

Proposals by the Opposition as to how the Venice Commission Report can be concretely implemented

After the publication of the Report by the Venice Commission, we feel that one should not only examine carefully the Report, but also start working on drawing conclusions from it and studying how these may be transformed into concrete proposals for change in the Constitution and the laws of the land. The fact that the two political parties have agreed that the Venice Commission's recommendations should be implemented, is an auspicious point of departure. However, one must also agree on the details of what may be proposed in practice. The aim of the Venice Commission and that of what we are proposing in this document is that of ensuring a wider spread of power, as well to guarantee the necessary checks and balances.

Election of the President:

It does not make any sense that the President is appointed by a simple majority of the members of the House and is removed in the same way. It is true that there is historical and political reason for this, namely that when the 1974 "Republic" changes were introduced, the political parties in Parliament wanted to change as least as possible the powers previously exercised by the Head of State and the Governor General; the latter could be substituted by a simple notification to the Sovereign in the United Kingdom; however after 46 years of being a Republic, it is proper that changes be introduced in the Constitution so that whoever is appointed to this highest position in the State, enjoys the widest possible trust. Therefore, it is being proposed that the President of Malta is appointed by a Resolution of the House supported by at least two thirds of all the members of Parliament. One may just stop there; after all even the holders of the offices of Ombudsman, Auditor General and Commissioner for Standards in Public Life all need the support of at least two thirds of all parliamentarians to be appointed. The fact that there is no alternative to such an election constrains the political parties to agree on such appointment. Experience has shown that this proposal is feasible for in the last two elections for President, in spite of the fact that this proposed rule did not exist, agreement was still reached between the two political parties in Parliament; and both the election of President Coleiro Preca and that of President Vella were supported by more than two thirds of all the members of the House. One should also state that after his election, President Vella expressed himself in favour of such a rule. The Opposition has already prepared a Bill to introduce such change.

Too many powers in the hands of the Prime Minister:

As to this comment by the Commission, one may propose the following line of action: Today the institutions established by the Constitution for different purposes, namely the Broadcasting Authority, the Public Service Commission, the Electoral Commission and the Employment Commission are all appointed by the President acting on the binding advice the Prime Minister, except for the Employment Commission, where out of five members, two are exceptionally

appointed on the advice of the Leader of the Opposition, but the other three are appointed by the President on the advice of the Prime Minister.

Throughout the years a tradition evolved, whereby half the members of all these Commissions or Authorities are appointed from amongst persons enjoying the confidence of the Government, the other half from amongst persons who enjoy the trust of the Opposition, and an attempt is made to reach a consensus on the Chairperson. Where such consensus is not reached, the Prime Minister uses his power granted by the Constitution and appoints such Chairperson himself. It is true that these appointments are made after consulting the Leader of the Opposition, but in truth this is no consultation at all; the Office of the Prime Minister at Castille, merely informs the Leader of the Opposition with its intention. Moreover, no Court may inquire into whether such consultation was made, let alone whether it was done properly.

Therefore, it is fit and proper that what is a tradition becomes law. The Commissions and Authorities abovementioned should start being appointed by the President, as to one half from amongst persons nominated by the Prime Minister, the other half from persons nominated by the Leader of the Opposition (this for instance happens already under art. 120 of the Constitution for the members of the Employment Commission); the Chairpersons of these constitutional organs are to be appointed by a resolution of the House of Representatives supported by at least two-thirds of all its members; and where this is not done within a certain period of time, then such power of appointment is vested in the President who will act according to his own deliberate judgment and exercise such power without any interference from any person. This shall not apply to the Commission for the Administration of Justice which should remain composed as it is today.

In order to increase review by the Courts of the actions of the Prime Minister, article 86(3) of the Constitution shall be repealed. This sub-article prevents the Courts from inquiring whether the Prime Minister acted or not in line with a recommendation of any other person or authority, even if such recommendation is according to article 86(1) binding (“he *shall* exercise that function in accordance with such recommendation).

Finally, in order to increase the powers of the President, it is being proposed that:

(a) the Prerogative of Mercy (art. 93 of Constitution) as a power is transferred to the President who will act according to his own deliberate judgment; The President in exercising this new power may be assisted by an advisory technical body, but the decision rests with the Head of State.

