

CONSTITUTIONAL REFORM

THE WAY FORWARD

A PROPOSAL PAPER BY ELSA MALTA'S
SOCIAL POLICY ORGANISING COMMITTEE

elsa

The European Law Students' Association

MALTA

Opportunities Ahead in Social Policy

ELSA Malta would like to thank...

*Discussions are good. However, proposals are better. Yet again our Legal & Social Policy Organising Committee has amalgamated months of hard work, co-operation, planning & research to produce our first ever proposal paper entitled '**Constitutional Reform: The Way Forward**'. Constitutional Reform is a heated issue and it's time that the ball is set rolling on the various discussions that are taking place. We are proud to also be contributing on such a relevant issue, with no other better way than proposals.*

ELSA Malta remains committed to be pro-active on several important issues that have a social impact. We will be there voicing our opinion, proposing legislation and discussing ideas. This policy paper is a clear example. We believe that it is surely our duty, as a law student organisation to be relevant in today's society and keep up to date with new proposed legislation.

Many people are behind such a project, and without them this would surely not have been possible. Our thanks goes to:

ELSA Malta President: Nigel Micallef

Director for Legal & Social Policy: Nick DeBono

Director for Legal Publications: Nicole Sultana

Policy Paper Leaders & Editors: Nicole Sciberras Debono & Maria Magro

Policy Paper Team: Nicole Portelli, Erika Taliana

Proof-Reading Team: Luca Zahra, John Caruana

Design: Daniel Vella

ELSA Malta's Legal & Social Organising Committee

*Our **special thanks** goes to **Dr. Tonio Borg**, who reviewed our proposal paper. **Dr. Borg** also provided suggestions and mentored them in the best way possible.*

*On behalf of the ELSA Malta Social Policy Office, we hope that you enjoy reading our paper, take the time to evaluate our suggestions, and lastly to follow us and support us in our aim - to always be **#pro-active!***

Thank you.

Table of Contents

Foreword	5
Abstract	6
Chapter I: The Republic	8
Neutrality Clause	8
The Constitutional Separation of Church and State	9
Replacing Religion with Ethics in our Educational Curricula	10
The Supremacy of the Constitution	12
Chapter II: Declaration of Principles	13
Rule of Law	13
Separation of Powers	14
Independence of the Judiciary	14
Individual Ministerial Responsibility	15
Other Principles	16
Chapter III: Citizenship	18
Chapter IV: Fundamental Rights and Freedoms of the Individual	19
‘Protection of freedom of conscience and worship’ (Article 40) and ‘Freedom of Expression’ (Article 41)	19
Prohibition of Deportation (Article 43)	21
Protection from Discrimination (Article 45)	22
A Stronger Protection of the Right to Life?	23
Protection for a person who has been wrongfully, but lawfully arrested	25
Protection from deprivation of property without adequate compensation – but is such compensation always enough?	26
Chapter V: The President	27
Security of Tenure	27
Suggestion to remove the possibility of the Chief Justice to act as Acting President	29
The President to be involved solely in the Executive	29
The President as guardian of the Constitution	31
Chapter VI: Parliament	31
A Bicameral over a Unicameral Parliament	31
Introducing a Council of State	32
Full time Members of Parliament	33
Ombudsman	34
<i>Inter-regnum</i> between one Parliament and Another	35
Alternative methods of voting	36

Chapter VII: The Executive	36
A shift towards a Presidential system of Government	37
Roles of Ministers and the Ministerial Code of Ethics	38
Chapter VIII: The Judiciary	39
Constitutionally tackling the delay in judicial proceedings.....	40
The Commission for the Administration of Justice.....	41
The Constitutional Court.....	42
Functions of the Attorney General.....	43
Appointment of Judges and Magistrates: A Judicial Appointments Committee	44
Chapter IX: Finance	45
Chapter X: The Public Service.....	46
Issue with 'persons of trust' and the Public Service Commission	46
Chapter XI: Miscellaneous.....	46
An invalid law: is there more to it than just a conflict with the Constitution of Malta?	
.....	47
The Constitution should make room for Supremacy of Union law.....	48
Ambiguity of term 'public office'	48
Consistency	49
The Broadcasting Authority: An Impartial or Partisan Institution?	49
The independent decision of the President must therefore be expressly provided for	
in the Constitution	51
Conclusion	53
Bibliography	54

Table of Legislation and Statutes

Maltese Law

Constitution of Malta

Chapter 9 of the Laws of Malta, The Criminal Code

Chapter 12 of the Laws of Malta, Code of Organisation and Civil Procedure

Chapter 530 of the Laws of Malta, The Civil Union Act

Chapter 88 of the Laws of Malta, The Land Acquisition (Public Purposes) Ordinance

Chapter 350 of the Laws of Malta, The Broadcasting Act

Council of Europe Conventions

European Convention on Human Rights

European Convention for the Protection of Human Rights and Fundamental Freedoms

EU Charter of Fundamental Rights

United Nations Convention

Convention on the Elimination of All Forms of Discrimination Against Women

Universal Declaration of Human Rights

International Conventions

Constitution of the World Health Organisation Constitution (WHO)

Table of Cases

Vo.vs. France, App. no. 53924/00 (ECtHR 8 July 2004).

Paton vs. UK, (1980) 3 EHRR 408

Bellizzi vs. Malta, App. no. 46575/09 (EctHR 28 December 2011).

Case 26/62 Van Gend en Loos and International Hendesgesellschaft [1963]
ECLI:EU:C:1963:1

Foreword

ELSA's contribution to the debate on Constitution Reform in publishing this booklet exposing its views is indeed commendable. As a student organisation, it has been a shining example to others as to how to be active in its proper field by contributing to a national debate. Student organisations are not limited to the four corners of the University campus. They have a right, perhaps also a duty, to show interest in what happens in society, make proposals which they think are in the best interests of the country.

ELSA has shown in this booklet its dedication to the general cause of promoting the common good. It has underlined shortcomings in the current constitutional text, and has also put forward proposals, such as introducing the rule of law in declaration of principles or incorporation the principle of individual ministerial responsibility, or the establishment of a Council of State. ELSA, in brief, has shown that it does not only reveal the problems, but offers solutions.

Not all solutions are endorsed by me. I put forward suggestions and drew attention to controversial parts of the document, but the ultimate decision remained exclusively in the hands of ELSA. I, for instance, have particular reservations on the proposals regarding removing the teaching of the Catholic Religion in State schools, and substitute it with "ethics" as a subject, as I would opt for a right to choose between the two.

Barring these reservations, I feel that ELSA has done a good and commendable job. It has contributed to a public debate in a professional way. It states its views with determination, supported by documents, cases and solid arguments. Its document should serve as a good basis for a proper discussion on the subject.

Dr. Tonio Borg

Constitutional Reform: The Way Forward

Abstract

With the current government promising the drawing up of a second republic, the principal objective of this paper is to review the Independence Constitution, which, being enacted over 50 years ago, is now somewhat outdated. Our aim as law students, on behalf of ELSA Malta, is to propose possible amendments in areas which seem to need updating as to be more relevant to the society we live in nowadays.

Throughout the paper we have analyzed most of the provisions individually, however, there are a number of them which pose more important issues and are more controversial than others.

To begin with, the neutrality clause at this time increasingly important matter with the growing threat that extremist and fanatical groups such as the recent terrorist group ISIS are unleashing onto the world, especially with the recent attacks in Paris and in Brussels. Another controversial clause is that related to the Roman Catholic Apostolic religion as the official religion of Malta, due to the recent proposed changes to the Criminal Code dealing with vilification of religion. This inevitably leads to controversy with regard to the Roman Catholic religion as being a compulsory subject taught in all state schools: due to our accession into the EU, Malta has increasingly become a multicultural state, wherein many citizens practice religions other than the Roman Catholic religion, something which was not so common when we were granted independence in 1964.

One cannot forget the supremacy clause provided by Article 6, which has been called into question after Malta's accession into the European Union (EU). EU case law has affirmed that EU law is prevalent over Member States' national laws, even national Constitutions and since fundamental human rights which are embedded within our Constitution are general principles of EU law, there are no grounds on which one can challenge the supremacy of EU law. Therefore, Article 6 of our Constitution is certainly outdated and contradictory, and should be amended to make room for the supremacy of Union law, in areas where the latter has competence.

However, a mere provision for the supremacy of Union law or of the Maltese Constitution is not enough – this supremacy must indeed be implemented, and this can be done by the introduction of a Council of State. In this way, the President would be allowed to seek counsel from a body that is above partisan politics (unlike the present situation wherein the President seeks advice from the Prime Minister) and is there to provide impartial advice to the President. This would ensure a stronger separation of powers, which is not so strict within the Maltese Constitutional framework, and thus a greater observance of the Rule of Law which is the basis of a democratic state.

With each proposal that is made, we have considered both the advantages and disadvantages in the Maltese context, and thus we have suggested that which is the most ideal. Although putting such amendments into practice is much easier said than done, they are indeed necessary, so that the foundations of the Maltese State will no longer reflect the past, but be adapted to the present.

Chapter I: The Republic

Neutrality Clause

The neutrality clause catered for by Article 1(3) of the Maltese Constitution is one which brought about various debates as to whether Malta should in fact remain 'neutral'. The term 'neutral state' as provided for in the Constitution entails the 'non-alignment and refusing to participate in any military alliance'.¹

However, some argue that this clause needs to be revised. This idea of revising this clause has become an increasingly important matter with the growing threat that extremist and fanatical groups such as the recent terrorist group ISIS are unleashing onto the world. Lino Bugeja argued that it is a wrongful mentality to downplay the threat that such Islamic State poses to Malta.²

On the other hand, there have been various other opinions arguing against the proposed revision of the neutrality clause and the arguments put forward by Mr. Bugeja. Michael Grech and Charles Miceli argue in favour of neutrality as the term does not imply that Malta is indifferent to any threats or pressing matters but simply states that we are not to become members of military alliances and that if we were to take a side, this should be done through peaceful ways.³ Article 1(3) as a result emphasized the fact that Malta should only set aside its neutral position in cases where Malta's peace and security would be in actual risk.

Furthermore, it was argued that apart from the fact that terrorism is not opposed through the formation of conventional armies, it is important to note that the neutrality clause does not restrict Malta from forming alliances with other countries and this became evident through the application for a membership in NATO's Partnership for Peace programme and also through the

¹ Constitution of Malta 1964, s 1(3).

² Michael Falzon, 'The Massive Neutrality Debate is Back', *Malta Today* (Malta, 7 October 2014) <http://www.maltatoday.com.mt/comment/blogs/44617/the_massive_neutrality_debate_is_back#.VuMZisdh1E5> accessed 28 February 2016.

³ Michael Grech and Charles Miceli, 'Our Neutrality Clauses', *Malta Today* (Malta, 30 September 2014) <<http://www.timesofmalta.com/articles/view/20140930/opinion/Our-neutrality-clauses.537835>> accessed 28 February 2016.

issue of the US Naval vessel 'La Salle' which came to the Maltese docks.⁴ Also, there exist a number of defense treaties that would still guarantee our safety if there were to be a threat.

In his letter to the Prime Minister on the 13th February 2001, the Attorney General held that if the two blocs with which the Warsaw Pact states and NATO powers had been aligned no longer existed, then non-alignment was no longer an extant policy or concept. In the circumstances, there no longer subsists an obligation to deny the shipyards of Malta to the military vessels of the two superpowers in accordance with the principles of non-alignment.

Therefore, when considering such an important and delicate clause, one must weigh the advantages and disadvantages that Malta would suffer if any changes had to be done. After considering such, it is evident that through accession to the European Union (EU) and the United Nations (UN), Malta is at a point where in cases of risk and terror threats, it can join forces with other countries which have better military forces in order to fight any threat. Had it not entered the EU, Malta's best interest might have been different because it does not have enough resources of its own to take action against large military forces.

