QORTI ĊIVILI – PRIM'AWLA

(Sede Kostituzzjonali)

ONOR. IMĦALLEF MIRIAM HAYMAN LL.D.

Seduta tal-lum l-Erbgħa 27 ta' Settembru, 2023

Referenza Kostituzjonali nru. 368/2022MH.

Numru: 2

Il-Pulizija (Spettur John Spiteri)

Vs

Kasem Khlef

Il-Qorti,

1. Rat ir-referenza Kostituzzjonali[1], kif formulata fin-nota ta' Dr. Joseph Brincat[2] li taqra hekk:

"Li permezz tagħha.

Jissollevaw li l-Artikolu 204(c) recte (Ċ) *tal-Kap 9 jivvjola l-Artikolu 7 tal-Konvenzjoni Ewropeja tad-Dritiijiet tal-Bniedem u l-Artikolu 39(8) tal-Kostituzzjoni minħabba li l-actus reus tar-reat inventat lokalment, u li ma jinsab fl-ebda legislazzjoni oħra, huwa vag, mhux faċċli li jiġi interpretat u jispiċċa li jkun mogħti interpretazzjoni soggettiva u mhux oggettiva, u estensiva.*

[1] Rat ukoll id-digriet ta' din il-Qorti diversamennt preseduta datat 14 ta' Ottubru, 2022 fejn din il-kawża fuq saħħa ta' digriet tagħha tal-5 ta' Lulju, 2022 ġiet mibgħuta lil din il-Qorti kif preseduta. (Folio 8)
[2] Din il-vertenza se tiġi kkunsidrata fl-eċċezzjonijiet aktar tard.

Fit-tieni lok għaliex ma hemmx proporzjonalita' bejn ir-reat vag de quo fejn jidħlu minuri, u reat soċjalment aktar gravi tal-korruzzjoni effettiva tal-minorrenni, u barra minn hekk jeskludi kull poter tal-genituri li njipprotegu kif jidhrilhom lil uliedhom minuri, saħansitra kontra l-volonta' tal-istess genituri."

2. Kien fuq bażi ta' hekk li saret din ir-referenza. Dan qed jingħad in kwantu għal fatt li l-Qorti referenti ma għamlet QATT referenza korretta skont il-liġi u li kellha tikkontjeni l-mistoqsija ċara u preċiża ndirizzata għal gwida ta' din il-Qorti. Li jidher li ġara hu, u hawn il-Qorti qed tħarres lejn l-atti tal-kumpilazzjoni bin-numru 538/2019 fl-ismijiet "Il-Pulizija kontra Kasem Khlef" relatata ma' dawn il-proċeduri, u referenza oħra miexja mal-istess bl-istess addebiti tar-reati u l-istess referenza bl-ismijiet "Il-Pulizija vs Clayton Farrugia", u fejn il-Qorti referenti qalet dan;-

"Il-Qorti wara li rat n-nota tad-Difiza kif ukoll ir-risposta tal-uffiċjal Prosekutur tħoss li t-talba tad-Difiza mhix frivola u vessatorja u għalhekk qed tilqa' t-talba għal referenza Kostituzzjonali u tibgħat l-atti sabiex tiġi deċiża din ir-referenza fil-parametri tal-istess nota"[3]

3. Kien in vista ta' kif ġiet redatta din ir-referenza li sar il-verbal datat 2 ta' Diċembru, 2022, in kwantu, għalkemm mhux hemm

[3] Folio 32 ta' dawk l-atti.

verbaliżżat, l-intimati talbu li l-atti jiġu rimandati lill-Qorti riferenti biex tikklarifika l-mistoqsija riferuta.

4. Din il-Qorti a skans ta' aktar ħela ta' żmien ivverbalizzat li kienet se tistrieħ fuq in-nota kif formulata minn Dr. Joseph Brincat, *supra.* Pero tħoss ukoll li minħabba n-natura proprja ta' referenza kostituzzjonali, fejn fil-verita' hija l-Qorti li qegħda titlob gwida dwar vertenza ta' natura fundamentali li tkun qamet quddiema, illi għandha tagħmel is-segwenti riferenzi ġurisprudenzjali li għandhom jservu ta' gwida għal kif il-liġi trid li jsiru tali referenzi.

5. Dan barra li jservi ta' valur akkademiku, jgħin ukoll biex il-Qrati referenda jkollhom stampa ċara u inekwivoka x'inhu l-ilment ta' natura kostituzzjonali/konvenzjonali li tiegħu huma mitluba l-gwida u risposta.

6. Għalhekk intqal dan fid-deċiżjoni tal-Qorti Kostituzzjonali fl-ismijiet **Il-Pulizija (L-Ispettur George Cremona) vs Pauline Vella[4]:-**

"*Konsiderazzjonijiet tal-Qorti*

13. *Ghal darb'ohra din il-Qorti ssib ruhha f'pozizzjoni li jkollha tirrimarka dwar l-mod xejn preciz, u b'nuqqas ta' osservanza tar-rekwizit*

[4] Qorti Kost. Appell Ċiv nru. 42/2007/1 deċiża 30/9/2011

formali bazici stabbiliti mirregolamenti, ta' kif qeghdin isiru r-riferenzi ta' kwistjonijiet kostituzzjonali li jigu sollevati fil-kors ta' proceduri li ma jkunux quddiem il-Prim' Awla tal-Qorti Civili. Il-Qrati, inkluza din il-Qorti, gja` rrimarkaw dwar dan f'aktar minn okkazzjoni wahda[5][6] izda jidher li l-Qrati riferenti jissoktaw filli jippekkaw serjament f'din il-materja bhal fil-kaz tarriferenza odjerna. Wara kollox hemm regolamenti precizi li jistabbilixxu r-rekwiziti minimi ta' kull riferenza ta' kwistjoni kostituzzjonali u dawn ir-rekwiziti, li ma huma xejn esigenti, ghandhom jigu dejjem segwiti. Hekk, issubinciz (1) tar-regola 5 tar-Regoli dwar il-Prattika u lProcedura tal-Qrati u l-Bon Ordni[7] jipprovdi kif gej:

"Fil-kazijiet imsemmija fl-artikolu 46(3) tal-Kostituzzjoni ta' Malta, f'l-artikolu 4(3) tal-Att dwar il-Konvenzjoni Ewropea u fl-artikolu 95(2)(b) tal-Kostituzzjoni ta' Malta, l-ordni li bih kwistjoni tigi mibghuta ghandu jkun fih b'mod konciz u car il-fatti u c-cirkostanzi li minnhom il-kwistjoni tinholoq, ittermini ta' dik il-kwistjoni, u jindika liema hi d-dispozizzjoni jew liema huma d-dispozizzjonijiet tal-Kostituzzjoni ta' Malta jew tal-Konvenzjoni Ewropea ghall-Protezzjoni tadDrittijiet tal-Bniedem u tal-Libertajiet Fondamentali, kif ikun il-kaz, li jkunu allegatament gew miksura."

14. *Filwaqt li l-fatti li taw lok ghar-riferenza huma delineati adegwatament fl-ordni ta' riferenza, it-termini tal-kwistjoni riferita lill-Prim' Awla tal-Qorti Civili huma inezistenti u lordni ma fih ebda indikazzjoni tad-dispozizzjoni jew dispozizzonijiet tal-Kostituzzjoni ta' Malta jew talKonvenzjoni Ewropea ghall-Protezzjoni tad-Drittijiet talBniedem u tal-Libertajiet Fondamentali li allegatament gew miksura. Ghalhekk l-ewwel Qorti, in vista tannuqqasijiet serji li fih l-ordni tar-riferenza, kienet tkun pjenament gustifikata li tibghat lura l-ordni ta' riferenza lillQorti riferenti sabiex tintegraha bir-rekwiziti skont kif previst fir-regola 5(1) tar-Regoli dwar il-Prattika u lProcedura tal-Qrati u l-Bon Ordni.*

15. *B'danakollu*, *f'dan l-istadju inoltrat tal-proceduri, filwaqt li ghal darb'ohra tishaq fuq in-necessita` li l-Qorti riferenti tottempera ruhha*

[5] Ara, fost ohrajn, Il-Pulizija v Belin sive Benigno Saliba, Qorti Kostituzzjonali,
[6] /04/1991; Il-Pulizija v Lawrence Cuschieri, Qorti Kostituzzjonali, 8/01/1992; Il-Pulizija v Longinu Aquilina, Qorti Kostituzzjonali, 23/01/1992
[7] AL 279/2008

ma' dak dispost fir-regoli fuq imsemmija, din il-Qorti ma hix ser thalli n-nuqqasijiet rilevati fl-ordni ta' riferenza jxekkluha milli tiddetermina lmertu tal-kwistjoni li temergi mill-fatti delineati sakemm ilQorti tkun tista' xort'ohra tidentifika t-termini tal-kwistjoni riferita, u dan sabiex jigi evitat kull dewmien bla bzonn fiddeterminazzjoni ta' kwistjonijiet li jinvolvu d-drittijiet fondamentali tal-bniedem."

Ukoll in tematika sentenza oħra tal-istess Qorti fl-ismijiet **Police vs Nelson Arias**[8]

"This Court's assessment

18. *It is with considerable consternation that this Court notes once again that, as correctly pointed out by the Attorney General in his reply to the reference before the first Court, the referring Court in this case failed to comply with the requirements of rule 5(1) of the Court Practice and Procedure and Good Order Rules*[9] *when drawing up the reference to the First Hall Civil Court in its constitutional competence. The reference made is totally vague, unclear as to the nature of the constitutional questions to which the referring Court required answers, completely deficient in the nature of the actual or potential violations of the Constitution and/or of the Convention, with not the slightest indication of the article or articles, to say nothing of the relevant paragraphs, of the Constitution or of the Convention which are alleged to have been or are likely to be breached. This Court repeats that this is unacceptable as it has pointed out on several occasions*[10] *but apparently to no avail."*

Aktar riċenti din il-Qorti kif diversament preseduta kellha dan xi tgħid

fir-rigward fid-deċiżjoni fl-ismijiet **Il-Pulizija (Spettur Oriana Spiteri)**

vs Miloud ELforjani[11]**-:**

[8] 67/2011/1 deċiża 28/9/2012
[9] L.N. 279/2008
[10] See among others **Pulizija v. Belin sive Benigno Saliba**, 10/4/1991; **Pulizija v. Lawrence Cuschieri**, 8/1/1992; **Pulizija v. Longinu Aquilina**, 23/1/1992; **Pulizija v. Pauline Vella**, 30/9/2011.
[11] 115/2022 deċiża 16 ta' Mejju, 2022.

