In the Privy Council. 9 OF 1965

On Appeal from the Court of Appeal, Malta.

BETWEEN

The Honourable DOCTOR ANTON BUTTIGIEG, M.L.A.,
PLAINTIFF (*Respondent*)

AND

The Honourable DOCTOR PAUL BORG OLIVIER
and others Nomine
DEFENDANTS (*Appellants*)

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DEFENDANTS (Appellants)

RECORD OF PROCEEDINGS

DOCUMENTS

DOCUMENTS THE TRANSLATION OF WHICH HAS BEEN OMITTED

Record of proceedings: Case Notices; Certificates of Service; Proces verbaux recording adjournments; Notes of the taking up of proceedings by Doctor John Attard during the absence from Malta of Professor Doctor Carmelo Coleiro; judgment of Her Majesty's Civil Court First Hall subsequently annulled by Her Majesty's Court of Appeal; Appeal proceedings relating to annulment of judgment by the Civil Court First Hall including judgment of Her Majesty's Court of Appeal ordering proceedings to be taken up again at the stage prior to delivery of judgment and to be decided afresh; further pleas relating to irrituality of proceedings; Notes of the taking up of proceedings by the Hon. Dr. Alexander Cachia Zammit during the absence from Malta of the Hon. Dr. Paul Borg Olivier; preliminary judgment by Her Majesty's Court of Appeal relating to the plea of irrituality; Notes of the resumption of proceedings by the Honourable Doctor Paul Borg Olivier and Professor Doctor Carmelo Coleiro.

In the Privy Council.

On Appeal from the Court of Appeal, Malta.

BETWEEN

The Honourable DOCTOR ANTON BUTTIGIEG, M.L.A.,

PLAINTIFF (Respondent)

AND

The Honourable DOCTOR PAUL BORG OLIVIER

and others Nomine

DEFENDANTS (Appellants)

DOCUMENTS

Translation

No. 1

Application

No. 1.
Application.

Application No. 1/1962.

In the First Hall of Her Majesty's Civil Court.

Hon. Dr. Anton Buttigieg, M.L.A.

vs.

Hon. Dr. Paul Borg Olivier, Minister of Health and Dr. Carmelo Coleiro as Chief Government Medical Officer and by a note of the 15th June, 1962 Doctor John Attard, M.D., D.P.H., D.I.H. in his capacity of Acting Chief Government Medical Officer assumed the Records of the Proceedings instead of Professor Carmelo Coleiro nomine.

The application of the said Dr. Anton Buttigieg.
Respectfully sheweth:—

That the defendants have issued an order by means of the Circular Enclosure A, by which, amongst other things, they have prohibited the entry in the Hospitals and other Branches of the Department under their charge of the newspapers condemned by the Ecclesiastical Authorities;

That this order is intended to prohibit the patients and the doctors in hospitals as well as all the employees of the Department of Health from carrying and reading within the hospitals the newspapers of the Official Opposition in the Legislative Assembly, that is the Malta Labour Party, amongst which the "Voice of Malta" edited by the applicant who is also a Member of the Opposition. The "Voice of Malta" was condemned by the Archiepiscopal Curia by a Circular dated the 26th of May, 1961;

That this order in so far as it affects the "Voice of Malta" constitutes a breach of sections 13 and 14 of the Malta (Constitution) Order in Council, 1961 relating to the freedom of conscience and the freedom of expression. The applicant as a Member of the Legislative Assembly and as Editor of the "Voice of Malta" is, for religious reasons, being impeded by the defendants from imparting his ideas and information to the patients in hospitals, amongst other people, without interference, while, at the same time, these are being debarred from receiving those ideas and information without interference;

Wherefore, the applicant prays with respect that this Honourable Court may grant the appropriate remedy in accordance with the provisions of section 16 (1) and (2) of the Malta (Constitution) Order in Council by the making of such orders, issuing such summonses and giving such directives as the Court deems proper with a view to protecting and ensuring the rights of freedom of conscience and expression pertaining to the applicant which have been contravened by the Circular aforementioned.

(signed) Adv. ANTON BUTTIGIEG.

Today the fourth of May, 1962.
Filed by the applicant with one enclosure.

(signed) A. FARRUGIA,
Deputy Registrar.

No. 1. Application. —*Continued.*

Her Majesty's Civil Court First Hall.

Judge:—

Hon. Prof. Jos. H. Xuereb, LL.D.

The Court,

Having seen the application;

Orders that the application be set down for hearing on the list of causes for the sitting of the 11th of May, and that the application and the present Decree be duly served.

This the 5th day of May, 1962.

(signed) S. BONELLO,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

Hon. Dr. Anton Buttigieg, M.L.A.

vs.

Hon. Dr. Paul Borg Olivier et.

The application of Dr. Anton Buttigieg.

Respectfully sheweth:—

That he has filed the attached application.

That the matter involved is of public interest and of a personal and urgent nature to the applicant.

Wherefore the applicant humbly prays that this Honourable Court may be pleased to set down the application for hearing at one of its early sittings.

(signed) Adv. ANTON BUTTIGIEG.

This the fourth day of May, 1962.

Filed by applicant without enclosures.

(signed) A. FARRUGIA,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

No. 1.
Application.
—*Continued.*

Judge:—

Hon. Prof. Jos. H. Xuereb, LL.D.

The Court,

Having seen the application;

Allows the request and orders the hearing of the application at the sitting of May the 11th, 1962.

This the 5th day of May, 1962.

(signed) S. BONELLO,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

Hon. Dr. Anton Buttigieg.

vs.

Hon. Dr. Paul Borg Olivier noe et.

List of enclosures annexed to the application.

Enclosure A. Circular issued by the Chief Government Medical Officer on the 25th of April, 1962.

(signed) Adv. ANTON BUTTIGIEG.

No. 1. Application. —*Continued.*

MH. Circular No. 42/62.

Medical and Health Department,
15, Merchants Street,
Valletta.

25th April, 1962.

Chairman,
St. Luke's Hospital
Management Committee,
Medical Superintendents,
Heads of Branches.

Political Discussions during working hours.

The attention of all employees is again drawn to the instructions contained in OPM Circular No. 34 of 22nd August, 1955, which is again being subjoined herewith for ease of reference.

The entry in the various Hospitals and Branches of the Department of newspapers, which are condemned by the Church Authorities, and the wearing of badges of political parties are strictly forbidden.

You are requested to ensure that the directions contained in the abovementioned OPM Circular and in paragraph 2 above are strictly observed by all the employees of the Department.

C. COLEIRO,
Chief Government Medical Officer.

No. 2. Statement of Defence.

No. 2
Statement of Defence by Defendants

In the First Hall of Her Majesty's Civil Court.

Honourable Dr. Anton Buttigieg, M.L.A.

vs

Honourable Dr. Paul Borg Olivier, Minister of Health and Dr. Carmelo Coleiro as Chief Government Medical Officer.

The reply of the defendants in their aforementioned capacity.
Respectfully sheweth:—

That the Circular in question —

a) Has not the force of law;

b) Is not directed to the patients;

c) Is only a directive regarding certain relations arising between the employer and employee, limitedly to the hours and places of work — where the defendants have the right to give to the employees all the instructions which in their discretion they deem fit and proper — and therefore the

applicant is not being hindered in the enjoyment of his freedom of expression, since he is still at liberty to publish and circulate all those ideas which he wishes to publish and circulate in the same way in which the doctors and employees, to whom the applicant made reference in his application, are still free.

With costs.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) ENRICO W. CORTIS.

This the tenth day of May, 1962.

Filed by Legal Procurator Enrico Cortis, without enclosures.

(signed) J. TONNA,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paolo Borg Olivier nomine et nomine.

Note of the defendants by which they are filing a copy of Circular number 42 of 1962 together with a copy of Circular number 34 of 1955, the former issued by the Department of Health and the latter by the Office of the Prime Minister.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

This the 11th day of May, 1962.

Filed by Dr. M. Caruana Curran with one enclosure.

(signed) S. BONELLO,
Deputy Registrar.

No. 2. Statement of Defence. —*Continued.*

MH. Circular No. 42/62.

Medical and Health Department,
15, Merchants Street,
Valletta.

25th April, 1962.

Chairman,
St. Luke's Hospital
Management Committee,
Medical Superintendents,
Heads of Branches.

Political Discussions during working hours.

The attention of all employees is again drawn to the instructions contained in OPM Circular No. 34 of 22nd August, 1955, which is again being subjoined herewith for ease of reference.

The entry in the various Hospitals and Branches of the Department of newspapers, which are condemned by the Church Authorities, and the wearing of badges of political parties are strictly forbidden.

You are requested to ensure that the directions contained in the abovementioned OPM Circular and in paragraph 2 above are strictly observed by all the employees of the Department.

C. COLEIRO,
Chief Government Medical Officer.

OPM Circular No. 34/55.

Office of the Prime Minister,
Valletta, August 22, 1955.

To Ministers.

Political Discussions during working hours.

Reports are continually being received to the effect that Government employees of various categories, particularly manual workers, indulge in political discussions during working hours. Such behaviour betrays a serious lack of discipline among the employees concerned and reflects no credit either on them or on the supervisory staff.

2. I am informed that this may account in part for the poor output still being given by certain employees.

3. Please therefore instruct all Heads of Departments in your Ministry to warn all employees that these discussions at work are strictly prohibited. Stern disciplinary measures, involving if necessary immediate discharge, will be taken against irresponsible individuals transgressing these instructions. No. 2. Statement of Defence. —*Continued.*

DOM. MINTOFF,
Prime Minister.

No. 3
Evidence

No. 3. Evidence.

Hon. Dr. Anton Buttigieg, M.L.A.

vs.

Hon. Dr. Paul Borg Olivier, Minister of Health

and

Prof. Dr. Carmelo Coleiro as Chief Government Medical Officer.

Sitting of Friday, 11th May, 1962.

The defendant Prof. Carmelo Coleiro, at the request of the applicant, states on oath: —

I am filing a note showing the various branches to which the Circular has been sent; it indicates also the number of the staff at each hospital and the number of patients; all employees connected with the Department are also included in the list which I am filing. The staff is represented by a total, in other words the staff is not divided up according to the various categories.

The list was not drawn up by me but has been compiled by the officer in charge of the records.

Cross-examination.

As a rule circulars are only issued to employees; at times however they are issued to apply also to patients: for instance when we call the attention of patients that they are not allowed to introduce into hospitals certain items of food or other things which may be harmful to them, this applies also to visitors. These circulars are addressed to the Officers in charge of the branch — Superintendents of hospitals or the Medical Officer in charge and to the Chairman of the Management Committee, St. Luke's Hospital.

In the body of the circular there is always indicated to whom the order contained in the circular should apply. The Circular in question was directed solely to the employees to the exclusion of the patients. For example, we never inferfere with the correspondence received by patients.

Re-examination.

Circulars do not bear a different number when directed only to the employees and when the patients also are included. Circulars are issued by the Department with a progressive number without any distinction as to its contents. The orders are given to the employees and the latter do not interfere with the newspapers, books and correspondence received by the patients. I cannot say whether these directives have always been obeyed by everybody, but as far as I know no employee has ever acted contrary to these instructions. Once a newspaper carried an

No. 3.
Evidence.
—*Continued.*

article wherein it was stated that these orders were not being carried out and we wrote back indicating precisely the instructions given out, namely in the sense I have mentioned. We made no investigations on the matter raised as we thought there was no reason justifying the holding of an investigation. This happened before the issue of this Circular.

(signed) C. COLEIRO.

Read over.

(signed) S. BONELLO,
Deputy Registrar.

25.5.62

Branch	*Staff*
Head Office	89
Health Offices	64
Health Office, Gozo	19
Port Health Offices	9
General store	21
Medical store	18
Addolorata Cemetry	18
Rodent Control Section	22
Public Cleansing Section	662
Child Health Service	50
School Medical Service	21
Antenatal Service	5
National Insurance Medical Officers	7
District Medical Officers	41

Hospitals	*Patients*	*Inmates*	*Resident*	*Non-Resident*
St Luke's Hospital	512	—	1	536
Central Hospital	40	—	—	69
Isolation Hospital	15	—	—	45
Santo Spirito Hospital	68	—	1	44
St Bartholomew Hospital	—	40	1	45
St Vincent de Paul Hospital	—	828	3	385
Hospital for Mental Diseases	—	914	4	305
Victoria Hospital	44	—	1	77
St John the Baptist Hospital	—	115	—	28
St Theresa Hospital	6	—	—	14
Hospital for Mental Diseases Gozo	—	158	1	66

(signed) C. COLEIRO.
11.5.62.

This the 11th day of May, 1962.

Filed by the defendant Prof. Dr. Carmelo Coleiro in the course of his evidence.

(signed) S. BONELLO,
Deputy Registrar.

This day the 11th of May, 1962.

No. 3.
Evidence.
—*Continued.*

Dr. Maurice Caruana Curran Deputy Attorney-General declares that when the Circular in question was issued it was intended to apply only to the employees of the Department of Health and submits that it should have been understood in that manner.

Dr. A. Buttigieg declares that apart from intentions the Circular is understood to apply to all the persons mentioned by him in the application.

The parties agree that the applicant is the Editor of the "Voice of Malta"; that he is a Member of the Legislative Assembly; that he is a Member of the Opposition and President of the Malta Labour Party.

The parties, moreover, agree that the "Voice of Malta" edited by the applicant is a newspaper duly registered in accordance with the provisions of the law.

In the First Hall of Her Majesty's Civil Court.

Honourable Dr. Anton Buttigieg, M.L.A.

vs.

Honourable Dr. Paolo Borg Olivier nomine and
Dr. Carmelo Coleiro nomine.

Note of the defendants nomine by which they are filing a copy of Circular number 229 issued by the Ecclesiastical Authority on the 26th of May, 1961 over the signature of His Lordship Bishop Galea, Vicar General and Monsignor Canon Mifsud, Chancellor of the Archiepiscopal Curia.

(signed) VICTOR FRENDO,
Crown Counsel.

This the 17th day of May, 1962.

Filed by Dr. V. Frendo with one enclosure during the hearing.

(signed) S. BONELLO,
Deputy Registrar.

No. 3.
Evidence.
—*Continued.*

CIRCULAR 229.

To the Very Reverend Archpriests, Chaplains, Vicar-Curates, Rectors of Churches and Superiors of Religious Orders.

His Grace the Archbishop cannot but feel pain at the conflict which has arisen in Malta as regards religious sentiments. He desires that unity which is desired by Our Lord, Jesus Christ. And since the Church cannot come to an agreement with those who refuse to be guided by the teachings of God, as authoritatively expounded by the Church, the Archbishop has felt it his duty to show what should be at least avoided by those who wish to remain in unity with the Church.

His Grace the Archbishop therefore notifies that, in present day circumstances, the following are most strongly to be condemned:

(a) the grave insults by word, in writing or by deed against the Archbishop or against the clergy;

(b) the support for the leaders of the Malta Labour Party so long as they remain at war with the Church and maintain contacts with Socialists, Communists and the A.A.P.S.O.

Besides the above, this very day there appeared in "Il-Helsien" "An Invitation to the Bishops" issued by the Executive of the Malta Labour Party. This invitation is the most grievous insult that could be levelled at the Ecclesiastical Authority. And this insult, following the admonition which the Ecclesiastical Authority had already given to "Il-Helsien" and to the "Voice of Malta" is also a challenge. Therefore His Grace the Archbishop condemns the "Voice of Malta", "Il-Helsien" and "The Whip" as dependents of the Executive, author of this invitation.

This means that no one, without committing a mortal sin, can print, write, sell, buy, distribute or read these newspapers.

His Grace the Archbishop reminds parents of the heavy responsibility they assume before God when they allow their children to frequent the M.L.P. Brigade where they learn disrespect towards the Authority of the Church and towards the Church's heavy penalties, besides other things contrary to the teachings of the Church.

Since it appears that there are persons who frequently receive Communion, and do not confess sins such as these, Confessors, as in duty bound, must, abiding by the rules of prudence, put the necessary questions to their penitents.

It is to be remembered that in the Church, all power resides in her Leaders, chosen by God and not by the people, and that therefore when the Church, within her province, issues any directives, no son of hers has the right to criticise, still less, as has been said on occasions, to condemn her.

Finally, as summer is approaching, the Archbishop feels in duty bound to repeat the warnings which unfortunately he has to repeat each year, against indecent attire and certain abuses which take place at swimming resorts.

Issued from the Archiepiscopal Curia, this the 26th day of May, 1961.

(signed) + EM. GALEA EP. TRALLIEN IN ASIA.
Vic. Gen.

Can. J. Mifsud.
Chancellor.

This day the 17th of May, 1962.

The applicant agrees that the copy of the Circular filed by Counsel for the defendants is a true copy of the Circular issued by the Archiepiscopal Curia on the 26th of May, 1961.

The case is adjourned to the 18th of May, 1962 and will be called at 12 noon.

(signed) S. BONELLO,
Deputy Registrar.

This day the 18th of May, 1962.

Evidence on oath given by —

1. Defendant the Hon. Dr. Paolo Borg Olivier at his own request.
2. Defendant Professor Dr. C. Coleiro at his own request.

The case was adjourned to the afternoon at 3.30 p.m.

(signed) S. BONELLO,
Deputy Registrar.

Advocate Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Dr. Paul Borg Olivier, M.D., M.L.A.

Sitting of Friday, 18th May, 1962.

Defendant, the Honourable Dr. P. Borg Olivier at his own request, states on oath:—

Every morning I am shown newspaper cuttings referring to my Ministry, and on one occasion there was a cutting, if I remember well from "Helsien" wherein the writer pointed out that some political activity was being carried on at St. Luke's Hospital by some nurses who were encouraging some other nurses to join the M.A.S. Union instead of the General Workers Union and that the nurses making this propaganda were wearing the badge of the Young Christian Workers; and the writer invited the Minister of Health to look into the matter. I instructed my Secretary to take the necessary steps.

Thereupon we issued the Circular in question which refers to a previous circular, regarding political activities during working hours, which was issued by Mr Mintoff when he was Prime Minister; and we added that part relating to the badges of all political parties and the reference to the newspapers condemned by the Church. This second part of the Circular referable to the newspapers condemned by the Ecclesiastical Authorities crossed my mind as an afterthought and this because it came to my knowledge that another circular contemplating the same subject had already been issued by another Department, namely the Education Department. I also recalled that I as president of a band club had also made a similar suggestion as that is the way I feel about the matter. It may be that in that particular band club the suggestion might have come from someone else; my impression is, however, that

No. 3.
Evidence.
—*Continued.*

I was the person who made the suggestion. I feel that way on account of the prohibition imposed by the Church. It appeared to me that this measure was necessary even from the point-of-view of departmental discipline, especially in hospitals; in fact, from what had happened in the band club the prohibition of reading only brought in its wake some trouble as the papers were being carried in and shown thereby irritating others, and therefore from the outset I prohibited also the entry of these newspapers. With regard to badges, I can say that the prohibition refers to all political parties *ut sic* and is not extended to other badges, for example, of associations without political colour, such as, the General Workers Union, the Young Christian Workers and the Catholic Action.

Cross-examination.

I did not consider that the order I gave could bring in its wake the trouble I mentioned and which I wanted to avoid if anyone carried with him into the hospitals a newspaper which has not been prohibited. In my opinion the Circular did not debar the entry of non-political newspapers, because political newspapers fall under the prohibition of political activities contemplated in the Circular. For example, I can say, in this context that newspapers that are not published as organs of political parties are not to be considered as prohibited by the Circular. As far as I know there are only two newspapers condemned by the Ecclesiastical Authority, viz. "Il-Helsien" and the "Voice of Malta". I know that there are other newspapers favouring the Malta Labour Party, but those had not been condemned, for example the "Torch". I consider this newspaper as independent which inclines more to a political party rather than to another, as is the case with the "Times of Malta". I do not consider these newspapers as political and therefore their entry is permissible as also their being read except during working hours.

(signed) P. BORG OLIVIER.

Read over.

(signed) S. BONELLO,
Deputy Registrar.
25.5.62.

Prof. Carmelo Coleiro, C.G.M.O. at the request of applicant states on oath:—

I am filing a statement which shows the number of persons which we describe as 'residents'. The total is 198 and is divided into two groups. Those for whom Government provides living accomodation either on their own or with their families; these quarters are considered as private dwellings since the employees have no alternative accomodation. The Circular does not apply to this group.

There is then the other group who sleep-in when on duty as is the case with Assistant Resident Medical Officers, the Registrars and the Chaplain; even when these quarters are within the precincts of the hospital, the quarters proper are considered as a private dwelling house and the Circular is not intended to apply to them. The only restriction in relation to these quarters, even if not within the grounds of the hospital, is that no extraneous person is allowed to live in with these employees except with the consent of the Head of the Department. There are some A.R.M.O.'s, porters and Chaplains who are on duty for 24 hours.

(signed) C. COLEIRO

Read over.

(signed) S. BONELLO,
Deputy Registrar.
22.5.62.

List showing the number of resident Officers and employees in the Medical and Health Department as on the 18th May, 1962. No. 3. Evidence. —*Continued.*

		Total
Central Hospital		
1	Medical Superintendent (a)	
5	Sisters of Charity	6
St Luke's Hospital including the School for Nurses		
4	Chaplains (b)	
48	Sisters of Charity	
3	Physiotherapists	
1	House Warden	
40	Student Nurses (males and females)	96
Santo Spirito Hospital		
1	Chaplain (b)	
5	Sisters of Charity	6
Isolation Hospital		
1	Medical Superintendent	
1	Chaplain (b)	
4	Sisters of Charity	
1	Stoker (a)	
1	Sanitary Inspector (a)	7
St Vincent de Paul Hospital and St Bartholomew Hospital (Mgieret)		
2	Medical Superintendents	
1	Resident Medical Officer	
5	Chaplains (b)	
31	Sisters of Charity	39
Hospital for Mental Diseases (Malta)		
1	A/Medical Superintendent (a)	
4	Resident Medical Officers (a)	
2	Chaplains (b)	
16	Sisters of Charity	23
Victoria and St John the Baptist Hospital (Gozo)		
1	Resident Medical Officer (a)	
1	Chaplain (b)	
10	Sisters of Charity	12

(a) resides in quarters provided by Government;
(b) sleeps in when on duty.

