

SHOULD A COUNCIL OF STATE BE ESTABLISHED IN MALTA?

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1. Introduction

Malta, as an ex-British colony, took much of today's governmental system from the British one; from ideas of how Government should perform; how laws should be enacted; how the judicial system should function, down to the image of the Head of State. There are clear advantages in this system, such as the reduction of bureaucratic stages in the passing of legislation. However, the glass is also half empty. There are a number of shortcomings in this system, namely the possible abuse which may come from the principle of Parliamentary Supremacy. The Maltese-adopted British notion of Parliamentary Supremacy, quite literally implies that Parliament rules all and decides all, subject to its actions being consonant with the provisions of the Constitution of Malta. In fact Judge Emeritus Giovanni Bonello has said, both in his published work, as well as in Constitutionally-related fora, that while the Constitutional Court had declared, on many an occasion, that laws are unconstitutional, they still remained valid for as long as parliament failed to repeal them.¹ Therefore, this discussion is at present, and has been for quite some time now, in turbulent waters.

It also implies that the Head of State is not much more than a figurehead, with the single most important figure of Maltese national identity being relegated to a point of irrelevance, in that most, if not all, of his prerogatives are exercisable solely upon the advice being sought from the relevant officer of Government. This stark reality acted as an impetus for a group of progressive political leaders to take the initiative and propose the establishment of an institution which was to ensure that the President of Malta would be given a more appurtenant role in the Government of Malta. This was the point when the wheel for the establishment of a Council of State was set in motion.

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¹ 'Gonzi suggests parliamentary select committee should pilot constitutional reform' *Times of Malta* (Malta, 25 April 2013) <<http://www.timesofmalta.com/articles/view/20130425/local/gonzi-suggests-parliamentary-select-committee-should-pilot-constitutional-reform.467101>> accessed 26 June 2013; Sarah Carabott, 'No rush to alter Constitution: Lawrence Gonzi suggests debate should be held in House select committee' *Times of Malta* (Malta, 26 April 2013) <<http://www.timesofmalta.com/articles/view/20130426/local/-No-rush-to-alter-Constitution-.467139>> accessed 26 June 2013.

In 1987 a Select Committee, presided over by the late President Emeritus Professor Guido De Marco, and which included prominent figures of Maltese political history such as Dominic Mintoff, President Emeritus Vincent 'Censu' Tabone and President Emeritus Dr Ugo Mifsud Bonnici, was commissioned to propose amendments to the Constitution of Malta. On 23 February 1988 the report was laid on the table of the House of Representatives. Some proposals were taken on, others not. Among the binned proposals was the one relating to the establishment of a Council of State.²

The Select Committee, clearly bearing in mind Maltese political history during the then recent past, saw it important to vest certain powers in the President of Malta, a figure cut off from political partisanship. In fact, the carrying momentum for the Council of State was the following:

Hemm materji fil-ħajja nazzjonali li jmorru `l hemm mill-glieda tal-partiti. Il- President tar-Repubblika ghandu jkollu d-dmir li f'dawk l-asperti ta' ħajja politika li jmorru `l hemm mill-politika partigġjana, iżda fit-twettiq tagħhom ma jkunx hemm qbil bejn il-partiti, l-ewwel li jfittex biex dan il-qbil jintlaħaq u jekk dan ma jsirx jerfa' r-responsabbilita' tad-deċiżjoni hu stess fisem u fl-aħjar interess tan-nazzjon.³

While many of the proposals of the Committee were taken up and Constitutional legislation enacted, the topic on the Council of State was disregarded. The parliamentary debates make no mention of the Council, delivering a blatant message that neither political party in Government wanted what would have easily, albeit wrongly, been construed as a violation of the sacrosanct authority of the executive. Once the amendments proposing the Council were disregarded, they were forgotten, as if they had never been put forward. However, circa three years ago the President breathed life back into the issue in one of his Republic Day speeches. His Excellency Dr George Abela, who saw it important to bring it to the attention of Malta's leaders in his address at the Grand Council Hall of the Palace at Valletta on Republic Day of 2009, remarked on the lack of 'coercive powers or the power to impose [of his office]', highlighting the Head of State's '[m]oral authority [...] based on the fact that he is in office to serve and not to be self-serving, to serve with a sense of pride about his mission but with humility and love for his country

² Preliminary Report of the Select Committee of the House presented by the Honourable Professor Guido de Marco in Sitting 72, Tuesday, 23 February 1988. Paper Laid (hereinafter 'P.L.') 214 of 1988).

³ *ibid.* English Translation:

Certain matters of national interest are beyond the boundaries of political altercation. The President of the Republic of Malta, in cases which are beyond the scope of political partisanship but where the parties are not in agreement, is duty-bound to first try to foster agreement between the said political parties, but in absence of such agreement he must decide in the name of the national interest and bear the responsibility of the decision.

and his People.’⁴ Furthermore he pointed out that ‘[h]is moral authority rests on his impartiality and the unity which he may bring about in the ultimate national interest which is the common good’.⁵ He acknowledged and came to terms with the fact that in the current system of government there was very little possibility that more direct powers be granted to the office, since it is largely ceremonial.⁶ In spite of this he saw potential in a Council, which he as those before him dubbed the Council of State, which can be consulted on certain matters and ‘be of assistance in the discussion of various matters that arise from time to time’.

