



Respectful of the Creator of the universe and His abundant blessings,

we do ordain

by this Constitution a Republic by, for and of the people of **Malta**
founded upon respect for human rights,
the human family, and
the fundamental importance of human labor in service of the peace and comfort of all.

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To be invited here today as a friend and scholar -- and I need to emphasize strongly **not** as an Ambassador since it would be highly irregular for the diplomat of one country to comment on another nation's constitutional make up -- is an extraordinary privilege and honor. With that prefatory note, I thank President Abela for his invitation to return to Malta for this brief visit which I accepted immediately lest he change his mind. In the research, I have learned as much or more about the nooks, crannies, and crevices of the American charter needing sprucing up as I have been able to identify any matter needing improvement in your own.

I. **Parliamentarianism v. Presidential Separation of Powers - General U.S.-Malta Comparisons**

Malta has chosen the path of Westminster parliamentarianism whereas our history commended a model premised upon the separation of powers, including the invention of a presidential office for which there was no template in 1787. Our president was to have both “energy and dispatch”; the president’s domestic authority was largely left to be defined by the Congress vis a vis the implementation of legislation. Presidential foreign affairs authority was expressly provided for appointing and receiving ambassadors, negotiating treaties, and serving as Commander in Chief of the military.

Measures of Accountability

The assumption is that reform is only warranted if it accentuates either the avoidance of tyranny (concentrated power) or accountability (efficiency) or both. Echoing Montesquieu, our founders believed that tyranny could only be avoided by dividing power, and in particular separating the executive from the legislative. By contrast, the parliamentary system leaves executive and legislative power united. Our President is elected for four year terms with a two term limit. Your prime minister and cabinet remain in power as long as they can retain the support of the equally democratically elected cabinet ministers, though they are obligated to face election after no more than five years. In both systems, executive actions can be the basis for justiciable claims before a constitutional court. In the United States, however, to have a justiciable claim against executive decision making, a person must suffer a discrete injury in fact, caused by the executive and capable of being remedied by the Court. These formidable limits on standing preclude the U.S. court from hearing complaints from individuals with generalized grievances (e.g., Taxpayers alone, whereas, Malta’s paragraph 46 would seem to confer wider jurisdiction for the courts to check the executive.

To assess accountability, it is also necessary to discern the public attitude toward government; is government a “necessary evil” that should be deployed sparingly or is it a form of community where it is a prominent means of achieving the common good.

In Malta, and much of Europe, there is a deeper acceptance of public-private collaboration where there is a desire for public responsiveness, rather than getting government out of the way. In these terms, it is fair to see President Obama as more European than many Americans have been in the past. The President sees government as a form of community, and a prominent means by which to secure the common good.

The European perspective has been gaining in the U.S. in the shadow of the massive corporate fraud that contributed to the financial breakdown of 2008, a mal-distribution of wealth, and recent Supreme Court opinion facilitating even greater corporate influence on election campaigns. There is growing concern that elective office in America is today the province of the wealthy and the friends of the wealthy. Period. Full Stop. Should this belief continue to erode the public’s trust, the United States would be flaunting the wise advice of Aristotle that democracy would fail without a vibrant middle class.¹

Control of the Bureaucracy

The U.S. Constitution directs the President to “take care” that the laws are faithfully executed. Domestically, the President has few inherent or implied powers beyond his executive oversight and direction of the cabinet agencies that the Congress has determined should exist to assist him. There is an on-going debate over the extent to which the executive is “unitary” and thus fully answerable to presidential direction. Congress has created a dozen or more specialized agencies, for example, the Federal Communications Commission (FCC) dealing with broadcasting and communications over which the president has only qualified authority. These so-called “independent” agencies are often in the form of commissions and the commissioners who, while nominated by the president, can only be removed for cause. This tenure protection was contemplated as a means of ensuring objectivity, but it can just as easily mean a governmental body captured by the industry it regulates and thus less accountable to the public interest.

¹ It is a warning President Obama understands, but even he has found it necessary to raise corporate funds through the so-called super-PAC (a political action committee which is nominally separate from the candidate, but with curious regularity seems to spend large amounts of money “coincidentally” where candidates need it most).

The President has great latitude in foreign affairs and presidents have, for better or worse, exercised that discretion with respect to military matters. The president is denominated the Commander-in-chief, and this has meant over 200 military interventions without a formal declaration of war.

While Malta's neutrality provision means there is little similarity between Malta and the U.S. in terms of military matters, the foreign minister or Deputy Prime Minister would appear to exercise day-to-day discretion in the conduct of foreign affairs, though as a practical matter, it is the Prime Minister's judgment that is definitive. In this sense, the Deputy Prime Minister or foreign minister is the equivalent of our Secretary of State, whose judgment in foreign affairs prevails, subject only to the President.