- *It is ultimately up to the Government to decide whether or not to form such alliances. Therefore, such a clause should be strengthened and not repealed as some suggest. Malta benefits much more from being a neutral state. However, seeing that in practice it is in the hands of the Government to decide, then a provision should be added to the Constitution granting discretion to Parliament to take decisions as it deems necessary and such resolution is to be backed up by a two-thirds majority of the House of Representatives so as to ensure that such decision is a reflection of Malta's best interest.*

The Constitutional Separation of Church and State

Currently, Article 2(1) of the Maltese Constitution affirms the Roman Catholic Apostolic Religion as the official religion of Malta.⁵ However, this is

⁴ UKEssays, 'How Is Malta's Neutrality Status Being Safeguarded Politics Essay' (November 2013) <<http://www.ukessays.com/essays/politics/how-is-maltas-neutrality-status-being-safeguarded-politics-essay.php?cref=1>> accessed 28 February 2016.

⁵ Constitution of Malta 1964 (n 1) s 2(1).

subject to a lot of controversy due to the recent proposed changes to Article 163 and Article 164 of the Criminal Code,⁶ through Bill 115 of 2015 which deals with the vilification of religion. The current law differentiates between the Roman Catholic Apostolic Religion and other religions or tolerated cults by attributing a higher punishment for offences against the Roman Catholic Apostolic Religion as opposed to the latter.⁷

Through Bill 115 of 2015, the distinction and superiority that the Roman Catholic Apostolic Religion has over other religions or cults will be eliminated. This is particularly done not only through the repeal of Article 163 and Article 164 but also through the amendment done to Article 165 which deals with the disruption of religious functions or ceremonies. Article 165 is proposed to be amended in a way as to incorporate the word 'any' and thus including both the Roman Catholic Apostolic Religion and other religions or cults under the same title.⁸

- *There were various opposing opinions with regards to this matter. However, the amendments done to the respective articles in the Criminal Code does not require the Constitution to amend its article 2. Assuming that the amendments of Bill 113 of 2015 are implemented, there would still be articles which safeguard the Roman Catholic Religion and other religions such as article 165 and 82A. On the other hand, even if the changes proposed in Bill 113 do not take place, article 2 would retain its importance.*

Replacing Religion with Ethics in our Educational Curricula

Article 2(3) of the Constitution deals with the teaching of the Roman Catholic Religion as a compulsory subject in all state schools.⁹ The situation as it stands, schools are experiencing a new reality in which students coming from different

⁶ Criminal Code 1854, Chapter 9 of the Laws of Malta, s 163 and s 164.

⁷ Kevin Aquilina, 'Religion Needs Protection', *Malta Today* (Malta, 22 July 2015), <<http://www.timesofmalta.com/articles/view/20150722/opinion/Religion-needs-protection.577592>> accessed 28 February 2016.

⁸ Bill 115 of 2015: An Act to amend the Criminal Code of Malta and to provide for any other matters ancillary or consequential thereto.

⁹ Constitution of Malta 1964 (n 1) s 2(3).

backgrounds and cultures, perhaps even from other countries, and this creates a problem when it comes to this subject being taken on a compulsory level.¹⁰

The need arose to create another option for students who do not conform to this religion but would still need to sit for such lessons and examinations. This brought about the proposal for the introduction of 'ethics' as a subject, instead of religion in Government state schools.¹¹

This subject would be based on themes such as honesty, non-violence and respect towards others,¹² themes which are vital in the lives of children and society in general, especially since such values are being transmitted to children in a religious context, rather than a social context. Both the Government and the Opposition are in favour of this and recognise such importance, with the Opposition holding that 'this step is important and timely', but 'timely does not mean that these classes should be introduced immediately and without proper assessment'.¹³

Ethics is being introduced initially to foreign students or students who due to other religious beliefs do not opt to take religion as a subject. However, following a potential reform in the Constitution, such a subject must not only be able to cater for situations at present but also try to foresee, as much as possible, future needs. Currently there is already the need to introduce such a subject and considering that the number of students not taking religion as a subject in school is on the rise.

- *Therefore it is plausible to argue that the Constitution must be updated in a way that it no longer recognizes the Roman Catholic Apostolic Religion as a compulsory subject, but rather, an optional one alongside ethics. In this way, both subjects will still be taught but it is up to the parents (or the students when they reach a certain age of maturity) to decide. Both subjects will offer the teaching of vital norms and values. Therefore, the curriculum of ethics would*

¹⁰ Malta Independent, 'Ethics to be offered in Government Schools instead of Religion as From September', *Malta Independent* (Malta, 24 January 2014), <<http://www.independent.com.mt/articles/2014-01-24/news/ethics-to-be-offered-in-government-schools-instead-of-religion-as-from-september-3770875906/>> accessed 1 March 2016.

¹¹ Malta Independent, 'Ethics in schools: 1,400 students do not attend religion classes' *Malta Independent* (Malta, 25 January 2015) <<http://www.independent.com.mt/articles/2014-01-25/news/ethics-in-schools-1400-students-do-not-attend-religion-classes-3785031680/>> accessed 1 March 2016.

¹² Andre P. DeBattista, 'Ethics vs. Religion?' *Zuntier.com challenging ideas* (Malta 11 February 2014), <<http://zuntier.com/2014/02/ethics-vs-religion/#.VuMs1Mdh1E5>> accessed 1 March 2016.

¹³ Malta Independent (n 12).

still be based on the differences between right and wrong but from a different perspective that is taken in Roman Catholic religion classes.

The Supremacy of the Constitution

Article 6 of the Constitution is perhaps one of the most important articles since it states that if any other law is inconsistent with the Constitution it is the Constitution that shall prevail and that the other law which was inconsistent with it would be declared void.¹⁴ This article is the one around which Malta's future as a Republic revolves. It was through the removal of the supremacy of the Constitution through Act 57 of 1974 that Malta could at the time make its way to becoming a Republic. The supremacy of the Constitution was then reaffirmed in the subsequent Act 58 of 1974. However, this procedure was only possible since the supremacy clause at the time was not yet enshrined. Nowadays, this article is enshrined and in order to amend it, there needs to be a two-thirds majority of the House of Representatives. Considering the events that occurred in 1974 and the way in which it was ultimately up to parliament to remove the supremacy of the constitution, then an article of such importance should not only be entrenched at a 2/3 level but should also require a referendum to be able to be amended.

With Malta's accession to the European Union in 2004, Article 6 can be said to be quite contradictory. This is because European Union law is supreme over national law, in the sense that if there had to be a conflict between EU law and Maltese law, EU law would prevail, irrespective of when the Maltese law was enacted, whether prior or subsequent to the enactment of the EU law. Furthermore, national courts should also give precedence to EU law as well as judgments of the Court of Justice of the European Union (CJEU) and disregard any conflicting national law or national judgments.¹⁵

- *Hence, the statement that the Constitution of Malta is supreme is not an entirely correct statement and thus, Article 6 should be amended in a way that states the supremacy of the Constitution at*

¹⁴ Constitution of Malta 1964 (n 1) s 6.

¹⁵ Simon Busuttil, *Supremacy of EU Law: What it means and what it entails*, <www.avukati.org/common/fileprovider.ashx?id=633057644632343750> accessed 1 March 2016.

national level while incorporating the supremacy of European Union law in the case of a conflict between the two.

Chapter II: Declaration of Principles

Rule of Law

The rule of law is the embodiment of the principle that the law prevails. According to Dicey, this doctrine is based on three pillars. Firstly, everyone is subject to the law and no one shall be punished except in the case of a breach of the law. Secondly, the rule of law requires equality before the law and thus high officials and ordinary citizens are subject to the same law administered by the ordinary courts. Thirdly, the rule of law necessitates that the rights and liberties of the individual should be embodied in the ordinary law of the land.

Another important characteristic of the rule of law is the impartiality of the judiciary and the protection of the fundamental human rights. The impartiality of the judiciary is guaranteed through Article 96 and Article 97 of the Constitution,¹⁶ including that the judiciary enjoy security of tenure and that their wage is paid out of Consolidated Fund. This is also enhanced through the fact that in order for there to be a removal of a member of the judiciary, a two-thirds majority is required of the members of the House of Representatives.

The protection of fundamental human rights is also guaranteed in the Constitution through Chapter IV, 'Fundamental Rights and Freedoms of the Individual'.¹⁷

- *However, although the State of Malta is governed by the rule of law,¹⁸ this doctrine is not mentioned in the Constitution of Malta. Therefore, after considering that the State follows such principle through the adherence to the pillars of this doctrine, then it is vital to include this under such a title 'Declaration of Principles' since it is clearly illustrated to be one of the most important principles of modern democratic states. This principle should not only be mentioned but should also be defined.*

¹⁶ Constitution of Malta 1964 (n 1) s 96 and s 97.

¹⁷ *ibid* Chapter IV.

¹⁸ Malta Independent, 'Malta to host international institute on justice, rule of law' *Malta Independent* (Malta, 30 September 2013) <<http://www.independent.com.mt/articles/2013-09-30/news/malta-to-host-international-institute-on-justice-rule-of-law-2761981952/>> accessed 1 March 2016.

Separation of Powers

The separation of powers is a very important doctrine which is adopted in Malta in order to ensure that there is no concentration of power in a single entity in order to avoid abuse of power.¹⁹ This doctrine was formally introduced by Montesquieu, who made a distinction between the three organs of the state: the legislative, the executive and the judiciary. He states that this doctrine entails the separation of the functions carried out by these organs and that there is a system of mutual checks and balances through which one organ checks upon the other and in that way they keep each other in order.

In Malta, this separation of powers although adopted is not exercised in its widest form. The legislature is elected through an electoral process, the executive is selected from those elected in the legislature and the judiciary is appointed by the President, being Head of the Executive, acting on the advice of the Prime Minister. Perhaps it is the judiciary which is the most independent since once appointed it acquires total independence from the legislative and the executive and this is guaranteed through the previously mentioned Article 96 and Article 97.

- *Despite this doctrine being of utter importance in a democratic society and despite being implemented, even though not in its widest form in Malta, this doctrine is not mentioned, let alone defined in our Constitution. Thus, this doctrine should be expressly stated as a principle that the Government of Malta is governed by it and should be defined under this sub-title of the Constitution.*

Independence of the Judiciary

Through the illustration of the importance of the principle of the rule of law and the separation of powers, the independence of the judiciary is also seen to be of absolute importance. The articles which are most commonly mentioned regarding this are Article 96 and Article 97. These provide security of tenure, the protection from removal without valid reason (since impeachment of a judge requires a two-thirds majority of the House of Representatives²⁰) and also not being susceptible to bribery or withholding of wages since their remuneration is taken out of the Consolidated Fund.

¹⁹ Oscar Sang, 'The Separation of Powers and the new Juridical Power: How the South African Constitutional Court plotted it's course' [2013] ELSA Malta Law Review 3 EMLR 96.

²⁰ Constitution of Malta 1964 (n 1) s 97(1).

This brings us to another important concept which is not expressly mentioned in the Constitution and this is the independence of the judiciary. Despite having Article 96 and Article 97 catering for such independence, as a principle this is not stated in the Constitution but simply deduced from the interpretation of these articles.

