

**SOCIAL
POLICY**

When Two-Thirds Is Not Just Two-Thirds

Supermajorities,
Political Structure,
and Constitutional Power

elsa

The European Law Students' Association

MALTA

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The ELSA Malta National Board's vision is to create a world where the student is able to thrive on both an academic level as well as a social one. From publishing academic materials to hosting events and competitions, the student is at the forefront of the mission of ELSA.

Foreword:

by Timothy Mifsud

A constitution is often described as the foundation of a democratic state. It establishes the principles upon which governance is built, protects the rights of individuals, and ensures that power is exercised within clear legal limits. At the same time, constitutions must remain capable of evolving alongside the societies they serve. The question of how constitutional change should take place, and the role played by supermajority requirements in that process, is therefore one of great importance in any democracy.

This publication explores that question through a series of thoughtful and well-researched contributions focusing on Malta's constitutional framework and the wider implications of two-thirds majority requirements. The student authors examine the purpose behind these mechanisms, the challenges they can create in practice, and the way they influence democratic representation, political stability, and institutional reform.

What makes this work particularly valuable is the variety of perspectives it brings together. The contributors do not simply describe constitutional provisions, but critically analyse how these rules operate in reality, both within Malta and in comparative constitutional systems. In doing so, they highlight the delicate balance between ensuring stability and allowing necessary reform.

At ELSA Malta, we strongly believe that students should engage with legal issues beyond the classroom. Academic discussion should encourage critical thinking and contribute to wider conversations taking place within society. This publication reflects that goal and demonstrates the level of research, dedication, and intellectual curiosity that students are capable of producing when given the opportunity.

I would like to thank Abigail Bonnici for coordinating this project, together with all the writers and contributors who dedicated their time and effort to making this publication possible. I would also like to extend my gratitude to Professor Tonio Borg for his guidance and valuable insight throughout the process.

I hope this publication encourages further discussion on constitutional reform, democratic accountability, and the role that legal structures play in shaping our society.

Timothy Mifsud

President of ELSA Malta (2025–2026)

Introduction:

by Professor Tonio Borg LL.D. Ph. D. K.O.M.

I have read all articles on the 2/3 requirement and supermajorities. In my view they are all of high standard, and well researched. The style and logical arguments are clear and intelligible. This does not mean that I agree with all the views expressed.

I am a firm believer in a 2/3 requirement even without a plan B in order to force the political parties to reach an agreement. Though the chief justice saga has dominated the local scene, one tends to forget that the last four Presidents of the Republic have been elected with almost unanimous consent when the two thirds requirement was not applicable except in the 2024 election of President Spiteri Debono.

Preamble

By Abigail Bonnici

As director for social policy I desired to co-ordinate a paper regarding a constitutional factor. Fellow board member Julian Mifsud gave me idea for co-ordinating a paper on the two-thirds majority requirement found throughout the Constitution of Malta. Yet the more writers began to research and debate the topic, the clearer it became that this seemingly procedural figure, sixty-six point six recurring per cent sits at the very heart of how power is exercised, checked, and shared in our Republic.

Over the past year, Malta has watched the two-thirds requirement move from the footnotes of constitutional law textbooks to the front pages of our newspapers. The prolonged impasse over the appointment of the Chief Justice, the government's contentious decision to split a constitutional amendment bill into individual clauses to sidestep the entrenched threshold, and the renewed public debate over anti-deadlock mechanisms have all demonstrated that this is not an abstract academic question. It is a live constitutional issue with real consequences for how Malta is governed.

This collection brings together the work of six student writers, each approaching the subject from a distinct angle. Some examine the theoretical justifications for supermajority rules and the ways in which their practical operation can depart from that theory. Others turn to comparative constitutional law, placing Malta alongside Germany, Hungary, the United States, and Ireland to show that "two-thirds" carries a different political weight depending on the system in which it operates. Still others offer a close, provision-by-provision analysis of Article 66 itself, or consider how the two-thirds threshold interacts with Malta's electoral system and its at-times imperfect translation of votes into seats.

Taken together, these papers do not offer a single verdict on whether the two-thirds requirement serves Malta well. Instead, they invite the reader to sit with the tension that runs through all constitutional design: the need to protect fundamental principles from the passions of the moment, weighed against the risk that a high threshold, in the wrong political conditions, becomes a tool of obstruction rather than consensus. As Professor Borg notes in his introduction, reasonable people can and do disagree on where that balance should lie.

On behalf of the ELSA Malta National Board, I want to thank our writers for the depth and rigour of their research, and Professor Tonio Borg for so generously giving his time to review this edition and to share his own perspective on a subject he has studied and shaped for decades. It is our hope that this publication contributes, in some small way, to a more informed public conversation about the rules that govern how Malta's Constitution itself may be changed.

Abigail Bonnici

Director of Social Policy and Human Rights (2025-2026)

Representation in Maltese Democracy:

by Sebastian Mifsud

A Constitutional Analysis

Abstract

This paper examines the constitutional framework of political representation in the Republic of Malta, with particular reference to the Constitution of Malta (1964, as amended). It analyses the key provisions that support representative democracy, such as the composition and election of the House of Representatives, the role of the President, the mechanisms ensuring proportional representation, as well as the constitutional safeguards that protect the democratic mandate. Drawing on specific articles of the Constitution, in addition to relevant amendments and electoral legislation, the paper demonstrates how Malta's constitutional structure balances the principle of popular sovereignty with the practical demands of governance in a small island state. The analysis also delves into the corrective mechanism introduced to ensure parliamentary majority for the party receiving most first-preference votes, a typical mechanism in comparative constitutional law.

Introduction

The concept of representation lies at the heart of any democratic system. In Malta, representation is a principle established constitutionally that defines the relationship between the governed and their government. Article 1 of the Constitution of Malta declares Malta a “democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.” This foundational provision establishes the democratic character of the state requiring that public authority is exercised and accountable to the representatives of the people.

In the case of Malta, representative democracy is shaped by Malta's particular historical, geographical and demographic context. As a small island state with, Malta has developed a constitutional framework which aims to ensure fair and effective representation while managing the challenges that arise from a political scene dominated by two parties.

Popular Sovereignty and the Right to Vote

The principle of popular sovereignty is fundamental to the Maltese constitutional order. Although the Constitution does not define the phrase “popular sovereignty”, this principle dominates its structure and is given concrete effect through several provisions. Article 51 vests legislative power in Parliament, which consists of the President and the House of Representatives. The democratic legitimacy of Parliament derives from the fact that the House of Representatives is constituted through general elections in which the people exercise their right to vote.

The right to vote is guaranteed by Article 56 of the Constitution, which provides that the House of Representatives shall comprise of such number of members as Parliament may from time to time determine, elected upon the basis of universal suffrage, through the single transferable vote system of proportional representation. This provision is significant for several reasons. First, the guarantee of universal suffrage ensures that the right to participate in elections is extended to all citizens who meet the prescribed requirements, without discrimination, second, the constitutionalisation of the single transferable vote (STV) system means that the specific method of election is a matter of constitutional law, not merely ordinary legislation. This limits parliament to the extent that any alteration to the electoral system would require a constitutional amendment rather than a simple legislative act.

Moreover, Article 57 elaborates on the qualifications for voters. Every citizen of Malta, aged sixteen or older, and who is registered as a voter in accordance with law is entitled to vote at elections of members of the House of Representatives. The provision thereby connects the right of representation directly to citizenship and age, reflecting the principle that all adult citizens should have an equal voice in the selection of their representatives.

The House of Representatives: Composition and Election

The House of Representatives is the principal organ of representation in Malta’s constitutional system. Its composition and mode of election are regulated primarily by Articles 52 to 56 of the Constitution and by the General Elections Act (Chapter 354 of the Laws of Malta), which provides the detailed procedural framework for the conduct of elections.

Article 51 states that Parliament shall consist of the President and a House of Representatives. This establishes a unicameral legislature, a feature aligned with the governance structures of many small

states. Consequently, the House of Representatives bears the full weight of legislative representation, making its composition and the fairness of its election all the more critical.

Furthermore, the General Elections Act divides Malta into thirteen electoral divisions, each returning five members. Thus, in ordinary circumstances, the House of Representatives comprises sixty-five elected members. The division of the country into multi-member districts is closely linked to the STV system mandated by the Constitution, since the STV method is designed to operate within such districts to achieve proportional representation. This use of multi-member districts allows voters to rank candidates in order of preference, and seats are allocated in accordance with a quota determined by dividing the number of valid votes by the number of seats plus one. This is known as the Droop quota.

This system has several consequences for the nature of representation in Malta. Voters elect individual candidates rather than party lists, which in theory allows for a more personalised form of representation in which the relationship between the elected member and the constituent is direct. In practice, however, the two dominant parties, the Partit Laburista (Labour Party) and Partit Nazzjonalista (Nationalist Party), exercise significant influence over candidate selection and electoral outcomes, meaning that the party system mediates the representational link between voters and their elected members.

The Corrective Mechanism: Ensuring Majority Representation

One of the most distinctive features of the Maltese constitutional framework is the corrective mechanism introduced by constitutional amendments in 1987 and further refined in 2007. This was introduced to address a specific democratic deficit that had arisen under the STV system: the possibility that a political party receiving a majority of first-preference votes nationally could nonetheless win fewer parliamentary seats than its rival, thereby being denied government.

This scenario occurred in the general elections of 1981, when the Partit Nazzjonalista won a majority of first-preference votes but the Partit Laburista won a majority of seats and formed government. The resulting political crisis highlighted the tension between seat allocation under the STV system and the principle that a parliamentary majority should reflect the will of the majority of voters,

The constitutional amendment of 1987, addressed this abnormality by providing that where only two parties are represented in the House and one of them obtains an absolute majority of first-preference votes but does not secure a majority of seats, additional seats shall be allocated to that party to ensure a parliamentary majority. The 2007 amendment further refined the mechanism to cater for situations where a third party or independent candidates also contest elections, though the essential principle remained the same: the party commanding the majority of the popular vote must hold the majority in the House of Representatives.

This corrective mechanism is notable from a comparative constitutional perspective. It represents an explicit constitutional recognition that, in a democracy, the legitimacy of government rests on popular support, and that an electoral system, however otherwise commendable, must not be permitted to frustrate the will of the majority. The mechanism functions as a constitutional safeguard which ensures that the seat allocation in Parliament corresponds to the expressed preferences of the electorate.

The President and Indirect Representation

The President of Malta is the Head of State, and while the office does not directly embody popular representation in the same manner as the House of Representatives, it plays a crucial constitutional role in the architecture of the Maltese democracy. Article 48 provides that there shall be a President of Malta, appointed by a resolution of the House of Representatives supported by a majority of not less than two-thirds of all members of the House. This form of appointment establishes indirect representation: the President gains legitimacy not from a direct popular mandate but from the collective authority of the elected representatives.

The constitutional functions of the President include critical acts that sustain the representative system. Under Article 80, the President appoints as Prime Minister the member of the House of Representatives who, in the President's judgement, is best able to command the support of a majority of the members of the House. This provision is the constitutional mechanism through which the outcome of a general election is translated into executive government. It ensures that the government is formed by the party commanding majority support in the legislature, hence linking executive authority to the representative mandate.

Additionally, Article 80 states that the President shall appoint Ministers on the advice of the Prime Minister from among the members of the House of Representatives. This requirement reinforces the

principle that executive office-holders must be elected representatives, therefore maintaining the relation between governmental authority and the democratic mandate.

Fundamental Rights and the Protection of Democratic Participation

The Constitution of Malta codifies a range of fundamental rights that are significant to the effective functioning of representative democracy. Chapter IV of the Constitution (Articles 32 to 47) sets out a Declaration of Rights encompassing, inter alia, the freedoms of expression, assembly and association. These rights are essential for meaningful political participation: without freedom of expression, citizens cannot debate public affairs; without freedom of assembly and association, political parties and civil society organisations cannot organise themselves to contest elections or hold the government accountable.

Within Article 41, freedom of expression, including freedom to hold opinions and to receive and give ideas and information without interference, is protected. In the context of representation, this right guarantees that the electoral process is conducted in an environment of open debate, enabling voters to make informed choices. Article 42 protects freedom of assembly and association, including the right to form and associate oneself with political parties. The latter right is of particular importance given the central role that political parties play in Maltese representative democracy.

Moreover, Article 45 prohibits discrimination on the grounds of race, place of origin, political opinions, colour, creed, sex, sexual orientation or gender identity, amongst others. This anti-discrimination provision safeguards the universality of the right to political participation, ensuring that no group of citizens is excluded from representation on prohibited grounds. In 2014, Article 45 was amended to include sexual orientation and gender identity to the list of prohibited grounds of discrimination, as a result, it embodied the Constitution's capacity to adapt in response to changing social values while maintaining the core commitment to equal representation.

Gender Representation and Recent Constitutional Reform

The introduction of a gender corrective mechanism was a significant development in the domain of representation in Maltese democracy. Enacted through the Constitution, this amendment took effect for the general election held in 2022 and introduced provisions aimed at addressing the persistent underrepresentation of women in the House of Representatives.

The mechanism provides that where the proportion of elected members of one gender falls below a defined amount, additional seats may be awarded to candidates of the underrepresented gender who obtained the highest number of votes without being elected. This provision marks a notable departure from the traditional understanding of representation based solely on electoral outcomes, introducing a substantive equality dimension to the constitutional framework.

The gender corrective mechanism reflects a growing recognition, both in Malta and in comparative constitutional law, that formal equality of opportunity in the electoral process does not necessarily produce just outcomes. By embedding a corrective measure in the Constitution itself, Malta has indicated that gender-balanced representation is a constitutional value and not merely a policy aspiration. This reform is consistent with Article 14 of the European Convention on Human Rights and the European Commission's recommendations on balanced participation in decision-making.

Local Government and Decentralised Representation

Representation in Maltese democracy is not restricted to the national level. The Constitution, in Article 115A, provides for the establishment of a system of local government. The Local Councils Act (Chapter 363 of the Laws of Malta) gives effect to this provision by establishing sixty-eight local councils across Malta and Gozo, each led by a Mayor elected by the residents of the locality.

