Small states and constitutional reform: democracy in Malta

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Abstract

The Republic of Malta is an archipelago of five islands that covers just 122 square miles. Its small size is interesting from a constitutional perspective for the manner in which it impacts upon the nature of its Parliament, the powers of its Government and the strength of its democracy. This chapter examines the relationship between state size and democracy. It argues that whilst the formal features of the Maltese system portray a liberal constitutional democracy, the more informal features undermine this perception. Excessive government power, allegations of corruption and assassination, and weak opportunity for legal and political accountability conspire to present Malta as an imperfect democracy. The chapter discusses recent reforms that attempt to correct this reality and it recommends further changes that are needed to strengthen the Maltese democratic and constitutional order.

Keywords: corruption; constitutional reform; democracy; Malta; small island

1. Introduction

This chapter focuses on constitutional and democratic reform in Malta. It explores the relationship between Malta's size and the issues affecting its democracy and culminates with an assessment of recent and potential reforms. Democracy here equates with the notion of "liberal constitutional democracy", which

> "has three conceptually separate but functionally intertwined elements … first, a democratic electoral system … [with] periodic free and fair elections … second[ly,] … the particular liberal rights to speech and association that are closely linked to democracy in practice. Finally, … a level of integrity of law and legal institutions – that

* I am grateful to Dr Tonio Borg, Dr Cassandra Wiener, Dr Aldo Zammit Borda, and an anonymous reviewer for their comments on earlier drafts. Earlier versions of this chapter were presented at ICON-S 2021 Mundo Conference, *The Future of Public Law*, 6 – 9 July 2021; and at IACL-AIDC Global Roundtable, *Democracy 2020: Assessing Constitutional Decay, Breakdown & Renewal Worldwide*, 18 – 26 November 2020. I am grateful to participants at those events who offered comments on some of the themes discussed in this chapter.

> is, the rule of law – sufficient to allow democratic engagement without fear or coercion" (Ginsburg and Huq, 2019: 10).

Consideration of the Maltese democracy centres upon those constitutional features that seek to sustain a liberal constitutional democracy. These include elections and other forms of citizen engagement, appropriately organised institutions that ensure a balance of power and opportunity for political and legal accountability, and a system of rights and freedoms protected through the constitutional text.

The focus on Malta is justified on two grounds. First, its small size. Made up of 5 islands and lying in the middle of the Mediterranean Sea the Maltese archipelago covers just 122 square miles (Blouet, 2017: 13) and has a population of 515,000 (National Statistics Office – Malta, 2020: 1). It is the smallest member state of the European Union, and the most densely populated. Secondly, recent political events have prompted concern for democracy and the rule of law in Malta. The assassination of a journalist, allegations of corruption, and a constitution that affords considerable power to the Government are factors that have contributed to this reality. Reforms have been introduced to address some of these concerns, but more is needed. The chapter starts by outlining the constitutional order in Malta, before going on to consider the relationship between its size and the state of its democracy. It then offers an in-depth analysis of Malta's democracy, ending with an examination of recent constitutional reform and suggestions for further changes that could improve the democratic health of this small island state.

2. The Constitution of Malta – history and context

Malta's history is intrinsically linked to its size and location. It has always proved historically attractive from a strategic perspective. It served as a trading station for the Phoenicians in 700 BC and a "refuge harbour … and military base" in Carthage's struggles against Rome in 400 BC, and it provided Napoleon with a base from which he could embark upon his Egyptian campaign in 1798 and afforded the British a valuable naval presence in the Mediterranean during World War Two (Blouet, 2017: 28 – 30; 119; 241). Whilst Malta's location has always been a central factor in determining its significance in the world, its exposed nature and its small size has also meant that Malta has been susceptible to invasion by external forces. Invasion, conflict, and colonisation by myriad powers is a defining feature of Maltese history.

Over the last 3,000 years, Malta has been colonised, invaded and controlled by the Phoenicians, the Romans, Byzantium, the Arabs, the Normans, the French, the Spanish, the Knights of St John (who successfully fought off the Ottoman Turks in the siege of 1565), Napoleon and the British, before eventually achieving independence in 1964. Similar to many other colonies that sought independence from the British at this time, the Constitution of Malta was "given to the Maltese … by the United Kingdom Parliament" (Aquilina, 2017: 113). This constitution bore many similarities to the British constitutional order, though was also drafted "on the same lines as previous colonial constitutions given to Malta under British rule" (Aquilina, 2017: 113). The Westminster model of government prevails on the archipelago, albeit within a unicameral Parliament, with the political party that claims at least half of the seats in the House of Representatives forming a government, and that government being potentially subject to myriad opportunities for parliamentary, public and legal accountability.

The role played by Malta's Head of State also bears some similarity to the position in the UK. For the first decade of independence, Malta remained a British constitutional monarchy, local execution of Queen Elizbeth II's authority being realised by the Governor-General of Malta. In 1974, Malta became a republic, the President being appointed by a two-thirds majority in Parliament for a single term of five years (The President can also potentially be removed by the same majority. Prior to reforms introduced in 2020, discussed below, the President was appointed (and potentially removed) by a simple majority of Parliament).

Despite the clear influence of historic British rule, the Constitution of Malta also has features that are not uncommon to other codified systems. The written constitutional document is supreme, that supremacy being ensured through an express clause providing 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" (article 6, Constitution of Malta). Parliament's legislative authority is limited by this reality but is otherwise regarded as supreme under the Constitution (see article 65(1), Constitution of Malta). Where there are questions regarding the constitutional validity of laws, the Constitutional Court has – in theory, at least – the "jurisdiction to hear and determine … appeals from decisions … as to the interpretation of this Constitution … [and] on questions as to the validity of laws" (article 95(2), Constitution of Malta). Though exercise of this jurisdiction in practice is problematic,

as this chapter later explains, this important constitutional mechanism is a fundamental feature of democracies across the world (see *Marbury* v *Madison* (1803)).

The Constitution of Malta (articles 76(2) and 77) also sets out the manner in which the Parliament is formed, with general elections held every five years, and their propriety "guaranteed by the Electoral Commission … [and] by special remedies granted to the Commission and to any ordinary voter in case of widespread electoral abuses" (Borg, 2016: 23). Elections in Malta consistently attract a very high turnout. In the five elections to the House of Representatives between 1998 and 2017, the average turnout was 94.1 per cent (International Foundation for Electoral Systems, 2022). At the most recent general election in March 2022, turnout was 85.5%, the lowest since 1955 (Giuffrida, 2022). This is not a unique case but is relatively typical of small states. As Blais (2006, 117, citing Blais and Carty, 1990; Blais and Dobrzynska, 1998) observes, "the highest levels of turnout are reported in small countries such as Malta". Others have sought to explain Malta's high turnout and it is not for this chapter to replicate these discussions here beyond acknowledging that "[t]he most convincing explanation involves intense two-party competition for highly centralized governmental power, grounded in strong and pervasive partisanship in the population at large" (Hirczy, 1995: 268). The Constitution also makes extensive provision for fundamental rights and freedoms, this being bolstered by the European Convention Act 1987, which incorporated into Maltese law the rights contained within the European Convention on Human Rights. Malta joined the European Union in 2004.

