INHERENT DEFICIENCIES IN THE CONSTITUTIONAL REFORMS (JUSTICE SECTOR) ACT, 2016: A CASE OF NO STEP FORWARD, TWENTY STEPS BACKWARD?

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Abstract

The Parliament of Malta has on 5 August 2016 enacted a law which amends the Constitution of Malta. It deals primarily with the addition of new provisions regulating judicial appointment, discipline and removal. This paper studies these novel articles of the organic law and concludes that the 2016 amendments are flawed for a plurality of reasons, the most important however being that they breach human rights law, in particular, Article 6 of the European Convention on Human Rights and Fundamental Freedoms. Moreover, the recent constitutional amendments also violate fundamental constitutional doctrines such as those of the rule of law, the separation of powers and the independence of the judiciary. In this respect, these changes are far from being modern, progressive or forward looking. On the contrary, they are a backward step, illiberal and inconsistent with a vibrant democratic society.

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1. Introduction

Malta became an independent state on 21 September 1964[1]. This date was established as the appointed day for Malta's independence from the United Kingdom by Her Majesty the Queen of the United Kingdom, Queen Elizabeth II, in terms of section 2 of the Malta Independence Order 1964[2]. The latter Order was made under the UK Malta Independence Act, 1964[3]. Malta had been a colony of the United Kingdom since 1800 after Napoleon Bonaparte had conquered Malta in 1798 from the Knights of St. John[4]. The 1964 Constitution of Malta regulated judicial appointment and removal but had no provision in relation to day-to-day judicial discipline apart from the sole punishment of judicial removal. The situation changed lately, fifty-two years after independence, when a new amending law was enacted by the Parliament of Malta to change the Constitution in relation to judicial appointment and discipline. No substantial changes were however made recently in relation to judicial removal where the procedure remains very much the same as it obtained way back in 1964. This paper studies the new amendments introduced on 5 August 2016

[1] For a history of the Constitution of Malta, see, for instance, J.J. Cremona, *The Maltese Constitution and Constitutional History Since 1813* (1994); H. Frendo, *Maltese Political Development 1798-1964* (1993); J.M. Pirotta, *Fortress Colony: The Final Act: 1945-1964, Volume I - 1945-1954* (1987); *Volume II - 1955-1958* (1991); *Volume III - 1958-1961* (2001); C. Scerri Herrera, *A Historical Development of Constitutional Law in Malta 1921-1988* (1988); K. Aquilina, *The Legislative Development of Human Rights and Fundamental Freedoms in Malta: A Chronological Appraisal*, in N. A. Martinez Gutiérrez, *Serving the Rule of International Law: Essays in Honour of Professor David Joseph Attard*, First Volume, (2009) 225; M.J. Schiavone, *L-Elezzjonijiet F'Pajjiżna Fl-Isfond Storiku 1800-2013* (Translation: Elections in our Country within a Historical Background 1800-2013) (2013).

[2] Statutory Instrument 1964 No 1398 made on 2 September 1964 at the Court at Buckingham Palace, United Kingdom.

[3] 1964 c 86.

[4] C. Testa, *The French in Malta 1798-1800* (1997).

to the Constitution[5] in order to determine whether the novel judicial appointment and discipline procedure and the slight additions made to judicial removal are a step in the right direction or backward looking. It concludes that, all in all, the new law is riddled with several difficulties notable amongst which are breaches of fundamental human rights.

2. Flaws in the new judicial appointments procedure

On independence, the Queen of the United Kingdom gave the Maltese their Westminster modelled Constitution which has a brief chapter dealing with the judiciary[6]. A Westminster Constitution is one which respects the rule of law and fundamental rights and freedoms including the right to a fair trial, where a person is adjudged by an independent court established by law and where there is a separation of powers. Thus, a judge cannot be both a prosecutor and an adjudicating person at one and the same time. Nor may an adjudicating body first make a appraisal of guilty, then pass on to hear the accused as its judgment would have already been tainted by bias. The Constitution provided, prior to 5 August 2016, that the 'judges of the Superior Courts shall be a Chief Justice and such number of other judges as may be prescribed by any law for the time being in force in Malta'[7]. Judges were appointed 'by the President [of Malta] acting in accordance with the advice of the Prime Minister'[8]. A similar provision is made with regard to the appointment of Magistrates of the inferior courts'[9]. In other words, the judiciary composed of three layers – the Chief Justice, judges and magistrates – were appointed by the government of the day. No consultation was held with the Opposition, the judiciary or other sectors of society. It was very much of a unilateral decision based on political patronage. No evaluation was made of the advocates to be appointed to the bench and Parliament did have no say, nor any involvement in,

[5] An updated version of the text of the Constitution of Malta is available at: http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono. Last accessed on 13 August 2016.

[6] Constitution, Chapter VIII, articles 95 to 101.

[7] Constitution, article 96(1).

[8] Constitution, article 96(2).

[9] Constitution, article 100(1).

such appointments. New judges and magistrates were not grilled before a parliamentary committee, a higher council for the judiciary or some other appointing mechanism. Over time, this selection procedure brought about considerable criticism as it was embroiled in political nepotism, afforded no transparency and accountability in the selection process and was perceived as outdated bearing in mind that the rest of Europe had moved on to a position that the executive organ of the state was no longer involved in judicial appointments, leaving the matter to be determined by independent institutions of the executive, if not of the judiciary itself[10].

