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RECALLING A DISSOLVED PARLIAMENT | HIGHLIGHTS FROM REGIONAL COURTS AND
THE EUROPEAN COMMISSION | ENSURING EFFECTIVE DEFENCE IN CROSS-BORDER CRIMINAL PROCEEDINGS



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1. The text of the Proclamation reads as follows:

Proclamation

BY THE PRESIDENT OF MALTA (L.S.) (Sd.) George Abela President

WHEREAS it is provided by subarticle (1) of article 76 of the Constitution of Malta that the President of Malta may at any time by proclamation dissolve the Parliament of Malta;

AND WHEREAS it is provided by subarticle (5) of article 76 of the Constitution of Malta that in the exercise of his aforesaid power the President of Malta shall act in accordance with the advice of the Prime Minister; AND WHEREAS I have been advised by the Prime Minister to dissolve Parliament from the 7th day of January, 2013; NOW, THEREFORE, in exercise of the power vested in me as aforesaid, I, GEORGE ABELA, President of Malta, do hereby notify and proclaim that the Parliament of Malta be and is hereby dissolved from the 7th day of January, 2013. Made at the Palace, Valletta, this 7th day of January, 2013. By Authority, (Sd.) Lawrence Gonzi Prime Minister. See Proclamation No 1 by the President of Malta, The Malta Government Gazette, 7th January 2013, No. 19,012, p. 77.

2. See The Times (of Malta), Saturday, 15 December 2012, p. TO ADD available at: <http://www.timesofmalta.com/articles/view/20121215/local/impeachment-motions-to-be-presented-today449672>

3. The other motion concerned Dr Raymond Pace. After the motion was presented Dr Pace resigned from judicial office.

Recalling a Dissolved Parliament



After the President of Malta dissolved Parliament on 7 January 2013¹, Dr Lawrence Gonzi, Prime Minister of Malta, presented the Speaker of the House of Representatives two motions to remove from office two judges of the Superior Courts². The text of these motions remains unpublished. One of these motions concerns the removal from judicial office of Mr Justice Carmelo Farrugia Sacco³. Prime Minister Gonzi was reported as having stated that if the Commission for the Administration of Justice were to make its recommendations after the

dissolution of Parliament, he would ask the dissolved Parliament to be recalled on a date in the interim period up to the general elections to be held on 9 March 2013.

This paper asks the question, with regard to the latter declaration of the Prime Minister, whether the Prime Minister, constitutionally speaking, is authorised by law to advise the President of Malta to recall a dissolved Parliament in the interim period when it has been dissolved and prior to the day of polling so that the House could

consider the removal of Mr Justice Farrugia Sacco from judicial office. The answer is in the negative in so far as removal of a member of the judiciary is concerned as such a measure is more in the nature of ordinary administration of the country than an extraordinary or an emergency measure as would be the case with the impeachment of a member of the judiciary which is devoid of such an emergency nature as understood not by ordinary law but by the Constitution of Malta, the highest law of the land.

2. The Constitutional Provision in Question

It is article 76(4) of the Constitution which deals with the situation of summoning a dissolved Parliament. It reads as follows:

(4) If between a dissolution of Parliament and the next ensuing general election of members of the House of Representatives an emergency arises of such a nature that, in the opinion of the Prime Minister it is necessary to recall Parliament, the President may by proclamation summon the Parliament that has been dissolved to meet, and that Parliament shall thereupon be deemed (except for the purpose of article 77 and, in relation to the next ensuing general election, article 61(3) and 66(6) of this Constitution) not to have been dissolved but shall be deemed (except as aforesaid) to be dissolved on the date on which the polls are concluded in the next ensuing general election.

This provision requires the following elements to materialise for Parliament to be recalled:

- (a) a dissolution of Parliament;
- (b) Parliament has to remain dissolved until the date of the next general election of members of the House of Representatives;
- (c) an emergency takes place in the interim period, that is, in the interregnum between the date of dissolution of Parliament and polling day;
- (d) it is the Prime Minister who has to decide whether the circumstances in question give rise to an emergency;
- (e) the President has a discretion to summon Parliament;
- (f) if Parliament is summoned it is deemed to be dissolved on polling day.

