

# Freedom of Expression Online: Is it really free?

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A Policy Paper by the ELSA Malta  
IFP Organising Committee

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The European Law Students' Association

MALTA

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## Foreword

ELSA, the European Law Students' Association is first and foremost a human rights organisation. In fact, ELSA's main purpose is "to contribute to legal education, to foster mutual understanding and to promote social responsibility of law students and young lawyers". On top of this, ELSA's vision is "A just world in which there is respect for human dignity and cultural diversity."

ELSA Malta focuses on promoting ELSA's vision in everything it does, and in order to continue furthering both the vision and purpose, it publishes a number of research and policy papers. This also aids to continuously contribute to the discussion about certain topical legal and human rights issues. In light of the International Focus Programme topic which has been chosen by ELSA, that of Law and Technology, and more specifically focusing on Freedom of Expression Online throughout the year 2020, ELSA Malta has decided to come up with this paper in order to promote understanding, increase awareness and the discourse on the topic at hand.

According to the Universal Declaration of Human Rights, freedom of expression is the right of every individual to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Freedom of expression is a fundamental human right. It also underpins most other rights and allows them to flourish. The right to speak your mind freely on important issues in society, access information and hold the powers that be to account, plays a vital role in the healthy development process of any society, and ultimately to any democracy. The reality is that this right is developing alongside society which is becoming much more present and vocal on online platforms.

Through the dissemination of the internet, the opportunity for people across the globe to express themselves has grown rapidly. However, as the benefits of the Internet and digital

technologies continue to present new opportunities for free expression, the challenges of defending this right are also increasing. These challenges, amongst others, include state censorship of online content, the filtering, blocking and taking down content from the internet, the vulnerability of children online, and the infringement of responsibilities of internet intermediaries. All this, and because of what is happening both nationally and internationally at the present moment in time and on a daily basis, is why the topic of freedom of expression online deserves our special attention.

The situation we find ourselves in today, due to the Covid-19 pandemic, has made us realise now more than ever how important the internet is and that we can do most of our daily activities such as working, having meetings, meeting friends, discussing, sharing our ideas and opinions and accessing information very easily online. In these difficult and challenging times society has learnt how to adapt itself and possibly also come to the realisation that most daily activities can be switched to an online alternative. Potentially, this will mean that the way we live, even after this situation is over, will change from the way we know it. This significant increase in our online presence brings us to the fact that the right of freedom of expression online can be considered to be at the forefront of the issues we should be discussing.

This important project is the result of the work and dedication of a number of people, without which it would not have been possible. Therefore, I would like to sincerely express my gratitude towards M. Cristina Aquilina for leading this project so skilfully. Moreover, I would also like to thank Ms Christine Borg Millo, Ms Hannah Crossey, Ms Hannah Chircop, Mr Mauro Abela and Mr Luke Bonanno for their valuable contribution and unyielding assistance to the work that went into the actual writing of this paper. I would also like to thank Dr. Tonio Borg for his help and guidance and for taking the time to carefully review our paper and providing us with his feedback on it. Finally, I would like to thank Ms. Kelly Galea for the design of this policy paper.

On behalf of ELSA Malta, we hope that you enjoy reading our paper, take the time to think about the subject at hand and to evaluate our suggestions, and lastly to follow us and support us in our aim – to always be proactive!

Yasmine Ellul  
President of ELSA Malta  
26th May 2020

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## Introduction

We are no longer living in an offline society. As the world develops and society progresses, online platforms are becoming increasingly important, enabling us to connect to others from all over the world, to share our thoughts and experiences, and to seek the same rights online as we seek in our daily lives. The Internet is a fundamental player in the exercise of the right to freedom of expression. This medium combines the right to receive with the right to express and disseminate information, ideas and opinions in different forms (through writing, audio or video). However, one may ask, should individuals be subject to the same treatment, rules and regulations online as they are offline?

Article 19 of the Universal Declaration of Human Rights states the following;

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>1</sup>*

With the rise of the internet, the opportunities to express oneself have grown exponentially, as have the challenges to freedom of expression online. The Internet has been described as being “as diverse as human thought.” Conversely, it is precisely because of its diversity of content and ease of use that the Internet has become controversial. Over recent years, the amount of problems which social media has produced has shockingly multiplied rather than ceased. Although the ability for the individual to exercise his fundamental human rights as mentioned in the Universal Declaration of Human Rights over a vast array of platforms is surely beneficial, as with any other tool, social media and digital communications can be used for different purposes. States use the internet to filter, censor and block online information. Hate speech online has also increased exponentially. Freedom of expression online may not always be used in the way it was intended and hate speech often leads to the same yellow brick road

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<sup>1</sup> Universal Declaration of Human Rights (1948) UNGA Res 217 A(III)



of insensitivity and inhumanity. Naturally, the notion of 'freedom of expression online' may be seen as one of the most misunderstood concepts in Europe, as well as the most popular.

## I. Internet Access as a Fundamental Human Right

### i. Internet Access as a So-Called 'Right'

It is of utmost importance to understand that the right to Internet access, which is also referred to as the right to broadband, or freedom to connect, points towards the fact that everyone is bound to make use of the internet through which they can exercise their rights to freedom of expression and express their own opinions. The UN defines internet access as a fundamental human right.

Even though there may be controversies as to whether internet access should or should not be considered a human right, there are quite a few reasons as to why it is considered and confirmed to be one. Despite the fact that the United Nations Human Rights Council has highly depended on the offline rights, such as the right to free speech and the right to peaceful assembly, the closest protection of Internet access as a right lies in Article 19 of the Universal Declaration of Human Rights.

### ii. Internet Access and Filtering of Information

The internet, as many know it, is an infinite network of individuals and information. It is a hub for knowledge, as well as containing the largest social platforms for people to connect together. The rights ensured by the Universal Declaration of Human Rights are guaranteed to everyone, anywhere and at any time. Technology is constantly developing. This means that the way and the manner in which people enjoy their fundamental rights also develops. This gives way to government interference in order to ensure that such rights are being exercised correctly.

The United Nations recently issued a commentary which directed itself to the Middle East and North Africa. Frank La Rue, an elite reporter grants the essential position the internet has when it comes to the exercise of human rights; *“The Special Rapporteur underscores the unique and*

*transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole".* This means that through the internet, the individual is granted many benefits and may exercise more than just one right, such as the right to freedom of opinion and expression.

Filtering online in today's world has become more common than ever before. This occurs as there may be instances where data or information is not pleasant for the public to access and make use of. This includes online material such as child pornography, hate speech and aggression online. On the other hand, reasons may differ, and an example of this includes to shield some data which the public is not supposed to perceive. Each country has its own reasons as to why they make use of filters and blocking online.<sup>2</sup>

The countries which possibly make the most use out of the filtering of online data include; China, Cuba, Myanmar (Burma), Oman, South Korea, Sudan, Syria, Tunisia, Turkmenistan, United Arab Emirates, Uzbekistan, Vietnam and Yemen, which all fall under three regions; namely East Asia, the Middle East and North Africa, and Central Asia. Of course, the reasons as to why they filter such information varies in each region. In the Asia-Pacific region an abundant of works talk about the 'Great Firewall of China'. In fact, there has been a settlement that China partakes one of the most cultured and high-level filtering techniques with regards to Internet censorship. Despite West Europe and North America lacking large restrictions with regards to filtering, these two however target images relating to child abuse as well as propaganda.

