

# **Legal environment and space of civil society organisations in supporting fundamental rights and the rule of law**

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# 1 Civic space developments in 2021

<b>1.1 Protection from Strategic Lawsuits Against Public Participation</b>	
Area	Safe Space & protection
Topic	Strategic Lawsuits Against Public Participation (SLAPPs)
Impact	Major

In Malta, journalists have long called for protection from Strategic Lawsuits Against Public Participation (SLAPP), which violate the right to free speech and burden them with intimidation lawsuits. In recent years, several Maltese journalists have been confronted with SLAPPs or threats of SLAPPs, as was the notorious case of the leading investigative journalist Daphne Caruana Galizia assassinated in 2017. To date, legal threats and actions continue against independent journalists in Malta, in particular against those who have investigated her assassination and followed up on her investigations.<sup>1</sup>

In March 2021, the Media Freedom Rapid Response and other media organisations submitted a Public Inquiry into the assassination of Daphne Caruana Galizia, urging Malta to introduce anti-SLAPP legislation.<sup>2</sup> The organisations noted the delays of the Maltese Government in establishing a public inquiry that is fully compliant with Malta's obligations under Article 2 of the ECHR. Article 2 sets out the State's positive obligation to "*put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.*"<sup>3</sup> The European Parliament confirms that Maltese authorities must ensure the protection and the independence of journalists and whistle blowers "*at all costs and at all times,*" and that Malta needs long-term legislative and policy measures to ensure accountability of politicians and officials, in particular as regards the prevention and sanction of threats.<sup>4</sup>

During a press conference on 1 September 2021, Prime Minister Robert Abela announced the Maltese government's intention to introduce anti-SLAPP

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<sup>1</sup> The Media Freedom Rapid Response, (2021) [Public Inquiry into the assassination of Daphne Caruana Galizia](#), 31 March 2021.

<sup>2</sup> The Media Freedom Rapid Response, (2021) [Public Inquiry into the assassination of Daphne Caruana Galizia](#), 31 March 2021.

<sup>3</sup> The Media Freedom Rapid Response, (2021) [Public Inquiry into the assassination of Daphne Caruana Galizia](#), 31 March 2021, Paragraph 10.

<sup>4</sup> The European Parliament, (2021) [Assassination of Daphne Caruana Galizia and the rule of law in Malta](#), 29 April 2021, paragraphs 13, 15.

legislation.<sup>5</sup> In a later joint press conference with EU Commission President Ursula von der Leyen, Abela confirmed that the Maltese government is working at the “*constant and continuous process to strengthen democracy and the institutions that protect the rule of law*” and that a national anti-SLAPP Bill will be presented in the “*coming days*”.<sup>6</sup>

In a plenary session on 1 November, the Prime Minister was asked whether there were any updates since his last public remarks on the matter. In his reply, Abela claimed that the draft preparation is at an advanced stage and a Maltese bill will be presented in Parliament as soon as possible.<sup>7</sup>

<b>1.2 Removal of online court judgements obstructs right of access to information</b>	
Area	Freedom of expression and information
Topic	Access to information; Online content removal
Impact	Major

In December 2021, Maltese civil society expressed concern over Legal Notice 456 of 2021 titled Online Publication of Court Judgements (Data Protection) Conferment of Functions Regulations<sup>8</sup>. The legal notice gives the court’s director-general exclusive discretion to decide whether a person has legitimate grounds to have court judgements removed from the database. In a letter, seven media organisations and NGOs voiced their criticism and asked for the withdrawal of the Legal Notice, “*as it denies ordinary citizens the right to know and inhibits access to information that is in the public interest. It also raises serious questions concerning the separation of powers between the judiciary and executive branches of government.*”<sup>9</sup>

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<sup>5</sup> The Government of Malta, (2021) [LIVE | Il-Prim Ministru Robert Abela u l-Ministru Roderick Galdes iniedu l-iskema New Hope](#), 1 September 2021.

