

## **Constitution of Malta and the Civil Service**

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### **INTRODUCTION**

Following the invitation by the President of Malta to the general public to participate in the Constitutional Reform process, I am submitting my views on how our Civil Service and thereby our governance, could be improved in the context of a better Constitution, having observed at close range how the whole system works for close to half a century.

The Civil Service is not as irrelevant as some make it out to be. More than an organization, the Civil Service is an institution with its own ethos, values and esprit de corps. It is as important as any other organ of the State on which good governance depends, and its professional status needs the protection of the Constitution. In my view a motivated, professional, apolitical Civil Service is of fundamental importance to the well-being and prosperity of the country. The Civil Service is meant to serve impartially and to the best of its abilities the whole country and all its citizens regardless of their political inclinations.

In my submission I shall briefly comment and make suggestions on the roles and responsibilities of Ministers and Civil Servants, the role and effectiveness of the Public Service Commission, meritocracy and political appointments in the Civil Service, and how the inter-relationship of these topics impact on a motivated, professional, apolitical Civil Service.

## **THE CONSTITUTION**

To my mind, parts of the Constitution seem to be based on three assumptions, namely, that common sense, integrity and good judgement would prevail in the running of our democratic institutions, secondly, that certain governability issues cannot be addressed by legal rigidities and thirdly, that a political price would eventually be paid for the abusive interpretation of any shortfall or ambiguity in its provisions. Indeed, the Constitution seems to have served us well for most of the way when common sense, integrity and good judgement, buttressed by a strong leadership, were not in short supply. In fact, this situation probably explains in part the general ambivalence that exists about whether or not the Constitution needs to be reformed.

The Constitution leaves no doubt that partisan politics should not interfere in Civil Service matters and it already provides safeguards to ascertain that this is the case. I believe, however, that, in the national interest, the current safeguards should be reinforced to make it a truly apolitical institution that serves both governments and the people, also taking into account the need for a healthy, productive symbiosis between elected and appointed officials.

## **PUBLIC OFFICER/CIVIL SERVANT/PUBLIC OFFICIAL**

Over the years, a gradual confusion has crept in about the proper meaning and use of similar terms like 'public officer', 'civil servant', 'public official', 'public employee' and 'government employee'. In common parlance it makes little difference which term to use, but in the Constitution the only term representing 'civil servant' that is officially recognised, used and defined is 'public officer'. Whether this confusion, even in government

circles, was deliberately allowed or encouraged to happen for political expediency, like bypassing the Public Service Commission, is a moot point. 'Public Officer' in the Constitution is a bit of an umbrella term which includes within its strict legal definition both civil servants and other officers but the latter officers are then excluded by the Constitution itself from being considered civil servants.

Although the more common term 'civil servant' is not defined in the Constitution, one can discern that the term 'civil servant' is indirectly defined in the convoluted way that 'public officer' is itself defined in the combined definitions of 'public office', 'public officer' and 'public service' in article 124 of the Constitution. The terms 'public official' and 'public employee' which have found their way in other legislation are not covered by the Constitution and should not in my view be mixed up with 'public officer' as defined in the Constitution.

Other than the few exceptions provided for in the Constitution itself, the term 'public officer' refers to those persons whom we used to call 'civil servants' or in the Maltese equivalent for 'employees with government', properly engaged by Government through the Public Service Commission, to serve in different government departments. The term 'civil servant' is still widely used both locally and abroad and everybody understands exactly what it means. To steer clear of political pitfalls and at the same time avoid including or excluding persons who are not civil servants, I have decided to use the terms 'civil servant' and 'civil service' throughout this submission although in strictness the terms 'public officer' and 'public service' obviously remain the correct legal terms according to the Constitution.

