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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MALTA

DRAFT OPINION
ON PROPOSED LEGISLATIVE CHANGES

On the basis of comments by

Ms Herdis Kjerulf Thorgeirsdottir (Member, Iceland)
Mr Martin Kuijer (Substitute Member, Netherlands)
Mr Myron M. Nicolatos (Member, Cyprus)
Mr Kaarlo Tuori (Member, Finland)

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I. Introduction

1. By letter of 20 April 2020, the Minister for Justice, Equality and Governance of Malta requested an opinion of the Venice Commission on Proposals for Legislative Changes that has been transmitted on 13 April 2020. Following a preliminary video-conference with the rapporteurs, on 5 May 2020, the Minister presented a revised version of the proposed legislative changes (hereinafter "the Proposals") on 5 May 2020 (CDL-REF(2020)024).

2. Ms Herdis Kjerulf Thorgeirsdottir, Mr Martin Kuijer, Mr Myron Nicolatos and Mr Kaarlo Tuori acted as rapporteurs for this opinion.

3. Following the video-conference with the Minister on 5 May 2020, the rapporteurs had a series of video-conferences on 20, 21 and 25 May 2020 with the President of Malta, the Speaker, as well as the majority and the opposition in Parliament, the Attorney General and the State Advocate, the Ombudsman, the Association of the Judiciary, the Chamber of Advocates, as well as with civil society. The Chief Justice informed the rapporteurs that he cannot meet them as he is the presiding judge over a case wherein judicial appointments are contested and which has been referred to the Court of Justice of the European Union. The Commission received a letter from the Commissioner for the Standards in Public Life on persons of trust as well as submissions from individuals.

4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the video-meetings. It was adopted by the Venice Commission on …, through a written procedure which replaced the … Plenary session in Venice, due to the COVID-19 disease.

II. The 2018 Opinion

5. In the Proposals, the Minister for Justice, Equality and Governance formally engages with the Venice Commission "on the subject of the implementation of the recommendations made by the Venice Commission in its Opinion of the 17th December 2018" (CDL-AD(2018)028). The Minister concludes that if the proposed legislative amendments were "deemed satisfactory" by the Commission, the Maltese authorities would immediately draft those legislative amendments and send them for the scrutiny of the Commission. As a consequence, the subject of this opinion is therefore to examine whether the Proposals can be deemed satisfactory for the implementation of the recommendations made in the 2018 Opinion.

6. In its Opinion CDL-AD(2018)028, the Commission had pointed out that Malta had an amended British inspired Constitution that had not followed reforms that were undertaken in the UK. The Prime Minister remained at the centre of power while other actors (President, Parliament, Cabinet of Ministers, Judiciary, Ombudsman, etc.) were too weak to provide sufficient checks and balances. The Commission welcomed the establishment of the Judicial Appointments Committee (hereinafter "JAC") in 2016 but found that it fell short of ensuring the independence of the judiciary.

7. The Opinion was critical of the double role of the Attorney General as advisor of the Government and as prosecutor. The part-time Parliament was found to be too weak to exercise sufficient control over the executive branch. The Prime Minister's wide powers of appointment make this institution too powerful, creating a serious risk for the rule of law. The Prime Minister's influence on judicial appointments resulted in the absence of crucial checks and balances. This problem was reinforced by the weakness of civil society and independent media.

8. Therefore, the Commission recommended that judicial vacancies be announced, that an enlarged JAC should vet and rank the applicants, including for the position of Chief Justice, and the JAC should propose candidates directly to the President of Malta for appointment; that

dismissals of judges and magistrates should not be made by Parliament; that the judgments of the Constitutional Court finding legal provisions unconstitutional should have *erga omnes* force; that an independent Director of Public Prosecutions (DPP) should be established, who would take over prosecuting powers and the corresponding staff from the Attorney General and the Police, and that magisterial inquests should be absorbed into this function. The decisions of this DPP, notably not to prosecute, should be subject to judicial review.

9. Apart from the Judiciary, the Opinion recommended that the position of the President of Malta should be strengthened by attributing to him or her powers to act without the advice of the Prime Minister, possibly by electing the President by a qualified majority. As concerns the legislative power, the Venice Commission recommended that Parliament should be strengthened by tightening rules on conflicts of interests notably as concerns appointments of MPs to public bodies. MPs should benefit from non-partisan information to perform their controlling function (increase of research staff or establishment of a senior consultative body). This should be accompanied by an increase of MPs' salaries allowing them to focus exclusively on parliamentary work.

10. The Opinion recommended that the appointing powers of the Prime Minister, notably as concerns independent commissions and permanent secretaries be reduced. Appointments to positions of trust should be strictly limited (and a constitutional basis for such appointments should be established).

11. The Opinion pointed out that such changes would not abandon Malta's legal traditions but would constitute an evolution that would provide more effective checks and balances than those in place. The Opinion also insisted that holistic constitutional changes should be adopted as the result of a process of wide consultation in society to give citizens a chance to take ownership of these amendments. The Opinion also insisted on the international obligation of the Government to ensure that the media and civil society play an active role in public affairs holding the authorities accountable.

