

**DR JULIETTE GALEA B.A., LL.D.**  
**ADVOCATE**

**8th December, 2020**

**Rik Daems - President of the Parliamentary Assembly of the Council of Europe**

Parliamentary Assembly of the Council of Europe  
F-67075 Strasbourg

**Leendert Verbeek - President of the Monitoring Committee**

Parliamentary Assembly of the Council of Europe  
F-67075 Strasbourg

**Boriss Cilevics - President Committee on Legal Affairs and Human Rights**

Parliamentary Assembly of the Council of Europe  
F-67075 Strasbourg

**House of Representatives**

Att: Mr Speaker Dr Angelo Farrugia  
House of Representatives,  
Parliament of Malta  
Freedom Square, Valletta, VLT1010, Malta

**Prime Minister Hon. Dr Robert Abela M.P.**

Office of the Prime Minister,  
Auberge de Castille,  
Valletta VLT1061, Malta

**Minister for Justice, Equality and Governance**

Att: Dr Edward Zammit-Lewis MP  
Ministry for Justice, Equality and Governance  
Independence Square, Valletta, VLT1521, Malta

**Office of the State Advocate**

Att: Dr Chris Soler LL.D.  
Casa Scaglia, 16, Mikiel Anton Vassalli Street,  
Valletta, VLT 1311, Malta

**The Public Inquiry into the Assassination of Daphne Caruana Galizia**

c/o Court Services Agency CEO Mr Frankie Mercieca  
The Law Courts, Republic Street, Valletta, Malta

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Hon. Ladies and Gentlemen,

**RE: COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY RESOLUTION 2293 (2019)  
An Independent Public Inquiry into the Assassination of Daphne Caruana Galizia  
(in order to ensure fulfilment of its obligations under Article 2 of the European  
Convention on Human Rights ETS No. 5).**

I write in my capacity as counsel to Mr Yorgen Fenech in relation to the Independent Public Inquiry into the Assassination of Daphne Caruana Galizia set into motion by means of Council of Europe Parliamentary Assembly Resolution 293 (2019).

Mr Yorgen Fenech stands charged with complicity in the assassination of the late Daphne Caruana Galizia, to which charges he is **pleading not guilty**. I extend my client's condemnation without reserve for Daphne Caruana Galizia's assassination. He hopes that justice will be served upon those truly responsible for this terrible act.

On the **26th June 2019** the Parliamentary Assembly of the Council of Europe called on Malta to establish at the earliest opportunity, within three months, an independent public inquiry in order to ensure fulfilment of its obligations under Article 2 of the European Convention on Human Rights (ETS No. 5), resolved to continue following developments in Malta in relation to the above issues and encouraged its Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) to address them in its periodic review of Malta.

It is within this context that I wish to bring to your attention matters of grave concern regarding the conduct of the Independent Public Inquiry into the Assassination of Daphne Caruana Galizia. It has failed to provide Mr. Yorgen Fenech with basic procedural and substantive safeguards consistent with the protections guaranteed under Article 6 and 8 of the European Convention on Human Rights.

The terms of the Public Inquiry were published on the **15th November 2019**<sup>1</sup> following former Prime Minister Dr Joseph Muscat, the former Minister for Justice, Culture and Local Government, Dr Owen Bonnici MP and the former Attorney General Dr Peter Grech from the government's side, and Dr Joseph Zammit Maempel, Dr Therese Comodini Cachia MP and members of the Caruana Galizia family.<sup>2</sup> Mr. Fenech was not consulted.

