

A REVIEW OF THE CONSTITUTION OF MALTA AT FIFTY: RECTIFICATION OR REDESIGN?

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Lead Authors: Michael Frendo and Martin Scicluna

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The Today Public Policy Institute
c/o The Malta Chamber of Commerce, Enterprise and Industry,
Exchange Buildings, Republic Street, Valletta
VLT 1117 MALTA
Email: martins@onvol.net

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**A TRIBUTE TO FATHER PETER SERRACINO INGLOTT:
*THE PETER SERRACINO INGLOTT AWARD***

Father Peter Serracino Inglott, who died in 2012, was a founder member of the Board of the Today Public Policy Institute. He always gave his time generously and provided level-headed input on every policy topic on the think-tank's agenda.

At the very first meeting of the think-tank in July 2007, Father Peter raised the need for a comprehensive review to be conducted of the Constitution of Malta. He undertook to lead this work.

Although the think-tank's approach to the project underwent a number of transformations as the work progressed under Father Peter's guidance – from inviting former Presidents and Prime Ministers of the Republic to set out their views, to obtaining the advice of experts in constitutional law on specific issues – it was sadly not completed before his final illness took hold.

However, it is fitting that this report should be dedicated to him for his inspiration in getting it under way. We can only speculate on whether he would have approved of what the Board has finally produced. Knowing his playful wit and originality of mind, possibly not. But, if so, knowing also his generosity of spirit and broad-minded approach, he would probably also have found much to like about it. We miss both his wisdom and his humour.

His contributions in philosophy, politics, music and the arts were numerous and varied. His life touched so many. Above all, he was a good and most lovable man who, as an outstandingly enlightened and open-minded priest, gave spiritual comfort and encouragement to all who turned to him for support.

But it is in the manner in which he contributed to a range of causes and the quality and originality of his input, his kindness, humility, puckish humour and breadth of vision that his colleagues in the Today Public Policy Institute will continue to miss, and to which they pay tribute.

The Today Public Policy Institute is therefore establishing an award, to be known as *The Peter Serracino Inglott Award*, which will be given annually in his memory for outstanding contributions to civic thinking and engagement.

ACKNOWLEDGEMENTS

The think-tank is most grateful to a number of experts in Constitutional law or practice who have presented the Institute with reports, analyses and comparative studies, as well as those who attended meetings with the Board to discuss the Constitution. Their contributions have greatly assisted in the presentation and completion of this report. The report does not necessarily purport to reflect their views.

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A REVIEW OF THE CONSTITUTION OF MALTA AT FIFTY: RECTIFICATION OR REDESIGN?

INTRODUCTION: A BRIEF HISTORY

1. The Constitution represents the bedrock of the democratic governance of Malta. It is the rule-book regulating Malta's governing institutions and processes. It constitutes the supreme law of Malta.
2. The Constitution of Malta is based on British constitutional theory and practice. It came about fifty years ago in the wake of earlier limited self-governing Constitutions, following Maltese demands for political and democratic emancipation and national sovereignty.
3. The aims of the Constitution were neatly expressed by then Prime Minister George Borg Olivier at the Chatham House Independence Conference of 1963: "The Constitution which we envisage incorporates the principle of responsible parliamentary government based on a tested democratic system. It safeguards the interests of the nation and the fundamental rights and freedoms of the individuals composing the nation. It secures the independence of such organs and authorities as must be outside political influence. It reaffirms the political sovereignty of the electorate by ensuring the holding of free elections at fixed intervals."
4. The distinguishing mark of the Constitution was that it was the first to be based on the premise that the Maltese people would be sovereign over all matters that related to the administration of their own territory and their relations with outside powers. Never before had this been the case in all the centuries that Malta had been under some form of foreign tutelage.
5. The Malta Independence Constitution of 1964 was closely based on the Sir Hilary Blood Commission's recommendations for a Constitution drawn up in

1961. In the fifty intervening years, its evolution has been remarkably stable. It is now well developed and it has acquired distinctive national characteristics.

6. Its progress has been marked by five broad periods of constitution-making development. First, there was the period between 1961 and 1964 of the erection of the constitutional framework we know today as Malta moved towards sovereign statehood. This witnessed a period of manoeuvre by the main political parties for constitutional 'prizes', which included the beginnings of the displacement in the hierarchy of power of the previously pre-eminent Maltese Church.

7. Secondly, the period between 1972 and 1974, which saw the introduction of important amendments to electoral rules and the establishment of the Republic of Malta within the Commonwealth of Nations. The State was in the ascendant. The period was marked by recurring political and industrial conflict and the bi-partisan division in Maltese politics was reinforced.

8. Thirdly, there was the constitutional crisis of 1981 to 1987, which culminated with its resolution in 1987 with the striking of a grand political bargain between the two political parties.

9. Fourth, this was followed between 1992 and 1997 by a period of bi-partisan institutional development. Cabinet government was consolidated. Administrative government reforms were instituted. The profile of the Presidency was raised. Parliamentary Committees were first introduced and local councils formed.

10. The fifth period, between 1998 and today has seen the 'Europeanisation' of Malta's Constitutional framework in the lead-up to, and following, the accession of Malta to the European Union in 2004. This period was initially marked by a bitter contest between the political parties over the vital strategic choice about Malta's future direction. Accession to the European Union raised implications about 'shared sovereignty' with the EU which were further reinforced by the Lisbon Treaty of 2007.

11. In the fifty years since 1964, there have been twenty-six amendments to the Constitution. Some have been substantial, such as when Malta became a Republic in 1974, or when provisions were introduced for a corrective mechanism to provide for majority rule and neutrality in 1987. Other amendments were of a more minor and sectoral nature. No comprehensive

attempt at studying the Constitutional instrument as a whole has been attempted during the last fifty years.

12. Overridingly, it has been a Constitution dominated by two political parties – two political mass movements which are closely in touch with their grass roots, including through their own mass media outlets. The two parties are the king-makers in Maltese politics and, effectively, the “Masters of the Constitution”.

13. The Constitution has proved to be an adaptable, well-performing and legitimate Constitution, which is now firmly embedded in an emerging Constitutional order. While there have been cycles of constitution-making reflecting geo-political shifts, domestic conflicts followed by protracted mediated negotiations and limited compromises, there is inevitably still some unfinished business.

Arrangement of Articles under the Maltese Constitution

14. The arrangement of Articles of the Constitution of Malta is shown at Annex A for ease of reference. It may be noted that the Constitution consists of eleven Chapters and 124 Articles. The various Chapters of the Constitution are closely inter-woven and this points to a holistic approach to any proposed Constitutional amendment being adopted.

The Government’s Manifesto Commitment to a Constitutional Convention

15. Five decades after Malta attained its Independence, the time may be ripe for the Constitution to be reviewed as a complete document, rather than the piecemeal approach which has hitherto been adopted.

16. The Labour government’s electoral manifesto stated that: “It would hold a Constitutional Convention that will give birth to the Second Republic”.

AIM

17. The aim of this review is to consider what lessons may be learnt about Malta’s constitution-making from the experience of the last fifty years, and to propose improvements to the Constitution as a baseline document for further consideration by a national Constitutional Convention.

OUTLINE OF THE REPORT

18. The review will address six key issues:

- It will identify those elements of governance which might perform more efficiently with the aid of appropriate Constitutional amendments.
- It will collate and appraise leading proposals for Constitutional reform in specific areas affecting both institutional and political issues.
- It will identify and assess forces that may induce stresses in the Constitutional order.
- It will examine the prospects of emancipating the Constitution from the tutelage of the two major political parties.
- It will consider whether any of these factors should lead to the creation of a “Second Republic”.
- Finally, it will recommend the way ahead through proposals for the establishment of a Constitutional Convention.

19. The report is laid out in six Parts:

- **PART I:** Constitutional Principles.
- **PART II:** Consideration of Major Institutional Issues.
- **PART III:** Other Institutional Issues.
- **PART IV:** Political Issues.
- **PART V:** Conclusions: Rectification or Redesign?
- **PART VI:** The Way Forward: Recommendations for a Constitutional Convention.

