



QORTI KOSTITUZZJONALI

**ONOR. IMHALLEF -- AGENT PRESIDENT
RAYMOND C. PACE**

**ONOR. IMHALLEF
TONIO MALLIA**

**ONOR. IMHALLEF
NOEL CUSCHIERI**

Seduta tad-29 ta' Novembru, 2012

Appell Civili Numru. 12/2009/1

**Adrian Buckle, Christopher Gatt, Maria Pia sive Pia
Zammit, Mikhail Acopovich Basmadjian u s-socjeta`
Unifaun Theatre Productions Limited**

v.

**Teresa Friggieri f'isimha proprio u fil-kwalita` taghha
ta' Chairman tal-Bord ta' Klassifika tal-Pellikoli tal-
Palk, il-Prim Ministru, il-Kummissarju tal-Pulizija u l-
Avukat Generali tar-Repubblika**

Il-Qorti:

Rat ir-rikors ipprezentat fit-3 ta' Marzu 2009, li jaqra hekk:

“1. Illi għall-habta ta' Ottubru 2008 is-socjeta' rikorrenti Unifaun Theatre Productions Limited (C-45124) tramite d-diretturi tagħha li wiehed minnhom huwa r-rikorrenti Adrian Buckle iddecidiet li ttella' produzzjoni teatriali gewwa Malta tad-dramm Ingliz bl-isem Stitching, miktub mill-awtur Skocciz Anthony Neilson u ppubblikat fis-sena 2002 ;

“2. Illi għal dan il-ghan l-imsemmija socjeta' ottjeniet il-permessi kollha relattivi minghand l-awtur u l-agent tiegħu sabiex dan id-dramm ikun jista' jittella' Malta, u dan skond ma jidher mid-dokument hawn anness u mmarkat Dokument 'A' ;

“3. Illi fit-23 ta' Dicembru 2008 l-istess socjeta' rikorrenti applikat mal-Bord ta' Klassifika tal-Pellikoli u tal-Palk sabiex tottjeni certifikat li jkopri l-produzzjoni ta' dan id-dramm f'Malta, u dan skond ma jidher mill-kopja tar-ricevuta hawn annessa u mmarkata Dokument 'B' ;

“4. Illi sabiex tkun tista' tizgura li l-produzzjoni tagħha tigi mtella' f'post adegwat u tigi ppubblicizzata sufficjentement is-socjeta' rikorrenti pprenotat it-teatru tal-Kavallier ta' San Gakbu fil-Belt Valletta għat-13, 14, 15, 20, 21, 22, 28 ta' Frar u l-1 ta' Marzu 2009 u dahlet fi ftehim mal-istess teatru (Dokument 'C') ;

“5. Illi inoltre s-socjeta' rikorrenti Unifaun Theatre Productions Limited assumiet ukoll obligazzjonijiet kemm fil-konfront tar-rikorrenti Christopher Gatt li huwa d-direttur teatriali tal-produzzjoni kif ukoll fil-konfront tar-rikorrenti l-ohra Maria Pia sive Pia Zammit u Mikhail Acopovich Basmadjian bhala atturi fl-imsemmi drammi ;

“6. Illi fl-20 ta' Jannar 2009 inhareg certifikat mill-Film Stage and Classification Office fi hdan il-Pulizija ta' Malta u li kien jindika lic-Chairperson tal-Bord ta' Klassifika tal-Pellikoli u tal-Palk Tereza Friggieri bhala l-klassifikatrici li ezaminat id-dramm in kwistjoni, liema certifikat ikklassifika l-produzzjoni tad-dramm Stitching bhala '**Banned**' – Banned and disallowed (ara Dokument 'D') ;

“7. Illi tali certifikat imkien ma indika r-ragunijiet tal-imsemmija klassifikazzjoni ;

“8. Illi meta sussegwentement nhar it-23 ta' Jannar 2009 ir-rikorrenti Adrian Buckle baghat email (Dokument 'E') u nhar il-25 ta' Jannar 2009 kellew lill-istess Chairperson Teresa Friggieri permezz tat-telefon dan baqa' ma rceviex ragunijiet konkreti ghal tali klassifikazzjoni ;

“9. Illi permezz ta' ittra tal-25 ta' Jannar 2009 (Dokument 'F') is-socjeta' rikorrenti kitbet permezz tal-avukat taghha lill-imsemmija Chairperson Teresa Friggieri fejn talbet li d-decizjoni tal-Bord tigi rikonsidrata ai termini tal-Artikolu 47(1) tar-Regolamenti dwar il-Pellikoli u l-Palk (Legislazzjoni Sussidjarja 10.17) ;

“10. Illi permezz ta' ittra minghajr letterhead datata 29 ta' Jannar 2009 (Dokument 'G') il-Bord informa lill-avukat tas-socjeta' rikorrenti illi r-rizultat tar-revizjoni kien illi d-decizjoni originali giet konfermata ;

“11. Illi mill-gdid din l-ittra ma ndikat l-ebda raguni ghal tali decizjoni u lanqas kien hemm indikat min kien ezamina l-iscritt ta' Stitching it-tieni darba ;

“12. Illi sussegwentement l-istess Chairperson Teresa Friggiera baghtet ittra mill-gdid minghajr letterhead (Dokument 'H' hawn anness) indirizzata lill-avukat tar-rikorrenti u datata 31 ta' Jannar 2009 li permezz taghha ghaddiet lir-rikorrenti kopja ta' dokument datat 30 ta' Jannar 2009 u ndirizzat merament 'To whom it may concern', liema dokument l-istess Chairperson iddikjarat li kien gie depozitat mal-Kummissarju tal-Pulizija, u liema dokument kien jelenka hames ragunijiet ghall-klassifika 'banned' li l-imsemmi Bord kien ta lid-dramm Stitching, liema ragunijiet ir-rikorrenti jqisu bhala skorretti u invalidi ;

“13. Illi l-istess drammi gie mtella' f'diversi pajjizi barra minn Malta fejn id-dritt tal-espressjoni huwa mhares anke peress li dawn huma pajjizi firmatarji tal-Konvenzjoni

Ewropea bhal per ezempju fl-Ingilterra u mkien ma gie mwaqqaf milli jintwera ;

“14. Illi d-decizjoni li l-imsemmi dram *Stitching* jigi klassifikat bhala ‘**Banned**’ – Banned and disallowed tikkostitwixxi vjolazzjoni tad-dritt fundamentali tar-rikorrenti ghal-liberta’ tal-espressjoni kif sancit permezz tal-Artikolu 41 tal-Kostituzzjoni ta’ Malta u tal-Artikolu 10 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, u dan aktar u aktar meta wiehed iqis illi l-iscrypt tad-dramm koncernat jista’ jigi akkwistat u moqri liberament f’Malta minn kwalsijasi persuna u dan skond ma jidher mir-ricevuta hawn annessa u mmarkata Dokument ‘I’ ;

“15. Illi inoltre t-tehid tal-imsemmija decizjoni kien jikkostitwixxi vjolazzjoni tad-dritt fundamentali tar-rikorrenti ghal smiegh xieraq bi ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea u dan fost l-ohrajn minhabba li tali decizjoni ma kienitx motivata, ir-rikorrenti ma kellhomx l-opportunita’ jaghmlu r-rapprezentazzjonijiet taghom dwar il-kaz u lanqas ma kien hemm ‘smiegh’ fil-veru sens tal-kelma ;

“16. Illi bhala konsegwenza tad-decizjoni msemmija r-rikorrenti soffrew danni konsiderevoli konsistenti f’danni morali, telf ta’ reputazzjoni u danni ohra fost l-ohrajn it-telf ta’ flus li kienu gew investiti fil-produzzjoni (inkluz hlasijiet ta’ pagi u kontijiet, xiri ta’ apparat u materjal iehor, pubblicita’ u promozzjoni), kif jidher anke mill-annessi kopji ta’ uhud mir-ricevuti tal-ispejjez li dahlu fihom ir-rikorrenti (Dokument ‘J’), u telf ta’ qliegh mill-bejgh ta’ biljetti lill-pubbliku ;

“17. Illi minkejja li sar protest gudizzjarju mir-rikorrenti (Dokument ‘K’) l-intimati baqghu inadempjenti, anzi ntavolaw kontro-protest (Dokument ‘L’) ;

“18. Illi konsegwentement sabiex jigu salvagwardjati d-drittijiet tar-rikorrenti u sabiex jigu reintegrati d-drittijiet fundamentali tal-istess, ir-rikorrenti kellhom jaghmlu l-prezenti kawza ;

“19. Illi r-rikorrenti jemmnu li r-rimedju xieraq għall-vjolazzjonijiet imsemmija għandu jkun (i) dikjarazzjoni li d-decizjoni li l-imsemmi drammi Stitching jigi kklassifikat bħala ‘**Banned**’ – Banned and disallowed tikkostitwixxi vjolazzjoni tad-dritt fundamentali tagħhom għal-liberta’ tal-espressjoni kif sancit permezz tal-Artikolu 41 tal-Kostituzzjoni ta’ Malta u tal-Artikolu 10 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem; (ii) dikjarazzjoni illi t-tehid tal-imsemmija decizjoni kien jikkostitwixxi vjolazzjoni tad-dritt fundamentali tar-rikorrenti għal smiegh xieraq bi ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea; (iii) kumpens xieraq għall-imsemmija vjolazzjonijiet; (iv) l-ordni ta’ din l-Onorabbli Qorti li l-klassifikazzjoni tal-imsemmi drammi bħala ‘**Banned**’ – Banned and disallowed tigi mħassra u sostitwita bi klassifikazzjoni oħra li tippermetti li l-istess drammi jigi mtella’ għall-pubbliku f’Malta; u (v) kwalsijasi rimedju iehor li din l-Onorabbli Qorti jidhrilha xieraq u opportuna a tenur tal-Artikolu 13 tal-Konvenzjoni Ewropea u tal-Artikolu 46 tal-Kostituzzjoni ta’ Malta.

Jghidu għalhekk il-konvenuti, prevja kwalsiasi dikjarazzjoni necessarja u opportuna, u għar-ragunijiet premissi, għaliex m’għandhiex din il-Qorti:

“1. Tiddikjara li d-decizjoni tal-intimati li d-drammi tal-awtur Anthony Neilson bl-isem Stitching jigi kklassifikat bħala ‘**Banned**’ – Banned and disallowed tikkostitwixxi vjolazzjoni tad-dritt fundamentali tar-rikorrenti għal-liberta’ tal-espressjoni kif sancit permezz tal-Artikolu 10 tal-Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem ;

“2. Tiddikjara illi t-tehid tal-imsemmija decizjoni kien jikkostitwixxi wkoll vjolazzjoni tad-dritt fundamentali tar-rikorrenti għal smiegh xieraq bi ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea ;

“3. Tiddikjara lill-intimati responsabbli għall-vjolazzjonijiet fuq imsemmija ;

“4. Tillikwida l-kumpens xieraq għall-imsemmija vjolazzjonijiet

“5. Tordna lill-intimati jhallsu l-kumpens hekk likwidat ;

“6. Thassar jew tordna li tithassar il-klassifikazzjoni tal-imsemmi drammi bhala ‘**Banned**’ – Banned and disallowed u tordna li tali klassifikazzjoni tigi sostitwita bi klassifikazzjoni oħra li tippermetti li l-istess drammi jigi mtella’ għall-pubbliku f’Malta ;

“7. Tagħti kull rimedju iehor xieraq u opportun a tenur tal-Artikolu 13 tal-Konvenzjoni Ewropea u tal-Artikolu 46 tal-Kostituzzjoni ta’ Malta, inkluż il-likwidazzjoni tad-danni kollha sofferti mir-rikorrenti bhala rizzultat tal-imsemmija decizjoni u klassifikazzjoni.

“B’rizerwa ta’ kwalsijasi azzjoni oħra spettanti lir-rikorrenti naxxenti mill-istess fatti.

“Bl-ispejjeż, inkluż dawk tal-protest gudiżżjarju tat-2 ta’ Frar 2009, u bl-intimati ingunti minn issa għas-subizzjoni.”

Rat ir-risposta tal-intimati li in forza tagħha eċċepew illi:

“Illi t-talbiet tar-rikorrenti kollha kemm huma qegħdin jigu opposti u dan in virtu` tas-segwentijiet -

“1. Illi preliminarjament jigi rilevat li kemm l-Onorevoli Prim Ministru, kemm il-Kummissarju tal-Pulizija, kemm l-Avukat Generali tar-Repubblika u anke Teresa Friggieri f’isimha proprio u fil-kwalita’ tagħha ta’ Chairman tal-Bord tal-Klassifika tal-Pellikoli u tal-Palk m’humieq il-legittimi kontraditturi f’dawn il-proċeduri u dan għas-semplici fatt: -

“1.1 Li hadd minnhom m’għandu l-poter u/jew il-funzjoni regolatorja li jeżamina, jikklassifika u li jew f’dati cirkostanzi anke saħansitra jipprojbixxi jekk ikun il-kaz il-wiri ta’ xi pellikola u/jew izomm rappreżentazzjoni teatrali milli tittella’ fuq il-palk ;

“1.2 Li ma jirrizultax mir-rikors promotur li qiegħda tigi attakkata l-validita' jew il-kostituzzjonalita' ta' xi ligi jew regolament partikolari ;

“1.3 Li għal dak li jikkoncerna l-Onorevoli Prim Ministru u l-Avukat Generali tar-Repubblika huwa lampanti li dawn ma jiffiguraw bl-ebda mod la direttament u lanqas indirettament mal-fattispeċji tal-kaz odjern ;

“1.4 Li fil-konfront tal-Kummissarju tal-Pulizija l-uniku involviment tiegħu f'dan il-kaz huwa c-cirkolazzjoni ta' kopja ta' l-applikazzjoni għall-eżami tar-rappreżentazzjonijiet teatrali u l-eventwali hrug ta-certifikat tal-klassifikazzjoni skond kif gie deciz mill-Bord tal-Klassifika tal-Pellikoli u tal-Palk ; u

“1.5 Li fl-aħħar nett dwar Teresa Friggieri f'isimha proprio u fil-kwalita' tagħha ta' Chairman tal-Bord tal-Klassifika tal-Pellikoli u tal-Palk għandu jingħad li hi dejjem agixxiet fil-veste ta' ufficċjal pubbliku u b'hekk m'hijiex soġġettibbli għal dawn il-proċeduri ;

“Għalhekk isegwi li dawn ilkoll kemm huma gew imharrkin inutilment u kwindi għandhom jigu liberati mill-osservanza tal-gudizzju.

“2. Illi in vena preliminari wkoll l-esponenti qed jeccepixxu n-nuqqas ta' interess guridiku tar-rikorrenti, Adrian Buckle, Christopher Gatt, Maria Pia sive Pia Zammit u Mikhail Acopovich Basmadjan stante illi d-decizjoni tal-Bord tal-Klassifikazzjoni li pprojbiet ir-rappreżentazzjoni teatrali tad-dramm 'Stitching' zgur li ma tirrigwardahomx fil-kapacita' personali tagħhom u semmai tirrigwarda biss lir-rikorrenti l-oħra, is-socjeta' Unifaun Theatre Productions Limited ;

“3. Illi, ukoll in via preliminari, dan ir-rikors għandu jigi respint stante illi jidher car illi r-rikorrenti qabel ma għazlu li jintavolaw dan ir-rikors kostituzzjonali li per se huwa strettament di natura straordinarja, huma naqsu milli jezawrixxu r-rimedji ordinarji kollha li tagħtihom il-ligi ;

“4. Illi preliminarjament ukoll jitnissel mit-talbiet kif dedotti fir-rikors kostituzzjonali taghhom li r-rikorrenti f'dawn il-proceduri odjerni m'humix qeghdin jattakkaw xi disposizzjoni tal-ligi jew xi regolament partikolari naxxenti minn xi ligi sussidjarja izda qeghdin merament jattakkaw decizjoni purament amministrattiva fir-rigward ta' klassifikazzjoni tad-dramm teatrali 'Stitching' ;

“5. Illi in vista tal-fatt li tali decizjoni hija biss wahda ta' natura amministrattiva, allura jsegwi li l-procedura idoneja li kellha tigi segwita mir-rikorrenti kienet rikors a bazi ta' l-Artikolu 469A tal-Kap 12 tal-Ligijiet ta' Malta u kif ukoll taht id-disposizzjonijiet recentement introdotti bis-sahha tal-Kap 490 tal-Ligijiet ta' Malta (Ara s-sentenzi Raymond Farrugia vs. Kummissarju tal-Pulizija moghtija mill-Prim Awla tal-Qorti Civili (Sede Kosistituzzjonali) fit-12 ta' Novembru 2001 u Emanuel Ciantar vs. Kummissarju tal-Pulizija moghtija mill-Qorti Kostituzzjonali fit-2 ta' Novembru 2001) ;

“6. Illi ta' min josserva f'dan l-istadju li dawn iz-zewg rimedji f'kaz ta' ezitu pozittiv jistghu jwasslu anke ghal dikjarazzjoni ta' nullita' ta' l-att amministrattiv – fil-kaz in ezami r-revoka tac-certifikat tal-klassifika mahrug mill-Bord fuq imsemmi ;

“7. Illi kwindi jirrizulta car li r-rikorrenti kellhom u ghad ghandhom ghad-disposizzjoni taghhom mezz ordinarji effettivi u adegwati sabiex jissodisfaw it-talbiet taghhom u in vista ta' dan din l-Onorabbli Qorti ghandha tiddeklina milli tezercita s-setghat kostituzzjonali taghha a tenur ta' l-Artikolu 46 (2) tal-Kostituzzjoni ta' Malta u tal-proviso tas-subartikolu (2) tal-Artikolu 4 tal-Kap 319 tal-Ligijiet ta' Malta ;

8. Illi minghajr pregudizzju ghas-suespost ghal dak li ghandu x'jaqsam mal-mertu dwar l-allegat lezjoni ta' **l-Artikolu 39 tal-Kostituzzjoni** u tal-korrispondenti **Artikolu 6 tal-Konvenzjoni Ewropea Ghad-Drittijiet Fundamentali tal-Bniedem** qed jigi umilment sottomess li dawn l-Artikoli ma humix applikabbli ghall-kaz odjern stante :

“8.1 Illi l-Bord tal-Klassifika tal-Pellikoli u tal-Palk ma jistax jitqies bhala Qorti jew awtorita' gudikanti ai termini tal-precitati artikoli ;

“8.2 Illi fil-procedura tal-klassifikazzjoni ta' rapprezentazzjoni tejjatrali ma hemmx prezenti r-rekwizit tal-kontestazzjoni kif imsemmi fl-artikoli ; u

“8.3 Illi l-procedura tal-klassifikazzjoni redatta mill-Bord f'ebda punt ma tiddetermina la akkuza kriminali u lanqas xi dritt jew obbligu civili u ghalhekk anke minn dan l-aspett din il-procedura ma tistax titqies bhala li tinkwadra ruhha fid-dawl ta' dawn l-artikoli ;

“9. Illi sussidjarjament fi kwalunkwe kaz qed jigi umilment sottomess li ma kien hemm l-ebda ksur tad-dritt tas-smiegh xieraq kif ghandu jemergi waqt il-mori tal-kawza u dan kif wara kollox gja gie ampjament spjegat mill-esponenti fil-kontro-protest taghhom, kopja ta' liema gie fil-fatt anness mill-istess rikorrenti mar-rikors kostituzzjonali taghhom li gie mmarkat bhala Dok. L ;

“10. Illi bla pregudizzju ghas-suespost fir-rigward ta' l-allegat ksur ta' l-**Artikolu 41 tal-Kostituzzjoni u ta' l-Artikolu 10 tal-Konvenzjoni Ewropea Ghad-Drittijiet Fundamentali tal-Bniedem** qed jigi rilevat illi in massima legali d-dritt ta' liberta' ta' espressjoni m'huwiex wiehed assolut u anzi huwa soggett ghal diversi limitazzjonijiet fosthom meta l-limitazzjoni hija ragonevolment mehtiega fl-interess tal-moralita' u d-decenza pubblika ;

“11. Illi dan gie affermat f'bosta sentenzi tal-Qorti Ewropea tad-Drittijiet tal-Bniedem fosthom **Handyside vs. United Kingdom** deciza fis-7 ta' Dicembru 1976, **Muller and others vs. Switzerland** deciza fl-24 ta' Mejju 1988, **Otto-Preminger-Institut vs. Austria** tal-20 ta' Settembru 1994 u **Wingrove vs. United Kingdom** deciza fil-25 ta' Novembru 1996 ;

“12. Illi jekk wiehed japplika dawn il-principji ghal kaz odjern ghandu jirrizulta palezement li l-iscrypt tad-

dramm 'Stitching' mhux biss fih kliem oxxen u f'partijiet ukoll kliem li joffendi s-sentiment religjuz, izda fih kontenut dekadenti u depravat ta' perverzjonijiet moqzieza ta' natura sesswali u sadomasokista u ghal waqtiet anke pedofilijaci, b'referenza wkoll gratwita ghall-imsejkna vittmi tal-kamp ta' koncentrament ta' Auschwitz, li minghajr tlaqliq u minghajr habi ta' xejn jaqbez sew mhux biss il-limitu tad-decenza pubblika izda jbaxxi sahsitra d-dinjita' tal-bniedem ;

"13. Illi in vista ta' dan l-esponenti jissottomettu li tassew jezistu ragunijiet validi skond id-dettami tar-**regolament 64 tar-Regolamenti dwar il-Pellikoli u l-Palk** sabiex dina r-rapprezentazzjoni tejjatriali tigi pprojbita milli tittella' quddiem il-pubbliku u dan minghajr ma tkun saret l-ebda lezjoni ta' l-**Artikolu 41 tal-Kostituzzjoni u ta' l-Artikolu 10 tal-Konvenzjoni Ewropea Għad-Drittijiet Fundamentali tal-Bniedem** kif qed jippretendu r-rikorrenti ;

