

ELSA MALTA'S CONSTITUTIONAL LAW

MIND MAPS



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ACKNOWLEDGEMENTS

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The logo for ELSA, featuring the word 'elsa' in a lowercase, bold, blue serif font.

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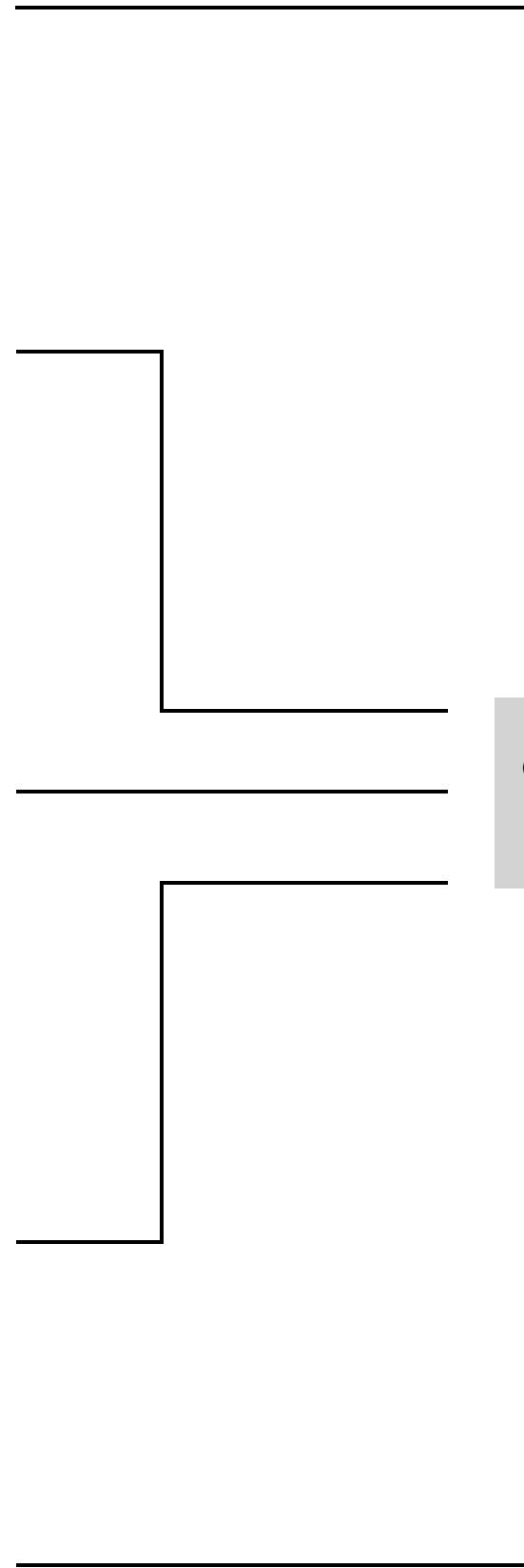
Conventions are rules of political practice which are regarded as binding by those to whom they apply, but which are not enforceable in a court of law

Dicey defines conventions as habits, understandings or practices which though they may regulate the conduct of officials are not in reality laws at all, since they are not enforced by the courts

There is no single authoritative way of recognising and interpreting a convention, but it is the behaviour of the politicians and those who are involved in the workings of the constitution that are the main guide

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Statemen probably observe conventions, as they hope to retain the favor of the electorate



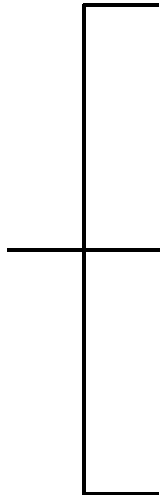
Conventions (Part 1)

Conventions

Essential for the proper functioning of the constitution as they bring about constitutional development without formal changes to the law

In the UK conventions are largely unwritten

In Malta conventions are no longer unwritten, but instead they are incorporated in the constitution



If a convention has been observed and accepted as binding over a long period of time, it is hard to dispute its existence

Those who operate the constitution accept the convention as binding

There must be good political reason for the convention

Sir Ivor Jennings proposed two requirements for the creation and recognition of a valid convention

Conventions (Part 2)

Some conventions mentioned in The Constitution of Malta

Appointment and removal of the PM and ministers. The president appoints PM whoever commands the majority in the House which is usually by convention the leader of the winning party

Condition the continuance of government in office. Matters of importance may be treated as votes of confidence/no confidence Eg: 1998, Mintoff did not want to vote in favor of the Cottonera project and Sant treated this as a vote of no confidence, and thus advised president for a dissolution

Presidents have power to dissolve parliament, if after three days of the PM suffering the vote of no confidence, he does not resign or advise for a dissolution (UK PM removed or parliament dissolved immediately affect)

The President may refuse the dissolution, if not in the best interest of Malta and government may be carried on without the dissolution. Only if one can command the majority in the house

Ministers can only be appointed from House is a conventional rule subject to change Eg: Mintoff appointed two individuals from outside parliament to his cabinet. Cabinet can invite anyone for its sittings.

The manner in which executive authority is conducted. Ex: Presidential pardon is exercised on the advice of the PM and Cabinet. whether the president has obtained this advice or not is not something in which the courts may interfere

Monarch/presidential ascent to pause bills without delay as stated in the constitution. This is a convention since if the President were to refuse, there is no way that he will be charged in court. (State thrown in emergency)

In the principle of collective responsibility, all cabinet ministers must observe the confidentiality of the cabinet's discussions and support the decisions as a united whole. A minister, who does not support government policy by convention, resigns

In the Principle of the Individual Ministerial Responsibility, a minister is accountable to parliament regarding the administration of his ministry. If this is not upheld, the conventional character of his resignation depends on whether PM continues to support him and if his resignation would be damaging to the party

The most important unwritten convention in Maltese constitutional law is that when the Prime Minister gives advice on the appointment of members of the authorities established by the Constitution, he will advise to appoint half the members from amongst persons who enjoy trust of the Opposition; and a consensus is sought for the appointment of chairperson



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Who can vote? Maltese citizens 16 years of age and over, whose name is listed in the Electoral Register and have resided in Malta for 6 months in the past 18 months

Unilateral

Maltese Parliament

Parliament = President + House of Representatives (Section 51 of the Constitution)

The composition of the House of Representatives consists of an odd number of representatives which is divisible by the number of electoral divisions

1

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4

Maltese Electoral System (Part 1)

5

Proportional Representation Single Transferrable Vote (PRSTV)

Our electoral system is that of the PRSTV (Section 56 (1) of the Constitution)

In the PRSTV system, voters express preference by numbers '1', '2', and so on. This allows the electorate to choose candidates from different political parties.

After voting ends, the Electoral Commission counts the number of valid votes in each constituency.

To win a seat in the House of Representatives, a candidate must acquire a specified quota of votes.

This quota is determined by a formula being; $[\text{votes cast divided by (no of members to be elected from district + 1)}] + 1$.

