THE CONSTITUTION OF MALTA: SUPREMACY, PARLIAMENT AND THE SEPARATION OF POWERS

John Stanton*

Abstract: The Constitution of Malta makes express provision for its own supremacy, clarifying the predominance of the codified document over the internal constitutional arrangements in the context of post-imperial government. This provision, though, presents legal and practical problems, particularly in view of the weak entrenchment the Constitution is afforded. This claim to supremacy is fragile and, in many respects, is dependent upon continued parliamentary recognition. What is more, in assessing the constitutional validity of legislation, the Constitutional Court has not regarded findings of invalidity as having effect beyond the scope of that particular case, leaving it to Parliament to determine whether constitutionally invalid laws should be repealed (or not). This article explores solutions to these problems, arguing for firmer constitutional entrenchment, a refined process for amendment and a more authoritative power for the Constitutional Court to declare unconstitutional Acts void.

Keywords: Malta, constitutional supremacy, the Maltese Parliament, entrenchment, the Constitutional Court, constitutional review, the separation of powers.

I. Introduction, context and history

"The Constitution of Malta was given to the Maltese in 1964 by the United Kingdom Parliament",[1] upon the archipelago's independence from the British Empire, coming into

* Senior Lecturer in Law, The City Law School, City, University of London, Northampton Square, London EC1V 0HB. Email: john.stanton.1@city.ac.uk, and Visiting Lecturer in Law (2018 – 19), University of Malta, Msida, Malta. This paper has its roots in an Erasmus exchange between The City Law School and the Faculty of Laws at the University of Malta in February 2018. I am grateful to Professor Kevin Aquilina, Dr Austin Bencini, Dr Tonio Borg and Dr Ivan Mifsud for hosting that visit and for sharing their expertise. I would also like to thank Dr Tonio Borg, Dr Ivan Mifsud, Dr Elizabeth O'Loughlin, and members of the Comparative Law Section of the Society of Legal Scholars for comments on earlier drafts of this paper.

[1] Kevin Aquilina, *The Rule of Law à la Maltaise: Selected writings of Kevin Aquilina* (Msida: University of Malta 2017), 113. United Kingdom hereinafter as UK.

force on 21 September of that year.[2] Malta was by no means alone in inheriting an Independence Constitution negotiated with Britain at this time. A period of decolonisation in the two decades since the Second World War saw the dismantling of the British Empire, with most former colonies being declared independent by the late 1960s and many receiving similar constitutional documents.[3] The 1964 Maltese Constitution, for instance, was, in some ways, modelled on that given to Nigeria in 1960 and Sierra Leone in 1961.[4]

British involvement in Malta began in 1800 following an invitation to assist in the successful defeat of Napoleon's forces.[5] Thereafter, the islands served as a British Protectorate until 1813 when, under the authority of the Bathurst Constitution and - a year later - the Treaty of Paris, formal legal recognition of Malta as a British colony became settled.[6] In this context, it is hardly surprising that the Maltese constitutional settlement put in place in 1964 bears many similarities to the UK system, albeit in codified form and (since 1974) within the framework of a Republic. As Aquilina explains, "[o]ur Constitution is … not home grown. It remains very much a colonial Constitution modelled on the same lines as previous colonial constitutions given to Malta under British rule".[7] The predominance of the

---

[2] The process of Malta's independence was relatively smooth. Following a request from Prime Minister George Borg Olivier in 1962 and a referendum in 1964, the Malta Independence Act 1964 was enacted by the UK Parliament, giving legal effect to Malta's independence. Just 5 weeks later, the Malta Independence Order 1964 was passed by the Queen, accompanied by the agreed Independence Constitution. The Order decreed that from 21 September 1964, Malta would be formally independent from the British, the new Constitution coming into force on that day. (See: sections 2 and 4, Malta Independence Order 1964).

[3] Other former colonies negotiating independence and receiving Constitutions from the British at this time include: Kenya, Malaya, Nigeria, South Africa and Uganda.

[4] JJ Cremona, *The Maltese Constitution and Constitutional History since 1813* (San Gwann: Publishers Enterprises Group (PEG) Ltd, 2nd ed., 1997), 69.

[5] See, for further discussion, Brian Blount, *The Story of Malta* (Mriehel: Allied Publications, 8th ed., 2017), chapters 9 and 10.

[6] The Treaty of Paris 1814, which marked the end of the Napoleonic wars, declared in article 7 "that Malta should belong in full sovereignty to His Britannic Majesty". Occupation by the British was just the latest chapter in a long story: "Malta has been a colony of several great powers such as the Romans, the Arabs, the Normans, the Knights of St John, the French and, more recently, the British" (Kevin Aquilina, *Constitutional Law in Malta* (Alphen aan den Rijn: Wolters Kluwer 2018), 23).

[7] Aquilina, *The Rule of Law à la Maltaise* (note 1), 113. Between 1813 and 1964, 11 Maltese Constitutions were ratified.

Westminster model of government, for instance, explains many of the arrangements that prevail in both London and Valletta. The Head of Government in both cases is a member of the legislature who commands the support of a majority of the chamber, working with a Cabinet to effect executive leadership over the country. Even the positions of Head of State have their similarities. Though Malta is a Republic, the President is not elected by the people,[8] having, as a result, a limited role in the legislative and executive processes and being "bound by the Constitution to act … on the advice of the Government of the day".[9] Also unelected (and, in fact, holder of a purely hereditary position), the British monarch has significantly limited power and responsibility, being required by convention to act on the advice of the Government of the day.[10]

One of the most notable distinctions between the Maltese and British systems, though, is the former's reliance on a codified constitution. Along with all-but-three countries in the world,[11] Malta's Constitution is set out in a document, which makes provision for, *inter alia*, citizens' rights, the powers and operation of the state's governmental institutions, and the functioning of certain services and commissions. On this basis, the constitutional document reflects the highest source of law in Malta, all people and institutions being subordinate to its entrenched provisions and subject to the jurisdiction of the Constitutional Court where they act contrary to its articles. This being so, the manner in which the supremacy of the Maltese Constitution is protected and upheld (both internally through its provisions, and externally through the operation of the Constitutional Court) is problematic. Entrenchment is weak, meaning that the Constitution is susceptible to easy change and manipulation by those holding political office, whilst the traditional role of constitutional review, including the power to declare laws void on grounds of constitutional invalidity, has not been fully assumed by the Constitutional Court. Consequently, it is argued that the Constitution of Malta cannot be regarded as supreme. Instead, the predominance of a codified document

[8] The President of Malta is appointed by a Resolution of the House of Representatives, passed by a simple majority.

[9] Tonio Borg, *A Commentary on the Constitution of Malta* (Birkirkara, Malta: Kite Group 2016), 9.

[10] For further discussion on the Westminster Model, in the context of both Malta and the UK, see: William Elliot Bulmer, "Constrained majoritarianism: Westminster constitutionalism in Malta" (2014) 52(2) Commonwealth and Comparative Politics 232.

[11] Three countries in the world have uncodified constitutions: Israel, New Zealand and the United Kingdom.

notwithstanding and despite over 50 years of independence from Britain, the Maltese system appears to cling to certain principles that derive from the UK's own system, reliant as that is on the sovereignty of Parliament.[12] Reforms are needed, therefore, to bring the instrument in line with normative understandings of a constitutional democracy, as well as broader constitutional principle. In so doing, this article is structured in two halves. The first discusses article 6 of the Constitution (the "Supremacy Clause"), considering the reasons underpinning the provision's inclusion in the constitutional document, and analysing the process through which it – along with the rest of the Constitution – can be amended. The second half of the article then explores the Constitutional Court's role in effecting constitutional review, critically evaluating the established practice of limiting a finding of invalidity to the particular case at hand, leaving it to Parliament to decide whether constitutionally invalid provisions should be repealed or should remain on the statute book.

II. The supremacy clause and constitutional entrenchment

Article 6 of the Constitution of Malta provides that:

> "Subject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".[13]

On this section rests one of the most fundamental differences between the Maltese and UK systems: the constitutional document itself is supreme, Parliament is not. Indeed, emphasising this last point, article 65(1) of the Constitution makes clear that "[s]ubject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta".[14] These "provisions of this Constitution" include article 6 itself, thereby clarifying the legislature's inferiority to the constitutional document. Emphasising this further, Attard also explains that "[u]nder Maltese law, it is the Constitution, and not Parliament, which is supreme … Parliament has to abide by the provisions of the

[12] See: AV Dicey, edited by JWF Allison, *Introduction to the Study of the Law of the Constitution* (first published 1885, Oxford: OUP 2013), 27.

