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In search of constitutional supremacy in Malta

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In search of constitutional supremacy in Malta

Submitted for review to “European Public Law”.

John Stanton*

Abstract:

The supremacy of the Constitution of Malta is declared in Article 6 of the constitutional text. This article examines the effects of this clause, exploring its limitations, and the way in which it has been treated by politicians and judges. It is critical of the way in which the clause seeks to secure the supremacy of the Constitution, arguing that its easy alteration and manipulation compromise its effect, undermining the Constitution. Concern for the way in which the Constitutional Court defers to Parliament on whether unconstitutional laws should be repealed is also a factor, such restraint meaning that the Constitution lacks protection. On the strength of these concerns, the article discusses the ways in which the supremacy of the Maltese Constitution might be strengthened, drawing from established literature to explore possible amendments, and considering the ways in which the composition of the Constitutional Court might be increased and enhanced.

Keywords: Supremacy, Constitution of Malta, supreme courts, constitutional reform.

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1 CONSTITUTIONAL SUPREMACY

In the case of *Marbury v. Madison*,¹ the United States² Supreme Court observed that:

all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation ... the particular phraseology of the Constitution of the United States confirms and strengthens the principle ... a law repugnant to the constitution is void; and that the courts, as well as other departments, are bound by that instrument.³

From these words flows a fundamental principle: a constitution is a nation's highest law, and *all* exercises of power must lawfully be within the confines of that constitution. The text of the US Constitution does not proclaim its own supremacy.⁴ The Supreme Court's finding is justified by the truth that, if a law that conflicted with the Constitution were to be upheld by the courts in preference to the Constitution,

then written constitutions ... [would be] absurd attempts, on the part of the people, to limit a power, in its own nature illimitable ... [and it would be] giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits ... [both] prescribing limits and declaring that those limits may be passed at pleasure.⁵

The judgment holds because '[i]t would [otherwise] defeat the purposes of a written Constitution if the courts had to enforce unconstitutional statutes'.⁶ The US is not the only

¹ 1 Cranch (5 US) 137 (1803).

² Hereinafter US.

³ Above, n. 1, at 177 and 180.

⁴ The only mention of supremacy is in Article 6 of the Constitution, which states: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding' (Art. 6, Constitution of the United States of America). This provision does not proclaim the supremacy of the Constitution over all other exercises of power as such, but simply proclaims the Constitution and the federal level of Government as supreme over the states, a reality that is essential for the preservation of federalism.

⁵ Above, n. 1, at 177 – 8.

⁶ Richard H. Fallon, *The Dynamic Constitution: An Introduction to American Constitutional Law* 13 (CUP 2004). The decision in *Marbury v. Madison* is justified on theoretical grounds. Hart's rule of recognition, for instance, serves as the highest rule in a legal system, clarifying the legitimacy of other rules in that system (See H.L.A. Hart, *The Concept of Law* 94 (OUP Clarendon Law Series 3rd ed. 2012; David Dyzenhaus, *The Idea of a Constitution: A Plea for Staatsrechtslehre*, in *Philosophical Foundations of Constitutional Law* 9 (David Dyzenhaus and Malcolm Thorburn eds, OUP 2016); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* 54 (CUP 2010)). Further, Kelsen's basic theory of law explains that all norms in a system

country to establish a principle of supremacy in the absence of express supporting provision in the constitutional text. In Norway, the Constitution is similarly silent on the matter. This has not prevented the Supreme Court, however, from asserting the power to declare laws unconstitutional, thereby upholding the supremacy of the Norwegian Constitution. In the case of *Grev Wedel Jarlsberg v. Marinedepartementet*,⁷ Chief Justice Lasson observed:

What has the Supreme Court to do, when presented at the same time with the Constitution and a private statute? It has then, as far as I know constitutional law, been generally agreed that as one cannot place it upon the courts to uphold both these laws at once, they must necessarily give preference to the Constitution.⁸

Whilst these cases reflect constitutional supremacy that is rooted in judicial principle, there are countries whose constitutional documents make express provision for their supremacy.⁹ This article examines the expression of supremacy found in Article 6 of the Maltese Constitution. It highlights the limitations inherent both in the text of that clause and in the way in which it has been treated over the years. Whilst there is already a body of literature in this field,¹⁰ this contribution offers fresh perspectives, inclusive of recent developments, and gives novel

must be legitimised by a higher norm, this hierarchical trend persisting until a Basic Norm is reached, reflecting the supreme power that emanates from a Constitution (or the Constituent Power that gives us that constitution). See Hans Kelsen, *The Legal System and its Hierarchical Structure*, in Introduction to the Problems of Legal Theory: A Translation from the First Edition of the *Reine Rechtslehre* ch. V (B.L. Paulson and S.L. Paulson trans, OUP Clarendon Press 1992), as cited in Dyzenhaus, above, n. 6, at 9.

⁷ (1866). Also see the *Kløfta* case (Rt. 1976 s. 1).

⁸ (1866), quoted in Anine Kierulf, *Judicial Review in Norway: A Bicentennial Debate* 69 (CUP 2018). Also see Hon Justice Carsten Smith, *Judicial Review of parliamentary legislation: Norway as a European pioneer* 32 *Amicus Curiae* 11 (2000).

⁹ In South Africa, Article 2 of the Constitution states that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid ...'. The constitutions of many former British colonies, who gained independence from the Empire in the 1960s and 1970s, contain supremacy clauses. This is perhaps a result of these constitutional documents being granted by the UK Parliament upon each country's independence. See the following countries, with years and relevant constitutional provisions in brackets: The Bahamas (1973 – Art. 2); Bangladesh (1972 – Art. 7); Barbados (1966 – Art. 1); Grenada (1973 – Art. 106); Kiribati (1979 – Art. 2); Mauritius (1978 – Art. 2); Singapore (1963 – Art. 4); Sri Lanka (1978 – preamble); Trinidad and Tobago (1976 – Art. 2(2)).

¹⁰ See Kevin Aquilina, *The Parliament of Malta versus the Constitution of Malta: Parliament's law-making function under section 65(1) of the Constitution* 38(2) *Commonwealth Law Bulletin* 217 (2012); Austin Bencini, *The Supremacy of the Constitution of Malta* (2011) (unpublished Ph.D thesis, University of Malta); Tonio Borg, *The Constitution of Malta: Anomalies and Imperfections* 32 *Id-Dritt* 107 (2022); J.J. Cremona, *Birth Pangs of a Republic: Section 6 of the Maltese Constitution*, in Selected Papers Vol. II (1990 – 2000) 129 (J.J. Cremona (ed.), PEG 2002); John Stanton, *The Constitution of Malta: Supremacy, Parliament and the Separation of Powers* 6(1) *Journal of International and Comparative Law* 47 (2019).

suggestions for ways in which the supremacy of the Maltese Constitution might more effectively - and with greater strength - be realised.

2 CONSTITUTIONAL SUPREMACY IN MALTA

The Constitution of Malta came into effect on 21 September 1964, upon the islands' independence from the British Empire. It was given to the Maltese people by the UK Parliament following a referendum in May 1964 at which its contents were approved by the local population.¹¹ Article 6 of the Constitution of Malta proclaims that '[s]ubject 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'.¹²

This clause is not the first time that Maltese constitutional law has embraced the notion of supremacy. Back in 1802, the Declaration of Rights of the Inhabitants of the Islands of Malta and Gozo was drawn up by the Maltese in protest at the Treaty of Amiens' provision that the islands were to be returned to the Order of St John.¹³ Malta had been occupied by the French since 1798. However, when Napoleon's forces began depredating the islands' churches to fund its Egyptian campaign, the Maltese revolted and, with the aid of the British, expelled the French from the islands in 1800.¹⁴ The Maltese would have thereafter preferred the islands to become a British protectorate, rather than return to occupation by the Order of St John.¹⁵ They 'presumed that the King of Britain would reign, not rule, over the Maltese',¹⁶ and stipulated that

His Majesty's governors or representatives in these Islands and their dependencies are, and shall ever be, bound to observe and keep inviolate the Constitution, which with the sanction and ratification of his said British Royal Majesty, or his representative

¹¹ See Kevin Aquilina, *The Rule of Law à la Maltese: Selected Writings of Kevin Aquilina* 113 (University of Malta 2017); Stanton, *ibid.* It is worth noting that, whilst formally granted by the Malta Independence Act 1964 and the Malta Independence Order 1964, the text of the Constitution was drafted with the assistance of then Attorney-General, J.J. Cremona.

¹² Article 6, Constitution of Malta.

¹³ Article 10, Treaty of Amiens provided that '[t]he islands of Malta, Gozo, Comino, shall be restored to the Order of St John of Jerusalem, to be held on the same conditions on which they possessed them before the war'.

¹⁴ See, for further discussion of this period, Carmel Cassar, *A Concise History of Malta* 141 – 7 (Mireva Publications 2000).

¹⁵ By the end of the 18th century, rule under the Order of St John had become increasingly autocratic (see *ibid.*, at 132 – 133).