If the quota is reached on the first count, the candidate is elected. (Surplus of votes are transferred to candidates who were ranked next). Then the second count is made. This goes on until 5 candidates are elected in every district

If 5 candidates are not elected/no candidate obtains electoral quota - The candidate with the least number of votes is eliminated and their votes are transferred to the candidate next ranked choice

When a ballot paper no longer indicates a preference for a remaining candidate, then the vote is no longer transferable and is unused in further counting

The PRSTV system gives proportional results most of the time. The exception being in the 1981 elections (PN won the popular vote while PL won the seats)

After the 1981 election, the Corrective Mechanism was agreed upon which would ensure that the party who attained the majority of valid votes cast would obtain the majority of seats in Parliament. This corrective mechanism would add on as many seats necessary should the party who attained the most votes, still did not attain majority in parliament.

It was agreed that the majority of seats is given to the party that polled the absolute majority of valid votes cast

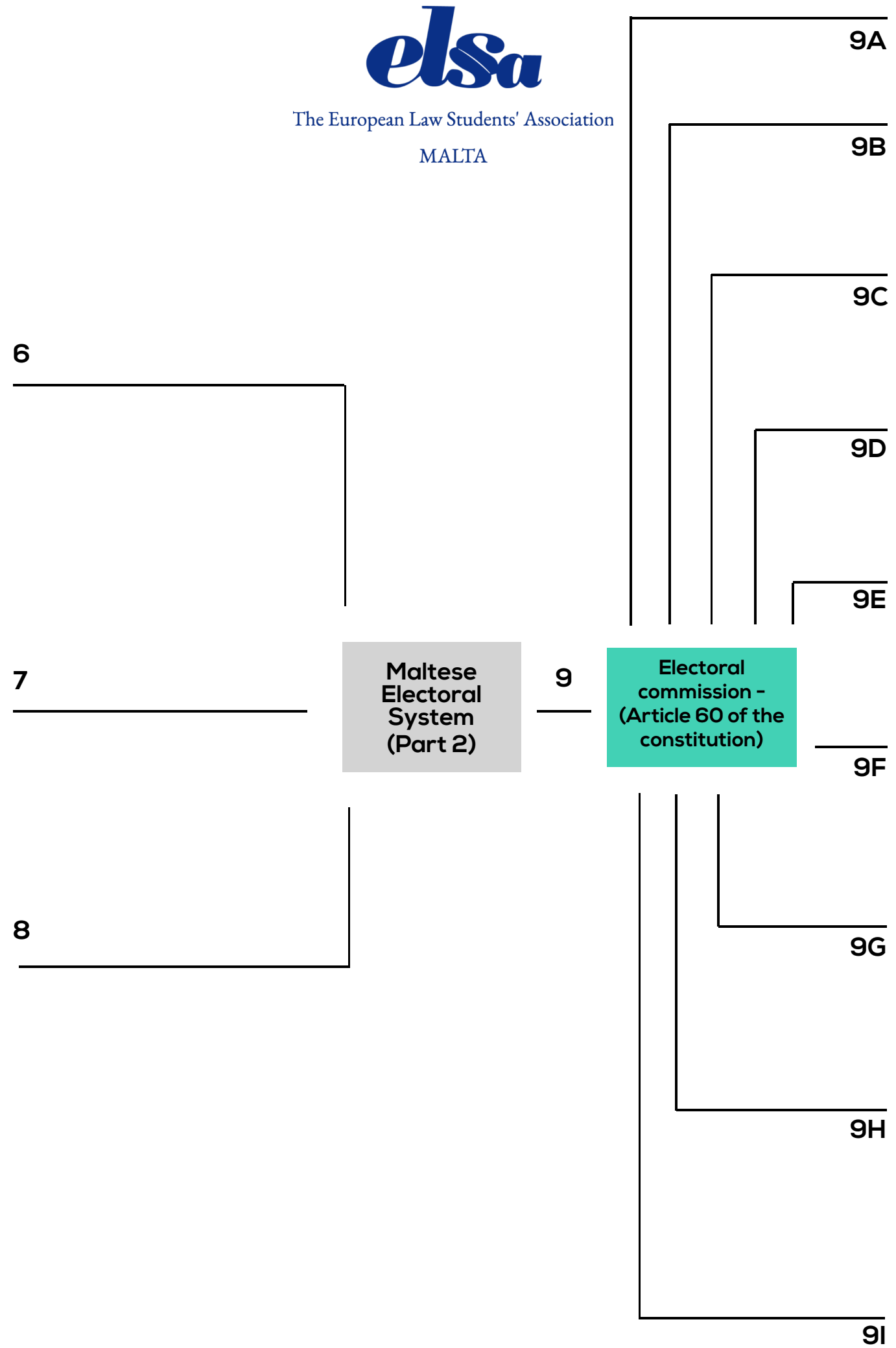
If a 3rd party contests, there might be a situation where no party obtains an absolute majority of votes. Therefore, the 1996 constitutional amendments provided further protection against this

In 2007 a corrective mechanism was introduced whereby the difference in first preference votes between parties in Parliament when only two are represented in the House should be reflected in the number of parliamentary seats. This mechanism can work in favour of the winning or losing political party

The composition of the House of Representatives consists of an odd number of representatives which is divisible by the number of electoral divisions

Amendments in the 1974 Constitution ensure that the parliament would not be even-numbered due to our bi-party system

At the moment, Malta is divided into 13 electoral divisions, each returning 5 members. Therefore parliament is made up of 65 members



Sees that district boundaries are fairly drawn

Sees that election takes place fair and honestly

Check that all eligible to vote are allowed to do so and that everyone votes out of their free will

Districts are not drawn too small (as in such cases 500 votes for example, would be enough to elect a candidate)

Must be independent and autonomous (section 60 (9))

Can suspend election if there is reasonable ground to believe that there was any corruption/foreign interference. This is then referred to the Constitutional court

Any registered voter can within three days from official publication of electoral result contest validity of election in one, some or all districts

The Constitutional Court has full power to annul a general election

Other ways that the constitution ensures fairness in our electoral system;

Ballot paper is secret

Vote is personal

Hence, everything is either done personally or in the name of the President

Malta, being an ex-British colony, has adopted a similar constitutional framework with respect to the Royal Prerogative of the Monarch in the UK

Constitutionally the President is both the Head of State and Government

1

Office is nominative

President is appointed to office by a resolution of the House of Representatives for a period of 5 years. This Resolution must be supported by at least two thirds of all the members of the House

2

Although constitutionally term in office is that of 5 years, the President can also be removed before 5 year term. but only for proved inability or incapacity or misbehavior and only by a two thirds majority

3

More often than not, The President will follow the advice of the PM as should this not take place (art 85)

A situation exists where in certain areas the PM has stronger authority than the President and vice versa

4

Although Article 78(2) holds that :The executive authority of Malta shall be exercised by the President, either directly or through officers subordinate to him, in accordance with the provisions of this Constitution in reality, the President does not have a real exercise executive powers

President appoints ministers subordinate to him

It is PM who has the central political role of in leading his Cabinet and Government

6

President (Part 1)

Neither the House of Representatives not President alone constitute parliament. A Bill passed by the House doesn't not become law until assessed by President as per Section 72 of the Constitution of Malta

5A

This assent is required ad validatem. Non-assent is very rare, however when this takes place, a constitutional crisis would emerge but it is difficult legally to challenge such decision in Court

