

RUE OFAW Policy Paper





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THE RULE OF LAW IS A GLOBAL REQUIRE-MENT...

The world is divided into States, and within each and every State people live, whose lives are controlled by their respective governments and regulated by their prevaling legal systems. The contemporary understanding of statehood, is that Sun Kings are no longer acceptable. Top priority of every State should be to devise and implement a system where laws rule, and not men.

The authors of this policy paper lay emphasis on the fact that the Rule of Law requires 'a well ordered constitution' (Adams J., 1788, A defence of the constitutions of government of the USA, VOL III, London) which includes a representative government, and an effective separation of powers.

In this policy paper, we are treated to a taste of how a number of different countries went about meeting these requirements, always with a view to upholding the Rule of Law. There is no 'one size fits all' formula, but there is always room to learn from other Nations. The focus then turns to Malta and our own Constitution, which may be criticised as rather outdated, and has long been touted for change, but which overall has served our Nation well.

We have enjoyed continuous relative prosperity, and stability, both political and economic. Malta has developed considerably since gaining independence from Britain in 1964. This is thanks not only to the Maltese people who have proven to be extremely hard working and dexterous, but no doubt to successive governments which while never perfect (perfection not being a human trait) have overall steered the country in a satisfactory manner. This would not have happened without a solid legal foundation, this being our 1964 Independence Constitution.

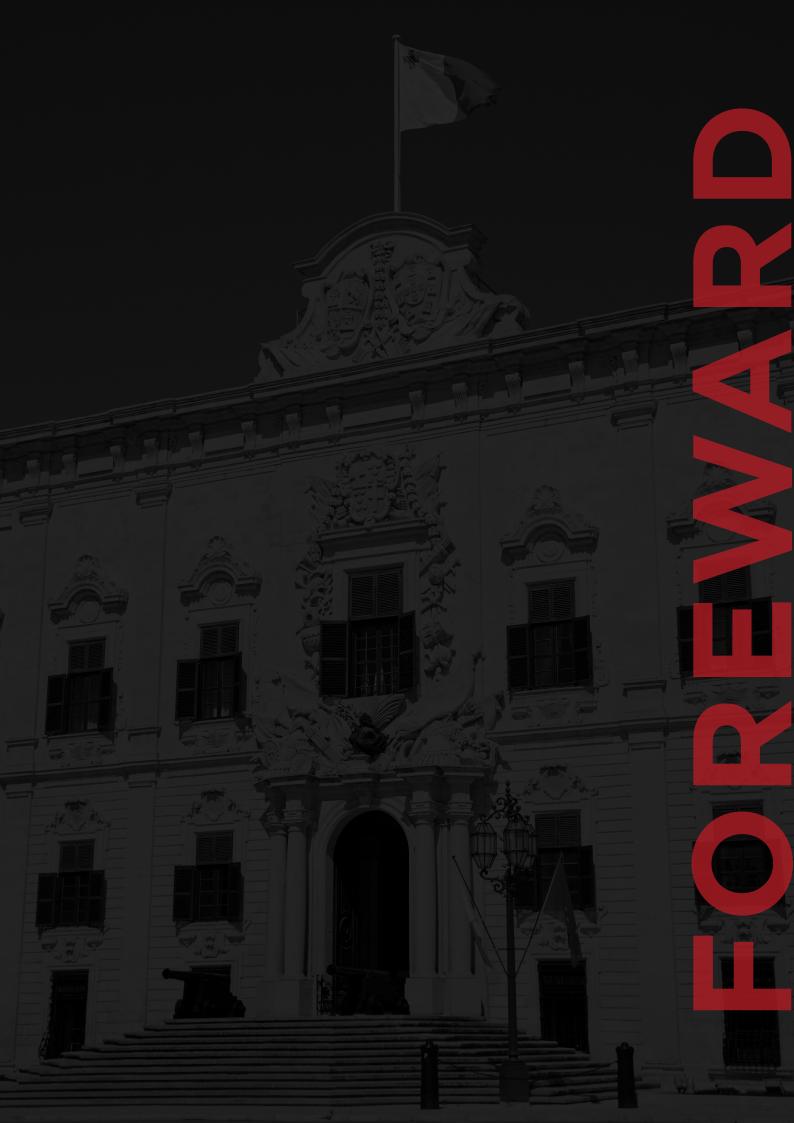
Emphasis is made in this Policy Paper, on improving the formalisms of the Rule of Law, by introducing amendments in the Constitution, such as the manner in which certain appointments are made (to name but one). This is all extremelly valid, and the authors of this Policy Paper are to be commended for the effort and initiative, tackling such a vast and multi-faceted topic. In particular they are to be commended for emphasising on the importance of minority rights; a tyranny of the majority in which dissenters are crushed, is no more conducive to the Rule of Law than the Sun King of old was in his day.

The ultimate goal must be the creation of a system which serves the common, public interest, from which every member of society benefits, nobody is left behind, and everybody prospers.

I would like to thank GħSL and all those who contributed in this publication for their sterilng work.

Best Regards,

DEPUTY DEAN Faculty of Laws



IT IS MY PLEASURE TO PRESENT GĦSL'S POLI-CY PAPER ON THE RULE OF LAW...

A paper worked on by the Policy Committee, whose work was invaluable in attaining the objectives set out by this project.

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GħSL has always endeavored to keep students apprised of the main legal issues debated in Malta. As the Rule of Law gained prominence in local media, the GħSL Executive deemed it vital to take on such project, which will serve as an informative reference not only to students but also to the public in general. Following the success of our Euthanasia policy paper, it is without a doubt that this paper will live up to the standard that the GħSL's policy office has acquired throughout the years.

Taking an unbiased approach, the policy paper focuses primarily on the Constitution of Malta, seeking to propose ways in which it can be reformed in order to further safeguard the Rule of Law, one of the most important pillars of democracy. In addition to informing the public, it serves to encourage policy makers to take action and decide on how to restructure the Constitution in a way that better embodies the Rule of Law.

Finally, I would like to personally thank all those who have contributed to the successful completion of this project, namely Michela Galea, Ylenia Busuttil and Pearl Agius, who worked tirelessly on this policy paper and John Caruana and Jurgen Micallef who edited the work. A special acknowledgment goes to Dr Ivan Mifsud who reviewed the work.

On behalf of the Policy Committee, the GħSL Executive and its members, thank you and we hope to leave an impact on an ever developing society.

Yours Truly,

ERIKA TALIANA

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POLICY OFFICER Għaqda Studenti tal-Liģi



THROUGHOUT THE YEARS...

...the rule of law has established itself as one of the dominant key elements in any political discussion, especially in relation to modern legal systems and democracy. In light of recent situations and developments, this concept has gained even more weight in popular discussions, beyond the academic or political sphere.

Due to this, a dissonance has surfaced whereby the citizens are publicly discussing the rule of law without there being exposure to an objective analysis of what the doctrine truly entails. In fact, there seems to be an extremely limited literature when it comes to the rule of law in the Maltese context.

This is why this policy paper aims at tackling this issue through an evaluation of the Rule of Law from an objective perspective. This is primarily done through an analytical approach, by primarily grounding the doctrine in its historic and ideological background. Stemming from this, the policy paper aims to analyze the local constitution, highlighting manners in which the rule of law is a predominant factor in our constitutional system. This will be countered with discussions on constitutional and administrative deficiencies with regards to the implementation of the rule of law in Malta. Hence, this policy paper offers an unbiased but honest overview of the Rule of Law which can be useful to the local community in putting the situation into perspective, balancing the currently politicized popular ideas.