So, while at first the impetus in 1987 was to give the President more powers, not to let him remain a mere figurehead, in 2009 the reasoning matured and evolved into an effort to establish and set up a Council of State because there is a need for input by an institution attributed with great moral authority. This, the author is convinced, was the point that most Committee members of the day, back in 1987, wanted to make by their report. Today, there is a clear need for such an institution, be it consultative or be it executive, or both for that matter.

2. Comparative Analysis of existing Councils of State

There is no universal doctrine of the composition and functions of a Council of State, so it is completely left to the respective adopting State to decide all matters pertaining to it. A Council of State may be set up to carry out a specific task, having a specific – single or multiple – role. However, if one were to draft a table containing all the existing (i.e. excluding defunct) Councils, one would find that there are a specific number of genus classes, namely: (i) Ceremonial; (ii) Advisory/Consultative; (iii) Advisory/Judicial; (iv) Judicial; (v) Executive; (vi) Legislative.

Ceremonial	Advisory/ Consultative	Judicial & Advisory	Judicial	Executive	Legislative
Britain Denmark	Ghana Ireland Luxembourg Nigeria Portugal Spain Philippines	Belgium Netherlands France Italy	Columbia Greece Turkey	China Finland North Carolina Norway Switzerland	Cuba India

⁴ Address by His Excellency Dr George Abela, President of Malta, on the occasion of Republic Day – Grand Council Hall, the Palace, Valletta, Malta, Sunday 13 December 2009.

⁵ *ibid.*

⁶ Art 78 of the Constitution of Malta (1964) vests executive authority in the President, to be exercised by him or any subordinates in accordance with the provisions of the Constitution. However, though on paper he is vested with this power, Parliament may confer executive functions on other persons or authorities aside from the President.

While the different States may fall under the same genus, it does not mean that the composition and function is the same. There is very little which likens a Council of State to any other. What is, perhaps, most notable is that each Council is tailor-made for the particular State; in that each Council is made to cater for particular governmental concerns of the respective State in which it operates. Clearly, the extent of the prominence of a Council of State of any country is largely dependent on factors that are particular to that country. Raphael Albert writes, on the French *Conseil d'Etat*, that 'the existence, in France, of a powerful autonomous administration, is due to historical and political reasons'.⁷ The author then proceeds to sketch out a political history of France, focusing it on the need of the centralised administration. A possible reason why in Britain, for example, there is no institution even coming remotely close to resembling the French *Conseil d'Etat*, is because the understanding and application of the rule of law in the two countries is different. In the United Kingdom, the principle that everyone is subject to the same law led to the system of the institutions being regulated by the ordinary courts, save those *ad hoc* tribunals created for efficiency purposes. The principle of Parliamentary Supremacy has prevented even the inception of a body which is of any way consultative to Parliament. Their neighbours across the twenty-one mile wide *La Manche*⁸ saw the creation of a Council of State as strengthening the relationship between Government and its people.

France, rather similar to its Italian neighbour has an intricate system of administrative tribunals and consultative committees. Any law proposed by non-parliamentary members prior to it being laid on the table of the House of Representatives must be rigorously reviewed by the Council's punctilious members.⁹ All orders-in-council signed by the Prime Minister and Cabinet Ministers and any order and form of delegated legislation outlining how a statute of Parliament is to be brought into effect is meticulously examined by its representatives. The Italian *Consiglio di Stato* does not burden itself with the laborious task of going through such material, but rather limits its operation to overseeing the consolidation and unification of legal texts, Bills and normative texts of the European Union and other matters of the sort.

So it is clear that a similar genus or class does not guarantee the equivalent prominence in the governance of the country. Shapes and forms of the institution differ greatly in comparison with some countries, and very little, at least *prima facie*, when compared with others.

3. Composition and Mission Statement of the Council of State

⁷ Raphael Alibert, 'The French Conseil d'Etat' (1940) MLR. 258.

⁸ The English Channel.

⁹ Constitution of France (1958), art 39.

When the adoption of a Council of State was first proposed, back in 1988, President Emeritus Professor Guido de Marco suggested in his report that the Council be of a consultative nature, advising Government on affairs relevant to the day-to-day running of the Government of Malta.¹⁰ This idea was perpetuated by the speeches and communications, particularly that of the 13 December 2009 (Republic Day) by His Excellency Dr George Abela, the current President of Malta. He too saw potential for an institution composed of highly respectable figures of Maltese political society aiding the Government in its road to good governance in its day-to-day running by providing morally sound advice on the various issues. However, the author is not of the opinion that it should be limited to seasoned political representatives, as will be propounded soon below.

Should the Council of State be introduced, it must be done so by the insertion of a Title in the Constitution of Malta, protected by a two-thirds majority vote of the House of Representatives by including the article numbers of the Title in Article 66 of the Constitution of Malta dealing with amendment of the provisions of the Constitution by at least a two-thirds majority vote of the House. It must be attributed with complete independence and impartiality, freedom from coercion, and of any external influence. Though the substance of these ideas were contained in the Preliminary Report of the Select Committee on suggested amendments to the Constitution of Malta, thereby implying that there should be the inclusion of a fresh Title in the document, the mechanisms of implementation were never discussed, particularly because such considerations fell outside of the scope of the Committee.

