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(VENICE COMMISSION)

MALTA

OPINION

**ON CONSTITUTIONAL ARRANGEMENTS AND SEPARATION OF POWERS
AND THE INDEPENDENCE OF THE JUDICIARY AND LAW ENFORCEMENT**

**Adopted by the Venice Commission
at its 117th Plenary Session
(Venice, 14-15 December 2018)**

On the basis of comments by

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Mr Martin Kuijer (Substitute Member, Netherlands)
Mr Myron M. Nicolatos (Member, Cyprus)
Ms Herdis Kjerulf Thorgeirsdottir (Member, Iceland)
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I. Introduction

1. By letter of 10 October 2018, Ms Ævarsdóttir, Chairperson, Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) requested an opinion of the Venice Commission on Malta's constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement bodies. On 13 October 2018, Mr Owen Bonnici, Minister for Justice, Culture and Local Government, requested an opinion on Malta's legal and institutional structures of law enforcement, investigation and prosecution in the light of the need to secure proper checks and balances, and the independence and neutrality of those institutions and their staff whilst also securing their effectiveness and democratic accountability.

2. Mr Richard Clayton, Mr Martin Kuijer, Mr Myron Nicolatos, Ms Kjerulf Thorgeirsdóttir and Mr Kaarlo Tuori were invited to act as rapporteurs for this opinion. On 5-6 November 2018, they participated in a visit to Malta where they met with, in chronological order, the Acting Prime Minister and the Minister for Justice, Culture and Local Government, the Chief Justice of Malta, the Judges' Association, the Acting Attorney General, the President of the Republic of Malta, the Government Whip, opposition Members of Parliament, the Ombudsman, the Police Commissioner, the Malta Police Association, the Police Officers Union and the Dean of the Faculty of Laws, as well as with representatives of civil society. The Venice Commission is grateful to the Maltese authorities for the excellent organisation of the visit.

3. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Malta. It was adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018).

II. General remarks

A. Scope of the requests

4. The request by PACE refers to constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement bodies. The request by the Minister of Justice refers to legal and institutional structures of law enforcement, investigation and prosecution. Both requests do not specify any legal text to be examined. "Constitutional arrangements" refers to the Constitution (CDL-REF(2018)058), but not exclusively. The scope of this opinion is therefore potentially very wide and the Venice Commission decided to focus on a number of specific issues.

5. The request from the PACE originated in a proposal to seize the Venice Commission by the Rapporteur for the Assembly's report on "Daphne Caruana Galizia's assassination and the rule of law, in Malta and beyond: ensuring that the whole truth emerges". Investigative journalist Daphne Caruana Galizia was assassinated on 16 October 2017. As a result of investigations with the assistance of Europol, the FBI and the Netherlands forensic Institute, three persons were charged in court with the commission of the crime. The alleged ineffectiveness of the investigation to find any persons who ordered this assassination and the alleged culture of impunity have been criticised from various quarters.

6. The Venice Commission notes that the request for an opinion by the PACE must be understood against this backdrop. It wishes to stress, however, that the scope of the request is confined to an examination of Malta's constitutional arrangements. The Venice Commission has neither the mandate nor the required competences to examine the effectiveness of a particular criminal investigation or the veracity of the allegations by the murdered journalist of individual cases of corruption and money-laundering. However, the Venice Commission insists on the positive obligations stemming from Article 1, combined with Articles 2 and 10, of the

European Convention of Human Rights and from the case-law of the European Court of Human Rights.¹

7. This opinion looks into structural, constitutional and legislative issues with a view to assisting Malta in improving checks and balances and the independence of the judiciary. In the Council of Europe, other bodies such as GRECO and Moneyval are preparing reports relating to Malta within the framework of their respective mandates.

8. In his request for an opinion, the Minister of Justice of Malta insisted that in the past six years, his Government has implemented a very ambitious law reform programme for the strengthening of good governance and the rule of law, *inter alia*:

1. A law removing time-barring by prescription on cases of corruption by holders of political office;²
2. A whistleblower's protection act;
3. A party financing act³
4. A new parliamentary scrutiny for the appointment of Chairpersons and non-career ambassadors;
5. A new media and defamation act;
6. A legislative package liberalising freedom of artistic expression;
7. A new law for Standards in Public Life;
8. Malta joined the European Public Prosecutor's Office;
9. A constitutional reform which led to the creation of an Independent Judicial Appointments Commission.

The Minister pointed out that most of these laws were a first in Maltese legal history. The Venice Commission recognises the readiness of the Maltese authorities to carry out reforms.

B. Fight against corruption

9. Malta's economy is thriving. Malta is not only an important tourist destination; it has important industries such as automotive, shipping, logistical, generic pharmaceutical, high-quality packaging and toy production. Malta has also developed an important gaming industry (casinos and on-line gambling, including payments with crypto-currencies), which generates some 12 per cent of Malta's GDP and employs about 6000 persons.⁴ The Government promotes the Individual Investor Programme, which is the world's top-ranking citizenship-by-investment programme.⁵ These sectors are an important source of income for Malta.⁶

10. Constitutional checks and balances as well as good governance are particularly important in small states where the Government apparatus has a strong influence on the economy and the generation of wealth. Controls and transparency are required in order to ensure a safe

¹ See CDL-AD(2018)021, paragraph 29 and ECtHR 17 July 2018, *Mazepa a.o. v. Russia* (appl. no. 15086/07) concerning the murder of journalist Anna Politkovskaya.

² By amendment of Article 115(2) of the Criminal Code in 2013, the statute of limitation was removed in respect of passive bribery offences committed by a person holding the function of a minister, parliamentary secretary, an MP, mayor or local councillor at the time when the offence is committed, if the offence involved an abuse of office.

³ Upon request by the Maltese authorities, the Venice Commission gave an opinion on the draft legislation: CDL-AD(2014)035, Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta.

⁴ "The gaming sector is large and has rapidly grown over the past twenty years. The gaming sector accounted for ~12% of GDP in 2016 and employs over 6,000 people (i.e. ~2% of the labour force). Gaming consists of four land-based companies (e.g. casinos) and 453 licensed remote gaming companies (e.g. online betting and lotteries). Employment in the land based sector licensed by the MGA stood at 866 and over 5,300 in remote gaming" (Ministry of Finance, Results of the ML/TF National Risk Assessment 2018, p. 10).

⁵ <https://iip.gov.mt/http://www.maltaimmigration.com/>.

⁶

management of national wealth. This is particularly important in public procurement and direct orders bypassing the procurement system must be the rare exception.

11. Preventive and repressive measures are required to fight corruption. The Criminal Law Convention on Corruption (1999),⁷ signed and ratified by Malta, calls *inter alia* for the introduction of legislative measure to criminalise a large number of corrupt practices. In addition, the Convention calls for “*effective and dissuasive*” sanctions and measures, including confiscation of the proceeds of criminal offences (Article 19 of the Convention). In a similar vein, Article 30 (3) of the United Nations Convention against Corruption (2003)⁸ calls on State Parties to the Convention to “*maximize the effectiveness of law enforcement measures*”. The Venice Commission has previously held that international instruments “clearly define an international obligation for states to ensure institutional specialisation in the sphere of corruption, i.e. to establish specialised bodies, departments or persons (within existing institutions) in charge of fighting corruption through law enforcement. Key requirements for a proper and effective exercise of such bodies’ functions, as they result from the above instruments, include: independence/autonomy (an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence); accountability and transparency; specialised and trained personnel; and adequate resources and powers.”⁹ Likewise, the Venice Commission has previously stated that “[i]t may be concluded [...] that a State is under a positive obligation to ensure that its criminal system is effective in the fight against serious forms of crime, that criminal law constitutes a strong deterrent to commit such offences, and that perpetrators of such offences do not enjoy impunity”.¹⁰

12. In its opinion on draft amendments to the Criminal Code and the Criminal Procedure Code of Romania, the Venice Commission identified the applicable international standards¹¹ flowing from international instruments on anti-corruption,¹² from positive (procedural) obligations under human rights treaties¹³ and under the rule of law.¹⁴

13. Lately, the Venice Commission was called upon to provide several opinions in this field.¹⁵ In 2016, the exposure of the Panama Papers revealed corruption in various countries in Europe. It is fair to say that corruption is a phenomenon affecting all Member States of the Council of Europe. According to recent reports, corruption costs the economy of EU countries more than 120 billion Euros per year, with some estimates going up to 990 billion Euros.¹⁶

⁷ ETS No. 173.

⁸ General Assembly resolution 58/4 of 31 October 2003.

⁹ CDL-AD(2014)041, Interim Opinion on the Draft Law on Special State Prosecutor’s Office of Montenegro, paras. 17, 18 and 23. See also CDL-PI(2018)007, para. 106.

¹⁰ CDL-AD(2018)021, Opinion on amendments to the criminal code and the criminal procedure code of Romania, para. 31.

¹¹ See also CDL-AD(2016)017, Rule of Law Checklist, II.F.1.

¹² CDL-AD(2018)021, Romania – Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, adopted by the Commission at its 116th Plenary Session (Venice, 19-20 October 2018), para. 22 seq.

¹³ CDL-AD(2018)021, para. 29 seq.

¹⁴ CDL-AD(2018)021, paras. 32-33.

¹⁵ CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the Judiciary (15 January 2016) of Albania; CDL-AD(2016)036, Albania – Amicus Curiae Brief for the Constitutional Court on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law); CDL-AD(2017)020, Ukraine – Opinion on the Draft Law on Anticorruption Courts and on the Draft Law on Amendments to the Law on the Judicial System and the Status of Judges (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences).

¹⁶ European Parliament, The Cost of Non-Europe in the area of Organised Crime and Corruption, ([http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA\(2016\)558779](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)558779)).

