The *Suprema Lex* of Malta

A Forgotten Law in Legislative Drafting, Statutory Interpretation and Law Making?

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Abstract

Although the Constitution of Malta is the supreme law of the land, yet, in practice, the three principal organs of the state – the legislature, executive and judiciary – have, in certain respects exemplified in this article, tended to close their eyes to the provisions of the supreme law of the land to such an extent that legislation, government action and judicial pronouncements have breached the basic law. Without attempting to be all-inclusive, the article discusses a few illustrations where this has been the case and reflects upon this institutional behaviour where the Constitution is not upheld as the supreme law of Malta but is instead derided and disparaged. Consequently, fundamental principles of state governance such as the tenets of a democratic society and the rule of law end up being threatened and imperilled by those same institutions which are called upon to respect them. Nevertheless, the Constitution proclaims itself supreme over any other law and the organs it establishes, including the three principal organs of the state which are assaulting it, and embodies within its fold the rule of law which at the current state of play is passing through a critical phase in the state of Malta.

Keywords: Maltese Law, legislative drafting, statutory interpretation, law making, supreme law.

A Introduction

No law in Malta can be drafted, interpreted or reformed without reference to the Constitution. This is because: (a) the Constitution is the supreme law of the land;[1] (b) any law which runs counter to it is void;[2] (c) Parliament's *vires* to enact

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1 The marginal note to Section 6 reads as follows: "Constitution to be supreme law".

2 Section 6 of the Constitution reads as follows: "Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

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laws derives none other than from the basic law;[3] and (d) the legislative body may make laws only subject to the provisions of the organic law.[4] It is, therefore, crystal clear that the Constitution ought never to be taken for granted in legislative drafting, statutory interpretation and law reform: on the contrary, it is an indispensable instrument which has to be complied with.

Every draftsperson, legislator and judge must, as a minimum, be extremely conversant with the constitutional provisions of his or her own state. In countries with written Constitutions like Malta, the above categories of persons tend to have an easier task as constitutional law is codified in one single legislative enactment rather than spread over a combination of myriad constitutional laws and unwritten constitutional conventions. Indeed, most states have their Constitutions embodied generally in a single document which, in the case of Malta, is known as the 'Constitution of Malta'.

Nonetheless, although the Constitution is *suprema lex*, a study of Maltese statutes points in the direction that Parliament is having second thoughts on its constitutional role when enacting legislation. This is because the present author has come across laws that do not uphold the Constitution's provision to enact legislation in conformity therewith. One gets the impression, when reading these enactments, that the Constitution has lost its relevance and superiority, if not formally *stricto jure*, at least in the practice adopted by the legislative, executive and judicial state organs. The Constitution ends up being nothing more than ornamental in nature and subservient to ordinary law, governmental action and judicial decision-making.

This article therefore examines these laws and carries out a constitutional impact assessment to gauge the extent to which these sampled laws violate the fundamental law. It argues that unless and until new draft legislation is subjected to a constitutional impact assessment before it passes on to be enacted, Parliament would continue to make statutes in violation of the organic law and of its constitutional duty to respect the tenets enshrined in the Constitution thereby being in breach of the rule of law and making a mockery of the superiority of the Constitution. Unfortunately, Maltese state organs do hold such dismal record and utter disrespect for the constitutional norm.

3 Section 65(1) of the Constitution provides that: "... Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003".

4 The opening words of Section 65(1) of the Constitution, omitted from the quotation at note 3, read as follows: "Subject to the provisions of this Constitution".

B Parliament's Assault on the Constitution: Unconstitutional Constitutional Amendments

I Parliament's Unscrupulous Betrayal of the Constitution: The 1974 Amendments to the Constitution

Perhaps the worst attack on the Constitution by Parliament is typified by the amendments to the Constitution of Malta, which changed its status from an independent to a republican state. This was achieved through two enactments, (a) the Constitution of Malta (Amendment) Act, 1974;[5] and (b) the Constitution of Malta (Amendment) (No. 2) Act, 1974.[6] The former enactment substituted Section 6 of the Constitution – the supremacy provision – while the latter enactment ushered in the republican status of Malta. The 1964 Constitution Section 6 provided that:

> Subject to the provisions of sections 48(7) and (9) and 67 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.[7]

Essentially Section 6(2) was stating that the Constitution of Malta (Amendment) (No. 2) Act, 1974 was superior to the Constitution and that the Constitution was subordinate to such enactment. All of a sudden Parliament, in breach of the spirit of the Constitution, decreed that the latter had lost its supremacy in favour of an ordinary law. It was the latter law which changed the status of Malta into a republic and it was this enactment which was enacted immediately after Act No. LVII of 1974, on the very same day that the latter enactment was enacted into law, that is on Republic Day (13 December 1974). Needless to say, the question arises here as to the legitimacy of Act No. LVII of 1974 bearing in mind that Act No. LVIII of 1974 did not simply change the status of Malta into a republic but also removed a number of provisions from the entrenchment provision, Section 67 (since then renumbered as Section 66), which required either at least a two-thirds majority vote of the House of Representatives or at least a two-thirds majority vote of the House and a majority vote in a referendum.

One must remember that prior to Malta becoming independent, a referendum was held, but when Malta became a republic the requirement to hold such a

5 Act No. LVII of 1974.

6 *Ibid.*

7 The new Section 6, as amended by Act No. LVII of 1974 on 13 December 1974, reads as follows:

> 1 Subject to the provisions of sections 48(7) and (9) and 67 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.
> 2 Where an Act of Parliament provides that a law, including a law containing such provision, or any provision of such law, shall have effect notwithstanding any provision of this Constitution, such law or provision thereof shall prevail and shall have full effect notwithstanding any provision of this Constitution and any inconsistency therewith, and this Constitution shall, to the extent of the inconsistency, be without effect.