The Council's members, in the author's view, should comprise of personalities of Maltese political and judicial life which have had an effect on the direction of the country. Such persons include former Presidents, former Prime Ministers (and possibly the inclusion also of former Leaders of the Opposition) who are not in any way affiliated or still active within their political party. There should also be the inclusion of quondam Chief Justices, who would have undoubtedly affected the direction of the State by their performance while in office, and who, without a shadow of a doubt, are experts in the subject of law and the application of their sound moral experience to the issues presented before the Council. The composition can vary greatly from that of other countries, but it may be worth considering a few Councils' composition so as to serve as a model. There are States, namely the Republic of Ireland, which also have the Attorney General as a member of the Council of State.¹¹ While not committing to the idea of his inclusion into the Council, the author does not exclude the possible benefits which may come out of it, particularly in the administrative aspects of the Council.

¹⁰ P.L. 214 of 1988.

¹¹ Constitution of the Republic of Ireland (1937), art 31(2).

For example, in the case of Luxembourg the institution is composed of twenty-one members, eleven of which must hold doctorates of law. The reason for there being lawyers is because most consultation is done in respect to legal matters, so persons learned in the field are essential.¹² According to the author, this fact, in regard to the Maltese scenario, will be catered for by the inclusion of ex-Chief Justices in the Council's composition line-up. The Dutch Council includes a number of persons with political, commercial, diplomatic and military experience. Maybe Malta may consider the inclusion of such persons to sit at the table of its Council. The French Council, on the other hand, includes the Presidency, and then experts in specified fields to give their advice to Council's public representatives so that its opinions are shared through the official channels.

In any variation of the composition of the Council of State the author emphatically proposes that the President of Malta should be the one chairing the Council. This proposal is extremely relevant when seen in light of the relevant of the Constitution of Malta, wherein it is stated that the President of Malta should be fully informed of all matters in which the Government of Malta is involved, and the fact that the Council of State would be a body supporting the executive, it is a natural fit that its overseer would be the President of the Republic.¹³ The Council of State as proposed by the author will have a very appurtenant role in the governance of the island, so it would be a natural fit for the President to chair the Council.

The Council should, at first be of a consultative nature, particularly since nothing like this has ever been put into practice in Malta in all of its history. However, the author is not of the belief that one should exclude the possibility that someday it would take a more prominent government position by actually exercising administrative discretion in certain, legally specified matters, such as, for example, having the power to examine enacted legislation *ex officio* and determine its relevance in the social context of the day. Naturally, one must keep in mind that its task is not executive, so it should not be granted unfettered discretion to consider all laws, but merely those which impact the nation's identity and its moral ideals.

Various procedures and mechanisms may be set up for nomination and appointment of the members of the Council of State such as, for example, appointment in the same way as the President of the Republic is appointed. Another method would be to allow Government to appoint them alone since the Council is meant to aid Government, and not Parliament, and in the end it is generally accountable to the executive, not to the House of Representatives. However, since

¹² Council of State of Luxembourg composition <<http://www.conseil-etat.public.lu/fr/composition/index.html>> accessed 5 January 2013.

¹³ Constitution of Malta (1964), art 87.

this exercise is largely academic the method and mechanism of appointment is not of determining substantial importance and so is outside the scope of this chapter.

The forthcoming headings outline a strictly advisory role of the Council of State. The silence of Maltese political leaders on the matter suggests uneasiness to implement policy establishing the Council of State institution, so it would be unwise to make the case for a prolifically elaborate body. While at times it may seem that the Council plays a more prominent role than others, it is done strictly in line of the fulfillment of its advisory functions.

4. Advisory functions of the Council of State in matters of law

Advisory and consultative functions are the most basic form of assistance which can be provided to the government of the day. The effectiveness of this activity can very likely be underestimated, principally because most of the time there is no legal force behind the enforcement of the decisions and advice given by the relevant body or institution. In the end it is the person/s who takes the final decision who concludes whether to bring the hammer down on the efforts of the Council or not. However, practice lays witness to the possibilities and achievements which may materialise if the operation is given its due attention.

The Council of State in Luxembourg is purely consultative. It advises Government on certain legally specified matters. In its latest report it indicates areas in which Government made use of its services.¹⁴ They include, *inter alia*, fundamental rights and freedoms, institutions and Government, public finance, international law, laws of the European Union, general principles of law and jurisprudence. The procedure is as follows: generally, the opinion of the *Conseil d'Etat* is requested by Government before a bill is presented to the Chamber of Deputies. A reasoned report containing general considerations, an examination of the text of the draft, and if appropriate, a draft against is presented to Government. However, in this case it is of fundamental import that the Opinion of the Council is communicated to the House before the final vote.¹⁵ It is only under special circumstances of urgency that this procedure may, though very rarely, be bypassed.¹⁶

This model has quite a lot to offer to Malta's efforts in its adoption of a consultative role for its own Council of State. It offers Government the opportunity to have their efforts put to the test, a legal stress-test before facing critical scrutiny by the House of Representatives. This would allow Malta to retain the age-old principle of Parliamentary Supremacy, at least at this stage, without compromising the

¹⁴ *Conseil d'Etat du Grand-Duché de Luxembourg, Rapport annuel 2010-2011*; English Translation: Council of State of the Grand-Duchy of Luxembourg, Annual Report 2010-2011.