"14. Illi subordinatament u minghajr pregudizzju għall-premess bi twegiba għall-pretensjoni tar-rikorrenti dwar danni finanzjarji allegatament sofferti minnhom għandu jinghad li din hija kawza ta' indoli kostituzzjonali u b'hekk m'huwiex permess li r-rikorrenti jittramutawha f'azzjoni civili għar-rizarciment tad-danni u kwindi f'dawn il-proceduri r-rikorrenti ma jistghux jitolbu lil din l-Onorabbli Qorti biex tillikwida xi forma ta' kumpens għal allegat telf ta' natura damnum emergens jew lucrum cessans peress li dan jezorbita mill-kompetenza ta' din il-Qorti fil-kompetenza odjerna ;

"15. Illi minghajr pregudizzju għal dak indikat fil-paragrafu precedenti, għandu jigi ribadit li meta persuna tikkontendi li sofriet danni hija fl-obbligu li tagħmel kull ma tista' biex timmitiga d-danni allegatament sofferti minnha ;

"16. Illi mill-kwadru tal-fatti għandu jirrizulta li s-socjeta' rikorrenti mhux talli m'ghamlet xejn biex timmitiga d-danni, talli qabdet u minn rajha stampat fuljetti u harget reklami li jagħtu pubblicita' lir-rapprezentazzjoni tejjatriali fuq imsemmija minghajr ma huma kellhom fil-pusses

tagghom ic-certifikat ta' kategorija mahrug mill-Bord tal-Klassifika ;

“17. Illi addirittura bi ksur flagranti tal-ligijiet li jirregolaw ir-rapprezentazzjonijiet tejjatrali, ir-rikorrenti jew min minnhom kienu sahsitra abbuzivament u llegalment ikklassifikawir-rapprezentazzjoni tejjatrali fil-fuljetti li ccirkolaw bil-kategorija ‘18’ u dan minghajr ma kellhom l-awtorizzazzjoni minn qabel tal-Bord tal-Klassifika ;

“18. Illi ghalhekk bid-dovut rispettt lejn ir-rikorrenti, galadarba kienu huma li hadu d-decizjoni unilaterali li abbuzivament jippromwovu r-rapprezentazzjoni tejjatrali, dan ifisser li r-riperkussjonijiet ta' tali decizjoni ghandhom ibatuhom l-istess rikorrenti. Ghalhekk m'huwix lecitu li issa r-rikorrenti jixhtu l-htija fuq l-intimati ;

“19. Illi dejjem minghajr pregudizzju ghal dak fuq espost, fil-konfront ta' l-asserzjoni l-ohra avanzata mill-istess rikorrenti fir-rigward ta' telf ta' reputazzjoni allegatament imgarrba mir-rikorrenti, ghandu jigu rilevat mill-ewwel li jekk kien hemm xi forma remota ta' telf ta' reputazzjoni din qabel xejn tehtieg illi tigi provata u fit-tieni lok ma jidhirx li dan jista' jigi addebitat b'xi mod lill-esponenti, stante li kienu r-rikorrenti stess fuq decizjoni tagghom stess li ghogobhom jonfhu din il-kwistjoni fi proporzjon inawdit permezz ta' spazji fil-gazzetti lokali, artikoli u kummenti fuq l-Internet u anke permezz ta' konferenza gewwa lukanda prominenti f'Malta, u allura l-esponenti m'ghandhomx jinzammu responsabbli ghal tali decizjoni mehuda unilaterament u inutilment da parti ta' l-istess rikorrenti ;

“Ghaldaqstant fid-dawl tas-suespost umilment jitolbu lil din l-Onorabbli Qorti joghgobha tichad it-talbiet kollha tar-rikorrenti bl-ispejjez kontra tagghom.”

Rat is-sentenza moghtija mill-Prim' Awla tal-Qorti Civili fit-28 ta' Gunju 2010, li in forza taghha l-kawza giet deciza fis-sens li gej:

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“Tichad l-ewwel eccezzjoni preliminari fejn din tirrigwarda lill-intimata Teresa Friggieri bhala Chairman tal-Bord tal-Klassifika tal-Pellikoli u tal-Palk u lill-intimat Avukat Generali.

“Tilqa` l-istess eccezzjoni fejn din tirrigwarda l-intimata Teresa Friggieri fil-kwalita` personali taghha, l-intimat Onor. Prim Ministru u l-intimat Kummissarju tal-Pulizija.

“Tillibera l-intimati Teresa Friggieri fil-kwalita` personali taghha, l-intimat Onor. Prim Ministru u l-intimat Kummissarju tal-Pulizija mill-osservanza tal-gudizzju.

“Tichad it-tieni eccezzjoni preliminari fejn din tirrigwarda lir-rikorrenti Christopher Gatt, Maria Pia sive Pia Zammit, Mikhail Acopovich Basmadjian u Unifaun Theatre Productions Limited.

“Tilqa` l-istess eccezzjoni preliminari fejn din tirrigwarda lir-rikorrent Adrian Buckle.

“Tichad it-tielet u r-raba' eccezzjonijiet preliminari.

“Tilqa' l-eccezzjonijiet fil-mertu.

“Tichad it-talbiet tar-rikorrent.

“B'applikazzjoni tal-Art.223(3) tal-Kap.12 tal-Ligijiet ta' Malta, tordna li kull parti ghandha tbatl l-ispejjez taghha.”

Dik il-Qorti tat is-sentenza taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

Sintesi tal-Fatti

“F'Ottubru 2008, is-socjeta' rikorrenti Unifaun Theatre Productions Limited (minn issa `l quddiem tissejjah “Unifaun”) riedet ittella' produzzjoni teatrali tad-dramm bl-isem *Stitching*, miktub mill-awtur Skocciz Anthony Neilson. Wara li gabet il-permess ta' l-awtur sabiex id-dramm jittella' f'Malta, fit-23 ta' Dicembru 2008 Unifaun applikat mal-Bord ta' Klassifika tal-Pellikoli u tal-Palk

(minn issa `il quddiem jissejjah "il-Bord") sabiex tottjeni certifikat li jkopri l-produzzjoni tad-dramm f'Malta. Unifaun pprenotat it-teatru tal-Kavallier ta' San Gakbu fil-Belt Valletta ghat-13, 14, 15, 20, 21, 22, 28 ta' Frar u l-1 ta' Marzu 2009 u dahlet fi ftehim mal-istess teatru. Unifaun assumiet ukoll obligazzjonijiet kemm fil-konfront tar-rikorrent Christopher Gatt (minn issa 'l quddiem jissejjah "ir-rikorrent Gatt") li huwa d-direttur teatrali tal-produzzjoni kif ukoll fil-konfront tar-rikorrenti l-ohra Maria Pia sive Pia Zammit (minn issa 'l quddiem tissejjah "ir-rikorrenti Zammit") u Mikhail Acopovich Basmadjian (minn issa 'l quddiem jissejjah "ir-rikorrent Basmadjian") li kienu l-atturi tad-dramm.

"Fl-20 ta' Jannar 2009 inhareg certifikat mill-Film Stage and Classification Office fi hdan il-Pulizija ta' Malta fejn irrizulta li l-Bord kien iccertifika l-produzzjoni bhala 'Banned'.

"Fit-23 ta' Jannar 2009 u fil-25 ta' Jannar 2009, il-President tal-Bord u cioe` l-intimata Teresa Friggieri (minn issa 'l quddiem tissejjah "l-intimata Friggieri") ntalbet taghti r-ragunijiet ghal dik il-klassifikazzjoni. Fil-25 ta' Jannar 2009, Unifaun kitbet bl-avukat taghha lill-intimata Friggieri fejn talbet li d-decizjoni tal-Bord tigi rikonsiderata ai termini tal-Artikolu 47(1) tar-Regolamenti dwar il-Pellikoli u l-Palk.

"B'ittra tad-29 ta' Jannar 2009, l-avukat ta` Unifaun kien infurmat li r-rizultat tar-revizjoni kien li d-decizjoni originali kienet konfermata.

"B'ittra tal-31 ta' Jannar 2009, l-intimata Friggieri baghtet lill-avukat ta` Unifaun dokument datat 30 ta' Jannar 2009, li kien depozitat mal-Kummissarju tal-Pulizija, fejn kienu elenkati l-hames ragunijiet ghala l-Bord hareg il-klassifika 'banned'.

"Skond ir-rikorrenti, dawk ir-ragunijiet kienu skorretti. Huma sostnew li dik id-decizjoni kienet tmur kontra d-dritt fundamentali tal-liberta` tal-espressjoni kif sancit bl-Artikolu 41 tal-Kostituzzjoni ta' Malta u tal-Artikolu 10 tal-

Konvenzjoni Ewropea dwar id-Drittijiet tal-Bniedem, anke kunsidrat li l-iscript tad-dramm seta' jigi akkwistat u jinqara liberament f'Malta minn kulhadd.

“Ir-rikorrenti sostnew ukoll li d-decizjoni kienet tikkostitwixxi vjolazzjoni tad-dritt fundamentali tar-rikorrenti ghal smiegh xieraq bi ksur tal-Artikolu 39 tal-Kostituzzjoni u tal-Artikolu 6 tal-Konvenzjoni Ewropea, kunsidrat li d-decizjoni ma kenitx motivata, ma kellhomx l-opportunita' jaghmlu r-rapprezentazzjonijiet taghhom dwar il-kaz u lanqas ma kien hemm 'smiegh'.

“Ikkunsidrat –

“L-Eccezzjonijiet Preliminari

“L-intimati ressqu **erba' eccezzjonijiet preliminari**. Din il-Qorti se tiddeciedi dawn l-eccezzjonijiet l-ewwel.

“Legittimi Kontraditturi

“F'din l-ewwel eccezzjoni preliminari, l-intimati jikkontendu li **huma ikoll** ma jistghux jitqiesu bhala l-legittimi kontraditturi f'dawn il-proceduri ghaliex hadd minnhom m'ghandu l-poter u/jew il-funzjoni regolatorja li jezamina, jikklassifika u li jew f'dati cirkostanzi anke sahansitra jipprojbixxi jekk ikun il-kaz il-wiri ta' xi pellikola u/jew izomm rapprezentazzjoni tejjatrali milli tittella' fuq il-palk. Inoltre ma jirrizultax li qed tkun attakkata l-validita' jew il-kostituzzjonalita' ta' xi ligi jew regolament. Specifikament l-Onorevoli Prim Ministru u l-Avukat Generali tar-Repubblika ma jiffiguraw bl-ebda mod la direttament u lanqas indirettament mal-fattispecji tal-kaz. In kwantu ghall-Kummissarju tal-Pulizija l-uniku involviment tieghu f'dan il-kaz huwa c-cirkolazzjoni ta' kopja ta' l-applikazzjoni ghall-ezami tar-rapprezentazzjonijiet tejjatrali u l-eventwali hrug tac-certifikat tal-klassifikazzjoni skond kif gie deciz mill-Bord. In kwantu ghall-intimata Friggieri f'isimha proprio u fil-kwalita' taghha ta' Chairman tal-Bord, din agixxiet fil-veste ta' ufficcjat pubbliku u b'hekk m'hijjex soggettibbli ghal dawn il-proceduri. Ghalhekk l-intimati

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jghidu li ghandhom jigu liberati mill-osservanza tal-gudizzju.

“Din il-Qorti tghid hekk.

“In kwantu ghall-intimata Friggieri fil-kwalita` personali taghha, din il-Qorti tghid mill-ewwel li l-inkluzjoni taghha ma kellhiex issir ghaliex ma rrizulta minn ebda prova konkludenti li dik l-intimata personalment (mhux fil-vesti rappresentativa taghha) setghet tkun responsabbli anke *prima facie* ghall-allegati lezjonijiet lamentati mir-rikorrenti.

“In kwantu ghall-istess intimata din id-darba bhala Chairman tal-Bord din il-Qorti taghmel riferenza ghal-ligi li tirregola l-hatra taghha sabiex issir indagni tar-rwol, funzjonijiet u setghat taghha.

“Ir-Regolamenti tal-1937 (kif emendati) maghrufa bhala r-Regolamenti dwar il-Pellikoli u l-Palk jirregolaw *inter alia* l-klassifikazzjoni ta' pellikoli u xogholijiet teatrali destinati ghall-pubbliku.

“Ir-Regolamenti jahsbu ghall-hatra ta' bord imsejjah il-Bord tal-Klassifika tal-Pellikoli u tal-Palk, li jkun maghmul minn president (l-intimata Friggieri fil-prezent) u membri li l-ghadd taghhom ma jkunx inqas minn hamsa u mhux iktar minn hmistax. Il-hatra taghhom issir ghal sena mill-Ministru responsabbli ghall-Pulizija.

“Hija funzjoni tal-Bord li jikklassifika produzzjonijiet ta' pellikoli u tal-palk fuq il-bazi ta' linji direttivi li jigu abbozzati mill-Bord innifsu kif imsejsa fuq dawn il-kriterji li gejjin :

“(a) il-livelli ta' moralità, dicensa u mgieba tajba b'mod generali skond ma huma accettati minn adulti ragonevoli ;

“(b) il-mertu letterarju, artistiku jew edukattiv, jekk ikun hemm, tal-produzzjoni ;

“(c) ix-xorta generali tal-produzzjoni, inkluz jekk din tkunx wahda ta' xorta medika, legali jew xjentifika ;

“(d) il-persuni jew klassi ta’ persuni li tkun intiza ghalihom jew li x’aktarx jaraw il-produzzjoni.

“Ghalkemm fil-kumpless taghhom, ir-Regolamenti huma ndirizzati lejn l-ezami u l-klassifikazzjoni tal-pellikoli, u johlqu makkinarju legali ta’ appell minn decizjonijiet li jiehu l-ezaminaturi, bis-sahha tar-Reg.64(1) produzzjonijiet ta’ drammi u produzzjonijiet ohra tal-palk ikunu soggetti wkoll ghall-klassifika.

“Ir-Reg.45 jahseb ghall-mod kif isir l-ezami ghal skop ta’ klassifika. L-ezami jsir minn klassifikaturi li jridu jhejju rapport lill-Kummissarju tal-Pulizija fuq il-formula ta’ l-applikazzjoni. Jekk, wara li jkunu qiesu, fid-diskrezzjoni taghhom, l-moralità, d-decenza jew l-imgieba tajba pubblika, jew l-interess pubbliku, x-xoghol li ghalih tirreferi l-applikazzjoni jista` jew ma jghaddix ghall-wiri (kif gara fil-kaz tal-lum) jew ighaddi ghall-wiri b’xi partijiet maqtughin jew ighaddi ghall-wiri minghajr qtugh. Ix-xogholijiet li jghaddu ghall-wiri jinghataw klassifikazzjoni skond wahda minn dawn is-sitt kategoriji li gejgin -

“(i) ‘U’ - UNIVERSALI. Tajjed ghal kulhadd.

“(ii) ‘PG’ - GWIDA TAL-GENITURI. Xi xeni mhumiex tajbin ghat-tfal zghar u l-gwida tal-genituri jew ta’ min ihares it-tfal titqies mehtiega.

“(iii) ‘12’ - Tajjed biss ghal persuni li ghalqu t-tnax-il sena, u fuqhom.

“(iv) ‘14’ - Tajjed biss ghal persuni li ghalqu l-erbatax-il sena, u fuqhom.

“(v) ‘16’ - Tajjed biss ghal persuni li ghalqu s-sittax -il sena, u fuqhom.

“(vi) ‘18’ - Tajjed biss ghal persuni li ghalqu t-tmintax-il sena, u fuqhom.

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“Skond ir-rapport tal-klassifikaturi, il-Kummissarju tal-Pulizija johrog ic-certifikat.

“Ir-Reg.47 jahseb ghall-procedura ta' revizjoni tad-decizjoni tal-klassifikaturi inkluz f'sitwazzjoni fejn, bhal fil-kaz tal-lum, kien dikjarat li l-produzzjoni de qua ma kenitx tajba ghall-wiri f'ebda wahda mill-kategoriji fuq riferiti. L-applikant li jkun hassu aggravat bid-decizjoni ghandu ghaxart ijiem zmien mid-data tad-decizjoni li japplika bil-miktub lill-President tal-Bord ghal revizjoni ta' dik id-decizjoni. Kif appena jircievi t-talba, il-President tal-Bord jara li jerga` jsir ezami minn mill-inqas tliet klassifikaturi u d-decizjoni taghhom tkun finali. U dik id-decizjoni finali titqies li tkun ittiehdet mill-Bord kif johrog car anke mir-Reg.48.

“Dak kien l-istat tad-dritt meta sehh il-kaz mertu ta' din il-kawza.

“Dan qed jinghad ghaliex b'effett tal-Avviz Legali 335 tal-2009 li dahal fis-sehh fis-17 ta' April 2009 ir-Reg.47 kien emendat sabiex kienu introdotti tliet subincizi godda u cioe` is-7, 8 u 9 li taw lil kull persuna li thossha aggravata bir-rizultat tat-tieni ezami d-dritt li tmur quddiem it-Tribunal ta' Revizjoni Amministrattiva sabiex titlob ir-revizjoni ta' dik id-decizjoni.

“Fil-kuntest tal-premess, din il-Qorti tghid li ghalkemm ir-Regolamenti ma jghidux li l-President tal-Bord ghandu r-rappresentanza legali, jibqa` l-fatt li l-intimata Friggieri fil-vesti taghha ta' President hija legittima kontradittrici tar-rikorrenti jew min minnhom stante li kienet id-decizjoni tal-Bord li tippresjedi li wasslet biex saret din il-kawza.

“In kwantu ghall-Kummissarju tal-Pulizija, din il-Qorti tghid li dan mhux kompartecipi fid-decizjoni. Fil-materja tal-klassifikazzjoni, l-unika funzjoni li ghandu hija li skond ir-rapport tal-klassifikaturi huwa jaghti l-licenzja. Pero` ma ghandu l-ebda ezercizzju ta' diskrezzjoni ohra f'dak ir-rigward. Ghalhekk fil-kaz tal-lum din il-Qorti ma tistax tqis lill-Kummissarju tal-Pulizija bhala r-rapprezentant tal-Gvern ghaliex mhuwiex *il-kap tad-dipartiment tal-gvern li*

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jkun inkarigat fil-materja in kwistjoni ghall-fini tal-ewwel parti tal-Art.181B(1) tal-Kap.12.

“In kwantu ghall-Avukat Generali, din il-Qorti tghid li dan kien citat tajjed f'din il-procedura in vista tas-subinciz 2 tal-Art.181B tal-Kap.12 li jaqra hekk -

“*L-Avukat Generali jirrapprezenta lill-Gvern f'dawk l-atti u l-azzjonijiet gudizzjarji li minhabba n-natura tat-talba ma jkunux jistghu jigi diretti kontra xi wiehed jew aktar mill-kapijiet tad-dipartimenti l-ohra tal-Gvern.*”

“Ladarba l-intimata Friggieri bhala President tal-Bord ma tikkwalifikax bhala *kap ta' dipartiment* ghall-fini tal-Art.181B tal-Kap.12, ir-rappresentanza tal-Gvern ghandha tkun tal-Avukat Generali.

“Accettat li l-intimat Avukat Generali huwa legittimu kontradittur ghax jirrapprezenta l-interess tal-Gvern, din il-Qorti taqbel li l-Onor. Prim` Ministru m'ghandux ikollu *locus standi* f'din il-kawza stante li l-azzjoni tar-rikorrenti mhijiex intiza sabiex tirrevoka ligi jew regolament.

“In vista tal-premess –

“Tichad l-ewwel eccezzjoni preliminari fejn din tirrigwarda lill-intimata Teresa Friggieri bhala Chairman tal-Bord tal-Klassifika tal-Pellikoli u tal-Palk u lill-intimat Avukat Generali,

“Tilqa` l-istess eccezzjoni fejn din tirrigwarda l-intimata Teresa Friggieri fil-kwalita` personali taghha, l-intimat Onor. Prim Ministru u l-intimat Kummissarju tal-Pulizija.

“Tillibera l-intimati Teresa Friggieri fil-kwalita` personali taghha, l-intimat Onor. Prim Ministru u l-intimat Kummissarju tal-Pulizija mill-osservanza tal-gudizzju.

“Ikkunsidrat -

“Karenza ta’ Interess Guridiku

“Fit-tieni eccezzjoni preliminari taghhom, l-intimati jallegaw li mhux ir-rikorrenti kollha ghandhom l-interess rikjest mil-ligi sabiex jintavolaw din l-azzjoni. L-eccezzjoni taghhom f’dan is-sens hija specifika u tghid hekk -

“‘‘‘Illi in vena preliminari wkoll l-esponenti qed jeccepixxu n-nuqqas ta’ interess guridiku tar-rikorrenti, Adrian Buckle, Christopher Gatt, Maria Pia sive Pia Zammit u Mikhail Acopovich Basmadijan stante illi d-decizjoni tal-Bord tal-Klassifikazzjoni li pprojbiet ir-rapprezentazzjoni teatrali tad-dramm ‘Stitching’ zgur li ma tirrigwardahomx fil-kapacita’ personali taghhom u semmai tirrigwarda biss lir-rikorrenti l-ohra, is-socjeta’ Unifaun Theatre Productions Limited.’”

“Din il-Qorti tghid hekk.

“Huwa principju ewlieni tad-dritt li min jipproponi kawza, irid ikollu l-interess. Dan irid ikun (a) **guridiku**, jigifieri d-domanda jrid ikun fiha ipotesi ta’ l-ezistenza ta’ dritt u l-vjolazzjoni tieghu ; (b) **dirett u personali** : fis-sens li jkun dirett meta jezisti fil-kontestazzjoni jew fil-konsegwenzi taghha, u jkun personali fis-sens li jirrigwarda l-attur, hlief ghall-azzjoni popolari (li mhix il-kaz tal-lum) ; (c) **attwali** fis-sens li jrid johrog minn stat attwali ta’ vjolazzjoni ta’ dritt, jigifieri l-vjolazzjoni attwali tal-ligi trid tikkonsisti f’kundizzjoni pozittiva jew negattiva kontrarja ghall-godiment ta’ dirett legalment appartenenti jew speattanti lid-detentur.’ (**Muscat vs Buttigieg: Vol. LXXIV.II.481**).

