

## Debate & Analysis

# Artistic expression: at what cost?



**KEVIN AQUILINA**

Another government Bill, another frontal attack on the rule of law and the independence of the judiciary.

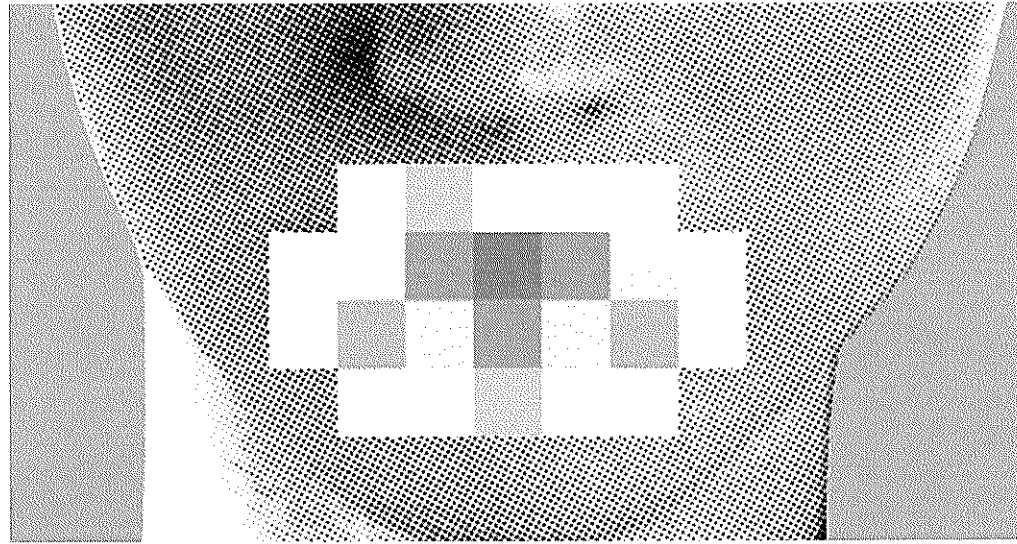
**B**y means of Bill No. 61, dated 28 June 2023, government proposed to 'further enhance freedom of artistic expression'. This is the long title of the Bill, which was unanimously approved by Parliament on Wednesday.

Nonetheless, an examination of the text of the Bill reveals that it is about 'artistic, satirical or comic expression' rather than only about 'artistic' expression as the long title and objects and reasons clause erroneously portray. The objects and reasons clause reads as follows: 'The objects and reasons of this Bill are to provide for the enhanced protection of artistic expression and in particular to provide for the avoidance of the misuse of the criminal justice system for the suppression of such form of expression'. The drafting style of such short bill leaves much to be desired.

The Bill consists in two principal provisions, one amending article 339 of the Criminal Code and another amending the proviso to article 49 of the Electronic Communications (Regulation) Act. The substance of both amendments is very much similar in so far as they decriminalise 'the uttering of insults or threats ... to allow for the freedom of artistic expression ... [so as not to] hinder artistic, satirical or comic expression which does not include any creditable and realistic threat to the personal liberty or security of the complainant or to his [and her] property'. Insults or threats are now acceptable if they form part of artistic impression, provided they are not addressed at the personal liberty, security, or property of the victim of the insult/threat.

On closer examination of Bill No. 61, the following deficiencies come to light.

First, the amendment resents of *ad hominem* legislation. It has been proposed not following a thorough review of Maltese Law to improve the regulation of artistic expression, but to simply



nip in the bud the outcome of a criminal court case that is ongoing and that has been exercised lawfully in terms of extant law, whether government, the artistic community, or all of us like it or not. One of the fundamental principles of legislation is that laws are made for the common good of society, have universal application, and are not addressed to a particular person, whether to his/her favour or detriment.

Second, the amendment addresses pending criminal proceedings. A legislature should avoid meddling in court cases once these are still ongoing so as not to interfere with the independence of the judiciary. The judiciary should be left to do their job serenely without any pressure being put upon them by government and parliament. The latter two organs of the state should not substitute themselves for the judiciary and decide whom the judiciary is to acquit and whom to convict. The amendment does not state that it does not apply to pending court proceedings.

