

PD's SECOND BRIEF ON CONSTITUTIONAL REFORM

A seed for long term change

Partit Demokratiku's role in a multi-party parliamentary system is politically vital, and more so in this reform. **We have a duty to highlight national issues that the longstanding two party system misses.**

As representatives of the people, we are committed to represent public interests to the Steering Committee, even though PD is of the opinion that this Committee is discussing issues which should not be in its remit.

PD is all for a culture of mature political compromise and consensus, keeping in mind Malta's interests foremost.

As a sign of political goodwill we expect that this Steering Committee suggests that the next President of the Republic be appointed by a two-thirds parliamentary majority and a Council of State be established.

PD has **full confidence in Her Excellency** as she has the integrity and competence to steer this reform away from deform.

This additional brief complements our first brief (PD Brief on Constitutional Reform) and delves into the requests made by Her Excellency.

Partit Demokratiku is hereby inviting you so that we be seeds of change.

A) ROAD-MAP

The road to hell is paved with good intentions.

A.1 Caution

Mutual trust and respect must be built by all political parties for a constitutional reform to succeed. We have an obligation to steer the Roadmap of Constitutional Reform away from a process of a fake consultation and a false positive approach. Our ideals should be those of Malta and public interests.

PD has expressed this in very clear terms and will not mince words. If the reform is going to be left in the hands of government or is in for a quick political fix or its ongoings resemble those of a back room deal, the reform would not be sticking to best practices.

We note that the call for Constitutional reform has been launched five months away from the appointment of a new President and at a time when the Prime Minister has stated that he intends to step down from his post. Let us not be constrained by a working process to rush things through, as if we are in search of lost time.

The roadmap needs to be free from the remotest possibility of any political interference or the possibility there of.

Malta must not lose such an opportunity. We are in for a positive approach.

A.2 Priorities

It is imperative to have a **functional** democracy. We need to fix the broken system. This is a foremost priority and has been highlighted in our first brief. This supersedes what **kind** of democracy we want.

To have a functional democracy, Malta needs to address it in an **overarching approach** and not piecemeal.

The three topmost priorities are clear.

- 1 Supremacy of the Constitutional Court;
- 2 The rule of law control system
- 3 Sectorial Fixes.

A.3 The Pathway

A bottom up approach pathway through active citizenship must be the principle that lead the reform and the Constitutional Convention should be the vehicle that will achieve these results with a purpose . It has to be supported by the **Technical and Specialized Committee** composed of local and international experts in Constitution and Democratic Governance. This same team would draft amendments to the Constitution. Members of this Committee should include Constitutional expertise representing the Venice Commission and the EU. It is imperative that we determine this correctly from the onset. (This has been highlighted in our first brief.)

All stakeholders must be actively involved in the consultation process. Political parties should not be prima donnas. (This has been highlighted in our first brief.)

An **informed education campaign**, co-ordinated by the Convention, must address the general public.

In PD's opinion the roadmap is to be divided into three parts.

The objectives and terms of reference of each of the three stipulated periods have to be clearly and specifically determined.

These are:

(i) **Functional Democracy**: Immediate address of the three topmost priorities with a time frame of delivery of no longer than one year. Once done, the Constitution is amended in Parliament.

(ii) **Type of Democracy**: Followed by addressing the rest of the concerns that are undermining our democracy with a timeframe of delivery of not more than one year. Once done the Constitution is amended in Parliament.

(iii) **Updates on Democracy**: Continuous follow-up by the Convention. A bi-annual update report is to be publicly issued.

(Example: the President under an obligation to assess and report on democratic functioning every two years, advised by experts/council of state, and report to Parliament, with suggestions for constitutional updates.)

It is in the forum of such a Constitutional Convention that the input of a vibrant democratic society is cherished. This Convention and Technical and Specialized Committee must have the time to consider what has worked and what has not, both locally and abroad, and with continued feedback from all stakeholders and different sectors.

PD is of the opinion that such a convention may be chaired by the present outgoing president on behalf of the Office of the President.