No. 3.
Evidence.
—*Continued.*

St Theresa Hospital (Gozo)

1 Chaplain (b)
2 Sisters of Charity

Hospital for Mental Diseases (Gozo)

1 Medical Superintendent
1 Chaplain (b)
4 Sisters of Charity 6

Grand Total 198

Chief Government Medical Officer.

At the unopposed request of applicant the case is adjourned to the 30th of May, 1962 at 10 a.m.

(signed) S. BONELLO,
Deputy Registrar.

This day the 30th of May, 1962.

The parties agree that the newspaper "Voice of Malta" is published by the Malta Labour Party.

The parties also agree that the paper is published weekly late on Saturday.

Dr. Anton Buttigieg counter-replied.

The case is adjourned to the 11th of June, 1962, for the filing of written pleadings by the parties. The case will be called at 10 a.m.

(signed) S. BONELLO,
Deputy Registrar.

This day the 11th of June, 1962.

Evidence on oath given by:—

1. Defendant Hon. Dr. P. Borg Olivier at his request.
2. P.S. 171 William Bonello at the request of the defendant.
3. P.C. 299 Carmel Zammit at the request of the defendant.
4. P.C. 967 Emanuele Cordina at the request of the defendant.

Dr. Anton Buttigieg agrees that the previous Saturday the "Voice of Malta" was on sale from 7.30p.m. onwards.

The case is adjourned to the 18th of June, 1962, but the written pleadings must be filed by the 15th June, 1962.

(signed) S. BONELLO,
Deputy Registrar.

(b) sleeps in when on duty.

Sitting of Monday 11th June, 1962.

No. 3.
Evidence.
—*Continued.*

Hon. Dr. Anton Buttigieg

Hon. Dr. P. Borg Olivier et noe.

The Hon. Dr. P. Borg Olivier at his request states on oath:—

The evidence I gave on the 16th of May, 1962 has just been read over to me and I wish to give some clarifications in connection with my evidence on cross-examination, because as it stands it may give rise to misunderstanding.

From the evidence it appears that I wanted to prohibit the entry of political papers in general. I meant to convey that political papers can be carried into the hospitals but could not be read as their reading during working hours is contrary to that part of the Circular which prohibits political activity; therefore the prohibition in the Circular was direct and in my evidence I meant to convey that the prohibition of entry was limited only to the newspapers condemned by the Ecclesiastical Authority. I confirm the reason I gave on the previous occasion, in the sense that the prohibition is due to the fact that these newspapers have been condemned by the Ecclesiastical Authority, as I feel that in the Department I am not to allow the entry of such newspapers.

Cross-examination.

It may be that when I gave evidence on the previous occasion I had stated that no political newspaper was to be allowed in the places falling under my charge as a Minister, but I meant to say that a political newspaper as such can be allowed in so long as it is not read during working hours, whereas the prohibition of entry referred to the newspapers which have been condemned by the Church, whether they are political or otherwise.

According to the Circular political newspapers that are not condemned by the Church can be read in places falling under my charge but not during working hours. The other newspapers cannot be carried into the places falling under my charge and to be read during leisure time they must be read outside these precincts.

(signed) P. Borg Olivier.

Read over.

(signed) S. Bonello,
Deputy Registrar.

13.6.62.

No. 3.
Evidence.
—*Continued.*

Sergeant No. 171 William Bonello at the request of defendant states on oath:—

I am stationed at Police Headquarters Floriana. Occasionally I am in town and I know that the "Voice of Malta" is on sale on Saturdays at about nine or ten p.m. Last Saturday it was on sale at 7.30 in the evening. I know that a person bought the paper at 7.30 p.m. from Floriana and I bought the paper myself last Saturday at about 8.30 p.m. Saturday last I had instructions to verify these facts.

(signed) W. BONELLO.
Read over.

(signed) S. BONELLO,
Deputy Registrar.

13.6.62.

Police Constable No. 299 Carmelo Zammit at the request of the defendant states on oath:—

From my experience I am in a position to state that the "Voice of Malta" is on sale at about 8 or 8.15 p.m. Last Saturday it was on sale before this time. Over the last year I have been stationed at Police Headquarters.

(signed) P.C. 299 C. ZAMMIT.

Read over.

(signed) S. BONELLO,
Deputy Registrar.

13.6.62.

Police Constable No. 967 Emanuele Cordina, at the request of the defendant, states on oath:—

Occasionally at Valletta I saw bundles of the "Voice of Malta" leaving town for sale. Strictly speaking I cannot say that these bundles contained the "Voice of Malta", but I know the persons who usually sell these newspapers. I know that last Saturday the "Voice of Malta" was bought at 7.45 p.m.

(signed) E. CORDINA P.C. 967.

Read over.

(signed) S. BONELLO,
Deputy Registrar.
13.6.62.

No. 4
Defendants' Note of Submissions

No. 4. Defendants' Note of Submissions.

In the First Hall of Her Majesty's Civil Court.

Honourable Dr. Anton Buttigieg, M.L.A.

vs.

Honourable Dr. Paul Borg Olivier, Minister of Health and Dr. Carmelo Coleiro as Chief Government Medical Officer.

Note of the Honourable Dr. Paul Borg Olivier, Minister of Health and Doctor John Attard, M.D., D.P.H., D.I.H., as Acting Chief Government Medical Officer.

In virtue of which they are filing, in compliance with the Court Order to the parties to submit written pleadings, the annexed note of submissions together with a note of reference to the authorities quoted and two appendices; Appendix I containing a recapitulation of the facts and Appendix II containing a list of Maltese judgments relating to "judicial control" of administrative acts.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) FRANCIS PSAILA, L.P.

This the 15th day of June, 1962.

Filed by Legal Procurator Francis Psaila with a note of submissions, a note of reference and two appendices.

(signed) E. SAMMUT,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

Honourable Dr. Anton Buttigieg, M.L.A.

vs.

Honourable Dr. Paul Borg Olivier, Minister of Health and Dr. Carmelo Coleiro as Chief Government Medical Officer.

Note of submissions of the defendants.

Respectfully sheweth:—

Question of law. How it should be framed.

1. The case turns on a question of constitutional-administrative law. The point of law revolves around sections 14 and 16 of the Constitution of Malta and resolves itself in the reply to the questions:

(a) Whether section 14 applies to the facts in the instant case, and

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(b) whether applicant has a remedy in the particular circumstances of the case. Apart from the defence which will be raised when dealing with the merit, it appears to the defendants that since this is the first case proposed under the Constitution it is appropriate for the Court to probe into another question which for its importance may perhaps go beyond the merits of the case; namely whether the whole question under review is extra-legal or otherwise; that is to say an administrative question upon which so far the Courts have always refrained from taking cognizance. Certainly, by this exercise and when one considers the abundant lines of defence open to them on the merits of the case, the defendants are not facilitating their task or that of the Court, they are rather inviting the Court to pronounce on a new and difficult question. But at the same time it is humbly submitted that the case merits a thorough investigation, because an eventual pronouncement might serve as a guide for the future (and perhaps not only in Malta). For this reason the two sections aforequoted are not to be examined on their own and separately.

The defendants submit that, when everything is considered, the points mentioned hereunder may be taken as the four corners of a vast and probably unexplored field which extends itself before the eyes of the judge in the question under review; that is:—

Part 11 of the Constitution.

1.1 The whole context of Part 11 of the Constitution.

Origin of the entrenched Bill of Rights.

1.2. The historical, philosophical and social origin of the written Bill of Rights in the Constitutions given by Great Britain within the last years to various countries (Malta included) wherefrom one can reach a conclusion and their proper "rationale", after taking into consideration the arguments deriving from the sector of research indicated in paragraph 1.3., whether — in spite of any incorrect impression that may arise from the haphazard reading and appreciation of sections 14 and 16 — these truly have any application to the present case.

Pre-constitutional system.

1.3. The system of law relevant to the present matter prior to the promulgation of the Constitution, was continued in force and was in no way abrogated under the provisions of section 120(1) so long as it is not in conflict with the Constitution.

Democratic society.

1.4. Beyond this limit there remains the merits, to which the Court will have to add, with the elements which emerge from the study of the three preceding paragraphs, its appreciation of what is reasonably justifiable in a democratic society.

The facts of the case.

2. Though the matter under review is exclusively a point of law, the interpretation which the Court is about to give cannot certainly prescind from the paucity and the special administrative nature of the facts; of those facts which, at least as it appeared to applicant, would have justified him to promote this case and to continue with it even after the declarations of the defendants at the opening of the proceedings that the Circular "de qua" was not directed to the patients in hospitals. The applicant could have

reached this conclusion on his own, or could have at least obtained such a declaration from the defendants without any difficulty (rather it was applicant himself who stated that he proposed the case as a political person and in this capacity he had available to him various remedies and other methods). In fact one has to remember that the applicant rushed into the case without the least endeavour on his part to call upon the defendants for an explanation either within or outside the Courts.

Reference to Appendix I.

2.1 The facts can easily be recapitulated and in order to concentrate on the point of law the defendants are indicating the facts in Appendix I.

Reference to the status of patients in Public Hospitals.

2.2 For the avoidance of any misunderstanding the defendants submit that though the question of hospital patients is irrelevant to the particular case, this does not mean that it is being admitted that patients in public hospitals are not to conform with the regulations and directives that may be given for the protection of morality and discipline in hospitals. Supposing, for example (just to mention one case) that a patient carries into the hospital books or other prohibited publications, or pornographic or seditious literature, the defendants feel that they are entitled to reserve any action, in spite of section 14 of the Constitution; because the freedom of expression of the patient does not render him the keeper of the hospital; but this right entitles him only, if there are contrary regulations emanating from the authorities in charge of the hospital, to read that literature at his residence or in other places which are not governed by superior directives of the competent authority.

The importance of the case.

3. If as stated above the facts are not complicated the same cannot be said with regard to the nature of the proceedings and to the consequences they may bring about with regard to the interpretation of Part II of the Constitution.

The difficulties of the case.

3.1 In fact this is the first case proposed before these Courts under this Part of the Constitution within a short period from its promulgation, and it appears — at least as it emerges from the limited possibilities of research that are available in Malta — that it is the first case of its kind in any other country. Therefore the Court is confronted with two kinds of difficulties, namely:—

Difficulties deriving from the relations between the Crown and its employees.

a) those deriving from the juridico-administrative relations between the Crown and its employees and lying on the outskirts or the marginal zone of the law: and from the corollary question of the rare power (if it exists at all) of the Courts to review those relations as regulated by the executive hierarchy;

b) those that are universally recognized in the other sector, which apart from its more evident aspects, can only be treated with difficulty, that is the so-called sector of natural or fundamental rights which found their first expression in the concept of the Rule of Law in the United Kingdom (nowadays recognized as a valuable motive content rather than of legal significance, except in the sense that "the Administration cannot do what it pleases: it can only do what it has power to do" (1) — a circular definition which leaves us where we started) and in the American Bill of Rights (U.S. Constitution, Amendments

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I —X); an aspect which was further fostered by the Universal Declaration of Human Rights, 1948 (2) and the European Convention for the Protection of Human Rights, 1950 (3); an aspect which continued to find expression and stress in the Constitutions of India (4) and Burma and post-war European Constitutions (vide article 21 of the Italian Constitution (5)) and more recently in various Constitutions given by the United Kingdom over the last years, e.g. Nigeria (6) (this is, as it emerges from the only preliminary work of public property, that is the Report of Sir Hilary Blood (7) the nearest source of our Constitution), Sierra Leone (8) and British Guiana; a ground, which in spite of all this, is in the early stages of its evolution because it depends from a social science which is "a plant of recent growth" (10); a sector which at the same time, in spite of the nobility of its inspiration darkens rather than clarifies the points which arise (11); a ground for which the best if not the only guiding and correct juridical solution is the exercise of "a just balance between power and liberty" (12).

New powers of the Superior Courts under the Constitution.

4. In spite of the complexities above specified, which reflect themselves also in a certain amount of interest shown in this case by the larger world outside the small circle of Malta, (13) the defendants would not wish to convey that the point at issue defies a solution. Nothing of the sort. The defendants only wish to place before the Court, with all due respect and deference, the necessity of the greatest circumspection in the first law-suit under Part II of the new Constitution in order that while protecting the fundamental rights of the individual one should not lose sight of the legal system and the heritage of case-law obtaining prior to the Constitution.

The Superior Courts with the power of Judicial Review conferred upon them by the present Constitution, are in a position to make an important contribution not only in the maintenance, but also in the development of the democratic way of life of the Maltese Islands. But without in any way suggesting any minimization in respect of the power of the Courts (in fact the ground which may be covered through this power has still to find its level) it appears prudent to submit that the principle should be affirmed that while on the one hand the Courts must ensure that no *illegal* impositions are to prevail over the freedom of the individual, on the other hand the Courts should not concern themselves with purely administrative matters and matters of executive discretion which are left in hands of the executive, that is in the hands of Ministers who in the Cabinet *under the same Constitution* have: (a) *Collective* responsibility (as a result of which they have to render account of their activities in parliament and in the polling-booths) for the general direction and control of the Government of Malta (Const. section 30) and (b) the *individual* responsibility for the general direction and control of the departments under their charge (ibid. section 42).

Use of these powers.

4.1 At this juncture, the defendants, even at the risk of anticipating, deem it proper and appropriate to hint at the *first distinction* they wish to point out. When the defendants referred at an earlier stage to the extra-legal aspect of the point-at-issue, which in their humble opinion is not cognizable by the Courts, they were not referring to legislative measures and to those ministerial acts, administrative or executive, which fall within the jurisdiction of the

Courts. The defendants, with regard to the new Constitution of Malta, make a distinction also between *legislative acts* and the other acts, which for the purpose of brevity, are going to be called *"administrative"*. In connection with administrative acts the Courts of Malta, prior to the Constitution, enjoyed a certain power of review. The extent of this power will be considered at a later stage (para. 4.2). With regard to *legislative acts* the Courts of Malta had no power of review, except in so far as, under the diarchical Constitutions of 1921 and 1947, they could enquire whether the laws passed by the Legislative Assembly encroached on "Reserved Matters". Except for this, in substance there was no other restriction on legislative freedom apart from those under the Colonial Laws Validity Act, 1865 and relatively to "delegated legislation" the well known limitations of "vires".

Review of legislation.

Today, in the context of the new Constitution, the English principle of the sovereignty of parliament, which was also established in Malta, has been encroached upon by Part II of the Constitution and with regard to legislative acts the American principle of the supremacy of the judiciary has been introduced at least in so far as regards the entrenched Bill of Rights which constitutes the organic instrument of Part II of the Constitution. This is therefore the stage where perhaps it should be recalled that the principle of the freedom of expression sanctioned in section 14 (1) of the Constitution is substantially the same as that enunciated in the First Amendment of the American Constitution as upheld by the High Court of Australia in re *D'Emden v. Peddler*: "that where the Constitution Act contained provisions indistinguishable in substance, though varying in form, from provisions in the Constitution of the United States, which had received judicial interpretation by the Supreme Court of the United States, it was proper to consult and to treat as a welcome aid, but not as an infallible guide, the relevant decisions of that Court" (14).

This is important for the purposes of the distinctions which the defendants are endeavouring to bring to light at this point of these written pleadings — *subordinately* to other distinctions which will soon follow. Also, in the review of legislative acts under provisions similar to those of Part II of the Constitution, the Courts without in any way abdicating their powers, generally recognize a *limit* to their interference, which by way of a happy phrase the U.S. Supreme Court and the Supreme Court of India have called "the legislative judgment". This limit was repeatedly stressed by the U.S. Supreme Court. Thus for example in re: *American Communications Association et al v Douds, Regional Director of the National Labor Relations Board* (15), Chief Justice Vinson, who pronounced the opinion of the Court, said: "This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But in so far as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress. (*Cf. United Public Workers v Mitchell, supra at 95.102*). In *Bridges v California, supra,* we said that even restrictions on particular kinds of utterances, if enacted by a legislature after

No. 4. Defendants' Note of Submissions. —*Continued.*

appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative enactment'. Vol. 314. U.S. at 261. The deference due to legislative determination of the need for restriction upon particular forms of conduct has found repeated expression in this Court's opinions".

This under a Constitution, which as is well known does not acknowledge the Supremacy of Parliament, but leaves in the hands of the Courts as a part of the machinery of checks and balances, which is typical of it, the protection of those natural rights of the individual which have been described by the famous Mr Justice Holmes in re: *Gompers v United States,* (16) with the words:—

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth".

Review of administrative or executive acts.

Now the defendants wish to submit that if the Courts are inclined to guide themselves on the reasonable limit of their *new ground* of review of legislation (the question is always one of *balance* as pointed out by Lord Mac Dermott) outlined by the U.S. Supreme Court, they will certainly find no difficulty in giving the due weight to the executive judgment in case an executive act is based on Part II of the Constitution. In fact there may be restrictions which are perfectly justifiable even though not imposed by a law.

Distinction of executive acts in themselves, that is between pure executive and judicial or quasi.

4.2. At this point the defendants wish to make that other distinction, and for the moment even more important, which they undertook (supra) to point out. This is no longer the distinction already referred to between legislative acts and executive acts in general, but of *executive acts between themselves.* These in fact are divided into:—

(a) pure administrative acts; and

(b) administrative acts which involve "a judicial decision or some proceeding of a judicial nature". (17)

Over the *first category,* to-date the Courts had no competence except so far as to examine whether the act was performed by the competent authority and in the prescribed form. The control of the Courts over the *second category* was wider and extended to the point that the Courts could examine, without substituting their criterion for that of the authority vested with discretion, whether the competent authority acted judicially (audi alteram partem, nemo judex in causa sua etc.), or as often said, using a phrase which is not quite accurate, whether the principles of natural justice have been observed.

The first plea of defendants. The challenged act is purely executive of an extra-legal nature which does not fall within the jurisdiction.

4.3. *The Constitution is irrelevant both for the first and the second category of executive acts.* For the first category because the acts are of an extra-legal nature. For the acts under the second category because the power of review, more extended in their sector, is there to ensure only the "fairness" in the exercise of the discretion (a procedural concept) and not a "fundamental right of the individual" (substantive concept). The distinction between the two types

of executive acts is well known to our Courts. The first plea of the defendants is based on this distinction, that is: (a) that the challenged act falls within the first category of executive acts, (b) that these acts, prior to the Constitution, were not cognizable by the Courts except in so far as the act had to be performed by the competent authority, that is an authority vested with the power to perform the act, and (c) that the new Constitution did not introduce any change under this aspect.

Necessary research under the first plea.

4.4. Under the first plea two processes of reasoning are necessary, that is:

(a) that the pre-constitutional position regarding administrative acts be re-stated;

(b) that of establishing accurately the juridical object protected under Part II of the Constitution; in other words its 'ratio legis'. We will find that this does not affect the pre-constitutional legal system relevant to the case under review and if one succeeds in this exercise, from the conclusion reached, other important elements may ensue enabling the Constitution to be worked out in a rational manner.

Harmony between the Constitution and the pre-constitutional system.

5. The Constitution is sovereign but is not worked out in a vacuum. If it is the apex of the legal system of a country, this is because it rests on a well-founded pyramid. If it is a centre of a system this is because it is surrounded by other laws. It would be useless for a country to have an elegant Constitution unless it is strengthened and substantiated by a system of public and private law which could work in harmony with it. The Constitution does not destroy the laws so long as these are not in conflict with it. It may be that this may appear elementary but it is also important for the point at issue. If, to use an English expression, the Constitution is intended "to drive a coach and four" through the legal system, then the heritage of case-law built up and elaborated by endeavour and abundant doctrine and for as long as Malta, in the field of public law, has been embracing the principles of English law, the legal edifice would be shaken from its foundation and may even collapse. With regard to the facts behind the case under review the defendants have already shown during the oral argument and by the evidence produced, that these are to be kept in their proper perspective and so far, since the Constitution came into force, no one has attempted to haul down from over the bastions of Malta the flag of freedom. Conversely from the legal aspect it is necessary for the eye to look beyond the widest horizons. Applicant tied himself to section 14 of the Constitution and by way of its literal interpretation, which deprives it of its real essence and meaning (contrary to the *dictum* of Holmes above quoted) is invoking a protection, which the defendants hope to prove, is intended for much different facts and circumstances.

Importance of section 120(1) of the Constitution. The Court must do its best to save the preceding laws.

5.1. If it is true that Part II of the Constitution does not operate in a vacuum; if it is true that its provisions are not simply a collection of words to be interpreted literally, which is the bridge joining that Part (as the whole of the Constitution) with the system of the former law which feeds it and gives it life? This link is constituted by section 120(1) which provides for the keeping in force of

No. 4. Defendants' Note of Submissions. —*Continued.*

prior laws, except in the case of conflict. This is in effect nothing else but the very old principle of interpretation that *posteriores leges ad priores pertinent nisi contrariæ sint.* The bridge is there and there is nothing left except for the Court to cross it. If the link is cut we would be resorting to a 'scorched earth' policy; we would be making 'tabula rasa'; we would be adopting a destructive rather than a constructive interpretation; we would be forgetting the rule: *interpretatio sumenda est ut res magis valeat quam pereat.*

Necessity of judgment "tota lege perspecta"

5.2. Certainly when they say "former law", the defendants have not in mind to examine all the law: they *submit* only that a view must be taken of the pre-constitutional system in its *entirety* so as to establish whether it contained any important rule relevant to the matter under review and by so doing to decide whether it still operates under the Constitution, and in the case of an affirmative decision to what extent. Otherwise we would be deciding the case solely under Part II of the Constitution as if it were the alpha and omega of the legal system without any consideration of section 120(1); in a few words *nisi tota lege perspecta.*

An integral part of the former system was the administrative law and the limits of judicial control over executive acts.