12. The Venice Commission appreciates that with the Proposals the Maltese authorities have taken a decisive step to engage in constitutional reform and seem to accept the 2018 Opinion as an important basis for such a reform. This opinion follows the structure of the Proposals and then refers to recommendations not yet taken up in the current Proposals, as these are not the final propositions submitted by Maltese authorities concerning the constitutional reforms in Malta.

III. The Proposals

A. Judicial appointments

13. The most elaborate part of the Proposals concerns judicial appointments.

14. In Malta, the Judicial Appointments Committee (JAC), established by a constitutional amendment in 2016, examines candidacies to join the judiciary and establishes a permanent roster of qualified candidates from which the Prime Minister can appoint candidates when vacancies come up.

15. In the Opinion, the Venice Commission criticised the strong powers of the Prime Minister over judicial appointments and made various recommendations as regards the composition of the JAC, the procedure to apply for a judicial vacancy, the competence of the JAC to not only vet candidates but also to rank the candidates upon merit on pre-existing criteria for appointment, the role of the Prime Minister in this procedure, and the fact that a revised procedure should also apply for the Chief Justice. The Commission summed this up as follows:
"In order to improve the system of judicial appointments, the Venice Commission therefore recommends:

1. Judicial vacancies should be published and candidates from inside and from outside the judiciary should be able to apply to the JAC for a specific vacancy.
2. The JAC should have a composition of at least half of judges elected by their peers from all levels of the judiciary.
3. The JAC should rank the candidates, upon merit on pre-existing, clear and transparent criteria for appointment, taking also into account the goal of achieving a gender balance.
4. The JAC should propose a candidate or candidates directly to the President of Malta for appointment. Its proposals should be binding on the President.
5. There should be no exception from this procedure for the appointment of the Chief Justice."
Below the various elements will be examined in a slightly different order.

1. Composition of the Justice Appointments Committee (JAC)

16. The establishment of the JAC was an important improvement in 2016. The current composition of the JAC is as follows: the Chief Justice, the Attorney General, the Auditor General, the Ombudsman, and the President of the Chamber of Advocates. Out of the five JAC members, only one is a judge, the Chief Justice, and he is not elected by his peers.

17. The Proposals aim to enlarge the JAC with two judges and one magistrate, all elected by their peers. In the Proposals the Attorney General would be replaced by the State Advocate in the JAC. Therefore, the new JAC would be composed of (1) the Chief Justice, (2) the State Advocate, (3) the Auditor General, (4) the Ombudsman, (5) the President of the Chamber of Advocates, (6-7) two judges elected by their peers, (8) a magistrate elected by his/her peers. The Chief Justice would continue presiding the JAC and he or she would have a casting vote in case of a tie.

18. Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe on "Judges: independence, efficiency and responsibilities" calls for judicial councils to be composed of at least half of judges (that includes magistrates) elected by their peers from all levels of the judiciary. According to the Proposals, half of the eight members of the JAC would be judges but not all would be elected by their peers because the Chief Justice is a member of the JAC ex officio and he is elected to that position by Parliament (see below). Nonetheless, the widening of the JAC with two judges and a magistrate elected by their peers is a welcome step forward.

19. As is the case now, the Chief Justice would chair the JAC. The Chief Justice would also have a casting vote in case of a tie. This is a reasonable solution, which strengthens the judicial component in the JAC.

20. Another proposed change relating to the composition of the JAC concerns the replacement of the Attorney General by the new State Advocate. The Proposals point out that the AG would be removed because of his/her prosecutorial functions. Replacing the Attorney General by the State Advocate does not seem a logical choice, however. According to the Article 91A of the Constitution and the State Advocate Act[1], the State Advocate is the *"advisor to Government in matters of law and legal opinion".* S/he is appointed by the President upon recommendation by the Prime Minister. Even if the State Advocate "*shall act in his individual judgment and he shall not be subject to the direction or control of any other person or authority"* (ibid.), the office of the State Advocate is not more remote from the executive than that of the Attorney General who is appointed in the same manner and has the same guarantee of individual judgment.

21. The main task of the JAC is to examine the merits of candidates for judicial appointment. Obviously, the moral qualities of candidates are a major issue in such considerations. Therefore,

[1] CDL-REF(2020)006.

the inclusion of the Commissioner for Public Standards in the JAC would be a more logical choice. During the videoconferences the argument was advanced that the Commissioner for Public Standards deals with the moral standards of MPs and that this should not be mixed with judicial appointments and that s/he is not a lawyer. The Commission does not deem these arguments to be convincing because high moral qualities are required in *all* public positions and there are sufficient other members of the JAC who have the required expertise to assess the professional qualities of candidates. Therefore, instead of the State Advocate, the Commissioner for Public Standards could be included in the JAC.