[13] Constitution of Malta, article 6.

[14] *Ibid.*, article 65(1).

Constitution. Hence, Parliament's supremacy is circumscribed by the provisions of the Constitution" itself.[15]

The importance of article 6 notwithstanding, though, the apparent ease with which certain provisions of the Constitution have been - and can be - amended by Parliament acting alone undermines the effectiveness of the supremacy clause and the sanctity of the constitutional document more generally, as this section will discuss. First, though, it is important to explain why it is that the drafters of the Maltese Constitution saw fit to include article 6 within the document, valid questions being raised concerning the need for express notice of constitutional supremacy.

A. The need for the article 6 'supremacy clause'.

In the American case of *Marbury v Madison*,[16] the United States[17] Supreme Court's power of constitutional review was explained, including the Court's ability "to void any law that … [it] deemed … to violate the Constitution".[18] In setting out the normative basis for this power, Chief Justice Marshall made clear that "it is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it",[19] thereby establishing a principle that has remained a firm tenet of US Constitutional Law: the Constitution is the highest form of law, and the Supreme Court has the power to review legislation where questions of their compliance with the Constitution are raised. Marshall identified this power of judicial review, not on the basis of any provision of the Constitution itself, but on the understanding that "[i]t would defeat the purposes of a written Constitution if the courts had to enforce unconstitutional statutes. The courts must exercise judicial review because the Constitution is

---

[15] David Joseph Attard, *The Maltese Legal System Volume II: Constitutional and Human Rights Law (Part A)* (Msida: Malta University Press 2015), 15. Also see: Kevin Aquilina, "The Parliament of Malta versus the Constitution of Malta: Parliament's Law-Making Function under Section 65(1) of the Constitution" (2012) 38(2) Commonwealth Law Bulletin 217.

[16] 5 US 137 (1803)

[17] Hereinafter US.

[18] Michael G Trachtman, *The Supremes' Greatest Hits: The 44 Supreme Court cases that most directly affect your life* (New York: Sterling, 2nd ed, 2009), 24.

[19] 5 US 137 (1803), 177.

law, and it is the essence of the judicial function 'to say what the law is'".[20]

It is on the strength of the judgment in *Marbury v Madison* that the purpose of article 6 of the Maltese Constitution can be questioned. If, as Chief Justice Marshall attests, the very foundation of a Constitution requires it to serve as the highest law in the land, this being "a proposition too plain to be contested",[21] then why is it necessary for that constitution to contain an express provision clarifying its own supremacy? Its predominance can be inferred from the circumstances surrounding the Constitution's introduction, the procedure for its amendment and the nature of its provisions. Echoing this view, Cremona remarks "that it was unnecessary to include a provision in the Constitution to the effect that a law which was inconsistent with the Constitution was invalid, since *the principle was implicit in the Constitution*".[22] What is more, "as Professor Stanley de Smith puts it, 'it does not strictly need to be expressly stated.' It is connatural to our Constitution".[23] Though these views were also expressed at the 1963 Malta Independence Conference, at which the draft text of the Constitution was discussed, "one of the Opposition delegates [present] felt that there would be [an] advantage in making [the Constitution's supremacy] clear, and what was later to become section 6 was … [consequently] introduced".[24] Cremona describes the article's addition as *ex abundanti cautela*,[25] reflecting that its inclusion was merely a matter of caution should future questions arise as to the predominance of the Constitution of Malta against the authority of the previously applicable sovereign UK Parliament. Indeed, and demonstrating this caution across other Commonwealth constitutions, Borg observes that, whilst "there are

---

[20] Richard H Fallon, *The Dynamic Constitution: An Introduction to American Constitutional Law* (Cambridge: Cambridge University Press, 2004), 13. The only mention that the US Constitution makes of supremacy is in article 6(2) which states: the Constitution "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding". Rather than serving as a statement of the document's supremacy, however, its application also to "Laws of the United States … and … Treaties made … under the Authority of the United States" signify that the provision is intended merely as a clarification of individual states' inferiority to the Constitution and federal laws.

[21] 5 US 137 (1803), 177.

[22] Cited in: Borg, *A Commentary on the Constitution of Malta* (note 9), 32. Emphasis added.

[23] Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 105, citing SA de Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons Ltd 1964), 109.

[24] *Ibid*., 105 – 6, citing Minutes of the Malta Independence Conference, 5th meeting, (19th July 1963).

[25] *Ibid.*, 106. In English, this means "an abundance of caution".

at least fourteen Commonwealth countries whose Constitution does not contain a supremacy clause at all", there are significantly more that do.[26]

B. Amending the 'supreme' constitution

The effectiveness of the supremacy clause, though, and the constitutional security it seeks to imply, can be questioned in the context of provisions outlining the process through which the Constitution can be amended. Article 66 of the Constitution of Malta sets out three possible ways in which amendment can be effected, each route applying to particular provisions. The first permits reform "supported by the votes of a majority of all the members of the House";[27] that is, an absolute majority. The second way permits reform to certain specified provisions where "it is supported by the votes of … two-thirds of all the members of the House".[28] Finally, the third way – applicable to just one provision[29] – requires a two-thirds majority in the House and support of a majority of electors voting in a referendum.[30] In short, then, all but one provision of the Constitution can be amended by a majority (either absolute or two-thirds) in the House of Representatives. This represents a particularly weak form of constitutional entrenchment, which undermines not only the security of the constitution but also the effectiveness of the supremacy clause.

The standard argument in favour of codified constitutional documents is their ability to offer a measure of protection to the important provisions set out in that Constitution. This is typically achieved through the explanation of an extraordinary process for constitutional amendment and repeal, making it harder to change or revoke, thereby affording the instrument a degree of entrenchment and rigidity. As Wheare explains, "a rigid Constitution is thought of as a Constitution which, because it contains legal obstacles, is hard to alter and is seldom altered".[31] This is desirable because it "make[s] an area of law more stable by

---

[26] Borg, *A Commentary on the Constitution of Malta* (note 9), 32.

[27] Constitution of Malta, article 66(5).

[28] *Ibid.*, article 66(2).

[29] This provision is article 76(2) of the Constitution, which concerns the duration of Parliament. Prior to reform in 1974, the mode of entrenchment requiring a two-thirds majority and a referendum for amendment applied to many of the more important constitutional provisions, such as the human rights chapter. Since 1974, however, article 76(2) is the only provision requiring this higher standard for amendment.

[30] Constitution of Malta, article 66(3).

[31] KC Wheare, *Modern Constitutions* (Oxford: OUP, 1966), 17.

making it harder to change[, also] … indicat[ing] areas of law that the state regards as essential to its identity".[32] In the USA, for instance, whilst ordinary laws are passed by a simple majority in Congress, constitutional amendments not only require the support of two-thirds of the House and the Senate, but in addition, ratification by three-quarters of all the states. In this way, we can say that the US Constitution enjoys a degree of entrenchment and rigidity, reflected by the reality that the Constitution has been amended on just 27 occasions in 230 years.

Conversely, in Malta, despite the predominance of a codified document, the reality that most amendments to the Constitution can be passed either with an absolute majority or with the support of two-thirds of the House of Representatives is indicative of a weak form of constitutional entrenchment that leaves too much power with the unicameral legislature to effect fundamental change to the most important laws of the country. Indeed, this concern for weak entrenchment is exacerbated by the size of the House of Representatives in Malta. Typically, following a general election, 65 representatives are returned to Parliament, though there is provision for the return of 67 or even 69 members where the circumstances demand.[33] Elections occur through the single transferable voting system, which, whilst a form of proportional representation, harbours the potential to deliver a strong government majority in the House,[34] which could enable those in power more easily to pass constitutional amendments, particularly those just requiring an absolute majority. Indeed, depending on the size of the House of Representatives, the votes of only 44, 45 or 46 members is needed to achieve a two-thirds majority, the level of support required to amend many provisions of the Constitution. The weakness of the Constitution of Malta's entrenchment, therefore, stems from the reality that Parliament can, in most cases acting alone, effect fundamental reform to

---

[32] NW Barber, "Why entrench?" (2016) 14(2) International Journal of Constitutional Law 325, 335.