5.3. The rule that the defendants have in mind is precisely that which has been upheld by numerous judgments of these Courts relative to the limits of judicial control over executive acts, which has been hinted at and perhaps even more that hinted at, earlier in this note of submissions and at this point it is necessary to examine more minutely its extent so as to establish therefrom why and to what extent it should remain operative under the Constitution. If this rule, or set of rules, used to form part of public law, that is the administrative law of Malta to-date, justice would not be made to the importance of the case under review if they are buried before administering the last legal rites and extreme unction. Very often the patient is fortified by chrism and is healed and brought back to normal.

Development in Malta of the rules of English administrative law in a democratic climate.

5.4. When section 120(1) mentions existing law certainly the reference is not meant to extend only to statutory laws. Heaven forbid that it were so. It would be enough to take the word "law" in the definition of *Salmond* who expanded the definition of *Austin* and *Holland*: "Law is the body of principles recognized and applied by the State in the administration of justice". Among this body of principles, there has existed over a considerable period the constant practice of this Court, so much so that nowadays it surely constitutes "jus receptum" (at least over the last one hundred years and the more so since Malta, started, as is had necessarily to do in matters of public law, to follow English sources) the rule regarding *the limits of judicial control over executive acts.* And the important thing is that even for the special purposes of the case under review, this plant, transplanted from English soil in the less fertile, but not completely sterile land of Malta, which grew and blossomed in a climate freshened by a democratic breeze, has in no way derogated from the liberties and the democratic sentiment of the people even when they did not enjoy franchise and parliamentary representation, because *democratic sentiment did not arrive in Malta with the advent of the present Constitution.*

The existence of the Rule of Law in Malta was always compatible with the limits of judicial control.

5.5. When the Maltese people placed themselves under British protection, this was done with the aim and intention of making the law reign over this small country, that state of fact for which later Dicey coined the phrase "Rule of Law" which the flag under which the nations united in the Declaration of San Francisco and the Convention of Rome, yes, the sources of the words used in Part II of the present Constitution but not of Maltese democracy. Before San Francisco, before Rome, before Nigeria, before Blood our fore-fathers had already established the principle of the Rule of Law, when they stated in article 9a of the Declaration of Rights that "no person has a personal right over the life, property and freedom of others. The power was only laid in the law". (18)

Maitland. Separation of powers.

5.6. What was then the system prevailing regarding administrative acts between 1802 and 1962? Was it in any way inconsistent with the noble principles so solemnly affirmed? Did the Courts in anyway leave anything to be desired or did they betray the protection which the people duly deserved against the acts of the executive, or did they rather, continue to strengthen, *in honour of the law,* that balance of power which is the essence of democracy, in the sense that power must reside somewhere?

A short time after the arrival of Maitland and when he assumed power on behalf of the British Crown he expressed the determination of the Sovereign "to recognize the people of Malta and Gozo as subjects of the British Crown and as entitled to its fullest protection". (19) Two years after in an address delivered to the Judges and other legal authorities before the opening of the first session of the Courts, he announced that the Government of these Islands had to be run on "the great principle of the separation of powers". The defendants are not asserting that in Malta the separation of powers is complete. As in England the lines of demarcation are not completely delineated, but substantially the principle is in force and the Rule of Law established. A short while afterwards Lord Glenalg said in the House of Lords: "..... It was peculiarly the duty of Great Britain to take care that the principles of British freedom and the full benefit of British legislation should be brought into operation". (20)

Attitude of the Courts in relation to administrative acts.

5.7. In the light of these principles there is no cause for surprise that Malta, which had no public law of its own, though it possessed an old and elaborate private law, started adopting the "public law" of England. There was no obstacle for this development. There were only some variations in the theme; the introduction of some theory which did not form part of English public law (principally the distinction between the two personalities of the State, a distinction which is not forming part of the thesis of the defendants in the case under review) and some differences in the method of interpretation. But the defendants submit as a proposition of law that all in all what is called "administrative law" of Malta is substantially the "administrative law" of Britain. So much so, that in Malta as in Great Britain, contrary to France and other countries of the continent no special Courts have been instituted, and in spite of all this a system of law developed regarding (a) cases proposed by or against public authorities before the ordinary Courts, and (b) the organisation of the services given to the charge of administrative agents of the Government. (21) It does not appear necessary to the

No. 4. Defendants' Note of Submissions. —*Continued.*

defendants to quote the numerous cases where the principles of British administrative law in relation to the matter under review, that is regarding executive acts, were followed, but in order to facilitate reference a list of pertinent precedents has been compiled under *Appendix II.* If in this list no cases are found which are factually similar to the one under review, this is solely due to the variety of human experience and to the fact that new circumstances present themselves for decisions.

From these judgments a clear cut distinction emerges between executive and ministerial acts on the one hand and administrative acts of a judicial character on the other. In the case of the former the Courts only examine whether the decision emanated from the competent authority, in the latter case the Court examines whether the principles of natural justice have been observed. This case-law is subtantially one and the same thing with British public law relating to the matter under review and it is the law of Malta. There remains to be seen *whether this law has been abolished by the Constitution.* There seems to be no doubt that this aspect of Maltese public law forms part of English public law, a doubt arises when one confronts the passage in the book by *Lord Mac Dermott* referred to in the Note of References (21A) and the passage by *Wade & Phillips* regarding "Discretionary Nature of Administrative Powers" wherein they state:— "The administrator is entitled to arrive at his decisions by considerations of policy..... within the limits of statutory power" (regarding the authority of the defendants to direct and control the Department of Health, reference is made apart from the general powers of each Minister, to section 42 of the Constitution and to Chapter 148 of the Laws) "which gives him discretion..... his decision cannot be challenged in a court of law..... the forum where his decision can be criticised is parliament" (22); and where they state:— "The main functions of administrators are planning, co-ordinating, supervising and generally exercising a discretion as regards alternative courses of action which are not of a character susceptible of adjudication in court" (23); and the observation by another authority that "the orders of prohibition and certiorari will lie only in respect of judicial acts and not for those of an administrative or ministerial character". (24)

Continuation of the same subject of para. 5.7 with special reference to the position of Government employees.

5.8. From the judgments quoted in Appendix II it transpires, that in the context of the case under review, the case *Boselli v. Roupell* merits special attention, in so far as in that judgment the Court of Appeal pointed out that civil employees are in a special position and in the absence of laws and regulations on their *status,* it is necessary to have recourse to the principles of English Constitutional law which relate to the qualities of the power of the executive. It is true that nowadays we have the Regulations of the Public Services Commission, (25) but these in no way affect the fundamental rights of the Crown in the selection and dismissal of Government employees, and the position is as it was, under that aspect, during the times of Boselli. If employment and dismissal are merely administrative acts which fall outside the review of the Courts, the same must be said of all those ministerial acts giving directives, instructions or orders to Government employees for regulating their conduct in the *place of work* and *during working hours,* as is laid

No cognizance of circulars relative to Civil Service.

down in the Circular in question. S.A. de Smith (Professor of Public Law in the University of London) was one of the few who up to now has investigated the special nature of government circulars in so far as directed to the administrative hierarchy and tells us in clear terms that this kind of instrument is not cognizable by the Courts. In the passage hereunder quoted the underlining is of the defendants:—

> "In most continental countries regulations which have *effect within the administrative hierarchy* are regarded as law-making instruments even if they do not derive from statutory authority. In the United Kingdom, also, the various non-statutory *instruments regulating the Civil Service* may be regarded as constituting *a special branch of public law,* although *their provisions are not cognizable by the Courts;* and in so far as these instruments are general in their application they may reasonably be characterised as 'legislative' ". (26)

What is important for the immediate purpose of the preliminary plea of the defendants is the conclusion reached by its author that the contents of the Circular, its provisions and naturally what happens under those provisions is not cognizable by the Courts. Otherwise the Courts would be substituting their criterion and judgment (which do not combine in themselves the internal knowledge of Government policy and the choice between two conflicting courses of action in a matter which is purely administrative and of internal management of a department for those of the Minister.

Equality of Maltese and English law. Distinction from other irrelevant theories.

5.9. The defendants feel that up to this stage they have accomplished the task they assigned themselves early in this note of submissions to show the similarity between English and Maltese law in relation to the distinction between executive acts of a judicial nature, and executive acts which, besides not having a judicial element, affect the Civil Service. Counsel for the defendants regret only one thing, that although they wrote at some length in their endeavour to go deep into the matter to the best of their ability to help the Court, they have not succeeded through their research in penetrating deeper into the question. On the other hand they hope that the statements of law made and the authorities quoted are substantially correct and may serve as a basis of reasoning acceptable to the Court. In the law and theories above expounded they have prescinded from those judgments of certain continental countries based on the distinction between *acts d'autorità* u *actes de gestion,* and on the doctrine of the *Acts of State* (27). The doctrine of "jus imperii" appears to find its application more in the matter of tortious liability and damages. Independently of these doctrines, the defendants feel satisfied that up to now they have proved the identity between Maltese and English law, the former effectively based on the latter, in the sense that the Circular in question is extra-legal or at least that it would have been so until the Constitution came into force. For the purposes of the first plea there now remains only to establish that this part of the law of Malta *was not abrogated by the Constitution,* as it appears would have been the position in Great Britain had that country in conformity with the ratification of the European Convention of 1950 adopted the Bill of Rights written in the same manner as that given to Malta under Part II of the Constitution.

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Effect of the introduction of Human Rights Bill.

6. S.A. de Smith in an article published in the International and Comparitive Law Quarterly already quoted (p. 219) says that:—

> "It was possible for the United Kingdom to accede to the Convention without any undue straining of conscience. The rights and freedoms these proclaimed were, to a very large extent, already recognised in English law — not as formal constitutional or statutory guarantees but as residual rights, liberties and immunities of the individual".

After ten years from the ratification of that Convention he found it possible, to continue saying (p. 219 note 17):— 10

> "It is doubtful whether any subsequent change in English law is directly attributable to the United Kingdom's accession to the Convention".

Now it is interesting that "the Convention imposes legal obligations on the parties to it to ensure that their laws are *in conformity* with it, and supplies machinery for securing compliance with its provisions" (ibid p. 218).

If the position relating to judicial control of administrative acts remained the same in England so it remained here in Malta.

6.1. If the legal position in England relating to the power of judicial control remained the same from the ratification of the Convention onwards, especially when one considers that the United Kingdom was one of the parties to the Convention (by accession) it must follow that this position regarding the judicial review remained the same also in Malta, and this in virtue of section 120(1). Part II of the Constitution of Malta was not requested by the Maltese people. This is a little inconsistent with the policy of benevolent neutrality which that author felt must be retained by the anglo-saxon constitutional consultant when he said (ibid. p. 236):— 20

> "If any genuine local demand exists, he may be ill-advised to do anything to discourage it. He will, however, be right to point out the dangers of drafting guarantees in language that will buoy up false hopes, and the undesirability of casting too heavy a burden on the courts". 30

Juridical foundation and "raison d'etre" of Part II of the Constitution.

6.2. It is true that the same author (in this case reference is being made to writers owing to the lack, due to novelty, of authorities and judicial precedents on the point under examination) at the end of his article (p. 237 note 71) refers to the fact that the Blood Commission had recommended constitutional guarantees for Malta based principally on those of Nigeria.

This fact, that is the recommendation of the Blood Commission is relevant. English Courts, apart from writers, are not very receptive to interpretations of "travaux preparatoires". In the legal system followed by our Courts, this is more permissible and the defendants feel that this is as it should be, the more so when interpreting a Constitution, of which part the legal world is still discussing the real object and effect. From the reading of the Blood Report it transpires clearly that the Commission made its recommendations relative to Part II not because Malta is a semi-civilised country where the rights of the individual are not known and guaranteed by law. Even in Nigeria there was a reason of a special nature. For Nigeria the reason was simply one of a compromise dictated by the fear of "balkanization" and the oppression of minorities in 40 50

a country consisting of various regions and peopled by races of different language (28). As the special reasons for the introduction of these provisions in the Constitution of Nigeria must influence the field of activity of the Court of that country in their interpretation and application, in the same manner, their application in Malta must be made restrictively, taking into account their "ratio legis" coupled with the juridico-administrative nature of the Circular. The only reason why the provisions contained in Part II were incorporated in the Constitution of Malta, as it emerges from the Blood Report itself, was the possibility of the setting-up of a Police State and a People's Court. Had it not been for these factors, there would have been no necessity at all for these provisions. As pointed out at an earlier stage of this note of submissions, the Rule of Law had long been established in Malta, thanks not only to the democratic sentiment and the high degree of civilisation of the Maltese people, but also owing to the influence of the liberal ideas of English law. The fundamental rights of the individual, habeas corpus, freedom and religious tolerance, the right to life and personal safety, prohibition of slavery, the right of compensation in cases of expropriation for a public purpose, protection of domicile, equality before the law, impartiality of judges, freedom of association and assembly, freedom of expression were all guaranteed by *apposite statutes,* or by way of *residual rights* as they are in the United Kingdom.

Reconciliation.

6.3. From all this one may reach the conclusion that the "rationale" of Part II of the Constitution is a repression of all those acts which go a long way in setting-up a *Police State, despotism* and *tyranny* and the gagging of freedom of expression in a country. These have to set the demarcation line in the application of Part II of the Constitution. The application of this Part starts where despotism commences and not before. A despotic act is easily discernible and one realises quickly that in the country at this moment there is absolutely no threat of depotism or police state; on the contrary a sense of relief which was so necessary prevails. But the provisions of that Part, elegant as they are, and which the Courts should apply when and to whom their application is due, were never intended to give to the Courts the power of review over acts which are purely executive regulating the activities of the Civil Servants merely with regard to the *time* and *place* of their work. This ground, as pointed out, is extra-legal, as it was prior to the Constitution and falls completely outside the ground which was meant to be covered by Part II and this Part should not be made to apply beyond the boundaries of its *ratio.*

Conclusion.

6.4. From all this it results that when one considers Part II of the Constitution together with section 120(1) one must resolve in one's mind the hypothesis of the retention and co-existence with Part II of another stream of law; which is that of the limits, existing prior to the Constitution, over the control of administrative acts regarding the management of a Government Department, which are of themselves extra-legal, as is the Circular in question; to reconcile the two concepts together within the frame of the origin and the reason of existence of Part II and to state that it was never the intention of extending this Part of the Constitution to affect circulars as the one under review. Moreover, the validity and

No 4. Defendants' Note of Submissions. —*Continued.*

soundness of the preliminary plea of the defendants stands out all the more when one considers that evidently the power of control which the Courts enjoyed up to the advent of the Constitution over administrative acts involving a judicial element in the exercise of a discretion, must of necessity, in the public interest be retained in force in virtue of section 120(1); and it is an essential corollary that *that control must remain vested in them together with its juridical limits;* namely that the Courts have no competence, in the sense above explained, to take cognizance of acts which are purely administrative or 'ministerial' *and much less* over *that restricted ground* relating to circulars regulating the management of a Government Department. Consequently the defendants submit that it pleases this Court to declare itself incompetent in the sense as above expounded.

Entry into merits of second plea. There is no breach of section 14(1).

7. Having out-stripped the ground of the first plea the defendants, without prejudice and subordinately to it, state that it is clear that for the applicant to be able to ask for redress under section 16 of the Constitution he must by way of a prior and essential condition prove that a breach of section 14(1) *has taken place* or *is taking place* or *is likely to take place.* The second plea of the defendants is that this element has not been proved.

Definition of freedom of expression.

7.1. The first limb of section 14 is not lacking in the definition of the concept of freedom of expression. This right consists, it is pointed out, (a) in the right to *hold an opinion* and (b) in the right to *impart* (the defendants here are looking at the matter from the angle of the applicant and not of the employees) *ideas and information,* both *without interference.*

Development of second plea. Distribution and circulation are the essence of the freedom of the press and these are still untouched.

7.2. Element (a) is irrelevant for the case under review because the applicant is still free to believe that which he wishes. With regard to element (b) the applicant was and is still completely free in the enjoyment of his right of registration as an editor of the "Voice of Malta", which is the only requisite under the Press Ordinance for a person to publish, circulate and foster his newspaper. It must be remembered at this juncture that the concept of the *freedom of expression* has to the concept of the *freedom of the press* the relation of the general to the particular. The freedom of the press is not the freedom of expression. It is only a part of it or a mode of its manifestation. If the right of expression is not absolute (that which Dicey defined "the right to speak and write what one chooses provided the law is not infringed") not even the right of the press is absolute. The essence of this right is *publication and distribution.* As decided by the Supreme Court of India in re: *Ramesh Thappar vs State of Madras* (29):—

> "There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is secured by freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication".

It has been proved that the newspaper of applicant is regularly issued every Saturday in the evening and is sold by anyone choosing to sell it. If not all newsagents and newsboys sell it to avoid falling under the penalty of sin inflicted by the competent Eccle-

siastical Authorities this is not to be attributed to Government but to the actions of applicant. In point of fact the paper in question can be sold by anybody who wishes to sell it and can be bought by anybody who wishes to buy it; it is freely distributed all round Malta in the clubs of the party issuing it. Very rightly the highest Indian Court observed that this is the *essence* of the question. One must not look for details, which are often of little entity, but must keep one's views directed frontly to the principle sanctioned in the declaratory part of the law of section 14 to evaluate that substantially that right was not violated.

Now apart from the fact that the Court knows that the newspaper remained available to the general public, as it was before the issue of the Circular, including the employees of the Department under the charge of the defendants, even these employees remained completely free to read those newspapers in their home, in the streets, on the buses, in public gardens, over the hills and in the valleys, in a few words everywhere, except for the directive given to them by the defendants not to carry it into their place of work and during working hours. This does not constitute a violation of the right of applicant to impart his ideas without interference.

Analogy with American case.

7.3. The case under review has a certain measure of analogy with the American case *Communications Association v. Douds* already quoted in this note of submissions in another context. In that case a provision of the law was challenged before the Supreme Court as being unconstitutional, which required the National Labor Relations Board not to take cognizance of cases raised by a trade union, if the officers of that union would not have subscribed, at least a year before, to an affidavit that they are not members of the Communist Party, or affiliated to it, and that they do not uphold organisations embracing the subversion of the American Government by unconstitutional means. The appellants in the case submitted, *inter alia,* that that provision was contrary to the "freedom of expression" sanctioned by the First Amendment. The defendants are not advocating here the introduction of the 'clear and present danger doctrine' developed and elaborated by the American Supreme Court. That doctrine had to be developed in America because in their enthusiasm the founders of the Constitution left no room for defence for the declaratory parts of the Constitution and after recognizing that the declared rights were not absolute the Supreme Court developed two doctrines of restriction that of the 'clear and present danger' and the other of the 'Police Powers of the State'. In our case the restrictions are sanctioned and permissible under the second limb of each of the sections in Part II and that explains why the analogy does not lie here, but in the reasons put forward by the Court, which apply to the case under review. The Court, while declaring the law valid referred to the fact that the provisions of the law were not tantamount to a violation of the freedom of expression and stated as follows:—

> "Of course we agree that one may not be imprisoned or executed because he holds particular beliefs. But to attack the straw man of 'thought control' is to ignore the fact that the sole effect of the statute upon one who believes in overthrow of the Government by force and violence — and does not deny his belief — is that he may be forced to relinquish

No. 4.
Defendants' Note of Submissions.
—*Continued.*

his position as a union leader. That fact was crucial in our discussion of the statute ..... The Act does not suppress or outlaw the belief in overthrow of the Government, nor prohibit it or those who hold that belief from engaging in any aboveboard activity ..... No individual is forbidden to be or to become a philosophical believer in overthrow of Government or a full-fledged member of a group which holds that belief. No one is penalised for writing or speaking in favor of such a belief or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a believer in overthrow of the Government by force. It applies only to one who becomes an officer of a labor union".

And at a later stage the judgment continued:—

"That Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the *keeper of the arsenal*". (30)

Needless to point out that the analogy consists in that the applicant cannot claim for himself the position that he is the "keeper" of the hospital. If anyone is a "keeper" that person is the Minister. The analogy runs further, in that the employees of Government can receive everywhere the ideas of the applicant, except within the hospital walls. In this manner the American Supreme Court is bringing the line more and more in harmony with the better moral and social sensibilities of the epoch (31) and in the same way the defendants feel that their Circular could be fitted not only with the democratic way of life of Malta, an integral part of which is the respect towards the person and the recommendations of its spiritual heads, (perhaps a merit of another subordinate pleading), but also with the freedom of expression provided for under section 14 (1) (the merit of this pleading). In another case not irrelevant to the case under review, *Kovacs vs Cooper* the eminent American Court held:—

"While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed. *The Court never intimated that the visitor could insert a foot in the door and insist on a hearing.* Martin v. Struthers, 319, U.S. 141, 143."

And in the same judgment the Court concluded in favour of a municipal ordinance which prohibited the use of sound-tracks with amplifiers, (used for the purpose of making people who would not like to lend an ear to listen, whether they like it or not, to certain politicians even from within one's residence), by holding that:—

"The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be *opportunity to win their attention*". (32)

Conclusion of second plea.

This, in the submission of the defendants is the phase and aspect of the freedom of speech involved in the case under review. The applicant has the full opportunity to print, publish and circulate his newspaper. If this freedom of the applicant has been preserved so has his right under section 14(1) been maintained; and this is why this right was in no way violated — and his action of the case it is not stayed under the first plea—should fall against this obstacle.

Third plea. Consistency with section 14(2) (b).

8. If the Court then decides not only that it is competent to review the contents of an administrative circular but also that the circular constitutes a substantial breach of section 14 (1) sufficiently for the defendants to be called upon their defence under the second subsection, then the respondents plead that the circular is consistent with section 14(2)(b).

Analysis of section 14(2)..

8.1. As is well known it was not possible for the framers of the European Convention to enunciate only the rights — which everybody knows are not absolute in themselves — without conferring on the legislative and executive organs the equal right of making an imposing list of restrictions which, though they may be classified in various categories, may be grouped under the general heading of 'public interest'. In fact the Convention has, over the Universal Declaration, the advantage that "it defines the range of permissible restrictions with greater particularity". (33)

Now both if the Circular is taken as an administrative act done under the general powers of the Minister and under his statutory powers and those of the Head of the Department, as well as if taken as a legislative act, the introductory part of section 14(2) applies to both hypothesis.