Local Councils are a form of democratic representation which brings governance closer to the citizen. Although their roles are largely administrative rather than legislative, local councils allow for community participation in public decision-making. The election of local councillors by STV ensures consistency in the representational principle throughout the Maltese democratic system.

Conclusion

The constitutional framework which governs representation in Maltese democracy is a product of historical experience, political negotiation and ongoing reform. The Constitution of Malta establishes a coherent system of representative government built on the pillars of universal suffrage, the single transferable vote, a unicameral legislature and an indirectly elected Head of State. The corrective mechanisms for both seat allocation and gender representation demonstrate the Constitution's capacity to respond to identified democratic deficits.

Nevertheless, Malta's system of representation does come with its challenges. The dominance of two political parties, the limited size of the legislature and the highly personalized nature of electoral politics raise important questions about the quality and inclusiveness of representation.

As Malta's democracy matures, the ongoing evolution of its constitutional provisions on representation will remain a subject of scholarly and political interest. The challenge for the Maltese constitutional order is to ensure that its representative institutions not only reflect the will of the majority but also safeguard the rights and interests of minorities, as a result fulfilling the democratic promise enshrined in Article 1 of the Constitution.

Why Supermajorities Can Distort Democratic Outcomes

by Luke Spiteri

INTRODUCTION

The two-thirds majority is frequently implemented in modern constitutional democracies in order to protect fundamental legal and political structures. This supermajority threshold is particularly prevalent in constitutional frameworks, ensuring that significant legal changes reflect a comprehensive consensus, rather than transient majorities. Theoretically, this mechanism serves as a crucial check against potential excessive majoritarianism, as a result, preserving stability and protecting minority interests within the democratic system.

However, while the rationale behind this supermajority threshold is grounded in principles of constitutionalism and restraint, its practical operation may produce unintended consequences. In some cases, the two-thirds majority requirement may distort democratic outcomes by enabling minority vetoes, obstructing necessary reforms, and disconnecting electoral mandates and legal change. Instead of enhancing democratic legitimacy, this mechanism may ultimately undermine it.

This tension is particularly relevant within the Maltese constitutional framework, where entrenched provisions require increased parliamentary consensus for amendment. In a politically polarised environment, such a threshold can contribute to certain nuisances like deadlock and strategic political obstruction, raising important questions about its appropriateness.

This paper argues that, although two-thirds majority requirements are designed to protect democratic stability, they can, in practice, distort democratic outcomes by restricting efficacy, amplifying minority power and limiting successful governance. I will first examine the theoretical justification for the supermajority requirements before analysing ways in which they may produce distortion, with special reference to the Maltese context. Finally, I will consider whether alternative approaches may better achieve the intended objectives of a two-thirds majority.

THEORETICAL JUSTIFICATION

Holmes and Sunstein give their definition of what a constitution is and should be as the following:

“A constitution is not simply a device for preventing tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensively, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the stupidity of politicians ... The task is to create limited government that is nevertheless fully capable of governing.”¹

This is contrary to ordinary laws which deal with daily governance and can be changed by simple majorities. Due to constitutions having a higher legal authority, they are naturally harder to amend. A simple majority rule brings with it the risk of a temporary governing majority imposing important constitutional changes without sufficient scrutiny, potentially undermining minority rights. This is where the two-thirds majority comes into play. This rigidity promotes legal certainty, ensuring laws remain stable over time, acting as a strict amendment procedure whilst providing various crucial safeguards. Even the very notion of constitutionalism implies that the fundamental principles for the efficient use of state power should be stable and predictable, and not subject to easy change which is essential for the constitutional and political system's legitimacy². The two-thirds majority is widely considered to be the most significant mechanism in constitutional amendment provisions, and it is both essential and sufficient to achieve a constant and moderate amendment rate³.

The main purposes and safeguards of the two-thirds majority can be broken down into two⁴. Firstly, they ensure that any changes are supported by an extensive range of the political spectrum, forcing agreements across different political parties, not just between a single party. This also increases the legitimacy of constitutional reforms by ensuring they reflect the will of a larger portion of society.

¹ Venice Commission, ‘Report on Constitutional Amendment’ (2010) <[venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e)>.

² Ibid.

³ Ibid.

⁴ Ibid.

This also prevents incumbents from easily or unilaterally altering fundamental rules, avoiding constant legal change, and ensuring that only well-considered changes are adopted, and providing long-term protection for constitutional principles⁵. Secondly, supermajorities play an important part in protecting minority interests, as if only a simple majority were required, the majority could easily impose changes that harm minority groups. A minority effectively has a veto power over constitutional amendments under such a requirement. These safeguards strengthen democratic stability and effective governance, and without these aforementioned safeguards, instability and abuse of power can occur.

It's also worth noting the relationships and links between the aforementioned safeguards. In democratic systems, political stability and predictability should be viewed as goals in and of themselves, but they will also improve decision-making efficiency and facilitate long-term planning⁶. Also, the economy may benefit from a predictable political system since it will foster investment and growth by creating stable conditions. This idea can be illustrated in Ulysses' metaphor, ordering his crew to tie him to the mast in order not to be tempted by the sirens' music⁷. In a similar way, society, by adopting a rigid constitution, "ties itself to the mast", to prevent itself from being swayed or distorted by transient political ambitions. Therefore, these safeguards show that there are, in theory, a number of valid reasons why a society should "tie itself to the mast" and commit itself to specific rules and norms that cannot be abruptly repealed or altered, even by a democratically legitimate majority.

However, while these theoretical justifications are compelling, the practical operation of supermajority requirements may produce unintended consequences.

MECHANISMS OF DISTORTION

⁵ Markus Bockenforde, 'Constitutional Amendment Procedures' (2015) <<https://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf>>.

⁶ Venice Commission, 'Report on Constitutional Amendment' (2010) <[venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e)>.

⁷ Ibid.

The aforementioned theoretical justification of the two-thirds majority requirements are riveting, when deployed practically, that being said, unintended consequences may be produced. The following section will analyse important mechanisms through which such distortions become apparent.

Minority Veto Powers

Supermajority requirements that allow partisan minorities to block regular legislation backed by majorities indefinitely are viewed as undermining democracy. Supermajority requirements provide legislative minorities with a powerful weapon: a minority veto. Such a veto could be justified if it protected fundamental rights or the democratic process itself; however, it's routinely used to defend the interests of legislative minorities, like in the case of the U.S. Senate filibuster⁸. These vetoes can be explicitly granted or they can exist in a de facto manner as a result of a society's particular demographic breakdown, voting system and legislative majority requirements⁹.

Even though supermajority requirements may, in some circumstances, promote compromise or consensus-building, they come with a high cost: they empower partisan minorities at the expense of majorities, thereby limiting, rather than protecting democracy.

Shane Kelleher gives his justification for minority vetoes:

“A veto may be justified on the basis that guarantees of proportional representation of minority groups in a power-sharing assembly and/or executive are not sufficient to protect the vital interests of that minority because the minority may simply be outvoted.”¹⁰

Therefore, vetoes are designed to protect communities' vital interests¹¹. In a broader sense, they are meant to promote compromise, democratic commitment, and political stability. However, while

⁸ Anthony McGann, ‘Minority Protection, Rights, and Supermajoritarianism’, *The Logic of Democracy* <<https://press.umich.edu/pdf/0472099493-ch5.pdf>>.

⁹ Devin Haymond, ‘Minority Vetoes in Consociational Legislatures: Ultimately Weaponized?’ [2020] *Indiana Journal of Constitutional Design* <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1019&context=ijcd>>.

¹⁰ Ibid.

¹¹ Ian Ian O’Flynn and David Russell, ‘Veto Rights in Power-Sharing Democracies: A Justificatory Test’ [2025] *Perspective on Politics* <<https://www.cambridge.org/core/journals/perspectives-on-politics/article/veto-rights-in-powersharing-democracies-a-justificatory-test/73F27A9CD2F31E80B36E7E72EF5F61AA#metrics>>.

veto can shield minority communities from adverse decisions and help strengthen their commitment to democracy, they may also incite these communities to present more and more issues, no matter how trivial, as vital interests¹². According to Arend Lijphart, the minority veto is the "ultimate weapon" for defending minority groups' vital interests¹³. He claims that a minority veto is successful if it effectively protects minorities' vital interests, and is applied infrequently and does not turn into a political weapon that interferes with the political process.

As formulated by William Galston, we run the risk of turning into a tyranny of the minority of the majority¹⁴. In other words, the law of democracy was born in the pursuit of majoritarianism. It quickly changed to try to ensure fair treatment of minority interests in the face of systematic conflict¹⁵. Yet, we now face the challenge of preventing radical or factional minoritarian interests from capturing and controlling the government¹⁶. The threatening tyranny of the minority now emerges as a main issue that democratic theory, policy, and philosophy must address¹⁷. In Brian Barry's work, 'Political Argument', he uses the term "offensive veto", of which groups with veto power may attempt to exploit this power to demand privileges, potentially preventing important initiatives from being carried out, also resulting in economic inefficiency¹⁸.

Democracies like Australia, Canada, France, and Great Britain, eliminated the possibility of minority vetoes by removing supermajority requirements for enacting legislation, instead adopting cloture rules, allowing simple majorities to end parliamentary¹⁹.

¹² Ibid.

¹³ Devin Haymond, 'Minority Vetoes in Consociational Legislatures: Ultimately Weaponized?' [2020] Indiana Journal of Constitutional Design <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1019&context=ijcd>>.

¹⁴ Samuel Isaacharoff and Richard Pildes, 'Majoritarianism and Minoritarianism in the Law of Democracy', *The Entrenchment of Democracy* (2024).

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Anthony McGann, 'Minority Protection, Rights, and Supermajoritarianism', *The Logic of Democracy* <<https://press.umich.edu/pdf/0472099493-ch5.pdf>>.

¹⁹ Anthony McGann, 'Minority Protection, Rights, and Supermajoritarianism', *The Logic of Democracy* <<https://press.umich.edu/pdf/0472099493-ch5.pdf>>.

Deadlock & Paralysis

Deadlock is frequently looked at as an inherent feature of constitutional systems that implement supermajorities. Keith Krehbiel defines gridlock as "the absence of policy change in equilibrium in spite of the existence of a legislative majority that favours change"²⁰. Therefore, as he also notes, gridlock also reflects policy stability rather than just legislative inactivity.

From one point of view, this can be seen as a desirable outcome. Defenders argue that deadlock reflects the strength of a constitutional system based on separated powers, preventing sudden or impulsive policy shifts. As former US Congressman Bill Frenzel comically stated, gridlock is "the best thing since indoor plumbing", describing it as a "natural gift" from constitutional framers designed for protection against unpredictable changes²¹. However, the more common perspective is that of critics viewing gridlock as a serious flaw. Supermajority institutions are frequently identified as key contributors to legislative deadlock as they restrict the policymaking capacity of political majorities²². Even where a majority supports reform, the need for a higher threshold prevents change, meaning that policy outcomes cannot reflect the preferences of the majority party.

This can result in prolonged inaction, as seen in the US Democratic 102nd Congress (1991-92), where multiple reforms failed due to deadlock such as efforts to enact campaign finance reform, parental leave, voter resignation legislation and to cut the capital gains tax or in 1999 when Democrats and Republicans disagreed over budget priorities which led to complete inaction. Such inactivity can have even greater consequences, as the inability to implement necessary economic reforms due to gridlock, has been linked to economic crises²³.

Deadlock also contributes to a decrease in democratic responsiveness, which is essential for a responsible government. G. Bingham Powell defines responsiveness as "what occurs when the

²⁰ Manabu Saeki, *The Other Side of Gridlock* (State University of New York Press 2010) <<https://ebookcentral-proquest-com.ejournals.um.edu.mt/lib/ummt/reader.action?docID=3407226&query=&c=RVBVQg&ppg=1>>.

²¹ Sarah A Binder, *Stalemate* (Brookings Institution Press 2004) <<https://ebookcentral-proquest-com.ejournals.um.edu.mt/lib/ummt/reader.action?docID=3004374&c=UERG&ppg=1>>.

²² Ibid.

²³ Fatih Serkant Adiguzel, 'Checks and Balances and Institutional Gridlock: Implications for Authoritarianism' (2025) 38 Wiley Governance <<https://research-ebSCO-com.ejournals.um.edu.mt/c/37fd6e/viewer/pdf/qtjwwkqirf>>.

democratic process induces the government to form and implement policies that the citizens want"²⁴. One essential component of democracy, is that governments should at least be somewhat responsive to what a majority of people want. However, if necessary government policies are getting blocked due to supermajorities making it more difficult to bring change, the overall democratic responsiveness and legitimacy of the government is significantly reduced.

Therefore, the more divided the political parties are, the more frequent gridlock is, as policy disagreement is reinforced thus making it difficult to assemble policy majorities necessary to establish significant change²⁵. Whereas unified party control, fuses political goals and ultimately decreases the frequency of gridlock²⁶.

Procedural Circumvention

Another criticism of supermajorities that can lead to the misrepresentation of democratic outcomes, is that of governments utilising certain methods to circumvent the rules; thus resulting in the bypassing of the supermajority. The main problem about this is that it is still technically considered as abiding by the rules, however, it raises serious concerns about the legitimacy and effectiveness of the state. Such an issue may arise when there is pressure for a particular measure or policy to be approved, but fixed barriers, i.e. the supermajority requirements, stand in the way and therefore making enacting new rules seem unfeasible²⁷. Rule-bending should not be admitted, even under a majority's acquiescence, therefore, the legislator's commitment to abide by institutional norms should prove sufficient to prevent procedural deviation²⁸. Moreover, as already mentioned, adherence to procedural rules contributes to the transparency of the legislative process. That being

²⁴ Peter Esaiasson and Christopher Wlezien, 'Advances in the Study of Democratic Responsiveness: An Introduction' (2016) 50 Comparative Political Studies 699 <<https://journals-sagepub-com.ejournals.um.edu.mt/doi/full/10.1177/0010414016633226>>.