¹⁶ *Ibid.*, at 146.

or plenipotentiary, shall be established by us, composing the General Congress elected by the people.¹⁷

This indicates a clear desire for local autonomy, the Maltese at the turn of the 19th century determined to exercise a measure of supremacy over their islands. Despite this, Malta became a British colony in 1813. Over the next 150 years, the British would grant Malta eleven different constitutions (the twelfth came in 1964), each gradually developing the system of government and introducing elements of democracy. The 1921 Constitution is particularly noteworthy, granting as it did self-government in Malta.¹⁸ A significant moment in the life of that Constitution is the case of *Giuseppe Micallef Goggi v PL Emanuele Armando Mifsud*.¹⁹ Here, a ‘law had been passed whereby all acts previously enacted by the Legislature were validated, in spite of the fact that the courts of law had found irregularities in the law-making procedure’.²⁰ Despite the fact that the 1921 Constitution had no supremacy clause, the Court of Appeal found that judges had the right to review the constitutional validity of legislation, a decision that is reminiscent of the judgment in *Marbury v. Madison*.²¹ The Maltese system, therefore, is no stranger to declarations of supremacy, whether expressed in a constitutional text or by the courts in clarifying a right to judicial review. The clause contained in Article 6 of the 1964 Constitution, however, is problematic both in the way it is worded and in the way in which it has been treated both by politicians and judges, as this article will now explain.

2.1. *A limited supremacy: laws and administrative actions*

Recalling the words from *Marbury v. Madison* that opened this article, ‘the courts, as well as other departments, are bound by’ the Constitution.²² The principle of supremacy thus presupposes that all exercises of power, whether legislative, executive, or judicial, and all institutions that wield these powers, are inferior to the Constitution. The principle is not just about ‘giving a rank order of legal norms’, but ‘also concerns the institutional structure of the

¹⁷ Article 2, Declaration of Rights of the Inhabitants of the Islands of Malta and Gozo (1802). The translated text of this Declaration can be found at *Maltese Political Development 1798 – 1964: A Documentary History* 55 (Henry Frendo ed., Ministry of Education and Human Resources 1993).

¹⁸ The 1921 Constitution established a diarchic system of government: ‘There was to be an elected Maltese government responsible for purely local affairs, and a nominated Imperial government responsible for all matters directly or indirectly connected with Defence and Foreign Affairs, listed as Reserved Matters’ (Joseph M. Pirota, *The 1921 Self-Government Constitution*, in Landmarks in Maltese Constitutional History 1849 – 1974: The Central Bank of Malta Symposium – June 2011 33, 38 (Central Bank of Malta 2011).

¹⁹ (CA) (25 June 1930) (Kollezjoni Vol. XXVII.I.553).

²⁰ Tonio Borg, *Leading Cases in Maltese Constitutional Law* 2 (Kite Group 2020).

²¹ See section 1, above.

²² Above, n. 1, at 180.

organs of State'.²³ It is, therefore, important that supremacy is understood as conferring 'the highest authority in a legal system on the constitution',²⁴ which must be superior to all laws, decisions, and judgments, and above all people, offices, and institutions. It is notable, though, that the Constitution of Malta states simply 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'.²⁵ Framed in these terms, Malta's supremacy clause appears only to clarify the superiority of the Constitution over the legislative function; it is silent on the way in which it relates to executive or judicial power.²⁶ On this basis, Borg asks whether since:

[i]n Chapter IV [of the Constitution] there is a special enforcement section (Article 46) regarding breaches of human rights, whether by legislative *or administrative* action[, d]oes this mean that in non-human rights matters the supremacy [of the Constitution] is limited only to conflict of laws and not executive actions?²⁷

This is a fair question, though Article 95(2)(d) of the Constitution counters the supremacy clause's omission by permitting judicial review where administrative actions allegedly violate the Constitution (provided that these actions do not involve human rights breaches),²⁸ a factor that implies the Constitution's supremacy over administrative actions.

The ostensibly limited scope of the Maltese supremacy clause is striking, particularly when it is contrasted with the more comprehensive provision offered in the Constitution of Kenya. This declares that the 'Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government',²⁹ thereby clarifying that the text is above all branches of Kenya's federal system of government. One argument that might justify the Maltese supremacy clause framed in these limited terms is that, in a hierarchy of norms, ordinary laws are superior to exercises of administrative power, a reality that is central to the rule of law.³⁰ This being the case, it can be inferred from Article 6 that, since the Constitution

²³ Jutta Limbach, *The Concept of the Supremacy of the Constitution* 64(1) *Modern Law Review* 1, 1 (2001).

²⁴ *Ibid.*, at 1.

²⁵ Article 6, Constitution of Malta. Emphasis added.

²⁶ See Borg, above, n. 10, at 111 – 112. 111 – 112.

²⁷ *Ibid.*, at 112.

²⁸ See art. 469A(1)(a), Code of Organization and Civil Procedure; art. 95(2)(d), Constitution of Malta. Also see, for further elaboration, Tonio Borg, *A Commentary on the Constitution of Malta* 517 (Kite Group 2nd ed. 2022); Tonio Borg, *Judicial Review of Administrative Action in Malta* 89 – 93 (Kite Group 2020).

²⁹ Article 2(1), Constitution of Kenya.

³⁰ In its most uncontentious form, the rule of law is taken to mean that Government should always have legal authority for everything that it does, implying the superiority of laws over executive activity (see Tom Bingham, *The Rule of Law* (Allen Lane 2010)).

of Malta is supreme over ordinary laws, it is by extension supreme over other, more inferior, manifestations of power, such as decisions and policies of the Government.

Another explanation is that the clause is merely symbolic and that the supremacy of the Constitution is assured regardless of what Article 6 might or might not proclaim. This is supported both by the fact that the clause was not included in the original draft of the Constitution, and by the observation that ‘the hierarchical superiority of the Constitution exists and operates independently of this formal affirmation [in Article 6] ... [it] was only inserted *ex abundanti cautela*’.³¹ Concerns for the way in which the Maltese supremacy clause was amended in December 1974 would appear to counter this view, alteration of the clause at that point being sufficient to alter the supremacy of the Constitution, as section 2.4 will discuss.

2.2. *A limited supremacy: Articles 47(7) and (9) and 66 of the Constitution*

The supremacy of the Maltese Constitution is limited in another way, too, insofar as it is ‘[s]ubject to the provisions of sub-articles (7) and (9) of article 47 and of article 66 of ... [the] Constitution’.³² The second of these provisions – Article 66 – sets out the differing levels of entrenchment that the provisions of the Constitution enjoy. Mention of Article 66 here, therefore, serves to acknowledge that the supremacy clause is amendable by a two-thirds majority of the House of Representatives. The two sub-articles of Article 47, however, further limit the scope of constitutional supremacy in Malta, albeit to a lesser extent than when the Constitution was first promulgated. Article 47(7) states:

(7) Until the expiration of a period ending on the 30 June, 1993, nothing contained in any such law as is specified in the First Schedule to this Constitution and, until the expiration of a period of three years commencing with the appointed day, nothing contained in any other law made before the appointed day shall be held to be inconsistent with the provisions of articles 33 – 45 (inclusive) of this Chapter and, subject as aforesaid, nothing done under the authority of any such law shall be held to be done in contravention of those sections.³³

Article 47(9) then adds:

(9) Nothing in article 37 of this Constitution shall affect the operation of any law in force immediately before 3 March 1962 or any law made on or after that date that amends or replaces any law in force immediately before that date (or such a law as from time

³¹ J.J. Cremona, *The European Convention on Human Rights as part of Maltese law*, in *Selected Papers: 1946 – 1989* 228, 230 (J.J. Cremona (ed.), PEG Ltd 1990). Also see Borg, above, n. 10, at 111.

³² Article 6, Constitution of Malta.

³³ Article 47(7), Constitution of Malta. The original version of the Constitution protected the laws listed in the First Schedule without any time limit. The immunity was abolished, though, with effect from 30 June 1993.

to time amended or replaced in the manner described in this sub-article) and that does not –

- (a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;
- (b) add to the purposes for which or circumstances in which such property may be taken possession of or acquired;
- (c) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or interest in the property; or
- (d) deprive any person of any right such as is mentioned in paragraph (b) or paragraph (c) of article 37(1) of this Constitution.³⁴

The effect of these two sub-articles is to place certain legal provisions beyond the reach of the Constitution, effectively rendering them above the proclaimed *suprema lex*. As Borg explains, Article 47:

contains within it an immunity from Chapter IV of three categories of ordinary laws which – as they stood on 21 September 1964, the appointed day – are specifically saved from the provisions of Chapter IV i.e. if they contain anything which is in conflict with the Constitution, they, and not the Constitution, prevail.³⁵

The three categories of legislation are: all laws passed before independence, which enjoyed ‘a protective cover from Chapter IV for three years after independence’;³⁶ laws set out in the First Schedule to the Constitution,³⁷ these being immune from challenge under Chapter IV until 30 June 1993; and laws ‘enacted prior to 3 March 1962 ... [which] cannot contravene article 37 of the Constitution’.³⁸ It runs counter to assertions that the Constitution of Malta is supreme if there are laws, many of which predate independence, that cannot – or, at least for a while, could not – be challenged as inconsistent with the constitutional text. It presents a

³⁴ Article 47(9), Constitution of Malta.

