The Right to a Healthy Environment in the Constitution of Malta

Abstract of '*The Second Republic: A Green One*' by Ethan Brincat

In the years after independence and continuing until the present day, the first Maltese republic has aged steadily and the general need is being felt that it no longer caters for some of the new political, legal, and social challenges that the Maltese state is currently facing at the local, European, and world levels. Chief among these challenges that the country is facing, and one which the Constitution contemplates only superficially, is the environment. One hopes that an eventually reconstituted Republic of Malta places the environment, specifically the right to a healthy environment, as a top priority.

Act No. XXII of 2018 developed a declared constitutional principle that had sat unchanged since the original promulgation of the Constitution. Article 9 of the Constitution entitled 'Safeguarding of landscape and historical and artistic patrimony' falls under Chapter II entitled 'Declaration of Principles'. Before being amended by Act No. XXII of 2018, said article was very brief, and only read as follows:

> ***9.*** *The State shall safeguard the landscape and the historical and artistic patrimony of the Nation.*

This means that the legislator, way back in 1964, already thought that the '*safeguarding of landscape and historical and artistic patrimony*' is a principle by which the State, eventually a Republic, is to operate. One would be disappointed to read that not only did article 9 of the Constitution not formerly make express reference to the 'environment', but that the term 'environment' was not found anywhere else throughout the Constitution, including in the miscellaneous provisions of the Constitution under Chapter XI. The phenomenon of environmental awareness is perfectly captured by Raymond Mangion in his article entitled '*Constitution and green rights*' for the 13 June 2015 issue of the Times of Malta, where he states that:

> *The protection of the environment in Malta has, over the past months, been at the epicentre of discussion without precedent. It has never mobilised and brought together so many diverse groups of society with the object of inducing institutions and politicians to take environment protection more seriously. Also, public opinion is now wholeheartedly and strongly pleading for real enforcement.*

In the absence of the term 'environment', the Constitution referred to the '*landscape*'. The word 'landscape' was considered at that time to be the appropriate term to refer to the natural environment. 'Landscape' is usually a term used to refer to the environment in its entirety, that is the environment that surrounds the people and that is vital for them to survive and thrive. From this perspective, it evokes a sense of environmental wellbeing. One should also appreciate the fact that at the time of Malta's independence, society might have conceived the term 'environment' as consisting mainly of the landscape. Over

time, society came to realise that there is more to the environment than just the landscape for its existence. Thankfully, society's environmental outlook today has widened to include ideas such as air, water, and light and noise pollution and therefore, it is no longer enough for the supreme law of a country to vaguely refer to the landscape alone and forsake other issues which are just as pressing, though perhaps less visual. It had to be Act No. XXII of 2018 to enshrine, for the first time, the term 'environment' in the Constitution. The legislator declared that Act No. XXII of 2018 was '*An Act to amend the Constitution of Malta, to ensure that the environment is given recognition in the Constitution.*'. The new article 9 of the Constitution with the added sub-article (2) reads as follows:

> ***9.*** *(1) The State shall safeguard the landscape and the historical and artistic patrimony of the Nation.*
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> *(2) The State shall protect the environment and its resources for the benefit of the present and future generations and shall take measures to address any form of environmental degradation in Malta, including that of air, water and land, and any sort of pollution problem and to promote, nurture and support the right of action in favour of the environment.*

Another important issue that Act No. XXII of 2018 did not extinguish was the issue of definition of the State's obligation to '*safeguard*'. Fortunately, the term itself is inclusive of state measures rather than prohibitionist of the same. Before the amendment, there was absolutely no indication in the Constitution of how the State was to honour such a crucial obligation as per this principle. After the amendment, the State's obligation to safeguard was widened to not only entail the landscape, and the historical as well as artistic patrimony, but also to include the protection and conservation of '*the environment and its resources*'. Interestingly, the notions of posterity and intergenerational equity were also introduced for the first time as the State's obligation is now clearly aimed for '*the benefit of the present of the present and future generations*'. Once again, such a statement raises the question of how the State is to follow through with this now-wider obligation, for the sake of the Republic, under the declared principle. With the amendment, this question is now partially, albeit vaguely, answered. Sub-article (2) states that besides safeguarding and protecting, the State also has an obligation to '*take measures to address any form of environmental degradation in Malta*'.

It can be presumed that the State is to '*take measures*' through its three organs: the legislature, executive, and judiciary. The legislature, that is Parliament, composed of the Office of the President of Malta and the House of Representatives, is to continue to legislate rules, that must be followed by natural and legal persons alike in Malta in favour of the environment. The Laws of Malta contain hundreds of environmental laws and regulations arising either out of domestic legislation enacted by the Maltese Parliament, or through the transposition of European Union law directives, or through the ratification of public international law instruments. Each of these are meant to provide a legal basis by which the various enforcement entities within the executive, that is government, may exercise jurisdiction over. The various courts and tribunals constituted by the Constitution and other special laws are to be given the jurisdiction and the competence to interpret the rules created by the legislator and adjudicate cases of an environmental, administrative, or constitutional nature.