The situation was changed only on 5 August 2016 where a new law, the Constitutional Reforms (Justice Sector) Act, 2016[11] was enacted to retain the *status quo* in so far as the appointment of the Chief Justice was concerned, to establish a Judicial Appointments Committee, to give privileged treatment to certain parliamentary offices and public officers over other advocates who are now requested to submit an expression of interest for appointment to judicial office, and who have to be evaluated and interviewed. It further sets out the composition of the new Judicial Appointments Committee and its functions.

Although one would have expected that the August 2016 amendments would have brought in more transparency, accountability and openness in the new judicial selection procedure, a study of new article 96A[12] of the Constitution and the 2016 amendments made to articles 96[13] and 100[14] of the Constitution leave much to be desired. The end result of these amendments is that government had not allowed the judiciary to appoint their own brethren as is the position in continental Europe but has left such power concentrated in the hands of the executive organ of the state with utter disrespect to the doctrine of the separation of

[10] See W. Voermans and P. Albers, *Councils for the Judiciary in EU Countries*, European Commission on the Efficiency of Justice (CEPEJ) (2003), available at: http://www.coe.int/t/dghl/cooperation/cepej/textes/CouncilOfJusticeEurope_en.pdf. Last accessed on 13 August 2016.

[11] Act No. XLIV of 2016.

[12] This article introduces a new provision in the Constitution establishing the composition, functions and powers of the newly constituted Judicial Appointments Committee.

[13] Article 96 of the Constitution deals with the appointment of judges.

[14] Article 100 of the Constitution deals with the appointment of Magistrates.

powers which mandates that the judiciary should self-regulate itself. The reasons why the 2016 amendments are backward looking rather than forward looking follow.

First, in so far as the appointment of Chief Justice is concerned, the August 2016 amendments to the Constitution retain the *status quo ante*. The Chief Justice continues to be appointed by the President on the binding advice of the Prime Minister. There is no need to issue a public expression of interest for prospective eligible applicants to apply. Nor is the Chief Justice grilled before a parliamentary committee, or by the newly established Judicial Appointments Committee or vetted in any other way. Essentially the Chief Justice continues to be appointed in the same way as other political appointees. Nor is the Leader of the Opposition consulted in this constitutional appointment to the top judicial office in Malta. Like when appointing chairpersons of public sector bodies, it is within the government's absolute and exclusive prerogative to decide whom to appoint Chief Justice. The main difference lies in the fact that the chairpersons are appointed for a limited period of time whilst the Chief Justice is appointed until retiring age, that is until sixty-five years of age[15]. No judicial evaluation of the proposed Chief Justice's credentials need be made by the Judicial Appointments Committee[16]. The situation is further compounded by the fact that the Chief Justice may be chosen from amongst advocates, not from amongst judges, who would have probably at least already been subjected to an evaluation procedure[17]. However, if an advocate is appointed, via political patronage, to the Office of Chief Justice s/he bypasses the whole evalua-

[15] Constitution, article 97(1).

[16] Article 96A(6)(a) of the Constitution, when listing the functions of the Judicial Appointments Committee, provides that the Committee is 'to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice)'.

[17] For a person to be appointed Chief Justice, s/he may be appointed either from the judiciary (from amongst judges or magistrates, though there have been no appointments of Chief Justices from the magistracy) and from advocates (whether in the employ of the state or in private practice). But the Constitution establishes only one criterion, a quantitative one, for judicial appointment in article 96(2): 'A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta, or has partly so practised and partly so served'.

tion system[18]. That is totally conducive to bad governance because it establishes a twofold system of appointment: one which requires judicial evaluation and one which does not require judicial evaluation. And to compound matters, it is the highest office in the judiciary – that of Chief Justice – which does not require judicial evaluation.

Second, the Judicial Appointments Committee is composed, *inter alia*, of the Auditor General[19] and the Commissioner for Administrative Investigations (that is, the Parliamentary Ombudsman)[20]. In the case of the President of the Chamber of Advocates there is a provision which states that s/he is debarred from being appointed to judicial office unless at least two years would have already expired since he last sat on the Judicial Appointments Committee[21]. But for the Auditor General and the Parliamentary Ombudsman – should they be advocates with at least twelve years of professional practice in Malta – no such two year qualification is required: they can be appointed a member of the judiciary on the very same day they resign from Auditor General or Ombudsman. Again, it is not conducive to good governance for two members of the Judicial Appointments Committee to be ap-

[18] The evaluation system is found in article 96A(6)(c) of the Constitution which provides that, amongst the functions of the Judicial Appointments Committee, there is that 'to conduct interviews and evaluations of candidates for the abovementioned offices [of judge and magistrate but not of Chief Justice] in such manner as it deems appropriate and for this purpose to request information from any public authority as it considers to be reasonably required'. By 'judicial evaluation', in this paper, I intend all the functions taken together as referred to in this constitutional provision.

[19] The office of Auditor General is established by article 108(1) of the Constitution. The Auditor General is a public officer: 'There shall be an Auditor General whose office shall be a public office'.

[20] The office of Ombudsman is established by article 64A(1) of the Constitution. The Constitution does not establish this office as a public office. However, the Ombudsman Act, Chapter 385 of the Laws of Malta, establishes the Ombudsman in article 3 as an officer of Parliament: 'There shall be appointed as an Officer of Parliament a Commissioner for Administrative Investigations to be called the Ombudsman'. Further information on the Office of the Ombudsman is available at www.ombudsman,org.mt.