I think there is no ambiguity in the wording of the Constitution about how a person could be employed by Government. The Constitution stipulates that, other than the specific exceptions made in the Constitution itself, a person may be appointed to hold or act in an office of emolument in the service of the Government of Malta in a civil capacity, if that person is recommended to be so appointed by the Public Service Commission and that appointment is approved by the Prime Minister. **In my view, therefore, unless the Constitution provides otherwise, only those persons who are thus appointed through the Public Service Commission should be considered to be regular government employees. This important provision in the Constitution should be clarified and reinforced if chances of abuse are to be curtailed and the Civil Service as an institution is not to be undermined.**

## **THE PUBLIC SERVICE COMMISSION**

The Constitution provides that the authority to make appointments in the Civil Service and to remove and exercise disciplinary control over such appointees is vested in the Prime Minister who in turn has to act following consultation with the Public Service Commission (PSC) or on the recommendation of the PSC.

The Prime Minister is not obliged under the Constitution to follow the advice given to him by the PSC following consultation and he may thereafter act as he thinks fit. In the case of a recommendation, however, the situation is different. Section 86 the Constitution provides that a recommendation may be referred back to the PSC only once. Despite the assumption that a recommendation should then be considered final and binding if it comes back to the Prime Minister unchanged, a recommendation for appointment,

promotion, discipline or dismissal may still be shelved for months or years and there is no mechanism for enforcement or redress. Since Constitutional reforms are not so common, I thought I should take this opportunity to highlight the limited weight the consultation process carries in making certain appointments while the recommendation process is not completely water-tight either. **This 'check and balance' issue deserves attention. It could perhaps be addressed in part if some relevant details of such eventualities were to be included in a mandatory annual report submitted, for example, by the PSC to a Parliamentary Committee on the Civil Service for open discussion.**

Furthermore, the PSC as currently constituted is not reassuring enough to Civil Servants, and to the public at large, that it is beyond the reach of government influences. In terms of the Constitution, the PSC is appointed by the Prime Minister following consultation with the Leader of the Opposition. In practice this means that the final choice of its membership, and therefore of its majority, rests with the Prime Minister of the day, even if for a number of years now the Leader of the Opposition is invited to nominate two members while another three members including the Chairman are appointed by the Prime Minister.

In terms of Section 109 of the Constitution, the members of the PSC including the Chairman and Deputy Chairman may be appointed to serve on the Commission for not more than five years. At the same time, members of the Commission are not eligible to serve in any public office for a period of three years following termination of their PSC appointment. Nevertheless, members of the Commission may still be reappointed immediately to serve on the Commission itself at the end of their appointment because the Constitution does not consider membership posts of Constitutional Commissions as public offices. This possibility of

reappointment not only defeats the initial limiting period of five years and the three years ineligibility period to a public appointment at the end, but it could also give the harmful impression that members of the PSC are being 'invited' to be accommodating to Government if they wish to be reappointed.

**In my view, the PSC should be able to function and be seen to function much more independently.** If the introduced practice, which is not yet provided for in the Constitution, whereby the Leader of the Opposition nominates two out of a five-member Commission were to be entrenched in the Constitution, a way would still have to be found how to give better security of tenure to members of the PSC, or if not to the five members, at least to the Chairman. **The Chairman should be appointed only once either for not less than seven years or to retiring age under terms and conditions similar to those of a judge, in either case with the approval of a two-thirds majority of the House of Representatives.**

**Under an ideal arrangement the PSC should be reconstituted and given a completely new brief under the aegis of an autonomous President of Malta who is subordinate to a two-thirds majority of the House of Representatives but not in any way dependent on the Executive.**

## **NON-PARTISAN CIVIL SERVICE**

The entrenched Section 110 of the Constitution provides that, other than the few exceptions mentioned in the Constitution itself, appointments to public offices may only be made by the Prime Minister acting on the recommendation of the Public Service Commission.