On the **19th November 2019** Mr Melvin Theuma, a person of bad character (previously charged twice with serious offences), was given a presidential pardon (a presidential pardon provides immunity from prosecution) for serious money laundering charges, participation in other serious criminal activity and for facilitating Daphne Caruana Galizia's murder. This pardon was tendered by former Prime Minister Dr Joseph Muscat who acted **alone**, without consulting his members of Cabinet.<sup>3</sup>

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<sup>1</sup> [https://www.gov.mt/en/Government/DOI/Press Releases/Documents/PR192460b \(Terms of Reference\).pdf](https://www.gov.mt/en/Government/DOI/Press%20Releases/Documents/PR192460b%20(Terms%20of%20Reference).pdf)

<sup>2</sup> [https://www.gov.mt/en/Government/DOI/Press Releases/Pages/2019/November/15/pr192460en.aspx](https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/November/15/pr192460en.aspx)

<sup>3</sup> See Times of Malta online: 'Daphne murder: PM confirms conditional pardon offered to 'middleman' Joseph Muscat has written to alleged middleman offering pardon, article published on November 19, 2019 by Ivan Martin

On the **20th November 2019** Mr Yorgen Fenech was arrested in connection with the murder of the late journalist Daphne Caruana Galizia and brought before the Court of Magistrates (Malta) as a Court of Criminal Inquiry. He pleaded not guilty to the charges before him. The evidence submitted by the Prosecution before the Court of Criminal Inquiry indicates that Yorgen Fenech's arrest was carried out on the basis of the evidence tendered by Mr Melvin Theuma in exchange of his pardon.

On the **6th December 2019** the Public Inquiry commenced its operation. The law governing Public Inquiries in Malta is the **Public Inquiries Act (Chapter 273 of the Laws of Malta)**<sup>4</sup>. This law was enacted in 1977 and is very similar to the **1921 UK Tribunals of Inquiry (Evidence) Act** which in turn was an upshot of certain parliamentary (as opposed to judicial) operations<sup>5</sup>. As such Chapter 273 of the Laws of Malta does not contain any rules which implement the basic precepts of justice found within the operation of a modern public inquiry.

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<sup>4</sup> <https://legislation.mt/eli/cap/273>

<sup>5</sup> see footnote 11



Although the 1977 law does not require any of the sitting members on a Public Inquiry Board to be a member of judiciary<sup>6</sup>, the Public Inquiry Board into the Assassination of Daphne Caruana Galizia is composed of three persons who are members or former members of the judiciary, namely Judge Michael Mallia (chairperson), Madam Justice Abigail Lofaro and former Chief Justice Joseph Said Pullicino<sup>7</sup>. All three members were elevated to the judiciary by the Nationalist Party in Government, a privilege and duty this political party was entrusted with for almost 25 uninterrupted years. The Government's choice of appointment to the Board had originally included Malta's foremost human rights lawyer Professor Ian Refalo as well as Malta's top forensic expert Dr Anthony J. Abela Medici but this choice was opposed by the victim's family's lawyers. so that the appointment of judges to the Public Inquiry Board as composed today was made at the behest of the victim's family and their lawyers<sup>8</sup>.

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<sup>6</sup> The original parliamentary format of a public inquiry included skilled or professional persons such as accountants. It was in fact possible that findings or conclusions by the original parliamentary format could lead to judicial process.

<sup>7</sup> The fact that the Public Inquiry Board is made up exclusively of serving and retired members of the judiciary is problematic as a public inquiry is not a judicial process. Members of the judiciary have a mindset that lends itself to judicial process by habit. However, the problem is not only interior/psychological, it is also dangerous from a constitutional point of view: In **Mistretta vs. US - US Supreme Court (1989)**, the use of judges to chair inquiries was generally considered unconstitutional: *"The legitimacy of the Judicial Branch ultimately depends upon a reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action"*.  
<https://supreme.justia.com/cases/federal/us/488/361/>

<sup>8</sup> The latter are two Nationalist Party Members of Parliament who sit in Opposition namely Dr Jason Azzopardi LL.D. MP and Dr Therese Comodini Cachia LL.D MP. Dr Jason Azzopardi has recently suspended himself from his parliamentary duties in Malta on the 9th of November, 2020, on account of allegations of misconduct. (<https://lovinmalta.com/news/jason-azzopardi-suspends-himself-from-pn-parliamentary-group-in-wake-of-tel-aviv-revelations/>)

The concept of a public inquiry was birthed as an upshot of **parliamentary accountability**<sup>9</sup> and that the findings of an inquiry should be directed towards the **executive** and **legislative** arms of the State. A public inquiry ought to have nothing to do with a **judicial** process seeking to establish criminal guilt.