Through the Constitution of Malta, therefore, the reality of Malta as "a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individuals" (article 1(1), Constitution of Malta) is ensured and protected. This is a reality that ostensibly resonates with established discourse concerning democracy in small states, as the next section will now discuss.

3. Small states and democracy

There is rich support for the view that small countries, particularly islands, tend to be more democratic, support that is deeply rooted in historical thought. "[C]lassical Greek thinkers - Pericles, Plato and Aristotle, among others – [for instance] believed that a polis had to be

small to be free of tyranny", whilst Rousseau later argued that "equality, participation, effective control over government, political rationality, friendliness, and civic consensus all necessitated a small state" (Srebrnik, 2004: 329, citing Dahl and Tufte, 1973: 5 – 7. Also see Baldacchino, 2012: 106). This view is justified by the fact that, in small states, it is easier for those in power to engage with the citizenry and, in turn, for the masses to participate in and engage with the governmental process. "A much reduced political distance between the voter and the voted makes citizens more politically aware and offers them better chances for reciprocal communication" (Baldacchino, 2012: 106). As a consequence, many small states enjoy an active political climate in which voter turnouts are often high and a good portion of the public are politically interested. As Dahl and Tufte (1973: 5 – 7) note, commenting on the historical support for the view:

> "Smallness, it was thought, enhanced the opportunities for participation in and control of the government … Smallness made it possible for every citizen to know every other, to estimate his qualities, to understand his problems, to develop friendly feelings toward him, to analyze and discuss with comprehension the problems facing the polity".

The assertion that small states tend to be democratic would appear to find credence in Malta. Just a few core features of the Maltese constitutional order were outlined above, these demonstrating high levels of democratic participation, established provision for individual rights and freedoms, institutional infrastructure designed to balance power and ensure opportunity for accountability, and respect for the sanctity of the constitutional text. Freedom House analysis of Malta also supports the claim that the country is democratic. With a global freedom score of 90/100, Malta is described as "a parliamentary democracy with regular, competitive elections and periodic rotations of power [in which c]ivil liberties are generally respected" (Freedom House, 2021). At first glance, therefore, the view that small states tend to be democratic is applicable to Malta.

There is, however, an alternative perspective; one that more accurately portrays the state of the Maltese democracy. It is rooted in a distinction observed between formal and informal democratic features. The elements of the Maltese system identified above and exemplified by reference to Freedom House's analysis can be labelled as formal democratic features insofar as they focus on "readily seen things such as regular elections, press-freedom laws,

and constitutional courts" (Erk and Veenendaal, 2014: 136). Informal features, by contrast, are those operating behind the scenes, perhaps within institutions, and potentially outside the realm of the readily identifiable democratic features of a constitution. They can focus, for example, on the ways in which the personal and professional relations of those in power might permeate their political activities, potentially giving rise to "illiberal practices including intimidation and cronyism" (Erk and Veenendaal, 2014: 136). The prominence of those wielding, what Erk and Veenendaal (2014: 136) call, "nonformal authority", meaning titleholders, powerbrokers, influential business figures and other elites might be encouraged, creating a culture of cronyism and clientelism. Cronyism refers to the practice of appointing known acquaintances or allies to given positions, whilst clientelism concerns the practice of rewarding individuals for their political support, perhaps with appointment to a particular position. "[C]lientelistic relationships are particularly likely to emerge and persist in small societies, due to the direct, face-to-face contacts between citizens and politicians" (Veenendaal, 2019: 1035. Also see Baldacchino, 2012: 107). Cronyism and clientelism can, in turn, lead to a risk of corruption; a concentration and dominance of government power; a correlative lack or suppression of effective opposition, thereby jeopardising plurality; erosion of individual rights, and, possibly, a breakdown in the rule of law.

The reality that many small states inherit their constitutional systems from colonial powers is also a factor. The appearance of stable, formal democratic features in such states is often rooted in systems that have been left behind or established by colonial powers upon independence (see Baldacchino, 2012: 108). This still does not preclude, however, the emergence of familiar concerns in respect of the more informal democratic features. Such concerns include:

> "divisive and monopolistic 'winner takes all' politics, long periods of one-party domination, rubber stamp parliaments, corruption and the entrenchment of patronage systems[, as well as the] emergence of an authoritarian-cum-charismatic leader … who exercise[s] almost total control over decision making in a jurisdiction for many years while the formal institutions of democracy persist" (Baldacchino, 2012: 108-9, citing Clegg and Pantojas-Garcia, 2009; Barrow-Giles, 2011; Singham, 1968; Klomp, 1986).

Baldacchino cites former Maltese Labour Prime Minister, Dom Mintoff, as an example of one such leader (2012: 109, citing Boissevain, 1994).

In countries that operate within systems inherited from colonial powers, there is a sense that the emergence of these informal practices can be attributed to the challenges faced when seeking to establish constitutional systems designed for large states in small states. A case in point is Tuvalu, which operates within a "Westminster-inspired" model. (Corbett, 2018: 39, citing Levine and Roberts, 2005). The "colonial bureaucratic structure" that this reflects, though, has presented concerns for "executive instability" and numerous attempts at constitutional reform have been made (Corbett, 2018: 39, citing Wettenhall and Thynne, 1994; Levine 1992).

Small state size, as well as the challenges inherent within a constitutional system inherited from colonial states, contribute to the contrasting democratic picture that the formal and informal features of a system reflect. The concern on this basis is that analyses that focus purely on the formal aspects of a democracy fail to present the full picture of a country's democratic and constitutional health, and potentially miss some of the issues that can flow from the more informal features of a system. Echoing this, Erk and Veenendaal (2014: 136) note the formal focus of Freedom House's analyses, explaining that whilst "[t]here is no question that the work of Freedom House has been and is a boon to the cause of democratization around the world … [its] data can miss how politics may really work behind a formal democratic façade".

The relevance of this dichotomy between formal and informal democratic features is pertinent here because, whilst there is an established school of thought, which presents small states as democratic, this conclusion arguably rests on analysis of solely formal democratic features. Consideration of the more informal aspects of small states' constitutional systems reveals potentially myriad shortcomings in the standards of democracy and illiberal political practices by those in positions of power. "Small states, in short, can look formally liberal-democratic but might be rather illiberal in their actual workings" (Erk and Veenendaal, 2014: 136). Noting how observance of this formal – informal distinction assists in revealing a fuller picture of small states' democracies, Morris (2018: 111, citing Veenendaal, 2015a; Veenendaal, 2015b) states that

> "a counterargument to the established narrative on small jurisdictions and democracies has emerged. This claims that the formalistic … approach does not

> provide the complete answer to questions of the democratization of small states … [indeed,] the blunt focus on institutions and the legal framework obscures the rather less democratic nature of political practices that can be experienced in small states".