(b) the President may send back a Bill to the House for re-consideration in a special sitting. This can occur for reasons relating to constitutional validity; if the House insists on leaving the Bill as it is, then it is sent back to the President for his signature and the President, as today, would be bound to signify his assent. If the House would like to introduce some changes – in

view of the reconsideration process - a recommittal according to the Standing Orders is made. This norm shall not apply to the Appropriation Act.

Duty of Good Governance:

We are proposing that a provision is included in the Constitution so that the State as guardian of the rule of law and of the natural patrimony and the well-being of society, acts lawfully, reasonably and proportionately and uses public funds carefully and properly.

More Rights to the Citizen:

It is being proposed that any person or non-governmental organization may institute proceedings for a law to be declared contrary to the Constitution. Up till now, plaintiff in such cases, has to prove a juridical, actual and personal interest to do so in human rights cases. Consequently, the *actio popularis* shall be extended to the challenging of any law even on human rights grounds. Where proceedings are instituted to challenge a decision of the Public Administration in public laws, any person who proves – as in the United Kingdom – sufficient interest, may do so – even if he has no personal, actual and juridical interest. In such way, association and groups, who in most cases enjoy an interest but not necessarily a personal and juridical one, will be able to institute proceedings against Government under public law. The law, which under pain of nullity, requires any person to notify Government by judicial act of its intention to institute proceedings against it, ten days prior to commencement of proceedings, (art 460 Ch. 12), shall be repealed.

Appointment of Members of the Judiciary:

The time is ripe for the participation of Government in the appointment of members of the Judiciary to come to an end, in order to guarantee that the appointment of Judges and Magistrates be free from any political interference. It is therefore being proposed that there be established a Judicial Appointments Committee in which the Judiciary shall appoint a majority of its membership. Whenever there is a vacancy, the appointment shall be made by the President of Malta acting on the binding advice of the Committee who shall nominate the candidate/s to fill the vacancy/ies. Such nomination shall be made only after a call for applications is issued by the Committee. This also applies to Magistrates who wish to apply to fill the vacancy. As to the appointment of the Chief Justice, such appointment must be supported by at least two-thirds of all the members of the House of Representatives.

Full Time or Part Time Members of Parliament:

The debate is a continuous one. There are advantages and disadvantages in both choices. That is why it would be good to excogitate a system whereby a member of Parliament, as soon as he enters Parliament, declares whether he chooses to be full time or part-time MP, rather than having a law imposed on everyone to be full time. The danger that everyone be considered full time, apart from questions relating to the fact that a parliamentarian would sever himself from the world of work and community, is that if one is not re-elected to Parliament, such member would find himself out of work, with serious consequences, even more so when a parliamentarian is of a young age.

As to members of Parliament being appointed on Boards of Commissions, public corporations and Government companies, these should not be appointed as members, officers, directors, chairmen or managers of such public entities. Nor should they be appointed consultants, legal or of any sort, to any public entity including Departments, public corporations and Government companies. They may be employed with such entities in the public sector, but only *before* they enter Parliament. The same rules which apply to parliamentarians in the public service in this context should apply to members of Parliament employed in public corporations (Chapter 462 of the Laws of Malta, namely that from grade 6 onwards, no employee of a public corporation or a Government company may also be a member of Parliament).

This is being proposed in the light of the recommendation made by the Commissioner for Standards in Public Life where he stated that “How can a back-bencher member of Parliament give a genuine contribution...if he is dependent on Government for his livelihood? This is an obvious conflict of interest.” (Statement dated 27 November 2019). The Principal Permanent Secretary, refused to execute the recommendations of the Commissioner.

Powers of Government when an election is called:

We believe that what is commonly called “caretaker Government” when Parliament is dissolved and the electoral campaign triggers off, should have limited powers. Up till now, during an electoral campaign, a Government has the usual full powers. We are proposing that during such period, recruitment or promotions on any sort in the public sector may not be made, including public corporations and Government companies; nor may any personal or real rights be created over Government-owned property, or any contract of works or services be signed, except in the last two instances in urgent cases and with the written consent of both the Prime Minister and the Leader of Opposition. The Opposition has already prepared a Bill on this matter.