“Konsiderazzjonijiet

15. *L-**artikolu 46(2) tal-Kostituzzjoni ta’ Malta** u l-**artikolu 4(2) tal-Att dwar il-Konvenzjoni Ewropea (Kap 319 tal-Liġijiet ta’ Malta)** jgħidu li l-Prim’Awla tal-Qorti Ċivili għandu jkollha ġurisdizzjoni oriġinali li tisma’ u tiddeċiedi kull talba magħmula minn xi persuna dwar ksur jew potenzjali ksur ta’ xi wieħed jew aktar mill-jeddijiet li jissemmew: (i) fl**artikoli 33** sa **45** tal-**Kostituzzjoni ta’ Malta**; (ii) fl-**artikoli 2** sa **18** tal-**Konvenzjoni għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal-Libertajiet Fondamentali**; (iii) fl**artikoli 1** sa **3 tal-Ewwel Protokoll tal-Konvenzjoni**; (iv) fl-**artikoli 1** sa **4 tar-Raba’ Protokoll tal-Konvenzjoni**; (v) fl-**artikoli 1** u **2 tas-Sitt Protokoll tal-Konvenzjoni**; u (vi) fl-**artikoli 1** sa **5 tas-Seba’ Protokoll tal-Konvenzjoni**;*

16. *Mill-banda l-oħra, l-**artikolu 46(3) tal-Kostituzzjoni ta’ Malta** u l-**artikolu 4(3) tal-Kap 319 tal-Liġijiet ta’ Malta** jgħidu li jekk tqum kwistjoni dwar wieħed mill-jeddijiet fuq imsemmija quddiem qorti li ma tkunx il-Prim’Awla tal-Qorti Ċivili, dik il-qorti għandha tibgħat il-kwistjoni quddiem il-Prim’Awla tal-Qorti Ċivili kemm-il darba fil-fehma tagħha ttqanqil ta’ dik il-kwistjoni ma tkunx waħda sempliċement frivola jew vessatorja. Bil-kelma ‘frivola’ wieħed jifhem li t-talba għar-referenza kostituzzjonali tkun żejda, bla ħtieġa, fiergħa jew vojta; filwaqt li bil-kelma ‘vessatorja’ wieħed jifhem li t-talba għar-referenza kostituzzjonali tkun saret biex iddejjaq jew tinki lil dak li jkun;*

17. *Minn kliem il-liġi hija qorti biss li tista’ tibgħat kwistjoni quddiem il-Prim’Awla tal-Qorti Ċivili.*

*Din għalhekk teskludi bordijiet bħall-Bord ta’ Arbitraġġ Dwar Artijiet (ara **Kummissarju tal-Artijiet v. Ignatius Licari nomine** deċiża mill-Qorti Kostituzzjonali fit-30 ta’ Ġunju, 2004), kif ukoll tribunali bħat-Tribunal Għal Talbiet Żgħar (ara **Anthony Grech v. Claire Calleja et** deċiża mill-Qorti Kostituzzjonali fid-29 ta’ Frar, 2008);*

18. *Issa kif ingħad fis-sentenza **Il-Pulizija v. Lawrence Attard** deċiża mill-Prim’Awla tal-Qorti Ċivili (Sede Kostituzzjonali) nhar l-1 ta’ Lulju, 2004, hemm differenza mhux traskurabbli bejn is-setgħat ta’ din il-qorti meta tkun imsejħa tiddeċiedi kwistjoni kostituzzjonali jew konvenzjonali direttament fuq talba ta’ parti u meta, bħal f’dan il-każ, tkun saritilha referenza minn qorti oħra dwar kwistjoni kostituzzjonali jew*

konvenzjonali li tkun tqanqlet quddiemha. Huwa meqjus li ż-żewġ għamliet ta' proċeduri huma paralleli għal xulxin (ara ***Anthony Coreschi v. Kummissarju tal-Pulizija et*** *deċiża mill-Qorti Kostituzzjonali fil-21 ta' Lulju, 1989) u għalhekk dan ifisser li dawn m'humiex l-istess għaliex dak li huwa parallel għal xi ħaġa ma jsir qatt biċċa minnha;*

19. *Illi l-akbar differenza hija fil-fatt li l-proċedura mibdija b'kawża ad hoc hija dritt u għażla tal-persuna li tkun qiegħda tilmenta minn ksur ta' xi dritt fondamentali tagħha; filwaqt li rreferenza mhijiex tal-partijiet li qed jissieltu fil-kawża iżda tal-qorti riferenti biss (ara inter alia* ***Glenn Bedingfield v. Kummissarju tal-Pulizija et*** *deċiża mill-Qorti Kostituzzjonali fil-31 ta' Lulju 2000 u* ***Nazzareno Galea et v. Giuseppe Briffa et*** *deċiża mill-Qorti Kostituzzjonali fit-30 ta' Novembru, 2001). Kemm hu hekk, intqal li l-proċedura marbuta mal-ordni ta' referenza hija waħda ta' ordni pubbliku, b'dana li qorti għandha tiddeċiedi hi mill-ewwel jekk il-kwistjoni mqanqla quddiemha tixraqx li tiġi mibgħuta lill-Prim'Awla tal-Qorti Ċivili u mhux toqgħod tistenna li xi parti tiftaħ kawża kostituzzjonali għal rasha dwar dik il-kwistjoni (ara* ***Avukat Dr. Lawrence Pullicino v. Kap Kmandant tal-Forzi Armati et*** *deċiża mill-Qorti Kostituzzjonali fit-12 ta' April, 1989);*

20. *Naturalment dan ma jfissirx li kull meta tinqala' kwistjoni li tista' tmiss ma' jedd fundamentali, il-qorti għandha tagħlaq għajnejha u taqbad u tibgħat kwistjoni lill-Prim'Awla tal-Qorti Ċivili bl-addoċċ jew kif ġieb u laħaq. Jekk il-kwistjoni tkun dwar xi ħaġa li taqa' flobbligi ta' dik il-qorti, ir-referenza m'għandhiex issir. Hekk pereżempju Qorti tal-Maġistrati m'għandhiex tibgħat referenza kostituzzjonali jekk f'talba dwar ħelsien mill-arrest titqajjem mill-akkużat kwistjoni dwar il-jedd tiegħu mill-ħarsien ta' arrest arbitrarju - dan għaliex huwa xogħol il-Qorti tal-Maġistrati li tiddeċiedi kwistjonijiet bħal dawn fid-dawl mhux biss tad-dispożizzjonijiet tal-****Kodiċi Kriminali*** *iżda anke fid-dawl tal-jeddijiet li jinsabu fil****Kostituzzjoni ta' Malta*** *u l-****Kap 319 tal-Liġijiet ta' Malta****. Wara kollox il-Qorti tal-Maġistrati mhijiex marbuta li timxi biss mal-liġijiet kriminali iżda hija marbuta li timxi malliġijiet kollha ta' Malta, magħdud magħhom għalhekk il-liġijiet li joħorġu mill-****Kostituzzjoni ta' Malta*** *u mill-****Kap 319 tal-Liġijiet ta' Malta****;*

21. *Eżempju ieħor huwa li l-Qorti tal-Appell m'għandhiex għalfejn tibgħat referenza kostituzzjonali jekk ikollha aggravju quddiemha dwar it-tħassir tas-sentenza appellata minħabba li din tkun ingħatat mingħajr*

ma semgħet x'kellha xi tgħid waħda mill-partijiet - dan għaliex huwa xogħol il-Qorti tal-Appell li tiddeċiedi kwistjonijiet dwar jekk is-sentenza appellata ngħatatx b'ħarsien tal-prinċipji tal-ġustizzja naturali. Hekk ukoll, il-Qorti tal-Maġistrati li tkun qed tisma' proċeduri ċivili ta' libell m'għandhiex għalfejn tagħmel referenza kostituzzjonali jekk il-konvenut iġib bħala difiża f'dik il-kawża l-fatt li huwa kien qiegħed jesprimi l-opinjoni ħielsa tiegħu - dan għaliex huwa mistenni li f'kawżi ta' libell ilQorti tal-Maġistrati twieżen bejn il-jedd ta' reputazzjoni tal-parti li tkun qiegħda tallega li kienet vittma ta' libell u l-jedd tal-parti l-oħra li tiddefendi ruħha billi tgħid li hija kienet qiegħda tesprimi l-ħsibijiet u l-fehmiet tagħha fil-pubbliku;

22. *Bl-istess mod, qorti għandha toqgħod kemm jista' jkun lura milli tagħmel referenza kostituzzjonali jekk quddiemha titqajjem kwistjoni ta' xejra kostituzzjonali jew konvenzjonali li bħalha tkun tqajmet qabel, u fejn dik il-kwistjoni tkun diġà tqieset millogħla qorti kompetenti u tat il-provvedimenti tagħha dwarha (ara* ***J.G. Systems Ltd. v. Kummissarju tat-Taxxa fuq il-Valur Miżjud*** *deċiża mill-Qorti tal-Appell fis-6 ta' Ottubru, 2010 u* ***Il-Pulizija v. Jean Piere Borġ*** *deċiża mill-Prim'Awla tal-Qorti (Sede Kostituzzjonali) fil-25 ta' Ottubru, 2016). Tassew ma jidhirx li jkun hemm għalfejn li qorti oħra għandha tirreferi l-każ mill-ġdid lill-Prim'Awla tal-Qorti Ċivili kull darba li tqum quddiemha kwistjoni bħal dik, sakemm il-kwistjoni ma tkunx tqanqal xi punt ġdid. Ikun xieraq li l-qorti li quddiemha titqanqal il-kwistjoni tieħu qies tad-direzzjoni murija mill-qorti ta' kompetenza kostituzzjonali dwar kwistjoni bħal dik u timxi ma' dik id-direzzjoni indikata fil-każ li jkollha quddiemha. B'daqshekk, ma jfissirx li dik il-qorti tkun qiegħda żżomm għaliha kompetenza li mhijiex tagħha, iżda biss li tkun qiegħda tapplika u tħaddem il-liġi fl-għarfien ta' punti li jkunu ġew stabbiliti mill-qorti kompetenti (ara* ***Il-Pulizija v. Pawlu Grech*** *deċiża mill-Prim'Awla tal-Qorti (Sede Kostituzzjonali) fit-3 ta' Novembru, 2011);*

23. *Sfiq ma' dan, huwa importanti li tinġibed l-attenzjoni wkoll li referenzi kostituzzjonali mhumiex maħsuba biex isiru għall-għanijiet akkademiċi iżda biex jiġu solvuti intoppi li jinqalgħu f'kawżi ordinarji. Wieħed ma jridx jinsa hawnhekk li jekk issir ir-referenza, ilproċeduri quddiem il-qorti riferenti għandhom jieqfu skont l-****artikolu 46 tal-Kostituzzjoni ta' Malta*** *u l-****artikolu 4 tal-Kap 319 tal-Liġijiet ta' Malta*** *sakemm ikun hemm tweġiba finali għal dik ir-referenza mill-qorti (ara inter alia,* ***Onorevoli Imħallef Dottor Anton Depasquale v. Avukat Ġenerali*** *deċiża mill-Qorti Kostituzzjonali fl-1 ta' Ġunju, 2001 u* ***Avukat***

***Ġenerali et v. Nicolai (Nicolai Christian) Magrin et** deċiża mill-Qorti tal-Appell fl-24 ta' Novembru, 2017);*

24. *Minħabba f'hekk, il-qorti riferenti għandha tkun għaqlija u prudenti biżżejjed meta tiġi biex tiddeċiedi jekk għandhiex tibgħat kwistjoni lill-Prim'Awla tal-Qorti Ċivili jew le. Il-qorti riferenti trid tkun ċerta li dik ir-referenza hija tabilħaqq meħtieġa sabiex hija tkun tista' tkompli twettaq ħidmietha. Referenza kostituzzjonali/konvenzjonali li ma tkunx ħa tħalli lfrott fl-eżitu tal-proċeduri quddiem il-qorti riferenti m'għandhiex issir mill-ewwel (ara **Director of Public Registry v. Ahmad Aziz** deċiża mill-Qorti tal-Appell fis-26 ta' Jannar, 2022);*