The same Section 110 also spells out that in the case of a delegated authority from the Prime Minister, recruitment to the Civil Service should be based on competition *'which ensures that no distinction, exclusion or preference is made or given in favour or against any person by reason of his political opinion and which provides opportunity for employment solely in the best interests of the public service and of the nation generally'*. I take it that this should be the norm not only in cases of delegated authority but also in those cases which are not of a delegated authority. Should this be spelt out? On the basis of logic, I do not think this is necessary but there are some who think that it should. What about appointments that are not made on a recommendation but only following a consultation? The answer to this last question is perhaps in the next paragraph.

The provisions of sub-section 120 (8) of the Constitution, which is also entrenched but of general applicability and not limited to employment in the Civil Service, reinforces the concept of non-partisanship in all employment matters by repeating that *'no distinction, exclusion or preference that is not justifiable in a democratic society is made or given in favour or against any person by reason of his political opinions'*.

**In my view it is clear that in the spirit and letter of the law our Civil Service should be non-partisan, fair and transparent in personnel matters.** The Constitution leaves no room for any other interpretation. I dare say that this was much more than a good thing in the Constitution in 1964, 1974 and 1987 and **I think that it should continue to be so sustained forevermore, perhaps much more effectively since this is a matter of critical importance.**

The Constitution also states that opportunities for employment in the Civil Service should solely be provided in the best interest of the Civil

Service itself and of the nation generally. This provision however begs a number of important questions to which there are no easy answers. For example, who should objectively and judiciously decide that every opening for employment with government is being made solely in the best interests of the Civil Service and of the nation generally? Could there be any conflict between the best interests of the Civil Service as an institution and those of the nation generally, and in the event, who should decide which of the two best interests should prevail?

In the case of mass unemployment should Government feel free to solve part of such a national problem by burdening the Civil Service with unbridled recruitment and thereby hamper its management and performance to the detriment of the whole country. Should unnecessary employment in the Civil Service be allowed to inflate its annual wage bill with unnecessary expenses and thus hinder competitive compensation to attract and retain the ablest and the brightest? What is even worse, should Government ever feel justified in bypassing the Public Service Commission to employ anybody directly with government if the Public Service Commission does not agree that certain appointments should be made?

There may still be times when unemployment becomes a social issue that would need to be addressed by Government pending expansion of the economy. In this context, it is perhaps useful to consider having in place an arrangement whereby, instead of employment with Government, unemployed personnel were to be given employment, training and re-training with a ring-fenced, government foundation, or agency, like Jobs Plus, external to and with no linkage or leakage to the Civil Service, from where they could eventually be placed in appropriate, more productive employment in the private sector. In addition, Jobs Plus should still continue



to carry out the duties assigned to it as an apolitical Government employment agency under the Constitution.

Should the President of Malta, in a revised independent role, be given absolute discretion in deciding such matters which are in effect bordering on what is in the national interest? Should such an independent President be given the role of being effectively responsible for the Civil Service? **Is it timely that we distance even further our Civil Service from partisan influences of elected and other political party officials, especially now that we have the opportunity to do so once we have full employment?**

### **ROOM FOR POLITICAL ABUSE**

Experience has shown that, behind the semblance of propriety, there are various ways of how a selection process could be manipulated and abused to include, exclude or favour candidates for appointments, deployment or promotions in the Civil Service. In my view, professionalism, which implies integrity, leadership and self-discipline, is the antidote to such abuse. A selection process, including eligibility requirements and job descriptions, could be skewed to include, exclude or favour a particular candidate or class of candidates.

While every Head of Department who is held accountable for agreed deliverables, should have the necessary discretion in the selection of his staff, the whole process of selection should be subject not only to an ongoing programme of ethical training and re-training of members of selection boards but also to rigorous scrutiny by an inspectorate of the Public Service Commission. The Commission should also put in place a framework for the immediate, publicized and proportionate censure of officers involved in a case which is not handled in a professional manner.