- *Therefore, if the Constitution includes such a section, 'Declaration of Principles', it is these principles which should be included and are of more relevance than those mentioned at present since the 'principles' mentioned are more of a list of economic, cultural and social values.*²¹

Individual Ministerial Responsibility

In a parliamentary system, ministerial responsibility can be collective or individual. Within a democratic state, those who govern should be accountable to those whom they govern. Therefore, the Constitution provides a framework through Article 79 within which the Government may be responsible to the representatives of the people, therefore Parliament.²² In fact, Article 79(2) states that the Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to parliament'.²³

Whilst the principle of collective ministerial responsibility is connected to the idea of the cabinet, that is, that all ministers must together be accountable to Parliament, the principle of individual ministerial responsibility is based on the Westminster model which provides that the cabinet minister should bear all the responsibility for the actions of his ministry. Therefore, through such a principle, the ministers are individually responsible for the work that their ministry carries out and are accountable to Parliament. It is important to note however that the term 'responsible' does not mean morally responsible or culpable but answerable or accountable to Parliament. Therefore, the minister would have to provide information to Parliament about his ministry and cannot plead ignorance of a matter within his competence.

Therefore, it is seen that in the Constitution, Article 79 caters for collective ministerial responsibility since it speaks of the 'cabinet' and not 'minister'. Individual ministerial responsibility has been a topic of much debate recently through various current events; the transport reform to name one such case.

²¹ The Today Public Policy Institute, 'A Review of the Constitution of Malta at Fifty: Rectification or Redesign?' (Today Public Policy Institute, 2014) accessed 1 March 2016.

²² Constitution of Malta 1964 (n 1) s 79.

²³ *ibid* s 79(2).

- *Therefore, it is important that the notion of individual ministerial responsibility is also enlisted in the Constitution under such article of the declaration of principles since it is an important concept that although in practice might be used, has no basis under our Constitution as a principle followed by the State.*

Other Principles

If one were to look at the current section on the 'Declaration of Principles', the provisions are mostly based on values which safeguard citizens' rights such as the right to work, the right not to be paid less than the minimum wage, the equal right of men and women and so on.

Although the values mentioned in this section of the Constitution are very important and are all very much relevant in today's modern society, however there are still some missing principles that should be incorporated.

One such principle is the right to good administration. Although the constitutive elements of such a right are adhered to, the principle per se is not found under our Constitution. This principle is upheld in Article 41 the EU Charter of Fundamental Rights which goes on to state the constitutive elements such as that every person has the right to the handling of his or her affairs in front of an impartial entity and within a reasonable time.²⁴ It also includes the right to be heard and the right to have access to your own file. These elements are ones that are found under Maltese law, through provisions such as the right to a fair trial in Article 39 of the Constitution.²⁵ Thus, it is reasonable to include such a general principle in the Constitution.

This right would also lead us to the principle of providing the citizens with an adequate remedy against the public administration. This brings us to Article 496A(1)(a) of the Code of Organisation and Civil Procedure (COCP) which provides that one is able to challenge an administrative act if 'the administrative act is in violation of the Constitution'.²⁶

- *Therefore, seeing that the COCP mentions that an administrative act may be challenged on the grounds of unconstitutionality, then this provides a reason for such a right of the individual to be included in the Constitution*

²⁴ EU Charter of Fundamental Rights 2000 art 41.

²⁵ Constitution of Malta 1964 (n 1) s 39.

²⁶ Code of Organization and Civil Procedure 1855, Chapter 12 of the Laws of Malta s 469A (1)(a).

itself and thus provide a more practical, applicable and somewhat easier remedy for the challenging of administrative acts.

Another principle that ought to be mentioned is the principle of openness and transparency of Government. Transparency is a very important principle especially in a democracy because it helps ensure that all contracts,²⁷ and decisions are genuine and that there is no abuse of power or fraud. All negotiations and decisions taken by the Government should be published and be subject to scrutiny. Furthermore, it would help make campaign promises more reliable and helps citizens update themselves on such promises.

- *So far, despite the increasing importance that this principle has recently been given, as a principle it has yet to be included in our law. It is in the interest of both the honest politician and the citizen to have such a principle enacted in our Constitution.*

Also, the Constitution should include the right to protection from gender, sexual, racial or other discrimination. With regards to this aspect, the same reasoning applies since although discrimination is catered for by Article 45 of the Constitution, found in the section catering specifically for the fundamental human rights, it is not found as a concept per se in the Constitution but simply deduced from such article.²⁸

- *Therefore it is recommended that the right to protection from gender, sexual, racial or other discrimination is added as a general principle under our constitution.*

When dealing with 'citizens', one must also take under consideration that the term 'citizens' also includes the LGBTIQ community. Throughout the recent years, this community has acquired more recognition, awareness and acceptance. This was clearly illustrated through the granting of civil unions between homosexual couples,²⁹ through the Civil Unions Act.³⁰ Therefore, this is an indication that society has broadened its mentality from when our Constitution was enacted.

²⁷ Malta Independent, 'Government promises full transparency on American University, says final contract will be public' *Malta Independent* (Malta, 20 June 2015), <<http://www.independent.com.mt/articles/2015-06-20/local-news/Government-promises-full-transparency-on-American-University-says-final-contract-will-be-public-6736137606>> accessed 1 March 2016.

²⁸ Constitution of Malta 1964 (n 1) s 45.

²⁹ Times of Malta, 'Changing times: divorce to legal same sex marriage in three years' *Times of Malta* (Malta, 20 April 2014) <<http://www.timesofmalta.com/articles/view/20140420/local/Changing-times-divorce-to-legal-same-sex-marriage-in-three-years.515580>> accessed 1 March 2016.

³⁰ Civil Unions Act 2014, Chapter 530 of the Laws of Malta.

- *Thus, with such a new state of mind arises the need to create some form of principle within the Constitution recognising the protection and rights appertaining to these citizens.*

Chapter III: Citizenship

Definition

This section of the Constitution deals with citizenship and yet the concept of citizenship is not yet defined. Thus, the first thing that should be incorporated is the definition together with who is eligible to have a Maltese citizenship.

Furthermore, Article 22(2) of the Constitution deals with dual or multiple citizenship yet it does not specify in any way when such dual citizenship is possible or who might be eligible for such citizenship.³¹ Therefore, Article 22(2) should be amended to include such. Article 22(1) and 22(2) provide a general regulation of citizenship by stating that it 'shall be regulated by law' and that dual citizenship is permitted 'in accordance with any law for the time being'. Whilst such general regulation is beneficial since one cannot possibly envisage all the possible circumstances that might arise, this generality should not be incorporated as a provision on its own but should be an added proviso found after the conditions and eligibility to acquire such citizenship. One must keep in mind that citizenship is not always very clear, such as in the case of the birth of a child born and raised in Malta but there are also other more complex situations in which further precision would be beneficial, particularly to the courts. Moreover, this would create more security as to whom Maltese citizenship is granted.

Maltese citizenship was the centre of various political debates in the beginning of 2015 due to the introduction of the Malta Individual Investor Programme (IIP), through which foreign individuals can apply against a fee to acquire Maltese citizenship. However, not every applicant would be accepted since in order to successfully become a Maltese citizen, one would have to fulfil strict requirements such as for instance, having a clean conduct, being in a state of good health and also make a financial, non-refundable contribution to the National Development and Social Fund set up by the Government of Malta.

- *Therefore, after considering that it is now possible for a foreign individual who has no ties with Malta to buy a Maltese citizenship, then this should be mentioned in the constitution in order to safeguard the people who are*

³¹ Constitution of Malta 1964 (n 1) s 22.

buying this citizenship. These people who are investing a sum of money in our country should be protected and reassured that this investment will not and cannot be lost and that they will be treated on par like any ordinary Maltese born citizen.

Chapter IV: Fundamental Rights and Freedoms of the Individual

‘Protection of freedom of conscience and worship’ (Article 40) and ‘Freedom of Expression’ (Article 41)

A democracy revolves mainly around the fact that every citizen has a right to voice his own opinion. This distinguishes a democratic society from a dictatorship. This right is thus protected in Article 41 of the Maltese Constitution under Chapter IV which deals with ‘Fundamental Rights and Freedoms of the Individual’.³²

Recently the question arose as to whether this fundamental human right is being restrained through the offences relating to the vilification of religion. This is an issue that not only arose in Malta but around the world, most particularly in Europe through the recent event of the Charlie Hebdo attacks. Countries all around the world united using the phrase ‘Je suis Charlie’, condemning the attacks as well as emphasising the right to free speech. French newspaper Le Parisien’s front page headline in fact contained ‘they shall not kill freedom’.³³ Furthermore, the Daily Mail argued that ‘if liberty is to mean anything, it must include the freedom to mock, offend or question the beliefs of others, within the limits of democratically decided law.’³⁴

Therefore, with catering for the current needs of society came the need to take a stand and find a balance between the right to religion and worship safeguarded by Article 40 of the Constitution and this freedom of expression. Bill 115 of 2015 introduced the proposal for the removal of Article 163 and Article 164 of the Criminal Code dealing with the offence of the vilification of religion.³⁵ However, in order to

³² Constitution of Malta 1964 (n 1) s 41.

³³ Anne Penketh and Tania Branigan, ‘Media condemn Charlie Hebdo attack as assault on freedom of expression’ (United Kingdom 8 January 2015) <<http://www.theguardian.com/world/2015/jan/08/media-charlie-hebdo-attack-freedom-of-expression>> accessed 1 March 2016.

³⁴ Daily Mail Comment, ‘Daily Mail Comment: A murderous attack on Western freedoms’ Daily Mail (United States, 8 January 2015) <<http://www.dailymail.co.uk/debate/article-2901368/DAILY-MAIL-COMMENT-murderous-attack-Western-freedoms.html>> accessed 1 March 2016.

³⁵ Criminal Code 1854 (n 6).

safeguard Article 40, there would be the retention of Article 165 dealing with the disturbance of any religious function which is given a mitigation in punishment. This should be read in conjunction with Article 82A which deals with the offence of incitement of religious hatred.³⁶

- *In order to make sure that there is a balance between Article 40 and Article 41 of the Constitution and therefore ensure that people are able to express themselves and their opinion in a way that still safeguards the right to religion, Article 41 should be amended in a way as to include as one of its provisions this specific problem.³⁷ Thus, it would cater for having unrestricted freedom of expression notwithstanding Article 165 and Article 82A when it comes to the 'limits' of the law with regards to religion.*

Another point that is worth mentioning when it comes to the proposed changes of Bill 115 of 2015. This bill is not only proposing the abolishing of any vilification of any religion but it is also proposing the amendment of Article 165 which deals with the offence of disturbing a religious function. The changes proposed for this article are the mitigation of the punishment for this article from a crime to a contravention and also the changing of the wording from 'Roman Catholic religion and other religions' to 'any'. Therefore, through the use of the word 'any' instead of the current wording, this brings about a change in the way that the Roman Catholic Religion is perceived as more important due to it being specifically mentioned in the article whilst other religions are simply listed under 'other religions'. Thus, there is a more sense of equality between religions and none are singled out. This brings about the need to reflect such equality in the Maltese Constitution.

Currently Article 40(1) reads 'All persons in Malta shall have full freedom of conscience and enjoy the free exercise of their respective mode of religious worship.'³⁸ In order to ensure that there is such afore-mentioned equality and that all religions are accepted and protected under this article, the law should be amended in a way as to read:...'full freedom of choice of religion and enjoy the free exercise of their choice of religious worship.' This is particularly important since Article 40 does not mention the right to choose one's religion but simply talks about the exercise of religious worship.

- *Furthermore, this amendment should be concluded by the changing of the title attributed to this human right: 'Protection of Freedom of Conscience and Worship' so as to include primarily 'Protection of Choice*

³⁶ *ibid* s 82A.

³⁷ Constitution of Malta 1964 (n 1) s 41.

³⁸ *ibid* s 40(1).

of Religion' followed by the protection of freedom of conscience and worship.

Prohibition of Deportation (Article 43)

Article 43 of the Constitution deals with extradition.³⁹ Extradition may occur either upon the request by the Maltese State for the return of an offender who committed an offence within the territory of Malta or it may be requested by another country to extradite a Maltese citizen or a person who is situated in Malta due to the occurrence of an offence within their territory.