This counterargument is supported by examples across the world. Erk and Veenendaal, for instance, provide a study of democracy in Palau, Seychelles, Saint Kitts and Nevis, and San Marino. Their analysis highlights, from a formal perspective, systems that are free, in which "political rights and civil liberties" are enjoyed, where "a fairly stable party system with ideologically distinguishable parties" prevails, and where turnouts are high (Erk and Veenendaal, 2014: 139). All this being so, the analysis also reveals "the continuing prevalence of informal but strong patronage customs; traditional titleholders and powerbrokers who wield ample nonformal authority; and illiberal practices including intimidation and cronyism" (Erk and Veenendaal, 2014: 136). In a similar vein, Srebrnik's analysis of democracy in the Commonwealth islands shows that countries "such as the Bahamas, Barbados, Dominica, and St. Lucia possess an 'impressive record of democratic politics'" (Srebrnik, 2004: 333, citing Griffith and Sedoc-Dahleberg, 1997: 2). Deeper examination, however, reveals problems with the health of democratic rule in such places. There are examples of "pre-democratic political cultures [in the South Pacific], including various forms of hereditary rule by tribal chieftains … prolonged periods of one party non-democratic misrule [in Cape Verde and Sao Tome e Principe], whilst in Equatorial Guinea … opposition political activity is systemically repressed, and torture and human rights violations are common" (Srebrnik, 2004: 335, citing Sutton, 1987: 9 - 10). This alternative perspective on the relationship between small state size and democracy, then, has a wealth of support. In terms of understanding why this pattern prevails, Corbett and Veenendaal opine that it largely stems from the ease with which politicians, citizens and various influential figures can interact with one another in such small states. They explain (2018: 167 – 8):

> "Virtually all small states have formally democratic political institutions, which … [means] that the majority of all small states are classified as 'free' in the Freedom House dataset. Yet, our analysis shows that formal institutions are able to shed light on a very small part of politics in small states. Rather, informal dynamics – a key component of personalistic politics – are of overriding importance. While the discrepancy and interaction between formal and informal institutions and politics in both new and older democracies is increasingly highlighted … we contend that this

> disparity is even more profound in small states, which, by definition, are 'face-to-face' societies."

These themes are also prevalent in Malta.

4. Malta – an imperfect democracy

This chapter has already explained how, from a formal perspective, Malta's system appears democratic. A free and fair system of elections that attract a high turnout, a parliamentary executive system that facilitates political accountability, and protection for individual rights, all framed within a supreme constitutional document that binds all people and institutions to its terms. The notion that analysis of the more informal features of (some) small states' systems reveals a somewhat different democratic picture, however, holds true in respect of Malta.

Concern for democracy in Malta is not new, and nor it is limited to the context of recent political circumstances. Back in the 1980s, for example, constitutional crisis from an election result that gave Dom Mintoff's Labour Party a majority of parliamentary seats in the House of Representatives, but with a minority of the votes cast. He nonetheless assumed the office of Prime Minister, which he held until 1987 (see Bencini, 2018: 144 - 147). Reforms were introduced ahead of the 1987 election – in the form of a corrective mechanism (see note 6) to ensure that such an occurrence could be avoided in the future. Concern for Malta's democracy at this point was linked not only to the fact that the party with the majority of votes won a minority of seats, but also to the fact that in practice the Government, rather than the Electoral Commission, had assumed responsibility for review and alteration of electoral district boundaries, this permitting a "redistribution of [said] boundaries … [in an act that opposition leader, Eddie] Fenech Adami described as 'blatant gerrymandering'" (Xuereb, 2021).

Issues with the state of Maltese democracy today are somewhat more complex and multi-faceted than those which arose in the 1980s, and they stem from myriad issues that conspire to undermine the health of the Maltese democratic experiment. Our starting point is to observe that, in January 2020, "Malta's democracy … [was] downgraded to the 'flawed' category in *The Economist's* annual index" (Caruana, 2020). This shift is said to be a result of

concern for the functioning of government, weaknesses in the rule of law, and the events surrounding the assassination of investigative journalist, Daphne Caruana Galizia (Caruana, 2020). These concerns, including the assassination and allegations of corruption, are discussed below. More broadly, though, political crisis has emerged amid, and as a result of, constitutional features that have permitted certain democratic values to be eroded and questionable political activities to occur. It is these that we explore now.

4.1. Malta's Parliament – majority and accountability

The Maltese Parliament, as might be expected for such a small country, is unicameral and comprised of a minimum of 65 seats (for further details, see Appendix). Modelled on the Westminster system, the Government is chosen from Parliament, a majority of seats being required for a political party to take office. The realities of such a small Parliament, however, are that ostensibly few votes are needed for a majority to be achieved and for laws to be enacted and Government initiatives passed. Furthermore, much of the Maltese Constitution is subject to weak levels of entrenchment, with the vast majority of provisions changeable by the passing of a bill "supported by the votes of not less than two-thirds of all the members of the House" of Representatives (article 66(2), Constitution of Malta). Consequently, important constitutional provisions, including those setting out the supremacy of the constitution, those focusing on human rights, and large parts of those determining the formation and operation of the legislative, executive and judicial institutions, can be amended by just 44 votes (where the Parliament is comprised of 65 seats), with no external approval required or upper chamber to agree. Before 2022, where the Parliament was comprised of 67 or 69 seats, the two-thirds threshold was met by 45 or 46 votes respectively. Following the new corrective mechanism in 2022, where a Parliament is made up of 81 seats, the two-thirds threshold is met by 54 votes.

The challenges and potential dangers presented by the small size of the Maltese legislature can be seen through constitutional reforms introduced in 1974. At that time, the supremacy clause in article 6 of the Constitution could be altered by an absolute majority of the Parliament. This being the case, Act No LVII of 1974 was enacted, repealing the supremacy clause and "permitting the passing of laws inconsistent with the Constitution" (Stanton, 2019: 53). Indeed, section 2 of the 1974 Act expressly stated that laws inconsistent with the terms

of the Constitution "shall prevail and shall have full effect notwithstanding any provision of this Constitution and any inconsistency therewith". With the supremacy of the constitutional document removed, reforms were enacted through the ordinary legislative process, including those establishing Malta as a Republic.

> "Having suspended the supremacy clause … and declaring that ordinary laws should 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" (Stanton, 2019: 53 – 4, citing Cremona, 1994: 106).

Once these changes had been introduced, the supremacy clause was reinstated with a heightened level of protection; it would thereafter require a two-thirds vote in Parliament to adjust the clause. Regardless, the ease with which it was removed (and then reinstated) in 1974 highlights the potential dangers of such a small legislature. At that time, the House of Representatives was comprised of just 55 seats, 28 votes therefore being the threshold at which one of the most significant provisions of the constitutional text could be removed and its authority undermined. The small size of the Maltese Parliament, therefore, combined with the weak entrenchment to which much of the Constitution is subject, means that the stability of the Maltese system rests with a small group of individuals, with the potential existing for abuse and manipulation.