[21] The proviso to section 96A(1) of the Constitution reads as follows: 'Provided that the President of the Chamber of Advocates shall not, before the expiration of a period of two years starting from the day on which he last occupied a post on the [Judicial Appointments] Committee or he was last a Committee member, be eligible to be appointed a member of the judiciary'.

pointed members of the judiciary without a breathing space of time having elapsed, giving the impression that they have appointed themselves to the bench simply because they are members of the Judicial Appointments Committee thereby bypassing the public call for expression of interest application procedure. This procedure does not augur well in so far as transparency is concerned. One asks: why is the President of the Committee of Advocates afforded a different treatment and granted second class status when compared to the parliamentary and public officers mentioned above?

Third, the new constitutional provision establishes a twofold category of applicants for judicial office, the privileged and the underprivileged. If a person occupies the office of Attorney General[22], Audit General, Ombudsman or Magistrate, then s/he forms part of an elitist category of parliamentary and public officers which are afforded different privileged treatment from the underprivileged category of advocates which have to go through an application procedure. Even judges are not treated in the same privileged way as magistrates in the case where a judge is to be appointed Chief Justice. Indeed, in case of judges, the Chief Justice need not be chosen from amongst judges and is not subjected to any form of evaluation. These privileged parliamentary and public officers do not submit themselves to any form of judicial evaluation process as the underprivileged advocates have to do when submitting an expression of interest to join the judiciary. In the case of the latter they are subject to a due diligence screening process which includes attendance at an interview, a judicial evaluation and the provision to the Judicial Appointments Committee of information from any public office. But in the case of these parliamentary and public officers, the selection standards have been deliberately lowered. Why is this so? These officers were, on appointment, not even subjected to proper evaluation when they were appointed to the parliamentary and public offices

[22] The office of Attorney General is a constitutional office. The Attorney General is a public officer and is 'appointed by the President acting in accordance with the [binding] advice of the Prime Minister' (article 91(1)). For a person to be appointed Attorney General, s/he has to have the same qualifications for appointment as a judge of the Superior Courts (article 91(2)). Essentially the Attorney General has a twofold function: s/he is the Chief Government Legal Officer and Director of Public Prosecutions.

they hold. And, even if this were the case – which is not – time would have elapsed since this judicial evaluation would have been carried out. The same applies to Magistrates who might have been subjected to such an evaluation process several years ago when they were appointed Magistrates and, on their appointment to the bench, a twenty year period might have elapsed since such evaluation last took place. There have indeed been several instances where a promotion from magistrate to judge took several years to materialise.

Fourth, although the Prime Minister is requested to seek the evaluation of the Judicial Appointments Committee with regard to selection of an advocate from the second class underprivileged category before he advises the President of Malta to appoint him or her judge or magistrate, the Prime Minister is not bound by that advice[23]. Thus, all the time, money, energy and resources invested in the judicial evaluation process is thrown overboard simply because the Prime Minister might not agree with the Committee's advice. This means that the Prime Minister is at liberty to appoint the candidate who placed twentieth on the list or even one of those candidates who failed the judicial evaluation process, even though there might have been adverse peer references on that failed candidate or the candidate has a reputation amongst his or her peers of incompetence, is outright lazy or skirts responsibility or taking decisions. Provided that the Prime Minister or the Minister responsible for justice publish a declaration in the Government Gazette announcing that the Prime Minister will not comply with the result of the judicial evaluation and the reasons therefor are explained in a statement in the House of Representatives then any person tainted with professional mediocrity can be appointed to the judiciary[24]. This provision defeats the whole purpose of having

[23] Nowhere does the Constitution stipulate that the Prime Minister has to act on the advice of the Commission. The situation would have been different had the term 'recommendation' been used instead of 'advice'. This distinction emerges quite clearly from the wording of article 86(1) of the Constitution: 'Where by this Constitution the Prime Minister is required to exercise any function on the recommendation of any person or authority he shall exercise that function in accordance with such recommendation'.

[24] Article 96(4) of the Constitution provides that 'the Prime Minister shall be entitled to elect not to comply with the result of the evaluation' but, if he were to have recourse to this procedure, the Prime Minister or the Minister responsible for justice have to '(a) publish within five days a declaration in the

a Judicial Appointments Committee set up and a proper judicial evaluation procedure.

3. The right to an unfair trial for an accused member of the judiciary

The 1964 Constitution had only one form of judicial discipline. It consisted in removal from office. It provided that: 'A judge of the Superior Courts shall not be removed from office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour'[25]. A similar provision is found in the Constitution for magistrates[26]. No other form of punishment was established for minor offences of a disciplinary nature. This made the Constitution unworkable as it was not possible to suspend a member of the judiciary, transfer him/her to a lower court, fine him/her, reprimand him/her or impose such other sanction of a minor nature short from removal from office.

The Constitutional Reforms (Justice Sector) Act, 2016 has added a new provision to the Constitution – new article 101B – which deals with judicial discipline. It establishes a Committee for Judges and Magistrates composed of three members of the judiciary which are entrusted with judicial discipline[27]. The function of the Committee is set out as follows: 'The Committee shall exercise discipline on judges and magistrates in the manner prescribed in

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[Malta Government] Gazette announcing the decision to use the said power and giving the reasons which led to the said decision; and (b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President'. A similar provision, found in article 100(4), applies to magistrates. Once again, this provision does not apply to the Chief Justice as this office is still regulated under the old regime of political patronage (article 96(4) second proviso – 'Provided further that the provisions of the first proviso to this sub-article shall not apply to the case of appointment to the office of Chief Justice').

[25] Constitution, article 97(2).

[26] Constitution, article 100(4).

