

Debate & Analysis

New procedure for appointment of President



KEVIN AQUILINA

The fact that the main political parties might disagree on the appointment of a new President of Malta in a year's time or so as a two-thirds MP majority vote might not be achieved in the House of Representatives after an incumbent's term of office lapses, raises several questions of a good governance nature.

First, this difficult scenario – that can lead to a constitutional crisis – applies not only to the President but also to other constitutional officers of state such as those of Chief Justice, the Ombudsman, the Auditor General, and the Deputy Auditor General. Such a qualified majority vote also applies to appoint the Commissioner for Standards in Public Life. However, in the latter's case, Parliament has this year established an anti-deadlock mechanism which essentially boils down to government doing away with the consent of the parliamentary opposition and appointing whoever it wants. The anti-deadlock mechanism was introduced only in that case without the Opposition's consent as no qualified majority of two-thirds was needed; but in the case of the constitutional officers abovementioned, the Constitution can be amended only with such a qualified majority to introduce an anti-deadlock mechanism.

Second, the Constitution also requires a two-thirds majority vote to remove the Attorney General, the State Advocate, and other state officers. Even a resolution declaring a period of public emergency requires a two-thirds majority vote, and so does the amendment of certain provisions of the Constitution such as the human rights articles. Third, the Constitution also re-



quired constitutional officers, on relinquishment of office, to continue as a caretaker until a new officer is appointed. There is no deadline given for such temporary automatic extension of appointment but the incumbent may, this notwithstanding, still call it a day should the successor not be appointed in a reasonable time. For s/he cannot be forced to stay on contrary to his/her will. However, this procedure neither applies to the Auditor General, nor to the Deputy Auditor General. In these two latter cases, the Constitution does not envisage a temporary automatic extension of appointment mechanism. So once an office becomes vacant it needs to be filled forthwith.

Ideally, a consensus should be reached between the two political parties on the appointment of a suitable presidential replacement. However, as the two political parties tend to operate outside the framework of the rule of law, it does happen – and has happened, the latest case being that of the Commissioner for Standards in Public Life – that no bipartisan agreement is reached and the wheels of government come to an irremediable halt.

The solution, at face value, appears to be to amend the Constitution and establish an anti-deadlock mechanism like that of the Standards Commissioner so that government can appoint its own preferred candidate to that of the opposition. However, in a two-party state as in Malta, this is hardly a suitable solution as, were this to happen, it opens a can of worms. Suffice it to note that the new Standards Commissioner has already been attacked by the Opposition that he is washing his hand à la Pontius Pilate when determining

complaints against government ministers. It is to be remembered that the Standards Commissioner was imposed upon the Opposition against its will, irrespective of whether its objections were justified or not.

Whether the Commissioner's alleged action is true or not is, at this stage, too early to determine. But, irrespective of its veracity or otherwise, it is clear that the government introduced anti-deadlock mechanism is typical of how Maltese politics are done: instead of arriving at an amicable agreement on a prospective appointee to the office of Standards Commissioner, that would have ended in a win-win situation for both political parties and, more importantly for Malta, the bickering between the Prime Minister and the Leader of the Opposition in this case, to quote the Civil Court, First Hall, has resulted in a situation where the winner (government) takes it all, leaving the Opposition with a crude bitter taste in its own mouth. This, naturally, leads to bad blood between the loser (the Opposition) and the new appointee to state office. Unfortunately, there can be no fruitful relationship between the two until the latter resigns, is removed, or his term of office ends. But is it fair that because of sour relations between the Prime Minister and the Leader of the Opposition, a paralysis of state institutions ensues? As though it is not already enough that state institutions are already failing us. Thus, this solution cannot be considered a viable option.

The question then is: why has there been a turn of events in so far as the appointment of independent state officers is concerned? In the past, the two-thirds vote was invariably

garnered without difficulty. But then there was only a handful of state officers appointed in that way. Why should this practice not continue in the future? A few reasons can be thought of. It can simply boil down to personality frictions between the Prime Minister and the Leader of the Opposition. It could also be because no party would want to concede and renounce to its preferred candidate as otherwise it could be perceived weak with the electorate and thus wants to stand firmly its ground. It could also be a question of wrong judgment in the sense that one party considers one possible appointee suitable for the job whilst the other party simply does not.

When the dispute, alas, reaches such stage, that is, nobody wants to budge because of pique, political immaturity, childish behaviour, and undignified statesmanship, the only solution is to remove the appointment power from the Prime Minister and the Leader of the Opposition or their respective parliamentary groups and to assign it to some other neutral authority that is above petty partisan politics. This can be the President of Malta. But the outgoing President of Malta should not appoint his/her successor as otherwise the democratic republic will transform itself into a constitutional monarchy.

Another alternative is to resort to the Ombudsman Act as a model. When the Prime Minister and the Leader of the Opposition disagree on the appointment of a Commissioner for Administrative Investigations, the Ombudsman makes the appointment after the passage of a reasonable period of time. Applying this analogy, instead of an anti-deadlock mechanism that operates in an acrimonious way, the Presi-

“However, as the two political parties tend to operate outside the framework of the rule of law, it does happen – and has happened, the latest case being that of the Commissioner for Standards in Public Life – that no bipartisan agreement is reached and the wheels of government come to an irremediable halt.”

dent can step in to make the appointment of all constitutional officers of state, except his/her replacement.

What needs to be done is to appoint a Council of State made up of former Presidents, Prime Ministers, and Chief Justices to advise the President in choosing these constitutional officers without the need of: (a) the involvement of the Prime Minister and the Leader of the Opposition, and (b) an anti-deadlock mechanism or some other futile concoction that the two political parties in the House may come up with to sort out their quibbles.

In sum, there are three possible options to solve situations where a qualified majority is not reached: (a) opting for an anti-deadlock mechanism; (b) removing the appointment power from the House or Prime Minister and Leader of the Opposition and vest it instead in the President (with or without an advisory Council of State); and (c) retain the parliamentary appointment power as is but, in the case of a deadlock, resort instead to the Ombudsman Act option with the President stepping in to make the appointment when the politicians disagree on a suitable candidate. Of all three options, it is the third that is the preferred option with the caveat that a Council of State is appointed to advise the President accordingly. The last say would vest entirely in the President. Where, however, the office in question is of President, the latter should not be involved in the appointment procedure of his/her successor and, instead, it should be the Council of State that approves the appointment of the new President.

Kevin Aquilina is Professor of law at the Faculty of Laws of the University of Malta.