³⁵ Borg, above, n. 28, at 371.

³⁶ *Ibid.*, at 371.

³⁷ The laws are the Criminal Code, the Civil Code, the Code of Organization and Civil Procedure, and the Code of Police Laws; ‘five codes of law which in 1964 formed the backbone of the Maltese legal system’ (*Ibid.*, at 371).

³⁸ *Ibid.*, at 371 – 2. Article 37 of the Constitution protects individuals from compulsory acquisition of property without adequate compensation. This immunity is ‘still in force and it applies also to post-1962 laws which do not add to the kinds of property that may be taken possession of, or add to the purposes in which such possession by the State can occur, or make conditions governing compensation less favourable to applicants, or deprives the right of access to a tribunal or court to determine compensation or the right of appeal to the Court of Appeal in Malta’ (*Ibid.*, at 372).

supremacy that is limited and selective, held hostage to institutions that were largely established under a regime subservient to the British Empire.

Subsequent constitutional development has narrowed the limitation that these provisions impose. In *Lawrence Pullicino v. Commander Armed Forces et*,³⁹ for instance, a murder suspect was refused bail, consistent with Article 573(1) of the Criminal Code of Malta. He wished to appeal this refusal on human rights grounds, though since the case came before 30 June 1993, under Article 47(7) of the Constitution, the Code could not be challenged on the basis of the Constitution's human rights provisions. Consequently, *Pullicino* challenged the bail refusal on the basis of Article 5 of the European Convention on Human Rights, which the Maltese Parliament had incorporated in 1987.⁴⁰ The Constitutional Court allowed this challenge, effectively meaning that the limitation in Article 47(7) was superseded by subsequent constitutional development. As Borg acknowledges, 'there is nothing at all to prevent the legislator from granting *more* rights to the individual not contained in the Constitution'.⁴¹

2.3. Constitutional supremacy and European Union⁴² law

Whilst this section has, so far, portrayed Maltese constitutional supremacy as limited, the way in which the principle engages with the supremacy of EU law offers a different perspective. Article 65(1) of the Constitution of Malta states:

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 2003.⁴³

As this provision shows, Parliament cannot pass any law that conflicts with the Constitution. But what if a provision of EU law - itself supreme over member states' domestic laws⁴⁴ - were to conflict with the Maltese Constitution? EU law takes effect in Malta by virtue of the European

³⁹ (CC) (12 April 1989) (Kollezjoni Vol. LXXIII.I.54).

⁴⁰ See the European Convention Act (Act No XIV of 1987).

⁴¹ Tonio Borg, *The Constitution and the European Convention on Human Rights – conflicts, similarities and contrasts*, L-Ghaqda Studenti tal-Ligi Online Law Journal (25 July 2020), <https://www.ghsl.org/lawjournal/the-constitution-and-the-european-convention-on-human-rights-conflicts-similarities-and-contrasts/>.

⁴² Hereinafter EU.

⁴³ Article 65(1), Constitution of Malta. Emphasis added.

⁴⁴ See Case 6/64 *Costa v ENEL* [1964] ECR 585, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, and Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

Union Act 2003. As an Act of the Maltese Parliament, this must be in conformity with, and inferior to, the supreme Constitution. It has long been hypothetically conceivable, therefore, that the Constitution of Malta could be read as supreme over EU law since EU law only takes effect in Malta as a consequence of ordinary legislation. Indeed, '[f]rom a purely domestic point of view, while an ordinary law can declare that the EU law be supreme *vis-à-vis* any other ordinary statute in Malta, it cannot declare such supremacy over the Constitution, unless the Constitution is amended to state so'.⁴⁵ The Constitution has not been amended to this effect.

In the recent case of *Michael Christian Felsberger et vs TSG Interactive Gaming Europe Ltd*, the First Hall of the Civil Court gave an indication as to how the dilemma between constitutional supremacy and conflicting EU law might be resolved.⁴⁶ The case concerned an attempt to enforce the judgment of an Austrian court, which imposed 'a garnishee order against a Maltese gaming company', under the authority of an EU Regulation.⁴⁷ In the context of the supremacy of EU law, it might be thought that the Austrian Court's attempt to enforce the Regulation would be followed and the order imposed. However, the Maltese Court 'blocked its enforcement ... [Its] decree was based on ... [recent] amendments to the Gaming Act – controversial in themselves, because they allow the courts to refuse such foreign judgments and give immunity to gaming companies from such legal actions'.⁴⁸ In explaining the reasoning behind the judgment, the court acknowledged that Article 825A of the Code of Organization and Civil Procedure provides that '[w]here regulations of the European Union provide ... in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matter not falling within the ambit of such regulations'.⁴⁹ However, they then

⁴⁵ Borg, above, n. 28, at 427.

⁴⁶ (FH) (21 July 2023) (1070/2023).

⁴⁷ Jenny Orlando-Salling, *Not With a Bang But a Whimper*, *Verfassungsblog* (22 August 2023), <https://verfassungsblog.de/not-with-a-bang-but-a-whimper/>. Whether the Austrian law (which formed the basis for the judgment) was compliant with EU law is a consideration. There are concerns that its attempt to permit those who had lost money gambling the opportunity to retrieve their losses served to prevent Maltese online gaming companies from operating in Austria, contrary to the free movement of services.

⁴⁸ Matthew Vella and Matthew Agius, *Legal shield for gaming pits Malta against the EU*, *Malta Today* (29 August 2023), https://www.maltatoday.com.mt/news/national/124630/legal_shield_for_gaming_pits_malta_against_the_eu. Vella and Agius here explain the amendments to the Gaming Act: 'Malta's amended gaming rules now introduce an "ouster clause", that prohibits the courts from hearing a particular type of litigation. Their declared objective, as presented in the House, are the codification of Malta's "long-standing public policy" to encourage the establishment of gaming businesses here – a protectionist law'.

⁴⁹ Article 825A, Code of Organization and Civil Procedure.

went on to note that '[i]t is true that these legal provisions affirm the supremacy of Union laws. But there is another supremacy which we often forget: that of the Constitution of Malta, which is the highest law in the country, and which surely must not be considered ... an ordinary law'.⁵⁰ Indeed, the judgment, 'in its closing paragraphs, asserts that the Court's ultimate "loyalty" is towards the Constitution against all other laws that are "inconsistent" with it (even, as specifically referenced, those that are supranational)'.⁵¹ Whether or not the Constitutional Court will overturn this decision in any potential appeal remains to be seen. The judgment is striking, though, as it affirms the supremacy of the Constitution of Malta, even in the face of the established primacy of EU law.

The way in which the Maltese courts have treated the notion of constitutional supremacy is addressed in section 3, below. It is worth noting, however, that the judgment in *TSG Interactive Gaming Europe Ltd* is not only a significant affirmation of judicial loyalty to the constitutional text, but one that highlights further deficiencies with the supremacy clause. In short, Article 6 fails to take account of Malta's membership of the EU, this generating the uncertainty that now stems from the *TSG Interactive Gaming Europe Ltd* case. As Aquilina rightly notes, 'an amendment needs to be made to article 6 of the Constitution to the effect that until such period as Malta continues to be a member of the European Union, it is EU Law that should prevail over the provisions of the Constitution'.⁵² Suggested reforms are discussed in section 4, below. For now, the article discusses the protection that the supremacy clause is afforded under the Constitution of Malta.

2.4. Unprotected supremacy

Malta's supremacy clause was not in the original draft of the Constitution but

was inserted during the Independence Conference in London on 19 July 1963 ... Professor Cremona, then Attorney General, registered in the minutes that it was unnecessary to include a provision in the Constitution to the effect that a law which

⁵⁰ Cited in Matthew Agius, *Judge rules for supremacy of Malta's Constitution over EU law*, Malta Today, (31 July 2023),

https://www.maltatoday.com.mt/news/court_and_police/124219/judge_rules_for_supremacy_of_maltas_constituti_on_over_eu_law_.

⁵¹ Orlando-Salling, above, n. 47.

⁵² Kevin Aquilina, *Supremacy of the Constitution or of EU Law?*, Malta Independent (20 August 2023),

<https://www.independent.com.mt/articles/2023-08-20/blogs-opinions/Supremacy-of-the-Constitution-or-of-EU-Law-6736254177>. It should be noted that Malta is not the only country to have experienced tension between domestic and EU supremacy. See Hans Von Der Burchard, *Commission threatens to sue Germany over EU law supremacy dispute*, Politico (9 June 2021), <https://www.politico.eu/article/commission-sues-germany-escalating-battle-over-supremacy-eu-law/>.

was inconsistent with the Constitution was invalid, since the principle was implicit in the Constitution.⁵³

This is a view that resonates with the decision in *Marbury v. Madison*, and the statement by the US Supreme Court that '[i]t is a proposition too plain to be contested, that the constitution controls any legislative [or executive] act repugnant to it'.⁵⁴ Indeed, Cremona has already been quoted as explaining that the clause 'was only inserted *ex abundanti cautela*'.⁵⁵ This reasoning, however, is not consistent with events that occurred in December 1974.