Fight against Corruption:

The Venice Commission criticized the weakness in the composition and powers of the Commission against Corruption. It is therefore proper to completely revise this matter, dismantle the Commission or at least give it executive powers. Another solution would be that, instead of a Commission, one would set up the office of a Commissioner against Corruption, who would be able to start criminal proceedings in the appropriate cases, without depending on the Executive Police. The appointment and removal of the holder of such office would be done through a Resolution supported by at least two thirds of all parliamentarians. The Police, in cases of corruption before the Commissioner, will take orders only from the Commissioner against Corruption. The Opposition has already drafted a Bill in this direction.

More Freedom and Protection for Journalists and Media:

Recently, cases have occurred where powerful entities, in order to intimidate journalists and individuals domiciled and resident in Malta, instituted civil proceedings in foreign jurisdictions, instead of in Malta, when such jurisdiction has no connection at all with the publication authored by the journalist in Malta. A proposal is being made where the execution in Malta will not be permitted of any judgment delivered outside Malta when such action abroad was intended to censure, intimidate and stop critics in Malta by constraining them to pay exorbitant legal costs and be greatly inconvenienced, forcing them to abandon their criticism, or opposition – a restriction on freedom of expression and information which is not acceptable in a democratic society. The Opposition has already prepared a Bill on what is usually referred to as SLAPP - *Strategic Lawsuit against Public Participation*.

Ombudsman:

The appointment, removal and powers of the Ombudsman are to be inserted in the Constitution and such provision should be entrenched. It is being proposed as well that every year, apart from the Annual Report, the Ombudsman is to prepare a Report on the cases where his recommendations were not implemented by the Public Administration. This Report will be discussed before the House Business Committee which would have the power to examine these cases, and summon witnesses for this purpose; finally, the Report and the testimony of the witnesses heard by the Committee shall be transmitted to the plenary session of the House for debate.

Attorney General:

In view of the powers of the Attorney General to commence, suspend and withdraw criminal proceedings (art. 91 of the Constitution) including those against high-ranking officials of the public administration, it is necessary that his appointment is supported by at least two thirds of all the members of the House of Representatives. The same shall apply to the appointment the

State Attorney. The abovementioned powers of the holders of the two offices may be subjected to judicial review at the instance of any individual or organization.

Commissioner of Police:

The appointment of Commissioner shall be made after a call for applications. One can also submit such appointment to the scrutiny of the Nominations Committee of the House recently constituted under the Public Administration Act. The appointment shall be made by a Resolution of the House of Representatives of supported by at least two-thirds of its members.

Permanent Secretaries:

The task of the Permanent Secretary, as the top civil servant in every Ministry, is that of ensuring that all the departments within the Ministry, act according to law, justice and equity; he is also an indispensable bridge so that, as soon as there is a change in Minister or Government, the workings of the Ministry from a civil service angle, continues unabated. It does not make sense, therefore, as what has occurred recently, permanent secretaries were requested to resign following a general election. It is therefore, being proposed that the Permanent Secretaries be appointed and removed only by the President acting on the binding recommendation of the Public Service Commission. The process shall include a call for applications by the PSC from amongst public officers.

Positions and/or Persons of Trust:

It is proper that one regulates the question of positions and/ or persons of trust. Owing to doubts as to the constitutional validity of these appointments over the years, these positions and/or persons of trust are to be limited to only four persons in each private office of a Minister or Parliamentary Secretary, so however that two shall be engaged at clerical grade and two as drivers/messengers.

Council of State:

This Council had been proposed some years back; the time has come to implement the proposal. The Council may be composed of all former Presidents, Prime Ministers, Speakers and Chief Justices. When requested, such a body may provide its advice as to the constitutional validity of a Bill or other relevant comments as to bills being debated in Parliament. Their powers shall be only advisory and shall not cover the Financial Estimates and the Appropriation Act.

Subsidiary Legislation:

Owing to the enormous volume of subsidiary legislation, the parliamentary scrutiny of such legislation, most of which contains criminal sanctions, is not being done properly. It would be proper to set up a Standing Committee of the House of Representatives on Subsidiary Legislation – to examine the contents of regulations and legal notices and report to the House, as is done by a similar Committee in the House of Commons in the United Kingdom. Where there is no unanimous agreement in the Committee on any particular legal notice, the question is referred to plenary session within a certain period of time under pain of nullity of the legal notice itself.