[33] The relevant circumstances arise where the number of seats won by a party in an election is disproportionate to the number of votes cast in their favour. The disadvantaged party is given extra co-opted members to correct the difference and to bring the number of seats occupied in the House more in line with the number of votes won. (I am grateful to Dr Tonio Borg for guidance on this point. Also see: Borg, *A Commentary on the Constitution of Malta* (note 9), 10).

[34] At the 2013 General Election, for instance, the Labour Party won 39 seats in the House, against 30 Nationalist seats, reflecting the strongest government in recent years. This said, following the Constitutional Court's judgment in *Dr L Gonzi ne v Electoral Commission* (CC) (25 November 2016), the "corrective electoral mechanism" (see *ibid.*) was applied and the Opposition was awarded two extra seats in the House, reducing the majority to 7. (I am grateful to Dr Tonio Borg for guidance on this point).

the Constitution. The larger the government majority, the easier this is to effect.

The impact of this weak entrenchment and the consequent ease with which Parliament can amend the constitution can be seen from reforms introduced by Acts No. LVII and LVIII of 1974. When the Constitution of Malta was first ratified, the article 6 supremacy clause could be altered by an absolute majority of the House of Representatives. With the necessary support, the House of Representatives passed Act No. LVII of 1974, which repealed – albeit temporarily – article 6 of the Constitution, thereby suspending its supremacy and permitting the passing of laws inconsistent with the Constitution. Indeed, section 2 of the Act replaced the repealed section with a provision that included the following:

> "Where an Act of Parliament provides that a law … shall have effect notwithstanding any provision of this Constitution, such law or provision thereof shall prevail and shall have full effect notwithstanding any provision of this Constitution and any inconsistency therewith, and this Constitution shall, to the extent of the inconsistency, be without effect".[35]

In other words, where a law conflicted with the Constitution, it was the law, not the articles of the Constitution, which would take effect. With the supremacy clause suspended, Act No. LVIII of 1974 was then passed, bringing in various constitutional amendments, including that recognising Malta as a "democratic republic".[36] Having suspended the supremacy clause, though, and declaring that ordinary laws should to take precedence over conflicting provisions of the Constitution, the Maltese Parliament had paved the way for these reforms to take effect without needing to pay heed to the requirements for constitutional amendment, in these circumstances, a referendum.[37] With Act No. LVIII's amendments introduced, the supremacy clause was re-instated, section 69 of the Act providing that article 6 should read as initially passed.[38] One further change made by the Act was that article 6 would, from that point on, require a two-thirds majority in Parliament before it could be amended or repealed.[39] This last point notwithstanding, the circumstances surrounding amendment of the

---

[35] Constitution of Malta, article 6(2), as amended by section 2, Act No. LVII of 1974.

[36] *Ibid.*, article 1(1).

[37] See: Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 106.

[38] See (note 13), above.

[39] Section 26, Act No. LVIII of 1974. See: Borg, *A Commentary on the Constitution of Malta* (note 9), 32.

Constitution in 1974 shows how easily the Parliament could overcome the weak entrenchment of article 6, suspending the document's supremacy and permitting fundamental reform through the ordinary legislative process. In this way, the supremacy clause was rendered ineffective, its suspension giving rise too easily to "a break in legal continuity".[40] In that moment Parliament was in effect supreme.[41] Indeed, though upon the reinstatement of article 6, supremacy transferred back to the Constitution,[42] it is still plausible now that "a power drunk government having a two-thirds majority in Parliament … [could still] amend section 6 so as to suspend the supremacy of the Constitution in order to prolong indefinitely the life-span of Parliament … without having to submit to the additional constitutional requirement of a referendum".[43] Consequently, since Parliament can determine both the supremacy and the content of the Constitution on its own, "there are situations where Parliament [can be seen as] … more supreme than the Constitution";[44] at the very least, the Constitution owes its own supremacy to Parliament, rather than the other way around.[45] This reality has been widely criticised, most notably by Cremona, who explains that:

> "[I]t was both legally and logically meaningless and … essentially unsound that a whole elaborate entrenchment edifice, erected with … meticulous care by the Constitution itself as part of its basic structure to safeguard against abuse of power, should in fact have been viewed as capable of being so devastatingly dismantled by just a simple (and, to a prospective power-abuser, convenient) *non obstante* parliamentary clause".[46]

In practice, if not in form, these arrangements appear reminiscent of principles underpinning the UK Constitution, rooted as that is in the acceptance of Parliament's supremacy over other institutions. The passing of the 1964 Independence Constitution in Malta and separation from the British Empire were intended to effect departure from the British tradition and in some

---

[40] Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 107.

[41] Ivan E Sammut, "The Constitution Prevails" *Times of Malta* (6 August 2012), <https://www.timesofmalta.com/articles/view/20120806/opinion/The-Constitution-prevails.431698> accessed 13 December 2018.

[42] See *ibid.*

[43] Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 107.

[44] Aquilina, *The Rule of Law à la Maltaise* (note 1), 160.

[45] See: Constitution of Malta, article 65(1), discussed at (note 14), above.

[46] Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 107.

respects this has been achieved. The practice of recognising the predominance of a supreme legislature, however, is reflective of the influence that the UK constitutional system, with its sovereign Parliament, still has over that prevailing in Malta. As former Chief Justice of Malta, Bonnici, notes:

> "Supremacy is a question of power. Where lies the ultimate power in our state? With us there is no doubt it is Parliament that has the power to do whatever it wills with a two-thirds majority of its members. Our Constitution was modelled on the lines of the British "Constitution" and there Parliament is supreme. And so it is with us; the only difference being that, in our case, that supremacy is watered down by the two-thirds majority rule … Nevertheless, Parliament is supreme - not the Constitution".[47]

Any changes that could be introduced to bolster the supremacy clause and strengthen the Constitution of Malta's mechanisms for entrenchment - discussed below - must, therefore, be mindful of the need to break more clearly from Malta's colonial past and to establish a system that better serves the Maltese people by realising the objectives sought through the constitutional arrangements put in place in 1964.

The above notwithstanding, there are those who argue that the Constitution of Malta can still be regarded as supreme. Sammut, for instance, makes two points. The first holds that "the Constitution becomes the source of its own legality and today no one would question the legality of the Constitution in any court of law".[48] This argument, though, does not negate the view already set out and, in fact, appears to conflate the distinction between legal and political constitutionalism. The legal position has already been explained and is clear: through the provisions of the constitutional document, Parliament can determine both the supremacy and the content of the Constitution on its own, the only requirement being satisfaction of an absolute or two-thirds majority as necessary. Nowhere is there legal provision for the rule that "no one would question the legality of the Constitution", this is merely a claim to political or conventional entrenchment, not any established legal rule. The second of Sammut's points contends that "the Maltese courts [have] continued after 1974 to

---

[47] Giuseppe Mifsud Bonnici, "The Supremacy of Parliaments" *Times of Malta* (2 June 2012), <https://www.timesofmalta.com/articles/view/20120602/opinion/The-supremacy-of-parliaments.422365> accessed 13 December 2018.

[48] Sammut, "The Constitution Prevails" (note 41).

apply the judicial doctrine of constitutional supremacy and to consider Parliament bound by the Constitution".[49] This being so (albeit to a limited degree, as this article will go on to explain), this argument does not account for the fact that Parliament, with the necessary majority, can still easily and legitimately amend the constitution, and even suspend article 6 as it did in 1974. The Constitution's weak entrenchment is embedded within the document's legal provisions, the political, conventional and judicial practices of the constitutional system leave this much unchanged.

As this section has shown, therefore, the Maltese Constitution's supremacy clause has proved problematic, largely as a consequence of the weak entrenchment the constitutional document offers: the clause is insufficiently insulated. It is necessary to explore possible options for reform, therefore, that could bolster the supremacy of the Constitution and protect it in the future from easy amendment by Parliament.

C. Strengthening the supremacy of the Constitution of Malta

"[I]t would have been preferable … not to have had at all an explicit provision concerning the supremacy of the Constitution, which being implicit in the Constitution itself, was unnecessary".[50] Whilst the benefit of hindsight would seem to highlight the value of this view, regardless of the arguments - discussed above - both in favour of and in opposition to the existence of article 6, to explore any option for repeal of the supremacy clause would be to "shut the stable door after the horse has bolted"; a provision that has been made explicit cannot by its simple repeal be made implicit. If the House of Representatives were to legislate for the abolition of article 6, it would simply effect a shift of supremacy to the body empowered to strip the Constitution of this clause, that is, Parliament itself. There are other possible avenues for reform, though.