When the Maltese Constitution was first enacted, Article 6, on paper at least,⁵⁶ could be altered by an absolute majority of the House of Representatives.⁵⁷ On this basis, the Constitution of Malta (Amendment) Act 1974 was passed. This expressly repealed Article 6 and, in its place, inserted a clause which provided that:

Where an Act of Parliament provides that a law, including a law containing such provision, or any provision of such law, shall have effect notwithstanding any provision of [this] Constitution and any inconsistency therewith, and this Constitution shall, to the extent of the inconsistency, be without effect.⁵⁸

The effect of this amendment was to render the Constitution no longer supreme and to proclaim that Acts contrary to the Constitution would take precedence. As Sceberras Trigona notes, '[t]he doctrine of the supremacy of the Maltese Parliament could not have been better enunciated. No longer was Parliament constrained by the Constitution in its law-making function'.⁵⁹ This being so, Parliament immediately passed – on the same day – the Constitution of Malta (Amendment) (No. 2) Act 1974. This Act made numerous changes to the Constitution, including declaring Malta a republic. The second Act included a provision that stated that:

⁵³ Borg, above, n. 28, at 37.

⁵⁴ Above, n. 1, at 177. The question of the need for a supremacy clause has been considered elsewhere and these discussions are not replicated here. See *Ibid.*, at 35 – 43; and Stanton, above n. 10, 50 – 51.

⁵⁵ Cremona, above, n. 31, at 230. Also see Borg, above, n. 10, at 111.

⁵⁶ See Borg, above, n. 28, at 36 – 40.

⁵⁷ See art. 67(5), Constitution of Malta, as originally enacted. The provision on amending the Constitution is now contained in art. 66.

⁵⁸ Article 6(2), Constitution of Malta, as amended by the (now repealed) Constitution of Malta (Amendment) Act 1974.

⁵⁹ Alex Sceberras Trigona, *Section 6 of the Constitution: a polarising or unifying factor?*, Times of Malta (11 December 2004), <https://timesofmalta.com/articles/view/section-6-of-the-constitution-a-polarising-or-unifying-factor.104578#:~:text=Act%20LVII%20could%20and%20did,not%20have%20been%20better%20enunciated.>

[T]his Act shall have effect notwithstanding any provision of the Constitution; and accordingly, notwithstanding any such provision and any inconsistency therewith, the Constitution shall have effect as amended by and subject to the provisions of this Act.⁶⁰

With the myriad reforms introduced by the second Act in force, the supremacy clause was reinstated,⁶¹ albeit with the added protection of a two-thirds parliamentary majority, which would be required for any future changes.⁶² The circumstances surrounding the treatment of the supremacy clause in 1974 contradicts the view that the supremacy clause ‘was only inserted *ex abundanti cautela*’.⁶³ The Constitution cannot be regarded as supreme ‘independently of this formal affirmation’,⁶⁴ if repeal of that affirmation was sufficient to render the Constitution no longer supreme and, indeed, inferior to inconsistent ordinary law.

An issue remains with the supremacy clause, however, even after its reinstatement. Whilst the second 1974 Act ensured that the clause could not be changed or repealed without a two-thirds vote in Parliament, it is concerning that ‘it was not ... entrenched with the maximum requirement of amendment found in Article 66: namely, two-thirds approval by the members of the legislature *and* a positive result in a referendum’.⁶⁵ This means that, whilst it is now harder to repeal the supremacy clause, there are features of the Maltese Constitution that could be changed in a similar fashion to 1974, were the supremacy clause were to be legitimately removed. Borg acknowledges:

if one were to apply the same reasoning which altered the supremacy clause in 1974, the legislature may by a two thirds majority amend the section in the Constitution which requires not only two-thirds but also a referendum to amend certain articles, such as the one which establishes the lifetime of Parliament.⁶⁶

⁶⁰ Section 1(2), Constitution of Malta (Amendment) (No. 2) (Act No. LVIII of 1974).

⁶¹ Section 69, of the Constitution of Malta (Amendment) (No. 2) (Act No. LVIII of 1974) stated: ‘section 6 of the Constitution is hereby repealed and in place thereof the following section shall have effect: ... “if any law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”’.

⁶² Section 26, Constitution of Malta (Amendment) (No. 2) (Act No. LVIII of 1974).

⁶³ Cremona, above, n. 31, at 230. *Also see* Borg, above, n. 10, at 111.

⁶⁴ Cremona, above, n. 31, at 230.

⁶⁵ Borg, above, n. 10, at 112. *Emphasis added.*

⁶⁶ *Ibid.*, at 112.

Whilst recent increases in the size of the Maltese Parliament mean that the two-thirds majority is now harder than ever before to attain,⁶⁷ it remains concerning that the events of December 1974 could theoretically be repeated.

Concern for the manner in which Parliament can manipulate the supremacy of the Constitution resurfaced in March 2021, not through any change to the supremacy clause, but as a result of an attempt by the Government to amend the Constitution through the ordinary legislative process. Article 39(1) of the Constitution of Malta provides that '[w]hensoever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law'.⁶⁸ Only the courts, therefore, have the power to impose criminal penalties on individuals who have been found guilty of an offence. In Malta, though, criminal penalties are not the only form of punitive sanction:

There has been a growing tendency over the past 10 to 15 years for the Maltese legislator to enact laws, principally of a regulatory nature, that provide a public authority, as a regulator, which is certainly not a court of law, with the power to investigate breaches of those laws, and then to judge them and to impose penalties which are termed in those various laws as *administrative penalties*.⁶⁹

In 2016, the Constitutional Court held that where these administrative penalties were particularly harsh, they should be regarded as criminal sanctions and, under Article 39 of the Constitution, they could only be imposed by courts.⁷⁰ In 2020, however, the Maltese Government attempted to amend Article 39 to the effect that public authorities *would* have the power to impose harsh administrative penalties; an amendment that would have had overruled the decision in *Federation of Estate Agents*. When the amendment was not passed by Parliament, the Government attempted to effect the necessary change through amending the Interpretation Act 1975, a piece of ordinary legislation that sets out key definitions, enabling

⁶⁷ Until 2022, the Maltese Parliament was made up of between 65 and 69 members (the precise number was determined by a corrective mechanism, which ensured that the party with the most votes had the most seats). Now, following reforms in 2021, where fewer than 40 per cent of the members are of a particular gender, up to 12 additional seats are allocated to candidates of that gender, potentially delivering a Parliament made up of as many as 81 members (see Austin Bencini, *Malta's Hybrid Electoral System: A Constitutional Review* ch. 11 (Kite Group 2nd ed. 2022)).

⁶⁸ Article 39(1), Constitution of Malta.

⁶⁹ Chamber of Advocates, *Bill 198 – the supremacy of the Constitution and due process*, Chamber of Advocates, Malta (10 March 2021), <https://www.avukati.org/2021/03/10/bill-198-the-supremacy-of-the-constitution-and-due-process/#:~:text=For%20instance%2C%20Bill%20198%20states,sanction%2C%20provided%20other%20elements%20subsist>.

⁷⁰ See *Federation of Estate Agents v Director General Competition et al* (2016) (CC) (3 May 2016) (87/13).

laws to be interpreted in an objective manner, and which can be changed through a simple majority.⁷¹ Bill No. 198 of 2021 sought to alter the definition of a criminal sanction in the 1975 Act to the effect that they could be imposed not only by courts but also by public authorities. Through such provision, the Government was not only seeking to overrule the Constitutional Court's decision in *Federation of Estate Agents* but also to change the scope of Article 39. No longer would the Constitution protect those facing criminal sanction by ensuring that only a court of law could impose such sanction; now, public authorities would also have that power. As Aquilina, *et al*, comment, '[o]ur due-process protection in serious criminal proceedings, hitherto entrusted to a court of law, will, in future, be replaced by the decisions of government-appointed officers or members of government entities'.⁷² The chief concern, though, is that the Government sought to amend the Constitution through the ordinary legislative process. Stanton explains:

Having failed to achieve the necessary votes for a formal constitutional amendment, the Government pursued an alternative route, that of changing the meaning of the Constitution's words through the simple legislative process. This was a dangerous use of a constitutional loophole and one that could have set an unwelcome precedent of Government amending the Constitution through technical adjustment.⁷³

Seeking to change the Constitution through passing ordinary legislation to alter the meaning of its words undermines the supremacy of the constitutional text. The Bill was ultimately abandoned, the Government only relenting following referral to the Venice Commission which was critical of the attempts to amend the Constitution in this way.⁷⁴ If it had been successfully passed, though,

then this would [have] constitute[d] the thin end of the wedge and there would be no restrictions to the government altering the meaning of important terms in the constitution by simply using its ordinary parliamentary majority to cripple beyond

⁷¹ See Chamber of Advocates, above, n. 69.

