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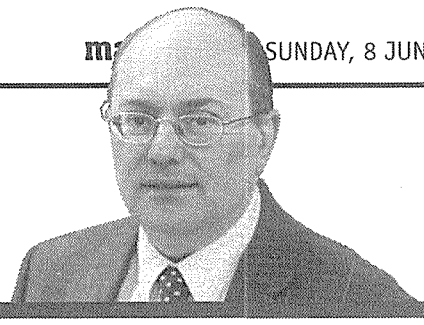

In defence of the Constitution's supremacy

My brief in this article is to defend the Constitution of Malta by maintaining its integrity as the supreme law of Malta. The Mr Justice Carmelo Farrugia Sacco v. Prime Minister et 5 June 2014 Civil Court, First Hall, judgment fails to appreciate the constitutional effects of a dissolution of parliament as set out in extant legal literature. Let me explain why.

First, article 76 of the Constitution states that Parliament is dissolved by the President's Proclamation and it 'shall stand dissolved'. B. S. Markesinis, in his authoritative book 'The Theory and Practice of Dissolution of Parliament' (Cambridge University Press 1972), states that, 'dissolution marks the death of Parliament; and no living creature ever vanquished death. No political expediency can adequately justify an exception to a constitutional rule of such grave importance. If such an expediency exists it is the duty of the constituent legislator to incorporate it in the constitution and not leave its interpreters to decide upon such a delicate matter.'

Edward A Freeman ('The Power of Dissolution', 1879, p. 162) states that the 'primary object of dissolution in a constitutional state is to get rid of the existing legislature in the hope that another may come in its place which may better suit the purpose of those who dissolve it'.

Second, although dissolution brings with it the death of Parliament, this does not mean that all parliamentary business comes to an end. This is because our written Constitution specifically recognises exceptions to this rule. One example is that on dissolution the Speaker still retains his office until a new legislature is summoned (article 59(4)(a)(i)).

Another example is that the President may recall Parliament when it has already been dissolved (article 76(4)). But there is no exception in the Constitution that a judicial removal motion survives the dissolution of Parliament and that any measure authorised by that motion can still continue in force.

Third, Durga Das Basu ('Commentary on the Constitution of India', Vol. F, p. 122), writes that 'Dissolution means the end of life of the lower House itself ... While in England, all business pending in Parliament is wiped out by dissolution, in India, Bills which originated in the Council of States and are pending in the House at the time of dissolution, without having been passed by the House of the People, do not lapse'. But such Bills remain 'alive' because Indian Constitutional Law allows it.

Fourth, in Malta, a motion to remove a judge is not one of those measures that survive dissolution of Parliament. The Constitution does not save such a motion from death in the same way that it does not save motions introducing Bills in the House of Representatives that have not been approved prior to dissolution.

Hence, if the Constitution – the supreme law of the law – does not allow judicial removal motions to be carried over from one legislature to another, how can the court state that the effects of dead motions can be so transferred when the investigation and report of judicial misbehaviour has been authorised by Parliament because of a judicial removal motion which is now dead, like Parliament itself?

Fifth, if a motion for judicial removal has been introduced in one legislature, it cannot automatically survive another legislature, nor can its effects survive automatically into another legislature. Quod nullum est nullum producit effectum (that which is nothing produces no legal effect). If the judicial removal motion has died – like Parliament – how can that motion still continue to have effect? Article 9 of the Commission for the Administration of Justice Act comes into being when there is a judicial removal motion in being.

The said motion is referred to the Commission by the Speaker for investigation/report. But the Commission for the Administration of Justice Act does not contain a provision to the effect that the Commission is empowered to continue with its investigation/report even when the House is dissolved or when a judicial removal motion has automatically lapsed by dissolution. But even if this were so, the latter enactment can never prevail over the Constitution because if there is an inconsistency between the Constitution and the other enactment, it is the Constitution that prevails.

If the Constitution states that when Parliament is dissolved, everything comes to an end bar a few exceptions that do not include a judicial removal motion, what is so special about such a motion, which does not come to any end? Where is it so written in the Constitution? Ubi lex voluit dixit. This is what the Constitution does with recalling Parliament during the interregnum or keeping the Speaker in office during such period.

We all know that a mandate comes to an automatic end when the mandator dies (article 1886(b) of the Civil Code). We also know that if a primary act is repealed, the subsidiary legislation made thereunder is also revoked. Again, if a Minister or a public officer resigns or is removed from office, his or her authority terminates forthwith.

So if the judicial removal motion as the source of authority of the Commission's task to investigate/report on judicial misbehaviour is terminated by dissolution of parliament, how can the judicial removal motion continue to produce effects? 'When anything is authorised to be done, everything is authorised by which performance of the authorisation may be attained... [But] when anything is forbidden, everything which amounts to the forbidden thing is forbidden also. When the law has forbidden the doing of anything directly, it equally forbids the doing of it indirectly, and that mere device or colourable evasion will not protect the doer from the consequences of his act' (Trayner's Latin Maxims, p. 502).

On dissolution, continuing with the investigation/report is unconstitutional and what is carried out illegally is considered to have no legal effect ('quod non rite factum est, pro infecto habetur')

Sixth, we follow the British constitutional system and in the U.K., it is clear that dissolution leads to termination of parliamentary business. A W Bradley and K D Ewing hold that both prorogation and dissolution 'terminate all business pending in Parliament... Any public bills which have not passed through all stages in both Houses lapse.' (Constitutional and Administrative Law, p. 181). Whilst Parliament dies following dissolution, the King never dies. The common law knows no interregnum: 'The King is dead, long live the King'.

The demise of a sovereign used to bring with it the effect of dissolving Parliament, vacating offices (including judicial office) under the Crown and discontinuing legal action. Since 1908, a saving measure was introduced by law in the UK to do away with the negative consequences of the King's demise. But a constitutional measure had to be enacted to thwart these negative effects.

However, what has to be kept always in mind when interpreting the Constitution is that it is a written constitution, not like the British, and not everything that applies in the UK applies automatically to the Maltese Constitution. A judicial removal motion that does not survive dissolution of parliament is a case in point.

Seventh, a judicial removal motion or its produce can have no independent and autonomous life of itself outside the Constitution. This is because article 97(2) of the Constitution does not state that judicial removal motions can be carried on from one legislature to another. Neither article 100(4) with regard to removal of a Magistrate nor article 91(5) with regard to removal of the Attorney General contain such an exception overriding the effects of dissolution.

Article 9 of the Commission for the Administration of Justice Act comes into being when there is a judicial removal motion in being

In the absence of such exception, dissolution is supreme and so are its effects. If a judicial removal motion is wiped out on dissolution why is it still possible for the Commission for the Administration of Justice to continue with its investigation and submit a report to a new legislature when the vires for that same action does no longer exist?

The power for the Commission for the Administration of Justice to investigate and draw up its report emanates from, and depends solely upon, that judicial removal motion. Once the umbilical cord between the House of Representatives and the Commission has been cut through dissolution, the Commission is left with no legal footing to stand on.

Hence, from a constitutional point of view, I can never agree that the Commission for the Administration of Justice may still continue with its task of investigating/reporting judicial misbehaviour to the House when the source of its authority to do so – the judicial removal motion – has been declared dead, inexistent, inoperative, nothing by the Constitution itself upon dissolution of Parliament.

The Commission has no vires to continue with its task which has been delegated to it by the House through the judicial removal motion and the Commission is precluded by the Constitution to act independent of the House's motion.

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