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referendum was removed by the amendments made by Act No. LVIII of 1974 without the people's consent who had approved the independence Constitution of 1964, a reason why Dr Giorgio Borg Olivier, then Leader of the Opposition in 1974 and former Prime Minister, who obtained independence for Malta in 1964, consciously chose to vote against the amendments to turn Malta from a constitutional monarchy to a republican state. Indeed, Alfred Bonnici reminiscences that Giorgio Borg Olivier was of the view that in the same way that when he was Prime Minister of Malta he had requested the Maltese to approve the independence constitution by means of a referendum, the former Prime Minister insisted that the same procedure should have been followed when Parliament was being requested to approve Malta's change to a republican status. He felt that he would have betrayed all those people who had approved the independence constitution in the referendum had he to vote in favour of the republican status of Malta behind their back and without the calling of a referendum.[8] But that was not to be.[9] Apart from six Members of Parliament who voted against the republican constitution, members from both the government and opposition side voted in favour of this assault on the Constitution garnering the required two-thirds majority vote to remove the supremacy of the Constitution and re-enact it with substantial amendments a few moments later.

The second set of amendments removed the supremacy provision from the Constitution. This was easy to do as Section 6 had never been entrenched before Malta became a republic. But does this imply that once such a provision was removed, the Constitution lost its supremacy? Through these amendments, the Constitution was reduced to ordinary law and, worse still, ordinary law (in the form of Act Nos. LVII and LVIII of 1974) was declared to be superior to none

8 A. Bonnici 'Alfred Bonnici' *in* House of Representatives, *90 Years of the Parliament of Malta 1921-2011: Commemorative Sitting Held on the 90th Anniversary from the Holding of the First Sitting of the Legislative Assembly and Senate Following the Grant of the Amery-Milner Constitution in 1921, Wednesday 2 November 2011, The Palace, Valletta,* Valletta, House of Representatives, 2011, p. 11. Henry Frendo states that Borg Olivier's argument in the Nationalist Party Executive was that once the Constitution was approved in May 1964 by a referendum, it could not be altered other than by another referendum. Parliament could and should not have changed the Constitution, even by a two-thirds majority, which had been approved in a national plebiscite. Borg Olivier stressed, even during public meetings, that the people owned the Constitution and that no person could take away their Constitution. *See* H. Frendo, *Patrijott Liberali Malti: Bijografija ta' Ġorġ Borg Olivier (1911-1980)* (Translation: Maltese Liberal Patriot: Biography of Giorgio Borg Olivier (1911-1980)), Pietà, Pubblikazzjonijiet Indipendenza, 2005, p. 367.

9 Giorgio Borg Olivier was one of six Nationalist Opposition MPs who voted against Malta becoming a republic. But as the required two-thirds majority had still nonetheless been attained, Malta became a republic without his vote and that of 5 other MPs. Borg Olivier took the oath of allegiance to the Constitution even though, when doing so, he murmured that he was doing so if and to the extent of its validity. *See* Frendo, 2005, p. 372 and p. 379.

other than the organic law of the land.[10] Perhaps the most intriguing provision of the Constitution of Malta (Amendment) (No. 2) Act, 1974 is Section 1 which, brought about a temporary suspension and re-enactment of constitutional supremacy.[11]

In addition, Section 69 of the Constitution of Malta (Amendment) (No. 2) Act, 1974 provided that:

> **69.** With effect as provided in subsection (3) of section 1 of this Act, and without prejudice to the continued validity of anything done thereunder and in particular of the continued effect of subsection (2) of section 1 of this Act, section 6 of the Constitution is hereby repealed and in place thereof the following section shall have effect:
>
> *"Constitution to be supreme law.*
>
> **6.** Subject to the provisions of subsections (7) and (9) of section 48 and of section 67 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The reinstitution of the supremacy provision in terms of the above provision simply served to indicate that Parliament was abusing the Constitution by resorting to an interpretation based on the word of the law while totally ignoring the spirit of the law, that is, that the Constitution is always supreme irrespective of whether the Constitution declares it to be so, and not only when Parliament wants it to be so.

10 It is not the purpose of this article to enter into the doctrinal debate as to whether the Constitution lost its legitimacy when the constitutional amendments of 1974 were enacted by Parliament as this merits a study in its own right. What can however surely be stated is that, in their regard, it has been held that: "The transformation of Malta into a republic on 13 December 1974 is an awful warning to constitutional draftsmen and appears to put in doubt the efficacy of the methods of entrenchment used in many recent Commonwealth Constitutions". H.W.R. Wade & H.L. Cryer (Eds.), *Annual Survey of Commonwealth Law 1975*, London, Butterworths, 1976, p. 45.

11 In relevant parts, it reads as follows:

> 1 For the purposes of section 6 of the Constitution as is in force on the coming into operation of this section, this Act shall have effect notwithstanding any provision of the Constitution; and accordingly, notwithstanding any such provision and any inconsistency therewith, the Constitution shall have effect as amended by law and subject to the provisions of this Act.
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> 2 The provisions of this Act, other than those of section 69 and, to the extent that they amend section 67 of the Constitution in its application to section 6 thereof, of section 26 of this Act, shall come into operation immediately upon their publication in the *Government Gazette*, and the provisions of section 69 and, to the extent aforesaid, of section 26 of this Act shall come into operation on the expiration of two days following such publication.
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> 3 Notwithstanding any other provision of this Act and of any provision of the Constitution of Malta (Amendment) Act, 1974, all such provisions shall cease to have effect and the Constitution of Malta shall again have effect in its entirety as in force prior to the coming into force of the Constitution of Malta (Amendment) Act, 1974, if Parliament shall, within three months from the publication of the results of the general election following the next dissolution of Parliament after the coming into force of the said Acts, by law so provide.