<sup>6</sup> The Government of Malta, (2021) [Press Conference addressed by the Prime Minister of Malta Robert Abela and the President of the European Commission Ursula von der Leyen](#), 16 September 2021.

<sup>7</sup> The Parliament of Malta, (2021) [Parliamentary session](#), 1 November 2021.

<sup>8</sup> The Parliament of Malta, (2021) [Legal Notice 456 on Online Publication of Court Judgements \(Data Protection\) Conferment of Functions Regulations](#), 23 November 2021.

<sup>9</sup> The Daphne Caruana Galizia Foundation, Lovin Malta, The Malta Independent, Access Info Europe, Times of Malta, The Shift, Newsbook, Malta Today, Institute of Maltese Journalists (IGM), (2021) [Statement on Legal Notice 456 of 2021](#), 2 December 2021.

The Letter refers to the principle of publicity of court proceedings, citing the obligations in both Malta’s Constitution and the European Convention on Human Rights, to ensure that all trials should be public, including the issuing and publicity of court judgments. The signatory organisations claim that Article 4 of Legal Notice 456 on ‘Manner of exercise of the right of erasure’ fails to define the legitimate circumstances and criteria in which the court’s director-general may choose not to publish court judgments online.<sup>10</sup> The Maltese government has addressed these concerns by enacting guidelines on the Application of Legal Notice 456 of 2021.<sup>11</sup> Section 3 of the Guidelines, titled ‘General Guidance - Balance between Rights and Obligations’, provides defined criteria to consider when assessing whether a request of removal or the anonymisation of a judgment from the online system is justified.<sup>12</sup> Ultimately however, the guidelines are not legally binding, and decisions remain at the director-general’s full discretion, with no provision for public notification or review of approved removal requests.

<b>1.3 A proposed legislation regarding public collections and charity shops has been repealed</b>	
Area	Financing framework
Topic	Funding landscape; charitable status
Impact	Minor

In April 2021, in a press release, NGO Repubblika expressed its concern to the Maltese government on two Legal Notices concerning the use of public collections and charity shops by voluntary organisations. Repubblika argues that because of these rules, voluntary organisations “*are controlled by the state and can collect funds only if they have the state’s permission, while the state will know who is donating money to whom*”.<sup>13</sup>

The subsidiary legislation was introduced to contribute to transparency in the voluntary sector and counter money laundering practices. In detail, Legal Notice 371 Voluntary Organisations (Public Collections) Regulations focuses on tracking

<sup>10</sup> The Daphne Caruana Galizia Foundation, Lovin Malta, The Malta Independent, Access Info Europe, Times of Malta, The Shift, Newsbook, Malta Today, Institute of Maltese Journalists (IGM), (2021) [Statement on Legal Notice 456 of 2021](#), 2 December 2021.

<sup>11</sup> eCourts, (2021) [Guidelines on Right to be Forgotten](#), 7 December 2021.

<sup>12</sup> eCourts, (2021) [Guidelines on Right to be Forgotten](#), 7 December 2021.

<sup>13</sup> Repubblika, (2021) [Repubblika refers to the insolent statement of the Commissioner for Voluntary Organizations who today said that he will not keep the fare he introduced with Regulations in September 2020 without consulting anyone](#), 5 April 2021.

money entering and leaving the organisation, by registering collectors with the voluntary organisation and including more checks in the public collection process.<sup>14</sup> For instance, Article 6 states that individuals or organisations wishing to make a public collection need to have an identification tag. The voluntary organisation has to request the tag in the name of the collector, and will only receive it after the approval of the Commissioner for Voluntary Organisations. Legal Notice 390 of 2020 on Voluntary Organisations (Charity Shops) Regulations lays down the rules for voluntary organisations using charity shops as a means of raising money and serving the public benefit.<sup>15</sup> Article 4(1) on "General Requirements" provides that a voluntary organisation has to register a charity shop with the Commissioner for Voluntary Organisations, where the Commissioner has "*the discretion to authorize or refuse such registration*".<sup>16</sup>