CAVEAT

20. In any consideration of Constitutional reform, it is inevitable that a whole host of issues will arise. It is not the intention of this review to carry out a detailed Article by Article and provision by provision examination of the Constitution as that would be a near-insurmountable task. Nor would it serve any necessary or practical purpose since, as will be seen, the Constitution

continues to provide a good working framework for the administration and governance of Malta. Nevertheless, it should be observed that in the course of conducting this review, we have inevitably come across many lacunae and some relatively minor anomalies which will need re-drafting and amendment in due course (for example, Article 33(1) dealing with the death penalty and several others).

21. This report therefore concentrates on highlighting those parts of the Constitution – both institutional and political – which may need revisiting with a view to stimulating a policy debate and acting as the working baseline for dialogue and discussion in a planned Constitutional Convention.

PART I: THE CONSTITUTIONAL PRINCIPLES

Declaration of Principles

22. Chapter 2 of the Constitution lays down a Declaration of Principles. However, on examination, it proves to be not so much a declaration of principles as a list of economic, cultural and social values – ranging from promotion of culture, to protection of work, rights of women workers and others - which the State should respect when enacting legislation. These are essentially statements of values, not rights, as they are simply guiding principles which are unenforceable, whereas rights are intended to be binding and enforceable. **It may therefore be for consideration** that the time is ripe to substitute these values (or add to them) with a list of principles which should be binding upon the State if they are considered to be fundamental to good Constitutional governance.

23. It is for consideration that a number of constitutional law principles which were previously not enshrined in the Constitutional document should be revisited with a view to their possible incorporation to strengthen the Constitution. These include the principle of the separation of powers; the principle of the rule of law; the principle of the independence of the judiciary; the principle of the anonymity of the public service; the principle of individual ministerial responsibility; and the principle of the constitutionality of legislation. It should be noted that the principle of the supremacy of the Constitution, which is laid down under Article 6, is discussed further in paragraphs 77 to 80 below.

24. Moreover, the State and its institutions today are called upon to respect the citizen. The modern philosophy in Constitution law-making is that State organs and institutions should be established with the specific purpose of serving the people, and not vice-versa. State organs have a duty of care. When they harm the citizen they should make good for injuries suffered.

25. Thus, **it is for consideration** that the following principles should also be incorporated into the Constitution: the right to a good administration; the principle of openness and transparency of government; the right to protection of minorities; the right to digital information; the right to protect privacy, including access to ICT; the right to access to government-held information (freedom of information); the right of citizens to an adequate remedy against the public administration; the rights of children, including the right to grow up in a safe, protective and healthy environment; the rights of the elderly, including the right to commensurate retirement benefits and an environment to encourage healthy ageing; the rights of the vulnerable, disabled and disadvantaged, including the rights of prisoners; the right to protection from gender, sexual, racial or other discrimination; the right to a healthy environment; the recognition and enforcement of the rights of future generations, inter-generational equity in the economic, social and environmental spheres and incorporation of the principles of sustainable development; the principle of legality; the principle of proportionality; the principle of subsidiarity; the principle of equality; the principle of fairness; the principle of reasonableness; the principle of accountability of the public administration; and the principle of good administrative behaviour for administrative tribunals.

PART II: CONSIDERATION OF MAJOR INSTITUTIONAL ISSUES

26. This part of the report examines a number of major institutional issues which, if pursued, would markedly affect the thrust, shape and balance of the current Constitution of Malta and lead to the need for the introduction of major changes to the way in which Malta is governed and thus to the Constitution.

Powers of the Executive

27. It is for consideration that under the Maltese Constitution too much power is concentrated in the Executive. ‘Majoritarianism’ – the notion that winning the election entitles the majority, through the Executive, to do whatever it pleases – appears to predominate. The Executive controls the House of Representatives (the Legislature) through its majority. The President invariably acts on the advice of the Cabinet and when they act on their own motion they do not have a body to advise them. Constitutional Commissions (that is, the Electoral Commission, the Commission for the Administration of Justice, the Public Service Commission and the Employment Commission), the Broadcasting Authority and other public offices, such as the Attorney General, the Data Protection Commissioner, the Security Services and top public officers are appointed by the Executive. Members of the Judiciary are selected and appointed by the Executive. Where the Executive is not the sole decision-making body, it partakes in, and has the effective last word on, appointments of the President of Malta, the Speaker of the House, the Deputy Speaker, the Ombudsman and the Auditor General and Deputy Auditor General. The Executive decides which treaties are to be adhered to, with some treaties being signed without the need of Parliament’s approval in terms of the Ratification of Treaties Act.

28. It is therefore for consideration that a re-balancing of the distribution and exercise of power by the Executive should be examined so that greater checks and balances and more transparency and accountability of the Executive under the Constitution are achieved. This report examines below a number of ways of doing so.

Cabinet or Presidential Government?

29. Should Malta continue to retain a system of Cabinet government, or should it move to a Presidential system? From the inception of self-government almost a century ago, Malta has followed the Westminster constitutional model. Maltese public law is deeply rooted within a Westminster Constitutional setting. However, this does not perforce imply that Malta should not consider other models, particularly now that Malta forms a part of the European Union.

30. There are four main options open, some of which are inter-locking:

- To retain the current Cabinet system of governance;
- To retain the current Cabinet system, while vesting more powers in the President of Malta;
- To introduce greater Parliamentary checks on the Executive; or
- To adopt a Presidential system of Constitutional government.

31. The powers vested in the Prime Minister of Malta are as all-embracing as those, albeit differently constructed, of countries under Presidential systems of democratic government. The Prime Minister is in practice much more than *primus inter pares*, and the last few years have led to Maltese Prime Ministers and politics becoming more presidential in nature. The Prime Minister employs and removes ministers at will and runs the country with full ‘presidential’ powers, albeit his Cabinet (which is made up from members of the Legislature) is ultimately answerable to Parliament.

32. Where there are effectively only two parties represented in Parliament - as has virtually been the case since the Constitution was promulgated – Malta has had in practice, if not in theory, the fusion of the Executive and the Legislative arms of Government, with the Executive proposing, and passing virtually at will, those laws which it intends to execute. This is particularly marked since the House of Representatives does not in practice enjoy full autonomy as an institution, an issue which is discussed further in paragraphs 81 to 89 below.

33. The positions of Prime Minister and his Cabinet are all the more powerful since not only is the Executive led by a President who is appointed in practice by the Prime Minister (who can also remove him or her through his control of the Parliamentary majority), but also because it is the Prime Minister who controls all appointments to the Judiciary, the third arm of Government.

34. It is for consideration that Malta’s majoritarian system of democratic government vests too much power in the hands of the Executive, and specifically in the hands of the Prime Minister.

35. As to the adoption of a Presidential system of government (where the Executive and the Legislature are separate and defined), there are both costs and benefits. The benefits are that there would be a clearer separation

between the Legislature and the Executive. There would be less dependence than now on a sometimes volatile Parliamentary majority. The *locus* of leadership would be more clearly defined and there would be greater latitude in the selection of ministers to serve in the Cabinet.

36. On the other hand, there would also be costs. A Presidential system which was not reined in by proper checks and balances would perpetuate, and possibly exacerbate, the feeling of an over-mighty Executive. It would reduce the scope for party initiatives in policy-making. It would sever the current close relationship between the voters and Ministers. It would add to the risk of gridlock between the Legislature and the Executive, especially if the President and the Legislature were from different political parties.

37. To move to a Presidential system of government would also mean forsaking all the experience gained during the last two hundred and fourteen years and starting from scratch, with all the difficulties and perils this might bring, especially in the initial transition years needed to adapt to the new system. All the experience obtained during the last two hundred and fourteen years of implementing British public law in Malta would be discarded. Such a course might contain serious pitfalls and unintended consequences since Malta adheres to a British legal culture in the realm of Constitutional and administrative law which is now well embedded in the Maltese legal system.

38. It is for consideration, therefore, that any move towards introducing an executive Presidency would merely serve to create personality cults (where political egos by definition are big) and distort institutional structures without improving democratic processes or the efficiency and effectiveness of governance and public performance. For these reasons **it is for consideration** that this option should not be pursued further.

39. It is therefore for consideration that, on balance, a middle of the road approach would offer greater advantages and should be adopted. This would retain the current Cabinet system of governance, which would be improved by the introduction of greater checks and balances. These might include granting more powers to the President of Malta, providing for security of tenure for the President, strengthening the autonomy of Parliament and the part played in holding the Executive to account, and introducing more rights of supervision by citizens over the State to hold the government more accountable to the

people. The enhancement of the role and functions of the President are addressed in paragraphs 49 to 60 below, while several proposals for greater Parliamentary checks on the Executive are highlighted in paragraphs 45 to 48 and 81 to 89 below.