7

He can be removed from office by a resolution supported by 2/3 of all members of the House and another President would then be appointed to assent the bill

The President could, if he so wishes, be absent from Malta temporarily, and An acting President would be appointed in order to assent the Bill and the previous president would then resume functions of office. This depends however on co-operation on the part of the President

The Speaker of the House is tasked with regulating this debate and, in some cases, resolving disputes between Members

5B

The President's residual prerogative can be exercised either personally on his own discretion or by taking the advice of the PM

5

Article 85(1) States that the President in the exercise of his functions shall act in accordance to cabinet's advice except when President acts in accordance to the Constitution or any other law

Example: President has the power to exercise a prerogative of mercy to grant a pardon to a convict in person but only when advised to do so by cabinet

Example: It is the prime Minister who advises President to dissolve Parliament for a general election

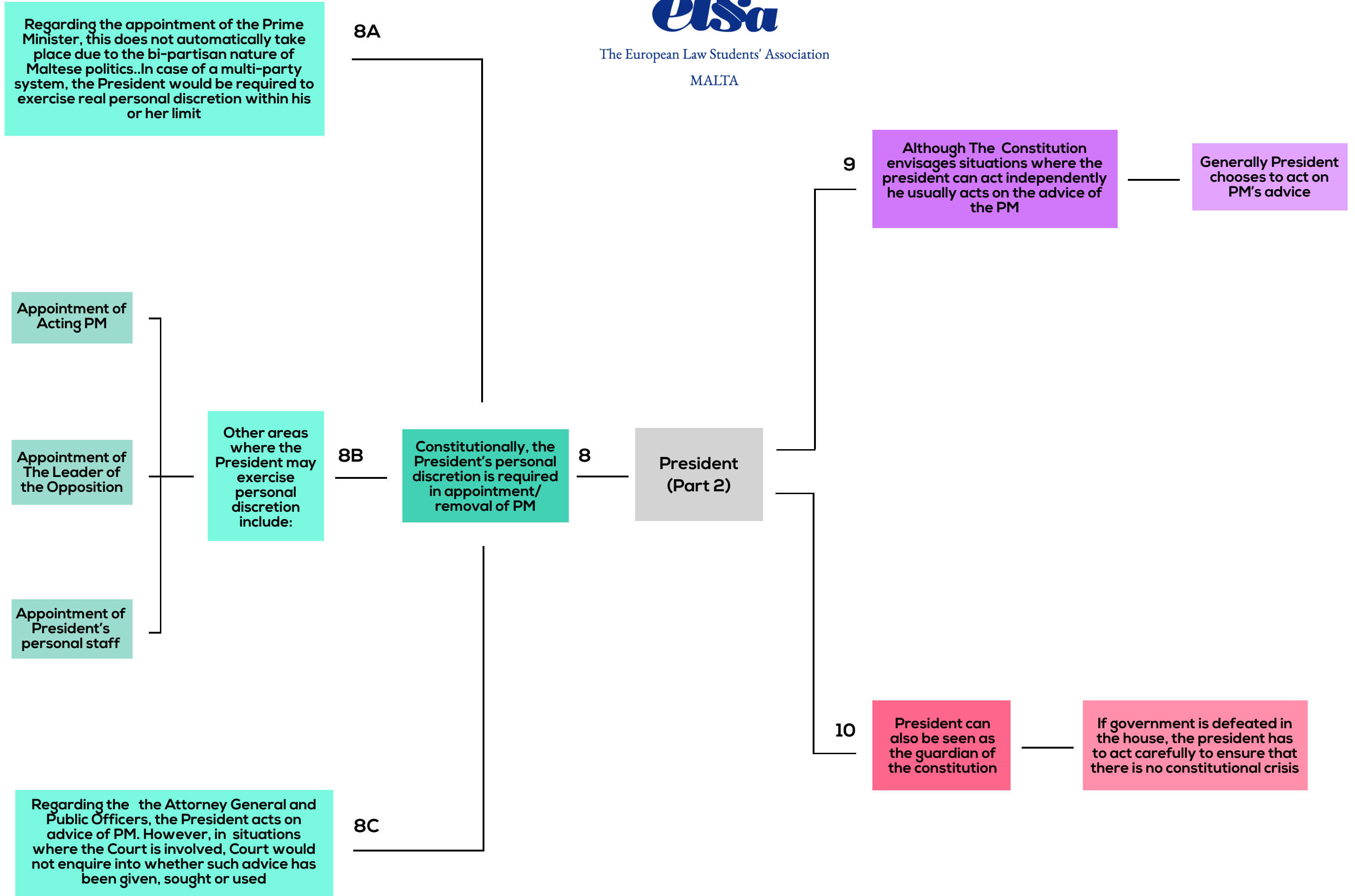
Under 76(5)(a) President has power to dissolve parliament following a vote of no confidence- If within 3 days the PM has not resigned, or advised dissolution (The Constitution here makes the president's authority stronger than the defeated PM)

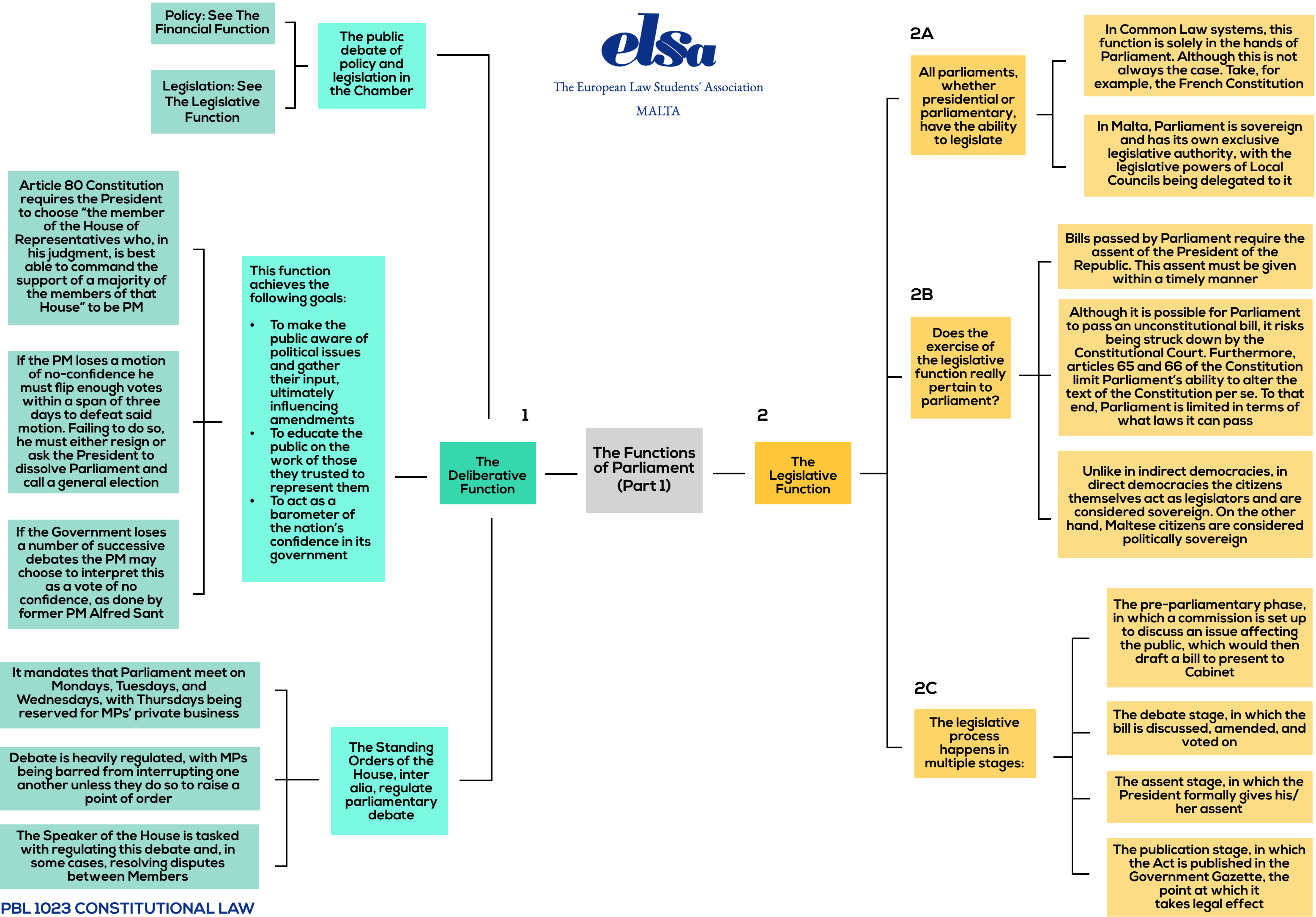
Presidential personal prerogative can be seen as safeguard of constitutional values

