

9th July 2020.

The Hon Dr Jason Azzopardi
House of Representatives
Valletta.

Today you have sought my advice in relation to article 90 of the Constitution of Malta. In particular, you have asked me about the relationship between subarticles (2) and (4) of that provision.

Article 90 of the Constitution is structured in a chronological way.

First, in subsection (1), it establishes the constitutional office of Leader of the Opposition.

Second, in subsection (2), it then establishes how the Leader of the Opposition is to be appointed by the President of Malta unadvised. In terms of paragraph (a) it is the Leader of the political party that enjoys a greater numerical strength of opposition MPs (that is of the Nationalist Party) that is so appointed. This provision is to be applied following a general election where, since independence, normally there has been one political party in opposition and its Leader is automatically appointed Leader of the Opposition. However, in 2017, there were (and continue to be) two opposition parties – the Nationalist Party and the Democratic Party. Hence the Leader of the Nationalist Party being the larger opposition party had to be appointed Leader of the Opposition. Paragraph (b) of subarticle (2) is inapplicable in the current scenario and is not being considered here.

Third, subarticle (3) deals with the grounds upon which the office of Leader of the Opposition becomes vacant. Of relevance here is paragraph (d) where the President, unadvised, elects in his own individual judgment to revoke an appointment made in terms of subarticle (2) of article 90.

Fourth, subarticle (4) contemplates two situations where, in the President's judgment, the appointment of the Leader of the Opposition made in terms of sub-article (2) above may be revoked. These are:

(a) where a member of the House of Representatives other than the Leader of the Opposition, has become the Leader in the House of the opposition party having the greatest numerical strength in the House or;

(b) the Leader of the Opposition has ceased to command the support of the largest single group of members in opposition to the Government.

Thus subarticle (2) is related to an appointment of the Leader of the Opposition and sub-article (4) the removal of the Leader of the Opposition. Of course, once a Leader of the Opposition is removed in terms of subarticle (4), the President has to fill in that constitutional office.

In practical terms, section 90(4)(a) is stating that if an MP – who is not the incumbent Leader of the Opposition – enjoys the support of a majority of Nationalist Party MPs, then the President has to revoke the appointment of the incumbent Leader of the Opposition and, by necessary implication, appoint that MP who enjoys the support of the majority Nationalist

Opposition MPs. The key words in this paragraph are “other than the Leader of the Opposition” because what is being challenged here in subarticle (4) is whether the Leader of the Opposition appointed in terms of subarticle (2) still enjoys majority support of PN MPs or otherwise.

Section 90(4)(b) is inapplicable to this case as the Opposition is currently made up of two political parties – a larger political party and a smaller political party and not of groups of members.

Fifth, subarticle (4) cannot be triggered if Parliament is dissolved. This is not the case as no general election has been announced that mandates dissolution of Parliament.

Finally, no reference is made in article 90 (or in any other provision of the Constitution) to the Leader of a Political Party. That is normally regulated by the political party’s statute. Who is appointed Leader of the Party is not the President’s business as this office is not a constitutional office.

To recapitulate. Subsection (2) relates to the original appointment of a Leader of the Opposition. Sub-article (4) relates to the removal of that person originally appointed Leader of the Opposition because such MP, at a determinate point in time during the legislature’s lifespan, has lost majority support of his own parliamentary group MPs. Although not spelt out black on white, subarticle (4) by necessary intendment is stating that the MP who now enjoys the majority support of PN MPs over the incumbent Leader of the Opposition is to be appointed as the new Leader of the Opposition instead of the incumbent Leader of the Opposition who has during the legislature’s lifespan lost majority support of PN MPs. This is why the incumbent Leader of the Opposition is being removed to be substituted by another MP as aforesaid.

Yours sincerely,

Professor Kevin Aquilina