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Comments on the Report of the Commissioner for Standards in Public Life
(Case Number C/002)

The Exclusion of Members of the House from the management of bodies corporate established by law:

Historical Evolution

The exclusion of Members of the Legislative Assembly, and later of Members of the House of Representatives, from being appointed members of Boards of public corporations (bodies set up by law to perform a public purpose function and having no shareholders) pre-dates independence.

For example Article 3 (6) (a) of the Electricity Act, 1963 excluded members of the Legislative Assembly from sitting on the Electricity Board.

This appears to have been maintained as a rule with a few exceptions which are probably related to the nature of the Board concerned. For example, the Malta Board of Standards Act, 1965, did not contain such a prohibition.

On the other hand, Ordinance XXXII of 1947 on the Constitution of the Royal University of Malta provided that the Council of the University had to include six members elected by the Legislative Assembly from among its Members through a single transferable vote. This was also retained in Ordinance XXIII of 1961 which amended that Ordinance.

That being said, the Malta Development Corporation Act, 1967 (article 5 (1) (a)), the Central Bank of Malta Act,1967 (article 11 (1) (a)), the Telemalta Corporation Act, 1975 (Article 6 (a)), the Housing Authority Act,1976 (Article 6 (2) (a)), the Enemalta Act, 1977 (Article 7 (a)) and the Public Transport Authority Act, 1989 (Article 3 (4) (a)), to mention some key examples, include the said prohibition.

The practice of excluding members of the House does not seem to have been always consistent. For example the Accountancy Profession Act 1979, the National Tourism Organization Act 1983, and the Malta International Business Activities Act 1988, did not contain such a prohibition whilst the Employment and Training Services Act 1990 contained a prohibition in respect of the Board of the Employment and Training Corporation (Article 7 (1) (a)) but did not impose such a prohibition on Members of the National Employment Authority.

It can therefore be concluded that Maltese laws generally include this prohibition, but not in a constant and absolute manner. The activity of the public corporation (e.g. regulator, supplier of essential services, quasi-commercial operator, a representative body of public and private interests in a particular sector (for example tourism) or a technical or educational body) and the administrative and political climate in which such entity was formed certainly influence the legislator's decision on whether such a prohibition is to be maintained or not.

Exclusion from Public Offices or from employment or appointments in the Public Sector

The fact that parliamentarians are not precluded from holding gainful employment or other activities is not particular to Malta. For example, in the UK this is also permitted and it is only certain jobs and activities which are prohibited. The situation under the Maltese Constitution is modelled on a similar framework: there is no general prohibition but a prohibition from carrying out certain types of jobs and activities specified in the law or the Constitution.

Ultimately, a member of parliament renders account of his income and his assets in the respective declarations which he is obliged to make from time to time.

Official Appointments

The prohibition of a public officer from being a Member of the House of Representatives is enshrined in article 54 (1) (b) of the Constitution but that prohibition is not absolute since it includes the possibility that Parliament may provide otherwise. In fact, this was done through the Members of Parliament (Public Employment) Act (Chap 472) which was passed by Parliament on 10th August 2004.

Apart from that Act, article 54 (3) of the Constitution provides that a person shall not be treated as holding a public office if (a) he is on leave of absence pending relinquishment of a public office or if (b) he is a teacher at the University of Malta who is not by the terms of his employment prevented from the private practice of his profession or called upon to place his whole time at the disposal of the Government of Malta.

In theory these laws enable all the Members of the House who are not Ministers, Parliamentary Secretaries, Leader of the Opposition or Speaker, or a substantial number thereof, to be public servants provided that they are not in a salary grade of scale 5 or upwards or members of a disciplined force, or if they are covered by Article 54 (3) of the Constitution.

Therefore, although the principle is that anyone who is a public official cannot be a Member of the House of Representatives, the Constitution gives broad discretion to Parliament to derogate from this principle and even the Constitution itself derogates from such principle in the case of persons who are about to retire from the public service and of multi-active persons who at the same time teach at the University, are employed by the Government, freely exercise their profession and are Members of Parliament.

The Members of Parliament (Public Employment) Act (Chap 472) envisages situations where a public officer is elected to Parliament and nowhere does it refer to the situation where a Member of Parliament becomes a public officer. However, nowhere is it stipulated that a Member of Parliament, naturally after having been elected, cannot take up public employment, which allows him to sit in Parliament under Chapter 472 or Article 54 (3) of the Constitution. Maltese law in this respect is much less restrictive than

English law on the prohibition of public officials from sitting in Parliament. This probably derives from the need for more participation and broader representation in Parliament which the legislator identified at a certain time.