Formal Checks and Balances

The three branches of government in the U.S. were intentionally designed to overlap, revealing the justification for the framers' reliance upon procedural checks and balances, rather than substantive and inflexible definitions of authority, to preserve their tripartite structure. These checks and balances are well-known. They include the President's ability to veto legislation and Congress' countervailing authority to override that disapproval with the concurrence of two-thirds of both Houses of Congress. The judiciary is checked by Congress' ability to determine the kind of cases which may be brought to court, and even, with the exception of the Supreme Court, to eliminate the federal courts altogether. Judicial authority is also bounded by the practical willingness of the executive to enforce judicial decisions. In turn, the courts have the final word with respect to the propriety and constitutionality of both executive decisions and legislation.

Executive-Legislative Interaction

Over our history, divided power has been a safeguard against the abuse of power. Today, however, voters tend to perceive only the day-to-day tension of divided government, where one political party holds the White House and the other one or both of the Houses of Congress. In this regard, this tension is greatest between the executive and the legislature, and has been on display between Barack Obama and the Congress for most of the last four years, but particularly since the President's party lost the House in 2010.

Adversarial Attitude Defeating a "Workable" Government

An overly adversarial attitude, which insists upon a precise demarcation of powers thrives on a level of confrontation which neither is in keeping with the

intent of the framers nor is necessarily conducive to good government. As the late Justice Robert Jackson observed that “while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

The adversarial attitude has not prevented questionable executive decisions premised upon questionable facts in military matters.²

As noted, our system has separate but overlapping power. The overlap is calculated to advance accountability by allowing ambition to check ambition, and by that means limit any overreach of executive power would be met by a counter-move by the legislature and/or the court. Judicial process did result in the condemnation of extreme forms of interrogation and the nominal reaffirmation of the writ of habeas corpus, but quite obviously, it did not avert either executive misstep or guard against legislative complicity in its subsidy. Instead, the politically adversarial attitude spawned the appointment of multiple independent counsels³ and saw a legislative effort focused on the personal imperfections in presidential character⁴ or worse, to make unlawful the sparring that was constitutionally intended by the separation of powers between the executive and the legislative branches.⁵

² The war on terror was and is costly to America; the initial destruction of the trade center and the financial center took several thousand lives and imposed massive financial losses; the subsequent war in Iraq resulted in the deaths of close to 4500 U.S. citizens and an equal or greater number of Iraqis; billions have been spent in both Iraq and Afghanistan to build respect for the rule of law and basic principles of civil order which is an imperfect science at best, especially when the stress of combat at any moment has the capacity to undo years of careful and respectful teaching.

The Presidential decision to involve us in Iraq and Afghanistan did not cause the financial breakdown of 2008, but the costs and concentration of the government on these areas certainly lessened our ability to be responsive to its after effects. Resources were also less available because of presidential decisions to involve us in military conflict to address environmental and climatic conditions that warrant global attention, and at home, left far fewer dollars for education, health care, assistance to homeowners losing their family homes in mortgage foreclosure, and much else.

³ The independent counsel law attempted to address what is perceived as anomalous; namely, that a criminal prosecutor is by definition an executive official, and it is unclear how the executive can fairly investigate, itself. Because both sides saw the independent counsel law being used as a political weapon, the law was allowed to lapse.

⁴ In this category many would place the unsuccessful attempt to remove President Clinton for attempts to shade the truth under oath about a marital affair in the context of civil litigation by a private citizen for sexual harassment.

⁵ This category would include prosecuting those who assisted President Reagan in seeking outside assistance from foreign leaders in support of the freedom fighters in Nicaragua when Congress limited U.S. funds for that purpose.

Before turning to examine the Malta Constitution it is worth noting that the concern with an overly adversarial attitude undermining the separation of powers in the United States is longstanding, as our first president, George Washington, warned against it. Washington's prescription was to rely upon religion and morality⁶ to unite the country and to expressly disavow political parties.⁷ Political parties are not an express part of the U.S. constitutional system though no one has demonstrated a sufficient alternative by which to organize competing thought and philosophy for consideration by the general voter.⁸

II. The Malta Constitution – An American Look from the Backbench

Having outlined the general structural contours of our two systems, and the unhappy advent of adversarial attitude of divided government in the U.S., the focus now shifts to Malta. Recently, there has been backbench call “for much-needed reforms of the Constitution and the institutions which provide for effective democracy.” While the expressed dissatisfaction may have much to do with intra-party politics to which I have no comment or special insight, a portion of the backbench criticism is formulated in the vocabulary of accountability, and this can be assessed in terms of comparative constitutional structures.

