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The Quality Leap from Act VII of 1994
('to promote occupational health and safety') to Act XXVII of 2000 and Beyond

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Abstract: As the OHSA marks its twentieth anniversary, in this article the author considers salient milestones in the recent legislative evolution of occupational health and safety in Malta, and the quality leap Malta has succeeded in achieving, and is set to continue to achieve, as a result of this continuing process of evolution.

Introduction

The legislator's concern for occupational health and safety did not start in the Year 2000; nor did it start in 1994 for that matter, as the Hon. Freddie Micallef pointed out to the Hon Joe Cassar in Parliament on 7th February 1994 during the debate on the proposed bill on occupational health and safety (second reading)[2]. Indeed Judge Joseph Zammit McKeon dealt with the subject in his 1981 LL.D. thesis[3] writing about the laws regulating safety in factories that hark back to the 1920s, building safety regulations safety at the Drydocks and the legislation on safety in the Conditions of Employment (Regulation) Act of 1952; Zammit

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[2] 'Is-soltu meta nitkellem qabel l-Onor. Joe Cassar dejjem jghajjarni li tkellimt bil-vuċi għolja, allura issa li se nitkellem warajh, se nipprova nitkellem bil-mod. Pero' rrid naghmel hilti kollha ghaliex meta nisma' certi dikjarazzjonijiet ta' l-Onor. Cassar, jien personalment titlaghli fawra.'

[3] 'The Law Relating to Health and Safety at Work: A Comparative Study', UM LL.D. thesis, 1981.

McKeon the law student called for more comprehensive legislation, which legislation was finally passed in 1994 with the same Zammit McKeon who by then was a seasoned, practicing advocate being appointed chairperson of the committee created under the same legislation. Act XXVII of 2000 on the other hand, was for the large part drafted by Dr Mark Gauci, who has held the position of OHSA CEO since its inception.

To say that legislation on occupational health and safety was completely ineffective before 1994 would be unfair and untrue, but the fact remains that a significant move forward occurred when Act VII of 1994 was passed, and it seems not a moment too soon if the El Faroud tragedy of 1995 is anything to go by. A real quality leap came about when Act XXVII of 2000 was passed and the Occupational Health and Safety Authority was created. At that point, the curtain went down on the soft prelude which the 1994 law had provided, and the heat was turned on the Maltese workplace and the Maltese employer who found himself subjected to real, stringent standards with sanctions for default to match. Since then this trend has continued unabated, as is befitting of a European Union Member State which is obliged to comply with and ideally surpass the minimum standards set on a supranational level by means of Directives which directives have to be transposed into local law and implemented.

Without intending any disrespect for our past, for the purposes of this paper the discussion shall start from 1994, and the need clearly felt to give the employer a 'soft start' and time to understand that occupational health and safety is not a waste of money, to appreciate that human lives matter, that accidents are more expensive than precautionary measures, to get used to and to change one's ways and practices from the way things were habitually done to how they are actually required to be done in the interest of safeguarding the life, limb and mental wellbeing of the worker. Reference will also be made to whether the 2000 law was an end in itself, or a milestone to be reached and surpassed in order to keep up with the times.

The soft start of 1994

This was a quaint law which created a 'Commission' as was probably a bit fashionable in those days when the government set about creating something new but was not ready to go all the way yet, or simply did not want to relinquish full control: this was the same government which created the Commission for