“Fis-sentenza taghha tat-28 ta’ Novembru 2003 fil-kawza **“Formosa Gauci vs Lanfanco”** il-Qorti tal-Appell elenkat l-principji li jikkwalifikaw dan l-interess -

“(i) l-interess (guridiku) mehtieg irid ikun wiehed dirett, legittimu, kif ukoll attwali ;

“(ii) l-istat attwali ta’ ksur ta’ jedd jikkonsisti f’kundizzjoni pozittiva jew negattiva li xxejjen jew

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tinnewtralizza dritt li jkun jappartjeni lid-detentur jew lil dak li lili jkun misthoqq ;

“iii) I-interess guridiku fl-attur huwa dak li l-imharrek jirrifjuta li jaghraf il-jedd ta' l-istess attur u dan billi kull persuna ghandha d-dritt titlob li, fil-konfront taghha, isir haqq jew tigi msewwija ingustizzja li tkun giet maghmula kontriha ;

“iv) I-interess guridiku irid ikun iwassal ghal rizultat ta' utilita' u vantagg ghal min irid jezercita l-jedd. Jekk l-azzjoni ma tistax twassal ghal tali rizultat ghal min jibdiha, dik l-azzjoni ma tistax tregi;

“v) I-interess guridiku jrid jibqa' jissussisti tul il-hajja kollha ta' l-azzjoni u mhux biss fil-bidu taghha. Jekk l-interess jintemm, il-konsegwenza mmedjata tkun li l-imharrek jinheles milli jibqa' fil-kawza;

“vi) I-interess ta' l-attur ghandu jkun jidher mill-att tac-citazzjoni nnifisha. Ghalkemm il-mottiv ta' l-interess mhux mehtieg li jkun imsemmi fic-citazzjoni, dan ghandu jrrizulta mill-provi jekk kemm-il darba jigi kkuntrastat ;

“vii) fil-prattika gudizzjarja, wiehed jista' jippromwovi kawza biex jikseb dikjarazzjoni preordinata ghal azzjoni definittiva u ahharija, minkejja li din ma tkunx giet inkluzja fl-azzjoni ta' accertament. Madankollu, f'kaz bhal dan, il-Qorti trid tkun sodisfatta li jkun hemm l-interess mehtieg, anki preordinat ghall-kawza l-ohra, u li d-dikjarazzjoni hekk miksuba tkun tiffirma l-bazi tal-kawza l-ohra li tista' ssir aktar 'il quddiem ;

“viii) I-interess mhux bilfors ikun wiehed li jigi kkwantifikat f'somma determinata ta' flus jew gid, imma jista' jkun imsejjes biex ihares jew jaghti gharfien ghal jedd morali jew soggettiv, imbasta l-jedd invokat ma jkunx wiehed ipotetiku ;

“ix) jekk azzjoni, ghalkemm tkun imsejsa fuq jedd ta' l-attur, tkun mahsuba biss biex tirreka hsara lill-imharrek bla ebda vantagg utli lill-attur tali azzjoni titqies

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bhala wahda llegali – azzjoni maghrufa fid-duttrina bhala wahda *acta ad aemulationem* – u titqies li fiha jkun jonqos l-interess guridiku mehtieg.

“Fis-sentenza **“Fenech Adami vs Abela et”** (A.C. – 6 ta’ Ottubru 1999 – Vol. LXXXIII.II.331) il-Qorti ta’ l-Appell sostniet -

“Illi d-definizzjoni accettata fil-gurisprudenza nostrana ta’ interess guridiku hija dik tal-Mortara li jghid li l-interess guridiku huwa ‘l’utilita’ finale della domanda giudiziale nel tema dell’asserita esistenza o violazione del diritto’. Illi ... huwa rekvizit essenzjali li jkun hemm dritt legali li jkun il-bazi li bih l-attur ikun jista’ jipromwovi u jitlob l-accertament tieghu permezz ta’ l-awtorita’ gudizzjarja”.

“Fis-sentenza ta’ din il-Qorti tal-15 ta’ Lulju 1952 (Vol.36.II.493), fil-kawza fl-ismijiet **“Baldacchino vs Bellizzi et”** inghad li -

“... min jistitwixxi azzjoni jrid bilfors ikollu xi dritt – ‘l’azione civile non puo’ essere promossa che per far valere un diritto, e da colui a cui il diritto spetti. Mancando l’uno e l’altro di questi requisiti, l’azione e’ infondata ed inammissibile’.”

“Hekk ukoll fis-sentenza **“Eminyan vs Mousu’ pro et noe et”** (A.C. 28 ta’ Frar 1997 - Vol. LXXI.II.429) u fis-sentenza **“Scerri et vs Farrugia et”** (P.A. – RCP - 1 ta’ Ottubru 2002) kien affermat *“li l-interess guridiku jrid ikun reali u attwali u ghandu jiskaturixxi minn vjolazzjoni jew theddida ta’ vjolazzjoni ta’ xi dritt li jappartjeni lill-attur u f’dan is-sens allura jrid ukoll ikun personali. Irid jigi stabbilit in-ness guridiku bejn l-agir abbużiv u llegali allegatament kommess mill-konvenut u d-danni jew almenu l-pregudizzju allegatament subit mill-attur konsegwenzjali ghal tali agir”.*

“Fil-kawza **“Persiano vs Il-Kummissarju tal-Pulizija”** (P.A. – JRM - 18 ta’ Jannar 2001), il-Qorti qalet hekk -

“Illi ghal bosta snin il-Qrati taghna fissru li l-elementi mehtiega biex isawru interess ta’ l-attur f’kawza huma tlieta, u jigifieri li l-interess irid ikun guridiku, li l-interess irid ikun dirett u personali u li dak l-interess ikun attwali. B’ ta’ l-ewwel, wiehed jifhem li dak l-interess ghandu jkollu mqar iz-zerriegha ta’ l-ezistenza ta’ jedd u l-htiega li tilqa’ ghal kull attentat ta’ ksur tieghu minn haddiehor. Dan l-interess m’hemmx ghalfejn ikun jissarraf fi flus jew f’valur ekonomiku [ara per eżempju, Qorti ta’ l-Appell fil-kawza fl-ismijiet “Falzon Sant Manduca vs Weale”, maqtugha fid-9 ta’ Jannar 1959, Kollezz. Vol XLIII.I.11”] Illi minbarra dawn l-elementi, gie m’fisser ukoll li biex wiehed ikollu interess li jiftah kawza, dak l-interess (jew ahjar, il-motiv) tat-talba ghandu jkun konkret u jezisti fil-konfront ta’ dak li kontra tieghu t-talba ssir [ara, per eżempju, sentenza ta’ din il-Qorti (PASP) moghtija fit-13 ta’ Marzu 1992, fil-kawza fl-ismijiet “Francis Tonna vs Vincent Grixti”, Kollezz. Vol LXXV1.III.592].”

“Fuq l-iskorta ta’ din il-gurisprudenza, u sentenzi ohra li jsegwu l-istess hsieb, din il-Qorti tghid li l-interess guridiku huwa essenzjalment distint mid-dritt. Huwa propju ghalhekk li l-interess mhux biss irid ikun dirett u attwali, izda anki legittimu, cioe’ konformi mid-dritt ta’ min ikun fil-kawza.

“Il-Mattirolo (Vol. I. p.50) f’dan ir-rigward ifisser li “l’azione compete soltanto a tutela dei diritti ; l-interesse e’ scompagnato dal diritto, non vi ha azione, non giudizio possibile ; cosi’ che, per istituire un giudizio, non basta che un fatt d’altri pregiudichi i nostri interessi, ma occorre che questo fatto arrechi un danno giuridico, che non esiste se non e’ ‘injuria datum’ se cioe’ non e’ prodotto da chi, esorbitando dalla sfera del diritto proprio, offende un nostro diritto”.

“Il-ligi qieghda hemm biex thares dak l-interess li ghandu dritt bhala bazi tieghu.

“Huwa propju ghalhekk li jinghad li l-interess huwa l-mizura ta’ l-azzjoni (“Il mezzo di tutelare un diritto leso o immediatamente minacciato non puo’ essere esercitata

senza un interesse, essendo assiomatico che l'interesse e' la misura delle azioni ed e' il motivo che giustifica l'accesso alle aule di giustizia" - Vol XXV.I.506).

“L-interest irid ikun guridiku fis-sens li dan l-interest irid ikun rikonoxxut bil-ligi u l-azzjoni trid tkun preordinata ghall-otteniment ta' rimedju protett bil-ligi (**Darmenia vs Borg Olivier**” – Qorti tal-Appell – 18 ta' Frar 1966).

“*“Meta l-azzjoni ma tkunx kapaci twassal ghal rizultat utli ghal min jipproponiha minhabba fatt sopravvenut ghall-istituzzjoni tal-kawza li jezawrixi jew jestingwi l-interest, dik l-azzjoni ma tistax tregi.”* (**Amato Gauci et vs Zammit**” – Qorti tal-Appell Inferjuri – 19 ta' Meju 2004).

“L-insenjament tal-Mortara (*l'utilita' finale della domanda giudiziale sul tema dell'asserita esistenza e violazione di un diritto* – Vol.II Pg.588) ikompli jsostni r-rekwizit ta' l-interest guridiku kostitwit mill-attwalita' tal-interest.

“Kif kien deciz mill-Qorti tal-Appell fil-kawzi **Flynn vs Zammit**” (22 ta' Marzu 1992), **Brockdorff vs Pace Balzan**” (8 ta' April 1899), **Xuereb vs Petrococchino**” (4 ta' Dicembru 1944) **Zammit vs Formosa et**” (11 ta' Gunju 1948), mill-Qorti Kostituzzjonali fil-kawzi **Cacopardo vs Ministru tax-Xogholijiet et**” (25 ta' Marzu 1985) u minn din il-Qorti fil-kawzi **Strickland vs Caruana Gatto**” (16 ta' Dicembru 1932) u **Baluci vs Vella**” (12 ta' Marzu 1946), min jipproponi kawza ghandu mhux biss ikollu interest fl-ezitu taghha, imma dan l-interest ghandu jkun jissussiti fil-konfront tal-konvenut.

“In kwantu ghall-mertu tal-eccezzjoni, din il-Qorti tghid li rrizulta li l-produzzjoni tad-dramm kienet tar-rikorrenti Unifaun. Kienet hi li dahlet fi ftehim mal-awtur tad-dramm sabiex dan jittella` f'Malta. Kienet hi li applikat mal-awtoritajiet ghac-certifikazzjoni. Kienet hi sborsat l-ispejjez kollha sabiex id-dramm jittella` u sabiex tinghata pubblicita`. Fuq kollox kienet hi li assumiet kull obligazzjoni fil-konfront tar-rikorrenti l-ohra. Mela, anke in relazzjoni mat-talbiet, certament li r-rikorrenti Unifaun kellha interest tressaq din l-istanza.

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“Issa fil-kaz ta’ Adrian Buckle, direttur ta’ l-kumpannija rikorrenti, ma rrizultax mill-provi li dan ghandu xi interess differenti minn dak tal-kumpannija rikorrenti u ghalhekk tghid li fil-kaz tieghu tirrizulta karenza ta` interess.

“Ma jstax jinghad l-istess fir-rigward tal-tliet rikorrenti l-ohra u cioe` Christopher Gatt, direttur teatrali, martu Maria Pia sive` Pia Zammit li ghalkemm direttur ta’ l-kumpannija rikorrenti kienet l-attrici tad-dramm, flimkien ma` Mikhail Acopovich Basmadjian li kien l-attur l-iehor tad-dramm, ghaliex, specifikament fil-kaz taghhom, dak li qed jippretendu huwa ksur tad-dritt taghhom ghal-liberta` tal-espressjoni. Dan id-dritt jiehu diversi ghamliet u forom fosthom it-teatru. Id-direttur artistiku u l-atturi huma persuni li qeghdin jaghtu hajja lill-*script* tad-dramm bir-rapprezentazzjoni artistika taghhom. Huma ghandhom interess iressqu `l quddiem il-pretensjoni taghhom f`din il-kawza ghaliex fil-kaz taghhom l-utilita` jew vantagg jinstab fil-fatt li jekk jinstab li kien hemm ksur tad-dritt taghhom ghal-liberta` tal-espressjoni, dan jista` jwassal sabiex id-dramm jigi rapprezentat. Ghalhekk anke fil-kaz taghhom, l-interess huwa dirett, legittimu, kif ukoll attwali. Jekk forsi ghad-differenza tal-kumpannija rikorrenti mhux necessarjament l-interess jista` jigi kkwantifikat fi flus, fl-istess waqt il-jedd taghhom huwa morali fis-sens wiesgha tal-kelma u mhux ipotetiku.

“In vista tal-premess –

“Tichad it-tieni eccezzjoni preliminari fejn din tirrigwarda lir-rikorrenti Christopher Gatt, Maria Pia sive Pia Zammit, Mikhail Acopovich Basmadjian u Unifaun Theatre Productions Limited.

“Tilqa` l-istess eccezzjoni preliminari fejn din tirrigwarda lir-rikorrent Adrian Buckle.

“Ikkunsidrat –

“Rimedji Ordinarji

“It-tielet eccezzjoni preliminari tal-intimati kienet fis-sens li r-rikorrenti, qabel ma ghazlu li jintavolaw dan ir-rikors kostituzzjonali li per se huwa strettament di natura straordinarja, naqsu milli jezawrixxu r-rimedji ordinarji kollha li taghtihom il-ligi.

“Din il-Qorti tghid hekk.

“L-intimati qeghdin jistiednu lill-Qorti biex ma tismax din il-kawza ghaliex iqisu li r-rikorrenti kellhom rimedju iehor taht il-ligi ordinarja u ma nqdewx bih. Fl-istess waqt ma specifikawx x'kellu jkun dan ir-rimedju ordinarju. L-ezistenza ta' rimedju iehor lill-parti li tressaq azzjoni ghal allegat ksur ta' jedd fundamentali taht il-Kostituzzjoni jew taht il-Konvenzjoni ghandha tirrizulta lill-Qorti bhala **stat ta' fatt attwali u objettiv**, u d-diskrezzjoni ta' l-Qorti li ma tezercitax is-setghat taghha “jekk tqis li jkun desiderabbli li hekk taghmel” minhabba l-ezistenza ta' rimedju iehor hija decizjoni fuq tali **stat ta' fatt**. Huwa biss meta jew jekk jirrizulta lill-Qorti bhala fatt li jezisti rimedju iehor **effettiv** lir-rikorrent li l-Qorti tista' tiddelibera li ma tezercitax is-setghat taghha li tisma' l-ilment imressaq quddiemha. F'kaz li ma jirrizultax li kien hemm rimedju iehor xieraq, il-Qorti trid tiehu konjizzjoni tal-ilment. Izda anke f'kaz li jirrizulta li kien hemm rimedju iehor, il-Qorti xorta wahda jibqaghlha s-setgha li tiddeciedi li ma ccedix l-ezercizzju tas-setgha taghha.

“Id-diskrezzjoni li l-Qorti ghandha f'dan ir-rigward trid titwettaq b'mod korrett u tkun mmirata lejn l-iskop tal-legislatur, u cioe` li filwaqt li ma jithallewx isiru kawzi kostituzzjonali bla bzonni, fl-istess waqt persuna ma tinzammx milli tipprocedi b'azzjoni bhal din meta jkun jidher li l-kaz huwa wiehed serju li jista` jimplika l-ksur ta' jedd fundamentali. Ghalhekk din id-diskrezzjoni ghandha tkun uzata dejjem fl-ahjar interess tal-amministrazzjoni tal-gustizzja sabiex minn naha wahda, il-Qorti ta' indoli kostituzzjonali ma jkunux rinfaccjati b'kawzi li messhom jew setghu tressqu quddiem Qorti ohrain kompetenti jew li dwarhom messhom jew setghu jfittxu rimedji ohrain effettivi, u min-naha l-ohra sabiex persuna ma tkunx

imcahhda mir-rimedji li ghandha jedd tfittex taht il-Kostituzzjoni jew taht il-Konvenzjoni.

“L-esistenza ta’ rimedju iehor ghandha titqies fil-kuntest tal-ksur tad-dritt fundamentali li jkun qed jigi allegat li nkiser. Ghandu jkun rimedju accessibbli, xieraq, effettiv u adegwat biex jindirizza l-ksur. M’hemmx ghalfejn li, biex jitqies bhala effettiv, ir-rimedju jintwera bhala wiehed li sejjer jaghti lir-rikorrent success garantit. Huwa bizzejjed li jintwera li jkun wiehed li jista’ jigi segwit b’mod prattiku, effettiv u effikaci.

“Diversi kienu s-sentenzi moghtija mill-Qorti Kostituzzjonali fejn kien determinati l-principji li ghandhom jigu segwiti minn Qorti biex tqis jekk huwiex minnu li r-rikorrent kellu ghad-dispozizzjoni tieghu rimedju alternattiv effettiv.

“Fost dawn il-principji, hemm li –

“(a) Meta jidher car li jezistu mezzi ordinarji disponibbli biex jikseb rimedju ghall-ilment tieghu, ir-rikorrent ghandu jirrikorri ghal dawk il-mezzi, qabel ma jirrikorri ghar-rimedju kostituzzjonali, u huwa biss wara li jkun fittex dawk il-mezzi jew wara li jidher li dawk il-mezzi ma jkunux effettivament disponibbli li ghandu jintuza r-rimedju kostituzzjonali.

“(b) Ghandha torbot id-diskrezzjoni tal-Qorti biex tqis jekk ghandhiex twettaq is-setghat taghha li tisma’ kawza ta’ natura kostituzzjonali, sakemm ma tingiebx xi raguni serja u gravi ta’ illegalita’, ingustizzja jew zball manifest fl-uzu taghha.

“(c) Ma hemm l-ebda kriterju stabbilit minn qabel dwar l-uzu ta’ din id-diskrezzjoni, billi kull kaz irid jitqies fuq il-fatti u c-cirkostanzi tieghu.

“(d) In-nuqqas wahdu ta’ tehid ta’ mezzi ordinarji mir-rikorrent mhuwiex raguni bizzejjed biex Qorti ta’ xejra kostituzzjonali tiddeciedi li ma tuzax is-setghat taghha li tisma’ l-ilment, jekk jintwera li l-imsemmija mezzi ma kinux tajbin biex jaghtu rimedju shih lir-rikorrent.

“(e) In-nuqqas ta’ tehid ta’ rimedju ordinarju – ukoll jekk seta’ kien ghal kollox effettiv biex jindirizza l-ilment tar-rikorrent - minhabba l-imgieba ta’ haddiehor m’ghandux ikun raguni biex il-Qorti ma tezercitax is-setghat taghha li tisma’ l-ilment kostituzzjonali tar-rikorrent.

“(f) L-ezercizzju minn Qorti (tal-ewwel grad) tad-diskrezzjoni taghha bla ma tistharreg il-materja necessarja li fuqha tali diskrezzjoni ghandha titwettag, jaghti lil Qorti tat-tieni grad is-setgha li twarrab dik id-diskrezzjoni.

“(g) Meta r-rimedju jaqa’ fil-kompetenza ta’ organu iehor jew meta s-smigh tal-ilment tar-rikorrent sejjer iwassal biex l-indagni gudizzjarja u l-process l-iehor tas-smigh tar-rimedju ordinarju jkunu duplikazzjoni ta’ xulxin, il-Qorti kostituzzjonali ghandha ttendi lejn ir-rifjut li tuza s-setghat taghha kostituzzjonali, sakemm l-indagni gudizzjarja tal-kaz ma tkunx, min-natura taghha, ixxaqleb izjed lejn kwistjoni kostituzzjonali.

“Fuq kollox, l-uzu tad-diskrezzjoni ghandha tigi ezercitata bi prudenza, u b’mod li fejn jidher li hemm ksur serju ta’ drittijiet fundamentali jew anke fejn sejjer ikun hemm ksur ta’ dawk id-drittijiet, allura l-Qorti ghandha xxaqleb lejn it-twettag ta’ dawk is-setghat.

“Ghall-konsiderazzjonijiet premissi, din il-Qorti ssib il-konfort ta’ dawn is-sentenzi : Qorti Kostituzzjoni - 31.5.1999 – **“Zahra vs Awtorita’ tal-Ippjanar”** (Kollez. Vol:LXXXIII.i.179) ; Qorti Kostituzzjonali - 27.2.2003 – **“Sammut vs Awtorita’ tal-Ippjanar et”** ; Qorti Kostituzzjonali - 5.4.1991 – **“Vella vs Kummissarju tal-Pulizija et”** (Kollez. Vol:LXXV.i.106) ; Qorti Kostituzzjonali - 7.3.1994 – **“Vella vs Bannister et”** (Kollez. Vol: LXXVIII.i.48) ; Qorti Kostituzzjonali -12.12.2002 – **“Visual & Sound Communications Ltd. vs Il-Kummissarju tal-Pulizija et”** ; Qorti Kostituzzjonali – 14.5.2004 – **“Axiaq vs Awtorita’ Dwar it-Trasport Pubbliku”**; Qorti Kostituzzjonali – 31.10.2003 – **“Mediterranean Film Studios Limited vs Korporazzjoni ghall-Izvilupp ta’**

Malta et”; Qorti Kostituzzjonali – 9.10.2001 – **McKay vs Kummissarju tal-Pulizija et**”; Qorti Kostituzzjonali – 25.6.1999 – **Spiteri vs Chairman Awtorita’ tal-Ippjanar et**” (Kollez. Vol: LXXXIII.i.201) ; Qorti Kostituzzjonali – 7.4.2000 – **Adel Mokhtar Al Sakalli v. Onor. Prim Ministru et**”; Qorti Kostituzzjonali – 31.5.2000 – **Rapa v. Chairman ta’ l-Awtorita’ ta’ l-Ippjanar et**”; Qorti Kostituzzjonali – 16.1.2006 – **Olena Tretyak v. Direttur tac-Cittadinanza u Expatriate Affairs**”; Qorti Kostituzzjonali – 6.1.2006 – **Melita Cable p.l.c. v. L-Avukat Generali et**”; Qorti Kostituzzjonali – 13.4.2007 – **Green et v. Avukat Generali et**”; Qorti Kostituzzjonali – 7.9.2007 – **Chircop v. Il-Kummissarju tal-Pulizija et**”; Qorti Kostituzzjonali – 27.2.2009 – **Xuereb et v. Direttur tax-Xogholijiet et**”; Qorti Kostituzzjonali – 15.1.1991 – **Balzan v. Prim Ministru et**”; Qorti Kostituzzjonali – 14.6.1995 – **Briffa v. Kummissarju tal-Pulizija**”.