The right of a person to participate in politics is basic in a democratic society and should not be restricted without real and objective justification. In some countries, for example in the Netherlands, even a member of the judiciary can be elected to Parliament since this is considered to be a right of every citizen. On the contrary, in the UK there is an express prohibition against this.

Any consideration as to whether by the engagement or employment of Members of the House in the public sector the Constitution is being violated or whether this is "contrary to the principles on which the Constitution is founded" should also appropriately be made against this background.
One may also consider that the argument to the effect that if a Member of Parliament is paid by the Government, he is being placed in the near-impossibility of being able to vote against the Government, despite holding certain validity, may also be rather exaggerated in its importance. People who come forward to run the country and who, at their sacrifice, step into the political arena should be considered to be, at least, a little more credible than that. One should be cautious of arguments based solely on finances and on the assumption that money prevails over principles. On the basis of the same logic one can also argue that a substantial increase in the honoraria of Members of Parliament can also reinforce their obedience and their subservience to the leadership of their parties (since the Member of Parliament would have more to lose) and, in the case of the party in government, to the Government.

One must therefore be attentive not to exaggerate the importance of certain arguments even if these appear to be valid.

Work in the Government Sector in general

The question as to whether the Members of Parliament on the Government side who carry out work, directly or indirectly, for the Government, are "in this manner being favoured and given preferential treatment over Members of Parliament forming part of

the Opposition, who as a consequence are suffering discrimination because they need another job to support themselves" depends on whether the work that Members of Parliament on the Government side carry out is a type of work that can be carried out by anyone who is technically qualified for such work (in which case it would not be appropriate to give such work directly to a Member of Parliament on the Government side) or whether the work is political in nature or involves political considerations related to the Government's programme, where therefore it is not realistic to envisage that the work be done by an Opposition Member of Parliament.

Persons of Trust

Employment in the public service is governed by Article 110 of the Constitution which provides in subsection (1) that the " power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission".
Article 110 (6) of the Constitution also regulates access to employment in the public sector by providing the following:

"Recruitment for employment with any body established by the Constitution or by or under any other law, or with any partnership or other body in which the Government of Malta, or any such body as aforesaid, have a controlling interest or over which they have effective control, shall, unless such recruitment is made after a public examination duly advertised, be made through an employment service as provided in sub-article (2) of this article."

These provisions are there to safeguard equal opportunity of access to public employment and are followed as constant rules on the basis of which persons are employed in the public service and public sector.

Appointments to official posts in the public service are generally appointments regulated by an appointment letter by which the employee is given an official legal status as a public officer which is usually linked to employment on an indefinite basis which is terminated upon reaching retirement age.

Over time, due to the changing needs of the public administration, the need was felt, by administrations of every political leanings, that in certain sectors of the public service, and in particular in Ministries, besides making use of public officers appointed under article 110 of the Constitution, use should also be made of the temporary services of persons employed by contract in order to perform work where personal trust is an integral part of the requirements of the employment relationship.

These temporary contractual appointments are regulated in detail by the Manual on Resourcing, Policies and Procedures of the public service and are limited to specific functions.

The Venice Commission in its opinion of 17th December 2018 did not challenge the need for such appointments or state that they do not exist in other European countries, but rather it recommended that they should be given a clear legal basis and that they should be more regulated.

That basis exists at present at administrative level. Neither can it be said that the law is entirely silent on appointments which are not made in accordance with article 110 of the Constitution.

In fact the Contracts of Service for a Fixed Term Regulations (SL 452.81), for the purpose of protecting the employee, regulate appointments in the public sector and the public service even if they are not made according to law, and this as set out in regulation 7 (10) which states:

"(10) Nothing in these regulations shall confer a right to employment on an indefinite contract under these regulations when a person is in an employment relationship in the public service or in the public sector which has not been made in accordance with the Constitution or with any law which applies to employment in the public service or the public sector:

Provided that if such an employment relationship in the public service or in the public sector is terminated after it has lasted for a period in excess of four years on the

grounds that it had not been made in accordance with the Constitution or with any law which applies to employment in the public service or the public sector, the employee whose employment has been so terminated may claim compensation from his former employer and may for this purpose refer his case to the Industrial Tribunal, within four months from the date of the said termination, and if the Tribunal is satisfied that the reason for the termination of the employment was that the employment was not made in accordance with the Constitution or with any other law referred to above, it shall grant an award of compensation which is, in the opinion of the Tribunal, sufficiently effective and constitutes a deterrent against abuse in the recruitment process and, in any case, such compensation shall be calculated as one month's wages for each year in employment, provided that this amount shall not be less than an amount equivalent to the total wages payable to such a person for a six month period of employment."