2. Permanent roll call v. call for individual vacancies

22. The Proposals do not follow the 2018 recommendations concerning the introduction of public calls for individual judicial vacancies but stick to the present system of a 'rolling public call'. This means that every lawyer who wants to be a magistrate/judge can place a candidacy with the JAC at any moment. This candidacy is then evaluated by the JAC and the candidacies deemed suitable are included in a permanent roster from where the appointing authority, now the Prime Minister, can choose. The Proposals justify keeping this system because it *"has consistently proven to be the most effective method for attracting the most suitable candidates to the post of judge or magistrate locally".*

23. The Minister pointed out that the current system of a rolling public call finds support with the Association of the Judiciary and the Chamber of Advocates. The argument was that in a small country like Malta with a small legal community ("everyone knows everyone") a public candidacy for a judicial vacancy that is not appointed would ruin the reputation of the candidates who are not appointed. The Association of the Judiciary proposed to have magistrates automatically considered as candidates for appointment as judge. On the other hand, the rapporteurs also received statements from individual judges who would prefer the publication of vacancies in each individual case.

24. The Commission does not doubt that the legal community in Malta is a small one and that the reputation of a candidate who is not appointed might be affected. However, it is the very fact that the community is so small which would require even more rather than less transparency besides it is in the public interest for citizens to know about the merits of the candidates for judicial posts. The importance of transparency is paramount and should pervade every step of the selection process. This would safeguard public confidence in the judicial selection process, and hence ultimately to the legitimacy of that process. The effectiveness of any judiciary depends upon its perceived legitimacy, especially in the eyes of the public.

25. At a minimum, vacancies should be announced although the Venice Commission would advocate making public the list of candidates. The roster of the existing rolling public call could be complemented by public calls for specific vacancies. In addition, persons already on the roster should indicate their specific interest for the upcoming post. They would be able to argue why they are particularly qualified for the vacant post . This way the JAC would have more information as to the merits of a candidate for a particular post, while there would be no danger for the reputation of candidates.

3. Direct proposal to the President

26. According to the Proposals, *"when a judicial vacancy arises the Judicial Appointments Committee will propose the three most suitable candidates for appointment to the judiciary directly to the President of Malta. The President will make the selection from amongst those candidates. The proposal of the Judicial Appointments Committee will be accompanied with a detailed report expressing the Committee's views on the suitability of each of the proposed candidates. The final choice will rest with the President."*

27. This is a major and very welcome change from the current situation where the Prime Minister is free to choose any candidate from the permanent roster that the JAC establishes.

28. The Commission's interlocutors, including the President himself, unanimously confirmed that under Article 85 (1) of the Constitution, with the exception of a few constitutionally determined tasks (dissolution of Parliament, appointment of the Prime Minister etc.) the President always has to act according to advice by the government: *"in the exercise of his functions the President shall act in accordance with the advice of the Cabinet or a Minister".*

29. The proposal to give the President discretion to choose among three candidates, therefore necessarily entails a change of Article 85 of the Constitution. Without such a change, the President would even be obliged to seek the advice of the Government before making such a choice.

30. During the videoconferences, several interlocutors pointed out that this in turn should entail a change of the system of appointment of the President who should be elected by a two thirds majority in Parliament. The Venice Commission would advocate such a change as then the President could become an important institution in the system of checks and balances in Malta.

31. In the absence of such constitutional changes, the JAC should send the name of only one candidate for judicial appointment to the President, removing any discretion, the advice of the Government to appoint this candidate would then be presumed.

32. In both alternatives, the Prime Minister and the Cabinet would not be substantively involved in the appointment of judges and magistrates. This is very welcome. In any case, Article 96(4) of the Constitution, according to which the Prime Minister may overrule the JAC by appointing a person who has not passed the vetting, should be abolished. The Commission understands that this is the intention of the Government.

4. Criteria and ranking of candidates

33. According to the Proposals, the newly composed JAC would have the competence to draft *"pre-existing, clear and transparent criteria for appointment"* on the basis of which it will conduct its work. The JAC would be competent to *"without being subject to any external influence or direction, to establish its own procedure and draw up objective and clear eligibility requirements."*

34. Obviously, such criteria would have to be public to enable candidates to orient their applications. The appointments *"should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity."* (CM/Rec(2010)12, para. 44). A validation of such criteria and their adoption in the form of law would provide sufficient legitimacy for such an important feature of a vital state institution as is the Judiciary.

35. The Proposals further provide that the JAC would submit a list of the three most suitable candidates for a given vacancy to the President, *"accompanied with a detailed report expressing the Committee's views on the suitability of each of the proposed candidates."* The President would therefore receive a non-ranked list of three names together with the reports on the candidates.