“Meta tapplika l-premess għall-fatti u cirkostanzi tal-kaz tal-lum, din il-Qorti tghid, minghajr esitazzjoni, li għar-rikors kostituzzjonali u konvenzjonali odjern, l-intimati ma jistghux jinvokaw l-ecezzjoni li r-rikorrenti ma ezawrewx ir-rimedji ordinarji li kellhom. Fuq l-iskorta tal-fatti akkwiziti, ma jirrizultax car u b’mod inekwivoku x’rimedju ordinarju kien hemm disponibbli lir-rikorrenti. Fis-sentenza fil-kawza **Cyprus vs Turkey**” (2001/1V), il-Qorti Ewropea ta’ Strasbourg fil-kaz Cyprus vs Turkey qalet hekk –

““The Court further recalls that, in the area of the exhaustion of domestic remedies, there is a distribution of the burden of proof. In the context of the instant case, it is incumbent on the respondent Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the aggrieved individuals’ complaints and offered reasonable prospects of success.”

“Fil-kaz tal-lum, irrizulta li fil-kuntest tal-ligi dwar il-klassifikazzjoni kif kienet fiz-zmien meta sehh il-kaz, ir-rikorrenti raw l-appell tagħhom mid-decizjoni tal-Bord jigi

michud ghal ragunijiet, u hawn l-importanti, li r-rikorrenti jqisu bhala lesivi ghad-drittijiet fundamentali citati minnhom. Rimedju effettiv, reali u effikaci li jindirizzaw l-lanjanza taghhom, ir-rikorrenti ma kellhomx ghajr li jirrikorru lejn din il-Qorti.

“Il-Qorti tqis li l-qofol tal-kwistjonijiet legali mqanqla f'din il-kawza ma jistghu jkunu **effettivament** mistharrga quddiem l-ebda Qorti ohra jekk mhux din. Fil-fehma ta' din il-Qorti, l-aspetti ta' dritt li jqanqal ir-rikors promotur jesigu li wiehed idur lejn din il-Qorti ghall-istharrig u d-definizzjoni taghhom. Din tal-lum mhijiex kawza ghal risarciment ta' danni allegatament subiti mir-rikorrenti. Ir-rimedju nvokat jinvesti *in pieno* l-allegat ksur lamentat u ghalhekk ghandha tkun din il-Qorti li tittratta l-materja fil-komplessita` taghha.

“In vista tal-premess -

“Tichad it-tielet eccezzjoni preliminari.

“Ikkunsidrat –

“L-Art.469A tal-Kap.12

“Din ir-raba` eccezzjoni preliminari tal-intimati hija fis-sens li ladarba bit-talbiet taghhom ir-rikorrenti mhux qed jattakkaw xi disposizzjoni tal-ligi jew xi regolament naxxenti minn xi ligi sussidjarja, izda qed jattakkaw decizjoni purament amministrattiva fir-rigward ta' l-klassifikazzjoni tad-dramm in kwistjoni, allura l-procedura li kellhom isegwu kellha tkun dik ta' rikors a bazi ta' l-Artikolu 469A tal-Kap 12, u kif ukoll taht id-disposizzjonijiet recentement introdotti bis-sahha tal-Kap 490. Iz-zewg rimedji jistghu jwasslu anke ghal dikjarazzjoni ta' nullita' ta' l-att amministrattiv u cioe` ir-revoka tac-certifikat tal-klassifika mahrug mill-Bord fuq imsemmi. Kwindi r-rikorrenti kellhom u ghad ghandhom mezzi ordinarji effettivi u adegwati sabiex jissodisfaw it-talbiet taghhom. Ghalhekk, skond l-intimati, din il-Qorti ghandha tiddeklina milli tezercita s-setghat kostituzzjonali taghha skond l-

Artikolu 46 (2) tal-Kostituzzjoni u tal-proviso tas-subartikolu (2) tal-Artikolu 4 tal-Kap 319.

“Din il-Qorti tghid hekk.

“Dak li din il-Qorti diga` rrilevat fil-kaz tat-tielet eccezzjoni preliminari japplika wkoll ghall-konsiderazzjoni ta' din ir-raba` eccezzjoni preliminari, u ghalhekk a skans ta' repetizzjoni taghmel riferenza ghal dawk ir-rilievi. Pero` biz-zieda ta' dan li gej. **In linea generali**, rikors kostituzzjonali huwa, min-natura tieghu, specjali u straordinarju, u ghalhekk meta s-sistema ordinarja ta' *redress* tipprovdi mod ta' soluzzjoni effettiva, dik is-sistema ordinarja trid tigi uzata u adottata qabel l-individwu jakkuza lill-Gvern, jew l-amministrazzjoni pubblika, bi ksur tad-drittijiet fundamentali tieghu.

“Il-gurisprudenza tal-Qrati taghna f'tentattiv sabiex tirrikoncilja l-inciz (1)(a) ta' l-Art. 469A tal-Kap. 12 u ta' l-Art.46 tal-Kostituzzjoni fejn si tratta ta' allegati lezjonijiet tad-drittijiet fundamentali, jidher li tiffavorixxi interpretazzjoni bazata fuq **l-effettivita' tar-rimedju** fis-sens illi rikors kostituzzjonali kellu jkun accessibbli f'dawk il-kazijiet fejn ir-rimedju effettiv ghal-lezjoni subita ma setax jinghata taht l-Art.469A tal-Kap.12.

“Fil-kaz in ezami anke kieku din il-Qorti kellha tghid li r-rikorrenti kellhom rimedju taht l-Art. 469A tal-Kap. 12 jew taht il-Kap.490 tal-Ligijiet ta' Malta sabiex jimpunjaw id-decizjoni tal-Bord bhala decizjoni amministrattiva hazina, li rrizulta fir-realta` li mhux il-kaz, jibqa' l-fatt li r-rikors tal-lum mhux unikament bazat fuq allegata vjolazzjoni tal-Kostituzzjoni [b'riferenza ghall-fini tal-Art.469A(1)(a)] izda tinvolti wkoll drittijiet ohra protetti *anke* mill-Konvenzjoni.

“Il-principju ghandu jibqa` dejjem li l-kompetenza kostituzzjonali u l-kompetenza civili ghandhom jibqghu separati u distinti anke ghaliex ir-rikors taht kull kompetenza hu regolat bi proceduri appositi b'finalita' ta' rimedju mhux dejjem identiku. Ir-rimedju taht l-Artikolu 469A tal-Kap.12 taht certu aspetti hu wiehed limitat. Mill-banda l-ohra, ir-rimedju Kostituzzjonali b'ebda mod ma

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jxekkel lill-Qorti fl-ghazla tar-rimedju li, jekk ikun il-kaz, ikun jidhrilha xieraq li ghandha takkorda. Ghalhekk l-element tar-**rimedju effettiv** ghandu jipprevali dejjem u ghandu jkun il-konsiderazzjoni ewlenija.

“Is-sens ta’ dan kollu huwa li ghalkemm huwa minnu li ghandha s-setgha li tiddeklina li tezercita s-setghat kemm skond il-Kostituzzjoni kif ukoll skond il-Konvenzjoni, din il-Qorti tirribadixxi ghal darb’ohra li fejn ikun jidher li jista’ jkun hemm kaz ta’ vjolazzjoni ta’ drittijiet fundamentali, l-individwu ma ghandux jigi privat mir-rimedju kostituzzjonali jew konvenzjonali meta jkun jidher li r-rimedji ohra li hemm jew li kien hemm ma jkunux adegwati fic-cirkostanzi tal-kaz.

“Fil-kaz in esami, ic-cirkostanzi tal-kaz jipprekludu li din il-Qorti tiddeklina mis-setghat taghha.

“F`kawza ghal stharrig gudizzjarju (*judicial review*), ir-rimedji li tista’ taghti l-Qorti huma limitati hafna – anke d-danni li jistghu jinghataw huma limitati b’dak li jiddisponi s-subartikolu (5) tal-Artikolu 469A tal-Kap.12. F`kawza ghal stharrig gudizzjarju, il-Qorti ma tistax tissostitwixxi ruhha ghall-korp pubbliku li jkun ; applikat dan il-principju ghall-kaz tal-lum, ma tistax tordna li d-dramm in kwistjoni jigi rapprezentat xorta minkejja li kien dikjarat “*banned*”. Mill-banda l-ohra, f`kawza bhal dik tal-lum, ma hemm xejn xi jzomm lil din il-Qorti fil-kompetenza taghha skond il-Kostituzzjoni inkella skond il-Konvenzjoni li tordna li ssir ir-rapprezentazzjoni tad-dramm.

“In vista tal-premess –

“Tichad ir-raba` eccezzjoni preliminari.

“Ikkunsidrat –

“Din il-Qorti se tghaddi issa biex tqis il-mertu.

“It-Trama ta’ *Stitching*

“F’din il-kawza, din il-Qorti kellha l-opportunita` li tisma` viva voce lill-awtur tad-dramm, Anthony Neilson. Ix-xhieda tieghu tinsab minn fol 101 sa fol 118 tal-process. Huwa jinseg it-trama tad-dramm kif gej –

“... A couple called Stewart and Abby, a very normal couple but however a couple who find themselves in relationship difficulties, there have been betrayals, they’re wondering whether to continue with their relationship. Abby discovers that she is pregnant by Stewart and so a large part of the play is concerned with them discussing whether or not to have the child. Ultimately they decide to have the child but they decide to do so in order to save their relationship, one might say for somewhat impure motives, they feel that having this child will keep them together. However their relationship continues to disintegrate and at one point during a fight they are having between themselves when their attention is diverted elsewhere, the child is involved in an accident and then dies. Obviously this is a huge trauma for them and they are driven apart. They come back together again some time later, maybe a year later and meet and for them their relationship is not quite finished and they come back together in their grief because they are the only other people who understand the depths of their grief. When they come together they can only do so in a perverted fashion, where Abby actually poses as a prostitute. She wants to make their sexual relationship a matter of commerce in order to distance herself from the emotions. What then ensues is a very violent and dark relationship, a kind of a punishment of themselves, confessions of their guilt. Eventually Abby is tipped into clinical mental illness and performs an act of self mutilation which she believes will restore her to a virginal state, and that is what finally blows apart their relationship. In a final coda Stewart meets Abby some time later when she has obviously received treatment for her mental illness and has in fact converted to Christianity and both of them decide to go their separate ways.”

“Id-Decizjoni tal-Bord

Kopja Informali ta' Sentenza

“Fil-kaz tal-lum, irrizulta li l-Bord iddecieda li jiddikjara l-produzzjoni bhala *banned – disallowed* kemm fl-ewwel istanza kif ukoll fl-istadju tar-revizjoni abbazi tal-*iscript* li kien ipprovdut mir-rikorrenti Unifaun.

“Ir-ragunijiet tal-Bord jirrizultaw minn dikjarazzjoni datata 30 ta' Jannar 2009 iffirmata mill-intimata Friggrieri (fol 20) u testwalment kienu dawn–

““1. *Blasphemy against the State Religion – pages 10 and 17*

“2. *Obscene contempt for the victims of Auschwitz – page 29*

“3. *An encyclopedic review of dangerous sexual perversions leading to sexual servitude – pages 33, 34 and several others*

“4. *Abby's eulogy to the child murderers, Fred and Rosemary West – page 35*

“5. *Reference to the abduction, sexual assault and murder of children – page 36*

“*In conclusion, the play is a sinister tapestry of violence and perversion where the sum of the parts is greater than the whole. The Board feels that in this case the envelope has been pushed beyond the limits of public decency.*”

“Dak li sejra taghmel issa din il-Qorti huwa li tipproduci *in toto* l-estratti tal-*iscript* li ghalihom oggezzjona l-Bord u li wasslu ghad-decizjoni tieghu. Il-partijiet krucjali huma bil-*bold* u saru minn din il-Qorti.

““1. *Blasphemy against the State Religion – Pg. 10*

“*Stu - No but that's the problem ; it's all just attack, defend, attack, defend –*

“*Abby - You do it too !*

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"Stu - *I'm not saying it's you ! **Jesus Fucking Christ !!***

"Abby - *I don't want to bring a child up with its parents fighting all the time.*

"Stu - *You think I do ? Christ, I had years of it.*

"Pg. 17

"Stu - *So if you're a whore, I can hire you again ; can't I ?*

"Pause

"What about Sunday ?

"Abby - *Sunday's the Lord's day.*

"Pause

"Stu - ***Fuck him.***

"2. *Obscene contempt for the victims of Auschwitz* – Page 29

"Stu - *I'm sure she got paid for it.*

"Pause

"Abby - *Nobody's forcing you to do this. You don't want to pay me, that's fine. I'll walk away. You feel sad and inadequate, fine. I'll walk away.*

"You're too tight to pay me, fine. I'll walk away.

"Pause

"Just say the word and I'll walk away.

"Pause

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"Just say the word. Just say the word.

"Stu - Walk away then.

"Pause

"Abby - Fine.

"She goes to the door ; but stops there.

"Stu - No. Don't.

"He doesn't see, but she is relieved.

"Pause

"The first time I came, you know what I was looking for ? A book about Auschwitz. All these naked women in a line, waiting to go into a gas chamber. I remember thinking how hairy their cunts were.

"3. An encyclopedic review of dangerous sexual perversions leading to sexual servitude – Pg. 33

"...And now they are rolling on the floor, but this time in the throes of violent sexual passion.

"They come apart, breathing heavily. Pause.

"He opens a box and takes out a dildo. He forces her to suck it, pushing her head back and forward on it.

"It gets too violent and she gags. She pulls his arm away and wrestles the dildo from him.

"She sticks it in his mouth and makes him suck it, doing the same to him as he did to her.

"After a while, he pushes her down on the ground, straddling her.

“He twists on her nipples. She grabs his ears and twists them.

“For both of them, the pains gets too much and they come apart.

“Pause.

“He tries to get her jeans off but she kicks him away. They can hardly speak for the lack of breath.

“Stu - I want to shave your cunt.

“Abby - Fuck off.

“Stu - Please.

“Abby - Why ?

“Sty - So I can see your clit better.

“Abby - Are you sure ?

“Stu - What do you mean ?

“Abby - Maybe you feel insecure with a woman. Maybe you want me like a girl. Maybe you`re a paedophile.

“Stu - Maybe. What`s it to you ?

“Abby - And what then ?

“Stu - What when ?

“Abby - After I`ve shaved my cunt. What do we go then ?

“Pg. 34

“Abby - Think I`m letting you near my cunt with a razor ?

“Pause

“Stu - What do you mean by that ?

“Pause

“You think I`d hurt you ? You think I`d ever do anything to hurt you ?

“Pause

“Abby - I`d like you to. I`d like to hurt you. I`d like you to drag a razor down my face and throat and tits –

“Stu - Don`t say things like that.

“Abby - I`d like you to stick a shotgun up my cunt and pull the trigger.

“Stu - Don`t be so fucking stupid.

“And several others”

“Fid-dokument mhux specifikati dawn is-“*several others*” izda meta xehdet l-intimata Friggieri ghamlet riferenza specifika ghal estratt iehor-

“... Qed titkellem hawn il-mara Abby “Tell me what you`re going to make me do”, jghidilha hu “We`re not going to fuck anymore, we`re not going to use condoms, you`re going to suck my cock and lick my balls and you`re going to look at me when you do it, yes you`re going to suck my cock like your life depends on it, yes and you`re going to open your mouth and stick your tongue and you`re going to beg me to come in your mouth and then I`m going to come right down your throath and you`re going to swallow it and dribble it like the whore you are, aren` t you yes? And then if I need to piss I`m going to piss on you on your face and on your tits and you`re going to swallow that too, aren`t you?”. U hawnhekk johrog il-famuzi stampi pornografici mill-folder. Hawnhekk m`hawn xejn fl-iscrypt li

jghid li dawn l-istampi pornografici se jkunu bicciet tal-karta A4 bojod, homor jew blue. "He shakes the pictures out of a folder. You want to be a whore? I'll show you what whores do", johrog stampa u jurihielha. "Think you could do that, think you could suck off a horse, think you could get a horse's cock up you" u juriha stampa ohra, "Look at this think you could do that, think you could eat the shit out of another woman's arse, is that shocking enough for you?"

"4. Abby's eulogy to the child murderers, Fred and Rosemary West

"5. Reference to the abduction, sexual assault and murder of children

"Pg. 35

"Abby - You know what else I'd like ? I'd like us to hurt someone together.

"I'd like us to abduct a child and fuck it and burn it and kill it.

We could be like the next Moors Murderers or like Fred and Rosemary West –

"Stu - Yes, right, very shocking, very good –

"Abby - You know what else I'd like ?

"Stu - Some valium ?

"Abby - I'd like to see you seduce the mothers of those murdered children –

"Stu - Abby, shut up –

"Abby - I'd like to see you console them and care for them and win them over.

"And then you could bring them back here –

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“He covers her mouth.

***Stu - Abby, you`re talking fucking shite !
Why are you being like this ? What are you trying to
achieve ? Why are you talking such fucking shite ?***

“She bites her hand ; with a yelp he withdraws it.

“Stu - You fucking litte cow !

“Abby - Don`t tell me I`m talking shite.

“Pause

***“Stu - Look – I don`t want to keep playing
this game. It was fun at first but now it`s getting
boring.”***

“Hemm imbaghad il-paragrafu konklussiv tad-dokument
kjarament intiz sabiex jolqot l-assjem tal-produzzjoni aktar
milli l-ispecifiku –

*“..., the play is a sinister tapestry of violence and
perversion where the sum of the parts is greater than the
whole. The Board feels that in this case the envelope has
been pushed beyond the limits of public decency.”*

“Ikkunsidrat -

“Il-Kwadru tal-Provi

“F`din il-kawza, diversi kienu l-persuni li xehdu kemm bl-
affidavit kif ukoll *viva voce*. Fis-sustanza, il-kwalita` tal-
prova dwar id-dramm li tirrizulta tista` tinqasam fi tlieta –
persuni bhar-rikorrenti Zammit u Basmadijan li ghax kienu
l-atturi mhux biss qraw l-*iscript* izda ghamlu r-recta
ghalkemm waqt *rehearsals* ; persuni li r-rikorrenti ressqu
bhala xhieda ghax raw ir-*rehearsal* ghalkemm ma qrawx l-
iscript qabel ; u persuni li l-intimati ressqu bhala xhieda li
qraw l-*iscript* izda ma rawx ir-*rehearsal*.

“Din il-Qorti se taghmel riferenza ghax-xhieda ta’ whud minn dawn il-persuni, tinseg sintesi tal-punti saljenti u tistabilixxi l-*common denominator*.

“Persuni li tressqu mir-rikorrenti

“It-Tabib Psikjatra Peter Muscat xehed li d-dramm kienet storja ta’ mhabba illi sfortunatament kienet marret hazin hafna. Il-personaggi kellhom relazzjoni bejniethom illi giet ibbazata fuq hafna mill-fantasiji taghhom wara li binhom miet tort tat-traskuragni taghhom u kif zvolgiet bil-fantasija li bdew juzaw illi dawna bil-mod il-mod specjalment il-mara dahlet fi stat biex nghid hekk ta’ genn. Hija storja ta’ dwejjaq, b`*redeeming feature* fis-sens li t-tnejn jergghu lura ghal bilanc f’hajjithom. Skond ix-xhud, ma ra xejn pornografiku fiha u l-kliem hazin illi ntqal kien kollu fil-kuntest tal-emozzjonijiet illi dawn il-koppja kienu qeghdin ihossu.