VS

Article 76(5)(c) allows the President to refuse the request to dissolve parliament on basis that it would not be in Malta's best interests and an alternative majority in the House exists



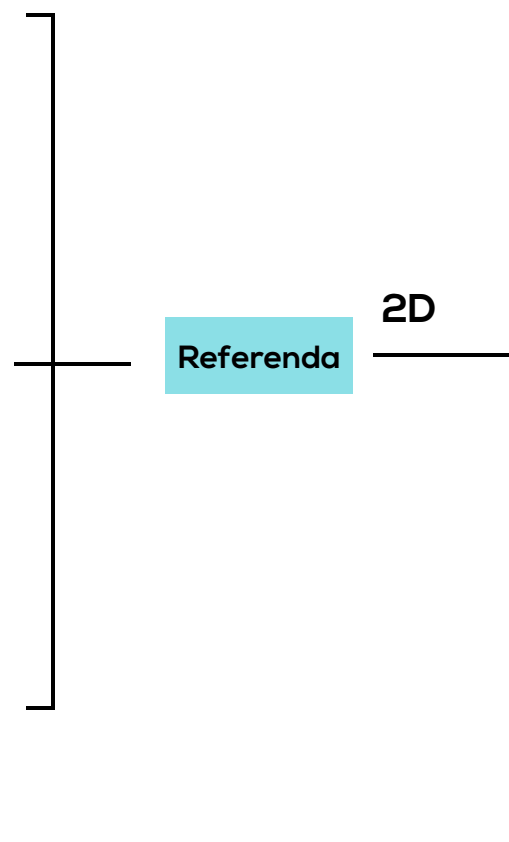




Referenda can either be: (1) Consultative: Where the government uses a referendum to gather public input on a prospective bill. Although the government is not bound by the results of the referendum, their recommendations are generally abided by for political reasons. Take, for example, the referendum held before the legalization of divorce

(2) Legislative: Found in direct democracies, where the people vote on a bill in a nationwide referendum with the result considered binding. Take, for example, the decision by the Swiss people to ban mosques

(3) Abrogative: Where the people vote on whether a particular piece of legislation should be repealed. No such referendum has ever taken place in Malta due to the fact that they are highly controlled by law

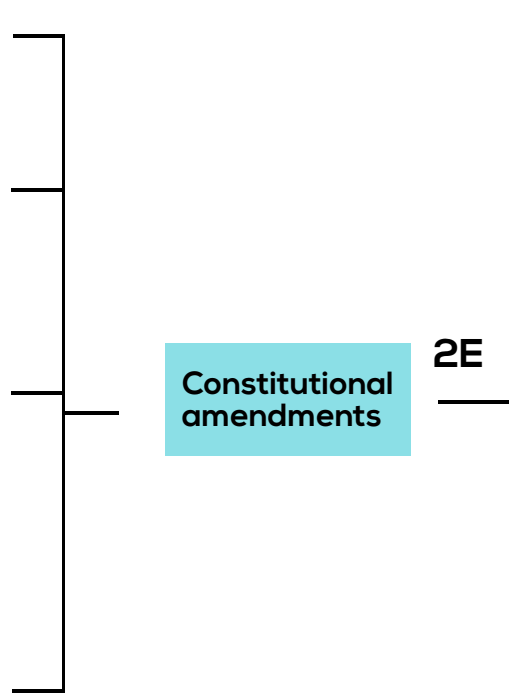


In Malta, constitutional change can only happen through parliament

The Constitution itself provides limits on the procedural process to its change, as listed in Article 66

Notwithstanding this fact, parliament is still seen as the supreme power which can change the whole constitution, as even in the event of a referendum it has the final decision

Generally, a qualified majority of two-thirds at the Third Reading is needed to amend the important provisions of the Constitution. In the case of amendment to the lifetime (5yrs) of Parliament a referendum also has to be held. In other matters a majority of ALL the members of the House is needed to amend the Constitution



The Legislative Function (Continued)

2

The Functions of Parliament (Part 2)

3

The Financial Function

3A

Erskine May's three rules governing financial parliamentary procedure read as follows:

(1) A charge, whether upon public funds (expenditure) or upon the people (taxation), must be authorised by legislation

(2) A charge may not be considered by the Commons unless it is proposed or recommended by the Crown, i.e., the financial initiative of the Crown (or the President of the Republic in Malta)

(3) A charge must first be considered in the form of a resolution which, when agreed to by the House, forms an essential preliminary to the Bill or clause by which the charge is authorised

3B

The system of supply (Provvista)

Funds are requested by the Government by means of estimates – government departments make sure that the estimates are consistent with the government's overall spending plans

The Appropriation Act authorises the issue from the Consolidated Fund of the balance of the grant of the estimates for the current financial year, and after scrutiny by and debate in Parliament, estimates are approved by a resolution of the House of Commons

Government expenditure must be paid for from taxation, which must in turn be authorised by Parliament, with tax rates being approved each year

Many forms of revenue, such as customs and excise duties are raised under Acts which remain in force from year to year. However, some taxes, notably income tax, are routinely adjusted

Although financial authority is held by the Minister of Finance, Parliament exercises control

The budget is made up of a statement of money collected and money spent throughout the year, compared to previous statements, and an estimate for the next year and proposals of new ways for raising money

Expenditure planning on the part of the Executive (the Budget)

Parliamentary debate and approval of the Executive's request for supply

Spending by the Executive of the finances approved by Parliament

The four stages of financial procedure are as follows:

The accounts of government are audited by the Auditor General (Article 108) who reports directly to the Public Accounts Committee. He may call to examine any file, or acquire information from any member thus giving him extensive powers