14. The even higher cost is the one of ruined lives, the erosion of the rule of law and decay of democracy. In the last two years, a number of journalists who had been investigating corruption have been brutally killed on European soil. Journalists have special duties; more duties than ordinary citizens and they need special protection.¹⁷

15. The Venice Commission welcomes the Maltese Parliament's enactment of legislation on public standards¹⁸ and its recent election of a Commissioner for Public Standards who comes from a political background within the political party currently in opposition.

16. According to Article 4 of the Standards in Public Life Act of 30 October 2018,¹⁹ the President of Malta appoints a Commissioner for Standards in Public Life, on the basis of a resolution of the House of Representatives. According to Article 13 of the Act, the Commissioner *inter alia*, examines declarations of interests and assets, examines complaints, provides recommendations, advises upon request on whether an action complies with the applicable Code of Ethics or any other duty, scrutinizes the register of absences of the House of Representatives, identifies lobby activities on which s/he makes recommendations. The Act applies to MPs (including members of Government), Parliamentary Secretaries and Parliamentary Assistants who are bound by the Code of Ethics set out in a Schedule of the Act itself as well as to persons of trust who are bound by the Code of Ethics of the First Schedule of the Public Administration Act (for persons of trust see section V.C.2 below). It is yet too early to assess the impact of the work of the Commissioner on public life in Malta.

C. Separation of powers and a system of checks and balances

17. Good governance is essential in view of guaranteeing the effective protection of human rights. That being said, there is no uniform constitutional model to achieve good governance. Especially with regard to smaller jurisdictions, it must be acknowledged that governance models that work in larger jurisdictions may not always be realistic within the context of a smaller island.²⁰ In line with the foregoing – and within the context of Guernsey – the European Court of Human Rights held that “neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such”.²¹

18. The current Constitution of Malta was drawn up in 1964, reflecting the sovereign statehood of Malta. It was largely based on British constitutional theory and practice. It is therefore worth comparing the constitutional systems in Malta with those of the United Kingdom (UK).

19. First, a difference between the two legal systems is that Malta has a written Constitution which incorporates a chapter on fundamental rights inspired by the European Convention on Human Rights.

20. As concerns checks and balances, it should be stressed that Malta is not typical of UK constitutional arrangements, because it only has one parliamentary chamber i.e. no upper house with a deliberative role when reviewing proposed legislation. Between 1921 and 1933, the Maltese Parliament was bicameral, but then departed from the British tradition. Most Commonwealth countries have two chambers, although New Zealand and Cyprus are an exception. The impact of having only one legislative chamber is significant from a constitutional perspective, because it prevents the upper house from providing a check to the legislature's

¹⁷ H. Thorgeirsdottir, *Journalism Worthy of the Name: Freedom within the Media and the Affirmative Side of Article 10 of the ECHR*, p. 297, Kluwer Law International (2005). Case of *Erdogdu and Ince v. Turkey*.

¹⁸ CDL-AD(2016)017, Rule of Law Checklist, II.F.1.a.i.

¹⁹ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12650&l=1>.

²⁰ See Island Rights Initiative; <https://www.islandrights.org/>.

²¹ ECtHR 8 February 2000, *McGonnell v. the United Kingdom* (appl. no. 28488/95), para. 51.

decision-making and enables the Prime Minister to exercise greater power through enforcing party discipline on parliamentarians.

21. Another important difference with the UK is that MPs in the UK were first paid a salary of £400 in 1911 (during the period of Lloyd George's radical budgets and the political outcry which resulted in restricting the powers of the House of Lords in 1911). MPs are now paid £ 76,011 plus expenses, while in Malta they only receive a part time salary. The effect of paying MPs part-time salaries inevitably affects their ability to operate independently from the executive, and the Venice Commission's delegation learned that this practice was exacerbated by the recent development of appointing backbenchers to important paid posts as commissioners at the various public commissions.

22. Governance in the UK, like in any other parliamentary democracy, blurs the principle of separation of powers and creates a very powerful executive, because of the control a Prime Minister exercises over MPs through the party system. Thus, the legislative programme of Parliament is determined by the Government, and government bills virtually always pass the House of Commons, because of the nature of the majoritarian first-past-the-post electoral system, which in general produces strong government, in combination with the imposition of party discipline on the governing party's majority, which ensures loyalty. Malta on the other hand has proportional representation with an electoral system with the single transferable vote.

23. Both systems confer very significant power on the Prime Minister. Having said that, the UK also has a very strong tradition of independence of the individual judge. Such a respect is a key element of constitutionalism and the essence of the rule of law.

24. In the UK, the position of the Prime Minister is further strengthened by the fact that a large number of MPs hold governmental positions (as ministers, junior ministers and Parliamentary Private Secretaries). Similar arrangements exist in Malta (see section IV below).

25. Until the reforms of the UK constitution in the early 2000s, the Lord Chancellor's responsibilities branched into functions of the executive, judiciary and parliament: the Lord Chancellor was head of the judiciary in England and Wales, Speaker of the House of Lords, Cabinet Minister and Law Lord. Following the Constitutional Reform Act 2005, the Lord Chief Justice took on the role as Head of the Judiciary and the House of Lords elected its own Speaker. In 2009, the legal function of the House of Lords was separated from the legislative function and the Supreme Court was created.

26. It is worthwhile noting that the political landscape in Malta is very much based on a two party system. Even though there is now a third, smaller party in Parliament, there are two main political parties, the Labour Party (PL) and the Nationalist Party (PN). Taking also into account the Prime Ministers strong position in judicial appointments (see below section III), crucial checks and balances are missing.

III. Judicial power

27. Both the judiciary, as an institution, and individual judges must be able to exercise their professional responsibilities in adjudication without being influenced by the executive or any other quarter. Only an independent judiciary is able to render justice impartially on the basis of the law and prevent the abuse of power. It is of vital importance for the rule of law that there is public trust in the proficiency of the judiciary to operate in an independent and impartial manner.

28. As the European Court of Human Right has held "in order to establish whether a tribunal can be considered 'independent' for the purposes of article 6 § 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of

safeguards against outside pressures and the question whether it presents an appearance of independence”.²²

29. The Judicial power is the field in which the delegation of the Venice Commission encountered calls for reform from nearly all stakeholders, notably as concerns the role of the prosecution. Judicial appointments are another topic which merits special attention.

A. Judicial appointments

30. In Europe, there is a great variety in the method by which judges are appointed in domestic legal orders.²³ No single ‘model’ exists which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary.²⁴ But, it is fair to say that international standards are more in favour of the extensive depoliticisation of the process.²⁵ Political considerations should not prevail over the objective merits of a candidate. Article 6 ECHR protects not only the independence of the individual judges but requires a system of judicial appointments that excludes arbitrary appointments.²⁶

31. The appointment of judges and magistrates is dealt with in Articles 96, 96A and 100 of the Constitution of Malta. The Constitution establishes two categories of judges: judges proper and first instance magistrates. Altogether Malta – with a population of about 475 000 inhabitants – has some 20 judges and 20 magistrates only. The judiciary is headed by the Chief Justice who also presides the Constitutional Court, which is composed of three judges and deals with constitutional cases.

32. The President appoints judges and magistrates “acting in accordance with the advice of the Prime Minister”. Until 2016, the Prime Minister was free to recommend any person to the President of Malta for judicial appointment (as judge, Article 96 of the Constitution; as magistrate, Article 100 of the Constitution). With the introduction of Article 96A in the Constitution in 2016, a Judicial Appointments Committee (“JAC”) was established in order to vet candidates for judicial appointment and to make recommendations to the Prime Minister, except in the case of the Chief Justice.

33. The JAC, which is a sub-committee of the Commission for the Administration of Justice (Article 101 of the Constitution), is composed of the Chief Justice, the Attorney General, the Auditor General, the Ombudsman and the President of Chamber of Advocates. The JAC is structured very differently from the Judicial Appointment Commission in the UK, which it appears to resemble. In the UK the Judicial Appointments Commission comprises 15 members, has a majority of non-judicial members, only one candidate for appointment to the High Court²⁷ may be selected each recommendation, appointment or pool membership to which a request relates,²⁸ and High Court judges are selected by the Lord Chancellor.²⁹

34. The task of the JAC is to ascertain whether candidates for judicial office fulfil the criteria for appointment. Apart from citizenship, etc., these are seven years of legal practice for appointment as a magistrate and 12 years of practice for appointment as a judge. The JAC also

²² Eur. Court HR, Case of Incal v. Turkey, judgment of 9 June 1998, Reports 1998-IV, p. 1571, para. 65.

²³ See M. Kuijer, *The Blindfold of Lady Justice – Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Wolf Legal Publishers, 2004.

²⁴ CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, para. 3.

²⁵ Ibidem.

²⁶ ECtHR, Oleksandr Volkov v. Ukraine of 9 January 2013, application no. 21722/11.

²⁷ Section 85(1) of the Constitutional Reform Act 2005.

²⁸ Section 88(4) of the Constitutional Reform Act.

²⁹ Section 94(4)(a)(ii) of the Constitutional Reform Act.

interviews the candidate and carries out a due diligence exercise on any assets or business involvements and other activities of the candidate.³⁰

35. Vacancies for judicial office are not announced or published. Interested lawyers may express their interest at any moment, the JAC then vets them and includes suitable candidates in a permanent register. The JAC may not rank the candidates or express a preference for any candidate. It may only establish whether the candidates fulfil the criteria. Magistrates are considered to be eligible and interested for appointment as judges.

36. When a vacancy comes up, the Prime Minister is free to choose – for appointment as judge – any person from that register or from among the sitting magistrates. As the wording of the Constitution “acting in accordance with the advice of the Prime Minister” stipulates, the role of the President in appointing the magistrate or judge is purely formal. In effect, the JAC’s role is to identify a pool of candidates for the judiciary from whom the Prime Minister has an uncircumscribed statutory discretion to appoint judges and magistrates.