As such the operation of the Public Inquiry should have been scrupulous in avoiding impinging upon the remit of any judicial process and any evidence already compiled in relation to the murder of Daphne Caruana Galizia. Instead, in the interests of **justice**, the **Rule of Law** and the precepts of the doctrine of the **Separation of Powers** of the state, the criminal process should be transmitted without delay and without interference to the court vested with the jurisdiction to compile evidence in relation to the said murder i.e. The Court of Magistrates (Malta) as a Court of Criminal Inquiry.

However, as outlined herein, the Board of Inquiry paid insufficient heed to these principles. Although it is customary for Maltese Courts and lawyers to refer to administrative and constitutional precedents in the UK where local rulings are sparse, the Board failed to draw upon key legal developments in the UK in relation to the regulation of the proper remit of public inquires.

In sum, the Board has proceeded without addressing basic principles of independence and impartiality, including, but not limited to, the need to:

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<sup>9</sup> From the mid 17th century, it was parliament that was considered to be the 'grand inquest of the nation'. Developments such as the Parnell affair led to the establishment of the **Parliament Select Committee of Inquiry**. Following the 1912 Marconi scandal relating to insider trading by English MPs, the **1921 UK Tribunals of Inquiry (Evidence)** was enacted. It was not enacted as part of the judicial organs of the state, hence the term (evidence) in the title.

The Maltese Parliament already has a number of officials and committees, both within and without, which scrutinise the work of government and parliament. These include various parliamentary committees, the office of the Ombudsman, the Commissioner for Standards in Public Life, the National Audit Office etc.



1. Appoint wing members with expertise relevant to the scope of the inquiry;<sup>10</sup>
2. Publish its methodology and outline with clarity its approach to its scope, including findings relevant to third parties' civil and criminal rights and liabilities;
3. Appoint a counsel to the Inquiry to guide it in its operation according to its Terms of Reference, methodology and findings;
4. Identify privileged/core participants and their rights<sup>11</sup>;
5. Identify and focus on the relevant regulatory regimes and where these have failed;
- 6.<sup>\*</sup> Refrain from determining civil or criminal liability and/or suggesting such and/or ensure procedural safeguards to protect third parties whose rights may be so engaged or impacted<sup>12</sup>;
7. Delineate its parameters, and sequencing vis-a-vis the ongoing judicial proceedings relating to the subject matter of the Public Inquiry, namely the Compilation of Evidence in Yorgen Fenech's criminal case;<sup>13</sup>
8. Ensure active participation in the Public Inquiry from groups and interested parties, especially those whose rights and duties may be considered, including journalists, the police and business owners<sup>14</sup>;
9. Record or make available its sittings to the Public through official and readily accessible means;

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<sup>10</sup> See Art. 6 of the Terms of Reference of the Public Inquiry into the Assassination of Daphne Caruana Galizia in relation to the facility to appoint experts

<sup>11</sup> See various rulings on core participants given in the UK Leveson Inquiry - culture, practices and ethics of the press by the Rt. Hon. Justice Leveson

<sup>12</sup> See Art. 4 of the Terms of Reference of the Public Inquiry into the Assassination of Daphne Caruana Galizia in relation to the obligation to not impede or compromise any criminal investigation or prosecution or its integrity;

<sup>13</sup> UK 2005 Inquiries Act, S. 13 which provides the Power to Suspend the Inquiry in the case of ongoing judicial proceedings.