“L-attrici Pia Zammit hadmet ir-rwol ta’ Abby. Tghid - *I didn't find it offensive in any way. Tghid li the emotions are very real and I felt that it was a love story. Dwar il-props, tghid li ma sarx uzu ta’ pornografija.*

“L-awtur Anthony Nielsen jixhed li - *I don't think that I have seen any of the other productions of Stitching. Dwar ir-riferenzi ghall-pornografija, qal hekk - I would not personally as a matter of my taste I would not for instance have used real pornographic pictures. I felt that that would be needlessly offensive for people, however another director might chose to do so. Dwar in-nisa ta’ Auschwitz sejrjn ghall-mewt, ighid hekk - *it should not be an unfamiliar concept that in their grief that couple confess to thoughts, to feelings that they feel guilty about. The play to some extent is about life and about death. When he talks about masturbating and using as his material pictures of women from Auschwitz, this is something that occurs when he is a small child, this occurs when he is a very young child. He says that it is the first time that he masturbated which would imply that it is reasonably early. At that time of life a young man is completely concerned with procreation, with the creation of life and he**

*understands nothing of death, of mortality. So in fact that is what actually that phrase is about, the fact that he is confessing, he is saying I knew nothing about death, I did not look at the atrocity of life, I saw only the nudity. So it's actually nothing to do with Auschwitz, it's to do with sexual urges and it's to do with him, you know small children don't understand Auschwitz. Din il-Qorti staqsietu dwar id-dagha. Neilson wiegeb hekk – *Well that's not a concept that ever crossed my mind. I'm not a religious person.* Din il-Qorti staqsiet hekk - *Does the script allow the director to put aside certain references to things that could be described by people as hard? Will the text lose by the director leaving it out ?* Ix-xhud wiegeb hekk -*

I dare say that a director could remove one or two swear words but that would all have to be taken on the case by case basis, but largely speaking I would say they would suffer yes because there is a reason why every line is in every one of my plays. There's a reason for it and I'm happy to stand here and justify them all day. Din il-Qorti kompliet tinsisti - ... *as far as Stitching is concerned an omission by the director could affect the whole performance ?* Skond Neilson - *Yes absolutely.*

"Il-Psikologa Jo Christine Scicluna tinsisti li hawn si trattava ta' tragedja ta' koppja li tinsab fi krizi, u li lahqet il-quccata taghha bil-mewt ta' binhom f'incident. Huma jippruvaw jaghmlu kuntatt ma' xulxin b'modi li wiehed mhux bilfors huma konvenzjonali. Hija play ta' natura sensittiva u titlob udjenza matura. Din il-Qorti rreferiet li-xhud ghal parti mid-diskors ta' Stu li taqra hekk - *And then if I need a piss I'm going to piss on you, on your face and on your tits and you're going to swallow that too, aren't you?. Issa iktar l-isfel "Look at that" dan qed jghid lilha eh tinsiex "Think you could do that? Think you could eat the shit out of an other woman's arse? Is that shocking enough for you?". Mela dana Stew qed jghid lilha qeghdin nitkellmu. Issa inti r-reazzjoni tieghek ghal sitwazzjoni bhal dik x'kienet? Ghal dan il-kwesit, ix-xhud wiegbet hekk - *Jiena lili ma xxokkjatnix ghax kif ghidt inti jiena ma nistax naqsam lili nnifsi bhala mara minn lili nnifsi bhala psikologa. Jigifieri jiena l-qofol tieghi huwa wiehed li hu, lili ma nistax nghidlek li xxokkjatni ghax inkun qed nigdeb.**

“Rev. Joseph Abela ra r-rehearsal pero` ma qarax l-*iscript*. Kien jikklassifika d-dramm ghal kbar bil-ghaqal. Ighid hekk - ... *ghandek koppja li qeghdin ibatu ghax miet it-tifel tagghom tort tagghom ... meta ghandek il-persuna li qieghda tbatlura taqzbilha c-cinga tidhol f'oqsma li ahna nies li nahsbu li ahna civili noggezzjonaw ghalihom. Pero' dik hija r-realta' umana ... Ighid li ... jekk inti lest illi tistudja wkoll il-mard u t-tbatija ta' nies li jkun ghaddejjin mill-ugigh allura inti hemm qed tkun demokratiku u tolleranti li taghti cans fis-socjeta' tieghek li tifhem lil min mhux ghaddej normali.*

“Kevin Drake ra r-rehearsal bla ma kien qara l-*iscript* qabel. Ir-reazzjoni tieghu kienet li ma kienx hemm krudelta` sabiex ikun hemm krudelta`. Hafna mid-djalogar kien ta' tnejn min-nies li ghandhom certi hangups u anki certi problemi inter personali illi kwazi kwazi bdew kompetizzjoni bejniethom biex anki jitqarrbu lejn xulxin fuq min jista' jkun l-iktar oltraggjuż. Assista ghal kompetizzjoni bejn il-karattri dwar min jista' jkun l-iktar oltraggjuż ghax kwazi kwazi hinijiet minnhom thosshom qed jiffliertjaw ma' xulxin imma qed jghidu affarijiet oltraggjużi.

“Persuni li tressqu mill-intimati

“Rev. Fr. Joseph Borg qara l-*iscript* pero` ma rax il-play. Sab l-*iscript* offensiv f'diversi partijiet u dizumanizzanti. Dejqu d-dagha ghax bid-dagha ghad-differenza tal-kliem hazin ikun li hu dagha specifiku mhux qabza kwalittattiva. Dejquh hafna r-referenzi lejn il-Moores Murderer. Dejquh hafna r-referenza ghall-Olokawst. Il-mara tpoggiet qisha oggett *jista' jkun li kienet hekk ghax trid hi, imma kienet subordinata hafna nahseb jien lej.*

“Tony Muscat membru tal-Bord li qara l-*iscript* biss. Qal hekk - ... *Bla dubju ta' xejn kieku kellna l-opportunita' li naraw il-produzzjoni kienet tkun ahjar, produzzjoni teatrali. Biss gieli jkun hemm kazijiet u proprju f'dal-kaz kien wiehed minnhom, fejn l-*iscript* minnu tant kien jahraq, tant kien oggezzjonabbli, illi jien min-naha tieghi ma hassejt l-ebda bzonn li nitlob li nara l-produzzjoni, il-ghaliex l-*

elementi li kien hemm iz-zewg elementi principali li jiena oggezzjonajt ghalihom, iddawwarhom kif iddawwarhom, tipprezentahom bhala tragedja jew bhala kummiedja, xorta wahda se jibqghu offensivi ghal sezzjonijiet tas-socjeta' taghna jew ta' socjeta' dinjija jekk nigu f'dan. Ix-xhud kien qed jirreferi ghall-kliem dwar Auschwitz u ghall-passagg dwar Fred u Rose Mary West. Is-shock huwa wahda mill-armi legittimi tat-teatru. Izda kompla x-xhud ... uza xokkijiet kemm trid imma toffendix sensibilatjiet ta' ndividwi jew ta' min jigi magghom. ... f'dawk iz-zewg incidenti tajjed tal-Olokawst u tac-child murderers, hija illi l-umanita' kollha hija at stake, qed joffendi s-sens ta' decenza illi l-bniedem suppost ikollu lejn haddiehor. Ma tridx titqazzez bis-sofferenzi ta' haddiehor.

“Il-psikologu Dr. Dione Mifsud wkoll membru tal-Bord ighid -*kien hemm ammont sostanzjali illi l-iscript kwazi kwazi mhuwiex daqshekk kredibbli, il-ghaliex tant hemm wahda wara l-ohra illi huwa difficli hafna li ssib xi persuna li tghaddi minn dawn l-affarijiet kollha wahda wara l-ohra. Kompla jghid - jiena minhiex qieghed nghid illi perverzjonijiet ma jezistux pero' din hija koppja li qieghda tigi pprezentata bhala koppja normali. Fil-kaz ta' koppja li huma normali, fil-kaz ta' koppja li jghaddu minn normal life experience bhalma hija l-mewt u sfortunatament hawnhekk ghandna mewt ta' tifel, ir-reazzjoni ma tkunx wahda bhal din, jigifieri r-reazzjoni ma tkunx li perezempju f'xena partikolari minnhom jaghmlu re enectment ta' qtil illi dahal fil-kuxjenza fil-memorja tal-pajjiz fejn sar l-Ingilterra ... Ix-xena ta' Auschwitz tiddeagra l-memorja ta' nies illi batew.*

“Prim Imhalef Emeritus Professor Giuseppe Mifsud Bonnici qara l-iscript mhux ra l-play. Hares lejn il-kontenut mill-punto di vista ta' morali pubblika. Ighid li partijiet mill-play iqazzuk bhall-parti fejn huwa deskritt Auchwitz, il-parti fejn hemm id-dagha u cioe` mhux biss jissemma` Alla fil-batal izda precedut bil-kelma *fuck*. Fil-letteratura Ngliza moderna, il-kelma *fuck* tirrikorri spiss izda fil-kuntest ta' kif kienet abbinata ma` Alla hija inaccettabbli ghax toffendi l-morali pubblika mhux tal-kattolici biss izda ta' nofs id-dinja. Allura daww il-partijiet

kellhom jithallew barra l-play ghax negattivi u deleterji ghall-morali pubblika. Il-parti fuq is-sess u l-perverzjoni tas-sess, kemm irid ihallasha biex tippermettilu jaghmel dawn l-affarijiet, dika hemm parti minnha dil-play li tqabbdek librezz, imma hawn min hu kapaci jsolfriha.

“Joseph Camilleri - Membru tal-Bord – kkonferma c-certifikazzjoni – banned – fl-istadju tal-appell. Mhux gustifikabbli, fost hwejjeg ohra li rreferew ghalihom membri ohra tal-Bord fix-xhieda taghhom, li ghax koppja tkun ghaddejja minn problemi, tista' taghmel certi atti, u trewwahom fil-pubbliku. Mhux accettabbli li biex mara turi lill-partner taghha li thobbu thit il-vagina taghha. Li kieku gie biex jaqta` mill-*iscript* ma kien jibqa' kwazi xejn. *Ma nistax insib xi haga pozittiva* – sostna x-xhud.

“L-intimata Teresa Friggieri sostniet li l-*iscript* kien fih hemm xeni shah li jmorru kontra l-moralita', xeni shah li huma affront, attakk atroci u spjetat kontra d-dritt tal-bniedem, id-dinjita' tal-bniedem. Tghid hekk - ... *ixxukkjatni u dejqitni hafna ghaliex dik hija pornografija unadulterated fl-opinjoni tieghi, fejn il-mara qed issir skjava tar-ragel assoluta*. Qalet li l-play fit-totalita' taghha kienet oggezzjonabbli u offensiva, mhux xena l'hemm u `l hawn. Ghalkemm il-play tispicca b'xena fejn huma mid-dehra jiddeciedu li jkollhom it-tarbija, ix-xhud tghid li *ma nistax nghid li l-messagg ta' play huwa pozittiv jekk jienera naghmel tmenin pagna nara dak l-affarijiet imbaghad f'xena minnhom nara li dawn iddecidew li jkollhom it-tarbija*.

“Ikkunsidrat -

“Din il-Qorti gharblet bir-reqqa n-nota ta' osservazzjonijiet tar-rikorrenti u tghid mill-ewwel li ghalkemm r-rikorrenti jsostnu li kien hemm ksur tad-dritt fundamentali taghhom ghal smigh xieraq u ksur tad-dritt taghhom ghal-liberta` tal-espressjoni, huwa ben ovvju u manifest, anke abbazi tal-mod kif ikkonducew u ressqu l-provi taghhom, li l-enfasi kwazi kollha taghhom mhix daqstant fuq allegata lezjoni tad-dritt ghal smigh xieraq izda fuq lezjoni tad-dritt ghal-liberta` tal-espressjoni.

“Ikkunsidrat -

“Id-Dritt ghal Smigh Xieraq

“Dan id-dritt huwa regolat bl-Art.39 tal-Kostituzzjoni u bl-Art.6 tal-Konvenzjoni. Meta qieset il-mod kif il-Bord ittratta l-kaz ta’ din il-produzzjoni, din il-Qorti ma tarax li kien hemm ksur ta’ dan id-dritt. Mill-provi rrizulta li l-Bord kemm fl-ewwel istanza kif ukoll fit-tieni istanza mexxa ma’ dak li jipprovdu r-Regolamenti. Fl-ewwel istanza, il-produzzjoni kienet certifikata bhala *banned*. Ir-rikorrenti ressqu appell abbazi tar-Regolamenti vigenti. Fit-talba li ressqu sabiex il-Bord jirrevedi d-decizjoni kienu liberi li jaghmlu kull sottomissjoni li xtaqu. Il-Bord kompost kif ighidu r-Regolamenti minn klassifikaturi differenti minn dawk tal-ewwel istanza kkonfermaw id-decizjoni originali. Il-fatt li l-Bord fl-istadju tal-appell ma talabx rapprezentazzjonijiet ulterjuri minghand ir-rikorrenti ma jirrendix id-decizjoni bhala hazin ghaliex id-decizjoni ttiehdet fil-kuntest tar-Regolamenti vigenti u ladarba r-rikorrenti ma hadu l-ebda proceduri sabiex jannullaw dawk ir-Regolamenti, il-procedura kif kontemplata tregi u din jirrizulta li kienet osservata bis-shih. L-allegazzjoni ta’ bias sollevata mir-rikorrenti ma gietx pruvata b’mod sodisfacjenti u konklussiv.

“Ghalhekk it-tieni talba tar-rikorrenti kif dedotta hija michuda kif ukoll hija respinta t-tielet talba fejn din tittratta l-allegat ksur tad-dritt ghal smigh xieraq.

“Ikkunsidrat –

“Id-Dritt tal-Liberta` tal-Espressjoni

“Fil-verita`, huwa fuq l-allegata lezjoni ta’ dan id-dritt li r-rikorrenti poggew l-enfasi ewlieni tal-istanza taghhom.

“Dan id-dritt huwa regolat bl-Art. 41 tal-Kosituzzjoni u bl-Art.10 tal-Konvenzjoni.

“Din il-Qorti se ticcita dik il-parti ta’ l-**Art.41 tal-Kostituzzjoni** li hija rilevanti ghal-kaz tal-lum –

“(1) *Hlief bil-kunsens tieghu stess jew bhala dixxiplina tal-genituri, hadd ma ghandu jigi mfixkel fit-gawdija tal-libertà tieghu ta’ espressjoni, maghduda libertà li jkollu fehmiel minghajr indhil, libertà li jircievi idejiet u taghrif minghajr indhil, libertà li jikkomunika idejiet u taghrif minghajr indhil (kemm jekk il-komunikazzjoni tkun lill-pubbliku in general i jew lil xi persuna jew klassi ta’ persuni) u libertà minn indhil dwar il-korrispondenza tieghu.*

“(2) *Ebda haga li hemm fi jew maghmula skond l-awtorità ta’ xi ligi ma ghandha titqies li tkun inkonsistenti ma’ jew bi ksur tas-subartikolu (1) ta’ dan l-artikolu safejn dik il-ligi taghmel provvedimenti -*

“(a) *li jkun mehtieg ragonevolment –*

“(i) *fl-interess tad-difiza, sigurtà pubblika, ordni pubblika, moralità jew decenza pubblika, jew sahha pubblika ; jew*

“(ii) *sabiex jigu protetti r-reputazzjonijiet, drittijiet u libertajiet ta’ persuni ohra, jew il-hajja privata ta’ persuni li jkollhom x’jaqsmu ma’ proceduri legali, jigi evitat il-kxif ta’ taghrif ricevut sigriet, tigi mizmuma l-awtorità u l-indipendenza tal-qrati, jigu protetti l-privileggi tal-Parlament, jew jigu regolati t-telefonu, it-telegrafu, il-posta, ix-xandir bil-wireless, it-televizjoni jew mezzi ohra ta’ komunikazzjoni, esibizzjonijiet pubblici jew divertimenti pubblici ; jew*

“(b) *li jimponi restrizzjonijiet fuq ufficjali pubblici, u hlief safejn dak il-provvediment jew, skond il-kaz, il-haga maghmula skond l-awtorità tieghu tigi murija li ma tkunx ragonevolment gustifikabbli f’socjeta` demokratika.*

“**L-Art.10 tal-Konvenzjoni** jaqra hekk -

“(1) *Kulhadd ghandu d-dritt ghal-libertà ta' espressjoni. Dan id-dritt jinkludi l-libertà li jkollu opinjonijiet u li jircievi u jaghti informazzjoni u ideat minghajr indhil mill-awtorità pubblika u minghajr ma jittiehed kont ta' fruntieri. Dan l-Artikolu ma ghandux jimpedixxi Stati milli jehtiegu licenzi ghax-xandir, televizjoni jew imprizi cinematografici.*

“(2) *L-ezercizzju ta' dawn il-libertajiet, billi jgib mieghu dmirijiet u responsabbiltajiet, jista' jkun suggett ghal dawk il-formalitajiet, kundizzjonijiet, restrizzjonijiet jew penali kif preskritti b'ligi u li jkunu mehtiega f'socjeta` demokratika, fl-interessi tas-sigurtà nazzjonali, integrità territorjali jew sigurtà pubblika, biex jigi evitat id-dizordni jew l-eghmil ta' delitti, ghall-protezzjoni tas-sahha jew tal-morali, ghall-protezzjoni tar-reputazzjoni jew drittijiet ta' haddiehor, biex jigi evitat il-kxif ta' informazzjoni ricevuta b'sigriet, jew biex tigi mizmuma l-awtorità u l-imparzjalità tal-Gudikatura.”*

“Is-sustanza tal-argumenti li ressqu r-rikorrenti u li huma esposti b'reqqa fin-nota ta' osservazzjonijiet taghhom tingabar fi bran li din il-Qorti sabet riportat f'pagna 458 tal-ktieb **Law of the European Convention on Human Rights** ta' Harris, O'Boyle & Warwick (Second Edition – Oxford University Press) -

“... *artistic freedom is vital to the enrichment of humanity and diversity of civilizations. The Court's dictum that the protection of Article 10 extends to expressions which 'offend, shock or disturb the state or any sector of the population' is of special importance to artistic work. The fact that artistic expression is triggered by commercial incentives or designed for profit-making purposes ought not to lessen its protection under Article 10. The liberal democratic values underpinning the Convention system means that artists should be encouraged freely to manifest their artistic convictions to challenge the orthodoxy as avant-gardes, and to create new and critical thinking. The mission of the artists to defy the establishment by radical work should be encouraged as*

essential contributions to the plural cultural values in democracies."

"Ghalkemm il-kuncett huwa apprezzabbli, ma jistax jigi distakkat mhux biss mill-fatti u c-cirkostanzi ta' kull kaz, izda ukoll mill-ambjent kulturali, socjali, morali u anke religjuz tas-socjeta` fejn il-manifestazzjoni artistika tkun se tittella`.

"Fin-noti rispettivi taghhom, il-partijiet ghamlu riferenza ghal diversi sentenzi tal-Qorti ta' Strasbourg. Din il-Qorti qieset is-sentenzi citati pero` tqis li tlieta minnhom huma dawk li l-aktar ghandhom jinghataw konsiderazzjoni kemm ghat-tematika taghhom izda l-aktar ghall-konsiderazzjonijiet tal-Qorti Ewropea. Dawn it-tliet sentenzi se jigu trattati f'dan l-istadju.

"Gurisprudenza tal-Qorti Ewropea

"Din il-Qorti se ticcita *in extenso* mit-test bl-Ingliz ta' dawn it-tliet sentenzi.

"I. *Handyside v The United Kingdom* tas-7 ta' Dicembru 1976

"II-Fatti

"Mr. Richard Handyside, is proprietor of the publishing firm "Stage 1" in London which he opened in 1968. He has published, among other books, The Little Red Schoolbook (hereinafter called "the Schoolbook"), the original edition of which was the subject of the present case and a revised edition of which appeared on 15 November 1971 ...

"The British rights of the Schoolbook, written by Søren Hansen and Jesper Jensen, two Danish authors, had been purchased by the applicant in September 1970. The book had first been published in Denmark in 1969 and subsequently, after translation and with certain adaptations, in Belgium, Finland, France, the Federal Republic of Germany, Greece, Iceland, Italy, the

Netherlands, Norway, Sweden and Switzerland as well as several non-European countries. Furthermore it circulated freely in Austria and Luxembourg.

“After having arranged for the translation of the book into English the applicant prepared an edition for the United Kingdom with the help of a group of children and teachers. He had previously consulted a variety of people about the value of the book and intended publication in the United Kingdom on 1 April 1971. As soon as printing was completed he sent out several hundred review copies of the book, together with a press release, to a selection of publications from national and local newspapers to educational and medical journals. He also placed advertisements for the book in various publications including The Bookseller, The Times Educational and Literary Supplements and Teachers World.

“On 22 March 1971, the Daily Mirror published an account of the book’s contents, and other accounts appeared in The Sunday Times and the Sunday Telegraph on 28 March. Further reports were carried by the Daily Telegraph on 29 and 30 March; they also indicated that representations would be made to the Director of Public Prosecutions demanding that action should be taken against the publication of the book. The Schoolbook was also the subject of further extensive press comment, some favourable and some not, immediately after and around the time of the seizure referred to below.

“After receipt of a number of complaints, on 30 March 1971 the Director of Public Prosecutions asked the Metropolitan Police to undertake enquiries. As a result of these, on 31 March 1971, a successful application was made for a warrant under section 3 of the Obscene Publications Acts 1959/1964 to search the premises occupied by Stage 1 in London. The warrant was issued in the applicant’s absence but in accordance with the procedure laid down by English law and a copy of the Schoolbook was before the judicial authority which issued the warrant. It was executed on the same day and 1,069 copies of the book were provisionally seized together with

leaflets, posters, showcards and correspondence relating to its publication and sale.

“Acting on the advice of his lawyers the applicant continued distributing copies of the book in the subsequent days. After the Director of Public Prosecutions had received information that further copies had been taken to Stage 1’s premises after the search, further successful applications were made on 1 April 1971 (in conditions similar to those described above) to search again those premises and also the premises of the printers of the book. Later that day altogether 139 copies of the book were seized at Stage 1’s premises and, at the printer’s, 20 spoiled copies of the book, together with correspondence relating to it and the matrix with which the book was printed. About 18,800 copies of a total print of 20,000 copies were missed and subsequently sold, for example, to schools which had placed orders.”

“Quddiem il-Qrati Inglizi

““On 8 April 1971, a Magistrates’ Court issued, under section 2 (1) of the Obscene Publications Act 1959, as amended by section 1 (1) of the Obscene Publications Act 1964, two summonses against the applicant ...

“On 1 July 1971, after witnesses had been called for both prosecution and defence, the applicant was found guilty of both offences and fined £25 on each summons and ordered to pay £110 costs. At the same time the court made a forfeiture order for the destruction of the books by the police ...

“On appeal ... by judgement delivered on 29 October 1971, the decision at first instance was upheld and the applicant was ordered to pay another £854 costs. The material seized as described above was then destroyed. The applicant did not exercise his right of making a further appeal to the Court of Appeal since he did not dispute that the judgment of 29 October 1971 had correctly applied English law.”

“Dwar il-ktieb ...

““The original English language edition of the book, priced at thirty pence a copy, had altogether 208 pages. It contained an introduction headed "All grown-ups are paper tigers", an "Introduction to the British edition", and chapters on the following subjects: Education, Learning, Teachers, Pupils and The System. The chapter on Pupils contained a twenty-six page section concerning "Sex" which included the following sub-sections: Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or "dirty old men", Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal diseases, Abortion, Legal and illegal abortion, Remember, Methods of abortion, Addresses for help and advice on sexual matters. The Introduction stated: "This book is meant to be a reference book. The idea is not to read it straight through, but to use the list of contents to find and read about the things you're interested in or want to know more about. Even if you're at a particularly progressive school you should find a lot of ideas in the book for improving things."

“The applicant had planned the distribution of the book through the ordinary book-selling channels although it was said at the appeal hearing to have been accepted that the work was intended for, and intended to be made available to, school-children of the age of twelve and upwards.”

“L-azzjoni fil-Qrati Inglizi ttiehdet abbazi tal-Obscene Publications Act 1959 kif emendat mill-Obscene Publications Act 1964.