One option would be to secure a clearer and firmer basis for constitutional protection through recognising a blanket requirement for entrenchment; the same for all provisions of the Constitution. Though a two-thirds majority - perhaps even a three-quarters majority - for all amendments is preferable to a requirement for an absolute majority, it is still - on its own - unsatisfactory in a system that boasts a unicameral Parliament and a fusion of executive and legislative authority. The procedure for constitutional amendment must also involve a body

[49] *Ibid.*

[50] Cremona, *The Maltese Constitution and Constitutional History since 1813* (note 4), 107.

external to the politically elected legislature.

Ultimately, what is needed is two things. First, an additional layer in the constitution-altering process. This could be satisfied by the creation of a permanent "Constitutional Committee", a body made up of both appointed and elected members and much smaller than the House of Representatives.[51] This Committee could be called into action whenever the House approves (by way of a two-thirds majority) a proposed constitutional amendment, the agreement of a majority of the Committee being required before that amendment can be ratified. This would serve to prevent a Government with a large parliamentary majority from pushing through constitutional amendments without any further check on their proposals. The second part of this proposed solution would be to accord the article 6 supremacy clause absolute permanence, protecting it from any form of amendment or threat of suspension. It would, in short, be unamendable.

> "An unamendable provision is 'impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities' … Such explicit unamendability, which is intended to express and protect deeply held values, has now become a standard constitutional design strategy".[52]

Such lengths of constitutional protection are seen, for instance, in France, the Constitution provides that "[t]he republican form of government shall not be the object of any amendment".[53] Also, in Germany, where "according to Article 79(3) of the German Basic Law, amendments affecting human dignity and the democratic and federal features of the constitutional order are inadmissible".[54] Placing the supremacy of the Constitution of Malta

---

[51] Such a committee could be made up of, *inter alia,* judges, politicians and academics (both retired and active).

[52] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts"(2017) 51(3) New England Law Review 555, 559, citing Richard Albert, "Constitutional Handcuffs" (2010) 42 Arizona State Law Journal 663, 666; Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 McGill Law Journal 225. Roznai explains that "between 1945 and 1988, twenty-seven per cent of world constitutions enacted in those years included such provisions; and out of the constitutions … enacted between 1989 and 2013, more than half included unamendable provisions" (at 559, n 34, citing Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: OUP, 2017), 20 - 21.

[53] French Constitution, article 89.

[54] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts" (note 52), 559, citing Article 79 S. 3 GG.

beyond the scope of any potential amendment would ensure that no government could suspend article 6 and pass amendments through an ordinary, or even extraordinary, legislative process alone, as happened in 1974. It would, instead, make the supremacy clause unamendable, giving it the permanence and weight it demands, securing the predominance of the constitutional document over all institutions, including Parliament, thereby upholding and preserving the sanctity of the Constitution.

An alternative solution, though one that is perhaps not best suited to Malta's constitutional arrangements, is to give - or at least permit - the Constitutional Court a role in the amendment process. Albert explains: "[i]n countries far and near … high courts have with accelerating frequency adopted the doctrine of unconstitutional constitutional amendment, authorizing themselves … to strike down an amendment for violating their reading of the constitution".[55] Where this practice has developed, it has generally done so not as the result of any express empowerment by the constitutional document, but rather by an extension of constitutional courts' role in upholding their Constitutions.[56] On this basis it is justified by a desire to "protect what [the courts] … regard as the fundamental values of constitutional democracy".[57] In this context, it is particularly attractive in a system - such as Malta - where the Constitution is weakly entrenched and can be amended by a strong majority in Parliament. In India, for example, the Constitution can be altered by an absolute majority of both Houses of Parliament and "by a majority of not less than two-thirds of the members of that House present and voting".[58] By satisfaction of the relevant parliamentary majority, then, a government has the power to effect fundamental change to the constitutional system. This is what happened in the 1970s under "the Indira Gandhi government, which relied on a supine Parliament to effect constitutional changes that the 'hyper-executive' government unilaterally

[55] Richard Albert, "How a court becomes supreme: Defending the Constitution from unconstitutional amendments" (2017) 77 Maryland Law Review 181, 183, citing Yaniv Roznai, "Unconstitutional Constitutional Amendments - The Migration and Success of a Constitutional Idea" (2013) 61(3) American Journal of Comparative Law 657, 670 - 710.

[56] See: Po Jen Yap, "The Conundrum of unconstitutional constitutional amendments" (2015) 4(1) Global Constitutionalism 114.

[57] Albert, "How a court becomes supreme" (note 55), 183, citing Richard Albert, "Amendment and Revision in the Unmaking of Constitutions" in David Landau and Hanna Lerner (eds.,) *Comparative Constitution-Making* (Cheltenham: Edward Elgar, 2017), 3 - 9.

[58] Indian Constitution, article 368(2).

wanted".[59] As a consequence, the "basic structure doctrine" was developed by the Indian courts as a way of ensuring that the most fundamental features of the Constitution could not be amended, the courts asserting the power to declare reforms interfering with these fundamental features invalid. Through this rule, the courts could ensure that a powerful government acting alone could not effect fundamental constitutional reform on its own. "The Indian judges were convinced that if they did not intervene, all vestiges of democracy in India would eventually be removed".[60]

In terms of the way in which this approach might work in Malta, the notion of the Constitutional Court asserting power to declare constitutional amendments unconstitutional can be justified in much the same way as the basic structure doctrine in India: in both countries, weak entrenchment means the Constitution is easily alterable by a strong government. Unlike India, though, one of the problems with this approach in Malta is doubt over the willingness of the Constitutional Court to assert itself in this manner. Development of this approach would require a high degree of judicial activism, the courts having to act "sometimes in defiance of the constitutional text".[61] As the next section of this article will demonstrate, the Maltese judiciary have not adopted a particularly activist approach to their constitutional responsibilities; indeed, and if anything, they have tended to do the opposite. A solution that centres upon a role for the Constitutional Court having the power to declare constitutional amendments unconstitutional, therefore, is perhaps not best suited to Malta's constitutional arrangements.

This first half of the article, then, has discussed and explored the purpose and operation of the article 6 supremacy clause in the Maltese Constitution. Whilst the inclusion of the provision has been justified on legitimate grounds, the manner in which Parliament has been able to amend and manipulate the clause through the Constitution's provision of weak entrenchment has presented a fundamental flaw in the Maltese system. Namely, it is often Parliament that can, in practice, make a claim to supreme authority, rather than the Constitution. This runs against not only certain provisions of the constitutional text itself, but it also undermines the sanctity and security of the constitutional settlement in Malta more

---

[59] Yap, "The Conundrum of unconstitutional constitutional amendments" (note 56), 126.

[60] *Ibid.*, 127, citing O Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (New Delhi: OUP, 2008), 53 - 72. I am grateful to Dr Elizabeth O'Loughlin for her assistance with this section.

[61] Albert, "How a court becomes supreme" (note 55), 183.

broadly. Another factor to consider, though, relates to the role of the Constitutional Court and its powers of judicial review, as the next section will now discuss.

III. The role of the Constitutional Court in upholding the Constitution

The Constitution of Malta, in addition to providing for its own supremacy, also empowers the courts of constitutional competence to entertain challenges to the validity of laws in light of the Constitution's provisions. Article 46(1), for instance, provides that "any person who alleges that any of the provisions of articles 33 to 45 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him … may … apply to the Civil Court, First Hall, for redress".[62] Paragraph (2) of the article goes on to make clear that "[t]he Civil Court, First Hall, shall have original jurisdiction to hear and determine any application made by any person in pursuance of sub-article (1) … and may make such orders … and … directions as it may consider appropriate".[63] Article 95(2) then makes clear that "the Constitutional Court … shall have jurisdiction to hear and determine – … appeals from decisions of the Civil Court, First Hall, under article 46 of this Constitution; … [and] appeals … as to the interpretation of this Constitution … [and] as to the validity of laws".[64] Through these provisions, and similar to other codified constitutional systems across the world, the Constitutional Court, with the Civil Court, First Hall, works to uphold and protect the provisions of the Constitution, ensuring its supremacy over other laws and institutions. Indeed, the Constitutional Court itself has acknowledged that it is "the guardian of the Constitution",[65] and that it has the power "to determine the unconstitutionality of laws".[66]

Consistent with these powers, there are many examples in Malta of "the courts of constitutional competence … [declaring] void laws enacted by Parliament either because they were inconsistent with the Constitution or with the ECHR as incorporated in the European

---

[62] Constitution of Malta, article 46(1).