25. *Biex wieħed forsi jagħti eżempju, mhuwiex indikattiv li ssir referenza kostituzzjonali biex il-Prim'Awla tal-Qorti Ċivili twieġeb biss jekk fil-proċeduri quddiem il-qorti riferenti qiegħedx ikun hemm dewmien irraġonevoli jew le. Referenza bħal din mhijiex utli għallproċeduri quddiem il-qorti riferenti, anzi l-qorti riferenti tkun qiegħda ttawwal iżjed dawk ilproċeduri għalxejn b'xejn jekk tagħmel referenza bħal dik. Wara kollox, il-qorti riferenti m'għandhiex bżonn il-gwida tal-qrati kostituzzjonali biex tkun taf jekk hemmx dewmien bla bżonn fil-proċeduri; dan tista' tarah waħidha billi tqalleb il-karti tal-atti;*

26. *Dan l-eżerċizzju ta' rilevanza u ta' ħtieġa huwa importanti li jsir mill-qorti riferenti għaliex jekk il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali jsibu li dik ir-referenza kienet irrilevanti għall-għanijiet tal-kawża li tkun qiegħda tinstema' mill-qorti riferenti, l-ordni ta' referenza tista' tintbagħat lura mingħajr tweġiba (ara inter alia **Karkanja Limited v. Carmel Galea et** deċiża mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fit-30 ta' Mejju, 2019);*

27. *llli kif tajjeb ġie mpoġġi mill-Qorti Kostituzzjonali fis-sentenza **Edgar Blundell et v. Direttur tas-Sigurtà Soċjali** deċiża fl-20 ta' Marzu, 2000, qorti b'setgħat kostituzzjonali hija,*

> *«prekluża milli tikkonsidra l-kwistjoni dwar ksur ta' xi waħda minn dawk iddisposizzjonijiet lilha riferita, jekk din ma tkunx rilevanti u tkun għal kollox estraneja għall-mertu tal-proċeduri li fihom il-kwistjoni tkun ġiet imqanqla, u li allura deċiżjoni dwarha ma tkunx tenħtieġ biex il-qorti li tkun għamlet irreferenza tkun tista' tiddisponi mill-mertu»;*

28. *Dan iġibna għall-punt ieħor dwar kemm huwa importanti l-mod ta' kif għandha ssir l-ordni ta' referenza, jekk kemm-il darba il-qorti riferenti tagħżel li tagħmilha. Ma ninsewx li billi lkwistjoni tkun inqalgħet quddiem qorti li mhix il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali, u billi l-proċediment ma jkunx tressaq quddiem din il-qorti direttament minn min jallega l-ksur tal-jedd fondamentali partikolari, din il-qorti trid tqis fedelment ilkwistjoni fil-mod u t-termini mgħoddijin lilha mill-qorti li tkun għamlet ir-referenza. Jekk il-Prim'Awla tal-Qorti Ċivili jew il-Qorti Kostituzzjonali tonqos li tagħmel dan jew titbiegħed milli tqis dak lilha riferut, hija tkun qiegħda tiddeċiedi extra petita (ara* ***Il-Pulizija v. John Aquilina et*** *maqtugħa mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali) fit-23 ta' Lulju, 2008 u* ***The Police v. Nelson Arias*** *deċiża mill-Qorti Kostituzzjonali fit-28 ta' Settembru, 2012);*

29. *Xogħol il-qorti li tirċievi r-referenza huwa illi twieġeb għall-mistoqsijiet magħmula lilha millqorti riferenti. Tassew mhuwiex mogħti lill-Prim'Awla tal-Qorti Ċivili jew lill-Qorti Kostituzzjonali l-jedd li tiddeċiedi hi l-mertu tal-kawża li minnha tnisslet ir-referenza kostituzzjonali jew li toqgħod tagħti xi rimedju fl-eventwalità li ssib xi vjolazzjonijiet taljeddijiet fundamentali tal-bniedem (ara* ***Il-Pulizija v. Vincent Etienne Vella*** *deċiża millQorti Kostituzzjonali fis-6 ta' Ottubru, 2020 u* ***The Police v. Austine Eze et*** *deċiża millQorti Kostituzzjonali fil-25 ta' Ottubru, 2013). Għalkemm irid jingħad ukoll li l-aħħar ġurisprudenza tgħid ukoll li ma hemm xejn xi jżomm lill-qorti b'setgħat kostituzzjonali li tagħmel kull osservazzjoni oħra li jidhrilha rilevanti għal risposta sħiħa għad-domanda magħmula anke billi tqajjem hi kwistjonijiet ex officio (ara* ***Il-Pulizija (Spettur Kevin Pulis) v. Robert Agius*** *deċiża mill-Qorti Kostituzzjonali fid-29 ta' Marzu, 2019 u* ***The Police (Inspector Keith Arnaud) v. Kristjan Zekic also kwown as Adhamjon Niyazov*** *deċiża mill-Qorti Kostituzzjonali fil-31 ta' Mejju, 2019);*

30. *Illi l-mod ta' kif għandha ssir ordni ta' referenza tinsab imfissra fl-**artikolu 5** tar-**Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni (Leġislazzjoni Sussidjarja 12.09)**. Dan l-artikolu jagħmilha ċara li l-ordni ta' referenza għandu jkun fiha b'mod konċiż u ċar:*

i. *il-fatti u ċ-ċirkostanzi li minnhom il-kwistjoni tinħoloq;*

ii. *it-termini ta' dik il-kwistjoni; u*

iii. *id-dispożizzjoni jew dispożizzjonijiet tal-**Kostituzzjoni ta' Malta** jew tal**Konvenzjoni Ewropea għall-Protezzjoni tad-Drittijiet tal-Bniedem u tal****Libertajiet Fondamentali** li jkunu involuti (ara f'dan is-sens **Il-Pulizija v. Dr. Melvyn Mifsud** deċiża mill-Qorti Kostituzzjonali fis-26 ta' April, 2013 u **The Police v. Nelson Arias** deċiża mill-Qorti Kostituzzjonali fit-28 ta' Settembru, 2012);*

31. *Huwa meħtieġ u mistenni li l-qorti riferenti timxi mal-**artikolu 5** tar-**Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni (Leġislazzjoni Sussidjarja 12.09)** sabiex il-qorti b'setgħat kostituzzjonali jkollha parametri ċari u preċiżi li fuqhom tagħmel l-istħarriġ tagħha tal-kwistjoni mqanqla u mibgħuta lilha mill-qorti riferenti (ara **Il-Pulizija v. Anthony Seychell** deċiża mill-Prim'Awla tal-Qorti Ċivili (Sede Kostituzzjonali fil-5 ta' Mejju, 2005);*

32. *Illi din il-qorti ħasset il-bżonn li tagħmel dawn il-konsiderazzjonijiet kollha dwar dan issuġġett għaliex jidhrilha li l-ordni ta' referenza mibgħuta lilha mill-Qorti tal-Maġistrati (Malta) bħala Qorti ta' Ġudikatura Kriminali setgħet u kellha ssir ħafna aħjar mill-mod ta' kif saret;*

33. *Ibda biex, huwa ċar li l-ordni ta' referenza ma saritx skont kif jitlob l-**artikolu 5(1)** tar**Regoli dwar il-Prattika u l-Proċedura tal-Qrati u l-Bon-Ordni**. Biżżejjed jingħad li flordni ta' referenza la jissemmew l-artikoli tal-**Kostituzzjoni ta' Malta** u/jew tal**Konvenzjoni Ewropea** li għandhom jiġu mistħarrġa minn din il-qorti u lanqas ma jissemmew il-mistoqsijiet li għandhom jiġu mwieġba minn din il-qorti. Daqskemm hemm bżonn li f'rikors maħluf ir-rikorrent iniżżel b'mod ċar u li jinftiehmu t-talbiet li huwa jrid li qorti tiddeċiedi; daqstant ieħor hemm bżonn li l-qorti riferenti tniżżel b'mod ċar u li jinftiehem il-mistoqsijiet fuq l-artikoli tal-**Kostituzzjoni ta' Malta** u/jew tal-**Konvenzjoni Ewropea** li hija tixtieq tweġiba dwarhom min-naħa tal-Prim'Awla tal-Qorti Ċivili jew talQorti Kostituzzjonali;"*

Detto ċioe' u minħabba n-natura delikata u fundamentali mressqa u a skans ta' aktar ħela ta' żmien, il-Qorti bi ftehim mal partijiet għaddiet biex tqies din ir-referenza fuq dak formulat fuq in-nota ċitata u tasal hi

biex tifformula minn hemm il-mistoqsija li ġiet magħmula lilha fir-rigward.

7. In suċċint l-akkuzi mressqa kontra Khlef Kasem huma relattati ma l-artikolu 204Ċ tal-Kap 9 tal-Liġijiet ta' Malta. Il-Qorti m'għandha ebda informazzjoni oħra fir-rigward, in kwantu din ir-referenza saret immdejatament wara li nqrat l-akkuza.

8. Fin-nota ta' sottomissjonijiet tiegħu, l-akkuzat Khlef isostni dan in sostenn tar-refereneza mitluba:

-Li daħlet emenda fil-liġi mingħajr ma ngħata attenzjoni għal dak li kien qed jintlaqat u li kien baqa' fil-kodiċi kriminali, dan dejjem fil-konfront ta' attivitajiet sesswali;

-Li nonostante li tnaqsset l-eta' għal dik ta' sittax, saru pieni aktar ħorox;

-Ir-reat ġdid ma fih ebda elementi kostituttivi tant li anke l-Qorti tal-Appell sabet diffikulta' tiddefinih ukoll li l-Qrati kellhom dilemma morali biex japplikaw dan l-artikolu;

-In-nuqqas ta' definizzjoni ta' dik li hi *"attivita' sesswali"* tenut kont li l-gravita' tal-piena tqarreb iżjed lejn stupru;

-In-nuqqas ta' differenza legali bejn ir-reat ta' korruzzjoni ta' monorreni u dak ai terminu tal-artikolu 204Ċ, fis-sens li l-attivita' sesswali kkontemplata fl-artikolu msemmi hija allura waħda ħafifa li ma

tikkorrompix l-għażla mogħtija lil prosekutur b'liema reat jakkuża lill-imputat. Dan allura jista' jwassal għal arbitrarjeta' mħollija f'idejn il-prosekuzzjoni;

-ukoll il-fatt li dan ir-reat huwa prosegwibbli ex ufficcio.

9. Għalhekk in suċċint Khlef isostni li l-ksur hu xprunat minnħabba nuqqas ta' kjarezza fil-liġi, aċċessibilta' tar-reat *de quo*, prevedibbilta' tal-istess reat, u l-arbitrarjeta' imħolli f'idejn il-prosekutur. [12].

