presence of grave violators of human dignity or ‘generators of dehumanising practices’, like detention, is a *universal responsibility*.

Thirdly, human rights culture is a *popular* culture, it is everyone’s, and cannot be exclusive to a profession or arena. The cultural internalisation of human rights principles require a change in the broader political culture, that is, how people treat each other and how political decisions are made. It is only in this way that human rights culture, in Francesca Klug’s words, can ‘unleash the potential of human rights’. Helena Kennedy articulates it such:

The cultural shift has to include everyone. Once human rights are reduced to the finely argued interpretations of words or cases, or time-consuming meritless arguments in the courts, the huge, embracing possibilities for change will be lost. If human rights are about anything, they are about a set of values, whose spirit and philosophy should inform everything from government policy to personal relationships. To travel this new journey we need new words and new methods and all of us have to be engaged.<sup>2</sup>

Finally, the efforts at nurturing a human rights culture should also be directed to irregular immigrants and the excluded in societies. This is necessary to break cycles of exclusion. If only they were allowed, irregular migrants in Malta - with their dual hard-won identity of migrants and victims of human rights violations - could play a central role in the promotion of a human rights culture.

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<sup>2</sup> Helena Kennedy, ‘Foreword’ in F. Klug, *Values for a Godless Age: The story fo the United Kingdom’s new Bill of Rights*, Penguin Books Ltd, London, 2000, pxiii.

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