37. According to Article 96(4) of the Constitution, the Prime Minister may overrule the JAC by appointing a person who has not passed the vetting (either because s/he did not ask to be vetted or because the person did not pass the vetting).³¹ In this case, the Prime Minister has to make a statement in the House of Representatives about his decision, explaining the reasons for overriding the decision of the JAC. This has not happened since 2016, however.

38. The Maltese authorities explained that this exception to the vetting by the JAC was necessary in order to ensure that the JAC could not discriminate against persons, for instance because of their sexual orientation.

39. In discussions with the delegation of the Venice Commission, the authorities insisted that the exercise of discretion by the Prime Minister had ensured a gender balance in the appointments. However, the Venice Commission is of the opinion that achieving a gender balance and the prevention of discrimination are valid goals, but attributing discretion to the Prime Minister in judicial appointments is certainly not the appropriate way to achieve these goals.

40. While the establishment of the JAC is in principle a welcome step, as compared to the situation before 2016, its composition is not in conformity with European standards. The JAC is composed of the Chief Justice, the Attorney General, the Auditor General, the Ombudsman, and the President of the Chamber of Advocates. The delegation of the Venice Commission was informed about the rationale behind the current composition of the JAC. Two out of five members are chosen and dismissed by a two thirds majority in Parliament (The Ombudsman and the Auditor General), two members can only be dismissed by a two thirds majority in Parliament (the Chief Justice and the Attorney General), and one member is not appointed at all by politicians (the President of the Chamber of Advocates).

41. The authorities insist that notably because of the small size of the Judiciary (44 judges and magistrates, including the Chief Justice) control of appointments cannot be completely left to the Judiciary itself and that it is necessary to include checks and balances such as those provided by the current system whereby the Prime Minister may make appointments to the judiciary against the advice of the Judicial Appointments Committee subject to the obligation of explaining his actions to Parliament, thus reflecting a proposal of the 2013 report on the Holistic Reform of the Justice System. Even if the current system were to be modified by excluding the executive power from judicial appointments, some checks and balances on the proposed power

³⁰ The JAC published guidelines on what constitutes “eligibility” and more “merit” for the purposes the requirements of the Constitution (<https://justice.gov.mt/en/justice/Pages/criteria-for-appointment-to-the-judiciary.aspx>).

³¹ CDL-AD(2016)017, Rule of Law Checklist, II.E.1.a.vi.

of the judiciary on further judicial appointments would still be required. The authorities also point out that the Chief Justice should not be appointed in the same manner as judges because judges within the appointing body would themselves aspire to become Chief Justice. For this appointment, the authorities propose that the appointment could be limited to sitting judges and a consultation with the Leader of the Opposition be statutorily provided for. Finally the authorities raise the question whether the retirement age of sixty-five for judges and the AG should be extended.

42. In order to be in line with European standards as expressed in Recommendation CM/Rec(2010)12 on “Judges: independence, efficiency and responsibilities” of the Committee of Ministers of the Council of Europe, at least half of the members of a council for the judiciary should be judges elected by their peers from all levels of the judiciary.³² The Venice Commission wishes to clarify that it has no principled objections against the current members of the JAC. Ensuring a more balanced composition could also be achieved by adding judicial nominees to the JAC. The Commission for the Administration of Justice, of which the JAC is a sub-commission, is closer to such a composition, but it is not in charge of the vetting or appointment of candidates. The inclusion of a significant part of non-judicial members in the body selecting judges provides accountability and checks and balances as sought for by the authorities. In a system where judicial vacancies are announced and candidates have to apply for such vacancies, it would be clear which judges apply for the position of Chief Justice. These judges would have to recuse themselves in the procedure of appointment of the Chief Justice. As concerns the retirement age, the Venice Commission has expressed strong criticism of the reduction of the retirement age when this applies to sitting judges but there is no objection in principle to extend the retirement age if sitting judges retain a possibility to retire under current rules.

43. In conclusion, the constitutional amendments 2016, which introduced the JAC, were a step in the right direction, but fall short of ensuring judicial independence. Further steps are required. The principle of independence of the judiciary requires that the selection of judges and magistrates be made upon merit and any undue political influence should be excluded. The Prime Minister should not have the power to influence the appointment of Justices and Judges-Magistrates. This would open the door to potential political influence, which is not compatible with modern notions of independence of the judiciary.

44. 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 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.³³
3. The JAC should rank the candidates, upon merit on pre-existing, clear and transparent criteria for appointment,³⁴ 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.

³² Recommendation CM/Rec(2010)12, para. 27; see also CDL-AD(2016)017, Rule of Law Checklist, II.E.1.a.viii.

³³ *Ibid.*

³⁴ CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges, para. 27

B. Judicial discipline

45. In the field of judicial discipline, a balance needs to be struck between judicial independence, on the one side, and the necessary accountability of the judiciary, on the other, in order to avoid negative effects of corporatism within the judiciary.

46. The Consultative Council of European Judges has stated that it does not believe that it is possible to specify in precise or detailed terms at a European level the nature of all misconduct that could lead to disciplinary proceedings.³⁵ Such codification of misconduct should be done at the national level. A comparative law research report entitled “Judicial Independence in Transition”³⁶ observed that in many European countries the grounds for the disciplinary liability of judges are defined in rather general terms. As an exception, in Italy the law provides an all-inclusive list of thirty-seven different disciplinary violations concerning the behaviour of judges both in and outside their office.

47. Principle 5.1 of the European Charter on the Statute for Judges states that the grounds giving rise to a disciplinary sanction need to be “expressly defined”. A similar wording was chosen by the European Court of Human Rights in the *Pitkevich* decision.³⁷ In this Russian case, the judge was an active follower of a religious movement, which started to influence her judicial work. In 1998, the Russian Judiciary Qualification Panel dismissed the applicant from office in disciplinary proceedings on the ground that she had “damaged her reputation as a judge and impaired the authority of the judiciary”. The judge complained before the Strasbourg Court that her dismissal constituted an unjustified interference with her freedom of religion as laid down in Article 9 ECHR. The Court therefore did not examine the case from a viewpoint of judicial independence. Nonetheless, the reasoning of the Court might be important in order to determine some of the relevant criteria when assessing the appropriateness of disciplinary proceedings against a judge. The Court, for example, found it relevant that the grounds for taking disciplinary action were “precisely defined”. This point was repeated in the 2013 Volkov judgment. In the absence of practice, domestic law needs to establish guidelines concerning vague notions to prevent arbitrary application of the relevant provisions: “the absence of any guidelines and practice establishing a consistent and restrictive interpretation of the offence of “breach of oath” and the lack of appropriate legal safeguards resulted in the relevant provisions of domestic law being unforeseeable as to their effects”.³⁸

48. In Malta, the issue of disciplinary liability is dealt with in Article 101B of the Constitution. This provision was introduced in the 2016 amendments and establishes the Committee for Judges and Magistrates. According to this provision, disciplinary proceedings against a judge or a magistrate shall be commenced “for breach of the provisions of the Code of Ethics for Members of the Judiciary or of a code or disciplinary rules for members of the judiciary promulgated according to the same procedure according to which the said Code of Ethics is promulgated which are from time to time applicable to the members of the judiciary”.

49. In this Code of Ethics,³⁹ as amended in 2004, there are admittedly some broadly defined norms (such as carrying out duties with ‘dignity, courtesy and humanity’, conduct that does not ‘tarnish their personal integrity and dignity’, or avoiding conduct that ‘could give rise to public scandal’). Using some of these broadly defined norms cannot be avoided. In addition, it is worthwhile noting that the provisions of the Code are accompanied by ‘Guidelines’ in which in more concrete terms describe relevant activities. These Guidelines are meant to give further guidance to members of the judiciary. In principle, this does not seem problematic. The Opinion

³⁵ CCJE-GT (2002) 7, p. 32.

³⁶ Seibert-Fohr, Anja (ed.); [Max Planck Institut für Ausländisches Öffentliches Recht und Völkerrecht], Beiträge zum Ausländischen Öffentlichem Recht und Völkerrecht; vol. 233, Berlin, 2012.

³⁷ ECtHR (admissibility decision) 8 February 2001, *Pitkevich v. Russia* (appl. no. 47936/99).

³⁸ ECtHR, Oleksandr Volkov v. Ukraine of 9 January 2013, application no. 21722/11, para. 185.

³⁹ <http://www.judiciarymalta.gov.mt/code>.

on the Judicial System Act of Bulgaria states “The Venice Commission acknowledges that, in defining unethical behaviour, the law may have recourse to some comprehensive formulas”.⁴⁰

50. In the 2013 Volkov judgment⁴¹ the ECtHR emphasised the importance of the independence and impartiality of the body imposing disciplinary sanctions and referred to the European Charter on the Statute for Judges in this respect (i.e. the substantial participation of judges in the relevant disciplinary body⁴²). The Court referred also to the opinion of the Venice Commission that the presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of *judges* created a risk.⁴³ Furthermore, a situation should be avoided where persons responsible for instigating a disciplinary procedure subsequently take part in the decisions whether or not a disciplinary sanction is imposed.⁴⁴

51. Until 2016, the only sanction available against judges in Malta was their dismissal. The 2016 constitutional reform brought a welcome graduation of sanctions, to be meted out by the Committee for Judges and Magistrates, another sub-commission of the Commission for the Administration of Justice, which consists of three members of the judiciary “who are not members of the Commission for the Administration of Justice and who shall be elected from amongst judges and magistrates according to regulations issued by the Commission for the Administration of Justice so however that in disciplinary proceedings against a magistrate two of the three members shall be magistrates and in the case of disciplinary proceedings against a judge two of the three members shall be judges” (Article 101B(1) of the Constitution). There is an appeal against the disciplinary decisions of the Committee for Judges and Magistrates to the Commission for the Administration of Justice.