Investigation of Injustices in 1988 to make recommendations on how past injustices could be remedied while leaving the final say on whether or not to implement the recommendations in the hands of the Government, and the Permanent Commission Against Corruption under Chapter 326 of the Laws of Malta which to this day investigates allegations and suspicions of corruption, and then reports on them. In other words, 'commissions' are a cautious choice of vehicle when taking an initiative, intended to get things done without yielding too much power into the hands of the entity being created, and leaving a backdoor through which to backtrack should things go wrong. The 1994 legislation on occupational health and safety was no different: apart from creating a commission which of its very nature has no executive authority, this law opened up with a number of prima facie nice-sounding principles[4] which however are remarkable for their vague nature e.g. 'ensure the workplace is free from unnecessary hazards' (who establishes what are 'necessary' hazards?) and then created a Commission for Promotion of Occupational Health and Safety[5] to draft and publish codes of practice aimed at i. creating a 'high level of safeguard of health and safety', ii. to propose regulations to the minister, iii. to give out information, iv. to promote scientific research and v. to give advice on the subject of occupational health and safety[6] while the real power lay elsewhere: the minister, when making regulations on occupational health and safety, exercised his own discretion[7] while investigations and the application of the Act remained in the hands of the Director of Labour and inspectors appointed to deal with enforcement were subordinate to the same Director. Prosecution for offences before the Court of Magistrates also lay in the hands of the inspectors subordinate to the Director of Labour. Also, when one looks at how the Commission in question was composed, one realises that all the stakeholders were given a say[8] and this no doubt helped those who occupied these positions to feel that they were not being side-lined by this new creation, and that they could peacefully coexist with it, indeed form part of it, at least at that point when it was still a commission.

Despite the retention of power in the hands of the traditional entities[9], under this law the scope of occupational health and safety was widened for example through the definition of 'worker' and 'workplace'; the work of the Commission is also to be acknowledged for example where awareness raising and education are concerned. Past regulations were also retained where considered necessary, while the old laws, on factories for example, were repealed.

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[4] Art. 2.

[5] Art. 3.

[6] Art. 4.

[7] Art. 7.

[8] For example, the Director of Labour.

[9] I.e. the minister and the director of labour.

The quantum leap of Act XXVII of 2000

The 1994 law only lived for six years and was replaced by Act XXVII of 2000. Then Deputy Prime Minister Lawrence Gonzi explained in Parliament[10] that an ILO expert had advised[11] that in order to obtain a meaningful culture change, the governing entity responsible for occupational health and safety must not only seek to promote and educate, but must also have powers of enforcement. There was also a need to gather all duties under one roof, because they were too spread out; thus for example the new entity would have its own inspectors, while the Occupational Health Unit within the Health Department would be absorbed within the same newly created Authority. Reference was also made to the need to comply with European Union directives, as part of the process of satisfying the requirements to join the European Union. This last is of essence: the Government of the day knew that by the time Malta joined the European Union, it would have to transpose all the relevant Directives into Maltese legislation and ensure their implementation too, and that the 1994 law did not suffice. The Government of the day was undoubtedly aware that it had to introduce and implement a system whereby i. all workers[12] benefit from an equal level of safety and health, ii. employers take appropriate preventive measures to make work safer and healthier, iii. risk assessments meeting the parameters laid down in the relevant Directive are undertaken and iv. preventive measures are put in place. The author of this paper indeed believes that the 1994 law was never intended to suffice but was merely intended to get the stakeholders as accustomed as possible to what obligations they would have to meet by the year 2004 when Malta joined the European Union.

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[10] Sitting of 9 October 2000.

[11] Dr Joe Cassar had made a similar claim when piloting the previous bill in 1994, as did the Hon. Micallef in response to Cassar on the same occasion N.2. , which shows the weight that the International Labour Organisation enjoys.

[12] The Framework Directive on Occupational Health & Safety (Directive 89/391) lists some exceptions.

The lawmaker truly raised the stakes when passing Act XXVII of 2000, as the following comparative table reveals:

Act VII of 1994	Act XXVII of 2000
2. Declaration of Principles	6. Duties of Employers
a. It is the duty of an employer of any person to ensure that the workplace is free from unnecessary hazards to health and from avoidable dangers to the physical and psychological integrity of workers;	1. It shall be the duty of an employer to ensure the health and safety at all times of all persons who may be affected by the work being carried out for such employer[14]:
b. It is also the duty of an employer to ensure that any work process carried out on his order is free from unnecessary hazards to health and from avoidable dangers to the physical and psychological integrity of the workers employed by him and of any workers employed by a self-employed person, contractor or sub-contractor to whom the employer shall have assigned any work: Provided that in the case of work assigned to a self-employed person, contractor or sub-contractor as aforesaid, the employer shall only be liable if he provides facilities including	Provided that where in pursuance of the foregoing an employer enlists competent external services or persons, the employer shall not be discharged from such incumbent

[13] The emphasis has changed completely.