This can only be done by understanding the rule of law from both perspectives - as a doctrine which our constitution is ingrained with, and a concept which the state has much to strive for to achieve.

The discussion on the rule of law is of a constitutional nature, which demands unity and objectivity. This policy paper aims to bestow and communicate a perspective necessary to productive political discussions at grassroot level. This might lead to better institutional efforts in this regard. Rather than offering suggestive ideas, this paper serves as a point of reference by setting down a starting point for a more neutral discussion of the rule of law from fresh standpoints.

HISTORY AND DEFINITION OF THE RULE OF LAW R

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THE TERM 'RULE OF LAW' WAS INTRO-DUCED IN THE 13TH CENTURY THROUGH THE PROCLAMATION OF DE BRACTON...

...a judge of King Henry VIII who held that "The king himself ought to be subject to God and the law, because law makes him king." This means that the law is more supreme than the King himself.

Louis XIV who was also known as the Sun King had claimed that "l'état c'est moi" which means he is the state. This is a clear example of despotism and not the implementation of the rule of law. The concept of the rule of law aims to remove this impotent concentration of power and introduce a system whereby there would be a more active participation by the citizens themselves. In this manner, one can also ensure that there would be the reduction of public apathy due to the involvement of individuals.

It is interesting to bear in mind that Louis XIV's ideology was one of the main factors which sparked off the French Revolution and the three principles of "liberté, égalité and fraternité."

One of the major contributors to the development of the Rule of Law was Professor A.V. Dicey. In 1885, he published his book 'Introduction to the Study of Law of the Constitution' wherein his theory consists of three main principles; firstly, *"that no man is punishable or can lawfully be made to* suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."¹ Secondly, that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."² Thirdly, the necessity of the rights and liberties of an individual to be embodied in the ordinary law of the land.³

Facing today's reality and challenges, Professor A.V. Dicey's theory cannot be applied word for word. The modern rule of law framework is more vast than the previously mentioned three principles. In the 1959 Delhi Declaration, this idea was developed by the International Commission of Jurists.

In fact, according to Davis there are seven factors which apply to the modern application of the rule of law;

1. law and order;

2. fixed rules;

3. elimination of discretion;

4. due process of law or fairness;

5. natural law or observance of the principles of natural justice;

6. preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and

7. Judicial review of administrative actions.⁴

3 Ibid p.195

¹ A. V. Dicey, An Introduction to the Study of the Law of the Constitution (1885; 9th edn., Macmillan, 1945), p. 188.

² Ibid p.193

^{4 &}lt;u>AllAnswers Ltd., 'Origin And Concept Of Rule Of Law' (Lawteacher.net,</u> March 2018) <<u>https://www.lawteacher.net?vref=1></u>

WHAT IS THE RULE OF LAW?

Professor David J. Attard states that this principle is a "mere assumption that law is applied in any given society. Rather, it is concerned with the regular application of law as distinct from arbitrary judgement."⁵

The United Nation's Secretary General describes the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."⁶

He also emphasises on the importance of certain doctrines and notions such as the doctrine of separation of powers and the adherence to the principles of the supremacy of the law which also includes the notion that everyone is equal in front of the law regardless of social status. This principle extenuates the latter notion as even government officials are subject to scrutiny by the public and are liable to court proceedings just like ordinary citizens.

Perhaps the most influential rendition of the definition of the rule of law is attributed to Dicey. He was of the belief that to maintain a democratic government, there needs to be complete observance of the law at any given situation. His aim with regards to this principle was to discard any arbitrary power.

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Equality before the law is one of the most important principles of rule of law. This notion refers to the equal treatment before the law. This however might not always be possible due to a number of immunities established by law. For example, the President may not be found guilty for any wrong happenings that might occur during her/his term as president since he/she enjoys immunity from liability of a breach with regards to the place of work. The absence of arbitrary power is essential to this principle and the doctrine of the separation of powers.

Dicey's third notion hints to the fact that since the fact that our judiciary does not create laws, but it is pre-established in a written Constitution. Despite this, the judiciary is essen-

⁵ Professor David Joseph Attard, The Maltese Legal System: Volume II, Constitutional and Human Rights Law. (Malta University Press, 2015)

^{6 &#}x27;What Is The Rule Of Law? - United Nations And The Rule Of Law' (United Nations and the Rule of Law, 2018) https://www.un.org/ruleoflaw/what-is-the-rule-of-law/

tial when it comes to interpreting the laws. Furthermore, the judiciary tries to be consistent between one judgement and another so as to maintain a structure of stability.

The World Justice Project identify four universal principles which uphold the theory of the rule of law. These include; Accountability, Laws themselves, an open government and an accessible and impartial dispute resolution. This brought about the establishment of the Office of the Ombudsman which was a step in the right direction for a functional system of checks and balances.

On the whole, the concept of the rule of law is concerned with the control of power through the law with the aim of protecting the individual against arbitrary exercise of power.

ENFORCEMENT OF THE RULE OF LAW

GENERAL CONCEPTS OF THE MANNER IN WHICH THE RULE OF LAW IS GENERALLY IM-PLEMENTED

The concept of regulating power has to do especially with the framework of democratical countries. This is due to the fact that the flourishing of democracy is ensured through the rule of law. It is interesting to note that the term democracy translates into the Greek words 'demos' and 'kratos'. This means *"to rule by the people."* The US' 16th President, Abraham Lincoln defines democracy as a form of government; *"of the people, by the people and for the people."*

Citizens are at the core of human societies. Simultaneously, citizens have a complex nature in the sense that one might become irrational when having uncontrolled power. The ancient Greek philosopher Socrates, based his whole moral philosophy on the value of rationality. According to Socrates, acting in an irrational manner is the result of ignorance and the lack of knowledge. He fails to recognise that akratic action is part and parcel of human behaviour. Irrationality could lead to a totalitarian type of government where the dictatorial would be above the law.

In the rule of law system, no one is above the law. In this manner, there would be the assurance of equality amongst citizens from various social stratus. At the same time, modern democracies are characterised by representative governments; an indirect democracy. Malta is in itself an indirect democracy because Members of Parliament are elected approximately once every five years to be the voice of the citizens who elected them. Our country is turned into a direct democracy whenever there is a referendum or a general election because there would be the equivocation of the will of the citizens. Unfortunately, indirect democracy can turn into public apathy since citizens let their parliamentary representatives to take decisions on behalf of them. Needless to say that democracy is all about participation. This can be conducted through petitions, the writing of articles in local newspapers and joining non-governmental organisations to express common interests.

Switzerland is an example of a modern hybrid system where direct democracy is enforced. In fact, there is an average of 2 referenda per annum. It is vital to note that the voting turn out in Switzerland is low; having an average turn out of 47.64%. ¹ Contrastingly, Malta had 92.07% in its last 2017 election. This had been the lowest voting turn out since the 1966 elections.² The ancient Greeks were in favour of of a direct form of representation. Pericles is considered to be the forefather of democracy. As a result, he got elected for 30 consecutive years. He used to claim that: "Our constitution is called a democracy because power is in the hands not of a minority but of the whole people."³ Therefore, one can see the vitality of having public participation so that democracy will not crumble as a system. The Greeks took this system even a step further when they practiced the annual ostracism contest to ensure that there was no abuse of power or corruption. In other words, the Greeks were keen on transparency.