¹⁵ Constitution of Malta (1964), art 65 *et seq.*

¹⁶ <<http://www.conseil-etat.public.lu/fr/attributions/legislative/index.html>> last accessed 25 October 2012.

possibility of a more holistic piece of legislation, and surely a positive report of the Council of State would aid the Government's credibility in facing the electorate. The fact that the Opinion of the Council is presented to the House before voting on the respective text gives the people of Luxembourg the opportunity to know the direction which its Council is aiming at. The success of this prestigious nation will definitely have a bearing in the consideration of this particular task of the Council in Malta should be adopted.

Similar to the policy adopted by Luxembourg the Council of State of Malta should not *ex officio* examine documents and legal texts. Its task should be explicitly mandated by Government since, as proposed by the author, it is meant to corroborate positively the efforts of Government, provided that the measures are lawfully sound and socially just. Hence, at least in its primacy, the Council should only operate upon request by Government. Once the draft report has been completed the Council will proceed to present it to the Minister responsible as a representative of Government in the matter, who will then be obligated to lay it on the table before the President of the House of Representatives. In the case where the document is a private member's Bill the document should be presented to the President of the House, the Speaker of the House or Deputy Speaker as the case may be, and he, as an officer of the House will be duty-bound to lay it on the table. This procedure is necessary since the Council is not responsible to the House, so it cannot participate in its democratic exercise.

A distinction must be drawn between the objectives of the efforts of the Council of State and the Permanent Law Reform Commission in this respect as in its absence one may operate under the false impression that the Council intends to encroach on the function of the latter. While the Permanent Law Reform Commission is a body commissioned by the respective officer of Government to draft legislation in the name of the aforesaid in accordance with its instruction, should the Council of State be adopted it will be assigned the function of assessing the constitutionality, respect for the fundamental rights and freedoms, and adherence with the principles of natural justice and public morality. Rather than competitors the Council and the Commission are partners, two sides of the same coin. In light of this point, one can certainly appreciate the prominent role the Council would play in the legislative process.

If this is successful and Malta feels it is ready to make what would be a tremendous leap forward, it may opt for the adoption of a system similar to the one found in France. The French Constitution orders mandatory consultation with the *Conseil d'Etat* in certain cases, and offers the optional consultation in others. Firstly, Article 39 of the French Constitution orders that the Council of State must be referred all

bills before their adoption by the Council of Ministers and laid before Parliament.¹⁷ Secondly, Article 38 of the French Constitution points out that Orders cannot be adopted by the Council of Ministers unless there is prior consultation with the Council of State.¹⁸ Finally, once the Council of State has issued a decree, after a matter has been referred, it may not be amended or altered in any way, regardless of whether it favours Government or not. Other than where consultation is mandatory, Government is free to decide whether it wishes to consult the Council of State regarding a matter or not. Additionally, Government may, at any time, submit to the Council a question posing a particular legal problem so that the Council may illuminate it.¹⁹

There are some matters in which the author believes would benefit first from the idea of mandatory consultation, namely in cases of any form of amendment to certain foundational and crucial legal texts, documents and treaties, similar to what the Italian *Consiglio di Stato*, which finds its legal basis in Article 100 of the Constitution of the Republic of Italy, is legally empowered to perform. The reason behind this is that some legal texts enjoy a more prestigious role over others due to the fact that they play a primary role in giving the nation its national and European identity, or because it protects the various fundamental rights of the citizens. *Vis à vis* Malta, possible candidate documents which come to mind are the Constitution of Malta, the European Union Act²⁰ and European Convention Act.²¹ Each one is chosen for reasons which can hardly be understated: the Constitution essentially defines the parameters the within which parliament, Government and practically any other administrative body can operate so as to be within the remit of the law;²² the European Union Act is that which gives the country its European identity and at the same time it doubles as the legal document which safeguard it; the European Convention Act is a human rights text representing Malta's full acceptance of the basic fundamental human rights found in the European Convention on Human Rights.²³

¹⁷ Constitution of France (1958).

¹⁸ *ibid*.

¹⁹ This procedure was first made use of in 1989 when there was the issue of whether the wearing of Islamic headscarves was in line with the principle of secularism in public schools. Another example is when in 1996 a question was raised over the regularization of certain categories of illegal aliens.

²⁰ Chapter 460 of the Laws of Malta, European Union Act.

²¹ Chapter 319 of the Laws of Malta, European Convention Act.

²² A distinction must be drawn between the Constitution and Constitutional law. The Constitution is the actual text but Constitutional law is very wide and comprises many other texts. Under the heading of Constitutional law there are also included, *inter alia*, judgments of the Court. The Council of State will only have power to take cognisance of a matter pertaining of the Constitution alone as an integral part of Constitutional law.

²³ Convention for the Protection of Human Rights and Fundamental Freedom, 4 November 1950, Rome.