10. Fin-nota ta' sottomissjonijiet jispjega li l-artikolu 7 tal-Konvenzjoni jinponi kjarezza fid-definizzjoni tar-reati, anke li jkun hemm distinsjoni ċara bejn reat u ieħor. Jsaħħaħ dan billi jsemmi varji deċizjonijiet tal-Qorti Ewropeja konċernanti *foreseeability of sentencing standards* konċernanti x-xelta mħollija f'idejn mill-prosekutur fejn si ċentra tal-Qorti ġudikanti, bħal per ezempju Malta vs Camilleri, Kafkaris vs Cyprus, Porsenna vs Malta.

Isostni wkoll li l-ksur tal-artikolu 7 huwa xprunat mill-fatt li r-reat ikkontemplat taħt l-artikolu 204Ċ nonostante li huwa aktar gravuż qua

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piena minn dak ta' korruzzjoni ta' minorreni jneħħi minn idejn il-genitur id-dritt tal-għażla tal-kwerela.

Da parti tagħhom l-intimati jsostnu li din ir-referenza jmissha qatt ma ġiet milqugħa u mibgħuta mill-Qorti tal-Magistrati in kwantu messa sabet li l-istess kienet waħda frivola u vessatorja u dan in vista tal-fatt li:
-l-Qrati Maltin ta' kompetenza kriminali ma sabu ebda diffikulta' meta rinfaċċati b'dan ir-reat *qua* akkuża, u ta' dan l-intimati ċċittaw diversi sentenzi kemm tal-Qorti tal-Magistrati ukoll tal-Qorti tal-Appell;
-ukoll jirribattu in kwantu għal arbitrarjeta' ta' dan ir-reat, li skonthom dan ir-reat għandu l-ħsieb ta' protezzjoni ulterjuri għal minorreni u oltre ma jikkaġuna ebda diskriminazzjoni bejn reat u ieħor u fl-għażla mogħtija lill-prosekuzzjoni b'liema reat għandha taddebita lill-imputat.

Isostnu li dan l-artikolu ġie promulgat bl-għan legittimu li jipproteġi l-minuri li sottomessi għal-attivitajiet sesswali meta jkunu tal-eta' ta' taħt is-sittax- il sena, irrelevanti mill-livell ta' korruzzjoni nvolut.

Ikkunsidrat u dan wara li rat l-atti kollha tal-kawża nkluż in-noti ta' sottomissjonijiet.

11. L-Artikolu 39(8) tal-Kostituzzjoni jaqra li;-

"Hadd ma għandu jitqies li jkun ħati ta' reat kriminali minħabba f'xi att jew omissjoni li, fil-ħin meta jkun sar, ma jkunx jikkostitwixxi reat bħal dak, u ebda piena ma għandha tiġi mposta għal xi reat kriminali li tkun aktar severa fi grad jew xorta mill-ogħla piena li setgħet tiġi mposta għal dak ir-reat fiż-żmien meta jkun ġie magħmul."

"L-artikolu korrispettiv tieghu fil-Konvenzjoni, l-artikolu 7 (1) jipprovdi li -

"(1) Ħadd ma għandu jitqies li jkun ħati ta' reat kriminali minħabba f'xi att jew ommissjoni li ma kinux jikkostitwixxu reat kriminali skont liġi nazzjonali jew internazzjonali fil-ħin meta jkun sar. Lanqas ma għandha tingħata piena akbar minn dik li kienet applikabbli fiż-żmien meta r-reat kriminali jkun sar."

Dwar l-artikoli nvokati fil-każ **Concetta Decelis et vs Il-Ministru tal-Ġustizzja u l-Intern et deċiż fid-9 ta' Dicembru 2010**[13] il-Qorti elenkat il-prinċipji applikabbli għall-artikolu 7 appena ċitat, liema prinċipji naturalment japplikaw ukoll ghall-artikolu 39 (8) tal-Kostituzzjoni nostrali -

"Illi l-artikolu 7 tal-Konvenzjoni Ewropea tad-Drittijiet tal-Bniedem jipprovdi li:-

""No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

"*Illi ghalhekk jirrizulta li r-rikorrenti qed jinvokaw t-tnejn miz-zewg principji separati li insibu protetti f'dan l-artikolu li jistghu jigu kkunsidrati bhala il-bazi tal-principju dwar tar-Rule of Law u dawn jikkonsistu fissegwenti:- "1. A criminal conviction can only be based on a norm which existed at the time of the incriminating act or omission (nullum crimen sine lege) and 2. On account of the infringement of that*

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*norm no heavier penalty may be imposed than the one that was applicable at the time the offence was committed (nulla poena sine lege)". (**Theory and Practice of the European Convention on Human Rights – van Dijk, van Hoof, van Rijn, Zwaak** – pagni 651/2).*

"*Illi fis-sentenza "**Kafkaris vs Cyprus**" (ECtHR – 12 ta' Frar 2008 intqal hekk:-*

*"1. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is possible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see **S.W. v. the United Kingdom** and **C.R. v. the United Kingdom**, 22 Novembru 1995, Series A no. 355-C, pp.41-42 para. 35, and pp.68 and 69 para. 33, respectively".*

*"2. Accordingly, it embodies in general terms, the principle that only the law can define a crime and prescribe a penalty (nullum crimen sine lege, nulla poena sine lege) (see **Kokkinakis v. Greece**, judgment of the 25 May 1993, Series A no. 260-A, p. 22, para. 52. While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by anology (**Coeme and Others v. Belgium**, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 145, ECHR 2000-VII; and Achour, cited above, para. 41".*

"*Illi fil-kawza "**Il-Pulizija vs Lorraine Falzon**", il-Prim Awla tal-Qorti Civili (P.A. (GV) Riferenza Kostituzzjonali 12/2007 - 28 ta' Marzu, 2008) qalet li dan l-artikolu jipprovdi li:-*

""(i) huwa projbit li persuna tigi akkuzata b'reat meta fil-mument meta hija kkommettiet l-att, dak l-att ma kienx jammonta ghal reat , i.e. retroactive application of a criminal offence";

""(ii) persuna tista' titressaq biss ghal reat illi kien jammonta ghal tali meta gie kommess l-att";

""(iii) isegwi illi sabiex tkun taf jekk l-azzjoni hijiex wahda kriminali jew le, jehtieg li l-ligi li tikkostitwixxi dak ir-reat tkun accessibbli u cara, i.e. "legal certainty"."

"*Illi inoltre, fil-kaz "**Kokkinakis v. Greece**" ((ECtHR) - 22 ta' Novembru 1995) l-Qorti Ewropeja qalet li l-artikolu 7 joffri, dak li hija sejhet bhala "essential safeguards against arbitrary prosecution, conviction and punishment" u spjegat illi:-*

""Article 7 embodies the general principle that offences must be based in law, and that an individual must be able to know from the wording of the relevant provisions, and if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him criminally liable. (para. 52)"

""It generally entails that the law must be adequately accessible – an individual must have an indication of the legal rules applicable in a given case – and he must be able to foresee the consequences of his actions, in particular, to be able to avoid incurring the sanction of the criminal law. (G v France para 25 where notwithstanding changes in legislation leading to reclassification of the sexual offences of which the applicant was accused, these fell within the scope of the Criminal Code provisions, which were accessible and foreseeable). In terms of the standard of foreseeability, absolute certainty cannot be required, and indeed may be undesirable, entailing the risk of excessive rigidity, since the law has to be able to keep pace with changing circumstances. A standard of 'reasonable foreseeability' is sufficient. (Sunday Times para 49)"."

"*Illi kif qalet il-Qorti Ewropeja fil kaz "**S.W. u C.R. v United Kingdom**" (ECtHR - 22 Novembru 1995) "judicial interpretation of criminal law provisions was a widespread and even necessary feature. Article 7 cannot be read as prohibiting the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, but the resultant development must be within the bounds of reasonable foreseeability and not alter the 'essence' of the offence. (Kokkinakis para 52 u G v France para 26)".*

"*Illi l-awturi fuq citati **van Dijk, van Hoof, van Rijn, Zwaak** fil-ktieb taghhom **Theory and Practice of the European Convention on Human Rights** josservaw ukoll li:-*

""in addition to the principles of "nullum crimen and nulla poena" the Court has distinguished a third principle: the authority applying criminal law shall interpret it not extensively, for instance by analogy, to the accused's detriment...according to the Court, an offence must be clearly defined in law. New more severe legislation cannot be applied to an ongoing situation that arose before it came into force. It is submitted, however, that this third principle is not a separate one but is embodied in the rationale of the nullum crimen and nulla poena sine lege principles". (pagna 652)."

"*Illi inoltre, dwar dan il-punt tal-intrerpretazzjoni u sorsi tal ligi l-awturi* ***Harris, O'Boyle & Warbrick*** *fil-ktieb taghhom* ***Law of the European Convention on Human Rights****, it-tieni edizzjoni, jghidu hekk dwar lartikolu 7 tal-Konvenzjoni Ewropeja:-*

""Given that Article 7 requires that national courts act on the basis of their national law and that they interpret and apply that law in accordance with Article 7, the Strasbourg Court may find itself reviewing the interpretation and application of national law by national courts. In accordance with the Court's general approach whereby it does not question the interpretation and application of national law by national courts, this supervisory function is undertaken with caution, with the Court only exceptionally finding the interpretation and application of national law by the national courts to be in breach of Article 7. Article 7 (1) refers to criminal offences that have a basis in 'law'. The term 'law' has the same autonomous meaning as it has elsewhere in the Convention, so that it includes, in terms of sources of law, judge-made law as well as legislation, whether primary or delegated. It does not include 'state practice' that is inconsistent with a state' written of judgemade law and its international human rights obligations. This was ruled in ***Streletz, Kessler and Krenz v Germany****. There the three applicants had been convicted by a German court of offences of incitement to commit intentional homicide and sentenced to five to seven years' imprisonment under the criminal law of the German Democratic Republic (GDR), or East Germany that applied in the GDR when they committed their offences and which the courts of the new Germany continued to apply). The cases concerned the deaths of a large number of individuals who had been killed by GDR order guards by shooting or by mines as they tried to cross the border to West Germany at the time of the Berlin war. The applicants occupied senior positions in the GDR government and party*

apparatus that was responsible for orders to border guards to arrest or, if necessary, 'annihilate' border violators and to protect the border 'at all costs'. Whereas the applicants were tried under the GDR criminal law that existed when the deaths occurred, they argued that GDR 'state practice' – by way of the orders to border guards referred to above for which they shared responsibility – had superseded that law and justified their acts. The Court held that this 'state practice' was not 'law' for the purposes of Article 7 as it was contrary to both the fundamental right provisions of the GDR constitution and other GDR laws and the GDR's international human rights obligations. Accordingly, it did not replace the GDR criminal law existing at the time, which met the requirements of Article 7 (1). The Court's judgement confirms that delegated legislation or administrative acts that are ultra vires in national law do not count as 'law' for the purposes of Article 7, whether to take away an otherwise valid legal basis for prosecution or to provide a basis for prosecution that otherwise does not exist. The case may also provide a basis for ruling that Article 7 is not complied with on the ground that a national 'law' which is valid within the national legal system is nonetheless contrary to the international human rights obligations of the state. In the companion case of ***K-HW v Germany****, no breach of Article 7 was also found where a young GDR border guard who shot and killed a border violator was convicted by a German court of international homicide. In this case, while acknowledging the great difficulties the border guard would have faced if he had not followed orders, the Court stated that the GDR constitutional and criminal law under which he was later prosecuted were accessible to him and that 'even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights'. In support of this approach, it may be argued that the soldier's difficulties should be taken into account in sentencing rather than in determining guilt." Ara wkoll is-sentenza "****Peter Borg vs Avukat Generali****" (P.A. (AL) – 4 ta' Novembru 2010)."*