In an official letter to Prime Minister Robert Abela signed by the president of Repubblika, the organisation expresses concern about the restrictions and bureaucracy introduced by these new regulations.<sup>17</sup> A document attached to the letter analyses the regulations and gives practical recommendations to improve the bills. In particular, Repubblika argues that the prior registration by the Commissioner for Voluntary Organisations obstructs the automatic right to collect from the public, empowering the government to neutralise NGOs and silence critics. Repubblika, therefore, asked the Maltese government to repeal the legislation.<sup>18</sup>

In November 2021, after various consultations with the Malta Council for the Voluntary Sector (MCVS) and voluntary organisations, the Office of the Commissioner for Voluntary Organisations issued a press release announcing new amendments to Legal Notices 371 and 390.<sup>19</sup> Legal Notice 424 on Public Collections, replacing Legal Notice 371, repeals the collector's obligation to be registered with the Commissioner before making a public collection.<sup>20</sup> Similarly, Legal Notice 425 on Charity Shops amends the previous Legal Notice 390 by

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<sup>14</sup> The Parliament of Malta, (2020) [Legal Notice 371 on Voluntary Organisations \(Public Collections\)](#), 15 September 2020.

<sup>15</sup> The Parliament of Malta, (2021) [Legal Notice 390 on Voluntary Organisations \(Charity Shops\)](#), 9 October 2020.

<sup>16</sup> The Parliament of Malta, (2021) [Legal Notice 390 on Voluntary Organisations \(Charity Shops\)](#), 9 October 2020, Article 4(1).

<sup>17</sup> Repubblika, (2021) [Letter to the Prime Minister: You have made rules that stifle the freedom of volunteering. You need to withdraw them immediately](#), 11 April 2021

<sup>18</sup> Repubblika, (2021) [Letter to the Prime Minister: You have made rules that stifle the freedom of volunteering. You need to withdraw them immediately](#), 11 April 2021.

<sup>19</sup> Office of the Commissioner for Voluntary Organisations, "[A collective win for the voluntary sector" - the new Legal Notices for Public Collections and Charity Shops are published](#)", 15 November 2021.

<sup>20</sup> The Parliament of Malta, (2021) [Legal Notice 424 on Voluntary Organisations \(Public Collections\)](#), 9 November 2021.

diminishing the role of the Commissioner for Voluntary Organisations and giving more discretion to the voluntary organisations.<sup>21</sup>

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<sup>21</sup> The Parliament of Malta, (2021) [Legal Notice 425 on Voluntary Organisations \(Charity Shops\)](#), 9 November 2021.

## 2 Examples of civil society contributions to the rule of law

<b>2.1 Strengthening Access to Justice for Improved Human Rights Protection</b>	
Topic	Assisting victims in accessing judicial and non-judicial mechanisms of justice

In January 2021, NGO Aditus Foundation introduced the project “Strengthening Access to Justice for Improved Human Rights Protection” supported by the Active Citizens Fund (ACF), part of the EEA Financial Mechanism 2014-2021.<sup>22</sup>

As its title suggests, the initiative aims to improve access to justice for individuals who are victims of human rights violations. Aditus acknowledges that despite Malta having a relatively strong human rights framework, the protection offered to vulnerable or marginalised groups is rather weak. Thereby, the venture seeks to address the shortcomings in Malta’s judicial system relating to the inefficiencies of the legal aid scheme, the judicial caseload, and the lack of expertise as regards the tribunals hearing human rights cases. The project consists of three stages: (i) The first stage comprises the formulation of “SMART” recommendations, developed through a survey requesting stakeholders from civil society, the government, and the legal sector, to share their experiences regarding access to justice for marginalised groups. (ii) In the second stage, the recommendations offered will be the basis on which Aditus will organise a series of bilateral meetings with the stakeholders, who have the power to influence the relevant law and policy making. In addition, a number of editorials, newspaper articles, and blog posts will be published in order to create a culture of understanding on the right to access to justice. (iii) The final stage is a continuous process of monitoring and evaluating the “advocacy database,” a platform listing all the existing legal and policy frameworks that need “*to be influenced*” to achieve the project’s mission. The stakeholders relevant to each legal or policy area will be listed as well, offering constant and updated information on the Advocacy process.

