

COMMENTS AND LETTERS

Powerless president, powerful cabinet

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I refer to Judge Dr Giovanni Bonello's contribution entitled 'Presidential pardons: anything but presidential?' (Times of Malta, May 30, 2024). I endorse some of his criticisms but beg to differ with his interpretation of the constitutional provision relating to the prerogative of mercy that vests decision-making powers exclusively in the head of the Executive on two counts.

First, the historical interpretation:

The Maltese constitution is a British colonial constitution. Made in the UK as a statutory instrument, it emulates in large part English law, and over the past 60 years has remained by and large so. It is not home grown (autochthonous), nor the result of a Maltese constitutional convention. It reflects British legal cultural values of 1964.

Being a 'British', not a Maltese-made constitution, following the convocation of a constitutional convention, it must be interpreted with reference to its main source – English law. From the perspective of UK law, the 1964 Constitution of Malta is not even a primary law (an Act of the British Parliament) but simply a subsidiary law made thereunder.

For us, it is the fundamental, British-imposed law of Malta! More colonial than that it cannot be. The constitution is not neo-colonial but postcolonial, being an uninterrupted continuation of colonial times post-independence.

In the UK, the prerogative of mercy is exercised by the monarch on the advice of an elected government. Gone are the days of absolute monarchical rule. The modern rules of parliamentary democracy dictate that in a democratic constitutional monarchy, the monarch, an unelected sovereign, acts on the advice of elected ministers when remitting punishments.

Before the advent of parliamentary democracy in the UK, the monarch was sovereign and administered the prerogative of mercy unadvised. All the three powers of the state (legislative, executive and judicial) were vested in the monarch. That is why it is called a 'prerogative', a monarch's power.

But absolutism has been considerably mitigated by the emergence of par-



Prime Minister Robert Abela and President Myriam Spiteri Debono.
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liamentary democracy such that the so-called 'prerogative' has since then transmuted itself to obligatory advice that the monarch is constitutionally bound by and expected to follow.

This modern British constitutional convention (or practice), like several others, has been codified in the (Maltese, or should I say 'British imposed') Constitution of Malta. This is also the constitutional law and practice of several other Commonwealth countries that, like Malta, have swallowed the British model hook, line and sinker.

Second, the rules of statutory interpretation:

The rules of statutory construction dictate that when a provision is clear, it should not give rise to interpretation. Article 85 states that in "the exercise of his functions the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet".



The time of monarchical absolutism has been dead and buried by parliamentary democracy for quite some time now

Article 85 then lists a few cases where the President acts on his/her own initiative, that is, without the need of Cabinet's or a Minister's advice. The provision regulating the prerogative of mercy (Article 95) is not one of these exceptions and, thus, the President cannot act on his/her own initiative. To do so would be in breach of the constitutional convention.

Hence, the constitution is clear. Not only is it clear but it has been so consistently applied over the last 60 years; it is the exact position obtaining in the UK; and it is also the carbon copy position in those Commonwealth countries that follow (like Malta) the British model. The president, therefore, is constitutionally bound to act on the advice of the cabinet/minister in all cases related to a prerogative of mercy and has no choice in the matter.

It must be remembered that the president is an independent officer of the state only in those very few limited exceptional cases listed in Article 85. To broaden this list would defeat the whole democratic system and hark back to absolutist historical times. The president, in a parliamentary democracy, must consequently comply with the elected government's advice.

Indeed, according to Article 78(1) of the constitution, the "executive authority of Malta is vested in the President". Hence, the president is the head of the executive. But, in terms of Article 78(2), in full adherence to the principles of parliamentary democracy, the "executive authority of Malta shall be exercised by the President, either directly or through officers subordi-

nate to him, in accordance with the provisions of this Constitution".

Few and far between are the instances where the president exercises executive powers on his/her own initiative. Indeed, the cases where the president exercises the executive authority directly are divided into two categories: those where s/he acts on the advice of cabinet or a cabinet minister (the vast majority of cases) and those where s/he acts unadvised (a handful of cases exhaustively listed by the Constitution in Article 85).

It is an established principle of constitutional interpretation that the constitution – like all other laws – must be interpreted as one document. Article 93 cannot be read in isolation from all the other provisions of the Constitution, such as articles 85 and 78.

To conclude:

I totally agree with Judge Bonello that (a) presidential pardons are only presidential in name in the sense that they are only signed by the president but decided elsewhere by cabinet or a cabinet minister; (b) Cabinet or a cabinet minister are constitutionally authorised to meddle to their heart's content in criminal justice; (c) Cabinet or a cabinet minister constitute a final quasi-judicial review layer over the criminal courts and that these members of the executive impeccably fail (contrary to the courts) in administering justice according to due process of law; and (d) that the constitution establishes the office of president (in relation to the prerogative of mercy) as a "futile and hollow robot". I have no qualms with these assertions.

That said, however, I do not agree that the solution to this conundrum is to grant to the head of the executive – the President of Malta – the unfettered, absolute, judicially unreviewable discretion to decide upon prerogatives of mercy. The time of monarchical absolutism has been dead and buried by parliamentary democracy for quite some time now.

I do not relish the idea of going back to the times of the grandmaster of the Sovereign Military Order of St John who was nothing more and nothing less than an unelected dictator.

What is, however, needed is a rethinking of the constitutional provision whereby the prerogative of mercy cannot give rise to executive abuse – whether that abuse is vested in an unelected presidential or an elected ministerial officer of the state.

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