"*Illi fl-istess sentenza inghad illi:-*

""Article 7 also extends to the situation in which the scope of existing law is extended to acts or omissions that were previously not criminal, and lays down the principle that the 'criminal law must not be extensively construed to the accused's detriment'. The application of the existing law may be extended to new conduct by the courts by way of interpretation

*where its meaning has previously been unclear or is given a changed meaning by the courts in the applicant's case. It will only be in exceptional cases that the Strasbourg Court will find a violation on either of these bases. As stated by the Court in **CR v UK**, 'there will always be a need for elucidation of doubtful points and for adaptation to changed circumstances. Indeed ... progressive development of the criminal law through judicial-lawmaking is a well entrenched and necessary part of legal tradition' in Convention states, so that Article 7 'cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretations from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'. As to clarity of meaning, the Court has in several cases not found a breach of Article 7 despite some very generally worded or obscurely drafted laws. This has been either because the national courts have already given it more precise meaning in their case law, or because they have given it a meaning when the point is ruled upon for the first time in the applicant's case that is both foreseeable and consistent with the essence of the offence."*

""B'zieda ma dan inghad *"However, the clarity of the law can be evaluated if the party has appropriate advice. This was stated by the ECHR in its judgment in the case **"Cantoni vs France"** whereby the Court held that: "A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (see also, among other authorities, the **Tolstoy Miloslavsky v. the United Kingdom** judgment of 13 July 1995, Series A no. 316-B, p. 71, para. 37) as ignorance of the law is no defence"."*

12. Kif ġia surriferut l-ilmenti li ressaq l-imputat għal din ir-referenza li l-Qorti tal-Magistrati għamlet tagħha, tant li qagħdet fuq in-nota tal-istess, huma sintetikament illi r-reat in eżami u ċioe' l-artikolu 204Ċ tal-Kap 9 tal-Liġijiet ta' Malta ġie hekk introdott bla każ għar-reati l-oħra ġia eżistenti konnessi ma' attivitajiet sesswali, tant li nonostante tnaqqis

fl-eta' il-piena hija aktar gravuża, ukoll li dan ir-reat il-ġdid tant huwa vag li saħansitra l-Qrati tagħna kienu qed isibu diffikulta' biex jinterpretaw l-istess in kwantu ma kellu ebda elementi kostituttivi ċari, allura l-effett tiegħu ma kienx ċar u prevedibbli u wisq anqas kien wieħed aċċessibbli. Ukoll l-arbitrarjeta' mħollija f'idejn il-prosekuzzjoni biex jagħżel hu liema reat jaddebita. Jilmenta ukoll minn dan il-ksur in vista tal-fatt li dan ir-reat huwa prosegwibbli ex uffiċjio, ukoll li ma kienx jippermetti b'mod ċar l-applikazzjoni tal-artikolu 17 tal-Kap 9.

13. Huwa regola bażika fil-kamp tal-liġi kriminali, u dan isib il-bażi tiegħu fil-prinċipju tas-saltna tad-Dritt, dak marbut mal-massima *nullum crimen sive lega, nullum poena sine legge.* Isegwi għalhekk li biex jidħol in operat il-protezzjoni tal-artikolu 7 invokat, jinħtieg li persuna mhux biss tkun rinfaċċata b'reat imma tinstab ħatja tal-istess u miegħu jkun hemm marbut kastig.

14. Fil-każ in eżami l-massimu ta' dan il-kastig hija piena karċerarja.

15. Ċar li marbut ma' din il-massima, jinħtieg ukoll li r-reat jkun wieħed, kif fil-każ nostrali, li jsib l-għeruq tiegħu fil-leġislazzjoni apposita, u li jkollu l-elementi tiegħu ċari, spjegati u prevedibbli tant li

kull bniedem jkun jista' jifhem il-konsegewenza ta' azzjonitu, ukoll li darba addebitat bih bħala akkuża, l-import u l-konsegwenza tal-piena, dan ovvjament b'għajnuna ta' professjonist fil-kamp legali. Il-pubbliċita' tal-istess reat hekk leġislat hija ukoll fattur biex jegħleb in-nuqqas ta' konoxxenza tal-effett ta' azzjoni kriminuza, għalkemm kulħadd huwa presunt li jaf il-liġijiet li jkunu minn żmien għal żmien qed jiġu promulgati u jirregolaw l-andament ċiviku ta' kuljum ta' inter azzjoni mat-terż. Dan l-element ta' pubbliċita' jassigura li dan ir-reat hekk introdott jissodisfa l-element ta' aċċessibilta'.

16. Għall-iskop tal-analiżi odjerna l-Qorti ssib interessanti d-deċiżjoni li tat il-Grand Chamber fl-ismijiet **Case of S.W vs The U.K**.[14], deċiżjoni li turi l-iżvilupp leġislattiv ukoll każistiku, dettat mill-milja taż-żmien u l-bżonnijiet xprunati minn dak li suppost hu avvanz fis-soċjeta' tagħna, ukoll relatati ma' atti sesswali, fil-każ tar-Renju Unit, li jwassal kontra l-ilment imressaq.

"B. Application of the foregoing principles

37. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 18 September 1990, when he committed the acts which gave rise to the rape charge (see paragraph 8 above). A succession of court decisions before and also after that date,

[14] 22/11/95 application 20166/92

for instance on 20 November 1990 in R. v. J. (see paragraph 23 above), had affirmed the general principle of immunity. It was clearly beyond doubt that as at 18 September 1990 no change in the law had been effected, although one was being mooted.

When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 (see paragraph 20 above), different views on the marital immunity were expressed. On the advice of the Minister of State to await a report of the Criminal Law Revision Committee, an amendment that would have abolished the immunity was withdrawn and never voted upon. In its report, which was not presented until 1984, the Criminal Law Revision Committee recommended that the immunity should be maintained and that a new exception should be created.

In 1988, when considering certain amendments to the 1976 Act, Parliament had the opportunity to take out the word "unlawful" in section 1 (1) (a) (see paragraph 20 above) or to introduce a new provision on marital intercourse, but took no action in this respect.

On 17 September 1990 the Law Commission provisionally recommended that the immunity rule be abolished (see paragraphs 26-27 above). However, the debate was pre-empted by the Court of Appeal's and the House of Lords' rulings in the case of R. v. R. (see paragraphs 11 and 12 above). In the applicant's submission, these rulings altered the law retrospectively, which would not have been the case had the Law Commission's proposal been implemented by Parliament. Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 21 above), it did not merely restate the law as it had been in 1976.

38. The applicant further argued that in examining his complaint under Article 7 para. 1 (art. 7-1) of the Convention, the Court should not consider his conduct in relation to any of the exceptions to the immunity rule. Such exceptions were never contemplated in the national proceedings, Mr Justice Rose having taken his decision in reliance on the Court of Appeal's ruling of 14 March 1991 in R. v. R. to the effect that the immunity no longer existed. Mr Justice Owen's decision of 30 July 1990 in R. v. R., adding implied agreement to terminate consent to intercourse to the list of exceptions, had not been reported by 18 September 1990 and was not a binding authority. In any event, the facts in the present case suggest that no such agreement existed.

39. Should a foreseeability test akin to that under Article 10 para. 2 (art. 10-2) apply in the instant case, the applicant was of the opinion that it had not been satisfied. Although the Court of Appeal and the House of Lords did not create a new offence or change the basic ingredients of the offence of rape, they were extending an existing offence to include conduct which until then was excluded by the common law. They could not be said to have adapted the law to a new kind of conduct but rather to a change of social attitudes. To extend the criminal law, solely on such a basis, to conduct which was previously lawful was precisely what Article 7 (art. 7) of the Convention was designed to prevent. Moreover, the applicant stressed, it was impossible to specify with precision when the change in question had occurred. In September 1990, change by judicial interpretation was not foreseen by the Law Commission, which considered that a parliamentary enactment would be necessary.

40. The Government and the Commission were of the view that by September 1990 there was significant doubt as to the validity of the alleged marital immunity for rape. This was an area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably foreseeable, with appropriate legal advice, to the applicant. He was not convicted of conduct which did not constitute a criminal offence at the time when it was committed.

41. The Court notes that the applicant's conviction for rape was based on the statutory offence of rape in section 1 of the 1956 Act, as further defined in section 1 (1) of the 1976 Act (see paragraphs 19 and 20 above). The applicant does not dispute that the conduct for which he was convicted would have constituted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. His complaint under Article 7 (art. 7) of the Convention relates solely to the fact that in deciding on 18 April 1991 that the applicant had a case to answer on the rape charge, Mr Justice Rose followed the Court of Appeal's ruling of 14 March 1991 in the case of R. v. R. which declared that the immunity no longer existed.

42. It is to be observed that a crucial issue in the judgment of the Court of Appeal in R. v. R. (summarised at paragraph 11 above) related to the definition of rape in section 1 (1) (a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not

consent to it". The question was whether "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 12 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 11 above).

43. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 11 and 23-27 above). There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 36 above).

44. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the

fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

45. Consequently, by following the Court of Appeal's ruling in R. v. R. in the applicant's case, Mr Justice Rose did not render a decision permitting a finding of guilt incompatible with Article 7 (art. 7) of the Convention.

46. Having reached this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant's case were covered by the exceptions to the immunity rule already made by the English courts before 18 September 1990.

47. In short, the Court, like the Government and the Commission, finds that the Crown Court's decision that the applicant could not invoke immunity to escape conviction and sentence for rape upon his wife did not give rise to a violation of his rights under Article 7 para. 1 (art. 7-1) of the Convention."

Din id-deċiżjoni ġia tagħti stampa ċara ta' kif reat jew aħjar azzjoni kriminuża jkollha effetti ta' reita, kif reat jitqies li hu aċċessibbli u prevedibbli fil-konsegwenzi tiegħu.

17. Huwa ċert li hawn l-imputat mhux milqut b'retroattivita' tar-reat.

18. Il-mistoqsija li suppost saret lill-Qorti hija fis-sens jekk dan ir-reat hux wieħed aċċessibbli, prevedibbli, ċar fl-interpretazzjoni tiegħu, ukoll jippermettix arbitrarjeta f'idejn il-prosekuzzjoni għad-detriment tal-imputat b'mod li jikkozza kontra l-preċetti tal-artikolu 39(8) tal-Kostituzjoni u 7 tal-Konvenzzjoni Ewropeja.