[27] Constitution, article 101B(1).

this article'[28]. A right of appeal exists from the decision of the said Committee to the Commission for the Administration of Justice[29]. Although the Commission for the Administration of Justice is ordinarily presided by the President of Malta, the latter is debarred from presiding when the Commission is hearing appeals from the Committee[30]. In this case, it would be the Deputy Chairman of the Commission – the Chief Justice – who would preside[31]. The new provision outlines the procedure to be followed by the Committee when determining judicial discipline[32], the power to suspend a judge or magistrate whilst still in office[33] and the punishments which can be inflicted for judicial misbehaviour[34].

Disciplinary proceedings against a judge or magistrate may commence upon a complaint by the Chief Justice (or the Minister responsible for justice)[35]. The Chief Justice, as complainant, has several procedural rights bestowed upon him which can be exercised throughout the *iter* of judicial disciplinary proceedings. He draws up the complaint 'in writing' which will 'contain definite charges for breach of the provisions of the Code of Ethics for Members of the Judiciary or of a code or disciplinary rules for members of the judiciary promulgated according to the same pro-

[28] Constitution, article 101B(4).

[29] Constitution, article 101B(12)(a).

[30] Constitution, article 101B(12)(e): 'The President of Malta shall not form part of the Commission for the Administration of Justice when the said Commission is hearing an appeal from a decision of the Committee'.

[31] Article 101A(1)(a) of the Constitution states that the Commission for the Administration of Justice is composed of 'the Chief Justice who shall be Deputy Chairman and shall preside over the Commission in the absence of the Chairman'.

[32] Constitution, article 101B(5) to (11).

[33] Constitution, article 101B(10)(b) and second sentence of paragraph (c), and article 101(11).

[34] Constitution, article 101B(10).

[35] Article 101B(5) states that: 'Disciplinary proceedings against a judge or magistrate shall be commenced upon a complaint in writing and containing definite charges made to the Committee [for Judges and Magistrates] by the Chief Justice or by the Minister responsible for justice, for breach of the provisions of the Code of Ethics for Members of the Judiciary or of a code or disciplinary rules for members of the judiciary promulgated according to the same procedure according to which the said Code of Ethics is promulgated which are from time to time applicable to the members of the judiciary. The complaint shall also include the grounds upon which each of such charges is based'.

cedure according to which the said Code of Ethics is promulgated'[36]. The complainant is enjoined to include the grounds upon which each of such charge is based[37].

First, the charge is prepared by the Chief Justice. The latter, in his role of Deputy Chairman of the Commission for the Administration of Justice, partakes in the promulgation of the Code of Ethics or a code or disciplinary rules binding the judiciary[38]. Should the complainant Chief Justice win the case against an accused judge or magistrate and the latter appeals before the Commission for the Administration of Justice, it is the complainant Chief Justice and disciplinary code or rule maker who presides the Commission[39]. Not only is the Chief Justice the prime mover and accuser of a judge or magistrate, but he is also one of the framers of the disciplinary offences upon which a judge or magistrate may be charged[40]. To make matters worse, on appeal, he is to judge the accused judge or magistrate upon that same charge which the Chief Justice as prime mover and complainant would have levelled against the accused judge or magistrate[41]. He therefore exercises different conflicting roles which are not conducive to the granting of a fair hearing to the accused judge or magistrate. There is therefore a twofold type of justice: that administered to ordinary persons and that administered to the judiciary. Whilst the former are entitled to a fair hearing, the latter are not. Instead the Constitution guarantees the accused judge or magistrate a right to an unfair trial.

Of course, government might argue that the Chief Justice can be challenged when he presides the Commission for the Administration of Justice. But what if the Chief Justice sees no reason why he should abstain and continues to hear and decide the case against the accused judge or magistrate? There is no provision in

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[36] Constitution, article 101B(5).

[37] *Ibid.*

[38] Article 101A(11)(e) of the Constitution provides that one of the functions of the Commission for the Administration of Justice is 'to draw up a code or codes of ethics regulating the conduct of members of the judiciary' whilst article 101B(5) extends this provision to apply also to a 'code or disciplinary rules' for the judiciary.

[39] *Supra*, note 30.

[40] *Supra*, note 35.

[41] *Supra*, note 31.

the Constitution, as in the case of the President of Malta,[42] which obliges him to abstain in those cases where he would have, or been involved, in the framing of the charge or, worse still, in prosecuting the accused judge or magistrate before the Committee. And who is going to decide whether the Chief Justice should abstain? Is it himself? As the provision is drafted, the right to a fair trial is prejudiced by the conflicting and antagonistic roles afforded by these amendments to the Chief Justice.

Second, when the Committee for Judges and Magistrates decides that 'there are sufficient grounds to continue the disciplinary proceedings the Committee shall appoint a date for the hearing'[43] and the Committee, after hearing all evidence adduced, decides the charge[44]. This means that the accused judge or magistrate will not be afforded a fair hearing as the same Committee members who are called upon to judge the accused would have already made a *prima facie* appraisal of guilt. Now the accused judge or magistrate has lost his presumption of innocence and the burden of proof has been shifted upon him or her to prove innocence. The evidentiary rule now is guilty unless proven innocent. Having found a *prima facie* case of guilt, the Committee now has to be convinced by the accused that s/he is innocent. This provision is surely not conducive to the exercise of the right to a fair trial.