36. The Venice Commission's interlocutors pointed out that the detailed reports on the candidates would enable the President to make an informed choice. This – in addition to the fact that the JAC would have to present the three 'most suitable' candidates – would amount to a *de facto* ranking. Again, the legitimacy of such an informed choice would depend on the position of

the President, who has to be free of any obligation to seek advice from the government in this function. Notably, the President's election by a qualified majority would provide sufficient legitimacy for a choice among non-ranked candidates.

5. Appointment of the Chief Justice

37. The Proposals provide that the Chief Justice is elected by a two thirds majority in Parliament. Even though there was no obligation to do so, the current Chief Justice was elected upon agreement with the opposition.

38. The Venice Commission had recommended appointing the Chief Justice in the same manner as other judges. Under the system envisaged by the Proposals that would be an appointment by the President upon a proposal of three candidates by the JAC.

39. For the Venice Commission, the important element is not that the procedure for the Chief Justice be exactly the same as for ordinary judges and magistrates, but that the appointment of the Chief Justice is depoliticised as much as possible. In that regard, a two-thirds majority in Parliament would also lead to some depoliticization because, even in the context of politics, both the parties would have to seek agreement on a 'neutral' candidate, acceptable to a wide majority in Parliament. However, there is also a danger that this could lead to a lobbying by candidates among politicians. Cross-party consensus is not a guarantee of judicial independence.

40. Another issue arises in this context. Any requirement of a qualified majority for an election to high office risks ending in deadlock. Even if the political parties in Malta should be commended that they seem able to reach agreement on such elections, it cannot be excluded that such a deadlock could arise in the future. The Chief Justice has such an important position that this situation has to be avoided. An extension of the mandate of the incumbent Chief Justice can be envisaged but this cannot be a solution if he or she can no longer exercise the office due to health reasons. A suitable anti-deadlock mechanism could therefore be that the Chief Justice would be elected by the judges of the Supreme Court if there is a prolonged stalemate in Parliament for the election by qualified majority in Parliament.

B. Judicial discipline

41. The Proposals insist that judges should continue to be impeached by Parliament by a two thirds majority upon proposal by the Commission for the Administration of Justice: *"The proposal of the Maltese Authorities is to the effect that w[h]ere the Commission for the Administration of Justice recommends that a member of the judiciary be removed by Parliament, the said member of the judiciary will have the right of an appeal from such."* The member of the judiciary (judge or magistrate) would therefore have the right of an appeal against dismissal to the Constitutional Court. The Venice Commission understands from the Government that the CC would have full jurisdiction over the dispute (i.e. facts and legal issues) and could offer full reparation.

42. As they are drafted, the Proposals are ambiguous whether following a proposal for dismissal by the Commission for the Administration of Justice, the next step would be Parliament impeaching the member of the judiciary and then there would be a right of appeal to the Constitutional Court or whether the right of appeal is against the proposal for dismissal. Presumably, if the Constitutional Court found against the proposal, the dismissal procedure would end and there would be no vote on impeachment in Parliament.

43. The Proposals acknowledge that this falls short of the recommendation made. The Proposals thus retain political elements in the removal of justices. For restoring and maintaining trust in an independent and objective judiciary this cannot be considered beneficial. Opening appeal to the Constitutional Court is welcome but does not remove the problem. In Cyprus, for instance, a

common law country, impeachment is a judicial act and not a political one. In any case, the involvement of Parliament can be acceptable only if the Constitutional Court has the final say.

44. While the proposed three steps are less likely to result in a final removal of the judge / magistrate from office, they also considerably prolong the procedure. In all likelihood, the Commission for the Administration of Justice will propose removal only in very serious cases of misconduct. Prolonging the procedure in such a way while the judge is suspended (Article 101B (10) (c) of the Constitution) could have a serious impact on the reputation of the Judiciary as a whole when it takes too long to a person who is (morally) unqualified to hold the position. On the other hand a prolonged suspension of a judge could ruin a career if – in the end – the proposed removal is not validated.

45. Maintaining the parliamentary procedure bears the risk that the two thirds majority for removal cannot be obtained for purely political reasons that may have nothing to do with the candidate for impeachment.

46. Therefore, the Venice Commission welcomes the proposal to provide for appeals against dismissals to the Constitutional Court, yet it insists that Parliament's role in the removal of judges should be avoided.

47. The above arguments for replacing the Attorney General with the State Advocate in the JAC apply also in relation to the proposed change in the Commission for the Administration of Justice, which is in charge of judicial discipline. The participation of the Commissioner for Public Standards could be a welcome change.

C. Prosecution

48. The 2018 Opinion recommended setting up an office of an independent Director of Public Prosecutions or Prosecutor General with security of tenure, being responsible for all the public prosecutions subject to judicial review. The Attorney General would remain the legal adviser to the Government and the Police could focus exclusively on investigative work. As the victim should not be able to choose an avenue of criminal investigation, magisterial inquiries should be absorbed into the functions of prosecution.