### iii. Blocking Information on the Internet

It is important to understand why the blocking, filtering and removal of content online occurs. Worldwide, governments block the access to online information for a wide array of reasons; whether it is to safeguard the young from viewing explicit content, or to forbid people from the right of use to copyright data or for the simple reason of protecting their citizens. Of course,

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<sup>2</sup> Dutton and others, 'Freedom of Connection - Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet' (November 29 2010) <<https://ssrn.com/abstract=1654464>> accessed on 14 March 2020

the country or state itself alters its transparency and consistency accordingly and uniquely, with its own reasons as to why certain content is filtered.

The Economic Freedom Fighters (EFF) believe that the hindering and filtering of information by any nation worldwide, is in fact in breach of Article 19 of the Universal Declaration of Human Rights, which guarantees the right *“to seek, receive and impart information and ideas through any media and regardless of their frontiers.”*

It is important to note that there are various ways in which content may be blocked. Firstly, blocking can occur by playing around with different province names, through filters or by preventing particular words from being searched, hindering exclusive IP addresses or commending online users to get rid of certain information and empty search results. Oftentimes, governments rely on commercial corporations for assistance in doing this.<sup>3</sup> Produce, whether its goods or services in general are found in markets, for exploitation at home, schools, and other areas which offer a good or service to the public, have been used in many countries. However, exceptions do exist. China for example, is a country which heavily presses on companies like Google to block and remove certain keywords, foreign websites and also filter specific websites. Countries such as Egypt and Morocco take on a much simpler approach, which contrasts to China. This is because they block certain URLs.<sup>4</sup>

Every country takes on a different approach towards transparency. There are various reasons as to why countries block content, such as due to political motives or for national cultural reasons. Reasons vary from one country to the other. India, for example, uses alleged reason for blocking certain data to safeguard the public. On the other hand, countries like Qatar prohibit websites that contain pornography or data that is felt to be an offence to their citizens. Russia bans child pornography, online data containing suicidal material as well as links to drug abuse.<sup>5</sup> Other reasons for blocking information online include the fear of trademark violation. Certain governments may also block information which is against their political stance and may harm them politically such as human rights groups and the independent media as these may leak serious information which could hinder the government. Therefore, such information would want to be concealed from the general public.

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<sup>3</sup> ‘Content Blocking’ <<https://www.eff.org/issues/content-blocking>> accessed 16 March 2020

<sup>4</sup> Ibid.

<sup>5</sup> Ibid

#### iv. Advocates Fighting for Internet Access as a Sole Right

A noticeable concern which is a hefty problem today is the fact that there is no official right dedicated specifically towards access to the Internet. This issue is tackled amongst advocates and other peers who create awareness on the problem through campaigns and by supporting the public every time this right is breached. There are many campaigns in which people may voice their opinion such as through *Access Now* which is a peer group that promotes these rights through the #KeepItOn campaign. Nonetheless, awareness from this aspect is still lacking and such campaigns need better support and have yet to be developed. Advocates also have the duty to stimulate the private subdivision to insist on these rights by intimidating to affect their stashes through intimidating the government they operate with. The same way companies such as Nike and GAP have been accused for breaching child labour laws, countries that abuse the restriction and blocking of content and deny access to internet should also be called out. Advocates that focus their work on policy should do their best in fighting for what is right when it comes to Internet access.

Unfortunately, till today, there has still been no movement which succeeded in preventing oppressive governments and heads of state from constraining, limiting or blocking Internet access and thus, many people are still denied this right daily. To a certain extent, this is a relatively new matter that has been only been existing for a few decades due to the rapid advancements of technology. Although the right to internet access may seem minor to some, its importance is increasing rapidly as the Internet becomes more important in our day to day lives. Campaigns such as the #KeepItOn campaign serve as stepping-stones in order to fight against repressive governments which violate the citizens' rights to Internet access and freedom to information online.

## II. The Danger of Free Speech on Social Media – When enough is enough

### i. The Link between Social Media and Freedom of Expression

Nowadays, Social Media has transformed into one of the easiest, if not the simplest, platforms for all individuals, young and old alike, to communicate their judgment on any subject matter or situation of their choice. Dealing with all forms of electronic communication, whether in the form of a community or type of network, social media enables one to listen and be heard, reaching a larger audience in comparison to speaking to a small group of persons. This could be done through the use of online applications, the most well-known being Facebook, Instagram and Twitter, among others, or else other sources such as websites, blogs, online pages and articles.

The connection between Social Media and Free Speech is one that must be given extreme significance when discussing such a topic. Indeed, the online social media system is used by the mass as the main tool of expressing their views, with minimal regulations on how this should be done, and limitations on what, or what not, to write and post. Therefore, the liberation from speech censorship is supported by the use of social media websites.

To take a simple example, when using Facebook, if a post is made public, this means that any person who sees that post can send a comment to the user, and this, too, is made public for others to read, and comment upon once more. This sometimes creates an area of conflicting opinions on a single post due to the fact that not everyone of course reasons in the same manner. Furthermore, online posts may create inconsistent tones in the way which one understands a message. This in turn may further diverge a person away from the true meaning of that specific post. In fact, many question the very safety of such networks because concern is raised regarding what methods are being followed to counter false speech, negative comments and

violent language. Online speech is seen as a nuisance when there is a wrong choice made in the time, place or manner of its delivery, which will create danger and will need to be limited.

When examining Freedom of Expression in Malta, we immediately must consider The Universal Declaration of Human Rights as the main stepping-stone of equal international recognition. As mentioned earlier, Article 19 states that everyone has the right to freedom of opinion and expression.<sup>6</sup> Fortunately, we live in a time and age where our human rights are safeguarded immensely, through our Constitution, the Human Rights Act, the European Convention Act and the European Court of Human rights. These are what empower us to believe that we are in the ‘safe hands’ of the law regarding anything that is posted online, as depicted in the example of Article 41 of our Constitution below;

*41.(1) ... no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.<sup>7</sup>*

This showcases how the Maltese Constitution works hand in hand with the European Convention Act. In fact, Article 10 of said Act states that; *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”<sup>8</sup>*

Nonetheless, we have been brought up in a somewhat passive culture that deems the Internet an extremely safe space when conferring a wide array of agendas. It is a place where being concerned of people’s personal reactions is unnecessary, because, as cliché as it may sound, in reality, one does not need to face the music of bad feedback and disapproval. Many, however, would like to think otherwise.

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<sup>6</sup> Universal Declaration of Human Rights (n 1)

<sup>7</sup> Constitution of Malta, 1964, art 41

<sup>8</sup> Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1952] ETS 9, art 10

Over the recent years, it has come to be more than shocking to realise that the amount of problems the social media has produced have increased rather than ceased. Hate speech online often leads to the same yellow brick road – that of insensitivity, selflessness and inhumanity. Needless to say, the idea of ‘freedom of expression’ on the social media can be seen as the most misunderstood of concept in Europe, although the most popular, ironically enough. When should our freedom of speech be somewhat limited, to a certain extent, to be stern in critical discussions online, but constrained enough to show when the fine line of brutality has been crossed?