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II *A Continuing Offence against the Constitution: Legislation in Breach of the Constitution*

The worst sin that can be committed in legislative drafting, statutory interpretation and law reform is when ordinary law breaches the *suprema lex*. Either there is in a legal system a hierarchy of law that ought to be respected and prevail or there is no such thing. A survey of a handful of recent statutes enacted in 2016 and 2017 indicates that Parliament has the bad habit of making law that does not comply with the Constitution. Recent examples to this effect from recent parliamentary business are the Constitutional Reform (Justice Sector) Act, 2016[12] and the Criminal Code (Amendment) Act, 2016.[13] The former breaches the human rights provisions of the Constitution and the European Convention of Human Rights and Fundamental Freedoms in relation to the right to a fair trial, while the latter contradicts the Constitution's provision relating to the Catholic religion as the official religion of the state. Parliament was unanimous when approving these two constitution-infringing amending statutes as both government and opposition voted in their favour.

As to the Constitutional Reform (Justice Sector) Act, 2016, Section 65(1) of the Constitution mandates Parliament to enact laws that are "in conformity will full respect for human rights". Yet the Constitutional Reforms (Justice Sector) Act 2016 does not comply therewith.[14] The new law does not afford a member of the judiciary accused for misconduct before the Committee for Judges and Magistrates, the right to a fair trial.[15] With regard to the Criminal Code (Amendment) Act, 2016, the decriminalization of vilification of religion is inconsistent with the Constitution as the national religion is a constitutional state symbol worthy of protection and there was no other criminal offence in the Criminal Code, apart from repealed Sections 163 and 164, which criminalized vilification of religion, thereby protecting the constitutional state religion.

As though this assault on the Constitution was not enough, Parliament has in 2017 continued in the same vein, increasing its dosage of unconstitutionality, by enacting three laws and had at least a further bill pending before it, four in all, which are in direct contrast with the Constitution (and, by the way, this is not intended to be a comprehensive list!). The three laws in question are: the Coordination of Government Inspections Act, 2017,[16] the Small Business (Amendment)

12 Act No. XLIV of 2016.

13 Act No. XXXVII of 2016.

14 Section 65(1) reads as follows: "Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003".

15 *See* K. Aquilina, 'Inherent Deficiencies in the Constitutional Reforms (Justice Sector) Act, 2016: A Case of No Step Forward, Twenty Steps Backward?', *Italian Journal of Public Law*, Vol. 9, No. 1, 2017, pp. 24-47.

16 Act No. II of 2017.

Act, 2017,[17] and the Standards in Public Life Act, 2017.[18] The relevant Bill is the Media and Defamation Bill.[19]

The Standards in Public Life Act, 2017 refers, in Sections 2 and 3(1)(b), to the unconstitutional office of "person of trust", that is,

> any employee or person engaged in the private secretariat of a Minister or of a Parliamentary Secretary wherein the person acts as an adviser or consultant to a Minister or to a Parliamentary Secretary or acts in an executive role in the Ministry or Parliamentary Secretariat, and where the person has not been engaged according to the procedure established under section 110 of the Constitution.

To show its might and disrespect of the Constitution, Parliament finds no difficulty in declaring that persons of trust are engaged not according to the Constitution! It does not even attempt to hide its unconstitutional behaviour. On the contrary, in full homage to the principles of openness and transparency, unashamedly, the House of Representatives perches its unbelievable assault on the Constitution for one and all to see.

The Constitution does not allow for the appointment of persons of trust but both the Nationalist Party when in government, and the Labour Party now in government, have had and continue to have no qualms in appointing persons of trust in complete defiance of the Constitution. This is indeed an unconstitutional way how to employ people with government without going through the proper procedures established by the Constitution and, thanks to the complicity of the Opposition and the connivance of the Public Service Commission (the latter has taken no steps over the years to halt such unconstitutional practice), government of both colours – whether Nationalist or Labourite – has had and continues to have the audacity and comfort to ride roughshod over the Constitution's provisions. While Chief Justice Emeritus Dr Joseph Said Pullicino, as Ombudsman, went to court and won both at first instance and, on appeal,[20] a case against the government related to the investigation of promotions under the Ombudsman Act, the Public Service Commission's timid and servile behaviour towards the government leaves much to be desired when it raised the issue of positions of trust being unconstitutional in three of its annual reports but failed to take any action on its part.[21] On the contrary, the Ombudsman has, in his 2018 Ombudsplan,

17 Act No. XII of 2017.

18 Act XIII of 2017.

19 Bill No. 192 of 2017.

20 *Chief Justice Emeritus Joseph Said Pullicino nomine v. Minister for Home Affairs and National Security et*, Civil Court, First Hall, per Mr Justice Lawrence Mintoff, 12 October 2015, and Court of Appeal (Superior Competence), 31 October 2016.

21 *See* Public Service Commission, *Annual Report 2011*, Valletta, Public Service Commission, 2012, pp. 20-21; and Public Service Commission, *Annual Report 2012*, Valletta, Public Service Commission, 2013, pp. 21-23, at p. 23.

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unequivocally stated that positions of trust run counter to the Constitution and that no ordinary law may change this constitutional prohibition.[22]

In terms of the Standards in Public Life Act, 2017, again approved by both sides of the House, the Commissioner for Standards in Public Life is empowered to

> investigate and report to the House of Representatives whether a person of trust shall have breached the provisions of the Code of Ethics included in the First Schedule to the Public Administration Act to which persons of trust shall by virtue of this Act and without any further requirement, be subject.

This is another case where ordinary law is supreme and the Constitution is inferior thereto.

The Small Business (Amendment) Act, 2017 empowers the competent Minister in Section 2 thereof – without the need of going to Parliament to request it to amend that law – to add any other entity which s/he may from time to time identify, as a public sector entity offering services to business even if the Constitution does not confer upon such minister the power to identify constitutional commissions and the Broadcasting Authority for that purpose. Needless to say, once again, the law was approved by both sides of the House. Thus, through the 2017 amendments to the Small Business Act, the independent constitutional commissions and Broadcasting Authority are subjugated to the whims and caprice of a government minister!