3. Dissolution of Parliament

The procedure as to the dissolution of Parliament is set out in the Constitution, in article 76(1). It states that:

The President may at any time by proclamation prorogue or dissolve Parliament.

The Constitution, in article 76(1), distinguishes between a 'prorogation' and 'dissolution' of Parliament. The case being studied in this paper is not one of prorogation but one of dissolution. The distinction between these two terms is that whilst in the case of a prorogation there is a discontinuance of a session of Parliament, that discontinuance does not lead to the dissolution of Parliament. Session, on the other hand, is defined in article 124 (1) as a period during which the House of Representatives is sitting continuously without adjournment and includes any period during which the House is in committee.

Thus Parliament may be postponed or deferred from one session to another but that prorogation does not lead to the dissolution of Parliament where fresh elections are needed to elect Members of Parliament. It is only dissolution which brings with it the need for fresh elections. This is made quite clear in article 77 of the Constitution that dissolution – not prorogation – leads to general elections

A general election of members of the House of Representatives shall be held at such time within three months after every dissolution of Parliament as the President acting in accordance with the advice of the Prime Minister, shall by proclamation appoint.

4. Requirements for Dissolution of Parliament

According to article 76(1) of the Constitution the following elements are needed to dissolve Parliament:

- (a) the President, who has to be in office or, in his absence, an Acting President
- (b) a proclamation, which has to be signed by the President (or acting President)
- (c) a Prime Minister, to advise the President to dissolve Parliament

Article 76(1) has to be read and construed with the provisions of article 76(5) which states that: In the exercise of his powers under this article the President shall act in accordance with the advice of the Prime Minister...

Hence, the President, although in terms of article 76(1) appears to be acting on his own initiative, this is not the case as, in terms of article 76(5) he has to act on the advice of the Prime Minister. But still, although the decision to dissolve in this case is taken by the Prime Minister, the President is still necessary as it is the Head of State who is constitutionally empowered to dissolve Parliament. There are other cases, however, where Parliament can still be dissolved without the advice of the Prime Minister, either unilaterally by the President (that is, on his own motion) or otherwise. I return to this point below.

Dissolution of Parliament may take place at any time during the term of a legislature provided that Parliament has not already been dissolved. Parliament need not be sitting to be dissolved. The President does not need to attend a sitting of the House of Representatives to dissolve Parliament; nor does he need to inform the Speaker of the House that Parliament has been dissolved. The Speaker, Deputy Speaker and Members of Parliament get to know that Parliament has been dissolved through the President's proclamation. This proclamation is published in The Malta Government Gazette.

5. Typology of Dissolution

In terms of article 76 of the Constitution, dissolution of Parliament comes in three different forms:

- (a) through a Prime Ministerial advised Presidential dissolution;
- (b) through an own initiative Presidential dissolution; or
- (c) through automatic dissolution.

5.1. Prime Ministerial Advised Presidential Dissolution

The Prime Ministerial advised Presidential dissolution of Parliament is that contemplated in article 76(1) read in conjunction with 76(5) of the Constitution where the President dissolves Parliament on the advice of the Prime Minister:

4. Article 76(3) of the Constitution provides that: 'At any time when Malta is at war, Parliament may from time to time extend the period of five years specified in sub-article (2) of this article for not more than twelve months at a time: Provided that the life of Parliament shall not be extended under this sub-article for more than five years.'

5. Anne Twomey, 'The Recall of Members of Parliament and Citizens' Initiated Elections', UNSW Law Journal, Vol. 34, No. 1, pp. 41-69.