Rule of law is connected to the term 'Separation of Powers'. This idea was developed in the 18th century through a French writer, Chares de Secondat who was the Baron de Montesquieu. He was of the idea that the main powers of the state were:⁴

- 1. The legislative branch
- 2. The executive branch and
- 3. The judicial branch

Montesquieu put pressure on the separation of the judicial institution from the legislative and executive sectors. Wil-

¹ www.electionguide.org

² The Independent, Election 2017: 92.07% turnout lowest since 1966, (The Independent, June 2017) <www.independent.com.mt/articles/2017-06-03/local-news/ More-than-half-eligible-voters-cast-preference-by-2pm-6736175044>

³ History Wiz, Pericles' Funeral Oration, (HistoryWiz, 2008) < http://www. historywiz.com/primarysources/funeraloration.html>

⁴ Baron de Montesquieu, Complete Works, vol. 1 (The Spirit of Laws) [1748]

liam Blackstone took it a step further and implied that even the legislative and executive should be distinct from one another.⁵

The legislative is responsible for implementing laws that have to be for the common good of the society. One must keep in mind that in a democracy the will of the majority rules. Nonetheless one has to enforce the minority rights especially in our globalised era. This scenario can even be depicted in Malta, where though our accession in the European Union, on the 1st of May 2004, Maltese citizens as well as EU citizens got the right of free movement. European Union nationals can work, study and live in Malta through this right. On the other hand, Maltese citizens can have this opportunity in all the European Union countries excluding the requirement of a VISA.

The executive is the cabinet. In Malta, the Executive Members sit even in Parliamentary sittings and debates. So, in this instance, it could be the case that there would be an overlap of power. This is different from the American system where the legislative and executive branches are extremely distinct from one another. The executive is in charge of maintaing the government's policy measures. According to O.Hood Philips, the executive supervises; "defence, order and justice, and the finance required therefor.⁶"On the other hand, the Maltese judiciary interprets the law which passes from the legislative. It checks that the laws do not go against the Constitution itself which is the supreme law of the island. In the suprema lex article of the Constitution there is stated that:

"if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of inconsistency, be void"

Therefore, the judiciary makes sure that laws are valid especially when it comes to the implementation and law enforcement of human rights and fundamental freedoms of the individual. In the UK, the judges are the creators of law because they follow the doctrine of binding precedent. Essentially, the role of the judiciary in the UK is different than Malta. As a result, one has to be acquainted to various systems in order to comprehend how the rule of law should function and how it is implemented in reality. In summation, this whole concept of separation of powers is a system of checks and balances. In this manner, one institution checks

6 O. Hood Phillips & Jackson, 'Constitutional and Administrative Law', (Sweet & Maxwell, 6th Edition, 1978), 11

⁵ All Answers ltd, 'Separation Of Powers In The UK' (Lawteacher.net, March 2018) <https://www.lawteacher.net?vref=1>

⁷ The Constitution of Malta, Chapter I, Article 6

and balances the other in order to ensure that there is no abuse or concentration of power. For instance, the legislative checks the executive through a vote of no confidence in the Prime Minister. ⁸

HOW IS THE DOCTRINE OF SEPARATION OF POWERS IMPLEMENTED?

THE AMERICAN MODEL OF SEPARATION OF POWERS⁹

The closest Constitutional framework which has a nearly complete separation of powers is the United States of America.

The American constitution sets up a legislative institution composed of the house of representatives and the senate in article 1. There is a bi cameral structure. Article 2 establishes the executive component which is made up of the President of the United States of America, the Vice-President and the Departments. Article 3 creates the federal and supreme courts.

In America, the legislative and executive do not overlap one another. This system is closest to achieving a nearly complete separation of powers.¹⁰

The Legislative

It has the right to check on the executive. The Legislative has the authority to select the President and Vice-President in the case no one obtains the majority electoral votes. It has to power to give the executive accessibility of funds. In certain cases, the legislative can override the President's vetoes.

The President does not have a seat in either the Senate or Congress. This ensures that the executive is not linked to the legislative branch.

The legislative checks on the judiciary when the Senate approves the federal judges. This is due to the fact that the United States of America has a Federal Constitution. It is not a unitary Constitution like the Maltese and Italian one. In

⁸ Professor David Joseph Attard, The Maltese Legal System: Volume II, Constitutional and Human Rights Law

⁹ Constitutional Topic: Checks and Balances (US Constitution) <https:// www.usconstitution.net/consttop_sepp.html>

¹⁰ ibid

addition, the legislative has the power to commence constitutional amendments.

The Executive

It has the authority to appoint judges and pardon power. The Vice-President is the President of the Senate as well as the Commander in chief of the military.

The Judiciary

The Judiciary creates a judicial review on the legislation which passes from the Houses. It maintains its checks on the Executive whenever the Chief Justice presides as the President of the Senate during a presidential impreachment.

SEPARATION OF POWERS IN THE UNITED KINGDOM

The Legislative

In the UK, the legislative power is upheld by the House of Commons, the House of Lords and the Monarch.

The House of Commons consists of elected members. In comparison, the House of Lords appoints members through the influence of the Crown, Archbishops and the Church of England. Since the House of Commons is of an elected nature, it has more power when it comes to the law-making procedure.

Therefore, in the UK there is the figure of the monarch as well as the Prime Minister. The Monarch has to act upon the advice of the Prime Minister. One can compare this to the Maltese procedure. Firstly, in Malta there is the President instead of the Monarch. The President has to act on the advice of the Prime Minister. This occurs in the majority of cases except when Parliamentary members take a vote of no confidence in the Prime Minister.

Therefore, one can note that the Prime Minister has a substantial amount of influence on the decision-making in the UK.

The Executive

The executive power is manifested in the formulation of a Cabinet of Ministers, Prime Minister, the Crown, the government as well as the Civil Service. Government can be removed from authority through Parliament.

This can be compared to the Maltese perspective since the Cabinet, Prime Minister and the government are part of the executive pillar.

The Judiciary

Consequentially, there is the judicial power which has the duty to develop the law through case law and judicial decisions. One has to maintain that in the UK there is a common law jurisdiction.

The senior judiciary are appointed by the Crown. Some argue that the judiciary are independent from the legislative and executive branches. Nonetheless, it is essential to note the way that the senior judicial get appointed whereby, the executive interferes in judicial appointments. This extends the possibilities of nepotism whereas meritocracy should be ensured.

The counter argument can be that once appointed these senior judges are completely independent. This can be ensured through the 'Act of Settlement' of 1700.

Additionally, pre-2005 'Constitutional Reform Act', the figure of the Lord Chancellor used to be present in all these three branches :

1. Head of Judiciary

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- 2. Member of Cabinet and
- 3. Speaker in the House of Lords

Through this reform, the Lord Chancellor is no longer the head of judiciary and the speaker of the House of Lords. This figure can be present in either of the Houses. As a result, there is a reduction in the concentration of powers in this influential figure.

When compared with the American system, the UK model of the doctrine of separation of power is weaker.¹¹

SEPARATION OF POWERS IN FRANCE

The democratic principles in France got strengthened through the principles of the French Revolution. The ideologies of Jean-Jacques Rousseau were based on an *"unconditional trust on Parliament."*

¹¹ All Answers ltd, 'Separation Of Powers In The UK' (Lawteacher.net, March 2018) <https://www.lawteacher.net?vref=1

"Instead of a mutual control of state powers, the French 'Constituant' placed the parliament at the centre of the French political system."¹² Some argue that the creators of the French Constitution and its separation of powers was created in "a rather restrictive way" in order to have a "strict-separated government."