⁶ Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . Let it simply be asked: Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

⁷ “Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party, generally. . . . The common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.

It serves always to distract the Public Councils, and enfeeble the Public Administration. It agitates the Community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foment occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions. Thus the policy and the will of one country are subjected to the policy and will of another.

⁸ Is there a realistic alternative to the party apparatus? While social media can ignite protest, can it also structure the policy vision necessary to sustain a government?

Accountability and the Cabinet Minister

As for the accountability of ministers, the American model seeks to make the president's principal officers fully answerable to him and subject to his removal at will. The Malta model seems similar. Ministers and parliamentary secretaries are appointed by the President upon the advice of the Prime Minister, and are removable in the same way. There is no limit to the number of ministers in either of our countries, though there clearly is a limit among the populace that tends to run against the over-bureaucratization of function. Caution should always be exercised in the creation of new departments since they only entrench and get larger.

Independent Agencies Reduce Accountability

In the U.S., accountability is generally enhanced by not fettering the removal of a cabinet officer; not giving the officer separate budget authority, but instead having the budgets of the various departments coordinated with an overall or master budget; and by requiring cabinet officers to disclose and coordinate their respective regulatory programs through a centralized office of regulatory affairs. This is the *unitary* executive model, and while it runs some risk of abuse, its advantages for accountability far outweigh the independent agency model. To the extent cabinet or commission officials are given fixed terms and removal protections, they are no longer answerable to the head of government and the ability of the electorate to hold the incumbent responsible is reduced.

There are one or two unique places where formal detachment from the Prime Minister is arguably sound, and Malta provides for the independence of the Attorney General in the exercise of his prosecutorial judgment. To this no categorical objection is raised, but it is important that Malta be on guard for the "independent counsel" disease that has beset America. Where the Attorney General deserves a wide berth is on the rooting out of corruption – that is, waste, fraud and abuse. It would be good for the majority and opposition parties to define that scope with reasonable precision outside the Constitution.⁹ I am not making light of your Attorney General's integrity function or the one anticipated for our Inspector General. Nothing destroys faith in government faster than allegations of corruption or kick-back. It is just that it is wrong to portray as corrupt any policy with which one disagrees.

⁹ See Douglas W. Kmiec, *Lift Up Your Hearts* 228 n.31 (2012) (referencing an opinion of the Department of Justice dating back to 1989 from your commentator finding the Inspector General (IG) to have failed to observe this important distinction.). In the recent Malta matter, IG responsibility was not to opine on the importance of my faith or that of others when the president made that his "special logic for appointment," but to ensure that no one was walking off with classified materials or the embassy furnishings

III. Would Malta find greater accountability under a presidential model?

It seems unlikely; to grasp why that is, one need merely ask the question: how many elections does it take to effectively exercise responsible authority? If the answer is one, you're in Valletta; if it is more than one, Washington D.C.

The difficulty of divided government

In the U.S., it is increasingly typical to have the presidency held by one party and the Senate or House or both by the other. The nature of the parliamentary system avoids this difficulty which is a profound one in America. Just consider how the U.S. was pushed to the brink of default in summer 2011 because of the impasse of divided government over raising the deficit ceiling.

Divided government hinders presidential operations both domestically and internationally.¹⁰ Refusing to hold hearings on presidential nominees, or greatly delaying them, can mean the President is effectively precluded from performing his constitutional duty to enforce the law. If the President is blocked from enforcing existing law, he is certainly unlikely to succeed at a major reform of, say, the tax code or a controversial extension of health care benefits or the encouragement for non-carbon – based fuels? You see the difficulty.

Presidents facing divided government attempt unilateral action by creatively construing existing law to authorize an action by executive order. There are limits to these presidential assertions, and a failure to conscientiously observe these limits reduces government accountability.¹¹

The best hope one has in a presidential system with divided government is for the general public to convey electorally that they do not want their representatives to act like spoiled children. Unfortunately, this message is lost when the general public itself gathers in tea parties and left-ward equivalents

¹⁰ It was this division which greatly delayed the confirmation of my successor. Ambassador Ambercrombie-Winstanley received a Senate vote and her approval by voice vote on March 29, 2012, after being nominated in October 2011. The President, however, had to make controversial recess appointments to fill vacancies in the new consumer affairs office as well as the National Labor Relations Board.