40. It may also be for consideration that fixed terms of government should be introduced as a means of reducing the Prime Minister's room for political manoeuvre in selecting an election date of his own choosing, although Malta's history of general elections shows that, with one major exception, since Independence most Parliaments have run virtually to their full term.

A Bicameral or Unicameral Parliament?

41. There was a period in Malta's Constitutional history when it had a bicameral Parliament consisting of a Legislative Assembly and a Senate. Although the Legislative Assembly was elected, the Senate consisted of a Chamber appointed by the Governor of Malta.

42. Should Malta replace its unicameral system of democracy with a bicameral Parliament? Would a Second Chamber make Parliament more efficient or effective, or would it simply complicate matters unnecessarily and act as a brake on parliamentary business?

43. The benefits of having a Second Chamber are that it would broaden and deepen the process of legislative deliberation and, arguably, lead to better laws. It would provide a forum for a broader range of views and interests. If a Second Chamber were appointed and not elected, it would be at one remove from the electoral fray and therefore (possibly) be less partisan. It would provide closer scrutiny of the Executive. It would permit the involvement in government of technocratic experts in their fields.

44. On the other hand, there would also be undoubted costs. An appointed (unelected) Second Chamber would lack electoral legitimacy, while an elected chamber would add considerably to the electoral and political over-load that already exists in Malta and would be likely to lead to political tension or even gridlock. There would inevitably be a risk of conflict with the Lower House, the House of Representatives. Its presence might well weaken the Parliamentary Executive's ability to fulfil its governance role and make the execution of policy less effective. Above all, perhaps, it would revive the historical ghosts of earlier

failed Maltese Senates and add considerably to the cost of government without, on balance, any real cost-effective benefits.

A “Council of State”?

45. While it would appear best, therefore, to retain the current tried and tested unicameral system of government on the pragmatic grounds that Malta’s governance has managed well without a Second Chamber and that on the whole the unicameral system makes good economic and practical sense, **it is for consideration, none-the-less**, that the prospect of a senior consultative body in the shape of a Council of State with a more limited role should not be dismissed out of hand.

46. It is for consideration that while retaining the current framework of the Parliamentary State (that is, with an Executive drawn from the Legislature and reliant on its confidence and answerable to it), there might be some merit in introducing an appointed Council of State focused solely on specific and limited areas of governance where it can act as the “guardian over the guardians”. This role might include the following, for example:

- Scrutiny of EU legislation pipeline *acquis* and policy-making (see also paragraphs 66 to 71 below).
- The scrutiny of public service appointments, embedding a system where the Prime Minister would propose, in consultation with the Leader of the Opposition, the nominees for appointment to all the Constitutional institutions, commissions and authorities highlighted in paragraph 59 below, which would then be subject to public or *in camera* scrutiny by the Council of State. The President would then be invited to appoint the selected nominees after recommendation and resolution by the Council of State.

47. Importantly, however, a Council of State would not be given any legislative power over the House of Representatives, nor would it have any power of veto over legislation passed in Parliament.

48. It is for consideration that it would be composed of individuals selected by the President from among a broad range of civil society. Alternatively, **it is for consideration** that an Electoral College could be formed comprising a set and

balanced number of former Presidents, former Prime Ministers, former Speakers and former Chief Justices and Judges, together with representatives from the academic institutions, Local Councils and civil society, to advise the President on the selection of those who would serve in a Council of State.

Appointment and Functions of the President of Malta

49. The President should continue to be seen as a unifying force who is above partisan politics and who opens and maintains channels of dialogue between the major parties and civil society. Presidents are elected and removed by the House of Representatives. But they are not appointed (as is the case of the Ombudsman, Auditor General and Deputy Auditor General) following a vote of not less than two-thirds majority in the House of Representatives. They are appointed following a simple majority in the House. This means that they are effectively elected or removed by the Government of the day, which enjoys a majority in the House of Representatives.

50. It is for consideration that there may be a case for arguing that the President should enjoy security of tenure and be elected and removed in the same manner as the three Parliamentary Officers in paragraph 49 above. As to tenure, this could be done by granting the President an extended term of office of, say, seven or nine years, rather than the current five years, without the possibility of renewing the President's stay in office for a second term. Alternatively, the possibility of extending the duration of Office of President to a second five-year term (on the same lines as the three Parliamentary Officers above, who are normally allowed to have their appointment extended for a second term) **should also be considered.**

51. Both these options would ensure continuity and some security of tenure for the President. What is being proposed under a two-term option is not an automatic extension to a second term of office. The House of Representatives should still be empowered to consider formally at the end of the first term whether or not to renew the appointment of the President for a second and final term.

52. As to the President's appointment, the Constitution does not allow a judge to be appointed President of Malta, although it contemplates the possibility of the Chief Justice carrying out the duties of Acting President of Malta. There

seems to be an anomaly here, however, which should be corrected. **It is for consideration** that to avoid potential conflicts of interest there should be no circumstances where a Chief Justice is appointed Acting President of Malta, especially given that the Chief Justice, *qua* Acting President of Malta, might have to take decisions which might be challenged in court (such as when he assents to a law and a court case might be instituted challenging the legality of the passage of that law, or when the Acting President of Malta signs an expropriation order and that order is challenged in court). **It is therefore for consideration** that this function should be carried out by the Speaker of the House as the President of the Parliamentary institution as sometimes happens under European constitutions, not by the Chief Justice.

53. Should the appointment of a President be subject to an electoral vote? **It is for consideration** that the existing system of appointment leads inevitably to political partisanship and manipulation which should be avoided. The propriety of usually appointing a senior active member of the party in government (in one case a former Prime Minister) as the person representing the whole nation and symbolising national unity might also be questioned. **Consideration should therefore be given** to whether in view of their inevitably partisan position in politics a former Prime Minister should be debarred by the Constitution from holding the post of President (as is formally the case already of an ex-Chief Justice or a Judge), in order to ensure that the President's role representing national unity is safeguarded.

54. **It is moreover for consideration** that a way of making the appointment of the President less overtly political would be to leave the decision, as now, in the hands of the Cabinet, but for the selection to be made from nominations put forward by an Electoral College appointed from civil society on the lines described in paragraph 48 above specifically for this purpose.

55. **It is also for consideration** that the time has come when the President of Malta should no longer be involved in the Parliamentary process and that Bills which become law should in future be signed by the Speaker of the House of Representatives rather than by the President who, in terms of the Constitution, is the Head of the Executive. Although the President's signature is currently a formality, the position at law is that it is the Head of the Executive who is signing bills into laws. If the President's parliamentary functions were assigned

to the Speaker of the House of Representatives, then the President would only be carrying out executive functions.

56. **It is for consideration** that the time has come for a revision of the President's functions. Broadly speaking, the President's current functions are primarily ceremonial. They normally act only on advice tendered by the Prime Minister or by a Cabinet Minister. It is in only a handful of situations (for example, under Article 76(5)) that Presidents act on their own motion, unadvised by Government.

57. For instance, should the President continue to be involved in the expropriation of private property or would this function not be better devolved upon a Cabinet Minister? Although there are historical reasons for this, today these functions are essentially carried out by the Prime Minister and his Cabinet.

58. More importantly, **it is for consideration** that there is a case for extending those functions which the President should carry out unadvised by Government. One possibility would be for Presidents to be accorded enhanced authority through their twin roles as the "Guardian of the Constitution" and the "Guardian of institutional integrity".

59. **It is for consideration** that the President should be made responsible for conflict resolution. They would also be made responsible for appointing all constitutional commissions and authorities – that is, the Electoral Commission, the Employment Commission, the Public Service Commission, the Commission for the Administration of Justice and the Broadcasting Authority and any other major institutional organs where political sensitivities run high and whose importance to national security are great (such as, the Commander of the Armed Forces of Malta, the Commissioner of the Malta Police Force and the Head of the Security Service). This would have the benefit of ensuring that the selection of these very sensitive posts in government are made without political interference, based on the President's judgment of the calibre and merit of the individuals concerned, not political preference. Presidents would be empowered to carry out their own consultations with a wider sector of society.