Third, 'the Commission for the Administration of Justice may also appoint an advocate to act as a special independent prosecutor in the disciplinary proceedings'[45]. Why should the Prosecutor be appointed by the Commission and not by the Prime Minister or by some other body or person totally unrelated to judicial discipline? Will the fact that the Prosecutor is appointed by the Commission imply that when deciding an appeal it will favour its own appointee to the detriment of the accused? Does it mean that the prosecutor is acting in that office on behalf of the Commission or is its delegate? Does not this provision place the special independent prosecutor in an advantageous position more so that s/he is answerable to the Commission for the duties entrusted to him or her and that his or her conditions of employment are estab-

[42] *Supra*, note 30.
[43] Constitution, article 101B(8).
[44] Constitution, article 101B(10).
[45] Constitution, article 101B(9).

lished by the Commission? Will not this appointment be tainted by objective bias?

Fourth, when the Commission does not exercise its constitutional right to appoint a Prosecutor, who will prosecute? Will it be the Chief Justice who is now complainant, prosecutor, law giver who partakes in the formulation of disciplinary offences and, at appeal stage, judge who will adjudicate the accused judge or magistrate?

Fifth, if the Committee considers the disciplinary breach such as to merit removal from judicial office, the Commission presided by the Chief Justice, can decide to suspend the accused judge or magistrate and refer the matter to the Speaker.

The fact that: a charge against an accused judge or magistrate is formulated by the Chief Justice (who is the Deputy Chairman of the Commission; partakes in the promulgation of the Code of Ethics or a code of discipline for the judiciary; and, on appeal, presides the said Commission when it determines the guilt or otherwise of the accused judge); when the Committee makes a *prima facie* appraisal of guilt prior to having heard the accused in breach of his/her presumption of innocence; that the Prosecutor is appointed by the adjudicating authority and not by an extraneous independent body; where the law does not oblige the Commission, in all cases, to appoint an independent prosecutor, nor does it prohibit outright the Chief Justice (rather than an independent Prosecutor) from prosecuting the accused member of the judiciary when the Commission (of which the Chief Justice is Deputy Chairperson and which he presides when an appeal is lodged from decisions of the Committee); and the Commission presided by the Chief Justice may suspend the accused judge or magistrate, all raise doubts as to where the right to a fair trial can be called into question because of the independence and impartiality of the adjudicating bodies – the Committee and, on appeal, the Commission.

4. Judicial removal by the House of Representatives which lacks independence

The 1964 Constitution did contemplate judicial removal, as stated above, in articles 97(2)[46] and 100(4)[47], though it did not empower Parliament or any other body or person to suspend a judge or magistrate from office as the 2016 amendments do[48]. The 2016 amendments do not change the position at law with regard to judicial removal but do introduce the possibility to suspend a judge or magistrate from office[49].

The deficiency with the Constitutional Reforms (Justice Sector) Act, 2016 lies with the fact that it has completely skirted re-evaluating the procedure in the Constitution which relates to removal of the judiciary from office. Currently, a member of the judiciary – Chief Justice, Judge or Magistrate – may be removed from office by means of a vote of at least two-thirds of the members of the House of Representatives[50]. The judicial role of the House has already received criticism by the European Court of Human Rights in *Demicoli v. Malta*[51]. However, when the Constitution was amended following the Demicoli judgment, the Constitution was amended piece meal and the other judicial sanctioning power of the House related to the judiciary was kept wholly intact. In this latter case, Strasbourg's voice fell on deaf ears.

This thorny issue of judicial removal has not been addressed at all in the latest amending act to the Constitution. On the contrary, where the August 2016 amendments refer to judicial removal, they simply retain the *status quo* compounding it further by taking it for granted that it is human rights law compliant. But, as explained below, there is a spate of Strasbourg case law which has condemned constitutions and laws like the Maltese which breach the right to a fair trial as envisaged in Article 6 of the European Convention on Human Rights and Fundamental Freedoms in so far as judicial removal by a political institution is concerned.

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[46] *Supra*, note 25.
[47] *Supra*, note 26.
[48] *Supra*, note 33.
[49] *Ibid.*
[50] *Supra*, notes 25 and 26.
[51] European Court of Human Rights, decided on 27 August 1991, application no. 13057/87.

This point has already been addressed elsewhere[52]. Yet since then other case law has been decided by the Strasbourg court which clearly makes the point that, from a human rights perspective, the House of Representatives can never guarantee a fair trial to a member of the judiciary. In brief, reference was made to the first case which was decided by the European Court of Human Rights in relation to Malta, *Demicoli v. Malta*,[53] which specifically dealt with the judicial functions of the House. Although applicant Demicoli was neither a judge nor a magistrate but an editor of a satirical newspaper, the question of independence of the adjudicating authority – the House of Representatives – was debated there and the *ratio decidendi* of that judgment still holds good for judicial removal from office. In the said 2014 paper an analysis was made of the case law of the European Court of Human Rights relevant to the parliamentary removal of a member of the judiciary notably *Vilho Eskelinen and Others v. Finland*[54], *Olujić v. Croatia*[55] and *Oleksandr Volkov v. Ukraine*[56] and the Maltese originating case of *Demicoli v. Malta*[57].

In the Eskelinen judgment, the Strasbourg court reversed its earlier interpretation of Article 6 of the European Convention on Human Rights where it had originally held that the right to a fair trial did not apply to the judiciary, including, therefore, a case of a judicial removal motion. In its new interpretation, the Strasbourg court now held that is was possible, were the House of Representatives to attempt to remove a member of the judiciary from office, that a breach of Article 6 materialises in relation to the right to a fair trial. But what government, through Parliament, did in the August 2016 constitutional amendments is to extend the procedure for judicial removal of a member of the judiciary to the case where it is now the Committee for Judges and Magistrates (which

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[52] K. Aquilina, *The Strasbourg Court's Case Law and Its Impact on Parliamentary Removal of a Judge in Malta: Turning Over a New Leaf?*, 3 Inter'l Human Rights L. Rev., Issue 2, 248 (2014).