¹¹ The Office of Legal Counsel, a position I once occupied is intended to keep these orders within reason, but presidents are formidable political actors and it takes special courage to tell a president and usually a chorus of political advisors, “no.”

huddled off into their respective corners, listening to separate political programming, and never thinking of pragmatic ways to find common ground.

Civil Service accountability - the problem of serving Two Masters

In a presidential system, civil service or career officials can find themselves answerable to two fundamentally opposed ideologies. The unity of the executive and legislative under the direction of the Prime Minister avoids this dilemma in large part. One author put it this way:

American bureaucrats, to a degree unmatched elsewhere, are responsible for shoring up their own bases of political support. . . [N]either protected by anonymity nor clearly serving a single master, American bureaucrats must find allies where they can. . . . To be sure, bureaucratic politics, properly understood, exists everywhere. But outside the United States the game typically is played with a narrower range of actors and a far more determinate, if not wholly definitive, set of rules. Bureaucratic politics in Europe typically is episodic; in the United States it is ceaseless.¹²

The Value of a President as Head of State

Before turning to a few suggested areas of more technical improvement for the specific parliamentary model in Malta, let me end this discussion of its relative advantages over the presidential model by saying a few nice things about your president, His Excellency George Abela, as head of state.

Now I would be fond of your President if he was only a football enthusiast, who he is, a devoted son, husband, father and grandfather, who he is also, and not someone privileged by his nation to symbolize the body politic. That said, the value of having a separate head of state in these times of hyper-division and incivility cannot be understated. The ability to have someone in your midst capable of rising above faction, beyond normal political calculus, giving attention to the charitable heart of this “uncommonly kind” and uniquely special place should never be taken for granted or thought insignificant.

IV. Technical Matters for your consideration

Is it Readable?

A chief technical concern with respect to the Malta constitution is not its substance, but its organization and clarity. For government to be transparent and accountable, the general citizenry must have a functional sense of the actual wording of the Constitution and its applicability to their vocational pursuits and individual lives. The Maltese Constitution has many fine aspects

¹² Joel D. Auerbach, Robert D. Putnam & Bert A. Rockman, *Bureaucrats and Politicians in Western Democracies* 95-96 (1981); cf., Bruce Ackerman, *The New Separation of Powers*, 113 *Harvard L. Rev.* 642, 703 (2000) .

to it, but accessibility is not one of them. It is a lawyer's document insofar as it would not be the type of document one would expect the general population to be capable of digesting. Yet, accessibility and understanding is indispensable to the long-term stability of government. Accessibility is also advanced by limiting redundancy. Reform should reduce the number of words as well, so that there might be less opportunity for misconstruction.

Less Legalism – A preamble to inspire

The Malta constitution has no real preamble; it deserves one, perhaps like the one appearing on the cover.

Reorganization

In keeping with an inspiring, unifying preamble, consideration might be given to reorganization: religious acknowledgment and freedom, human rights, family, and work constitute the nation's essential commitments and arguably should go first. The document would finish out with descriptions of the Office of the President, the composition and procedures of Parliament, the Office of the Prime Minister, the Judiciary, and finally, the statement of neutrality and the supremacy of the Constitution.

A good portion of the present document could be reduced in word volume, with many details placed in a separate constitutional code.¹³ By contrast, the functions of the local governments seem largely undefined in Chapter XA, paragraph 115A. The U.S. system divides power both horizontally and vertically, and while this may reflect the prior and continuing sovereignty of the States, it also allows for regulatory competition as well as for competing experimentation in the delivery of public services. This is an aspect of quasi-federalism that Malta might consider incorporating.

¹³ E.g.,

The Death Penalty is Abolished, Right?

Paragraph 33 declares that “no person shall intentionally be deprived of his life save in execution” of the sentence of a criminal court. The policy against the death penalty being firmly fixed, the suggested reform here is erasure.

Clear statement of human rights without redundancy

There are three listed categories of rights in Chapter IV: (1) life, liberty, personal security and property enjoyment; (2) freedoms of conscience, expression, assembly and association, and (3) respect for private and family life. Each of these is appropriately limited by the reciprocal observance of the rights of others, and that is all that need be recited. life as enemy. For the benefit of all, Malta's uniquely courageous and powerful voice in the defense of all human life would be a faith witness to be applauded

Work as Fundamental Pillar

It is noteworthy that Malta has identified work as one of its fundamental pillars of the Republic. Given the significance of the Catholic faith to the history and continued well-being of Malta, you might draw upon Catholic encyclical writing for a more prose-like discussion of this aspect and even introduce something important: namely, that work is for the person; the person is not for work.