⁷² Kevin Aquilina, Austin Bencini, Giovanni Bonello, and Tonio Borg, *Undermining the constitution*, Times of Malta (4 March 2021), <https://timesofmalta.com/articles/view/undermining-the-constitution.855481>. Also see John Stanton, *Small States and Constitutional Reform: Democracy in Malta*, in *Making Law in Small Jurisdictions: Law Creation, Reform and Change* (Caroline Morris (ed.), Springer-Verlag 2023) – forthcoming.

⁷³ Stanton, above, n. 72, forthcoming.

⁷⁴ See European Commission for Democracy through Law, *Malta – Urgent Opinion on the Reform of Fair Trial Requirements Relating to Substantial Administrative Fines (Opinion No. 1034/2021)*, Council of Europe (5 July 2021), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)021-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)021-e).

recognition the supreme law of the land. The supremacy of the constitution would translate into the will and whim of transient politicians.⁷⁵

The supremacy clause contained in the Constitution of Malta, therefore, is problematic. Compromised by limitation, susceptible to abuse and manipulation, and harbouring the potential for Malta to circumvent its EU obligations, the express provision in Article 6 has, at times, had the effect of undermining the very supremacy that it purports to clarify. Section 4 of this paper will explore ways in which the supremacy of the Constitution might be better ensured. For now, we examine the way it has been treated by the Maltese courts.

3 THE ROLE OF THE MALTESE CONSTITUTIONAL COURT

The case of *Marbury v. Madison* demonstrates that preservation of constitutional supremacy rests with a supreme, or constitutional, court. The US Supreme Court famously stated in the case that '[i]t is emphatically the province and duty of the judicial department to say what the law is',⁷⁶ going on to justify the role of the Court in declaring unconstitutional laws invalid. Reflecting the important role that apex courts play in upholding and protecting a constitution, constitutional documents across the world often express a judicial power to declare laws that are inconsistent with the Constitution invalid. Malta is one such country. Article 95(2) of the Constitution provides that 'the Constitutional Court ... shall have jurisdiction to hear and determine ... appeals and decisions ... as to the interpretation of this Constitution ... [and] questions as to the validity of laws'.⁷⁷ Alongside this, the Court has itself acknowledged that it has the power 'to determine the unconstitutionality of laws'.⁷⁸ Issues in practice with the way in which it fulfils this function, however, severely undermine the supremacy of the Constitution. Two factors are relevant. First, the non-justiciable nature of the Declaration of Principles, set out in Chapter 2 of the Constitution, and, secondly, the problematic reality that findings of constitutional invalidity by the Constitutional Court do not bind parties other than those involved in the case at issue and, therefore, do not have the effect of declaring unconstitutional laws permanently void. We address each issue in turn.

3.1. *Unenforceability of the Declaration of Principles.*

Chapter 2 of the Constitution of Malta sets out the Declaration of Principles. These are principles regarded as 'fundamental to the governance of the country'.⁷⁹ They include a right

⁷⁵ Aquilina, *et al*, above, n. 72.

⁷⁶ Above, n. 1, at 177 – 8.

⁷⁷ Article 95(2), Constitution of Malta.

⁷⁸ *Luis Vassallo v Hon Prime Minister (CC)* (27 February 1978), cited in Borg, above, n. 28, at 40.

⁷⁹ Article 21, Constitution of Malta. *Also see* Borg, above, n. 28, at 47.

to work,⁸⁰ equal rights for men and women 'to enjoy all economic, social, cultural, civil and political rights',⁸¹ and the safeguarding of the Maltese landscape 'and the historical and artistic patrimony of the Nation'.⁸² A notable feature of these principles is that they are unenforceable in a court of law. Article 21 of the Constitution provides that '[t]he provisions of this Chapter shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim of the State to apply these principles in making laws'.⁸³ The unenforceable nature of these principles is not a concern, and nor is it unique. Borg explains that:

The source of this chapter is evident. One of the first Constitutions to contain a similar chapter was that of India. The drafter of Part IV of the Indian Constitution entitled *Directive Principles of State Policy* admitted that these principles had no legal force but he was not prepared to admit that they were useless though he envisaged a moral or political sanction not a legal one.⁸⁴

The existence of unenforceable ideals is not novel. Jefferson's words in the *Declaration of Independence*, proclaiming the inalienability of rights to 'life, liberty, and the pursuit of happiness',⁸⁵ whilst not declared in any enforceable document, have remained prominent and underpin modern understandings of the US constitutional order, reflecting values that the Founding Fathers sought to convey. As Tsesis observes, 'Thomas Jefferson ... regarded the Declaration to be an official statement of the national government's obligation to secure the people's inalienable rights'.⁸⁶

⁸⁰ Article 7, Constitution of Malta.

⁸¹ Article 14, Constitution of Malta.

⁸² Article 9, Constitution of Malta.

⁸³ Article 21, Constitution of Malta.

⁸⁴ Borg, above, n. 28, at 47, citing H.M. Seervai, *Constitutional Law of India Vol. II 1927* (Universal Publishing 4th ed 1993). Borg also acknowledges that 'the Indian Constitution framers inspired themselves from the Irish Constitution which was the first Constitution to introduce in 1937 the principles of social policy, guaranteeing the basic tenets of the welfare state' (Borg, above, n. 28, at 47).

⁸⁵ *US Declaration of Independence* (1876)

⁸⁶ Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation* 89 *Southern California Law Review* 369, 373 (2016). Also see Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis* 32(1) *University of Richmond Law Review* 107 (1998). Cosgrove recalls the mistake made by one of the prosecutors in O.J. Simpson's murder trial. Christopher Darden 'argued to the jury ... that slain victims Nicole Brown Simpson and Ronald Goldman had rights to "life, liberty, and the pursuit of happiness" as stated in the Constitution'. Cosgrove opines that 'Darden's "mistake" reflects a widespread perception that in some way the Declaration of Independence does embody the principles to which Americans are constitutionally committed' (See Cosgrove, *The Declaration of Independence in Constitutional Interpretation*, n. 86, at 107 – 8).

Though the unenforceable nature of the Maltese Declaration of Principles is not an issue, the uncompromising approach taken by the Constitutional Court calls into question the extent to which they are regarded as ‘fundamental to the governance of the country’.⁸⁷ Whilst the Indian Constitution declares its Directive Principles as non-justiciable,⁸⁸ the Indian Supreme Court has still ‘applied the Directives to adjust the ambit of the Fundamental Rights ... to give a liberal interpretation to the ambit of a legislative provision; and to aid in the interpretation of the Fundamental Rights’.⁸⁹ In the case of *Keshavaanda Bharati v State of Kerala*,⁹⁰ the Court stated that

No one can deny the importance of the Directive Principles. The Fundamental Rights and the Directive Principles constitute the ‘conscience’ of our Constitution ... [to this end, o]ur founding fathers were satisfied that there is no anti-thesis between the Fundamental Rights and the Directive Principles. One supplements the other. The Directives lay down the end to be achieved and Part III [(which contains the Fundamental Rights)] prescribes the means through which the goal is to be reached.⁹¹

Similar sentiments have been echoed with regards to the Maltese Declaration of Principles. Bonello comments that Article 21 provides ‘that the legality of laws is to be established by reference to their conformity or otherwise with the principles it established’.⁹² By a similar token, Abela ‘says that the Declaration of Principles is what in legal terms is referred to as “Legal Desiderata” setting out moral guidelines to which, although not enforceable per se, the general governance of Malta must, as far as possible, comply’.⁹³

Despite this, the Maltese Constitutional Court has adopted a particularly strict approach, one that is not in line with that of the Indian Supreme Court, above. In the case of *Dr Walter Cuschieri et v. Prime Minister*,⁹⁴ for example, a law had been passed prohibiting striking doctors from a state-owned hospital from seeking work in a private hospital unless they renounced their right to strike. A challenge was brought arguing that the law breached

⁸⁷ Article 21, Constitution of Malta.

⁸⁸ Both the Indian and Irish Constitutions also declare these rights / principles as non-justiciable (see art. 37, Constitution of India; and art. 46, Constitution of Ireland).

⁸⁹ Borg, above, n. 28, at 47 – 48, citing Durga Das Basu, *Shorter Constitution of India* 631 – 632 (LexisNexis Butterworths Wadhwa 14th ed 2009).

⁹⁰ (1973) 4 SCC 225.

⁹¹ *Ibid.*, at para. 755 and 759. Also see Borg, above, n. 28, at 47.

⁹² Giovanni Bonello, *Misunderstanding the Constitution: How the Maltese judiciary undermines human rights* (BDL Publishing, 2018), 53. Also see Borg, above, n. 10.

⁹³ Quoted in Robert L. Zammit, *The enforceability or otherwise of the Declaration of Principles in the Constitution of Malta* 27 (2012) (unpublished LLD thesis, University of Malta).