The Coordination of Government Inspections Act, 2017, defines in Section 2 an "entity" as including "any state body". This means that the National Audit Office – a state body in its own right – might end up being curtailed in the number of inspections it carries out in terms of the Audit General and National Audit Act.[23] This is because the Inspections Coordination Office has, amongst other aims, that to "minimize the burden of inspections on entities and individuals".

This Office may give

> directions to inspectorates as are necessary to achieve its aims ... and notwithstanding any other law, it shall be the duty of officers of inspectorates and those responsible for them to carry out those directions.

The National Audit Office and Auditor General will end up muzzled when the Minister responsible for commerce amends the principal law to include the National Audit Office in its Schedule thereby bringing the National Audit Office subject to the government-appointed Head of the Inspections Coordination Office. Of course, the opposition toed the government's line and voted also in favour of this law.

22 Parliamentary Ombudsman, *Ombudsplan 2018*, Valletta, Office of the Parliamentary Ombudsman, 2018, p. 23.

23 Chapter 396 of the Laws of Malta.

The Media and Defamation Bill No. 192 of 2017 was an exercise in its own right of constitutional assault: it is in breach of the *lex mitior* principle (the retrospectiveness of the more lenient criminal law); it affords different treatment to persons accused of a criminal offence under the Press Act and the Criminal Code, on the one hand, and the Bill, on the other; it limits freedom of expression only to journalists in the employ of the traditional media houses and excludes other persons from exercising their freedom of expression; it maintains in force media gagging through recourse to the precautionary warrant of prohibitory injunction; and it is disproportionate when it requires practically anybody who owns a computer, a mobile phone, a tablet or some other communication technology equipment in Malta to register with the Media Registrar.

C Government's Assault on the Constitution

I Government's Botched Unconstitutional Attempt at Judicial Appointments

In the previous legislature, the government had announced its decision to appoint two advocates as magistrates.[24] Yet a controversy erupted as to the requisite qualifications for appointment. One advocate had just held the chair of the constitutionally established Employment Commission and the other did not satisfy the quantitative criterion for appointment when cabinet approved their nomination.

In the latter case, Section 100(2) of the Constitution states that

> A person shall not be qualified to be appointed to or to act in the office of magistrate of the inferior courts unless he has practised as an advocate in Malta for a period of, or periods amounting in the aggregate to, not less than seven years.

This provision allows for only a quantitative criterion for appointment to the magistracy based on length of practice as advocate.

The seven years of professional practice are limited to the practice of the profession of advocate. They need not be consecutive but may be broken up such as when an advocate takes a career break. Further, the practice has to be in Malta. Practice as an advocate in any foreign country is not counted. Nor is service on an international court or tribunal. But practice need not be at the bar. A person might have practised as an advocate in Malta but never pleaded a case in court. Yet s/he is still eligible for judicial appointment.

From when is the seven years counted, is it from graduation day? The answer is in the negative because it is not the law degree which makes one an advocate. Is it from the date of presentation by the Minister responsible for justice of the warrant to exercise the profession of advocate or when one subscribes to the oath of office in the Court of Appeal? The Constitution does not answer these queries but

24 Department of Information, *Cabinet Approves the Appointment of Two New Magistrates: The Number Of Women Serving in the Judiciary Increases by Ten Per Cent in Less Than Three Years*, Press Release Number: PR160211, Valletta, Department of Information, 3 February 2016.

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the matter is addressed by the Code of Organization of Civil Procedure. The Code provides in Section 79 that: "No person shall exercise the profession of advocate without the authority of the President of Malta granted by warrant under the Public Seal of Malta". Therefore, for a person to exercise the profession of advocate, s/he must be in possession of a Presidential warrant to exercise that profession. The warrant is granted following successful completion of the bar exam. But Section 80 of the Code debars an advocate from exercising the profession unless s/he has subscribed to the oaths of allegiance and of office. Both oaths are mandated by law. If not subscribed to, an advocate cannot exercise the profession. Practice starts following the taking of both oaths, whichever is the later.

As to the other case, Section 120(4) of the Constitution states that:

> A member of the Employment Commission shall not, within a period of three years commencing with the day on which he last held office or acted as member, be eligible for appointment to or to act in any public office.

In terms of Section 124(1) of the Constitution, "public office means an office of emolument in the public service" and in terms of Section 124(2), "public service includes service ... in the office of magistrate of the Inferior Courts". Thus in the two cases under consideration, cabinet approved a lawyer to be appointed magistrate who still had not satisfied the aforementioned 7-year appointment criterion of legal practice and also approved the appointment of another lawyer whose 3 years since last holding office as chairman of the Employment Commission had not elapsed. Both approvals breached the Constitution so much so that in the first case, the lawyer had to await three more months to elapse before she could be appointed magistrate, while in the latter case the lawyer withdrew herself from the appointment procedure. These two government decisions flied in the face of the Constitution notwithstanding its superiority.

II Failed Assignment of Unconstitutional Government Business to the Head of State

In a Department of Information Press Release,[25] the Prime Minister stated that the Presidency will be given a different role, an active role in the social agenda of Malta and the government would be providing the Presidency with the necessary tools to carry out this role. The President had to be responsible for the National Strategy against Poverty, the Food Aid Programme, the Family National Forum, the Family National Commission, the National Commission for the Development of a Child Strategy and Policy, the Domestic Violence Commission, the Substance Abuse Commission and the National Prevention Agency.

But can the President of Malta be assigned responsibility for these initiatives and governmental entities? An analysis of the Constitution's provisions indicates that the answer is in the negative.

The starting point of a discussion on the President's functions has to be Section 78 of the Constitution of Malta. In sub-section (1) it is stated that: "The

25 Department of Information, *Nomination for of President of the Republic of Malta Announced*, Press Release Number: 140400, Valletta, Department of Information, 4 March 2014.

executive authority of Malta is vested in the President". The President is the constitutionally appointed head of the Executive branch of the state. The Constitution does not appoint the Prime Minister as head of the executive but the President of Malta. However, sub-sections (2) and (3) provide two important inroads that practically render the President a figurehead rather than an active and dynamic official figure as the Prime Minister wanted to make out of the President without amending the Constitution.