<sup>14</sup> See Art. 6 of the Terms of Reference of the Public Inquiry into the Assassination of Daphne Caruana Galizia in relation the question of regulation of access to and participation by the family of the deceased and by the public in the proceedings and acts of the inquiry.

10. Establish and publish guidelines for the disclosure of evidence to interested and privileged/core participants;
11. Ensure the disclosure and transmission of all relevant information relating to the murder of Daphne Caruana Galizia obtained during the course of its function to the prosecution and to Mr Yorgen Fenech.

On the contrary, the Public Inquiry into the Assassination of Daphne Caruana Galizia:

1. Failed to formally include the State Advocate as *the* primary core participant, even when it is the State and its operation that is under scrutiny<sup>15</sup>;
2. Failed to focus on the operation of the state, the safety of journalists, and the well-being and safety<sup>16</sup> of all Maltese citizens;
3. Focused on the apportionment of personal or corporate responsibility even when that responsibility may be relevant to Yorgen Fenech's ongoing criminal proceedings and/or more generally his civil and criminal rights/liability, without providing him with essential (Article 6 and 8 European Court of Human Rights (ECHR) procedural safeguards, including participatory rights and legal representation;
4. Despite failing to provide third parties, such as Yorgen Fenech, whose civil and criminal rights are engaged, with any procedural safeguard, permitted politicians and others to participate, including through the direct questioning of witnesses, frequent commentary and submissions to the Board;

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<sup>15</sup> See Art. 1, & 2 of Terms of Reference of the Public Inquiry into the Assassination of Daphne Caruana Galizia

<sup>16</sup> See Art. 3 of the Terms of Reference: in the past seven years preceding Daphne Caruana Galizia's murder by car bomb, Malta had been plagued by a spate of no less than **19 bombings** which were carried out by and targeted towards what was, initially, a contained group of nefarious individuals operating from the depths of the criminal underworld-

[https://www.maltatoday.com.mt/news/national/81438/maltas\\_explosive\\_history\\_19\\_bomb\\_attacks\\_since\\_2010#.X6oKz-i9h3BI](https://www.maltatoday.com.mt/news/national/81438/maltas_explosive_history_19_bomb_attacks_since_2010#.X6oKz-i9h3BI)



5. Despite failing to provide third parties, such as Yorgen Fenech, whose civil and criminal rights are engaged, with any procedural safeguard, carried out a substantial portion of the proceedings behind closed doors, including, on occasion, with the victim's legal counsel-MPs present whilst removing all participatory rights for Yorgen Fenech in the proceedings;

Regarding points 1-6 whilst depriving Mr. Fenech of any participatory rights or legal representation, the Board of Inquiry has admitted information that is relevant to his civil and criminal liability and which may exonerate him or otherwise assist in his defence of the charges levelled against him.<sup>17</sup>

Three separate requests were filed with the Board of Inquiry on the 15<sup>th</sup> October 2020, 28<sup>th</sup> October 2020, and 31<sup>st</sup> October 2020 by Yorgen Fenech's Defence team seeking Article 6 and 8 ECHR compliance, including the right to fair representation and access to evidence (that, at a minimum, might exonerate their client). The Public Inquiry failed to consider the requests, instead issuing one decree issued on the 26<sup>th</sup> of October 2020 determining that that it will only provide access to information which is public and disregarding the substance of the requests.

In light of the Public Inquiry Board's disregard of Yorgen Fenech's ECHR rights, it is not anticipated that they intend to issue the equivalent of **Warning (Salmon) Letters**<sup>18</sup> to individuals that may be subject to criticism in the Inquiry's report. The aim of such letter is to give that person an opportunity for comment, participation and legal protection in the event of any adverse findings, especially those relevant to civil and criminal responsibility.