The position taken by the defendants is that the Circular *partakes more of the nature of an administrative act,* rather than a legislative act; in the first place, because even if one considers minutely the passage above quoted from page 34 of the book "Judicial Review of Administrative Action" one finds that the author did not say that circulars are always laws. In order to fall within that sphere circulars must be of 'general application' which is not the case in the matter under review; in the second place because, in expounding correctly the definition of "law" given by *Salmond,* also quoted above, one must not forget a very important element necessary for a rule to acquire the character of a law, that is the element noted by Basu (34) on the lines laid down by Wade and Phillips, when he says in relation to the saving of a pre-existing law in the Constitution of India — that "the answer to the question whether any rule of conduct has the force of law is to be found in the fact whether it is enforced by the Courts of law". Circulars, as the one in question, are not enforceable in the Courts. The Minister, under their provisions, cannot claim criminal penalties nor even civil sanctions and the employees cannot appeal from them to the Courts; and in this properly lies their extra-legal nature upon which the defendants based themselves in the submission of the preliminary plea. Therefore the defendants feel that it would be more apposite and appropriate, though it makes no difference with regard to this third plea, for the Court to consider the Circular for the purposes of section 14(2)(b) as a thing done under the authority of a law.

No. 4. Defendants' Note of Submissions. —*Continued.*

The same analysis continued

8.2. There is another distinction to be made with regard to section 14(2). The word "reasonably" appears twice, once before "required" in paragraph (a) and a second time before "justifiable" in the common and concluding part of the section. The words "reasonably required" in paragraph (a) show that in the case of a defence under that paragraph the restriction imposed must be not only "reasonably justifiable in a democratic society" (and we will see what this means in a moment) but also that it must bear reasonable connection or substantial relation with the "authorised purpose". Respondents are exempt from proving this additional element because they are basing their defence on paragraph (b) and not also on paragraph (a).

Elements of third plea.

8.3. From this stage we reach the conclusion that for the third plea to be entertained it is enough for the Court to be satisfied as to the two remaining elements:—

(a) that the act imposes restrictions on public officers; and

(b) that the act is reasonably justifiable in a democratic society.

As for the words "public officers", the defendants refer themselves to the definitions of "public officer", "public office" and "public service" contained in section 3(1) of the Constitution. As for the rest, there should be no doubt that if the Circular imposes restrictions on anybody, they are imposed on public officers. It is to be understood, of course, that this is not meant to convey that a *breach* of section 14(1) is being admitted. This point has been dealt with in the second plea and what is being said at this juncture is by way of subordinate submission. There remains only to make some observations with regard to the other element "reasonably justifiable in a democratic society".

"Reasonably justifiable in a democratic society"

8.4. What is the meaning conveyed by the words "reasonably justifiable in a democratic society"? These are new words for our law. Nowhere in the body of our laws do we find such a direct allusion to democracy but the concept of democracy is not new and this for the reasons aforementioned in this note of submissions. But on the other hand in that part of the submissions the point being considered was rather the aspect of democracy which is the *rule of law,* and although this other aspect has never been decided yet by our Courts these must now consider whether the concept of democracy includes in itself other elements outside the rule of law. The defendants approach this question with due apprehension. The concept of democracy is indeed too vast to be contained within the straight jacket of a definition. They are inclined to believe that though the rule of law is an important element, and for that matter one of the most important, in the set-up of a democratic society, it is not everything. After all, on the other hand, the meaning of the word 'democracy' is subject to variation from one country to another. Russia, for exmaple, claims that it is a democratic country, but the democracy of Western Europe and America, our political family, cannot quite agree that Russian democracy is the true democracy. In its ethymological sense it means "government by the people", but this, on the other hand, is only the *political* concept of the word, whereas the word is so comprehensive that it embraces *juridical,* (e.g. rule of law and freedoms of the individual) economical and *social* conditions (35).

In this last sense, the word democracy includes the notion of those differences deriving from ethnical, historical, geographical and religious influences. For example in a country where it may be said that all the people are very fond of their religion,where fortunately many people follow the custom of making the sign of the Cross or recite a short prayer before starting or at the end of their work, or even stop for a while from work during certain times of the day to recite the "Angelus", where the attendance in Churches even by busy men is much larger than that obtaining in other countries not only on days of obligation and on similar occasions, the defendants feel that the Court may recognise that an integral part and not of negligible importance of the 'democratic society' or the Maltese 'way of life' is the respect towards the spiritual heads and the Ecclesiastical Authorities; so much so that generally in the electoral manifestos of political parties presenting themselves for elections, indeed at the beginning of the electoral programme (including that of the party on the Government side returned by a rather strong majority) we come across declarations that they intend, if returned, to work hand in hand and collaborate with the ecclesiastical authority, which constitutes a sort of concordat, which though unwritten, is none the less deeply rooted in the heart and mind of the people. History and social science recognise religion as one of the strongest driving forces of humanity. For this reason while on the one hand one must admit certain difficulties in the co-relation of the abstract concepts of democracy, on the other hand it should not appear too difficult for the Court to place before its eyes a picture of democracy in Malta sufficiently real for the purpose of the case under review and from there to reach the conclusion that the Circular in question does not offend that picture rather that it conforms with it and finds its angle fitting with the mosaic which that picture represents. In this exercise then there are two other factors from which one cannot prescind, that is:—

a) the ethnical and social values of the judge himself, and

b) the consideration that although democracy aims at reaching the highest possible degree of "self fulfilment" of the individual, this must in some way be embanked, as the power must reside somewhere; and therefore we come again to the point submitted at the opening of this note of submissions that the point at issue is one of *balance,* balance between the power of the Government and the freedom of the individual.

Thus, for example the Supreme Court of India observed in re: *State of Madras v. Row,* (36) inspiring itself from some American judgments:— "the social philosophy and the scale of values of the judges participating in the decision should claim an important part in evaluating such elusive factors and forming their own concept of what is reasonable". It has to be added, as pointed out by that Court, that the limit of judicial interference must be traced to their sense of responsibility and self-restraint from the reflection that the Constitution is written for everybody but at the same time when the majority of the elected representatives of the people authorise the restriction, they considered it reasonable. In this case we come across the reference "to the majority of the elected representatives of the people" because the Court was considering the constitutionality of the law, but the same principles should apply in considering administrative acts, with the addition of the presumption that the public authority 'will act honestly' in the exercise of its power.

No. 4. Defendants' Note of Submissions. —*Continued.*

Distinction between European Convention and the Constitutions of Nigeria and Malta.

8.5 In concluding the defendants draw attention to the difference that exists between the words used in the European Convention *"necessary* in a democratic society" and those used in our Constitution *"reasonably justifiable* in a democratic society" (which are also the words adopted in the Constitution of Nigeria). What is *necessary* and what is *reasonably justifiable* may be fundamentally different in particular situations and it is impossible to avoid the conclusion that from the two documents the Constitution offers a substantially more *restricted* ground for the review of legislation and administrative acts than the European Convention (37). 10

So much is being submitted by the defendants for the better consideration of the case and subject to the judgment of this Court.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) V. FRENDO,
Crown Counsel.

Note of References

(1) Griffith and Street: Principles of Administrative Law pp. 18 — 22.

(2) Government Gazette, 10th May, 1949; the section relevant to freedom of expression is section 19.

(3) Cmnd. 8130; the section relevant to freedom of expression is section 10

(4) Basu's Commentary on the Constitution of India Vol. I.

(5) Quattro Codici; Hoepli. p. XII.

(6) S.I. 1960. No. 1652.

(7) Cmnd. 1261, Chapter IV, para. 37—39; Chapter VIII, para. 87—89; Chapter IX, para. 104; Appendices G and H.

(8) S.I. 1961 No. 741.

(9) S.I. 1961 No. 1188.

(10) Washington University. Department of Political Science: Democracy in the Mid-Twentieth Century (Washington Univ. Press, 1960), p. v.

(11) S. A. de Smith, Fundamental Rights in the New Commonwealth, Part II: I.C.L.Q. Apr., 1961 p. 217.

(12) Lord Mac Dermott: Protection from Power under English Law (Pub. Hamlyn Lectures, 9th Series), p. 195.

(13) The Times Newspaper; Law Reports, May, 1962.

(14) Craies on Statute Law, 5th Edit. p. 480.

(15) United States, Reports, Vol. 339, p. 400.

(16) United States, Reports, Vol. 233, p. 604, 610.

(17) Lord Mac Dermott, id. p. 82.

(18) Debono, Storia della Legislazione, p. 272.

(19) Minute, Government Gazette, 5th October, 1813.

(20) J. Ganado: British Public Law in Malta; Current Legal Problems, 1950, Vol. III, p. 198, which makes reference to Schwarzenberger, Human Rights in British State Practice.

Current Legal Problems, 1948, Vol. I, p. 166, which counsel of Respondents had no opportunity to consult.

(21) Wade and Phillips: Constitutional Law, 5th Edit: definition of Administrative Law at the opening of chapter I of Part VII, p. 286.

(21A) Lord Mac Dermott, ibid. p. 82.

(22) Wade and Phillips, p. 294.

(23) Wade and Phillips, p. 298.

(24) W. A. Robson: Justice and Administrative Law, 2nd Edit., p. 5, note l; and vide also regarding the distinction between what is "administrative" and what is "judicial" the important passage at pages 12—13.

(25) Public Service Commission Regulations, L.N. 32 of 1960; and Public Service Commission (Disciplinary Procedure Regulations) L.N. 42 of 1961.

No. 4. Defendants' Note of Submissions. —*Continued.*

(26) S.A. de Smith: Judicial Control of Administrative Action, p. 34, note 34.

(27) Regarding the origin in the French system of the distinction between *actes d'auctorità* and *actes de gestion*: H. Street, Governmental Liability p. 16 et seq. and p. 56 et seq; regarding *Acts of State,* ibid. p. 50 et seq. and Wade and Phillips, op. cit. p. 205.

(28) T. C. Elias: The New Constitution of Nigeria; Journal of the International Commission of Jurists, Vol. II, No. 2, Winter 1959 — Spring 1960; and de Smith, loc. cit. p. 215-6.

(29) Basu, op. cit. p. 170; this book is enriched with a great amount of work on comparative constitutional law.

(30) U.S. Reports, Vol. 339, p. 408 and 412.

(31) Fellman: The Supreme Court of the United States, p. 17.

(32) U.S. Reports, Vol. 336, p. 86 and 87.

(33) De Smith I.C.Q.L., loc. cit. p. 220.

(34) Basu, op. cit. p. 83.

(35) Idem, p. 46.

(36) Idem, p. 155 et seq., on "the standard of reasonableness"; also previous pages 152-5 on "the seven freedoms" of section 19 of the Constitution of India may be of help to the Court.

(37) De Smith, I.C.Q.L., loc. cit. p. 222.

Respondents had not the opportunity to consult another work which might help the Court:

Lauterpacht, International Law and Human Rights, which though ordered from abroad it was found out that it is out of print. There is also *Alan Gledhill*: Fundamental Rights of India.

No. 4.
Defendants' Note of Submissions.
—*Continued.*

APPENDIX I

The facts of the case

1. The defendants issued the Circular complained of.

2. This Circular, amongst other things which are irrelevant to the present case, prohibited the employees in hospitals and in the branches of the Medical and Health Department from carrying with them to their place of work the newspapers condemned by the Church; amongst these there is the newspaper edited by the applicant.

3. The employees affected by the Circular are all civil servants.

10 4. Those employees who have their quarters annexed to the hospitals are not debarred by the Circular from carrying the newspapers condemned by the Church into their residence.

5. The decision of the Church under penalty of mortal sin was pronounced by the competent Church Authority on May 26th, 1961.

6. Applicant is still free to exercise his functions as editor of the newspaper affected by the Circular.

7. The Circular exhausts its effects in the official hierarchy and this limitedly to the places and hours of work of the dependants of the Minister. During any other time and in any other place these are free to read the newspaper of applicant.

20 8. The paper is issued weekly, every Saturday evening and is put on sale by newsagents and newsboys willing to take part in its distribution, apart from its being put on sale in Labour Party clubs, and being a weekly publication it can be bought throughout the week and particularly on Sundays which is a public holiday.

No. 4.
Defendants' Note of Submissions.
—*Continued.*

APPENDIX II

Administrative Discretion

1. Giuseppe Xuereb versus Francesca widow Attard..	Law Reports Vol. XVIII p. II, page 147.	The concession and the renewal of a licence for the sale of wines and spirits must be granted in conformity with the regulations published by the Head of the Government. They are attributed to the administrative authority and the judiciary cannot discuss their expediency and fairness.
2. Prof. Antonio Boselli versus Hon. Ernest P. Roupell noe.	Law Reports Vol. XXI, p. I, page 433.	The Courts of Justice are competent to take cognizance of the legality of any administrative provision which is claimed to transgress the rights of others; that is they can examine whether such provision falls within the functions of the authority emanating it and whether it is regular in its form, but they cannot inquire into its expediency or fairness; that is to say whether the aforementioned authority was competent to take the challenged deliberation and whether it was taken in the prescribed form. In these Islands there exists no law or regulation governing the status of civil servants, and in their absence it is necessary to have recourse to the principles of English Constitutional Law regarding the powers of the executive and the relations between the Crown or its representatives in the colonies and civil servants. That according to these rules, except in special cases where it is otherwise provided, the employee who holds office at the pleasure of the Crown, may be dismissed or discharged at any time and the power of the Crown in this regard is an implied condition in the conferment of employment.
3. P.L. Ugo Muscat Azzopardi noe. versus Major Frank Stivala noe.	Law Reports Vol. XXVI, p. I, page 420.	With regard to an administrative provision issued by a government official or by a government body in virtue of a law or regulations, the Courts of Justice are competent to take cognizance of the case when it is claimed that a right pertaining to another person has been transgressed, in the sense that they can examine whether the provision falls within the competence of the Authority and whether it was issued in the pre-

		scribed form; they cannot inquire into its expediency or fairness if the authority issuing the challenged order was competent and issued it in the prescribed form.
4. Dottor George Busuttil versus Hon. Doctor Carlo Mallia noe. et.	Law Reports Vol. XXVI, p. I, page 164.	Among the sovereign rights there is also included the right of the Government to select and appoint its officials. The Crown also enjoys the right, which cannot be censored, to remove at any time its public officers without the Court being competent to discuss or decide the truth of the motives behind the dismissal.
5. Peter Bugelli versus Hon. Ugo P. Mifsud.	Law Reports Vol. XXVI, p. I, page 571.	The Courts of Justice cannot discuss the expediency or the fairness of an administrative measure, if the authority was competent to decide on the challenged measure and if this was undertaken in the prescribed form. These principles find their origin in the postulate of the division of powers between the judiciary and the executive which is a fundamental rule of the British Constitution and of those Constitutions framed to its likeness.
6. Giorgio Demarco et. noe. versus James Turner noe et.	Law Reports Vol. XXVIII, p. II, page 455.	"The civil judge is not empowered to take cognizance of decisions taken in the discretion of the public officer"...
7. The Hon. Mabel Strickland pro. et. noe. versus Salvatore Galea noe. et.	Law Reports Vol. XXIX, p. I, page 216.	Reasonable exercise — Executive discretion. "It is of course, always to be assumed that the Executive will act honestly and that its powers will be reasonably exercised — they (The Court) will not enquire whether an administrative authority had exercised soundly the discretion entrusted to it. If they did, they would be in danger of substituting their own discretion for that of the body which has been appointed by parliament (in the present case by the Crown in virtue of its prerogative) to decide, and they would soon find themselves responsible for every detail of Government".....
8. Ugo Pace et. versus Prof. Joseph Anastasi Pace noe.	Law Reports Vol. XXXII, p. II, page 317.	The War Damage Commission is an administrative body of a quasi judicial nature, vested with discretionary powers that are not cognizable by the Court, so long as these discretionary

No. 4.
Defendants' Note of Submissions.
—*Continued.*

		powers are exercised legally in substance and in form and in accordance with the rules of natural justice. The Court can review the discretionary acts of the Commission only in respect of inquiring whether the acts are legal, whether the necessary procedure has been adopted and whether the exercise of that discretion was 'fair and honest', but it cannot substitute its discretion, as a measure of expediency or convenience, for that of the Commission. Executive discretion — quasi judicial discretion — "the civil judge is not entrusted with the cognizance of decisions taken in the discretion of the public officer".
9. Saverio De Gabriele versus Salvino Mizzi noe.	Law Reports Vol. XXXIII, p. II, page 116.	Administrative measures are not subject to review by the Court when these fall within the competence of the authority emanating them and are issued according to the prescribed form laid down in the law, which must be observed.
10. Carmela Ciantar versus Hon. Advocate, Doctor G.M. Camilleri noe.	Law Reports Vol. XXXV, p. I, page 83.	The Court cannot inquire into the expediency or fairness of an administrative process performed by the Government so long as the measure is taken by the competent authority in the prescribed form.

No. 5

No. 5. Plaintiff's Note of Submissions.

Plaintiff's Note of Submissions

In the First Hall of Her Majesty's Civil Court.

In the Acts of the Application.

Hon. Dr. Anton Buttigieg.

vs.

Hon. Dr. Paul Borg Olivier noe.

Note of Applicant:

In virtue of which he is filing the annexed note of submissions.

(signed) Adv. ANTON BUTTIGIEG.

This the 16th day of June, 1962.

Filed by Dr. Anton Buttigieg with note of submissions.

(signed) S. BONELLO,
Deputy Registrar.

In the First Hall of Her Majesty's Civil Court.

In the Acts of the Application.

Hon. Dr. Anton Buttigieg.

vs.

Hon. Dr. Paul Borg Olivier noe.

Note of submissions of Applicant.

Respectfully sheweth:—

That the Circular in question goes against the fundamental freedoms of conscience and expression, as laid down in the Constitution, has appeared evident not only to the applicant but to the Maltese people in general. The applicant therefore, rather than explaining how the Circular affects sections 13 and 14 of the Constitution, is going to reply to the objections raised by the defendants.

The defendants raised the following pleas:

That the Circular in question:—

a) has not the force of law;

b) is not directed to the patients;

c) is only a directive regarding certain relations between employer and employee limitedly to the place and hours of work — where the defendants enjoy the right to give to their employees all those instructions which appear

No. 5. Plaintiff's Note of Submissions. —*Continued.*

to them in their discretion to be expedient — and therefore the applicant is not hindered in the enjoyment of his right of freedom of expression, in as much as he is still free to publish and circulate all those ideas which he feels and wishes to publish and circulate in the same manner in which the doctors and employees, to whom the applicant made reference in his application, remained free. The applicant is going to reply to these pleas one by one.

A. That the Circular has not the force of law.

It appears that the defendants are following this line of reasoning. They allege that American and English case-law with which they came across speaks of the annulment of laws, by the Courts, which run counter to fundamental freedoms and never of executive acts. And this, they state, with all good reason because if the Court had the power to annul all acts it would substitute its discretion for that of the Executive.

This submission is incorrect for the following reasons:

1. Section 16 of the Constitution is indeed more, if not altogether, directed to the orders of the Executive contravening the fundamental freedoms. This emerges clearly from the language of the law. The words "contravened in relation to him", "securing the enforcement of any rights to which any person concerned may be entitled", "without prejudice to any other action with respect to the same matter that is lawfully available", and the word "redress" show that the legislator meant to refer to acts. Had he in mind the laws he would have resorted to words quite different from those used. One asks for the annulment of a law, but requests for a remedy against some act performed in contravention of the law. The Constitution itself in sections 11 and 12 refers to various acts of the Executive which could be in contravention of the fundamental freedoms.

With regard to the annulment of laws the Constitution makes reference to the matter in section 120.

2. Section 16 of the Constitution is perfectly in agreement with section 13 of the European Convention on Human Rights of which the British Government is a signatory and bound itself to make it applicable to the colonies. This provides as follows: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

This article represents a marked progress over the Universal Declaration of Human Rights drawn up by the United Nations. While this was and always remained a mere resolution which cannot be enforced, the Convention in virtue of the aforementioned article is enforced before national tribunals and subsequently before the European Court of Human Rights.

3. It is true that a corresponding section to section 16 of the Constitution is not found in any English law. But we cannot say that the English Courts have not intervened to control the Executive. On the one hand there is the prerogative writ of *mandamus* and others in virtue of which the Courts make the corporations and other bodies comply with that which is to be fulfilled under the law—these are matters related to administrative law—on the other hand there is the *habeas corpus writ* which emanates from the Court when the freedom of the individual is transgressed by the Executive. Apart from this last writ there are no others relating to the convention of fundamental freedoms. But, it is to be pointed out that in England the sense of respect towards fundamental freedoms is so great that it is very

difficult for the Authorities to go against them and therefore these freedoms are sufficiently protected by parliamentary questions and the press without the need of special provisions and writs. On the contrary, it is not so on the continent and in other countries and this explains why the Convention on Human Rights in which section 13 abovementioned was inserted, has as its counterpart section 16 of the Constitution.

There can be no doubt, therefore, that the acts of the Executive are subject to the review of the Court under the provisions of section 16 of the Constitution and for this reason the first plea of the defendant should be rejected.

B. *That the Circular was not directed to the Patients.*

Also this plea is unfounded and this for the following reasons:—

1. In the first place the applicant could reasonably understand that the Circular referred to the patients. This, in fact, states that the newspapers condemned by the Church are not to be allowed to be carried into the hospitals, and this by way of a strict order, and the employees should see that this directive is observed. Among the employees there are the hall-porters and it is up to them to check that these newspapers are not carried into the hospitals. And the Circular does in no way state that the employees only are prohibited from carrying the newspapers into the hospitals, but that entry of these newspapers is strictly prohibited. Therefore, one had to understand reasonably that the order referred to the patients.

2. It is common knowledge that the Reverend Sisters and the Reverend Fathers in hospitals, not to mention government employees, are openly carrying out a campaign against the Malta Labour Party and for religious motives they are endeavouring to convince the patients to abandon this Party. Those who carried the newspapers of the said party were always looked daggers at and therefore one can reasonably understand that what was being done semi-officially, has become official through the Circular.