There seems to be one missing element in the Constitution when it comes to the restrictions for extradition. Article 43(2) states that no person shall be extradited for a political offence. However, there is another restriction on extradition and that is the death penalty. The death penalty in Malta was abolished in 1971.

Although the death penalty in Malta has been abolished for over 45 years, it is still retained in certain countries such as particular US States. Therefore, when it comes to the extradition of a person situated in Malta to a country where there is the death penalty, usually an agreement is reached between the requesting state and the requested state that if the extradition were to take place, the death penalty would not be given, and if given, it is translated into another punishment such as imprisonment. This is all found in the Extradition Act which is recognized also by the Constitution in sub-article (4) of this article.

In the case that this agreement is breached, then there would be serious repercussions for the requesting country. It is a punishment which goes against the most important fundamental human right, the right to life. Thus, it is vital that the country approving the extradition safeguards the offender's right to life. These rights are inalienable and therefore, their adherence is of top priority.

- *Without going into detail about the merits of extradition in the Constitution since extradition is specifically catered for by the Extradition Act, it is plausible to include as a possible refusal of extradition, the death penalty in the requesting country in which case, the trial would be held in Malta.*

³⁹ *ibid* s 43.

Protection from Discrimination (Article 45)

This article specifically caters for the protection against discrimination based on race, colour, and gender and also mentions sexual orientation. Therefore, on such level, this article seems to cater for most of the possible scenarios of discrimination.⁴⁰

However a dilemma may arise when it comes to sub-article (3) of this article which states that 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.⁴¹

- *When evaluating this provision, it can be noted that 'age' is not listed. It is important to add this to this definition of 'discriminatory'. This addition would include both children and senior citizens, two categories of people that are often taken for granted.*

Such age discrimination is particularly witnessed at the place of work, where employers take under consideration the age of the person before employing or granting a promotion. It is quite clear and simple to understand that a person who loses his job at 40 years old is more likely to find another job than a person who loses his job at 60 years old. In fact, many people claim to have been subject to age discrimination at the place of work.⁴² Age discrimination is not often debated and is not given a lot of importance in relation to other discriminatory actions such as gender and racial discrimination. However, this too should be given particular importance because it can cause irreparable damage to the individual.

- *Thus, not only should 'age' be included in the definition provided by sub-article (3) of Article 45, but should be specifically mentioned in an independent sub-article.*

⁴⁰ *ibid* s 45.

⁴¹ *ibid* s 45.

⁴² http://www.slate.com/articles/health_and_science/prudential_living_longer_project/2014/08/here_s_how_we_can_improve_age_discrimination_laws.html

A Stronger Protection of the Right to Life?

Outlining the criminal offences with regard to which the right to life could be subject to an exception

One of the exceptions to the right to life is when one is being stopped from committing a criminal offence.⁴³ At prima facie level it gives the impression that such a right could be swerved even to prevent the commission of a contravention. Although this would not happen in practice due to the principle of proportionality which has been regarded as fundamental by our courts, the law should be crystallized, by outlining which crimes can be prevented by deprivation of the agent's right to life. Furthermore, such a deprivation should be a matter of last resort – only in the situation where there is no other legitimate way to prevent the commission of the crime can one be deprived of his right to life under Article 33 of the Constitution of Malta.

How the right to life is to be protected: should it include access to adequate health care?

The law should also clarify what the right to life includes: does it include other forms of protection besides punishment of homicide and grievous bodily harm, such as ensuring that everyone receives adequate health care?

The right to adequate health care is even recognized by the Universal Declarations on Human Rights which provides 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care(...)'⁴⁴

With healthcare being free in Malta, should this be taken away, the right to life would only be accessible depending on your financial status and the ability to afford health services. This could lead to discrimination between persons in different financial positions and social statuses.

In this respect it would be worthy to consider the World Health Organization (WHO) Constitution, which enshrines 'The enjoyment of the highest attainable standard

⁴³ *ibid* s 33(2) (d).

⁴⁴ Universal Declaration of Human Rights (adopted 19 December 1948 UNGA Res 217 A(III)) (UDHR) art 25(1).

of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.⁴⁵

Thus what can be proposed is that when a person's life is at stake, that person should be entitled to free health care, or at least include such a right as a principle under Chapter IV of the Constitution of Malta. As free health care already exists, therefore, such a mention in the law would act as a surety to the right of life.

Is a foetus considered to have a life for the purposes of Article 33?

If the right to access health care is to be included when the person's life is on the line, then the law on abortion must be reviewed.

According to past judgments of the European Court of Human Rights (ECtHR), such as in the cases of *Vo vs. France*,⁴⁶ *Paton vs. UK*,⁴⁷ and *H. vs. Norway*,⁴⁸ the foetus is not entitled to protection of its right to life,⁴⁹ however this is still unclear under the Constitution of Malta.

Whether the right to life implies the prohibition of abortion should be clarified, because the Criminal Code currently criminalizes abortion under any circumstances, including when the mother's only way of surviving is to abort the pregnancy.⁵⁰ Such a case is not specifically provided in the Criminal Code, however it is not provided as an exception to this prohibition, and following the principle *ubi lex voluit dixit*, it should not be assumed that this exception exists.

Such a clarification is important because, if it does not include the protection of the life of the foetus, then the Criminal Code would be contrary to the Constitution. The right to adequate health care is also recognized in the Convention on the Elimination of all Forms of Discrimination Against Women.⁵¹ Therefore, such a prohibition could be argued that it could amount to discrimination against women: men in all circumstances would have access to medical means to save their lives, but women in such cases will

⁴⁵ Constitution of the World Health Organization Constitution (WHO) (adopted on 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 preamble.

⁴⁶ *Vo vs. France* App. no. 53924/00 (ECtHR 8 July 2004).

⁴⁷ *Paton vs. UK* (1980) 3 EHRR 408.

⁴⁸ *H. vs. Norway* App. no. 17004/90 (ECtHR 19 May 1992)

⁴⁹ Ann M. Spiteri, 'Right to Life and Abortion', *Times of Malta* (Malta, 10 April 2013), <<http://www.timesofmalta.com/articles/view/20130410/opinion/Right-to-life-and-abortion.465003>> accessed 1 March 2016.

⁵⁰ Criminal Code 1854 (n 6) s 241 - 244A.

⁵¹ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 12 and 14.

not benefit from the protection under Article 33 of the Constitution. Although there have not been any prosecutions against any pregnant woman who to save her life submitted to a surgical intervention which resulted in the killing of the unborn child, as the Criminal Code stands, such a person could be liable to the punishment provided for abortion. However, such an exception to abortion should only be a matter of last resort – only if it is the way in which the woman could live could she abort the pregnancy. Thus if for example a woman threatens to commit suicide if she continues with the pregnancy it would not be a justification to abort, because the danger to her life is caused by the woman herself, and not due to natural medical circumstances.

- *In no way is this stance promoting abortion, it is merely a request to determine whether the Criminal Code, in denying a pregnant woman to save her own life by terminating the pregnancy, is in violation of her right to life, and whether the termination of a pregnancy in such a situation is considered as an arbitrary deprivation of the unborn child's right to life, or whether it is considered as a legitimate and proportional deprivation. If it is in fact the latter, then such a situation should be added to the other limitations to the right to life under Article 33(2).⁵²*

Protection for a person who has been wrongfully, but lawfully arrested

Under Article 34, everyone shall enjoy his liberty, and anyone who has been unlawfully detained shall be entitled to compensation.⁵³ However the law does not provide for compensation to innocent persons who have been unlawfully detained, perhaps because the Constitution of Malta provides for the protection from arbitrary arrest, and in such a case where there is persistent reasonable suspicion, even though the person concerned is innocent, it cannot be said to have been an 'arbitrary' arrest.

However, the European Convention on Human Rights, under Article 5 (parallel to Article 34 of the Constitution) provides for the 'right to liberty and security', which attaches with it more humanitarian depth than the protection found under Article 34 of the Constitution. The fact that innocent persons are not entitled to compensation neither under the Constitution nor under the Convention, gives the impression that our right to liberty may be belittled due to an error of the authorities.

- *Thus to show the true value which our State gives to liberty of the citizens, a person who has been wrongfully arrested should be entitled to*

⁵² Constitution of Malta 1964 (n 1) s 33(2).

⁵³ *ibid* s 34.

compensation proportionate to, for instance, the time that he spent under arrest or detention, and proportionate to the crimes that he was accused of, which may have greatly affected his reputation amongst other citizens.

Protection from deprivation of property without adequate compensation – but is such compensation always enough?

Sub-article 4 of Article 37 of the Constitution provides that nothing under Article 37 affects the right of the State to make or operate a law for the compulsory taking of property in the public interest.⁵⁴ However, this article should be read in conjunction with Article 6 of the Land Acquisition (Public Purposes) Ordinance, as the latter should be an exception to the former, seeing that the Ordinance itself was amended.⁵⁵

The law currently provides that during expropriation proceedings, an individual has the right to contest the public interest by filing a lawsuit within 21 running days from the Presidential Declaration, published in the Government Gazette. Apart from the fact that 21 days is a short period of time, the only way in which one can know that his land is being expropriated is by checking publications in the Government Gazette. The owner of the land, or a person who has vital interest in the land, should at least receive a notice of the declaration made by the President and the 21 days should start after receipt of such notice, or if one is not in Malta when the notice is sent, the 21 days should start from the day of his return to Malta.

Expropriation proceedings should pause upon an application for contestation because otherwise it defies the whole purpose of such contestation. As the law stands now if it is actually found that there was no public purpose, the interested person could only receive compensation, whereas he should have a right to restoration of ownership rights is such an event. Thus, it is proposed that once an application is filed contesting the public interest, a warrant of injunction should be available to the applicant to stop expropriation proceedings from taking place before the case is resolved in court.

- *Furthermore, just as there is a lapse of 21 days for one to file an application, there should be a time-frame within which the Government*

⁵⁴ *ibid* s 37(4).

⁵⁵ Land Acquisition (Public Purposes) Ordinance 1935, Chapter 88 of the Laws of Malta, s 6:

This provides that

- (i) The only form of proof of the public interest in requisitioning a property is the declaration signed by the President of Malta
- (ii) Any person who has an interest in the land can only contest the public purpose within 21 days of the publication of the President's declaration
- (iii) Applying for contesting of public purpose will not hinder the continuance of expropriation proceedings

must compensate the person whose property has been expropriated, so as to ensure fulfilment of one's rights and avoid bureaucracy.

Chapter V: The President

The position occupied by the President in the Maltese Constitution indicates that formally, he or she represents the State as Head of State and the Government, being Head of the Executive whilst also being the Chairman of the Commission for the Administration of Justice. Therefore, all statal and Government action is done either personally or is done in the name of the President.

Historically speaking the President of Malta has inherited the position that was formerly occupied by the Governor General as in fact he holds the same functions of office and enjoys the same powers. After 1962, the Governor General in Malta became purely the representative of the British Monarch, as he could only work on instructions given by the Queen or the Prime Minister. The post inherited was a mere representative one and this is why the post of the President in Malta remains a figurative one.

A drastic reform is needed with regard to the Office of the President and Office of the Prime Minister. However, such change can only come about gradually in order to allow the Maltese population to adapt to such a transition. This reform must be a well-drafted and well-planned change which will benefit the Maltese society at large and not merely those in power. The powers given to the President and the Prime Minister are inversely proportional. The more power is given to the President, the less power the Prime Minister retains, and vice-versa.

Security of Tenure

The President is presently elected and removed by a simple majority of the House of Representatives. The highest office of the land seems to be at the mercy of the Government having a majority in the House, as a result it does not enjoy a security of tenure.