Another consequence of a small Parliament, particularly one that subscribes to the Westminster model of government, is the exaggerated effect of MPs working within the executive. The defining feature of a parliamentary executive system is that the Government is drawn from, and typically enjoys a majority of seats in, the legislature. This being the case, there is scope for Government to wield considerable authority. Lord Hailsham, for instance, in the context of the UK system, identified the difficulties inherent within a system where "the absolute legislative power confided in Parliament, [is effectively] concentrated in the hands of a government armed with a Parliamentary majority", going on to explain that such a system risks becoming an "elective dictatorship" (Hailsham, 1978: 127). Though the UK's peculiar constitutional arrangements, including the predominance of a sovereign Parliament, make this particular risk subject to unique challenges, it is nonetheless one that might potentially beset any system rooted in the Westminster model. Small states, though, are perhaps at

greater risk because a smaller Parliament will inevitably mean that a greater portion of its members are employed within the Government, Malta being a case in point. In Malta, "[t]here is no limit to the number of Ministers who may form the Cabinet along with the Prime Minister" (Borg, 2016: 380). In 2020, when Robert Abela took office as Prime Minister, 26 of the 37 Labour MPs in the House served in the Government, either as a Minister or as a parliamentary secretary: almost 40 per cent of the legislature. This means that the Government enjoyed a healthy presence in Parliament, leaving potentially little scope for backbench rebellion and the opportunity to achieve majority support with relative ease since it also permits "the Prime Minister to exercise greater power through enforcing party discipline on parliamentarians" (Venice Commission, 2018). In addition, "[i]n smaller legislatures, having a relatively high proportion of the membership in the executive leaves a smaller proportion available for executive scrutiny" (Horgan, 2019: 87), something that, in Malta, is exacerbated not only by the lack of an upper chamber and the potential opportunity for scrutiny that that might afford, but also by the fact that MPs work part-time, meaning that the opportunity to offer scrutiny of the Government is further reduced. It is not an exaggeration, therefore, to suggest that, in Malta, "the executive generally controls the legislative process" (Beatson, 2021: 119).

Several issues flow, therefore, from the small size of the Maltese legislature, and the implications that this has for the operation of Government. Changes were introduced in 2020 to place certain restrictions on the scope of Government's power in Parliament, though more is needed. These recent reforms, and the needs for further change, are discussed below.

4.2. Malta's Government – cronyism and excessive power

The chief concern for the state of the Maltese democracy is the extent of executive power. The previous section outlined the way in which the government's position within Parliament creates the potential for it to wield considerable authority and perhaps even to control Parliament. Above and beyond this, though, through the development of established practice, as well as constitutional provision, the Maltese Government has been able to exercise considerable power in a number of broader respects. For example, prior to the 2020 constitutional reforms, the Prime Minister had the power to appoint judges, magistrates, the Attorney-General, and the Police Commissioner. This had profound ramifications. With

regards to the judiciary, for instance, whilst since 2016, a Judicial Appointments Committee has added a degree of balance to the process, permitting the vetting of candidates and the making of recommendations, the Prime Minister has still ultimately had the power to appoint whomever he wished to the judiciary. Explaining the problems that this reality presents with particular focus on the role of the Chief Justice, Aquilina (2017: 50) writes that "the … law empowers the Prime Minister to exercise his political patronage to appoint whomever he wants, with no proper evaluation by an independent committee, to the office of Chief Justice". In this way, says Aquilina, the Constitution sets out values "of mediocrity, nepotism, discrimination in treatment, elitism and favouritism" (Aquilina, 2017: 50). The potential dangers that this can present is shown by the reality that, in recent years, those closely associated with the Prime Minister have been appointed to public office. In 2019, for example, a magistrate was appointed to the bench by the Prime Minister, Joseph Muscat, who was the daughter-in-law of "the government's representative on the Commission for the Administration of Justice (CAJ) … the Prime Minister's personal lawyer … [and] the Labour Party's main legal advisor" (Camilleri, 2019).

Government's historic input into the appointment, not only of judges but also of other offices of state, meant that there was also an uneasy overlap between the executive function and the prosecuting authorities. In Malta, "[t]he task of ... prosecution is … split between the Police and the AG" (Venice Commission, 2018). Having the Government's legal advisor responsible, in part, for the prosecutorial function was "problematic from the viewpoint of the principle of democratic checks and balances and the separation of powers" (Venice Commission, 2018). Moreover, and with a particular focus on anti-corruption, not only would the Attorney General have been potentially involved in deciding whether to prosecute allegations of Government corruption, itself reflecting a potential conflict of interests, but a judge, also appointed by the Government might also have played a central role in anti-corruption investigations and prosecutions. This overlap is particularly pertinent in the context of allegations of Government corruption and the assassination of Daphne Caruana Galizia.

The Maltese Government's historic powers to appoint individuals to key positions is amplified when we consider the small size of the country. In part this is because "[e]xecutive dominance is a feature of most small island states, in which government typically controls a

disproportionately large section of the job market" (Veenendaal, 2019: 1046, citing Baldacchino, 1997). Moreover, it is because the political culture in small states can lead to cronyism and clientelism. As Veenendaal (2019: 1046) notes:

> "In the Maltese context … [e]lection victories translate into a party's near-total control of the state apparatus … Clientelism and patronage are linked to executive dominance, because partisan appointments amplify the control of the party in power, weakening (semi-) public institutions that are supposed to function in an impartial or neutral manner".

This tendency towards clientelism is echoed by Aquilina (2017: 103), who notes that "the rule of the day … is nepotism, clientelism and cronyism."

This executive dominance, and its reliance on partisan appointments, can potentially be used to the Government's advantage not only to "amplify the control of the party in power", but also "as a tactic to weaken or subjugate institutions that may pose constraints on executive power" (Veenendaal, 2019: 1046). In this vein, Veenendaal (2019: 1046) observes that there is "frequent turnover of top positions[, which] may be used as a strategy to curtail their independent functioning". Reflecting this concern, a respondent to Veenendaal's empirical study (2019: 1046 – 7) opines that:

> "It's … [the] government who appoints the new police commissioner. And that commissioner gets changed nearly every year. We've had five commissioners in 4 years … it is not well for the institution. You have certain people being appointed as police commissioner, and you question their credentials. The same applies with the judiciary, and it is ultimately the whole institution that is going to be questioned".