60. As part of this devolution of power from the Executive to the President, **it is for consideration** that they should have recourse to the Council of State described in paragraphs 45 to 48 above to tender advice in this process. The final decision would be vested in the President, thus giving the Office of The President greater prestige whilst ensuring that politically partisan appointments are avoided and that merit, integrity and competence are the sole criteria adopted for selection to these important public offices of State.

PART III: OTHER INSTITUTIONAL ISSUES

A Citizen-centred or a State-centred Constitution?

61. Should the Constitution be revised to reflect a greater citizen-centred perspective than a State-centred institutional one? **It is for consideration** that the Constitution should not continue to be viewed simply as an instrument which establishes the organs of State and regulates their composition, powers and duties, but should focus more broadly on the citizen, rather than solely on the State. Currently, although the Constitution contains both elements, the preponderance is on State institutions, rather than on citizens' rights and well-being.

62. Chapters II, III and IV of the Constitution, dealing respectively with social, economic and cultural rights, citizenship, human rights and fundamental freedoms do undoubtedly place the citizen within the context of the Constitution. However, the remaining seven chapters lay emphasis on the powers of State organs.

63. For example, although the institution of the Ombudsman – the defender of citizen's rights – is recognised by the Constitution, the provision is scant when compared to other State organs established by the Constitution. Proposals to correct this specific omission are made in paragraphs 101 to 104 below.

64. It is for consideration, therefore, that the Constitution should adopt a greater citizen-centred, rather than a State-centred, approach. Various measures may be contemplated to give the citizen more rights against the State. Part I above (paragraphs 22 to 25) has highlighted a number of rights and principles which could productively be incorporated into the Constitution to strengthen citizens' rights. For instance, freedom of information and data

protection can be recognised as citizens' rights, including the rights against abuse of digital media; quality service charters could also be referred to in the Constitution to make the public administration more liable to provide an efficient service to the public; the sole provision regulating the Ombudsman can be expanded (see paragraphs 101 to 104 below); the right to good public administration should be enshrined in the Constitution and the principles of good public administration elaborated upon.

65. It is for consideration that the Constitution should not be perceived as an instrument wielding power for State institutions, but as the means for a transparent, open and accountable system of governance. Steps to re-balance matters should be incorporated accordingly.

Effects of Accession to the European Union

66. While furthering the European ideal of peace, stability and prosperity through the sharing of sovereignty, Malta's accession to the European Union has had a deep impact on the scope of the Constitution, which has inevitably become subject over a wide range of policy areas to decisions taken in the European Union institutions, albeit with Maltese participation.

67. An amendment to Article 65 (1) of the Constitution clarified that Parliament would be drafting laws "with full respect for ... Malta's international and regional obligations, in particular those assumed by the treaty of accession to the EU signed in Athens on the 16th April 2003."

68. Increasingly, therefore, Malta's Parliament is implementing directives and regulations drafted and adopted by the European Union, albeit with Maltese participation in the European level decision-making process. However, there still needs to be adequate scrutiny of these documents by the national Parliament and it is clear that, to date, Parliament has insufficient resources to vet properly legislation pipeline *acquis* coming from Brussels. Meaningful discussion about the impact of such legislation in the local context is rarely attempted and remains insufficient. This parliamentary scrutiny is also important in relation to the proper implementation of policies and legislation originating from legislative instruments and measures taken at the European Union level.

69. Moreover, the juridical debate as to how the doctrine of supremacy of European law dove-tails with the status of national constitutions of Member

States continues to be a live issue in the European Union, not least as exemplified by the German Constitutional Court judgement (decided on 7th September 2011, Az.2 BvR 987/10 BvR 1099/10) relating to the sovereign debt crisis in the Eurozone and Germany's participation in the Greek bail-out for which it required approval of executive action in this regard by the *Bundestag*.

70. It is for consideration that the *de jure* and *de facto* effects which accession to the European Union has entailed should be reflected in the institutions under the Constitution. As mentioned in paragraph 46 above, **it is therefore for consideration** that there may be a case for establishing a Council of State, made up of appointed, not elected, individuals specifically to deal with, *inter alia*, the scrutiny of EU legislation pipeline *acquis* and policy-making. Alternatively, the possibility of a strengthened system of Parliamentary Committees, as discussed in paragraphs 81 to 86 below may be considered.

71. It is also for consideration that, as is currently being proposed, the principles of fiscal responsibility of the EU Fiscal Responsibility Act should be incorporated, but not entrenched, in the Constitution as a means of exerting pressure on the Executive to honour fiscal discipline.

Judicial Accountability and the Commission for the Administration of Justice

72. Magistrates and Judges are appointed by the party in government at the Executive's sole discretion. The Attorney General, who has certain judicial functions (yet forms part of the Executive and is a civil servant) is also appointed by the government. He, like Magistrates, depends on the Executive to be promoted to the post of Judge or even Chief Justice. This situation has long been crying out for reform, but has found stiff resistance from successive Cabinets which have shown a reluctance to give up the power of judicial appointment.

73. The safeguards on the Judiciary's independence take the form, *inter alia*, of making the salaries of Judges and Magistrates a direct charge on the Consolidated Fund; of ensuring that they can only be removed by a two-thirds majority in a motion for removal before Parliament; and of ensuring that their salaries and terms of office cannot be altered to their disadvantage during their tenure of office, while setting a compulsory retiring age. Protected in this way, members of the Judiciary are supposed to have full independence in the exercise of their office.

74. It is for consideration that the President of Malta should no longer chair the Commission for the Administration of Justice to avoid potential and actual conflicts. There have been instances in the past where a President, as Chairman of the Commission for the Administration of Justice, has been called upon to advise on the appointment of a Judge and, notwithstanding that the Commission for the Administration of Justice entertained doubts as to the appointment, the Prime Minister at the time had advised the President to appoint such a person as a Judge. There have also been occasions when the President has had to abstain from involving himself as Chairman of the Commission in the investigation of a Judge whose removal was being requested by the Prime Minister.

75. It is clear that the Commission does not have the necessary power or clout to discipline recalcitrant members of the judiciary. **It is for consideration** that, in line with the recommendations made by the Final Report of the Commission for the Holistic Reform of the Justice Sector, three independent Authorities should be established under a reformed Commission for the Administration of Justice to assist it with its responsibilities for judicial appointment, judicial discipline and judicial supervision. **It is also for consideration** that, in line with the Justice Reform Commission's recommendations, the President should no longer preside over the Commission. This will help to obviate any conflict of interest which the President might have with his or her other constitutional roles.

76. It is also for consideration that the Prime Minister and the Leader of the Opposition should no longer appoint their own nominees to the Commission for the Administration of Justice since they should have no part to play on it as it is a quasi-judicial body rather than an executive body of the State. **Moreover, it is for consideration** that a reformed Commission for the Administration of Justice should be seen as a Judicial Commission, not an Executive Commission. As proposed by the Justice Reform Commission, the Commission should be strengthened to be able to appoint and discipline members of the Judiciary. Such functions should no longer be exercised by Government but by an independent and impartial Commission for the Administration of Justice with the necessary guarantees to provide the accused Judge or Magistrate with a right to a fair trial and a right of appeal to the Constitutional Court.

Supremacy of the Constitution

77. The supremacy of the Constitution means that the constitutionality of laws is the foremost value of governance. But it has been strongly argued that the supremacy of the Constitution is being undermined if laws declared to be unconstitutional by the Constitutional Court remain enforceable so long as Parliament does nothing about amending them.

78. In practice, Parliament has been allowed to arrogate to itself the final say as to whether those laws declared void by the Constitutional Court, should still remain valid and binding, or should be repealed. The Constitutional Court has, by default, waived aside the supremacy of the Constitution. There have even been cases, perversely, where the Constitutional Court, after declaring a provision of law to be null and void and unconstitutional will still consider that provision to be perfectly valid and legally binding in a later case between different parties because Parliament has done nothing to repeal it.

79. Article 6 (the invalidity of laws which conflict with the Constitution), Article 95 (which establishes who is the authority that the Constitution empowers to determine controversies on whether or not a law is in conflict with the Constitution) and Article 65 (which enjoins Parliament to be subservient to the Constitution in law-making functions), are clear. The Constitution has expressly designated the authority to determine any controversy as to whether any law is inconsistent with the Constitution. That authority is the Constitutional Court, not Parliament. Any law that is declared to be inconsistent with the Constitution is void and it is only the Constitutional Court that is empowered to do that. The Constitution gives no say to Parliament in the process of determining the validity or otherwise of laws which have been challenged before the Constitutional Court, but the Executive and the Legislature have in effect usurped it.