⁹⁴ (CC) (30 November 1977) (70/77).

the doctors' protection from forced labour under Article 35 of the Constitution, though reference was also made in the course of arguments to articles 7 and 12, parts of the Declaration of Principles.⁹⁵ The challenge failed purely on the basis of Article 35. The Constitutional Court made clear in its judgment, however, that the Declaration of Principles were not only unenforceable, but they completely ignored references made to Articles 7 and 12.⁹⁶ Through such an approach, Bonello claims, the 'constitutional courts ... failed to give the weight the Constitution called on them to give to the second part [of Article 21, namely that] – these principles are essentially fundamental and indispensable to law-making by Parliament'.⁹⁷ Bonello observes that:

no one, that I am aware of, has, since the doctor's case, ever tried to challenge the validity of any law on the grounds of its inconsistency with the principles. According to our Constitutional courts, the principles are a cute superfluity, they only voice pious intentions which the courts are then forced to disregard. Pretty verbiage, devoid of any legal weight.⁹⁸

The Declaration of Principles, therefore, are a valuable expression of rights and principles that are fundamental to the Maltese constitutional order. Whilst their unenforceability is not contentious, the manner in which the courts have uncompromisingly ignored the values that they set out raises questions as to their relevance. Moreover, and keeping in mind the role of constitutional courts generally in preserving both the letter and the spirit of a constitution, it is an omission on the part of the Maltese judiciary that the values espoused by the Declarations have not been allowed to permeate their judgments. As the work of the Indian Supreme Court shows, there is legal space to afford relevance and value to declaratory principles, without going so far as to permit them as enforceable.⁹⁹ A more significant way in which the constitutional courts undermine the supremacy of the Constitution, however, is through their reticence in declaring permanently void laws that are unconstitutional, as we now discuss.

⁹⁵ See Borg, above, n. 20, at 182. See art. 7, Constitution of Malta (which ensures that 'The State recognises the right of all citizens to work', and art. 12 (which provides that 'The State shall protect work').

⁹⁶ Borg, above, n. 28, at 48.

⁹⁷ Bonello, above, n. 92, at 55 – 56.

⁹⁸ *Ibid.*, at 56.

⁹⁹ Zammit discusses how some of the principles are potentially protected through other – enforceable – provisions of the Constitution (see Robert L. Zammit, *The enforceability or otherwise of the Declaration of Principles in the Constitution of Malta* 42 – 69 (2012) (unpublished LLD Thesis, University of Malta).

3.2. Findings of constitutional invalidity

Despite both the fact that Article 95(2) empowers the Constitutional Court to question the validity of laws, and the assertion from the *Luis Vassallo* case clarifying the Court's power 'to determine the unconstitutionality of laws',¹⁰⁰

[u]ntil 1987, the question did not even arise ... Malta's was the only Constitutional Court in the whole democratic world that had virtually never found Parliament in violation of the Constitution when making laws ... The USA Supreme Court, in one corresponding period of just twenty years, struck down 264 pieces of legislation as unconstitutional.¹⁰¹

In 1987, Malta incorporated the European Convention on Human Rights into domestic law and, after this, the Constitutional Court 'started finding that some laws breached constitutional human rights'.¹⁰² There are numerous examples to this effect.¹⁰³ What is striking about the way in which the Maltese courts began using its powers to declare laws unconstitutional, however, is that whilst laws were found to be inconsistent with the Constitution, 'those laws remained valid and binding, unless and until Parliament ... repeal[ed] them'.¹⁰⁴ This remains the case today. The Constitution notwithstanding, the Court, when finding that a law is inconsistent with the Constitution, will not declare that law permanently void but, instead, will leave it to Parliament to decide whether that law should be repealed or should be allowed to remain on the statute book.¹⁰⁵ Consequently, it is not inconceivable that the Court might find a law unconstitutional in one case, and find the same law constitutionally valid in another.

The reasons underpinning this practice have been examined elsewhere and repetition of their detailed consideration is not necessary here. In brief, '[t]he lack of a system of judicial precedent ... 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'.¹⁰⁶ Particularly stringent rules on juridical interest are also a factor, these limiting 'the

¹⁰⁰ *Luis Vassallo v Hon Prime Minister* (CC) (27 February 1978), cited in Borg, above, n. 28, at 40.

¹⁰¹ Bonello, above, n. 92, at 177.

¹⁰² Bonello, above, n. 92, at 180.

¹⁰³ See Kevin Aquilina, *Constitutional Law in Malta* 170 (Wolters Kluwer 2018). Also see, for a list of example cases, Stanton, above n. 10, at 60 (n. 66).

¹⁰⁴ Bonello, above, n. 92, at 180.

¹⁰⁵ See Austin Bencini, *The Constitution: Our Common Sense of Democracy*, Times of Malta (28 January 2018), <https://timesofmalta.com/articles/view/The-Constitution-our-common-sense-of-democracy-Austin-Bencini.669089>. Also see Stanton, above n. 10, at 61.

¹⁰⁶ Stanton, above n. 10, at 61, citing David Joseph Attard, *The Maltese Legal System Volume II: Constitutional and Human Rights Law (Part A)* 15 (Malta University Press 2015).

scope of a particular case',¹⁰⁷ and meaning that a declaration of invalidity only applies between those parties who have a juridical interest in the case at issue. The effect of this practice is that preservation of the supremacy of the Constitution relies not on the independent courts tasked with that responsibility, but with the politicians in Parliament. Parliament is supreme rather than the Constitution. Moreover, Parliament does not always remove an unconstitutional law, meaning that 'the Constitutional Court is faced with repetitive cases, because the administration – and sometimes even judges, it seems – continue to apply the provisions found unconstitutional'.¹⁰⁸ An example of this in practice can be seen in *Mark Formosa v. Permanent Secretary in Ministry for Gozo*.¹⁰⁹ Here, a civil procedural requirement, dating back to 1981, which provided that 'under pain of nullity any person instituting court action against government had to file a judicial letter laying out his claim at least ten days prior to instituting such action' was found to be in breach of Article 6 of the European Convention on Human Rights, and Article 39 of the Constitution of Malta.¹¹⁰ Despite this, on two subsequent occasions, Maltese courts nullified actions for failing to satisfy this procedural requirement, such findings being made despite an earlier decision declaring the 1981 law unconstitutional. Commenting on the approach adopted by the Constitutional Court, the Venice Commission, in its 2018 examination of Malta's constitutional arrangements,¹¹¹ noted that '[t]he execution of judgments of the Constitutional Court is an essential requirement of the rule of law. Leaving the choice of whether or not to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement'.¹¹²

¹⁰⁷ Stanton, above n. 10, at 61. Also see Tonio Borg, *Juridical Interest in Constitutional Proceedings*, L-Ghaqda Studenti tal-Ligi Online Law Journal (17 February 2017), <https://www.ghsl.org/lawjournal/juridical-interest-in-constitutional-proceedings/>.

¹⁰⁸ European Commission for Democracy through Law, *Malta – Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement (Opinion No. 940/2018)*, Council of Europe, para. 76 (17 December 2018), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)028-e).

¹⁰⁹ (CC) (20 July 2020) (8/19).

¹¹⁰ Borg, above, n. 28, at 184.

¹¹¹ The Venice Commission's visit to Malta in November 2018 was to give 'opinion on Malta's legal and institutional structures of law enforcement, investigation and prosecution in the light of the need to secure proper checks and balances, and the independence and neutrality of those institutions and their staff whilst also securing their effectiveness and democratic accountability' (European Commission for Democracy through Law, above, n. 108, at para. 1). Concerns in this regard became prominent in the light of the murder of investigative journalist, Daphne Caruana Galizia, in October 2017.

¹¹² *Ibid.*, at para. 77, citing European Commission for Democracy through Law, *Rule of Law Checklist*, Council of Europe (11 – 12 March 2016), https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

It is fundamental constitutional principle the world over that apex courts guard and protect the provisions of the Constitution from abuse, manipulation, and conflicting legislative and executive actions. As Ginsburg observes:

Constitutional review, the power of courts to strike down incompatible legislation and administrative action, is an innovation of the American constitutional order that has become a norm of democratic constitution writing ... [As of 2008], 158 out of 191 constitutional systems include some formal provision for constitutional review.¹¹³

The practice of the Maltese Constitutional Court to defer to Parliament in making decisions as to whether unconstitutional laws should remain valid, therefore, subverts one of the most fundamental principles of constitutional law and undermines the supremacy of the very text it is designed to protect. Whilst some have suggested that empowering the Court with fresh powers might serve to reassert its responsibility and reinforce the supremacy of the Constitution, more fundamental change is needed as section 4 of this article now explores.

4 CONSTITUTIONAL REFORM TO STRENGTHEN SUPREMACY

So far, this paper has highlighted several concerns with the supremacy of the Maltese Constitution. The supremacy clause appears limited in its scope and application, it is weakly protected from constitutional amendment and manipulation, and it is not bolstered by a Constitutional Court willing to uphold conflicting laws as permanently void. There are a number of potential changes that could correct these concerns, and which are in need of consideration if the supremacy of the Constitution is to be more strongly asserted.