In France, the President gets elected by the French citizens once every five years. The role of the President is influential and powerful through popular support. It is the President who appoints the Prime Minister. France is a semi-presidential country. These two figures are responsible for the executive matters.

The President does not carry the right to issue a veto. Nonetheless, he has the possibility of asking Parliament to check a bill. An interesting feature in the French system is that if the President's party obtains power in the Parliament, the President becomes more powerful. The Prime Minister appoints the members of government and heads the military and civil service.¹³

SEPARATION OF POWERS IN SPAIN¹⁴

Spain is a parliamentary monarchy and like the USA, it has a federal Constitution. This Constitution was ratified by the Spanish citizens in 1978, after General Franco's brutal dictatorship. The King is the head of the Spanish state and is responsible for maintaining unity in the Institutions.

The Legislative

Legislative power is manifested in the the Spanish Parliament which is made up of

- 1. The Congress of Deputies and
- 2. The Senate

These are in charge of passing legislation and giving the government the right of expenditures through the approval of annual budgets.

14 Antonio Tapia & Amalia del Campo, 'Legal Systems in Spain: Overview' (Thomson Reuters, 2018) https://uk.practicallaw.thomsonreuters. com/7-634-0207?transitionType=Default&contextData=(sc.Default)&first-Page=true&bhcp=1>

¹² Theodore Georgopoulos, 'The Checks and Balances Doctrine in Member States as a Rule of EC Law: The Cases of France and Germany', (European Law Journal, Vol. 9, No. 5, December 2003, pp. 530–548., Blackwell Publishing Ltd. 2003), p.4

^{13 (}n 17)

The Spanish Parliament checks the government through the appointment of fact-finding committees. It also has the possibility of challenging the government's policy, that is the executive branch by passing a motion of censure.

Executive Power

The Executive is made up of the President, Vice-Presidents and Ministers who are in charge of implementing the foreign and domestic policy.

In any case of urgency, the government can intervene in the legislative when issuing temporary legislative provisions. These are decree-laws which cannot however interfere in general election Law and the basic state institutions.

Judicial Power

Judges are independent, irremovable and have to make sure that there would be the application of the rule of law. Judges are appointed by the General Council of the judiciary and the senior judges by a royal decree, through a proposal of the General Council.

CONCLUSION

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In summation, one can see that the doctrine of the separation of powers is at the forefront of the Consitition's agenda. Each jurisdiction has its own manner of implementing it. The period of Colonialism in Malta has influenced the way our legislative and executive branches function and overlap one another.

In the 1921 Armer-Milner Constitution, there was a bi-cameral structure composed of the House of Representatives and the Senate. Nowadays, there is a unicameral structure. Through such experiences, the Constitution has also embodied other concepts which, along with the separation of powers, collectively achieve a Constitution which establishes the principle of the Rule of Law in our legal system.

THE MALTESE CONSTITUTION

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THE CONSTITUTION OF MALTA IS RELATIVELY NEW...

As such, it entails concepts and attributes of the rule of law beyond its strict classical meaning, namely that put forward by Dicey. Moreover, the rule of law which may be witnessed in our constitution is highly inspired by the political, social, cultural and colonial experiences of the islands, the latter referring to the Westminster system adopted which in itself ensures the observance of the rule of law. In fact, the constitution of Malta exhausts the principle of the rule of law since the legal framework creates a system in which the law is supreme and governs over the people and the government. However, the rule of law embodied is one which is moderate in the sense that it is an intermediate state between democracy and the Classical meaning of the rule of law.

As such, apart from the doctrines of separation of powers, the supremacy of law over that of the individual and so on, the constitution also holds principles such as the observance of the modern concepts of human rights amongst others.¹ This is because the rule of law encompasses several aspects which collectively form an intricate and composite concept which, when observed, protects the citizen through the rigidity of a justified legal framework. This is evident throughout the Constitution which, although never expressly declares the Rule of Law as being a binding principle, in-

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Tonio Borg, 'A Commentary on the Constitution of Malta', (KiteGroup, 2016)

stils its observance through its provisions and articles.

As expressly stated by Dr. Tonio Borg, the rule of law is a 'politico-legal' concept, by which the state, its citizens and the government are subject to function within the same 'framework of law'.² In our constitution, this is reflected in the conceptual features of the constitution itself, specifically through its supremacy.

Our constitution, in granting its own supremacy, becomes the most prominent political authority which in practice protects the state from dictatorship by preventing the rule of man and enshrining the rule of law. This is substantiated by Marius Andreesuc in stating that *"guaranteeing of the observance of this principle is essential to the rule of law".* ³ By way of explanation, this implies that politicians, as the political motors of any modern legal system, in respecting the supremacy declared by the Constitution, would be substantiating the eminence of the rule of law.

Article 6 of the Constitution of Malta declares itself to be the supreme law of the state to the extent that any other law which is even remotely inconsistent or not in compliance with its text, becomes null and void, and hence is legally invalid.⁴ This is self-proclaimed since being supreme, the Constitution authorizes and substantiates its own supremacy. So much so, that Professor Cremona argues that the written declaration of constitutional supremacy is merely an unnecessary formality since even though this makes supremacy unequivocal, supremacy would still be implied by the very nature of the Constitution without the article in question. This is because supremacy of our Constitution is inherently linked to the spirit of the Constitution, consequently also linking the attributes of the rule of law to the spirit of the constitution.⁵

This is substantiated by the judgement of *Dr. Louis Vassallo* et v. Prime Minister⁶ of 1978 in interpreting Article 6 through reference to the United States Supreme Court's ruling on the *Marbury v Madison*⁷ case. This was done to corroborate the idea that since a constitution restricts the powers and competences of the organs of the state whose power is derived from the constitution, the constitution is characteristically <u>supreme law.⁸ Hence, the supremacy found in the essence</u>

- 4 Constitution of Malta, Chapter I, s 6
- 5 Tonio Borg, 'A Commentary on the Constitution of Malta', (KiteGroup, 2016).
- 6 Dr. Louis Vassallo et. vs. Prime Minister, 27th February 1978, Constitutional Court
- 7 Marbury vs. Madison, 24th February 1803, U.S. Supreme Court
- 8 The History of Human Rights in Malta <www.judiciarymalta.gov.mt/file.aspx?f=433>

² ibid 22

³ Marius Andreescu, 'Receipting the Principle of Supremacy of Constitution on the New Penal Code, (University of Pitesti, Practical Application of Science, Vol. IV, Issue 2, 2016)

of the constitution enshrines the rule of law in our constitutional system by establishing itself as the parameters which limit the law makers, avoiding abuse of arbitrary power of individual government officials in the process.

This is why the constitution establishes a Constitutional Court as a Court of Appeal, also being a superior court, as established by article 95(1). This court upholds the constitution's supremacy in practice through some of its competences granted by the Constitution. Such is the jurisdiction over appeal of cases which are connected to the interpretation of the Constitution itself and the validity of laws.⁹ In fact, this court has the role to put supremacy in practice through judicial action on whether a law passed by parliamentary procedure is constitutional, while also having the power to clarify the Constitution's interpretation. These judicial functions enhance the practice of the Rule of Law since they make law clearer to the citizens, while also ensuring that parliament does not pass legislation which is beyond the assigned powers ascribed by the Constitutional provisions. Hence, this is a practical instrument established by the Constitution for its own security since through this function, the Constitutional Court may impede Parliament from potentially breaking the privileges of the citizens or the Constitutional system.