B) WHAT IS MISSING IN THE VENICE CONVENTION

Partit Demokratiku notes that the terms of reference of the Venice Commission on which it prepared its Malta Report were not broad. The terms of reference were given by Parliamentary Assembly of Council of Europe (PACE). They seem to have been too narrow.

As stated in our first public reaction to the Prime Minister's statement and in our presentations at the Office of the President we do not agree that the Venice Report should have been sent to be discussed by the Steering Committee on Constitutional Reform, as the objectives of this committee should be very different and more focused on defining the inroads of road-map.

PD is still of the opinion that the Venice Commission Report on Malta should be used as a blueprint by a Constitutional Convention, but notes that it does not address the whole scenario of our dysfunctional democracy. It has missed crucial points, notably the rule of law control system. Assistance should be sought from a Technical and Specialized Committee.

It is Partit Demokratiku's opinion that the Malta report by The Venice Convention needs further elaboration on:

a) Point No 2 of PD's twelve suggestions: The rule of law control system

The Constitution is the supreme law of the state and it is an instrument that must be faithfully observed by the three principal organs of the state – the Legislature, Executive and Judiciary. The Constitutional Court's power to annul unconstitutional laws approved by parliament must be immediately installed, as at present the legislature can over-ride the Constitution. Moreover, Government should not have the power to suspend the Constitutional Court.

The Maltese Constitution and the case-law of the Maltese Constitutional Court do not have binding regulatory principles of the rule of law that safeguard a modern democracy. This falls short of European rule of law expected standards.

At present we only have institutional provisions and a human rights system. The objective of such a system is to constraint abuse of power, ensure equal treatment of citizens and

guarantee that public power is used in the public interest. The fact that this system is missing in our Constitution has created the many problems we are identifying to-day.

For the rule of law control system, the best solution to resolve the challenge would be to extend the EU law rule of law control system to cover our national law.

A list of enforceable constitutional principles, amongst others, may include:

principle of equal treatment

principle of justice

principle of good public administration,

principle of legality

principle of separation of powers

principle of transparency

principle to access to justice

principle of judiciary independence

principle of legal certainty

principle of effectiveness

principle of legitimate expectations

principle of proportionality

principle of loyal co-operation between organs of the state

principle of individual ministerial responsibility

principle of pluralism and independence of media

principle of human dignity and rights

principle of precaution

principle to safeguard our common natural and architectural heritage

principle of Constitutional interpretation

principle of devolution of power in favour of local government

These are the guiding principles of state governance, and which protect public goods including public health and wellbeing.

The most practical and easy thing to do for most of the stated principles so that our Constitution is updated, would be to adopt the rule of law principles of EU. In so doing, our courts will also have to interpret these principles in accordance with the case law of the European Court of Justice.

Those principles that are not part of EU rule of law control system, and these are a minority (eg protection of our natural heritage) the Convention has to be tasked to create a complementary system. Others like the principle of devolution of power in favour of local government will require further deliberation.

b) Point No 3 of PD's twelve suggestions: Judiciary

International best practices must be in place to eliminate structural weakness and conflict of interests. This should include:

- Provisions regulating the independent appointment, promotion, training, discipline and dismissal of the judiciary. This will eliminate possible conflict of interest when judges adjudicate cases against government. Judges and magistrates with past political connections should never be appointed. (<https://rm.coe.int/168066d624>)

- Institutional, administrative and financial independence (similar to Parliament) backed by effective and efficient resources to minimize court delays. Malta has the poorest EU record in court delays. (<https://rm.coe.int/168066d624>)

c) Point No 4 of PD's twelve suggestions: Media (fourth estate)

There are no Constitutional requirements or safeguards to protect pluralism and the independence of the media.