80. Although this principle is enshrined in the Constitution, its application has not been without difficulty. **It is for consideration** that this dichotomy should be determined, as recommended by the Justice Reform Commission, by the Constitutional Court's judgment being published in the Government Gazette

within a week and thereafter automatically becoming *res judicata* (that is, a matter already judged), thus having the force of law not only between the parties to the case, but universally. Once the Constitutional Court pronounces its judgment, a Constitutional mechanism should exist to oblige Parliament to correct the law in question forthwith.

The Autonomy of Parliament and Parliamentary Scrutiny

81. The function of Parliament to vet legislation and scrutinize administrative performance – holding the Executive to account - should be considerably strengthened. The issues to be considered, therefore, are how to strengthen the autonomy of Parliament and how to make the laws and other regulations that serve to underwrite constitutional provisions more streamlined and effective. **It is for consideration** that this requires radical amendments to Parliament's funding and Standing Orders, rather than a change of legislation.

82. Moreover, it is for consideration that the autonomy of Parliament can only be strengthened if it is given its own budget, if it controls and recruits its own staff and if Members of Parliament are given the administrative infrastructure and research under-pinning to be fully effective.

83. The committee structure in the House of Representatives outside plenary meetings, is further marginalising the scrutiny of laws and legal notices that forms part of Parliament's function. The institution itself and all non-Cabinet Members of Parliament are under-resourced by way of staff and funds to carry out the basic work required to monitor the legislation that is being introduced or extended. **It is for consideration** that it is not the Constitution itself which needs to be revised but the legal, administrative and parliamentary procedures that implement its provisions. These should be strengthened and adapted if the Constitution's provisions are to be fully honoured.

84. It is for consideration that past amendments to the Constitution have served to make existing institutions bigger and heavier but none-the-less still ineffective. A good example has been the increase in the number of MPs sitting in Parliament, the recent expansion in the number of ministerial portfolios, or the recent inclination of governments to appoint back-bench MPs either as Parliamentary Assistants or to other public administration entities, thus diluting the separation of responsibilities between the Legislature and the Executive. These steps have not in and of themselves contributed to any discernible improvement either in the quality or effectiveness of governance,

or the democratic processes. The upshot has been that the distinction between the Government and Parliament has become blurred and the ability of the Legislature to hold the Executive to account has been weakened.

85. The Public Accounts Committee, modelled on that of other Parliaments to scrutinize government's financial and administrative performance, is underfunded. Its remit as a fearless interrogator of government business has been undermined by the presence of two government ministers or more who are appointed to it as full members to "scrutinize" the performance of the government to which they belong at Cabinet level. Their divided loyalties undoubtedly affects the ability of the Committee to hold the Executive to account.

86. It is therefore for consideration that for Parliamentary scrutiny of the executive to be meaningful the Public Accounts Committee – and other Parliamentary Select Committees of the House – should be given the manpower resources, funding, research facilities and other means to hold the government to account. Specifically, its composition should not include MPs or Ministers where a conflict of interest might arise. In the case of the Public Accounts Committee, the National Audit Office, which is its servant, should be allocated greater resources.

Full-time Members of Parliament

87. More importantly, however, and perhaps the absolute key to strengthening the autonomy of Parliament, **it is for consideration** that Parliamentary business cannot be transacted efficiently or effectively when the House of Representatives is a part-time Parliament, when MPs are known to absent themselves on a regular basis from attending the House and when Parliament has to rely almost exclusively on the Executive for it to function.

88. It is therefore for consideration that by having a Parliament made up of full-time MPs whose loyalty is first and foremost to the House and to the people who elected them to represent them will lead to a more potent and effective Parliament. It will ensure that Parliament can be in session for longer periods, Select Committees can be established on a wider range of subjects than those currently available, Parliament can draft its own laws, and petitions submitted by the people can be discussed by the House and remedies provided. **It is also for consideration** that there should be specific days allocated for Debates by back-bench MPs.

89. A disadvantage of having full-time Members of Parliament, however, is that they might be reluctant to give up a lucrative professional practice in order to serve on a full-time basis, thus further diluting the quality of individuals willing to stand for Parliament. **It is therefore for consideration** that for a Parliamentary system to attract full-time MPs a higher salary should be paid, linked perhaps to the pay of senior civil servants in the public service.

Technocratic Ministers in Cabinet

90. There is currently no way that a Cabinet can include a Minister who has not first been elected to the House of Representatives. **It is for consideration** that the Constitution should be amended to allow for a limited number of Ministers in Cabinet to be selected for inclusion by the Prime Minister based on a judgment about their technocratic contribution to improving the governance of the country. They would sit in the House of Representatives and answer to Parliament, but would have no vote on parliamentary business.

Anti-Corruption Measures, Transparency and Accountability

91. Maladministration and cronyism in the running of institutions has a corrosive effect on national institutions, as well as on the ability of society to curb perceived or real threats to its integrity, chief of which is corruption. One result has been the weakening of public accountability and public trust, both at the administrative and political levels.

92. Over the years, and under governments of both Parties, a wide range of public institutions have been created. They are supposedly autonomous or independent of the government in the day-to-day running of their operations. They have taken the form of corporations, public companies under the commercial company laws, agencies, boards, foundations, authorities, commissions, and so on, led by political appointees carrying out the instructions of their political masters in a non-transparent way. On the surface, the Public Service is independent and professional. In reality, it has become over-bureaucratic, dependent on political appointees for real decision-making (and implementation) to occur, and controlled more than ever by their political masters.

93. It is for consideration that the best approach to curbing corruption and conflicts of interest would be one that seeks to establish a more transparent framework for the functioning of public institutions, by strengthening the ancillary laws through which they can operate and thereby narrowing the

margins for bad faith. The Protection of the Whistleblower Act, rules on party political funding, consumer protection and anti-corruption measures need to be introduced, or considerably strengthened where they already exist.

94. Malta's Permanent Commission Against Corruption has never been given the teeth - a fully-fledged investigative arm with wide-ranging powers - to implement its role effectively. **It is for consideration** that, in line with the recommendations of the Justice Reform Commission, the Permanent Commission Against Corruption should be wound up and its functions assigned to a new, independent Office of the Prosecutor General which will be given the teeth to act independently in cases of corruption and which would also assume the criminal prosecution functions of the Attorney General. **It is further for consideration** that since successive governments have demonstrated they cannot be relied upon to tackle corruption, the Constitution should have binding anti-corruption safeguards written into it by formally recognising the independent Prosecutor General.

Local Councils and Powers of Local Government

95. The way in which the creation of a layer of local government has progressed over the last two decades illustrates the difficulties when governance structures are deepened. While it is beneficial that the creation of local councils since the early 1990s has motivated more citizens to become involved in the management of local affairs, recent developments have seen what started as an exercise in subsidiarity and devolution turn into an exercise in decentralisation, through a redefinition of Local Council powers which makes the Councils effectively subservient to the central authorities.

96. It is for consideration that although Local Councils are now an established level in the governance of Malta, the standards of delivery of local services and their administration across the board leave much to be desired. An independent review – taking due account of the Council of Europe's European Charter of Local Self-Government - to take stock of the local government experience to date, its size and structure and to propose appropriate improvements to the formula for funding appropriations from government (including the possibility of limited local tax-raising powers) should be put in place. **It is also for consideration** that such a review should reassess the current arrangements for holding local council elections as part of the re-examination of the electoral law proposed in paragraphs 98 to 100 below. It

should also examine the advantages and disadvantages in governance and EU funding terms of forming a regional government for Gozo.

The Separation of Church and State

97. Malta's constitutional position is that of a liberal, secular, Parliamentary democracy, albeit one which recognises the Catholic faith as the religion of Malta. **It is for consideration** that the integrity and content of Article 2 of the Constitution should not be made the subject of debate (which would inevitably be divisive), but that the "primacy of honour" of the Catholic religion as a defining component of national identity should be maintained. However, **it is for consideration** that constitutional recognition should also be explicitly given to the changed heterogeneous, multi-faith nature of Maltese society today and the acceptance of those of other faiths or of none, by formally enunciating the principle of the separation of the State from the Church.