The program is projected to run until December 2022.<sup>23</sup>

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<sup>22</sup> Aditus, (2021) [Strengthening Access to Justice for Improved Human Rights Protection](#), January 2021.

<sup>23</sup> For more information, see the project web page on [Strengthening Access to Justice for Improved Human Rights Protection - aditus foundation](#).

## 2.2 The Public Interest Litigation Network (PILN)

Topic	Assisting victims in accessing judicial and non-judicial mechanisms of justice/ Monitoring the legality and proportionality of laws, measures and practices; triggering the judicial review of laws, measures and practices and the enforcement of rulings; strategic litigation
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In September 2021, the Daphne Caruana Galizia Foundation launched the Public Interest Litigation Network (PILN), Malta's first non-governmental access to justice initiative.<sup>24</sup> PILN is a network of lawyers who strive to increase awareness of policy and legal systems based on the rule of law and respect for human rights. By highlighting the benefits of a system based on the rule of law and respect for human rights, the project tries to divert from the current culture of "*patronage, clientelism, and abuse of public office.*"<sup>25</sup>

The project ensures access to justice for victims of discrimination, human rights violations, abuse of power, and state collusion in criminal activity. Public interest litigation lawyers establish a supportive framework of legal cases to command institutional reform and accountability. Besides national courts, they will resort to regional and international mechanisms, providing further avenues for redressing human rights violations in Malta.<sup>26</sup> The organisation consists of 12 representatives, including a Governance Committee composed of five members.<sup>27</sup>

## 2.3 NGOs request involvement in decision making

Topic	Contributing to law and policy making (including involvement in public consultations)
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On 17 June 2021, a group of civil society organisations and NGOs addressed a letter to the prime minister, expressing concern about Malta's recent lack of

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<sup>24</sup> The Daphne Caruana Galizia Foundation, (2021) [Malta's first non-governmental access-to-justice initiative](#), 23 September 2021.

<sup>25</sup> The Daphne Caruana Galizia Foundation, (2021) [Facebook publication](#), 23 September 2021.

<sup>26</sup> For more information, see the project web page on [Malta's first non-governmental access-to-justice initiative](#).

<sup>27</sup> The Daphne Caruana Galizia Foundation, (2021) [Facebook publication](#), 24 September 2021.

engagement and commitment to its obligations as a member of the Open Government Partnership (OGP).<sup>28</sup>

The Partnership, consisting of national, local, and civil society actors, cooperates to develop concrete two-year action plans, comprising commitments on various issues, such as digital governance, protection of civic space, and corruption.<sup>29</sup> On 7 February 2020, the Open Government Partnership notified the Maltese government of its lack of compliance with the Partnership's obligations to submit a complete version of the Action Plan with all requirements requested. After the lack of submission in 2017, and the incorrect submission in 2020, the Partnership placed Malta under procedural review by the OGP Criteria and Standards Committee.<sup>30</sup>

In the June letter, the NGOs discuss the shortcomings in the content of Malta's 2018-2020 Action Plan.<sup>31</sup> Specifically, they question whether there is a new Ministry responsible for this Partnership to comply with its obligations, as the previous responsible Ministry discontinued this role. The organisations further argue that Malta's final 2018-2020 Action Plan does not acknowledge civil society input, thereby undermining the Partnership's goal of citizen empowerment. The civil society organisations recommend the government initiate a permanent multi-stakeholder forum as a minimum requirement for OGP participation. This forum can improve civil society engagement, thereby succeeding basic consultation processes.