Sub-section (2) states that: "The executive authority of Malta shall be exercised by the President, either directly or through officers subordinate to him, in accordance with the provisions of this Constitution". This implies that, first and foremost, executive powers are not solely exercised by the President but are exercised by both the President and officers subordinate to him/her and, second, when the President exercises executive authority, s/he can do so only "in accordance with the provisions of this Constitution".

A study of all the provisions of the Constitution indicates a twofold typology of Presidential executive authority:

a where the President exercises, in the vast majority of cases, executive authority in accordance with the advice of government; and
b where the President exercises, in the vast minority of cases, executive authority on his/her own deliberate judgment.

Finally sub-section (3) states that: "Nothing in this article shall prevent Parliament from conferring functions on persons or authorities other than the President". This sub-section is disallowing Parliament, by law, to confer functions upon the President. This means that while Parliament may delegate functions of whatsoever nature to any person or authority, it is debarred from increasing the functions of the President as contained in the various provisions of the Constitution. But the President may chair the Commission for the Administration of Justice without difficulty as such function is assigned to him/her by the Constitution itself and not by ordinary law.

Of course, for Parliament to confer new functions upon the President as the Prime Minister was advocating in the said Department of Information Press Release, the Constitution has to be amended. On the other hand, it is perfectly lawful for Parliament to remove certain functions which are assigned to the President by ordinary law such as to expropriate property even though strictly speaking such function should have never been assigned to the President. This latter function is essentially a vestige of colonial times when the Governor used to expropriate property. On becoming a republic this power was wrongly left to be exercised by the President rather than the Prime Minister. Following the issue of the said press release, no further action was taken and the President was not assigned such governmental functions and responsibility as proposed in the press release. This clearly illustrates that the prime ministerial decision was constitutionally flawed once it was not acted upon.

As to where the President exercises executive authority in accordance with the advice of government, the Constitution in Section 85(1) states that:

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> In the exercise of his functions the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of any person or authority other than the Cabinet....

The rule is therefore that the President cannot act unless s/he is so advised to do by government, that is, by cabinet or by a minister acting under the general authority of the cabinet. Again, the powers in question are those powers assigned to the President by the Constitution.

There are a handful of instances where the President exercises executive authority on his/her own deliberate judgment. These exceptions are listed in an exhaustive manner in the Constitution itself, in Section 85(1), which contains a proviso that reads as follows:

Provided that the President shall act in accordance with his own deliberate judgment in the performance of the following functions:

a the dissolution of Parliament;
b the appointment or removal of the Prime Minister;
c the performance of the functions of the Prime Minister during absence, vacation, or illness;
d the appointment and removal of the Leader of the Opposition;
e the approval of his personal staff.

As this list of exceptions is by way of a proviso, it cannot be afforded a liberal interpretation. On the contrary, it is intended as an exhaustive list and hence a restrictive construction must be given. In relation to the allocation by the President of government business to oneself, Section 82(1) relates to the allocation of portfolios to ministers. The question that has to be asked at this juncture is whether the President can assign unto him/herself ministerial functions, that is, responsibility for government business. The answer is in the negative because:

a the provision under examination does not contemplate such an occurrence. On the contrary, it is clear that the assignment of government business can be assigned to a minister only;
b the President's powers are only those which are established by the Constitution and the President is debarred from increasing his own powers;
c the cabinet is responsible for government business and answerable to Parliament, the President being also part of the legislature. It would not have made sense for the President, as Head of the Executive, to carry out executive functions and then be answerable to Parliament of which s/he is a component part. Section 79(2) states that: "The Cabinet shall have the general direction and control of the Government of Malta and shall be collectively responsible therefor to Parliament." If the President were to be assigned independent functions from government then this means that insofar as those functions are concerned, government is not collectively responsible to Parliament for the President of Malta does not sit in cabinet. All the system of cabinet government rests on the doctrine of collective ministerial responsibility enunci-

> ated in Section 79(2) of the Constitution. While government is democratically elected, the President is not. The President is a figurehead, not an agent of reform. Nor can s/he make policies unless such function is assigned to him/her by the Constitution.

Finally, the Prime Minister is duty bound to keep the President informed of government business. This once again indicates that the President should not be involved in the administration of the country. Section 87 states that:

> The Prime Minister shall keep the President fully informed concerning the general conduct of the Government of Malta and shall furnish the President with such information as he may request to any particular matter relating to the Government of Malta.

If, on the other hand, the President assumes executive authority, then the provision would have had to be the obverse stating that it is the President who should keep the Prime Minister involved on government business not *vice versa* as is the position today.

By way of summing up on this point, the following observations have to be made:

a If the above government business and entities listed by the above-mentioned press release are assigned under the office of the President of Malta, that would be in breach of the Constitution.

b If the President is given the duty to draw up and approve or participate in the drawing up or approving policy, this would be in breach of the Constitution.

c If the President is asked to convene a new series of the President's Forum under his/her auspices, that is not in breach of the Constitution as the President in doing so is not given an executive power. The power will still remain in the government of the day once the President's Forum is a place where only matters are discussed but not decided upon.

The only way how to assign any of first and second functions to the President is by amending the Constitution as happened in 1994 when the President was appointed Chairman of the Commission for the Administration of Justice.

Paragraphs a) and b) above are new measures which go well beyond what the Constitution provides as they confer unconstitutional executive powers to the President while paragraph c) is a modified version of what has happened in the past and does not confer executive powers on the President. Paragraph c) is the safest of the three to go for without ending up in violation of the Constitution.