5.2. *Own Initiative*

Presidential Dissolution

An own initiative Presidential dissolution is when the President dissolves Parliament in terms of paragraphs (a) and (b) of the proviso to article 76(5) of the Constitution. In these two cases, the President does not require any advice from the Prime Minister to dissolve Parliament but may do so on his own deliberate motion. Indeed, it would be anathema for the President to require such advice in these two situations. The two cases in question are:

- (a) if the House of Representatives passes a resolution, supported by the votes of a majority of all the members thereof, that it has no confidence in the Government, and the Prime Minister does not within three days either resign from his office or advise a dissolution, the President may dissolve Parliament;
- (b) if the office of Prime Minister is vacant and the President considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the President may dissolve Parliament;

5.3. *Automatic dissolution*

An automatic dissolution – a dissolution

ex lege mandated by the Constitution – takes place in terms of article 76(2) which establishes a maximum period of five years for the life-time of Parliament. When such five year period expires and Parliament is not dissolved – unless the eventuality contemplated in article 76(3)⁴ materialises – Parliament is automatically dissolved by command of the law: ... Parliament, unless sooner dissolved, shall continue for five years from the date of its first sitting after any dissolution and shall then stand dissolved.

6. **Presidential Refusal of a Parliamentary dissolution**

There is surely one situation where the President may refuse dissolution. I have here in mind paragraph (c) of the proviso of article 76(5) of the Constitution which reads as follows:

- (c) if the Prime Minister recommends a dissolution and the President considers that the Government of Malta can be carried on without a dissolution and that a dissolution would not be in the interests of Malta, the President may refuse to dissolve Parliament.

Whilst the President may dissolve Parliament (on the advice of the Prime Minister), this advice is not always binding. One such situation is article

76(5) proviso paragraph (c). The vexata questio – to which I shall return later – however, is whether the President may refuse to recall a dissolved Parliament.

7. **Recalling a Dissolved Parliament**

The constitutional provision in article 76(4) of the Constitution refers to a 'recall' of Parliament. It does not use the term 'resumption' or 'reconvene' or similar terminology. However a dissolved Parliament is recalled by means of a proclamation. Recall can have more than one meaning in constitutional law for it may also mean recalling of a Parliament or one or more members of Parliament by the electorate. Anne Twomey refers to the legislation of some jurisdictions which operate another form of recall, that of members of Parliament by the electorate when, for instance, one or more MPs engage in corruption or misconduct or for political or policy reasons⁵. It must nonetheless be pointed out that the Maltese Constitution does not use the term 'recall' in the sense of removing an elected Member of Parliament from office before his or her term of office expires. Recall in the context of the Constitution of Malta is a summoning of Parliament after Parliament has been dissolved for general elections.

8. When can Parliament be Recalled?

According to the Constitution Parliament may be recalled in the interregnum between dissolution of Parliament and the holding of general elections. Article 77 of the Constitution, quoted above, makes this point.

9. What Constitutes an 'Emergency'?

The President, on the advice of the Prime Minister may (not 'shall') recall a dissolved Parliament when 'an emergency arises of such a nature that, in the opinion of the Prime Minister it is necessary to recall Parliament'. The Constitution does not define the term emergency, neither in article 76 nor in article 124 – the interpretation provision. However, the Constitution does use this term in article 47. Article 47(2) defines the expression 'period of public emergency' as follows:-
(a) Malta is engaged in any war; or
(b) there is in force a proclamation by the President declaring that a state of public emergency exists; or
(c) there is in force a resolution of the House of Representatives supported by the vote of not less than two-thirds of all the Members of the House declaring that democratic institutions in Malta are threatened by subversion.