Making the right choices in personnel matters is a delicate matter although transparency does help and so do legal safeguards. The Merit Principle was one such legal safeguard. The Merit Principle was proposed and defined in the White Paper entitled *A Public Service for the 21st Century* published in October 2003 and enacted in the now defunct Public Administration Act of 2009.

Article 21 of the 2009 Act defined the Merit Principle as follows:

***Merit principle***

*21. (1) Except as otherwise provided for in this or any other Act, appointments to public offices shall be made by competitive selection on merit.*

*(2) For the purpose of this article, competitive selection on merit means the selection of the candidate best suited for the office on the basis of an assessment of eligible candidates' individual and relative merits against the requirements of that office.*

This provision introduced the concept of individual and relative competitive merit against the requirements of the Civil Service in a particular vacant post. It is unfortunate that the two alternating political parties in Government did not find it timely to bring this article into force in the decade that it was on our books between 2009 and 2019. The 2009 legislation was replaced by a new law with the same name in 2019. The new law still provides for the establishment of a Merit Protection Commission which was proposed in the earlier law although when it is eventually brought into force it would now have a revised brief. The Merit Principle however is no longer defined in the new law.

There is no point in embracing the merit principle in appointments unless one objectively tries *a priori* to define also what that principle really means, however elusive and subjectively ambiguous that concept may be. Meritocracy and good governance go hand in hand.

In my view the Merit Principle, as it was enacted, should be brought back to life and entrenched in the Constitution but the first sentence should just read '*Appointments to public offices shall be made by competitive selection on merit*', while the second sentence need not be changed.

## **HEADS OF DEPARTMENT**

The Constitution already states that Heads of Departments have to be appointed from among senior public officers but without defining who is a senior public officer. Should seniority be measured by the level of one's grade or should the grade be combined with some length of service in that grade. Although in this fast, modern age of cutting corners one may be tempted to suggest deleting this qualifying provision in the Constitution, at the same time one has to consider the ramifications of the financial regulations, the Public Administration Act and several other responsibilities that devolve on the shoulders of a Head of Department. If the qualifying provision is retained, as in my view it should, then should an external recruit appointed to a high position in the Civil Service be immediately eligible for appointment to a headship post or should an officer serve for a minimum number of years in that high position before he may be considered as a senior officer eligible for a headship post? Lawyers have to practice for no less than twelve years before they may be considered eligible for appointment to the bench. **I think that a minimum period of six years at a senior level should be introduced for eligibility to a headship post.**

## **DELINEATION OF ROLES**

Similar to other institutions and organizations, the Civil Service will provide and sustain an excellent level of service only if it attracts, motivates and retains some of the ablest and best brains in the country and if the officers concerned are held accountable for the results of their efforts. In my view, this is in turn only possible if the whole system is built on a transparent reward and sanction system based on performance. In practice, however, things are not so simple.

The wheels within wheels of power complicate matters. Some Ministers do understand very well, but not all of them do, that it is in their own long-term interest and in the best interests of the country if they hold their Heads of Department accountable to deliver specific results. Ministers also understand that to enable Civil Servants to deliver specific results, they have to step back and allow Heads of Department to manage their departments in a professional manner, especially where personnel and procurement issues are concerned. They already have enough constraints in complying with all the rules and regulations as they are.

Excellence in performance is achieved through the strong leadership of both the political and administrative arms of Government that promotes the integrity, competence and commitment of Civil Servants in a transparent manner as sustained by adequate provisions in the Constitution.

