

***‘PUBLIC SERVICE’:  
‘PUBLIC OFFICERS’***

‘Public Sector’:  
‘Public Officials’

Robert Musumeci

# Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled 'Judicial Interpretation of Maltese development planning law. Eliciting the added value' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled 'The Development Planning Act 2016 – A critical Appraisal'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a perit in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is also a senior lecturer in planning law and administrative law at the University of Malta. Dr Musumeci also penned the books 'Selected Principles of Maltese Planning Law', 'Decoding Administrative Law' and 'Servitujiet'. Dr Musumeci is the first to hold warrants to practice both as a lawyer and a perit in Malta

One area that often confuses students in administrative law is understanding the difference between the "public service" and the "public sector." While this may seem like a minor distinction, it's actually crucial because each carries its own legal implications. Grasping these differences is essential, as they shape how we interpret legal responsibilities and jurisdictions. As someone who teaches administrative law, my goal is to break down this distinction and highlight why it matters from the very beginning.

As previously stated, this distinction becomes particularly significant when seeking legal redress against actions of the executive, whether related to administrative acts, tort claims, or challenges to executive measures, including subsidiary legislation or contractual breaches. It is essential to clearly identify the entity or individual being challenged in such cases.

First, let's examine the relevant sections of **Article 124** of the **Maltese Constitution**, which we need to understand in order to guide this discussion. By doing so, we ensure that the relevant provisions are readily available for reference as the analysis unfolds.

*'124. (1) In this Constitution, unless the context otherwise requires –*

*[...]*

*"public office" means an office of emolument in the public service;*

*"public officer" means the holder of any public office or of a person appointed to act in any such office;*

*"the public service" means, subject to the provisions of sub-articles (2) and (3) of this article, the service of the Government of Malta in a civil capacity;*

[...]

(2) *In this Constitution, unless the context otherwise requires, "the public service" includes service in the office of judge of the Superior Courts, service in the office of Auditor General and Deputy Auditor General, service in the office of magistrate of the Inferior Courts and service in the office of a member of the Malta Police Force.*

(3) *In this Constitution "the public service" does not include service in the office of*  
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(i) *Prime Minister or other Minister, a Parliamentary Secretary, Speaker, Deputy Speaker, a member of the House of Representatives, a member of a Commission established by this Constitution;*

(ii) *Save where the holder of the office is selected from the public service, an Ambassador, High Commissioner or other principal representative of Malta in any other country; or*

(iii) *Save in so far as may be prescribed by Parliament, a member of any council, board, panel, committee or other similar body established by or under any law.'*

Clearly, the "public service", as defined by **Article 124(1)** of the **Maltese Constitution**, refers to *"the service of the Government of Malta in a civil capacity"*. It refers to those public officers who are employed by the government. These officers typically work in ministries and departments, and their employer is legally considered the government itself, which is treated as a single legal entity. The most senior figure in the public service is the Principal Permanent Secretary, followed by other permanent secretaries who oversee ministries and

departments. Importantly, while ministries and departments are organizational units, they do not have separate legal identities—they act as extensions of the government, which, as a single legal personality, can sue, be sued, and enter contracts. This convention is somewhat reflected in Maltese law, particularly in **Article 181B** of the **Code of Organisation and Civil Procedure**.<sup>1</sup> This article clarifies that the head of a government department, when involved in legal proceedings, represents the government as a whole, not just their individual department.

As outlined in **Article 124(1)** of the **Maltese Constitution**, the "public service" is defined as "the service of the Government of Malta in a civil capacity". Meanwhile, **Article 124** defines a "public office" as an office of emolument, or salaried post, within the public Service, and a "public officer" as a person appointed to such an office.

It is important to note that appointments to public offices, specifically those within the public service, as well as the authority to remove or exercise disciplinary control over individuals holding or acting in such offices, are vested in the Prime Minister. This power is exercised on the recommendation of the Public Service Commission, as outlined in **Article 110(1)** of the **Constitution**.<sup>2</sup>

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<sup>1</sup> **Article 181B of Chapter 12** : '(1) *The judicial representation of the Government in judicial acts and actions shall vest in the head of the government department in whose charge the matter in dispute falls: Provided that, without prejudice to the provisions of this article:*

*(a) actions for the collection of amounts due to Government may in all cases be instituted by the Accountant General;*

*(b) actions involving questions relating to Government employment or to obligations to serve Government may in all cases be instituted by the Principal Permanent Secretary*

*(c) actions relating to contracts of supplies or of works with Government may in all cases be instituted by the Director of Contracts.*

*(2) The State Advocate shall represent Government in all judicial acts and actions which owing to the nature of the claim may not be directed against one or more heads of other government departments.*

*(3) Every application, whether sworn or not, or other judicial act filed against Government shall be served upon each head of a government department against whom it is directed and upon the State Advocate and every time limit for the filing of any reply to any such act by any head of a government department being a defendant or a respondent in judicial proceedings shall not commence to run before the act is served upon the head or heads of the government departments against whom it is directed and upon the State Advocate. The registrar shall not charge any fees for effecting the service on the State Advocate'*

<sup>2</sup> **Article 110(1)** of **The Constitution** states: '*Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission:*