49. The Proposals refer to the reform undertaken in December 2019, when the Office of the State Advocate was established by virtue of the new Article 91A of the Constitution in order to ensure a separation of the various roles of the Attorney General. The State Advocate is to take over the non-prosecutorial functions that the AG performed in the past, and the AG will be responsible for the prosecutorial functions for offences carrying a punishment of more than two years.

50. In principle, the Maltese authorities have chosen for the mirror-image solution that was advocated in the 2018 Opinion. The main goal (i.e. separation of the dual function of the AG) is achieved but the system has not yet been implemented. The Attorney General informed the Venice Commission's rapporteurs that currently a procedure of recruitment of staff is taking place and that the legislation enabling the shift of prosecution for crimes punishable with two years imprisonment and more could enter into force in summer 2020.

51. However, the police will retain prosecutorial functions for offences carrying a punishment less than two years (summary cases). The 2018 Opinion insisted that the police should focus exclusively on investigative functions. The Attorney General pointed out that eventually the shift of all prosecution to the AG is envisaged but that this goal has to be achieved in stages due to a lack of human resources. Asked why policemen who have a long experience in prosecution would not be shifted to the AG's Office, the AG explained that his office should be composed of lawyers only. Policemen who had such a background were welcome to move to his office.

52. The Venice Commission understands that this change needs some time and expresses the hope that all prosecution, including for summary offences, can be taken over by the AG as soon as possible. A possibility to advance on this path might be to second experienced non-lawyer police officers to the AG's office until the AG's capacities are fully built up. A background in law impacts performance but so do skills and technical know-how that come with experience and should not be forfeited, especially as concerns complicated corruption cases.

53. While an appeal against non-prosecution by the police exists already (the somewhat vague Article 541 of the Criminal Code[2]) a new provision is to be introduced to allow such appeals also against non-prosecution by the Attorney General. Such a provision is indeed necessary.

54. Civil society insisted that this recourse is open only to the victim and often there is no individual victim in cases of corruption. In such cases, an appeal by the Permanent Commission against Corruption, the Ombudsman, the Commissioner for Standards in Public Life, the Auditor General and possibly others could be introduced. In turn, the AG should be able to actively request investigation from the police, in addition to the general obligation of the police to investigate crime. The independence of prosecutorial decisions from political pressure must be safeguarded.

D. Ombudsman

55. The 2018 Opinion recommended raising the rules on appointment and dismissal of the Ombudsman as well as the Ombudsman's powers to the constitutional level, and that Parliament should be obliged to debate reports addressed to it by the Ombudsman.

56. The Proposals provide for raising provisions dealing with the appointment, removal and suspension of the Ombudsman to the constitutional level and to provide for the mandatory obligation for Parliament to debate the annual report of the Ombudsman.

57. The Commission welcomes these proposals and insists that the main provisions on the Ombudsman's powers be included in the Constitution as well. This concerns notably the right to information of the Ombudsman. In urgent cases the Ombudsman should also have the possibility to trigger a parliamentary debate on important reports (and not only annual reports). It would be necessary to give more clout to the Ombudsman's requests for information when the executive is not willing to provide such information. When amending the legislation on the Ombudsman, the Venice Commission recommends taking into account its Venice Principles[3], adopted in May 2019, after the adoption of the Opinion in 2018.

E. Prime Minister / appointments to independent commissions

58. The 2018 Opinion established that the Prime Minister is clearly the centre of political power in Malta as he or she has very wide powers *inter alia* as regards appointments and constitutional commissions. The Prime Minister is predominant while other actors are not sufficiently strong to contribute significantly to the system of checks and balances. The 2018 Opinion therefore recommended that it should be the Cabinet of Ministers, and not the Prime Minister alone, which acts as appointing authority. Appointing powers of the Prime Minister, notably as concerns independent commissions and permanent secretaries, should be reduced.

[2] http://www.justiceservices.gov.mt/downloaddocument.aspx?app=lom&itemid=8574.

[3] CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles").

59. Apart from the important change as concerns judicial appointments discussed above, the Proposals provide that it should be the Cabinet of Ministers and no longer the Prime Minister who would be the appointing body for: (i) members of the Employment Commission, (ii) the Governor, the deputy Governor and the directors of the Central Bank of Malta, (iii) the Chairman of the Malta Financial Services Authority, (iv) the members of the Board of the Arbitration Centre, (v) the members of the Permanent Commission Against Corruption, and possibly – after consultation with the Leader of the Opposition – (vi) the Information and Data Protection Commissioner.

60. These changes are welcome. It is true that it is the Prime Minister who chooses the members of the Cabinet, but collective decisions are always more conducive to transparency than individual ones.

61. The Venice Commission recommends extending these positive steps also to other independent commissions, for instance the Electoral Commission (Article 60 of the Constitution), the Public Service Commission (Article 109 of the Constitution), and the Broadcasting Authority (Article 118 of the Constitution).

F. Permanent Secretaries

62. Permanent secretaries are the highest civil servants and are accountable to the Prime Minister and not to the Minister they work for. The 2018 Opinion recommended that Permanent Secretaries be selected upon merit by an independent Civil Service Commission and not by the Prime Minister.

