QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI
MAGISTRAT DR. JOSEPH MIFSUD
B.A. (LEG. & INT. REL.), B.A. (HONS.), M.A. (EUROPEAN), LL.D.

Il-Pulizija

vs

Onor. Joseph Mizzi
Omissis[1]

Kawza: Distrett

Illum 29 ta' Dicembru, 2017

Il-Qorti,

Rat l-imputazzjonijiet migjuba kontra l-imputat **Omissis** u **Joseph Mizzi** detentur tal-karta tal-identita' bin-numru 211552 (M) billi huma akkuzati talli fis-26 ta' Gunju 2007 f'dawn il-Gzejjer, permezz ta' artikolu intitolat '**Water Crises**' ippublikat f'pagna 12 tal-gazzetta The Times of Malta dolozament xerridtu ahbarijiet foloz illi x'aktarx jallarmaw lill-pubbliku u dan bi ksur ta' l-Artikolu 82 tal-Kap 9 tal-Ligijiet ta' Malta.

Rat li b'assenjazzjoni tal-Prim Imhallef Silvio Camilleri datata 4 ta' Ottubru 2017 din il-kawza giet assenjata lil din il-Qorti.

Rat l-imputazzjoni;

[1] Deciza 14 ta' Ottubru 2008 fejn l-imputat Raymond Bugeja kien illiberat wara li fis-seduta tat-29 ta' April 2008 il-parte leza l-Perit Michael Falzon iddikjara li ma kellux interess li titkompla l-akkuza kontra l-editur tal-gurnal stante illi kien deher rapurtagg korrettorju.

Rat id-dokumenti;

Rat il-provi;

Rat l-Artikoli indikati;

Semghet sottomissjonijiet finali.

Il-fatti specie tal-kaz

Illi din il-kawza inbdiet fuq ilment li ghamel il-Perit Michael Falzon dak iz-zmien, chairman tal-Water Services Corporation wara artikolu li kiteb f'**The Times** l-imputat Joe Mizzi dak iz-zmien membru parlamentari f'isem l-Oppozizzjoni. Il-Qorti tinnota li fil-kaz odjern hu evidenti mill-atti – kemm mic-citazzjoni li da nil-kaz mhux tahrika ta' kawza privata, izda "tahrika ta' kawza tal-pulizija" – kif ukoll mill-okkio tal-verbali, jirrizulta li l-prosekuzzjoni tmexxiet mill-Pulizija Ezekuttiva ghalkemm ha rwol attiva l-avukat ta' min talab lill-pulizija tiehu passi kontra l-imputat.

KUNSIDERAZZJONIJIET TAL-QORTI

<u>Dewmien ta' procedura</u>

Il-Qorti tinnota li dawn il-proceduri kriminali huma marbuta ma' artikolu li nkiteb fit-**Times** mill-imputat fis-26 ta' Gunju 2007. Originarjament kien akkuzat ukoll l-editur tal-gurnal Ray Bugeja li gie liberat minn kull akkuza. Il-proceduri ilhom ghaddejjin mis-27 ta' Settembru 2007 meta nhargu l-akkuzi fil-konfront tal-imputat, dak iz-zmien kelliem ewlieni tal-

Oppozizzjoni dwar is-servizzi infrastrutturali, illum hu Ministru inkarigat mill-istess settur.

F'dan ix-xenarju ta' dewmien bla bzonn, din il-Qorti ttenni dak li qalet il-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz **O'NEILL AND LAUCHLAN v. THE UNITED KINGDOM**[2] deciz fit-28 ta' Gunju 2016 fejn intqal hekk dwar dewmien:

> *… in view of the need for diligence triggered by the significant lapses of time both between the commission of the offence and the laying of charges, and between the laying of charges and the applicants' conviction becoming final, the Court considers that the overall length of the proceedings (almost nine years in respect of the first applicant, and just over nine years and two months for the second applicant – see paragraphs 16, 46 and 90 above) was excessive and failed to meet the reasonable-time requirement.*
>
> *97. There has accordingly been a breach of Article 6 § 1.*

<u>Il-media</u>

Illi l-opinjoni pubblika hija importanti hafna sabiex ikun hemm demokrazija shiha f'pajjiz, izda f'pajjizna m'ghandniex Qrati tal-poplu li jiddeciedu l-kawzi fit-toroq u l-pjazez. Ghandna Qrati li dejjem kienu t-tarka tad-drittijiet ta' dawk kollha li ressqu quddiemhom sabiex titwettaq gustizzja.