Update Neutrality

The neutrality provision beyond its relocated placement needs updating especially with reference to the provision dealing with shipyards which seems gratuitous and not in keeping the general understanding of what neutrality requires. The reference to “two superpowers” is out of date.

Persons over Property

The defense of the right to life can also be strengthened by giving less constitutional sanction to the use of force to defend property. Property crimes are adequately and appropriately dealt with in criminal code, not basic charter, and paragraph 33(2)(a) warrants re-examination to the extent it suggests the taking of life is excused, or can be, by defense of property.

The Family

Given the significance and importance of family to Malta, it is surprising not to find a battery of provisions acknowledging its importance. To be sure, many of the economic matters in Chapter II relate to the family, including education, rights to work, and labor conditions, but Malta again has a unique opportunity to strongly affirm as important much of what the world has forgotten; namely, that family is the first vital cell of any civilization.

The Family & Equal Gender Opportunity

The protection of the family should not however be construed to derogate from the equal rights of women in paragraph 14, which is well stated, though I suspect perhaps not as fully enforced. It is wrong for any society to exclude women from the economic life of the nation, and this seems doubly true where the enjoyment of the work of society, be it in the public or private sector. However, for equal opportunity to be compatible with the interests of family, business firms need to pay a family wage, arrange work hours more flexibly with parental duties, and it should be a general assumption that both men and women desire to play a role in both the marketplace and childrearing. f

Catholicism and Religious Freedom

Malta has an established faith and guarantees of freedom of conscience and expression. (paragraphs 40 & 41). These guarantees are limited by the need to preserve public decency and order, but are not in the least hindered by the designation of Roman Catholicism as “the religion of Malta,” as is provided in Chapter I (2). These provisions ought to be placed together. The special place of religion in Malta places it in a leadership position, since it can be both an exemplar for the EU as it struggles with secularism and an example for Arab nations as to how particularistic claims can be accommodated without coercion.

An Independent Judiciary Under the Will of the People

Judicial independence is secured by removal protections in both Malta and the U.S. Malta has less capacity to address “judicial activism,” which under the American charter can be met by legislated exceptions to the appellate jurisdiction of the courts (at least, preventing prospective enlargement or entrenchment of judicial misconstruction). It is not clear that the Malta constitution allows for a comparable power of legislative exception as a check on judicial over-reaching. Another possibility would be a referendum call which would preserve the status quo as against alleged judicial invention until a confirmatory super-majority of the citizenry could decide the matter.

Judicial Delay

A very practical concern in any judicial system is delay. In the United States, the federal speedy trial act, with limited exceptions for defense pre-trial motions challenging the sufficiency of the evidence, specifies that a trial is to commence within 70 days of arraignment. By contrast, it would appear that criminal proceedings have been delayed sometimes years in Malta. This has been of concern to the Malta judiciary, itself. In this area there is an oddity in the Malta judicial practice – at least from the vantage point of the separation of powers. Specifically, in the US, it would be a conflation of the executive and judicial roles to assign judicial officers a role in the police investigation – a role that magistrates report they do not feel well suited for and almost always adds to delay.

Amendment

A constitutional amendment procedure should be clearly specified in the constitution: the process should be difficult to signify the importance of the constitution as basic charter.¹⁴

¹⁴ Reflective of the idea of the constitution as a basic law or charter, our constitution has been amended only 27 times. Since the culmination of reform is often amendment, the Malta constitution should provide a clearly stated means of amendment. Were that means to follow the U.S. approach, an amendment proposal could originate by a substantial vote (say, 2/3ds) in either Parliament or a commission made up of delegates elected solely for the purpose of drafting and debating amendment proposals and then presented to the people for ratification again by significant fraction (say, 3/4ths of the people voting). Amendments should not be easy, but they should be directly approved by the people.

A Concluding Clerihew

Let me conclude, having abided more by Father Peter's clock than not, by expressing the hope that what has been written here proves to be useful. As indicated, in my judgment the parliamentary model you have followed has much to commend it. The suggested areas of constitutional improvement are few in number, but worthy of your attention.

Shortly before I left in defense of President Obama's assignment of inter-faith diplomacy, Father Peter gave a thoughtful interview in the *Times* in which he regretted my early, but principled, departure. There has not been a day when I have not had equal regret. Father Peter put it in clerihew terms:

Douglas Kmiec
Got a tweak.
It did not please
Many Maltese

Let me return the favor:

Father Peter Inglott
Hit the spot.
But friendship with this U.S. fella
Would be kept intact by George Abela

It is a friendship I deeply treasure, and I hope these comments prove to be useful.