52. The Committee for Judges and Magistrates can impose a warning or a pecuniary penalty for minor breaches (Article 101B(10)(a) of the Constitution or suspend the judge or magistrate for up to six months on half of his or her salary (Article 101B(10)(b)). In principle this aspect is unproblematic. However, Article 101B(10)(c) provides that the Committee is not competent to impose the most serious sanction, i.e. the removal of the judge or magistrate from office. In that situation, the Committee reports its findings to the Commission for the Administration of Justice. The Commission will be competent – in case it finds the evidence to constitute *prima facie* proof – to suspend the judge or magistrate. Imposition of the sanction in the end is in the hands of a political entity, the House of Representatives. This is problematic under European standards,⁴⁵ even if dismissal requires a two-thirds majority of all Members of the House and is open to contestation in court. The most obvious solution would be to give this power to the Commission for the Administration of Justice and to provide for an appeal against the decision of this body to a court.⁴⁶ While the authorities seem to agree to such a proposal they point to the need for checks and balances. Again, the mixed composition of Commission for the Administration of Justice should provide checks and balances.

53. In conclusion, reforms introduced through the 2016 constitutional amendment may be welcomed. However, these amendments do not go far enough. Therefore, the Venice Commission recommends:

- The removal of a judge or magistrate from office should not be imposed by a political body;

⁴⁰ CDL-AD(2017)018, para. 108.

⁴¹ ECtHR, Oleksandr Volkov v. Ukraine of 9 January 2013, application no. 21722/11.

⁴² Ibid, para. 109.

⁴³ Ibid, para. 114.

⁴⁴ Ibid, para. 115.

⁴⁵ CDL-AD(2016)017, Rule of Law Checklist, II.E.1.a.ii; see also recent ECtHR Grand Chamber judgment Ramos Nunes de Carvalho e Sá v. Portugal (applications nos. 55391/13, 57728/13 and 74041/13).

- There should be an appeal to a court against disciplinary decisions directly imposed by the Commission for the Administration of Justice.

C. Prosecution

54. Following the British model, in Malta, the major part of prosecutions is carried out under the authority of the Police. It is the Police who investigate crimes and who then press the charges in court. Only for the most serious crimes, the office of the Attorney General (AG) prosecutes directly. In complex cases, the Police seek advice from the Attorney General, but they are not obliged to follow this advice (it seems that usually this advice is being followed in practice). The task of the prosecution is, therefore, split between the Police and the AG. This ambiguous system is problematic from the viewpoint of the separation of powers, notably taking into account the roles of the AG and the Police Commissioner, which makes it open to criticism when considering politically controversial or sensitive prosecutions.

55. Article 91 of the Constitution establishes an AG who is appointed by the President acting in accordance with the advice of the Prime Minister. The AG must be qualified for appointment as a judge of the Superior Courts. The AG is independent in the exercise of his or her powers to institute, undertake and discontinue criminal proceedings. However, the AG is also the Legal Adviser to the Government and s/he represents the interests of the State in judicial proceedings and s/he helps in drafting laws and agreements.

56. In addition, the AG chairs the Financial Intelligence Analysis Unit (FIAU), which produces reports that potentially lead to criminal prosecutions. The authorities point out that the Board of Governors of the FIAU which the AG chairs, is not involved in the FIAU's operational matters such as particular financial investigations. Nonetheless, attributing the chair of such a body to the AG, who has a key role in prosecution, seems problematic and even any appearance of incompatibility should be avoided.

57. Article 91(3) of the Constitution provides that the decisions of the AG shall not be reviewed by any other person or authority (thus including the courts) in the exercise of his or her powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him or her by any law in terms which authorise him or her to exercise that power in his or her individual judgment. This is problematic in particular as concerns decisions not to prosecute.

58. The multiple roles of the AG derive from British rule (it still exists in Cyprus, for instance). The concentration of the powers of adviser to the Government and prosecutor in one institution makes the office very powerful. This is problematic from the viewpoint of the principle of democratic checks and balances and the separation of powers. In the UK, the two offices were separated in 1983 with the creation of the office of the Director of Public Prosecutions (DPP) as a result of the recommendations of the Phillips Royal Commission on Criminal Procedure in 1981.⁴⁷

59. No such reform was undertaken in Malta. However, the Venice Commission's delegation has the impression that a separation of the roles of the AG is now widely accepted in Malta following the 2013 Report of the Commission for a Holistic Reform of the Justice System.⁴⁸

⁴⁷ In considering the separation of the investigator's and lawyer's roles the Phillips Report noted that it was "... said to be unsatisfactory that the person responsible for the decision to prosecute should be the person who has carried out or been concerned in the investigation." (6.24) and that "... the case for separation is also argued on the ground that the investigator, by virtue of his function, is incapable of making a dispassionate decision on prosecution." (6.28).

⁴⁸ <https://justice.gov.mt/en/justice/krhg/Pages/Commission-for-the-Holistic-Reform-of-Justice-System.aspx>.

60. The authorities insist that the AG does not come from a background of being a politician, enjoys security of tenure of the same level as a judge and can only be removed by a resolution of the House of Representatives backed by a two-thirds majority vote. His or her appointment is not limited to the term of a Government and it has always been the practice that s/he would be appointed from the most senior lawyers serving at the office of the Attorney General. The authorities also point out that the two functions are in the service of the law and not in the service of individual politicians. These functions are performed independently in that lawyers with prosecuting duties do not give civil or constitutional advice and vice-versa because the Office of the Attorney General is organised in two main sections one of which deals with Civil, Administrative and Constitutional matters and another section which deals with Criminal Law and Prosecution matters. The AG exercises no executive power and derives no 'power' from the fact of being legal adviser to Government whose advice, being in the nature of advice, is not legally binding. With regard to prosecution the AG does not even initiate prosecutions himself but advises the police when these request his advice. As concerns prosecution, the AG does have the power to discontinue a prosecution (the power of *'nolle prosequi'*) and certain prosecutions require his prior approval. He also supervises committal proceedings, has a right to appeal all judgements of the Court of Magistrates and prosecutes trials by jury and appeals from such trials. It is not seen that these powers go beyond normal prosecution powers. Summing up, the AG has a legal and not a political advisory function.

61. Aware of these valid arguments, the Venice Commission nonetheless recommends that in order to avoid the double role of the Attorney General, an office of an independent Director of Public Prosecutions or Prosecutor General or Public Prosecutor should be established in Malta. This would avoid the appearance of any possible conflict. This DPP should take over the prosecuting powers from the AG, who could remain the legal advisor of the Government with functions normally exercised by an AG in jurisdictions where an independent DPP is also in place.⁴⁹ In order to ensure the independence of the DPP his or her security of tenure in line with accepted international practice is essential.

62. As concerns prosecution by the Police, the delegation of the Venice Commission was informed that already some 15 years ago, for a short period, the Police had established a department specialising on prosecution only. However, this reform had been discontinued at the time. Police officers told the Commission's delegation that they had to spend a significant part of their working day at court in order to prosecute cases and they could do their investigative police work only in the remaining working hours. It seems that many police officers dread the time spent in court, which prevents them from doing 'real police work'.

63. The delegation of the Commission also learned that, currently, the establishment of a specialised department on prosecution is being prepared again. Police officers in this department would give up on investigative work and specialise only on prosecution work, whereas the remaining police officers would do investigative work only.

64. Such a reform is certainly commendable. However, the Venice Commission recommends to go further and to merge the staff of this new department of prosecuting police officers with the existing prosecuting department of the AG in order to form the personnel of the new Director of Public Prosecutions. This would unite all prosecutors (from the Police and the AG) under one roof. The delegation of the Venice Commission was told that some of the prosecuting police would prefer to retain their status as members of the Police Force, but such a merger should be possible if it were accompanied by appropriate transitional measures.

⁴⁹ CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 77.

65. The office of the independent DPP would thus be responsible for all public prosecutions (institution, suspension or termination of criminal proceedings), taking over the prosecution powers of police and that of the AG.

66. In prosecution, Malta applies the continental legality principle,⁵⁰ which obliges the prosecuting authority to bring charges when “there is a case”. The legality principle is opposed to the opportunity principle, according to which the prosecuting authority brings charges only when this is in the interest of the State. This obligation of the Police (Article 346 of the Criminal Code) should be maintained for an independent DPP.

67. Any powers to start, stop and discontinue criminal proceedings, which are not subject to judicial review, do not comply with modern notions of the rule of law. Already now, non-prosecution can be challenged in court. It has been said that Maltese court consistently held that any ouster clauses in the Constitution excluding judicial review do not affect the power of the courts to determine whether the actions of any authority are in breach of fundamental human rights. The powers of the new DPP should be subject to judicial review,⁵¹ notably as concerns non-prosecution,⁵² upon request by the victims.

68. A specific issue is the role of magistrates in investigation. While the investigation of crime is in general in the hands of the Police, under Maltese law magistrates can be asked to start inquests or “*in genere*” (article 546 of the Criminal Code, sometimes improperly referred to as “inquiry”). While the original purpose of the inquest was the description and conservation of material evidence,⁵³ these inquests have developed into full investigations. As during an

⁵⁰ 1) Order in Council of the 30th of January, 1854 on the Criminal Code

“2. Offences are divided into crimes and contraventions.

3. (1) Every offence gives rise to a criminal action and a civil action.

(2) The criminal action is prosecuted before the courts of criminal jurisdiction, and the punishment of the offender is thereby demanded.

(3) The civil action is prosecuted before the courts of civil jurisdiction, and compensation for the damage caused by the offence is thereby demanded.

4. (1) The criminal action is essentially a public action and is vested in the State and is prosecuted in the name of the Republic of Malta, through the Executive Police or the Attorney General, as the case may be, according to law.