It is very clear from this provision that ordinary day-to-day governance of the state does not fall under the expression 'emergency'. Hence, for instance, the passing of legislation by Parliament to increase social security benefits or to appropriate money because a budget has not been approved, laudable as much as such legislative functions might be, do not seem to fall under the definition of emergency because the latter term 'emergency' has to be understood in the sense that something out of the ordinary (extraordinary) has occurred which is of such fundamental nature to the governance of the state. Hence there can be situations where there is a traffic accident where ten cars have collided into each other with no fatalities or human injuries. That is a case of an extraordinary event as it does not normally happen that such a type of traffic accident occurs on a daily basis. However, it is not of a

fundamental nature to the governance of the state. In such case, there is no war declared, no state of emergency, nor is there an attempt at subversion of the state. So whilst at law the term 'emergency' may be used in different circumstances, differing from motor traffic accident to the provision of aid, care or assistance to a person who has been thrown out of his tenement, the term 'emergency' as used in the Constitution is used in a different sense, in a technical sense rather than in the ordinary meaning of the term. The three meanings of 'emergency' in this technical sense are: war; state of public emergency; and subversion.

9.1. War

'War' means that Malta is at risk of losing its sovereignty, independence, unity, territorial integrity and status of neutrality and non-alignment.

9.2. State of public emergency

'State of public emergency' is not defined in the Constitution. However, a definition is afforded in article 4(1) of the Emergency Powers Act.⁶ It is there stated that the President, on the advice of the Prime Minister, may make regulations 'necessary or expedient for securing the public safety, the defence of Malta, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.'

9.3. Subversion of democratic institutions

Subversion of democratic institutions is when the three organs of state or any one of them is or might be overthrown or destroyed through illegal and undemocratic means.

Other Commonwealth countries refer to emergency in the sense of a state of war and a state of public emergency. In the case of the Maltese Constitution an emergency includes as well the third criterion of subversion of the democratic institutions. The removal of a judge from judicial office does not qualify as an emergency in the constitutional sense of the word. Nor,

for that matter, does the Constitution allow the recall of Parliament in the case of a Government who was defeated in a budget vote. In such latter case, the Constitution makes interim provisions in article 104 until a new Parliament is reconvened.

10. What is an 'Emergency'?

The Constitution does not consider all emergencies to be of the same type. It thus discriminates between various forms of emergencies. This means that there are different sorts of situations which might be classified as 'emergencies' but not all such situations qualify for an 'emergency' as understood by the Constitution. In other words, there are emergencies which do not allow the recalling of a dissolved Parliament and there are other emergencies which permit the President to recall a dissolved Parliament. This distinction is made in article 76(4) of the Constitution which does not simply contemplate when 'an emergency arises' but qualifies these terms by the words 'of such a nature that, in the opinion of the Prime Minister it is necessary to recall Parliament'. So the Prime Minister has to be able to distinguish between an emergency and a constitutional emergency. It is the latter not the former which empowers him to advise the President to recall a dissolved Parliament. The Constitution thus puts the burden upon the Prime Minister to take this decision.

Interesting enough section 47(5) of the Constitution of the Federation of Saint Kitts and Nevis 1983 allows Parliament to be summoned because of some matter of urgent national importance. In other words, no reference is made to a state of war or to a state of emergency as is the position with a number of Commonwealth countries' constitutions which emulate the British Constitution like the Constitution of Malta does⁷. The words 'urgent national importance' bring to mind the corresponding wording in the Standing Orders of the House of Representatives of 'urgent public importance' as contained in Standing Order 13 relating to adjournment on

matters of definite urgent public importance⁸. What constitutes 'urgent public importance' is more amenable to interpretation and a motion to impeach a member of the judiciary may well fall under this terminology. But the same cannot be said for a state of war or a state of emergency which are narrower in purport than 'urgent public importance'.

11. Who decides what constitutes an 'Emergency'?

At face value, it is the Prime Minister who decides what circumstance amounts to an 'emergency'. But there is no harm for the Prime Minister, should he so wish, to consult with Cabinet or with any other body or person. Hence, the Prime Minister is in his right to convene a Cabinet meeting to discuss the recalling of a dissolved Parliament.

12. Is the Prime Minister's power reviewable?

The obvious question which arises at this juncture is whether the decision arrived at by the Prime Minister, whether unilaterally or following legal and/or cabinet advice, is reviewable. Second, should it be reviewable, by whom is it so reviewable? The answer to these questions lies in article 85 of the Constitution.