The Constitutional Court also safeguards the principle of electoral justice, this being the idea of free and fair elections, binding the Rule of Law to democracy. In fact, electoral justice is said to *"safeguard both the legality of the electoral process and the political rights of citizens"*.¹⁰ In essence, it is the protection from and prevention of electoral malpractice through the establishment of stable and effective electoral bodies and measures which substantiate this. Hence, these may be procedural or structural guarantees acting as an institutional effort aimed at keeping the Rule of Law stable.

The Constitution establishes mechanisms which built on a basis of legitimacy and transparency. These work to prevent cases of abuse, fraud, electoral inequality or corruption, which might be detrimental to the Rule of Law. In essence, in recognizing and protecting electoral rights, the Constitution ensures the democratic approach of appointing key parliamentary officials. This idea also extends to the protection of the citizens' representation in reflecting the electoral result. ¹¹ This is mirrored in article 63 and the relative jurisdiction of the Constitutional court. Through this, the Constitutional court is vested with the right to adjudicate on the validity of an election of any Member of the House of Representa-

11 Ibid

⁹ Constitutional Court, <http://judiciarymalta.gov.mt/constitutional-court>

¹⁰ Jesús Orozco-Henríquez et al., 'Electoral Justice: The International IDEA Handbook', (IDEA, 2011) https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf 3

tives or Speaker and on whether a member should vacate the parliamentary seat. Moreover, the Constitutional Court's interference in the case of a breach of Article 56 of the Constitution also protects the concept of free and fair elections and Rule of Law.

Article 56 is monumental to the Rule of Law since it enshrines the principle of free elections through the establishing of the voting system itself. In fact, sub-article 1 emphasises the importance of proportional representation which is one of the main ideas behind democracy and consequently behind the Rule of Law. Sub-article 2 states that "the election of members of the House of Representatives shall be free of illegal or corrupt practices and foreign interference", directly tackling the issue of fair elections and transparency by ensuring that the electorate is represented by the best possible candidates through the prevention of politically abusive individuals in power. In such cases, the remedial action taken may extend to the suspension of the election leading to national or regional re-elections as to ensure that the election is truly free and that the Rule of Law is upheld. The Constitutional Court is also entrusted with such decisions.

Free elections are also observed through the establishment of the secret ballot referred to in sub-article 10. This ensures that citizens' votes reflect their true wishes without pressure from external forces and without possibility of coercion. Free and fair elections are also protected by electoral law establishing the corrective mechanism system, as referred to in Article 52(1)(ii) of the Constitution. Through this, the winning party is awarded additional seats in case of a minority in the House of Representatives which ensures that the party which best represents the citizens' wishes is granted political power. In fact, this being one of the responsibilities of the Electoral Commission, this said commission regulates issues of electoral abuse by protecting majority representation, free and fair elections and avoiding *"perverse results"*.¹²

The rule of law must be followed in the appointment of the legislative since the former entails that those in power have a legitimate claim to this legal authority. This is known as the principle of legality. Subsequently, the Rule of Law demands that even the actions of the legislative are regulated by procedural laws which enable and restrict the functions of the legislative. In fact, in the words of Lord Johan Steyn, *"Parliament does not legislate in a vacuum"* but in the context of the principles of the relative legal system, including the Rule of Law. ¹³ This is why a discussion of Chapter VI of

¹² Tonio Borg, 'A Commentary on the Constitution of Malta', (KiteGroup, 2016)

¹³ Mark Elliot, 'Public Law for Everyone: The Rule of Law', (October, 2015) https://publiclaw-foreveryone.com/2015/10/16/1000-words-the-rule-of-law

the Constitution on Parliament is imperative. The afore-discussed electoral system is of extreme importance since this is the vehicle which makes appointed Members of Parliament legitimate through the system of appointment itself. Article 54 of the Constitution partially abides by the rule of law in adopting separation of powers. In fact, Articles 54(b), 54(c) and 55(1)(c) disqualify members of the Armed Forces of Malta, public officers and people with a conflict of interest related to business partnerships with the government (as decided upon by the speaker) from contesting in General elections. However, in this context the Rule of Law and the separation of powers are only minimally observed since locally, the Executive is namely composed of members of the Legislative. While ensuring democratic representation, this also breaches the principle of separation of personnel.

The Rule of Law is also reflected in the powers and procedures of Parliament. Parliament is obliged to follow and respect "human rights, generally accepted principles of international law and Malta's international and regional obligations", these being inclusive of principles which prospectively bind the functions of the Parliament to the Rule of Law. Moreover, the Constitution binds the legislative process to its established laws in article 72(3) whereby a law may only come into being when the Constitution is observed.

The importance of this is seen through the landmark case of the Constitutional Court of *Mintoff v. Borg Olivier* in 1970 which brings us to the discussion on legal sovereignty of parliament, a concept through which the Rule of Law is observed since the main legislator is a Constitutional institution and not an individual possessing political power. This is a trait inherited from the British system through which the parliament is made the supreme legal authority since it is empowered to decide on legislation promulgation and revocation.¹⁴ In fact, the Constitution establishes the competence of the Parliament, enabling it and restricting it with the legislative function to make or end law.¹⁵ In fact, the executive is dependent on the legislative when it wants to propose a new law and, as stated in Article 79(3), and is also answerable to parliament. In principle, the Rule of Law is followed in the composition of the Cabinet due to the Appointment of Ministers, as established in article 80 of the Constitution. Although separation of power of the executive and legislative is in essence non-existent, the Rule of Law is followed since the President, based on the binding opinion of the Prime minister, is empowered to appoint the Ministers from this same House, which as pre-established, consists of members

¹⁴ UK Parliament, 'Parliamentary Sovereignty' https://www.parliament.uk/about/how/role/sovereignty/

¹⁵ Duhaime's Law Dictionary, <http://www.duhaime.org/LegalDictionary/P/ParliamentarySupremacy.aspx>

elected by the general will of the citizens through the democratic process of elections.

Moreover, the President must appoint the person who is "best able to command the support of a majority of the members of the House" as Prime Minister. This is ensured by Article 81(1) which empowers the House of Representatives to pass a vote of no confidence so that the president may potentially remove the Prime Minister from office or dissolve parliament. This ensures that that democratic representation and loyalty of the executive to the legislative is reflected throughout the legislature. The executive is established by the Constitution through strict procedural regulations which describe specific functions and grant powers in a detailed manner as to bind the executive branch by explicitly stating its composition, behaviours and functions. In this way, the executive follows the Rule of Law.

The separation of judiciary is crucial to the acknowledgement of the Rule of Law within a system. In fact, the Rule of Law demands the separation of powers of the judiciary from the other organs of the state as means to avoid abuse of power. This works to ensure that everyone is equal in the eves of the law since it would be easier for a member of the executive or legislative to get away with illegal or corrupt behaviour with power or weight in the judiciary. Hence, the separation of power works to ensure that the judiciary is independent and able to pass judgement freely and without bias based on political stature, class and so on. This equality before the law is also extended to the President of the Republic sitting in office whose criminal immunity is only established in the context of fulfilling the functions set down by the Constitution, as stated in article 5(1) of the Criminal Code. Adjacent to this, one might also consider article 39 of the Constitution, establishing the provisions to secure protection of the law. This fundamental right is observed through proclaiming the judiciary to be an *"independent and* impartial court established by law" in aim of ensuring a fair trial.