Constitutional reform has been explored and considered over the years in Malta,¹¹⁴ with some even advocating for the adoption of a new constitution through the creation of a 'second republic'.¹¹⁵ This article does not echo this proposal. The discussions herein found notwithstanding, many of the shortcomings of the Maltese system are not borne out of the constitutional text, especially since reforms in 2020 corrected identified concerns for the separation of powers and the extent to which the Government was able to exercise autonomy

¹¹³ Tom Ginsburg, *The Global Spread of Constitutional Review*, in *The Oxford Handbook of Law and Politics* 81, 81 (Gregory A. Caldeira, R. Daniel Keleman, and Keith Whittington (eds), OUP 2008). Also see Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis* ch. 2 (Hart Publishing 2014).

¹¹⁴ See, for example, Anthony Manduca, *How would experts reform the Constitution?*, *Times of Malta* (7 November 2017), <https://timesofmalta.com/articles/view/how-would-experts-reform-the-constitution.662228>; Marc Sant, *Proposals for a Constitutional reform agenda in Malta: Why the Constitution of Malta requires updating* (VDM Verlag Dr. Müller 2010).

¹¹⁵ See Aquilina, above, n. 11, at 113.

over the other branches of the State.¹¹⁶ This paper, instead, considers two main proposals. The first explores ways in which Article 6 of the Constitution might be amended; the second considers how the Constitutional Court might be reformed to enable it more robustly to preserve and protect the supremacy of the Constitution. We take these proposals in turn.

4.1. *Amendments to the supremacy clause*

Amendment of Article 6 would need to do two things: first, eradicate limitation, helping to clarify the unequivocal supremacy of the Constitution; secondly, it should provide stronger protection for constitutional supremacy, ensuring that it cannot be abused or manipulated too easily by a majority in Parliament.

With regard to the first of these suggestions, it is recalled that Article 6 appears limited in two respects: firstly, in its assertion that the Constitution is supreme above legislation, without reference to exercises of executive or judicial power; and, secondly, through its express subjection to Article 47(7) and (9) of the Constitution. Reasons underpinning the first of these have already been examined, above, and, indeed, the supremacy clause set out in the Constitution of Kenya has already been cited as one that proclaims a more complete conception of supremacy.¹¹⁷ Whilst the apparent omission in Article 6 to declare the Constitution of Malta supreme over 'all persons and all State organs' has not necessarily created system in which Government and the courts assume exemption from the terms of the Constitution, amending the clause in terms similar to Kenya would at least offer a more complete acknowledgement of total constitutional supremacy. The second limitation, namely Article 6's subjection to Article 47(7) and (9) of the Constitution, is now largely historic since 'incorporation of the European Convention on Human Rights in Maltese law ... rendered the immunities which were still then operative, practically irrelevant and redundant'.¹¹⁸ The only surviving immunity is that pertaining to Article 37 of the Constitution and even in this respect the Constitutional Court has observed that Article 1 of Protocol 1 of the Convention is capable of providing appropriate scrutiny.¹¹⁹ Removal of the express limitations to Article 6, therefore, is unlikely to effect a seismic change, but it would nonetheless ensure a clearer expression of an illimitable conception of supremacy and it is here proposed.

¹¹⁶ See Act No. XLIII of 2020. For explanation and analysis of these reforms, see Stanton, above, n. 72, forthcoming; Tonio Borg, *The 2020 Constitutional Amendments: A Legal Analysis* 7 ELSA Malta Law Review 96 (2020).

¹¹⁷ See above, n. 29.

¹¹⁸ Borg, above, n. 28, at 372

¹¹⁹ See *Bernard Gauci et v. Commissioner of Land et (CC)* (19 April 2016) (2/09).

The second, and more urgent, suggestion with regard to Article 6 is the need to offer the supremacy clause a stronger level of entrenchment.¹²⁰ According to some, including Cremona, entrenchment of the supremacy clause was unnecessary. He noted that '[i]t is like entrenching truth or reality. Since section 6 (or rather the principle embodied in it) is by its very nature essentially unalterable, it would really make no sense to entrench it'.¹²¹ The events of December 1974, however, would appear to undermine this argument, repeal of the supremacy clause then being sufficient to suspend the supremacy of the Constitution and leave it susceptible to alteration in defiance of the required amendment thresholds in (what is now) Article 66. These events not only show that entrenchment is necessary but that the supremacy clause should be subject to the highest form of protection, which would mean that it could only be changed by a two-thirds majority in Parliament *and* subsequent approval in a referendum.¹²² Leaving it to the people to endorse any future attempt to alter the supremacy clause would remove the possibility that Parliament, hostage to a large government majority, could be used to introduced contentious amendments to the Constitution. This would offer stronger protection to the Constitution and potentially mean that events such as that which occurred in December 1974 could not easily be repeated.

An alternative way in which the supremacy clause could enjoy stronger protection would be through making Article 6 unamendable. The argument in favour of making the supremacy clause unamendable is a simple one. As Chan Sek Keong observes with regard to the Constitution of Singapore, '[i]f the supremacy of the Singapore Constitution or its basic structure could be destroyed or eviscerated by a valid constitutional amendment ... then the notion of constitutional supremacy is meaningless, because Parliament is effectively supreme'.¹²³ Unamendable constitutional provisions are by no means uncommon and much has been written about their use and effectiveness.¹²⁴ The practice of declaring constitutional supremacy unamendable is less common, though not without example. The Constitution of

¹²⁰ At the time, some called for the supremacy clause to be entrenched to this extent (see Cremona, above, n. 10, at 133. Cremona observes that 'Edgar Mizzi writes that this section 6 should have been entrenched by requiring for it to be altered not only [by] a two-thirds majority of all members of the House but also a referendum' (Cremona, above, n. 10, at 133, citing Edgar Mizzi, *Malta in the making* 169 (Malta 1995)).

¹²¹ Cremona, above, n. 10, at 133.

¹²² See Art. 66(3), Constitution of Malta. The only provision that enjoys this level of protection is art. 76(2), which determines the life of Parliament.

¹²³ Chan Sek Keong, *Basic Structure and Supremacy of the Singapore Constitution* XXIX Singapore Academy of Law Journal 622, 665 (2017), cited in Yaniv Roznai, *Constitutional Amendability and Unamendability in South-East Asia* 14(1) The Journal of Comparative Law 188, 194 (2019).

¹²⁴ See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* ch. 4 (OUP 2019); Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* pt. 1 (OUP 2017).

Bolivia, for example, states in Article 411(1) that: '[t]he total reform of the Constitution, or that which affects its fundamental premises, affects rights, duties and guarantees, or the supremacy and reform of the Constitution, shall take place through an ordinary plenipotentiary Constituent Assembly, put into motion by popular will through referendum'.¹²⁵ The convening of a Constituent Assembly to adjust the supremacy of the Constitution is tantamount to a process through which a new Constitution might be drafted, implying that the supremacy of the constitutional text cannot be changed without putting into motion the same processes required to draft a new document.¹²⁶ A more prominent example is provided in the Constitution of Bangladesh. Article 7(2) of the Constitution provides that '[t]his Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void'.¹²⁷ Following this, Article 7B of the Constitution provides: '[n]otwithstanding anything contained in article 142 of the Constitution ... all articles of Part I, [which includes the supremacy clause in article 7(2)] ... shall not be amendable by way of insertion, modification, substitution, repeal or by any other means'.¹²⁸ There are examples, therefore, of supremacy clauses being declared unamendable.¹²⁹

A provision declaring the Maltese supremacy clause unamendable could take a simple form, along the lines as that offered in the Constitution of Bangladesh. This would involve adjustment of Article 66 of the Constitution to the effect that 'Article 6 of this Constitution cannot be amended and no amendment may suspend the supremacy of this Constitution'. Such a reform would place the sanctity of the constitutional text beyond the reach of any governing party, no matter the size of its parliamentary majority, and it would ensure the supremacy of the Constitution over Parliament in the plainest possible terms.

These suggested changes to Article 6 of the Constitution could potentially serve to remove the limitations inherent within the supremacy clause and provide an unequivocal expression of the Constitution's superiority over *all* laws, decisions, and policies. Concerns for constitutional supremacy in Malta, however, stretch beyond the text of Article 6. As section 3 discussed, the Constitutional Court has stopped short of declaring unconstitutional laws

¹²⁵ Article 411(1), Constitution of Bolivia. It is pertinent to observe that Bolivia is one of the hardest constitutions in the world to amend (see Albert, *ibid.*, at 99).

¹²⁶ See Roznai, above, n. 124, at 165.

¹²⁷ Article 7(2), Constitution of Bangladesh.

¹²⁸ Article 7B, Constitution of Bangladesh.

¹²⁹ India is an example of the supremacy of the Constitution being declared unamendable not through any constitutional provision but through the Basic Structure doctrine, developed by the Indian Supreme Court in *Keshavanda Bharati v. State of Kerala* (1973) 4 SCC 225.

permanently void, a practice that further undermines the supremacy of the Constitution. The article now goes on to consider one way in which this practice might be rectified.