Needless to say, this regulation which aims at protecting the employee (who is generally the weaker party in the employment relationship) does not enter into the question of whether a particular class of employees (such as persons of trust) are in a state of illegality or not but, within its limits, it protects all employees even if an illegality was committed at the commencement of their employment.

Persons of trust are also subject to the jurisdiction of the Commissioner For Standards in Public Life and the relative Act which defines them as follows:

"person of trust" means any employee or person engaged in the private secretariat of a Minister or of a Parliamentary Secretary wherein the person acts as an adviser or consultant to a Minister or to a Parliamentary Secretary or acts in an executive role in the Ministry or Parliamentary Secretariat, and where the person has not been engaged according to the procedure established under article 110 of the Constitution."

Naturally it would be much better if the legal basis for the employment of persons of trust were to be clarified, as is envisaged to be done, but today one cannot say that appointments on the basis of trust are completely unrecognised by law or illegal. It is recognized that this type of contract of service brings about legal consequences even after its termination.

On the question as to whether a Member of the House may be appointed as a person of trust in a Ministry it is relevant to note that the principal method according to which such a member may be assigned duties under a Minister in a particular sector of the public administration is that of having the member appointed Parliamentary Secretary. Our laws, in contrast with the laws of the UK, do not impose a limit on the number of Members of Parliament who may be appointed as Ministers or Parliamentary Secretaries. Consequently the situation of a Member of Parliament who is not appointed Parliamentary Secretary but is designated as a person of trust in a Ministry to do work related to the government's programme, can be seen as a question of level of responsibility and commitment demanded and therefore as one related to the extent of responsibility which the Government would wish to confer on such a Member if it considers that he should not be appointed Parliamentary Secretary.

The question as to whether such Member would thereby be rendered captive by the Executive is a question that remains quite relative so long as there is no limit on appointments of Ministers and Parliamentary Secretaries.

Public Procurement

The main purpose of the constitutional rule that prevents a person who enters into contracts with the Government from sitting in Parliament derives from the need to avoid the conflict of interest concomitant with situations where a person would , so to say, be on both sides of a contract.

That rule, however, is not an absolute one and it is permissible for the situation be remedied by prior declaration in agreement with the House.

In virtue of Act XXXVIII of 1976 the words in paragraph 54 (1) (c) which used to refer to "any contract with the Government of Malta for or on account of the public service " was amended to refer a "contract with Government of Malta being a contract of works or a contract for the supply of merchandise to be used in the service of the public".

It emerges from the relative parliamentary debates that this amendment was made with a view to adopting a restrictive and focused interpretation of the article in the written law which the Courts had already supported in the few judgments which they had delivered about it.

It is to be noted that in the part regarding "Members of the House appointed as Legal Advisors or otherwise by the Government and/or corporate bodies established by law" the report does not establish that an illegality is taking place but it rather identifies a problem related to 'fundamental principles' and recommends changes.

Considerations regarding the criticism and suggestions for improvement.

It is noted that the Report by the Commissioner for Standards in Public Life generally criticises several identified practices whereby Members of the House end up earning a salary from the Government or from the Public Sector, not because the Commissioner deems them to be manifestly illegal but because he feels that such practices go 'against the principles on which the Constitution is founded'. This means that those practices are not considered to violate the written and explicit law but if one applies the interpretation of the Constitution based on its objectives and its fundamental principles one would come to the conclusion that the spirit of Constitution is being violated.
Naturally, this type of interpretation of the Constitution and the law would have to take into account the different legal, social and economic factors which formed the basis of the spirit of the Constitution over time and therefore one cannot guarantee that the Constitutional Court will adopt one perspective rather than another about what constitutes a fundamental and inviolable principle of the Constitution.

It is only in the case of "Members of the House employed on a Contract for Service" that the Report refers to "this evident violation of the Constitution", but further down in the discussion on the same point (page 14) the Report concludes that the situation in question "is analogous to the appointment of Members of the House as persons of trust or as consultants" where the judgment of the Commissioner was based on a perspective of a 'violation of the fundamental principles' rather than on one of manifest or explicit illegality.

Consequently one cannot state that the Report established that laws are being violated but rather that there are practices which may potentially be illegal if one evaluates them from a particular perspective of what can be identified as the fundamental principles of the Constitution. Such perspective remains always open to debate until the Constitutional Court pronounces itself on the matter.

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24th July 2019