As established in article 95(5), the Constitutional court employs the automatic mechanism of appointment. Hence, if the Constitutional Court is not composed, within a limited number of days as required by the Constitution, or if the government fails to find a substitute, the three senior-most judges are constitutionally empowered to claim their seat in the said Court. This is a mechanism by which the Constitution guarantees that the Constitutional Court is never undone or vacant but is always available to protect the state and the citizens within its jurisdiction, especially when it comes to issues which would be a breach of democracy or the Rule of Law.¹⁶ This also ensures separation of powers since in this way, the composition of the Constitutional Court is not at the mercy of the executive. Otherwise, the normal procedure, as stated by article 96 (1), is that all *"judges of the Superior Courts shall be appointed by the President acting in accordance with the advice of the Prime Minister"*, so the executive nominates the judges.

The conditions of appointment of judges are also in accordance with the Rule of Law. In fact, article 96(2) and 100(2) ensure that supreme and inferior courts' judges have a minimum of 12 and 7 years respectively of practical experience working as advocates or magistrates. Moreover, the Judicial Appointments Committee, established in Article 96A, is empowered in sub-articles 6(c) and 6(d) to hold interviews and subsequently consult with the Prime Minister on the eligibility and merit of the candidates to be appointed. Although this is not a binding opinion, when followed it prevents nepotism and safeguards meritocracy by ensuring that the Prime Minister is accountable for his decisions, making the appointment legitimate and in compliance with the Rule of Law rather than the power of an individual government official.

The tenure of judges in accordance with article 97 is also of strong significance to the Rule of Law. In fact, article 97(2) conditions the dismissal of a judge of the supreme court by an agreement of two-thirds of the whole House of Representatives on a justifiable reason based on mental or bodily infirmity or proved misbehaviour. Hence, the Constitution tackles the issue of arbitrary dismissal of judges by the executive or legislative, preventing a breach of the separation of the judiciary in the process. This avoids the possibility that judges are pressured by the government to pass a politically biased judgement since the judge is responsible to the court and to justice not the executive or legislative. The judge is responsible to the Rule of Law.

On the other hand, accountability of the judges is addressed in article 101B(5). Through this, the Committee for Judges and Magistrates, established in Article 101B, is empowered to receive and decide on complaints against any judge or magistrate in case of breach of the Code of Ethics for Members of the Judiciary and other applicable laws. This keeps the judges and magistrates in check and in line with ethical behaviour, including behaviour which ensures loyalty to justice and the law.

Linking back to the argument of electoral justice, in protecting the Rule of Law in the context of electoral decisions

16 Susan Cassar, 'The Composition of the Maltese Constitutional Court', (University of Malta, 2016) ">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu.mt/library/oar/bitstream/handle/123456789/17569/16LLB043.pdf?sequence=1&isAllowed=y>">https://www.um.edu/handle/handle/handle/handle/

and elections, human rights, which are another characteristic of the rule of law, would also be protected. ¹⁷ In fact, free and fair elections are crucial to the protection of political and civil human rights since through this, political transparency, equality and accountability are protected. By falling under the jurisdiction of the Constitutional Court, the Constitution protects the political freedom of the citizens. ¹⁸

Moreover, through supremacy of the constitution, "supreme constitutional demands" are instituted. These create obligations which bind the citizens, the public officials and the state in aims of protecting the freedoms and rights.¹⁹ The presence of human rights as a constituent to the Rule of Law is a method of insurance against the suppression of the law itself. In other words, as not to inhibit freedom by imposing rigid laws on the citizens, the Rule of Law is observed by instituting a democratic system based on fundamental human rights which are universal. Hence a legal state, this being one which follows the Rule of Law, must also follow human rights to be democratic.²⁰

In fact, Malta has ratified and is a signatory of several international treaties and conventions regarding human rights, including: 'European Convention of Human Rights' and Council of Europe's Convention on Prevention of torture and inhuman or degrading punishment of treatment'. These may have been extremely beneficial implications on the observance of the Rule of Law in Malta, such as those which arose from the ratification of the protocols of the European Convention abolishing the death penalty and other related European Union Policies which have had a substantial impact in substantiating the legal framework which ensures the Rule of Law.²¹

Moreover, this is reflected in Chapter IV of the Constitution which is introduced in article 33 as a framework of human rights which this legal state aims to protect and ensure. To exemplify this, specific reference will be made to articles 34, 36 and 39 of the Constitution on Protection from arbitrary arrest or detention, the Protection from inhuman treatment and Provisions to secure protection of law, respectively.

The Constitution gives protection from arbitrary arrest

21 Tonio Borg, 'A Commentary on the Constitution of Malta', (KiteGroup, 2016)

¹⁷ Jesús Orozco-Henríquez et al., 'Electoral Justice: The International IDEA Handbook', (IDEA, 2011) https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf

¹⁸ UN Chronicle, 'Rule of Law and Democracy: Addressing the Gap Between Policies and

Practices' (The Magazine of the United Nations, Vol. XLIX No. 4 2012) https://unchronicle.un.org/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices

¹⁹ James R. Silkenat, James E. Hickey Jr. & Peter D. Barenboim, 'The Legal Doctrines of the Rule of Law and the Legal State', (Spinger International, 2014) https://link-springer-com.ejournals.um.edu.mt/content/pdf/10.1007%2F978-3-319-05585-5.pdf

²⁰ Ibid

or detention by giving an exhaustive list of exceptions for breach of the deprivation of someone's personal liberty. Hence, the Constitution systematically ensures that arrest or detention is lawful and only when necessary as to ensure the Rule of Law and avoidance abuse of power or coercion. This article also respects the humanity of the citizen by regulating the procedure and behaviour of the police during arrest. Moreover, it explicitly states its own permanence, strict observance and supremacy over any other law except in case of state emergency. This concept is similarly applied in the Protection from inhuman treatment, whereby no promulgated legislation's breach of such a right will be valid or Constitutional. Hence, the Rule of Law is ensured by limiting the parliament's will to protect the citizens' fundamental rights.

CONCLUSION

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The fact that the drafters of the constitution observed the theory of the Rule of Law is undeniable when considering the Constitutional system and the Constitution itself. Having said this, as exclaimed by several legal scholars throughout the past years, there is a schism between the Rule of Law in theory and its application. For this reason, the Constitution should be amended to further employ the rule of law and protect this principle from being abused, neglected or disregarded. THE FUTURE PROSPECTS FOR THE RULE OF LAW

WHAT NOW?

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When discussing the concept of 'The Rule of Law' we often look back in time. We look at theorists who have been influential and vocal towards this notion such as Dicey who laid down the principles for this concept, principles which many democratic countries follow to this very day. It is more than crucial to look back but how often do we look to the future and discuss the future prospects of this notion? It's about time to look to the future and discuss, as a nation, how we wish to progress and develop this concept in a modern-day society.

In the wake of Daphne Caruana Galizia's brutal assassination, this notion of 'The Rule of Law' has surfaced as a more critical and acknowledged issue. As a result of this, the European Parliament sent a number of representatives to evaluate the situation and the workings of the Rule of Law in Malta.

The idea of 'The Rule of Law' is also embraced within the doctrine of the separation of powers as *"it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power."* The notion of the separation of powers upholds and supports the theory due to the fact that it insists on the separation on the three insti-

¹ T. R. S Allan, *Constitutional Justice* (Oxford University Press 2003).

tution of the country: the Executive, the Legislative and the Judiciary. This separation is however arbitrary as it is quite essential that these institutions keep tabs on each other in order to make sure that neither one is in breach of any laws to maintain order in society.