The main reason why the author has mentioned that this would be a tremendous leap forward for Malta is because a system, or to some extent a variation of such a system, would encroach on the country's British-adopted principle of Parliamentary Supremacy which is among the remnants of a one hundred and sixty-four year occupation period by British forces on the Islands. However, such an adoption does have its benefits, chief of which are predictability and complete transparency in the law-making process from inception to fruition. A mechanism the author wishes to give the Council of State which is absent in Luxembourg's version of the Council of State is its right to review private members' Bills prior to them being considered in Committee. In terms of Article 39 of the French Constitution 'the President of either House may submit a Private Member's Bill tabled by a Member of the said House, before it is considered in committee, to the *Conseil d'État* for its opinion, unless the Member who tabled it disagrees'. The French Constitution wisely ensures that the *Conseil d'État* does not interfere in matters of Parliament without request by allowing the President of the House to take the initiative. This is a possibility worth considering in a Maltese adoption of the Council of State, as procedurally explained later. After all, the enactment of a law set in motion by a private member's Bill is still law.

5. Specialised advice to Ministers of Cabinet

According to Article 78(1) of the Constitution of Malta executive authority of the State is vested in the President of Malta.²⁴ However, sub-Article (2) of the same provision enunciates that executive authority can be exercised by the 'President, either directly or through officers subordinate to him'. Furthermore, sub-Article (3) asserts that Parliament may confer functions on persons or authorities other than the President.²⁵ In practice what happens is that the Prime Minister will advise the President on the appointment of his Ministers, after which the President of Malta will be, de facto, completely divested of all executive powers.

Without any jaundice whatsoever, the author believes that while the system as it is should be kept perfectly the way it is in most respects, the Council of State can still play a role in the administration. A minister of Cabinet should have the option to seek specialised advice on particular issues with which his portfolio is faced. Consultation with the Council and the opinion of Council should remain strictly confidential unless both Council and the Prime Minister agree that the information is to be made public. In the event of an agreement that the report is to remain a privileged draft, such agreement is to be respected, save any understanding that the document is to be declassified at some point in the future, possibly after the vote in the House over the matter is taken. If, on the other hand the hand, the Prime

²⁴ Constitution of the Republic of Malta (1964).

²⁵ *ibid.*

Minister and Council agree to make the consultation report public it will be in the form of a formal consultation report, presented on the table of the House by the Prime Minister together with a declaration that the text is being presented with the concurrence of the Council. The most reasonable of all possible reasons as to why such advice may be sought would be to gain deep insight on the respective matter through the Council's expert advice prior to the presentation of a draft Bill in Parliament. The minister concerned may furthermore seek to acquire an official Opinion on a particular Bill – or any other affair – and place it on the table of the House of Representatives in aid of his efforts which may help in its justification.

If Malta feels that there is a need to move forward in the direction which States like France are most fond of, there may be the enactment of provisions which require certain matters to be mandatorily referred to the Council of State, such as in the case of Luxembourg, where there is an obligation placed on the relevant minister to consult with the Council on matters relating to public finance. However, the proposal of optional consultation by a minister is sufficient as a starting point.

6. Appointment and Dismissal of the President of Malta

Article 48(1) of the Constitution of Malta holds that the President of Malta is appointed by a simple majority vote of all members of the House of Representatives.²⁶ There is a certain understandable logic in this procedure, most evidently because the President is the Head of State of a democratic Malta, so it naturally follows that the right of appointment should vest in the people, or their representatives in Parliament. The other option would be to elect the President of Malta by means of a general election, but there is no historical basis for such a process since the person of the President of Malta was created to replace the Queen of England once Malta became a Republic on 13 December 1974. Since the President of Malta has very little to no impact on the political and governmental affairs of the nation there is little reason why a general election should be held in such respect; not to mention that the immense costs of holding an election.

The procedure is that Parliament is presented with a number of candidates, and eventually a vote is taken on who is to be President. Without prejudice to the aforementioned, the author believes that Parliament should retain the power to appoint the President, but the author proposes a change in procedure which will hopefully make the affair more transparent, one where the Council of State should undertake the task of identifying particular characters who would possibly serve as Head of State for the next five-year period. After the selection process is completed the name of a single candidate is forwarded to the House of Representatives. In the event that no consensus is reached by the Council the names of the more prominent

²⁶ Constitution of Malta (1964).

candidates will be put forward in a report for its consideration. The House will be presented with a document with the reasons why the Council feels that the selected candidate, or candidates, should be Malta's Head of State. A vote in Parliament will then be taken on the matter. If a majority of the members vote in favour the candidate becomes the new President of Malta; if the vote is negative the Council must consider another candidate. Where the Council puts forward more than one name, the procedure is considered successfully completed if one of them is chosen. Such a procedure, albeit possibly leading to the prolongation of electing a Head of State, namely, as outlined above, that of absolute transparency, wherein possible rumours on the reasons why a particular candidate was chosen instead of others will be effaced before inception.

Before proceeding further, it should be kept in mind that should the Council of State institution be implemented, the President of Malta will be the recommended person chairing the Council of State. Article 48(3)(b) then states that the President can be removed by a resolution of the House of Representatives on the grounds of inability to perform the functions of the office or misbehaviour.²⁷ Following this allegation, it is the opinion of the author that, provided that there is *prima facie* evidence to show that this may be the case, the President should be temporarily suspended from his position as chairman of the Council and an ad hoc chairman should be appointed for the purposes of hearing the matter. The author proposes that if it is shown that there are sufficient grounds for the removal of the person from his position as President of Malta the Council of State must formally deliver its Opinion to the House of Representatives, which will then vote on the matter. If the Council does not find that the President has acted in any way which would jeopardise his position as Head of State or in a way which prejudices the integrity of the office, the Council will deliver its Opinion to the House of Representatives and the suspension will then be lifted.