[14] To note also the implication that those who create the risk, must manage it. This is indeed a cardinal underlying principle of occupational health and safety

[15] The employer was left with no room to hide.

Act VII of 1994	Act XXVII of 2000
tools, equipment, know-how, plans or place of work or the use of such facilities, and he was aware that such facilities, or the use thereof, would ordinarily present a hazard or danger to health or safety.	duties[15] arising out of this Act and out of regulations made under this Act:
	Provided further that the workers' obligations in the field of occupational health and safety shall not affect the principle of the responsibility of the Employer.
c. It is the duty of every worker in a place of work to safeguard the health and safety of other workers as well as his own:	(1) It shall be the duty of every worker to safeguard one's own health and safetyand that of other persons who can be affected by reason of the work which is carried out. (2) It shall be the duty of every worker to cooperate with the employer and with the Health & Safety Representative or representatives at the workplace....
d. It is the duty of the Government to see that the levels of occupational health and safety protection established by regulations made under this Act are maintained.	

Act VII of 1994

The Commission's functions[16]:

- Formulating and publishing codes of practice;
- Proposing regulations to the Minister;
- Disseminate information at places of work;
- Promote scientific research;
- Decide appeals against orders of inspectors;
- Advise ministers for health and labour

Act XXVII of 2000

The Authority's functions[17]

- Establish strategies on how to implement the national policy on health and safety;
- Advise the minister on regulations;
- Monitor compliance;
- Prepare codes of practice;
- Promote the dissemination of information;
- Promote education and training;
- Collate and analyse data and statistics;
- Keep registers of plant, installations, equipment, articles, substances, chemicals which in the opinion of the Authority may provide a serious occupational and health risk;
- Investigate any matter concerning health and safety and secure enforcement[18];
- Promote and carry out scientific research;
- Keep registers of persons competent to give advice on health and safety.

[16] Art. 4.
[17] Art. 5.
[18] This was the game-changer.

The changes from 'commission' to 'authority' are evident. There are also some interesting provisions in the current law, not found in the previous law, which include that an officer can give an order, verbally or in writing, to safeguard occupational health or safety, and every person shall obey such order forthwith[19]. This continues with a most interesting statement: 'An officer shall not be required to hold or afford to an employer, worker or other person an opportunity for a hearing before making an order'. This makes sense from a pragmative perspective, but may be questionable from an audi et alteram partem perspective[20].

Also interesting is the exclusion of liability: no action whether disciplinary or otherwise, or other proceeding for damages shall lie or be instituted against the Occupational Health and Safety Authority's Chief Executive Officer or against any officer for an act done or omitted to be done in good faith in the execution or intended execution of their duties. This serves to allow the OHSA's CEO and all other officers to go about their duties without having to concern themselves with lawsuits. The law strikes a good balance, by excluding the protection of malicious behavour.

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[19] Art. 17.

[20] I.e. the right to be heard before a decision which affects one's rights and interests is taken.

An explosion in legislation

Act XXVII of 2000 goes much further than the provisions referred to above. It gives the Authority and its officers the necessary powers through which to operate effectively, including powers to penalise those who fall foul of its rules. Then there is the proliferation of subsidiary legislation to consider, some of which precede the same Act XXVII of 2000, such as the Dock Safety Regulations[21] originally passed in 1953 but which were amended over time.