The exercising of this separation varies from jurisdiction to another. One of the most ideal scenarios with regards to this notion is by far the United States of America. It is composed of a bicameral legislature: The Senate and the House of Representatives which make up the legislative branch called Congress. Both houses have their own responsibilities but for most of the part, their common aim is to pass legislation for it to become law. This structure was purposeful to create a system of checks and balances. The two chambers keep in check each other's authority which is supposed to prevent anyone getting any tyrannical power.

LEGISLATURE

A unicameral legislature may result in vesting too much power in one institution. This can be observed in our country with our present situation. We currently have a very strong executive and its constituents make up half of the legislative assembly. Therefore, we can observe a very evident overlap between these institutions. Presently, there are 67 members of parliament, 37 of which are members of the government and the remaining 30 are members of the opposition (28 of which are part of the Nationalist Party and the other 2 are part of the Democratic Party). Needless to say, the government has guite the upper hand when it comes to passing legislation. If hypothetically the government decided to amend a law entrenched with an absolute majority in the Constitution, hypothetically speaking, a member of parliament can pass a motion and with its seven-seat majority, the government can easily amend the certain provisions of the Constitution - the highest law of the land.

Malta could become a bicameral legislature with a Senate rather than a House of Lords which is hereditary. A Senate can be composed with constituents which represent each electoral district. However, this might cause bureaucracy due to the fact that the House of Representatives may have one party in majority and another political party in majority in the Senate and legislation might pass through the House of Representatives but might get stalled in the Senate and the whole deal would just turn political which would not be an ideal scenario taking into consideration the partisanship present in Maltese society. A more tangible solution to this would be a strong and sharp Opposition to effectively question the Government's decisions. Many are of the opinion that the current Opposition is rather weak and divided. A solution to this would something similar to the UK's 'Question Time' which gives Members of Parliament the perfect chance to grill the government on decisions they might have taken. To ensure transparency in parliament, this time dedicated to questioning ought to be televised for the public scrutiny.

APPOINTMENT OF THE COMMISSIONER OF POLICE

Another point worth mentioning is the fact that the police force should be separate entity, independent of the institutions such as the executive. This is not the case in Malta as the Commissioner of Police himself is appointed by the Prime Minister whilst he is also under the orders of the Ministry for Justice.

Article 6, sub-article 2 of the Police Act clearly states, "The Commissioner shall be appointed by the Prime Minister. The Commissioner shall hold office for a period of five years and may be eligible for re-appointment."² Therefore, let's suppose a situation where the Government is presumed to be corrupt, it is very much possible that the Police corps might not take action.

The Commissioner can be easily appointed by a 2/3 majority in parliament to ensure trust from both sides of the house or he can be appointed through an independent entity which scrutinises applicants up for the position. Also limiting the number of terms that a Commissioner can serve will ensure a healthy transition for corps in order to guarantee that power is being passed round instead of one person possessing such power for a number of years.

APPOINTMENT OF JUDGES IN SUPERIOR COURTS

Judges are appointed by the President acting on advice of the Prime Minister, but the Prime Minister gives his advice

² Laws of Malta, Chapter 165 'Police Act'

in accordance to the evaluation of candidates done by the Judicial Appointments Committee.

The Judicial Appointments Committee is chaired by the Chief Justice and is constituted by the Attorney General, Auditor General, the Ombudsman and the President of the Chamber of Advocates who by law are all supposed to act on *"individual judgement and shall not be subject to the direction or control of any person or authority."*³ This committee is supposed to examine statements of interest in the position of a judge. They are also responsible for conducting interviews and evaluating the individual's merits. Subsequently, they will give their advice to the Prime Minister. However, the Prime Minister may choose to go against their advice and Article 96 sub-article 4 of the Constitution gives him the power to do so;

"Notwithstanding the provisions of sub-article (3), the Prime Minister shall be entitled to elect not to comply with the result of the evaluation referred to in sub-article (3)"

Despite this, the Prime Minister or Minister of Justice have to publish in the Government Gazette the reason why they decided to opt for this decision within 5 days. Apart from this, they must address the House of Representatives and make a statement as to why this power was resorted to not later than the second sitting of the house after the advice was given.

Article 96 was recently amended in 2016⁴ to establish this committee as before this, the President used to appoint Judges on the advice of the Prime Minister after having consulted with the Minister for Justice. This amendment was a step in the right direction in order to ensure judicial independence away from the political arena.

APPOINTMENT FOR KEY PUBLIC ROLES

Recently, a new law came into force for parliamentary scrutiny on nominees who are to hold high key roles in society such as ambassadors and chairs of government entities.

"A new parliamentary committee is to be created and tasked with scrutinising individuals appointed to key roles, with grillings to be broadcast live from parliament."⁵

3 Constitution of Malta

4 Parliament of Malta, Sitting No. 355 on 15th February 2016 (Plenary session), Bill No. 142

5 Times of Malta, 'Law introducing parliamentary scrutiny enters into force', (February, 2018) https://www.timesofmalta.com/articles/view/20180206/

Members of Parliament sitting in this committee will have the chance to ask questions in writing as well as one-on-one questions. They will then evaluate the nominees and give their advice to the responsible minister on who should be appointed; however, the Minister has full discretion and has a right to disregard the committee's advice.

Current Minister for Justice, Dr Owen Bonnici, stated that this measure will strengthen good governance and the rule of law.

When it comes to the appointment of the Judiciary and the key public figures, committees are established to have their say which makes the appointment process more democratic. Despite this, discretion still remains with members of the executive. These committees should enjoy trust of both the legislative and the executive institution to be given more power to appoint individuals to overall ensure a clear separation between institutions.

THE JUDICIARY

The Judiciary branch upholds Dicey's notion that everyone is equal in a Court of Law. This in no way would it exclude government officials. The Judiciary incorporates this notion of the Rule of Law in relation to the interpretation of the law.

Every individual has the right to a fair trial. But, is getting a divergent judgement from a similar case, fair? Should the case be considered on its own merits? Or should the doctrine of precedent be followed? In Malta, though it is practiced, the doctrine of precedent is in no way binding on a judge or magistrate. In this country's law courts, the judiciary has the discretion of giving the final judgement without having previous convictions from superior courts holding it down.

Due to this, interpretation is up to the judge or magistrate presiding the case. Interpretation of the law varies from one person to another; however, fundamental principles still remain. An adjudicator might settle for an interpretation which is slightly different to what the legislator had in mind.

A point worth mentioning is the number of pending cases each year. During recent years many reports have rightly stated that the number of pending cases in the Maltese Courts have been lowered but this does not mean much considering the thousands of cases left pending each year.

local/mps-will-now-start-grilling-nominees-to-key-public-roles.669971?utm_ source=tom&utm_campaign=top5&utm_medium=widget#.WnneorRRcos.facebook>

An article in a local news portal⁶ quoted the Ministry for Justice by stating that the number of pending cases in the Civil Court was halved since the year 2000 to the year 2017. From 18,831, the number goes down to 9,686. It is understandable that the adjudicator's work is beyond serious but that still doesn't excuse the fact that a gross number of people are awaiting justice.

A very recent case which sparked a lot of public interest was the case which involved the individual, William Agius, "a man who admitted involvement in a drug trafficking case 14 years ago, but has since reformed himself…"⁷ Agius was jailed for 3 years, fined €3000 and had his property confiscated. He could have faced between 4 to 20 years in prison.