““Following further previous case-law, the court had decided that expert evidence should be admitted on the question of whether the Schoolbook was obscene ...

“Concerning the Schoolbook itself, the court first stressed that it was intended for children passing through a highly critical stage of their development. At such a time a very high degree of responsibility ought to be exercised by the

courts. In the present case, they had before them, as something said to be a perfectly responsible adult opinion, a work of an extreme kind, unrelieved by any indication that there were any alternative views; this was something which detracted from the opportunity for children to form a balanced view on some of the very strong advice given therein.”

“Il-Qorti ccitat estensivament mill-ktieb sabiex issib jekk kienx hemm *a tendency to deprave and corrupt* u sabet li hekk hu.

“Proceduri quddiem il-Kummissjoni

“In his application, lodged with the Commission on 13 April 1972, Mr. Handyside complained that the action in the United Kingdom against himself and the Schoolbook was in breach of his right to freedom of thought, conscience and belief under Article 9 (art. 9) of the Convention, his right to freedom of expression under Article 10 (art. 10) of the Convention and his right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 (P1-1). He also maintained that, contrary to Article 14 (art. 14) of the Convention, the United Kingdom had failed to secure to him the above rights without discrimination on the ground of political or other opinion; that the proceedings brought against him had been contrary to Article 7 (art. 7) of the Convention; and finally that the respondent Government were also in breach of Articles 1 and 13 (art. 1, art. 13) of the Convention ...

“In its decision of 4 April 1974, the Commission accepted the application insofar as it concerned allegations under Article 10 of the Convention and Article 1 of Protocol No. 1 (art. 10, P1-1) ...”

“Quddiem il-Qorti Ewropeja

“Dwar l-Art.10

“Wara li semghet is-sottomissjonijiet tal-partijiet, il-Qorti qalet hekk dwar l-allegat ksur tal-Art.10 tal-Konvenzjoni –

“The various measures challenged ... were without any doubt, and the Government did not deny it, "interferences by public authority" in the exercise of his freedom of expression which is guaranteed by paragraph 1 (art. 10-1) ... Such interferences entail a "violation" of Article 10 if they do not fall within one of the exceptions provided for in paragraph 2 (art. 10-2), which is accordingly of decisive importance in this case. If the "restrictions" and "penalties" complained of by Mr. Handyside are not to infringe Article 10 (art. 10), they must, according to paragraph 2 (art. 10-2), in the first place have been "prescribed by law". The Court finds that this was the case.

“Having thus ascertained that the interferences complained of satisfied the first of the conditions in paragraph 2 of Article 10 (art. 10-2), the Court then investigated whether they also complied with the others. According to the Government and the majority of the Commission, the interferences were "necessary in a democratic society", "for the protection of ... morals".

“... the Court first finds that the 1959/1964 Acts have an aim that is legitimate under Article 10 para. 2 (art. 10-2), namely, the protection of morals in a democratic society. Only this latter purpose is relevant in this case since the object of the said Acts - to wage war on "obscene" publications, defined by their tendency to "deprave and corrupt" – is linked far more closely to the protection of morals than to any of the further purposes permitted by Article 10 para. 2 (art. 10-2) ...

“The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ...

“The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines These observations apply, notably, to Article 10 para. 2 (art. 10-2). ... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their

respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. ... Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100; cf., for Article 8 para. 2 (art. 8-2), De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45-46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21-22, para. 45). Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court ...

"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but

also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

“From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society". It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation. However, the Court's supervision would generally prove illusory if it did no more than examine these decisions in isolation; it must view them in the light of the case as a whole ...

“Riferibbilment għall-fattispece ta' dak il-kaz, il-Qorti qalet hekk –

“... despite the variety and the constant evolution in the United Kingdom of views on ethics and education, the competent English judges were entitled, in the exercise of their discretion, to think at the relevant time that the Schoolbook would have pernicious effects on the morals of many of the children and adolescents who would read it ... The Court thus allows that the fundamental aim of the judgment of 29 October 1971, applying the 1959/1964 Acts, was the protection of the morals of the young, a legitimate purpose under Article 10 para. 2 (art. 10-2) ...”

“the Court thus reaches the conclusion that no breach of the requirements of Article 10 (art. 10) has been established in the circumstances of the present case.”

“Otto-Preminger-Institut v. Austria tal-20 ta’ Settembru 1994

“Il-Fatti

““The applicant, Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI), is a private association under Austrian law established in Innsbruck. According to its articles of association, it is a non-profit-making organisation, its general aim being to promote creativity, communication and entertainment through the audiovisual media. Its activities include operating a cinema called “Cinematograph” in Innsbruck.

“The applicant association announced a series of six showings, which would be accessible to the general public, of the film Das Liebeskonzil (“Council in Heaven”) by Werner Schroeter ..

“This announcement was made in an information bulletin distributed by OPI to its 2,700 members and in various display windows in Innsbruck including that of the Cinematograph itself. It was worded as follows:

““Oskar Panizza’s satirical tragedy set in Heaven was filmed by Schroeter from a performance by the Teatro Belli in Rome and set in the context of a reconstruction of the writer’s trial and conviction in 1895 for blasphemy. Panizza starts from the assumption that syphilis was God’s punishment for man’s fornication and sinfulness at the time of the Renaissance, especially at the court of the Borgia Pope Alexander VI. In Schroeter’s film, God’s representatives on Earth carrying the insignia of worldly power closely resemble the heavenly protagonists. Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated.”

“In addition, the information bulletin carried a statement to the effect that, in accordance with the Tyrolean Cinemas

Act (Tiroler Lichtspielgesetz), persons under seventeen years of age were prohibited from seeing the film ...

“At the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against OPI’s manager, Mr Dietmar Zingl, on 10 May 1985. The charge was "disparaging religious doctrines" (Herabwürdigung religiöser Lehren), an act prohibited by section 188 of the Penal Code (Strafgesetzbuch - see paragraph 25 below).

“On 12 May 1985, after the film had been shown at a private session in the presence of a duty judge (Journalrichter), the public prosecutor made an application for its seizure under section 36 of the Media Act ... This application was granted by the Innsbruck Regional Court (Landesgericht) the same day. As a result, the public showings announced by OPI, the first of which had been scheduled for the next day, could not take place.

“Those who attended at the time set for the first showing were treated to a reading of the script and a discussion instead.

“As Mr Zingl had returned the film to the distributor, the "Czerny" company in Vienna, it was in fact seized at the latter’s premises on 11 June 1985.

“An appeal by Mr Zingl against the seizure order, filed with the Innsbruck Court of Appeal (Oberlandesgericht), was dismissed on 30 July 1985. The Court of Appeal considered that artistic freedom was necessarily limited by the rights of others to freedom of religion and by the duty of the State to safeguard a society based on order and tolerance. It further held that indignation was "justified" for the purposes of section 188 of the Penal Code only if its object was such as to offend the religious feelings of an average person with normal religious sensitivity. That condition was fulfilled in the instant case and forfeiture of the film could be ordered in principle, at least in "objective proceedings" (see paragraph 28 below). The wholesale derision of religious feeling outweighed any interest the

general public might have in information or the financial interests of persons wishing to show the film ...

“On 10 October 1986 a trial took place before the Innsbruck Regional Court. The film was again shown in closed session; its contents were described in detail in the official record of the hearing.

“In its judgment the Regional Court ordered the forfeiture of the film. It held :

““The public projection scheduled for 13 May 1985 of the film Das Liebeskonzil, in which God the Father is presented both in image and in text as a senile, impotent idiot, Christ as a cretin and Mary Mother of God as a wanton lady with a corresponding manner of expression and in which the Eucharist is ridiculed, came within the definition of the criminal offence of disparaging religious precepts as laid down in section 188 of the Penal Code.”

“The court’s reasoning included the following :

““The conditions of section 188 of the Penal Code are objectively fulfilled by this portrayal of the divine persons - God the Father, Mary Mother of God and Jesus Christ are the central figures in Roman Catholic religious doctrine and practice, being of the most essential importance, also for the religious understanding of the believers - as well as by the above-mentioned expressions concerning the Eucharist, which is one of the most important mysteries of the Roman Catholic religion, the more so in view of the general character of the film as an attack on Christian religions ...

“... Article 17a of the Basic Law (Staatsgrundgesetz) guarantees the freedom of artistic creation and the publication and teaching of art. The scope of artistic freedom was broadened (by the introduction of that article) to the extent that every form of artistic expression is protected and limitations of artistic freedom are no longer possible by way of an express legal provision but may only follow from the limitations inherent in this

freedom Artistic freedom cannot be unlimited. The limitations on artistic freedom are to be found, firstly, in other basic rights and freedoms guaranteed by the Constitution (such as the freedom of religion and conscience), secondly, in the need for an ordered form of human coexistence based on tolerance, and finally in flagrant and extreme violations of other interests protected by law (Verletzung anderer rechtlich geschützter Güter), the specific circumstances having to be weighed up against each other in each case, taking due account of all relevant considerations ...

“The fact that the conditions of section 188 of the Penal Code are fulfilled does not automatically mean that the limit of the artistic freedom guaranteed by Article 17a of the Basic Law has been reached. However, in view of the above considerations and the particular gravity in the instant case - which concerned a film primarily intended to be provocative and aimed at the Church - of the multiple and sustained violation of legally protected interests, the basic right of artistic freedom will in the instant case have to come second ...”

“Mr Zingl appealed against the judgment of the Regional Court, submitting a declaration signed by some 350 persons who protested that they had been prevented from having free access to a work of art, and claiming that section 188 of the Penal Code had not been interpreted in line with the guarantee of freedom of art laid down by Article 17a of the Basic Law.

“The Innsbruck Court of Appeal declared the appeal inadmissible on 25 March 1987 ...”

“L-iscreenplay tal-film

““The play on which the film is based was written by Oskar Panizza and published in 1894. In 1895 Panizza was found guilty by the Munich Assize Court (Schwurgericht) of "crimes against religion" and sentenced to a term of imprisonment. The play was banned in Germany although it continued in print elsewhere. The play portrays God the

Father as old, infirm and ineffective, Jesus Christ as a "mummy's boy" of low intelligence and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. Together they decide that mankind must be punished for its immorality. They reject the possibility of outright destruction in favour of a form of punishment which will leave it both "in need of salvation" and "capable of redemption". Being unable to think of such a punishment by themselves, they decide to call on the Devil for help. The Devil suggests the idea of a sexually transmitted affliction, so that men and women will infect one another without realising it; he procreates with Salome to produce a daughter who will spread it among mankind. The symptoms as described by the Devil are those of syphilis. As his reward, the Devil claims freedom of thought; Mary says that she will "think about it". The Devil then dispatches his daughter to do her work, first among those who represent worldly power, then to the court of the Pope, to the bishops, to the convents and monasteries and finally to the common people."

"Il-film

"The film, directed by Werner Schroeter, was released in 1981. It begins and ends with scenes purporting to be taken from the trial of Panizza in 1895. In between, it shows a performance of the play by the Teatro Belli in Rome. The film portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil."

"Proceduri quddiem il-Kummissjoni

“The applicant association applied to the Commission on 6 October 1987. It alleged violations of Article 10 (art. 10) of the Convention. On 12 April 1991 the Commission declared the application admissible. In its report adopted on 14 January 1993, the Commission expressed the opinion that there had been a violation of Article 10 ... (a) as regards the seizure of the film ... (b) as regards the forfeiture of the film”

“Quddiem il-Qorti Ewropeja

“The applicant association submitted that the seizure and subsequent forfeiture of the film Das Liebeskonzil gave rise to violations of its right to freedom of expression as guaranteed by Article 10 of the Convention ...

“The Court must therefore examine in turn whether the interferences were "prescribed by law", whether they pursued an aim that was legitimate under that paragraph (art. 10-2) and whether they were "necessary in a democratic society" for the achievement of that aim.

“The applicant association denied that the interferences were "prescribed by law", claiming that section 188 of the Austrian Penal Code had been wrongly applied. Firstly, it was in its view doubtful whether a work of art dealing in a satirical way with persons or objects of religious veneration could ever be regarded as "disparaging or insulting". Secondly, indignation could not be "justified" in persons who consented of their own free will to see the film or decided not to. Thirdly, the right to artistic freedom, as guaranteed by Article 17a of the Basic Law, had been given insufficient weight.

“The Court reiterates that it is primarily for the national authorities, notably the courts, to interpret and apply national law ...

“The Innsbruck courts had to strike a balance between the right to artistic freedom and the right to respect for religious beliefs as guaranteed by Article 14 of the Basic

Law. The Court, like the Commission, finds that no grounds have been adduced before it for holding that Austrian law was wrongly applied.

“The Government maintained that the seizure and forfeiture of the film were aimed at “the protection of the rights of others”, particularly the right to respect for one’s religious feelings, and at “the prevention of disorder”.

“As the Court pointed out in its judgment in the case of Kokkinakis v. Greece of 25 May 1993 (Series A no. 260-A, p. 17, para. 31), freedom of thought, conscience and religion, which is safeguarded under Article 9 (art. 9) of the Convention, is one of the foundations of a “democratic society” within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life. Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.

“In the Kokkinakis judgment the Court held, in the context of Article 9 (art. 9), that a State may legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others (ibid., p. 21, para. 48). The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9) can

legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 (art. 10) in the present case must be in harmony with the logic of the Convention (see, mutatis mutandis, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 31, para. 68).

“The measures complained of were based on section 188 of the Austrian Penal Code, which is intended to suppress behaviour directed against objects of religious veneration that is likely to cause "justified indignation". It follows that their purpose was to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons. Considering also the terms in which the decisions of the Austrian courts were phrased, the Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2 (art. 10-2), namely "the protection of the rights of others".

“As the Court has consistently held, freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of everyone. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see, particularly, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 23, para. 49).

“However, as is borne out by the wording itself of Article 10 para. 2 (art. 10-2), whoever exercises the rights and freedoms enshrined in the first paragraph of that Article

(art. 10-1) undertakes "duties and responsibilities". Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

*"This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued (see the Handyside judgment referred to above, *ibid.*).*

"As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 20, para. 30, and p. 22, para. 35); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.

"The authorities' margin of appreciation, however, is not unlimited. It goes hand in hand with Convention supervision, the scope of which will vary according to the circumstances. In cases such as the present one, where there has been an interference with the exercise of the freedoms guaranteed in paragraph 1 of Article 10 (art. 10-1), the supervision must be strict because of the importance of the freedoms in question. The necessity for any restriction must be convincingly established ...

“The film which was seized and forfeited by judgments of the Austrian courts was based on a theatre play, but the Court is concerned only with the film production in question ...

“The Court notes first of all that although access to the cinema to see the film itself was subject to payment of an admission fee and an age-limit, the film was widely advertised. There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature; for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently "public" to cause offence.

“The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.

“The Austrian courts, ordering the seizure and subsequently the forfeiture of the film, held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Their judgments show that they had due regard to the freedom of artistic expression, which is guaranteed under Article 10 (art. 10) of the Convention (see the Müller and Others judgment referred to above, p. 22, para. 33) and for which Article 17a of the Austrian Basic Law provides specific protection. They did not consider that its merit as a work of art or as a contribution to public debate in Austrian society outweighed those features which made it essentially offensive to the general public within their

jurisdiction. The trial courts, after viewing the film, noted the provocative portrayal of God the Father, the Virgin Mary and Jesus Christ (see paragraph 16 above). The content of the film (see paragraph 22 above) cannot be said to be incapable of grounding the conclusions arrived at by the Austrian courts.

“The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time. In all the circumstances of the present case, the Court does not consider that the Austrian authorities can be regarded as having overstepped their margin of appreciation in this respect.

“No violation of Article 10 (art. 10) can therefore be found as far as the seizure is concerned ...”

“Wingrove v. the United Kingdom tat-22 ta’ Ottubru 1996

“Il-Fatti

““The applicant, Mr Nigel Wingrove, is a film director ...

“Mr Wingrove wrote the shooting script for, and directed the making of, a video work entitled Visions of Ecstasy. Its running time is approximately eighteen minutes, and it contains no dialogue, only music and moving images. According to the applicant, the idea for the film was derived from the life and writings of St Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ.

“The action of the film centres upon a youthful actress dressed as a nun and intended to represent St Teresa. It begins with the nun, dressed loosely in a black habit, stabbing her own hand with a large nail and spreading her blood over her naked breasts and clothing. In her writhing, she spills a chalice of communion wine and proceeds to lick it up from the ground. She loses consciousness. This sequence takes up approximately half of the running time of the video. The second part shows St Teresa dressed in a white habit standing with her arms held above her head by a white cord which is suspended from above and tied around her wrists. The near-naked form of a second female, said to represent St Teresa's psyche, slowly crawls her way along the ground towards her. Upon reaching St Teresa's feet, the psyche begins to caress her feet and legs, then her midriff, then her breasts, and finally exchanges passionate kisses with her. Throughout this sequence, St Teresa appears to be writhing in exquisite erotic sensation. This sequence is intercut at frequent intervals with a second sequence in which one sees the body of Christ, fastened to the cross which is lying upon the ground. St Teresa first kisses the stigmata of his feet before moving up his body and kissing or licking the gaping wound in his right side. Then she sits astride him, seemingly naked under her habit, all the while moving in a motion reflecting intense erotic arousal, and kisses his lips. For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described. Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.

“Apart from the cast list which appears on the screen for a few seconds, the viewer has no means of knowing from the film itself that the person dressed as a nun in the video is intended to be St Teresa or that the other woman who appears is intended to be her psyche. No attempt is made in the video to explain its historical background.

“Visions of Ecstasy was submitted to the British Board of Film Classification (“the Board”), being the authority designated by the Home Secretary under section 4 (1) of the Video Recordings Act 1984 (“the 1984 Act” - see paragraph 24 below) as “the authority responsible for making arrangements -

“(a) for determining, for the purposes of [the] Act whether or not video works are suitable for classification certificates to be issued in respect of them, having special regard to the likelihood of video works in respect of which such certificates have been issued being viewed in the home,

“(b) in the case of works which are determined in accordance with the arrangements to be so suitable

“(i) for making such other determinations as are required for the issue of classification certificates, and

“(ii) for issuing such certificates ...

“The applicant submitted the video to the Board in order that it might lawfully be sold, hired out or otherwise supplied to the general public or a section thereof.

“The Board rejected the application for a classification certificate on 18 September 1989 ...”

“Ir-ragunijiet moghtija kienu dawn –

““The criminal law of blasphemy, as tested recently in the House of Lords in R. v. Lemon (1979), commonly known as the Gay News case. The definition of blasphemy cited therein is ‘any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible ... It is not blasphemous to speak or publish opinions hostile to the Christian religion’ if the publication is ‘decent and temperate’. The question is not one of the matter

expressed, but of its manner, i.e. 'the tone, style and spirit', in which it is presented.

"The video work submitted by you depicts the mingling of religious ecstasy and sexual passion, a matter which may be of legitimate concern to the artist. It becomes subject to the law of blasphemy, however, if the manner of its presentation is bound to give rise to outrage at the unacceptable treatment of a sacred subject. Because the wounded body of the crucified Christ is presented solely as the focus of, and at certain moments a participant in, the erotic desire of St Teresa, with no attempt to explore the meaning of the imagery beyond engaging the viewer in an erotic experience, it is the Board's view, and that of its legal advisers, that a reasonable jury properly directed would find that the work infringes the criminal law of blasphemy.

"To summarise, it is not the case that the sexual imagery in Visions of Ecstasy lies beyond the parameters of the '18' category; it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of the crucified Christ. If the male figure were not Christ, the problem would not arise. Cuts of a fairly radical nature in the overt expressions of sexuality between St Teresa and the Christ figure might be practicable, but I understand that you do not wish to attempt this course of action. In consequence, we have concluded that it would not be suitable for a classification certificate to be issued to this video work.

"The applicant appealed against the Board's determination to the Video Appeals Committee ("the VAC" - see paragraph 25 below), established pursuant to section 4 (3) of the 1984 Act. "

"Fost hwejjeg ohra, l-appellant qal hekk -

"... upon a proper understanding of the serious nature of the video as an artistic and imaginative interpretation of the 'ecstasy' or 'rapture' of the sixteenth-century Carmelite nun, St Teresa of Avila, it would not be taken by

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a reasonable person as contemptuous, reviling, scurrilous or ludicrous or otherwise disparaging in relation to God, Jesus Christ or the Bible ...”

“Fir-risposta tieghu, il-Bord baqa’ jsostni li l-produzzjoni kienet tikser id-dritt penali li jirregola l-blasfemija u nsista li l-appell kellu jkun michud.

““The Board submits and is advised that in Britain the offence of blasphemy is committed if a video work treats a religious subject (in particular God, Jesus Christ or the Bible) in such a manner as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented.”

“Kompla jsir apprezzament tax-xoghol innifsu.

““... Moreover, the manner in which such imagery is treated places the focus of the work less on the erotic feelings of the character than on those of the audience, which is the primary function of pornography whether or not it shows the sex act explicitly. Because there is no attempt, in the Board's view, to explore the meaning of the imagery beyond engaging the viewer in a voyeuristic erotic experience, the Board considers that the public distribution of such a video work would outrage and insult the feelings of believing Christians ...”

“L-appell kien deciz kontra l-appellant fit-23 ta’ Dicembru 1989.

““In the opinion of a majority of the Panel the video did not, as the appellant claims, explore St Teresa's struggles against her visions but exploited a devotion to Christ in purely carnal terms. Furthermore they considered that it lacked the seriousness and depth of The Last Temptation of Christ with which Counsel for the appellant sought to compare it. Indeed the majority took the view that the video's message was that the nun was moved not by

religious ecstasy but rather by sexual ecstasy, this ecstasy being of a perverse kind – full of images of blood, sado-masochism, lesbianism (or perhaps auto-erotism) and bondage. Although there was evidence of some element of repressed sexuality in St Teresa's devotion to Christ, they did not consider that this gave any ground for portraying her as taking the initiative in indulged sexuality. They considered the over-all tone and spirit of the video to be indecent and had little doubt that all the above factors, coupled with the motions of the nun whilst astride the body of Christ and the response to her kisses and the intertwining of the fingers would outrage the feelings of Christians, who would reasonably look upon it as being contemptuous of the divinity of Christ.