Third, the amendment uses confusing terminology. In two cases (the long title and objects and reasons clause cited above) it refers only to 'artistic expression' whilst in the two proposed amendments to the Criminal Code and the Electronic Communications (Regulation) Act, it refers to 'artistic, satirical or comic expression'. The inevitable question that arises is: are not satire and comedy part and parcel of artistic expression? If this is so, why have they been singled out and distinguished from 'artistic expression'? If an artist writes a play on the tragicomedy of government's abortion bill, when first it proposed a radical overhaul of the law, then it reverted back to rewriting what the law already provided for (in politics, it is called a u-turn, in literature a tragicomedy), will this play fall under 'artistic' expression, 'comic expression', or none?

Your answer is as good as mine!

Furthermore, once these three terms are undefined but thrown at the reader, are satirical and comic expressions two subsets of artistic expression or are they totally independent therefrom and, if so, how and to what extent? If the latter is the case, and this can obviously be deduced from the fact that the law is purposely distinguishing between the three terms, why are not other forms of artistic expression included specifically as well such as dance, photography, sculpture, drawings, cartoons, paintings, etc.? Would it have not been better – as the long title and the object and reasons do – to refer only to 'artistic expression' and to afford a precise non-confusing definition and to also state that artistic expression includes also satirical, comic, and other specified forms of expression? To add insult to injury, the Opposition is suggesting the introduction into the potpourri of a fourth type of expression – 'cultural expression'. Who did once say that variety is the spice of life? By this proposed 'cultural expression' addition, the rule will become the exception and the exception will become the rule. Quite a convoluted way of drafting legislation! Only government and the opposition have mastered it! What would continue to be the relevance of the criminal prohibition if the Opposition gets its way?

Fourth, both laws that are proposed to be amended are of a criminal nature. Hence, the interpretation that must be given to the amending clauses must be a narrow (restrictive) one. If a novelist writes a tragicomedy on the current government's maladministration which would surely take up several volumes, it will not fall under 'comic expression' because literally speaking it is both a 'tragedy' and a 'comedy' at one and the same time. The episode related to the recently enacted abortion law as seen above contains the

seeds of a tragicomedy. First, government wanted to abort in the original bill unborn babies till a few seconds before the pregnancy is brought to term, then – all of a sudden – it changed track and went back to square one, not out of remorse (for Cabinet ministers do not suffer from this moral ailment), not because their conscious was pricking them (for an indispensable requirement for appointment to cabinet is to be soulless) but because of the presidential hurdle which would have brought the country into a constitutional crisis and Labour Party grassroots' dislike of the nihilist philosophy of death embraced by Cabinet ministers and parliamentary secretaries.

Comic expression does not include tragicomedies. The latter is wider than the former. But does a tragicomedy fall under an artistic expression? As the bill has singled out a comedy, not a tragicomedy, and as the term 'artistic' is not defined, a serious difficulty is entertained once the latter term cannot be given a wide interpretation in so far it forms part of a criminal law and is proposed in the nature of an exception to the criminal offence in the general clause. To allow a wide interpretation is counterproductive as it would fall foul of the criminalization of a particular conduct in the Criminal Code. What does 'artistic' really mean? Is a journalist's opinion piece, an editorial in a newspaper, or a blogger's running comment 'artistic'? If the latter is not the case, why the discrimination between a journalist/blogger and an artist? Why should an artist be given a privileged preferential treatment over a journalist/blogger or other bona fide writer? Moreover, why should an artist be given a carte blanche to insult whoever s/he wants under the pretext of artistic expression when other categories of society will not enjoy such privilege? Where does equality come into the equation? Can this lead to

abuse by artists not in bona fide?

Fifth, the amendment contravenes the rule of law in so far as government, through Parliament, has mounted a media campaign against a person who is resorting to his legitimate rights as currently enshrined in law, irrespective or not whether one agrees with this criminal action, or whether it complies with freedom of expression, and this when there are ongoing criminal proceedings that are affecting the right to a fair trial through a public trial conducted by government in the media and in the House of Representatives. The timing of the Bill is therefore resentful of the judicial process and disrespectful of the independence of the judiciary, if not also in blatant contempt of the authority of the court.

Finally, once the amendment was adopted before the conclusion of the ongoing court proceedings, which law will the court have to apply in the absence of a transitory provision in the Bill: the law existing prior to the amendment, or the law as it will be amended? In the former case, the new provision would have made no difference at all to the accused who will not be able to benefit therefrom, thereby having to conclude that it was nothing more and nothing less than a pure governmental gimmick aimed solely for populist purposes. In the latter case, should the court be legislatively forced to adopt the new provision to pending proceedings, the government in parliament, would be in violation of the rule of law through the direct interference of parliament in ongoing proceedings whereby parliament is now directing the judiciary how to decide cases. This will be a bad precedent indeed. But who cares? Government? The Opposition?