In a final comment, the undersigned group of organisations offered Malta their assistance to recommit to the OGP process and address the recommendations set out by the OGP Independent Reporting Mechanism, implementing them in the co-creation of the forthcoming 2021-2023 Action Plan.

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<sup>28</sup> The Daphne Caruana Galizia Foundation, Aditus Foundation, SOS Malta, Integra Foundation, Kopin and Repubblika, (2021) [Letter: Government of Malta's participation in the Open Government Partnership](#), 17 June 2021

<sup>29</sup> Open Government Partnership, (2022) [Our Process](#), 2022.

<sup>30</sup> Chief Executive Officer Open Government Partnership, (2021) [Letter: Under Review](#), 7 February 2020

<sup>31</sup> Open Government Partnership, (2019) [Malta Action Plan 2018-2020](#), 7 January 2019.

## 3 Other relevant developments

### 3.1 The amendment of the Protection of the Whistleblower Act

On 18 December 2021, Act No. LXVII of 2021 titled the Protection of the Whistleblower (Amendment) Act, 2021 was published in the Government Gazette.<sup>32</sup> The Act was first introduced on 15 November 2021 and was passed by the House of Representatives at Sitting No. 530 of 14 December 2021 to address Malta's lack of transposition of the EU Whistleblowers Directive (2019/1937).<sup>33</sup>

Act No. LXVII of 2021 amends the Protection of the Whistleblower Act (CAP 527 of the Laws of Malta)<sup>34</sup>, extending protection to other categories of people and introducing a public disclosure procedure.<sup>35</sup> Under the whistleblowers' regime fall not only the employees who wish to disclose information, but also the shareholders, and the persons in a pre-contractual relationship with the employer. Article 4 will now extend legal protection to facilitators, third persons connected with the reporting persons, and people who offer legal aid to the whistleblower. A new section on Public Disclosure procedures is added, introducing Article 18A. According to Article 18A, a disclosure which is made publicly available falls under the protection of the whistleblowing framework, provided that there is a risk of retaliation or a low prospect of the breach being effectively addressed, or an emergency situation which relates to the public interest.<sup>36</sup> New Article 21A states that the whistleblowing units and the whistleblowing reporting officers "*shall keep records of every report received*" and regulate the ways such records should be carried out.

On 15 December 2021, three days before the new bill was published in the Government Gazette, the NGO Repubblika called on the government to start a broad, transparent, and effective consultation on reforms to protect whistleblowers.<sup>37</sup> After a thorough analysis, the NGO maintains that at first sight the new law may be considered an improvement to the current system,

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<sup>32</sup> The Parliament of Malta, (2021) [Protection of the Whistleblower \(Amendment\) Act](#), 18 December 2021.

<sup>33</sup> [Directive \(EU\) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law](#), OJ 2019 L 305.

<sup>34</sup> The Parliament of Malta, (2013) [Protection of the Whistleblower Act](#), 15 September 2013.

<sup>35</sup> The Parliament of Malta, (2021) [Protection of the Whistleblower \(Amendment\) Act](#), 18 December 2021.

<sup>36</sup> The Ministry for Justice, Equality and Governance, (2021) [Whistleblower's Act](#), press release, retrieved 14 December 2021.

<sup>37</sup> Repubblika, (2021) [Malta: New law to protect whistleblowers a "Trojan Horse"](#), 15 December 2021.

however, loopholes pose a significant threat to trust and confidence in whistleblower protections. For instance, the EU Directive clearly states that the burden of proof is reversed, so that the employer will be required to show any adverse treatment is not connected to the reporting of wrongdoing. However, new Maltese Article 2(vi)(q) provides for the qualified exclusion of retaliation where it is "*justifiable for administrative or organisational reasons.*" An exception of this kind is easy to find for most employers, thus weakening the protection provided by the entire Act.<sup>38</sup>

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<sup>38</sup> Repubblica, (2021) [Malta: New law to protect whistleblowers a "Trojan Horse"](#), 15 December 2021.