3. This interpretation is further strengthened by the circular issued a few days before by the Minister of Education, which directed not the employees, but the parents of children attending Government schools that their sons and daughters were not allowed to carry with them in the schools newspapers condemned by the Church. Press Release 303/62 states: "Parents of children attending Government Schools are hereby informed that it is absolutely prohibited for their children to wear political badges, to chant political hymns, and to introduce subversive or anti-religious literature including papers condemned by the Church".

4. Applicant feels that this plea clashes with the other two pleas submitted by the defendants and shows that they are not convinced of what they have submitted. And in fact, if the defendants are seriously maintaining that the Circular is not a law and therefore does not fall within the jurisdiction of this Court, as submitted by them in the first plea, this remains so both if the Circular was directed only to the employees as well as if it included the patients. If the defendants seriously feel that they were entitled to issue that order as the heads of the hospital, their jurisdiction in the same way is extended over the patients. If the motive behind the order was as maintained by the Attorney-General during the oral argument what he called "clear and present danger" to the Catholic Religion which is the official religion of Malta and for this reason forms part of Maltese democracy, in the same way this reason applies to the patients.

If the reason for the issue of the Circular was one of discipline — a reason diametrically opposite to that brought up by the Attorney-General — as was maintained by the defendant, the Honourable Doctor Paul Borg Olivier, in his evidence, this also applies to the patients because the patients could just as well be involved in heated discussions between them if they read political newspapers of different and opposing parties.

No. 5. Plaintiff's Note of Submissions. —*Continued.*

This plea shows how weak are the other pleas in the mind of the defendants and represents a strategic withdrawal in the endeavour of the defendants to minimize as far as possible and to conceal all the gravity of the contravention against the freedom of expression.

5. But the case of the employees who are residents or are in continuous duty for twenty-four hours remains to be considered. These without any shadow of doubt are included in the Circular so long as they are not excluded by the issue of a counter-circular by the Minister.

C. *The Third Plea.*

This contains two points:—

i) That the defendants as employers are entitled to issue orders which in their discretion appear to them expedient limitedly to the place and hours of work;

ii) That by so doing they made use of their rights and therefore did not interfere with the right of expression of others.

With regard to the First Point (i)

1. The right of the employer to give directives to his employees regarding his work is not absolute but limited. His discretion must be reasonable and not arbitrary or capricious. The more so when the employer is the State which should set an example to all other employers. When the decision of the private employer is arbitrary, this can be taken cognizance of: thus for example in accordance with Act XI of 1952, when the employer dismisses the employee before the term of expiry agreed upon, the Courts have the right to inquire whether the reason was lawful. And the modern tendency is in the sense that the law should encroach more and more on the contract of service to ensure fair conditions for the employee.

2. When the employer is the State, it has also the duty to abide by the fundamental rights of the individual as laid down in the Constitution. Therefore, while the private employer can exclude the citizen from occupying a certain position in a private office owing to the religion he professes, the State cannot do so. Because in the same way as the State is debarred from acting against the law, so much less can a Minister or a head of a department issue orders contravening the same rights.

3. Rather, for an order of a State Official to restrict validly the fundamental freedoms, there must be before anything else a law restricting these freedoms. If there is no restrictive law as an *enabling provision*, the order is in itself void, without any necessity of probing into other conditions.

This appears clearly from the examination of the provision laid down in sections 11(2), 12(11), and 14(2). The Constitution distinguishes between law and contravening acts with the words "nothing contained in any law" and "nothing done under the authority of any law". The act must be performed in virtue of a law and not in contravention of the Constitution when certain conditions are prescribed by the same law. Apart from this even if the act is performed under a law which is reasonably necessary, it must be reasonably justifiable in a democratic society. The European Convention uses the same words in sections 8, 9, 10 and 11.

4. In the case under review no law was enacted which in any way prohibited the reading or the entry in the departments of the newspapers condemned by the

Church, both by the general public and the Government employees. Rather, these papers over the last year have been delivered and distributed by post even though there is a law against subversive, immoral or irreligious literature. Over the last year they have been carried into the departments of the defendants by the employees, and the defendants themselves, as stated by them in the case under review, find no objection to the entry of the newspapers when addressed to the patients.

Not only there is no law in virtue of which the order in question was issued, but it can be stated that the idea of the Maltese legislator is that a newspaper can be brought before the Courts and eventually found guilty of a contravention against the press law, but can never be suspended or cancelled. In fact in 1946, section 62 which gave power to the Governor to suspend a newspaper while proceedings were pending, was repealed. During the same year there were also repealed the power of the Governor to give a warning to a newspaper which appeared to him in certain matters to endanger public order; and the power to suspend its publication until he deemed fit as laid down in section 65. In 1962 section 42 of the same Ordinance which empowered the Court to suspend or cancel a newspaper previously found guilty of an offence against the press law was also repealed.

The only shade of legal support of the order that may be brought up, is Act I of 1921 in virtue of which the Roman Catholic Apostolic Religion was declared as the official religion of Malta.

It has to be pointed out, however, that the National Assemblies of 1920 and 1946 both attempted to insert a similar declaration in the Constitution but the Queen never entertained the request in the various Constitutions given to Malta. This shows that in the idea of the Queen the Act abovementioned is to be subordinate to the Constitution, which in the first place and above anything else protects democracy and the preservation of order by way of the freedom of conscience and religious toleration and that the Act must be interpreted consistently with the provisions of the Constitution.

Everything therefore, that preserves the Catholic Religion but goes against these principles contravenes the Constitution.

Apart from this, religion and morals are sufficiently protected by section 163 of the Criminal Code and the press law. Article 163 was enacted by Parliament following a unanimous report of a select committee composed of members from all the parties. The legislator did not prohibit all immoral and irreligious acts, but only those which apart from being in themselves immoral and irreligious, also endanger social order. And the Civil Courts must inquire into these matters: otherwise they would not remain Courts of Her Majesty, but would become Tribunals of the Inquisition.

5. And even if for the sake of argument one had to admit that there is an enabling law, one cannot say that the order can be considered as being reasonably justifiable in a democratic society. The Constitution states clearly that in these matters we must look at the usage in democratic countries and in the mind of the legislator there certainly was English and American usage.

7. Very little is required to prove that the order was in itself undemocratic, in the contradictory reasons which motivated it and when confronted with the democratic usages of other countries. *Anti-democratic in itself* because it discriminates. It is common knowledge that the newspapers condemned by the Church are all the newspapers issued by the Malta Labour Party and because they are the organs of that party. It is also common knowledge that the Malta Labour Party is the party which forms the Opposition in Parliament, while the other parties constitute the Government and those parties that support it. The order coupled with similar orders

No. 5. Plaintiff's Note of Submissions. —*Continued.*

already issued or that may be issued, in case this application is rejected would extinguish the Opposition which is already sufficiently strangled. The order itself shows discrimination. In fact, while it prohibits the wearing of badges of all political parties, in the case of newspapers only those that are condemned by the Church are prohibited which is tantamount to the newspapers of the Labour Party *as such.*

Anti-democratic in its own reasons. The Attorney-General during the oral debate and the defendant the Honourable Borg Olivier in his evidence brought up arguments which were wide apart and contradictory of each other as much as the two poles — a factor which further shows how weak is the position of the defendants.

The Attorney-General advances the motive of the protection of the Catholic Religion which is the official religion of Malta, as underlined by him. His argument was similar to that of the Supreme Court of America, which with all the democratic institutions that exist in that country took certain decisions against communism based on the reason that it was *a clear and present danger to the State.* The fallacy of the argument emerges from the fact that the order was limited to the newspapers condemned by the Church, and at the same time it does not affect 'listed' books nor thousands of other newspapers which though perhaps bad in themselves are not condemned by the Church. The fallacy of the argument transpires further when one notes that if the order was necessary for the protection of religion, the State would not have left the issue of the provision to one Minister, but would have made a law to operate for everyone.

The defendant, the Honourable Borg Olivier, brought forward the argument of discipline. According to the same circular, however, political discussions during the periods of rest are permissible — these are prohibited only during the hours of work — as also the entry of the other political newspapers is permissible. Now how danger to public order can arise if one carries in his pocket a newspaper condemned by the Church and such danger does not arise when political discussions take place, is left to the defendant to explain.

The motive of the Circular is one, that is, that of gradually suppressing the Labour Party newspapers and the labour movement. The Circular must be taken with the background of the other circular issued by the Minister of Education, as also with the fact that the Ecclesiastical Authorities subordinated the reading, buying, selling and printing of newspapers supporting the Malta Labour Party to the penalty of mortal sin, as well as attending its meetings or enrolling as a member and vote for it.

Anti-democratic when compared with usages of other democratic countries. In democratic countries, like Britain and America they do not even dream of embarking on similar measures. On the contrary the Corrupt Practices Act and similar legislation are still in force. In Italy, a Catholic country like Malta, all Opposition papers are on sale and carried about everywhere and can be read by everybody. And it was the Democratic Christian Government which introduced for all parties on television, the programme "Political Platform" (Tribuna Politica). Newspapers are prohibited and not allowed to be carried into Government Departments not in the countries mentioned, but only in those countries behind the Iron Curtain.

In regard to the Second Point (ii)

The defendants maintain that the order does not interfere with the right of freedom of expression of applicant, because he is still free to print and circulate his paper.

Section 14 of the Constitution does not only lay down that every citizen has the right of the freedom of expression, but states also that he has the right to impart his ideas *without interference.* That the order of the defendants interferes with this right is evident. The employees of the Department of Health — and these are of a considerable number — are not only precluded from reading the labour party newspapers during their period of rest, but if they buy the paper before they enter for work, they are debarred from carrying it with them into their place of work and they are therefore compelled to buy it with a certain amount of uneasiness and with the risk of remaining without it. Applicant is therefore being interfered with in imparting his ideas to these persons, while at the same time other editors and Members of Parliament and other political parties may do this without any interference on the part of the defendants.

During the oral discussion the Attorney-General in his endeavour to further minimize the importance of the case said that evidence was necessary to prove that the newspaper of the applicant on some occasion had been interfered with. In the first place, it is to be pointed out that for the right of action under section 16 it is not necessary that the contravention be actual, but its likelihood is enough: "is or is likely to be contravened". On the other hand, the Court must appreciate how at the present times, when jobs are even scarcer than gold, it is particularly difficult for government employees to come forward and take the witness-stand to give their evidence, the more so when the directive of the defendants has the support of the strongest two forces in Malta, namely the Ecclesiastical Authorities and the Colonial Office.

Further submissions of the Applicant.

Respectfully sheweth:—

That the note of submissions of the applicant was ready for filing at the sitting of the 11th of June, 1962, but on that day the Attorney-General asked that the time for the filing of his note be extended. The applicant feels that he must add the following submissions to his note.

That the present case was orally argued on the 25th of May, 1962. In the course of the oral submissions the applicant submitted that the defendant the Honourable Borg Olivier in his evidence gave a different reason for the Circular from that submitted by the Attorney-General in his oral argument. In fact, the defendant stated that not only the "Voice of Malta" and the "Helsien", but also the "Poplu" and "Malta Taghna" were banned from entry into his Departments, as they could give rise to trouble within the departments. On the contrary, the defendant, the Honourable Borg Olivier went on to say, the entry of the "Berqa" and the "Times of Malta" was not prohibited as these were not political newspapers being independent, that is papers which were not published as organs of political parties.

That following the oral argument the case was put off for the filing of the notes of submissions for the sitting of the 11th of June. To the great surprise of the applicant on that day the defendant, the Honourable Borg Olivier, requested to take the witness-stand again because, as he said, in his previous evidence he had expressed himself wrongly. In this second testimony he stated that the reason for the Circular was only that the "Voice of Malta" and "Helsien" were condemned by the Ecclesiastical Authorities, and therefore the newspapers of the other political parties could be carried into his Departments and read during the rest periods, while this was not permissible in regard to newspapers condemned by the Ecclesiastical Authorities.

No. 5. Plaintiff's Note of Submissions. —*Continued.*

That it is clear that the defendant, the Honourable Borg Olivier, in his first evidence stated what he had in mind without making any mistakes in the way he expressed himself, and that the evidence given at the sitting of June 11th is a new version and not a correction of previous evidence. It is true that according to law, the defendant can at any time change his line of defence, but the changing of a line of defence is one thing and the changing of evidence is another thing.

That the Attorney-General at the sitting of the 11th of June produced various witnesses to prove the day and time of sale of the "Voice of Malta". According to the evidence given the "Voice of Malta" is issued on Saturday evening between eight p.m. and nine p.m. and close to nine rather than eight p.m. This is a late hour of the evening, especially in winter, and this is why the majority of the sales take place on Sunday morning. On Sundays shops pull down their shutters at 10 a.m. and after that hour it is not possible to buy the newspaper from news-agents. Several of the employees of the defendant work on Sundays in hospitals and these are interfered with because if they buy the paper in the morning they cannot carry it with them into the hospital and it is not available in the evening. These persons are not only debarred from reading the newspaper at their place of work during the rest periods, as is the case with other newspapers, but they cannot even read it in their home in the evening.

(signed) Adv. Anton Buttigieg.

No. 6. Defendants' Note Complying with Court Order contained in judgment.

No. 6

Defendants' Note Complying with Court Order contained in judgment

In the First Hall of Her Majesty's Civil Court.

After the Acts of Application 1/62 in the names:

Honourable Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paolo Borg Olivier nomine et nomine.

Note of the defendants nomine in virtue of which in compliance with the judgment pronounced by this Honourable Court on the 11th of March, 1963 in the above names they are filing a copy of the circular issued by the Department of Health.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) A. CATANIA L.P.

This the 13th day of March, 1963.

Filed by Legal Procurator Ant. Catania without enclosures.

(signed) E. SAMMUT,
Deputy Registrar.

M.H. Circular No...../62.

M.H. 1030/56.

No. 6.
Defendants' Note Complying with Court Order contained in judgment.
—*Continued.*

Medical and Health Department,
15, Merchants Street,
Valletta.

13th March, 1963.

Chairman,
St Luke's Hospital
Management Committee,
Medical Superintendents,
Heads of Branches.

Following the judgment of the Court of Appeal of the 22nd February, 1963. which annulled the judgment of the Court of first instance in the names "Hon. Dr. A. Buttigieg, M.L.A. vs. Hon. Dr. P. Borg Olivier noe., et", Her Majesty's Civil Court (First Hall) disposed of the case on the 11th March, 1963. and declared that that part of Circular No. 42/62, which prohibited the entry of the newspapers condemned by the Ecclesiastical Authorities in the places therein specified was illegal and of no effect.

The Minister of Health and the Chief Government Medical Officer intend to appeal against the judgment of the 11th March, 1963.

No. 7
Judgment of H.M. Civil Court First Hall

No. 7.
Judgment of H.M. Civil Court First Hall.

In the First Hall of Her Majesty's Civil Court.

Judge:—

The Honourable Professor Joseph Henry Xuereb LL.D.

Sitting of Monday the 11th of March, 1963.

Number 1.

Application.

Honourable Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paul Borg Olivier, Minister of Health and Doctor Carmelo Coleiro as Chief Government Medical Officer.

The Court,

Having seen the judgment of Her Majesty's Honourable Court of Appeal of the 22nd of February, 1963, by which, after the judgment previously given by this Court on the 17th of July, 1962 was declared null and void for the reasons therein stated, the record of the proceedings was sent back to this Court to be decided afresh;

No. 7.
Judgment of H.M. Civil Court First Hall.
—*Continued.*

Having taken cognizance of the record and considered the request of the applicant and the pleas of the defendants nomine, the evidence produced and the submissions made;

.....*Omissis*.....

Considers on the merits:

That by an application filed on the 4th of May, 1962, the applicant after stating (a) that the defendants nomine had issued a Circular (a copy of which was annexed to the application) in virtue of which amongst other things the newspapers condemned by the Church were prohibited from being carried into the hospitals and in the branches of the Departments under their charge, and (b) that this order was intended to prohibit patients and doctors in hospitals and all the employees of the Medical and Health Department from carrying with them and reading while within the precincts of the hospitals and the Medical and Health Department the newspapers of the official opposition in the Legislative Assembly, that is the Malta Labour Party, amongst which is the "Voice of Malta" edited by the applicant who is also a member of the opposition, which newspaper was condemned by a circular issued by the Archiepiscopal Curia on the 26th of May, 1961, and (c) that this order in so far as it affects the "Voice of Malta" constitutes a breach of sections 13 and 14 of the Malta (Constitution) Order in Council, 1961, relating to freedom of conscience and freedom of expression: the applicant as a Member of the Legislative Assembly and as editor of the "Voice of Malta", is being hindered for religious reasons by the defendants from imparting his ideas and information without interference to the patients in hospitals, amongst others, and the latter are being hindered from receiving them without interference — prayed that this Court in accordance with section 16(1) and (2) of the Order in Council referred to above may be pleased to provide the appropriate remedy by making such orders, issuing such writs and giving such directions as it considers appropriate for the purpose of enforcing or ensure the enforcement of his rights of freedom of conscience and of expression which have been contravened by the Circular abovementioned;

That against this application the defendants nomine pleaded (a) that the Circular has not the force of law, (b) that it was not directed to the patients and (c) that it is only a measure regarding the relations between the employer and the employees, limitedly to the hours and place of work — where they have all the right to give to the employees all those instructions which in their discretion appear to them apposite and appropriate — and therefore the applicant is not being hindered in the enjoyment of his freedom of expression because he is still at liberty to publish and circulate in the same way in which doctors and patients, to whom reference was made in the application, are still free. These pleas, were further expanded by the defandants by a note of submissions wherein it was submitted that (a) the Circular in question is not cognizable by the Courts since it constitutes a pure administrative act, (b) there is no breach of section 14(1) of the Constitution as alleged by applicant, and subordinately (c) if there is a breach of this section or rather subsection, it is within the limits of the restrictions permissible under subsection (2) of section 14 itself;

Considers:

That apart from the preliminary plea whether the Court can review or otherwise the Circular in question, the parties maintain opposite theses on the merits in the sense that the applicant holds that there is a breach of his rights acknowledged by the Constitution whereas the defendants deny that there is such a breach. It has to be noted with regard to this latter aspect that while the applicant makes reference to section 13 (freedom of conscience) and 14 (freedom of expression), the defendants refer only to the latter section. In connection with this clarification of fact the Court notes that though these freedoms are distinct, nevertheless they

can both be contravened by one and the same act, as may happen if one owing to the views which he is entitled to hold in virtue of his right of freedom of conscience is denied the freedom of expressing the same views owing to the contents; in such a case in fact one would be suffering an impairment of one's right of freedom of conscience in its external manifestation, which is also protected, owing to the views which one is free to hold, because the concept of liberty cannot be reconciled with that of restriction: these two concepts are in antithesis and therefore cannot be reconciled.

And with regard to this matter the Court would like to add that while the freedom of expression can be contravened, so to speak, in different degrees of gravity in as much as one may be able to express one's views in some place or time, or only to certain persons, and in this way the gravity of the interference is diminished and at times lightened to the extent that it could become negligible; it is not the same with regard to the freedom of conscience, as this quality is one and the same thing with the personality of the individual in such a way that any violation in this regard is always grave in itself and should be looked upon as such;

That following this clarification of fact and comment on this matter, one has now to inquire into the controversy and naturally one has to consider the preliminary plea regarding the competence of the Court to take cognizance or otherwise of the act of the defendants constituted by the Circular in question. A copy of this Circular was filed by the defendants at fol. 5 of the record of the proceedings, which however does not carry with it the preceding Circular No. 34 therein declared as "sub-joined"; another copy of the Circular reproducing also the preceding Circular was filed by the defendants and it is at fol. 8 of the record of the proceedings;

Considers:

That about this Circular a question arose as to whom it was directed: this question has a double importance as it is connected with the preliminary plea in the sense that the Circular may be considered a purely administrative act if directed and applicable only to the employees (saving and apart for the moment from its contents) and it is also connected with the merits in case the Circular is considered as an act cognizable by the Court for the purpose of enquiring whether objectively (in its contents) it contravenes any rights and. affermatively, whether this is done legitimately or not, always in accordance with the Constitution;

That the Court, having examined the Circular and having considered it in the light of the purpose of the previous circular, that is that of giving directives regarding that which is permissible or rather not permissible in relation to the Government employees themselves, cannot agree with the thesis of the applicant, that is, that also the patients and the doctors (who are not employees, one has to understand) were prohibited from carrying with them the paper in question in the places indicated; had it been the case one would also add to these, the visitors. In the view of the Court, the words used leave no doubt about the matter and once the rule is that a circular applies to the employees unless it appears from its contents that it should not and this does not so appear in the present case, the same Circular should be taken as limiting the prohibition therein contained regarding the entry of newspapers condemned by the Church only to the employees; in view, then, of the declaration of the defendants themselves in this sense, the Circular must be interpreted as being applicable only to the employees for the purposes of the present case;

That looked at in its form and intended in the above sense, the Circular appears to be an administrative act executed by the defendants nomine in the exercise of the powers inherent in their respective office regarding the management of the Department and other places connected with it; and it is as such that the

No. 7. Judgment of H.M. Civil Court First Hall. —*Continued.*

defendants claim that the Circular is not cognizable by the Court. This submission, however, cannot be accepted in principle, in the sense that is of the absolute lack of power on the part of the Court to take cognizance of similar acts; though, in particular cases, regarding acts dealing with the administrative policy and which measure should be adopted to reach the intended purpose of the administration, the Courts certainly would not feel inclined to disturb that particular measure, even though entitled to do so, unless for very grave reasons; this, of course, is being said without prejudice to those cases in which one is in doubt and therefore questions the power to do the challenged act in the sense that the person who performs the act would be executing it "ultra vires". The Court enunciated the general power of review on the part of the judicial authority regarding the acts of the executive in view of the new principle introduced in the Constitution which confers this power even in the legislative field of which the administrative branch is only the implementation, since it must be considered an essential postulate that the administrative act is supported by a law which authorises it, even if only generically if not specifically, for otherwise one would have to look at the act as something unauthorized and therefore "ultra vires" as stated above;