13. The President's discretion – when exercisable

When article 76(4) is read alone, that is, not in conjunction with article 76(5) and/or article 85, one gets the impression that the President enjoys discretion at accepting or not the Prime Minister's advice. In reality that is so. However, in the United Kingdom, a convention has arisen that although the Monarch enjoys the power to recall a dissolved Parliament, the Monarch exercises this power on the advice of the Prime Minister. This constitutional convention has been enshrined in article 76(5) of the Constitution of Malta. The Maltese version of the Constitution is truthful to the English version as it uses the term "jista" (he may). So although in the United Kingdom this power was exercised by

the Monarch on his or her own initiative, as the Monarch's powers became diluted in favour of a cabinet system of government, the Monarch has ended up exercising such powers on the advice of the Prime Minister. This constitutional convention in the UK has moved into the text of the Constitution in Malta. This therefore means that if the President fails to take the advice s/he may be removed by the House of Representatives. However, in this scenario, the House cannot be recalled if the President does not do so and s/he might have his/her own reasons for not doing so as will be explained below.

14. Exercise of functions of President

Article 85 states the President acts in accordance with his deliberative judgment in the performance of the functions listed in article 85(1) proviso, paragraphs (a) to (c). No cross reference is found to article 76(4). The Constitution is very specific when it sets out, provision after provision, the cases where the President acts in accordance with his own deliberative judgment and article 76(4) is not included in the said list. Being a proviso, a narrow interpretation has to be given to it and therefore it cannot be argued that the list of cases where the President acts on his own deliberate judgment is by way of exemplification. On the contrary, the situation seems to be the obverse: the list is a comprehensive one.

15. The Vexata Questio

Although article 76(4) of the Constitution states that 'the President may by proclamation summon the Parliament that has been dissolved', the next sub-article seems to make a different provision:

(5) In the exercise of his powers under this article the President shall act in accordance with the advice of the Prime Minister:...

The difficulty which therefore arises is whether the President has a discretion to summon a dissolved Parliament or not. Sub-article (4) answers the question in the positive; sub-article (5) answers the question in the negative. Is

there thus a contradiction between these two provisions in one and the same article? The reply must be in the negative. I think that the 'may' in article 76(4) should be construed as a 'shall' for the following reasons:

(a) article 76(5) follows article 76(4) and article 76(5) states that it applies to article 76(b) article 76(4) is not listed amongst the articles in the proviso to article 85(1) which allows the President to act in his own deliberative judgment (c) when the President dissolves Parliament in terms of article 76(1) he does not do so on his own deliberate judgment but on the advice of the Prime Minister. In other words, the President is bound by the advice given (d) as this provision has been taken from the United Kingdom, British Constitutional Law is to the effect that the Monarch cannot refuse the Prime Minister's advice except for very grave and exceptional circumstances.

16. What if the advice is wrong?

A situation may arise where the Prime Minister, either in bona fide or maliciously, wrongly advises the President to recall Parliament. Let us take the case which has prompted the writing of this paper: Suppose the Speaker receives the report of the Commission for the Administration of Justice concerning the removal of office of Mr Justice Farrugia Sacco and suppose further that the Commission is recommending removal of the judge. Again, suppose that the Prime Minister advises the President to recall Parliament so that the House can discuss the Commission's report. The question which has to be asked here is whether the Prime Minister can advise the President accordingly. From what has been stated above, there is no case of an emergency as understood by the Constitution. So Parliament should not be convened. But, this notwithstanding, the Prime Minister might elect to advise the President to recall Parliament. What should the President do? It is clear from article 76(5) that the President should act upon the advice tendered by the Prime Minister. But it is also clear from a reading of article 76(4) that the Prime Minister should give such advice only in



the case of an emergency and the Farrugia Sacco motion does not fall under this category. There is thus an abuse of power on the part of the Prime Minister or, to put it more diplomatically, the Prime Minister might not have been advised correctly as to what amounts to an emergency. In my opinion, and as I shall explain below, the President should not take the Prime Minister's advice in such a circumstance.