[2] *Applications nos. 41516/10 and 75702/13*

Illi tajjeb li gudikant meta jkun qieghed jiddeciedi jiehu kont tal-impatt tar-reat fuq is-socjeta' u tar-reazzjoni tas-socjeta' ghal dak it-tip ta' reat izda l-gudikant mhux qieghed hemm sabiex jissodisfa l-ghajta ta' dawk li, ma' kull sentenza, tarahom jiktbu fil-gazzetti jew f'xi *blog* fuq l-*internet* sabiex jikkritikaw kollox u bl-addocc ghax minghalihom li saru issa esperti anke fil-ligi u fil-mod kif is-sentenzi ghandhom jigu finalment decizi. Jaghmel hafna sens dak li ntqal dan l-ahhar "*… il-kultura tagħna hija għal kollox l-oppost –normalment aħna ma nistrieħux qabel ma nieħdu l-pound of flesh mingħand min ikun għamel xi azzjoni ħażina! Ħafna minna li jippreżentaw ruħhom bħala difensuri tal-ġustizzja, jemmnu biss fil-ġustizzja vendikattiva u mhux dik restorattiva. Għalhekk xi drabi nissuspetta li taħt l-għajta għall-ġustizzja jkun hemm moħbi l-għatx għad-demm ta' min ikun żbalja."*[3]

Illi l-imputazzjoni migjuba kontra l-imputat hija dik **li jipprovdi ghaliha l-Kodici Kriminali** u mhux akkuzat bil-ksur tal-Ligi tal-Istampa.

Il-Kodici Kriminali - Kap 9 jipprovdi:

> **82.** *Kull min dolożament ixerred aħbarijiet foloz illi x'aktarx jallarmaw lill-pubbliku jew jiksru l-bon-ordni pubbliku jew il-paċi pubblika inkella illi jġibu aġitazzjoni fost il-pubbliku jew fost xi klassijiet tal-pubbliku, jeħel, meta jinsab ħati, il-piena ta' priġunerija minn xahar sa tliet xhur.*

L-Att dwar l-Istampa - Kap 248 jghid:

[3] L-Isqof ta' Ghawdex Mario Grech nhar it-Tnejn 18 ta' Dicembru 2017

9. *(1) Kull min dolożament, b'xi mezz imsemmi fl-artikolu 3, ixerred aħbarijiet foloz illi jistgħu jallarmaw l-opinjoni pubblika, jew jiddisturbaw il-bon ordni jew il-paċi pubblika, jew jistgħu joħolqu agitazzjoni fost il-pubbliku jew fost ċerti klassijiet tal-pubbliku, jeħel meta jinsab ħati prigunerija għal żmien ta' mhux iżjed minn tliet xhur jew multa jew dik il-prigunerija u multa flimkien:*

Iżda, jekk ir-reat iwassal għal xi storbju jew jekk ir-reat ikun ikkontribwixxa għall-ġrajja ta' xi storbju, min jagħmel ir-reat jeħel prigunerija għal żmien ta' mhux inqas minn xahar iżda mhux iżjed minn sitt xhur u multa.

Fil-Ligi tal-Istampa hemm sitwazzjonijiet fejn certu kitba u pubblikazzjonijiet huma privilegjati.

Il-Qorti tfakkar dak li jipprovdi l-Att dwar l-Istampa (Kap 248) f'Artikolu 33 fejn jindika meta ma tista' tittiehed ebda azzjoni dwar il-pubblikazzjonijiet ta' procedimenti f'qorti tal-gustizzja f'Malta **"kemm-il darba dawk ir-rapporti jkunu rapporti gusti tal-procedimenti"** (enfazi ta' din il-Qorti).

Illi dan ma jfissirx illi l-protezzjonijiet estizi ma jhallux "casualties". Ta' kuljum fil-media Maltija jigu rappurtati numru konsiderevoli ta' individwi mixlija b'diversi reati. Meta, anki snin wara, xi whud minnhom jigu liberati, mhux dejjem jigi rappurtat dan l-istat ta' fatt u certament ir-rappurtagg mhux dejjem jinghata l-prominenza li biha kienu mxandra l-akkuzi originali. Jew inkella jkollok min bi skuza ta' rapport privileggjat ta' proceduri fil-Qorti jxandar allegazzjonijiet foloz u malfamanti fil-konfront ta' xi hadd. Ir-rapporti jridu jkunu *bona fide* u mhux impjantati

malizjozament b'komplicita' ma' min ikun qieghed jixhed il-falz biex il-qarrej jitqarraq b'dak li jaqra.

Dan huwa stat ta' fatt, ghalkemm wiehed mhux felici li jesisti mhux biss f'Malta izda jippermea id-demokraziji varji madwar id-dinja.

Il-Qorti tinnota dak li qal Lord Diplock fil-kaz **Horrocks v. Lowe**[4] li:

> *"In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach."*

Il-Prim Imhallef Emeritus Vincent Degaetano fis-sentenza **Pulizija v. Maurice Agius** jikkwota lil Lord Justice Lawton fil-kawza **R v. Sargeant**[5] dwar dan:

> *"Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand they must disregard it.* ***Perhaps the main duty of the court is to lead public opinion*** (enfasi ta' din il-Qorti).