Finally, Article 49 of the Constitution points out that where the office of the President of Malta becomes temporarily vacant, the Prime Minister may, after consultation with the Leader of the Opposition, appoint another person to hold such office and carry out such tasks temporarily.²⁸ If, however, no such person is found the functions of President will be carried out by the Chief Justice. While not intending, in any way, to show any form of disrespect to the institute currently in force, the author opines that it is the Council which should appoint the temporary replacement to carry out the functions of Head of State while the President is in absentia. The reasoning behind this proposal resonates from a desire to keep the

²⁷ Constitution of Malta (1964).

²⁸ *ibid.*

*élan*²⁹ which progresses as if naturally after holistic consideration of the issue in its entirety is taken.

7. Council of State to advise the President on the exercise of his Reserved Powers

Article 93 of the Constitution of Malta states that the President of Malta may exercise the prerogative of mercy, as well as other residual powers provided the competent minister or Cabinet as a whole acquiesces. There are other reserve powers which the office commands, but most of the time it is subject to some form of input by the relevant authority, such as where the Prime Minister has lost the confidence of the House and instead of dissolving Parliament, the President appoint instead another Prime Minister.

Both the Irish and the Portuguese Councils of State have advisory roles. The Irish Council of State advises the President of Ireland on the exercise of most of his reserved powers. In no case where consultation takes place is the President obliged to heed the advice of Council, but in certain circumstances, such as referring a bill to the people for referendum or referring a bill to the Supreme Court to test its Constitutionality, consultation is mandatory nonetheless.³⁰ Albeit in practice the Council meets very rarely. The Portuguese Council of State is also an advisory body to the President of the Republic, aiding him through consultation in the exercise of most of his reserved powers. The Council is convened whenever the President wishes to; but he is obliged to convene the Council in the case where he dissolves the Assembly of the Republic or in case of a declaration of war and peace.³¹

Should it be adopted, Malta's Council of State should be vested with such above cited attributes. The author is of the opinion that the Council should mirror and build on the good practices of the aforementioned examples. To consider a relatively recent example, where the President has a request to exercise a residual power, such as the presidential pardon, the issue would be discussed internally within the Council, and not Cabinet, before making the decision public.³² The Council of State would, in effect, be replacing Cabinet, a minister or the Prime Minister when it comes to the exercise of the Presidential prerogatives.

The impression one is getting from the recent constitutional reform discussions is that there is the intention to introduce some variation of the sort. There is no clear

²⁹ English Translation: vigour, zeal and spirit.

³⁰ Constitution of the Republic of Ireland, arts 31-32.

³¹ Constitution of the Portuguese Republic, Seventh Revision [2005], art 145.

³² Christian Peregin, 'Decision on Jailed mother today, Prison term was 'wrong message'' *Times of Malta* (Malta, 15 October 2012) <<http://www.timesofmalta.com/articles/view/20121015/local/Decision-on-jailed-mother-is-today.441103>>, last accessed 25 October 2012.

indication as to what the advisory body will include, but there is consensus that the President requires an independent advisory body which would allow a more holistic exercise of his office as Head of the Executive, more importantly, as Head of State.³³

8. Appointment and Dismissal of Judges and Magistrates, temporary vacancy of office of Chief Justice

Judges and magistrates in Malta are appointed by the President acting on the advice of the Prime Minister.³⁴ What this translates to in practice is that a member of the Executive branch appoints a member of the Judiciary. In contrast, in the United Kingdom judges and magistrates are appointed by a special commission called the Judicial Appointments Commission. In the United States a judge or magistrate is appointed by the American President, the person vested with executive power after the nomination has been confirmed by Senate, one of the Houses of Congress.³⁵ So in this respect we are more akin to our friends across the Atlantic than we are to the usual suspect, Malta's ex-coloniser.

Though it is by no means suggested that the current Maltese system is flawed in the sense that it jeopardises the independence of the Judiciary, an organ fundamental to the stability of any State endorsing the principles of democracy, the rule of law and the separation of powers, the author cannot but raise an eyebrow as to why the procedure is done in this way. There has never been, to the author's knowledge, any undesirable appointment, but the truth is that one will never know such facts as if they are felt they would still never be made public as such matters are in various subtly ways, politically related. The fact that Malta is one of the only countries in Europe which applies this procedure of appointment, should be reason enough to advocate change, a possible alternative being adopted the English system which has a specific Commission set for the appointment of the members of the Judiciary.

It is propounded that the Council of State should be the institution entrusted with the appointment of judges and magistrates. This perhaps is one of the very few occasions when the Council of State had better be equipped with administrative powers from the start of its lifetime. There are only a very limited number of institutions which can possibly take on this mission, and the Council of State would be ideal because it has no ties with any other organ, it does not form part of the Executive; but most importantly, its *raison d'être* is mainly for applying a morally sound philosophy accumulated by seasoned pioneers to all matters with which it is faced.

³³(n 1).

³⁴ Constitution of Malta (1964), art 96(1).