CONCLUSION:

These proposals are not hewn in solid rock; we believe, however, that they are just proposals which implement the recommendations of the Venice Commission seriously and not only formally – by deeds and not words alone. As a serious Opposition, we are open to any proposal from wherever it comes. Civil society has an important role to play in this field and we hope that with the publication of these proposals, there shall be a proper reaction, and that proposals be made by any association or individual which wishes to do so. The Constitution is not something of interest only to political parties and politicians, although they have an important role to play in its drafting and execution. It is the “Statute” of the State and as such, everyone should have an interest in what happens in this field. We hope that this Report, and these proposals launch a serious public debate, open and wide, in the best interests and well-being of our country.

Summary of Proposals:

1. The President of Malta is appointed by a Resolution of the House supported by at least two thirds of all the members of Parliament.
2. The Chairpersons of constitutional organs shall be appointed by a majority of two-thirds of all the members of the House of Representatives; and where this cannot be done within a specified period of time, the appointment is made by the President of Malta acting according to his own deliberate judgment. The members are to be appointed by the President as to one half on the advice of the Prime Minister and the other half on the advice of the Leader of the Opposition.
3. Article 86(3) of the Constitution to be repealed. This article precludes the courts from inquiring whether the Prime Minister acted or not on the recommendation of any person or other authority.
4. The appointment of Chief Justice shall be supported by a majority of at least two thirds of all the members of Parliament; and when a vacancy arises, the members of the Judiciary shall be appointed by the President, acting on the binding advice of the Appointments Committee whose majority of members shall be appointed by the Judiciary.
5. The Prerogative of Mercy (art. 93 of Constitution) as a power is transferred to the President who will act according to his own deliberate judgment;
6. The President may send back a Bill to the House for re- consideration in a special sitting.
7. A provision is included in the Constitution so that the State acts lawfully, reasonably and proportionately and uses public funds carefully and properly.
8. Any person or non-governmental organization may institute proceedings for a law to be declared contrary to the Constitution without need to prove any personal interest; in proceedings against Government (not constitutional) it shall be enough for plaintiff to have an interest not necessarily a juridical and personal one;
9. The law requiring any person, under pain of nullity, to send an official letter, ten days prior to instituting proceedings against Government, shall be repealed.
10. Members of Parliament may not be appointed as members, directors, managers, or officers of boards of public entities; nor may they be appointed as consultants, legal or otherwise of any public entity including Departments, public corporations and government companies.
11. Positions of trust are to be limited to four persons in the offices of each Minister and Parliamentary Secretary;
12. There shall be a Commissioner against Corruption appointed by two thirds of all the members of the House, who can commence criminal proceedings where he deems appropriate.

13. The appointment, removal and powers of the Ombudsman shall be included and entrenched in the Constitution. Every year, apart from the Annual Report, the Ombudsman shall prepare a Report on those recommendations of his which were not implemented by the Administration, which shall be debated in Parliament.
14. The Attorney General shall be appointed by a two-thirds majority of members of the House; the powers of the Attorney General relating to criminal proceedings shall be subject to judicial review at the instance of any individual or organization;
15. The appointment of Commissioner of Police shall be made by a Resolution of the House of Representatives supported by two-thirds majority of all its members.
16. Permanent Secretaries shall be appointed and removed by the President acting on the binding recommendation of the Public Service Commission;
17. Following the dissolution of Parliament, no recruitment or promotions may be made in the public sector. Nor may any real or personal right be created over government owned property or contracts of service or works signed;
18. Judgments delivered against journalist domiciled and resident in Malta by foreign jurisdictions intended to censure, intimidate and stop critics in Malta shall not be executed in Malta;
19. A Council of State composed of all former Presidents, Prime Ministers, Speakers and Chief Justices, shall be established, which shall have the power, when requested to give advice to the Administration and to Parliament;
20. A Standing Committee on Subsidiary Legislation shall be set up in the House to control and monitor subsidiary legislation in Malta.