[53] *Ibid.*

[54] European Court of Human Rights, decided on 19 April 2007, application no. 63235/00.

[55] European Court of Human Rights, decided on 5 February 2009, application no. 22330/05.

[56] European Court of Human Rights, decided on 9 January 2013, application no. 21722/11.

[57] *Supra*, note 51.

is entrusted with judicial discipline) which should not: 'if it considers the breach is of such a serious nature that it merits the removal of the judge or magistrate from office, it shall report its findings to the Commission for the Administration of Justice which shall consider whether the evidence constitutes *prima facie* proof and, if it considers that such degree of proof exists the Commission shall suspend the judge or the magistrate concerned and shall refer the matter to the Speaker of the House of Representatives'[58]. In other words, the three members of the judiciary who sit on the Committee are being directed by the Constitution to ignore Strasbourg case law and, in effect, do the obverse that Strasbourg directs in such cases. Now the House can proceed to advise the President to remove the accused judge or magistrate in clear breach of Strasbourg case law on the matter cited above.

Bearing in mind Strasbourg case law, the suspension procedure of the accused judge or magistrate by the Commission for the Administration of Justice, presided by none other than the Chief Justice, raises human rights law compliance issues.

Since then new cases have been decided on the question of judicial removal, the latest being *Baka v. Hungary*[59]. Judge Baka was a former Hungarian judge at the European Court of Human Rights between 1991 and 2008. In 2009, he was elected by the Parliament of Hungary as President of the Supreme Court of Hungary. The Grand Chamber of the European Court of Human Rights held that 'the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review'[60] as is the situation in Malta with judicial removal by the House of Representatives. The Court considered this 'lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful'[61]. The Court could not fail to note 'the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the interven-

[58] Constitution, 101B(10)(c).
[59] European Court of Human Rights, decided on 23 June 2016, application no. 20261/12.
[60] *Ibid.*, para. 121.
[61] *Ibid.*

tion of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge'[62]. Unfortunately, the Maltese government has fallen foul of this failure.

In *Saghatelyan v. Armenia*[63] the European Court of Human Rights held that 'when disputes to which Article 6 is applicable are determined by organs other than courts'[64] – and the House of Representatives is one such organ – 'the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with requirements of Article 6 paragraph 1'[65] (and *Demicoli v. Malta*[66] has clearly stated that this is not the case in so far as the House of Representatives is concerned) 'or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 paragraph 1'[67] – which undoubtedly is not the case in Malta. It is a great pity that there were all these pointers to the Maltese government which were not taken on board in the August 2016 constitutional reform amendments. Instead the matter of judicial removal continues to cry out for serious reform.

5. Conclusion

Overall, the main problem with the 2016 law on justice sector reform is that is raises serious human rights infringements concerns and aspects of bad governance apart from constituting an unwarranted interference by the executive in the independence of the judiciary viewed in the light of the separation of powers and independence of the judiciary doctrines. This paper has limited itself only to a study of the August 2016 constitutional reforms from the perspectives of judicial appointment, discipline and removal. The main difficulty raised in this paper is that right from day one these new provisions are clearly in violation of the right to a fair trial as enshrined in the European Convention on Human Rights and Fundamental Freedoms and as espoused by the European

[62] *Ibid.*
[63] European Court of Human Rights, 20 October 2015, application no. 7984/06.
[64] *Ibid.*, paragraph 39.
[65] *Ibid.*
[66] *Supra*, note 51.
[67] *Supra*, note 63, para. 39.

Court of Human Rights in its case law. This is further complicated by the fact that an accused judge or magistrate – notwithstanding that his or her human right to a fair trial are breached – does not have an effective remedy before the Maltese courts[68]. This is because the provisions of the Constitution cannot be challenged under the European Convention Act[69] in the light of the supremacy provision of the Constitution[70], notwithstanding the provisions of Article 1 of the Convention, that is, the obligation to respect human rights[71]. Stoner[72] apart, there is not much of a likelihood that

[68] The right to an effective remedy in the Convention is guaranteed by Article 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

[69] Although the European Convention Act, Chapter 319 of the Laws of Malta, incorporates into Maltese Law the provisions of the European Convention on Human Rights, article 3(2) that: 'Where any ordinary law is inconsistent with the Human Rights and Fundamental Freedoms, the said Human Rights and Fundamental Freedoms shall prevail, and such ordinary law, shall, to the extent of the inconsistency, be void'. The expression 'ordinary law' is defined in article 2 as meaning 'any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta'.

[70] Article 6 of the Constitution states that: '... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void'. The Constitution does not allow the Constitutional Court to declare a provision in the same Constitution to be in breach of the human rights provisions of the Constitution.

[71] Article 1 of the Convention states that: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

[72] In *Paul and Evelyn Stoner v. Hon Prime Minister et*, the Constitutional Court (22 February 1996) declared that article 44(4)(c) of the Constitution was discriminatory and in violation of the freedom of movement of the Stoner couple. Hence, in this unique case, the Constitutional Court declared a human right provision to run counter to another human right provision in the same chapter of the Constitution with one human right provision related to protection from sexual discrimination having the upper hand on the other human right (the sexual discrimination in treatment between a married couple where the Constitution allows a foreign woman married to a Maltese national born in Malta freedom of movement in Malta but not vice-versa). This is indeed a very controversial judgment, a one-off, and its constitutionality is dubious. Whether the Constitution Court will adopt the same reasoning in future judgments still has to be seen. The Stoner judgment, in Maltese, is reproduced in the *Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta* (Collection of Decisions of the Superior Courts of Malta), Volume LXXX, Part I, 85-114 (1996).

the 2016 amendments can be challenged under the human rights provisions of the Constitution as these provisions have been introduced in the Constitution itself.