³⁵ Constitution of the United States, art 2.

Currently the Prime Minister may ask the Commission for the Administration of Justice, according to Article 101A(11)(c) of the Constitution of Malta to advise him on any appointment of any judge or magistrate to be made in terms of Articles 96, 98 and 100 of the same text, which deal with the appointment of judges and magistrates, as well as the appointment of acting Chief Justice and acting judges. The author believes that the Prime Minister should not be involved in this procedure and that the Council of State should take his place in this. The Commission for the Administration of Justice should still retain its role as advisor on these matters, the recipient of the advice being the Council of State, rather than a member of the Executive branch. However, the Commission should act in manner which is strictly advisory. This may seem that the Council is usurping the power of the Commission, a body set up specifically for such matter, but in actual fact while the power of decision is shifted to the Council, the Commission is still deeply intimately involved in the whole procedure. Also, one can note that two parties are giving opinions, thereby creating an added check to ensure a decision is correctly taken in order to avoid any future problem which may cast doubt on the independence, impartiality, efficacy or functioning of the judicial organ.

Following what had just been outlined in the paragraph above, the Constitution provides that if the office of Chief Justice becomes temporarily vacant the President may appoint an acting Chief Justice from among the panel of judges after being advised by the Prime Minister.³⁶ The Prime Minister may, in turn, ask the Commission for the Administration of Justice to advise him on a possible candidate for the seat.³⁷ As the author opined above, the Council of State should replace the Prime Minister in this matter, and it should be the one to appoint the acting Chief Justice. Again, it may consult the Commission on the matter, but it should not be bound by its advice. Among the many reasons the most valid reason for the appointment to be made by the Council of State and not the Prime Minister is that first and foremost the Prime Minister is the unofficial Head of the Executive branch of the State, and secondly the Council of State, being completely neutral and bearing no political ties with any other institution in the country, would be more ideal insofar as it can appoint apolitically.

Article 97(2) states that a judge can only be removed by a two-thirds majority vote of all members of Parliament on proved grounds of misbehaviour or inability to perform the functions which the office demands.³⁸ Should the Council of State be implemented it should replace Parliament as the adjudicating body in the matter. If so evidence will be collected by the members of the Council with the help of State

³⁶ Constitution of Malta (1964), art 98.

³⁷ Constitution of Malta (1964), art 110(11)(c).

³⁸ Art 100(4) of the Constitution makes applicable art 97(2) and (3) when it comes to removal from office for magistrates.

officials usually tasked with the collection of such evidence, and then the Council can go on to hand down its decision, which will be given after a careful appreciation of the merits of the case. The decision of the Council will become *res iudicata* upon being delivered, and is therefore not subject to an appeal. Certain procedures, hence, must be formulated to cater for this process.

9. Appointment and Dismissal of the Ombudsman

The Ombudsman, generally speaking, is an Officer of Parliament. We find this explicitly stated in the legal text responsible for the creation of the institute of the Ombudsman such as the various legal documents on the matter of different Member States throughout the European Union, as well as in EU texts, which created the office of the European Ombudsman.³⁹

Being an officer of Parliament he is answerable to the House for his performance. The author agrees completely with the current setup surrounding the office *vis-à-vis* the State of Malta. At present the Ombudsman is appointed by a resolution of the House of Representatives supported by no less than a two-thirds majority vote of all members of the House.⁴⁰ As the current procedure for the appointment is sufficiently adequate the Council should not take on this additional role. However, it is advocated for there to be the consideration of the option for the Council of State to be available for the nomination procedure by providing expert advice and opinions. Surely any form of input by the institution will have considerable value.

10. Council of State and the Broadcasting Authority⁴¹

Article 118 of the Constitution of Malta caters for the creation of a Broadcasting authority. Sub-article (2) claims that the members of the Broadcasting authority are elected by the President acting in accordance with the advice of the Prime Minister after he has consulted with the Leader of the Opposition. The reasoning behind this procedure is to ensure there is, to the greatest possible extent, the safeguarding of the independence of the authority in issue. In fact its function is '[...] to ensure that [...] in such sound and television broadcasting services [...] due impartiality is preserved in respect of matters of political or industrial controversy or relating to current public policy and that broadcasting facilities and time are fairly apportioned

³⁹ Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, (94/262/ECSC, EC, Euratom), 1, Preamble.

⁴⁰ Chapter 385 of the Laws of Malta, Ombudsman Act, art 3.

⁴¹ In terms of art 119 of the Constitution of Malta, the Broadcasting Authority is entrusted with the duty to ensure that in sound and television broadcasts there is impartiality and equal treatment of opinions in matters of political and industrial controversy, or matters relating to public policy. Broadcasting times should be fairly apportioned between the persons belonging to the different political parties. In terms of this duty, then various, special legislation has been promulgated to set out the specific rights and obligations of this constitutional body.

between persons belonging to different political parties.⁴² The Select Committee of 1987 in its report highlighted that:

*[Hija] ir-responsabbilita' unika ta' l-Awtorita' tax-Xandir bhala korp imparzjali u indipendenti li thares biss u tkun immexxija mill-interess nazzjonali u kapaçi tonora ir-responsabbilitajiet tagħha u tiggarrantixxi l-imparzjalita' fix-Xandir kif tirrikjedi l-istess Kostituzzjoni.*⁴³