19. Jekk wieħed iħares lejn id-dibattiti parlamentari li ġew riprodotti fiż-żewġ noti tal-partijiet, huwa ċar li nonostante dak l-ilment imressaq u li fuqu tistrieħ din ir-referenza, l-ispirtu ta' din il-liġi kien tali li l-leġislatur ried li minuri jkunu akkost ta' kollox protetti minn azzjonijiet u attivitajiet sesswali ikkontemplati fl-artikolu 204Ċ anke jekk nonostante l-eta' tenera tagħhom, sa sittax-il sena, jkunu ġia konoxxenti ta' ċertu għerf (jekk hekk jista' jissejjaħ) fil-kamp ta' sesswalita'. In poche parole u fil-lingwa legali jkunu ġia korrotti. Iżżid ukoll il-Qorti li din hija diċitura li tuża b'ċertu kawtela in kwantu llum tajjeb jew ħażin minuri huma sfortunatament esposti għal sferi tal-ħajja li ftit snin ilu kienu għadhom mistura jekk mhux ukoll ta' skandlu fit-trobbija normali. Imma ġia minn dawn id-dabattiti, anke mill-intervent tal-istess Avukat Ġenerali fil-parlament, huwa ovvja li l-leġislatur ried li jinqala' mill-element ta' korruzzjoni previst fl-artikolu 203 tal-Kap 9.

20. Għalhekk in linja mal-ħsieb rifless fis-sentenza appena ċitata l-Qorti tħoss li kien jinkombi fuq il-leġislatur li jassigura, li l-minuri, hu x'inhu l-grad ta' żvilupp sesswali tagħhom, jiġu xorta protetti in vista tal-eta' tenera tagħhom meta suġġetti għal fatturi riflessi fl-artikolu 204Ċ mingħajr ma jkun meħtieg l-element tal-korruzzjoni. Il-fatt biss li każistika Maltija setgħet mxiet 'l hinn minn dan l-element ta'

korruzzjoni[15], la jagħmel dan ir-reat vag u wisq anqas inutli għax fih jipprospetta elementi oħra mhux kontemplati fl-artikoli oħra li jmessu r-reati sesswali. Bla ma l-Qorti tidħol fid-dettall ta' dak li hu l-elementi kostituttivi tar-reat addebita huwa ċert li kemm l-eta' tenera ukoll attivita' sesswali huma elementi bażiċi tal-istess reat.

21. Għalhekk il-Qorti ma tistax tifhem kif u għaliex saret lilha din ir-referenza meta huwa ċar illi l-Qrati nostrali ma sabu ebda diffikulta' biex jinterpretaw l-istess reat u jadoperawh fil-konfront ta' imputazzjonijiet relattivi. Tqies li d-distinzjoni bejn ir-reati konnessi ma' attivitajiet sesswali hija netta u distinta u li l-leġislatur kien ċar għala ħass il-ħtiega li jiġi introdott dan ir-reat. Il-fatt waħdu li dan jkun suġġett għal interpretazzjoni ġurisprudenzjali la tagħmlu ekwivoku u tant anqas imprevedibbli.

22. Ingħad dan fir-rigward tad-deċiżjoni fl-ismijiet **Jorgic vs Germany** fejn il-Qorti Ewropeja ma sabet ebda vjolazzjoni tal-artikolu 7 tal-Konvenzjoni in kwantu għal interpretazzjoni tar-reat ta' ġenoċidju:-

"101. In any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful

[15] Kif tinsisti d-difiza

points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see, inter alia, S.W. v. the United Kingdom, cited above, § 36;C.R. v. the United Kingdom, cited above, § 34; Streletz, Kessler and Krenz, cited above, § 50; and K.-H.W. v. Germany [GC], no. 37201/97, § 45, ECHR 2001-II).

102. As regards the interpretation and application of domestic law, the Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, mutatis mutandis, Kopp v. Switzerland, 25 March 1998, § 59, Reports of Judgments and Decisions 1998-II, and Streletz, Kessler and Krenz, cited above, § 49). While the Court's duty, in accordance with Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, mutatis mutandis, Schenk v. Switzerland, 12 July 1988, § 45, Series A no. 140, and Streletz, Kessler and Krenz, cited above, § 49)."

23. Ir-referenza hija wkoll fis-sens li r-reat ma jiddefinixxix b'mod ċar x'inhi *attivita' sesswali,* dan dejjem marbut mal-elementi kostituttivi tal-istess reat. Marbut sfiq ma' dak li għadu kif jingħad dwar żviluppi ġurisprudenzjali nsibu fin-noti li jservu ta' gwida għal interpretazzjoni

tal-artikoli tal-Konvenzzjoni Ewropeja Għad-Drittijiet Fundamenti tal-Bniedem[16] li:-

"28. Owing to their general nature of statutes, their wording cannot be absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and the interpretation and application of such enactments depend on practice (Kokkinakis v. Greece, § 40, as regards the definition of the offence of "proselytism"; Cantoni v. France, § 31, as regards the legal definition of "medicinal product"). When the legislative technique of categorisation is used, there will often be grey areas at the fringes of the definition. This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases (ibid., § 32). On the other hand, the use of overly vague concepts and criteria in interpreting a legislative provision can render the provision itself incompatible with the requirements of clarity and foreseeability as to its effects (Liivik v. Estonia, §§ 96-104). The fact that the legislator subsequently reworded the law in a more detailed manner (e.g. as a result of the transposition of an EU Directive) does not necessarily mean that the behaviour had not been punishable until then (Georgouleas and Nestoras v. Greece, § 66)."

Pero' jerġa' jingħad li l-Qrati nostrali mis-sentenzi riferuti fin-nota ta' sottomissjonijiet tal-intimati, urew mod ieħor. Fil-fatt il-Qorti tagħmel

[16] Guide on Article 7 of the European Convention on Human Rights: No punishment without law: the principle that only the law can define a crime and prescribe a penalty dated 31/08/2021

referenza għas-segwenti sentenzi li kollha kellhom jikkunsidraw l-addebitu tal-akkuża ikkontemplata taħt l-artikolu 204Ċ tal-Kap. 9; Qorti Kriminali per Imħallef Scerri Herrera, Att ta' Akkuża 13/2018 **Repubblika ta' Malta vs Omissis**, **il-Pulizija vs Raisa Mangion** mogħtija mill-Qorti tal-Maġistrati bħala Qorti ta' Ġudikatura Kriminali, kump 1081/2013 datata 23 ta' lulju 2013, ukoll mill-istess Qorti per Maġistrat **Joseph Mifsud Pulizija vs Omissis**, kumpilazzjoni 54/2015 deċiża 31 ta' Mejju, 2017; Per Maġistrat J.Padovani Grima il-**Pulizija (Spt Elton Taliana) vs Neil Muscat** deċiża 28/04/2010 kump. 144/2010, (fost oħrajn).

"79. It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see Cantoni v. France, 15 November 1996, § 29, Reports of Judgments and Decisions 1996-V, and Kafkaris, cited above, § 140).

80. The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Coëme and Others, cited above, § 145, and Achour v. France [GC], no. 67335/01, § 43, ECHR 2006-IV)." Dan ingħad fid-deċiżjoni tal-Grand Chamber fl-ismijiet **Case of Rio Padre vs Spain[17].**

[17] G.C. 21/10/2013 appl 42750/2013

24. Minn lat lokali nsibu wkoll li l-Qrati nostrali f'waħda mis-sentenzi appena msemmija dik ta' **Raisa Mangion** li l-Qrati tagħna ma sabu ebda diffikulta' biex jinterpretaw l-element ta' attivita' sesswali misjub fl-artikolu 204Ċ u dan billi ingħad li:

"Il-ligi ma taghtix definizzjoni ta' x'jikkostitwixxi attivitajiet sesswali pero' huwa maghruf li dawn l-atti jrid ikollhom bhala minimu certu element ta' sess sabiex l-atti jissejhu attivitajiet sesswali u ghalhekk m'hemmx dubju li ghandu jkun hemm l-uzu ta' l-organi sesswali tal-persuni nvoluti fir-relazzjoni. Ghalhekk mhux kwalsiasi att bejn zewg minn nies f'relazzjoni tista tissejjah attivita sesswali bhal per ezempju tghanniqa jew koppja lambranzetta, jew addirittura 'flirting' ma jistax jissejjah attivita sesswali. Huwa ghalhekk kompitu ta' din il-Qorti sabiex tinvestiga ulterjorment dak li rnexxielha tipprova l-Prosekuzzjoni dwar dak li sehh bejn l-imputata u -omissis- sabiex jigi stabbilit jekk il-hbiberija/relazzjoni ta' bejniethom kienitx wahda li taqa' taht il-kappa fejn kien hemm attivitajiet sesswali bejniethom."

Il-Qorti għalhekk ma tagħrafx la d-diffikulta' tal-Qorti riferenti u wisq anqas d-diffikulta' tad-difiza fir-rigward. Xejn minn dan l-eżami ma jwassal biex jsostni t-teżi li dan ir-reat huwa wieħed vag kif jilmenta l-imputat u qed issaqsi l-Qorti riferenti.

25. Terġa u tgħid jekk issir referenza għal dawk id-delitti kkontemplati fil-Kap. 9 taħt is-sub titolu II *"Fuq Delitti Sesswali"* huwa ċar l-iżvilupp leġisalttiv li sar fir-rigward biex jiġu minn żmien għal

żmien kombattuti reati li jmorru kontra l-minorenni, ukoll li l-leġislatur kien ċar fl-intenzjoni tiegħu li jagħmel l-almu tiegħu li jimpunixxi kull grad ta' abbuż fuq il-minorrenni, stupru, korruzzjoni, pornografija, prostituzzjoni etċ. Il-fatt waħdu li reat jista' jirrispekkja ieħor bl-elementi simili imma mhux identiċi, ma jfissirx li dan jinkozza kontra l-artikolu 7 tal-Konvenzjoni. Fil-fatt xejn fil-liġi penali nostrali ma jmur kontra dritt fundamentli meta reat ikun kompriż u nvolut f'reat ieħor addebitat.

26. Punt ieħor li jmur ukoll kontra l-allegazzjoni ta' kuntrarjeta' kontra d-dettami kostituzzjonali u dawk konvenzjonali huwa l-fatt li r-referenza tqies ukoll l-applikazzjoni tal-artikolu 204Ċ bħala wieħed vag, apparti għal applikazzjoni tiegħu kif ġia dikuss mill-punto di vista tal-elementi kostituttivi tiegħu, imma anke sa fejn si tratta l-piena marbuta miegħu. Il-fatt waħdu li piena tkun aktar onoruża minn reati oħra, f'dan il-kaz ta' korruzzjoni ta' minorreni, ma tinkozzax mad-dettami tal-artikoli msemmija. Anzi jerġa jiġi ritenut li l-leġislatur ried li anke mankanti l-element ta' korruzzjoni, sodisfatti elementi oħra, jissussisti dan ir-reat. Oltre hekk, darba li huma ċari u prevedibbli l-elementi kollha li jwasslu għal dan ir-reat, il-piena attribwita lilu hija daqstant ċara u prevedibbli għal min addebitat b'din ir-reita' ta' azzjonitu.