63. The Proposals foresee that the Public Service Commission (an independent constitutional body) will make recommendations for appointment directly to the President on the basis of clear and pre-established requirements, after giving due consideration to any recommendation by the Principal Permanent Secretary. For the Principal Permanent Secretary the appointment shall be made by the President acting on the advice of the Cabinet of Ministers after having consulted with the Public Service Commission.

64. This new system is a clear improvement because, with the exception of the Principal Permanent Secretary, the Prime Minister and even the Cabinet is cut out from the procedure. It is true that via the recommendations of the Principal Permanent Secretary, the Prime Minister may retain some influence but the decision taken will be one of the Public Service Commission.

G. Persons (and positions) of Trust

65. The 2018 Opinion criticised the lack of a legal basis for the practice of employing civil servants bypassing the requirement of Article 110 of the Constitution. The concern was that appointments on trust could be used to avoid issuing calls for applications for vacancies that should be filled on the basis of merit. The 2018 Opinion recommended *"introducing a constitutional amendment and legislation that admit, but at the same time limit, the possibility to appoint persons to positions of trust quantitatively, but also as concerns the type of activities"* (paragraph 128). Currently, there are more than 700 such appointments.

66. The Proposals would limit the employment of persons of trust *"to consultants to Ministers or Parliamentary Secretaries, staff in the Secretariats of Ministers or Parliamentary Secretaries and appointments of a temporary nature whenever a post remains vacant after repeated public calls are issued."* There would also be a *"maximum number of persons that may be engaged as persons of trust in the Secretariats of Ministers and Parliamentary Secretaries as well as the conditions and duration of such engagements."* The Proposals do not specify that maximum number. The definition of a person of trust would then be amended in the Standards in Public Life Act.

67. In principle, these proposals are welcome. They should cover both persons and positions of trust. The Venice Commission reminds the Maltese authorities of the urgency of implementing the recommendations in this field by referring to the Fifth Evaluation Round on "Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies", published on 3 April 2019 by the Council of Europe Group of States against Corruption (GRECO): *"GRECO recommends that measures be taken to solve the legal situation of persons of trust and to limit the number of such discretionarily appointed officials to an absolute minimum".*[4] As for other proposals, only the draft legislation implementing these Proposals will show to which extent these requirements are met.

H. Anti-Corruption

68. The 2018 Opinion found two structural problems in the set-up of the Permanent Commission against Corruption (PCAC): (a) its membership depends on the Prime Minister, even if s/he has to consult with the opposition; (b) the Commission reports its findings on corruption to the Minister of Justice who has no powers of investigation. The Venice Commission recommended to either dissolve the PCAC or sending its reports to the prosecution's office. The work of the PCAC should not prevent any investigations into or prosecution of the case.

69. The Proposals provide for the chairperson of the PCAC to be appointed by the President acting in accordance with a two thirds majority resolution of the House of Representatives. The other two remaining members of the PCAC would be appointed by the President acting in accordance with the advice of the Cabinet given after consulting the Leader of the Opposition. Reports that contain a finding of corrupt conduct in the opinion of the PCAC should be transmitted directly to the public prosecutor (i.e. the AG).

70. This is a welcome step. Even reports that express *doubts* as to corruption or are indicative of corruption, not only a *finding* of corruption should be transmitted to the prosecution. In its Fifth Evaluation Round GRECO, made very important recommendations to Malta that should be implemented.[5]

71. In addition, the proposals by the Commissioner for Standards in Public Life "Towards Higher Standards in Public Life Proposals to Modernise the Provisions of the Constitution on Parliament, the Judiciary and Public Administration" of 30 October 2019[6] deserve support.

I. *Erga omnes* effects of CC judgments

72. The 2018 Opinion noted that decisions of the Constitutional Court finding a legal provision unconstitutional do not have the direct effect of rendering void that legal provision. It is up to Parliament to repeal or amend such laws, which does not always happen, in practice. The Opinion recommended a constitutional amendment that would ensure that a finding of unconstitutionality of a legal provision would directly result in the annulment of that provision without intervention by Parliament. This does not mean that individual acts that were adopted on the basis of the unconstitutional provision would lose their legal force. Typically the annulment of a law has effects only for the future.[7]

[4] https://rm.coe.int/grecoeval5rep-2018-6-fifth-evaluation-round-preventing-corruption-and-/168093bda3.
[5] https://rm.coe.int/grecoeval5rep-2018-6-fifth-evaluation-round-preventing-corruption-and-/168093bda3.
[6] https://standardscommissioner.com/wp-content/uploads/constitutional-reform-proposals.pdf.
[7] CDL-AD(2018)012, Georgia - Amicus curiae brief for the Constitutional Court of Georgia on the effects of Constitutional Court decisions on final judgments in civil and administrative cases.