Accounting for the money spent (audit)

S/he is appointed by an absolute majority and can only be removed by said majority and on the basis of proved misbehaviour and inability to perform. Thus, his position is secured by the constitution. This is vital because he must be able to criticise what is put forward

Known as the 'power of the purse', this role is central to the ability of Parliament to call the government to account. A government which fails to ensure supply of funding would have to resign or to seek a general election due to the fact that Parliament's refusal to grant a budget is tantamount to a vote of no confidence

3C

3D

3E

The Financial Function (Continued)

The Functions of Parliament (Part 3)

4

The Judicial Function

4A

Traditionally, the British House of Lords was the final court of appeal in Britain, but this function has almost disappeared entirely

4B

MPs enjoy a number of privileges that no other member of society does. These include:

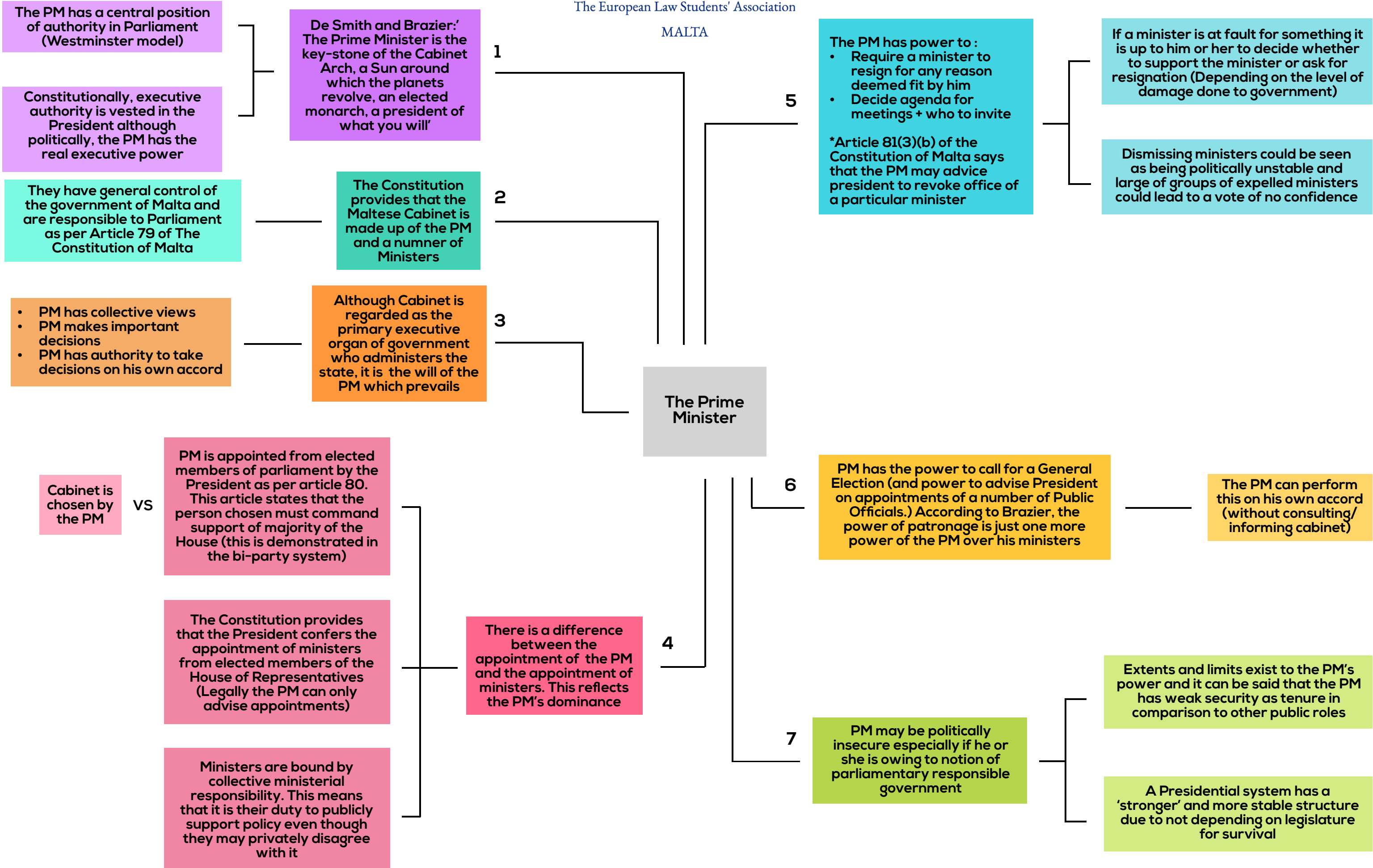
The primary privilege of legislating. Although slightly limited by the constitution (which provides a framework for these privileges), parliament can still regulate its own proceedings up to a certain extent

Another privilege is the protection given to MPs from libel proceedings regarding anything said in Chamber. This gives them the freedom to bring issues to light and do their work effectively

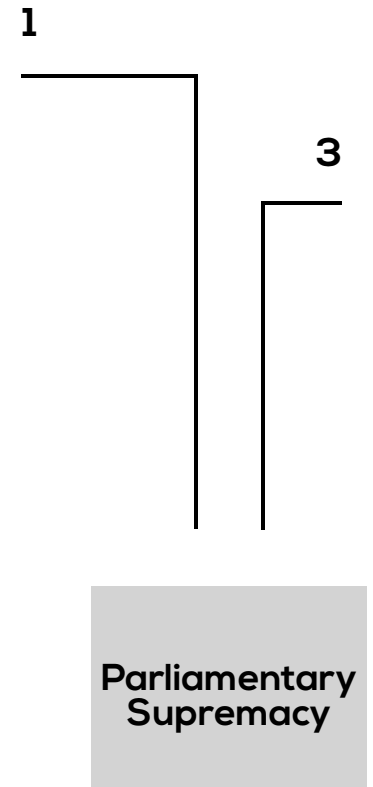
4C

Prior to European Court of Human Rights decision in 'Demicoli v. Malta', Parliament acted as a court in instances of breach of parliamentary privilege. Now, the Court of Magistrates deals with such cases

MALTA



With the Constitution giving it such power, the Maltese Parliament holds the legislative authority to pass laws which are enacted through parliamentary procedures. The Maltese Parliament is only supreme within a more supreme Constitution



3
Following the Westminster model, 3 things have been implied;

3A
Parliament is the ONLY organ which can make laws
Within France, such power is not exclusive only to Parliament as the Constitution provides power to other authorities
An Act of Parliament is regarded valid when formulated in the proper manner stipulated within law

3B
Any other law making bodies within the UK have their powers delegated from Parliament
No future Parliament can be bound by the preceding Parliament. (Parliament may not bind its successors)
Limitation of Parliamentary Supremacy
Exception: in Malta a Bill amending say Fundamental Human Rights needs a 2/3s majority, or an additional approval of referendum, in certain other cases is needed

3C
On the other hand, an Act of British Parliament cannot be declared as null and void by any court
Within the UK, Parliamentary Supremacy can only be altered by a change in approach from the Judiciary
Parliamentary Supremacy is fundamental to the British Constitution