All this makes for a system that is not only controlled by the Government, but open to easy abuse by those in positions of power, as the next section discusses in the context of alleged corruption in Malta. Above and beyond its power to make appointments to key public positions, there are broader concerns for the extent of the Government's influence. Under article 118 of the Constitution, for example, the Chair of the Broadcasting Authority is appointed by the President, acting on the binding advice of the Prime Minister and after merely consulting the leader of the Opposition. The potential for Government influence over public broadcasting – whether direct or indirect – can be seen from events that occurred in 2020. Borg, writing in the Times of Malta, explains how, amid the Covid-19 pandemic, a 90

minute televised press conference given by the Prime Minister covered not only its intended announcement of pandemic-related restrictions, but also "delved into such matters as the reforms the government was introducing and the new system it was proposing for the appointment of members of the judiciary" (Borg, 2020b). When the opposition petitioned the Broadcasting Authority for a right to reply, it took 3 and a half months for a decision to be made and for the right to be granted. As Borg noted (2020b), "[g]ranting the opposition a right of reply in September for what was said in May is, to say the least, preposterous". In the context of such an active and polarized political culture as that which persists in Malta, it is potentially dangerous that the party in power can wield such influence over broadcasting and the way in which matters are reported to the public. Indeed, back in 2020, "the public broadcasting station gave scant importance to the sensational news that a former chief of staff at the Office of the Prime Minister had been arrested and his entire assets seized" (Borg, 2020b). That the Government wields such wide authority across the public sector is problematic, particularly in the context of aforementioned concerns for the strength of parliamentary accountability. As the Venice Commission (2018: 4 - 5) notes:

> "Constitutional checks and balances as well as good governance are particularly important in small states where the Government apparatus has a strong influence … [In Malta, t]he double role of the Attorney General as advisor of the Government and as prosecutor is problematic. A part-time Parliament is too weak to exercise sufficient control over the executive branch of power. The wide powers of appointments, that the Prime Minister enjoys, make this institution too powerful and create a serious risk for the rule of law. Taking into account the Prime Minister's powers, notably his or her influence on judicial appointments, crucial checks and balances are missing".

Above and beyond the way in which these matters relate to the strength of the constitutional infrastructure, excessive power and weak accountability also creates the potential for abuse.

4.3. Corruption and assassination

Many of the problematic features of the Maltese system already discussed underpin what is perhaps the most significant concern for the state of democracy on the archipelago; namely, allegations of corruption and the 2017 assassination of an investigative journalist.

In its first annual report on the rule of law in the European Union, the European Commission commented that "[d]eep corruption patterns have been unveiled [in Malta] and have raised

a strong public demand for a significantly strengthened capacity to tackle corruption and wider rule of law reforms" (2020). This perception is not helped by the inadequacies of the Maltese system to deal with such allegations effectively. Prior to the 2020 constitutional reforms, mechanisms in place to tackle allegations of corruption were problematic, with the Government afforded a considerable role in the process. The Permanent Commission Against Corruption, for instance, created to investigate allegations of corruption, previously consisted of members who were appointed by the Prime Minister, and the Commission itself reported to the Minister of Justice. That key members within the Government could play such a crucial role in the work of the Commission potentially compromised efforts to investigate alleged corruption. It is perhaps no surprise that Malta's "track record of securing convictions in high-level corruption cases is lacking" (European Commission, 2020). It is problematic, therefore, particularly in the context of concerns for corruption in Malta, that the Government has historically played such a role in anti-corruption processes. Though "corruption has … always been a feature of Maltese politics" (Veenendaal, 2019: 1047, citing Mercieca, 2012; Mitchell, 2002; Pirotta, 2012), certain allegations have gained considerable prominence in recent years. It is these that we outline now.

In October 2017, investigative journalist, Daphne Caruana Galizia, was murdered when a bomb exploded in her car. Three men were charged. One pleaded guilty in return for evidence and was sentenced to 15 years in prison. The other two await trial. Investigations have largely focused on identifying those responsible for orchestrating and ordering the attack. To this end, prominent businessman, Yorgen Fenech, was arrested in 2019 for his alleged involvement in the conspiracy and, in August 2021, he was formally charged with complicity in the murder. At the time of her death, Caruana Galizia was working on stories that alleged corruption in Malta. In particular, she was investigating Fenech's activities and his alleged links with the Maltese Government, revealing a link between Fenech's secret company, 17 Black, and the Prime Minister's former Chief of Staff, Keith Schembri, and the former Energy Minister, Konrad Mizzi, a link that allegedly netted Schembri and Mizzi US$2 million (Camilleri, 2021: 118). Though Schembri and Mizzi have not been charged as part of the murder investigations, a public inquiry found that

> "[t]he state should shoulder responsibility for the death of Daphne Caruana Galizia … It singled out former prime minister Joseph Muscat for enabling this state of affairs

> and found his entire cabinet collectively responsible for their inaction in the lead-up to the assassination … [There was] an atmosphere of impunity, generated from the highest echelons of the administration inside Castille, the tentacles of which then spread to other institutions, such as the police and regulatory authorities, leading to a collapse in the rule of law" (Borg, 2021, 1).

These events reflect a further degree of cronyism and clientelism at the heart of the Maltese Government. As Borg (2021: 2) notes, the public inquiry into the assassination "found 'abundant proof' of the cosy relationship between certain government officials and big business". Inevitably, there has been much criticism of the events surrounding the murder and the circumstances that enabled it to be committed (see Camilleri, 2021; Delia, 2021). The Venice Commission, for instance, following a visit to Malta in 2018, noted that:

> "The media and civil society are essential for democracy in any state. Their role as watchdogs is an indispensable precondition for the accountability of Government. The delegation of the Venice Commission had the impression that in Malta the media and civil society have difficulty living up to these needs. Even when it is stressful for the authorities to endure their criticism, the latter have a duty to ensure that the media and civil society can freely express themselves" (Venice Commission, 2018).

Since 2018, the Venice Commission has offered recommendations for constitutional reform in Malta, and opinions on proposed legislative changes (see Venice Commission, 2018, 2020a, 2021). These are discussed below. In a similar vein, though, and in the aftermath of the European Parliament's own visit to Malta in December 2019, Vice-President of the European Commission, Věra Jourová (2019), said:

> "The Commission condemns the assassination of journalist Daphne Caruana Galizia. Her murder was an attack on the free media and is a grave concern to Europe as a whole. Media freedom is the foundation of our free and democratic society. Journalists must feel safe to work in Europe. If not, democracy as we know it will be under threat".

Above and beyond their connection with Fenech's secret shell company, 17 Black, Schembri and Mizzi were also investigated for their own allegedly corrupt activities. Both were implicated in the Panama Papers revelations as owning secret offshore shell companies (Camilleri, 2021: 118). Schembri, along with a number of his associates, was arrested in March 2021 on charges of corruption and money-laundering for his role in an allegedly "corrupt deal … wherein they defrauded Malta Enterprise" in its purchase of a printing press (Camilleri,

2021: 14). He awaits trial. Muscat and Schembri both resigned their posts; Mizzi, ejected from the Labour Party and serving lately as an Independent MP, did not stand in the 2022 General Election.

Scandals flowing from the Panama Papers, as well as the alleged involvement of government figures in the murder of Daphne Caruana Galizia are the most prominent forms of corruption currently alleged in respect of Malta. They are, though, by no means the only matters of concern. In 2013, for example, Prime Minister, Joseph Muscat, established a scheme whereby Maltese passports – and thus Maltese and EU citizenship – could be purchased, creating the potential for further cronyism and clientelism. "[W]ithout strict controls, such programs can be abused by tax evaders, money launderers, and organized crime figures who may find it useful to be able to cross borders on short notice" (Bagnoli, 2018). As a reaction to the scheme, the European Union in 2020, instigated infringement proceedings against Malta, noting that "the granting of EU citizenship for pre-determined payments or investments without any genuine link with the Member States concerned, undermines the essence of EU citizenship" (Daphne Foundation, 2021). Though these proceedings have not yet reached their conclusion, the scheme as initially conceived has been abandoned and replaced by one that places more of an emphasis on actual residency in Malta. This remains in operation, though has recently come under fresh scrutiny in the context of the war in Ukraine since a number of Russian oligarchs are believed to have bought Maltese passports (Bonini, *et al*, 2019: 134 – 135).