73. Article 6 of the Maltese Constitution provides 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."* This does not mean that all legal acts adopted on the basis of the unconstitutional provision become invalid.

74. The Government considers that enshrining the principle of *erga omnes* application of judgments of the Constitutional Court in the Constitution of Malta would go against established principles of the Maltese legal system and would give rise to undue complications. Already in 2018 and during the video-conferences, the specific situation of rent and housing laws was raised. The Proposals insist that "*in the field of rent and housing laws, owners of residential properties subject to protected leases are seeking recourse to the newly introduced remedies before the Rent Regulation Boards which are now available under the newly amended rent laws [Vide Act XXVII of 2018 – An Act to Amend The Housing (Decontrol) Ordinance]. Thus, the aggrieved party sustaining the undesired effects of previous legislation is himself or herself recognising and benefitting from the effectiveness of the newly introduced ordinary domestic remedies."*

75. A solution might be that decisions of the Constitutional Court on the compatibility of specific laws with the Constitution in particular cases, will have the effect that the specific laws, declared unconstitutional, will be of no effect (null and void) only in the particular cases *(inter partes)* and not *erga omnes*, on condition that the House of Representatives has an obligation, within a specified time, to make the necessary amendments/changes/repeals, in order to comply, fully, with the decision of the Constitutional Court *in abstracto*. Such a solution would be in line with the principles of the Rule of Law, and with the doctrine of separation of powers.

IV. Recommendations not reflected in the Proposals

76. The Proposals refer to the Constitutional Convention for further reforms. In the videoconference, the Minister insisted that the current proposals are only one step to be seen as a part of wider reforms. Therefore, this opinion briefly recalls recommendations that were not yet taken up in the Proposals.

A. The President of Malta

77. The 2018 Opinion noted that the President has a rather ceremonial role as the constitutional Head of State (not elected by universal suffrage but by the House of Representatives by simple majority for five years). The removal of the President requires a simple majority resolution by the House of Representatives, which means that the President could effectively be elected or removed by the political party that has won the last election and which, therefore, controls the Government and a majority in Parliament.

78. The Venice Commission argued that strengthening the Presidency and increasing the distance of the President from the political majority of the day, could be a way to improve checks and balances. The Opinion therefore recommended to attribute the President more powers of appointment without the intervention of the Prime Minister, notably as concerns judicial appointments, and to consider electing the President with a qualified majority instead of a simple majority.

79. The Proposals do not cover changing the status of the President. During the video conferences, several interlocutors argued in favour of strengthening the President by providing for an election (and removal) with a two thirds majority in Parliament. That would be very important in order to give the President sufficient legitimacy when s/he is asked to choose among candidates for judicial office.

B. Parliament

80. The 2018 Opinion found that the Maltese House of Representatives needs to be strengthened in order be an effective check on government. The low salaries of the backbench MPs for their part time work make them dependent to a certain extent on offers of paid positions in public commissions or institutions, which possibly reduces their ability to critically scrutinise government action. The Opinion recommended considering changing the system to full time work and payment of MPs. In addition, the Commission recommended strengthening the rules on incompatibilities and tightening the rules as regards appointments of MPs to public bodies. Individual MPs should benefit from non-partisan research capacity and/or benefit from a senior consultative body. Finally, extensive use of delegated legislation should be avoided.

81. The Proposals do not refer to these recommendations, which remain valid, notably after the video discussions with the Speaker, the majority and opposition.

82. As concerns integrity standards, the GRECO recommendations of the Fifth Evaluation Round provide important guidance.[8]

C. Police

83. In addition to the recommendations concerning the prosecutorial functions of the Police, the 2018 Opinion also recommended that the Police Commissioner should be appointed following a public competition and the Police should be bound by instructions from the prosecution.

84. The Commission takes note that following a recent reform, the position of the police commissioner will be filled after a public call for applications. Applications will be analysed by the Public Service Commission, which will then propose two candidates to the Cabinet.

D. Specialised Tribunals

85. The Opinion noted that Malta had a surprisingly high number of specialised tribunals adjudicating in specific areas (Refugee Appeals Board, Environment and Planning Review Tribunal, the Consumer Claims Tribunal, the Competition and Consumer Appeals Tribunal, the Industrial Tribunal, the Information and Data Protection Appeals Tribunal, the Mental Health Review Tribunal, the Patent Tribunal, the Police Licences Appeals Tribunal, the Panels of Administrative Review Tribunals and the Prison Appeals Tribunal). Many of them have special appointment procedures involving the executive power. As these tribunals do not enjoy the same level of judicial independence as that of the ordinary judiciary, the Commission saw a danger of parallel jurisdiction and offered its advice on whether the establishment and jurisdiction of these tribunals raise constitutional questions. This offer remains valid.

V. Procedure of reforms / constitutional convention

86. The Venice Commission calls for 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 should be transparent and open for public scrutiny not least through the media.

