PUBLISH AND BE DAMNED

Pierre Cassar

Ordinance No. IV of 1839 drafted by the Royal Commission of 1836, abolished 'censorship' and provided against 'abuses of the consequent liberty of publishing printed writings.'[1]

Before the said ordinance was enacted, printing was a Government monopoly. According to law, no trade or business could be exercised in Malta without a previous Government licence. By simply refusing to grant any licence to exercise the trade of printer, Government ensured that nothing was printed in Malta except at its own press and with its previous permission which could be withheld without any reason being given.[2]

Since Ordinance IV of 1839 censorship has never been reintroduced in Malta. However, the absence of legal restraint before publication is guaranteed by the Press Act of 1974 and not by our Constitution. Nevertheless, any system of prior restraints of expression comes to the court bearing a heavy presumption against its constitutional validity.[3]

Freedom of expression cannot be adequately protected merely by limiting the use of remedies which may affect it, nor by avoiding any form of prior restraint. If there is a right to free expression, than it is essential that it should be reflected in the substantive law, for it is this which ultimately determines the climate within which journalism and other forms of public debate may take place. It is no use insisting that there is freedom to 'publish and be damned' if at the end of the day fear of damnation exerts too great a restraint, for the substantive law then becomes itself a form of prior restraint even if its remedies are limited to subsequent operation.[4]

Once this is appreciated, it becomes imperative to enquire how the law of libel affects the newspapers' right to write and publish their material freely while highlighting the importance of the defence of fair comment.

It is much to be desired that newspapers and television should be free to being to the notice of the public, any matter of public interest or concern. The law recognises this already by the defence of fair comment on a matter of public interest.[5]

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1. J.J. Cremona; Human Rights Documentation in Malta, 1966.
2. J.J. Cremona: Human Rights Documentation in Malta, 1966.
3. Near v Minnesota 1931.
   Bantam books v Sullivan 1963.
   New York Times Co. v U.S. 1971.
4. Freedom of expression as a public interest in English Law by Alan Boyle, Public Law Journal 1982.
5. Lord Denning 'What next in the law?' Pt. 5, page 585.

According to L.J. Scott in Lyon v Daily Telegraph Ltd., "the right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom."

In Malta, the defence of fair comment has been accepted by our courts even before the 1961 Constitution introduced a justiciable bill of rights.

The courts are conscious of the paramount importance of the press.

> *"... Il-kunċett tal-libertà tal-istampa kif qed tiżviluppa llum, u li dil-qorti temmen ħafna fih hu li figura pubblika bħal ġurnalista, jew trade unjonista, bħal imputat, mhux biss għandhom id-dritt li jikkritikaw per eżempju Ministru u jiċċensuraw l-operat tiegħu, iżda għandhom dover li jagħmlu dan meta hu l-każ. Però l-kitba trid tkun ġusta, fil-limiti imposti mill-liġi, u bażata fuq fatti sostanzjalment veri. L-imputat jista' jibqa ċert u miegħu l-ġurnalisti kollha li ċertament mhux ser tkun din il-qorti li tnaqqaslu mill-libertà tal-kelma u tal-espressjoni, anzi tridu jikkonvinċi ruħu li l-aħjar protezzjoni għal dan id-dritt sagrosant jsibha fil-qorti. Però din il-qorti trid tagħmilha ċara wkoll li l-libertà tal-kelma ma tifssirx li anki jekk qed tgħid fatti li temmen li huma veri, tista' taqbad u tuża l-aggettivi kollha adattati u mhumiex, u imbagħad meta xi ħadd jiġbidlek l-attenzjoni, meta l-froġa tkun saret, kif volgarment jingħad, inti tiddefendi ruħek billi ssostni sinifikat differenti għall-dawk l-aġġettivi milli jkun tagħhom id-dizjunarju jew kif jifhimhom kulħadd. Jekk tagħmel dan, ma tistax titieħed bis-serjetà anzi jkollok tbati l-konsegwenzi."*[6]

Unfortunately our courts have refrained from elaborating the defence of fair comment. Nor have they been very instrumental in granting our newspapers more liberty. Today the defence of fair comment is essentially the same as that expounded by Judge Harding over thirty years ago. Then, as now, the notion of the defence of fair comment has remained the same, in spite of the fact that in this span of time the legislator has attached more importance to the liberty of speech by embodying it in the constitution as a fundamental human right, a right which was not constitutionally enshrined at the time of Judge Harding's utterance.

According to the law of Malta, three requisites are required to constitute a fair comment:

(1) a matter of public interest. "il-fatti bħala tali jridu jkunu fuq kwistjoni ta' interess pubbliku."[7]

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6. Il-Pulizija v Alphonse Farrugia, Perit Michael Falzon v Paul Spiteri – 5th December 1980 decided by Magistrate Agius.
7. Il-Pulizija v Perit M. Falzon, Sandro Calleja v Paul Spiteri 1977. Mizzi J.