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D Judicial Assault on the Constitution

I An Unconstitutional Judicial Decision: The Constitution's Irreconcilability with the Right to Free Elections

The Constitutional Court's judgment of 29 May 2015[26] relating to the two seats in the House of Representatives being claimed by the Nationalist Party has attempted to square the circle with the end loser being the Constitution. The court held that there exists a parallel jurisdiction between the Constitutional Court under the Constitution and the Civil Court, First Hall, under the European Convention Act,[27] to determine cases related to the membership of the House of Representatives. The Civil Court endorsed this reasoning in its 26 May 2016[28] judgment. I find this interpretation of the Constitution unconstitutional.

An action related to the membership of the House cannot be proposed before any court of first instance once it runs counter to Sections 63[29] and 95(2)(a)[30] of the Constitution, which vest exclusive jurisdiction to determine such questions uniquely in the Constitutional Court. The latter Court had already pronounced itself against two Nationalist Party candidates on 13 March 2013[31] on the two seats being sought by them. From a constitutional viewpoint the matter has been finally and conclusively determined without the possibility of reopening it again under any pretext whatsoever, be it a retrial or a human rights issue.

Section 95(2)(a) grants sole jurisdiction to the Constitutional Court as a court of original instance in cases instituted in terms of Section 63 of the Constitution. Being a court of final instance, Constitutional Court decisions delivered in terms of the Constitution (as opposed to those delivered in terms of the European Convention Act) are not reviewable by any other court, be it foreign (such as the Judicial Committee of the Privy Council in the past or the European Court of Human Rights at present). Nor can it be reviewed by a court of civil jurisdiction such as the Civil Court, First Hall, sitting in its constitutional competence, as the Constitution does not grant such latter court jurisdiction to hear cases under Sections 63 and 95(2)(a) of the Constitution.

26 *Nationalist Party et v. Electoral Commission et*, Constitutional Court, 29 May 2015.

27 Chapter 319 of the Laws of Malta. This enactment incorporates into Maltese Law the European Convention on Human Rights.

28 *Nationalist Party et v. Electoral Commission et*, Civil Court, First Hall (Constitutional Competence) per Madam Justice Lorraine Schembri Orland, 26 May 2016.

29 Section 63(a) of the Constitution reads as follows: "Any question whether – (*a*) any person has been validly elected as a member of the House of Representatives; ... shall be referred to and determined by the Constitutional Court in accordance with the provisions of any law for the time being in force in Malta".

30 Section 95(2)(a) of the Constitution reads as follows: "(2) One of the Superior Courts, composed of such three judges as could, in accordance with any law for the time being in force in Malta, compose the Court of Appeal, shall be known as the Constitutional Court and shall have jurisdiction to hear and determine – (*a*) such questions as are referred to in article 63 of the Constitution".

31 *Frederick Azzopardi et v. Electoral Commission*, Constitutional Court, 13 March 2013 and *Claudette Buttigieg v. Electoral Commission et*, Constitutional Court, 13 March 2013.

Even the European Convention Act validates this reasoning, which derives from the supremacy provision of the Constitution (Section 6).[32] This enactment provides that fundamental rights and freedoms as enshrined in the European Convention on Human Rights and Fundamental Freedom (ECHR) reproduced in the First Schedule to that Act and which comprises the right to free elections in Article 3 of the First Protocol to the European Convention on Human Rights,[33] can be enforced under that enactment only in respect of any ordinary law but not in relation to the Constitution.

Although Malta has ratified the First Protocol to the ECHR and although the European Convention Act has granted jurisdiction to the Civil Court, First Hall (Constitutional Competence), to determine cases under the First Protocol, and, on appeal, to the Constitutional Court, the European Court of Human Rights, is by an express provision of the Constitution (Sections 63 and 95(2)(a)) precluded from ruling on questions related to the membership of the House under the said Protocol. Otherwise the Constitution's finality of decision-making in relation to membership of the House conferred solely upon the Constitutional Court is brought to naught. Indeed, the Constitution did not envisage a situation where the Strasbourg Court reviews the Constitutional Court's decision as being contrary to Section 95(2)(a) of the Constitution.

On 14 August 1928,[34] the Court of Appeal declared that the then upper house, the Senate, was not constituted according to law and that all laws made by the bicameral legislature were null and void. The Imperial Parliament intervened and enacted a law to validate the annulled laws. The Judicial Committee of the Privy Council[35] also declared that once the Constitution had conferred jurisdiction upon the Court of Appeal, only it could determine such issue and the Privy Council, though a hierarchically superior court to the Court of Appeal, desisted from reviewing the domestic court's decision on the basis of lack of jurisdiction. The Privy Council held:

The clause of the Letters Patent which deals with this matter is Section 33, and is in the following terms:

> All questions which may arise as to the right of any persons to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta.
>
> To their Lordships, these words appear to be clear and distinct. They direct that all questions touching the membership either of the Senate or

32 *See supra* note 2 for text of Section 6.

33 Art. 3 of the First Protocol to the European Convention on Human Rights on the right to free elections provides that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

34 *Walter Agius et v. The Hon. Dr Alfredo Parnis noe et*, Court of Appeal, 14 August 1928.

35 *The Right Honourable Gerald Lord Strickland, G.C.M.G., LL.B., M.L.A., the present Minister for Justice (in the place of The Honourable Dr. Alfredo Parnis O.B.E., LL.D., and others v. Giuseppe Grima, in his capacity as President of the Trade Union Council of Malta (in the place of Walter Agius, deceased) and others*, Judicial Committee of the Privy Council, 23 January 1930.

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> Legislative Assembly created by the Letters Patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any Court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island. Even if their Lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusions that His Majesty had advisedly designated His Court of Appeal in Malta finally to determine all these questions. It appears to their Lordships that the section being found in Letters Patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect given to it.