## ii. Hate Speech

The definition of ‘hate speech’, is given by the United Nations’ and it states that it is “*any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality race, colour, descent, gender or other identity factor.*”<sup>9</sup>. Thus, this type of speech can be directed to many types of persons, for various reasons, with the result that there is the diminishing of the victims’ self-worth and dignity. There are many strategies implemented to stop types of hate speech, however, the most reasonable suggestion by the authorities is finding a balance between preserving freedom of speech and on the other hand, combating problems which arise from hate speech, which, when not seen to, create worse forms of violence and harm.

## iii. Racism

A first example to be given in this regard is the matter concerning refugees and immigrants. Presently, this situation in Malta has been at full tension, seeing that there is a recurring problem of migrants entering the Maltese islands, with the issue that we lack adequate space and facilities for their protection and survival. This is creating further friction among different opinions of Maltese citizens, some of which are exceeding the borders of human respect towards one another as can be seen in the photo below;

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<sup>9</sup> ‘United Nations Office on Genocide Prevention and the Responsibility to Protect’ (*United Nations*) <<https://www.un.org/en/genocideprevention/hate-speech-strategy.shtml>> accessed March 11 2020





To translate a few to English, one says; “Shoot them, women, men and children and kill them all”, and received eight reactions which agreed to the statement. Another states; “These; gas them Hitler style” and another which reads “Throw them back on the dinghy or burn them all”<sup>10</sup>.

These comments came about after a mass riot which took place last October 2019, at the Hal Far migrant centre, setting alight a police car and three other employee vehicles during the night. This was due to a dispute which began among one of the residents, who was drunk, and the guard who would not let him enter. More so, in April of the same year, a drive-by shooting took place in Hal Far, unfortunately killing refugee *Lassana Cisse* and badly injuring another two victims. Two young Maltese soldiers were found guilty of this shooting, with the explanation that “he was black”.

Without beating behind the bush, this is a clear-cut instance of a painful cycle which is created due to the posting of hate-speech; an event takes place in which not all agree; this leads to the publishing of an article or post online; in turn, this allows for nasty comments to begin to be piled one on top of the other; tension begins to rise and arguments increase; the sequence goes on.

#### iv. Attacks on Journalists

<sup>10</sup> Julian Bonnici, ‘Stamping Out Hate Speech: Malta Sets Up Specialised Unit Amid Hal Far Backlash’ (*Lovin Malta*, October 24, 2019) <<https://lovinmalta.com/news/stamping-out-hate-speech-malta-sets-up-specialised-unit-amid-hal-far-backlash/>> accessed March 14 2020

Hate speech is found to be present in today's journalism too. There is genuine incitement to cause harm, fear and vulnerability to those whose work is to promote the free speech of truth and justice. Whereas there are certain boundaries of professional conduct that are left untouched by true journalists, they are not properly protected with receiving this protection in return. Any internet user can publish offensive comments and pick fights on their articles posted on social media to indulge further hate speech and unethical discussions. This can lead to abuse which intimidates the purity of the work of any journalist, and may compel them to remain silent in times where their voices need to be heard the most.

No introduction could do her considerable justice; the case of Daphne Caruana Galizia has boosted hate speech in Malta to measures beyond borders. A very well-known Maltese blogger, mother and sister was brutally killed by a car bomb in 2017, but this painful reality did not adhere to the termination of spiteful comments directed towards her life, her families and all she had written on the social media. A few examples can be seen in the photos below;

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One shocking comment even stated: “She can rot in hell”. Caruana Galizia was a very critical writer and opinion leader, but many could not handle her style of condemning the good from the evil. She would often make fun of others, call them ridiculous names and reveal detailed, yet horrific unknown stories, the main subject being the corruption of the Government on the

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<sup>11</sup> David Grech Urpani ‘Almost Nothing Can Save Them’: Matthew Caruana Galizia Shares Fresh Slew Of Comments Celebrating His Mother's Death’ (*Lovin Malta*, January 27 2020) <<https://lovinmalta.com/news/news-human-interest/almost-nothing-can-save-them-matthew-caruana-galizia-shares-slew-of-shocking-comments-celebrating-his-mothers-death/>> accessed March 14 2020

island; and would certainly not be afraid of menacing her words to the brim. And this, she had every right to. Because it was the truth.

For many, the work of Journalists should be to only narrate and evaluate the current face-value reality. For the few, like Caruana Galizia herself, this work is a step beyond the horizon. If it weren't for her dominant discourse regarding the Panama companies which were set up as to 'hide' away from actuality, the Maltese population would have remained under a dark, heavy cover of lies and corruption.

In fact, on the sixth month anniversary of her assassination, PEN International's Director, Carles Torner, said straight out and plain that, "This political murder was a product of hate, and hate is manufactured with words. There has been no accountability for the denigrating comments about Caruana Galizia from authorities at the highest level." This is a clear depiction of how a person, like each and every one of us essentially, was harassed, both in her life and death; something that is rarely witnessed among our society, given that we are living in the 21<sup>st</sup> century. Is there enough being done to punish such legal, and mental abuse of sufferers? This is a question that remains unanswered by the higher authorities.

#### v. The Vulnerability of women

A final example to be given in this context is in the very volatile discussion of Pro-Life and Pro-Choice Women activists in our society. Many persons were taken aback after reading disgusting comments, found online, of women who agree with the idea that one should have the right to choose whether to have an abortion or not, after carrying out a silent protest. They were named; "*Qattiel, xjaten, kannibali*" (*Killers, devils, cannibals*)<sup>12</sup>, among another 100 or so offensive comments; simply because they voiced their honest opinion about an ongoing matter that is bound to be increased in debate in the next few years. Even though all this was reported to the police, no action of punishment took place. The most worrying thing of all,

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<sup>12</sup> 'Padlock Your Pussy' And 'Give Your Rapist A Condom': Activist Shares Shocking Comments Threatening Maltese Pro-Choice Activists' (Lovin Malta, January 30 2020) <<https://lovinmalta.com/opinion/reactions/padlock-your-pussy-and-give-your-rapist-a-condom-activist-shares-shocking-comments-threatening-maltese-pro-choice-activists/>> accessed March 14 2020

however, is that, one would report hate speech to the police, and expect absolutely nothing to happen.

As from a group of determined activists who find strength in their right to unite as one, on the social media, they are being personally attacked through dehumanising phrases being made public, and turning their free speech into down-right hate speech – just because there are those who disagree with the opposite opinion.

Needless to say, incidents like these definitely raise to the surface questions of doubt on decisions being taken and punishment allocated by the authorities. It is from these above-mentioned cases where one can understand how severe the consequences are if such violence of speech is not treated quickly. Also, more education is certainly required to demonstrate what should be acceptable on the social media. The ignorance of the masses leaves harmful impacts on the community through hate speech, and once again creates more unnecessary tension which brews the surface. It is time, or finally, about time, the government and experts take a stand. Lest we not forget.