The new sub-article (2) to article 9 of the Constitution inserted term '*environmental degradation*'. Such term can be construed to '*include*' degradation to the '*air, water and land*' of Malta and '*any sort of pollution problem*' affecting them. The legislator's use of the word 'include' implies that the Maltese legal drafters did not want to close the constitutional door on the scientific study of environmental degradation. This can be compared back to how the 1964 legal drafters opted for the nowadays-vague term 'landscape', which is still present in sub-article (1), because the mindset in regard to environmental degradation at the time was restricted to that. Since the term 'landscape' has been left in, it is to be considered in a different perspective namely as to what landscape means today, thereby giving way to the 'environment'. Another thing the legal drafters in 2018 wanted in their amendment was for the newly introduced sub-article (2) to be an indicative, rather than an exhaustive, provision. This is why they inserted the term 'including' so that not only do they manage to capture the contemporary mindset of environmental degradation of the '*air*', '*water*', and '*land*', but to leave it open-ended so that future legal drafters or the participants of a future constitutional convention will be able to add to it as the circumstances of the time may necessitate.

Lastly under sub-article (2), the State is obliged '*to promote, nurture and support the right of action in favour of the environment.*'. This means that the State must '*promote*' the right of its citizens to bring an action before Maltese courts whenever they perceive that the executive institutions are actively participating or passively allowing their environment to be degraded. This promotion of '*the right of action in favour of the environment*' is a further example of the State's duty to '*take measures*' through its judicial organ. Nurturing the '*right of action*' may mean that at some point, there may be the introduction of a *locus standi*, that is a legal base from which citizens can challenge any law that the legislature may enact, that government may enforce, or that the judiciary may interpret, that goes against the guiding principles declared under Chapter II of the Constitution. Such a *locus standi* would be in the form of an enforceable human right under Chapter IV entitled 'Fundamental Rights and Freedoms of the Individual' of the Constitution as distinct from the right to life, as shall be discussed. To '*support*' such a judicial right may mean that the State must take the side of the citizens that exercise it, by providing them with protection as the weaker parties to cases against big businesses and corporations as well as affluent lobby groups with a wealth of resources at their disposal by which they might seek to stifle such a right. As it stands, the principle in article 9 of the Constitution is non-justiciable, meaning that it may not form the subject-matter of an action for its enforcement by a person against the Maltese State before a Maltese court or tribunal because of the following article 21 of the Constitution:

> ***21.*** *The provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country* and *it shall be the aim of the State to apply these principles in making laws.*

Mangion refers to these declared principles as '*second generation*' rights, meaning that they are fundamentally of an economic, social, and cultural nature. These are to be contrasted with human rights proper ('*first generation*' rights) under Chapter IV of the Constitution. While the former principles are unenforceable in court, the latter rights are, and fiercely so.

Giovanni Bonello, in his article entitled '*Misunderstanding the Constitution: A battery of pointless 'principles'*?', for the 7 January 2018 issue of the Times of Malta, states that the principles declared under Chapter II of the Constitution were stripped of their potency. This took place when the Constitutional Court declared them to be unenforceable and reduced them to little more than guidelines in 1977, during the ten-year dispute between the government and Maltese doctors and subsequent strike by the latter. In the concluding paragraph to his contribution, Bonello states the following:

> *There you have it – a potent tool for ensuring good governance has languished, debased and unused, for over half a century. Thank those courts which dismissed these principles as valueless and scrap.*

Tonio Borg replied to Bonello's '*excellent piece*', in the 14 January 2018 issue of the Times of Malta entitled '*Chapter II: a proper interpretation of its principles*'. In the introductory paragraph, Borg regrets the opinion sometimes embraced by Maltese courts, including the Constitutional Court, that:

> *Chapter II is merely a list of pious hopes not enforceable in a court of law, a mere cosmetic chapter even though contained in the highest law of the land.*

Instead, Borg writes, that '*Chapter II and Chapter IV of our Constitution are therefore inextricably intertwined and do not have a separate existence.*'.