[4] Horrocks v. Lowe [1975] A.C. 135, 149
[5] R v. Sargeant (1974) 60 Cr. App. R. 74

Id-dritt ghall-espressjoni hielsa tal-kelma

Il-Qorti Ewropea tad-Drittijiet tal-Bniedem hija tarka tad-dritt tal-espressjoni tal-kelma u kien ghaqli l-legislatur Malti li minbarra li dan il-kuncett kien introdott sa minn kmieni fil-Kostituzzjonijiet taghna haseb biex il-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem tkun ukoll inkorporata fil-ligijiet taghna. B'hekk ic-cittadin Malti huwa protett kemm mill-Kostituzzjoni imma wkoll b'din il-Konvenzjoni. L-Istituzzjoni tal-Gustizzja f'pajjizna ddefendiet dawn id-drittijiet anke bil-gwida ta' dak li jigri barra minn xtutna.

Dak deciz fil-Qorti Ewropea tad-Drittijiet tal-Bniedem jghabbi b'responsabbilta' lill-gudikant Malti ghaliex id-decizjoni tieghu tista' tkun skrutinizzata jekk il-kaz wara li jkunu ezawriti r-rimedji kollha f'Malta jittiehed fil-Qorti Ewropea tad-Drittijiet tal-Bniedem mill-persuna li thoss li f'pajjizna ma nghatax *fair deal* fil-qorti taghna.

Artikolu 10 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem jipprovdi li:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Artikolu 19 tal-*International Covenant on Civil and Political Rights* (ICCPR) jghid li:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order, or of public health or morals.

Il-Qorti Ewropea tad-Drittijiet tal-Bniedem tipprovdi li l-Espressjoni Hielsa tal-Kelma tikkostitwixxi wiehed mill-pilastri ewlenin ta' socjeta' demokratika:

> *"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."*[6]

Il-Qorti Ewropea tad-Drittijiet tal-Bniedem fil-kaz ***L. De Haes and H. Gijsels v. Belgium***[7] qalet li:

> *"… the general interest in a public debate which has a serious purpose outweighs the legitimate aim of protecting the reputation of others, even if such debate involves the use of wounding or offensive language."*

Fil-kaz ***Barford v Denmark***[8] intqal li:

> *"the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern."*

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[6] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[7] *Appl. No. 19983/92, report of 29 November 1995, para. 63*
[8] 22 February 1989, *Series A No. 149,* para. *29*

Fil-kaz ***Ozgur Gundem v Turkey***[9] kien sostnut li:

> *"genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual"*

Is-sinifikat li ghandha f'demokrazija l-Espressjoni Hielsa tal-Kelma kienet spjegata mill-***Inter-American Court of Human Rights***:

> *Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.*[10]

Meta l-Qorti hi rinfaccjata b'sitwazzjoni fejn trid tohloq bilanc bejn interessi varji, l-protezzjoni tal-Dritt tal-Espressjoni tal-Kelma u l-protezzjoni tar-reputazzjoni tal-inidividwu trid:

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[9] 16 March 2000, Reports 2000-III, para. 43

[10] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No 5, para 70.

When faced with a conflict between competing rights and interests, courts usually favour a judicial approach where the relevant rights and interests are "harmonized" with due regard to the particular circumstances of each case. Such ad hoc balancing is more an artistic exercise than a scientific one as the circumstances of each case will ultimately determine which norm shall prevail.[11]

L-espert dwar il-Media **Kevin Boyle** kiteb*:*

"to point out that there are circumstances in which other interests shall prevail over freedom of expression is not inconsistent with a strong commitment to the value of freedom of expression".[12]

Fil-kaz **Campbell v MGN** l-Baronessa Hale tispjega dwar it-tipi differenti ta' diskors:

"There are undoubtedly different types of speech, just as there are different types of information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life."[13]

[11] Laurent Pech, Balancing Freedom of the Press with Competing Rights and Interests, A Comparative Perspective, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909507
[12] Kevin Boyle, "Overview of a Dilemma: Censorship versus Racism", in S Coliver, K Boyle and F D'Souza, *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* above at note 7 at 1.
[13] Campbell v MGN [2004] UKHI. 22, at para. 148

Lord Justice Stephenson fil-kaz **Lion Laboratories v Evans**[14] fisser l-interess tal-pubbliku li jkun infurmat fuq materja ta' certu thassib:

> *"1. There is a wide difference between what is interesting to the public and what it is in the public interest to make known.*
> *2. The media have a private interest of their own in publishing what appeals to the public and may increase the circulation or the numbers of their viewers or listeners and as a result they are 'particularly vulnerable to the error of confusing the public interest with their own interest.'*
> *3. The public interest may be best served by an informer giving information not to the press but to the police or other responsible body.*
> *4. It is in the public interest to disclose grave misconduct or wrongdoing or to put it another way there is no confidence 'as to the disclosure of iniquity."*[15]