“In these circumstances the majority were satisfied that the video is blasphemous, that a reasonable and properly directed jury would be likely to convict and therefore that the Board was right to refuse to grant a Certificate. Hence this appeal is accordingly dismissed.”

“Proceduri quddiem il-Kummissjoni

““Mr Wingrove applied to the Commission on 18 June 1990. He relied on Article 10 of the Convention (art. 10), complaining that the refusal of a classification certificate for his video work Visions of Ecstasy was in breach of his freedom of expression. The Commission declared the application admissible on 8 March 1994.”

“Quddiem il-Qorti Ewropea

“L-argument tar-rikorrent kien li -

“The refusal by the British Board of Film Classification to grant a certificate for the applicant's video work Visions of Ecstasy, seen in conjunction with the statutory provisions making it a criminal offence to distribute a video work without this certificate ... amounted to an interference by a public authority with the applicant's right to impart ideas ... “was a violation of his right to freedom of expression, as guaranteed by Article 10 of the Convention.

“To determine whether such an interference entails a violation of the Convention, the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction “prescribed by law”, which pursued an aim that was legitimate under that provision (art. 10-2) and was “necessary in a democratic society”.”

“Il-Qorti komplet tghid hekk –

“... In refusing the applicant's video on the basis that it infringed a provision of the criminal law of blasphemy, the British Board of Film Classification acted within its powers under section 4 (1) of the 1984 Act

“The Court recognises that the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence ...

“... the Court is satisfied that the applicant could reasonably have foreseen with appropriate legal advice that the film, particularly those scenes involving the crucified figure of Christ, could fall within the scope of the offence of blasphemy.

“Against this background it cannot be said that the law in question did not afford the applicant adequate protection against arbitrary interference. The Court therefore concludes that the impugned restriction was “prescribed by law”.

“The Court notes at the outset that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner “as to be calculated (that is, bound, not intended) to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or

ludicrous tone, style and spirit in which the subject is presented" ...

"This is an aim which undoubtedly corresponds to that of the protection of "the rights of others" within the meaning of paragraph 2 of Article 10 (art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (art. 9) to religious freedom.

"Whether or not there was a real need for protection against exposure to the film in question is a matter which must be addressed below when assessing the "necessity" of the interference.

"... it is not for the European Court to rule in abstracto as to the compatibility of domestic law with the Convention.

"The refusal to grant a certificate for the distribution of Visions of Ecstasy consequently had a legitimate aim under Article 10 para. 2 (art. 10-2).

"The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory ...

"No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 (art. 10) unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article (art. 10-2). In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the European Court to give a final ruling on the restriction's

compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" ...

"The Court observes that the refusal to grant Visions of Ecstasy a distribution certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians ...

"... blasphemy legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether ...

"However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention ...

"... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with

regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended ...

"... This does not of course exclude final European supervision. Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material. In this regard the scope of the offence of blasphemy and the safeguards inherent in the legislation are especially important ...

"The Court's task in this case is to determine whether the reasons relied on by the national authorities to justify the measures interfering with the applicant's freedom of expression are relevant and sufficient for the purposes of Article 10 para. 2 of the Convention (art. 10-2) ...

"Bearing in mind the safeguard of the high threshold of profanation embodied in the definition of the offence of blasphemy under English law as well as the State's margin of appreciation in this area ... the reasons given to justify the measures taken can be considered as both relevant and sufficient for the purposes of Article 10 para. 2 (art. 10-2).

"... the Court is satisfied that the decisions by the national authorities cannot be said to be arbitrary or excessive.

"... Against this background the national authorities were entitled to consider that the impugned measure was justified as being necessary in a democratic society within the meaning of paragraph 2 of Article 10 (art. 10-2). There has therefore been no violation of Article 10 of the Convention (art. 10)."

"Ikkunsidrat –

“Minn ezami akkurat ta’ din il-gurisprudenza, wiehed jifhem mill-ewwel ir-rilevanza li ghandha ghall-kaz tal-lum : fl-inqas grad, ghal dik li hija tematika; u fi grad certament aktar oghli, l-insenjamenti li hargu japplikaw bis-shih, *mutatis mutandis*, ghall-kaz tal-lum. Din il-Qorti mhix se tindika wahda wahda l-applikazzjoni tax-xebh u tal-principji ghall-kaz tal-lum ghax tifhem li dan huwa ben identifikabbli f’kull wiehed mit-tliet pronunzjamenti tal-Qorti Ewropea.

“Karen Reid fil-ktieb taghha **“A Practitioner’s Guide to the European Convention on Human Rights”** – (Sweet & Maxwell – Third Edition) Pg. 355 et seq tghid hekk -

“... Controversy tends to arise where the work provokes religious or moral outrage. Freedom to receive and impart information and ideas includes the opportunity to take part in the public exchange of cultural, political and social information of all kinds, including artistic expression. Artists cannot claim an unlimited freedom however but are subject to duties and responsibilities under the second paragraph of Art.10. In Otto Preminger vs Austria the Court stated that these included an obligation to avoid gratuitously offending others and infringing their rights, since this could not contribute to any public debate capable of furthering progress in human affairs. This approach would appear to place a strict burden on artists to avoid offending, since what is or is not gratuitous may be rather subjective, as shown in the Otto Preminger case, where the Court appeared to agree with the authorities that the provocativeness of the film outweighed the artistic values ...

“A wide margin of appreciation is generally afforded by the Court to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals, or especially religion. The Court considers that there is no uniform concept of morals, or of the requirements of the protection of religious beliefs, which differ from place to place and time to time. Local State authorities which are in direct and continuous contact with the vital forces of their

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country are thus, in principle, in a better position to give an opinion on the exact contents of these requirements as well as the necessity of the measures designed to meet them. It found in Muller vs Switzerland ...

“There was arguably public outrage in Otto Preminger ...

“The element of risk to public outrage and religious peace was nevertheless absent from Wingrove vs UK ... The Court however found that the decision pursued the legitimate aim of protecting the rights of others not to be offended in their religious beliefs. Having regard to the wide margin of appreciation and particular contents of the film, the decision was found not arbitrary or unreasonable ...”

“Dan il-bran jinseg b'reqqa l-punt krucjali ta' l-kwistjoni tal-lum.

“U cioe` id-decizjoni tal-Bord [li l-intimati jikkontendu hija tutelata bl-Art.10(2) tal-Konvenzjoni] tikkostitwixxi ksur tad-dritt tar-rikorrenti ghal-liberta` tal-espressjoni ?

“Ikkunsidrat –

“Il-kitba ta' Dr. Yutaka Arai-Takahashi kienet citata f'pagna 633 ta' l-ktieb **“Cases and Materials on the European Convention on Human Rights”** ta' Alastair Mowbray (Second Edition – Oxford University Press) -

““Even in the increasingly harmonised constitutional dimension, however, the diversity of values embraced by Member States makes it hardly conceivable for the Strasbourg organs to establish an “autonomous” meaning for such elusive notions as “morals” or “public interest”. Nor is it desirable to enforce uniform standards of the Convention at the expense of regional litigimacy and of richness in cultural values and traditions in Member States. The margin of appreciation must be understood as an essential constitutional device designed to preserve the fundamental prerequisite and virtue of a liberal democratic society : value pluralism. The doctrine's only

defensible rationale during and after the process of integration is to enable the Strasbourg Court to provide endorsement of the maintenance of cultural diversity, ensuring to the citizens of Europe the means to articulate and practice their preferred values within a multi-cultural democracy (Y. Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR Antwerp : Intersentia, 2002 p.249)"

“Waqt it-trattazzjoni tal-kawza, saret enfasi mir-rikorrenti li sabiex johrog il-qawwa tat-taqlib li kienet ghaddejja minnu l-koppja Steward u Abby, l-awtur ma ghamel xejn hazin li adotta il-lingwagg u l-plot li adopera (li kellu mbaghad jissarraf f’*acting* konvincenti u fidil mill-atturi).

“Din il-Qorti ma taqbilx.

“Is-sofferenza hija maghguna mal-hajja tal-bniedem. Imbaghad fil-koppja, issib is-sintesi *par excellence*. Ghaliex jekk il-bazi tal-koppja se tkun *anke* l-accettazzjoni tat-tbatija bhala *parti mir-raison d’etre* tal-hajja, allura anke sabiex johrog din ir-realta` esistenza, l-awtur ma ghandux ghalfejn jirrikorri ghall-perverzjoni li hija negattiv *par excellence*.

“Ir-rikorrenti ghandhom kull jedd ighidu : imma min ghandu dritt jindahal lill-awtur kif jesprimi l-hsieb tieghu ?

“Fuq il-pjan teoriku, hekk hu izda l-pjan teoriku mhux l-“alpha u l-omega”. Ghax hemm konsiderazzjonijiet ohra ta’ natura socjali li jissuperaw kull konsiderazzjoni ohra speċjalment f’socjetajiet bhal taghna fejn “the rule of law” hija l-mizura ta-civilta`.

“F’pagna 807 tal-ktieb taghhom “**Theory and Practice of the European Court of Human Rights**” l-awturi Van Dijk, Van Hoof, Van Rijn u Zwaak (Fourth Edition – Intersentia) ighidu hekk -

““*In the Murphy case (Murphy vs Ireland – 10 ta’ Lulju 2003) ... the Court held that ... a wider margin of appreciation is generally available to the Contracting*

States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous content of these requirements with regard to the rights of others as well as on the 'necessity' of a 'restriction' intended to protect from such material those whose deepest feelings and convictions would be seriously offended."

“F’dan il-procediment, il-kompitu ta’ din il-Qorti huwa li tara jekk id-decizjoni tal-Bord li jzomm il-wiri tad-dramm in kwistjoni kienx lesiv jew le tad-dritt ghal-liberta` tal-espressjoni tar-rikorrenti.

“Din il-Qorti tghid bil-kuxjenza *a posto*, minghajr l-icken esitazzjoni izda fl-istess waqt b’sens ta’ gustizzja li d-decizjoni tal-Bord kienet retta u skond il-ligi.

“Din il-Qorti doverozament qrat folja folja tad-dramm in kwistjoni. U b’kull rispettt lejn l-intellett tal-awtur, tghid li ma tistax torbot it-trama li ried jittrasmetti mal-metodu adoperat. Il-qabza fil-kwalita`, din il-Qorti tghid, b’kull rispettt, lejn id-depravazzjoni fl-aghar manifestazzjoni taghha ma tista` qatt tkun dik li ssalva d-dramm almenu fic-civilta` ta’ pajjizna, b’kull rispettt lejn il-pajjizi l-ohra fejn id-dramm intwera bla problemi ta’ xejn.

“Il-Bord kien fl-obbligu li jassikura l-osservanza tal-ligijiet vigenti u kellu linji gwida li fil-kaz tal-lum kellu jimplimenta. F’dak il-kuntest, din il-Qorti ma tara xejn irragonevoli fid-decizjoni tal-Bord li jqis id-dramm fl-assjem tieghu bhala offensiv ghall-kultura shiha ta’ pajjizna fis-sens mill-aktar wiesgha tal-kelma. Skond il-linji gwida u skond il-ligi, il-Bord kellu kull dritt iqis il-partijiet offensivi tad-dramm li

diga` saret riferenza ghalihom u ohrajn li jirrizulta *man mano* li wiehed igharbel it-test bhala lesivi ghad-dinjita` tal-bniedem li hija parti integrali mit-tessut civili u morali tal-pajjiz. Mhux accettabbli f`socjeta`, anke demokratika u pluralista bhal taghna, li l-waqa` fil-baxx tad-dinjita` umana tkun esaltata anke jekk ghall-fini “presumibbilment” genwin li juri kif koppja fil-maltemp issib il-bnazzi.

“Il-Bord sab li fis-sustanza, id-dramm huwa affront gravi lejn id-dinjita` tal-bniedem. Travaljata kemm hi travaljata r-relazzjoni tal-koppja, ma jistax isir uzu estensiv ta` lingwagg vulgari, oxxen u blasfem, li jesalta l-perverzjoni, ikasbar id-dritt ghall-hajja, ikasbar id-dritt kontra trattament disuman u degradanti, ikasbar ir-rispett lejn id-dinjita` tal-mara, ixandar imgieba incivili li tikser il-ligi, tbaxxi is-sofferenza ta` nisa waqt il-holocaust, iwaqqa` lil mara ghal semplici oggett ta` sodisfazzjon sesswali, jirredikola l-hajja fil-familja u r-responsabilitajiet tal-genituri versu uliedhom.

“Civilta` demokratika izda fl-istess waqt tolleranti u hanina bhal dik ta` pajjizna ma tistax taccetta li l-valuri taghha jinqalbu ta` taht fuq semplicement ghaliex jezisti d-dritt ghal-liberta` tal-espressjoni. Din hija pruzunzjoni inaccettabbli mhux biss ghal socjeta` zghira bhal taghna li pero` hija mibnija fuq valuri inassodabbli izda, kif rajna, fuq bazi multinazzjonali.

“Il-Bord kellu kull dritt iqis li d-dramm jesalta l-perverzjoni bhallikieku dik hija mgieba accettabbli f`socjeta` civili aktar milli l-eccezzjoni. Il-hjata tal-vagina bhala att ta` pjacir sesswali, il-bestajalita`, id-depravazzjoni kostitwita anke mill-hsieb biss li mara tiekol l-eskrementi ta` mara ohra, il-pjacir ricerkat fl-isturpru tat-tfal, fil-qtil tat-tfal, u fis-sess mal-ommijiet tat-tfal li gew stuprati jew maqtula huma inaccettabbli anke f`socjeta` demokratika.

“F`pagna 237 tal-ktieb **“European Human Rights Law”** ta` Janis, Kay & Bradley (Third Edition – Oxford University Press) insibu hekk –

“... *expression cannot be protected absolutely. It is uncontestable that the utterance of some kinds of*

language in some situations may impose grave social harms ... The Convention explicitly provides that limitations on the right of free expression do not violate the Convention if they are for one of the purposes and meet the other criteria listed in Art 10(2)."

“In partikolari dwar id-dagha, skond l-awtur sabiex ikompli jsostni l-qagħda mwegħra tal-personaggi, din il-Qorti tgħid huwa inaccettabbli f’socjeta` demokratika bħal dik ta’ pajjizna fondata fuq *the rule of law* li persuna, hi min hi, jew tagħmel x’tagħmel, tithalla tidghi jew tgħid kliem oxxen u vulgari fil-pubbliku, anke jekk fuq *script* teatrali, u tithalla tgawdi immunita` meta skond il-ligi tagħna il-fatt **biss** li persuna tidghi fil-pubbliku, tkun xi tkun ir-raguni ghala, hija kontravvenzjoni u allura ksur tad-dritt penali tal-pajjiz. Jekk din il-Qorti se tippermetti dan f’socjeta` demokratika, tkun qed tiddiskrimina bejn persuna u oħra, ghax min jidghi fil-pubbliku huwa punibbli ghax ikkommetta reat, pero’ min jidghi ghax parti minn drammm dak suppost ibati immunita`!

“Is-*Shoa* hija fatt storiku fejn il-vittmi innocenti tar-regim Nazista garrbu tbatijiet inawditi. Minflok suggett sensitiv u delikat, anke għal socjeta` zghira bħal tagħna, kien trattat bir-rispett dovut u b’turija ta’ dinjita’ lejn il-vittmi, il-karattru Stu juri biss depravazzjoni sesswali. Ghalkemm huwa fatt guridikament accettat li l-qtil tal-Lhud fit-Tieni Gwerra Dinija, huwa suggett li għandu jigi protratt korrettament u b’mod sobriju, l-awtur jippermetti għal kollox *out of context* li dik it-tragedija titbaxxa u tkun umiljata għal xejn izjed milli għall-perverzjoni. Iddur kemm iddur, it-test tad-drammm jinkalja mas-sikka kostitwita mid-dinjita` inaljenabbli tal-bniedem, li din il-Qorti fehmet li hija l-bazi tad-decizjoni tal-Bord.

“In konkluzjoni, din il-Qorti tgħid li bid-decizjoni tiegħu l-Bord ma kkommetta ebda ksur tad-drittijiet fundamentali tar-rikorrenti kif tutelati mill-Kostituzzjoni u mill-Konvenzjoni.”

Rat ir-rikors tal-appell tal-atturi li in forza tieghu, ghar-ragunijiet minnhom premissi, talbu sabiex din il-Qorti joghgobha:

“(a) thassar u tirrevoka d-digriet tal-Ewwel Onorabbli Qorti tal-20 ta' Ottubru 2009 u minflok tiddeciedi billi tilqa' t-talba tar-rikorrenti sabiex tintwera rapprezentazzjoni tad-dramm *Stitching* lill-Qorti u lill-intimati appellati privatament; u

“(b) tirrifirma s-sentenza moghtija mill-Prim' Awla tal-Qorti Civili (Sede Kostituzzjonali) fit-28 ta' Gunju, 2010 fl-ismijiet fuq premissi, u dana fis-sens illi:

“i. Tikkonferma s-sentenza in kwantu l-Qorti cahdet l-ewwel eccezzjoni preliminari ta' l-intimata Friggieri fil-kapacita` taghha bhala Chairman tal-Bord tal-Klassifika tal-Pellikoli u tal-Palk, u ta' l-intimat Avukat Generali;

“ii. Tikkonferma s-sentenza in kwantu l-Qorti laqghet l-istess eccezzjoni fil-konfront ta' l-intimata Teresa Friggieri fil-kwalita` taghha personali, l-intimat Onor. Prim Ministru, u l-intimat Kummissarju tal-Pulizija;

“iii. Tikkonferma s-sentenza in kwantu l-Qorti illiberat lill-intimata Teresa Friggieri fil-kwalita` personali taghha, lill-intimat Onor. Prim Ministru, u lill-intimat Kummissarju tal-Pulizija mill-osservanza tal-gudizzju:

“iv. Tikkonferma s-sentenza in kwantu l-Qorti cahdet it-tieni eccezzjoni preliminari fejn din tirrigwarda lir-rikorrenti Christopher Gatt, Maria Pia sive Pia Zammit, Mikhail Acopovich Basmadjian u Unifaun Theatre Productions Limited;

“v. Tikkonferma s-sentenza in kwantu l-Qorti laqghet l-istess eccezzjoni fejn din tirrigwardja lir-rikorrent Adrian Buckle;

“vi. Tikkonferma s-sentenza in kwantu l-Qorti cahdet it-tielet u r-raba' eccezzjonijiet preliminari;

“vii. Tirrevoka u thassar dik il-parti tas-sentenza li permezz taghha l-Qorti laqghet l-eccezzjonijiet ta' l-intimati fil-mertu u cahdet it-talbiet tar-rikorrenti, u ordnat li kull parti tbatu l-ispejjez taghha, u tiddetiedi minflok billi tichad l-istess eccezzjonijiet fil-mertu u tilqa' t-talbiet tar-rikorrenti kif proposti fir-rikors taghhom tat-3 ta' Marzu, 2009, bl-ispejjez taz-zewg istanzi kontra l-intimati appellati;

“U dana bir-rizerva illi jitressqu kwalunkwe provi permessi mill-ligi f'dan l-istadju, u salv kull provvediment iehor illi dina l-Onorabbli Qorti jidhrilha xieraq u opportun fic-cirkostanzi.”

Rat ir-risposta ta' Teresa Friggieri fil-kwalita` ta' Chairman tal-Bord tal-Klassifika tal-Pellikolu u tal-Palk u tal-Avukat Generali, li in forza taghha, ghar-ragunijiet minnhom premessi, issottomettu li l-appell tal-appellanti ghandu jigi michud bl-ispejjez taz-zewg istanzi kontra taghhom;

Rat ir-risposta ta' Teresa Friggieri f'isimha proprio, tal-Prim Ministru u tal-Kummissarju tal-Pulizija li in forza taghha ssottomettu illi la darba l-appellanti mhux qed jappellaw in konfront taghhom (fejn gew liberati mill-osservanza tal-gudizzju), is-sentenza tal-ewwel Qorti in konfront taghhom saret *res iudicata*;

Semghet lid-difensuri tal-partijiet, u rat ukoll it-traskrizzjoni tat-trattazzjoni li saret quddiem din il-Qorti, izda diversament ppresjeduta, waqt l-udjenza tal-5 ta' Ottubru 2011;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Ikkunsidrat:

Illi l-atturi xtaqu jtellghu hawn Malta produzzjoni teatriali tad-dramm Ingliz bl-isem “Stitching”, izda l-Bord ta' Klassifika tal-Pellikoli u tal-Palk (il-Bord) ipprojbixxa l-produzzjoni ta' dan id-dramm hawn Malta. L-atturi ressqu

din il-procedura fejn qed jallegaw li tali decizjoni tikkostitwixxi vjolazzjoni tad-dritt fundamentali taghhom ghal-liberta` tal-espressjoni kif sancit bl-Artikolu 41 tal-Kostituzzjoni ta' Malta u l-Artikolu 10 tal-Konvenzjoni Ewropeja dwar id-Drittijiet tal-Bniedem, kif ukoll vjolazzjoni tad-dritt fundamentali ghal smiegh xieraq bi ksur tal-Artikoli 39 tal-Kostituzzjoni ta' Malta u l-Artikolu 6 tal-imsemmija Konvenzjoni. L-ewwel Qorti cahdet it-talba tal-atturi biex tara l-produzzjoni u strahet fuq qari tal-*iscript*, u ghaddiet biex cahdet l-ilmenti kollha tal-atturi peress li sabet li d-dramm "*huwa affront gravi lejn id-dinjita` tal-bniedem*".

L-atturi appellaw mis-sentenza u qed jinvitaw lil din il-Qorti tara l-*iscript* tal-produzzjoni teatrali u tirrevoka s-sentenza tal-ewwel Qorti, u ssib li bid-decizjoni li tigi mizmuma l-wirja tal-produzzjoni gew, fil-fatt, miksura l-libertajiet fundamentali taghhom kif invokati.