87. Especially when adopting decisions on issues of major importance for society, such as a significant constitutional reform, wide and substantive consultations are a key condition. Such an inclusive process presupposes transparency so that critical actors are able to voice their

[8] https://rm.coe.int/grecoeval5rep-2018-6-fifth-evaluation-round-preventing-corruption-and-/168093bda3.

proposals and objections in a timely fashion. The Venice Commission has repeatedly stressed the importance of public debates and consulting civil society. The Constitutional Convention initiated by President Coleiro Preca and continued by President Vella can be an occasion to bring together all stakeholders in order to achieve the widest possible consensus.

88. During the last two years, there have been eight meetings of a steering committee composed of three members of the majority and three members of the opposition under the chairmanship of the President. The future Convention has a web-site which was used to collect contributions from all interested organisations and individuals[9]. The six months deadline for submissions has ended and more than 500 submissions have been received. The next phase will be the start of the Constitutional Convention as such, composed maybe of some 120 persons representing associations and organisations from all strata of society. The Convention would last for two or two and a half years. However, the Venice Commission recommendations are considered urgent and would be dealt with directly, before the Convention. The President sees his role as a facilitator who would not interfere on substance.

89. The Venice Commission welcomes that a Constitutional Convention will be established to bring about constitutional reforms. This should be an important occasion enabling a 'holistic' constitutional reform that was recommended in the 2018 Opinion. Even if recommendations by the Venice Commission are considered urgent, it is essential that they be widely discussed in society and there is an effort to obtain consensus not only among political parties but also with civil society and media, who should have ample occasion to provide input for these reforms.

VI. Conclusion

90. In December 2018, the Venice Commission adopted an Opinion on Constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement in Malta (CDL-AD(2018)028), which came to the conclusion that in the present Maltese Constitution, the Prime Minister is clearly the centre of political power. Other actors such as the President, Parliament, the Cabinet of Ministers, the judiciary or the Ombudsman, have too weak an institutional position to provide sufficient checks and balances. The Opinion therefore made various recommendations aimed to strengthen those other actors.

91. The Maltese Government made proposals for legislative changes (CDL-REF(2020)024) that attempt to implement many of these recommendations. The Venice Commission welcomes the endeavours of the Maltese authorities to implement various recommendations of its 2018 Opinion and welcomes that they do so based on a dialogue with the Commission. The Proposals would certainly decrease the powers of the Prime Minister, but the current proposals alone will not yet be sufficient for achieving an adequate system of checks and balances. More power should be shifted to the President and Parliament, which need to be strengthened.

92. For the Venice Commission it is crucial to point out that the current Proposals are only part of a wider reform envisaged that will also be driven by the Constitutional Convention. With a guided and structured dialogue opened between all stakeholders, the Convention should look into the overall constitutional design of the country. In view of the positive discussions with the Maltese authorities, the Commission hopes and expects that those recommendations of its 2018 Opinion which are not the subject of the current Proposals will be addressed in a satisfactory manner in this process.

93. As concerns the Proposals themselves, the Venice Commission makes the following recommendations for their further improvement:

[9] https://riformakostituzzjonali.gov.mt/?lang=en.

1. Instead of replacing the Attorney General with the State Advocate in the JAC and the Commission for the Administration of Justice, the Commissioner for Public Standards could be included in these bodies.
2. The existing system of a rolling public call for judicial vacancies should be supplemented by public calls for individual vacancies. The Venice Commission would advocate making public the list of candidates.
3. The JAC's proposal to the President of three candidates for judicial appointment needs to be accompanied by a constitutional amendment enabling the President to exercise discretion without being obliged to seek advice from the government; the President's legitimacy for this choice should be strengthened by providing for his or her election with a qualified majority in Parliament.
4. In the absence of an agreement of two thirds of the MPs on a candidate for election as Chief Justice, his or her election by the judges of the Supreme Court should be introduced as an anti-deadlock mechanism.
5. The involvement of Parliament in the procedure of impeachment of judges should be avoided. In any case, an involvement of Parliament in the dismissal of judges can be acceptable only if the Constitutional Court has the final say.
6. The Ombudsman's powers should be entrenched in the Constitution, notably as concerns his or her right to obtain information and the duty for Parliament to discuss important reports by the Ombudsman (and not only the annual reports).
7. Powers of appointment to independent commissions should shift from the Prime Minister to the Cabinet with regard to other commissions than those mentioned in the Proposals.
8. While not moving towards a full *erga omnes* effect, Parliament should be obliged to act on the basis of decisions of the Constitutional Court finding a legal provision unconstitutional.

94. In addition, a number of recommendations from various reports deserve support. This concerns notably the reports of the Ombudsman and of the Commissioner for Public Standards on the domestic level, and the GRECO recommendations on the international level.

95. As with any preliminary proposal or concept paper, a full assessment can only be made when concrete texts are available. The Venice Commission therefore remains at the disposal of the Maltese authorities for further assistance, notably as concerns the draft legislation implementing the Proposals.