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POSITION PAPER ON THE DECRIMINALISATION OF THE PUBLIC VILIFICATION OF RELIGION AND OF PORNOGRAPHY

We are living in a world that is becoming more and more pluralistic, on all levels. This has brought about a heightened awareness of the value of individual and group freedoms, giving one an increasingly wider range of possibilities of choice.

This is certainly a positive trend, yet in a context of increasing individual freedoms the real challenge seems to lie in safeguarding the quality of our common life, based on shared values. There is no doubt that religious beliefs are foremost among the values that people hold dearest since they constitute the ultimate basis on which choices are made on both an individual and collective level. It is thus in the interest of society, especially of a radically pluralistic society, to defend and promote respect for religious beliefs or non-belief.

It is in this context that we wish to express our views on the Criminal Code (Amendment) Act, 2015.

The Decriminalization of the Public Vilification of Religion

1. The Criminal Code (Amendment) Act, 2015 will be deleting the criminal sanctions against the vilification of the Roman Catholic religion and other religions. The assumption seems to be that the public vilification of the Roman Catholic religion (Article 163) and any other cult tolerated by law (Article 164) will no longer need to be regarded as a criminal act, because the criminal sanctions that have been subsequently imposed against the instigation of religious and other forms of hatred (presumably through the provisions under Article 82 A (1) and (2) of the Criminal Code) have rendered the previous provisions on religious vilification superfluous.
2. We believe that the introduction of more recent legal sanctions against hate crimes does not warrant the removal of Articles 163 and 164 since these articles make specific reference to the abuse of vilification of religion not found in other legislative measures. Articles 163 and 164 prohibit the vilification of religion, which is wholly different from criticising, ridiculing, censuring or even disparaging or hating. To vilify is to “render vile” and so what the law prohibits is the malicious, abusive debasement of religion, its adherents and its leaders.



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3. The prohibition of the incitement to religious and other forms of hatred is certainly essential for a truly democratic society where people can relate with each other in freedom and in peace, irrespective of their different backgrounds and beliefs. But a decent society should not allow anyone to vilify any other person or group for belonging to a particular religion or that religion itself. Incitement to religious hatred is one thing, religious vilification is another. The vilification of any religion is incompatible with any decent society.
4. One should note also that article 2 of the Constitution of Malta is not to be seen in isolation but as part of Chapter One which lays down the six most hallowed fundamental civic values. These are the Republican governance of Malta, the Religion of Malta, the National Flag, the National Anthem, the National Language and the Constitution itself. These values the Constitution considers equal and special and are to be governed by rules different from those which govern other subordinate values.
5. It is difficult to see, from a Constitutional point of view, how the State will now allow, by law, the vilification of one of the six fundamental values proclaimed by its own Constitution. The National Religion is on a par with the other five values. One cannot choose between them by requiring five to be treated with reverence and allowing the sixth to be subjected to vilification.
6. Articles 163 and 164 should, therefore, not be deleted. However, in view of the equal respect to be shown to everyone's right to freedom of conscience and religion, there should be no difference between the sanctions imposed on those vilifying the Roman Catholic religion and those vilifying any other religion or non-belief and this in line with recent pronouncements of other European constitutional courts.

The Decriminalisation of Pornography

1. The Criminal Code (Amendment) Act, 2015 will be allowing under certain conditions the displaying of any pornographic material (i) in places to which the public have access only on payment and to which the public can only gain access by passing beyond an adequate warning notice (in this case minors are not admitted while the display is continuing); (ii) in the course of a television broadcasting service regulated by the Broadcasting Authority and within the meaning of the Broadcasting Act; (iii) in an art gallery or museum where reasonable precautions are taken for the protection of minors; (iv) in a film exhibition subject to the Cinema and Stage Age Classification Act and (v) in those instances where the display of pornographic material can serve the public good by being in the interest of science, literature, art or learning or other objects of general concern.



2. Once approved, these amendments will make it possible for any pornographic material to be displayed for a variety of purposes. It will be displayed not only in contexts that may be, perhaps loosely, described as 'artistic' or as being in the interest of science, literature, art or learning or any other objects of general concern. It will be displayed also for trading and purely profit-making purposes. This is altogether out of line with the objects and reasons of the Bill. The Bill states that the reason behind the amendment and the aim to be achieved is "to provide for the better implementation of the right to freedom of expression with regard to the striking of the necessary balance between the right of everyone to receive and impart information and ideas and the need to protect society and vulnerable persons in particular from certain forms of pornography and indecency." The intent of the legal reform concerning the decriminalisation of pornography is presumably to maximize individual freedom of expression or the right to exercise full control over one's preferences in sexual entertainment and gratification. It is claimed that adults must be treated as adults and for this reason their freedom to engage in diverse forms of sexual gratification must be legalised and regulated.
3. We cannot see this provision as a step forward. An individualistic interpretation of human rights is, unfortunately, detaching human rights from those values that together create "a culture of dignity". A society that maximises individual freedom of choice in sexual matters risks falling prey to market forces where profit, rather than human dignity, dictates what should or should not be done. The commercialization of the human body is always harmful to the dignity of the human person, even when this occurs with one's own consent. Sex and sexuality are more than just gratification and pleasure but they are a gift and an invitation for self-giving and for an interpersonal relationship with others. Sexual leisure economy and the sex industry transform these human values into a commodity, lust in exchange of profit. Moreover, the exploitation of vulnerable people and the fostering of out-dated attitudes that instrumentalise particular groups of individuals are demeaning to human dignity and it should be the state's duty to prevent such debasement of human dignity.
4. For instance, the licensing of sex shops has nothing to do with the "freedom of expression" or the right "to receive and impart information". It is simply part of the sex industry and trade. Unfortunately, pornographic material and paraphernalia is already very easily available online. It hardly seems wise to promote further this very lucrative, but essentially exploitative, industry. By doing so, we would certainly be sending the message that money and profit are more important than human well-being.
5. Even from a purely constitutional point of view, one should ask how this proposed change fits into what the Constitution of Malta expressly establishes on "public morality or decency" (see Articles 38, 40, 41, 42) and what the European Convention on Human Rights (which Malta has ratified as binding under international law and incorporated as enforceable in domestic law) establishes on "morals" (see Articles 8, 9, 10, 11). The safeguard of public morality, decency or morals is so fundamental in these supreme



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laws that it even expressly overrides the enjoyment of all fundamental human rights, like the right to privacy, the rights of freedom of conscience and of worship or religion, the protection of the freedom of expression, the protection of freedom of movement, and the protection of freedom of association.

6. In a conflict between these fundamental rights, on the one hand, and the protection of public morality or decency, on the other, the Constitution and the European Convention expressly mandate that it is the protection of public morality or decency that prevails.
7. Both locally and abroad there is a growing awareness of the real harm that easily available pornography inflicts on society, through the demeaning of the human body and of relationships in general. Why should it not be self-evident that the arguments in favour of public decency are more compelling than those in favour of public indecency?

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