### III. Protecting Freedom of Expression Online: a breakdown of International and Maltese Legislation

*'When an expression impinges on someone else's human rights it stops being an opinion'.*<sup>13</sup>

This was the response given by the young Maltese activist, Dr Sara Ezabe when she was questioned to give her own view on a judgement in which she was the victim of. In September of 2018, the European Commission issued a report by the name of 'Illegal content online' in which it places Malta in the lead out of all the 28 other European Countries when it comes to Hate speech.<sup>14</sup> What makes this more perplexing is that the majority of the people who makes use of hate speech holds that they are doing so by virtue of freedom of speech. However, what does freedom of speech truly means? Moreover, how does one identify between freedom of speech and hate speech? The main focus of this section is to analyse racial hatred in Malta and how our Criminal Code through article 82A tackles these kinds of situations. A close look at a landmark judgement on this matter which stirred some debate will also be mentioned Finally, a way forward to this conundrum shall be proposed in order to reduce racial hatred from our social platforms.

#### i. The Vital Ability of Citizens to Speak out Without Fear of Repercussion – The Relationship between Freedom of Expression and Hate Speech?

In the case of *Handyside v UK*, the European Court of Human Rights pointed out that freedom of expression does indeed constitute one of the 'essential foundations' of a democratic society. This notion is encapsulated in various charters of human rights from the Universal Declaration of Human Rights to the European Convention on Human Rights.<sup>15</sup> After the turmoil of the Second World War, the legislators identified that one of the main problems which led to the rise of the Nazi party was the lack of freedom of expression. Although this paper focuses on

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<sup>13</sup> Rebekah Cilia, 'People discouraged from reporting hate speech, police do not take it seriously' (*The Malta Independent*, 27 November 2020) <<https://www.independent.com.mt/articles/2018-11-27/local-interviews/People-discouraged-from-reporting-hate-speech-police-do-not-take-it-seriously-activist-6736199952>> accessed 16 March 2020

<sup>14</sup> 'Illegal Content On Online Platforms - Shaping Europe's Digital Future' (*European Commission*, 2018) <<https://ec.europa.eu/digital-single-market/en/illegal-content-online-platforms>> accessed 16 March 2020

<sup>15</sup> *Handyside v UK* 5493/72 (ECtHR, 7 December 1976)

the darker side of this notion, it must be stated that freedom of expression does indeed have its own attributes inter alia as it is an indispensable vehicle for minorities and civil societies. The last few months in Malta is a clear illustration of this statement in which after certain revelations on the assassination of Maltese journalist Daphne Caruana Galizia were revealed, both the opposition and several civil societies exercised their freedom of expression through several means inter alia social media and protests. Article 10 of the European Convention on Human rights holds that any person has the right to freedom of expression without any interference by public authority. Thomas Emerson, a legal jurist who specialized on the first amendment of the American Constitution held that the importance of such a notion could be summarised into 4 reasons. The first reason is that freedom of expression enables a person to realise their own potential. Second, it acts as a vital element in order to advance knowledge and subsequently the discovery of the truth by providing an unbiased and equal opportunity to hear both sides of the question. The third element here is that it enables all members of the society to take part in public decisions. Finally, Emerson holds that freedom of speech is that method which is able to achieve social change without resort to violence. These four reasons as propounded by Emerson affirms the notion that freedom of speech is indeed the basis of a democracy.<sup>16</sup>

## ii. Free Speech Encourages Debate whereas Hate Speech Incites Violence

In his paper, Profs. Ronald Rychlak holds that people tend to believe that they have the right to use insulting and vulgar language and say whatever they want without any consequences. He also adds that such a definition only misconstrues the right of free speech. In the case of *Handyside V UK*, the Court held that freedom of speech 'is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.<sup>17</sup> Such a statement by the European Court creates an environment into our society in which discussion and public debates may flourish. However, as with any other aspect in life this also may be taken into extremes and that is the reason why we have article 17 of the Convention which is a safety mechanism in order to prohibit these kinds of situations. Therefore, the latter article is usually invoked in order to deter racist, anti-Semitic or xenophobic speech. It must be held that

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<sup>16</sup> Thomas Emerson, *Freedom for Political Speech in the Supreme Court and Human Rights* (1970)

<sup>17</sup> *Handyside v UK* (1976) 5493/72 (ECtHR, 7 December)

when it comes to deciding a judgement with regards to hate speech, the European Court of Human Rights makes use of two different approaches. On one hand, there is the approach of exclusion from the protection of the Convention which is provided by Article 17. Thus, in this scenario, the comment/s in question does amount to hate speech and subsequently negate the principles of the Convention. On the other hand, there exists the approach of setting up restrictions on protection which is provided in Article 10 paragraph 2 of the Convention. Therefore, here we have a scenario in which the comment/s in question despite the fact that it amounts to hate speech still it does not contradict the fundamental values of the Convention.

In the last two decades, the phenomenon of the internet has grown exponentially. Subsequently it revolutionized the way media operates. For instance, if we had to take the Covid-19 situation, a person who lives in New Delhi India could check which drugs the FDA had just approved to be used. As a result of all these changes, the content which is available to us is more diverse and plentiful than it has ever been in any point in history to the extent that the internet's content has been described 'as diverse as human thought'<sup>18</sup>. As already mentioned, every aspect has both its pros and cons. The advancement in information and communications technology gave rise to an unprecedented amount of crimes which were never dreamt of. Whereas in the past in order for a person to convey their own message to the masses they had to negotiate their way through the institutionalised media, this is no longer the case. Nowadays, from the comfort of one's home, one could share a video of a 15-year-old committing a suicide on his social media and in a matter of minutes that specific video would have reached the four corners of the earth.<sup>19</sup> The internet is to be considered as a weapon and as the saying goes, 'words cut deeper than a knife'. If one had to take a closer look at the role of social media during the Arab Spring uprising, they would be surprised<sup>20</sup>. However, when I stated that the internet is a weapon, I did not only mean a weapon which could topple a regime but a weapon which could decimate a human being.

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<sup>18</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (SCOTUS, 19 March 1997)

<sup>19</sup> Kyle Macdonald, 'Sharing suicide videos is dangerous Facebook has failed us by allowing it' (*The Guardian*, 11 January 2017) <<https://www.theguardian.com/commentisfree/2017/jan/11/sharing-suicide-videos-is-dangerous-facebook-has-failed-us-by-allowing-it>> accessed 17 March 2020

<sup>20</sup> Peter Beaumont, 'The truth about Twitter, Facebook and the uprisings in the Arab world' (*The Guardian*, 25 February 2011) <<https://www.theguardian.com/world/2011/feb/25/twitter-facebook-uprisings-arab-libya>> accessed 17 March 2020

With the dawn of a new century, the Council of Europe indeed realised that the internet did create an environment in which it acted as a platform for those to spread hatred. In 2002, the Council voted to outlaw all acts of a racist and xenophobic nature which was conducted through the use of a computer system.<sup>21</sup> Furthermore, the Council expressed that it considered racism not as an opinion but as a crime. In 2016, the European Commission together with leading IT companies inter alia Facebook, Twitter and YouTube drafted the Code of Conduct on countering illegal 'hate speech' online. The main purpose for this Code is to prohibit the promotion of hateful conduct.<sup>22</sup>

### iii. Article 82A of the Maltese Criminal Code

In the past two decades, Malta and the other European countries have encountered a new phenomenon, that of a huge influx of migrants who are escaping their homeland for various reasons with the sole purpose of finding a safe place to host them. Subsequently, these migrants ended on the spotlight of various media companies describing such a situation as a 'huge migration crisis'<sup>23</sup>. Moreover, Nationalism has started to gain traction once again across all the European countries with political parties such as the Alternative for Germany (AfD), which sows the seed of anxiety and resentment against these migrants in order to attract voters. In Malta, during the past decade we have seen the formation of various political groups with their main battle cry being the deportation of refugees. Amongst these are Għaqda patrijotti Maltin and Imperium Europa. Xenophobic and racist comment started gaining traction and almost become the norm, with the internet facilitating this matter. All the European countries realised that this was indeed a nuisance thus legislation was drafted in order to deter such comments and Malta was not the exception.

