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## Reforming Malta's constitution to enhance the independence of 'fourth' branch institutions

By Michael Briguglio, **6 December**



\_\_\_\_\_ Demonstrators hold a 'No Change No Justice' Banner (photo credit: @TinaUrso/Twitter)

*The recent public demonstrations have put the issue of constitutional reforms at the forefront of the political agenda. In a context of a de facto two-party system, the independence and impartiality of institutions, such as the Attorney General and Police Commissioner, has become central to the reform demands. In view of its significance, the reform process should be inclusive and participatory and may involve a consultative referendum to enhance its legitimacy – writes Michael Briguglio.*

On 16 October 2017, influential investigative journalist Daphne Caruana Galizia (<https://www.politico.eu/blogs/on-media/2017/10/murder-malta-journalist-daphne-caruana-galizia-joseph-muscat/>) was murdered in a car bomb in Malta. Described as a 'one-person WikiLeaks' ([http://www.huffingtonpost.co.uk/entry/daphne-caruana-galizia-dead-who-was-journalist-killed-in-malta-car-bomb\\_uk\\_59e5bdb9e4b0a2324d1d4127](http://www.huffingtonpost.co.uk/entry/daphne-caruana-galizia-dead-who-was-journalist-killed-in-malta-car-bomb_uk_59e5bdb9e4b0a2324d1d4127)) by *Politico*, Caruana Galizia frequently revealed stories of corruption and abuse of power, and her blog often attracted readership that surpassed the combined circulation of Maltese newspapers. Caruana Galizia was the journalist who revealed the involvement of central figures on the Maltese Labour government in the Panama Papers (<http://www.bbc.com/news/world-35954224>) scandal. This eventually led to a snap election in June 2017, which, however, retained Labour's place in government.

Her murder was widely reported in the international media, and European Parliament President Antonio Tajani attended (<http://www.independent.com.mt/articles/2017-11-02/local-news/European-Parliament-president-Tajani-to-attend-Daphne-s-funeral-on-Friday-6736180983>) her funeral. The European Parliament has also demanded (<http://www.europarl.europa.eu/news/en/press-room/20171110IPR87818/malta-s-rule-of-law-needs-close-monitoring>) that the European Commission look into Malta's rule of law. It has also triggered *Civil Society Network* to organize two national demonstrations, which in addition to demanding justice for Caruana Galizia's family, have called for the dismissal of the country's Police Commissioner and Attorney General. These two officials have been criticized for a lack of action on controversial matters, such as the Panama Papers scandal and collaboration with the law courts (<https://www.timesofmalta.com/articles/view/20171002/local/courts-are-powerless-if-the-police-ag-fail-to-act-chief-justice.659418>). Given that the Prime Minister effectively appoints the two officials, their lack of action on these matters has eroded public trust in their impartiality.

***Malta's constitution tends to facilitate***

***(<http://blogs.lse.ac.uk/europpblog/2017/11/07/assassination-of-daphne-caruana-galizia-malta-politics/>) the 'rule of the party' over the 'rule of law' in a winner-takes-all political system and culture.***

Beyond these immediate demands, the demonstrators have sought renewed engagement in constitutional reforms towards guaranteeing the independence and impartiality of crucial state institutions, including particularly the Attorney General and the Police Commissioner. Accordingly, Malta's Parliament agreed (<http://www.independent.com.mt/articles/2017-10-30/local-news/Demonstrators-gather-in-front-of-Parliament-as-debate-on-rule-of-law-gets-underway-6736180864>) to move forward with the process of constitutional reform – the reform was already promised (<https://www.timesofmalta.com/articles/view/20170624/local/government-pledges-constitutional-reform-as-13th-legislature-gets.651533>) by the Labour government following its reelection in June 2017. Constitutional reform had previously been considered (<https://lovinmalta.com/opinion/this-is-why-maltas-constitution-needs-to-change>) when the Labour Government in 2013 launched a process led by a controversial former Nationalist member of parliament, Franco Debono. Debono had in 2012 voted against his Nationalist government when it had a one-seat majority, and the Nationalist opposition considered him a divisive figure on constitutional reform. The reform efforts failed. The Labour Government also largely ignored a report (<https://www.timesofmalta.com/articles/view/20171107/local/how-would-experts-reform-the-constitution.662228>) of the Justice Reform Commission (<https://www.timesofmalta.com/articles/view/20131202/local/justice-reform-commission-makes-450-proposals-in-final-report.497273>) 2013), which was chaired by the same Debono and included recommendations including in relation to the independence of the prosecution services.

## **The de facto two party system and flaws in Malta's constitutional framework**

Chief Justice Emeritus Joseph Said Pullicino states (<https://www.timesofmalta.com/articles/view/20171107/local/how-would-experts-reform-the-constitution.662228>) that Malta's 'basic essential elements of good governance' such as transparency, accountability and universal enforcement of laws are 'being swiftly and dangerously eroded'. This might be because Malta's constitution tends to facilitate (<http://blogs.lse.ac.uk/europpblog/2017/11/07/assassination-of-daphne-caruana-galizia-malta-politics/>) the 'rule of the party' over the 'rule of law' in a winner-takes-all political system and culture. Considering that two parties, the Nationalist Party and the Labour Party, continue to dominate Maltese politics, the system has led to high levels of polarization and interparty mistrust. In this

context, the existence of 'fourth branch' state institutions independent of the political authorities is crucial. Indeed, the parties tend to call for constitutional reforms (<http://www.constitutionnet.org/news/op-ed-maltas-constitution-needs-be-changed>) to enhance the independence of various state institutions while in opposition, but have been reluctant to implement reforms when in power.