More recent scandal is also worth noting. In late 2020, for example, it emerged that Labour MP and parliamentary secretary, Rosianne Cutajar, had received money from Yorgen Fenech as part of a property deal (Martin, 2020). Finally, in March 2022, in the days leading up to the first General Election after much of the above became public, the Labour Government introduced a scheme through which €70 million was shared out across the majority of the population as a tax rebate. Former Minister, Tonio Fenech, suggested that the timing of the refund amounted to the Government effectively buying votes (Borg, 2022). These and other instances demonstrate the current political culture in Malta. From allegations of corruption at the very top of Muscat's Government, to more recent scandal and questionable political activities, these concerns are not helped by Malta's small size and the cronyism and clientelism that can penetrate such systems. Nor are they assisted by features of the

constitutional system, outlined above, that facilitate a government that can wield considerable power. Ways in which these features of the Maltese constitutional system have recently been – and still need to be – reformed are now explored in the final section.

5. Constitutional reform in Malta

In view of both recent political scandal and the alleged patterns of corruption, as well as the aforementioned shortcomings of the Maltese constitutional system that enabled these to evolve, reform is needed; both in respect of the way in which Government is able to function, and with regards to the broader constitutional order. This final section of the chapter has two parts. The first identifies reforms that were introduced in 2020, whilst the second offers thoughts on further reforms that are still needed.

5.1. 2020 Constitutional Reforms and the Venice Commission

On 29 July 2020, constitutional reforms were passed unanimously by the Maltese Parliament, ushering in what some called "the most significant [reforms] since Malta became a republic in 1974" (Micallef, 2020). Motivated by a report of the Venice Commission, published in December 2018, the changes focused, *inter alia,* on rebalancing powers within the Maltese constitutional order and limiting the authority of the Government. Significantly, the government can now no longer exercise discretion in the appointment of judges, with appointment now by the President on the advice of the Judicial Appointments Committee. Reforms also provide that the President of Malta will be appointed (and potentially removed) by a two-thirds majority of the House of Representatives, not a simple majority as was previously the case; and the Chief Justice, the Ombudsman, (the Ombudsman was always chosen by two-thirds, under ordinary legislation. Now, though, it is entrenched within the Constitution) and the Chairman of the Permanent Commission Against Corruption are now also appointed by a two-thirds majority. Furthermore, and crucially, where the Attorney General decides not to prosecute cases of suspected corruption, they can be subject to judicial review by *inter alia* the Permanent Commission Against Corruption meaning that the courts can potentially be involved to ensure that alleged cases of corruption are appropriately investigated and tried.

Prior to their enactment, the Venice Commission (2020a: 18) was consulted about the proposed reforms and it welcomed "the efforts of the Maltese authorities to implement various recommendations of its 2018 Opinion … [noting that t]he proposals would certainly decrease the powers of the Prime Minister". In this vein, it is notable that many of the positions discussed earlier in this chapter are now no longer capable of appointment solely by the Government but, instead, require super-majority support in the Parliament, thus ensuring cross-party support. Though, as the Venice Commission went on to stress (2020a, 18), "the current proposals alone will not yet be sufficient to achieve an adequate system of checks and balances", these reforms nonetheless indicate a willingness to move away from a system that more easily facilitated a culture of cronyism and clientelism. The 2020 reforms, therefore, are undoubtedly a step in the right direction.

Whilst the substance of these reforms was positive, the manner in which they were introduced was not. In its Opinion of June 2020, in which it provided feedback on the proposed reforms, the Venice Commission (2020a: 17) called for their introduced to be preceded by

> "wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions, in order to open a free and unhampered debate of the current and future reforms, including for constitutional revision, to make them holistic. The process of the reforms[, they said,] should be transparent and open to public scrutiny not least through the media".

In a small state, such as Malta, such a process should be relatively easy since, due to the aforementioned ease with which those in positions of power can engage with the citizenry, opportunity for consultation and dialogue should be relatively easy to afford (see Diamond and Tsalik, 1999). In reality, however, the introduction of the 2020 reforms was notable for the speed with which they were passed and the lack of opportunity for scrutiny that was afforded by the Government. Indeed, a mere 4 days after the Venice Commission (2020b: 5) had stressed the need to engage on a broad process of consultation and dialogue, "ten concrete Bills were presented [to Parliament] (which were at the time restricted documents). And little more than a month later, six out of ten Bills were adopted. It seems that at no stage of the process there was any serious consultation of civil society or possibility for wider public debate". The Maltese Government was criticised not only for the haste with which it sought

to introduce these reforms but also for the manner in which opportunity for discussion and consultation was so limited and based on concrete texts, rather than on any flexible proposals (Venice Commission, 2020b: 5). Reflecting the constitutional drawbacks that this approach represents, Pieter Omtzigt, the Council of Europe's Rapporteur on Malta's rule of law, noted (2020) that

> "Constitutional reform is … an occasion of historical significance, with profound and lasting consequences for the whole country. High levels of transparency and public engagement are required to ensure true … democratic legitimacy and popular acceptance. Unfortunately, neither requirement has been met. No one outside the government and parliamentary opposition was consulted on these bills. Malta's active civil society was kept entirely in the dark. It seems that most MPs had not even seen the final texts when they were told to vote for them".

The manner in which these reforms were introduced, therefore, is troubling. Whilst the substance of the Acts reflects an ostensible willingness to embark on a process of fundamental constitutional change, the haste and lack of transparency and discussion with regards to their introduction reflects a somewhat illiberal attitude to much needed constitutional development and restoration in Malta. As the Venice Commission notes (2020b: 5), "[c]onfining the discourse to political parties in parliament without meaningful public consultation is akin to denying citizens their democratic entitlement to have a say in the shaping of the constitutional order", something which in a country of Malta's size should be more attainable.