(2) Facts must be correct. "Biex l-eċċezzjoni tal-fair comment tiġi anki biss konsedrata, hu meħtieġ li tkun saret narrazzjoni sostanzjalment eżatta tal-fatti li fuqhom il-kumment hu bażat."[8]

(3) Comment must be honest. "Il-kliem ... fil-kwadru taċ-ċirkostanzi u tal-kuntest li ntqalu ma kienux akkompanjati bl-intenzjoni difamatriċi, imma biss bl-intenzjoni li jsir kumment ġust moderat, onest u doverus, bla eċċessi u sekondi fini u mingħajr il-movent ta' interessi oħra, u b'dan il-mod jeskludi fiċ-ċirkostanzi konġuri, l-element psikoloġiku tal-inġurja cioè l-animus injurandi."[9]

In England the defence of fair comment may be recapitulated by quoting the case Slim v Daily Telegraph 1968. The Court of Appeal held that: "In considering a plea of fair comment it is not correct to canvass all the various imputations which different readers may put upon the words. *The important thing is to determine whether or not the writer was actuated by malice.* If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his opinion was wrong or exaggerated or prejudiced, and no matter that it was badly expressed so that other people read all sorts of innuendos into it, nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He has nothing to fear, even though other people may read more into it. I stress this because the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to publish his letter. It is often the only way to get things put right. The matter must of course be one of *public interest.* The writer must get his *facts right*: and he *must honestly state his real opinion.* But that being done, both he and the newspaper should be clear of any liability. They should not be deterred by fear of libel actions."

The difference between the law of Malta and the law of England lies in the so called element of "mens rea". English law is concerned with the publisher's intention. In Maltese law the publisher's specific intention is irrelevant. What matters is the consequence of the publication.[10]

The result is that English law affords protection to the 'honest man expressing his genuine opinion on a subject of public interest, then no matter that his opinion was wrong or exaggerated, or prejudiced: and no matter that it was badly expressed so that other people read all sort of innuendos into it; nevertheless he has a good defence of fair comment'. The defence of fair comment in an identical case here in Malta, would not be of much use.

On the 5th October 1928 in the case Mr. Masini v Avukat Bartolo, the court laid down the principle that in a trial on proceedings for libel, if the defendant did not succeed in proving the truth of the writing,

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8. Il-Pulizija v A. Farrugia. Perit M. Falzon v Paul Spiteri 1980. Magistrate Agius.
9. Reginald Cilia v Lionel Pugliesevich 1963. Harding J.
10. "Mhux dak li seta' talvolta kellu f'rasu min kiteb l-artikolu li jgħodd imma dak li fil-fatt kiteb." Dom Mintoff v Thomas Medley et ne 1953.

but satisfied the court that he was in good faith and that he had a just reason for publicising the facts proving that he honestly believed the allegations to be true and that he exercised due care and diligence in ascertaining such allegations, then he may be exempted from criminal liability.

In effect this judgement gave the newspapers further protection. The judgement gives newspapers nothing less then a defence of fair information on a matter of public interest.

Fifty years after our courts delivered this judgement Lord Denning came out strongly in favour of the defence of fair information on a matter of public interest.

"... in many cases, however, the newspapers are not able to rely on fair comment because they cannot prove that the facts stated are true. Where this is the case, there is sometimes a need for the newspapers to be granted a privilege – a qualified privilege – for them to give fair information to the public when it is in the public interest for them to do so. This privilege may be defeated if the newspaper is actuated by malice, but otherwise it should avail the newspaper." "I would like this principle emerging: if the newspaper or television receive or obtain information fairly from a reliable and responsible source, which it is in the public interest that the public should know, then there is a qualified privilege to publish it. They should not be liable in the absence of malice."[11]

Unfortunately, such a defence, does not probably exist any longer in our law. In fact our courts, in Police vs Joseph James Scorey 1949, have rejected the defence that the article was published in the honest belief that it was true.

Judge Harding rejected the defence's plea arguing that in the Masini – Bartolo case, the court was relying on S 21 of Ordinance XIV of 1889 which made the animus injurandi the basic ingredient of the offence.

As long as our courts interpret the word 'knowingly'[12] so as to include both specific and generic intent, technicalities will prevail over our right to a free press which is yet unafraid to expose itself to the chilling effect of libel.

Interest in the freedom of expression is at its peak within the area of official conduct and political debate.

The public conduct of a public man is a matter of public interest and may be discussed with the fullest freedom. It may be made the subject of hostile criticism and hostile **animadversions**; provided the language of the writer be kept within the limits of an honest intention to discharge a public duty, and is not made as a means of promulgating slanderous and malicious allegations ... and whether instead of a fair, reasonable and honest comment upon the circumstances, it was made an opportunity for gratyfing personal vindictiveness and hostility.[13]

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11. Lord Denning – 'What next in Law?' – Part V; 7 Fair Information, page 188.
12. As found in S 25 of the Press Act 1974.
13. Il-Pulizija v Joseph Micallef Stafrace 1959 – Judge Harding.