Wendell Holmes J fis-sentenza **Abrams v United States**[16] qal:

> *"… the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out … we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful*

[14] Lion Laboratories v Evans [1984] 2 AII E.R. 417
[15] Ibid. at p.423
[16] Abrams v United States [1919] USSC 2.

and pressing purposes of the law that an immediate check is required to save the country."[17]

Lord Nicholls fil-kaz **Albert Cheng v Tse Wai Chun Pauk**[18] jghid li:

"The public interest in freedom to make comments within these limits is of a particular importance in the social and political fields. Professor Fleming stated the matter thus in his invaluable book on The Law of Torts, 9th edition, p. 648: '… untrammelled discussion of public affairs and of those participating in them is a basic safeguard against irresponsible political power. The unfettered preservation of the right of fair comment is, therefore, one of the foundations supporting our standards of personal liberty.'"

Fil-kaz **London Artists Ltd. v. Littler**[19] Lord Denning qal li*:*

"Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest on which everyone is entitled to make fair comment."

Il-protezzjoni tal-espressjoni hielsa tal-Membru Parlamentari[20]

Fil-ktieb **La Diffamazione Mediatica**[21] li jitratta *I Grandi Orientamenti della Corte di Cassazione* jiddedika kapitolu shih dwar ir-rwol tal-membru

[17] Ibid. Dissenting judgement
[18] Albert Cheng v Tse Wai Chun Pauk [2000] HKCFA 88
[19] London Artists Ltd. v. Littler [1969] 2 Q.B. 375, 391
[20] Arai l-**Pulizija vs Onor. Dr. Jason Azzopardi** deciza minn din il-Qorti fil-15 ta' April 2016

parlamentari lil hinn mill-Kamra tar-Rapprezentanti bit-tema **I loughi e I modi della diffamazione istituzionale.**

Dwar id-dibattitu u l-bilanc li jrid jinholoq fil-hidma tar-rapprezentant elett fost dawk li jelegguh meta jargumentaw dwar temi ta' interess pubbliku jinghad:

> *Il problema, naturalmente, consiste nell'individuare i confini e nello stabilire i limiti entro i quali la descritta attivita' politico-parlamentare possa comprimere la tutela dell'onore e della reputazione dell'aggredito. In particolare il quesito si e' posto per l'attivita' che il deputato o il senator esercita fuori dal perimetro dei palazzi parlamentari, attingendo frequentemente, con le sue dichiarazioni, anche soggetti non direttamente (e professionalmente) impegnati sul piano politico.*
>
> *[…]*
>
> *La comunicazione politica ha assunto modalita' ben differenti rispetto a quelle che hanno caratterizzata in passato: essa si svolge (fisicamente) anche al di fuori delle sede istituzionali, si e mediatizzata, si e' estesa e frammentata. Cio', per altro, deve ritenersi perfettamente coerente con lo spirito della Costituzione republicana, atteso che, "proiettarsi al di fuori delle aule (…) nell'interesse della liberta dialettica politica, che e' condizione di vita delle [stesse] istituzioni democratico-rappresentative."*[22]

[21] UTET Giuridica, Wolters Kluwer Italia S.r.l. [2012], pg. 269-298
[22] C. Cost., sent. 321/2000

[…]

Proprio il ruolo di rappresentanti, faculta i parlamentari … a sindacare l'operato, non solo dei "colleghi", ma – se cio' appare funzionale allo svolgimento del mandato ricevuto dagli elettori – di qualsiasi consociato, e, come e' ovvio, li legittima a coltivare il rapporto con il corpo elettorale, portando anche ***extra moenia*** *i contenuti della polemica intraparlamentare.*

[…]

Da tempo, pertanto, la giurisprudenza (costituzionale innanzitutto) si e' spesa per individuare il "nesso funzionale" che, legando l'attivita' svolta, appunto, ***intra moenia*** *alla sua proiezione esterna, valga a giustificare la tutela (c.d. "avanzata") della funzione parlamentare, vale a dire la possibilta' per il senatore o il deputato di "esportare" le sue dichiarazioni, le sue considerazioni, le sue iniziative oltre le porte dell'aula parlamentare.*

[…]

Dunque, se si fa riferimento alla costante lettura che di tali norme ha dato la Corte Costituzionale, si giunge agevolmente alla conclusion che non vi e' altra interpretazione possibile, al di fuori di quella che vuole sia tutelata la funzione politica del parlamentare, non la persona dell'"onorevole"; in realta', solo in tale ottica ha senso il criterio

ermeneutico che pretende la ricerca del "nesso funzionale" tra attivita' parlamentare e dichiarazione denigratoria ***extra moenia****.*