In 2002, following the landmark judgement of *Police V Stephen Caruana*, article 82A was introduced in our Criminal Code. This provision specifically deals with hate speech and to the incitement of racial hatred and similar notions. Obviously since here we are dealing with

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<sup>21</sup> Ronald Rychlak, 'Compassion, Hatred, and Free Expression' (Mississippi College Law Review, 2007) <<https://law.olemiss.edu/wpcontent/uploads/2019/01/rychlak.pdf>> accessed 20 March 2020

<sup>22</sup> The EU Code of Conduct On Countering Illegal Hate Speech Online' (European Commission, 2016) <[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en)> accessed 20 March 2020

<sup>23</sup> 'Migrant crisis: Migration to Europe explained in seven charts' (BBC, 4 March 2016) <<https://www.bbc.com/news/world-europe-34131911>> accessed 20 March 2020



Criminal matter, the Latin maxim of *Actus Non Facit Reum Nisi Mens Sit Rea* is applicable thus if one had to dissect this provision, the main elements in order to constitute an offence under this provision are two. In the case of *Police v Norman Lowell* the court held that the Actus Reus here is the use of words which are threatening, abusive or insulting in their nature. On the other hand the Mens Reas could be divided into two scenarios. On one hand you have the intention of inciting violence or racial hatred however on the other hand our Criminal Code goes a step further and criminalizes those scenarios in which there exists the probability of causing violence or racial hatred.<sup>24</sup> Notice that the word ‘probability’ does indeed differ from the term ‘certainty’ and carries less connotation than ‘beyond a reasonable doubt’. In 2009, this provision was amended in order to substitute the phrase ‘racial hatred’ to ‘violence or racial hatred’ with the second sub article of the provision providing a definition to the latter amendment. Moreover, in 2012 new amendments were introduced in which article 82A was expanded in order to protect other social groups inter alia ‘gender identity’. Once again, in 2014 a minor amendment was introduced in order to replace the phrase ‘violence or hatred’ with the phrase ‘violence or racial hatred’ and also included ‘national’ and ‘citizenship’ hatred. However in order to truly understand the way a provision truly works and in order to see whether the intention of the legislator is achieved or not, one has to take a look at case law on this subject. For this paper, the case of *Police V Brandon Bartolo*<sup>25</sup> shall be analysed since at its core, this particular case has the element of the use of freedom of speech through the use of media platform coupled with racial hatred.

#### *iv. Police V Brandon Bartolo*

Social media platforms, such as Facebook, provide the opportunity for a person or an entity to create its own group in order to discuss various issues. In this particular case, the defendant was an active member of the group ‘Ghaqda Patrijotti Maltin’ and which as mentioned above, is a far-right political party based in Malta. In April of 2017, Bartolo commented on one of the posts in this particular group by using vulgar language which was clearly aimed at Muslims. It so happened that Dr Sara Ezabe reported this particular comment to the police and a case was opened against Bartolo. In this particular case, the court delves deep on article 82A by citing

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<sup>24</sup> *Police v Norman Lowell* 98/2011 (CoCA, 15 July 2013)

<sup>25</sup> *Police v Brandon Bartolo* 48/2018 (CoCA, 17 January 2019)

various judgements and writings of jurists. The court of magistrates acquitted Bartolo however the Criminal Court of Appeal overruled the Court of Magistrates and found Bartolo guilty of the charges brought against him.

What is interesting in this case, is the fact that the court does notice that there were several comments including the one in question which had nothing to do with the subject. The Court of Magistrates held that in such cases, the statement written must not be considered in an abstract manner but must be coupled with the circumstances and the context of why that comment was written in the first place. In fact, the legislator included the phrase 'having regard to all the circumstances' in provision Article 82A. Despite this fact, the Court clearly held that 'contrary to what is actually believed that a person is able to say or write something which they want, in a democratic society you cannot say everything that you want to say'. The court reaffirmed the notion which was introduced in *Police V Stephen Caruana* that despite the fact that freedom of expression does constitute one of the main fundamental features of a democratic society this does not mean that it could violate other human rights which some are equal or more important than freedom of. Once again, the Court affirms the notion that the internet does create a nuisance since every person, including those who does not share the same belief of the writer, is able to read and be influenced by the writings of other people.

Moreover, in this case the Court attempts to define the phrase of 'hate speech' by citing literature works, jurists and judgements as well. Perhaps, the most interesting is given by Lewis Carroll in his book 'Through the looking glass'. In his book one of the character holds that 'When I use a word it means just what I choose it to mean – neither more nor less'.<sup>26</sup> Moreover, it was also pointed out that 'The boundary between the expression of intolerant or offensive views and hate speech is not always an easy one to draw'.

#### v. Article 82A runs counter to legal principle – a way forward

Following the judgement of *Police v Bartolo* an online article on the Malta Independent newspaper was uploaded in which Professor Kevin Aquilina expressed his concerns on the said article. Aquilina explains that the wording used in Article 82A is so extensive that it does not

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<sup>26</sup> Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (Alfred A. Knopf, Inc. 1984)

meet the 'standard' for the principle of *nullum crimen sine lege*. He holds that 'If one were to dissect the constitutive elements of this provision and calculate the permutations and combinations amongst themselves, the end result is one of mathematical infinity and, consequently, total uncertainty'.<sup>27</sup> However, this was not the first time that the article in question was criticised for the way it is construed. In 2017, the characteristics of this article were described as 'broad' and were even on par with other provisions which are found in other countries such as Spain's or Lithuania. In the Rabat Plan of Action, the United Nations held that when it comes to national legislation, 'the broader the definition of incitement to hatred is, the more it opens the door for arbitrary application'.<sup>28</sup>

Prof. Aquilina provides a way forward to this situation by holding that the provision should be dissected into further parts in order to clarify which 'criminal conduct is prohibited'. Moreover, if we follow the recommendations which are pointed out in the Rabat plan of Action, the Committee came to decision that national legislation should include a distinction between three types of hate speech. First and foremost, there is that kind of speech which constitute a criminal offence. Second, those which does not constitute a criminal offence, yet they may give rise to a civil suit or an administrative action. Moreover, there are those which only raises concern in terms of tolerance. Apart from this, another recommendation is that nations must include 'robust definitions' of crucial terms such as discrimination. Finally, the Rabat Plan of Action includes a 'six-part threshold test' which the national Courts must uphold in order to determine whether the speech in question constitutes a criminal offence. These include the context, the speaker/author, the intent, the content and form, the extent of the speech act and finally the likelihood of causing incitement.