5.2. Bill No. 198

Further problems were encountered in the Government's efforts to reform the Maltese system through its introduction of Bill 198 to Parliament in March 2021. Pursuant to article 39 of the Constitution of Malta, criminal penalties are within the exclusive discretion of the courts. Furthermore, in 2016, the Constitutional Court held that harsh administrative penalties should also be regarded as criminal, and therefore fall within the exclusive jurisdiction of the courts (see *Federation of Estate Agents v. Director General Competition et,* 2016). In chief, this is because of the heavy burden that such penalties can impose on those against whom they are levied and, as such, "[t]he person facing severe fines and measures [whether of a criminal or administrative nature] needs all the protections of the courts"

(Fsadni, 2021). In 2020, the Maltese Government tabled an amendment to the Constitution, however, that would have enabled public authorities also to impose harsh administrative penalties, thus circumventing the Constitutional Court's decision. When the amendment failed to attract the necessary two-thirds majority in Parliament, the Government sought an alternative means of affecting the change. This involved seeking to pass an amendment to the Interpretation Act 1975, which could be enacted through the ordinary legislative process with a simple majority. In this way, the Government attempted to alter the definition of a criminal sanction by providing that such sanctions could be imposed by public authorities, as well as courts. This attempt at constitutional reform is problematic for two reasons. First, access to the courts and the protection of the court system is at the very heart of the rule of law, bolstered as that is by the notion of an independent judiciary and the value of due process. By permitting public authorities to impose criminal sanctions in this fashion by-passes the courts and undermines the rule of law. Echoing this concern, Aquilina et al (2021) note that: "[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". In view of the aforementioned cronyism and clientelism that has recently infected Maltese Government, such a move is particularly troubling. Aquilina *et al* (2021) continue by noting that:

> "The vast majority [of public authority officials] do not enjoy any security of tenure, come with no guarantees of independence and impartiality and their appointment, term of office and aspirations to reappointment depend exclusively on the caprice and pleasure of the government of the day" (Aquilina et al, 2021).

The second problem is more fundamental. 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 and "using … ordinary parliamentary majority to cripple beyond recognition the supreme law of the land. The supremacy of the constitution would translate into the will and whim of transient politicians" (Aquilina et al, 2021). In view of these concerns, the advice of the Venice Commission was sought once more, the response unsurprisingly being that constitutional

change, such as that pursued by Bill 198, could not be achieved by an ordinary act, passed with a simple majority. It had to be sought through the established process of constitutional amendment; requiring the support of two-thirds of Parliament. Though the Government obliged and once again pursued reform through the proper manner in July 2021, this was once again unsuccessful.

5.3. Need for further reform

Though the reforms introduced in 2020 are a step in the right direction, further reform is needed. Borg (2020a: 109), for instance, notes that whilst "the 2020 constitutional amendments were a step in the right direction and the result of mature political decisions … more needs to be done to prevent abuse of power, fight corruption, and make the institutions more credible, forceful and accountable". The Venice Commission also stressed, in reviewing the 2020 reforms, that a number of their previous recommendations had yet to be implemented, including the suggested transfer of all prosecutorial powers to the Attorney General and a strengthening of the Constitutional Court's powers to ensure findings of constitutional invalidity apply *erga omnes* (Venice Commission, 2020b: 20). This section offers five suggestions for reform in respect of Parliament, the President and the Constitutional Court.

5.3.1. <u>President of Malta</u>

The first suggested reform relates to the President of Malta. Historically, the President of Malta was appointed (and potentially removed) by a simple majority in the House of Representatives (see article 7(1), Constitution of Malta). The position, therefore, is constitutionally weak. As a result, the President of Malta has typically enjoyed few meaningful powers and instead will generally be required to act on the advice of the Government of the day. Reflecting this reality, article 85(1) of the Constitution states that "[i]n the exercise of his functions the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution or any other law to act in accordance with the advice of any person or authority other than the Cabinet". The role of President, therefore, is not significantly different from that of the Governor-General in Malta prior to its establishment as a Republic in 1974. Echoing

this, Borg (2016: 302) observes that "Parliament wanted the smoothest transition [from monarchy to Republic in 1974]. Consequently, no innovation was introduced to strengthen the office of the President compared with that of Governor-General". This appears somewhat at odds, however, with the notion that the President is "guardian of the Constitution" and must "preserve, protect and defend" its values and provisions (Aquilina, 2017: 84). Since the 2020 reforms, the position of President has become stronger since a two-thirds majority is now needed in the House of Representatives for appointment and removal. There is a case to be made, therefore, for the President – on the strength of this more secure position – to exercise greater power and, in so doing, to serve as a valuable check on Government and to achieve a clearer balance of power. This suggestion has been mooted before. In 2020, the Venice Commission proposed increasing the powers of the office (see 2020a: 18). Moreover, in the late 1980s, the Preliminary Report of the Select Committee proposed that:

> "adjustment of the powers (and consequently the position) of the President to enable him to take a more active part in the workings of … [governmental] organs and in the supervision of the constitutional structure of the State … [by including the] office in the checks and balances system … [and by increasing the] discretionary power of the President" (Sant, 2010, 67).

The nature of any powers that might be bestowed upon the President would need careful consideration. The office should serve as a check and balance on the workings of Government but should not necessarily be blessed with significant executive authority such as would usurp the elected Government's functions and reduce the office to a political role. Though some have suggested that a move to, what would effectively be, a presidential system would affect a clearer separation of powers (see Aquilina, 2017: 118), this is not proposed here since such systems can leave limited opportunity for political accountability. In terms of the additional powers that might be bestowed upon the President, however, a number of suggestions could be – and have been – made. The President, for example, could be permitted to exercise an element of discretion in the appointment of certain key positions, such as, for instance, the Ombudsman, the Chief Justice, the various Commissions (eg the Commission for the Administration of Justice, the Public Service Commission, and the Permanent Commission Against Corruption), and the Broadcasting Authority, thus further tempering government influence in the process and limiting opportunity for cronyism or clientelism. As Aquilina (2017: 120) notes:

> "All appointments should be made in the national interest and not in the interest of the party in government or opposition and the main criteria to be adopted for such appointments should be merit, integrity and competence. This would ensure that members of the said Commissions/Authority will not be appointed on the basis of loyalty to the political party in government or in opposition but loyalty to the State of Malta and its people".

Building on the increased protection that the position of President now enjoys, proposals to give the office greater power could ensure its function as guardian of the Constitution and serve to ensure a more appropriate balance with and stronger check of government power.

5.3.2. Parliament

The Maltese Parliament is also in need of reform, both to ensure a stronger degree of political accountability as well as to mitigate the aforementioned problems that can arise in small states' small legislatures. A number of proposals are made in this regard. First, it is suggested that the size of the Parliament be increased. Currently, the Parliament contains between 65 and 81 MPs, depending on the application of corrective electoral mechanisms. It is proposed, though, that it be increased further to 100 – 120 members. A bigger Parliament would mean that there would potentially be a greater number of people in opposition (as well as in Government), thus strengthening opportunity for parliamentary accountability. Moreover, it would mean that the number of votes required to achieve a two-thirds majority for constitutional amendment would also be harder to attain. This would then protect the Constitution from being too easily manipulated and adjusted. Secondly, it is proposed that a limit be introduced on the number of Ministers that can be appointed from Parliament. At present, there is so such limit meaning that a significant number of those on the government benches can be given a role within the Government. This, in turn, reduces the number of backbenchers and the number of those empowered to hold the Government to account. A limit of this kind exists in respect of the UK Parliament, a maximum of 95 MPs capable of being given government roles. Thirdly, and finally, it is proposed that MPs become full time. At present, MPs in the Parliament of Malta are part-time, leaving them free to engage with and participate in other jobs and enterprises when not in the House. This, however, potentially increases the risk of conflicts of interest. "Being full-timers MPs will have more time for adequate parliamentary scrutiny of bills, they may also draft laws themselves rather than rest

upon the Executive to do so, [and] they can supervise better the workings of government including the making of subsidiary legislation, financial expenditure and the maximization of resources by government" (Aquilina, 2017: 118).