Hence, in order to exhaust domestic remedies in terms of Article 35 of the European Convention on Human Rights[73] any person claiming that the 2016 law is in breach of his or her human rights must go through the national courts, in all probability lose the case there, and then move on to Strasbourg. Alternatively, if such person prefers a shorter route bypassing Maltese courts, s/he may request a Member State of the Council of Europe to take the case against Malta before the European Court of Human Rights through the inter-state procedure set out in Article 33 of the Convention[74]. Yet even if Strasbourg where to eventually pronounce against the Government of Malta, there is no guarantee that the required two-thirds majority would be mustered to have the Constitution of Malta changed and brought in line with the right to a fair trial.

I therefore come to these conclusions with regard to judicial appointments, discipline and removal.

5.1 Criticisms Related to Judicial Appointments, Discipline and Removal

5.1.1 Judicial Appointments

The judicial appointments reform amendments are now law, part of the highest law of the land. Rather than ensuring that the most deserving, reputable, talented, capable, knowledgeable and upright members of the legal profession are appointed to the bench, the new law empowers the Prime Minister to exercise his political patronage to appoint whomever he wants, with no proper evaluation by an independent committee, to the office of

[73] Article 35 of the European Convention on Human Rights provides that: '1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken'.

[74] Article 33 of the European Convention on Human Rights provides that: 'Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and Protocols thereto by another High Contracting Party'.

Chief Justice. If the Prime Minister wants to appoint a parliamentary or a public officer above-mentioned to the bench, he is not bound to require proper judicial evaluation of these officers before their appointment. In the case of those advocates who submit themselves to such an evaluation process, there is no guarantee that those who deserve appointment to judicial office will get it for the Prime Minister is not bound by the independent Committee's report. Nor is he bound by the principle of merit. Indeed, he can select candidates who performed miserably or who even failed the evaluation. All in all, these amendments have embedded into the Constitution new public service values – those of mediocrity, nepotism, discrimination in treatment, elitism and favouritism. Indeed, they are a historic mess never seen before in the annals of Maltese Constitution law making. It makes banana republics shame themselves for not having adopted the new Maltese method of judicial procedure themselves!

5.1.2 Judicial Discipline

All in all, the provisions on judicial discipline are unworkable. The Chief Justice should be totally detached from the filing of the charge or prosecution thereof. The Chief Justice should not exercise all the diverse conflicting and antagonistic functions conferred upon him by the August 2016 constitutional amendments. The Committee adjudging a disciplinary office should not make an appraisal of guilt then pass on to decide the case. The Commission should not be involved in appointing the prosecutor. If at all, such task should be carried out by a prosecutor who is neither appointed by the Commission, nor by the Committee. Further, the provision is prone to be challenged on the ground that it does not afford the accused judge or magistrate a fair trial as the law does not strike a fair balance between the rights of the prosecution and those of the accused judge or magistrate who is judged by his prosecutor and who is presumed guilty unless proven innocent. If this is not a travesty of justice, then what is?

In *Mitrinovski v. The Former Yugoslav Republic of Macedonia*[75], the European Court of Human Rights stated that a person who had set in motion judicial disciplinary proceedings (in our case it would be the Chief Justice) 'has acted as "prosecutor" in respect of

[75] Decided on 30 April 2015, application no 6899/12.

the applicant' (the disciplined judge). In that case, the judge who initiated the judicial disciplinary proceedings subsequently took part in the decision to remove from office the accused judge, casts objective doubt on his impartiality when deciding on the merits of the case.

In Gerovska Popĉevska v. The Former Yugoslav Republic of Macedonia[76], the European Court of Human Rights held as follows:

> 50. In such circumstances, the Court considers that the applicant had legitimate grounds for fearing that Judge D.I., the then President of the Supreme Court, was already personally convinced that she should be dismissed for professional misconduct before that issue came before the SJC (see, *mutatis mutandis*, *Werner v. Austria*, 24 November 1997, § 41, *Reports* 1997-VII).

In *Jakŝovski and Trifunovski v. The Former Yugoslav Republic of Macedonia*[77], the Court held that the complainants had brought in motion the impugned proceedings, submitted 'evidence and arguments in support of the allegations of professional misconduct on the part of the applicants', acted as prosecutors and 'were also parties to the decisions of the plenary of the SJC in respect of the applicants' dismissals'. For the court, this casted 'objective doubt on the impartiality of those members when deciding on the merits of the applicants' cases. It therefore concluded that 'the confusion of roles of the complainants ... in the impugned proceedings resulting in the dismissal of the applicants prompted objectively justified doubts as to the impartiality of the SJC.'

Finally. the same point made in *Jakŝovski and Trifunovski* was reiterated in *Poposki and Duma v. The Former Yugoslav Republic of Macedonia*[78].

All the above quoted decisions of the Strasbourg Court indicate that the latter is not prepared to allow a situation where an adjudicating body fails the test of impartiality or where it exercises antagonistic roles ranging, on the one hand, from those of a witness, prosecutor, or complainant to, on the other hand, that of a

[76] Decided on 7 January 2016, application no. 48783/07.
[77] Decided on 7 January 2016, applications nos. 56381/09 and 58738/09.
[78] Decided on 7 January 2016, applications nos. 69916/10 and 36531/11).

judge. This is because justice must not only be done but must seen to be done.