In such way, the validity of an enforced Act of Parliament may not (unlike Malta) be questioned by a Court of authority, and it may neither be overridden nor refused to be abided by

2
In The UK Dicey supported the belief of having a single authority with absolute will as a sovereign lawmaker

Dicey believed that in theory, irrespective of fairness, justice, or practical possibilities, Parliament can make or unmake any kind of law

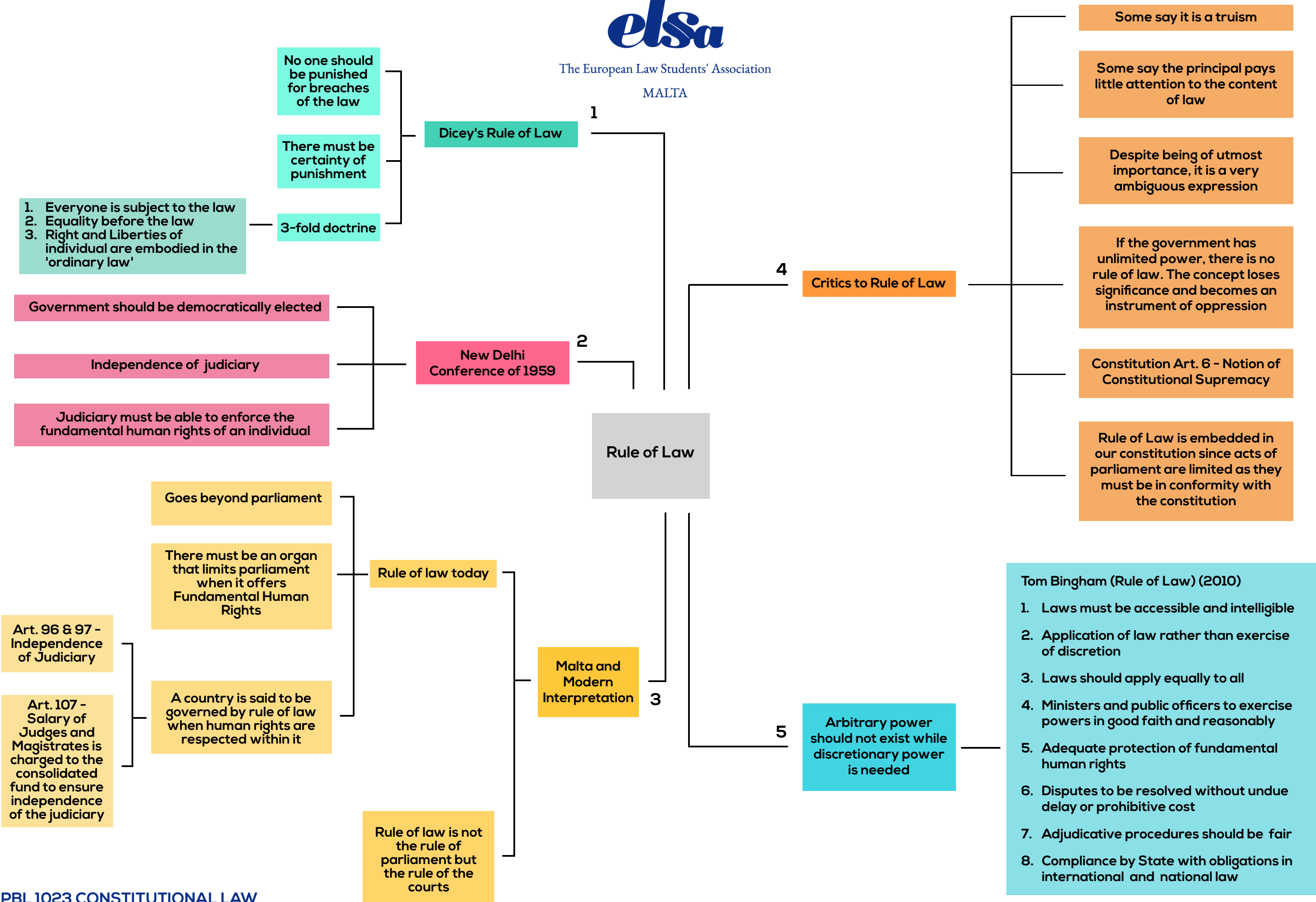
4
In relation to Malta

4A
Parliament is sovereign in its affairs to legislate, yet it is subservient to a more supreme Constitution
Parliament is the ultimate legislative authority, and its main function is to enact laws for the peace, order and good government of society

4B
Parliament can only legislate within the confines of the Constitution due to judicial review

4C
Mintoff Vs. Borg Olivier (1977)
Mintoff claimed that, for a constitutional amendment, the correct procedure was not followed within Parliament, while Borg Olivier maintained that Court could not interfere as Parliament was supreme
The Constitutional Court ruled that Parliament was only supreme within a more supreme constitution thus, Courts were entitled to enquire regarding procedure

4D
50%+1 of members present at voting is necessary to legislate, followed by the Presidential assent



The Doctrine of Separation of Powers refers to a system of 'checks and balances' essential in a democratic society - balancing power between the organs of the state so that no one organ can act without the cooperation of the others and each organ checks the other

The first proponent of this principle was Montesquieu who proposed that the government should be divided into the legislative, the executive and the judiciary whereby 3 sections have distinct functions allocated to different bodies and function independently of each other

The Maltese constitution is written, rigid and supreme in contrast to the UK constitution which is unwritten, flexible and sovereignty lies in Parliament

However, both are unitary constitution as legal sovereignty is contained in a central power

The idea of separation of powers is also enshrined in the Constitution, where the constitution deals with the powers separately too. In fact, Chapter 6 deals with Parliament, Chapter 7 deals with the Executive, and Chapter 8 deals with the Judiciary

Separation of Powers

Constitutions

Separation of Powers (Part 1)

Executive Branch

The executive refers to the government

The government is formed by the president through appointment of the PM - this is an easy choice in a bi-party system as the Prime minister would be the leader of the winning party. He remains the leader for five year provided he enjoys the confidence of the House. If there is a vote of no confidence in the prime minister by absolute majority he can either resign or advise a dissolution

The president must either find an alternative upon resignation or else dissolve parliament. The president can also block a dissolution if he finds a better alternative

The prime minister has the power to call an election - this is used strategically. In the USA, the president does not have the power to call for an early election

The prime minister chooses his cabinet members from the House and the Cabinet must retain confidence of the house and is answerable for the running of government

The House of Representative could be said to 'control' the executive since the house can oust a government which has lost the ability to command a majority, through a vote of no confidence. In contrast, however, so long as the cabinet can retain the confidence of the house, it can exercise control over Parliament

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In a parliamentary system, the executive emanates from Parliament while in a presidential system, there are separate elections

In a Parliamentary system, the executive is responsible to the legislative, while in a Presidential system it isn't

The Prime Minister in the Parliamentary system can ask the president to dissolve parliament and the president is bound to this advice. The PM can call an election when he chooses. In the presidential system, the elections are fixed term elections (fixed by law). However, in Malta, the PM chooses the timing of the executive

The US constitution is written and rigid. It is also Supreme as declared by the Chief Justice Marshall and the landmark case of Marbury versus Madison