(2) A criminal action is prosecuted ex officio in all cases where the complaint of the private party is not requisite to set the action in motion or where the law does not expressly leave the prosecution of the action to a private party.

346. (1) It is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.

(3) In the carrying out of their duties, the Police shall take all measures necessary for the immediate protection of victims following an assessment as the case may be.

2) Act No. XVIII of 2017 to regulate the organization, discipline and duties of the Police Force, and to provide for matters ancillary or consequential thereto.

“4. The main objectives of the Force are:

(b) to respond immediately to any request for the protection and intervention of the law;

Part III “Investigations” provide regulations on each procedures like interviews, protection of witnesses, etc.

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28520&l=>

347. The Police shall not institute criminal proceedings, except on the complaint of the injured party, in cases where the law does not allow criminal proceedings to be instituted without such complaint.”

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574>

⁵¹ CDL-AD(2016)017, Rule of Law Checklist, II.E.1.d.xii.

⁵² CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, para. 45.

⁵³ “...the magistrate may, instead of holding in person an inquest on the spot, direct a Police officer not below the rank of inspector to establish the relevant facts ...” (Article 546(3) of the Criminal Code).

inquest there is not yet a person to be charged with a crime, the proceedings are not adversarial. However, the magistrate can identify a suspect as a result of an inquest. The result of the inquest is served on the person who requested it and – if applicable – to the suspect. It seems that in recent time the number of requests for inquests has increased and their duration is increasing as well.

69. Different from an inquest is the adversarial criminal inquiry before a Court of Magistrates, ‘committal proceedings’, which compile evidence with the purpose of deciding whether or not to indict a person (Articles 390 *seq.* of the Criminal Code). If the Court of Magistrates decides that the person should be indicted, the case is referred to the Criminal Court (composed of judges). In practice, it seems, the AG refers such cases to a Court of Magistrates as a court of criminal judicature after the conclusion of the ‘criminal inquiry’ stage if these involve charges subject to a punishment of up to 12 years imprisonment. Charges attracting a higher punishment have to go for a Bill of Indictment and trial by jury in the Criminal Court.

70. Thus magistrates, different persons of course, can intervene in three different functions during investigation and adjudication of the same crime. Inquests can run in parallel to police investigations and there seems to be no co-ordination between inquests and police investigation. The delegation of the Venice Commission was informed that sometimes the Police and the Magistrate are not even aware that such investigations run in parallel.

71. The Venice Commission is of the opinion that investigation of crime is a task of the State. While the rights of victims are indeed very important under the rule of law,⁵⁴ the victim should not be able to choose an avenue of criminal investigation. The establishment of a DPP should also absorb the function of the inquest.

72. For the rule of law, the efficient prosecution of corruption is an essential issue in any state.⁵⁵ In Malta, a Permanent Commission Against Corruption (PCAC) was established by virtue of Act No XXII of 1988 and is composed of a chairman and two members, appointed by the President of Malta, acting in accordance with the advice of the Prime Minister, given after s/he has consulted with the Leader of the Opposition (Article 3(1)). While the establishment of such a body recognises that there is a need to fight against corruption, the Permanent Commission Against Corruption has two structural flaws: (a) its membership depends on the Prime Minister, even if s/he has to consult with the opposition; (b) According to Article 11 of Act No XXII, the Commission reports its findings to the Minister of Justice. If the PCAC, following its investigation, comes to the conclusion that corrupt practices took place, the consequence must be prosecution of the crime and not merely a report to the Minister of Justice, who has no powers of investigation. In the light of the recommendation to establish an independent DPP, the PCAC should be dissolved in order to avoid overlapping competences or it could be kept as a body reporting on corruption and sending the reports to the DPP. In the latter case, an inquiry by the PCAC should not block any investigation or prosecution by the Police and the DPP.

73. In conclusion, the structure of the office of the AG should be altered and allow for a more transparent prosecutorial branch:

1. An office of an independent Director of Public Prosecutions or Prosecutor General or Public Prosecutor should be established in Malta.
2. The office of the independent DPP would be responsible for all public prosecutions (institution, suspension or termination of criminal proceedings, including corruption).
3. The powers of the new DPP should be subject to judicial review, notably as concerns non-prosecution, upon request by the victims.
4. The AG would remain the legal advisor of the Government
5. The Police remain responsible for investigative work.

⁵⁴ CDL-AD(2016)017, Rule of Law Checklist, para. 96.

⁵⁵ CDL-AD(2016)017, Rule of Law Checklist, II.F.1.c.iii.

D. Effects of judgments of the Constitutional Court

74. The Constitutional Court hears appeals from decisions of other courts on questions relating to the interpretation of the Constitution and on the validity of laws, as well as appeals from decisions on alleged breaches of fundamental human rights. The Constitutional Court also decides on the validity of the election of members of Parliament and the termination of their mandate, and the validity of the election of the Speaker.

75. The Constitutional Court is composed of the Chief Justice and two other judges (Article 95 of the Constitution). It is part of the ordinary judiciary and therefore similar to systems where the Supreme Court exercises constitutional review (for instance, Cyprus, Estonia or Ireland).

76. The Constitution remains silent on the effects of judgments of the Constitutional Court that find a legal provision unconstitutional. The Venice Commission's delegation learned that uncertainty exists as to the *erga omnes* effect of judgments of the Constitutional Court. Laws or provisions thereof that have been found unconstitutional by the Constitutional Court remain 'on the books' and are not removed from the body of laws. It is up to Parliament to repeal or amend such laws. In practice, this seems not to happen in all cases and the Constitutional Court is faced with repetitive cases, because the administration – and sometimes even judges, it seems – continue to apply the provisions found unconstitutional.

77. The execution of judgments of the Constitutional Court is an essential requirement of the rule of law.⁵⁶ Leaving the choice of whether or not to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement.

78. The Venice Commission recommends amending the Constitution to ensure that a legal provision found unconstitutional as such by the Constitutional Court loses legal force with the publication of the judgment of the Court. In order to avoid legal gaps, the Constitutional Court could be empowered to postpone the entry into force of the repeal of the provision found to be incompatible with the Constitution by a specified period (typically up to one year).⁵⁷ This allows Parliament to phase in new legislation before the unconstitutional provisions lose their force.

79. In conclusion, the Constitution should be amended to provide that judgments of the Constitutional Court finding a legal provision unconstitutional will result directly in the annulment of that provision without intervention by Parliament.

E. Specialised Tribunals

80. In comparison to its size, Malta has a surprisingly high number of specialised tribunals that adjudicate in specific areas. These tribunals are: the 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.⁵⁸ As many of them have special appointment procedures involving the executive power, these tribunals do not enjoy the same level of judicial independence as that of the ordinary judiciary.

81. In its recent opinion, requested by the Maltese authorities, on the draft act amending the Constitution, on the draft act on the human rights and equality commission, and on the draft act

⁵⁶ CDL-AD(2016)017, Rule of Law Checklist, II.A.1.i, II.E.2.d.i and II.E.3.ii.

⁵⁷ CDL-AD(2010)039rev, Study on individual access to constitutional justice; 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.

⁵⁸ <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Official%20Appointed%20Bodies/Pages/Tribunals/1-OAB-Tribunals.aspx>.

on equality,⁵⁹ the Venice Commission had to deal with the idea of establishing a specialised Human Rights and Equality Board, with quasi-judicial functions. In that opinion, the Commission pointed out that "... specialised courts or other special-purpose adjudicative bodies should not undermine the authority of the basic judicial structures set out in the Constitution. ..."⁶⁰

82. The Commission saw a danger of parallel jurisdiction,⁶¹ "... once the Board starts operating, very similar cases may end up in two different highest instances, which may lead to incoherence in the case-law, and, in any event, the parties to a dispute will have unequal rights to appeal."⁶² The Commission concluded "... that giving adjudicative powers to the Board in the manner designed in the Draft Act may raise serious questions from the constitutional perspective. ...".⁶³

83. Within the framework of this opinion, the Venice Commission cannot examine whether or not the establishment and jurisdiction of other tribunals raise similar questions, but the Commission is ready to examine these matters if requested to do so.

IV. Legislative power

A. House of Representatives

84. As already pointed out, even though Malta inherited the British public law system, it has a unicameral Parliament only. In the UK, the House of Lords acts as an important counterweight to the House of Commons. No similar counterweight exists in Malta.

85. Another important difference is that of size. While the UK House of Commons has 650 MPs, the House of Representatives of Malta has one-tenth of the number of MPs. This size is, of course, explained by the size of the population. As all Members of Government have to be MPs, the percentage of MPs, who also have government positions or work in government appointed commissions, is disproportionately higher. This is an issue of separation of powers. In a larger parliament, not only opposition, but also backbenchers from the governing party, act as a check to the powers of the Government and the Prime Minister. A smaller Parliament needs even more guarantees to be able to fulfil its role of controlling the executive.

86. This is exacerbated that by the fact that Members of the House of Representatives act as 'part-time' MPs. The salaries they obtain from Parliament are too low for a living. This means that the MPs have other professions and can spend less time on their parliamentary work, and notably on controlling the work of the Government. However, as required by the Constitution, not only are there 15 Ministers who are MPs,⁶⁴ nearly a quarter of the number of MPs, many MPs also hold office in other Officially Appointed Bodies.⁶⁵ The salaries in these bodies (committees, commissions etc.) are often substantially higher than those of Parliament. Given that it is often the Prime Minister who appoints MPs to these bodies, the possibilities of backbenchers controlling Government are seriously reduced if MPs have a financial incentive to seek offices at the disposal of the administration that they are supposed to control. The authorities pointed out that that part-time MPs, despite receiving part-time salaries, are not

⁵⁹ CDL-AD(2018)014.

⁶⁰ Ibid, para. 23.