'L'abuso dei mezzi di comunicazione e degli strumenti di partecipazione sociale messi a disposizione dalla Rete costituisce un fenomeno crescente e preoccupante'.<sup>29</sup> This statement

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<sup>27</sup> Jeremy Micallef, 'Freedom of Speech case: Article of Criminal Code runs counter to legal principle – Dean of Law' (*The Malta Independent*, 31 January 2019) <<https://www.independent.com.mt/articles/2019-01-31/local-news/Freedom-of-Speech-case-Article-of-Criminal-Code-runs-counter-to-legal-principle-Dean-of-Law-6736202874?fbclid=IwAR3ZmjrCFrM1At1q15jhut2fMmR5ipB7-4o0NpdNW-iZmfxENxHMJcKm8us>> accessed 20 March 2020

<sup>28</sup> United Nations 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (United Nations General Assembly, 11 January 2013) <<https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/RabatPlanOfAction.aspx>> accessed 20th March 2020

<sup>29</sup> 'Apertura Anno giudiziario, allarme per baby-gang, femminicidi e abuso dei social' (*La Repubblica*, 26 January 2018) <[https://www.repubblica.it/cronaca/2018/01/26/news/apertura\\_anno\\_giudiziario\\_cassazione\\_mammone\\_fuzio-187321473/](https://www.repubblica.it/cronaca/2018/01/26/news/apertura_anno_giudiziario_cassazione_mammone_fuzio-187321473/)> accessed 25 March 2020

by Giovanni Mammone encapsulates the on growing problem that the internet is posing on the society today. In this paper, a closer look at article 82A of the Maltese Criminal code and the way our judiciary acts on online hate speech brings forth various flaws which our legislators need to tend to. However, as Albert Einstein once held, 'Laws alone cannot secure freedom of expression' and even when it comes to hate speech, laws alone cannot combat this phenomenon. In late 2019, a new hate crime and speech unit was inaugurated in Malta. Despite the fact that this does not solve the problem of hate speech it sure is a step in the right direction. In any aspect of life, education is the true key in order to eradicate any ignorance in society and this is no exception. From an early stage in their educational journey, students should be taught how to use the weapon that is the internet in order to truly exercise their freedom of speech and not resort to hate speech.

#### vi. The Media and Defamation Act of 2018

As mentioned previously, when considering local case law, it is no surprise that the first case which comes to mind is that of the Maltese journalist Daphne Caruana Galizia. The brutal murder of Mrs Caruana Galizia shocked the nation and triggered a political and constitutional crisis which led to a number of resignations and reconsiderations in Malta's political scene. In light of this, one can understand why the law tries to regulate the concept freedom of expression online. In fact, article 3 of The Media and Defamation Act of 2018 states that "*Defamatory words in written media shall be deemed to be published and to constitute libel.*"<sup>30</sup> However, not every 'unpleasant' word may be deemed defamatory. Article 3(4) of said Act states that "*Statements are not defamatory unless they cause serious harm or are likely to seriously harm the reputation of the specific person or persons making the claim*"<sup>31</sup> The entirety of the Act, continues to indicate what constitutes defamation.

The Media and Defamation Act of 2018 also made a significantly important amendment to the article 49 of the Electronic Communications (Regulation) Act, adding a new provision stating that;

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<sup>30</sup> The Media and Defamation Act, 2018, art 3(1)

<sup>31</sup> Ibid art 3(4)

*"Provided that mere defamatory words or statements uttered or published on an electronic communications network or apparatus and which may give rise to an action for defamation or slander in terms of the Media and Defamation Act, shall not constitute an offence under this Act."<sup>32</sup>*

A recent libel case which showcases the right to freedom of expression online is *Jean Claude Micallef vs Emanuel Delia*.<sup>33</sup> In this case, the plaintiff, Micallef accused the defendant of defamation and libel. The defendant's defence declared that in context, the name of his article, 'When hypocrisy is transparent', is a "fair comment" and an acceptable comment in a democratic society.<sup>34</sup> With regards to this comment, the Courts quoted Gately on Libel and Slander who state that;

*"To succeed in a defence of fair comment the defendant must show that the words are comment, and not a statement of fact. He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of. Finally, he must show that the comment is on a matter of public interest, one which has expressly or implicitly put before the public for judgment or is otherwise a matter with which the public has a legitimate concern. If, however, the plaintiff can show that the comment was not made honestly or was actuated by malice, he will defeat the plea".*

The court also made reference to the case *Chauvy and Others vs France*<sup>35</sup> where the European Court of Human Rights stated that;

*"Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10,*

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<sup>32</sup> Ibid art 32

<sup>33</sup> *Jean Claude Micallef vs Emanuel Delia* 347/2017 (CoM, 26 November 2018)

<sup>34</sup> Ibid

<sup>35</sup> *Chauvy and Others vs France* 64915/01 (ECtHR 29th June 2004)

*this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.”*

The Court also quoted the case *Jesmond Mugliette vs Alfred Sant* where the court held that when there is a political debate between politicians, the levels of criticism must be interpreted differently and on a wider scale since political debates are the pivot of a democratic society.

Therefore, after considering all the facts of the case, the court decided that the defendant's actions were in line with his rights to freedom of expression and opinion.<sup>36</sup> Nonetheless, the court stressed the importance of the role politicians and persons have in influencing the people around them and emphasised the obligation such influential persons have to ensure that through their positive example, the national union reigns.

## vii. International Case Law

Beyond the local scene we find a number of interesting cases. One of those cases is the murder of investigative journalist Ján Kuciak and his fiancée. Kuciak's work focused primarily on tax fraud of multiple businessmen, some of whom had connections with politicians. In fact, his last article was about the Italian Mafia in Slovakia and alleged links with the Slovakian Prime Minister Robert Fico.<sup>37</sup> A month after Kuciak's death, Fico along with his entire cabinet ended up resigning. This murder as well as that of Daphne Caruana Galizia and many other journalists are all considered to be an attack on freedom of expression online. Whether what they wrote was true or not and whether they were liked by the public or not is irrelevant. These crimes can never be justified. After all, one of the pillars of the Rule of Law is supremacy of the Law.

Another international case is that of *Sheckler v. Virginia Broadcasting Corporation*.<sup>38</sup> In 2003, WVIR-TV, a television station in the United States, reported that Jesse Sheckler was arrested and that police found cocaine in his home. Although Sheckler had been arrested, he had not

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<sup>36</sup> *Jean Claude Micallef vs Emanuel Delia* (n 33)

<sup>37</sup> 'Italian Mafia In Slovakia. Tentacles Reaching Out To Politics' (*Spectator.sme.sk*, 2020.) <<https://spectator.sme.sk/c/20770432/italian-mafia-in-slovakia-tentacles-reaching-out-to-politics.html>> accessed 25 March 2020

<sup>38</sup> *Sheckler v. Virginia Broadcasting Corp.* 63 Va. Cir. 368 (2003)

been convicted of drug possession. After being acquitted, Sheckler successfully sued the station for libel and won \$10 million which was later reduced to \$1 million on appeal.