17. The President's vires to discard the Prime Minister's advice

The Prime Minister can never and should never act in breach of the Constitution. If the Prime Minister still insists with the President that Parliament should be recalled and if the President thinks that such a request is not in full conformity with the Constitution, the President should not take that advice as otherwise the President would end up being an accomplice in the breach of the highest law of the land. Indeed, the Second Schedule of the Constitution sets out the oath of office of President. In that oath, the President solemnly swears that he will faithfully execute the office of President of Malta and will 'to the best of my ability preserve, protect and defend the Constitution of Malta'. In

terms of article 50 of the Constitution, a person 'appointed to or assuming the functions of the office of President shall, before entering upon that office, take and subscribe the oath of office as set out in the Second Schedule to this Constitution'. In this respect the President is the guardian of the Constitution. Having sworn to 'preserve, protect and defend the Constitution of Malta' he can never and should never act on the advice of a Prime Minister which he considers to be in breach of the Constitution. This very exceptional circumstance allows the President to act in terms of article 76(4), article 50 and the Second Schedule of the Constitution not to take the Prime Minister's advice for, which is the lesser of two evils, not to take the unconstitutional advice of the Prime Minister or for the Constitution to be breached by that person whose specific constitutional duties comprises that of preserving, protecting and defending the Constitution? Moreover, one must keep in mind the conventional status of the duty of the President in Malta (and the Monarch in the United Kingdom) to act on the advice of the Prime Minister. If that advice is, without any shred of doubt unconstitutional, then the President should exercise his/her discretion against the Prime Minister's

unconstitutional advice.

18. Can the President's decision be judicially reviewed?

The President's decision as to whether he has taken or refused the Prime Minister's advice is not reviewable in any court of law. This is explicitly stated in article 85(2) of the Constitution: Where by this Constitution the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court.

19. Commonwealth Constitutional Law

The Constitutions of other Commonwealth countries can shed light on the interpretation of article 74(4) of the Constitution. Essentially there are two trends in the Constitutions of Commonwealth countries concerning the recalling of a dissolved Parliament. The first trend is where the Constitution requires the Head of State or Governor General, as the case may be, to summon Parliament. In this case the President has no choice: it is constitutionally speaking mandatory upon him/her to recall Parliament. The second trend is



that similar to the Maltese wording of the Constitution where the term 'may' recall a dissolved Parliament is used.

19.1. Mandatory recalling of Parliament

From a comparative constitutional exercise I have carried out, I came across eight constitutions of Commonwealth countries which oblige the Head of State/Governor General to summon Parliament:

- Section 49(2) of the Constitution of Saint Vincent and the Grenadines, 1979 where Parliament must be recalled in the case of a state of war or a state of emergency in Saint Vincent
- Section 55(5) of the Saint Lucia Constitution of 1978 where Parliament must be recalled in the case of a state of war or of a state of emergency in Saint Lucia
- Section 54(5) of the Commonwealth of Dominica Constitution 1978 where Parliament must be recalled in the case of a state of war or of a state of emergency in Dominica
- Section 188(3) of the Constitution

of the Republic of the Fiji Islands the President must summon the members of the dissolved House of Representatives if there is a proclamation of a state of emergency

- Section 42(2) of the Constitution of the Republic of the Seychelles of 1993, the President shall summon Parliament if there is a proclamation of a state of emergency
- Section 47(5) of the Constitution of the Federation of Saint Kitts and Nevis 1983, where Parliament has to be summoned because of some matter of urgent national importance
- Section 57(5) of the Constitution of Mauritius where Parliament must be recalled in the case of a state of war or of a state of emergency.