⁶¹ CDL-AD(2016)017, Rule of Law Checklist, II.A.2.ii and II.E.1.b.iii.

⁶² Ibid, para 25.

⁶³ Ibid, para 29.

⁶⁴ <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Pages/Ministries-and-Entities.aspx>.

⁶⁵ <https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Official%20Appointed%20Bodies/Pages/1-Officially-Appointed-Bodies.aspx>. If previously such appointments were deemed to be incompatible with the functions of an MP, this tradition was not maintained.

necessarily less independent than full-time ones, since MPs who have a sufficient revenue from another profession are more independent and less dependent on their political party. Nonetheless, the Prime Minister appointing MPs to paid positions coupled with their part time salary as MPs compromises their independence as legislators.

87. In discussions with the delegation of the Commission, the authorities advanced the argument that forcing MPs to give up their other profession would change the nature of Parliament and, for instance, highly qualified advocates would no longer be available to stand for election, because they would have to give up on the work in their Cabinet.

88. While it is true that in a country with a small population it may be hard to fill all public positions with appropriate candidates, a solution would be to substantially increase the salaries of the Members of Parliament so that they have a real choice on concentrating on their parliamentary work.

89. Another important factor for checks and balances is the support that MPs can obtain for their work, notably for research. As is the case in other countries, Malta faces very complex challenges in society and when legislating, the Members of Parliament need to be sufficiently informed to make important choices for their country. Under the authority of the Clerk of the House of Representatives (Article 64 of the Constitution), the MPs benefit from the work of some ten staff who can conduct research for them. In addition, the parties represented in Parliament receive funds from the State for such research. However, these funds remain under the control of the parties. In order to be able to control the executive, the MPs need assistance from Parliament. The Venice Commission therefore recommends increasing the parliamentary staff that can assist the MPs in their work.

90. Currently, the role of advisor to the Government (and Parliament when appropriate) is that of the AG. The role of Parliament as a critical controller of Government policy could be reinforced by considering the establishment of a senior consultative body, which advises the Government and Parliament on (draft) legislation and governance. When providing its independent advice, this body (resembling a Council of State) could focus on issues such as:

- whether the bill is compatible with the Constitution, with European law, and with treaties (such as the human rights conventions);
- whether the bill is in accordance with the principles of democracy and the rule of law;
- whether the bill is compatible with the principles of good legislation, such as equality before the law, legal certainty, proper legal protection and proportionality; and
- whether the bill can be easily incorporated into the existing legal system;
- whether the budgetary impact of the bill is sustainable.⁶⁶

91. If such a body were established, a substantial amount of information would be available to Members of Parliament when starting to debate a draft bill. Parliament would then be able to request additional information from the Government in a more focused manner. If established, such a council should have a constitutional basis.

92. Moreover, Parliament should be careful with regard to an extensive use of delegated legislation as it diminishes the possibility of parliament to exercise its supervisory powers *vis-à-vis* the executive.

93. Finally, the political parties that compose Parliament are key actors for any democracy. In 2014, the Venice Commission and OSCE/ODIHR gave a joint opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta.⁶⁷ Referring to this opinion OSCE/ODIHR recently made

⁶⁶ CDL-AD(2016)017, Rule of Law Checklist, II.A.5.v.

⁶⁷ CDL-AD(2014)035, Joint Opinion on the Draft Act to regulate the formation, the inner structures, functioning and financing of political parties and their participation in elections of Malta.

a number of important recommendations, notably as concerns party financing, in its final report on the early parliamentary elections 2017.⁶⁸

94. In conclusion, the Venice Commission invites the Maltese authorities to reflect on the continued desirability of having part-time MPs. As long as being an MP is a part-time position, it is even more necessary to give serious thought to the following points:

1. Conflicts of interest should be avoided, *inter alia* by strengthening the rules on incompatibilities as laid down in Article 54 of the Constitution and tightening the rules as regards appointments of MPs to Officially Appointed Bodies. The newly appointed Commissioner of Standards could act as a catalyst in this regard. This should be accompanied by revisiting the salaries of MPs.
2. MPs should benefit from non-partisan information to perform their role of critical controller of the Government. In this regard, consideration could be given to increasing the parliamentary staff that can assist the MPs in their work and/or the establishment of a senior consultative body.
3. Extensive use of delegated legislation should be avoided as it diminishes the possibility of Parliament to exercise its supervisory powers vis-à-vis the executive.

B. The Ombudsman

95. The institution of the Commissioner for Administrative Investigations or Ombudsman was established in 1995 by virtue of the Ombudsman Act.⁶⁹ In 2007, the institution was raised to the constitutional level through the introduction of Article 64A of the Constitution. However, Article 64A leaves the necessary safeguards, notably as concerns appointment, dismissal and powers of the Ombudsman, to ordinary law, i.e. the Ombudsman Act.

96. Article 3 of the Ombudsman Act provides that the Ombudsman is elected by Parliament with a two-thirds majority of all members of the House of Representatives. Removal from office is possible with the same majority only. According to the Act, the Ombudsman can appoint Commissioners for specific issues (Article 17A). Indeed, the Ombudsman appointed three commissioners: for Environment and Planning, for Health and for Education.⁷⁰

97. Article 18(3) of the Act provides that the Ombudsman “may hear or obtain information from such persons as he thinks fit, and may make such enquiries as he thinks fit.” Article 17B(4) provides that the Ombudsman’s Commissioners “shall have full access to all information relating to the investigation”. The only exception to the obligation for the administration to provide information is Article 20 of the Act (affecting the security or defence, damaging seriously the economy, involves the disclosure of the deliberations or proceedings of Cabinet or any committee of Cabinet; or prejudices the investigation or detection of offences).

98. Article 29 of the Act provides that the Ombudsman “shall annually or as frequently as he may deem expedient report to the House of Representatives on the performance of his functions under this Act to the Speaker who shall instruct the Leader of the House to lay a copy on the Table of the House at the first available opportunity.” However, there is no obligation for the House of Representatives to debate the reports.

99. According to the Annual Report of the Ombudsman, requests for information are frequently not complied with.⁷¹ This is worrying. Widespread refusal by the administration to provide the

⁶⁸ OSCE/ODIHR, Republic of Malta, Early Parliamentary Elections, 3 June 2017, OSCE/ODIHR Election Assessment Mission Final Report, p. 19.

⁶⁹ <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8852&l=1>.

⁷⁰ Parliamentary Ombudsman – Malta, Annual Report 2017.

⁷¹ Parliamentary Ombudsman – Malta, Annual Report 2017, pp. 11-13.

information needed for the work of the Ombudsman is inadmissible.⁷² The Ombudsman cannot be made dependent on enforcing his/her requests for information in the courts in each case.⁷³

100. Unless this information concerns the grounds listed in Article 20 of the Act, information held by the administration should be available not only to the Ombudsman but to the public at large. The Freedom of Information Act should be up-dated, using available international models, to guarantee the transparency of the administration *vis-à-vis* the media and the citizens.

101. In order to give the Ombudsman office sufficient weight, the Venice Commission⁷⁴ recommends raising the rules on appointment and dismissals of the Ombudsman as well as his/her powers to the constitutional level. This concerns notably the right to information of the Ombudsman. Parliament should be obliged to debate reports addressed to it by the Ombudsman.

V. Executive power

A. The President of Malta

102. The role and function of the Office of the President and the Prime Minister are intricately embedded in the conceptual framework of the Constitution of Malta. The Constitution declares Malta to be “a liberal democracy safeguarding the fundamental human rights of the Maltese citizens” and demarcating a separation between the executive, the judicial and the legislative organs of the state. 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) while the governance of the country is carried out by the Prime Minister and the Cabinet of Ministers., who exercise the general direction and control of the Government of Malta and who are collectively responsible to Parliament.⁷⁵ The removal of the President requires a simple majority resolution by the House of Representatives (not a qualified majority like with the AG).⁷⁶ This 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.

103. While the President may act as a moral authority, s/he does not have sufficient powers to act as an effective actor in the system of checks and balances. Strengthening the Presidency and increasing its independence of the Government could be a way of improving checks and balances.

104. From the viewpoint of constitutional checks and balances, it would be preferable for the President to be more remote from the majority of the day. The President can be an important check on the wide powers of the executive. Strengthening the President could be achieved for example by electing the President with a qualified majority in Parliament, combined with an anti-deadlock mechanism. Even more important for the independent exercise of the powers of the President is that s/he can be removed by qualified majority only.

105. However, even without such a major constitutional change, the powers of the President *vis-à-vis* the Prime Minister could be strengthened by removing the power of the Prime Minister to make certain proposals for appointment. As it was already stated above, the Venice

⁷² CDL-AD(2016)017, Rule of Law Checklist, II.A.7.v and II.B.5.ii

⁷³ See case of promotions in the Armed Forces, Parliamentary Ombudsman – Malta, Annual Report 2017, p. 12.

⁷⁴ The Venice Commission is currently preparing draft principles on the protection and promotion of the ombudsman institution.

⁷⁵ Constitution of Malta, Article 79(2).

⁷⁶ Constitution of Malta, Article 48(3)(b).

Commission recommends that judges be proposed for appointment to the President directly by the Judicial Appointments Committee.⁷⁷ This method of judicial appointment would strongly contribute to the separation of powers and the independence of the judiciary.

106. In conclusion, the President should be strengthened by attributing him/her more powers of appointment without the intervention of the Prime Minister, notably as concerns judicial appointments. In addition, the election of the President with a qualified majority could be considered and it should be possible to remove the President by a qualified majority only.

B. The Prime Minister

107. Under the Maltese Constitution, the executive authority of Malta is vested in the President (Article 78 of the Constitution) and the Cabinet headed by the Prime Minister (Article 79 of the Constitution). However, as the President has a more ceremonial role acting upon (and in accordance with) the advice of the Prime Minister (see also above), it is the Prime Minister who is clearly the centre of political power.