- *It is proposed that the Office of the President should enjoy a security of tenure as is the case of the Ombudsman, the Auditor General and Deputy Auditor General who are appointed and removed by a two-thirds majority of the House of Representatives. Thus, the House must reach a consensus for the vote to pass. This method of selection would ensure that the appointment is effected with the agreement of both parties in*

Parliament and not solely based on a decision of the party that enjoys the majority in the House and, therefore, is in Government.

An advantage to electing a President by a two-thirds majority is that for an individual to be appointed as President, both parties in Parliament must agree to the person in question, thus giving the President a more unifying role and strengthening the Office of the President. As a result of this method, the President would be afforded more powers, since the threshold to be elected is higher than the present one and appointment, or dismissal, is more difficult to implement. On the other hand, a disadvantage to this method of appointment may be that both parties in Parliament may not agree on the same person to be elected as President, and thus fail to find a suitable person for this job.

To remedy such a situation, Professor Kevin Aquilina in his speech at the 2013 President's forum suggested that:

Should the House not agree on a person to occupy that Office within a week from the day that the Office of President becomes vacant, the proposed Council of State should appoint an Acting President from amongst past Presidents or one of its members should there be no past President willing to take up the Presidency. Once the House agrees on the appointment of a President of Malta, the Acting President will vacate Office. If the House takes more than three months to make such appointment, then it will forfeit its authority to make such appointment and the Acting President will take over the Office of President until the term of Office in terms of the Constitution comes to an automatic end, thereby ensuring an uninterrupted period of time in Office.⁵⁶

- *The President's security of tenure could also be enhanced by fixing another method of removal. The President's removal before the five year term elapses should be done by an impeachment following a two-thirds majority vote of the House of Representatives after the President would have been declared guilty by the Constitutional Court. Thus, the court would play a very important role in the impeachment process, whilst safeguarding the President's role from any partisanship. A Constitutional matter like that of removal of the President must be reviewed and*

⁵⁶ Kevin Aquilina, 'A Second Republic for Malta' (Dean, Faculty of Laws, University of Malta - 25th April 2013).

determined by the main guardian of the Constitution, and that is the Constitutional Court.⁵⁷

- *Currently, the President occupies her office for a period of five years. It is proposed that this term should be renewed or extended for a further term of five years in order to grant the necessary security of tenure for the highest office of the country. This is in line with the roles of the parliamentary officers mentioned who all have the possibility of a second term of office. This has worked well with regard to the Ombudsman as in the cases of Joseph Sammut and Chief Justice Emeritus Joseph Said Pullicino who have both served an extended term of office as Ombudsman. The extension should not be an automatic one, but should be considered thoroughly by the House of Representatives based on the performance of the President in the first term.*

Suggestion to remove the possibility of the Chief Justice to act as Acting President

A contradiction which is found in the Constitution lies in Article 48(2) where any judge or the Chief Justice are not eligible to be President.⁵⁸ On the other hand, the Constitution allows the Chief Justice to perform the functions of the President, if there is no person in Malta able to perform those functions.

- *Thus, it is suggested that this contradiction be removed by not allowing the Chief Justice or any other judge to occupy the role of President in order to remove any conflicts of interest.*

Any judge or Chief Justice appointed to replace the President may come across a situation where he would have to take decisions which would ultimately be the same laws challenged in court. Taking the example of expropriation, the judge or Chief Justice might have assented to a certain expropriation, and consequently having it challenged in court.

The President to be involved solely in the Executive

⁵⁸ Constitution of Malta 1964 (n 1) s 48(2).

- *It is suggested that the President should no longer be involved in the legislative and judicial organ of the State. In fact, many suggest that the President's power should be limited only to the executive organ.*

As it currently stands, the President is vested with the executive authority of the State as delineated in Article 78 of the Constitution, chairing the Commission for the Administration of Justice, thus forming part of the judicial organ and assents to bills passed by the House of Representatives, forming part of the legislative organ.⁵⁹ This goes against the doctrine of the separation of powers, since the President is involved in all three organs of the State, prohibiting an effective measure of checks and balances.

- *Thus, the President's role of signing bills into law should no longer be vested in the President, but should be attributed to the Speaker of the House of Representatives. Taking this into consideration, the President would only be tackling executive issues and would no longer be involved in any matters of the legislature.*
- *Moreover, the President should not be a Chairman of the Commission for the Administration of Justice. Amongst the many functions of this Commission, it may be called upon by the Government to give advice on the appointment of a member of the judiciary. The President, as Head of the Executive would be called upon to appoint and remove from office a member of judiciary, a clear breach of the separation of powers. This duty should be left in the hands of the Chief Justice who is Deputy Chairman of the Commission.*

With all these changes, the President would be mainly responsible for the executive organ of State. However, this makes little sense since the President has very little roles tied to the executive in accordance with the constitutional mechanism.

- *Thus, the President should be given more powers to exercise on his/her own initiative. One such power contemplated by Prof. Aquilina is that the President should appoint all the constitutional commissions, that is, the Electoral Commission, the Employment Commission, the Public Service Commission, the Commission for the Administration of Justice and the Broadcasting authority, after having discussed this with the proposed Council of State. The appointments should not be done politically, but in the interest of the State as a whole.*

⁵⁹ Constitution of Malta 1964 (n 1) s 78.

The President as guardian of the Constitution

In Prof. Aquilina's paper regarding the Second Republic, he commented that the President as guardian of the Constitution, lacks the necessary powers to carry out such a role.

- *He should, therefore, be empowered to issue directives that help him make sure that everyone is complying with the provisions of the Constitution in those situations where it is not possible for the Constitutional Court, or any other body or person, to provide a solution in terms of the Constitution itself. These directives may be directed to anybody who is in breach of this supreme law, be it the Prime Minister, a Minister, a public officer, or any other person or body.*

Chapter VI: Parliament

A Bicameral over a Unicameral Parliament

As things stand, Malta has a unicameral parliament which is made up of part-time Members of Parliament (MPs) who are in the meantime normally expected to carry on with their employment and professions, whilst in the duration of their service as MPs. There has been a time throughout our Constitutional history in which there existed a bicameral Parliament, which consisted of a Legislative Assembly and a Senate. The Senate, at the time, was appointed by the Governor of Malta, whilst the Legislative Assembly was elected.

- *Presently speaking, it should be considered as to whether a bicameral Parliament would aid the current Parliament in its efficiency. The benefits of having a second chamber are that it would broaden and deepen the process of legislative deliberation, which would arguably lead to better and more effective laws. A second chamber could provide for alternative ideas, and a show for a variety of views other than those in the First Chamber of Parliament. It is also to be recommended that this second chamber need not be elected, but rather appointed, as this would lead to be less partisan, and could even be used to permit the involvement of technocratic experts in their*

field, to involve their expertise and implement it in adequate legislation in a shorter period of time than in the current procedure.

Undoubtedly, this would be rather costly, and above all could lack electoral legitimacy, which could risk conflict between the two chambers, reminiscent of past attempts of having a bicameral parliamentary system. Not only so, but it would be rather impractical to have a bicameral legislature on an island of only 316km².

- *Therefore, although such ideas should be considered, the expansion of Parliament should be promoted in the light of the following subsection, that of a Council of State.*

Introducing a Council of State

- *If the above consideration is not taken into account on the basis of the fact that in Malta, a unicameral parliament has somewhat worked well, and it has so far made economical and practical sense in being the sole chamber, a senior consultative body should still be taken into consideration, due to the mere fact that experience has shown that in order for Parliament to work efficiently, it needs some external help. This need not form part of Parliament itself, but could constitute a separate body. The role of the Council of State would be to act as a 'guardian over the guardians'. The Council of State has been proposed several times, including by Guido de Marco in 1988, and more recently in 2009 by President Emeritus George Abela.*

Questions arise as to whether Malta would benefit from this Council. The replies should be in the affirmative, bearing in mind that such Council exists in several other jurisdictions and served the purpose for which it was established. The Council of State would act as the advisory organ of the State, and would advise the President on certain decisions in which presently, the President would need to make on his or her own. The President, as it stands under our current Constitution, has nobody to turn to, to seek advice from and comfort in his or her decisions, especially when these decisions concern all the three organs of the State.

Article 85(1) of the Constitution enlists instances in which the President could act on his or her own accord, of which include the instances of dissolution of Parliament, the appointment or removal of the Prime Minister from his office, the appointment of an Acting Prime Minister, to revoke the authority of a Cabinet Minister to act as Prime Minister, to appoint and revoke the appointment of a Leader of the

Opposition and to appoint his/her personal staff.⁶⁰ Focusing on Article 85(1)(a), referring to the dissolution of Parliament, in such cases, the President should be allowed to seek counsel from a body that is above partisan politics and is there to provide impartial advice to the President. This can be achieved through a Council of State. The Prime Minister and the Leader of the Opposition should not be included as members for reasons of impartiality.

- *It is recommended that the member of the Council of State should constitute individuals selected by the President from the civil society, or instead, it could be composed of a number of former Presidents, former Prime Ministers, former Speakers and former Chief Justices and Judges, together with representatives from academic institutions or Local Councils.*

Full time Members of Parliament

Currently, Members of Parliament are not on a full time basis, and in addition to their parliamentary work, they are expected to work normally and carry on with their employment or professions. Although most of the Members of Parliament work as professionals, that is, they hold positions as lawyers, doctors or architects, others are also employees.

It has always been heavily discussed as to whether MPs should work full time, and this brings with it several advantages to be considered, as well as other negative implications. Having full time MPs would be advantageous as there would undoubtedly be more qualitative work, where parliamentarians would have time to well-research their ideas and come up with better long-term solutions. They would be expected to be highly-specialised in the particular field they are responsible for. Parliamentary business cannot possibly be carried out efficiently or effectively when MPs are currently known to absent themselves on a regular basis from attendance, which results in Parliament having to rely almost solely on the Executive for it to function.

- *Having a Parliament made up of full-time MPs would promote loyalty which lies to the House and to the people who elected them to represent them, leading to a more potent and effective Parliament. It will ensure that Parliament can be in session for longer periods, Select Committees can be established on a wider range of subjects than those currently available, Parliament can draft its own laws, and petitions submitted by the people can be discussed by the House and*

⁶⁰ Constitution of Malta 1964 (n 1) s 85(1).

remedies provided. Full time MPs would be expected to present work of better quality, and would have more time available to interact with the electorate, in order to understand them, along with any of their problems. Above all, having full-time MPs would also mean being able to attend international meetings more regularly, and they would also be better prepared for such meetings.

Those contesting elections, knowing they would be full-time MPs, would perhaps be more truly dedicated and actually interested in contesting; as a result candidates would be more aware that they would be actively participating as members of the House. Their time would be fully dedicated to the issues in Parliament.

The negative implications would obviously concern the finances related to maintaining full-time parliamentarians, as the idea of spending a lot of money on full-time MPs might not be received well by the public at large. Also, problems could arise as regards to adequate office space. Another factor is that the best possible candidates would not actually contest elections, as they would not wish to give up their successful private career.

Ombudsman

The recognition in a democratic State that the individual enjoys a fundamental right to good administration, should be at the centre of any major reform to strengthen the Office of the Ombudsman. This office acts as a means of promoting transparency and assurance for accountability and good administration, which was given further importance than previous years upon attaining full membership within the European Union. The Ombudsman represents the citizen as its defender, hence such a role enjoys the trust of the public at large. The office was only recently recognised in the Constitution in 2007, this is aside from the fact that there has been no substantive changes in the recent years within the Ombudsman Act since its enactment.⁶¹

The Ombudsman has recommended that the right to a good public administration be enshrined as a fundamental right in the Constitution, a reflection of the European Code of Good Administrative Behaviour that translates in a comprehensive manner the right to good administration, acknowledged in the Charter of Fundamental Rights of the European Union to which Malta is a signatory. This implies that the State should continue to be liable for its actions and that an individual has a right to seek redress for damages suffered under it.