Our Constitution already provides in sub-section 92(1) that Ministers '*shall exercise general direction and control*' over the departments for which they are responsible. This means that Ministers should determine the policies that should be followed by departments for which they are responsible, while the day to day running of each department should be managed by the Head of Department under the supervision of a Permanent Secretary. Do we have adequate legal provisions and supporting

mechanisms to ascertain that this is done? I think that in most cases the system works but in some others it does not. **In my view, for a more harmonious symbiosis between elected and appointed officials, the different constitutional roles and responsibilities should be spelt out and the internal boundaries defined in more detail in the Constitution itself and beyond the reach of any Interpretation Act.**

## **POLITICAL APPOINTMENTS**

However much others may be in denial, career officers in the Civil Service quickly lose faith in the whole system when they observe that partisan political interferences erode management's prerogatives. A demoralized workforce is never found at the core of a success story. The exercise of management's prerogatives provides for a unity of command, a consistent reward and sanction system and a clear line of accountability from and to the Head of Department. The Head of Department is in turn accountable to the Permanent Secretary and the Permanent Secretary to the Minister.

The proper line of command should not bestow any privileges on the Principal Permanent Secretary, Permanent Secretaries or Heads of Department nor should it diminish the Ministers' authority as provided for in the Constitution and other laws. Ministers will still be respected as Ministers, perhaps even more so, when they do not interfere in the day to day running of the departments, especially where human resources and procurement matters are concerned. For the system to work better, however, **the Prime Minister and Ministers have to be adequately supported by a small team of competent political advisers so as to be**

**able to translate governments' agenda into the deliverables expected of the Civil Service.**

I would not be surprised if, for different or similar reasons, representatives of political parties of different leanings were to agree among themselves that there was no need for any Constitutional changes to further distance politics from the Civil Service. At the same time, given my long experience, I would not be surprised either if among the elected politicians who would be called upon to approve the proposed amendments to the Constitution in the House of Representatives, the views and values of strong principled leadership would prevail. **To my mind this is a matter of such fundamental importance to good governance and the prosperity of the country that it deserves very careful and in-depth consideration before this Constitutional Reform exercise is over.**

Since no one is a prophet in one's own land, I decided to corroborate my views about the downside of political interference in Civil Service matters, with what others abroad think about the same matter. At one point in my long career, I came across an old, harrowing cartoon of 1877 which refers to the election of American President Andrew Jackson in 1828, when partisan political patronage was rampant.

With pressure from a civil service reform movement, the Pendleton Act was introduced in 1883 to put an end to the spoils system. In the run up to this reform legislation, the 1877 cartoon, entitled *In Memoriam – our Civil Service as it was*, was published showing a statue of President Andrew Jackson on the back of a pig wallowing on 'fraud', 'bribery', 'spoils' and 'plunder', with the inscription on its base: TO THE VICTORS BELONG THE SPOILS, with dollars and the dollar signs all over the place.

Certain top posts in the Federal Civil Service of the US remain, even to this day, the prerogative of a newly elected President. This does not mean to say however that the American system is correct or better than having a professional Civil Service to the very top. The business of Government is too serious a matter where experience and expertise with institutional memory could only contribute to the stability and prosperity of the country.

Malta is very densely populated but in its totality the country's population is relatively very small. Society is also very closely knit for any exclusion on the basis of politics which would, in turn, be harmful to family bonds and the very fabric of society. The politicization of the Civil Service could only harm a country with a population the size of Malta where the field of selection for the 'ablest and the brightest' is already limited in the first place and where continuity, professionalism and investment in leadership and human resources in the Civil Service give a better return. Yet there are other leading authorities abroad who share this view even if the population constraint is not taken into account.

In an interview given to Professor Bogdanor at Gresham College in September 2006, Lord Butler, a former high-profile UK Civil Servant, who served as Cabinet Secretary under both Labour and Conservative Governments, and later also as Head of the Civil Service, explained the advantages the UK non-partisan Civil Service system had over the US Federal system. First, he highlighted how the US as *'the most powerful government in the world, in a four-year term, had only about eighteen months when the Administration was pretty stable and everybody was settled'*. He found this situation rather alarming because there was a lot to be said for the continuity one finds in the UK. Then he mentioned that *'the senior UK Civil Servants were not dependent on the politicians for their jobs and they could give objective advice without the fear of losing their job'*, which was another good

thing. Thirdly, perhaps the most important point he made, which he claimed some could consider to be a rather 'crude point', concerns corruption. He said that *'Government in Britain, on the whole, has been regarded as remarkably incorrupt'*. He thinks that *'one of the things that keeps politicians straight is the fact that some of the closest people around them are not their people'*.