108. The Prime Minister has very wide powers:

- the President appoints the Ministers from the elected members of the House of Representatives, but such a function is assumed on the advice of the Prime Minister (Article 80(1) of the Constitution);
- the Attorney General is appointed by the President acting in accordance with the advice of the Prime Minister (Article 91(1) Constitution);
- the Commissioner of Police is appointed by the Prime Minister (Article 6(2) of Act No. XVIII of 2017 to regulate the organisation, discipline and duties of the Police Force, and to provide for matters ancillary or consequential thereto);
- the Information and Data Protection Commissioner is appointed by the Prime Minister (Article 11 Data Protection Act)
- the Prime Minister assigns departments of government to Permanent Secretaries (Article 92(2) Constitution) and plays a role in their appointment and removal from office. The Principal Permanent Secretary shall take instructions from the Prime Minister (Article 13(2) Act No. I of 2009 'The Public Administration Act')
- various other top public officers are appointed by the Prime Minister.

109. In addition, the Prime Minister has an important role *vis-à-vis* constitutional commissions:

- the Electoral Commission, members of which are appointed by the President, acting in accordance with the advice of the Prime Minister (Article 60(3) Constitution);
- the Public Service Commission, members of which are appointed by the President, acting in accordance with the advice of the Prime Minister (Article 109(2) Constitution);
- the Employment Commission, members of which are appointed by the President who, in appointing the chairman shall act in accordance with the advice of the Prime Minister given after s/he has consulted the Leader of the Opposition, in appointing two of the four other members shall act in accordance with the advice of the Prime Minister, and in appointing the other two members shall act in accordance with the advice of the Leader of the Opposition (Article 120(2) Constitution);
- the Broadcasting Authority, members of which are appointed by the President, acting in accordance with the advice of the Prime Minister (Article 118(2) Constitution).

110. Even more delicate as concerns the separation of powers, members of the judiciary, including the Chief Justice, are equally appointed upon the advice of the Prime Minister (Articles 96 and 100 Constitution).

⁷⁷ If the President found procedural errors in the proceedings before the JAC s/he could submit the case to court for adjudication.

111. In the constitutional arrangements currently in force in Malta, the Prime Minister is predominant.⁷⁸ This, in itself, could be unproblematic if a solid system of checks and balances were in place. However, as shown above, these other actors are not sufficiently strong to contribute significantly to the system of checks and balances. The predominance of the Prime Minister and the concentration of powers enabled by the Constitution shows that the system of checks and balances needs to be reinforced.⁷⁹

112. In order to balance the dominance of the Prime Minister, other state institutions (Judiciary, President, Parliament and Ombudsman) need to be strengthened, as set out above. However, the executive should also be more balanced from within.

113. The President, acting in accordance with the advice of the Prime Minister, assigns specific business of the Government to a Minister, including administration of any department of Government (Article 82(1) of the Constitution). This means that ministers have the responsibility for their departments. Therefore, they cannot be entirely dependent on the Prime Minister. In order to balance the power of the Prime Minister, some of his or her competences, notably as concerns the appointments of members to independent commissions, should be shifted from the Prime Minister to the Cabinet of Ministers. Collective decisions reduce the danger of abuse.

114. The authorities point out that as a matter of legal drafting the Prime Minister is often named as the appointing authority when an appointment has to be made by Government. References to the Prime Minister in the laws do not necessarily mean that in practice the appointments are made by the Prime Minister acting alone. The Venice Commission is of the opinion that for the sake of legal certainty these powers should explicitly be attributed to the Government.

C. Civil Service

1. Permanent Secretaries

115. Article 92(3) of the Constitution provides that the power to appoint Permanent Secretaries⁸⁰ and the power to remove them from office is vested in the President acting in accordance with the advice of the Prime Minister given after the Prime Minister has consulted with the Public Service Commission.⁸¹ The Permanent Secretaries are thus accountable to the Prime Minister and not to the Minister they work for.

⁷⁸ Following 1964, Maltese Prime Ministers have followed an ever increasing tendency to be a dominant figure holding absolute sway over their Cabinets; assuming the status of primus inter pares in political terms but apparently shifting from a Cabinet Government to a Prime Ministerial Government in real terms (Ian Refalo, "The Prime Minister" – Lecture Notes (Faculty of Laws, University of Malta 2006) in <https://www.um.edu.mt/library/oar/bitstream/handle/123456789/7746/13LLD045.pdf?sequence=1&isAllowed=y>).

⁷⁹ CDL-AD(2016)017, Rule of Law Checklist, II.C.ii.

⁸⁰ <https://family.gov.mt/en/Permanent-Secretary/Pages/default.aspx>.

⁸¹ Constitution of Malta:

"92. (1) Where any Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department; and, subject to such direction and control, the department may be under the supervision of a Permanent Secretary: Provided that two or more departments of government may be placed under the supervision of one Permanent Secretary.

(2) The Prime Minister shall be responsible for assigning departments of government to Permanent Secretaries.

(3) Power to appoint public officers to hold or act in the office of Permanent Secretary and to remove from office persons holding or acting in such office shall vest in the President acting in accordance with the advice of the Prime Minister given after the Prime Minister has consulted with the Public Service Commission.";

see also <https://publicservice.gov.mt/en/Pages/Leadership/PermanentSecretaries.aspx> .

116. Article 88 (1) of the Constitution of Malta declares that the President, acting in accordance with the advice of the Prime Minister, may appoint Parliamentary Secretaries from among the members of the House of Representatives to assist Ministers in the performance of their duties.⁸²

117. Permanent secretaries are therefore the highest civil servants whilst the parliamentary secretaries have a political role similar to deputy ministers in other countries. In view of their role, the appointment of permanent secretaries by the Cabinet, rather than the Prime Minister, could be considered.

118. It is striking that while a Minister has responsibility for his or her department, it is the Prime Minister who appoints the Permanent Secretary for that department. The Prime Minister thus has a very strong impact on the work of his or her Ministers. From a viewpoint of check and balances, the role of the Prime Minister in deciding on Permanent Secretaries in all Ministries seems problematic.

119. These high-ranking officials should be selected upon merit by an Independent Civil Service Commission and not by the Prime Minister. Permanent Secretaries should not be political appointees, but independent and permanent, high level, civil servants, who should be able to serve any Government. As a consequence, they should have security of tenure, until retirement or dismissal for good specified reasons. Political (executive) power and administration are two separate things, and this should remain so.

120. In conclusion, Permanent Secretaries should be selected upon merit by an Independent Civil Service Commission and not by the Prime Minister.

2. Positions and persons of trust

121. As an exception to Article 110 of the Constitution, which provides that in appointing public officers the Prime Minister has to consult with the Public Service Commission, whose members are appointed on the proposal of the Prime Minister, the Government can appoint persons on 'positions of trust' (fixed term employment) or 'persons of trust' (indefinite contracts) bypassing the procedure for appointing civil servants through the Public Service Commission.

122. It seems that the only statutory reference to for such a practice has been established recently with the Standards in Public Life Act of 30 October 2018. According to Article 2 of that Act "person of trust' means any employee or person engaged in the private secretariat of a Minister or of a Parliamentary Secretary wherein the person acts as an adviser or consultant to a Minister or to a Parliamentary Secretary or acts in an executive role in the Ministry or Parliamentary Secretariat, and where the person has not been engaged according to the procedure established under article 110 of the Constitution". Article 3(1)(b) of the Act provides that persons of trust are bound by Code of Ethics of the Public Administration Act and that the Commissioner for Public Standards is competent to investigate complaints against violations of the Code.

123. It is positive that the Act on Public Standards provides for ethical standards for persons of trust but it does not establish a legal, let alone a constitutional basis, for the practice of employing civil servants bypassing the requirement of Article 110 of the Constitution.

124. Appointing "persons of trust" seems to be an old practice. Already in its 2011 report, the Public Service Commission stated: "As a matter of longstanding practice, staff in ministerial

⁸² <https://www.gov.mt/en/Government/Government%20of%20Malta/Administration/Pages/The-Administration.aspx>.

secretariats are recruited directly on the basis of trust, without resort to calls for applications. This is justifiable since Ministers need to have staff in their secretariats in whom they can repose their full personal confidence. However, the regularisation exercise highlighted a number of instances in which appointments on trust were used to fill administrative, managerial or technical positions. This gave rise to a concern on the Commission's part that appointments on trust could be used to avoid issuing calls for applications for vacancies that should be filled on the basis of merit. Moreover, the Constitution makes no provision for the engagement of staff in positions of trust, so the legality of this practice could be questionable even where ministerial secretariats are concerned. The Commission came to the conclusion that mechanisms need to be put in place to ensure that appointments on trust are legal, and are not used to bypass the merit principle."⁸³

125. The authorities point out it is a long standing practice in Malta that certain positions in the immediate entourage of Ministers and Parliamentary Secretaries (even if not occupying high posts) are filled by persons who enjoy the personal trust of the Minister or Parliamentary Secretary since personal trust is recognised as an essential element for the fulfilment of the functions of the employment. Such employees do not become public officers by virtue of their employment as 'persons of trust' but they still have an employment contract valid at law. Engagement on a trust basis never results in an indefinite status in the position. Neither does it result in any entitlement for "shortcut" appointment as a public officer. Consequently, such employment does not engage article 110 of the Constitution which regulates the engagement in the Public Administration of public officers. The Act on Standards in Public Life, which is subject specific and relates only to public standards, does not attempt to legalise acts against the Constitution but merely ensures that such persons are subject to the public service ethical standards regime despite the fact that they are not public officers.