²⁵ Sarah A Binder, *Stalemate* (Brookings Institution Press 2004) <<https://ebookcentral-proquest-com.ejournals.um.edu.mt/lib/ummt/reader.action?docID=3004374&c=UERG&ppg=1>>.

²⁶ Ibid.

²⁷ Luis Otavio Barroso da Graca, 'Complying with Legislative Procedural Rules: Why Legislatures Shall Foster This Goal and How It Can Be Done' (2025) 14 UCL Journal of Law and Jurisprudence <<https://student-journals.ucl.ac.uk/laj/article/1984/galley/1761/view/#:~:text=disobedience%20might%20open%20the%20door,a%20role%20in%20safeguarding%20compliance>>.

²⁸ Ibid.

said, due to heated political disagreements, the temptation to bypass supermajorities to achieve short-term goals might prove to be ungovernable²⁹.

The Venice Commission has maintained that the legislature should always have the authority to assess the legislative output of the executive and determine the scope of its authority in that regard since it is practical in a democratic society that upholds the separation of powers³⁰. The Commission has insisted on this fact due to the danger of the possibility of the circumvention of correct constitutional amendment procedures.

Application to Malta

The Constitution of Malta contains numerous entrenched provisions that require a two-thirds majority for their amendment. These include provisions regarding fundamental rights, the establishment of Parliament, the composition of the House of Representatives, general elections, the executive authority of Malta, the Attorney General, superior courts, the appointment of judges, and most importantly the supremacy of the Constitution. This is procedurally encapsulated in Article 66 of the Constitution, which requires that these provisions need a parliamentary two-thirds majority to be modified. Having this supermajority implemented for such vital provisions displays the theoretical justification of the two-thirds majority. That being said, its practicality can clash with its theoretical implications and instead create unwanted nuisances and distortions, such as those mentioned previously. Moreover, these can be observed within a Maltese constitutional context.

This is shown through proposals to address judicial rulings of the Constitutional Court of Malta regarding administrative penalties, which had ruled such penalties as criminal in nature³¹. Since the bill had "been having a siesta on the parliamentary agenda, due to the blockage and inability to secure the required two-thirds majority for constitutional amendment, efforts were instead made to achieve similar outcomes through ordinary legislation, including proposed changes to the

²⁹ Ibid.

³⁰ Venice Commission, 'Report on Constitutional Amendment' (2010) <[venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)001-e](http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e)>.

³¹ Kevin Aquilina and others, 'Undermining the Constitution' *Times of Malta* (4 March 2021) <<https://timesofmalta.com/article/undermining-the-constitution.855481>>.

Interpretation Act. Such circumventions raise significant concerns regarding the preservation of constitutional supremacy, as they suggest that entrenched constitutional protections may be indirectly modified without following the reinforced amendment procedures. Therefore, the rigidity of this supermajority requirement may not only block reform but also encourage alternative legal strategies that jeopardise undermining the rule of law and democracy. In other words, where a two-thirds majority cannot be achieved, there may be incentives to pursue similar legal effects through ordinary legislation, effectively bypassing entrenched constitutional amendment procedures.

The Venice Commission's 2021 Opinion on proposed reforms to Article 39 of the Constitution concerning the aforementioned proposals is a key reference point for analysing the application of supermajority requirements in Malta³². Such reforms cannot be achieved through ordinary legislation alone, but must instead follow the formal constitutional amendment procedure set out in Article 66 of the Constitution, which requires a two-thirds parliamentary majority. The Venice Commission explains that this qualified majority is a safeguard to ensure broad political consensus when changing fundamental constitutional provisions. It continues by describing how allowing major constitutional change through ordinary legislation (in this case the Interpretation Act) would undermine the purpose of entrenching provisions by bypassing the supermajority requirements. It even mentions how this specific bill has "generated heated debates in Maltese society" as the bill is attempting to amend the Constitution without actually amending it. Nevertheless, the Maltese constitutional system uses these supermajority requirements for strengthening the parliamentary minority and guaranteeing stability, ensuring such important changes can only be enacted through broad agreement between parties. However, as already mentioned, due to Article 39 requiring a two-thirds majority to be amended, the Constitution gives the opposition power on the final decision, leading to potential blockage.

In a different opinion, the Commission discussed how the two-thirds majority is intended to strengthen checks and reduce political control in Malta's constitutional system³³. In particular, the introduction of a two-thirds majority for the appointment of the Chief Justice ensures that no single

³² Venice Commission, 'URGENT OPINION on the REFORM of FAIR TRIAL REQUIREMENTS RELATING to SUBSTANTIAL ADMINISTRATIVE FINES' (2021) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)021-e)>.

³³ Venice Commission, 'OPINION on PROPOSED LEGISLATIVE CHANGES' (2020) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)006-e)>.

governing party can make unilateral decisions, thereby promoting the selection of more neutral and broadly acceptable candidates, with the aim being to depoliticise the judiciary. Similarly, the recommendation that the President of Malta be elected by a two-thirds majority enhances the legitimacy and independence of the office, especially given the President's increasing role in areas such as judicial appointment. At the same time, the Commission recognises that requiring such a high threshold can lead to political deadlock if agreement cannot be reached. Therefore, it suggests the inclusion of anti-deadlock mechanisms, such as repeated votes or transferring the decision to a neutral body, and even criticises Malta for not including such a safeguard. The two-thirds requirement is also maintained for the removal of the President, safeguarding the office from being removed by a single ruling party whilst reinforcing institutional independence. However, the Commission notes that even a qualified majority doesn't fully eliminate political influence, as seen in the previous system where judges could be removed by Parliament, and therefore recommends shifting such decisions and authority to judicial bodies instead like the Constitutional Court.

Another local, modern example which reinforces these concerns about the circumvention of the two-thirds majority requirement occurred in June 2025³⁴. The government was criticised by the opposition for changing parliamentary voting procedures in order to pass elements of a constitutional amendment bill without securing the required two-thirds majority. Instead of a single vote on the bill, Parliament voted on individual clauses, allowing those supported by a simple majority to be adopted. The opposition described this approach as a "dangerous precedent" and a threat to the rule of law, arguing that it effectively bypassed the entrenched amendment procedures required under Article 66 of the Constitution. Conversely, the government justified its actions as necessary to prevent deadlock and to ensure that reforms supported by the parliamentary majority could still be implemented.

Reforms/Alternatives

As already analysed in the Maltese context, there have been several attempts to circumvent the two-thirds majority requirement, which raises serious concern about the current constitutional state. As a

³⁴ Farrugia Matthew, 'Government Bypasses Two-Thirds Majority Requirement to Pass Constitutional Amendments' *MaltaToday* (22 June 2025) <https://www.maltatoday.com.mt/news/national/135578/government_bypasses_twot thirds_majority_requirement_to_pass_constitutional_amendments>.

result, it's worth looking at the various possible alternatives to this supermajority in order to fix the tensions that it brings with it.

One of these potential options is the implementation of anti-deadlock mechanisms to avoid the inherent stalemate of the two-thirds majority. However, the anti-deadlock mechanism's main purpose is to make the original procedure work by encouraging both the majority and minority to reach an agreement³⁵. According to the Venice Commission, the two-thirds majority requirement bolsters the parliamentary minority, and the anti-deadlock mechanisms restore the balance back. It goes without saying that these mechanisms should not prevent the coming of an agreement based on a two-thirds majority in the first place³⁶. Also, the anti-deadlock mechanism is unappealing to both the majority and the minority, it might help the process of promoting the consensus. It is worth noting that there isn't a single model for creating suitable and efficient anti-deadlock systems³⁷. One alternative is to allow for different, decreasing majorities in later voting rounds, but this has the disadvantage that the majority would not try to reach an agreement in the first round knowing that in later rounds their candidate will win³⁸. Other, possibly better, options include using proportional voting methods, obtaining the help of other institutional actors, or establishing new relations between state institutions³⁹. Anti-deadlock mechanisms have started being proposed in Malta, as a bill that would alter the Constitution to create a an anti-deadlock mechanism for the appointment of Malta's next Chief Justice was proposed to Parliament and even passed the first reading stage)⁴⁰.

Article 88(a)(2) of the Maldives Constitution states that the People's Majlis (the unicameral legislative body of the Maldives) shall "make regulations and principles concerning its business with due regard to representative and participatory democracy, accountability, transparency and

³⁵ Venice Commission, 'UPDATED COMPILATION of VENICE COMMISSION OPINIONS and REPORTS RELATING to QUALIFIED MAJORITIES and ANTI-DEADLOCK MECHANISMS' (2025) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2025\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2025)023-e)>.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ 'Bill Introducing Anti-Deadlock Mechanism for Chief Justice Appointment Tabled in Parliament' *Malta Independent* (2 March 2026) <<https://www.independent.com.mt/articles/2026-03-02/local-news/Bill-introducing-anti-deadlock-mechanism-for-Chief-Justice-appointment-tabled-in-Parliament-6736287661>>.

public involvement"⁴¹. This draws a striking difference to the reliance on rigid supermajority requirements in Malta. This alternative sill ensures legitimacy and consensus, while prioritising the inclusiveness and openness of the decision-making process. In this regard, legitimacy comes from ensuring that decisions are subject to broad consultation and public scrutiny rather than from reaching a fixed threshold in Parliament. Moreover, this model may offer a solution to certain intrinsic challenges of the two-thirds majority, like the risk of gridlock or procedural circumvention. Such a method can support reform while preserving democratic values and avoid unilateral action by focusing on the decision-making process rather than enforcing strict voting thresholds. However, relying on procedural safeguards like public participation and transparency, is not without its own limitations and risks. Looking at the same Maldivian Constitution, experience shows that these requirements can be bypassed in practice, as in November 2024 a constitutional amendment was passed in a single day without public consultation, despite such obligations⁴². This demonstrates that procedural guarantees may lack enforceability, especially where political power is concentrated.

Conclusion

This paper has argued that, while two-thirds majority requirements rest on compelling theoretical foundations, their practical operation, operation can distort democratic outcomes in ways that undermine the very principles they are designed to maintain. In practice, as the Maltese experience illustrates, such thresholds can empower legislative minorities to obstruct reform, produce deadlock that erodes democratic responsiveness, and encourage procedural circumvention that subverts constitutional supremacy. Rather than enhancing legitimacy, the supermajority requirement can, in certain conditions, become an obstacle to effective and accountable governance.

This does not mean that supermajority requirements should be abandoned altogether. The challenge is to preserve their consensus-building function while preventing them from becoming instruments of obstruction. Evidently, this challenge has proved to be very complex and difficult to overcome as there is no clear solution to achieving the correct balance between rigidity and flexibility. That

⁴¹ Functional Translation of the Constitution of the Republic of Maldives 2008.

⁴² Shafaa Hameed, “A Supermajority Is Not a Blank Cheque”: Is the Maldives Anti-Defection Amendment Unconstitutional? *Maldives Independent* (18 March 2026) <<https://maldivesindependent.com/politics/a-supermajority-is-not-a-blank-cheque-is-the-maldives-anti-defection-amendment-unconstitutional-86f2>>.

being said, anti-deadlock mechanisms and more inclusive procedural models, as considered above, offer promising paths forward. Ultimately, a constitutional framework that demands broad agreement for fundamental change, while remaining capable of effective governance, is both the theoretical ideal and the practical imperative that Malta and other democracies must continue to pursue.

When Two-Thirds Mean Different Things

by Haley Xuereb

A two-thirds requirement is never merely sixty-six per cent.

I. Introduction

Supermajority requirements are the constitutional designer's favourite talisman.

They can certainly serve as beacons of stability, deliberation and cross-party consensus. And the two-thirds threshold enjoys an especially fond place in the constitutional imagination: high enough to discourage casual tinkering, low enough (in theory) to remain attainable when genuine agreement exists.⁴³

The numbers themselves appear deceptively simple. Two-thirds is always sixty-six point six recurring per cent. Yet, as comparative constitutional practice relentlessly demonstrates, that same mathematical figure can mean radically different things depending on the political ecosystem in which it is embedded.⁴⁴

In one jurisdiction it functions as a genuine straitjacket; in another it becomes little more than an elegant formality; in a third it is transformed into a weapon of dominance. The Maltese experience offers a particularly instructive illustration of this contingency.⁴⁵

⁴³Walter F Murphy, *Constitutions, Constitutionalism, and Democracy* (Duke University Press 1991).

⁴⁴ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019).

⁴⁵ John Stanton, 'The Constitution of Malta: Supremacy, Parliament and the Separation of Powers' (2019) *Journal of International and Comparative Law*, 6(1), 47-73.

This article examines the operation of the two-thirds constitutional amendment rule in Malta within a broader comparative framework. It argues that, in Malta's tightly bipolar party system, the rule does not operate as a meaningful constraint on constitutional change.⁴⁶

Instead, it has crystallised into a mechanism of bipartisan elite coordination that effectively excludes smaller parties, independents, and wider civil society from any genuine role in constitutional bargaining.⁴⁷

By placing the Maltese case alongside the United States, Germany, and Hungary, this article will show that constitutional amendment rules are never neutral arithmetic. They are political institutions whose real meaning is forged in the crucible of party competition, electoral design, and institutional architecture.⁴⁸

II. The function (and frequent dysfunction) of supermajority rules

Supermajority requirements are conventionally justified by two overlapping ambitions: to make constitutional change more onerous than ordinary legislation, and to compel agreement across political cleavages.

Comparative scholarship has long understood, however, that these ambitions are frequently in tension and are largely shaped by context.

This article will examine three jurisdictions, in order to demonstrate how important context becomes when discussing supermajority requirements.

⁴⁶ John Stanton (n 1); Tonio Borg, 'The 2020 Constitutional Amendments: A Legal Analysis' (University of Malta 2021).

⁴⁷ John Stanton (n 3); Constitution of Malta, Article 66.

⁴⁸ Richard Albert (n 2).