A joint study carried out in 1996 for the Brookings Centre for Public Management of Washington DC, by four leading academics and practitioners (Kettl, etc.), also found that in effect the American system of political appointees at the top fell short of the non-partisan system that one found in the UK and elsewhere. They noted how the US *'federal civil servants face a glass ceiling at the top levels of their agencies'* and that *'elected officials have found it impossible to resist the temptation to push political appointees ever deeper into executive branch agencies to increase leverage over decisions'*. They called the argument that *'real direction could come only from political appointees directly responsive to elected officials'* as *'patently false'*. They added that *'career leadership (not just management or administration) has driven reform everywhere it has occurred.'*

With regard to the perennial allegation that the Civil Service is prejudiced in favour or against the left or right of politics, may I refer to what the outspoken Michael Foot, a former left-wing Labour Party Leader in the UK, said in his book *Loyalists and Loners*. In reviewing Barbara Castle's first published Diaries, covering the period 1974 to 1976, he said she put to rest what he called *'the Left-wing mythology that mandarins at the Treasury sometimes had settled policies which they wanted to rivet on the necks of Labour Ministers .....She mobilised her department on her side, her fellow Ministers, her political advisers (no one ever had better ones), above all the*



*much-maligned civil servants. ....No nonsense from her, just as there was never any from Aneurin Bevan, about Civil Service sabotage. She knows and shows how the modern Civil Service can be made to work; how indeed it can be transformed into the most priceless asset for any reforming Socialist Minister; and how imbecile it would be if we ever allowed this essential instrument to be cast aside."*

## **RECOMMENDATIONS**

In conclusion, I would wish to submit the following recommendations for consideration by the Constitutional Reform Committee:

1. that the President of Malta, in a new role, independent of the Executive but subject to a two-thirds majority of the House of Representatives, should be given the constitutional responsibility for all matters concerning the Civil Service taking into account the duties and views of elected and appointed officials;
2. that a redefined Public Service Commission, with security of tenure, should become the Presidential organ appointed by him to scrutinize Civil Service issues. The Civil Service should be encouraged to manage its own affairs within the parameters set by the Public Service Commission;
3. that the establishment of the Merit Protection Commission together with the Merit Principle in making appointments, deployments and promotions in the Civil Service, as was defined in Section 21 of the now defunct Public Administration Act (Chapter 497), should be introduced and entrenched in the Constitution of Malta. The Merit Protection Commission should also have the authority to audit

- appointments in the Civil Service, especially those made under a delegated authority;
4. that the Constitution should pave the way for the establishment of a new Parliamentary Standing Committee for the Civil Service to review, monitor and debate issues concerning the Civil Service on an ongoing basis. This should provide for continuity and change between alternating administrations. Not to blur the Standing Committee's focus, I think that the term 'Civil Service' should be used in its name, instead of any other term;
  5. that the 2019 amendment to section 94 of the Constitution regarding the Secretary to the Cabinet should be reversed with a view to having instead an entrenched provision which would separate the role of Secretary to the Cabinet from that of the Principal Permanent Secretary (PPS). The Secretary to the Cabinet, which is key role, should again be a civil servant designated to the post by the Prime Minister in his absolute discretion, unfettered by any bureaucratic procedures and processes just as he used to be in the past, while the PPS should still be appointed and considered as the most senior officer in the Civil Service as at present. The Civil Service needs to have the PPS on a fulltime basis to be able to unify it, provide it with the necessary leadership and coherence and speak out in its interests and on its behalf;
  6. that any weaknesses highlighted in this submission which are not captured by these recommendations should be redressed.

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