[63] *Ibid.*,, article 46(2). Also see: David Joseph Attard, *The Maltese Legal System Volume I* (Msida: Malta University Press 2012), 134.

[64] *Ibid.*, article 95(2)(d) and (e).

[65] Aquilina, *Constitutional Law in Malta* (note 6), 168, citing *Dr Wenzu Mintoff et in the name of Alternattiva Demokratika v. Chairman, Broadcasting Authority*, (CC) (31 July 1996).

[66] *Luis Vassallo et vs Hon Prime Minister* (CC) (27 February 1978). See: Borg, *A Commentary on the Constitution of Malta* (note 9), 35.

Convention Act".[67] It is what happens to an unconstitutional Maltese provision following a declaration of invalidity, however, with which this article is particularly concerned. In many other codified constitutional systems across the world, the power of a supreme or constitutional court to review the validity of laws against the provisions of the Constitution goes hand-in-hand with the power of that court to strike down as permanently void any laws that it has declared unconstitutional.[68] In this way, the authority of that constitution, and its supremacy above other laws and institutions, is assured. Indeed, Tocqueville, in explaining the constitutional review power of the US Supreme Court, notes that "the power granted to American courts to pronounce on the constitutionality of laws remains … one of the most powerful barriers ever erected against the tyranny of political assemblies".[69] Despite the significance of this power of review, the practice in Malta is somewhat different from that in America and other codified systems. This is because:

> "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 … [whilst t]he Constitution gives no say to Parliament in the

[67] Aquilina, *Constitutional Law in Malta* (note 6), 170. See, for example: *Hon Dom. Mintoff v Hon. Dr Giorgio Borg Olivier nomine et*, (CC) (5 November 1970), where a challenge was brought to Act XVI of 1970 on the grounds that internal parliamentary procedures were not followed, per article 67 of the Constitution; *Police v Massimo Gorla*, (FH) (16 July 1986), where the Foreign Interference Act 1982's prohibition of foreigners addressing meetings in Malta was declared contrary to article 42 of the Constitution; *Dr Lawrence Pullicino v. Commander Armed Forces*, (CC) (12 April 1989), where a provision of the Criminal Code excluding the granting of bail in murder cases was declared in breach of article 5, ECHR; *Mario Galea Testaferrata v Prime Minister*, (FH) (3 October 2000), where a law permitting tenants to acquire their property at the end of a long lease, at the landlord's expense, was deemed unconstitutional; and, finally, *Josephine Bugeja v Attorney-General*, (CC) (9 December 2009), in which article 12(4) - (6) of Chapter 158, provisions granting protection to tenants whose title over residence had expired, was declared contrary to article 1 Protocol I of the ECHR; I am grateful to Dr Tonio Borg for his assistance with these cases. For further discussion, see: Borg, *A Commentary on the Constitution of Malta* (note 9), 85, 118, 135-6, 139 and 196-7.

[68] See, for example, *Marbury v Madison* (note 16), above.

[69] Alexis de Tocqueville, *Democracy in America* (first published: 1835 – 40, London: Penguin Books Ltd, 2003), 122. Ginsburg and Versteeg also explain that "by 2011, 83% of the world's constitutions had given courts the power to supervise implementation of the constitution and set aside legislation for constitution incompatibility" (Tom Ginsburg and Mila Versteeg, "Why do countries adopt constitutional review?" (2013) 30(1) Journal of Law, Economics and Organization 587, 587).

> process of determining the validity … of laws which have been challenged before the Constitutional Court … the Executive and the Legislature have in effect usurped it".[70]

That this is the case has recently been endorsed by the Constitutional Court itself. In January 2018, "a declaration by the Constitutional Court of Malta that a law is unconstitutional has been interpreted to mean that this same law will remain in our statute book until and unless the people who originally passed that law, namely the legislators, decide themselves to remove it from the statute book".[71] This state of affairs is problematic for a number of reasons, as this article will go on to explore. First, though, it is necessary to consider *why* this practice has developed.

A. The doctrine of judicial precedent and juridical interest

The reasons underpinning the Constitutional Court's practice of leaving it to Parliament to decide whether constitutionally invalid laws should be repealed are related and intertwined They concern what has been regarded as "[t]he baneful … transposing [of] civil law doctrines to constitutional rights".[72] The lack of a system of judicial precedent, on the one hand, means that even where the court takes a decision in a particular case to the effect that a law is unconstitutional, this is not binding on lower courts or in subsequent cases,[73] whilst on the other hand, strict rules regarding juridical interest limits the scope of a particular case. This section considers these factors in turn.

Operating as they do within a civil law system, the Maltese Courts - including the Civil Court, First Hall and the Constitutional Court - are not bound by judgments handed down in previous cases and nor are they required - where relevant - to follow the judgments

---

[70] The Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty: Rectification or Redesign?" (2014), 24 – 25 < http://www.constitutionnet.org/sites/default/files/a_review_of_the_constitution_of_malta_at_fifty_rectification_or_redesign.pdf> accessed 13 December 2018.

[71] Austin Bencini, "The Constitution: our common sense of democracy" *Times of Malta* (28 January 2018), < https://www.timesofmalta.com/articles/view/20180128/opinion/The-Constitution-our-common-sense-of-democracy-Austin-Bencini.669089> accessed 13 December 2018.

[72] Giovanni Bonello, "When Civil Law trumps the Constitutional Court" (2018) *Gh.S.L Online Law Journal.*

[73] The relevance of this factor is also considered by Attard, *The Maltese Legal System Volume II* (note 15), 15.

of superior courts.[74] Instead, the findings in a given case and on a particular point of law are binding merely between the relevant parties – *res inter alios acta* – and not binding to all through creation of any judicial principle – *erga omnes*. Consequently, this means that where a particular judgment is handed down to the effect that a given law is contrary to the Constitution, that finding is only binding on the parties to that case and does not create a precedential finding for constitutional invalidity. As Aquilina explains:

> "[T]he Constitutional Court, in recognizing that a provision of a law runs counter to the constitution when challenged by a particular person, fails to extrapolate that finding to others who end up in the same fate as that person. Because Malta does not subscribe to the doctrine of precedent, the Constitutional Court could declare a provision of ordinary law to be in breach of the constitution in one lawsuit and then come to the opposite conclusion regarding the same provision in another lawsuit".[75]

Only where Parliament acts to repeal the offending law will the Constitutional Court - and other courts - thereafter consider its provisions to be no longer applicable.[76] There is a wealth of case law, which not only demonstrates this practice but which also emphasises the extent to which it underpins the Constitutional Court's tendency to regard constitutionally invalid provisions as valid in the event that Parliament has not repealed the relevant law. As Bonello explains, for instance:

> "On September 6, 2010, [in the case of *Joseph Muscat v Prime Minister*[77]] the Constitutional Court found a law establishing compulsory arbitration in some traffic accidents to be valid, as it was in conformity with the human rights provisions of the Constitution. On September 30, 2011, [in the case of *H Vassallo and Sons Ltd v Attorney General*[78]] the Constitutional Court in a lawsuit instituted by a different

---

[74] See, for further discussion: Kevin Aquilina, "Do pronouncements of the Constitutional Court bind erga omnes? The Common Law Doctrine of Stare Decisis versus the Civil Law Doctrine of Nonbinding case law within a Maltese Law Context" in Vernon Valentine Palmer, Mohamed Y Mattar and Anna Koppel (eds.,) *Mixed Legal Systems, East and West* (Farnham: Ashgate Publishing Ltd, 2015), 43.

[75] *Ibid.,*

[76] See: Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty" (note 70), 24 - 5.

[77] (CC) (6 September 2010).

[78] (CC) (11 September 2011).

> plaintiff, ruled that the same law on compulsory arbitration was void as it violated the same human rights provisions of that same Constitution. According to current thinking, there is nothing to preclude the Constitutional Court from deciding at some future time, that the law which it had found to be valid in 2010 and void in 2011, to be valid in 2012 and to be void in 2013".[79]

Bonello's last comments were somewhat prophetic, the Constitutional Court finding in *Untours Insurance Agency Limited v Victor Micallef et*[80] that the same provisions were constitutionally valid.