Issir referenza għal artikolu 17 tal-Kap 9, li ġie sollevat fin-nota ta' sottomissjonijiet tal-imputat, u anke f'dan ir-rigward ma taqbilx li l-applikazzjoni ta' dan fejn tidħol il-piena marbuta mal-artikolu 204Ċ tmur kontra d-dettami marbuta mal-artikolu 39(8) tal-Kostituzjoni u 7 tal-Konvenzjoni. Dan jingħad għax nonostante l-piena marbuta ma' kull reat addebitat, dejjem jittieħed in konsiderazzjoni r-reat aktar gravi u jiġu applikati r-regoli kif prospettati b'mod partikolari fis-sub inċiż (b) tal-istess, għalhekk ma jintilef ebda benefiċċju fil-konkors tal-piena li jmur a benefiċċju ta' kull imputat.

27. Oltre dan jingħad ukoll illi ħarsa lejn l-atti kriminali annessi u li xprunaw din ir-referenza, Kasem Khlef ġie addebitat biss bir-reat ai termini tal-artikolu 204Ċ tal-Kap. 9 u ebda reat ieħor għalhekk ma setgħet qatt issir ebda referenza fir-rigward ta' lanjanza marbuta mal-artikolu 17 tal-Kap. 9. Dan jingħad fuq il-pretest li referenza kostituzzjonali/konvenzjonali ma ssirx biss għal skopijiet ta' xi studju akkademiku imma trid ikollha użu u skop għal direzzjoni mitluba fil-kawza proprja li fiha tqum. Għalhekk kull ilment indirizzat lejn l-applikazzjoni tal-artikolu 17 huwa għal kollox fieragħ u mhux f'loku f'dan il-kweżit.

28. Punt ieħor li għandu jiġi ndirizzat huwa fejn jirrigwarda l-arbitrarjeta' in vista li l-għażla tal-addebitu tar-reat hija mħollija f'idejn l-uffiċjal prosekutur ukoll għas esklussjoni tal-ġenituri. L-imputat fin-nota tiegħu jagħmel referenza għal sentenzi wkoll fejn jidħol l-element ta' foreseeability, prevedibbilta' tal-piena.

Il-Qorti se tirrriproduċi partijiet mid-deċiżjonijiet ċitati saljenti għal-iskop odjern:

Kafkaris vs Cyprus [18] : "

"B. The Court's assessment

1. General principles

137. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S.W. v. the United Kingdom, and C.R. v. the United Kingdom, 22 November 1995, §§ 35 and 33 respectively, Series A no. 335-B and C).

138. Accordingly, it embodies in general terms the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) (see Kokkinakis v. Greece, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays

[18] Application 219060/04 deċiża 12/2/08

down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, and Achour, cited above, § 41).

139. When speaking of "law", Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law (see, mutatis mutandis, The Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 47, Series A no. 30; Kruslin v. France, 24 April 1990, § 29, Series A no. 176-A; and Casado Coca v. Spain, 24 February 1994, § 43, Series A no. 285-A). In this connection, the Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law (see, in particular, mutatis mutandis, De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 93, Series A no. 12). In sum, the "law" is the provision in force as the competent courts have interpreted it (see Leyla Şahin v. Turkey [GC], no. 44774/98, § 88, ECHR 2005-XI).

140. Furthermore, the term "law" implies qualitative requirements, including those of accessibility and foreseeability (see, among other authorities, Cantoni v. France, 15 November 1996, § 29, Reports 1996-V; Coëme and Others, cited above, § 145; and E.K. v. Turkey, no. 28496/95, § 51, 7 February 2002). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see Achour, cited above, § 41). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (see, among other authorities, Cantoni, cited above, § 29). Furthermore, a law may still satisfy the requirement of "foreseeability" where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, ibid., § 35, and Achour, cited above, § 54).

141. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see, mutatis mutandis, The Sunday Times (no. 1), § 49, and Kokkinakis, § 40, both cited above). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, mutatis mutandis, Cantoni, cited above). Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (see S.W. v. the United Kingdom, cited above, § 36, and Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II).

142. The concept of "penalty" in Article 7 is, like the notions of "civil right and obligations" and "criminal charge" in Article 6 § 1 of the Convention, autonomous in scope. To render the protection afforded by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see Welch v. the United Kingdom, 9 February 1995, § 27, Series A no. 307-A, and Jamil v. France, 8 June 1995, § 30, Series A no. 317-B). The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see Welch, cited above, § 28, and Jamil, cited above, § 31). To this end, both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where

the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, inter alia, Hogben, cited above; Hosein v. the United Kingdom, no. 26293/95, Commission decision of 28 February 1996, unreported; Grava, cited above, § 51; and Uttley, cited above). However, in practice, the distinction between the two may not always be clear cut.

2. Application of the above principles to the instant case

143. At the outset the Court notes that it is common ground between the parties that at the time the applicant was prosecuted and convicted, the offence of premeditated murder was punishable by mandatory life imprisonment under section 203(2) of the Criminal Code and that he had been sentenced under that provision. The legal basis for the applicant's conviction and sentence was therefore the criminal law applicable at the material time and his sentence corresponded to that prescribed in the relevant provisions of the Criminal Code.

144. The essence of the parties' arguments concerns the actual meaning of the term "life imprisonment". On the one hand the applicant maintains that at the time he committed the offence of which he was convicted life imprisonment had been tantamount to imprisonment for a period of twenty years. The subsequent repeal of the Prison Regulations and the retroactive application of the Prison Law of 1996 brought about both an unforeseeable prolongation of his term of imprisonment to an indefinite term for the remainder of his life and a change in the conditions of his detention. On the other hand the Government submit that section 203(2) of the Criminal Code was, and still remains, the only substantive provision of domestic law prescribing the penalty of a life sentence to be imposed by the courts for premeditated murder. This was the penalty imposed by the Limassol Assize Court on the applicant. The Prison Regulations concerned the execution of the life sentence imposed by the court, namely, the assessment of a possible remission of his sentence on the grounds of good conduct and diligence.

145. Consequently, the issue that the Court needs to determine in the present case is what the "penalty" of life imprisonment actually entailed under the domestic law at the material time. The Court must, in particular, ascertain whether the text of the law, read in the light of the accompanying interpretative case-law, satisfied the requirements of accessibility and foreseeability. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time.

146. Although at the time the applicant committed the offence it was clearly provided by the Criminal Code that the offence of premeditated murder carried the penalty of life imprisonment, it is equally clear that at that time both the executive and the administrative authorities were working on the premise that this penalty was tantamount to twenty years' imprisonment (see paragraph 65 above). The prison authorities were applying the Prison Regulations, made on the basis of the Prison Discipline Law (Cap. 286), under which all prisoners, including life prisoners, were eligible for remission of their sentence on the grounds of good conduct and industry. For these purposes, Regulation 2 defined life imprisonment as meaning imprisonment for twenty years (see paragraph 42 above). As admitted by the Government, this was understood at the time by the executive and the administrative authorities, including the prison service, as imposing a maximum period of twenty years to be served by any person who had been sentenced to life imprisonment (see paragraph 65 above). The prison authorities were therefore assessing the remission of the life sentences of prisoners on the basis of twenty years' imprisonment. This also transpires from the letter sent by the then Attorney-General of the Republic to the President at that time (see paragraph 53 above).

147. On 5 February 1988 the Nicosia Assize Court, in its sentencing judgment in the case of the Republic of Cyprus v. Andreas Costa Aristodemou, alias Yiouroukkis, clearly stated that life imprisonment under the Criminal Code was for the remainder of the biological existence of the convicted person and not for twenty years. Subsequently, on 10 March 1989 the Limassol Assize Court, when passing sentence on the applicant, relied on the findings of the Nicosia Assize Court in the above case. It accordingly sentenced the applicant to "life imprisonment" for the remainder of his life. In spite of this, when the

applicant was admitted to prison to serve his sentence, he was given a written notice by the prison authorities with a conditional release date, the remission of his life sentence having been assessed on the basis that it amounted to imprisonment for a term of twenty years. It was not until 9 October 1992 in the case of Hadjisavvas v. the Republic of Cyprus (see paragraphs 19 and 50 above) that the Regulations were declared unconstitutional and ultra vires by the Supreme Court (see paragraphs 50-51 above). They were eventually repealed on 3 May 1996.

148. In view of the above, while the Court accepts the Government's argument that the purpose of the Regulations concerned the execution of the penalty, it is clear that in reality the understanding and the application of these Regulations at the material time went beyond this. The distinction between the scope of a life sentence and the manner of its execution was therefore not immediately apparent. The first clarification by a domestic court in this respect was given in the Yiouroukkis case subsequent to the commission of the offence by the applicant that led to his prosecution and conviction. Furthermore, the Court notes that in both the case of Yiouroukkis and that of the applicant, the prosecution was inclined to take the view that life imprisonment was limited to a period of twenty years (see paragraphs 15 and 47 above).

149. At the same time, however, the Court cannot accept the applicant's argument that a heavier penalty was retroactively imposed on him since in view of the substantive provisions of the Criminal Code it cannot be said that at the material time the penalty of a life sentence could clearly be taken to have amounted to twenty years' imprisonment.

150. The Court considers, therefore, that there is no element of retrospective imposition of a heavier penalty involved in the present case but rather a question of "quality of law". In particular, the Court finds that at the time the applicant committed the offence, the relevant Cypriot law taken as a whole was not formulated with sufficient precision as to enable the applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution. Accordingly, there has been a violation of Article 7 of the Convention in this respect.

151. However, as regards the fact that as a consequence of the change in the prison law (see paragraph 58 above), the applicant, as a life prisoner, no longer has a right to have his sentence remitted, the Court notes that this matter relates to the execution of the sentence as opposed to the "penalty" imposed on him, which remains that of life imprisonment. Although the changes in the prison legislation and in the conditions of release may have rendered the applicant's imprisonment effectively harsher, these changes cannot be construed as imposing a heavier "penalty" than that imposed by the trial court (see Hogben and Hosein, both cited above). In this connection, the Court would reiterate that issues relating to release policies, the manner of their implementation and the reasoning behind them fall within the power of the member States in determining their own criminal policy (see Achour, cited above, § 44). Accordingly, there has not been a violation of Article 7 of the Convention in this regard.

152. In conclusion, the Court finds that there has been a violation of Article 7 of the Convention with regard to the quality of the law applicable at the material time. It further finds that there has been no violation of this provision in so far as the applicant complains about the retrospective imposition of a heavier penalty with regard to his sentence and the changes in the prison law exempting life prisoners from the possibility of remission of their sentence".

Porsenna vs Malta[19] :

"25. The Court notes that the complaints in the present case are directed at the defects arising out of the Dangerous Drugs Ordinance. The same complaint in respect of that Ordinance was examined in Seychell v. Malta (no. 43328/14, 28 August 2018) where the Court followed its findings in Camilleri (cited above, in connection with the Medical and Kindred Professions Ordinance) and concluded for a violation of Article 7 in relation to the unfettered discretion of the AG to choose the trial court and therefore the applicable punishment, and found that it was not necessary to examine the complaint under Article 6 of the Convention.