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<sup>17</sup> See among others Malta Today news portal on the 28<sup>th</sup> of September 2020: [https://www.maltatoday.com.mt/news/national/104956/castille\\_man\\_schembri\\_sent\\_to\\_calm\\_him\\_melvin\\_down\\_was\\_shocked\\_to\\_learn\\_of\\_bail\\_demand#.X8oiey9h3fY](https://www.maltatoday.com.mt/news/national/104956/castille_man_schembri_sent_to_calm_him_melvin_down_was_shocked_to_learn_of_bail_demand#.X8oiey9h3fY)

<sup>18</sup> Royal Commission on Tribunals of Inquiry (1966) (Justice Salmon) - U.K.

While some public inquiries may not involve civil and criminal responsibility (and therefore not all Art. 6 procedural safeguards), the Board of Inquiry's approach to the inquiry into Assassination of Daphne Caruana Galizia, including hearing witnesses who have testified at the Court of Magistrates (Malta) as a Court of Criminal Inquiry, it is reasonable to assume that Yorgen Fenech's Art. 6 and Art. 8 ECHR rights will be engaged. In these circumstances Yorgen Fenech's rights must be safeguarded as outlined.

The Board and the victim's family and political counsel cannot vest themselves with the power bestowed upon a trial by jury vis-a-vis the accused<sup>19</sup>. The Court of Magistrates (Malta) as a Court of Criminal Inquiry is currently compiling evidence for and against the accused and other lines of investigation are still open: one of the alleged 'hitmen' (who has not been afforded a pardon, neither by the Prime Minister acting alone, nor by Cabinet) is pointing towards individuals other than the accused as being responsible for the murder of the late Daphne Caruana Galizia.<sup>20</sup>

In view of the above, I respectfully ask you to take immediate action within your respective remit to:

1. Take all necessary steps to **safeguard the integrity of all ongoing judicial proceedings** including the suspension of the operation of the Independent Public Inquiry into the Assassination of Daphne Caruana Galizia until its proper remit is established, including its relationship with all ongoing criminal proceedings (or such criminal proceedings are concluded);

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<sup>19</sup> <https://lovinmalta.com/news/live-blog-first-day-of-the-public-inquiry-into-assassination-of-daphne-caruana-galizia/>

<sup>20</sup> <https://newsbook.com.mt/en/prominent-people-who-have-not-been-named-linked-to-caruana-galizias-murder-suspected-hitman/>, see also <https://newsbook.com.mt/en/italian-mafia-involved-in-daphnes-assassination-cassola/>

2. Take all necessary steps in the interests of justice, including the suspension or termination of the operation of the Independent Public Inquiry into the Assassination of Daphne Caruana Galizia until Mr Yorgen Fenech's **Art. 6 and Art. 8 rights**, as a person subject to criminal proceedings in relation to the assassination of Daphne Caruana Galizia, may be correctly determined and safeguarded at law. At a minimum, before any findings that impact upon his civil and criminal liability are made, determination of Yorgen Fenech's rights must include the right to **legal representation**. At this stage of the proceedings, legal representation, at a minimum, must include and be directed towards:

- A. Exercise of the right to participate, including the right to comment on, and adduce, evidence in support of the aforementioned rights;
- B. Providing Mr Yorgen Fenech with accurate and complete copies of all the records of the proceedings held so far in the Public Inquiry, whether in public or restricted, according him the opportunity to record his reactions thereto within the acts of the Public Inquiry;
- C. The opportunity to review all evidence which is, or might be, relevant to Yorgen Fenech's civil and criminal liability;
- D. The opportunity to argue for the recall of any witnesses to, *inter alia*, challenge allegations relevant to the aforementioned rights; and
- E. The opportunity to make legal and factual submissions in relation to any (prospective) findings in relation to the aforementioned rights.

3. With respect to any prospective findings which might be relevant to Yorgen Fenech's civil and criminal liability, accord him the right to be issued with the equivalent of **Warning (Salmon) Letters** and provide him with the opportunity to participate and confront any adverse findings.



I am at your disposal and call upon your urgent reply to the matters raised in this communication.

Sincerely,



**JULIETTE GALEA**