"Huwa veru li kull ċittadin għandu d-dritt jikkommenta f'ġurnal u anki, jekk jidhirlu, b'mod aħrax, indipendentement minn jekk il-qarrej ma jikkonvidix l-opinjoni tiegħu fuq materja ta' interess publiku; imma ma jistgħax fil-kitba tiegħu jattribwixxi lill-uffiċjal publiku għemil diżonest fl-esekuzzjoni tal-kariga tegħu mingħajr ma jipprova l-allegazzjoni tiegħu."[14]

Our courts have accepted the principles that considerable latitude must be given to political writers,[15] after all the object of this branch of the law is not to interfere with temperate discussion of politcal questions.[16]

The pronouncements which our courts have made regarding official conduct and political debate are at face value conducive to free expression.

However, when one reviews the judgements decided by our courts, one has to come to the conclusion that the balance is invariably tipped in favour of the Plaintiff. Suffice it to mention the following facts to substantiate this statement:

(a) Falsity is presumed.
"Il-falsità tal-kliem inġurjużi hija preżunta favur il-kwerelant."
Buttigieg vs Montanaro, 15th December 1964.

(b) As soon as the court decides that the publication is defamatory, damages follow automatically, without any need for the plaintiff to prove actual injury. It is only in this field of the law, that damages are awarded for "mental suffering." In the case Captain Agius vs J. Attard Kingswell et noe 19860; damages were given without any inquiry into the commercial damages, the plaintiff claimed to have suffered after the publication.

Highly controversial statement of comment is proved to be factual and true the courts will uphold the "pre-eminence of free expression".

In America, the law of libel is subject to the pre-eminence of the concept of free expression, and therefore the balance is tipped in favour of the defendants (i.e.) the newspapers.

In America, in 1964, the Warren Court, sweeping aside 175 years of settled law regarding libel, held in New York Times Co. vs Sullivan – that the First Amendment bars a state from awarding a public official damages for a defamatory falsehood relating to his office, unless the falsehood is published with knowledge of its falsity or with reckless disregard whether it is true or false.[17]

This decision enables the American Press to pursue investigations into corruption and other abuses of public position, relieving newspapers, reporters, editors, and publishers of the worry that they might have to pay

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14. Il-Pulizija v Dr. Carmelo Caruana 1958 – Judge Flores.
15. Il-Pulizija v Nestu Laiviera 1953 – Judge Harding.
16. Il-Pulizija v Joseph Micallef Stafrace 1959 – Judge Harding.
17. Archibald Cox – Freedom of Expression – 1981.

damages to a public person whom they injure by publishing what some judge finds to be a false and defamatory statement of fact.[18]

In Gertz vs Robert Welch, Inc. 1974, the Burger Court yielded to more cautious weighing and balancing of interests. The court found the interests to be the circulation of information and debate upon matters of public significance, on the one side, and the individual's private personality – his dignity and worth – on the other.[19]

In the case of a public figure, Justice Powell argued that the imposition of liability for anything less than an intentional or reckless falsehood, carries too much risk of self censorship resulting in suppression of truth, but the balance is to be struck more favourably for a private person because a private person, unlike a public official or public figure, does not voluntarily expose himself to risk of falsehood, and lacks opportunity to command attention for his reply.[20]

Four rules emerged from this case:

1. The Constitution (of America), gives the press absolute freedom to publish statements about public figures that turn out to be false, unless the publisher knew they were false or recklessly disregarded warning of their untruth.
2. The first amendment frees the press from liability to other persons, when there is neither negligence nor more serious fault.
3. Conversely, the states are free to expose liability for defamation of a private person, if the publisher or broadcaster is at fault.
4. Damages may be avoided to compensate for "actual injury", but punitive damages will not be allowed unless the statements were intentionally or recklessly false. Actual injury includes impairment of standing in the community, personal humiliation, and mental suffering. Injury must be proved however; it cannot be presumed from the fact of publication.

Our constitutional court cannot be as liberal and egalitarian as the American Courts. The reason is that the very wording of our Constitution is more restrictive than the First Amendment. Nonetheless, our Constitution grants us the right to free speech. Our legislator did not give us such a freedom to protect academic and harmless discussion. S. 42 of the Constitution of Malta was written primarily to afford a defence to those men who are prepared to denounce injustice and who wish to expose deception in Government. The fact that our constitution gives us such right, indicates that our democratic framework is profoundly committed to the principle that debate on public issues should be uninhibited, robust and wide open.

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18. Archibald Cox – Freedom of Expression – 1981.
19. Archibald Cox – Freedom of Expression – 1981.
20. Archibald Cox – Freedom of Expression – 1981.