⁶¹ Constitution of Malta 1964 (n 1) s 64A.

- *Our proposal with regards to the Ombudsman in terms of the Constitution is to strengthen the constitutional status of the Ombudsman, by regulating the Ombudsman's method of appointment, term of office, security of tenure, funding of the office and the conditions of service, similar to the situation of the Auditor General under Article 108 of the Constitution.⁶² Reference must be made to Article 41(2) of the Charter,⁶³ which specifies what the right to good administration includes. It is thus also for consideration that now, with the constitutional reform being proposed, that the individual's right to good public administration be enshrined in our Constitution. This effective remedy would result in the individual being given an effective legal tool to exercise that right by keeping the public authority accountable for its actions through judicial review and other processes. Also, this institution should also be made available to the other organs of the State, that is, it should be made available of the executive and the committees of the House. This is advantageous considering the Ombudsman's role as a parliamentary officer, independent of the Government.*

Inter-regnum between one Parliament and Another

During the period after the dissolution of Parliament, several administrative and constitutional lacunae have arisen. When Parliament is dissolved, so are all its standing and select committees. One of these committees discusses European Union affairs, of which it does not make sense to halt merely due to the fact that the House of Representatives is not in office for a few weeks. The current period for an electoral campaign, around three months, is considered to be too long to render Parliament and its committees non-functional.

- *Therefore, this should be reduced to perhaps a maximum of six-weeks, especially with regards to the more important and effectual committees, such as the Foreign and EU Affairs Committee. These should continue to function notwithstanding the dissolution of Parliament as to not prejudice Malta's position in any EU decisions being taken during the period.*

⁶² *ibid* s 108.

⁶³ EU Charter of Fundamental Rights 2000 (n 26) art 41(2).

Alternative methods of voting

Taking into consideration the fact that the current method of voting, the Proportional Representation by means of the Single Transferable vote method, has worked well for our country, as it permits splitting voting preference amongst candidates from different parties (although this is not used due to a high degree of partisanship in Maltese electives), it should perhaps remain so. However, efforts should be made in order to promote less partisan voting.

- *On the other hand, with a new Constitution, it would be beneficial to introduce a new method of voting, that is, e-voting. It could be a potential step towards the modernisation of exercising a basic right. This would undoubtedly increase electoral participation, making it much easier to vote and less burdensome, especially amongst the younger generation who are a group that is less likely to vote in an election.*
- *Also, voting online can lead to better sources of information on which vote should be based, thus could lead to more informed decisions, and perhaps less partisanship. Conclusively, since votes are logged in electronically, the counting process is carried out in a quicker manner. Of course, one should mention the downside, the improbability of creating a fool-proof system. This method of voting would lack security and would require technological security systems which perhaps are not available.*

Chapter VII: The Executive

De Smith and Brazier stated that 'The Prime Minister is the key-stone of the Cabinet Arch, a sun around which the planets revolve, an elected monarch, a president of what you will'.

The emergence of the office of the Prime Minister, in the modern sense, arose and evolved in the British Constitution out of constitutional conventional arrangements. Initially, there was the birth of the cabinet. This constitutional development took place around 400 years ago, when the British monarch delegated the power of governing to confidential advisors (ministers). In time, the monarch declined to preside over at such meetings and was replaced by the most senior minister, who gradually became known as the Prime Minister. The Office of the Prime Minister has the central position of authority in the parliamentary system of Government (Westminster model), which is characteristic of the British Constitution and which Malta, an ex-British colony, has

similarly adopted. Legally speaking, the written document of our Constitution lays down that the executive authority is vested in the President of the Republic of Malta (who also is the Head of State) according to Article 78.⁶⁴ Yet, this is only a nominal head-skip and therefore, politically-speaking it is the Prime Minister who has the real executive power.

However, our Constitution also provides that the cabinet of Malta shall consist of the Prime Minister and a number of other ministers and this cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible to Parliament (Article 79). Yet, there is an ever-increasing tendency for Prime Ministers, especially today, to dominate their cabinets and nowadays, the proposition that the Prime Minister is merely '*primus inter pares*', that is, first among equals, cannot be upheld in reality (except in the legal sense that all ministers are under the executive authority of the President) since there has been a definite and real shift from a Cabinet Government to a Prime Ministerial Government.

The Maltese Constitution grants the majority of the power to the executive.

- *Therefore, it is proposed that a better system of checks and balances is implemented, by reducing the majoritarianism in the executive. The latter currently controls the legislature since it owns a majority in the House of Representatives; it appoints constitutional commissions and other public officers whilst also appointing members of the judiciary. The executive also has an important say in the appointment of the President of Malta, the Speaker of the House of Representatives and the Deputy Speaker, the Ombudsman, the Auditor General and the Deputy Auditor General. Therefore, less powers should be given to the executive. These powers should be allocated more evenly within the executive and the judiciary to attain more transparency and accountability.*

A shift towards a Presidential system of Government

Although the cabinet has been regarded as the primary executive organ of Government concerned with the governing and administration of the state and its affairs of dealing with national policy, the Prime Minister today has sufficient political authority and should he enjoy a strong personality, he has the ability to dominate the cabinet. Therefore, the Prime Minister within the constitutional framework and largely

⁶⁴ Constitution of Malta 1964 (n 1) s 78.

as a matter of convention, holds considerable authority over other ministers and this can be seen from the number of functions of the Prime Minister that have evolved from their origin.

- *Now that Malta forms part of the European Union, other options should be considered such as introducing a presidential system of governance, or to retain the current cabinet system whilst distributing the powers of the executive or vesting more powers in the President of Malta. It is the will of the Prime Minister that prevails. Thus, a Prime Minister's power is greater than the total sum of his cabinet's powers today (provided the Prime Minister retains the confidence of the House of Representatives) and a significant reason for this is that his profile is higher than any other minister.*

A presidential system is a system of Government where an executive branch is led by a President who serves as both Head of State and Head of Government. In such a system, this branch exists separately from the legislature, to which it is not responsible and which it cannot, in normal circumstances, dismiss. This brings about a clearer system of the separation of powers which would enhance transparency and accountability due to better checks and balances between the three organs of the state. A presidential system would also entail less focus on parliamentary majority which is very determinate in the present cabinet system. Parties would no longer have to rely on up-keeping a strong majority in order to govern. However, had the proposed system be abused of, this would bring about an over-powered executive. It would also reduce the relationship that ministers have with their voters, which is one of the most popular elements of a bicameral Parliament.

Shifting towards a presidential Government would mean losing over two centuries of experience as a cabinet government influenced by British public law. Thus, a middle-road approach should be taken to incorporate the present system of a parliamentary system of governance with an improved system of checks and balances which can be done mainly by increasing the powers of the President as discussed above.

Roles of Ministers and the Ministerial Code of Ethics

The current Ministerial Code sets out that Ministers and Parliamentary Secretaries are prohibited from having a paid job whilst in office.

- *Although this is favourable, a period of transitioning should be given to Ministers and Parliamentary Secretaries in order to get their houses in order. This period should not be longer than three to six months, after which Ministers and Parliamentary Secretaries should not be able to resume any work, whether it be paid or voluntary in order to avoid a conflict of interest between public duties and private work.*
- *A revision of the Code should be done in order to list down the fundamental principles of natural justice, including accountability and transparency as well as openness and fairness.⁶⁵ Failure to abide by these would remit a negative sanction.*

Chapter VIII: The Judiciary

It was perhaps proposals for a judicial reform that gave rise to the realisation that ultimately, the entire Constitution needed reform and some form of updating. The European Commission for the Efficiency of Justice country report on Malta, has continuously highlighted shortcomings in the efficiency of the judicial system in dealing with administrative cases as well as litigious civil and commercial cases. It noted that the country was lacking in its duty to provide the judicial system with the necessary resources to ensure speed and efficiency. Quoting the European Commission Report in April 2013, it was found in Malta, local civil cases take up to 850 days to be resolved, in contrast to 50 days in Lithuania, or 200 in Poland.

- *This dwells on the fact that the need for reform has never before been so urgent. Some form of body needs to be entrusted with a thorough reform of our courts, in practice and not just on paper.*

However, an adequate way to start would be with our Constitution, which should seek to implement and ensure that not only speed and efficiency are taken into consideration when it comes to doing justice, but also to reduce crimes and protect human rights. Having an efficient judicial system is a practical way of ensuring that a country's democracy is being maintained.

There have been many recommendations regarding the judiciary, of which included the increase of the age of retirement for the Attorney General, judges and

magistrates, increasing it to 68 from 65. This is of great importance as it has too often been the case that judges and magistrates are forced to retire at the height of their career, when they would still be fit and healthy to continue on with their duty as part of the judiciary.

Constitutionally tackling the delay in judicial proceedings

To a certain degree of misfortune, the Maltese courts have become rather synonymous with their delays in judicial proceedings, despite the fact that there are laws, such as those found under the Code of Organisation and Civil Procedure, which contain provisions, including sanctions, for the avoidance of delays and the allocation of time hearings. With around only nine judges for every 100,000 persons, there seems to be a lack of proportion, leading to slow judicial proceedings. However, it appears that there is no one single reason for such, and perhaps, it is not only the judges which can be considered to have full control over the course of proceedings, or to ensure that there is no unnecessary prolongation. There is no one person to point at as being the cause of this, as ultimately there are too many parties which contribute to this.

Nevertheless action must be taken in order to abide with Article 6(1) European Convention on Human Rights,⁶⁶ and Articles 39(1) and (2) of the Constitution of Malta,⁶⁷ dealing with the fact that judicial proceedings should be instituted and completed within a reasonable time frame.

- *The Constitution should provide for amendments which give the Commission for the Administration of Justice the adequate powers to hold judges and magistrates accountable for causing delays by starting sittings late or postponing them. Similar sanctions should be handed out to parties involved in a case, lawyers and prosecution officers who, presumably without just cause, do not turn up or who try to stall or delay proceedings. However before administering fines, it is elemental that the the inefficiency of the Court's system be addressed.*

Changing the written rules is unlikely to cause a difference, it is the implementation of new practices and perceptions of the 'court community' that will ultimately constitute the true changes which are so drastically needed.

⁶⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (n 9) art 6(1).

⁶⁷ Constitution of Malta 1964 (n 1) s 39.

The Commission for the Administration of Justice

The Commission for the Administration of Justice was established in 1994 by Constitutional amendments made by Act No. IX of 1994 whereby Article 101A in the Constitution of Malta was included. Keeping in mind the doctrine of the separation of powers, it should be noted that the Commission for the Administration of Justice, as it currently stands under Article 101A, is composed of the President of the Republic as the Chairman of the Commission.⁶⁸

- *It is to be considered that the President, who is also the Head of the Executive, is not needed to form part of the Commission, as it could perhaps provide as a conflict between the other organs of the State and would impede on their separation. Having referred to the executive, this could lead to the consideration that the Prime Minister and the Leader of the Opposition should not be given the duty under the Constitution to choose their own representative to form part of the Commission, but rather this should be replaced by the choice being given to the general public.*
- *It is thus up for consideration that the Constitution should provide for less members in the Commission, but of which constitute solely members of the Judiciary. In replacing the President as the Chairman of the Commission, it is therefore recommended that the Chief Justice ex officio would replace this role. One judge and one Magistrate amongst the existing selection of judges and magistrates presiding in the Maltese Courts would be selected to be part of the Commission, whereas the roles of the Attorney General ex officio and the President of the Chamber of Advocates ex officio would remain as stated in the Constitution.*
- *Moreover, Parliament has proposed that the Commission for the Administration of Justice shall appoint a sub-committee known as the Committee for Judges and Magistrates which will deal with any disciplinary proceedings that may arise. It will include members of the Commission for the Administration of Justice itself, elected amongst the members themselves. However, the majority in any such Committee should be composed of members of the judiciary itself.*
- *Consequently, among its recommendations, additional disciplinary powers should be handed to the Commission for the Administration of*

⁶⁸ *ibid* s 101A.