Since the USA is a federal state the three powers are divided between central (federal) legislatures and governments on the one hand and state (provincial) authorities on the other. This was considered to avoid a concentration of power

The executive power is vested in the president, legislative power is vested in Congress while the judicial power is vested in the Supreme Court

Presidential elections are held separate from those of Congress and are held every four years – fixed term of office. The president is elected by the people and can only hold two successive terms. He can be impeached by Congress only for reasons of treason bribery and other high crimes and misdemeanors, however, this is rare. The independence from the legislature could prove to be an advantage for the stability of office

The Supreme Court once appointed is independent from both the Congress and the president. The president appoints judges to the Supreme Court who are appointed for life although 2/3 of the Senate is required for removal. Judges two can be removed from office by impeachment. With Marbury versus Madison the courts became entitled to review constitutionality of legislation passed by Congress and acts of president this is a crucial feature of the American constitution

The USA goes further than any other state in applying this notion of separation of powers as each organ is distinct both in function and membership however it still does not apply the pure form of this doctrine as it is impossible to achieve complete separation of power

Presidential vs Parliamentary systems

4

Separation of Powers in the USA

5

Separation of Powers (Part 2)

Judicial Branch

6

Conclusion

7

Judicial independence is crucial in a democratic state and therefore, there are certain aspects related to this power, that can secure its independence

Independence of the judiciary is secured through the security of tenure, the salary of judiciary is a direct charge consolidated fund and they can never be reduced

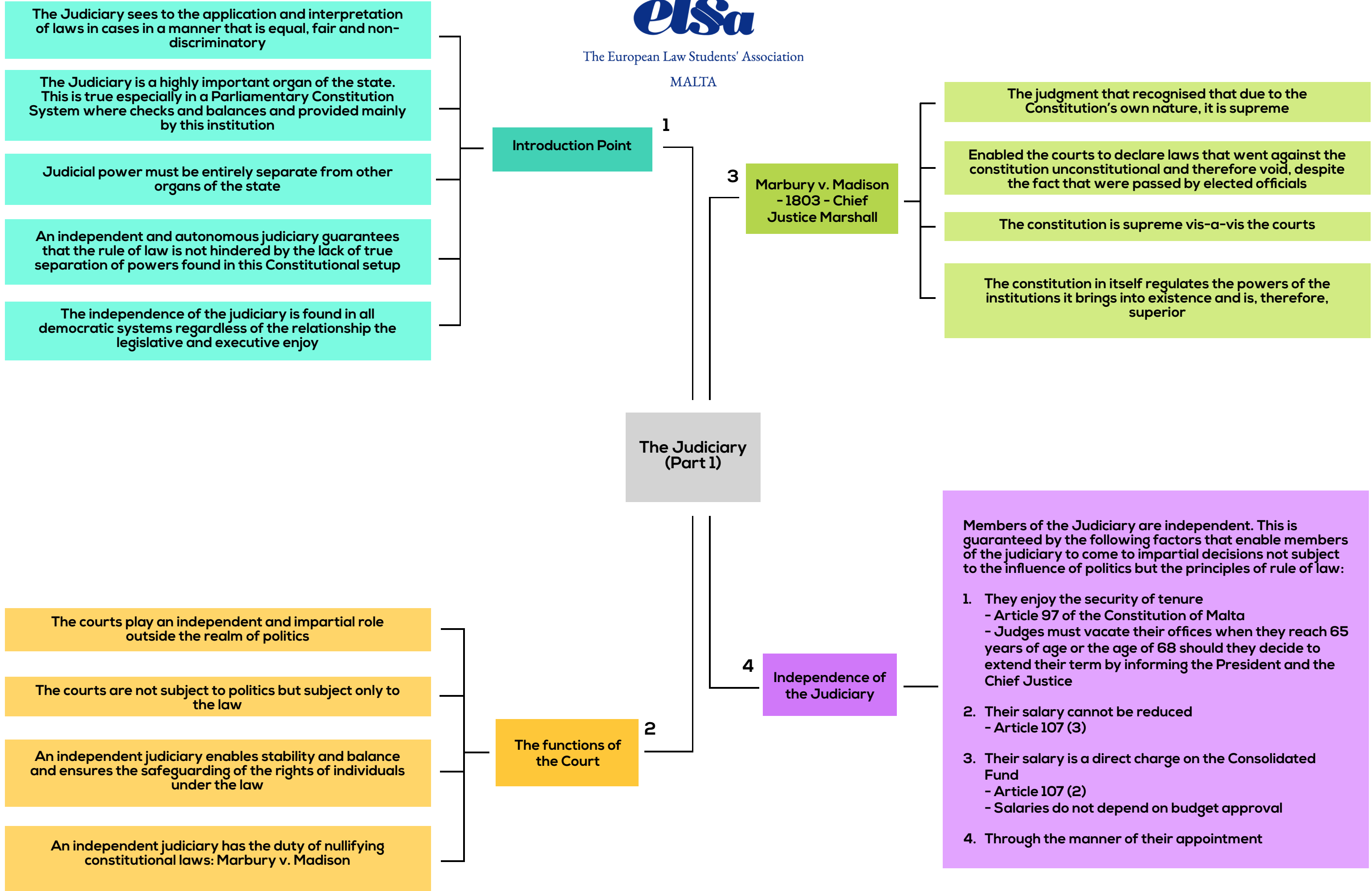
In Malta, the relationship between the executive and legislative can be said to be fused, giving rise to what is known as a Parliamentary democratic government