It is not always a case, though, of the Court finding constitutional provisions valid where previously they have been declared invalid, sometimes the same decision is reached in respect of an invalid provision, the key factor being that the Court has considered the issue in isolation each time, regardless of previous findings. In *Anthony Frendo v Attorney General*, for example, the Court had declared schedule 6(4)(c) of the Value Added Tax Act 1994 to be in breach of article 39(2) of the Constitution and article 6(1) of the ECHR. Upon hearing a later case – *Vincent Cilia v Prime Minister et*[81] – that presented a challenge to the same provisions on the same grounds, however, the Court held that it was not bound by the earlier decision because it did not bind *erga omnes*. The Court went on to make clear, though, that "its decision did not negate the ability of the Constitutional Court or the Civil Court, First Hall … to declare a particular provision of the law in conflict with the rights of a citizen in one case and then to make the same declaration regarding another person in a similar case".[82] These cases show, though, that by not adhering to any system of judicial precedent, conflicting findings of constitutional (in)validity by the Constitutional Court are not only possible but are deemed legitimate and appropriate. Explaining why this is the case, the Constitutional Court in the case of *H Vassallo and Sons Ltd v. Attorney General*[83] explained

---

[79] Bonello, "The Supremacy Delusion" (note 73), 130, cited in Attard, *The Maltese Legal System Volume II* (note 15), 20. Also see: Borg, *A Commentary on the Constitution of Malta* (note 9), 36.

[80] (CC) (25 January 2013).

[81] (FH) (20 June 2003), cited in Aquilina, "Do pronouncements of the Constitutional Court bind erga omnes? (note 74), 43). Also see: Giovanni Bonello "Bad Law? Worse Remedy" *Times of Malta* (2 May 2012); Giovanni Bonello, "How the Constitutional Court betrays Malta's Constitution" *Times of Malta* (19 May 2013); and Bonello, "The Supremacy Delusion" (note 73), 131.

[82] Aquilina, "Do pronouncements of the Constitutional Court bind erga omnes?" (note 74), 44.

[83] (CC) (30 September 2011).

that:

> "The present day action and that of *Joseph Muscat v Prime Minister* decided by this Court on 6th September 2010 were not an *actio popularis* on the validity of laws under article 116, and therefore applicants had to provide juridical interest. As a result of this … the remedy which it grants is necessarily limited to the interest which forms the basis of the action. The interest of applicant in such cases is to seek remedy in his case and not that the law be declared invalid *ergo omnes*; for the plaintiff has no interest in the case of others. Therefore the most that a court can state is that the law is without effect in the particular case before it and not in other cases. In other words, in a case which is not one under article 116 of the Constitution, where therefore the applicant has to prove personal interest, a declaration that a law is inconsistent with the Constitution (or by analogy with the Convention) has effect only *inter partes*".[84]

As this extract shows, the absence of a system of judicial precedent, therefore, and the effect this has on findings of constitutional invalidity, is influenced by the rules on juridical interest. In Malta, "to initiate proceedings and open a case before a court of law, plaintiff or applicant must provide juridical interest which is personal in the subject matter of the litigation. He cannot start proceedings in order to obtain an opinion or for mere personal satisfaction. There must be a tangible benefit to him in consequence of a breached legal right".[85] On this basis, judgments in such cases apply only to the specific parties to the case and do not establish any broader principle applicable in wider cases. The effect of this particular factor is evident from the case of *Paola sive Pawlina Vassallo v Marija Dalli*.[86] Here, the court was requested to

---

[84] *Ibid.*, cited in Tonio Borg, "Juridical Interest in Constitutional Proceedings" *Gh.S.L Online Law Journal* (February 2017) <http://lawjournal.ghsl.org/en/articles/articles/64/juridical-interest-in-constitutional-proceedings.htm> accessed 13 December 2018. An *actio popularis* refers to a challenge under article 116, which states that "[a] right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action". In other words, the strict rules on juridical interest do not apply to article 116, hence the qualification here.

[85] Borg, "Juridical Interest in Constitutional Proceedings", (*ibid.*). Article 116 of the Constitution of Malta is an exception to this. (See *ibid.*).

[86] (FH) (18 September 2008).

declare that, since articles 12(4) and (5) of the Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta, had been declared contrary to the constitution by the Constitutional Court in the prior case of *Mario Galea Testaferrata et v Prime Minister et*,[87] these provisions were – since that case was decided – "not operative at law and could no longer be applied".[88] The Civil Court, First Hall, however, held that the Constitutional Court's declaration in the Mario Galea case, was *res inter alios acta*,[89] not *erga omnes*. As such, that those articles were invalid in the earlier case, did not automatically mean that they should be regarded as invalid in all cases thereafter. Indeed, and what is more, the Civil Court, First Hall, also noted that "articles 12(4) and (5) of Chapter 158 still remained operative in the statute book … [because] the Maltese parliament had not taken any action to have the articles amended or revoked".[90]

The lack of any system of judicial precedent, therefore, along with the strict rules on juridical interest, contributes to the Maltese courts' practice of leaving it to Parliament to decide whether constitutionally invalid provisions should be repealed. Though both these principles (or lack thereof) are central to Malta's judicial tradition, their relevance in a constitutional setting is inappropriate. They are principles of civil law, supported by section 237 of the Code of Organisation and Civil Procedure,[91] and should not be applicable in the much broader sphere of public law.

> "[I]n civil lawsuits, a civil-law judgement only applies to the parties in that civil law suit. But in constitutional litigation, private-law principles are totally immaterial – we are … in the entirely different realm of public law, in a public-law confrontation to establish the objective truth whether a law conforms to the Constitution or whether it defies it. In a constitutional lawsuit there are no private civil-law relationships or contractual interests at stake – there is the state which is claiming … that the

[87] (FH) (3 October 2000).

[88] Aquilina, "Do pronouncements of the Constitutional Court bind erga omnes?" (note 74), 45.

[89] Loosely translated, this means "between the parties".

[90] Aquilina, "Do pronouncements of the Constitutional Court bind erga omnes?" (note 74), 45.

[91] This states: "[a] judgment [of the courts] shall not operate to the prejudice of any person who neither personally nor through the person under whom he claims nor through his lawful agent was party to the cause determined by such judgment" (section 237, Code of Organization and Civil Procedure).

impugned will of the legislative power is in conformity with the Constitution, and there is the Constitutional Court solemnly telling the state that it is or that it is not".[92]

Adherence to the Maltese judicial tradition notwithstanding, though, the reality that legislative provisions found to be unconstitutional can - and are - still regarded as valid by the courts is constitutionally problematic, as the next section will now explain.

B. The Constitution and its normative function

Above all, this approach calls into question the supremacy and sanctity of the Maltese Constitution and runs contrary to its normative function. The supremacy clause and provision for the Constitutional Court to find unconstitutional laws invalid has already been explained, above. In reality, though, if and where the Constitutional Court identifies a law inconsistent with the Constitution, rather than any automatic declaration to the effect that the law be regarded as permanently and universally void, the Court leaves it up to Parliament to act (or not) in respect of the unconstitutional provision(s). Where Parliament does not Act, the courts still regard that law as valid in future cases. The consequent effect of this is to undermine the Constitutional Court's role under article 95 and to condition the supremacy clause in article 6 with the proviso that where a law is found to be "inconsistent with [the] Constitution", it is up to Parliament to decide whether or not that "law shall, to the extent of the inconsistency, be void".[93] In other words, "[t]he Constitutional Court has … waived aside the supremacy of the Constitution",[94] and impliedly declared Parliament as the *de facto* source of supreme authority. In so doing, the Court has presented another feature of the Maltese constitutional system that is reminiscent of the UK's own constitutional arrangements, with its emphasis on parliamentary sovereignty, and thus the UK's historic colonial influence on the islands. Indeed, it is a key facet of parliamentary sovereignty that "no person or body [including a court of law] is recognised … as having a right to override or set aside the legislation of Parliament",[95] it being central to the judicial function that the will of Parliament is always respected. Contrary to articles 65 and 95 of the Constitution of Malta, Maltese judges appear to conduct their responsibilities in a way that is not inconsistent with this rule. Their apparent

---

[92] Bonello, "When Civil Law trumps the Constitutional Court" (note 72)

[93] See: Constitution of Malta, article 6.