- The Broadcasting Authority lacks a true independent function that should merit such an impartial institution. This needs redress. The current appointment of the members of the Broadcasting Authority is not made in the public interest but in the interest of the two major political parties. The Broadcasting Authority has been rendered as a political partisan institution. Moreover, it is appointed or dismissed as decided by the Government of the day.
- The Public Broadcaster is an instrument of propaganda in the hands of government. The Board of Directors of PBS and the Editorial Board are appointed by the Minister.
- Political media stations are presenting unbalanced and bias programmes. This is a critical problem in the function of the Fourth Estate. Like the rest of Europe, political parties should be prohibited from owning, managing or controlling stations.
- Safeguards must be set up in advertising spending by government.
- Freedom of information needs redress.
- A media Ombudsman needs to set up.

d) Civil Society (Third Sector). This is to be incorporated as point 13 of PD's proposals.

NGOs, community and pressure groups, unions, charitable organizations, professional associations, sports organization, festa clubs and foundations are all part of civil society that have the power to raise concerns, influence government policy, create meaningful dialogue, hold institutions to account, give power and offer services to the marginalized, encourage active citizenship and much more.

A characteristic of our culture are our voluntary organizations that organize community feasts. These give a cultural identity. Their identity should be protected.

The independence of this third sector is crucial as a pillar to democracy.

e) Point No 7 of PD's twelve suggestions: Police and public service

Politicization of the police force has been a longstanding and serious problem. The Police Commissioner should never be politically appointed by government and promotions within the police force should be based on meritocracy. Political direction may be given but not complete take-over.

The same goes for the Civil Service and public sector. These have been taken over by the political system.

f) Point No 6 of PD's twelve suggestions: Constitutional bodies

All Constitutional bodies (eg Broadcasting Authority, Commission Against Corruption, Employment Commission, Public Service Commission, etc) and public offices (eg Auditor General, the Data Protection Commissioner, the Head of Security Services, Ombudsman etc) must be above politics and truly independent. They lack safeguards which are necessary for these bodies to be independent and autonomous, and hence removed from direct political control. Moreover, they should not be led by Boards whose majority is appointed by the Prime Minister as this eliminates the necessary checks and balances. (exceptions are the Auditor General, Commissioner of Public Standards, and Ombudsman)

Reports on financial maladministration by the Auditor General and by the Ombudsman are non-binding regulations and are publically perceived as useless as these public offices do not have the built-in legal mechanisms to deliver on the integrity system.

Certain public offices such as the Information and Data Protection Commissioner, the Commissioner of Children the Commissioner for the Promotion of Rights of Persons with Mental Disorders, National Commission Persons with Disability, National Commission for the promotion of Equal Rights between men and women, National Youth Council and Malta Council for Economic and Social Development; and Authorities like the Malta Financial Services, Lotteries and Gaming Authority and Malta Tourism Authority should be established by the Constitution.

It is important that ones a public body is given independence and autonomy this must be counterweighted by provisions on accountability

g) Point No 8 of PD's twelve suggestions: extrapolated to Anti-corruption safeguards

A functional and independent anti-corruption body, separate from the establishment of the Prosecutor's Office (this too needs to be distinct from the Attorney General's role) that can investigate criminality within the police force or AG's office itself. Experience has taught us that we need to guard the guards.

h) Point No 9 of PD's twelve suggestions: Reform in electoral law

The period between dissolution of Parliament and a general election has to be revisited and the undemocratic governance because of incumbency should be regulated.

Moreover, a reform in the electoral law is urgently needed as it is undemocratic. It favours a bi-partisan approach.

i) Point No 11 of PD's twelve suggestions: Environment and green rights

Our environment and its resources, which also includes our natural heritage, must be nurtured, defended and preserved by guaranteeing sustainability, thus safeguarding the well-being of the people for the benefit of present and future generations.

A healthy environment must become a basic Constitutional right and governments must be constitutionally held responsible for any misdoings.

J) Office of the President

The President is not an elected person but an appointed one. The citizens vote for their government. The President should not have executive powers (positive) but we do need a president that has the power (negative) to check that things are done right and to block abuse. A State Council that advises the president is a must.

C) CONCLUSION

The Constitution belongs to the people and Partit Demokratiku has the political will to do what is right in the interest of the people.