5.1.3 Judicial Removal

The Constitution, thanks to the 2016 amendments, now establishes a twofold mechanism whereby an accused judge or magistrate can be found *prima facie* guilty of misbehaviour. In terms of the 1994 amendments to the Constitution[79] (which established the Commission of the Administration for Justice), and the Commission for the Administration of Justice Act[80], it is the Commission which makes such *prima facie* evaluation of judicial misbehaviour. With the 2016 amendments, it is the Committee for Judges and Magistrates which is also tasked with making, concurrent with the Commission for the Administration of Justice, such *prima facie* evaluation.

It is not clear why two distinct procedures are resorted to in order to arrive at a *prima facie* appraisal of judicial misbehaviour. Moreover, the 2016 amendments did not address the difficulties which are ingrained in the 1994 amendments, that is, that the body established by those amendments to arrive at a *prima facie* appraisal of guilt - the Commission for the Administration of Justice - like the High Council of Justice in *Volkov v. Ukraine* does not enjoy independence and impartiality. For instance, one of the members of the Ukrainian High Council of Justice was at the time the prosecutor. The Attorney General, the public prosecutor in Malta, also sits on the Commission for the Administration of Justice and the 2016 constitutional amendments have not taken stock of the Volkov judgment. In Volkov, the Strasbourg court held that 'the presence of the Prosecutor General[81] on a body concerned with the

[79] Article 101A(11)(f) of the Constitution states that the Commission for the Administration of Justice may be given 'such other function as may be assigned to it by law'. Such other function has been conferred upon it by article 9 of the Commission for the Administration of Justice Act, Chapter 369 of the Laws of Malta, in relation to judicial discipline.

[80] Article 9(5) of the Commission for the Administration of Justice Act states that: 'If the report of the Commission contains a finding *prima facie* that the misbehaviour or incapacity has been proved then, the motion referred to in article 97(2) of the Constitution shall, together with the report of the Commission, be taken up for consideration by the House'.

[81] In the case of Malta the Prosecutor General is called the Attorney. Article 91 (4) of the Constitution states that: '(3) In the exercise of his powers to institute,

appointment, disciplining and removal of judges created a risk that judges would not act impartially in such cases or that the Prosecutor General would not act impartially towards judges of whose decisions he disapproved'[82]. The issue which arises is that if the Strasbourg Court finds, as it did in Volkov, that the Judicial Appointments Committee is tainted with human rights violations, does it mean that all appointments made following a recommendation by the Judicial Appointments Committee are null and void and that all decisions taken by the member of the judiciary appointed in this way are also null and void?

Other difficulties which the legislator failed to tackle in the 2016 constitutional amendments in relation to judicial removal include the following: (a) there is no procedure which allows a Member of Parliament who has a conflict of interest in the judicial removal procedure from abstaining *di proprio motu* on being challenged by the accused judge or magistrate; (b) the separation of powers and the independence of the judiciary doctrines are breached when the judiciary are removed by the Legislature and not by the judiciary; (c) there is no review proceedings after Parliament arrives at a decision to remove a judge or magistrate from office before an independent and impartial judicial tribunal; and (d) Parliament - contrary to a court of justice - does not follow an adversarial procedure such that all the guarantees set out in Article 6 of the European Convention in Human Rights are not followed by the House of Representatives when it is hearing and deciding upon a judicial removal motion. This is because the Constitution does not mandate the House of Representatives to strictly abide by such due process.

5.2 Concluding Remarks

Article 65(1) of the Constitution mandates Parliament to enact law which are 'in conformity will full respect for human

undertake and discontinue criminal proceedings and of any other powers conferred on him by any law in terms which authorise him to exercise that power in his individual judgment the Attorney General shall not be subject to the direction or control of any other person or authority'.

[82] *Volkov v. Ukraine*, para. 114.

rights'[83]. Clearly, the Constitutional Reforms (Justice Sector) Act 2016 is in breach of this direction[84]. Whilst the judiciary are mandated by the Constitution and the European Convention Act to dispense justice to litigants and accused persons appearing before them, the Constitution does not establish a corresponding obligation towards the judiciary when it is they who are accused before the Committee for Judges and Magistrates - the right to a fair trial here is allowed to be trampled upon with impunity. The Constitution is adopting different weights and different measures when it comes to the dispensation of justice: a human rights friendly approach to non-members of the judiciary and a human rights infringement approach to members of the judiciary. The inevitable conclusion arrived at in this paper is that the Constitutional Reforms (Justice Sector) Act, 2016 has no redeeming features. It is a constitutional mess which a democratic republic that respects the rule of law, the independence of the judiciary and the separation of powers should abort without any unrepentant remorse being felt for such total and complete contemptuous disavowal. It is surely not a case of a forward looking law which encapsulates those majestic principles of the rule of law, the separation of powers, the independence of the judiciary, respect for human rights, good governance and transparency in government. On the contrary, it serves to deny these laudable constitutional principles. As the issues raised in this paper give rise to serious and grave concerns of the functioning of the rule of rule in a democratic society which fall within the competence of the Venice Commission, the latter should examine these issues as it has already done in the case with regard to, *inter alia*, Hungary and Poland.

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[83] K. Aquilina, *The Parliament of Malta versus the Constitution of Malta: Parliament's Law Making Function under Section 65(1) of the Constitution of Malta*, 38 Commonwealth Law Bulletin, Issue No 2, 217.

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