III. Malta: The two-thirds rule as bipartisan coordination

Malta operates a very stubborn bipolar party system. Despite the Single Transferable Vote, a mechanism usually celebrated for fostering proportionality, electoral outcomes have for decades delivered near-total dominance by the Labour Party (PL) and the Nationalist Party (PN).⁴⁹

Together, these two parties routinely secure well over 90% of seats in the House of Representatives, often on the back of highly concentrated vote shares.⁵⁰

Constitutional tweaks introduced in 1987 and subsequently refined have further entrenched this duopoly.⁵¹ Mechanisms designed to guarantee stable majorities for the largest party have the convenient side-effect of rendering it almost impossible for third parties or independents to translate non-trivial electoral support into parliamentary voice.⁵²

In this tightly structured environment, the two-thirds amendment rule acquires a character quite removed from its ostensible purpose.

Rather than forcing wide-ranging agreement, the rule effectively requires only that the two dominant parties reach a bilateral accommodation. Smaller actors are structurally absent from the negotiating table. There is no second chamber, no ratification process, no mandatory referendum for ordinary amendments.

⁴⁹ Malta Parliament, 'Electoral System in Malta' <<https://www.parliament.mt/en/electoral-system/>> accessed 21 April 2026.

⁵⁰ Electoral Commission Malta, 'General Election', <<https://electoral.gov.mt/ElectionResults/General>> accessed 21 April 2026.

⁵¹ Constitution of Malta (Amendment) Act 1987.

⁵² Camilleri Charlene 'The 'corrective mechanism' in the Maltese electoral law : a constitutional misnomer?', LL.D. Thesis.

The entire procedure remains centralised within a single, highly disciplined legislature. Strong party whips and predictable alternation between PL and PN produce a closed, stable bargaining environment in which constitutional change becomes an exercise in elite coordination rather than pluralistic deliberation.

The result is neither unilateral domination nor genuine consensus-building. It is something more insidious: a polite, bipartisan cartel that maintains the ceremonial dignity of a supermajority while insulating the process from broader democratic contestation.

IV. The United States: Two-thirds majority as the opening bid

The United States offers a masterclass in how the same numerical threshold can become something far more demanding. Article V requires two-thirds majorities in both houses of Congress merely to propose an amendment; ratification by three-fourths of the states (or conventions) remains the decisive barrier.⁵³

The sheer scale and diversity of the republic turn the congressional supermajority into little more than an opening gambit. Over 11,000 amendments have been proposed since 1789; only 27 have succeeded.⁵⁴ The real work, and the real veto power, lies beyond Capitol Hill.

Consider the Thirteenth Amendment. The Senate achieved two-thirds in April 1864. The House initially failed in June, despite majority support. Only on 31 January 1865, after intense executive lobbying by Lincoln and his administration, did the House reach 119–56 — just clearing the

⁵³ US Constitution 1787, art V.

⁵⁴ Library of Congress, Congressional Research Service, Proposals to Amend the U.S. Constitution: Fact Sheet (2024) <<https://www.congress.gov/crs-product/R47959>> accessed 23 April 2026

threshold.⁵⁵ Votes were secured through patronage appointments, strategic timing after the 1864 election (rendering certain Democrats “lame ducks”), and outright political pressure. Even then, ratification required heavy federal leverage over the defeated Confederacy, including conditioning readmission to the Union on approval.⁵⁶

The Equal Rights Amendment tells the opposite cautionary tale. Approved by overwhelming two-thirds majorities in both chambers in 1972, it nevertheless collapsed at the ratification stage, stalling at thirty-five of the required thirty-eight states.⁵⁷ Several states later rescinded their ratifications, and decades of subsequent litigation over deadlines and validity only underscored how fragile even a successful congressional supermajority can prove.⁵⁸

In the American system, two-thirds in Congress is necessary but almost never sufficient. The additional veto points, may they be geographic, cultural, or institutional, transform the threshold from a simple numerical test into an extraordinarily demanding exercise in nationwide coalition-building.

Sixty-six per cent in Washington is merely the price of admission to a far more arduous contest.

V. Germany: Supermajority as a genuine, hard-won consensus

Germany illustrates the opposite scenario. Article 79(2) of the Basic Law requires two-thirds majorities in both the Bundestag and the Bundesrat.⁵⁹ On paper, the rule appears straightforward. In

⁵⁵ National Archives, ‘13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)’ <<https://www.archives.gov/milestone-documents/13th-amendment>> accessed 23 April 2026

⁵⁶ Akhil Reed Amar, *America’s Constitution: A Biography* (Random House 2005).

⁵⁷ National Archives, ‘Equal Rights Amendment’ <https://www.archives.gov/federal-register/constitution> accessed 23 April 2026.

⁵⁸ Congressional Research Service, *The Equal Rights Amendment: Overview and Issues for Congress* (CRS Report R42979, updated 2023) <https://www.congress.gov/crs-product/R42979>> accessed 23 April 2026

⁵⁹ Basic Law for the Federal Republic of Germany 1949, art 79(2).

practice, the combination of proportional representation, multi-party fragmentation, and robust federalism turns it into a formidable substantive constraint.

Since 1949, the Bundestag has rarely contained fewer than four significant parties and has often housed six or seven: CDU/CSU, SPD, FDP, Greens, Die Linke, and, more recently, the AfD.⁶⁰ No single party has ever approached a two-thirds majority; even large “Grand Coalitions” between the Christian Democrats and Social Democrats frequently fall short without additional opposition support.⁶¹

The Bundesrat, composed of representatives of the Länder governments, introduces an entirely separate arena of negotiation. Because state coalitions frequently diverge from the federal balance of power, cross-level agreement is rarely automatic.

The eternity clause (Article 79(3)) adds a further layer of protection, rendering human dignity, democracy, federalism, and the rule of law unamendable even by unanimous vote.⁶²

The 1968 Emergency Acts provide a vivid illustration. Enacted during a period of genuine constitutional anxiety, the amendments required two-thirds majorities in both chambers. The Grand Coalition of the day possessed a comfortable parliamentary majority, yet still faced massive public protests and internal dissent.⁶³ Passage came only after protracted negotiation and compromise; the eternity clause ensured that core democratic safeguards remained untouched.

⁶⁰ 'The Federal Republic of Germany (since 1949)' (German Bundestag). https://www.bundestag.de/en/parliament/history/parliamentarism/frg_parliamentarism/frg_parliamentarism-200324 accessed 22 April 2026.

⁶¹ *ibid.*

⁶² Basic Law for the Federal Republic of Germany 1949, art 79(3).

⁶³ David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994).

Similarly, every major step in European integration; Maastricht in 1992, Lisbon in 2009, and subsequent treaty adjustments, demanded repeated two-thirds majorities.⁶⁴ Each required sustained cross-party and cross-Länder bargaining. In Germany, therefore, the two-thirds rule “works” precisely because the political and institutional environment makes satisfaction of the threshold extraordinarily difficult.⁶⁵

Sixty-six per cent here is the hard-won product of genuine pluralism, and not mathematical convenience.

VI. Hungary: Supermajority as Instrument of Entrenchment

Hungary demonstrates the darkest possibility: a two-thirds requirement that has been captured and weaponised by a single political force.

In 2010 the Fidesz–KDNP alliance secured roughly 53 % of the national vote, yet translated it into a two-thirds parliamentary majority thanks to the amplifying mechanics of Hungary’s mixed electoral system.⁶⁶

Subsequent boundary changes, voting-rule adjustments, and campaign regulations further improved the ruling bloc’s ability to convert modest popular support into constitutional supermajorities.⁶⁷

⁶⁴ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (7th edn, OUP 2020).

⁶⁵ Arthur B Gunlicks, *The Länder and German Federalism* (Manchester University Press 2003).

⁶⁶ Kim Lane Scheppele, ‘The Unconstitutional Constitution’ (2013) 2 *Journal of Modern European History* 1, Princeton University. <https://amc.sas.upenn.edu/sites/www.sas.upenn.edu/andrea-mitchell-center/files/uploads/Scheppele_unconstitutional%20constituent%20power.pdf> accessed 23 April 2026.

⁶⁷ Zsolt Enyedi, ‘Democratic Backsliding and Academic Freedom in Hungary’ (2018) 27 *Perspectives on Politics* 1067. <<https://www.jstor.org/stable/26615693>> accessed 23 April 2026.

Armed with this advantage, Fidesz enacted an entirely new Fundamental Law in 2011 with minimal opposition involvement and tightly controlled public consultation.⁶⁸ The government then embarked on a programme of serial amendment, reshaping the Constitutional Court, altering judicial retirement ages, rewriting electoral districts, and regulating media and cultural institutions.⁶⁹ “Cardinal laws” (ordinary statutes requiring two-thirds majorities for amendment) extended the supermajority’s reach into taxation, family policy, and electoral rules, effectively entrenching policy preferences beyond the reach of future governments.⁷⁰

The 2013 Fourth Amendment was particularly brazen: it reintroduced provisions previously struck down by the Constitutional Court and curtailed the Court’s own power to review future amendments.⁷¹ In Hungary, the two-thirds threshold concentrated and stabilised power, instead of constraining it.⁷²

At the time of writing, Péter Magyar's Tisza Party has won a two-thirds supermajority in parliamentary elections, aiming to end Viktor Orbán's 16-year tenure. Whether this marks a reversal of entrenched constitutional practices or their continuation under new stewardship remains an open question.

Sixty-six per cent, once intended as a safeguard, became the mechanical enabler of one-party constitutional transformation.

VII. Comparative Lessons

A two-thirds requirement is never merely sixty-six per cent.

⁶⁸ Kim Lane Scheppele (n 24).

⁶⁹ Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 85 University of Chicago Law Review.
< <https://chicagounbound.uchicago.edu/uclrev/vol85/iss2/2/>> accessed 23 April 2026.

⁷⁰ *ibid.*

⁷¹ Kim Lane Scheppele, ‘The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work’ (2013) Governance < <https://onlinelibrary.wiley.com/doi/abs/10.1111/gove.12049>> accessed 23 April 2026.

⁷² Venice Commission, Opinion on the Fourth Amendment to the Fundamental Law of Hungary (2013).

That deceptively simple fraction – two out of every three – reveals its true nature only when placed inside the living machinery of a political system.

Its practical meaning is forged in the interplay between electoral rules, the degree of party fragmentation or concentration, and the surrounding institutional architecture.

A crucial but often underappreciated variable is the territorial structure of the state.

Federal systems, by distributing constitutional authority across multiple levels of government, effectively multiply veto players and transform legislative supermajorities into only one stage of a broader process.

In contrast, unitary systems concentrate amendment authority within a single institutional arena, rendering the practical meaning of a two-thirds threshold far more dependent on party system dynamics than on formal constitutional design.

Substantive limits, such as eternity clauses or unamendable principles, add an independent layer of protection that operates independently of mere arithmetic.

Without these surrounding conditions, the numerical rule risks becoming either an empty ceremonial formality or, more dangerously, a sophisticated tool of entrenchment.

VIII. Reassessing the Maltese Model

Placed against this comparative canvas, Malta's two-thirds requirement appears considerably less robust than its formal dignity suggests.

It demands neither dispersed territorial consent, nor multi-party negotiation, nor substantive entrenchment of core principles. It operates instead within a highly centralised, bipolar parliamentary system reinforced by strong party discipline and electoral mechanisms that reward the two dominant actors.

In such a setting, the threshold does not broaden consensus; it narrows the circle of legitimate constitutional actors to the two parties that already control the legislature. Constitutional change becomes an exercise in bilateral elite bargaining rather than pluralistic deliberation.

The same sixty-six per cent that functions as a genuine constraint in Germany or a mere opening bid in the United States here serves primarily as a mechanism of coordinated control.

IX. Conclusion

The two-thirds requirement has long been treated as something approaching a universal constitutional virtue: a sturdy numerical bulwark against transient majorities and impulsive reform.

As discussed in this chapter, in Malta, the rule functions less as a meaningful barrier to constitutional change and more as a sophisticated instrument of bipartisan coordination. It enables the two dominant parties to negotiate and legitimate amendments with the appearance of restraint, while effectively excluding wider voices from the process.

This is not an accident of design, but is a predictable consequence of embedding a supermajority threshold within a tightly concentrated, highly disciplined two-party system lacking additional veto points or substantive limits.

Without meaningful mechanisms to disperse power, broaden participation, and prevent elite capture, whether through a wider introduction of referenda, differentiated amendment procedures for different categories of provision, stronger regional or local voices, or additional institutional checks, even the most respected supermajority thresholds risk devolving into elegant façades rather than genuine safeguards.

Malta's experience, when placed in comparative perspective, therefore carries a sobering implication for constitutional designers both at home and abroad.

Any serious conversation about reform should look beyond the superficial comfort of adjusting numerical thresholds. The real challenge lies in cultivating the political and institutional conditions under which a two-thirds requirement might actually perform the demanding role that constitutional theory has long, and perhaps too optimistically, claimed it should.

Only then can sixty-six per cent mean what we so often pretend it already does.

Amending the *Suprema Lex*: A Critical Analysis of Article 66 of the Constitution of Malta

By Julian Pulis

Introduction

The Constitution of Malta, like most constitutions around the world, is regarded as the highest law of the land, as it establishes the fundamental framework of the Maltese State, governing issues ranging from Maltese symbols and identity,⁷³ the protection of fundamental rights and freedoms of the individual,⁷⁴ as well as the composition of the main organs of the State.⁷⁵ For this reason, it is only logical that the procedure to amend the *suprema lex*, as it is also known, differs slightly from the standard procedures used to enact or amend other pieces of ordinary legislation.

This is particularly the case with the more sensitive provisions within the Constitution that form the bedrock of the Maltese democratic establishment. Consequently, the original drafters of the Constitution believed that such provisions should only be amended upon reaching a higher threshold rather than a simple majority of the members of the House of Representatives, present and voting in that particular session.⁷⁶

As a result of this, Article 66 of the Constitution stipulates how the Constitution of Malta is to be amended⁷⁷ by creating a so-called ‘three-tier amendment mechanism’, governing such amendments.⁷⁸ This mechanism aims at ensuring the special nature of constitutional amendments,

⁷³ Constitution of Malta (1964), Chapter I.