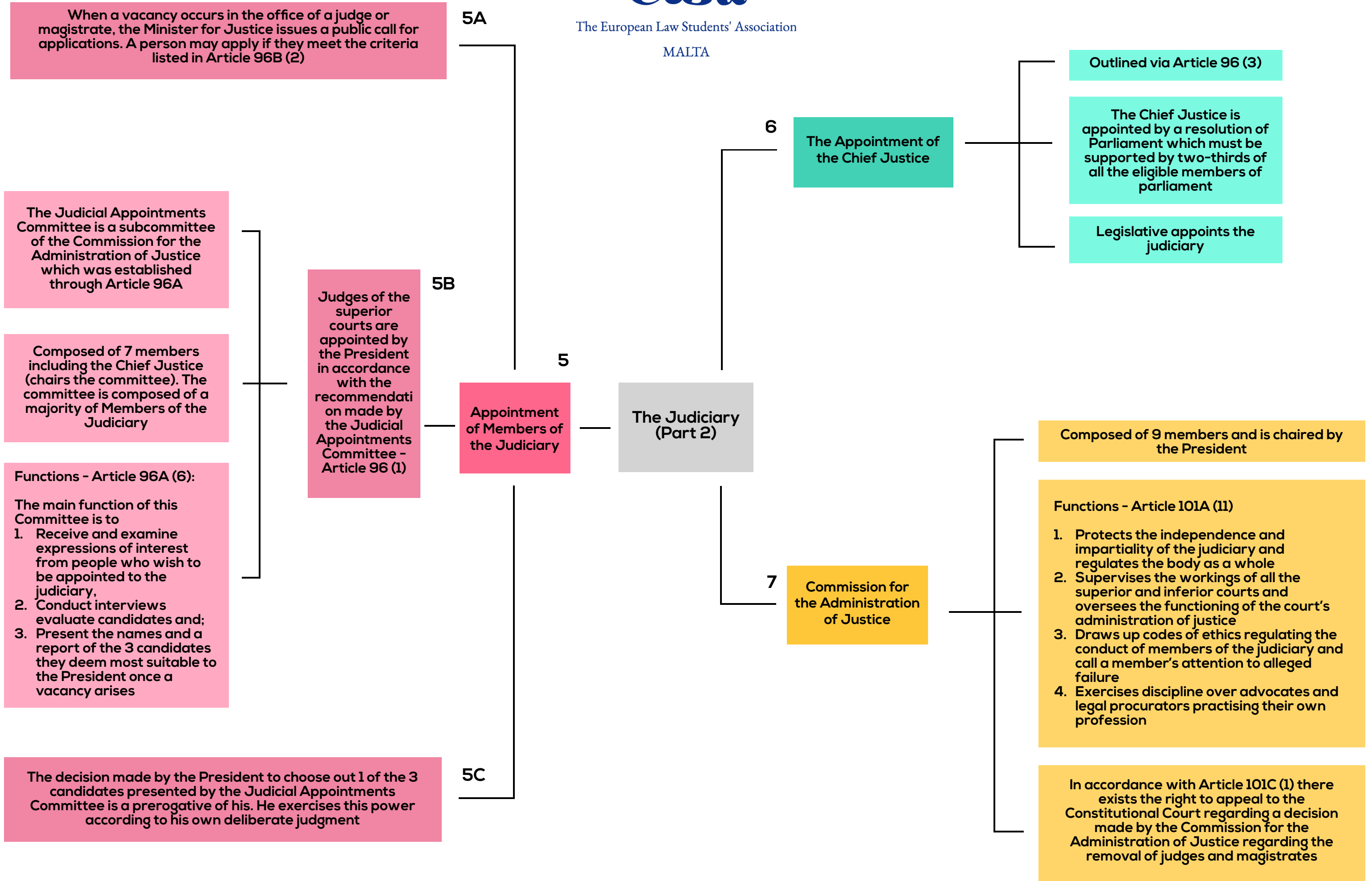
Judicial review found in Maltese Constitution - Courts may enquire into the validity of law to see if it is unconstitutional. Bills approved by the house have to be assented to by the president without delay. However, the courts retain the right to scrutinise the constitutional validity of any law or executive measure in line with the doctrine of constitutional supremacy

Judiciary may not be subject to political threats or government policy

Legislature appoints chief justice by a qualified majority of 2/3. We have moved away from executive appointing chief justice to the chief justice being appointed by the president on the advice of a resolution of parliament supported by at least 2/3 of all members of the house (see Article 96 (1) and 96 (3)) Similarly judges and magistrates are appointed by the President who, acting alone, chooses one out of three candidates whose names are submitted by the Judicial Appointments Committee within which judiciary enjoys majority of membership

Laws are approved by the legislature where as a rule the executive has the support of a majority of its members. Bills approved by the house have to be assented to by the president without delay. However, the courts retain the right to scrutinise the constitutional validity of any law or executive measure in line with the doctrine of constitutional, not parliamentary, supremacy. These checks and balances keep the three powers of the state distinct without enclosing them in separate watertight compartments. They relate to each other, but no excessive power is vested in one authority





The Judicial Appointments Committee is a subcommittee of the Commission for the Administration of Justice which was established through Article 96A

Composed of 7 members including the Chief Justice (chairs the committee). The committee is composed of a majority of Members of the Judiciary

Functions - Article 96A (6):
 The main function of this Committee is to
 1. Receive and examine expressions of interest from people who wish to be appointed to the judiciary,
 2. Conduct interviews evaluate candidates and;
 3. Present the names and a report of the 3 candidates they deem most suitable to the President once a vacancy arises

The decision made by the President to choose out 1 of the 3 candidates presented by the Judicial Appointments Committee is a prerogative of his. He exercises this power according to his own deliberate judgment

Outlined via Article 96 (3)

The Chief Justice is appointed by a resolution of Parliament which must be supported by two-thirds of all the eligible members of parliament

Legislative appoints the judiciary

Composed of 9 members and is chaired by the President

Functions - Article 101A (11)
 1. Protects the independence and impartiality of the judiciary and regulates the body as a whole
 2. Supervises the workings of all the superior and inferior courts and oversees the functioning of the court's administration of justice
 3. Draws up codes of ethics regulating the conduct of members of the judiciary and call a member's attention to alleged failure
 4. Exercises discipline over advocates and legal procurators practising their own profession

In accordance with Article 101C (1) there exists the right to appeal to the Constitutional Court regarding a decision made by the Commission for the Administration of Justice regarding the removal of judges and magistrates



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A subcommittee of the Commission of the Administration of Justice established through Article 101B

This Committee shall exercise discipline on judges and magistrates - Article 101B (4)

Disciplinary proceedings:

1. Begin upon a complaint in writing containing definite charges being made to the Committee by the Chief Justice/Minister for Justice regarding a breach of the Code of Ethics/disciplinary rules.
2. The judge or magistrate against whom the complaint is made is granted reasonable time to reply.
3. Following prima facie consideration, the Committee decides whether the case has merit or not. Should the case not have merit it is discarded. If the case has sufficient grounds to continue then a hearing date is established.
4. If the Committee finds the judge or magistrate has broken the Code of Ethics it:

- Considers the nature of the breach: if its minor a warning or a pecuniary penalty is issued. If it is serious it may suspend the judge or magistrate from exercising their duties for a period not longer than 6 months
- If the breach is serious enough to warrant removal or is based on the grounds of incapability or incapacity, the judge is suspended and the findings are reported to the Commission of Administration of Justice which ultimately decides whether the judge or magistrate ought to be removed following an investigation
- If the results of the investigation confirm that judge or magistrate ought to be removed, the Commission shall proceed to advise the President to remove them

In accordance with Article 101C (1) there exists the right to appeal to the Constitutional Court regarding a decision made by the Commission for the Administration of Justice regarding the removal of judges and magistrates

The legislative has been removed entirely from such judicial decisions

8
The Removal of a Member of the Judiciary and the Committee for Judges and Magistrates

The Judiciary (Part 3)

9
Judicial Review

10
Systems of Courts

Parliament has the ultimate authority to legislate but that which they can legislate is restricted. No legislation can violate the constitution

If legislation violates the constitution, it will be declared null and void

Parliament is supreme but subject to a higher authority

Through the review of acts of parliament, the judicial function of the courts defines the limits of the legislative authority of parliament. Subdivided into Constitutional Actions and Administrative Actions

Courts provide structure to the notion outlined in Marbury v. Madison - that since the constitution serves to regulate the institutions it brings into existence, it is superior

Article 6 - the Supremacy Clause

Article 66 - regulates how the constitution can be amended

The Constitution references the superior courts and the inferior courts

Their structure is laid out through an act of parliament. Parliament has the freedom of structuring the courts provided that the ultimate safeguard of the impartiality and independence of the judiciary is observed

An example of a Superior Court is the Constitutional Court. This is a court of second instance