That, however, the Circular in question, apart from its form, has also to be examined in its contents, in order to see whether it is a case in which the Court should properly feel reluctant to change the act done, on the ground that it is connected directly with the policy of the Department in such a way that if changed, even though the Court has such a power, the Court would be arrogating to itself a purely administrative function and therefore should not disturb that same act. The Circular in question does not appear to the Court to be such an administrative act as submitted by the defendants and this owing to the subject matter or activity regulated by the same Circular. In fact the Circular does not contain any directive as to what the employees should do in relation to the work expected of them and which the defendants nomine have to co-ordinate in order that the Department may fulfill its purpose. On the contrary it relates to what the employees should not do during the hours and in the place of work, as it is not connected with their real work and might rather, if done, interfere with their real work. The defendants are therefore regulating an activity which is extraneous to that which is relevant to the work they intend to co-ordinate, which activity, however, they have also a right to control so long as it affects the final running of the Department. In so regulating the Department, however, and especially in view of the fact that in so doing, as will be pointed out later on, they are limiting the rights of the applicant, who is not their employee, the defendants should not enjoy the same measure of freedom from judicial control which must be recognized to them in a matter which is directly and intimately relevant to the purposes of their Department and is at the basis of the relative policy, in which cases as above stated the Courts would be very reluctant to review the administrative action, although this, in principle is reviewable. Moreover, it can be added that considering the nature of the activity covered by the Circular and its repercussions in respect of third parties, such Circular would be reviewable even if the general principle of judicial review had not been applicable, and under this aspect the preliminary plea advanced by defendants nomine is even more unacceptable;

Considers:

That with regard to the true merits of the case, namely whether the Circular in question violates any right which renders necessary the intervention of the judicial authority for the removal of the violation, it is evident that the right contravened must appertain to the applicant. In this respect it is worthwhile recalling what has already been said in the sense that the Circular has been interpreted as applicable only to the employees, whereas according to the Constitution the right of redress contemplated in section 16 may be exercised by the person in whose respect the

right has been contravened or is likely to be contravened. This is being said for the reason that otherwise one may be induced to attach too much importance to that which really concerns the employees affected by the Circular and which, being personal to them, is not communicable to the applicant. Another reason for mentioning this is that owing to the consideration last made the limitation on the right of freedom of conscience cannot find application since this refers to Government employees and the applicant does not fall within this category. If it is his personal right that is being contravened, this contravention, if necessary, must be kept within the limits marked out in letter (a) and not (b) of section 14(2) of the Constitution; at least this must be the principle regulating this contravention, alleged by the applicant, so far as possible, since there is interdependence between the right of the applicant and that of the employees concerned as the Circular infringes on those very same ideas and information imparted by the applicant in the newspaper edited by him and which the employees cannot carry with them to their place of work. That however such distinction must be made appears clearly when one reflects that the same act may affect differently the person who imparts the idea and those entitled to receive it and when the means used is a newspaper; if only one person is precluded from reading the newspaper, the editor would not materially be much affected (saving the question of principle) but to the reader it is tantamount to an absolute denial of the right also in fact (saving also the question of principle);

This being premised and in the light thereof, the contravention of the right alleged by the applicant consists in the fact, that he as editor of a political newspaper, does not enjoy the same rights enjoyed by other editors of similar newspapers, in the sense that his newspaper, on account of the Circular in question, is not allowed to be carried into the places therein specified by the Government employees who work in those places. And as there cannot be any doubt that a newspaper is one of the means through which one can express his ideas and impart information and that a political newspaper is intended to achieve the largest circulation possible, it follows, that as a consequence of the Circular, the applicant is being interfered with by the defendants nomine in the enjoyment of his right (which should be equal to that of others in the same position as politicians) to propagate his ideas. Therefore there is an impairment or violation of his right of freedom of expression as alleged by the applicant, since this must be considered not only, as submitted by the defendants nomine, from the point of view of the person who publishes and circulates a newspaper but also from the angle of those for whom a newspaper is intended and a restriction on the latter, affects also the editor and restricts his rights also. This of course is being stated as a principle and therefore, in principle, the contravention complained of by the applicant in respect of his freedom of expression exists; with regard to the extent of the limitation of this right however, the Court feels that in the circumstances obtaining (namely that the newspaper in question is published only once weekly late on the eve of the Sunday holiday, the number of employees involved, the limited places in which entry is prohibited, et similia) the same limitation in comparison to the number of readers that the newspaper may reach, if these really want to buy it and read it, is so small that one may consider it negligible and therefore such that it does not affect materially (apart from the principle) the same right of freedom of expression;

That, however, in the enquiry into the reason which brought about this restriction, which enquiry was necessary in view of the allegation by the applicant that this was happening on account only of a religious motive, one expected that this was not the real reason and that on the contrary it was due to some reason which justifies it in the sense of the provisions of section 14(2)(a) of the Constitution; this was all the more expected, since there is no evidence that for the same reason indicated by applicant, any action has been taken against the applicant under the

No. 7. Judgment of H.M. Civil Court First Hall. —*Continued.*

special laws which protect the Catholic Religion (e.g. the criminal laws and particularly the press law) and no similar Circular was issued in other departments (except the Education Department — which, however, is on a different basis from the Department of Health) and so one expected the reason to be due to some special motive relating to the particular Department in respect of which only it was issued, and this even though the Circular itself specified the reason indicated by the applicant namely the banning of the newspapers by the Ecclesiastical Authorities. This indication was however, confirmed by the Honourable Doctor Borg Olivier in his evidence, since his evidence is tantamount to that much; in fact the reference which he also made to discipline is itself based on the religious sentiment of those employees who disagree on this ground with the applicant — and so the prohibition against the newspaper edited by the applicant is truly based only on religious motives; and this reflection must be linked with the consideration already made, in the sense that the Circular in question was regulating something extraneous to and different from the activities of the employees in connection with the work truly demanded of them for the smoother running and the achievement of the purposes of the Department in which they work. And while this consideration assumes, in this context, more character and force. on the other hand this fact gives practical reality to the other consideration also already made in the sense that the Circular also affects the right of freedom of conscience of the applicant, once this right has, for religious motives, been in some way restricted and has not remained free. If this restriction was truly necessary for the better management of the Department and one could justify such a measure under the provisions of section 14(2)(a) of the Constitution, this however, would have required the restriction of the freedom of everyone so that there would have been no discrimination since the Constitution does not discriminate in this regard. This would also have placed in a parity of conditions the employees in the Department itself, for the particular reasons of the Department — though — as said above the reasons applicable to the employees are not to be stressed upon as they are not necessarily communicable to the applicant. In this context, however, this reference to the situation created among the employees, as a direct consequence of the Circular, shows that the powers conferred on the defendants nomine for the better direction of the Department were not properly used as they restricted unduly and not uniformly and consequently unjustly, an activity which does not properly come within the sphere of their powers and therefore use has been made of such power different from that in which it was intended to be used when conferred; and the exercise thereof made by the defendants for this purpose (i.e. for the protection of the conscience of a section only of the employees) is "ultra vires" and illegal; and as this exercise has caused a violation both in right of freedom of conscience of the applicant and the other employees such violation is also illegal and must be dealt with.

That in this connection the Court has been invited to consider that the use made of these powers is justified by the local way of life in view of the respect up to now due to the Ecclesiastical Authority, in such a way that the restriction complained of is consonant with the local democratic way of life. In this respect the presiding judge has also been invited to contribute his views regarding the concept of democracy. Certainly this submission carries weight especially when one remembers the laws that have as their object this respect and recollects also that Act I of 1922 acknowledged the Catholic Religion as the National Religion of these Islands. On the other hand, however, one would not be realistic if one did not admit the fact declared by the applicant and which resulted during the hearing of the case in the sense that notwithstanding the time (now almost two years) that has passed since the newspaper edited by him was condemned by the aforementioned Authority this is still being printed and circulated. As a proposition of law (and this is the crux of the whole question) the Court cannot fail to recognize this right of the applicant, which evidently relates more to the freedom of conscience than the freedom of expression and this shows more clearly how well-founded is

the preceding conclusion in the sense that the Circular in question contravenes this right of freedom of conscience of the applicant. And in the light of the fact which has resulted, of the continued publication of the condemned newspaper, in spite of such condemnation, that measure cannot be considered as democratic which denies such right on the ground that formerly such a thing did not occur, in as much as by following such line of reasoning one would not be giving the due weight to the change which has occured in the circumstances. The Court sees its opinion confirmed by the absence of any measure similar to the Circular in question on the part of the other departments, comparable with the Department under the charge of the defendants nomine (that is where the directive is addressed to adult persons of formed opinion, as distinct from those who have not yet reached maturity as are school children) as also by the absence of any action under some other law against the applicant. In fact, even this passive attitude on the part of those whose duty it would have been to take action reflects their concept of democracy in the present circumstances and this contribution to such concept so much invoked has its weight. This attitude does not mean that one is disregarding the importance of Act I of 1922 consistent with the Constitution, which proclaims the freedom of conscience which freedom stands out more clearly where a national religion obtains. Nor does it mean that the other departments are not being run in the spirit of the same Act simply because they have not issued a Circular like the one in question, or that the Department concerned was not, one presumes, being managed in accordance with that spirit even before, that is in the absence of the Circular. Indeed the limitation of the application of the Circular to the employees only, declared by the defendants, confirms also the view above expressed in regard to that which the concept of democracy requires in its application, particularly if such limitation so declared is looked at in the light of the other declaration that the restriction of entry of the condemned newspapers was made in order not to irritate the employees who do not agree with the views of the condemned newspapers. In fact, the means used, once it is not of general application, cannot have a general and complete result, as was desired and expected, and it is logical therefore to conclude that the reason for the limitation of the restriction was that which has just been mentioned and it is precisely for this reason and on its account that the Circular cannot be upheld, that is because it does not respect the rights of other people, whose rights are equal to those respect for whom motivated it.

For these reasons:

The Court provides on the merits of the application (a) allowing the prayer therein and declaring that the Circular contravenes the rights of freedom of expression and of freedom of conscience of the applicant, the latter more gravely, and that is also illegal in that part which prohibits the entry of the newspapers condemned by the Ecclesiastical Authorities in the places therein specified; and (b) as a measure for the removal of that contravention, declaring the said prohibition without any effect and to be set aside and ordering that this declaration be brought to the cognizance of the people to whom the preceding Circular was directed by means of a fresh circular over the signature of either of the defendants and this within two days from today — saving any other order if it is submitted by an apposite application and proved to the Court that this order has not been complied with and executed. Costs to be borne by the defendants nomine.

(signed) S. BONELLO,

Deputy Registrar.

True copy.

No. 8.
Defendants' Note of Appeal.

No. 8

Defendants' Note of Appeal

In the First Hall of Her Majesty's Civil Court.

Application Number 1/62 X.

Honourable Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paul Borg Olivier nomine et.

Note of Appeal of the defendants the Honourable Doctor Alexander Cachia Zammit, Acting Minister of Health and Professor Doctor Carmelo Coleiro, Chief Government Medical Officer.

In virtue of which, being aggrieved by the judgment pronounced by this Honourable Court on the 11th of March, 1963 in the present case, they humbly enter an appeal from that judgment to Her Majesty's Court of Appeal.

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) ENRICO W. CORTIS L.P.

This the 18th day of March, 1963.

Filed by Legal Procurator Enrico Cortis without enclosures.

(signed) EDWARD CAUCHI,
Deputy Registrar.

In Her Majesty's Court of Appeal.

The Acts and Records of the proceedings of this case have been introduced in this Court today.

This the 2nd day of April, 1963.

(signed) M. PETROCOCCHINO,
Deputy Registrar.

No. 9
Defendants' Petition

No. 9. Defendants' Petition.

In Her Majesty's Court of Appeal.

Application Number 1/62.

Honourable Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paul Borg Olivier and Doctor Carmelo Coleiro as Chief Government Medical Officer and by a note of the 18th of March, 1963, the Honourable Doctor Alexander Cachia Zammit, Acting Minister of Health and by another note of the 2nd of April, 1963, Doctor John Attard, Acting Chief Government Medical Officer assumed the records of the proceedings instead of the abovementioned Honourable Doctor Paul Borg Olivier and Doctor Carmelo Coleiro absent from these Islands.

Petition of Appeal of the said the Honourable Doctor Alexander Cachia Zammit, Acting Minister of Health and Doctor John Attard, Acting Chief Government Medical Officer.

Respectfully sheweth:—

That by an application in the abovementioned names filed on the 4th of May, 1962, the respondent Doctor Anton Buttigieg, M.L.A., after premising that the appellants nomine had issued a Circular (annexed as Enclosure A with the application of the respondent), which among other things prohibited the entry in the hospitals and other branches of their Departments of the newspapers condemned by the Ecclesiastical Authorities and that this order was intended to prohibit the patients and the doctors in hospitals as also all the employees in the other branches of the Department from carrying with them and read in those places the newspapers of the Official Opposition in the Legislative Assembly, amongst which the "Voice of Malta" edited by the applicant (respondent in this appeal), which paper was condemned by a Circular of the Archiepiscopal Curia dated the 26th of May, 1961, and that in so far as that order affected the "Voice of Malta" it constituted a breach of sections 13 and 14 of the Malta (Constitution) Order in Council, 1961, relating to the freedoms of conscience and expression, and that Doctor Anton Buttigieg as a Member of the Legislative Assembly and as editor of the "Voice of Malta" was for religious reasons being hindered by the defendants nomine (now appellants) in imparting ideas and information without interference to the patients in hospitals among other people, while these were being hindered in receiving ideas and informations without interference, prayed that in accordance with the provisions of section 16(1) and (2) of the Malta (Constitution) Order in Council, 1961, a proper and appropriate remedy be afforded by the Court making such orders issuing such writs and giving such directions as it considered appropriate for the purpose of enforcing and ensuring the enforcement of his rights of freedoms of conscience and expression which had been contravened by the Circular abovementioned.

That in their reply the appellants submitted that the Circular had not the force of law, that it was not intended for the patients and that it constituted only a directive regarding certain relations between the employer and the employee limitedly to the time and place of work, where they had all the right to give to the employees those directives which in their discretion appeared to them to be fit and proper, and therefore the respondent was in no way hindered in the enjoyment of his right of freedom of expression in as much as he was still free to publish and circulate all those ideas which he wished to publish and circulate.

No. 9. Defendants Petition. —*Continued.*

That, moreover, by a note of submissions filed on the 15th of June, 1962, to which ample reference is made, the appellants formally pleaded:—

1) That the Circular was of an extra-legal nature and was not cognizable by the Courts in as much as it related to discretional directives of the Executive to the employees of the Department and therefore it constituted a pure administrative act which does not fall within the jurisdiction of the Court;

2) That there was no breach, neither actual nor possible, of section 14(1) of the Constitution as the respondent was and still is free to publish and circulate his paper;

3) Subordinately — that if there was some breach of section 14(1) this was permissible under the provisions of section 14(2)(b) of the Constitution which authorises restrictions over public officers that are reasonable in a democratic society.

That Her Majesty's Civil Court (First Hall) by judgment in the names abovementioned delivered on the 17th of July, 1962 provided on the application and declared that part of the Circular prohibiting the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein indicated as illegal and therefore of no effect and ordered the respondents nomine to bring this fact to the persons to whom the Circular had been directed by means of a fresh circular within two days from the pronouncement of the judgment.

That the appellants entered an appeal from this judgment to this Honourable Court and by a judgment delivered by Her Majesty's Court of Appeal on the 22nd of February, 1963, the Court after upholding the plea of nullity of the judgment pronounced by the First Court, declared the judgment delivered by the Civil Court (First Hall) on the 17th of July, 1962 to be null and void and placed the parties in the position they were before the pronouncement of that judgment and sent back the record of the proceedings to the First Honourable Court for the case to be decided afresh.

That following the remittance of the record of proceedings, the appellants further pleaded before the First Court that the proceedings initiated by the respondent were null, since when the law does not prescribe the "libel", proceedings before the Civil Court First Hall must be instituted by Writ of Summons.

That the Civil Court First Hall by judgment delivered on the 11th of March, 1963, after taking cognizance of the case and after rejecting the plea of nullity of the proceedings allowed the application by declaring that the Circular issued by the respondents contravened the rights of freedom of expression and of conscience of the respondent, but more seriously the latter, and that it was illegal in those parts where it prohibited the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein indicated, and as a measure to remove the same contravention declared the prohibition to be without any effect and to be set aside and ordered the appellants to bring this fact to the cognizance of those to whom the original Circular was directed by means of another circular, over the signature of one of the respondents and this within two days from the pronouncement of the judgment — saving any other order in case it is submitted by an apposite application that this order was not complied with and executed. With costs against the appellants.

That by a note dated the 18th of March, 1963, the appellants respectfully entered an appeal from the judgment of the Civil Court First Hall of the 11th of March, 1963 to this Honourable Court.

..... *Omissis* .....

No. 9. Defendants' Petition. —*Continued.*

That with regard to the grievances on the merits the appellants humbly submit in the first place that the Circular in question is of an extra-legal nature and is not cognizable by the Court because it concerns the administrative sphere of a department assigned to the appellants, and if in this field the appellants have the right to give to the employees the directives they deem proper within their competence they would be making use of their right which cannot be interfered with by the respondent who in this case is a third party. It is to be pointed out, at this stage, that the only argument in the appealed judgment that was brought forward in support of the power of review of the Circular by the Court is based on the distinction between what appeared to the First Court as constituting the real duties of the employees (a sector in which the First Court admitted that it had no right to intervene except for very grave reasons) and other matters which are not directly connected with their work. Apart from the fact that such a distinction is not very clear, the fact remains that it appeared to the Minister, rightly or wrongly, that the reading of newspapers condemned by the Church Authorities might influence the general behaviour of the Department, a matter over which the First Court recognized that the appellants have a right of control. The argument of the First Court might bring about the consequence that a right of review would lie against a ministerial order prohibiting the parking of vehicles of the employees within the precincts of the department and this on the pretext that that particular activity of the employees is not directly connected with their work within the department.

That the grievances on the merits are as follows:—

(a) That the First Court misdirected itself on various points of law; and

(b) That the judgment is unfair.

That under the first aspect the judgment is based on a false premise which induced the First Court to confuse altogether the freedom of conscience with the freedom of expression and as a result of this confusion the Court misdirected itself on a point of law of the first importance, indeed conclusive in the present case. This self-misdirection appears from the very opening of the judgment (vide paragraph beginning with words "That from this it is evident that .....") where the First Court declared that whenever a person has a right to certain views owing to the freedom of conscience this right is transgressed "unico actu" when that person is denied the freedom of expression of those views.

This declaration of the First Court which constitutes the point of departure and the basis of the appealed judgment is erroneous logically and legally for the following reasons:—

a) The First Court here considered as a concomitant and provocative fact of the breach of the freedom of conscience the other alleged transgression of the freedom of expression; but by so doing it gratuitously assumed what it had yet to show, especially when it is considered that later on it qualified the effects of the Circular as a matter of negligible and immaterial importance vis-a-vis the right of the freedom of expression of respondent.

b) Apart from this the breach of the first right does not necessarily or juridically follow from the breach of the second right, even if there were such breach. The material element of the breach of the right of freedom of conscience had to be proved "aliunde", that is by way of acts and means directed to the internal belief of the respondent and which may debar him from believing as he wishes, which is absolutely beyond the matter under review.

No. 9. Defendants' Petition. —*Continued.*

That the manner in which the First Court based the alleged breach of section 13 on the pretended breach of section 14 brought about a double transgression out of proportion to the case and therefore unfair.

That apart from all this, the First Court, again misdirected itself on another point of law, when immediately after, it held that the breach of the freedom of expression brings about a breach of the freedom of conscience in its external manifestation. Here again the First Court mixed up the two freedoms. The external aspect of the freedom of conscience is not rooted in the freedom of expression (section 14 of the Constitution), but in the freedom of religious worship laid down in the second sentence of section 13(1) as distinct from the liberty of conscience contained in the first sentence of that subsection and which is commonly known as the liberty of mind and religious belief.

That the remaining arguments contained in the judgment on the merits regarding the freedom of conscience is only a consequence necessarily mistaken of the erroneous premise abovementioned, barring some speculative considerations which further complicate the difficulties.

That with regard to the substance the First Court should not have found for the respondent, as there was nothing to substantiate its conclusions, under section 13(1). In fact any remote attempt of definition or analysis of the juridical objectivity governed by that provision is completely missing. The appellants submit that the correct interpretation should be that that section in its first part refers to and protects the freedom of belief (which reflects primarily the internal aspect of the conscience of man) and in the second part the freedom of worship (which reflects the external manifestation of the internal belief). But in the freedom of religious worship or, as it appears also from the marginal note, the principle of toleration mentioned in the second part of that subsection affects and refers only to the execution of functions or religious rites.

The Circular in question left the respondent in full possession of his internal freedom of mind and conscience and it is equally certain that with regard to him there was no religious intolerance in the sense that he was impeded from practising any one of the religious cults tolerated by the legal system of the country. This is not being said by the appellants in order to suggest that they ever had the slightest doubt that the respondent ever embraced a tolerated "cult", but simply owing to the question which, without any necessity, has been precipitated into in the appealed judgment, that is that of "the external" aspect of the freedom of conscience, which, as above stated consists only in the protection of protestant and similar religious functions, and "per se" does not give any right to proselytism in Malta.

That nowhere else in the appealed judgment is there offered the least demonstration of the alleged breach of the freedom of conscience. At a certain juncture, the First Court re-echoing what it had stated previously, seemed to be on the point of again dealing with this point so essential to substantiating the judgment on the merits, but it ended by saying only "that the Circular affects also the freedom of conscience of the applicant, as this freedom, for religious motive, has been restricted and has not therefore remained free" a circumlocution which leaves us where we started.

With regard to freedom of expression this is a question of principle.