Mangion explains that the '*non-actionable*' principles under Chapter II of the Constitution are entrenched in the first tier and therefore, they can be added to or '*legislatively removed*' by an absolute majority in the House of Representatives. Meanwhile, the rights and freedoms under Chapter IV of the Constitution are entrenched in the second tier and therefore, require a House majority of two-thirds. Borg agrees that declared principles are non-enforceable as substantive provisions because they are legal principles acting as the basis for of legal reasoning. The question now is what the implications would have been had the parliamentarians decided to entrench the right to a healthy environment as a 'full-blown' human right as other jurisdictions have done. The door is not yet closed on such a prospect as the addition of an '*express locution*' for judicial enforceability of environmental rights remains in discussion before the possible proclamation of a second republic. This statement is something Borg does not agree with, having concluded his piece with the following:

> *There is no need for a Second Republic to adjust this interpretation. What is needed is men of good will who avoid a positivist approach to law. Too many incidents in the past based on this view have distorted the true meaning of the Constitution. … The Constitution is a living instrument, but it remains a document. It can only be brought to life though constructive interpretation by fearless men and women who give a proper meaning to words aridly found in the Constitution.*

Therefore, the only constitutional remedy available to a plaintiff against the Maltese State is to bring an action under article 33 of the Constitution entitled 'Protection of right to life':

> ***33.*** *(1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence under the law of Malta of which he has been convicted.*
> *(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in such cases as are hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this article if he dies as the result of the use of force to such extent as is reasonably justifiable in the circumstances of the case -*
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> *(a) for the defence of any person from violence or for the defence of property;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) for the purpose of suppressing a riot, insurrection or mutiny; or*
> *(d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.*

Maltese courts have traditionally been reluctant to accept an argument for the enforcement of the right to a healthy of environment under the right to life. However, following a number of Continental European judgments, the need has arisen for Maltese courts to consider making a more flexible interpretation of the right to life to cater for environmental rights. An interesting development took place before Maltese courts in February 2019 relating to a number of class action lawsuits brought by workers who suffered harm at their workplace as a result of exposure to asbestos, a hazardous material, as well as family members of workers deceased because of the same. Whereas in prior judgments, Maltese courts had awarded damages in tort, within the limits allowed under that institute of civil law, 2019 marked the first time that a Maltese court, the First Hall of the Civil Court in its Constitutional Jurisdiction presided over by Mr Justice Joseph R. Micallef, awarded great constitutional damages. This was possible because of a flexible interpretation of article 33 of the Constitution and article 2 of the European Convention on Human Rights, both relating to the right to life. This thinking and reasoning of the Court is heavily inspired by the jurisprudence of the European Court of Human Rights.

The ideal constitutional remedy that the author envisages is one where the spirit, if not the letter, of the non-justiciable article 9 from Chapter II of the Constitution is replicated in a new article either under Chapter IV of the current Constitution or its equivalent in a new constitution. This would eliminate the need for the plaintiff/s in an action or class action against the State to prove the, at times unclear, link between environmental damage and the right to life. As it stands, if the plaintiff fails to prove that State action or inaction is in fact breaching their right to life, they risk having the case thrown out by the Court. It would also eliminate the (over)stretching of the right to life by virtue of their being a specific human right to a healthy environment. Within the current constitutional framework, the author would include something along the lines of the following, placed right after article 33 on the right to life to symbolise the complementary and supplementary relationship between the two rights:

> **33A.** (1) No person shall, through any form of environmental degradation or pollution problem, be deprived of his right to live in a healthy environment.
> (2) For the purposes of this article, the term "environment" shall include -
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> (*a*) The air;

(*b*) The water;
(*c*) The land; and
(*d*) Living and non-living resources.

(3) No person shall be deprived of his right to enjoy the historical and artistic patrimony of the Nation.

This would mean that the individual would have a right of action in favour of the environment directly under this hypothetical 'article 33A' on the right to a healthy environment should the State fail in its obligation to protect and conserve the environment, as in article 9(1), without having to prove the causal link between the State's active or passive failure and the breach of the right to life under article 33.

Article 2 of the European Convention on Human Rights on the right to life states the following:

ARTICLE 2
Right to life
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

From this one can see that article 33 of the Constitution is almost an exact replica of article 2 of the ECHR. A great part of the argumentation on the environment before the ECtHR takes place under the right to life. Section I of the ECHR on rights and freedoms, on which Chapter IV of the Constitution of Malta is based, also lacks a specific human right pertaining to the environment. A possible reason for this is that the right to life has been interpreted flexibly to include the right to a healthy environment. If one were to keep on adding text to human rights one runs the risk of making them exclusive rather than inclusive.

One might say that Malta has made a 'Great Leap Forward' in human rights. Starting from the Constitution of Malta of 1964 with a noble declaration of principles under Chapter II and a 'Bill of Rights' under Chapter IV, the latter being fashioned after the time-tested ECHR, the first republic is already firmly with the European fold. However, an enforceable right to a healthy environment is a must, either as part of the continuing evolution of the first republic, or as part of a metamorphosis into a second, greener, republic. Given that a lot of the legal framework for a green republic is in place, there might not even need to be a second republic for Malta to be 'crowned' with a right to a healthy environment in its Constitution. What matters to the individual is the presence of a legal base from which they can enforce their precious right. This looks and seems to be achievable without the need for a second republic as what is needed for the most part is stronger enforcement procedures.