#### viii. Cross-Border Defamation

With the constant development of the Internet, the question over which court has jurisdiction in cross-border defamation case often arises. The concept of forum shopping, also known as ‘Libel Tourism’, became a popular occurrence in the United Kingdom. This was due to the High Court having a number of benefits for the plaintiff such as shifting the burden of proof to the defendant and the fact that the plaintiff did not, in most cases, need to show actual damages.<sup>39</sup> All this, paired up with the fact that the United Kingdom is part of multiple treaties (therefore any civil judgement could be widely enforced around the world) and that legal fees would have to be paid by the defendant if the plaintiff won the case, made the UK an ideal destination for libel suits. In many instances of online libel suits brought to the High Court, the plaintiff would prove some sort of relationship with Britain through some sort of reputation they had within the UK.<sup>40</sup> This led to legislative measures being taken by the UK by the means of the Defamation Act 2013 of England and Wales. The US also passed an act which renders foreign libel judgements unenforceable unless they gave the same protection as the First Amendment.<sup>41</sup>

Having said this, the question of which court would have jurisdiction is still left unanswered. Within Europe, there is the application of the Brussels I Regulation and the Lugano Convention. They state that the dispute is generally heard in the Member State where the defendant is domiciled. Special jurisdiction may be given under certain circumstances for the dispute to be settled in the member state where the event occurred.<sup>42</sup> In 2012 it was concluded by the European Parliament that “The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be

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<sup>39</sup> ‘Special Considerations In Cross-Border Defamation Cases’ <<https://www.excubitor.com/en/areas-of-focus/areas-of-focus/the-legal-option/special-considerations-in-cross-border-defamation-cases.html>> accessed 25 March 2020

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> ‘Knowhow briefs: The Brussels regulation at a glance’ <<https://www.twobirds.com/~media/pdfs/brochures/dispute-resolution/client-know-how/client-briefings---the-brussels-regulation.pdf?la=en&hash=27692997F832310D34F58FADD6C2673D9A5A4B3A>> accessed 25 March 2020

the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.”<sup>43</sup>

The Brussels I regulation can be observed in action in cases such as that of *Fiona Shevill vs Presse Alliance SA*.<sup>44</sup> In this libel case, a UK national brought a libel case against a French Paper in English Court. Despite the number of copies sold in the UK being low (around 200) the Brussels I regulation allowed for Shevill to claim defamation in the UK. However, since the suit was brought in the UK and not the place where the article originated from, the Brussels I Regulation only gives the UK jurisdiction over harm caused in that State.

Most courts seem to have established a similar framework which suggests that a defamation case can be held in any court where there is a substantial connection to the plaintiff or defendant. However, there seems to be an overall legal lacuna in this field. Transpicuous rules need to be established for the protection of both victims as well as anyone accused of cross-border defamation.

In the case of *Yousef Jameel vs Dow Jones & Co. Inc.*<sup>45</sup>, an article was published in the online edition of the Wall Street Journal which contained a hyperlink to the ‘Golden Chain’ document, a list of people allegedly helping to fund Al Qaeda, a transnational extremist Salafist militant organization. On this list, the name ‘Yousef Jameel’ appeared. The claimant, a Saudi Arabian national, served libel proceedings on the defendant out of the jurisdiction, relying on the fact that there were over 5,000 subscribers to the online edition in this jurisdiction (the UK). The Defence applied to strike out the claim on various grounds, relying on evidence to the effect that only 5 people had accessed the document in this jurisdiction. On the basis that the evidence as to the number of ‘hits’ here was correct and damage caused was minimal, it was established that no real tort was committed.

Similarly, in the case *Gutnick vs Dow Jones and Co. Inc.*<sup>46</sup>, an Australian businessman brought libel proceedings in Australia over an article published in the magazine ‘Barron’s’ which

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<sup>43</sup> ‘European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations’ (*Rome II*, 2009/2170(INI)) <<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0200+0+DOC+XML+V0//EN#BKMD-159>> accessed 25 March 2020

<sup>44</sup> *Shevill v Presse Alliance* 68/93 (CJEU, 7 March 1995)

<sup>45</sup> *Dow Jones & Co Inc V Jameel* A2/2004/1540 (EWCA Civ 75, 3 February 2005)

<sup>46</sup> *Dow Jones & Co. Inc. v Gutnick* [2002] HCA 56 (High Court of Australia, 10 December 2002)



alleged that he was “the biggest customer” of a convicted money launderer. Gutnick brought his case in the state court of Victoria. Although the defendant had online subscribers in Victoria, it argued that the case should be heard where the article was uploaded, in New Jersey. It was established that publication on the internet takes place wherever the information is downloaded and since the claimant was only suing for damages done in Victoria, it was without a doubt the most appropriate place for proceedings to take place.

All this shows how freedom of speech online, although often times taken for granted can be a very controversial matter. This is especially due to the fact that the internet is still a relatively new concept and legislation regarding this sector has not yet been fully developed to cover all aspects of this very vast topic.

## IV. Breaches in Freedom of Expression Online: How to Target and Prevent such Breaches

Freedom of Expression, both online as well as offline is perhaps one of the most fundamental freedoms entitled to each and every human being. However, as with all other rights and freedoms, one often finds that there are a number of breaches which take place. These breaches can be split into two separate categories, those which are permissible and those which cannot take place in a democratic society. Therefore, we must pose the question: How can we target and prevent such breaches in Freedom of Expression?

### i. Permissible Breaches in the Right to Freedom of Expression

Article 10 (2) of the European Convention on Human Rights<sup>47</sup> lays down any formalities, conditions and restrictions which may be prescribed by law in order to safeguard areas such as national security, public safety and public health. Such restrictions are set up not with the aim of censoring individuals, but with the ultimate aim of safeguarding human rights as a whole. Therefore, should the restriction to freedom of expression happen with the purpose of protecting any other human right found within national or supranational treaties and conventions, then it will fall under the category of a permissible breach.

Very often, in the case of conflict between upholding the right to freedom of expression and another right, the court must find the middle ground between the two rights in order to establish the superiority of one right over another. Furthermore, in deciding whether or not interference is warranted, the court also examines the type of expression, that is, political expression, commercial expression or any other similar category, as well as the method in which the expression is circulated. Furthermore, the court also examines the audience that the expression is intended towards, whether it is adults, children, the general public or any other audience.

In order for any interference into freedom of expression to take place, there must be justification from the state as to why such interference took place. In order to evaluate this

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<sup>47</sup> Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (n 8)

justification, the court makes use of a three-part assessment whereby interference is permitted upon the fulfilment of three conditions<sup>48</sup>:

1. The interference must be prescribed by law.
2. The interference must protect at least one form of public interest. This may include public safety, national security, the prevention of crime or the protection of health.
3. The interference must be necessary in a democratic state.

Only upon the fulfilment of these three requirements can a state's interference into freedom of expression be considered as justified.