Wherefore the appellants while making reference to the evidence and documents already produced and reserving to produce other evidence and documents permissible by law, respectfully pray that it may please this Honourable Court to

.....*Omissis*.....

reverse the judgment in the abovementioned names pronounced on the 11th of March, 1963 by Her Majesty's Civil Court First Hall, it being declared and decided in accordance with the pleas of the appellants and that consequently that part of the Circular which prohibits the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein indicated is not illegal since the rights of freedom of conscience and expression of the respondent have not been transgressed and consequently there is no need for the order given by the Court for the appellants to bring the fact of the illegality to the cognizance of the people to whom it was addressed by means of a fresh circular a copy of which is to be filed in Court in the records of these proceedings within two days from the date of the appealed judgment and reserving to provide further in case that order is not complied with and consequently that the requests contained in the application of the respondent be disallowed with costs of first instance and appeal against applicant.

No. 9. Defendants' Petition. —*Continued.*

(signed) M. CARUANA CURRAN,
Deputy Attorney-General.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) ENRICO W. CORTIS L.P.

This the 2nd day of April, 1963.

Filed by Legal Procurator Enrico W. Cortis without enclosures.

(signed) M. PETROCOCCHINO,
Deputy Registrar

No. 10
Plaintiff's Reply

No. 10. Plaintiff's Reply.

In Her Majesty's Court of Appeal.

Application 1/62.

Honourable Dr Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paul Borg Olivier noe. et.

Reply of respondent.

That the appealed judgment is fair and should be confirmed both on the plea of nullity of the proceedings and on the merits.

....*Omissis*.....

(signed) Adv. ANTON BUTTIGIEG.

This the 16th day of April, 1963.

Filed by the party appearing without enclosures.

(signed) E. SAMMUT,
Deputy Registrar.

This day the 24th of June, 1963.

.....*Omissis*.....

Dr. Caruana Curran argued the appeal.

Dr. Anton Buttigieg replied.

The case is adjourned for judgment on the preliminary plea to the 28th of June, 1963.

(signed) M. PETROCOCCHINO.
Deputy Registrar.

No. 11.
Judgment of
H.M. Court
of Appeal.

No. 11

Judgment of H.M. Court of Appeal

10th January, 1964.

His Honour Sir A. J. Mamo, Kt., Q.C., O.B.E., B.A., LL.D., Chief Justice and President of the Court of Appeal

The Hon. Mr Justice T. Gouder, LL.D.

The Hon. Mr Justice A. V. Camilleri, B.A., LL.D.

The Hon. Dr Anton Buttigieg, M.L.A.

versus

The Hon. Dr Paul Borg Olivier noe. et noe.

The Court:—

Having seen its judgment of February 22nd, 1963 containing the usual summary of the request of the applicant Dr. Buttigieg and the pleas of the defendants and in virtue of which following the declaration of nullity of the judgment of the 17th July, 1962, pronounced by the First Court, the record of proceedings was sent back to that Court for the cause to be decided anew;

Having seen the judgment of the First Court of the 11th of March, 1963, which disallowed the further plea that the proceedings should have been instituted by Writ of Summons and that the application initiating the action null and without effect and that the applicant be non-suited; and, on the merits provided:

a) by allowing the demand and declaring that the Circular contravened the rights of freedom of expression and conscience, more gravely the latter freedom, and that it was also illegal in that part which prohibited the entry of the newspapers condemned by the Ecclesiastical Authorities in the places therein indicated; and

b) as a measure for removing the contravention, declared that that prohibition was of no effect and should be set aside and ordered that this declaration be brought to the cognizance of those to whom the Circular had been directed by means of a fresh circular duly signed by one of the appellants within two days — saving any other remedy if it is submitted and proved to the Court by an apposite application that that order was not complied with and executed — with costs against the appellants.

Having seen the note of appeal and the petition of the appellants in which they prayed that the proceedings be declared null and of no effect as not having been instituted in the form laid down by the law; and subordinately that the appealed judgment be reversed and that it be decided in accordance with their pleas thus disallowing the demand of the respondent and revoking the orders given by the First Court;

Having seen the reply of the respondent submitting that the appealed judgment is fair and should be affirmed both in respect of the plea of nullity and on the merits;

Having seen the other judgment of this Court of the 20th June, 1963, which affirmed the appealed judgment in as much as it had declared that the plea of nullity raised by the appellants could no longer be raised at the stage in which it was raised and on this count dismissed the appeal and adjourned the case to be continued on the merits;

Having heard arguments on the merits the Court considers:—

The Circular in question issued over the signature of appellant Professor Coleiro on the instructions of the other appellant the Honourable Dr. Borg Olivier and addressed to the Chairman of St. Luke's Hospital Management Committee, Medical Superintendents and to Heads of Branches in the part which is relevant to this case, that is in paragraph 2 stated:—

> "The entry in the various Hospitals and Branches of the Department of newspapers which are condemned by the Church Authorities..... (is) strictly forbidden.
>
> You are requested to ensure that the directions contained..... in paragraph 2 above are strictly observed by all the employees of the Department".

That wording could perhaps lend itself to the interpretation which the respondent, when he made his application before the First Court, gave to it in the sense that the order "was intended to prohibit the patients and the doctors in hospitals as well as all the employees from carrying and reading in the places therein indicated the newspapers of the Official Opposition in the Legislative Assembly" among which the "Voice of Malta". But from the evidence submitted before that Court it appeared and so it was held in the appealed judgment, that the Circular must be considered as limiting the prohibition therein contained only to the employees and it was on that basis that the Court proceeded in its judgment.

Throughout the hearing on appeal no question was raised on this point and the discussion was wholly on the footing of that assumption which this Court too, naturally, is going to adopt for the purposes of this judgment. This notwithstanding the Court cannot but observe that, even if so interpreted, the Circular affects — considering the size of the population and of the country — a relatively considerable number of people and a number of institutions and places spread all over the two Islands, as appears from fol. 12.

The respondent also observed in the course of the oral discussion that, if it were to be held that the present appellants had the right to issue the Circular in question, naturally the same right would appertain to each and every other minister and head of department in respect of the department under his charge, in such a way that the interference with the circulation and reading of his newspaper would be vastly widened and extended with impunity. This submission, even though true, the Court does not consider it should take into consideration for the purposes of this case.

Now, precisely because the case concerns a Circular applicable to the employers, the appellants claim in the first place that their action is not cognizable by the Court, except perhaps in the sense of the case-law prior to the Constitution, that is only whether the act was within the competence of the Public Officer who performed it and whether it was executed in the prescribed form; but without any examination of its contents as regards its expediency or justice or its objectivity. In the petition of appeal this contention is expressed in the following words:—

> "Petitioners submit in the first place that the Circular in question is of an extra-legal nature which is not cognizable by the Court since it relates to the administrative sphere of management of the Department assigned to the appellants and if in this sphere the appellants have a right to give their employees directives which within their competence they deem necessary, they would be making use of a right of their own that must not be hindered by the respondent, who in this case is a third party".

No. 11. Judgment of H.M. Court of Appeal. —*Continued.*

Before considering this contention it appears to the Court necessary to make it clear that the complaint of the respondent can be considered, and if well-founded remedied only in so far as the transgression of a fundamental right guaranteed by the Constitution complained of affects *himself* personally. According to section 16 of the Constitution, application to the Court for redress may be made by the person alleging that any of the provisions under Part II has been, is being or is likely to be contravened in relation to *him* or to some other person appointed by the Court at the request of the person who so alleges. (The second part of this provision is not relevant in the present case). The respondent cannot apply for redress, and in point of fact he is not applying for it, on behalf or in the interest of the employees who, by the Circular have been debarred from carrying and reading the "Voice of Malta" in the places therein specified. He is applying for redress in so far as he alleges that by that prohibition he himself is being hindered in the enjoyment of *his* freedom to impart ideas and information even to those employees without restrictions or interference not permitted by the Constitution. In this sense, evidently, the respondent is not a "third party" as the appellants described him in the passage of their petition reproduced above.

The contention advanced in that part of the petition in the sense that the Court cannot take cognizance of the Circular, was in the course of the hearing of the appeal generalised. It was contended that purely administrative and executive acts of Government Authorities are not subject to review by the Courts not even in respect of fundamental rights and liberties, except perhaps, as above stated, within the limits of pre-constitutional case-law. By "purely" executive or administrative acts, which the appellants termed "extra-legal", they seem to mean those Governments acts which are not legislative nor "quasi-judicial" nor done *in virtue* of some specific law which authorises them, but are done only under the authority which the Cabinet or individual Ministers have for the general management of the Government of Malta or of the department assigned to a Minister.

The First Court rejected this contention of the appellants and held that "it could not be upheld as a principle, that is to say, as an absolute lack of power of the Courts to review similar acts; though" — the First Court went on to say — "in particular cases concerning acts regarding administrative 'policy' and which measures, therefore, conduce to the achievement of the purpose fixed by the Administration, the Courts certainly would not be disposed to disturb the particular measure — as the Courts however have the right — unless for very grave reasons".

This Court agrees with the first proposition laid down by the First Court, that is where it held as unfounded the contention of the appellants excluding the jurisdiction of the Courts in regard to executive or administrative acts challenged as violating fundamental rights or freedoms. With regard to the qualification of that proposition made by the First Court something more will be said further on in this judgment.

These rights and freedoms are called "fundamental" precisely because they are guaranteed by the fundamental law and cannot certainly be suspended or abridged except in the cases and in the manner laid down in the Constitution. Precisely because these rights are so guaranteed *no* organ of the State can act in breach thereof and any act of the State which is repugnant to those rights, is within the limits of that repugnancy, necessarily null and void.

Once the Constitution is considered as the Supreme Law of the land and the powers of all the other Organs of the Government are considered as limited by its provisions, it follows that not only the Legislature but also the Executive and

the Administrative Authorities are limited by its provisions, in a manner that every administrative or executive act contravening those provisions and, to the extent of such contravention are similarly null and void. The very purpose of a "Bill of Rights" is that certain matters should be removed from the vicissitudes of political controversy and placed beyond the control of the majority or the executive "pro tempore" and established as legal principles to be applied by the Courts.

The position *prior* to the Constitution cannot obscure the new situation as now established by the Constitution with regard to the rights in question. It is enough to observe, in the first place, in connection with what the appellants submitted in their note fols. 50-59 in the sense that the principles laid down in previous judgments should be considered as "law", that section 120 of the Constitution, quoted by them, does save, it is true the continued operation of the law existing immediately before the Constitution came into force, *but* that section goes on expressly to declare "for the avoidance of doubt ..... that all provisions of such law shall have effect on and after the appointed day *only to such extent as they are consistent with the provisions of this Order*". Furthermore the general powers themselves of direction and administration already mentioned, inferred by sections 30(1) and 42(1) are expressly, by the same sections made "subject to the provisions of this Order".

Now the provisions of Part II relating to the fundamental rights and freedoms of the individual are manifestly addressed also to the Executive; indeed, in some cases, it appears that they cannot be directed except to the Executive, and the acts of these organs, if challanged as contravening those rights and freedoms cannot be removed from the cognizance of the Court and the sanction of unconstitutionality. Once the appellants in their note of submissions, already referred to, made reference to English law and to decisions of English Courts, it is perhaps apposite to quote what was said by the Privy Council in re "Teveridge v. Anderson" (1942) A.C. 206 per Lord Wright, namely, that: "No member of the Executive can interfere with the liberty or property of a British Subject except on the condition that he can support the legality of his action before a Court of Justice".

The fundamental rights and freedoms as protected in the Constitution are not a matter of administrative or executive "discretion". The contention of the appellants implies this, that while the Courts have, as they themselves acknowledge, right of review over the *laws* and acts done *in virtue of a law,* the same Courts are denied all authority over acts performed solely on the basis of the general power of administration — a claim which in the opinion of this Court, appears to be wholly inconsistent.

Moreover, the submission of the appellants ignore that even in respect of laws and of acts done in virtue of a law, the Courts under several provisions of Part II must ascertain whether the law or the thing done in virtue of such law is "reasonably justifiable" or "reasonably required". This is manifestly an examination which is not either a question of "competence" or of "form".

In fact, really, the appellants in this submission are *assuming* that which has to be proved. They assume *for the purposes* of their argument that the restriction of fundamental freedoms involved in the Circular — if there is such a restriction — was within their competence, whereas this is a question which has still to be discussed.

With regard to the "qualification" abovementioned made by the First Court in the sense that "in particular cases the Courts, though having the right, would not disturb the administrative discretion except for very grave reasons", the Court would like to say as follows.

No. 11. Judgment of H.M. Court of Appeal. —*Continued.*

In questions concerning fundamental rights and freedoms in connection with executive acts the Court is not concerned with the "policy" of the act. As was said by the Supreme Court of another country: "the Court does not approve or disapprove the 'policy'. Its duty is to ascertain and declare whether the act impugned is or is not in contravention of the relevant provisions of the Constitution, and when it has done this its duty is at an end".

If the Courts in Malta, as in other democratic countries, try to perform the important and by no means easy function of "review" assigned to them, this is not due to any desire or inclination to criticise the administration or the legislature, but is due solely to the necessity of discharging a duty imposed expressly upon them by the same Constitution. This is particularly the case with regard to the fundamental rights and freedoms over which the Court has been constituted as a sentinel on the "qui vive", as, using an expressive and picturesque phrase, Sastri C.J. once put it. Though the Courts will naturally give to the judgment of the executive or, as the case may be, the legislature, the proper weight, they cannot shirk the duty of deciding finally on the Constitutionality even of administrative acts which are impugned.

This certainly does not mean that the intervention of the Courts is unlimited or capricious. In the first place there are the limits expressed in the Constitution itself. Thus in section 16 of our Constitution it is laid down that any Court other than the Civil Court First Hall or this Court shall not refer any question as to the interpretation of any of the provisions under Part II which arises before such Court if it appears to that Court that the question is merely frivolous or vexatious. The First Hall itself and this Court on appeal can, if it appears to them so desireable, refuse to exercise their powers under subsection (2) of that section whenever they are satisfied "that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law"

In other countries, then, especially in the United States of America, both on account of the 'delicacy' of the judicial intervention in the executive (or legislative) action as well as on account of the very limitations inherent in the judicial functions, a series of rules of 'self-restraint' have been elaborated for the guidance of the Courts in cases which undoubtedly fall within their jurisdiction. In virtue of these rules, the Courts in proper cases decline to pronounce themselves on constitutional issues brought before them. It is not necessary to go into the details of these rules. The Court would only say that if the case warrants it will inspire itself from those principles so far as this is possible and permissible in the light of the precise and detailed provisions of our written Constitution which this Court is called upon to interpret and apply.

Of those rules of self-restraint there is one which the Court thinks is undoubtedly wise and prudent and which the Court wishes to mention, as both in the written pleadings as well in the oral submissions, the appellants invited the Court to dilate on questions which in the view of the Court are not necessary for the definition of this case. This rule, as expressed by the American Supreme Court is that "the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" or "decide questions beyond the necessities of the immediate issue".

Having dealt with the first preliminary grievance of the appellants, the grievances on the real merits can now be examined. As explained in the oral submissions these grievances can be recapitulated in the same sense of the pleas raised by the appellants from the very beginning, namely:—

(a) The Circular in question does not restrict any fundamental right or freedom of the respondent; and

(b) If there is any restriction this is permissible under section 14(2)(b).

The First Court, as above stated, held that the Circular contravenes the freedoms of expression and of conscience of the respondent, but more grievously the latter and is also illegal in that part which prohibits the entry in the places therein indicated of the newspapers condemned by the Ecclesiastical Authorities. From the reasons premised in the judgment it appears that, in the opinion of that Court, the restriction was not permissible under the provisions of the Constitution and was not "reasonably justifiable" in a democratic society.

This Court, after reflecting at length, cannot but agree with the conclusions reached by the First Court, even if, as will appear hereafter, not perhaps entirely in the precise terms and for the same reasons as the First Court.

As has already been made clear, the respondent challenges the Circular not in as much as it contravened the rights of the persons to whom it was addressed but in as much as it contravened his own rights and freedoms as a direct consequence of the prohibition imposed on those persons.

Subsection (1) of section 14 lays down:—

"Except with his own consent, *no person shall be hindered* in the enjoyment of *his freedom of expression,* that is to say, freedom to hold opinions and to receive *and impart ideas and information without interference.....".*

In their elaborate written pleadings, already referred to, the appellants, reasonably made reference to and quoted several judgments of other Courts, particularly of American and Indian Courts, where there is copious case-law and doctrine on the subject of fundamental rights, — a subject which on the contrary is new for our Courts. For the same reason this Court believes that it can make reference to similar authorities.

With regard to the freedom of expression the Supreme Court of India in re "Ramesh Thappar vs State of Madras" (1950) S.C.R. 594 (597) held as follows:—

"Expression, naturally presupposes a second party to whom the ideas are expressed or communicated. In short, expression includes the idea of publication and distribution as well as the right to receive the matter distributed".

"There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas, and that freedom is secured by freedom of circulation. Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value".

And in the case "Martin vs Struthers" (1943) 319 V.S. 141 it was held that:—

"Freedom to distribute information to every citizen wherever he desires to receive it, is clearly vital to the preservation of a free society".

It was also held in re: Roth vs U.S. (1956) 354. V.S. 476 (484) that (in the absence, naturally of limitations permissible in terms of the Constitution) "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion, have the full protection of the guarantee of freedom of speech and expression".

In the opinion of the Court there seems to be no doubt that the prohibition to a number of people, which, as already stated is not inconsiderable, to carry the newspaper of the respondent in the several hospitals, offices, Government dispensaries and other branches of the Department — which implies, for instance, that

No. 11. Judgment of H.M. Court of Appeal. —*Continued.*

they cannot buy that newspaper on their way to work to read it in those places during their leisure periods — constitutes an interference with his freedom to impart ideas and information about his ideas and those of his political party by means of that newspaper to those persons in the places where they may wish and can receive those ideas and information, and therefore constitutes an interference with his freedom of expression as defined.

This Court, without in any way dramatising or magnifying the entity of the incident is not on the other hand of opinion that in the circumstances above outlined the hindrance and interference can be considered as the First Court considered them, as insignificant and negligible; this apart from the fact, that as the appellants themselves appear to acknowledge and said in the last paragraph of their petition of appeal "With regard to the freedom of expression this is a question of principle". (fol. 263 tergo).

This interference was committed in the shape of "previous restraint" in the sense that the entry and reading of the newspapers in the places abovementioned was prohibited "wholesale", whatever the contents of the particular issues of the newspapers in question, for all the time during which they remain condemned by the Ecclesiastical Authorities and for this reason only.

Now precisely in this reason the First Court found that there was also interference with the freedom of conscience secured by section 13 of the Constitution which lays down:—

> "(1) All persons in Malta shall have full liberty of conscience and enjoy the full exercise of their respective modes of religious worship.
>
> (2) No person shall be subject to any disability or be excluded from holding any office, by reason of his religious profession".

This part of judgment appealed from, namely that dealing with the liberty of conscience, was strongly criticised in the petition of appeal: indeed it can be said that it was the only part which was therein truly discussed. But when one considers well what is said that judgment says, the conclusion of the First Court cannot but appear justified. Though the provision made in the Circular directly affects the freedom of expression, the reason for it, as explained by the Minister, was solely of a religious character. For *that* reason it was discriminated against the respondent, in as much as only the circulation, entry and reading of the newspaper edited by him was prohibited and some other papers of the political party to which he belongs. In this manner there was a contravention also of his freedom of conscience, intended such freedom in the general and comprehensive sense as protected by section 13.

Certainly what the appellants say in their petition, that is that subsection (1) of section 13 contemplates principally the freedom of belief and the external manifestation thereof in the freedom of worship is true.

But freedom of conscience manifests itself also in the freedom of expression of the beliefs or religious views of the person concerned.

Moreover, the question can also perhaps be also looked at from another aspect. The respondent may say that owing to religious motives he has been subjected to a certain amount of disability in communicating his views without interference to a certain section of persons by means of his newspapers, a disability to which other editors of other newspapers, whether political or not have not been subjected.

Therefore in the opinion of the Court the First Court was justified in holding that the act complained of constitutes a restriction of both one and the other of the fundamental rights.

No. 11. Judgment of H.M. Court of Appeal. —*Continued.*

But the appellants submit that even though the Circular in question involves such a restriction, that restriction was in the circumstances legitimate.

The Court thinks that for a proper examination of this submission, it is necessary to keep in view the structure of Part II apart from the words used in section 14 (and also 13). The first section of this Part, namely section 5, lays down:—

"5. Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely:—

a) life, liberty, security of the person and the protection of the law;

b) freedom of conscience, of expression and assembly and association; and

c) protection for the privacy of his home and other property and from deprivation of property without compensation.

The provisions of this Part of this Order shall have effect for the purpose of affording protection to the said rights and freedoms *subject to such limitations of that protection as are contained in these provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest*".

This language in the opinion of the Court cannot but mean that for a limitation of a guaranteed right to be held permissible it must come at least within one of the limitations expressly laid down. Except for those limitations, the right or freedom is protected and the Court must provide the redress, saving that which, as has been said above, is provided in section 16, when the question raised is frivolous or vexatious or the Court thinks that the applicant has or had a remedy under another law: (two hypotheses which in the opinion of the Court are not relevant to the present case).

Now section 14, after establishing and defining in subsection (1) the freedom of expression, in subsection (2) limits it only by the following words:—

"(2) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section *to the extent that the law in question makes provision* —

(a) that is reasonably required —

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosures of information received in confidence, maintaining the authority and independence of the Courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or

No. 11. Judgment of H.M. Court of Appeal. —*Continued.*

(b) that imposes restrictions upon public officers and except so far as that provision, or as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

Appellants do not in any way invoke paragraph (a) of this subsection. It is not alleged that the newspapers in question contravene the law of the country in respect of any of those matters or, for that matter, any other law. The appellants invoke only paragraph (b). Their submission on this point, as expounded in the oral submissions during the hearing of the appeal, is substantially the same as explained in the written pleadings before the First Court at fol. 93 paragraph 81. Though in other parts of the written pleadings the appellants appeared to suggest that the "Circular" could be considered as a "legislative act" (fol. 59) and in the context of their first plea, in order to remove it from the cognizance of the Court, they submitted that the Circular was merely an extra-legal act of administrative discretion, now for the purposes of this defence in the merits the appellants took the position that the Circular in question is to be considered as an administrative act done under statutory power and the Court should consider it as a *"thing done under the authority of a law"*. The "law" which, then, the appellants invoke is section 42 of the Constitution already referred to and "The Medical and Health Department (Constitution) Ordinance" (Chapter 148). There is nothing in the latter law which in the opinion of the Court could be of interest to the point at issue except that the "head" of the "Medical and Health Department" is the Chief Government Medical Officer — an office held by the appellant Professor Coleiro. Section 42 of the Constitution, as already stated, lays down: "subject to the provisions of this Order, where responsibility for the administration of a department of Government has been assigned to any Minister he shall exercise general direction and control over that department".