⁷⁴ *ibid*, Chapter IV.

⁷⁵ *ibid*, Chapters V – VIII.

⁷⁶ *ibid*, Article 71(1).

⁷⁷ *ibid*, Article 66.

⁷⁸ Tonio Borg, *A Commentary on the Constitution of Malta* (3rd edn, Kite Group 2025) 468.

with the most fundamental changes to the *suprema lex* even requiring public intervention by means of a referendum.⁷⁹

That being said, despite the thresholds devised by Article 66, the discussion on whether this mechanism truly ensures that the Constitution of Malta remains proportionate and reflective of the realities of Maltese society remains. Indeed, like all other representative democracies, Members of the Parliament of Malta are tasked with taking the vast majority of decisions in the running of the country including on how to amend the Constitution from time to time. Incidentally, Maltese political history has only shown too well, that referral to the public via a referendum has been a mere exception proving this rule. This, coupled with the fact that parliamentarians face their most evident public scrutiny in election season often risks malalignment between the intentions of the former with those of the latter.

The Evolution of Article 66 of the Constitution of Malta

In the past, provisions similar to Article 66 of the Independence Constitution of 1964 were also found in previous constitutions granted to the Maltese by the British colonial administration governing the islands at the time. For instance, Article 25 of the MacMichael Constitution of 1947⁸⁰ and Article 63 of the Blood Constitution of 1961⁸¹ each govern how these colonial constitutions, made in the form of Orders-in-Council, could be amended depending on the needs of the time. In turn, this illustrates how even the colonial legislator sought to have a means of flexibility in the constitutions it granted to the Crown Colony of Malta over the years.

From a political point of view, such flexibility was also not just an accessory, but a necessity given the role of Malta as a fortress colony within the wider British Empire. As a result of this, Maltese history provides us with examples where the British administration resorted to amend, suspend, or at times even entirely revoke the constitution of the day for fears that rife tension would result in instability within the fortress colony. Incidentally, the 1921 Amery-Milner Constitution, the first

⁷⁹ *ibid* (n 1), Article 66(3).

⁸⁰ Constitution of Malta (1947), Article 25.

⁸¹ Constitution of Malta (1961), Article 63.

self-governing Constitution of Malta, met its end as a result of this prerogative by the British owing to the political turmoil experienced in Malta during the 1930s.⁸²

That being said, the procedure for amending the Constitution outlined in Article 66 of the Independence Constitution of 1964 is more elaborate and intricate than those that came before it as 1964 marks the birth of Malta as a sovereign State and no longer rendering it subject to colonial authority. Moreover, this mechanism also had to be even more comprehensive than that contained in preceding constitutions owing to the fact that independence made the State of Malta the master of its own destiny with any future decisions only being made on the basis of the Constitution promulgated on the 21st of September 1964.

The ‘Three-Tier’ Mechanism of Article 66

The comprehensiveness of Article 66 of the 1964 Constitution was achieved with the creation of the aforementioned ‘three-tier amendment mechanism’ governing how alterations to the Maltese Constitution are to be made.⁸³ Here, the drafters of the Constitution essentially divided the provisions of the *suprema lex* into three, namely the provisions that require the support of two-thirds of all members of the House of Representatives, those which require both the support of two-thirds of all members of the House as well as the support of a simple majority of the electorate in a referendum, and the rest which can be amended by a mere absolute majority of members of the House. Nevertheless, such mechanism itself has also undergone its fair share of amendments over the years in turn reflecting the dynamic nature of Maltese politics and constitutional law throughout the course of the last six decades.

Tier 1: Article 66(2) – Two-Thirds Majority in the House of Representatives

The first classification made under Article 66 is found in Article 66(2), listing the provisions that can only be amended upon obtaining ‘the votes of not less than two-thirds of all the members of the

⁸² Raymond Mangion, ‘Aspects from the Constitutions of Malta, 1921 – 1964’, in Tonio Borg and John Stanton (ed), *The Constitution of Malta at Sixty* (Kite Group 2024) 71.

⁸³ *ibid* (n 6) 468.

House' when it comes to the final vote.⁸⁴ Here, Article 66(2) provides an exhaustive list of the provisions that must satisfy this requirement in order to be amended.

Upon a closer inspection of these provisions, it soon becomes apparent how these are the core provisions meriting the title of *suprema lex* to the Constitution.⁸⁵ The most important example to consider in this regard is the protection of fundamental rights and freedoms of the individual provided for under Chapter IV of the Constitution.⁸⁶ With this, any attempts to amend Maltese human rights law found in these provisions must first receive the support of two-thirds of the members of the House of Representatives. That being said, the incorporation of the European Convention of Human Rights (ECHR) into Maltese law via the European Convention Act in 1987⁸⁷ has resulted in the notion of 'parallel protection', meaning that any potential shortcomings of the Constitution in human rights law may still be covered by the ECHR and vice versa.⁸⁸

Apart from human rights, this category also includes provisions relating to fundamental notions of the Maltese State as we know it today. For instance, the neutrality status of Malta, enshrined in Article 1(3) of the Constitution by virtue of Act IV of 1987 also ensured that any future amendments to this provision, and indeed to whole of Article 1 on 'The Republic and its territories' would require two-thirds support from the House of Representatives.⁸⁹

The same can also be said about various symbols of Malta and Maltese identity provided for in Chapter I of the Constitution. Here, it is interesting to consider how some symbols are 'entrenched' meaning that they require the support of two-thirds of all members of the House in order to be amended whilst others do not. Perhaps the most interesting example of this is seen in Article 3 wherein the red and white colours of the Maltese flag are entrenched whilst the George Cross is not.⁹⁰ Throughout the Constitution, such occurrences can mainly be attributed to cross-party negotiations over the years given the fact that the political parties are aware of this 'two-thirds'

⁸⁴ *ibid* (n 1), Article 66(2).

⁸⁵ *ibid* (n 6) 468.

⁸⁶ *ibid* (n 1), Articles 32 – 47.

⁸⁷ European Convention Act, Chapter 319 of the Laws of Malta.

⁸⁸ *ibid* (n 6) 59-61.

⁸⁹ Act IV of 1987, Constitution of Malta (Amendment) Act, 1987, Article 5.

⁹⁰ *ibid* (n 6) 35.

reality and often navigate this requirement by negotiating these amendments together before coming to the House of Representatives as a united front.

Last but not least in Chapter I, is Article 6 proclaiming the supremacy of the Constitution. This provision was not initially entrenched by the original drafter, J. J. Cremona, who had argued that a written Constitution was in itself supreme. This reality, coupled to the positivist thinking as advocated later on, by the then Crown Advocate Dr Edgar Mizzi,⁹¹ enabled the constitutional amendments ushering in, amongst others, the Republic of Malta on the 13th of December 1974.⁹²

The House of Representatives could therefore by-pass the notion of supremacy as expressed in the original 1964 text by Cremona and hence enact the desired 1974 constitutional amendments. In light of this, Cremona counter-argued that the entrenchment of constitutional supremacy under Article 66(2) alone, without the explicit need for a referendum, does not completely ensure that supremacy is safeguarded.⁹³

As expected, other entrenched provisions include those on the running of the country. For instance, the establishment of the Office of the President of Malta,⁹⁴ the Parliament of Malta,⁹⁵ and Maltese electoral law within the Constitution,⁹⁶ in addition to provisions establishing the Electoral Commission⁹⁷ and the Parliamentary Ombudsman,⁹⁸ all require the support of at least two-thirds of members of the House to be amended.

⁹¹ Edgar Mizzi, *Malta in the Making, 1962 – 1987: An Eyewitness Account* (1995) 157-172.

⁹² These constitutional amendments were enacted by virtue of Act LVII of 1974, Constitution of Malta (Amendment) Act, 1974, and more importantly, Act LVIII of 1974, Constitution of Malta (Amendment) (No. 2) Act, 1974.

⁹³ J. J. Cremona, 'Birth-Pangs of a Republic: Section 6 of the Maltese Constitution' in J. J. Cremona (ed), *Selected Papers Volume II (1990 – 2000)* (PEG 2002) 133.

⁹⁴ *ibid* (n 1), Article 48.

⁹⁵ *ibid* (n 1), Article 51.

⁹⁶ *ibid* (n 1), Articles 52, 52A, 56, 57, and 61.

⁹⁷ *ibid* (n 1), Article 60.

⁹⁸ *ibid* (n 1), Article 64A.

Likewise, the executive authority of the President of Malta,⁹⁹ the appointment of the Prime Minister and Ministers,¹⁰⁰ as well as the Office of the Attorney General¹⁰¹ must meet the same requirement to be amended. More recently, in 2019, Article 91A was added to the Constitution providing for the establishment of the Office of the State Advocate. This provision has however been left unentrenched, with only his removal requiring a two-thirds majority in the House of Representatives. Arguably, this reflects the role of the State Advocate as ‘advisor to the Government [and not the State as is the case with the Attorney General] in matters of law and legal opinion’.¹⁰²

The other provisions entrenched by Article 66(2) of the Constitution relate to several Judiciary matters¹⁰³ and all aspects covering Finance,¹⁰⁴ including the protection, granting, and withholding of State pensions.¹⁰⁵ Furthermore, Chapter IX provides for the establishment and appointment of the Office of the Auditor General. This also requires a two-thirds majority but, in a recent amendment to Article 108, a new contingency mechanism allows for the incumbent to retain his post until any potential deadlock about a successor is resolved.¹⁰⁶

Moreover, the provisions establishing the Public Service Commission, its role and functions,¹⁰⁷ the Broadcasting Authority and its functions¹⁰⁸ as well as the Employment Commission¹⁰⁹ are also entrenched so as to further ensure their political impartiality. The same can also be said for Article 115A establishing Local Councils, thereby enshrining the democratic election and the role of local government in Malta and Gozo.

⁹⁹ *ibid* (n 1), Article 78.

¹⁰⁰ *ibid* (n 1), Article 80.

¹⁰¹ *ibid* (n 1), Article 91.

¹⁰² *ibid* (n 1), Article 91A(3).

¹⁰³ *ibid* (n 1), Chapter VIII.

¹⁰⁴ *ibid* (n 1), Chapter IX.

¹⁰⁵ *ibid* (n 1), Articles 113 and 114.

¹⁰⁶ Act IX of 2026, Constitution of Malta (Amendment) Act, 2026, Article 2.

¹⁰⁷ *ibid* (n 1), Articles 109 and 110.

¹⁰⁸ *ibid* (n 1), Articles 118 and 119.

¹⁰⁹ *ibid* (n 1), Article 120.

From this analysis, it is clear that the legislator sought to entrench the most sensitive provisions within the Constitution so as to ensure that no single political entity in the House of Representatives can solely amend these provisions as it wishes. In fact, bearing in mind the political duopoly characterising the House of Representatives since 1966, any amendment to such provisions can only be successful upon the achievement of bipartisan support.

Apart from this, the enactment of constitutional amendments should be expected to become more complicated in the future, should a third political entity secure parliamentary representation. Whilst it is true that this would indeed help to ensure that the House of Representatives is more democratically proportional and reflective of the political mood of Maltese society, this scenario seriously risks slowing down even further the process of constitutional reform. For obvious reasons, the achievement of the two-thirds majority criterion would be far more problematic. In turn, this would very probably lead to the watering-down of proposed amendments to appease as many parties as possible in the hope that the required consensus is reached. In practice, this could easily translate into barely significant reforms, almost effectively reinforcing the status quo in the longer term.

Tier 2: Article 66(3) – Two-Thirds Majority in the House of Representatives and Referendum

Article 66(3) provides for a unique circumstance in which a constitutional amendment would require both a two-thirds majority of all members in the House and public support through a referendum with at least a simple majority in favour of the amendment.¹¹⁰ At present, this provision only applies to amend the lifespan of the Legislature, currently fixed at 5 years per Article 76(2) of the Constitution.¹¹¹

In a democratic State governed by the rule of law, it stands to reason that such a provision can only be amended through direct public involvement. After all, the maximum legal duration of a Government in office must ultimately also rest with the electorate. This mechanism mitigates against the risk that the House of Representatives unilaterally extends the length of its own tenure to a term of its pleasing. Conversely, the term can also be shortened but the practical merits of this are questionable given that Parliament is dissolved by a proclamation of the President upon the advice

¹¹⁰ *ibid* (n 1), Article 66(3).

¹¹¹ *ibid* (n 6) 469.

of the Prime Minister.¹¹² In fact, early elections well before the expiry of a Legislature have been called in the past, most notably in 1998.

Under Article 66(3) a referendum – in this case, binding in nature – must be held between three and six months following the passage of the bill through the House of Representatives approved by a two-thirds majority of all the Members of the House. This is intended to give enough time to the electorate to adequately process this unique situation whilst preventing any unnecessary prolonging of the state of affairs. Secondly, Article 66(3) has been interpreted such that any amendments to the lifespan of a Legislature will only come into effect from the next dissolution of Parliament. This implies that no prevailing Legislature can alter the maximum duration of its own tenure.¹¹³

With regards to amending Article 66(3) itself, this also requires a two-thirds qualified majority in the House supported by a public referendum. Moreover, this is also applicable to Article 66(4) prescribing the basic parameters that are applicable to holding such referendum. In this respect, reference is made to Article 56(10) of the Constitution that enshrines the fundamental notions of democratic electoral law, and indeed of any poll that prides itself as being free and fair, into the *suprema lex*, namely that voting shall be carried out through a secret ballot and in person.¹¹⁴

It is worth noting that under the original draft of the Constitution of 1964, the Article 66(3) mechanism in force today used to apply to a wider spectrum of provisions including the Maltese symbols, the Office of Governor-General of Malta, who was the precursor to the President of Malta, and other matters relating to the Maltese Parliament including its election, and the executive authority of the State.¹¹⁵ Technically, this also applied to the transition of the State of Malta into a republic. However, as previously discussed, the positivist interpretation as proposed by Dr Edgar Mizzi ultimately prevailed. In fact, Act LVIII of 1974 did not only establish the Office of the President of Malta but also amended Article 66(3) to its present form.¹¹⁶ Additionally, the fact that the Constitutional Court was dysfunctional at the time due to its lack of complete and proper

¹¹² *ibid* (n 1), Article 76(1).