## ii. Identifying Breaches in Freedom of Expression and Possible Solutions to such Breaches

Naturally, although certain breaches in freedom of expression may be justified, the vast majority of them must be prevented in order to ensure a properly functioning democratic society. In spite of this, one can observe that states do in fact breach the citizen's right to freedom of expression as well as their right to receive information through journalists and other similar sources. In practice, this disregard to freedom of expression can be seen in a number of different situations.

### a. Mass Surveillance as a Form of Censorship

According to Amnesty International<sup>49</sup>, censorship online has become a worldwide phenomenon. However, this cannot simply be limited to the traditional view of online censorship, that is, a state blocking websites which it deems to be threatening or incompatible with the message it wishes to portray to its citizens. Nowadays, in an era of ever evolving technological and cyber advancements, governments are making use of more complex forms of cyber-censorship.

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<sup>48</sup> Dominika Bychawska-Siniarska, 'Protecting the Right to Freedom of Expression Under the European Convention on Human Rights' (Council of Europe 2017) <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>> accessed 25 March 2020

<sup>49</sup> 'Protecting Human Rights On The Internet' (*Amnesty.org*, 2020) <<https://www.amnesty.org/en/latest/news/2017/03/fighting-back-against-cyber-censorship/>> accessed 28 March 2020.

One such method of censorship is mass surveillance which although does not directly seem to be a form of censorship, has a large impact on people's online habits. By definition, mass surveillance is "*the practice of spying on an entire, or significant part of a, population.*"<sup>50</sup> Whilst it is generally carried out by the state, it is also possible for this to be carried out by corporations and may include CCTV monitoring, email surveillance, wiretapping and computer hacking.

Whilst mass surveillance is in clear breach of one's right to privacy, it also goes against a person's right to freedom of expression. This is due to the fact that very often a person will have a tendency to self-censor if they are aware of the fact they are being observed. Following an investigation in Belarus, Amnesty International recorded that constant, unchecked surveillance had a "*debilitating effect on free speech and dissent.*"

Similarly, a study conducted by Jon Penney on Online Surveillance<sup>51</sup> concluded that the existence of surveillance within a state invokes fear and conformity and represses freedom of expression. This may be done in an attempt to seem less suspicious or in order to avoid something that may "*get them into trouble.*"

There are a number of things which may be done by individuals in order to protect themselves from mass surveillance online. These include:

1. The use of different passwords in order to safeguard your information in the case of a data breach.
2. Ensuring that the connection between you and a website is secure. The connection is secure if the website link in the address bar begins with *HTTPS* instead of *HTTP*. In the case of the latter, the connection between you and the website is open and therefore, anyone can see what is being written or viewed.
3. Making use of encrypted messaging platforms in order to prevent monitoring of communication through government surveillance programmes.

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<sup>50</sup> Benson Egwuonwu, 'What Is Mass Surveillance And What Does It Have To Do With Human Rights?' <<https://eachother.org.uk/explainer-mass-surveillance-human-rights/>> accessed 28 March 2020.

<sup>51</sup> Jon Penney, 'Chilling Effects: Online Surveillance And Wikipedia Use' (31 *Berkeley Technology Law Journal*, 2016) <<https://ssrn.com/abstract=2769645>> accessed 28 March 2020

## b. Protection of Whistle-blowers and Journalistic Sources

Without the existence of whistle-blowers and other journalistic sources, it would be impossible for a society to function in a democratic way. These sources are the factor ensuring freedom of the press as well as the freedom to receive information. Without such sources, journalists would be unable to perform their duty to impart information to the public. Therefore, it is vital that the freedom of expression possessed by such whistle-blowers and sources is safeguarded in order to protect the foundation upon which democracy is built upon. Moreover, the adequate protection of journalism forms part of a well-functioning democratic system based upon the rule of law.

The non-disclosure by journalists of their sources is not considered to be merely a privilege that may be adhered to or neglected according to convenience, but it goes hand in hand with the right to information and must therefore be preserved. Without adequate protection, sources may become discouraged from sharing information with vital importance to the public interest and as a result, the crucial role of the press as a democratic guardian may be undermined.

The protection of such sources is generally upheld, as can be seen through a numerous jurisprudence. According to the European Court of Human Rights, *“Protection of journalistic sources is one of the basic conditions for press freedom. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be adversely affected. ... [A]n order of source disclosure ... cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”*<sup>52</sup>

Furthermore, the protection of whistle-blowers is ensured at a national level through legislation such as the Protection of the Whistle-blower Act (Chapter 527) wherein the aim of such act is to ensure the protection of employees in both the private and public sectors who disclose information regarding improper practices within the workplace from detrimental action taken against them as a form of retaliation or to prevent their freedom of expression.

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<sup>52</sup> *Godwin v The United Kingdom* 28957/95 (ECtHR, 1 December 1997)

Whistle-blower safety and protection is also ensured at a supranational level through frameworks set out by bodies such as the Council of Europe and the European Union. These include guides on how to implement effective national frameworks<sup>53</sup> as well as new rules for the protection of whistle-blowers adopted by the Council of the European Union which are to be implemented in 2021.<sup>54</sup>

### c. Protection of Journalists against SLAPP

Journalists are often considered to be the cornerstone of freedom of expression. However, they are often faced with numerous attempts to silence them or prevent them from reporting the truth. This is often done through what is known as Strategic Lawsuits Against Public Participation, or SLAPP for short. These lawsuits are directed towards those who speak out on issues pertaining to public interest, more often than not, against journalists.

The intention behind such generally baseless lawsuits is to intimidate those who disagree with the applicant or their activities, stop investigative research and silence criticism by draining the target's financial resources. Very often, in an attempt to avoid the financial strain caused by meritless lawsuits, journalists will self-silence and retract or seemingly correct what they had previously written. However, such a tactic may not always prove to be successful as very often journalists may be faced with multiple SLAPP suits in an attempt to silence them indefinitely. Such an example is in the case of Daphne Caruana Galizia, who at the time of her assassination had 47 SLAPPs against her, and whose family continues to be faced with numerous SLAPP defamation cases over two years after her death.

Targeting SLAPPs efficiently and effectively must occur through the reform of defamation legislation and eliminating existing loopholes which are exploited by individuals in attempts to silence journalists and other forms of criticism. Another possible remedy to prevent the silencing of journalists due to SLAPP suits is the setting up of a fund to contribute towards legal fees which may prevent journalists from maintaining their freedom of expression and therefore their vital role within democracy.

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<sup>53</sup> 'Protection of Whistleblowers: A Brief Guide for Implementing a National Framework' (*Council of Europe* 2016) <<https://rm.coe.int/16806fffbcc>> accessed 29 March 2020

<sup>54</sup> 'Better Protection Of Whistle-Blowers: New EU-Wide Rules To Kick In In 2021' (*European Council*, 2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/>> accessed 29 March 2020

Whilst there have been numerous measures taken in both the national as well as the international field in order to uphold freedom of expression and prevent any violation of such an indispensable human right, there is still a long way to go before we can remark an adequate protection of freedom of expression. This is true to both freedom of expression online as well as offline. On the national stage, there is a particular shortage in the realm of protection of journalists, however, in recent months there have been propositions within the legislative branch of the state to introduce Anti-SLAPP legislation. Advancements such as this are what is required in order to take a closer step towards true protection of the right to freedom of expression.

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