COMMENTS AND LETTERS

Constitutional changes

# Radical rethink required (3)

JOE CANNATACI

The first two parts of this article summarised 'the sins of omission', what the government of Malta should have offered to its citizens in the way of proposals for constitutional change yet failed to do.

There are so many sins of omission that all government MPs and cabinet ministers acting conscientiously should put pressure on Prime Minister Robert Abela and persuade him to immediately change course while there is still time.

The detailed proposals I have outlined would be perfectly consistent with Labour's enlightened past approach to private life matters, especially those issues in the LGBTQI sphere, so why not also join forces with those Nationalist MPs who would equally support such entrenchment of fundamental freedoms?

There are, however, also 'the sins of commission' to deal with. Mistakes which should have never found their way into the text and which parliament is still in time to rectify.

It may help to systematically identify some of the more glaring mistakes which need to be fixed. The most serious of these are the lack of adequate safeguards and the inclusion of exceptions which are inadmissible under European law.

Let's start with Malta's obligations under international law. On July 2, 2020, Malta signed Convention 108+ of the Council of Europe and, subsequently, ratified it on November 2, 2020.

Article 11 of that treaty requires that any derogation to the right to privacy must "be provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society".

The first key question to ask, therefore, is: How do the government's proposed constitutional amendments make explicit provision for the tests of necessity and proportionality? (Spoiler alert: they don't.)

A closer reading of the government's proposals of September 2022 makes for some startling results. There are precisely 18 words which enunciate the bare bones of the right to privacy: "Everyone has the right to respect for his private and his family life, his home and his correspondence."

These words were already previously in the constitution but were previously formally unenforceable at the constitutional level.

This feeble effort is complemented by 23 words outlining protection from forceful search and seizure of property. Full stop. No new constitutional safeguards for privacy are introduced.

In the digital age, protecting rights requires exceptional attention. PHOTO: SHUTTERSTOCK.COM

Contrast these with the explicit safeguards contained in the 412 words which flesh out the rights to privacy within a coherent vision of information flows in society in the proposals published as a benchmark in this article and which the government forgot or ignored.

Then, please, note that the bulk of the government's 2022 proposals on constitutional amendments regarding privacy consist of 268 words spelling out exceptions, that is, derogations to the right to privacy.

This is quite astounding. Instead of focusing on reinforcing the right to privacy, the government's main effort is expended on explaining when and how it can use the law to weaken this right.

> *Instead of focusing on reinforcing the right to privacy, the government's main effort is expended on explaining when and how it can use the law to weaken this right*

This article appears in a newspaper so I will not go into the detail normally reserved for an academic journal. But we need to point out that the 268 words contain derogations which are also very questionable when the tests of necessity and proportionality are applied.

For example, to name but a few of the more glaring examples, when and why should something required for "town and country planning" take precedence over the right to private and family life? When and why should the right to obtain public benefit from utilisation of property trump the right to privacy?

What is most amazing, however, is how the wording used by the government fails the fundamental test of explicitly requiring derogations to respect the key principle of proportionality. Proportionality is not something which Malta has contracted to internationally, only at the European level as mentioned above in the case of Convention 108+.

On September 13, 1990, Malta also acceded to the UN's International Covenant on Civil and Political Rights (ICCPR). Any constraints upon the right to privacy under article 17 of the ICCPR must strictly comply with the principles of legality, necessity and proportionality. These requirements are included in both the inter-American and the universal systems of human rights.

In relation to the requirement of legality, any limitation must be expressly, exhaustively, precisely and clearly provided for in a law in the formal and material sense (OEA/Ser.L/V/II IACHR/RELE/INF. 2/09, para. 69). It is not enough that the restrictions be formally approved and by a competent body; they must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34, para. 25), as well as satisfy the usual mechanisms for deliberation (OC 6/86, IACHR).

The restrictions must pursue one of the exhaustively enumerated legitimate objectives and be necessary, that is, the restriction must be more than "useful", "reasonable" or "desirable" (A/HRC/29/32, para. 34). It must be indispensable to the achievement of the legitimate aim, in that it cannot reasonably be achieved by less restrictive means. (OEA/Ser.L/V/II IACHR/RELE/INF. 2/09, para. 85).

Measures restricting enjoyment of the right to privacy must comply with the principle of proportionality; they must not unduly interfere with other rights of the persons targeted (A/HRC/29/32, para. 35). Such measures "must be adequate to fulfil their protective role [...] and must be proportionate to the interest to be protected" (CCPR/C/GC/34, para. 34).

In the digital age, protecting these rights requires exceptional attention.

Where do we find all of this (and much more) in the Maltese government's proposals in the bill published in September 2022? We don't and this is very disappointing.

Privacy and freedom of expression as well as the right to unhindered development of personality are fundamental rights which everybody should enjoy and the debate about them in Malta should rise above that of partisan politics.

This article is intended as a non-partisan contribution to what should be a constructive national debate. This is not a subject which Nationalists and Labour politicians should agree or disagree about on party lines. This is something about which they have a special responsibility, for this is the first time in nigh on 60 years that the protection of privacy is going to be considered for proper protection at the constitutional level.

Let's not bungle it now, especially if we have another two generations to wait for the next opportunity to improve protections of our most fundamental of rights.

This concludes the article.

*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.*