¹¹³ *ibid* (n 6) 469.

¹¹⁴ *ibid* (n 6) 469.

¹¹⁵ *ibid* (n 6) 469.

¹¹⁶ J. J. Cremona, *The Maltese Constitution and Constitutional History since 1813* (3rd edn, DOM Communications Ltd 2016) 90-91.

composition meant that the events of December 1974 could not be scrutinised from a judicial perspective.

Arguably, the fact that the tool of referendum has been drastically limited to within the aforementioned constraints could be seen as sensible in a small island State like Malta given the highly polarised nature of Maltese party politics. To a significant extent for example, the outcome of the 2003 EU accession referendum was interpreted as an overwhelming vote of confidence in the Government of the day, triggering an immediate general election. Likewise, it is impossible to deny, entirely, that the outcome of the 2011 divorce referendum was not influenced from the diametrically opposite positions held by the respective leaders of the Labour and Nationalist parties. Perhaps, in the interest of national unity, both political parties may have come to the tacit conclusion that a referendum should only be held should there be no better political alternative on the table. In fact, Malta has held only three nationwide referenda since Independence in 1964.¹¹⁷

Clearly, the Maltese stance towards referenda does not necessarily reflect the position of other jurisdictions, which have opted to maintain the referendum as an important element of direct democracy. The Republic of Ireland, for instance, requires that all constitutional amendments undergo public approval in a referendum prior to taking effect.¹¹⁸ In turn, this has resulted in the Irish electorate going to the polls a total of 53 times since the enactment of the Irish Constitution in 1937.

In such cases, if the referendum fails to win a simple majority with the Irish electorate, as has happened for fifteen times in the past, such amendment is laid to rest for the foreseeable future. Alternatively, future legislators may opt to take the matter on after determining that a considerable amount of time has passed and public perception on the issue would have shifted. This was seen with the failed Tenth Amendment of the Constitution Bill 1986 which intended to remove the constitutional prohibition on divorce under Irish law,¹¹⁹ only for the motion to succeed with the Fifteenth Amendment of the Constitution of Ireland referendum of 1995, albeit by a slim margin.¹²⁰

¹¹⁷ The three referenda that have taken place in Malta since 1964 are the 2003 European Union membership referendum, the 2011 divorce referendum, and the 2015 spring hunting abrogative referendum.

¹¹⁸ Constitution of Ireland (1937), Article 46.

¹¹⁹ Government of Ireland, 'Referendum Results: 1937 – 2024' (Department of Housing, Local Government, and Heritage 2024) 42-43.

¹²⁰ *ibid* 54-55.

Another interesting episode was how the Irish electorate was even made to vote on the same matter twice, just sixteen months apart, namely on the Irish ratification of the Lisbon Treaty in June 2008¹²¹ and October 2009.¹²² This was done following guarantees being given to Ireland by the European Union pertaining to taxation, military activity relevant for Irish neutrality, and the status of abortion in Ireland. In fact, it was only after Brussels provided such guarantees that the Irish electorate permitted the ratification of Ireland to the Lisbon Treaty in the second referendum.

In turn, this also shows the power of referenda in giving society a true voice in the politics of their nation, but potentially at the expense of taking swift, firm, and decisive action. Therefore, the reality of constitutional referenda illustrates the broader tension which may exist between democratic legitimacy and institutional efficiency. Whilst Ireland enjoys a much higher degree of democratic legitimacy, tangibly, through the referendum requirement in its Constitution, the situation with the Maltese constitutional amendments of 1974 is completely different.

Tier 3: Article 66(5) – Absolute Majority in the House of Representatives

The third and final tier provided for in Article 66(5) is a residual tier covering all other provisions not already mentioned in Article 66(2) or Article 66(3). In such cases, the provision in question can only be amended upon obtaining the votes of the absolute majority of all members of the House. Although similar, this is not the same as a simple majority since in this case, the motion only passes if a majority, that is 50% plus one of all parliamentarians, vote in favour thereof.¹²³

At the time of writing, during the Thirteenth Legislature, the 2022 general elections resulted in a House of Representatives composed of 79 Members of Parliament (MPs). A hypothetical bill proposing constitutional amendments requiring an absolute majority would pass only if 41 MPs vote in favour. Should those in favour be less than 41, but the bill still garners more votes in favour than against, hence a simple (or relative) majority, the bill would not pass. Nevertheless, for the purposes of constitutional amendments, it is always more desirable to arrive at bipartisan agreements. That being said, since the Constitution represents the highest law of the land, it remains

¹²¹ *ibid* 78-79.

¹²² *ibid* 80-81.

¹²³ *ibid* (n 1), Article 66(5).

in the best interest of a democratic society that such amendments are supported by both sides of the House.

Historically, it was this residual provision that resulted in the controversial amendment of Article 6 within the 1974 republican amendments of the Constitution. Back then, positivist thinkers considered that since Article 6 was not provided for in the above subsections of Article 66, the provision in Article 6 had to be interpreted within the context of Article 66(5), irrespective of the substance provided for in this provision. Therefore, since the rest of Article 66 was silent on the matter, such provision could easily be amended by an absolute majority, as in fact happened resulting in the birth of the Republic of Malta.¹²⁴

Final Voting

With respect to Article 66, a final point worthy of consideration is the fact that all of these requirements are only required at the ‘final stage’ of voting, namely in the Third Reading prior to having the bill sent to the President of Malta for his assent. Therefore, for the bill to pass from the initial stages of parliamentary procedure, a simple majority would be enough.

Having said that, it is very hard to imagine a bill garnering the support of an absolute majority of members of the House at the eleventh hour, let alone a two-thirds majority where necessary, if it only scraped through the preceding stages by simple majorities from the Government members. Hence, it is best to ensure that the motion is ultimately in a position to secure the required threshold at the final vote meaning that members from both sides of the House remain on board with the proposed amendments and their negotiations so as to avoid any last minute upsets.

This principle was originally applied to the procedure to amend provisions requiring an absolute majority, namely Article 66(5), and even confirmed in the seminal Constitutional Court judgment of *Mintoff v Borg Olivier*.¹²⁵ By analogy, this was then taken to refer to the other provisions requiring a special majority to be amended, namely that such a majority would only be required at the Third Reading of the motion before it is sent for the assent of the President of Malta. In fact, in the process to enact Act IV of 1987,¹²⁶ whilst the Second Reading thereof only received a simple

¹²⁴ *ibid* (n 6) 470.

¹²⁵ *Mintoff v Borg Olivier*, Constitutional Court 22 January 1971.

¹²⁶ Act IV of 1987, Constitution of Malta (Amendment) Act, 1987.

majority in the House, it eventually passed as the third, and final, reading, received the required majority of two-thirds of members of the House.¹²⁷

Conclusion

What makes a Constitution truly stand out from other pieces of ordinary legislation is its robust framework governing how it can be amended. In the case of Malta, Article 66 does this in a comprehensive manner by creating a ‘three-tier’ mechanism depending on the substance of the clause in question. In turn, this ensures that no provision is trapped within a straitjacket thereby allowing more practical provisions to be amended with an absolute majority of parliamentarians, something that all majority governments have in the House of Representatives.

Moreover, in the case of more sensitive provisions, Article 66(2) requires the approval of two-thirds of the members of the House, bearing in mind that the political duopoly would translate this into virtually unanimous approval from the House of Representatives. In one instance, namely the lifespan of the Legislature, direct popular involvement is also required so as to ensure that democracy and the rule of law remain at the heart of Maltese constitutional law rather than tyranny and dictatorship.

In spite of this, Article 66 has not remained static since the enactment of the Independence Constitution in 1964 but has experienced its fair share of amendments. Of course, the most notable of such amendments were those of 1974 which drastically reduced the instances in which a public referendum is required thereby making it clear that the Maltese legislator favours effective governance. Although institutional efficiency is to be appreciated, this should be balanced with the adequate consideration that should be given to the will of the electorate and Maltese society at large.

Ultimately, Article 66 opens the debate on the equilibrium of constitutional stability and democratic integrity within Maltese constitutional law. Whether this equilibrium is relevant in light of the ever-changing Maltese political landscape has, and remains, a debated question by many ever since the Constitution of Malta was enacted. In particular, this discussion has often come to light in moments of discord between parliamentary decision-making and public sentiment. As a result of this, the relevance of Article 66 even sixty years since its original enactment remains and effectively

¹²⁷ *ibid* (n 6) 470-471.

depends on its capacity to balance out these two competing, yet essential, notions within the Maltese constitutional framework.

Balancing stability and fair representation in Maltese democracy

by Thea Marie Fountain

Introduction

Stability and fair representation are cornerstones of any democracy. Without stability, be it political, constitutional or any other, a democracy cannot function as it is the stability of its institutions that allow it to prosper. A stable political system allows democratic practices which embolden democratic principles. The most pertinent example of such a practice is the holding of legitimate elections aimed at ensuring fair representation. In this context, political stability, supported by the entrenchment of certain constitutional provisions, facilitates fair representation of all political candidates and parties, ensuring that the will of the electorate is heard.

The Maltese Constitution, in its supremacy, was written not merely to organise political authority, but to restrain it. Pivotal to this restraint of power is the concept of entrenchment, whereby certain constitutional provisions are shielded from ordinary amendment through a two-thirds majority in Parliament. In principle, such thresholds perform an important democratic role; they seek to ensure that fundamental constitutional change reflects broad political agreement rather than the will of a short-term majority. By doing so, they protect minority interests, promote deliberation, and reinforce institutional stability. Within the Constitution of Malta, a number of provisions are entrenched in this manner, reflecting a constitutional commitment to continuity and consensus rather than the will of a simple majority.

Yet, the legitimacy of supermajority requirements cannot be evaluated in isolation from the political and electoral systems within which they operate. As Tonio Borg observes, the Maltese Constitution is shaped not only by its formal legal structure, but by the practical realities of the country's political system, particularly its strongly bipolar party landscape. Malta's electoral system, based on the Single Transferable Vote (STV), is formally designed to achieve proportional representation and has been supplemented by corrective mechanisms intended to align parliamentary seats with vote shares. However, in practice, electoral outcomes may still produce disproportional effects, whereby parliamentary majorities exceed the level of support obtained at the ballot box.

This gives rise to a fundamental constitutional tension. A two-thirds majority is intended to signify a high degree of consensus within society. However, where parliamentary representation does not fully mirror the distribution of voter preferences, reaching such a majority may not necessarily indicate genuine democratic agreement. In these circumstances, the supermajority threshold risks becoming disconnected from its underlying justification, potentially allowing significant constitutional change to take place without a proportionate level of electoral support.

While two-thirds majority requirements remain an essential safeguard within constitutional design, their appropriateness in the Maltese context becomes less straightforward when considered alongside the realities of electoral representation. Their effectiveness and legitimacy appear to depend not only on their formal purpose, but on the extent to which the electoral system accurately reflects voter preferences. Examining the relationship between electoral disproportionality and constitutional entrenchment suggests that, in certain circumstances, supermajority requirements may prove inappropriate in relation to the democratic principles they are intended to protect.

Theoretical Justifications for Supermajority Requirements

Supermajority requirements are a well-established feature of constitutional design, rooted in the broader objective of limiting the concentration and exercise of political power. At their core lies the idea that certain constitutional provisions should be protected from ordinary political processes, requiring a higher threshold of agreement before they are amended. This reflects a fundamental distinction between ordinary legislation, which may legitimately be shaped by the will of a simple majority, and constitutional norms, which are intended to remain in force beyond short-term political changes.

From a theoretical perspective, supermajorities are closely associated with the concept of constitutional entrenchment. By requiring more than a simple majority, they seek to ensure that constitutional change is the product of deliberation and broad agreement rather than temporary political advantage. As noted by Arend Lijphart, a leading political scientist known for his work on democratic systems, those systems that emphasise consensus rather than majoritarian dominance tend to incorporate institutional mechanisms that encourage power-sharing and inclusivity, particularly in societies characterised by political division. Supermajority thresholds can therefore be understood as part of a wider constitutional commitment to restraint, dialogue, and stability.

At the same time, these mechanisms are often justified on the basis that they protect minority interests. By raising the threshold required for constitutional amendment, supermajorities prevent a governing majority from unilaterally altering the rules of the political systems in ways that may disadvantage opposition groups. In this sense, they function as a safeguard against what Robert Dahl, a prominent theorist of democracy, describes as the risks inherent in majoritarian systems, where the preferences of the majority may override those of smaller or less powerful groups. Supermajority requirements thus contribute to maintaining a balance between democratic responsiveness and constitutional stability.

However, these justifications are not without tension. While supermajorities are designed to foster consensus, they may also have the effect of entrenching political power or creating institutional rigidity. As Giovanni Sartori, a leading scholar of comparative constitutional design, argues constitutional mechanisms must be evaluated not only in terms of their formal design but also in light of the political environments in which they operate. In certain contexts, supermajority requirements may lead to legislative deadlock, particularly where political actors are unwilling or unable to cooperate. In others, they may reinforce existing imbalances, especially where parliamentary majorities do not accurately reflect the distribution of voter preferences.

This suggests that the value of supermajority thresholds is inherently context-dependent. While they are intended to promote stability and agreement, their effectiveness ultimately rests on the extent to which the broader political and electoral system supports those objectives. Where such conditions are absent, the protective function of supermajorities may become less certain, raising questions as to whether they continue to serve their intended democratic purpose.

Patterns of Democracy (2nd edn, Yale University Press 2012).

On Democracy (Yale University Press 1998)

Comparative Constitutional Engineering (2nd edn, Macmillan 1997).

Any critical assessment of supermajority requirements within the Maltese constitutional framework must be situated within the broader objectives that the Constitution seeks to achieve. While such thresholds may give rise to concerns in relation to representational accuracy, they also form part of a wider constitutional framework designed to ensure stability, continuity, and the integrity of the democratic process.