In the view of the Court the law so invoked by the appellants, that is the provision of the Constitution itself which in general terms assigns the direction and control of the department to the Minister, is not the law contemplated in subsection (2) of section 14. The Court thinks that "the law in question" therein contemplated (that is the law under the authority whereof something is done which is not considered as inconsistent with or in contravention of subsection (1)) is a law which itself "makes provision..... that imposes restriction upon public officers". This appears to be the natural meaning of the words that a thing contained in or done under the authority of a law is not considered inconsistent *"to the extent that the law in question makes provision..... that imposes restrictions upon public officers"*. What is here visualized, in the opinion of the Court, is a law which has as its object to impose or *at least* authorize the imposition of restrictions upon public officers that are related to the freedom of expression. No law of this kind authorizing restrictions upon a section of the employees, of the nature of those contained in the Circular complained of has been suggested by the appellants.

Once the Court has reached this conclusion, namely that the Circular cannot be considered as a thing done under the authority of a law imposing restrictions upon public officers, it is not necessary to examine the other condition which is also required, that is whether the Circular can be considered as reasonably justifiable in a democratic society. Nevertheless the Court feels it is its duty to state that if this had been necessary, there do not appear to be any grounds on which it could have disagreed with what was held by the First Court on this point.

For these reasons this Court dismisses the appeal and in the sense of the premised considerations, affirms the judgment appealed from with costs against the appellants.

No. 12.
Defendants' Petition for Leave to Appeal to H.M. Privy Council.

No. 12

Defendants' Petition for Leave to Appeal to H.M. Privy Council

In Her Majesty's Court of Appeal.

Application Number 1 of 1962.

Honourable Doctor Anton Buttigieg, M.L.A.

versus.

Honourable Doctor Paul Borg Olivier, Minister of Health and Doctor Carmelo Coleiro as Chief Government Medical Officer and by a note of the 18th of March, 1963, the Honourable Doctor Alexander Cachia Zammit, Acting Minister of Health and by a further note of the 2nd of April, 1963 Doctor John Attard, Acting Chief Government Medical Officer assumed the Acts of the proceedings instead of the Honourable Doctor Paul Borg Olivier and Doctor Carmelo Coleiro absent from these Islands and by a note of the 31st of January, 1964 the Honourable Doctor Paolo Borg Olivier, Minister of Health and Professor Doctor Carmelo Coleiro, Chief Government Medical Officer assumed the acts of the proceedings instead of the Honourable Doctor Alexander Cachia Zammit nomine and Doctor John Attard nomine respectively.

The Petition of the defendants, the Honourable Doctor Paul Borg Olivier, Minister of Health, and Doctor Carmelo Coleiro, Chief Government Medical Officer.

Respectfully sheweth:—

That by an application in the abovementioned names filed on the 4th of May, 1962 in Her Majesty's Civil Court, First Hall, the applicant Doctor Anton Buttigieg, M.L.A., after premising that the defendants nomine had issued a Circular (exhibited as enclosure "A" with the application of the said Doctor Anton Buttigieg) which, among other things, prohibited the entry in hospitals and in the branches of the Department under their charge of the newspapers condemned by the Ecclesiastical Authorities and that that Circular was intended to prohibit the patients and doctors in hospitals as also the employees of the Department from taking with them into the places and during the hours of work the newspapers of the Official Opposition in the Legislative Assembly, amongst which the "Voice of Malta" edited by the applicant, which paper was condemned by a circular issued from the Archiepiscopal Curia bearing date the 26th of May, 1961, and that in so far as that Circular concerned the "Voice of Malta" it contravened sections 13 and 14 of the Malta (Constitution) Order in Council, 1961, regarding the freedom of conscience and expression, and that the applicant Doctor Anton Buttigieg, as a Member of the Legislative Assembly and as Editor of the "Voice of Malta", for religious reasons, was thus being hindered by the defendants nomine in imparting ideas and information without interference to the patients in hospitals, among other people, while these were hindered in receiving ideas and information without interference; prayed that in accordance with the provisions of section 16(1) and (2) of the Malta (Constitution) Order in Council, 1961, a fit and proper remedy be provided, by making those orders, issuing those writs and giving those directions which the Court deemed fit and proper in order to protect and ensure the rights of the applicant of freedom of conscience and expression which had been contravened by the Circular in question.

That in their reply the defendants submitted that the Circular had not the force of law, that it was not intended for the patients and that it only constituted a directive regarding certain relations between the employer and the employees

No. 12. Defendants' Petition for Leave to Appeal to H.M. Privy Council. —*Continued.*

limitedly to the hours and place of work, where the defendants had every right to give to the employees all those instructions, which in their discretion, appeared to them to be opportune and appropriate, and therefore the applicant was not being hindered in the enjoyment of his freedom of expression as he was still free to publish and circulate all those ideas which he felt and wished to publish and circulate.

That, moreover, by means of a note of submissions filed on the 15th of June, 1962 the defendants formally pleaded: —

1) That the Circular was of an extra-legal nature and was not justiciable by the Court in as much as it related to a discretionary directive of the Executive to the employees of the Department and therefore constituted a mere administrative act which does not fall within the jurisdiction of the Court.

2) That there was no breach, either actual or likely, of section 14(1) of the Constitution in as much as the applicant was still free to publish and circulate his newspaper.

3) That subordinately — if there was any breach of section 14(1) — this was permissible under the provisions of section 14(2) (b) of the Constitution which authorises restrictions on public officers that are justifiable in a democratic society.

That Her Majesty's Civil Court First Hall by a judgment given on the 17th of July, 1962 provided on the application by declaring that part of the Circular which prohibited the entry of the newspapers condemned by the Ecclesiastical Authorities in the places therein indicated illegal and therefore without any effect and ordering the defendants nomine to bring that fact to the cognizance of those to whom the Circular was directed by means of a fresh circular within two days from the pronouncement of the judgment.

That the defendants respectfully lodged an appeal against that judgment to Her Majesty's Court of Appeal which Court by a judgment of the 22nd of February, 1963, allowing the plea of nullity of the judgment of the First Court, of the 17th July, 1962 declared that judgment null, placed the parties in the position they were prior to the pronouncement of that judgment, and referred back the record of proceedings to the First Honourable Court for the case to be decided afresh.

That following the reference back of the record of proceedings, the defendants pleaded before the First Court that the proceedings as instituted by the applicant were null in as much as, where the law does not expressly prescribe the 'libel', proceedings before the Civil Court First Hall must be instituted by Writ of Summons.

That the Civil Court First Hall by judgment delivered on the 11th of March, 1963, dismissed the plea of nullity of the proceedings and allowed the application by declaring that the Circular issued by the defendants nomine contravened the rights of freedom of expression and of conscience of the applicant, more grieviously the latter, and that it was illegal in that part which prohibited the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein indicated, and, by way of redress of that contravention, the said prohibition was declared without effect and set aside and the defendants were ordered to bring this to the cognizance of those to whom the original Circular had been addressed by means of a fresh circular, over the signature of either of the defendants and this within two days from the date of the judgment — saving any other order of the Court should it be submitted by an apposite application that that order was not complied with and executed — with costs against the defendants nomine.

No. 12. Defendants' Petition for Leave to Appeal to H.M. Privy Council. —*Continued.*

That by a note of the 18th of March, 1963, the defendants entered an appeal from the said judgment of the Civil Court First Hall of the 11th of March, 1963, to this Honourable Court.

That by a petition filed before this Honourable Court on the 2nd of April, 1963, the defendants prayed that the proceedings be declared null and ineffectual in as much as they had not been instituted in the form laid down by the law, and subordinately that the said judgment of the 11th of March, 1963 by Her Majesty's Civil Court First Hall be reversed it being declared and decided in accordance with the pleas of the defendants and consequently that that part of the Circular which prohibited the entry of newspapers condemned by the Ecclesiastical Authority in the places therein indicated was not illegal in as much as the rights of freedom of conscience and of expression of the applicant had not been contravened and therefore there was no need for the order made by the First Court for the defendants to bring the fact of the illegality to the cognizance of those to whom the original Circular had been addressed, by means of another circular to be filed in the records of the proceedings within two days from the date of the judgment appealed from, and consequently that the prayer of the applicant contained in his application be disallowed with the costs before both Courts against the applicant.

That this Honourable Court by judgment delivered on the 28th of June, 1963, disallowed the preliminary plea concerning the nullity of the proceedings raised by the defendants and affirmed the judgment appealed from in so far as it had declared that the plea of nullity could no longer be raised at that stage and, on this score dismissed the appeal of the defendants with costs against them and ordered that the appeal be proceeded with on the merits.

That by judgment of the 10th of January, 1964, this Honourable Court dismissed the appeal on the merits and affirmed the judgment of the First Court with costs against the defendants nomine.

That the defendants nomine feel aggrieved by the said judgment of the 10th of January, 1964 and respectfully desire to enter an appeal against it to Her Majesty's Privy Council.

That the points involved and decided upon in the present case are in the humble opinion of the petitioners not only without precedent but also of great general interest and public importance.

Wherefore the Petitioners nomine humbly pray that this Honourable Court may be pleased to grant them leave to appeal from the abovementioned judgment of the 10th of January, 1964 to the Judicial Committee of Her Majesty's Privy Council with a view to obtaining a reversal of the said judgment on the preliminary plea, on the merits and on costs.

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) ENRICO W. CORTIS L.P.

This the thirty-first day of January, 1964.

Filed by Legal Procurator Enrico W. Cortis without enclosures.

(signed) E. SAMMUT,
Deputy Registrar.

No. 13.
Plaintiff's
Reply.

No. 13
Plaintiff's Reply

In Her Majesty's Court of Appeal.

Application No. 1 of 1962.

Honourable Dr. Anton Buttigieg, M.L.A.

vs.

Honourable Dr. Paul Borg Olivier noe. et.

Reply of applicant to the petition of respondents.

Respectfully sheweth: —

That the points involved and decided upon in the present case are not new. The rights involved are the fundamental rights of the individual, and therefore even though as such they are of a great interest to everybody, they are as old as man himself.

These rights have been acknowledged in various Bills of Right as also by the Universal Declaration of Human Rights, the same rights acquired the force of law in the European Convention of Human Rights and also in the various constitutions of Commonwealth countries; amongst which, Malta.

These same rights have been interpreted since olden days by the Courts of various countries as appears from the quotations of various foreign pronouncements in the judgment in question.

That there is therefore no new aspect in the points involved in the judgment and that the appeal to the Privy Council is only a waste of public money; applicant opposes the request contained in the petition.

(signed) Adv. ANTON BUTTIGIEG.

This the 5th day of February, 1964.

Filed by the party appearing without enclosures.

(signed) S. BONELLO,
Deputy Registrar.

Civil Appeal (P.C. — C.L.).

Honourable Dr. Buttigieg, M.L.A.

vs.

Honourable Dr. Borg Olivier, et. noe.

The 6th of March, 1964.

Crown Counsel Dr. V. Frendo on behalf of the petitioners declares that pending these proceedings and eventually an appeal to the Privy Council they bind themselves not to take any measure which might disturb the "status quo" in the sense that the circular issued in execution of the judgment of the First Court which revoked the Circular complained of will remain in force.

Crown Counsel Dr. Frendo discussed and submitted his argument in favour of the petition. No. 13. Plaintiff's Reply. —*Continued.*

Advocate Dr. A. Buttigieg replied.

The case is adjourned to the 13th of March. 1964 for judgment.

No. 14
Decree granting Conditional Leave to Appeal

No. 14. Decree granting Conditional Leave to Appeal.

Court of Appeal of Her Majesty the Queen

(Civil Hall)

Judges:—

His Honour Professor Sir Anthony J. Mamo, O.B.E., Q.C., B.A., LL.D., President.

The Honourable Mr Justice T. Gouder, LL.D.

The Honourable Mr Justice A.V. Camilleri, B.Litt., LL.D.

Sitting of Friday the 13th of March, 1964.

Number 1.

Application Number 1 of 1962.

Honourable Doctor Anton Buttigieg, M.L.A.

vs.

Honourable Doctor Paul Borg Olivier, Minister of Health and Doctor Carmelo Coleiro as Chief Government Medical Officer and by a note of the 18th of March, 1963, the Honourable Doctor Alexander Cachia Zammit, Acting Minister of Health and by a further note of the 2nd of April, 1963 Doctor John Attard, Acting Chief Government Medical Officer assumed the acts of the proceedings instead of the Honourable Doctor Paul Borg Olivier and Doctor Carmelo Coleiro absent from these Islands and by a note of the 31st of January, 1964 the Honourable Doctor Paolo Borg Olivier, Minister of Health and Professor Doctor Carmelo Coleiro, Chief Government Medical Officer assumed the acts of the proceedings instead of the Honourable Doctor Alexander Cachia Zammit nomine and Doctor John Attard nomine respectively.

The Court having seen the application in the abovementioned names filed on the 4th of May, 1962 in Her Majesty's Civil Court, First Hall, wherein the applicant Doctor Anton Buttigieg, M.L.A., after premising that the petitioners nomine had issued a Circular (exhibited as enclosure "A" with the application of the said Doctor Anton Buttigieg) which among other things prohibited the entry in hospitals and in the branches of the Department under their charge of the newspapers condemned by the Ecclesiastical Authorities and that this order was intended to prohibit the patients and doctors in hospitals as also the employees of the Department from carrying with them into the places and during the hours of work the newspapers of the Official Opposition in the Legislative Assembly, amongst which the "Voice

No. 14. Decree granting Conditional Leave to Appeal. —*Continued.*

of Malta" edited by the applicant, which paper was condemned by a circular issued by the Archiepiscopal Curia on the 26th of May, 1961, and that in so far as this order affected the "Voice of Malta" it contravened sections 13 and 14 of the Malta (Constitution) Order in Council, 1961, regarding the freedom of conscience and expression and that the applicant, Doctor Anton Buttigieg, as a Member of the Legislative Assembly and as Editor of the "Voice of Malta", for religious reasons, was being hindered by the petitioners nomine from imparting ideas and information without interference to the patients in hospitals among other people, while these were hindered from receiving ideas and information without interference; *prayed* that in accordance with the provisions of section 16(1) and (2) of the Malta (Constitution) Order in Council, 1961, a fit and proper remedy be given, by making those orders, issuing those writs and giving those directions which the Court deems fit and proper in order to secure and enforce the rights of applicant of freedom of conscience and expression which were contravened by the Circular in question;

Having seen the reply of the petitioners where they submitted that the Circular had not the force of law, that it was not intended for the patients and that it only constituted a directive regarding certain relations between the employer and the employees limitedly to the hours and place of work where they had every right to give to the employees all those instructions, which in their discretion appeared to them to be right and appropriate and therefore the applicant was not being hindered in the enjoyment of his freedom of expression as he was still free to publish and circulate all those ideas which he felt and wished to publish and circulate;

Having seen the judgment of the Civil Court First Hall of the 11th March, 1963 which, after disallowing the plea of nullity of the proceedings, allowed the request of the applicant by declaring that the Circular issued by the petitioners nomine contravened the rights of freedom of expression and of conscience of the applicant, more grieviously the latter, and was illegal in that part which prohibited the entry of newspapers condemned by the Ecclesiastical Authorities in the places therein indicated and as a measure for redressing this contravention declared that prohibition without effect and set it aside, and ordered the petitioners to bring this to the cognizance of those to whom the original Circular was addressed by means of a fresh circular, over the signature of any one of the petitioners and this within two days from the date of the pronouncement of the judgment saving any other order, if it was submitted by an apposite application that the said order was not complied with and executed. With costs against the petitioners nomine;

Having seen the judgment of this Court dated the 28th June, 1963 disallowing the preliminary plea of nullity of the proceedings as raised by the petitioners and affirming the judgment appealed from, in as much as it had declared that the plea of nullity could no longer be raised at that juncture and on this count dismissing the appeal of the petitioners with costs against them and ordering that the appeal be proceeded with on the merits;

Having also seen the other judgment delivered by this Court on the 10th of January, 1964, by which the appeal on the merits was dismissed with costs against the petitioners nomine, and the judgment of the First Court affirmed;

Having seen the petition by which the petitioners prayed that this Court may be pleased to grant them leave to appeal from the abovementioned judgment of this Court of the 10th of January, 1964 to the Judicial Committee of Her Majesty's Privy Council;

Having seen the reply of Dr. Buttigieg whereby he opposed the request;

Having heard counsel; considers —

No. 14.
Decree granting Conditional Leave to Appeal.
—*Continued.*

The petition is evidently made under section 2(b) of the Order in Council of the 22nd of November, 1909 as amended by the Order in Council of the 5th of November, 1942 which provides that an appeal to Her Majesty in Council from a judgment of this Court may be made when this Court in its discretion thinks that the question involved is one which by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision.

In cases involving new questions of the interpretation of the Constitution this Court in the past was rather inclined to grant leave to appeal. In the present case it does not appear that it can be denied that points of law have been discussed and decided upon which for their importance transcend the intrinsic merits of the dispute. For this reason — even though the case concerns a judgment in which all the members of the Court were unanimous, and such judgment affirmed the judgment of the First Court, and moreover, the question on the merits cannot perhaps be isolated altogether from the local background — the Court is of opinion that it should grant the leave asked for.

The judgment of the First Court had already been carried out before the appeal to this Court was entered, as a result of the issue of another circular as ordered by that Court which revoked the Circular complained of, and Doctor Frendo on behalf of the petitioners declared that they bind themselves, that pending the proceedings of appeal to the Privy Council no measure will be taken that would disturb the present "status quo"; which means that the circular issued in execution of the judgment of the First Court will remain in force. Therefore there is no need for any further provision regarding the execution of the judgment.

With regard to the securities contemplated in the Order in Council, it has been held that the Government is exempt from giving such sureties (section 908 of the Code of Organisation and Civil Procedure and Law Reports Vol. XXXVII, I, 194).

For these reasons the Court allows the demand contained in the petition and gives conditional leave to the petitioners to appeal to Her Majesty in Council from the judgment of this Court of the 10th of January, 1964, and allows the petitioners three months time within which to take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to the Judicial Committee in accordance with section 4 of the abovementioned Order in Council.

Costs are reserved for adjudging on final leave.

(signed) ANT. FARRUGIA,
Deputy Registrar.

True copy.

No. 15. Defendants' Application for Final Leave to Appeal.

No. 15

Defendants' Application for Final Leave to Appeal

In Her Majesty's Court of Appeal

Application Number 1 of 1962.

Honourable Doctor Anton Buttigieg

vs.

Honourable Doctor Paolo Borg Olivier noe. et. noe.

The Application of the said Doctor Paolo Borg Olivier, Minister of Health and Professor Doctor Carmelo Coleiro, as Chief Government Medical Officer.

Respectfully sheweth:— 10

That this Honourable Court, on an apposite application by respondents in virtue of a Decree of the 26th of August, 1964 ordered the revision of the translation of the record of the proceedings filed on the 18th of July, 1964 and for this purpose extended the time limit for the preparation and despatch of the record of the proceedings to the Privy Council up to the 26th of October, 1964.

That in accordance with the aforementioned Decree and in compliance with the provisions therein contained the translation as revised is now completed and has been filed in the Registry of this Honourable Court by means of a Schedule of Deposit of the 26th of October, 1964.

Wherefore applicants humbly pray that this Honourable Court be pleased to appoint for hearing the case in the abovementioned names for the granting of the final leave to appeal. 20

(signed) VICTOR FRENDO,
Crown Counsel.

(signed) ENRICO W. CORTIS L.P.

No. 16. Decree granting Final Leave to Appeal.

No. 16

Decree granting Final Leave to Appeal

Her Majesty's Court of Appeal
(Civil Hall)

Judges:— 30

His Honour Professor Sir Anthony Mamo, O.B.E., Q.C., B.A., LL.D.,
President.

The Honourable Mr Justice T. Gouder, LL.D.

The Honourable Mr Justice J. Flores, B.L.Can., LL.D.

Sitting of Friday the 20th of November, 1964.

Number 1.

Application Number 1 of 1962.

The Honourable Dr. Anton Buttigieg, M.L.A.

vs.

The Honourable Dr. Paolo Borg Olivier, et. noe. 40

No. 16.
Decree granting Final Leave to Appeal.
—*Continued.*

The Court,

Upon seeing the application of defendants nomine, appellants, wherein they submitted that the translation and printing of the record of the proceedings have been completed, wherefore they prayed for final leave to appeal to the Judicial Committee of Her Majesty's Privy Council;

Upon seeing the Decree of the 13th of March, 1964, in virtue of which conditional leave was granted to defendants nomine to appeal from the judgment given by this Court on the 10th of January, 1964 to appeal to the Judicial Committee of Her Majesty's Privy Council and that the costs were reserved to be provided for in the Decree granting final leave;

Upon seeing the note of contestants filed at the day's sitting in virtue of which they agreed on the translation and printing of the records of the proceedings;

Allows the application of the said Doctor Paolo Borg Olivier, Minister of Health and Professor Doctor Carmelo Coleiro, as Chief Government Medical Officer and grants them final leave to appeal from the abovementioned judgment of this Court to the Judicial Committee of Her Majesty's Privy Council.

The costs relative to this Decree and to the Decree granting conditional leave are to be borne by the said Doctor Paolo Borg Olivier in his capacity as Minister of Health and Professor Doctor Carmelo Coleiro as Chief Government Medical Officer, saving the right to recover the whole or part thereof from applicant as may be ordered by the Judicial Committee of Her Majesty's Privy Council.

(signed) ANTHONY TONNA,

Deputy Registrar.