Din il-Qorti tibda biex tosserva illi r-rikorrenti, wara d-decizjoni li ha l-Bord ta' Klassifika tal-Pellikoli u tal-Palk li waqqaf il-wiri tal-produzzjoni, ma talbux stharrig gudizzjarju ta' dik id-decizjoni a bazi tar-regoli ta' dritt amministrattiv kif applikati hawn Malta. L-intimati, f'din il-kawza, ressqu eccezzjoni fis-sens li talbu lill-ewwel Qorti tiddeklina milli tezercita l-funzjoni kostituzzjonali u konvenzjonali taghha peress li r-rikorrenti ma ezawrewx ir-rimedji ordinarji disponibbli, pero`, l-ewwel Qorti ddecidiet li, f'kull kaz, kellha diskrezzjoni fil-materja, u ghazlet li ma tiddeklinax il-gurisdizzjoni taghha li xorta wahda tistharreg u tiddeciedi fil-meritu fuq il-kaz. Kontra dik id-decizjoni ma tressaqx appell, pero`, jibqa' l-fatt li r-rikorrenti m'humix qed jattakkaw id-decizjoni bhala invalida jew li mhux imsejsa fuq ir-raguni. Il-qrati ordinarji ta' Malta ghandhom is-setgha jattakkaw kwalunkwe decizjoni amministrattiva (kif inhi d-decizjoni inkwistjoni) fuq il-bazi li meta ttiehdet id-decizjoni, il-Bord jew agixxa ghal ghanijiet mhux xierqa (*improper motives* jew *improper considerations*) jew li, biex wasal ghal konkluzjoni tieghu, ha in konsiderazzjoni affarijiet li ma kienux rilevanti (*irrelevant considerations*). Fuq kollox, il-qrati ordinarji jistghu dejjem jistharrgu r-ragjonevolezza tad-decizjoni, mehud kont tac-cirkostanzi

tal-kaz. Huwa principju guridiku assodat fid-dritt amministrattiv anke ta' pajjizna li:

“a person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so – he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.”

(Sottolinear ta' din il-Qorti)

(ara “Administrative Law” ta' H.W.R Wade & C.F. Farsyth, 10th Edit. pagna 295).

Stharrig fuq din il-linja kienet taghti lill-qrati ordinarji s-setgha li jissindikaw id-decizjoni forsi anke b'mod l-aktar wiesgha. Fil-fatt l-istess awturi jghidu (f'pagna 303 u 304) li *unreasonableness*, fit-test klassiku tieghu, “*covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion. The rule of reason has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as ‘irrelevant considerations’, and mistakes and misunderstandings which can be classed as self-misdirection, or addressing oneself to the wrong question.*”

Kif inghad, ir-rikorrenti, f'din il-kawza ma dehrilhomx li kellhom jattakkaw ir-ragjonevolezza jew il-vires tad-decizjoni, li ha l-Bord ta' Klassifika. Huma qed jghidu li d-decizjoni, li mhux qed iqisu bhala wahda irragjonevoli, tikser id-dritt fundamentali ghal-liberta` tal-espressjoni u ta' smiegh xieraq. Dan ifisser li r-rikorrenti ma jistghux aktar jilmentaw mid-decizjoni *ut sic*, ghax avolja kellhom kull opportunita` jattakkaw ir-ragjonevolezza tad-decizjoni quddiem il-qrati ordinarja, dan ma ghamluhx. Kwindi

x'jahseb haddiehor fuq il-produzzjoni, u x'kienet l-opinjoni ta' terzi dwar id-decizjoni, mhux rilevanti, ghax id-decizjoni giet accettata mir-rikorrenti bhala wahda "ragjonevoli".

Trattat issa l-ilment tar-rikorrenti taht l-aspett kostituzzjonali u konvenzjonali tieghu, din il-Qorti ma tarax li l-ezistenza tal-Bord ta' Klassifika per se, jista' jitqies li jivvjola xi dritt tar-rikorrenti u dan lanqas jista' jinghad b'xi mod peress li hija l-Ligi stess li tistabbilih u din il-Ligi ma gietx attakata lanqas b'dawn il-proceduri.

Huwa wkoll dmir tal-Istat li jikkontrolla l-eccessi f'kull kamp tal-attivitá socjali, u ma ghandux jabdika din l-obbligazzjoni u dan anke fid-dawl li jrid jipprotegi d-dritt ta' liberta` tal-espressjoni li wkoll ghandu l-limitazzjonijiet tieghu kif indikati kemm fl-Artikolu 41 tal-Kostituzzjoni u kif ukoll fl-Artikolu 10(2) tal-Konvenzjoni. L-ideja li fi stat demokratiku u sekulari dak li jkun jista' jaghmel li jrid hija assolutament falza. Id-drittijiet li jgawdi l-individwu ghandhom dejjem marbut maghhom doveri u responsabbiltajiet u hekk ukoll fil-kuntest tal-liberta` ta' espressjoni. Hekk tali liberta` ta' espressjoni ghandha l-limitazzjoni taghha f'dak li l-ligi nazzjonali stess tipprovdi sabiex jigu *inter alia* mharrsa l-protezzjoni tal-morali u l-protezzjonijiet tar-reputazzjoni jew drittijiet ta' haddiehor kif indikat fl-Artikolu 10 tal-Konvenzjoni u moralita` u d-dicenza pubblika kif indikat fl-Artikolu 41(2) tal-Kostituzzjoni. Huwa f'dan l-isfond li l-azzjoni tar-rikorrenti ghandha tigi ezaminata.

Fil-kuntest ta' din il-produzzjoni teatrali, fis-sentenza tal-ewwel Qorti hemm riproduzzjoni ta' diversi brani li din il-Qorti thoss li twaqqá fil-baxx id-dinjita` tal-persuna umana, f'hafna mill-aspetti taghha, u dan bl-uzu estensiv ta' lingwagg vulgari, oxxen u blasfem, li jezalta l-perverzjoni, ikasbar id-dritt ghall-hajja, ikasbar id-dritt kontra trattament dizuman u degredanti, ikasbar ir-rispett lejn id-dinjita` tal-mara, ixandar imgieba incivili li tikser il-ligi, tbaxxi is-sofferenza ta' nisa waqt il-*holocaust*, iwaqqa' lil mara ghal semplici oggett ta' sodisfazzjon sesswali, jirredikola l-hajja fil-familja u r-responsabbiltajiet tal-genituri versu uliedhom.

Illi dan qed jinghad wara li din il-Qorti, bhall-ewwel Qorti, qrat l-*iscript* kollu tal-imsemmi dram, u ssib li tali istanzi fejn id-drittijiet ta' persuni u d-dinjita` taghhom huma tant difuzi fl-istess dram, li dawn certament jaffettwaw il-livell ta' moralita` u dicensa b'mod generali tal-istess xoghol u prezentazzjoni, u li dan kien kollu fil-kompetenza tal-Bord tal-Klassifika tal-Pellikolu u tal-Palk li jezamina u dan anke fid-dawl ta' dak li jipprovdi l-istess Regolamenti dwar il-Pellikoli u l-Palk.

Ma hemm l-ebda dubbju ghalhekk anke f'ghajnejn din il-Qorti hemm frazijiet despregattivi u insulenti fil-konfront ta' iktar minn twemmin partikolari, u kliem dispreggattiv u insolenti lejn nisa, u anke ghal dak li minnu ghaddew il-Lhud taht in-nazzisti fl-ahhar gwerra dinjija. Kif qalet il-Qorti Ewropeja ta' Gustizzja fil-kaz **Otto Preminger Institut v. Austria**, deciza fl-20 ta' Settembru 1994, u li ghalha ghamlet ampia riferenza l-ewwel Qorti, min ihaddan religjon, *"must tolerate and accept the denial by others of their religious beliefs and even the propogation by others of doctrines hostile to their faith. However, the manner in which religious belief and doctrines are opposed or denied is a matter which may engage the responsabbility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 to the holders of those beliefs and doctrines."*

Jigi hawn precizat li l-limiti ta' dicensa gew maqbuza f'dan il-kaz mhux biss fil-kaz ta' dagha, li hawn Malta huwa fih innifsu reat, izda wkoll fejn fl-istess dram hemm aktar minn istanza wahda fejn id-dinjita` ta' gens, ta' mara, ta' tfal, u ta' bniedem uman, giet mkassbra, u wkoll hemm lingwagg uzat li juri u jezalta b'mod estrem il-perversita` sesswali, u dawn tant huma qawwija li jaffettwaw id-dram kollhu mehud fl-assjem tieghu, u attwalment imur u jepprevali fuq kull allegat ghan prezumibilment genwin li juri koppja li ghaddiet minn maltemp kbir u ssib il-bnazzi.

Il-mod ta' kif il-produzzjoni tiddisprezza d-dinjita` tal-bniedem u in partikolari certu sezzjonijiet tal-bnedmin,

sew jekk nisa jew tfal, sew minhabba n-nazzjonalita` taghhom jew anke minhabba t-twemmin taghhom, u l-mod kif l-istess huma mkasbrin, anke fuq il-pretest li tali persunaggi ghadew jew kienu ghaddejjin minn mument verament difficli f'hajjithom, li jwassluhom biex jagixxu taht tensjoni, pressjoni u dipressjoni, ma ghandhux lanqas iwassal sa hawn u dan ma jista' lanqas jigi accettat taht l-isem ta' "arti". Il-kelma "arti" hija wiesgha bizejded biex tkopri kwalunkwe manifestazzjoni ta' espressjoni, pero`, ma tistax tasal biex thaddan fiha nfisha dagha, kliem oxxen u zebblieh ta' trawma fuq skala ta' genocidju, li bil-mod kif esposti jista' minnhom infushom imorru kontra l-ligijiet tal-pajjiz, u sahsitra jistghu jigu kkonsidrati bhala illegalli u/jew reati fihom infushom. Biex wiehed jibghat messagg morali qawwi, kif qal li ried jaghmel l-awtur ta' din il-produzzjoni, mhux mehtieg li dak li jkun jirrikorri ghal oxxenita` u d-dagha. Il-liberta` ta' espressjoni tista' tinnecessita` li haddiehor ihossu mhux komdu jew imdejjaq, izda mhux li jigi insultat minhabba t-twemmin tieghu jkun xi jkun li huwa jhaddan jew minhabba li jippartjeni ghal xi gens partikolari jew sempliciment ghax hija mara jew minuri, u dan ghaliex dak li jkun ikun ghadda minn memorja ta' tragedja kbira.

Hu dmir tal-Istat li jara li tigi mharsa l-moralita` tal-pajjiz, u l-Istat, u l-funzjonarji tieghu, huma fi dmir li jipprottegu l-istess u f'dan is-sens huma l-ligijiet attwalment applikabbli f'dan il-pajjiz inkluzi dawk li bhalissa jirregolaw tali produzzjonijiet u kien fil-fatt fid-dawl tal-istess li l-Bord specifikat ha l-istess decizjoni mertu ta' din il-pendenza.

Huwa f'dan l-isfond u fid-dawl tal-Ligijiet vigenti li l-Bord imsemmi sab li tali produzzjoni ma kellhiex tintwera ghaliex il-kontenut taghha kien:-

“1. *Blasphemy against the State Religion – pages 10 and 17*

“2. *Obscene contempt for the victims of Auschwitz – page 29*

“3. *An encyclopedic review of dangerous sexual perversions leading to sexual servitude – pages 33, 34 and several others*

“4. *Abby’s eulogy to the child murderers, Fred and Rosemary West – page 35*

“5. *Reference to the abduction, sexual assault and murder of children – page 36*

“In conclusion, the play is a sinister tapestry of violence and perversion where the sum of the parts is greater than the whole. The Board feels that in this case the envelope has been pushed beyond the limits of public decency.”

Din il-Qorti bhall-ewwel Qorti taqbel ma’ dan ghaliex fuq kollox x’inhu moralment korrett ma ghandux u ma jistax jigi deciz f’sens universali u oggettiv ghax jiddependi hafna mill-Istat u anke mir-regjun partikolari. Il-fatt, ghalhekk, li din il-produzzjoni thalliet tixxandar f’pajjizi ohra, ma jfissirx li ghandha tixxandar f’Malta wkoll, ghax dak li hu accettabbli f’pajjiz, mhux neccessarjament accettabbli u permissibbli f’pajjiz iehor anke in vista tal-fatt li l-ligijiet fid-diversi pajjizi ndikati huma differenti, u dan anke fir-rigward tar-reati kontemplati u ghalhekk li f’dak li huwa d-dritt fundamentali ta’ liberta` ta’ espressjoni skont id-decizjonijiet fuq citati anke tal-Qorti Ewropeja tad-Drittijiet tal-Bniedem huwa car li hemm certu latitudini moghtija lill-Istat sabiex jirregola r-restrizzjonijiet ghal tali dritt b’ligijiet *ad hoc* li jaqghu taht il-parametri tal-**Artikolu 10(2) tal-Konvenzjoni** u hawn issir riferenza ghall dak li ritenut fis-sentenza **Wingrove v. The United Kingdom** (ECtHR – 22 ta’ Ottubru 1996 fis-sens li:-

“This is an aim which undoubtedly corresponds to that of the protection of "the rights of others" within the meaning of paragraph 2 of Article 10 (Art. 10-2). It is also fully consonant with the aim of the protections afforded by Article 9 (Art. 9) to religious freedom.

“Whether or not there was a real need for protection against exposure to the film in question is a matter which

must be addressed below when assessing the "necessity" of the interference.

"... it is not for the European Court to rule in abstracto as to the compatibility of domestic law with the Convention.

"The refusal to grant a certificate for the distribution of Visions of Ecstasy consequently had a legitimate aim under Article 10 para. 2 (Art. 10-2).

"The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society. As paragraph 2 of Article 10 (art. 10-2) expressly recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them, in the context of religious beliefs, may legitimately be included a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profanatory ...

"No restriction on freedom of expression, whether in the context of religious beliefs or in any other, can be compatible with Article 10 (art. 10) unless it satisfies, inter alia, the test of necessity as required by the second paragraph of that Article (art. 10-2). In examining whether restrictions to the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Court has, however, consistently held that the Contracting States enjoy a certain but not unlimited margin of appreciation. It is, in any event, for the European Court to give a final ruling on the restriction's compatibility with the Convention and it will do so by assessing in the circumstances of a particular case, inter alia, whether the interference corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued" ...

"The Court observes that the refusal to grant Visions of Ecstasy a distribution certificate was intended to protect "the rights of others", and more specifically to provide protection against seriously offensive attacks on matters regarded as sacred by Christians ...

“... blasphemy legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether ...

“However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention ...

“... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended ...”

L-appellanti jghidu li s-setgha tal-Istat ghandu jkun limitat biex jikklassifika l-produzzjoni b'eta` ta' min jista' jaraha, izda mhux li jwaqqafha ghal kollox. Izda fil-verita` din ma hijjex il-pozizzjoni legali attwalment ezistenti f'dan il-pajjiz u din il-Ligi bl-ebda mod ma giet attakata f'dawn il-proceduri. Ghalhekk din il-Qorti ma taqbilx ma' dak hekk

sottomess ghaliex tali setgha hija moghtija bil-Ligi li waqqfet l-istess Bord. Dan apparti l-fatt li anke jekk produzzjoni tigi, per ezempju, klassifikata li jistghu jsegwuwha biss adulti, ma jfissirx li lil dawg l-adulti jista' jinghad u jintwera kollox, bla limitazzjoni. Il-fatt li adult jaf li jekk jara dik il-produzzjoni, jista' jinfaccja riskju ghal karattru u l-inkolumita` tieghu, ma jfissirx li hu lest biex jiffaccja kollox jew lest li jaccetta anke insulti oxxeni u gravissimi. B'analogija jista' jinghad li bil-fatt li *pedestrian* jaqsam it-triq, hu jaf li qed jiehu riskju ghal sahtu, pero`, din ix-xjenza ma jintitola lill-ebda sewwieq isug b'mod azzardat ghal fuqu! Hu, ghalhekk, li l-Istat irregola s-sewqan eccessiv fit-toroq u dan ma huwiex permess.

Ghalhekk kif inhi l-Ligi lllum l-Bord ta' Klassifika, f'isem l-Istat, hu fid-dover li jara preventivament il-produzzjoni u jqis l-effett taghha fuq il-fibra socjali tal-pajjiz. Ghandu, fi kliem il-Qorti Ewropeja fil-kaz kontra Austria aktar qabel imsemmi, "*a certain margin of appreciation*", biex jassessja l-htiega ta' kif u sa fejn ghandu jintervjeni. Huwa dmir tal-Istat li jhares il-valuri ta' pajjizna, u jara li s-sensittivita` tac-cittadini li huma silenjuzi (*the silent citizen*) a differenza minn dawg il-ftit vociforuzi li jimlew il-pagni u l-hin tal-*media* bil-veduti taghhom) ma jigux ikkalpejati. Lanqas xi tip ta' rimedju wara l-prezentazzjoni ma tista' sservi ghal dan l-iskop, ghax jekk tintlahaq issir hsara lis-socjeta`, mhux daqstant facli tregga kollox lura. Hu, ghalhekk, li l-Bord ta' Klassifika f'dan il-kaz agixxa tajjeb u korrettement. Il-projbizzjoni tal-produzzjoni teatrali tad-dramm ma kinitx wahda kapricjuza jew esagerata f'dan il-kaz, izda kienet tirispondi ghal bzonn socjali tal-protezzjoni tal-moralita` pubblika fis-socjeta` Maltija, kif ukoll ghal bzonn illi d-drittijiet ta' haddiehor jigu protetti. X'ghamel dan il-Bord fil-konfront ta' materjal artistiku iehor mhux rilevanti f'din il-pendenza u dan ghas-semplici raguni li ma tifformax b'xi mod il-mertu tal-azzjoni odjerna.

Din il-Qorti, fis-sentenza preliminari taghha tat-12 ta' Lulju 2011, gia` qalet li mhux il-kompitu` taghha li toqghod taghmel analizi komparattiv mad-dramm "Stitching" ta' diversi produzzjonijiet teatrali li thallew jittellghu Malta, u dan principalment, ghax ir-rikors promotur ma jaghmel

ebda allegazzjoni ta' diskriminazzjoni bhala bazi ta' din il-procedura.

Din il-Qorti wkoll ma deherilhiex li kellha tara produzzjoni tad-dramm. L-Ewwel Qorti dehrilha li kellha bizejded fuqieq timxi billi taqra l-*iscript*, u din il-Qorti, hi wkoll tara, li minn qari tal-*iscript* setghet tiehu ideja tajba u cara tal-iskop tal-produzzjoni u s-suppost htiega tal-oxxenita`. L-istess jidher li ghamel il-Bord u jirrizulta li d-decizjoni tieghu kienet skont il-Ligi (ghalkemm jirrizulta wkoll mid-decizjoni tal-ewwel Qorti ghaliex sar dan) Fuq kollox ma hux garantit li drammm kif muri lill-pubbliku jkun l-istess bhal dak li jigi muri lill-Qorti; bidla fit-ton jew l-enfasi ta' kelma tista' taghmel differenza, daqs kemm tista' taghmel differenza mossa jew tixjira ta' idejn.

F'dan il-kaz certament li hemm hafna iktar minn hekk u l-brani stess mill-istess drammm citati fis-sentenza tal-ewwel Qorti juru manifestament dan. Din il-Qorti, ghalhekk, dehrilha li kellha toqghod fuq it-*text* oggettiv tal-*iscript* u dan fuq kollox ghaliex din hija wkoll Qorti ta' Revizjoni u ser tiddeciedi fuq il-provi kif prodotti fl-Ewwel Istanza u mhux fuq dawk li jistghu jigu kkonsidrati bhala provi godda.

Ma hemm ebda dubbju li l-produzzjoni kienet xorta twassal il-messagg li trid tibghat kieku uzat kliem, qawwi iva, izda mhux necessarjament li jikkontjeni dagha, oxxenitajiet, perversitajiet, u dawk li huma insulenti u espressjonijiet tassew degredanti jew razzisti u dan ukol u fil-konfront ta' diversi persuni minhabba n-nazzjonalita`, is-sess, it-twemmin, u stat taghhom fost affarijiet ohra, anke fuq imsemmija.

Mhux komputu` ta' din il-Qorti li tipprova tbiddel mill-*iscript* tad-dramm. L-ewwel Qorti staqsiet lill-produtturi jekk jaccettawx bidliet fit-*text*, izda dawn irriffjutaw. Kwindi, id-dramm jew jitella kif inhu jew jibqa' projbit. Fil-fehma ta' din il-Qorti, l-analizi li ghamlet l-ewwel Qorti tal-fattispecie tal-kaz huwa impekkabbli, u ma tarax li ghandha ghalfejn tmur oltre dak li diga` osservat.

Kopja Informali ta' Sentenza

Dwar l-allegat ksur tal-Artikolu 6 tal-Konvenzjoni Ewropeja u l-Artikolu 39 tal-Kostituzzjoni, gia` intwera li jekk mill-Bord kien hemm ksur ta' xi principju ta' gustizzja naturali (li jistghu jwasslu ghal nuqqas ta' smiegh xieraq), ir-rikorrenti setghu talbu lill-qrati ordinarji jaghmlu '*judicial review*' ta' dik id-decizjoni. Dan ma ghamluhx li jfisser li dak li gara ghandu jitqies li sehh *rite et recte* – salv l-implikazzjonijiet kostituzzjonali u konvenzjonali tad-decizjoni li, fil-fehma ta' din il-Qorti, ma joholqux stat ta' vjolazzjoni tad-drittijiet tar-rikorrenti. Fuq kollox, f'dan il-kaz ma hawnx determinazzjoni ta' drittijiet civili, u ma hawnx kontro-parti; l-interess hu biss tal-Istat li jipprotegi l-interess pubbliku.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell interpost mir-rikorrenti billi tichad l-istess u tikkonferma s-sentenza tal-ewwel Qorti, bl-ispejjez jithallsu in solidum mir-rikorrenti appellanti.

< Sentenza Finali >

-----TMIEM-----