The Constitution of Malta establishes not only the procedural requirements for constitutional amendment, with key provisions - particularly those relating to electoral governance - entrenched and requiring a two-thirds majority for amendment, but also the foundational principles governing democratic participation, including the conduct of free and fair elections. These principles are central to the legitimacy of the constitutional order, as they seek to ensure that political authority is derived from the electorate in a manner that is both representative and accountable. Within this framework, electoral outcomes are intended to provide a reliable basis upon which parliamentary representation is constructed.

In this context, supermajority requirements may be understood as complementing, rather than contradicting, the democratic foundations of the system. Where elections are free, fair, and competitive, and parliamentary representation broadly reflects voter preferences, a two-thirds majority may reasonably be taken as indicative of a higher level of democratic endorsement. The supermajority threshold, in this sense, gives institutional form to a broader consensus, reinforcing the legitimacy of constitutional change.

Moreover, the entrenchment of constitutional provisions through a two-thirds requirement contributes directly to political stability. By limiting the capacity of transient majorities to alter fundamental rules, the Constitution reduces the risk of abrupt or partisan-driven constitutional change. This is particularly significant in smaller political systems, such as Malta, where electoral competition is highly concentrated and political polarisation may be pronounced. In such circumstances, the supermajority requirement serves as a stabilising mechanism, encouraging deliberation and, where possible, cross-party agreement.

At the same time, the relationship between stability and representation remains inherently delicate. While the constitutional framework seeks to ensure that electoral processes are fair and that the representation is broadly aligned with voter preferences, the extent to which this alignment is achieved in practice is not absolute. It is precisely within this space, between constitutional intention and electoral reality, that questions surrounding the operation of supermajority

requirements arise. As such, while the Constitution provides a structure within which stability and fair representation are intended to coexist, the effectiveness of this balance ultimately depends on how these principles are realised in practice. This balance between stability and representation provides the framework within which the practical operation of Malta's electoral system must be understood.

The Maltese Constitutional and Electoral Context

The application of supermajority requirements within Malta must be considered within the context of its constitutional and electoral framework. The Constitution of Malta provides for the entrenchment of a number of key provisions, requiring a two-thirds majority in Parliament for their amendment. This reflects a clear intention to ensure that fundamental aspects of the constitutional order are insulated from ordinary political change and can only be altered where a broad level of agreement exists across the political parties.

At the same time, Malta's electoral system is based on the Single Transferable Vote (STV), a form of proportional representation designed to translate votes into parliamentary seats in a way that closely reflects voter preferences. While this system is intended to produce proportional outcomes, its operation within a small and highly competitive political environment means that proportionality is not always perfectly achieved in practice.

However, the Maltese system operates within a distinctive political context characterised by strong bipartisanship, with electoral competition largely dominated by two principal parties. This has important implications for how representation functions in practice. While STV is designed to be proportional, it does not always produce perfectly proportional outcomes, particularly in a small electoral system with relatively few districts and seats. As a result, disparities may arise between the percentage of votes obtained by a party and the number of seats it secures in Parliament.

In recognition of this, constitutional and legislative adjustments have been introduced over time to correct certain disproportional outcomes, most notably through mechanisms that allocate additional seats to ensure that the party obtaining a majority of votes is also granted a parliamentary majority. While these corrective measures strengthen the representative character of the system, they also highlight an underlying tension: parliamentary majorities may, in certain circumstances, be shaped not solely by voter preference, but by institutional design.

This raises important questions for the operation of supermajority requirements. Where parliamentary composition is influenced by corrective mechanisms or structural features of the electoral system, the extent to which it can be taken as a direct reflection of voter consensus becomes less clear. In such a context, the attainment of a two-thirds majority may not necessarily correspond to the level of broad based agreement that such a threshold is intended to represent.

The Gap Between Votes and Representation

Despite its design as a proportional representation system, the operation of the Single Transferable Vote in Malta does not always result in outcomes that fully reflect the distribution of voter preferences. While the system generally ensures that the party obtaining the majority of votes secures a governing majority, the relationship between votes and seats is not always exact. In certain electoral contexts, relatively small differences in vote share may translate into more marked differences in parliamentary representation.

This dynamic is particularly important within Malta's highly competitive two-party system. Because electoral contests are often closely contested, even marginal shifts in voter support can lead to disproportionately larger gains in parliamentary seats. Although corrective mechanisms have been introduced to address situations in which the party with the majority of votes does not obtain a parliamentary majority, these adjustments do not entirely eliminate broader concerns relating to proportionality. Rather, they guarantee governability while leaving intact certain structural features that may continue to influence how representation is distributed. In this sense, the two-thirds majority requirement cannot be regarded as universally appropriate, as its legitimacy is contingent upon the extent to which parliamentary representation reflects genuine electoral support.

The result is that parliamentary composition may, at times, reflect a mediated rather than a direct expression of voter preferences. While this does not undermine the legitimacy of electoral outcomes as such, it complicates the assumption that parliamentary strength corresponds precisely to levels of public support. In particular, a party that enjoys a comfortable or even dominant majority in Parliament may not necessarily enjoy a comparable level of support among voters.

This dynamic can be illustrated by reference to Maltese electoral results in which relatively small differences in vote share have translated into more marked differences in parliamentary representation. For instance, in the 2017 general election, the Labour Party Malta secured

approximately 55% of the popular vote, yet obtained a substantially larger share of parliamentary seats, resulting in a comfortable governing majority. While such outcomes are not uncommon in proportional systems operating within small electoral districts, they nonetheless

demonstrate how parliamentary strength may exceed the underlying margin of electoral support. This reinforces the point that the composition of Parliament, although broadly reflective of voter preferences, may not always provide a perfectly proportional measure of public consensus. This becomes particularly notable where constitutional thresholds, such as a two-thirds majority, are concerned.

This distinction becomes especially relevant when considered in relation to supermajority requirements. Where constitutional thresholds are tied to parliamentary representation, any gap between votes and seats takes on greater significance. A two-thirds majority in Parliament may therefore be achieved under conditions that do not fully reflect a comparable level of consensus among voters. In this sense, the relationship between electoral outcomes and constitutional thresholds is not merely procedural, but raises substantive questions about the extent to which formal parliamentary majorities can be taken as reliable indicators of broader democratic agreement, particularly in circumstances where electoral disproportionality weakens the link between votes and parliamentary power.

Implications for Constitutional Design and Reform

The preceding analysis suggests that the challenges associated with supermajority requirements in Malta do not arise from the principle of entrenchment itself, but from the interaction between constitutional thresholds and the realities of electoral representation, particularly where disparities emerge between electoral support and parliamentary strength. This raises the question whether additional safeguards or complementary mechanisms may be required to ensure that supermajority rules continue to reflect genuine democratic consensus.

One possible approach lies in strengthening the proportionality of electoral outcomes, thereby reinforcing the link between voter preferences and parliamentary composition. Where representation more closely mirrors the electorate, the legitimacy of supermajority thresholds is correspondingly enhanced. Alternatively, greater reliance on supplementary mechanisms, such as

referenda or enhanced deliberative processes, may provide a further level of democratic validation for significant constitutional change.

At the same time, any reform must be approached with caution. The stabilising function of supermajority requirements remains an essential feature of the Maltese constitutional framework, particularly in a political system characterised by strong bipartisanship. The challenge, therefore, is not to displace the two-thirds requirement, but to ensure that it operates within a system that preserves both constitutional stability and meaningful democratic representation.

Conclusion

The analysis undertaken demonstrates that while supermajority requirements are grounded in sound constitutional principles, their operation within the Maltese system reveals important limitations. The two-thirds majority requirement plays a central role in safeguarding constitutional stability, protecting entrenched provisions, and preventing abrupt or partisan-driven change. Within a constitutional framework that seeks to ensure free and fair elections, it is intended to reflect a heightened level of democratic consensus.

However, this assumption is not always reflected in practice. As the Maltese electoral system demonstrates, disparities may arise between electoral support and parliamentary representation, particularly within a highly competitive two-party context. In such circumstances, the attainment of a two-thirds majority may not accurately reflect the level of widespread agreement it is intended to signify. The result is a disjunction between formal constitutional legitimacy and substantive democratic endorsement.

This does not render the two-thirds majority requirement inherently inappropriate. Rather, it highlights that its legitimacy is conditional upon the representativeness of the electoral system through which it operates. Where parliamentary composition closely reflects voter preferences, the supermajority threshold may reasonably be regarded as an expression of enhanced democratic consent. Where this alignment is weakened, the appropriateness of the supermajority requirement becomes correspondingly less certain.

Accordingly, the two-thirds majority requirement in the Maltese Constitution is better understood not as a universally appropriate safeguard, but as a context-dependent mechanism whose

effectiveness is shaped by the relationship between stability and representation. It is within this interaction that both its constitutional value and its limitations must ultimately be evaluated.

‘The two-thirds majority vote in the House of Representatives: addressing shortcomings in light of recent Constitutional controversies’

by Neil Casha

1. Introducing the concept of two-thirds majority voting

In order that democracy exists, what must prevail is the will of the majority.¹²⁸ While this assertion is made in the context of the majority will of the electorate, this is no less true when the House of Representatives carry out the functions entrusted to the elected representatives of the electorate by the Constitution.

One may extrapolate three primary forms of Parliamentary voting by which the Representatives of the electorate carry out these entrusted functions: (a) voting by simple majority of members of the House present and voting;¹²⁹ (b) voting by absolute majority of all members of the House;¹³⁰ and voting by two-thirds majority of all members of the members of the House.¹³¹ Extraordinarily, the Constitution requires a two-thirds majority and a referendum.¹³²

All forms of voting serve different purposes. Simple majority voting is the default, run-of-the-mill form of voting which is mainly used for the different stages of a Bill to pass through the House,¹³³ and generally all matters requiring a decision in the House. A notch higher than simple majority is absolute majority, because while in simply majority voting the total number of votes will be calculated depending on the number of members present and voting, absolute majority encompasses

¹²⁸ Giovanni Bonello, *Misunderstanding the Constitution: How the Maltese Judiciary Undermines Human Rights* (BDL Publishing 2018) 92.

¹²⁹ Article 71 of the Constitution of Malta <<https://legislation.mt/eli/const/eng>>; Section 21 of the Standing Orders of the House of Representatives <<https://legislation.mt/eli/sl/const.2/eng/pdf>>.

¹³⁰ Article 66(5) of the Constitution of Malta.

¹³¹ Article 66(1) of the Constitution of Malta.

¹³² Article 66(5) of the Constitution of Malta.

¹³³ Tonio Borg, *A Commentary on the Constitution of Malta* (3rd edn, Kite Group 2025) 476.

all the members of the House. This form of majority is used, for example, for alteration of provisions in the Constitution which are not extremely significant.

Then there is two-thirds majority voting, the focal point of this writing. What is the rationale behind this form of voting? It may be generally said that this form of voting is required for the more important provisions forming the core of the Constitution.¹³⁴ It captures '*the most fundamental of constitutional provisions*'.¹³⁵ This undoubtedly echoes the phenomenon that the Maltese Parliament owes its very existence to the Constitution and hence it is subject to it.¹³⁶ Entrenchment serves as a source of '*constituent nature*'.¹³⁷ As a result, Parliament is '*subservient to the Constitution*'.¹³⁸ To the contrary, British constitutional law exercises legislative supremacy of parliament, meaning that the British Parliament may make any law whatsoever, and there are no laws so fundamental which Parliament cannot repeal or alter in the same way ordinary legislation is repealed or altered.¹³⁹ While this is undeniably a core feature of British constitutional law, it has been submitted that: '*Owing to the nature of its subject matter ... a constitution and its laws ideally should be of a higher/fundamental status*'.¹⁴⁰ Undoubtedly, Maltese constitutional law places the Maltese Constitution at a higher status.

With this being said, the two-thirds majority requirement is not only reserved for the entrenchment of constitutional provisions. The forthcoming are all the instances in the Constitution not dealing with constitutional alteration which require a qualified voting of two-thirds majority of the members of the House: (a) determining a language as an official language;¹⁴¹ (b) putting in force a resolution declaring that democratic institutions in Malta are threatened by subversion;¹⁴² (c) appointment and

¹³⁴ *ibid* 468.

¹³⁵ Edgar Mizzi, *Malta in the making, 1962-1987: an eyewitness account* (Beck Graphics Limited 1995) 169.

¹³⁶ J.J. Cremona, *The Maltese Constitution and Constitutional History since 1813* (Publishers Enterprises Group 1994) 105.

¹³⁷ Austin Bencini, 'The supremacy of the Constitution of Malta' (Ph.D thesis, University of Malta 2011) 42.

¹³⁸ Kevin Aquilina, *Constitutional Law in Malta* (Wolters Kluwer 2018) 60.

¹³⁹ O. Hood Phillips, Paul Jackson and Patricia Leopold, *Constitutional and Administrative Law* (8th edn, London Sweet & Maxwell 2001) 47.

¹⁴⁰ Mark Ryan and Steve Foster, *Unlocking Constitutional and Administrative Law* (4th edn, Routledge 2019) 11.

¹⁴¹ Article 5(2) of the Constitution of Malta.

¹⁴² Article 47(2)(c) of the Constitution of Malta.

removal of the President of Malta;¹⁴³ (d) the appointment and removal of the Ombudsman;¹⁴⁴ (e) removal of Attorney General;¹⁴⁵ (f) removal of State Advocate;¹⁴⁶ (g) appointment of the Chief Justice;¹⁴⁷ (h) the appointment and removal of the Auditor General;¹⁴⁸ and (i) the appointment and removal of the Deputy Auditor General.¹⁴⁹

Therefore, this form of qualified majority is dispositioned throughout the Maltese Constitution for various purposes. We shall now proceed to examine three particular issues which involve the two-thirds majority qualified voting.