Electoral Law and Emancipating the Constitution from the Tutelage of the Two Major Political Parties

98. In the last fifty years, except very briefly, only two parties have ever been elected to Parliament. Malta has effectively been ruled by a two-party hegemony. This has happened for two reasons. First, the political spoils available are inevitably constrained. Secondly, the two main political parties do not limit the number of candidates who contest constituencies. Thus, they allow for competition between their own candidates. This gives most aspiring politicians an entry, or at least the prospect of entry, into the Parliamentary ranks of either party as they are not excluded from Party lists by virtue of there being some upper limit to the number of candidates who can contest a given constituency. There is therefore little incentive for the more promising candidates, who would otherwise have been left out of a party's ranks, to devote time and resources to the creation of some new political formation.

99. It is for consideration that alternatives to the current electoral system for local, parliamentary and European elections should be considered including, *inter alia*, putting in place the least intrusive and most cost-effective arrangements for local council elections and lowering the threshold for election to Parliament to, say, 5% or 8%, thus opening the electoral field to healthy competition from other political Parties. **It is for consideration** that equivalence in proportionality between votes obtained by a party and the

number of its MPs should be applied to the point where a certain percentage of votes nationwide should translate into Parliamentary seats, even if the party concerned has not won a single constituency, though nation-wide it has obtained a certain percentage.

100. The real issue is that changes introduced in 1987, 1996 and 2007, have served to reduce the margins for gerrymandering by the two major parties to undermine the rules of the electoral game as set by the Constitution, but this has undoubtedly left a significant minority of the electorate disenfranchised and unrepresented in Parliament. **It is for consideration** that the proportion of votes needed for election to Parliament should be reduced and the current thirteen-district constituency arrangement should be replaced by one district as is already the case in European Union Parliament elections. This notwithstanding, **it is also for consideration** that, given that every system has its shortcomings, a careful appraisal should be conducted before it is adopted to ensure that on the balance of advantage the most democratic solution is achieved.

The Ombudsman

101. The Ombudsman is the citizen's defender. The Ombudsman Act was enacted nearly twenty years ago. The office was recognised by the Constitution in 2007. The 1995 enactment was substantially amended in 2010 to provide for the establishment of Commissioners for Administrative Investigations within the Office of the Ombudsman. This notwithstanding, there has been no comprehensive review of the Ombudsman Act since its enactment. As highlighted in paragraph 25 above, the Ombudsman has recommended that the right to a good public administration be enshrined as a fundamental right in the Constitution. This implies that the State should continue to be liable for its actions and that an individual has a right to seek redress for damages suffered under it.

102. It is for consideration that the constitutional status of the Ombudsman should be strengthened to ensure that the Constitution regulates, as it does in the case of the Auditor General, the Ombudsman's method of appointment, term of office, security of tenure, funding of the office and the conditions of service.

103. It is also for consideration that further use of the Ombudsman institution should be made both by the Executive and the Committees of the House. There is a great advantage in requesting the Ombudsman to carry out an investigation because his is a Parliamentary office independent of government and enjoys the trust of the public at large. While the Ombudsman's recommendations should continue to be non-binding, there should be a mechanism in place to address those Ombudsman recommendations which remain unimplemented. As the Ombudsman is a Parliamentary Officer, it should be the House of Representatives which should decide whether the unimplemented recommendations of the Ombudsman should be enforced or not. **It is for consideration** that the House Business Committee should debate unimplemented recommendations, acting as a revising committee.

104. Moreover, there might be cases where there is disagreement between the Ombudsman and the Administration as to the interpretation of laws and regulations. In such a case, Parliament is not the most competent forum to rule on this matter. A court or tribunal, such as the Administrative Review Tribunal, would perhaps be better placed to resolve such disputes. **It is for consideration** that this judicial remedy should be made available in the interest of citizens' rights.

The Security Services Commission

105. It is for consideration that the current lack of accountability of the Security Services should be rectified. Currently, warrants to investigate national security issues are vested in the power of Ministers, specifically the Minister for Home Affairs and National Security. **It is for consideration** that, in line with the rulings of the European Court of Human Rights, this power should in future be made subject to judicial review through the issuing of judicial warrants and by expanding the powers of the Commissioner responsible for hearing complaints about the Security Service.

Formation of an 'Executive Services Commission'

106. It is for consideration that it would make better administrative sense to incorporate the current Public Service Commission and the Merit Protection Commission into a beefed up Executive Services Commission. Its role would be to supervise all top-level public service appointments, to investigate

misconduct in the public service and to hear appeals. But **it is also for consideration** that as part of a structural and sustained Public Service Reform process led by the Head of the Public Service, the operational mandate of the Executive Services Commission (especially where this concerns leadership development or imposes limitations on appointments to managerial positions), should be reviewed. Moreover, it should be given an independent scrutiny role of top-level appointments in the public service and government agencies and entities, acting as an administrative arm of the Council of State proposed in paragraphs 45 to 48 above.

The *Inter-regnum* Between One Parliament and its Successor

107. Several administrative and Constitutional *lacunae* have arisen as a result of the *inter-regnum* that occurs between the dissolution of Parliament and the formation of a new government and the prorogation of Parliament.

108. First, when Parliament is dissolved, so are all its standing and select committees. One such Committee discusses European Union matters. Its meetings cannot be halted simply because the House of Representatives is not in office for a number of weeks, as occurred in the run-up to the general election in 2013. During the *inter-regnum*, European Union measures cannot be discussed and this could prejudice Malta's stand on such issues. **It is for consideration** that the current three month period is too long for an electoral campaign as this renders Parliament and its committees non-functional. **It is therefore for consideration** that the three month period should be reduced to a maximum of six weeks. Moreover, **it is for consideration** that the Foreign and EU Affairs Committee (or the Council of State, if one is formed – see paragraph 46 above) should continue to function notwithstanding Parliament's dissolution so that Malta's position is not prejudiced by any EU decision which is taken during this period.

109. Secondly, as things stand, it is not possible for the House of Representatives, once dissolved, to be re-called to debate the removal of a Judge or Magistrate from office. On the assumption that it is the right forum for such decisions (but see also paragraphs 45 to 48 above), **it is for consideration** whether Parliament should be convened to discuss a judicial removal motion, more so where, for instance, a court of criminal jurisdiction

has found the Judge or Magistrate conclusively guilty of a criminal offence related to the functions of his office but that member of the judiciary refuses to resign.

110. Third, the Constitution allows for the recall of a dissolved parliament in the case of war, when the democratic institutions are threatened by subversion, or in the case of a state of public emergency. But **it is for consideration** that today there may be other situations, apart from these extraordinary cases, where Parliament might need to be recalled (for example, in the case of approving a budget, filling important vacancies in the offices of state, debating motions of an urgent nature, or approving EU measures ranging from treaty provisions to a late transposition of a European Union directive combined with infringement proceedings commenced by the EU Commission against Malta, or other emergencies).

111. Fourth, each time a new Parliament is prorogued the Standing Orders are suspended and remain suspended normally during the entire legislature. **It is for consideration** that this is untenable and illogical. Parliament should revise the Standing Orders and, once approved, it should stick by them. It should only be in very exceptional circumstances that the House of Representatives should be allowed to suspend the operation of Standing Orders and, when they are so suspended, they should not be suspended for more than a limited duration and for specifically defined reasons.

Integrity of those in Public Life and the Ministerial Code of Ethics

112. Ethics in public life are crucial to keeping the entire system of government clean and decent. The Prime Minister has made transparency, accountability and public integrity one of the fundamental themes of his new Administration. He has moved to revise the Ministerial Code of Ethics. A Ministerial Code should set out clearly the principles underpinning the standards of conduct to be expected of Ministers and Parliamentary Secretaries.

113. One of the questions which has arisen in the current revision is whether Ministers and Parliamentary Secretaries should be allowed to carry out paid work whilst in office. Although the current Code prohibits this and it may be agreed that this approach makes good sense in ensuring no conflict of interest arises between private work and public duties, **it is for consideration** that there

should be a three month period allowed for Ministers and Parliamentary Secretaries after assuming office to get their houses in order. After the expiration of three months, they should no longer be permitted to carry out any private work, whether paid or unpaid, governmental or voluntary.