In Malta, the Government wields considerable power. Against this, it is important that Parliament be in a position to offer strong accountability. Whilst this has historically not been a fundamental feature of the Maltese system, the reforms here offer ways in which this might be achieved. Further accountability, though, can be offered by the Constitutional Court. This is discussed now.

5.3.3. Constitutional Court

One final reform, that has been discussed elsewhere, relates to the Constitutional Court. It has already been noted, above, that under the Constitution of Malta, the Court has the power to assess the constitutional validity of laws passed by Parliament and, where appropriate, to declare these unconstitutional and void. Prevailing constitutional and legal practice in Malta, however, has meant that this power to declare laws unconstitutional and void is not appropriately used. One of the reasons for this is that, in Malta, there is no system of judicial precedent. Consequently, "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*" (Stanton, 2019: 61). In the context of questions of constitutional validity, this means that any decision of the Constitutional Court to the effect that a law is contrary to the Constitution "does not bind third parties, even if the same legal principle applies both in the case of the applicant and in the case of the third party" (Aquilina, 2015: 43). In addition, and connected to this legal practice, the Constitutional Court has tended to leave final decisions on the continued force of unconstitutional laws to Parliament, falling short of declaring laws universally void. The reality that this presents is explained by Bonello (2013: 4, cited in Aquilina, 2015: 48):

> "Parliament has been allowed to arrogate unto itself the final say as to whether those laws declared void by the Constitutional Court, should still remain valid and binding, or should be repealed … The Constitutional Court, after solemnly declaring a provision of law to be null and void and anti-constitutional will, in a subsequent case, still consider that provision it has determined to be anti-constitutional and null, to be

> perfectly valid and legally binding – because … Parliament has done nothing to repeal it".

This has ramifications for the perception of constitutional supremacy on the archipelago in the sense that, if Parliament, rather than the Constitutional Court, has the final say on the validity of unconstitutional laws, then the legislature is arguably the supreme body rather than the Constitution. This view is explored elsewhere and does not need replicating here (see: Aquilina, 2015; Stanton, 2019). Of more pertinence, though, is the questions that this reality raises concerning the strength of the legal accountability that the Constitutional Court is permitted to offer in the face of Malta's powerful Government. On the basis that "the defendant is always the Maltese government in those judicial proceedings that question the validity of a law" (Aquilina, 2015: 43), it is contrary not only to the Constitution of Malta but to values at the heart of the rule of law that Parliament enjoy "the choice of whether or not to follow the judgments of the Constitutional Court" (Venice Commission, 2018). Keeping in mind the presence that the Government has in the legislature, those in power should not also be in the position to decide for themselves which judgments of the highest court they wish to follow and honour and those that they wish to ignore. It is in part for this reason – and in part to bolster the supremacy of the Constitution – that reform of the way in which judgments are received is considered. This is a reform that has been suggested elsewhere, most notably by the Venice Commission, which recommended (2018: 17) that "a legal provision found unconstitutional … by the Constitutional Court loses legal force with the public of the judgment of the Court". This would render Parliament's involvement unnecessary and strengthen the system of checks and balances in Malta through the ability of an independent Court to hold Government and Parliament legally accountable and ensure the supremacy of the Constitution.

The proposals for constitutional reform offered here, therefore, focus on the institutions of government – the President of Malta, the Maltese Parliament, and the Constitutional Court. The recommendations seek to adjust the balance of power to restrict the authority that the Maltese Government can exert, and they aim to strengthen the opportunity for government accountability. It should not be underestimated, however, the difficulty with which institutional reform is achieved. "Historical institutional theories highlight the durability of political structures and therefore generally struggles to explain institutional change"

(Veenendaal, 2016: 67, citing Streeck and Thelen, 2005: 1 – 2). The challenge of institutional reform is arguably exacerbated in small states where it is potentially easier to circumvent the institutions altogether rather than go through the time, expense, and effort of amending them. Moreover, given that some political figures involved in aforementioned concerns for cronyism, clientelism, corruption and other questionable political activities would be those contributing to any debate surrounding potential reform, and, indeed, the realisation of those reforms, institutional adjustment becomes even harder to envisage as such figures would be unlikely to endorse a system that could curtail the scope of their political activities. As Veenendaal (2016: 67) acknowledges, "[b]ecause institutional rules to a large extent determine the context within which individuals are assumed to be unwilling or unable to change these institutional structures". The difficulty with which such changes might be achieved, therefore, further fuels the concerns that motivate the need for that change. It is for this reason, however, that it is all the more important that such change be sought. Institutional adjustment could serve to strengthen the formal aspects of the Maltese democracy, these then providing a stronger counterbalance and more effective restriction to those activities that contribute to the more informal aspects.

6. Concluding remarks

Malta's small size and isolated location has always been at the very heart of the islands' story. It has also had consequences, though, for the operation of the constitutional system on the archipelago. This chapter has explored and examined some of these issues, with a particular emphasis on the workings of the Government and allegations of corruption and assassination that have been made in its regard. Excessively powerful governments are not an uncommon concern in small states, and Malta appears to be no exception. From historic power over key appointments to a commanding position in the legislature, the system has historically been one that permitted the Government to exercise substantial authority. More than this, however, revelations in the Panama Papers, broader concerns for corruption and the assassination of an investigative journalist have also contributed to what might be described as an imperfect democracy. The small size of the Parliament, the weak entrenchment afforded to the constitution and the deference of the Constitutional Court further contribute to these concerns. This chapter has examined reforms introduced in 2020, which offer a step

in the right direction, and it has recommended further reforms that might limit further the power of Government and strengthen the Constitution.

Appendix: Notes on Maltese elections

The Constitution of Malta provides (article 61) that "[t]he Electoral Commission shall review the boundaries of the electoral divisions … at intervals of not less than two nor more than five years and may, in accordance with the provisions of this article, alter such boundaries to such extent as it considers desirable". Despite this, alterations to electoral district boundaries "had become … an exercise the party in government took as its own. This was a known secret and the undeclared practice at the time" (Xuereb, 2021).

There are two corrective electoral mechanisms in Malta that potentially increase the size of the legislature beyond the minimum 65 seats. The first, introduced following the 1981 General Election, and amended in 1996 and 2007, permits additional members to be co-opted to the House (increasing its size to 67 or 69) to ensure that the number of seats is proportionate to votes cast in their favour (see Bencini, 2018, 38; Stanton, 2019, 53). The second corrective electoral mechanism was introduced in 2022 to address the gender imbalance in Parliament. Following the 2017 General Election, only 7 of the 67 MPs were women. Under the new mechanism, where "a gender has less than 40% representation in Parliament, and only if two political parties successfully elect representatives to the House", then a maximum of 12 new MPs of the under-represented gender will be elected, with both parties having the same number of new additions (Galea, 2022). At the 2022 election, 12 additional female MPs were elected to Parliament: six for each party. Following this election the Maltese Parliament is made up of 79 members

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