Justice, the method of appointment and removal of judges, the setting up of a Prosecutor's Office and ways to improve the efficiency of the law courts.

The Constitutional Court

When the Constitution of Malta was first formulated in 1964, the idea was that constitutional cases were merely a remedy and used as a last resort. Time has shown, however that they have become the norm, and not an exception. The Constitution should provide for this change, for the sake of the judicial economy, where a Constitutional remedy shall be considered an ordinary one.

- *It could perhaps be recommended that as a constitutional matter, such should be submitted and decided with ordinary matter within one court case, and not in two separate court cases distinct from each other although on the same subject. This would inevitably save a lot of time, whilst the number of court cases would decrease, as there will be no need for having such a multiplicity of cases on the same matter. With the judicial process of the constitutional remedy, there has been a lot of unnecessary prolongation, such as when the need for a reference arises, or whether such reference is deemed frivolous or vexatious, or when such is filed by means of an application. All these have contributed to unneeded delays.*

As the situation stands, court cases of a constitutional nature are being heard by a single judge who presides in the First Hall of the Civil Court, hierarchically inferior to the Chief Justice who presides the Constitutional Court.

- *As regards to the establishment of the Constitutional Court, the Constitution should be amended as to provide that the Constitutional Court could be made up of three judges that perform their duties in the said court only and not in any other court. Several reports such as 'The Final Report of the Commission from a Holistic Reform in the Field of Justice' by the Commission for the Holistic Reform of Justice System, have contended that the Constitutional Court ought to have its own budget. Ideally, those judges appointed are experts in human rights, in order to ensure that the appointed Judges in the Constitutional Court would follow the sentences given by the European Court of Human Rights, who has so far criticised Malta for taking a long time to decide*

cases of a constitutional nature, whose sentences can be wiped out before the same ECtHR at a later stage.

In the judgement '*Bellizzi vs. Malta*', it was asserted that the scenario in which the Constitutional Court has jurisdiction, that is, the Civil Court, and the Constitutional Court in the case of an appeal, the Courts will assess complaints related to proceedings of the Constitutional Court, and the Civil Court would likely have to rule on the conduct of the Chief Justice, that is, the President of the Constitutional Court, who is hierarchically superior to the other judges.⁶⁹ It was stated in this case, under Article 43, that this scenario may raise issues in respect to impartiality and independence. If amendments are made to the setting up of the Constitutional Court, there will be indeed less cases which will end upon this Court, and perhaps further less cases that would end up being taken to the European Court of Human Rights. Therefore it is up for consideration that the Constitutional Court is to be made up of five judges as it were in the past, limited on a full time basis to such court.

Functions of the Attorney General

The Attorney General has several roles, ranging from the Government's lawyer, to that of a prosecutor, to aiding in drafting laws as that of serving a number of boards.

- *With so many roles and duties vested in the Attorney General, it is recommended that this is to be divided where necessary and allowed, particularly as regards to the prosecution function vested in the Attorney General. It is to be considered that this role is vested in another officer, to be known as the General Prosecutor, and would focus on criminal proceedings.*

With this duty taken away from the Attorney General and his office, he could focus on other urgent constitutional matters and administrative duties, such as collecting money owed to the Government, advising ministers, advising in the creation of subsidiary legislation and generally serving the public. Having both an administrative role and acting as a prosecutor in criminal proceedings could perhaps result in a delay in judicial proceedings which is one of the biggest impediments in our judicial system.

In terms of the Constitution, the Attorney General remains a constitutional office, but would be given less functions, which could potentially aid in the process of judicial proceedings, and hence reducing delay. Therefore, it would only be the duties found under Article 91(3) of the Constitution that would be transferred to a new constitutional

⁶⁹ *Bellizzi vs. Malta* App. no. 46575/09 (EctHR 28 December 2011).

office.⁷⁰

- *It is for consideration that the General Prosecutor shall have constitutional and legal guarantees which are necessary so that his independence from the Executive is guaranteed. On the other hand, the Attorney General and the lawyers in his office should have the same conditions of employment of the General Prosecutor and of the staff of the Office of the General Prosecutor.*

Another issue which arises as regards to the role of the Attorney General is that it is not required for him to give reasons for his decisions when acting as a Judge in the Superior Courts, according to Article 90 of the Constitution.⁷¹ This is a point which needs to be addressed and amended. There should be the duty of the Attorney General to give reasons for his decisions, for the simple reason as to eliminate any room for supposition.

Appointment of Judges and Magistrates: A Judicial Appointments Committee

- *With the recent upheaval and statements made as regards to corrupt practices related to the appointment of the judiciary, it should be recognised that there ought to be some constitutional reform as regards to how judges and magistrates are appointed, with particular control over the executive on this matter.*

Dr Franco Debono refers to the appointment of the judiciary as being done out of the goodwill (*'buona grazia'*) of a minister when advising the President of Malta. This is the situation in accordance with Article 96 and Article 100 of the Constitution.

Our present system of judicial appointment is what was the norm in other European countries twenty years ago until the doctrine of the separation of powers was given a lot more significance and other methods were adopted. Reference ought to be made to other models which are similar to our own when it comes to adopting a system which is more democratic, reflecting meritocracy and not a system which is governed by favours. Such a system to be referred to is the Scottish judiciary, as it is one of the systems which most reflects our own. Under the Scottish judiciary, there exists a committee known as the Judicial Appointments Committee, where Ministers seek advice as regards to the appointment of the judiciary. Following this model, it is suggested that the prerogative remains in the hands of the Executive, as the operation

⁷⁰ Constitution of Malta 1964 (n 1) s 91(3).

⁷¹ *ibid* s 90.

of checks and balances provides, however there should be a such a committee available to advise the executive.

Bill 145, on the Constitutional Reforms of the Justice Sector has made reference to the above-mentioned and included such a recommendation, adding an article after Article 96 of the Constitution, Article 96A, which makes reference to this Judicial Appointments Committee. Interestingly, the bill appoints members of which include the Chief Justice *ex officio*, the Attorney General *ex officio*, and the President of the Chamber of Advocates *ex officio*, who are all derived from past members of the judiciary. Moreover, this solidifies the distinction between the powers of the state as it explicitly states that no person shall be a member of the Judicial Appointments Committee if this person is a minister, a Parliamentary Secretary, or a member of the public service, or an official or candidate of any political party. The system of checks and balances is ensured through the Secretary of the proposed Commission, which is appointed by the Minister of Justice.

Chapter IX: Finance

The Auditor General, after auditing all accounts of Government departments, and as head of the National Audit Office (NAO), makes several reports.⁷² What is missing is what happens after such reports are made, and it is found that there are shortcomings and 'lack of good practice', which, according to current Auditor General Anthony Mifsud is not due to fraud, but to 'lack of adherence to financial rules and regulations, weaknesses in internal controls and mismanagement.'

- *In view of the lack of mechanisms which are employed after NAO reports are made, it is thus recommended that there should be an adequate subsequent mechanism in order to implement remedial actions, or a report explaining such shortcomings and lack of adherence and lack of good practice and financial rules.*

In order to have stronger internal controls and give the NAO reports the attention they deserve, there should be an adequate subsequent mechanism in order to remedial actions, or an explanation for such shortcomings and lack of adherence and lack of good practice of financial rules. At the moment there is the Public Accounts Committee (PAC) which facilitated corrective measures to be taken on audit issues through the

House of Representatives, but only makes recommendations to Parliament after having investigated reports.

- *Thus what is needed is stricter and more solid rules in order to increase good practice regarding finances of the Government. The new Constitution should have mechanisms to ensure financial propriety and means to ensure that there is no abuse to such funds, especially in the months leading to general elections. There is it to be considered that the Public Accounts Committee is to be strengthened through means of the Constitution, by giving it the power to exercise better control on government expenditure.⁷³*

Chapter X: The Public Service

Issue with 'persons of trust' and the Public Service Commission

- *A constitutional reform should tackle the appointment of 'persons of trust' due to the lack of clarity of what is meant by such a person. A 'person of trust' should be clearly defined in the law and there shall be criteria which one has to satisfy with regard to the nature of the functions that they are to perform in order to ensure that there are no abuses and that not just any job will satisfy for a position of a person of trust.*
- *Considering that their salary is taken out of public funds, there should be a limit on the number of persons of trust each minister could appoint and there shall be an investigation by the Public Service Commission before such appointment is made, to ensure honesty and integrity in such appointments. In the light of the recent appointment of Eric Frendo (son-in-law of Speaker Anglu Farrugia) as a 'person of trust' such investigation by the Public Service Commission would have been ideal so as to avoid accusations of nepotism and being matters of family affinity.*

Chapter XI: Miscellaneous

⁷³ Kevin Aquilina, 'Constitutional Change: Proposals for Reform', (Id-Dritt, Volume XXIV, 2014)

An invalid law: is there more to it than just a conflict with the Constitution of Malta?

According to Article 6, the supremacy clause, a law is invalid ('void') when it is in conflict with the Constitution.⁷⁴ However, the fact that Article 116 gives individuals the right of an action for a declaration that a law is invalid 'on any grounds' seems to imply that it is not only conflict with the Constitution that renders a law invalid, and therefore there seems to be a contradiction between Article 6 and Article 116 of the Constitution.⁷⁵ But since the Constitution is supreme, which article is to apply?

After Malta's accession into the European Union, a Maltese law passed by Parliament can be declared invalid, or given no legal effect. However, this would not be so without a declaration of invalidity on one of the grounds provided for in the Constitution.

- *The Constitution of Malta should clarify that a law can be declared invalid on grounds other than conflict with the Constitution of Malta – particularly due to inconsistency with a directly effective European Union law provision.*

The principle of direct effect under EU law holds that if the Court of Justice, or a national court applying the rules, criteria, and conditions set out by the Court of Justice, holds that a particular Treaty provision or provision in a regulation, or, importantly, a provision in a Directive, or a provision in a decision, as directly effective, an individual can enforce that provision in the national courts, and this is a right 'which must be legally protected'

The right of *actio popularis* under Article 116 can also be extended to allow citizens to request the nullity, that is, legal ineffectiveness of an Act of Parliament, even if it is not declared as invalid.⁷⁶

Despite that a Maltese law can only be annulled or declared invalid by the Constitutional Court, the ECJ has required that national courts give effect to EU law even when EU law goes against a national law, including national Constitutions and Constitutional law. In fact the ECJ has held that the recognition that national laws which conflict with Union law had any legal effect 'would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably, and

⁷⁴ Constitution of Malta 1964 (n 1) s 6.

⁷⁵ *ibid* s 116.

⁷⁶ *ibid*.

would impair the very basis of the Community'. Although national courts are not obliged to annul the provision that is in conflict with EU law, they should refuse to apply it. In fact the ECJ has held that it does not need to wait for the national court to declare a law invalid to apply EU law.

The Constitution should make room for Supremacy of Union law

Thus if the Constitution is to be amended and the clause for Constitutional supremacy is to be kept, Parliament has to make room for supremacy of Union law, which has been affirmed in many cases such as *Van Gend en Loos* and *International Hendesgesellschaft*.⁷⁷

- ▶ *The Constitution should recognize that where there is a conflict between an Act of the Maltese Parliament and the Constitution, the Constitution shall prevail, but it should also in turn recognize that in such a situation, if the Constitution is not in line with EU law, the latter shall prevail, and the Act of Parliament can be declared invalid on the grounds of inconsistency with Union law and not with the Constitution. It is in this way that the aforementioned contradiction between Article 6 and Article 116 of the Constitution, can be resolved.*

Ambiguity of term 'public office'

The Constitution does not define exactly what a public officer is, or what the public service consists of. It just provides that a public officer is 'the holder of any public office or of a person appointed to act in any such office'.