2. Controversial entrenchments – additional seats for the under-represented sex

The Constitution was amended in 2021 to introduce a gender-balancing corrective mechanism,¹⁵⁰ with the goal ‘to introduce *temporary positive measures necessary and reasonable in a democratic society to ensure de facto equality between men and women in politics*’.¹⁵¹ It is not the purpose of this writing to delve deeply into the socio-political aspects of this amendment; nor is it apt to comment on the actual process itself and its ramifications on Maltese electoral law.

The point of interest here is that article 52A of the Constitution of Malta was also entrenched.¹⁵² This therefore means that in order that this provision is amended or repealed, two-thirds of the members of the House must vote positively for such amendment or repealing of the law. Furthermore, this provision introduced what the Technical Committee for the Strengthening of

¹⁴³ Articles 48(1) and 48(3)(b) of the Constitution of Malta.

¹⁴⁴ Articles 64A(1) and 64A(3) of the Constitution of Malta.

¹⁴⁵ Article 91(5) of the Constitution of Malta.

¹⁴⁶ Article 91A(5) of the Constitution of Malta.

¹⁴⁷ Article 96(3) of the Constitution of Malta.

¹⁴⁸ Articles 108(2) and 108(4)(a) of the Constitution of Malta.

¹⁴⁹ Article 108(9)(b) of the Constitution of Malta.

¹⁵⁰ Act No. XX of 2021 <<https://legislation.mt/eli/act/2021/20/eng>>.

¹⁵¹ Bill No. 119, 17 March 2020 <[bill-119-constitution-of-malta-and-various-laws.pdf](#)>.

¹⁵² Article 66(1) of the Constitution of Malta.

Democracy called a ‘*sunset clause*’,¹⁵³ which provides that article 52A shall remain in force for a period of twenty years until it is automatically revoked, or until it is revoked or altered by an Act of Parliament prior to the twenty-year period.¹⁵⁴

So essentially, the Constitution contains an entrenched provision with an expiry date. The justification for this time-period by the aforementioned Committee is to have ‘*a more proportionate approach to the legitimate aim pursued*’.¹⁵⁵ While it is understandable that the Legislature which introduced this provision sought a balance between the longevity of the provision and avoiding the repealing thereof by a simple change in Government, and that it is as much as possible a proportionate change, it sends a hardly compatible message. On the one hand, this implementation was so important that it could only be altered by the highest form of qualified voting in the House (excluding referendum); and on the other hand, the provision was not important enough to uninterruptedly remain in the Constitution. A counter-argument could be that perhaps this provision seeks to create a social change to the political landscape for the next few years, and hence despite it being temporary, it still embodies a significant role. However, this seems unsatisfactory, because if the aim of social change is achieved, cannot Parliament revoke this provision without the need of an automatic expiration period? While this can be debated back and forth, nonetheless, it is certainly out of the ordinary that what should be the most fundamental and core provisions of the Constitution simultaneously carry a temporal character.

3. The Chief Justice limbo

In 2020, there were amendments to article 96 of the Constitution to include a two-thirds appointment procedure.¹⁵⁶ While recently the constitutional role of the Chief Justice has sparked nation-wide political controversy due to stark disagreement between the political parties,¹⁵⁷

¹⁵³ Gender Balance in Parliament Reform, Consultation Document, 26th March 2019 <https://www.um.edu.mt/library/oar/bitstream/123456789/103754/1/Gender_balance_in_Parliament_reform_consultation_document_2019.pdf> 31.

¹⁵⁴ Article 52A(4) of the Constitution of Malta.

¹⁵⁵ Gender Balance in Parliament Reform, Consultation Document (n 26).

¹⁵⁶ Act No. XLIII of 2020 <<https://legislation.mt/eli/act/2020/43/eng/pdf>>.

¹⁵⁷ Daniel Ellul, ‘Scerri Herrera fails to obtain two-thirds majority for chief justice post’, Times of Malta, 4 February 2026 <<https://timesofmalta.com/article/president-trying-broker-deal-chief-justice-vote.1123581>>.

constitutional issues related to this office were already foreseen. Consider the following excerpt of the 2020 report of the Venice Commission, where it was said that what is important is:

‘that the appointment of the Chief Justice be depoliticised as much as possible. In that regard, a two-thirds majority in Parliament would also lead to depoliticization, because both the parties would have to seek agreement on a ‘neutral’ candidate, acceptable to a wide majority in Parliament. Cross party consensus does not guarantee judicial independence, but strengthens the credibility of the choice made for such an important constitutional post. There is however a danger that this could lead to a lobbying by candidates among politicians.

*Another issue arises in this context. Any requirement of a qualified majority for an election to high office risks ending in deadlock. Even if the political parties in Malta should be commended that they seem able to reach agreement on such elections, it **cannot be excluded that such a deadlock could arise in the future**. The Chief Justice has such an important position that this situation must be avoided.’¹⁵⁸*

Like a tarot reader, the Venice Commission predicted the unfortunate situation the Maltese judiciary found itself in earlier this year. Prof. Borg also foresaw this possibility when remarking his observations on the 2020 constitutional amendments: ‘This means that, for the very first time it could possibly happen that a Chief Justice continues in office until the stalemate is resolved, even beyond the compulsory retirement age’.¹⁵⁹ This situation, and appointment procedure, is no better described than in the words of Prof. Aquilina as ‘a complete mess’.¹⁶⁰

This risk of stalemate, which became no longer a risk but a reality, was not the only issue encountered with the amendments that introduced a two-thirds majority mode of appointment. There is a misalignment between the appointment and the removal of the Chief Justice, which is atypical of other offices which require a two-thirds majority of the Members of the House to be appointed. Whereas these other offices already mentioned are removed by a two-thirds majority, in

¹⁵⁸ European Commission for Democracy through Law (Venice Commission), ‘Opinion on Proposed Legislative Changes in Malta’ (Opinion No 986/2020, 19 June 2020) <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2020\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)006-e)>.

¹⁵⁹ Tonio Borg, ‘The 2020 Constitutional amendments: a legal analysis’, 2020 Edition VII of ELSA Malta Law Review, 96-109.

¹⁶⁰ Kevin Aquilina, ‘The impending appointment of a Chief Justice’, The Malta Independent, 8 February 2026 <<https://www.independent.com.mt/articles/2026-02-08/blogs-opinions/The-impending-appointment-of-a-Chief-Justice-6736286973>>.

the same way they are appointed, the Chief Justice may be removed by ordinary majority through the Commission for Administration of Justice.¹⁶¹ Even the Commissioner for Standards in Public Life currently regulated by ordinary legislation requires that the support of two-thirds of the members of the House in order to be removed.¹⁶²

The situation is dire, and to use the remarks of the Chamber of Advocates, each day that passes in this situation ‘*continues to erode public confidence in the institutions and to cause harm to the justice sector*’.¹⁶³ It unfortunately hinders the proper operation of the judiciary. This in turn takes a toll upon the fundamental principle on which our democracy is based – the rule of law.¹⁶⁴

4. Addressing the lack of Constitutional solution to Parliamentary deadlocks

The issue of not having a back-up solution when a two-thirds majority is not achieved for a number of constitutional offices is a recurring issue in the Constitution. The reality is that if the two political parties disagree entirely on the appointment of the offices which require a two-thirds majority vote, the execution of the appointment is completely stuck.

Unfortunately, the ‘solution’ provided in the Constitution to the non-achievement of the two-thirds majority support of the members of the House is that the person occupying the office remains in office until a Resolution is supported by two-thirds of the Members of the House.¹⁶⁵ For some time until very recently, there was a complete *omissus* in the law regarding a back-up solution for the office of Auditor General.¹⁶⁶ However, despite having the opportunity to introduce a different mechanism for such officer, the solution has been for the Auditor General to also remain in office if the two-thirds majority vote is not attained.¹⁶⁷ This is quite disappointing given that this amendment

¹⁶¹ Tonio Borg, ‘The Constitution of Malta: anomalies and imperfections’, 2022 Vol. XXXII Id-Dritt 107-127; Borg (n 32).

¹⁶² Article 7 of Standards in Public Life Act, Chapter 570 of the Laws of Malta <<https://legislation.mt/eli/cap/570/eng>>.

¹⁶³ Chamber of Advocates, ‘Statement on the Appointment to the Office of Chief Justice’, 25 February 2026 <<https://avukati.org/news/stqarrija-dwar-il-hatra-ghall-kariga-ta-prim-imhallef-tal-qrati-2/>>.

¹⁶⁴ Mark Said, ‘How politics weakens the judiciary’, Times of Malta, 31 March 2026 <<https://timesofmalta.com/article/politics-weakens-judiciary.1126234>>.

¹⁶⁵ Article 48(1) of the Constitution of Malta; Article 64A(2) of the Constitution of Malta; Article 96(3) of the Constitution of Malta.

¹⁶⁶ Article 108 of the Constitution of Malta.

¹⁶⁷ Act No. IX of 2026, 27 March 2026 <<https://parlament.mt/media/138010/act-ix-constitution-of-malta.pdf>>.

mirrors the whole issue with the Chief Justice appointment, even though this motion passed after this issue. Therefore, while currently the pertinent national issue regards the Chief Justice, the peril of having a stalemate regarding other offices which require a two-thirds majority appointment is very much possible. It is time to directly address this issue, and to stop relying on the likelihood that consensus will always be reached – because it is clearly not always possible.

There have been a number of different ideas to anti-deadlock mechanisms relating to the Chief Justice appointment since the nation was faced directly with the lack of remedial alternatives. The following ideas (some relating to the Chief Justice and some to other offices) in a stalemate situation where the two-thirds majority cannot be attained have been compiled: (a) the President would decide on the appointment;¹⁶⁸ (b) a special committee would form consisting of the President, the acting Chief Justice, a Minister, and a member of the House from the Opposition, to decide on the appointment;¹⁶⁹ (c) the judiciary elects the Chief Justice from amongst themselves;¹⁷⁰ (d) appointment by the Commission for the Administration of Justice;¹⁷¹ (f) a shift to an absolute majority;¹⁷² (g) the judges of the highest Court take the responsibility of appointment;¹⁷³ (h) a shift to absolute majority after three rounds of voting deadlock;¹⁷⁴ (g) and a representative commission system consisting of members from the executive, legislature, judiciary, legal profession and laypersons.¹⁷⁵

¹⁶⁸ Emma Borg, 'President would have final say in government's chief justice anti-deadlock plans', Times of Malta, March 17, 2026 <https://timesofmalta.com/article/watch-deadlock-solution-takes-centre-stage-chief-justice.1125620?_gl=1*tj0ggc*_up*MQ..*_ga*MjA1MTUyNDUzOC4xNzc2MDEzMTA3*_ga_QKDS2VG3HT*czE3NzYwMTMxMDckbzEkZzAkDE3NzYwMTMxMDckajYwJGwwJGgxNDU3NDQ2MzU>.

¹⁶⁹ Bertrand Borg, 'PN's formula for anti-deadlock mechanism in chief justice appointment revealed', Times of Malta, March 4 2026 <https://timesofmalta.com/article/watch-live-ramona-attard-vs-darren-carabott-kazin-debate.1124952?_gl=1*1pe5jv3*_up*MQ..*_ga*MjA1MTUyNDUzOC4xNzc2MDEzMTA3*_ga_QKDS2VG3HT*czE3NzYwMTMxMDckbzEkZzAkDE3NzYwMTMxMDckajYwJGwwJGgxNDU3NDQ2MzU>.

¹⁷⁰ Times of Malta, 'Judiciary should elect chief justice from among its members: Momentum', 2 March 2026 <<https://timesofmalta.com/article/judiciary-elect-chief-justice-among-members-momentum.1124831>>.

¹⁷¹ Mark Said, 'Breaking the impasse', Malta Independent, 19 March 2026 <<https://www.independent.com.mt/articles/2026-03-19/blogs-opinions/Breaking-the-impasse-6736288109>>.

¹⁷² European Commission for Democracy through Law (Venice Commission) (n 31).

¹⁷³ *ibid*.

¹⁷⁴ Article 4 of Standards in Public Life Act, Chapter 570 of the Laws of Malta.

¹⁷⁵ Mark Said, 'The appointment of the chief justice and judicial independence', Malta Today, 16 April 2026 <https://www.maltatoday.com.mt/comment/opinions/140984/the_appointment_of_the_chief_justice_and_judicial_independence#>.

Hence there are a number of methods which can be utilised. In the writer's opinion, it would not be unideal to involve the judiciary branch in the appointment; and if not the judiciary, the involvement of the President, because this office is needed in determining moments.¹⁷⁶ In terms of the degree of involvement of the President, the writer tends to allude to the idea of such President acting on her own deliberate judgement to appoint the office at hand. For example, Prof. Borg and Prof. Stanton, while recommending that the office of the Commissioner for Standards in Public Life is inserted into the Constitution and shall be appointed by two-thirds majority of all members of the House, assert that: '*When such a qualified majority is not forthcoming, the President, acting according to their own deliberate judgement, should appoint such a Commissioner.*'¹⁷⁷

5. Moving forward

It is mainly a special qualified majority which differentiates amendments to primary ordinary legislation and the Constitution.¹⁷⁸ Indeed, the two-thirds qualified majority is an intriguing characteristic of the Maltese Constitution.

There have been examined both advantages and flaws of this system. The advantage mainly lies in the attractive result of the system – which is the general consensus between the members of two opposing parties in the House on the decision at hand. On the other hand, the main flaw is the fear of the non-attainment of this result, and when there is such non-attainment, what happens after such stalemate – and this is both with respect to appointing offices and alterations to the Constitution. One hopes that with respect to appointments, the Legislator introduces concrete solutions, which go beyond than the original office holder remaining in office. The present situation is depreciative to Maltese democratic situations and Maltese constitutional law.

¹⁷⁶ Ugo Mifsud Bonnici, *Il-Manwal tal-President tar-Repubblika*, 43.

¹⁷⁷ Tonio Borg and John Stanton, *The Constitution of Malta at Sixty* (Kite Group 2024) 40.

¹⁷⁸ Kevin Aquilina, *Constitutional Law in Malta* (Wolters Kluwer 2018) 60.