[…]

La problematica relativa alla ricerca di un difficile equilibrio tra la liberta' di espressione del parlamentare e la tutela del cittadino "aggredito" e' certo non sconosciuta a Strasburgo: la Corte ha sempre spiegato che le limitazioni alla liberta' di espressione devono essere interpretate, appunto, in maniera "ristretta", al fine di non svuotare il valore che la liberta' di espressione riveste all'interno di una societa'; ma contemporaneamente, cio' non deve (non dovrebbe) tradursi nel diniego di "accesso" a un giudice terzo e imparziale, da parte di chi si senta diffamato. La potenziale tensione tra il dettato dell'art. 6 (diritto a un processo equo) e quello dell'art. 10 della convenzione (liberta' di espressione), applicato alle dichiarazioni del parlamentare dovrebbe trovare soluzione nel rapporto di proporzionalita' con le finalita' servite dall'istituto della immunita' parlamentare. E la proporzione, per la Corte europea, non sussiste qualora l'immunita' sia concessa per coprire dichiarazioni non aventi un legame diretto con l'attivita' politica e parlamentare di un membro del parlamento e la parte che si ritiene lesa non abbia una possibilita' chiara e concreta di far valere le proprie ragioni presso un giudice terzo e imparziale. Cio' che piu' conta: non si puo' ritenere che tale possibilita' sia realizzata qualora dipenda dalla facolta' del giudice a quo di sollevare conflitto presso la Corte Costituzionale"[23]

[23] Patrono vs Italia, 2004; Osman vs Regno Unito, 2008; Esposito vs Italia, 2007; Cordova vs Italia, 2003; Dichand vs Austria e Lopez Gonzales vs Portogallo, 2000.

Protezzjoni tad-diskors tal-politiku: id-dritt li tikkritika

Il-Qorti Ewropea tad-Drittijiet tal-Bniedem tenfasizza li:

> *The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for re-plying to the unjustified attacks and criticisms of its adversaries or the media.*[24]
>
> *The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned....*[25]
>
> *In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly,*

[24] Castells v. Spain, Judgment of 23 April 1992, Series A no. 236.
[25] Feldek vs. Slovakia, Application No. 29032/95, Judgment of 12 July 2001.

interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court....[26]

Il-*House of Lords* tal-Ingilterra spjegat:

It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.[27]

Il-Qorti Kostituzzjonali ta' Spanja sostniet:

Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.[28]

Il-Qorti Kostituzzjonali tal-Indja qalet:

[26] Jerusalem vs. Austria, para 36.
[27] Derbyshire County Council v. Times Newspapers Ltd, [1992] 3 All ER 65 (CA), af rmed [1993] 2 WLR 449.
[28] Voz de España case, STC of June 81, Boletín de Jurisprudencia Constitucional 2, 128, para. 3.

... there must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind.[29]

Fil-ktieb **Freedom of Expression, Media Law and Defamation**[30] meta jitratta l-protezzjoni li ghandha tinghata lil diskors politiku jinghad li:

True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing-house closes down would toll the death knell of democracy.

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs ... The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources...[31]

KUNSIDERAZZJONIJIET DWAR L-IMPUTAZZJONI

Din il-Qorti tirreferi ghas-sentenza fl-ismijiet **Il-Pulizija v. Joseph Sciberras et** deciza fl-20 ta' Jannar 1997[32]. Din is-sentenza turi li f'dan il-

[29] Bombay High Court, Binod Rao v. M R Masani (1976) 78 Bom. LR 125.
[30] A reference and training manual for Europe ippubblikat mill-Media Legal Defence Initiative u l-International Press Institute fi Frar 2015
[31] M Joseph Perera & Ors v. Attorney-General, App. Nos. 107-109/86, (SC) Judgment of 25 May 1987
[32] Vol. LXXXI.iv.91.

kaz jekk il-prosekuzzjoni kellha tmexxi kontra l-imputat kif ghamlet kellha taghmel dan skont l-Att dwar l-Istampa ghaliex titratta materjal stampat, cioe' artikolu f'gurnal lokali.

F'dak il-kaz **Il-Pulizija v. Joseph Sciberras et**, l-imputazzjoni migjuba kontra l-kwerelati ghal malafama kienet taht il-provvedimenti tal-*Press Act*. Hemm il-kwerelati kienu qeghdin jargumentaw illi l-ittra mertu tal-kaz ma kinitx intiza ghac-cirkolazzjoni ossia sabiex jigi mxandar u ghalhekk kienu japplikaw id-disposizzjonijiet tal-Kodici Kriminali. Il-Qorti ma laqghetx dan l-argument u qalet hekk:

> **"Fil-fehma tal-Qorti, meta l-legislatur qed jitkellem dwar 'stampat b'tipi tipografici" ('*printed in typographical characters*', fit-test Ingliz) l-enfasi mhix fuq il-process tipografiku izda fuq ir-rizultat li wiehed jara stampat quddiemu, jigifieri li jara r-rizultat bhalma jhallu t-tipi li jintuzaw fil-process tipografiku. Jekk il-process ikunx dak tipografiku klassiku ('*composing type and printing from it*', Collins English Dictionary, '*v. typography*'), jew process jew sistema, sia mekkanika kif ukoll elettronika jew kombinazzjoni tat-tnejn, li taghti rizultat finali simili ghal dak tipografiku (bhal, per ezempju, *phototypesetting*, l-uzu ta' *typewriter*, l-uzu ta' *printer* tal-kompjuter, diversi forom ta' *offset printing*) hu rrelevanti.**
>
> **Kif inghad, l-ittra in kwistjoni (a fol. 3 tal-process) jidher li giet stampata bil-kompjuter b'tipi tipografici u ghalhekk**

tikkwalifika bhala 'stampat' ghall-finijiet tal-Kap. 248. Ghal din il-konkluzjoni jidher ukoll li waslet ghaliha l-Prim'Awla tal-Qorti Civili fis-sentenza taghha tas-7 ta' Mejju, 1991, fil-kawza fl-ismijiet *Dr. Joseph M. Ciappara vs Joseph Zammit* u li ghaliha ghamlet referenza wkoll l-Ewwel Qorti fis-sentenza appellata. Jekk, mill-banda l-ohra, ittra saret bit-*typewriter*, din ukoll tammonta ghal kitba stampata b'tipi tipografici (ara f'dan is-sens ukoll, ghalkemm taht l-allura Kap. 117, is-sentenza tal-Qorti Kriminali li kienet allura tisma' appelli minn sentenzi tal-Qorti tal-Magistrati) tat-18 ta' Marzu, 1961 fl-ismijiet *Tabib Dottor Henry Copperstone et al vs Publio Schembri*);

Kwantu ghar-rekwizit tal-pubblikazzjoni, l-imsemmi artikolu 2 tal-Kap. 248 jiddefinixxi pubblikazzjoni bhala li tfisser:

'Kull att li bih kull stampat jigi jew jista' jigi kkomunikat jew imgharraf lil xi persuna jew li bih kliem jew immagini vizwali jigu mxandra';

L-appellanti jikkontendu li l-ittra kienet 'komunikazzjoni ufficjali ta' natura privata' mibghuta minnhom lill-kap tal-Gvern u li ma kinitx ghall-finijiet ta' jekk hemmx 'pubblikazzjoni' fis-sens tal-Kap. 248. Stampat jigi ppubblikat anke jekk jigi kkomunikat jew imgharraf lil persuna <u>wahda</u>. Ghalhekk fetahx l-ittra l-Prim Ministru personalment jew xi membru tas-segretarjat tieghu hi ukoll

konsiderazzjoni rrelevanti galadarba l-fatti malafamanti ma kinux qed jigu attribwiti lill-Prim Ministru."

Illi l-imputazzjoni addebitata lill-imputat tirrigwarda r-reat kontemplat taht l-Artikolu 82 tal-Kodici Kriminali li jipprovdi li huwa hati ta' reat "*kull min dolozament ixerred ahbarijiet foloz illi jistghu jallarmaw lill-pubbliku jew jiksru l-bon ordni pubbliku jew il-paci pubblika inkella illi jgibu agitazzjoni fost il-pubbliku jew fost xi klassijiet jew ohra tal-pubbliku*".

Fis-sentenza - Il-**Pulizija (Dep. Kumm. Anthony Mifsud Tommasi) kontra Hon. Dottor Gwido DeMarco B.A.,LL.D.,M.P**[33] deciza nhar l-Erbgha, 27 ta' Lulju, 1994 mill-Imhallef Carmelo A. Agius wara appell minn sentenza tal-Qorti tal-Magistrati tas-27 ta' Mejju, 1982 intqal li l-estremi ta' dan ir-reat huma:-

a) Tixrid ta' ahbarijiet foloz.

b) imxerrda dolozament.

c) li jistghu jallarmaw il-pubbliku.[34]

Jirrizulta illi l-allegazzjonijiet indikati u maghmula mill-imputat, gew maghmula u indirizzati lill-qarrejja ta' gurnal ewlieni **The Times** permezz ta' artikolu bit-titlu ***Water crisis*** ippubblikat fis-26 ta' Gunju 2007. Illi ghalhekk l-akkuzi komprizi fl-istess allegazzjonijiet ghandhom in-natura ta' ahbarijiet.