The Civil Court, First Hall (Constitutional Competence),[36] by allowing two additional seats to the Nationalist Party, by way of remedy under the European Convention Act, contravened the Constitution, which allows only the Constitutional Court to rule on these types of electoral matters. This is a classic case of where the Constitutional Court should have applied the legal maxim of civil procedure *electa una via non datur recoursus ad alteram*. If one chose one remedy (that under Section 63), then one cannot resort to another remedy (that under the European Convention Act) if one has lost the first action. The remedy under the European Convention Act is not additional to the constitutional remedy: it is in contravention thereof. The solution to such legislative conflict is parliamentary, not judicial. The law has to be amended to ensure that the Constitution and the European Convention Act are brought in unison together. Yet the Civil Court's judgment is in breach of the Convention even though it was considered by the Constitutional Court not to be so.[37]

II Unconstitutional Judicial Decision Breaching the Constitution's Supremacy

The Civil Court, First Hall,[38] failed to appreciate the constitutional effects of a dissolution of parliament as set out in extant legal literature. Section 76 of the Constitution states that Parliament is dissolved by the President's proclamation when it "shall stand dissolved". Edward A Freeman[39] states that the

> primary object of dissolution in a constitutional state is to get rid of the existing legislature in the hope that another may come in its place which may better suit the purpose of those who dissolve it.

Although dissolution brings with it the death of Parliament, this does not mean that all parliamentary business comes to an end. This is because our written Constitution specifically recognizes exceptions to this rule. One such example is that on dissolution the Speaker still retains his/her office until a new legislature is

36 *Nationalist Party et v. Electoral Commission et*, Civil Court, First Hall (Constitutional Competence) per Madam Justice Lorraine Schembri Orland, 26 May 2016.

37 *Nationalist Party et v. Electoral Commission et*, Constitutional Court, 25 November 2016.

38 *Mr Justice Carmelo Farrugia Sacco v. Prime Minister et*, Civil Court, First Hall, per Madam Justice Lorraine Schembri Orland, 5 June 2014.

39 E.A. Freeman, 'The Power of Dissolution', *The North American Review*, Vol. 129, 1879, p. 162.

summoned.[40] Another instance is that the President may recall Parliament when it has already been dissolved.[41] But there is no exception in the Constitution that a judicial removal motion survives the dissolution of Parliament and that any measure authorized by that motion can still continue in force.

Durga Das Basu[42] writes that

> Dissolution means the end of life of the lower House itself ... While in England, all business pending in Parliament is wiped out by dissolution, in India, Bills which originated in the Council of States and are pending in the House at the time of dissolution, without having been passed by the House of the People, do not lapse.

But such Bills remain 'alive' because Indian Constitutional Law specifically and unequivocally allows it to be so.

In Malta, a motion to remove a judge is not one of those measures which survive dissolution of Parliament. The Constitution does not save such a motion from death in the same way that it does not save motions introducing Bills in the House of Representatives which have not been approved prior to dissolution. Hence, if the Constitution – the supreme law of the law – does not allow judicial removal motions to be carried over from one legislature to another, how can the court state that the effects of dead motions can be so transferred when the investigation and report of judicial misbehaviour has been authorized by Parliament because of a judicial removal motion which is now dead like Parliament itself?

If a motion for judicial removal has been introduced in one legislature, it cannot automatically survive another legislature, nor can its effects survive automatically into another legislature. *Quod nullum est nullum producit effectum.*[43] If the judicial removal motion has died – like Parliament – how can that motion still continue to have effect? Section 9 of the Commission for the Administration of Justice Act[44] comes into being when there is a judicial removal motion in being. The said motion is referred to the Commission by the Speaker for investigation/report. But the Commission for the Administration of Justice Act does not contain a provision to the effect that the Commission is empowered to continue with its investigation/report even when the House is dissolved or when a judicial removal motion has automatically lapsed by dissolution. But even if this were to be considered to be so, the latter enactment can never prevail over the Constitution because if there is an inconsistency between the Constitution and the other enactment, it is the Constitution which prevails. If the Constitution states that when Parliament is dissolved, everything comes to an end bar a few exceptions which do not include a judicial removal motion, what is so special about such a

40 Constitution, Section 59(4)(a)(i).

41 Constitution, Section 76(4).

42 D.D. Basu, *Commentary on the Constitution of India*, 7th ed., Vol. F, Calcutta, Sri R. N. Sarkar, 1992, p. 122.

43 Translation: "Whatever is null produces no legal effect".

44 Section 9 of the Commission for the Administration Act deals with the procedure to be followed for the removal of a member of the judiciary.

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motion which does not come to any end? Where is it so written in the Constitution? *Ubi lex voluit dixit*.[45]

Furthermore, this is what the Constitution does with recalling Parliament during the interregnum or keeping the Speaker in office during such period. To take an analogy from civil law, a mandate comes to an automatic end when the mandator dies.[46] If a primary act is repealed, the subsidiary legislation made thereunder is also revoked. Again, if a Minister or a public officer resigns or is removed from office, his or her authority terminates forthwith.[47] So if the judicial removal motion as the source of authority of the Commission's task to investigate/report on judicial misbehaviour is terminated by dissolution of parliament, how can the judicial removal motion continue to produce effects?

When anything is authorized to be done, everything is authorized by which performance of the authorization may be attained... [But] when anything is forbidden, everything which amounts to the forbidden thing is forbidden also. When the law has forbidden the doing of anything directly, it equally forbids the doing of it indirectly, and that mere device or colourable evasion will not protect the doer from the consequences of his act.[48]

On dissolution, continuing with the investigation/report is unconstitutional and what is carried out illegally is considered to have no legal effect (*quod non rite factum est, pro infecto habetur*).

Malta follows the British constitutional system and in the UK it is clear that dissolution leads to termination of parliamentary business. A.W. Bradley and K.D. Ewing hold that both prorogation and dissolution "terminate all business pending in Parliament... Any public bills which have not passed through all stages in both Houses lapse".[49] While Parliament dies following a dissolution, the King never dies. The common law knows no interregnum: "The King is dead, long live the King". The demise of a sovereign used to bring with it the effect of dissolving Parliament, vacating offices (including judicial office) under the Crown and discontinuing legal action. Since 1908, a saving measure was introduced by law in the UK to do away with the negative consequences of the King's demise. But a constitutional measure had to be enacted to thwart these negative effects. However, what has to be kept always in mind when interpreting the Constitution is that it is a written constitution, not like the British, and not everything which applies in the UK applies automatically to the Maltese Constitution. A judicial removal motion that does not survive dissolution of parliament is a case in point.

