

## Talking Point

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# Squaring the circle

European Court of Human Rights judgments have, since 2009, consistently enunciated the principle of retrospectiveness of the more lenient criminal law, the *lex mitior*, which is a principle of international criminal law. However, according to a recent report on the online edition of this newspaper, the Minister of Justice raised the point that there are a handful of criminal libels still pending where the injured party had not instituted a civil suit and that, on repeal of the criminal libel provision, such injured parties will remain without a remedy.

It is necessary for Parliament, when enacting law, to comply with human rights provisions.

This obligation is set out in the highest law of the land, the Constitution. This lays down that "Malta is a democratic republic founded on work and on respect for the

fundamental rights and freedoms of the individual".

Chapter 4 of the Constitution sets out the fundamental rights and freedoms of the individual, which the State has to comply with.

The Constitution also directs Parliament to ensure that laws are made "in conformity with full respect for human rights".

Once the situation at law is known through the European Court of Human Rights' case law that the *lex mitior* dictates the application of the more lenient penalty, once the criminal libel provision is repealed it has to be repealed both in relation to future and even present pending cases.

So there is no constitutional and legal argument favouring the enactment of clause 27(4) of the Media and Defamation Bill, which decriminalises future criminal libel cases while saving the pending ones.

Nonetheless, the minister does have a point when he states that he

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does not want to prejudice those persons who had elected to exercise the criminal action but not the civil action and that now they cannot exercise any longer the civil action as it is time barred and once the criminal libel provision is removed from the statute book they remain without a remedy.

Yes, it is possible to square the circle, to repeal the criminal libel provision without prejudicing the injured parties who have only instituted criminal libel proceedings while, at the same time, ensuring full compliance with the Constitution, human rights law and the *lex mitior* principle.

This can be done - bearing in mind that there are fewer than a dozen pending criminal libels - by adding to clause 27 provisions to the effect that:

(a) the offence of criminal libel should be repealed three months after the entry into force of the Media and Defamation Act;

(b) all pending criminal libels have to be determined within that three-month period;

(c) empowering the Chief Justice to give all the necessary directions to all courts involved to ensure that those cases are decided at first and appellate instance within the said three-month period;

(d) that the court of first instance should order the parties to bring their evidence within one sitting and the court should allocate one whole day for this purpose; and

(e) a provision be also added to the effect that should any person institute a criminal libel after the entry into force of the law but before the repeal of the criminal libel provision (in the above-mentioned three months) he would be doing so at his own risk and peril and would be knowledgeable of the fact that the criminal libel provision would be repealed within three months from the entry into force of the new media law.