4.2. *Strengthening the Constitutional Court and altering its composition*

The case of *Marbury v. Madison* shows that preservation of constitutional supremacy rests not so much on an express clause but on a court able and willing to guard the Constitution from easy change and manipulation by Government or Parliament. Constitutional reform strengthening the power of the Maltese Constitutional Court has been explored before.¹³⁰ The Venice Commission has recommended:

amending the Constitution to ensure that a legal provision found unconstitutional as such by the Constitutional Court loses legal force with the publication of the judgment of the Court. In order to avoid legal gaps, the Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specific period (typically up to one year). This allows Parliament to phase in new legislation before the unconstitutional provisions lose their force.¹³¹

This is a valid proposal and one that could potentially correct the Constitutional Court's treatment of unconstitutional laws. As section 3 of this paper has demonstrated, however, the issue is less with the *powers* of the court and more with the way in which the court has failed to use those powers to the fullest extent. Substantive provision already exists giving the courts the power to declare laws void and, in many other countries, absence of such provision has not prevented a court from declaring unconstitutional laws permanently void. Something further is needed to change the Court's approach. Two reforms are here proposed, therefore, which aim to strengthen the Court, providing a foundation upon which it should be in a better position to assert its role as guardian of the Constitution and to adopt the practice of declaring permanently void unconstitutional laws. The first proposal is that the size of the Court be increased to five; the second is that the Court broaden the scope of eligible judges to include legal academics.¹³² We examine each proposal in turn.

When the Constitution of Malta was first granted in 1964, Article 96(2) provided that '[o]ne of the Superior Courts [in Malta], composed of the Chief Justice and four other judges

¹³⁰ See Stanton, above n. 10, at 71 – 73.

¹³¹ European Commission for Democracy through Law, above, n. 108, at para. 78. This practice is not uncommon, with countries such as Germany, Hungary, Italy, Poland, and Spain all being known to use a variety of measures sometimes to delay the coming into effect of findings of constitutional invalidity (see De Visser, above, n. 113, at 317 – 324).

¹³² I am grateful to Tonio Borg for informing this suggestion.

of the Superior Courts, shall be known as the Constitutional Court'.¹³³ There were, in other words, five judges on the Court, including the Chief Justice as President and another nominated judge as Vice-President. This arrangement lasted less than a decade. During the early 1970s, and with the Vice-President position then vacant, the Government attempted to abolish the post. When it failed, it refused to nominate a new candidate, meaning that the Court was not able to sit. This state of affairs lasted until the constitutional reforms, controversially introduced in 1974,¹³⁴ reduced the size of the Court to three judges, one of which is still the Chief Justice. This remains the case today, the only recent change to the Court being an alteration of the way in which judges and the Chief Justice are appointed.¹³⁵ The main requirement for judges to be eligible to sit on the Constitutional Court is that they are eligible for appointment to the Court of Appeal. On this, Article 95(2) of the Constitution states that the Constitutional Court is 'composed of such three judges as could, in accordance with any law for the time being in force in Malta, composed the Court of Appeal'.¹³⁶ The Constitution goes on to clarify that '[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'.¹³⁷

It is in the context of these provisions that the first proposal is made: the Constitutional Court should return to a panel of five judges. The reasoning behind this proposal is that increasing the size of the panel would provide opportunity for more in depth scrutiny, a more thorough process of deliberation informed by a broader number of views, and the potential for greater expertise. Moreover, since, as Ginsburg observes in this context, that 'there is ample empirical evidence that group decision making is of higher quality than individual decision making',¹³⁸ it can be argued by extension that five judges would offer higher quality decision making than three judges.

The second suggested alteration to the Maltese Constitutional Court concerns the way in which these two new, additional, judges might be appointed. It is proposed that, rather than

¹³³ Article 96(2), Constitution of Malta (as originally enacted).

¹³⁴ See above, section 2.4.

¹³⁵ Judges are appointed by the President, acting on the advice of the Judicial Appointments Committee, whilst the Chief Justice is formally appointed by the President following approval by a two-third vote in the House of Representatives (see art. 96(1) and (3), Constitution of Malta). *Also see*: Borg, above, n. 28, at 515 – 516.

¹³⁶ Article 95(2), Constitution of Malta.

¹³⁷ Article 96(2), Constitution of Malta.

¹³⁸ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* 47 (Cambridge University Press 2003), citing Stephen Bainbridge, *Why a Board? Group Decision-making in Corporate Governance*, 55 Vand. L. Rev. 1 (2002).

be selected from existing members of the judiciary or the legal profession, the two additional members should be suitably qualified and expert legal academics. Academics as judges is by no means a new phenomenon. Many members of the US Supreme Court, for example, have held academic positions, the late Ruth Bader Ginsburg prominent amongst these. Indeed, writing in 2012, Barton observes of Chief Justice Roberts' Supreme Court that '[w]ith ninety-five collective years in legal academia, Roberts['] Court] is ... first among all Supreme Courts in years spent in legal academia ... two Courts from the 1940s (Hughes and Stone) are just behind with ninety-four total years spent in. legal academia'.¹³⁹ In the UK, the creation of the Supreme Court in 2009 saw a move toward a more diversely qualified bench. Brenda Hale, for example, spent the majority of her early career in academia, whilst Andrew Burrows – appointed to the Court in 2020 – is the first Justice to be selected directly from the legal academy. Finally, in Ireland, the Judicial Appointments Commission Bill 2022 seeks to amend the Courts (Supplemental Provisions) Act 1961 by providing that:

A person shall be qualified for appointment and for nomination for appointment or election to judicial office ... where he or she – (a) is for the time being – (i) a legal academic of not less than 12 years' standing who has been employed as such for a continuous period of not less than 2 years immediately before such appointment.¹⁴⁰

It is thus a practice that is established – or is being established – in other parts of the world. The arguments in favour of using legal academics on the Maltese Constitutional Court are numerous. Whilst academics will not always have the same practical experience of the courts' systems and processes, the opportunities that academia affords to think more critically about the law, the way in which it works, and the way in which it interacts with society would be an obvious benefit. As Rafferty notes:

The experience ... [that an academic] has to offer the judiciary is gained from analysing and critiquing that which is said to be law and evaluating it based on its substantive intellectual merits. This presents an alternative interpretation to accepted practice and presents a greater scope by which to shape the law ... The academic takes on a more intellectual, holistic approach to the law; his or her purpose being to unearth and decipher the various concepts, values and obligation[s] of the society in which they live and operate. The academic engages more with the intellectual substance of the law

¹³⁹ Benjamin H Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience* 64 Florida Law Review 1137, 1156 (2012), cited in Conor Reidy, *Who am I to Judge? – The Appointment of Academics to the Irish Judiciary* 3 Irish Judicial Studies Journal 74 (2019).

¹⁴⁰ See s. 63(e), Judicial Appointments Commission Bill 2022. Also see, for further discussion: Reidy, *ibid.*; Laura Cahillane, *Judicial appointments in Ireland: the potential for reform*, in *Judges, Politics and the Irish Constitution* 123 (Laura Cahillane, James Gallen, and Tom Hickey (eds.), Manchester University Press 2017).

with regards to the legal doctrine, institutions, a personnel that make up the law and the lawyers who operate within its realms ... An academic lawyer in his or her capacity of judge could[, therefore,] offer more innovative and creative ways of thinking about law, what law is, and that which can be done with the law. Furthermore, the academic judge could offer the potential to galvanise the intellectual weighting of the law.¹⁴¹

On this basis, appointing appropriately expert academics to the Maltese Constitutional Court could enhance the depth and quality of constitutional interpretation, and provide a more intellectual basis upon which decisions are made. Moreover, these benefits, combined with those noted above in respect of proposals to increase the size of the Constitutional Court, mean that there exists the potential for the Court to adjudicate alleged breaches of the Constitution upon a more intellectually robust critical foundation. This could, in turn, furnish the Court with the confidence and attitude required to make clearer findings of constitutional invalidity that are not limited to the particular case at hand, but mean that an unconstitutional law can be declared permanently void.

5 CONCLUDING REMARKS

The supremacy of the Constitution of Malta is asserted plainly in Article 6 of the instrument that was granted to the Maltese people sixty years ago. This is a supremacy, however, that has not always been effectively realised. Limitations inherent within the text of the clause, as well as concern for the way in which the Constitutional Court has struggled to provide appropriate protection have generated examples of the constitutional text itself being easily manipulated by those in power. Discussion of proposed amendments to the text of Article 6, as well as consideration of reforms to the Constitutional Court, have sought to offer ways in which the supremacy of the Constitution of Malta might be asserted with greater confidence in the future.

¹⁴¹ Brónach Rafferty, *The Case for Academics as Judges*, Penn Undergraduate Law Journal (18 April 2016), <https://www.pulj.org/the-roundtable/the-case-for-academics-as-judges>.