[94] Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty" (note 70), 25.

[95] Dicey, *Law of the Constitution* (note 12), 27.

deference to Parliament on whether laws that have been found to be unconstitutional should be regarded as thereafter valid reflects a judicial desire to respect the will of a Parliament that is arguably supreme over its own Constitution.

Beyond running contrary to substantive provisions of the Constitution, though, this approach is also counter to the normative function of the Constitution, which is in part realised through articles 6 and 95, but also bolstered by well-established principles of Constitutional Law. To explain, Thomas Paine famously wrote in the years following the ratification of the US Constitution that:

> "A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government … the government is … governed by the constitution".[96]

In a similar fashion, Chief Justice Marshall's assertion in *Marbury v Madison*, that "[t]he powers of the Legislature are defined and limited … [by] the Constitution", justifies his later claim that "the Constitution is superior to any ordinary act of the Legislature",[97] thereby explaining the Constitution's supremacy over the institutions it creates.[98] Inherent within any Constitution, therefore, is - or should be - a normative acceptance of supremacy over a state's institutions, a reality that is typically reflected in the constitutional document's provision for the formation, powers and limitations of the institutions of government. If a Constitution creates these institutions and clarifies the scope of their powers, it would be unlawful for those institutions to act beyond those powers and unconstitutional for them to act in such a way that assumes supremacy over the Constitution that gave them those powers. In this vein, it has already been explained that article 65(1) of the Constitution of Malta provides that "[s]ubject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta".[99] This clearly ensures that Parliament's law-making power is subordinate to the Constitution, but that within the authority provided by the Constitution, Parliament may make any law: "Parliament is supreme within and subject to the

---

[96] Thomas Paine, Rights of Man (first published 1791, New York: Penguin Books Ltd, 1985), 71.

[97] 5 US 137 (1803), 176 - 178.

[98] See: Attard, *The Maltese Legal System Volume II* (note 15), 22.

[99] Constitution of Malta, article 65(1).

Constitution itself";[100] the Constitution of Malta gives Parliament its power.

In reality, though, by arrogating "to itself the final say as to whether … laws declared void by the Constitutional Court, should … remain valid and binding",[101] Parliament – encouraged by the courts - is actually going beyond the scope of its powers set out in the Constitution and assuming a constitutional supremacy over and above the Constitution itself. The effect this approach has on the Constitution of Malta is that as soon as we start to compromise on the sanctity or supremacy of the constitution - as has been the case through Parliament's assumption of the final say on the constitutional validity of laws - we immediately relieve that Constitution of its authority as the highest source of law and relegate it to the status of ordinary law. The Constitution of Malta cannot ultimately be deemed supreme if, when informed of a law contravening that Constitution, the Parliament has discretion as to whether that law should be retained or repealed. Such discretion represents the prerogative of supreme power and relegates the Constitution to a body of ordinary law. Substantiating this reality, Chief Justice Marshall said in *Marbury v Madison* that:

> "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable".[102]

Though the Constitution of Malta enjoys a slightly different procedure of amendment to ordinary law, technically making it "unchangeable by ordinary means", the weak entrenchment coupled with the reality that the Constitutional Court defers to Parliament on matters of constitutional invalidity nonetheless demonstrates the extent to which the document is "alterable when the legislature shall please to alter it".[103] The approach to constitutional review in Malta, therefore, undermines the sanctity and supremacy of the Constitution, runs counter to its normative function and relegates the document to the status

---

[100] Sammut, "The Constitution Prevails" (note 41).

[101] Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty" (note 70), 24 - 5.

[102] 5 US 137 (1803), 177.

[103] *Ibid*., 177.

of ordinary law.

The extent to which this approach runs contrary to accepted understanding of a constitution can be seen from a parallel drawn with the UK system and, in particular, the Human Rights Act 1998. This Act seeks to maintain a balance between ensuring that legislation is interpreted compatibly with the European Convention on Human Rights[104] on the one hand, and unavoidable incompatibilities dealt with appropriately, consistent with prevailing constitutional norms on the other. To this end, section 3(1) of the Act provides that "[s]o far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights".[105] Where a compatible reading is not possible, section 4 of the Act empowers the court to "make a declaration of … incompatibility".[106] These declarations do "not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and … [they are not] binding on the parties to the proceedings in which it is made".[107] This means that where a court has found a provision to be incompatible with the ECHR, they have the power only to *declare* that provision incompatible. Such a declaration merely notifies Parliament and Government of the incompatibility, leaving it up to them to decide if and how best to deal with the offending law. This approach reflects the reality that, in the absence of a codified constitutional document, supreme domestic authority rests with Parliament, which can pass any law whatsoever, that law binding all parties and institutions, including the courts who have no power to declare Acts void. Sections 3 and 4 of the Human Rights Act 1998 are consistent with these arrangements, the courts stopping short of striking out legislation incompatible with the ECHR, and leaving it with Parliament and Government to resolve any incompatibilities if and when it chooses.

Despite the obvious parallel between this mechanism and the practice of the Maltese Constitutional Court leaving it to Parliament to rectify (or not) unconstitutional laws, there is a crucial difference. Putting this in the context of the current discussion, we can say that the UK courts' approach – under the 1998 Act – in simply *declaring* a law incompatible and deferring to Parliament is entirely consistent with prevailing constitutional arrangements, the

---

[104] Hereinafter ECHR.

[105] Human Rights Act 1998, section 3.

[106] *Ibid.*, section 4.

[107] *Ibid.*, section 4(6).

mechanism designed to uphold the sovereignty of Parliament as the prevailing norm in the UK. By contrast, in Malta, the Constitutional Court's deference to Parliament, on whether provisions found to be unconstitutional should be repealed, runs against prevailing constitutional norms and undermines the Constitution as the accepted locus of ultimate power by permitting Parliament, rather than the Constitutional Court, the final say on matters of invalidity. This article goes on later to explore ways in which this approach might be corrected; for now, there is a broader constitutional principle relevant to this discussion: the separation of powers.

C. The Constitutional Court and the separation of powers

The principle of the separation of powers is widely understood,[108] Montesquieu's explanation providing a firm base on which it is argued that the three core constitutional functions - legislature, executive and judiciary – should be exercised independently from one another and with minimal overlap so as to protect citizens from potentially arbitrary exercises of power.[109] Despite the familiarity of the principle, it is accepted that "Montesquieu never advocated a complete separation of powers".[110] Indeed, Borg – writing in respect of the Maltese Constitution – notes that complete separation would "in practice … be impossible".[111] This appears to be an accepted view: Founding Father, James Madison, in contributing to the Federalist Papers also acknowledged that Montesquieu "did not mean that these departments [legislative, executive and judicial] ought to have no *partial agency* in, or no *control* over, the acts of each other".[112] Indeed, it is widely accepted that a degree of overlap between the institutions is necessary to ensure that "each branch of government –

---

[108] See: Aristotle, *Politics,* Book IV, 14 (1297b35) and Montesquieu, *L'Esprit des Lois,* Book 11 (1748) Ch 6. For general discussion of the principle see: John Stanton and Craig Prescott, *Public Law* (Oxford: OUP, 2018), chapter 2.

[109] "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … Again, there is no liberty, if the judiciary power be not separated from the legislature and executive" (Montesquieu, *ibid.,* as cited in Stanton and Prescott, *ibid.,* 40 - 41).

[110] Borg, *A Commentary on the Constitution of Malta* (note 9), 19.

[111] *Ibid.*

[112] James Madison, "Federalist No. 47: The particular structure of the new Government and the distribution of power among its different parts" (1 February 1788) in *The Federalist Papers: A collection of essays written in favour of the new Constitution (as agreed upon by the Federal Convention September 17, 1787)* (Presented by: Dublin, Ohio: Coventry House Publishing, 2015), 234, 235.

legislature, executive, and judiciary – is able to check the exercise of power by the others, either by participating in the functions conferred on them, or by subsequently reviewing the exercise of that power".[113]

Such a conception of the separation of powers is known as "checks and balances" and is prominent in constitutions across the world. It is this principle, though, that justifies states with codified constitutions having a supreme or constitutional court charged with upholding its provisions by "checking" that what other institutions do is constitutional. The relevance of the US Supreme Court in this regard has already been noted, the aforementioned case of *Marbury v Madison* providing the appropriate authority.[114] Indeed, Chief Justice Marshall said in that case:

> "It is … the … duty of the Judicial Department to say what the law is … if a law be in opposition to the Constitution … [and] both the law and the Constitution apply to a particular case … the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law … If … the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written Constitutions".[115]

In short, therefore, on the basis that constitutions are, by their very nature, superior to ordinary laws, it is incumbent upon courts, where relevant, to assess the validity of ordinary laws against the provisions of the constitution, thereby acting as a "check" on ordinary law. That *Marbury v Madison* sets out the basis for this valuable constitutional principle (in the USA, at least) is explained by Trachtman:

> "[A]fter *Marbury v Madison* … a single citizen … can invoke the power of the judiciary to measure their laws and decisions against constitutional standards. Each

---

[113] Eric Barendt, *An Introduction to Constitutional Law* (Oxford: OUP, 1998), 15 – 16.