The result is a Catch-22 situation where, because of government's rush to be populist by favouring and maintaining local popularity with the artistic community to attract their votes (the EU Parliamentary elections are behind the corner), they neglect the common good by putting the interests of the artistic community before those of good governance. Further, this Bill is nothing but an attempt to cover up government's own mistake, short-sightedness, and incompetence when not tackling this matter earlier when enacting the Media and Defamation Act, 2018. Why was this measure not included in government's much coveted law against censorship? In terms of this Bill, the courts will be reduced to nothing but a government department and lose their independence from the government of the day.

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With the enactment of the bill into law, the judiciary would have migrated from an independent body to a government-controlled body, at least, in so far as artistic expression is concerned. But there is no guarantee that government will be further enticed to adopt this newly found legislative drafting model to interfere in how court proceedings are decided in other cases, with the courts having no option but to obey government's diktat to the utter disgust of the citizen. As the Italian saying goes, *l'appetito vien mangiando!*. Indeed, this current government's frontal attack on the independence of the judiciary should be noted and condemned by the Chief Justice in his opening speech of the forensic year not as a one-off isolated case but as a pattern that government is adopting.

Prudence and diligence – of course not a characteristic trait of Cabinet members – dictates that they should not have re-

acted instantaneously to media reports by rushing to introduce ad hominem legislation that poses a serious threat to the independence of the judiciary and the rule of law and are discriminatory in nature, but should have awaited the court proceedings to be finally determined before taking any premature politically-populist vote-grabbing rash and folly decision. For, after all, the court proceedings might have ended before the European Court of Human Rights that might declare those criminal proceedings in breach of freedom of expression. In that way, government would intervene to comply with a Strasbourg court decision without needing to put the cart before the horse. With the passage of the amendment, it is not only the horse that has lost its direction but, once Cabinet through parliament approves the Bill, government would have lost the rudder of the country thereby steering its course into a brick wall. Nothing unfamiliar so far!

Were the government to observe the principles of good gov-

ernance, it would have first and foremost carried out a human rights impact assessment of the provision in the Criminal Code upon which the ongoing criminal action is instituted and after the proceedings in court are brought to a definitive end, it would then adopt the necessary legislative measures.

The current situation is further aggravated by the courts who are not bothered at such legislative drafting style and are very willing to accommodate government as far as possible as it is well known that in constitutional cases against the government, the Constitutional Court tends to look favourable at government whilst at times deriding the poor citizen subject to a government – and, to makes matters worse, subsequent judicially sanctioned – injustice. In Malta, it is only the institution of the Ombudsman that since its inception serves as the citizens' defender, not the Constitutional Court for the former defends justice, the latter the law. The said court, in post-independent Malta, has a track record of favouring government

than the people in its judicial output.

The Constitutional Court operates through the unwritten principle that where there is a doubt, or where it can invent one itself *ex officio*, it decides in favour of government, not in favour of the citizen (*in dubio pro governo*). In theory, this is a sound principle of law, provided of course that the government is: (a) acting for the common good of society; (b) is not acting so as to advantage personal interests over those of society as it does, for instance, when it resorts to direct orders, employing persons of trust, or amends planning laws to accommodate ministers in breach of those laws; (c) is acting in good faith; (d) is not proposing legislation that is made ad hominem; and (e) complies with fundamental principles of law such as the rule of law (a principle quite alien to our government that it observes only limitedly and conditionally through lip service in order to effectively take for a ride international institutions such as the EU Parliament, the EU Commis-

sion, the Parliamentary Assembly of the Council of Europe, the Venice Commission, GRECO, FATF, etc.), the independence of the judiciary, and the principle against the exercise of abuse of power.

A premature decision that is intended to satisfy government's purely populist interests by appeasing the artistic community is not necessarily tantamount to respect for the rule of law and the independence of the judiciary. It is a short-sighted measure loaded with detrimental consequences. The road to hell is paved with good intentions as the saying goes. Whilst artistic expression should be protected, though this is already protected by Human Rights Law (hence the irrelevance of this Bill), this should never come through misrule of law and subjecting the judiciary to the government's diktat, irrespective of whether our Constitutional Court judges are all out to play ball with government.

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