114. The integrity of all those in public life should be guided by the same principles. They are expected to behave in a way that upholds the highest standards of propriety including, importantly, ensuring that no conflict arises, or appears to arise, between their public duties and their private interests. They are under a paramount duty to comply with the law, to uphold the administration of justice, and to protect the integrity of public life and service.

115. It is for consideration that a revision of the Code should also lay down the clear principles to which Ministers and all those in public life are expected to adhere. These should include commitments to probity and integrity; selflessness, impartiality and the firm desire to render to everyone that which is a person's due; objectivity, a respect for reason and an appreciation of the wider public good; accountability; transparency and openness; and honesty, equity and fairness.

116. The proposed appointment of a Parliamentary Commissioner for Standards in Public Life will be a major step forward and **it is for consideration** that the Constitution should duly recognise the importance of his or her functions.

A Word of Caution about Institutional Changes

117. Despite the institutional areas considered above and the number of possible amendments that might follow, it is our judgment that the Constitution has served Malta well. The institutions it defines have been robust and adaptive. Regrettably, there has been a tendency for successive Administrations to conclude that institutions should be replaced or reformed, rather than ensuring that the available institutions to organize economic and social behaviour are operated fairly, efficiently and prudently.

118. It is for consideration, therefore, that rather than blaming institutional failures, there has mostly been a failure in administering these institutions properly. This has been especially pertinent to those organisations or government entities, such as the Planning Authority or the Broadcasting

Authority, which are meant to be safeguarded against political interference. **It is therefore for consideration** that in proposing institutional change on the lines highlighted in this report, care should be exercised to strike the right balance between the enactment of laws incorporating Constitutional prescription and those areas where regulation by ordinary legislation will suffice – or even simply by taking the necessary steps to improve standards of professionalism, leadership, administration and management in government.

PART IV: CONSIDERATION OF POLITICAL ISSUES

National Days

119. Malta currently has five national days. To have so many is not only economically wasteful, but also distracts and confuses Malta's historical and cultural identity. **It is for consideration** that these should at least be reduced to two: Independence Day and Republic Day – although agreement on just one national day would be preferable.

Neutrality and Non-alignment

120. Article 1 (3) of the Constitution on neutrality and non-alignment, as currently worded, is anachronistic and out-dated given the collapse of the Superpower duopoly in world affairs. **It is for consideration** that if Malta is to retain its neutrality the clause should be amended to reflect present realities, while still retaining Malta's position as a neutral country within the European Union supporting the EU's Common and Foreign Security Policy.

Party Political Funding

121. Proposals for new rules on party political funding (Bill No 59: Financing of Political Parties Bill) have been submitted. **It is for consideration** that once agreement on the ground-rules for party financing have been reached, with clearly regulated and enforceable rules, a reference to their adherence should be included in the Constitution.

PART V: CONCLUSIONS: RECTIFICATION OR REDESIGN?

122. This report has attempted to identify the salient Constitutional issues which may need reconsideration in the light of practical experience and Malta's economic and political development of the last five decades of constitution-making.

123. The key question is whether, given what this report has highlighted, a new Constitution should be written to replace the existing one, or whether it would suffice simply to propose further focused amendments with a view to updating the Constitution to today's needs. Does Malta's Constitution require complete re-design or, simply, rectification, amendment and amplification?

124. The answer to the question depends essentially on the range and depth of the changes to be made to the Constitution. Constitutions represent the institutional continuity of the State. The promise of a Constitution is that the rules of the game are predictable. The more contingent those rules appear, the less confidence citizens (including foreign firms contemplating foreign direct investment in Malta) have in their ability to plan and invest for the long term. The more often rules are altered, the less seriously citizens will take them, and without proper rules democracy is undermined.

125. The current Constitution, notwithstanding some deficiencies, has served Malta well for the last fifty years. It is difficult to make a valid case for the complete re-writing of all, or even a major part, of its provisions. However, even if a radical redesign of the Constitution were proposed as a result of considerations of major institutional structural changes covered in Part II of this report, this would not imply that several existing provisions of the current Constitution should not find their place in a new one.

126. It is the judgment of this report that the Constitution should be amended and amplified, but there is no need for a fundamental redesign. In our view, there is no requirement for a different Constitutional structure to the one that works today, or for a wholesale re-writing of the Constitution.

127. What is essential, however, is that whichever method is chosen, there should be no legal break whatsoever with the Constitutional continuity established by the last fifty years. The Constitution has neither collapsed, nor is it discredited. The crux of the argument is that there should be no legal break with the existing Constitution since such a step would not accurately reflect the reality of Malta as a stable European country that has developed its sovereign Constitutional framework in a democratic manner over a period of half a century without a break since it achieved independence.

128. As former Prime Minister, Dr Alfred Sant said: “It is difficult to see how the institutions designed by the Constitution over fifty years ago can be faulted, except that they are not safeguarded against bad faith. But can they be? [Former] Chief Justice J. J. Cremona [the father of the Constitution], wisely concluded his study of Maltese constitutions with this remark: ‘...*It is well to remember that no Constitution operates in a vacuum... What essentially secures the good working of a Constitution in a democratic society is a proper sense of responsibility, allegiance to the rule of law and sensitiveness to the just demands of liberty on the part of those who govern, coupled with constant, full and unrelenting vigilance on the part of the governed*’”.

129. It would be sensible, therefore, to start from the premise that those Constitutional provisions which have withstood the test of time should be retained. There is a wealth of case-law, doctrine and State practice linked to these provisions and it would be irrational to scuttle them simply for the sake of change. But those provisions in the current Constitution that have failed, or not worked as intended, should be rectified and re-written. The principle of legal certainty requires that the law should be clear and where provisions are clear they should be retained and continue to be applied. The Constitution should be viewed as one whole document. **It is for consideration** that a holistic approach to constitutional law change should be adopted.

130. However, given the extensive amendment which may be undertaken, the above does not preclude a political approach and language which deems the exercise to be in effect the launch of a “Second Republic”. **It is therefore for consideration** that in such a context great care should be exercised to emphasise that the term “Second Republic” is understood to mean a *de facto* evolution and development of the Maltese Constitutional order without any break in the *de jure* reality.

PART VI: THE WAY FORWARD: RECOMMENDATIONS FOR A CONSTITUTIONAL CONVENTION

131. As this report has highlighted, there is an undoubted need for a review of the Constitution. Much has changed in the last fifty years, not least Malta's accession to the European Union. The way in which a Constitutional Convention tackles these issues will need very careful consideration, great tact and the most delicate choreography. It is hoped that the assessments in this

report will make a contribution to this process by stimulating an intelligent and well-founded public debate on the subject.

Phases of the Constitutional Convention

132. The government is committed to holding a Constitutional Convention. It is not yet clear what shape the Convention will take. However, **it is for consideration** that the Convention should consist of broadly three phases:

- First, a period of listening to civil society and to delegates from the established institutions following the wide publication of this report.
- Secondly, deliberation by a group of experts, comprising MPs, Mayors and representatives of civil society and non-governmental organisations, as well as, importantly, experts in Constitutional law, public policy and political science, together with former Presidents, Prime Ministers, Chief Justices and Speakers of the House who know the Constitution at the rock-face.
- Thirdly, in the light of this period of deliberation, the drafting of proposals for change by the ‘Group of Experts’ in conjunction with the Parliamentary Select Committee on the Constitution.

Organisation and Logistics of the Convention

133. As to the organisation and logistics of the Convention, **it is for consideration** that there are four points which should be addressed at the start.

134. First, the importance of having somebody of stature, political independence and objectivity to over-see the Convention will be crucial to its success. **It is for consideration that** the serving President should not be involved since she could find herself facing possible conflicts of interest, for example when discussion turns to the powers of the President. But the selection of a former President of the Republic, a former Speaker or a former Chief Justice, Judge or similar to over-see the Convention would appear appropriate.

135. The presence of a person of stature to lead the Convention will help defuse any political heat which might otherwise threaten to undermine it. However, the appointment of a strong Head to over-see the Convention does

not preclude other roles from being undertaken. For example, it would make good administrative sense to select somebody to perform a supplementary coordinating role on the ground as Secretary General of the Convention, who could also be a leading figure in some aspects of the important “listening stage” of the process.