[114] See (note 16), above. Also see: *Ibid.*, 15 - 16.

[115] 5 US 137 (1803), 177 - 180.

> citizen, through this right to invoke the overriding authority of the Constitution, can play a direct role in controlling government … [Consequently] constitutional democracies throughout the world … revere the decision as the wellspring of the checks and balances that make a true and lasting democracy feasible".[116]

The application of the checks and balances conception of the separation of powers doctrine in states with codified constitutions, therefore, typically sees a supreme or constitutional court fulfilling a valuable constitutional role in checking the validity of laws against the provisions of the Constitution. In Malta, though, by failing to regard findings of invalidity as permanently binding, instead leaving it to Parliament to determine whether or not an invalid law should be repealed, the Constitutional Court is falling short of its responsibilities by failing to provide an adequate check against breaches of its provisions. Bonello criticises this in strong terms:

> "[The] Constitutional Courts … have betrayed their very foremost function: that of ensuring that nothing inconsistent with the Constitution would have the force of law in Malta. They have abdicated, with daring insouciance, the very reason of their existence: that of squashing the head of any law that violates the Constitution … A law found by the Constitutional Court to wound the very core of the Constitution is still a valid law. Anti-constitutional, but perfectly legitimate. It is only the political Parliament, they ruled, that has the power to annul it".[117]

In this way, therefore, the separation of powers principle in Malta is inadequately protected. It is central to the work of constitutional courts that actions of institutions inferior to the constitution be checked and scrutinised, so as to preserve the sanctity of the constitutional document. In Malta, though, by stopping short of recognising constitutionally invalid provisions as permanently void, the Constitutional Court is eschewing its responsibilities under the separation of powers principle by failing to offer an effective check on allegedly unconstitutional Acts and decisions.

As the last few sections have discussed, therefore, the practice of the Maltese Constitutional Court in permitting the "Parliament … to arrogate to itself the final say as to

---

[116] Trachtman, "The Supremes' Greatest Hits" (note 18), 25 – 26.

[117] Giovanni Bonello, "Foreword" to Borg, *A Commentary on the Constitution of Malta* (note 9), xxii.

whether … laws declared void by the Constitutional Court, should still remain valid and binding",[118] presents a number of constitutional problems. It is contrary to the provisions and normative function of the Constitution itself, as well as to broader constitutional principle. In terms of seeking a solution, though, the next section sets out recommendations for establishing a firmer basis for constitutional review in Malta.

D. Re-establishing constitutional review

This article has already explained that the Constitution of Malta provides a basis on which actions can be brought contesting the constitutional validity of legislation. The document is silent, however, as to the effect judgments in such cases have going forward. It is here where a possible solution to some of the issues discussed above could be sought. In short, what is needed is a firmer and more defined procedure for constitutional review. To this end, fresh provisions could empower the Constitutional Court not only to declare unconstitutional laws invalid, but also to hold that a finding has universal and permanent effect.

There is precedent for such provision. The French Constitution, for instance, requires that Acts, before their entry into force, be referred to the Constitutional Council for a ruling "on their conformity with the Constitution",[119] whilst article 61-1 adds that: "[i]f during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred … to the Constitutional Council".[120] These provisions are buttressed by article 62, which states:

> "A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal

[118] Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty" (note 70), 24 - 5. Also see (note 70), above.

[119] French Constitution, article 61.

[120] French Constitution, article 61-1.

> shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts".[121]

In other words, the French Constitution expressly ensures that legislation declared invalid by the Constitutional Council be immediately void. This occurs either through Acts not yet in force not being implemented or through repeal of existing legislation. It is argued that a similar provision could be added to the Maltese Constitution, thereby ensuring that Acts declared unconstitutional by the Constitutional Court be regarded as universally and permanently void. A proposal on similar, though not identical, lines has been suggested before by Attard, who comments:

> "Given the importance of the issue, and the Constitutional Court's position, it would appear prudent for Parliament to promulgate legislation which would settle the matter in favour of the view that once a law is declared inconsistent with the Constitution, then it would *ipso facto* be void and null *erga omnes"*.[122]

The problem with this particular proposal is that Parliament, controlled by a large government majority, could easily repeal such legislation, thereby restricting the Constitutional Court's ability to strike down unconstitutional laws. If, as the first part of this article suggested, the Constitution becomes more entrenched, then setting such a proposal out in the Constitution itself would protect the process of constitutional review from easy change and manipulation. Indeed, and as with the proposed unamendability of article 6, above, a similar absolute protection could be afforded to any provision setting out constitutional review in the manner described in this section.

In terms of the precise scope of this proposed power, it would be for those setting the finer details of such a provision to determine whether a finding of invalidity would effect an immediate and automatic repeal, as in France, or whether it would require Parliament to act either to rectify the unconstitutional features of the Act or to repeal it entirely. Indeed, with the latter proposal in mind, the Today Public Policy Institute's review of the Constitution suggested that "[o]nce the Constitutional Court pronounces its judgment, a Constitutional mechanism should exist to oblige Parliament to correct the law in question forthwith".[123] This

---

[121] French Constitution, article 62.

[122] Attard, *The Maltese Legal System Volume II* (note 15), 20.

[123] Today Public Policy Institute, "A Review of the Constitution of Malta at Fifty" (note 70), 25.

potentially raises questions of judicial precedent. This article has already explained how the civil law system in Malta does not operate within a system of judicial precedent, decisions of the courts being binding only *inter partes* and not *erga omnes*. An exception could be made, however, with regards to findings of constitutional invalidity reached by the Constitutional Court under this proposed provision, this being justified on the grounds of constitutional prudence and the need to uphold and protect the sanctity of the constitutional document.

Through making provision for a firmer basis for constitutional review in this way, therefore, the Constitutional Court of Malta could assume a role that is more in keeping with that of such an institution, protecting more robustly the Constitution from the clutches of Parliament.

IV. Concluding remarks

The Constitution of Malta, then, though a relatively recent development, has become firmly established as the primary source of authority in Malta, albeit one that is unquestionably rooted in its imperial past. Despite its provision, however, prominent features of the constitutional document present issues as regards the extent to which we might view the Constitution as the ultimate source of supreme power. Its express provision for its own supremacy, for instance, coupled with its general provision for weak entrenchment, mean that the Constitution can too easily be amended by the House of Representatives. More fundamentally, though, the Constitutional Court's findings of constitutional invalidity have been taken only to bind the parties to the particular action at issue and not to reflect any broader or permanent declaration of unconstitutionality. This is, in part, a result of the civil law system that prevails in Malta, operating as that does without any practice of judicial precedent and with strict rules on juridical interest, but also a tendency of the court to see the power permanently to strike down legislation as resting solely with Parliament. The combined effect of these issues is to reveal a Constitution that cannot easily be regarded as supreme, that supremacy in practice seeming to rest, at least to a degree, with Parliament. This is problematic not only insofar as it undermines the normative function of the Constitution, but also because it means the Constitutional Court falls short of its responsibilities within the doctrine of the separation of powers. Moreover, it appears reminiscent of the UK's own constitutional arrangements - from which Malta sought to separate in the 1960s - in recognising the supremacy of Parliament, rather than the supremacy of the Constitution, even where prevailing constitutional provisions and norms would seem to

support the latter over the former. With these issues in mind, though, this article has offered proposals for reform that would see the Constitution enjoying a firmer basis for supremacy, complete with stronger entrenchment, and a constitutionally protected requirement that findings of invalidity by the Constitutional Court have the effect of rendering void the offending Act (or sections thereof). Only then, it is argued, could the Maltese constitutional system claim a document that is truly supreme over other laws and institutions.