19.2. Discretionary recalling of Parliament

On the other hand, there are a number of other constitutions of Commonwealth countries which use the same wording as that found in article 67(4) of the Constitution of

Malta. These are:

- Section 65(4) of the Constitution of Jamaica of 1962
- Section 61(5) of the Constitution of Barbados of 1966
- Section 68(4) of the Constitution of the Republic of Trinidad and Tobago of
- Section 60 of the Antigua and Barbuda Constitution of 1981
- Section 66(5) of the Bahamas Constitution of 1973

20. The United Kingdom Position

S.E. Finer argues that the advice of the Prime Minister in the United Kingdom is not necessarily binding on the Monarch:

In certain exceptional circumstances, however, the Queen may or must not act without the advice of Ministers...⁹

Of the same view are Paul Jackson and Patricia Leopold in the context of dissolution of Parliament when they state that:

The reason for the general convention that the Sovereign is bound by the advice of her Ministers is not applicable if they do not represent the wishes of the electorate (or the Commons).

10. Paul Jackson and Patricia Leopold, O. Hood Phillips and Jackson: Constitutional and Administrative Law, eighth edition, London: Sweet & Maxwell, 2001, p. 166. A.V. Bradley and K.D. Ewing argue that: 'the view that the Sovereign's reserve power may serve to restrain a Prime Minister who otherwise might be tempted to abuse his or her position is an argument for maintaining the reserve power as a potential weapon, not for abolishing it.' Bradley and Ewing, Constitutional and Administrative Law, thirteenth edition, Essex: Pearson Education Limited, 2003, p. 242. J.F. Northey agrees that the exercise of the power to dissolve Parliamentary is discretionary: '(1) In the exercise of prerogative powers, including the power of dissolution, the governor-general has a discretion. No government can take it for granted that their advice will be accepted. (2) The discretion is a personal one, but by convention the governor-general must act on the advice of responsible ministers. (3) Subject to proposition (4), the governor-general may reject the advice of his ministers for the time being only if there is a possibility of the formation of an alternative government which will accept responsibility ex post facto for the rejection of the advice tendered by the outgoing ministry. (4) The governor-general, as the final guardian of the constitution, may in very exceptional circumstances refuse the advice of his ministers although there is no possibility of an alternative government being formed.' J.F. Northey, 'The Dissolution of the Parliaments of Australia and New Zealand', The University of Toronto Law Journal, Vol. 9, No. 2, (1952), pp. 294-304



Among the factors that would have to be taken into account before the Sovereign could properly refuse a dissolution would be the time that had elapsed since the last dissolution, whether the last dissolution took place at the instance of the present Opposition, whether the question in issue is of great political importance, the supply provision, whether Parliament is nearing the end of its maximum term, whether the Prime Minister is in a minority in the Cabinet, and whether there is a minority government.¹⁰

21. Is it Discretionary or Mandatory power to recall a dissolved Parliament?

In the case of the Maltese Constitution and those Constitutions of

Commonwealth countries which use the term 'may', even though they require the Head of State to act in accordance with the advice of the Prime Minister, the following considerations have to be made:

- 1) Contrary to the constitutions of Commonwealth countries listed in section 19.1 of this paper; the word 'may' not 'shall' is used;
- (2) All the constitutions listed in section 19.2 of this paper follow the British model;
- (3) In the United Kingdom the Monarch has, by convention, to act on the advice of his/her Minister subject to certain exceptions. The position is that in the Constitution of Malta we have included these British conventions including that which states that the President has to act in accordance with

the advice of the Prime Minister. Having its origin in a convention implies that they are 'rules' of political practice which are regarded as binding by those whom they concern – especially the Sovereign and statesman – but which would not be enforced by the courts if the matter came before them. The lack of judicial enforcement distinguishes conventions from laws in the strict sense and this point is made in article 85(2) of the Constitution: 'Where by this Constitution the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court';

(4) Although conventions in the British Constitution are not written down in

11. In terms of article 76(3) of the Constitution, 'At any time when Malta is at war, Parliament may from time to time extend the period of five years specified in sub-article (2) of this article for not more than twelve months at a time. Provided that the life of Parliament shall not be extended under this sub-article for more than five years'.

law, in the Malta they are written down in the Constitution but still they are unjusticiable in terms of article 85(2) of the Constitution.