136. Secondly, it is equally clear that the discussion during the Convention should be under-pinned by a sound assessment of where the Constitution stands today, what are its strengths and weaknesses and how it might be improved for the greater good of the country. It is hoped that the assessment in this report will help to set a base-line for discussion and stimulate an informed debate about key issues. It is no good trying to cherry-pick aspects of the Constitution – whether it be, say, neutrality, or national days, electoral reform or public broadcasting, to mention just a few items which have caught the public eye – without at the same time recognising that each action has an equal and opposite reaction. The Constitution has to work as an organic whole.

137. The Convention should listen carefully not only to those in the academic and legal fields who have made a careful study of the Constitution, but also hear from those who have worked with it at the political coal-face: our former Presidents of the Republic, Prime Ministers, Chief Justices and Speakers of Parliament. They, more than most, know not only where the wrinkles lie in our Constitution, but also the political realities of any proposed changes.

138. In embarking on this project, it is important to recall that one tampers with a Constitution at one’s peril. In matters of the Constitution of Malta it might be wise for the Constitutional Convention to be guided by the old adage: “When it is not necessary to change, it is necessary not to change”.

139. Thirdly, the selection of attendance of delegates to the Convention will need very careful consideration. It should attract as wide a representation of Maltese civil society as possible, but must not be so large as to be unmanageable. It should work to a clear schedule lasting several weeks or months and focus on specific areas, Articles or themes within the Constitution. It cannot simply be a brain-storming session, but must be able to concentrate on particular aspects and make clear proposals, guided by experts in those fields.

140. Fourth, it is essential that, once the Convention has taken place and a distillation of all the ideas and proposals which have emerged from it has been

made by a Group of Experts, the Parliamentary Select Committee on the Constitution should take the matter forward to the next step, tasked with proposing the necessary amendments to the Constitution.

Need for a Referendum?

141. It may be that a referendum on the issue will be needed. Some might argue that the Constitution, as the country's supreme law, is a matter for the people to approve through a popular vote to give it legitimacy. But **it is also for consideration** that matters of such complexity as amending a Constitution do not lend themselves to such a course of action, as the botched referenda on the EU Constitution over a decade ago demonstrated. In any case, a consultative referendum should not provide a substitute for the amendment of the Constitution in accordance with its own current provisions, including where necessary, a two-thirds majority in the House of Representatives.

142. In the final analysis, it must be hoped that if the Constitutional Convention and the Group of Experts have done their work properly this should not be necessary since a measure of political agreement should by then have emerged on the sensible way ahead. Indeed, **it is for consideration** that if political agreement has not proved possible, not only will the Convention have been a failure, but attempted wide-ranging amendments to the Constitution could prove risky and destabilising. It would be far better in such circumstances to abandon the project and stick with the tried and tested processes under the current Constitution.

ANNEX A: Arrangement of Articles under the Maltese Constitution

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ANNEX A

ARRANGEMENT OF ARTICLES UNDER THE CONSTITUTION OF MALTA

ARRANGEMENT OF ARTICLES

CHAPTER I

The Republic of Malta

Article

1. The Republic and its Territories. 2. Religion. 3. National Flag. 4. National Anthem. 5. Language. 6. Constitution to be supreme law.

CHAPTER II

Declaration of Principles

7. Right to work. 8. Promotion of culture, etc. 9. Safeguarding of landscape and historical and artistic patrimony. 10. Compulsory and free primary education. 11. Educational interest. 12. Protection of work. 13. Hours of work. 14. Rights of women workers. 15. Minimum age for paid labour. 16. Safeguarding labour of minors. 17. Social assistance and insurance. 18. Encouragement of private economic enterprise. 19. Protection of artisan trades. 20. Encouragement of co-operatives. 21. Application of the principles contained in this Chapter.

CHAPTER III

Citizenship

22. Persons who become citizens on appointed day. 23. Persons entitled to be registered as citizens. 24. Persons naturalized or registered as resident before appointed day. 25. Acquisition of citizenship by birth or descent by persons born on or after appointed day.

26. Marriage to citizen of Malta. 27. Dual citizenship. 28. Commonwealth citizens. 29. Criminal liability of Commonwealth citizens. 30. Powers of Parliament. 31. Interpretation.

CHAPTER IV

Fundamental Rights and Freedoms of the Individual

32. Fundamental rights and freedoms of the individual. 33. Protection of right to life. 34. Protection from arbitrary arrest or detention. 35. Protection from forced labour. 36. Protection from inhuman treatment. 37. Protection from deprivation of property without compensation. 38. Protection for privacy of home or other property. 39. Provisions to secure protection of law. 40. Protection of freedom of conscience and worship. 41. Protection of freedom of expression. 42. Protection of freedom of assembly and association. 43. Prohibition of deportation. 44. Protection of freedom of movement. 45. Protection from discrimination on the grounds of race, etc. 46. Enforcement of protective provisions. 47. Interpretation of Chapter IV.

CHAPTER V

The President

48. Establishment of the office of President. 49. Discharge of President's functions during vacancy, etc. 50. Oath to be taken by the President.

CHAPTER VI

Parliament

PART 1

Composition of Parliament

51. Establishment of Parliament. 52. Composition of the House of Representatives.

53. Qualifications for membership of House of Representatives. 54. Disqualifications for membership of House of Representatives. 55. Tenure of office of members. 56. Voting at Elections. 57. Qualification of voters. 58. Disqualification of voters. 59. Speaker and Deputy Speaker. 60. Establishment

of Electoral Commission. 61. Electoral divisions. 62. Filling of vacancies. 63. Determination of questions as to membership. 64. Clerk to House of Representatives and his staff.

PART 2

Powers and Procedure of Parliament

65. Power to make laws. 66. Alteration of this Constitution. 67. Regulation of procedure in House of Representatives. 68. Oath to be taken by members of House of Representatives. 69. Presiding in House of Representatives. 70. Quorum in House of Representatives. 71. Voting. 72. Mode of exercising legislative powers. 73. Restriction with regard to certain financial measures. 74. Language of Laws.

PART 3

Summoning, Prorogation and Dissolution

75. Sessions of Parliament. 76. Prorogation and dissolution of Parliament. 77. General elections.

CHAPTER VII

The Executive

78. Executive authority of Malta. 79. The Cabinet. 80. Appointment of Ministers. 81. Tenure of office of Ministers. 82. Allocation of portfolios to Ministers.

83. Acting Prime Minister. 84. Temporary Ministers. 85. Exercise of functions of President. 86. Exercise of Prime Minister's functions. 87. President to be informed concerning matters of government. 88. Parliamentary Secretaries. 89. Oath to be taken by Ministers. 90. Leader of the Opposition. 91. Attorney General. 92. Permanent Secretaries and heads of government departments. 93. Prerogative of mercy. 94. Secretary to the Cabinet.

CHAPTER VIII

The Judiciary

95. Superior Courts. 96. Appointment of judges. 97. Tenure of office of judges. 98. Acting Chief Justice and acting judges. 99. Inferior Courts. 100. Magistrates. 101. Oaths to be taken by judges and magistrates. 101A. Commission for the Administration of Justice.

CHAPTER IX

Finance

102. Consolidated Fund. 103. Authorisation of expenditure from Consolidated Fund. 104. Authorisation of expenditure before appropriation. 105. Contingencies Fund. 106. Public debt. 107. Remuneration in respect of certain offices. 108. Auditor General.

CHAPTER X

The Public Service

109. Public Service Commission. 110. Appointment, etc. of public officers. 111. Principal representatives of Malta abroad.

112. Appointment on transfer in respect of certain offices. 113. Protection of pension rights. 114. Grant and withholding of pensions, etc. 115. Protection of Public Service Commission from legal proceedings.

CHAPTER XI

Miscellaneous

116. Actions on validity of laws. 117. Prohibition of certain associations. 118. Broadcasting Authority. 119. Function of the Broadcasting Authority. 120. Employment Commission. 121. Powers and procedure of Commissions. 122. Resignations. 123. Reappointments, etc. 124. Interpretation.

SCHEDULES TO THE CONSTITUTION

FIRST SCHEDULE SECOND SCHEDULE: Oaths Of Office THIRD SCHEDULE: Oath of Allegiance FOURTH SCHEDULE: List of Commonwealth Countries other than Malta

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