[19] Application 1109/16

26. In Seychell (§ 48), as well as in Camilleri (§ 42), both cited above, the Court found that the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. Reiterating its findings in Camilleri, in the most recent Seychell judgment the Court considered that:

"50. ... An insoluble problem was posed by fixing different minimum (and maximum) penalties. The Attorney General had in effect an unfettered discretion to decide which minimum (and maximum) penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. ...

51. Moreover, the domestic courts were bound by the Attorney General's decision as to which court would be competent to try the accused. The Government acknowledged that Article 21 of the Criminal Code - which provided for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons – was not applicable to the present case... . Thus, at the relevant time, a lesser sentence could not be imposed, despite any concerns the judge might have had as to the use of the Attorney General's discretion (ibid.).

In the light of the above considerations, the Court concludes that the relevant legal provision at the material time (prior to recent amendments in the light of the Camilleri judgment, cited above) failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided for in Article 7."

27. The Court notes that under the Supervision of the Committee of Ministers, in the execution phase related to the judgment in Camilleri, the national authorities undertook changes to the relevant laws, namely, the Dangerous Drugs Ordinance and the Medical and Kindred Professions Ordinance, by means of Act XXIV (see Relevant domestic law, paragraph 20 above). In particular, quite apart from the fact that the amended laws provided guidelines to be followed by the AG in future cases, an additional provision, specifically, Article 22 (2B) in relation to the Dangerous Drugs Ordinance, pertinent to the present case, provided the criminal courts with the power to apply a different punishment bracket, namely that applicable to proceedings before the Court of Magistrates if, bearing in mind all the circumstances, the punishment

applicable before the Criminal Court would have been disproportionate. Thus, contrary to that claimed by the applicant (see paragraph 24 above) the decision of the AG was no longer binding, and could be remedied by the courts. It follows that the domestic courts, which were no longer bound by the AG's discretion, constituted a procedural safeguard against the latter's discretion, irrespective of whether the AG's discretion was applied pre (as in the present case) or post amendments.

28. Indeed the Court notes that the new provisions entered into force in August 2014, at a time when the applicant in the present case was going through appeal proceedings. At that stage, the Court of Criminal Appeal considered such favourable amendments and exercised its power to assess whether the situation was such to merit the more lenient punishment bracket but decided, giving reasons, that it was not the case (see paragraph 11 above). The Court finds nothing arbitrary in the Court of Appeal's detailed conclusions, thus despite the outcome of that assessment, it considers that the applicant in the present case had effective safeguards against the imposition of an arbitrary punishment as provided for in Article 7 of the Convention.

29. The Court also notes that the applicant committed the crime at issue prior to 2003, at a time when he could not have known the exact punishment bracket which applied to him. At that time he could only know that, taking into account both punishment brackets, the minimum was six months and the maximum life imprisonment. Now, in the present case, following the above-mentioned amendments which were taken into consideration in the applicant's case, the Court of Criminal Appeal could apply any of the two punishment brackets, that is, his punishment could have varied between six months to life imprisonment and thus corresponded to his knowledge at the time of the commission of the crime, and thus no issue of foreseeability arises in the instant case.

30. It follows that in the present case, in view of the 2014 amendments, it cannot be said that the law which applied to the applicant failed to satisfy the foreseeability requirement or to provide effective safeguards against arbitrary punishment as provided for in Article 7. For the same reasons no issue arises under Article 6 of the Convention."

Camilleri vs Malta[20] :

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"39. The issue before the Court is whether the principle that only the law can define a crime and prescribe a penalty was observed. The Court must, in particular, ascertain whether in the present case the text of the law was sufficiently clear and satisfied the requirements of accessibility and foreseeability at the material time.

40. The Court finds that the provision in question does not give rise to any ambiguity or lack of clarity as to its content in respect of what actions were criminal and constituted the relevant offence. The Court further notes that there is no doubt that section 120A (2) of the Medical and Kindred Professions Ordinance provided for the punishment applicable in respect of the offence with which the applicant was charged. In fact, it provided for two different possible punishments, namely a punishment of four years to life imprisonment in the event that the applicant was tried before the Criminal Court, or six months to ten years if he was tried before the Court of Magistrates. While it is clear that the punishment imposed was established by law and did not exceed the limits fixed by section 120A (2) of the above-mentioned Ordinance, it remains to be determined whether the Ordinance's qualitative requirements, particularly that of foreseeability, were satisfied, regard being had to the manner of choice of jurisdiction, as this reflected on the penalty that the offence in question carried.

41. The Court observes that the law did not make it possible for the applicant to know which of the two punishment brackets would apply to him. As acknowledged by the Government (see paragraph 31 above), the applicant became aware of the punishment bracket applied to him only when he was charged, namely after the decision of the Attorney General determining the court where he was to be tried.

42. The Court considers relevant the cases of G. and M. mentioned by the applicant (see paragraph 25 above). It observes that although these cases were not totally analogous (in that G., unlike M., was a recidivist), they were based on the same facts, offences in relation to which guilt was found, and a similar quantity of drugs. However, G. was tried before the Criminal Court and eventually sentenced to nine years' imprisonment whereas M. was tried before the Court of Magistrates and sentenced to fifteen months' imprisonment. More generally, the domestic case-law presented to this Court seems to indicate that such decisions were at times unpredictable. It would therefore appear that the applicant would not have been able to know the punishment applicable to him even if he had obtained legal advice on the matter, as the decision was solely dependent on the prosecutor's discretion to determine the trial court.

43. While it may well be true that the Attorney General gave weight to a number of criteria before taking his decision, it is also true that any such criteria were not specified in any legislative text or made the subject of judicial clarification over the years. The law did not provide for any guidance on what would amount to a more serious offence or a less serious one (based on enumerated factors and criteria). The Constitutional Court (see paragraph 14 above) noted that there existed no guidelines which would aid the Attorney General in taking such a decision. Thus, the law did not determine with any degree of precision the circumstances in which a particular punishment bracket applied. An insoluble problem was posed by fixing different minimum penalties. The Attorney General had in effect an unfettered discretion to decide which minimum penalty would be applicable with respect to the same offence. The decision was inevitably subjective and left room for arbitrariness, particularly given the lack of procedural safeguards. Neither could such a decision be seen only or mainly in terms of abuse of power, even if, as the Government suggested without however substantiating their view, this might be subject to constitutional control (see paragraph 29 above). The Court is not persuaded by the Government's argument to the effect that it was possible that the minimum punishment before the Criminal Court would not be handed down. The Court considers that the domestic courts were bound by the Attorney General's decision as to which court would have been competent to try the accused. The Court observes that Article 21 of the Criminal Code provides for the passing of sentences below the prescribed minimum on the basis of special and exceptional reasons. However, section 120A of the Medical and Kindred Professions Ordinance, which provides for the offence with which the applicant was charged, specifically states in its subsection (7) that Article 21 of the Criminal Code shall not be applicable in respect of any person convicted of the offence at issue. On an examination of the provision, the Court finds that it would not be possible to interpret the wording of that provision otherwise. Moreover, this interpretation has been confirmed by the domestic courts, the most recent decision being that of 2008 in the above-mentioned case of The Republic of Malta v. Stanley Chircop, in which the Criminal Court considered that the application of Article 21 to the relevant offences was excluded and therefore the court could not impose a sentence below the minimum established by law. Furthermore, the Government have not provided any examples of decisions showing that a domestic court had actually done so. Thus, a lesser sentence could not be imposed despite any concerns the judge might have had as to the use of the prosecutor's discretion (ibid.).

44. In the light of the above considerations, the Court concludes that the relevant legal provision failed to satisfy the foreseeability requirement and provide effective safeguards against arbitrary punishment as provided in Article 7.

45. It follows that there has been a violation of Article 7 of the Convention.".

29. **Xejn** minn dan hawn riprodott ma jolqot il-kwistjoni in eżami. Qari tal fuq appena ċitat ukoll jagħti stampa ċara li s-sitwazzjoni prevista fl-artikolu 204Ċ m'għandha x'taqsam xejn ma' dak diskuss fid-deċiżjonijiet riprodotti in parte. Il-piena marbuta ma' dan l-artikolu hija ċara fil-kaz ta' ħtija u l-aggravji marbuta. Il-Qorti ġia espremit ruħha dwar il-fatt li dan huwa reat distint minn dak ikkontemplat ai terminu tal-artikolu 203 tal-Kap. 9. Oltre hekk dan ir-reat la hu milqut b'retroattivita' fil-konfront tal-imputat u wisq anqas iħalli xi diskrezzjoni f'idejn il-prosekuzzjoni bħal dik li ġiet sanċita fejn jirrigwarda r-reati relatati mad-droga.

Il-fatt waħdu li l-prosekutur wara li jgħarbel il-provi jaddebita reat minn flok ieħor mhux punt ta' arbitrarjeta' imma ta' valutazzjoni ta' fatti nvestigati u l-applikazzjoni tal-liġi rilevanti. Il-fatt li jaddebita reati alternattivi ma jqarreb xejn lejn in-nuqqas ta' *foeseeability* li hija waħda mill-bazi tar-referenza. Għalhekk xejn mill-konkluzzjoni li waslet għalihom il-Qorti Ewropeja ma jista' jitfa' dawl fuq din ir-referenza

f'dan ir-rigward. Xejn fl-applikazzjoni tal-artikolu 204Ċ ma jalloka lill-prosekuzzjoni xi wesa' ta' diskrezzjoni ta' liema Qorti għandha tiġġudika u wisq anqas x'piena għandha tiġi imposta. Din hija mħollija f'idejn liġi appożita applikata mill-Qorti skont il-kompetenza tagħha. Lanqas il-fatt li l-prosekuzzjoni hija waħda esklussivament *ex uffiċio* ma tmur kontra d-dettami tal-kostituzzjoni u l-konvenzjoni, dan juri biss kemm il-leġislatur ried ikun aktar iebes u nċisiv fejn jirrigwarda l-protezzjoni tal-minorenni.

Konsegwentement din il-Qorti qegħda tiddisponi minn din ir-referenza billi tirrispondi b'dan illi xejn fl-artikolu 204Ċ tal-Kap. 9 tal-Liġijiet ta' Malta ma jivvjola l-Artikolu 7 tal-Konvenzjoni Ewropeja tad-Dritiijiet tal-Bniedem u l-Artikolu 39(8) tal-Kostituzzjoni minħabba li l-*actus reus* tar-reat inventat lokalment, u li ma jinsab fl-ebda leġislazzjoni oħra, huwa vag, mhux faċli li jiġi interpretat u jispiċċa li jkun mogħti interpretazzjoni soġġettiva u mhux oġġettiva, u estensiva. Ukoll fit-tieni lok għaliex ma hemmx proporzjonalita' bejn ir-reat vag de quo fejn jidħlu minuri, u reat soċjalment aktar gravi tal-korruzzjoni effettiva tal-minorenni, u barra minn hekk jeskludi kull poter tal-ġenituri li jipproteġu kif

jidhrilhom lill-uliedhom minuri, saħansitra kontra l-volonta' tal-istess ġenituri.

Spejjes ta' dawn il-proċeduri a karigu ta' Khlef Kasem.

Onor. Imħallef Miriam Hayman

Rita Falzon
Dep. Reg