***The reform of the process of appointment of the Attorney General and the Police Commissioner is critical.***

According to Giovanni Bonello, a constitutional expert and a former member of the European Court of Human Rights, Malta's constitutional court seems to accept that parliament, rather than the constitution, holds supreme power in Malta. Hence, this calls for a reform which reverses the situation. In his words (<https://www.timesofmalta.com/articles/view/20171107/local/how-would-experts-reform-the-constitution.662228>):

A country cannot claim to follow the rule of law when all the prosecuting authorities are controlled and muzzled, when the judiciary is packed with party inepts, when the police force employs convicted criminals, when impunity is guaranteed for anyone on the right side of the political fence, when court-certified felons are promoted, when prosecutions are sabotaged and when those who try to follow up political corruption are battered, when the voice of protest is silenced in a blast of Mafia.

It is in this context that both of the major political parties now agree (<http://theshiftnews.com/2017/11/22/constitutional-reform-an-iceland-in-the-mediterranean/>) that constitutional reform should take place. But none of them has come up with a clear vision on how to proceed.

### **Ensuring the independence and impartiality of 'fourth' branch institutions**

The high level of awareness the public demonstrations created has given renewed impetus to the constitutional reform process and has led to its inclusion in Malta's parliamentary agenda. Following the murder of Daphne Caruana Galizia, many people were mobilized to participate in vigils, demonstrations organised by *Civil Society Network*, sit-ins and other public actions. These included national demonstrations as well as a colourful repertoire of tactics by *Occupy Justice*, a newly formed group of female activists

who eventually met Malta's Prime Minister (<https://lovinmalta.com/news/news-breaking/heres-what-went-on-during-awkward-meeting-between-prime-minister-and-protestors>) on the matter. The matter also gained the attention of the international press and the European Parliament, the latter agreeing on a motion to monitor the rule of law in Malta. The higher level of awareness and questions regarding the independence of crucial institutions have put the issue of constitutional reform firmly on the public agenda.

***One proposal would require the approval of the nominee of the Prime Minister to the office of Attorney General and Police Commissioner with a two-third legislative majority ([http://partitnazzjonalista.com/programm/doc\\_EN.PDF](http://partitnazzjonalista.com/programm/doc_EN.PDF)).***

The demands for constitutional reform relate to crucial issues with potentially significant substantive impacts through policy and legislative changes. In this regard, the call for amendment of the constitution to reform the process of appointment of the Attorney General and the Police Commissioner is critical. Under the current constitutional framework, the President in accordance with the suggestion of the Prime Minister, appoints the Attorney General. The appointment of the Police Commissioner, also by the Prime Minister, is regulated through ordinary legislation. Unlike in cases of judicial appointments, there is no expert committee that advises the Prime Minister in appointing the two office, nor does he or she receive advice from the public service commission.

To ensure the impartiality of these officials, civil society groups and the Nationalist opposition party have suggested the adoption of a process that will require the approval of the nominee of the Prime Minister to the said offices with a two-third legislative majority ([http://partitnazzjonalista.com/programm/doc\\_EN.PDF](http://partitnazzjonalista.com/programm/doc_EN.PDF)) in the first vote and a simple majority in the third vote, if the former is not achieved. The fact that the process of appointment of the Police Commissioner is regulated in ordinary legislation means that changes to it do not require a constitutional amendment. Nevertheless, the constitutional regulation of the process will ensure that future legislative majorities cannot easily do away with it. It is also important to note that the two-third requirement has already been put to good use in the appointment of the auditor general.

***Any reform to guarantee the independence and impartiality of these institutions would be incomplete without similar reforms regarding their removal.***

The government is yet to accept demands to remove the current Police Commissioner and Attorney General and the replacement of the process of appointment. While the approval of the proposed reforms is still uncertain, the demand for constitutional reform has been successful in that the ball has been set to roll.

The Dean of the Faculty of Law of the University of Malta, Professor Kevin Aquilina (<http://www.independent.com.mt/articles/2017-11-20/newspaper-opinions/Appointment-of-two-state-officers-6736181653>), has in addition indicated that any reform to guarantee the independence and impartiality of these institutions would be incomplete without similar reforms regarding their removal. Crucially, he suggests that the proposed two-third majority appointment process retains the authority within the political class. Instead, he discusses the possible establishment of an independent prosecution authority whereby the officials would be appointed and removed in a manner comparable to judges. Indeed, this is in line with the recommendations of the 2013 report of the judicial reform commission.

***It is imperative that constitutional reform has a broad sense of ownership, if it is to succeed.***

The more optimistic Labour government is proposing to strengthen Malta's state institutions as well as the establishment of a constitutional mechanism to remove MPs (<http://josephmuscat.com/wp-content/uploads/2017/05/MANIFEST-ABRIDGED-ENG.pdf>) and public officials from office. Other proposals (<https://www.timesofmalta.com/articles/view/20170624/local/government-pledges-constitutional-reform-as-13th-legislature-gets.651533>) likely to be discussed in the current legislature include Labour's plans for quotas for women's representation and the lowering of the voting age to 16 in the general elections.

## **Concluding remarks**

In view of Malta's highly polarized political context, it is imperative that constitutional reform has a broad sense of ownership, if it is to succeed. For this to take place, the government should ensure an open and transparent process. The persons chosen to head the reform process should be committed to integrity, fairness and honesty. They should have backing from political and civil society forces. While political parties should have an important role in the process, it should not be at the expense of input from the general public, academia, legal experts and civil society organizations. The reform process should be deliberative and dialogic. Top-down rushed formalities should be avoided. The process should be approved through the widest means possible. This would require a two-thirds parliamentary majority and could include a consultative national referendum to add legitimacy, although a referendum may not be legally required. This would be the third consultative referendum in recent years, following those regarding Malta's EU accession (2003) and the introduction of divorce (2011), both of which required parliamentary approval for legal validity.

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