Another example of pre-2000 subsidiary legislation is the Work Places (Health, Safety and Welfare) Regulations[22] which include specific rules aimed at making places of work safer, for example by requiring the substitution of harmful substances such as sand in sand-blasting being substituted with steel-shot or grit; these regulations also contain interesting quirks which may be attributed to the era when they were passed: women are prohibited from being employed or exposed to certain environments or activities such as the manufacture of alloys containing more than 10% lead! The same regulations include specific obligations on storing substances, obligation to keep registers such as registers of accidents, inspections by officers and penalties for failure in one's obligations including a reversal of proof in regulation 27, leaving it to the accused to prove that it was not practicable, or was not reasonably practicable, to do more than was in fact done to satisfy the legal requirement.

Without a doubt, the lawmaker is transposing EU Directives into Maltese law via such subsidiary legislation. At EU level, not only are there a number of directives all of which need to be transposed faithfully into Maltese law, which directives include the Framework Directive of 1989[25], the directive on workplaces[26] and the directive on work equipment[27]; the legal scenario also continues to evolve - a prime example of this being the European Commission's Strategic Framework on Health and Safety at Work 2021-2027[28]. To match, we have new subsidiary legislation being created while existing subsidiary legislation is amended or repealed depending on exigencies[29]. The result is a considerable number of legal notices which may be divided into two categories, the first being those specifically imposing some

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[21] S.L.424.03.

[22] S.L.424.09.

[23] Reg. 17.

[24] In our day and age, this might come across as sexist.

[25] Directive 89/391 EEC.

[26] Directive 89/654 EEC.

[27] Directive 89/655 EEC.

[28] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0323&qid=1626089672913#PP1Contents

[29] Subsidiary legislation is more straightforward to pass, amend or repeal, than acts of parliament because subsidiary legislation is not subject to a first, second or third reading but is laid on the Table of the House as per the Interpretation Act (Laws of Malta, chapter 249).

form of protection whether aimed at the workplace or at the worker[30], and those concerning procedures and penalties. Under the latter category one finds the Occupational Health and Safety Appeals Board (Procedure) Regulations[31] which is aimed at creating a streamlined, clear, expeditious appellate procedure, and the Occupational Health and Safety (Payment of Penalties) Regulations[32].

The Occupational Health and Safety (Payment of Penalties) Regulations are of interest for a number of reasons, including that the employers cannot buy their way out of their occupational health and safety obligations[33]. Also of interest is the second column to Schedule I, which constitutes no less than thirty-nine different contraventions and in itself reflects the large number of duties and obligations which the employers must bear as a direct result of the danger they created and now must manage[34] , to the extent that a person who knows nothing on the subject but wishes to in under ten minutes form a half decent idea on what occupational health and safety is about, need look no further than Schedule I of the Legal Notice under discussion. Another point of interest is that these regulations were passed in 2012 with the intention of securing speedier compliance and in this sense represent another step in the legislative evolution of occupational health and safety in Malta.

Conclusion: the future

Occupational health and safety is anything but static. As stated on the website of the European Agency for Safety and Health at Work[37] the European Commission via its 2021-2027 strategy[38] is 'addressing rapid changes in the economy, demography and work patterns'. The most obvious in this regard, is catering for older workers as retirement ages rise. As the European Commission strives to address these changes, it will undoubtedly impose new obligations on the EU Member States. The Maltese OHSA will undoubtedly rise to the challenge, and this will lead to yet further evolution in legislation.

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[30] E.g. S.L.424.31 'Work Place (Minimum Health and Safety Requirements for the Protection of Workers from Risks resulting from Exposure to Vibration) Regulations' as opposed to S.L. 424.10 'Protection of Young Persons at Work Places Regulations'.

[31] S.L.424.12.

[32] S.L.424.33.

[33] Regulation 6 ensures that payment of penalty does not prejudice the duty to undertake a measure.

[34] Only contravention number 18 is aimed directly at the worker.

[35] i.e. a full twelve years after the original law was passed, within which time the Authority sought to raise its game in this case by creating a way how to reduce court proceedings which can prove to be lengthy, expensive and occasionally also unpredictable.

[36] OHSA Activity Report 2012 p.26.

[37] https://osha.europa.eu/en/safety-and-health-legislation/eu-strategic-framework-health-and-safety-work-2021-2027

[38] N.28.