This ambiguity arises even further in Article 118, sub-article 3 provides that:

A person shall not be qualified to hold the office as a member of the Broadcasting Authority if he is a Minister, a Parliamentary Secretary, a member of, or candidate for election to, the House of Representatives, a member of a local government authority or if he is a public office.⁷⁸

From this provision, the Constitution is treating a Minister, Parliamentary Secretary, member or candidate for election to the House of Representatives and a member of a local Government as separate entities from a 'public office.' Sub-article 4 then provides that a 'member of the Broadcasting Authority shall not, within a period

⁷⁷ Case 26/62 *Van Gend en Loos and International Hendesgesellschaft* [1963] ECLI:EU:C:1963:1

⁷⁸ Constitution of Malta 1964 (n 1) s 118(3).

of three years commencing with the day on which he last held office or acted as a member, be eligible for appointment to or to act in any public office.⁷⁹

Since in the previous sub-article the Constitution treated the mentioned offices as separate from that of a public office, should 'public office' in sub-article 4 be interpreted as in the previous sub-article, or should it be interpreted as including the offices above-mentioned?

- *One of the most important characteristics of a well-written law is that it is clear and precise. If amendments are to be made to the Constitution, it would be worthwhile to clarify what is meant by a 'public office', and in this way, Article 118(4) (and many other articles) will be crystallized, because as it presently is, it seems to imply that it does not include ministers, Parliamentary Secretaries, members of the local Government and members or candidates for election of Members of Parliament of the House of Representatives, and that a member of the Broadcasting Authority can be appointed to such offices within less than three years of their membership in the authority, when this is obviously not the case.*

Consistency

What is also important is consistency in the wording of the law. So if 'public office' includes the said offices, then in all provisions regarding public offices as a whole, they should not be treated as being separate, as is currently under Article 118.

Article 118(7) provides that a person appointed as a temporary member of the Broadcasting Authority is subject to Article 118(3) as well as Article 118(5) and Article 118(6) (which provide for removal of members) but it does not provide whether it is subject to Article 118(4). Although it again seems obvious that sub-article 4 also applies to temporary members, if other sub-articles are provided for, then it should also be provided for so as to ensure that there is legal certainty.

The Broadcasting Authority: An Impartial or Partisan Institution?

Updating the impartiality clause

The Constitution imposes upon the authority to ensure that 'due impartiality is preserved in respect of matters of political or industrial controversy or relating to

⁷⁹ *ibid* s 118(4).

current public policy', and this centers more around the public broadcasting service than the political stations.

- *This should be updated so as to recognize today's reality, that there cannot be true impartiality due to political stations. In this way, the realistic Article 13(2) of the Broadcasting Act, which allows the authority, in ensuring impartiality, to take into consideration the 'general output' of the programmes of each station 'as a whole', that is, it can take into account the fact that a station belongs to a particular political party and that it will be biased, and this will no longer be considered as 'unconstitutional'.⁸⁰*

Updating the membership selection process: increasing the role of the President of Malta

Since the members of the Broadcasting Authority consist of two persons chosen by the Prime Minister, two persons chosen by the Leader of Opposition whilst the Prime Minister has the final say in the selection of the Chairman, the authority is not as impartial as it seems to be required by the Constitution – it is the chairman who makes actual and fruitful decisions because the members appointed will very rarely disagree with the views of the party who has appointed them. It is as though the other four members are useless, and rather than making an unbiased decision, this decreases independence from the legislature and the executive, being contrary to the nature of the Broadcasting Authority, a constitutional organ and not a political partisan institution.

The President, as in many other functions, has an insignificant role because she does not make autonomous decisions but only that which is advised by the Prime Minister.

- *Impartiality could be indeed achieved if the President's role is increased from mere formalities of appointments to actually assessing and analysing suitable candidates to be members of the authority, at the same time, decreasing the role of the Prime Minister and the Leader of Opposition, furthermore, as has been suggested by Prof. Kevin Aquilina, the appointment should be the President's autonomous decision, consulting not only the Prime Minister, Leader of Opposition and political parties, but also civil societies, organized interests and stakeholders.*

⁸⁰ Broadcasting Act 1991, Chapter 350 of the Laws of Malta, s13(2).

- *There is also a perceived bias with regard to the Public Service Broadcasting Limited, because its board of directors and Editorial Board are appointed by the Minister responsible for Culture. To do away with bias, it would be ideal to have the President making such appointments*

The independent decision of the President must therefore be expressly provided for in the Constitution

Article 85 of the Constitution provides that the President is to act according to the advice of the PM, except where stated otherwise by any other law or by the Constitution itself.⁸¹

- *In order for the President to have an autonomous decision regarding the appointment of such members, by Article 85, it would have to be expressly stated in the Constitution, and so Article 118(2) of the Constitution will have to be amended to state that the members are appointed by the President at his own discretion.*

Then why not amend the Broadcasting Act rather than the Constitution?

Firstly, the Broadcasting Act does not provide how the members of the Authority are appointed, and even if such a provision were to be added, it would not fall within the ambit of the Act, whose aim is to '(...) to provide for the powers, duties and financial resources of the Broadcasting Authority set up in accordance with the Constitution...'.⁸² In fact the Constitution is defined as a document which lays down the composition and functions of each organ of the State, so it is the Constitution which should define how the Broadcasting Authority is to be composed and how the member composing it are to be appointed.

Investigation of the grounds for removal from membership

- *One of the grounds for removal of the members is misbehaviour. This misbehaviour should be further investigated by an independent authority so as the members would not feel as if they are risking their membership if they go against the interests of the party who appointed them.*

⁸¹ Constitution of Malta 1964 (n 1) s 85.

⁸² Broadcasting Act 1991 (n 87) preamble.

Therefore one can say that the political bias that the Broadcasting Authority has been characterized with is not a result of the institutional failure of the Broadcasting Authority itself, but rather failure in the administration of such an institution.

- *If the method of appointment of the members of the Broadcasting Authority is amended, then so will the method of appointment of the members of the Employment Commission, who are currently appointed in the same way as the former, will have to be amended, because like the Broadcasting Authority, the Employment Commission is an institutional organ which is meant to be separate from the executive and legislature.*

Risk of bias is evident since the Commission will act even if one of the members is absent. So, how can the Employment Commission be impartial when it comes to exclusion on the grounds of political opinions?

- *This can only be resolved if the President does not act on the advice of the Prime Minister and of the Leader of Opposition, but appointing persons who he thinks are actually fit.*

However, in order for the President to make such decisions which may conflict the interests of the political party in Government, her office must be safeguarded.

- Thus, what is also needed are stronger grounds for removal, or a more demanding method of removal of the President.

Conclusion

The most substantial deduction to be derived out of this proposal paper is that considering the several apparent deficiencies in the current Constitution, it would be ideal to do away with piecemeal and disjointed amendments to the Constitution, but rather, rewrite it anew. That being said, the new Constitution should not intend to be totally different from the current one, as it is clear that there are several provisions which have seemingly stood the test of time and would merely need strengthening. Therefore, with the new Constitution, there should be the element of continuity from the current Constitution. It is also suggested that there should be a more coherent and neater arrangement of the legal provisions, with a better assortment of chapters, introducing novel concepts never before dealt with in the Constitution.

The new Constitution must come around in a constitutional manner as provided for under Article 66 of the current Constitution, and not through undemocratic or illegitimate means. Applying the principle of legality, the current Constitution does allow for the making of a new one. This is important to bear in mind, considering the issues and debates which are still prevalent today in respect to the 1974 amendments to the Constitution.

Should constitutional reform eventually materialize, stakeholders in the field should ensure that the changes made and decisions taken are not solely done by the political parties represented in Parliament, but should however involve the rest of society, perhaps through the means of a referendum, similar to the 1964 Constitution. The Maltese population must have a say in the drafting of the new constitution, in order to ultimately provide for the legitimacy of the new Constitution and to ensure that it is not those representing the population in Parliament that are making the decisions, but in reality, the true sovereign stakeholders – the people of the Republic of Malta.

Bibliography

Articles, Blogs and Websites

Falzon M, 'The Massive Neutrality Debate is Back'

<http://www.maltatoday.com.mt/comment/blogs/44617/the_massive_neutrality_debate_is_back#.VuMZisdh1E5>

Grech M and Micheli C, 'Our Neutrality Clauses'

<<http://www.timesofmalta.com/articles/view/20140930/opinion/Our-neutrality-clauses.537835>>

UKessays, 'How is Malta's Neutrality Status Being Safeguarded Politics Essay'

<<http://www.ukessays.com/essays/politics/how-is-maltas-neutrality-status-being-safeguarded-politics-essay.php?cref=1>>

Aquilina K, 'Religion Needs Protection'

<<http://www.timesofmalta.com/articles/view/20150722/opinion/Religion-needs-protection.577592>>

Malta Independent, 'Ethics to be offered in Government Schools instead of Religion as From September'

<<http://www.independent.com.mt/articles/2014-01-24/news/ethics-to-be-offered-in-government-schools-instead-of-religion-as-from-september-3770875906/>>

Malta Independent "Ethics in Schools: 1,400 students do not attend religion classes"

<<http://www.independent.com.mt/articles/2014-01-25/news/ethics-in-schools-1400-students-do-not-attend-religion-classes-3785031680/>>

DeBattista A.P. "Ethics vs. Religion?"

<<http://www.sherv.net/cm/emo/lol/face-lol.gif>>

Busuttill S, Supremacy of EU Law: What it means and what it entails,

<www.avukati.org/common/fileprovider.ashx?id=633057644632343750>

Malta Independent, 'Malta to host international institute on justice, rule of law'

<<http://www.independent.com.mt/articles/2013-09-30/news/malta-to-host-international-institute-on-justice-rule-of-law-2761981952/>>

Malta Independent, 'Government promises full transparency on American University, says final contract will be public'

<<http://www.independent.com.mt/articles/2015-06-20/local-news/Government-promises-full-transparency-on-American-University-says-final-contract-will-be-public-6736137606>>

Times of Malta, 'Changing times: divorce to legal same sex marriage in three years'
Times of Malta

<<http://www.timesofmalta.com/articles/view/20140420/local/Changing-times-divorce-to-legal-same-sex-marriage-in-three-years.515580>>

Penkenth A and Branigan T, 'Media condemn Charlie Hebdo attack as assault on freedom of expression'

<<http://www.theguardian.com/world/2015/jan/08/media-charlie-hebdo-attack-freedom-of-expression>>

Spiteri A, 'Right to Life and Abortion',

<<http://www.timesofmalta.com/articles/view/20130410/opinion/Right-to-life-and-abortion.465003> >

Aquilina K, 'A Second Republic for Malta'

Balzan S, 'Still defiant-Franco Debono'

<<http://www.maltatoday.com.mt/news/interview/15226/still-defiant-franco-debono-20120116>>

Working Papers

Sang O, 'The Separation of Powers and the new Juridical Power: How the South African Constitutional Court plotted it's course' [2013] ELSA Malta Law Review 3 EMLR 96

The Today Public Policy Institute, 'A Review of the Constitution of Malta at Fifty: Rectification or Redesign?' (Today Public Policy Institute, 2014)

Aquilina K, 'Constitutional Change: Proposals for Reform' (Id-Dritt, 2014)

elsa

The European Law Students' Association
MALTA

WWW.ELSA.ORG.MT