126. Admittedly, there can be a legitimate need for Ministers, who have a political mandate, to benefit from the assistance of persons of trust who assist them in implementing their political programme. However, the numbers of such persons of trust should not be excessive and they should directly assist the Minister in implementing his/her political programme.

127. The delegation of the Venice Commission was informed that the number of such persons of trust had increased considerably (currently some 700 persons) and that even persons working as gardeners or drivers have been recruited under this procedure. The Venice Commission cannot investigate such cases. It is, however, evident that any exception to procedures that provide for appointments on merits are a danger to the quality of the civil service, which is the backbone of a democratic state under the rule of law.⁸⁴ The Venice Commission recognises the need for such exceptions in specific cases, but limits for exceptions should be clearly defined. As the persons of trust are funded from the State budget, a mere tradition cannot be the basis for such expenses on a large scale. A sound constitutional and legal basis is required.

128. The Venice Commission therefore recommends 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. Only activities directly related to the exercise of power should be considered as a valid exception from the general system of appointments in the public service.

129. In conclusion, without a constitutional and real legal basis this practice is illegal, even if it has a legitimate purpose and originated some time ago. In order to remedy to this problem, the Venice Commission recommends adopting a constitutional amendment together with clear legal basis, which strictly limits the appointments of persons of trust.

⁸³ <https://psc.gov.mt/en/Documents/Annual-Reports/Annual-Report-2011.pdf>.

⁸⁴ CDL-AD(2016)017, Rule of Law Checklist, II.A.2.iv.

D. Police

130. The Constitution refers to the police only marginally, in respect of the seizure of newspapers (Article 41), disciplinary legislation (Article 47) and as part of the civil service (Article 124). It is Act No. XVIII of 2017 that regulates the organisation, discipline and duties of the Police Force. Its Article 6 establishes a Commissioner of Police leading and guiding the Police Force, as well as regulating the appointment, duties and discipline of the Force. The Police Commissioner is appointed by the Prime Minister and holds office for a period of five years. The Commissioner is eligible for re-appointment.⁸⁵

131. The Minister can issue various codes of practice (e.g. Article 38) and s/he can adopt general regulations (Article 82). The delegation of the Commission was, however, informed that the Minister cannot give instructions in individual cases. Within the limits of the law and the regulations by the Minister, the Police Commissioner may make standing orders (Article 83). The Police are therefore quite autonomous in the fields of investigation and prosecution.

132. It is important that in a democratic society the Police Force has the confidence of the general public and is perceived as politically neutral in the service of the State and the professional, unbiased, enforcement of the law and the protection of the citizen. Therefore, in Malta, there should be a public competition for the post of Police Commissioner and the appointing authority (Prime Minister or President) should be bound by the results of the evaluation of that competition, even though they might have a power of veto against the candidate selected. This recommendation holds true even if the powers of prosecution were attributed to a DPP (see above).

133. The Powers of the Police to investigate should be subject to review by the AG's Office or a future office of an independent DPP, if the two offices are to be separated. The Police would act under the instruction of the DPP.

134. In conclusion, the Police Commissioner should be appointed following a public competition and the Police should be bound by instructions from the prosecution.

VI. Media / Civil Society

135. 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 in living up to these needs.⁸⁶ 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.

136. It is, notably, the positive obligation of any Member State of the Council of Europe to protect journalists. This is also an issue under the rule of law.⁸⁷ In general, for a positive obligation to arise, (a) regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. (b) The scope of the obligation will vary, having regard to the diversity of situations in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. (c) The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities⁸⁸.

⁸⁵ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28520&|=>

⁸⁶ Some interlocutors of the Commission even referred to a prevailing "law of *omertà*".

⁸⁷ CDL-AD(2016)017, Rule of Law Checklist, II.A.2.v, II.A.3.i.

⁸⁸ ECtHR, *Rees v. the United Kingdom*, v. the United Kingdom judgment of 17 October 1986, Series A no. 106, p. 15, § 37, and *Osman v. the United Kingdom* judgment of 28 October 1998, Reports 1998-VIII, pp. 3159-61, §§ 115-117; European Court of Human Rights, Positive obligations on member States under Article 10 to protect journalists and prevent impunity, Research Report, 2011, p. 4.

137. As a party to the European Convention on Human Rights, Malta has a positive obligation to protect “everyone’s right to life” under Article 2 of the Convention. One of the positive obligations, stemming from Article 2 para. 1 ECHR, read in conjunction with Art. 1 ECHR (and in the case of journalists – also in conjunction with Art. 10 ECHR) is the primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals, whose lives are at risk from the criminal acts of another individual. The ECtHR case law furthermore stipulates the link between Art. 2 and Art. 10 – taking measures to protect the lives of journalists.

138. The requirements of (i) independence, (ii) effectiveness and (iii) expedition and promptness and (iv) access to the public and involvement of relatives⁸⁹ have been considered in numerous ECtHR cases, which have applied it to a variety of different circumstances.⁹⁰

139. In its judgment of July 2018, the European Court of Human Rights held, in the case of the Russian investigative journalist Politkovskaya known for her fierce criticism of the role of the Russian authorities in the Chechen conflict, that it was of utmost importance to examine a possible connection of her killing to the investigative journalist’s work. The Court stated that there was an “absence of genuine and serious investigative efforts taken with the view to identifying the intellectual author of the crime, that is, the person or people who commissioned the assassination”. The European Court of Human rights was “not persuaded that the investigation into Politkovskaya’s killing has met the adequacy requirement” and that the “domestic authorities’ scrutiny in the case concerning a contract killing must aim to go beyond identification of a hit man.”⁹¹

140. In its ruling, the Court referred to a Recommendation on the protection and safety of journalists by the Committee of Ministers that “the conclusions of an investigation must be based on a thorough, objective and impartial analysis of all the relevant elements, including the establishment of whether there is a connection between the threats and violence against journalists and other media actors and the exercise of journalistic activities or contributing in similar ways to public debate.”⁹² The mere knowledge of an assassination on the part of the authorities gives rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.⁹³ An inadequate investigation constitutes a violation of Article 2 ECHR⁹⁴ and the right to an effective remedy under Article 13 ECHR.

141. As concerns positive obligations in relation to the murder of Daphne Caruna Galicia, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁹⁵

⁸⁹ The prosecutor did not have to make access to all police reports available to the family as they were issued, but at a later stage: see ECtHR, *Velcia and Marare v. Romania* 1 December 2009 §§ 113-114;

⁹⁰ See e.g. ECtHR, *Rantsev v Russia and Cyprus*, 7 January 2010, §§ 232-237.

⁹¹ ECtHR, *Mazepa and Others v. Russia*, 17 July, 2018.

⁹² Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers’ Deputies), Para. 19.

⁹³ ECtHR, *Ergi v. Turkey*, 23818/94, 28 July 1998.

⁹⁴ ECtHR, *Ramsahai and others v. the Netherlands [GC]*, 53291/99, 15 May 2007

⁹⁵ See ECtHR, *Kılıç v. Turkey*, no. 22492/93, paras. 62-63, ECHR 2000-III.

142. The Venice Commission is not in a position to examine whether or not the investigation into the murder of Daphne Caruna Galicia lived up to these high standards. However, the Commission insists that it is an international obligation of the Government to ensure that the media and civil society can play an active role in holding authorities accountable. Criticism of those in power is part of the political debate essential to democratic governance and it is clearly protected under the case-law on Article 10 ECHR.⁹⁶

VII. Conclusion

143. The Venice Commission welcomes that the Maltese Government has already embarked on a process of reforms. These reforms are, however, not sufficient. The Commission notes that all its interlocutors acknowledged the need for further reform of the institutional settings, notably as concerns the judiciary and particularly the role of criminal prosecution. The Commission, therefore, hopes that the necessary consensus for change at the constitutional level can be achieved. From colonial times, Malta has inherited a British inspired Constitution that has been amended several times, but that has not followed reforms that were undertaken in the UK already in the 1980s. The Prime Minister is at the centre of power and other actors (President, Parliament, Cabinet of Ministers, Judiciary, Ombudsman) have too weak an institutional position to provide sufficient checks and balances.

144. The introduction of the Judicial Appointments Commission in 2016 was a step in the right direction, but it falls short of ensuring the independence of the judiciary. The 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. This problem is accentuated by the weakness of civil society and independent media.

145. The Venice Commission makes the following main recommendations:

1. Judicial vacancies should be announced, an enlarged Judicial Appointments Committee 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. Dismissals of judges and magistrates should not be made by Parliament. The judgments of the Constitutional Court finding legal provisions unconstitutional should have *erga omnes* force.
2. An independent Director of Public Prosecutions (DPP) with security of tenure should be established, who takes over prosecuting powers and the corresponding staff from the Attorney General, and the Police. Magisterial inquests should be absorbed into this function. The decisions of this DPP, notably not to prosecute, should be subject to judicial review.
3. The position of the President should be strengthened by attributing to him or her powers to act without the advice of the Prime Minister and possibly by electing the President by qualified majority. It should be possible to remove the President by a qualified majority only.
4. Parliament should be strengthened by tightening rules on conflicts of incompatibility notably as concerns appointments of MPs to Officially Appointed 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 on parliamentary work.

⁹⁶ ECtHR, *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, 14 September 2010, § 137.

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

146. 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 today. Very importantly, holistic constitutional changes should be accompanied by adequate transitional arrangements and adopted as the result of a process of wide consultation in society. It is important that the citizens have a chance to take ownership of these amendments.

147. As with any reform, it is obvious that not only the texts matter, but also their implementation in good faith.

148. Finally, the Venice Commission insists that it is an international obligation of the Government to ensure that the media and civil society can play an active role in public affairs holding the authorities accountable.⁹⁷

149. The Venice Commission remains at the disposal of the Maltese authorities and the Parliamentary Assembly for any further assistance they may need.

⁹⁷ ECtHR, *Dink v. Turkey*, § 137.