45 Translation: "When the law wants to regulate a matter it does so".

46 Section 1886(b) of the Civil Code.

47 The Interpretation Act, Chapter 249 of the Laws of Malta, provides in Section 6(b) that where an Act "confers a power, or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of that office".

48 Lord Trayner, *Trayner's Latin Maxims collected from The Institutional Writers on the Law of Scotland and Other Sources with Translations and Illustrations*, 4th ed., Edinburgh, W. Green/Sweet & Maxwell, 1993, p. 502.

49 A.W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, 13th ed., Essex, Pearson Education Limited, 2003, p. 181.

A judicial removal motion or its produce can have no independent and autonomous life of itself outside the Constitution. This is because Section 97(2)[50] of the Constitution does not state that judicial removal motions can be carried on from one legislature to another. Neither Section 100(4)[51] with regard to removal of a magistrate nor Section 91(5) with regard to removal of the Attorney General contains such an exception overriding the effects of dissolution. In the absence of such exception, dissolution is supreme and so are its effects. If a judicial removal motion is wiped out on dissolution, why is it still possible for the Commission for the Administration of Justice to continue with its investigation and submit a report to a new legislature when the vires for that same action does no longer exist? The power for the Commission for the Administration of Justice to investigate and draw up its report emanates from, and depends solely upon, that judicial removal motion. Once the umbilical cord between the House of Representatives and the Commission has been cut through dissolution, the Commission is left with no legal footing to stand on.

Hence, from a constitutional point of view, the Commission for the Administration of Justice, as a delegate of Parliament, cannot continue with its task of investigating/reporting judicial misbehaviour to the House when the source of its authority to do so – the judicial removal motion – has been declared dead, inexistent, inoperative, a nullity by the Constitution itself upon dissolution of Parliament. The Commission has no vires to continue with its task, which has been delegated to it by the House through the judicial removal motion and the Commission is precluded by the Constitution to act independent of the House's motion.

E Conclusion

There is no doubt that when (a) the legislature enacts unconstitutional law with impunity, with the concurrence, if not instigation, of government and connivance of the opposition; (b) government tramples upon constitutional law without any adverse consequence resulting therefrom; and (c) the constitution's judicial guardians dose off when it comes to enforcing the fundamental tenets of the Constitution, the rule of law suffers. The three organs of the state end up usurping the power accorded to them by their own sovereign – the Constitution. Yet the Constitution's sovereignty does not derive from any one or more or all of the three organs of the state or from the constitution itself but from the people. A combined assault by the legislature, executive and judiciary on the Constitution is nothing more than a declaration of war upon the people.

50 Section 97(2) of the Constitution provides that: "A judge of the Superior Courts shall not be removed from his office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour".

51 Section 100(4) applies the provisions of Section 97(2) and (3) to magistrates.

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Democracy is at risk when any one or more or all of the three constitutional state organs act, covertly or overtly, in tandem or solely, in breach of the Constitution as their respective mandate is circumscribed by the provisions of the Constitution, notably Sections 6 and 65 as well as the oaths of office[52] and allegiance[53] subscribed to by Members of Parliament, Ministers and Parliamentary Secretaries, and judges (including the Chief Justice) and magistrates. By exercising rights that go beyond the powers assigned to them by the organic law, the three organs of the state end up not respecting their oaths of office and allegiance, as the case may be, but turning the country into an oligarchy where the incumbents of the offices pertaining to these three organs of the state suffer a total amnesia as to the contents of both oaths and temporarily put aside the constitutional provision favouring a lower norm in status. In this way, democracy is imperilled, oligarchs usurp powers vested in them directly by the Constitution and indirectly by the people, and the end result is the slow but constant erosion of democracy and its slow but sure transformation into an oligarchy.

Democracy, undoubtedly, does have its own limitations but rendering ordinary the supreme law of the land while subjugating it to the whims and caprice of oligarchs is surely not in line with the letter and spirit of the Constitution which, apart from proclaiming itself sovereign over any other law, states in its very first provision that "Malta is a democratic republic"[54] thereby enshrining both the rule of democracy and the rule of law in the supreme law of the land.

The solution to all this is to ensure that: (a) prior to any law being enacted by Parliament or made by a delegate thereof, it is subjected to a human rights impact assessment intended to ensure that no new law contravenes the Constitution; (b) the Constitution is amended to guarantee that when the executive runs counter to its provisions, the responsible member thereof is removed from office forthwith and that the doctrine of collective ministerial responsibility is rendered inapplicable to such cases; and (c) it should be an offence against judicial discipline leading to automatic removal from office for a member of the judiciary to deliver decisions in contrast with both the letter and spirit of the fundamental law. If no such action is taken, the status quo will continue to prevail with the three organs of the state continuing to pay lip service to the Constitution's supremacy and all that it stands for in a democratic society respecting the rule of law, observance of the Constitution and adherence to human rights provisions.

52 Oaths of office are taken by the Prime Minister, Ministers and Parliamentary Secretary to perform their duties "in accordance with the Constitution and the laws of Malta, without fear or favour" (Constitution, Second Schedule).

53 Oath of allegiance are subscribed to by Members of Parliament, the Chief Justice, judges and magistrates whereby they swear/affirm "to bear true faith and allegiance to the people and the Republic of Malta and its Constitution" (Constitution, Third Schedule). No reference is made to the "laws of Malta" in the case of MPs and the judiciary. Hence the emphasis is solely and unequivocally on allegiance to the Constitution.

54 Constitution, Section 1(1).