

COMMENTS AND LETTERS

Constitutional changes

Radical rethink required (2)

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Part 2 of this article will continue to outline proposals for change in the constitution, from *The Implementation of European Privacy Law in Malta* by Mireille M. Caruana and Joseph A. Cannataci (book chapter in Sammut, Ivan & Agranovska, Jelena [2021], *The Implementation and Enforcement of European Union Law in Small Member States, A Case Study of Malta*).

“(b) The right to freedom of expression which includes:

“1. freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public spaces and in private, irrespective of whether such expression or receipt of ideas occurs in a physical or virtual space;

“2. the prohibition of any censorship of any form of publication;

“3. freedom from interference with the citizen’s access to and receipt or transmission of data using electronic means [whether wired or wireless] irrespective of whether such interference is attempted by the state or by any natural or legal person and irrespective of whether such interference is physical or electronic or economic;

“4. the free setting up of publications using any medium;

“5. the prohibition of suppression of any publication;

“6. the obligation upon the mass media to make public their financing source, which obligation shall be provided for by law;

“7. provision by law that freedom of expression shall not be prejudicial to the right of personality including the dignity, honour, privacy of a person and to the right to one’s own image;

“8. provision by law that any instigation to national, racial, class or religious hatred, any incitement to discrimination, or public violence, as well as any obscene conduct contrary to morality shall be prohibited;

“9. provision by law that freedom of expression shall not be prejudicial to intellectual property rights, the regulation of which shall also be provided for by law.”

“(c) the right to free access to public information which implies that:

“1. a person’s right of access to any information of public interest held by a public body shall not be restricted;

“2. all public bodies shall be bound to provide timely and correct information



The right to unhindered development of the personality was recognised by the UN Human Rights Council in 2017. PHOTO: SHUTTERSTOCK.COM

to citizens in public affairs and matters of personal interest.;

“3. public and private media shall be bound to provide correct information when producing all news and current affairs services and generally all works of non-fiction;

“4. public radio and television services shall be autonomous. They must guarantee any social and political group the exercise of the right to an equitable portion of broadcasting time. The organisation of these services and the parliamentary control over their activity shall be provided for by law.

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subarticle (1) of this article to the extent that the law in question makes provision that is reasonably required in the interests of national security, public safety, public order, public morality or decency, or public health 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.



The proposals were intended to provide constitutional-level protection for everybody in Malta in the 21st century

“(3) Where the police or other competent authorities seize any electronic or other equipment utilised for publication and/or any output intended for publication on reasonable suspicion of it being the means whereby a criminal offence has been committed, they shall within 24 hours of the seizure bring the seizure to the notice of the competent court and if the court is not satisfied that there is a *prima facie* case of such offence, that equipment or output shall be returned to the person from whom it was seized within 48 hours of it having been seized.”

The above proposals were intended to provide constitutional-level protection for everybody in Malta in the 21st century, in the Information Age, in the Internet Age. Every word counts.

Of the 1,016-word proposal reproduced here, 412 words are largely focused on detailed reinforcements of the right to privacy within a coherent vision of the flows of information in society in the 21st century. This approach will later be contrasted with the approach taken by the government in its current set of proposals.

The above 2013 proposals were also intended to introduce into the Maltese Constitution explicit mention of the overarching right to unhindered development of the personality, already explicitly provided for in the constitutional law of many countries and the conceptualisation of which was eventually recognised by the UN Human Rights Council in 2017.

In this particular vision, three information-related fundamental rights - private and family life, freedom of expression and freedom of access to information - were articulated in unprecedented detail, deliberately and explicitly recognising a number of associated rights including gender identity, same-sex marriage and others,

some of which have been recently incorporated into Maltese law at the status of ordinary legislation.

It should be made clear at this stage that the above proposals were drafted 10 years ago and could have benefitted from further enhancement to take into account the requirements of privacy and freedom of expression in the Internet Age as well as the new obligations Malta has taken on under international law since 2012. They could have also been further enhanced by entrenching the principles of necessity and proportionality. None of this would seem to have happened.

The proposals above sought to expand on the principles of human dignity and the right to free development of personality. Dignity is not explicitly mentioned in the European Convention on Human Rights (ECHR) but it features most prominently in the Charter of Fundamental Rights of the European Union (CFR) which, in 2000, established in its very opening article that “[h]uman dignity is inviolable. It must be respected and protected”.

Meanwhile, the right to personality is also explicitly recognised in article 22 of the UN’s Universal Declaration of Human Rights (UDHR): “[e]veryone [...] is entitled to the realisation [...] of the rights indispensable for one’s dignity and the free development of their personality.”

Article 29 UDHR also protects the right to develop one’s personality: “[e]veryone has duties to the community in which alone the free and full development of his personality is possible”.

I am especially perplexed that the government’s advisors have ignored the UN’s Human Rights Council endorsement of privacy as an enabling right for the free development of personality: “Recognising the right to privacy also as an enabling right to the free development of personality and, in this regard, noting with concern that any violation to the right to privacy might affect other human rights, including the right to freedom of expression and to hold opinions without interference, the right to freedom of peaceful assembly and association” (UN A/HRC/L.17/Rev - March 2017).

The third and final part of this article will be carried tomorrow.

Joe Cannataci was appointed the UN’s first special rapporteur on the Right to Privacy in 2015 and served the maximum of two three-year terms until 2021. Since April 2022, he serves as the Council of Europe’s lead expert on the interpretation of Article 11 of Convention 108+. He is the head of the Department of Information Policy and Governance at the University of Malta and holds the chair of European Information Policy and Technology Law at the University of Groningen in the Netherlands.