22. How to reconcile article 76(4) and (5) with regard to the power of the President to recall a dissolved Parliament

All things being equal, the President should act on the advice of the Prime Minister. That is what the Constitution states and that is what the President should do. One must bear in mind that here we are implementing a convention of the British Constitution. But there might be an exceptional circumstance where the President would have to act otherwise.

23. Does a British Convention incorporated into the Constitution of Malta stop the President from rejecting the Prime Minister's advice to recall Parliament?

If the President is of the view that what is being asked of him by the Prime Minister, that is, to recall a dissolved Parliament in the interregnum between dissolution of Parliament and a general election, does not comply with the provisions of the Constitution (in other words there is no emergency), then the President has a constitutional duty to preserve, protect and defend the Constitution and should not take the Prime Minister's advice. His guardianship of the Constitution is of paramount importance to any other duty which the President might have under the Constitution or under any other law. This overriding power to preserve, protect and defend the Constitution is lifted from the wording of the oath of office of the American Constitution found in Article II, Section I, which runs as follows:

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States. The oath of office which the President of Malta subscribes to, as contained in

(a) Oath for the due execution of the office of President.
I..... solemnly swear/affirm that I will faithfully execute the office of President (perform the functions of the President) of Malta, and will, to the best of my ability preserve, protect and defend the Constitution of Malta. (So help me God).

The powers given to the President when s/he subscribes to the oath of office is a complete departure from British Constitutional Law and this factor should be given its proper weight. Within a British context, the Monarch has to follow the advice of the Prime Minister. But the United Kingdom follows a cabinet system. In the United States, the President carries out the functions of both Monarch and Cabinet within a cabinet system of government. The American system is a Presidential system of government where it is the President who is the chief executive of the state. As within the American system, the President musters most powers, he has, in terms of the Constitution of the USA effective powers to preserve, protect and defend the USA Constitution. These powers are listed in Article II of the Constitution of the United States of America. Very few people, if at all, probably realise the great departure from British Constitutional Law has this oath of office provoked within Maltese Constitutional Law. Through the oath of office of President, the latter can constitutionally speaking refuse to receive the Prime Minister's advice if this advice does not comply with any provision of the Constitution. So whilst there is no power in the Constitution for a court to judicially review the Prime Minister's advice to the President, the President – in his/her function as guardian of the Constitution – exercises a supervisory role over the Prime Minister and, through this overarching fundamental duty, may refuse the Prime Minister's advice if the President considers that advice to run counter to the Constitution. The Constitution is therefore supreme and the Prime Minister is not above the law. Whilst in the period between independence and republic, the Governor-General had to act on the Prime Minister's advice, this situation has

changed drastically following republic day. This is because when the President acts to preserve, protect and defend the Constitution s/he does not need the Prime Minister's advice to do so and might even have to refuse the Prime Minister's advice to preserve, protect and defend the Constitution. Of course, the next question which has to be asked is whether the President does have the power to stand up to the Prime Minister. One must bear in mind that the President is appointed and removed by a simple majority vote on a resolution of the House of Representatives. On the other hand, if Parliament is dissolved it is impossible for the Prime Minister to seek to remove the 'misbehaving' President as the Prime Minister can request the House of Representatives to remove a 'misbehaving' President only when Parliament is sitting.

24. Conclusion

It can be concluded that for a Prime Minister to advise the President of Malta to recall Parliament, there must be an 'emergency'. In Commonwealth Constitutional Law, an emergency means a war¹¹ or a period of public emergency. The same position obtains in Malta as well although in our case there could also be the threat of subversion of democratic institutions in Malta in addition to war and a state of public emergency which can lead to a constitutional emergency. A report from the Commission for the Administration of Justice to remove a member of the judiciary, however serious the recommendations in that report might be, does not give rise to a constitutional emergency as defined in this paper and thus cannot lead to the recall of Parliament in the interregnum between the date of dissolution of Parliament and polling day.