Many were of the opinion that his sentence was unfair despite him being given the absolute minimum. People argued that the person had reformed himself into an exemplary citizen and it is unjust for the judiciary to give him such sentence after all this time. On the other hand, the crime was still committed no matter what.

The issue that confounded many was the fact that justice was served 14 years too late. The individual will have to endure the pain of having to lose everything again after having gained his life back. Apart from this, many are concerned about the dangers lurking inside the correctional facility which may throw him back into the vicious circle of crimes and illegalities.

CONSTITUTIONAL REFORM

Needless to say, it is time for Constitutional reform in our country. This concept was not something dreamt of yesterday. Quite the contrary actually. A number of publicly-known people have been trying to tackle this issue for a number of years. For example, Professor Kevin Aquilina, has published numerous articles with regards to the Constitutional reform leading to the creation of the second republic.

We can no longer pretend that the Westminster based, 'template' Constitution is doing justice for this day and age. Some examples of the outdatedness of our Constitution include the declaration of the country's religious belief and

⁶ TVM Malta, 'Lowest ever number of pending Civil Court cases' (February, 2017) <https://www.tvm.com.mt/en/news/lowest-ever-number-of-pending-civil-court-cases/>

⁷ Edwina Brincat, 'Former addict has been 'clean' for 10 years and an inspiration to others', (Times of Malta, 2017) ">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug.665420>">https://www.timesofmalta.com/articles/view/20171211/local/will-reformed-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-after-drug-addict-be-jailed-today-14-years-addict-be-jailed-today-14-years-addict-be-jailed-today-14-years-addict-be-jailed-today-14

that the religious teachings should be taught in a compulsory manner in all state schools. In such a diverse society, it is quite shocking that this provision is still intact in our Constitution. Some of our highest people in the country boast on how cosmopolitan this country is becoming and as yet we impose teachings of a specific religious doctrine when our schools are filled with students of different faiths or just no faith at all. The subject should be widened to teach a spectrum of religions or children should be taught basic and fundamental principles which are essential in life.

Chapter 2 of the Constitution refers to the declaration of principles which includes the right to education, work and equal pay between sexes. Article 21 states that these principles are essential for good governance and it shall be the aim of the State to apply these principles. However, these principles are not enforced in a Court of law. Undoubtedly, these rights should be enforced in courts if they are ever breached.

THE PRESIDENT

A simple majority and a motion in the House of Representatives is all that is needed to appoint the President of the Republic.

The highest office in the country is elected by a simple majority. It could be amended so that the President is elected with a 2/3 majority. Furthermore, the number of years that one shall serve as a president can be extended to years 8 (4 years which equals to 2 terms).

The president has limited powers, and this is done for a reason. If the president has more power, then we will no longer live in a democratic state. Despite this, the president should have more prerogatives such as having a say in the appointments such as judges, the Attorney General and other key public figures.

Moreover, the President should also have the opportunity to refuse signing a bill immediately if he/she deems it to be against the country's interest. Apart from this, they need to provide the House of Representatives with a number of reasons as to why the President came to this conclusion.

By granting the President such rights, the executive's power would be diminished and a separation between institutions would be seen more clearly.

CONCLUSION

Overall, Constitutional reform is essential to our outdated Constitution. A Constitution which will continue enforcing its supremacy whilst envisaging a stricter separation of powers between institutions by sharing their power with a number of entities. As a result of this, the system of checks and balances would be exhausted to the full. Apart from this, the principle of 'The Rule of Law' could be strengthened through various amendments.

Constitutional reform does not mean scrapping the current Constitution and creating a new one as this would not insure a healthy transition for society. Such reform would include amendments to various articles from the current Constitution in order to make sure that our laws are developing to cater for the needs of our ever-evolving society.

This current Constitution might have been sufficient a few years back, but currently, there is a great need of reform to ensure that the rule of law in our country continues evolving and strengthening. Therefore, it is now essential to look to the future and jump into action to safeguard social order and to ascertain the notion that law is above every individual.





THE RULE OF LAW IS AN EXTREMELY ELABORATE CONCEPT...

Both as a theory or principle, it embodies a number of other principles and doctrines which are in themselves dynamic. For this reason, it is observed that different constitutions adapt the same concepts in a different manner and extent. However, all states with a constitution encompassing the rule of law all have similarities in ideology and aspirations. The most notable may be democracy.

In fact, in their endeavour for the observance of democracy, most states apply the rule of law, giving power to the society and the citizens as to ensure legitimacy and rationality in the government. This may be seen through the meritocracy and equality which all of the aforementioned states strive to achieve systematically through their constitutional system.

Another similarity is the representation of the citizens achieved through the electoral systems which aim to provide a system in which the people with political and legal power derive this power from the law, guided by and reflecting the wishes of the citizens. However, the rule of law also entails that in reflecting the majority's opinion, minorities are also to be respected. Hence, human rights also impact all of the states applying the rule of law. This dynamism may be observed in the rule of law's content as much as in its application.

This may be exemplified through a comparative consideration of the separation of powers, as one of the most essential attribute of the rule of law. Whereas separation of judiciary is prevalent in all states in question, separation of all three organs is not common in all systems. America falls under this first criteria. Other states, namely Malta, UK, Spain and France, do not have such a strict separation of powers. However, a system of checks and balances in all system balances the separation of powers in such a way as to protect the rule of law efficiently by ensuring accountability and preventing despotic use of power.

The Constitution of Malta and its amendments, namely those of 1974, along with other constitutional laws, create a unique system which systematically aims at creating a framework of legal rights and obligations ensuring the rule of law. This framework aims at regulating the system and functions of the main institutions of the state. The rule of law in Malta's Constitution may be observed in two ways through the system created and through the very nature and authority of the Constitution itself. he analysis of the current Constitution leads to the conclusion that our constitutional system is infused with tactful provisions and articles aimed at imbuing our system with principles embodied by the rule of law.

Some of these are the supremacy of the Constitution, the appointment of the judiciary, executive and legislative, the electoral system, the functions of the court, especially the Constitutional Court, and other laws which protect the citizens as individuals and as part of a society.

There is a strong discrepancy between what is theoretically established and the practical application in Malta. Although the practical observance of the rule of law has recently been given more prominence as a very important issue, several local and foreign legal scholars have insisted on this point for a long time. One concern is the practicality of the supremacy of the Constitution in consideration of how easily the party in government may amend this having a strong majority in Parliament. Potentially, Constitutional drafters might consider ideas such as bicameralism or alternatively institute a direct grilling system on the governmental decisions, both aiming at ensuring accountability and limiting the partisanship which clouds politicians' decisions.

Prospectively, a future constitution might also employ a more independent means of appointing key officials, namely the commissioner of police and the judges so that these officials are not only loyal to the party in government. Ac-

countability should also be enforced more strictly, as is being done through the introduction of the grilling system for the key public figures appointed. Efforts are also to be made in the judiciary in aims of making it more efficient time-wise. A future constitution could also alter the distribution of power by potentially granting the president more power, which would only be possible and practical with more democratic appointment for the office of president.

All the reflections discussed throughout this document lead to one conclusion - The rule of law is crucial to the upholding of the rule of law in any democratic constitution, as proven by its different applications namely throughout the Western world. This is equally evident in Malta where although it is undeniable that our Constitution is not completely unsuccessful in enforcing the rule of law, it is also evident that stricter measures for the observance of the rule of law are long overdue.



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