[33] Appell Nru.: 122/82
[34] Appell Nru.: 122/82

F'dan l-artikolu Joseph Mizzi dak iz-zmien kelliem ewlieni tal-Oppozizzjoni ghas-Servizzi Infrastrutturali kien sostna li '*The looming water crisis is a priority we have to address for a healthy and sustainable future.*' Fl-istess artikolu jaghmel analizi dwar il-problema tal-ilma f'pajjizna u jaghmel kritika lill-gvern li f'ghoxrin sena kien injora l-problema tal-ilma u li "*now seems to be desperately looking for non-existent quick solutions*".

Ghal dak li jirrigwarda l-element li l-ahbarijiet foloz iridu jkunu mxandra dolozament, din il-Qorti taghmel referenza ghas-sentenza tal-l-Imhallef Fortunato Mizzi deciza fis-6 ta' Gunju, 1978 fil-kawza fl-ismijiet "Il-**Pulizija v Frederick Barry u Joseph Busuttil L.P**" fejn irreteniet li biex jigu ravvizati r-reati kontemplati kemm fl-artikolu 9 kif ukoll fl-artikolu 10 ta' l-Att dwar l-Istampa, **hemm bzonn, f'kull kaz, li n-notizzja divulgata b'xi wiehed mill-mezzi predetti tkun mhux biss falza, imma tali li setghet potenzjalment tallarma l-opinjoni pubblika, jew tiddisturba l-bon ordni jew il-kwiet pubbliku. Dak li jikkostitwixxi l-element differenzjali bejn iz-zewg reati huwa l-fattur psikiku in kwantu ghall-konfigurazzjoni ta' l-ewwel reat, li hu gravjuri, jehtieg id-*dolus*, li ghalih il-ligi tekwipara n-nuqqas ta' verifika preventiva tal-verità ta' l-ahbar, mentri ghall-konsistenza tat-tieni reat huwa sufficjenti li tigi konstatata s-semplici negligenza.**

Il-prova tal-falsità ta' l-ahbar, ghall-finijiet sew ta' l-artikolu 9 kif ukoll ta' l-artikolu 10 ta' l-Att dwar l-Istampa, tispetta lill-prosekuzzjoni u ghalhekk kull dubju ragonevoli dwar dan l-element indispensabbli tar-

reati hemm previsti ghandu jirrizolvi ruhu favur l-akkuzat.[35] Din l-affermazzjoni hija korollarju mprexxindibbli ta' dak li hu assjomatiku fil-kamp tad-dritt penali ta' kull pajjiz verament civilizzat. Dan id-dritt huwa wkoll sancit fl-artikolu 40(5) [illum 39(5)] tal-Kostituzzjoni ta' Malta. Huwa veru li malintenzjonat jista' koncepibilment jiffabbrika notizzja, anke mill-aktar allarmanti, b'mod talment subdolu u ingenjuz li jirrendi mill-aktar difficili u ardwu l-kompitu tal-prosekuzzjoni li tipprova, minghajr dubju ragonevoli, il-falsità taghha. Din, però, m'hijix materja ta' kompetenza ta' l-awtorità gudizzjarja, imma, jekk jidrilha li hu opportun li tirregolaha, ta' awtorità ohra *in jure condendo*.

Kwantu ghall-potenzjalità ta' l-allarm, rekwizit iehor tar-reati in ezami li wkoll imiss lill-prosekuzzjoni li tipprova, il-Qorti ghandha tkun perswaza illi, bhala konsegwenza tan-notizzja falza, seta' kien hemm lok ghal certa eccitazzjoni ta' passjonijiet, certa esasperazzjoni ta' rankuri u inklinazzjonijiet hziena, certu incitament ghall-ksur tal-ligi, jew, kif jinghad fit-testi antiki inglizi, "occasion for discord" li, minhabba f'hekk, jista' ikun hemm "an apprehended breach of peace".[36]

B'referenza ghall-kliem "jistghu jallarmaw l-opinjoni pubblika, jew jiddisturbaw il-bon ordni jew il-paci pubblika" f'dak li kien l-artikolu 13 tal-Kap. 117, fis-sentenza taghha tas-26 ta' Gunju 1957 fl-ismijiet **Il-**

[35] Il-Qorti ghamlet referenza ghas-sentenza "Il-Pulizija v. Carmelo sive Charles Buttigieg" [06.08.1975]; saret referenza wkoll ghas-sentenza "Il-Pulizija v. Anthony Micallef" [26.06.1957 – Kollez. XLI.iv.1420] fejn il-Qorti kienet imxiet fuq il-presuppost kuntrarju u rriteniet li kien jissussisti r-rekwizit tal-falsità tan-notizzja inkriminata in bazi ghas-semplici kontestazzjoni li ma setghax jinghad li l-appellant kien irnexxilu jipprova li dik in-notizzja kienet vera.

[36] Il-Qorti ghamlet referenza ghas-sentenza "Il-Pulizija v. Anthony Micallef" [26.06.1957 – Kollez. XLI.iv.1420].