However, while not disputing the independence and impartiality of the current setup of the Broadcasting Authority, it is felt that a constitutionally created institution which has as its core principle independence and impartiality should not be appointed by an agreement between the Prime Minister and the Leader of the Opposition. Such practice seems to be akin to a gentlemen's agreement on a mutually beneficial fact, the lack of which would lead to unlimited and constant affray. This is not the ideal scenario for the reason that a fundamental principle of good governance is that there must be set up a system of checks and balances in order to safeguard against the possibility of deviation from the mission. It is for this reason that the author proposes that the Council of State replaces the Prime Minister and Leader of the Opposition as the competent authority to appoint members to form part of the Broadcasting Authority. Additionally, a further safeguard of independence and impartiality is submitted: the Prime Minister and Leader of the Opposition may, at any time oppose the nomination of any member to the Broadcasting Authority, in which case an ad hoc tribunal composed of a distinguished panel of judges (the number of judges is irrelevant at this point) should hear the concerns raised by the objector and deliver judgment, directing the Council to act accordingly. Where a chair on the Authority becomes vacant, temporarily or otherwise, the Council may be given the responsibility for appointment of the new or temporary member by making use of the ordinary procedure laid out above. To the author's knowledge there is no country which grants the Council such a task, mostly because there are specific authorities dealing with such appointments in the bigger countries. However, this model may prove adequate for Malta, particularly because of the socio-political scenario the country finds itself in.

Tracking along the same line of thought it follows, as if naturally, that the staff appointments mentioned in Article 9 of the Broadcasting Act,⁴⁴ should be done by the Broadcasting Authority as is, but with the concurrence of the Council of State instead of that of the Prime Minister. In the proviso of the article, there is stated that

⁴² Constitution of Malta (1964), art 119.

⁴³ (n 2) 10-11. English translation: 'The single function of the Broadcasting Authority should be the national interest. It has the duty to ensure that it is run in an independent and impartial manner in the national interest.'

⁴⁴ Chapter 350 of the Laws of Malta, Malta Broadcasting Act.

the Broadcasting Authority may establish schemes of incentives related to productivity and performance with the approval of the Prime Minister after consultation with the Minister of Finance. The Broadcasting Authority, in this respect, should get the authorisation of the Council of State, which in turn would consult with the relevant minister, most likely the Prime Minister after he has consulted with the Minister of Finance; since he is the person responsible for allocation and disbursement of funds.

11. Council of State and the Electoral Commission

Article 60 of the Constitution of Malta⁴⁵ lays the down the necessary material concerning the Electoral Commission. Of particular importance for the purposes of this discussion is Article 60(3), dealing with the appointment of the members of the Electoral Commission and Article 60(6) dealing with the removal of a member of the Electoral Commission. While referring to the above reference of the gentlemen's agreement, it is believed that the best guarantee for impartiality would be that the members be appointed by the Council of State, reason being that the socio-political climate surrounding elections is such a sensitive issue that the more transparent the process, and the more independent and impartial the authority to whom the Electoral Commission would be answerable; the more the public faith will grow.

At present all members of the Electoral Commission are appointed by the President acting on the advice of the Prime Minister after he has consulted with the Leader of the Opposition. The author proposes an overhaul in this regard. At present the members sitting on the Electoral Commission are politically appointed. The Council of State should be the institution taking on the responsibility for the appointment of members on the Electoral Commission, having regard to the intrinsically apolitical nature of the Council. Should the Prime Minister or Leader of the Opposition oppose a nomination of any member they may contest it before an ad hoc tribunal composed of a distinguished panel of judges (the number of judges is irrelevant at this point) where the concerns raised by the objector are heard and judgment is delivered, directing the Council to act accordingly.

Article 60(6) currently states that if a member of the Electoral Commission is found unable to discharge the functions of the office or is found to have misbehaved, then according to article 60(7) the President will remove the person from office after being advised to do so by the Prime Minister.⁴⁶ A natural progression to what has been said above is that the Council of State should be the one to remove the member found guilty under Article 60(7), not the Prime Minister. Where under Article 60(8) there is a vacant position on the Electoral Commission, temporary or otherwise, the Council, should it be adopted, may be made to be the body

⁴⁵ Constitution of Malta (1964).

⁴⁶ Constitution of Malta (1964).

responsible for appointment of the new or temporary member by faithfully adopting the procedure mentioned above for the appointment of members of the said Commission.

12. Conclusion

On 23 February 1987 a document was presented in Parliament for the setting up of a Council of State but the proposal was not taken up. On 13 December 2009, Republic Day, the President of the Republic of Malta rekindled what had long been forgotten.⁴⁷ While both the Prime Minister and the Leader of the Opposition welcomed the idea of the setting up of an institution, clearly of high esteem, nothing has been done, and not a word of it has been uttered since. Be it due to discomfort with the notion, disregard for the opinions of a number of political figures and academics, or any other possible cause, nobody can discount the possible benefits of the adoption of such an institution. There is no grounded model of what a Council of State should look like: its composition and function. Each State adopts its own working model so that the institution may produce the best possible results. Academia can only do so much in this respect. It is up to our politicians to seize the moment and set the ball rolling.

⁴⁷ (n 1).