Pulizija v. Anthony Micallef il-Qorti, preseduta mill-Imhallef William Harding, qalet hekk:

"Ghandu jigi immedjatament avvertit li b'dawk il-kliem ma jistax wiehed jifhem semplicement li bil-pubblikazzjoni tan-notizzja falz jkun hemm fil-kollettivita` tan-nies is-sens li hi perikolata s-sikurezza u t-trankwillita` taghhom. Kull reat jilledi ta' bilfors l-ordni pubbliku; u r-repressjoni tieghu hi appuntu ntiza, minbarra ghal finalitajiet ohra, sabiex fil-kollettivita` tan-nies tigi ristabbilita l-opinjoni tas-sikurezza li giet turbata. Il-kliem fuq riportati tal-art. 13 ghandhom ikollhom sens li jmur aktar 'l hemm minn dan is-sens generali li hu komuni ghar-reati kollha.

…

L-Imhallef sedenti jahseb li l-effett ta' dawk il-kliem fl-art. 13 hu li l-Qorti ghandha tkun perswaza illi, bhala konsegwenza tan-notizzja falza, seta' kien hemm lok ghal certa eccitazzjoni ta' passjonijiet, certa ezasperazzjoni ta' rankuri u nklinazzjonijiet hziena, certu incitament ghall-ksur tal-ligi, jew, kif jinghad fit-testi antiki inglizi, 'occasion for discord', li minhabba f'hekk jista' jkun hemm 'an apprehended breach of the peace'. Dan hu s-sens ta' dawk il-kliem.

….

Dan l-element hu dak li l-aktar ippreokkupa l-Qorti, appuntu ghax hu intangibbli. Huwa ovvju li l-Qorti ghandha tara jekk in-notizzja 'de

qua', dak il-mument tal-pubblikazzjoni taghha, kellhiex 'fiha nnifisha' l-attitudini li ggib l-effett fuq indikati; u ghalhekk il-Qorti ghandha tipprexxindi milli tikkunsidra l-passi li talvolta hadu l-Pulizija biex jigu skongurati dawk it-temuti effetti. Fil-valutazzjoni ta' dan l-element, inoltre, il-Qorti ghandha tqies li l-artikolett gie publikat in prima pagina, f'post prominenti, 'in thick type' kollu kemm hu. Kwindi kien jinqara zgur, u mill-ewwel …. Cert hu li fil-konsiderazzjoni ta' dak l-element il-gudikant ghandu jhares maggjorment lejn ic-cirkustanzi lokali fi zmien determinat; ghaliex minn dawk ic-cirkustanzi fiz-zmien partikolari jiddependi jekk potenzjalment hemmx l-'apprehension' ta' 'a breach of the peace'."

Fis-sentenza tal-Qorti tal-Appell Kriminali fl-ismijiet **Onor. John Dalli vs Francis Grixti**[37] tat-28 ta' Jannar 2005, li trattat artikolu li kien ippubblikat fil-gurnal fejn l-editur kien mixli dwaru, li xerred ahbarijiet foloz, l-Imhallef David Scicluna spjega:

Ma tarax li potenzjalment kien hemm il-periklu li xi uhud li, minhabba raguni jew ohra, ma jafux jew ma jistghux jikkontrollaw il-passjonijiet taghhom, setghu kkommettew attijiet ta' vjolenza biex jivvendikaw il-fatt notizzjat, u allura ohrajn setghu a loro volta jirreagixxu ghal dawk l-attijiet vjolenti, jew li seta' qam tant agha fil-pajjiz b'mod li jkun hemm disturb tal-bon ordni pubbliku. Li l-ligi tipprospetta l-potenzjalita` ta' "storbju" huwa evidenti mill-proviso ta' l-artikolu 9(1) li jipprovdi ghal piena akbar jekk effettivament ir-reat (ta' tixrid

[37] App. Nru. 82/04DS

ta' ahbarijiet foloz) "iwassal ghal xi storbju jew jekk ir-reat ikun ikkontribwixxa ghall-grajja ta' xi storbju".

L-istess ghall-artikolu mistharreg minn din il-Qorti li ppubblika l-imputat, f'dawn l-atti ma ngabitx xi prova li fil-pajjiz kien hawn xi storbju jew l-istess artikolu kkontrbwixxa ghal xi grajja ta' xi storbju jew vjolenza.

DECIDE:

Ghal dawn il-mottivi l-Qorti ma jirrizultaliex illi l-artikolu inkwistjoni jammonta ghal ahbarijiet foloz u li gew imxandra bl-intenzjoni specifika li jigi allarmat il-pubbliku.

Illi ghalhekk il-Qorti ssib illi l-estremi tar-reat dedott fl-imputazzjoni migjuba kontra l-imputat ma jirrizultawx u ghalhekk qieghed ikun liberat.

_____

Dr. Joe Mifsud
Magistrat