Meanwhile, certain positions, such as judges, magistrates, and the Auditor General, cannot be classified as "public officers" even though **Article 124(2)** reads *'In this Constitution, unless the context otherwise requires, "the public service" includes service in the office of judge of the Superior Courts, service in the office of Auditor General and Deputy Auditor General, service in the office of magistrate of the Inferior Courts and service in the office of a member of the Malta Police Force'*. How can we assert that a judge or the Auditor General is part of the "public service," defined as "the service of the Government of Malta in a civil capacity"? Certainly not, as this would undermine the separation of powers. It is important to clarify that while judges and the Auditor General are public officials (which is a term I am using for the purpose of this contribution and which is nowhere mentioned in **The Constitution**), meaning they hold public office or are appointed to such positions, they cannot be regarded as public officers holding an office of emolument (salaried position) in the public service, which serves the government, specifically the executive branch.<sup>3</sup>

In other words, despite their "apparent designation" as public officers held in **Article 124(2)**, these individuals—judges, magistrates, and the Auditor General—cannot be classified as public officers in the traditional sense but, at most, 'public officials' which, as I said, is a term I am using for the purpose of this contribution to distinguish from 'public officer'. Indeed, judges, magistrates, and the Auditor General are not employed by the government in the same way that civil servants (that is public officers holding public office which means an office of emolument in the public service). Likewise, 'public officials' working outside the public service fall outside the ambit of 'public officers' so much so that their roles are not subject

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*Provided that the Prime Minister may, acting on the recommendation of the Public Service Commission, delegate in writing, subject to such conditions as may be specified in the instrument of delegation, any of the powers referred to in this sub-article to such public officer or other authority as may be specified in that instrument'*

<sup>3</sup> Interestingly, until 2016, even the staff of the House of Representatives were considered public officers, but they now fall under a separate Parliamentary Service. There has also been a push to establish a Judicial Service, separate from the public service, which led to the creation of the Court Services Agency in 2019.

to the same oversight or control by the Public Service Commission.

The idea, therefore, that 'public officers' extend beyond the executive branch and also plays a role in the legislative and judicial branches is a huge misnomer.

Now, when we shift focus to the "wider public sector" we encounter a different set of entities, such as statutory authorities, government agencies, and government-owned companies. These organizations, unlike 'public service departments' have separate legal personalities, which means they can independently employ staff and engage in contracts. Their employees are considered 'public officers' but not government employees. These entities, commonly referred to as "public sector entities", range from regulatory bodies like the Planning Authority to companies like Gozo Channel Company Limited.

One critical distinction is that these entities are established by law or, in the case of foundations, by a notarial deed, giving them legal independence from the government. It is held that they fall outside the jurisdiction of the Public Service Commission unless a specific policy decision dictates otherwise.<sup>4</sup> These bodies are granted legal personality through legislative acts, allowing them to operate independently while still serving state functions.

Public sector entities come in various forms, including:

- **Statutory authorities and corporations:** These are established by law and include regulatory bodies and service providers like the Planning Authority.
- **Government-owned companies:** Primarily set up for commercial activities, examples include Air Malta and Gozo Channel Ltd. Some companies, like Wasteserv, implement policy rather than pursuing commercial goals.

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<sup>4</sup> Appointments within the public service, as well as the authority to remove or exercise disciplinary control over individuals holding or acting in such offices, are vested in the Prime Minister. This power is exercised on the recommendation of the Public Service Commission, as outlined in **Article 110(1)** of the **Constitution**.

- **Government foundations:** These focus on social services or infrastructure, such as the Foundation for Tomorrow Schools.
- **Agencies under the Public Administration Act<sup>5</sup>:** A growing category that includes bodies like Infrastructure Malta or Identity Malta, offering more transparency than foundations since they are established by law.
- **Other agencies established by law:** These include bodies like the Office of the Attorney General and the Office of the State Advocate established by the Constitution.
- **Entities under the Education Act:** These include institutions like University of Malta.

While these categories help classify public sector entities, inconsistencies exist in their terminology. For example, Infrastructure Malta is technically a statutory corporation, despite being designated as an agency by law. Similarly, the Malta Information Technology Agency, despite its name, is not an agency in the legal sense.

Meanwhile, some entities, such as the Armed Forces of Malta or the Office of the

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<sup>5</sup> **Article 26 (1)** of the **Public Administration Act** provides as follows:

*'The Prime Minister may establish government agencies by order in the Gazette under this Act.*

*(2) An order establishing an agency under this Act shall serve as the basic charter governing the agency's operations and it shall:*

*(a) set out the functions and duties of the agency;*

*(b) specify which Minister is responsible therefor;*

*(c) prescribe the financial arrangements applying to the agency in accordance with the provisions of article 31;*

*(d) set out any other special arrangements applying to the agency; and (e) amend the Fourth Schedule.*

*(3) All government agencies established in accordance with sub-article (1) shall be listed in the Fourth Schedule together with an indicative summary of their functions.*

*(4) The Prime Minister may by order in the Gazette: (a) abolish an agency established by order under this Act and listed in the Fourth Schedule; or (b) amend the functions and duties thereof as well as amend any other matter provided for in sub-article (2):*

*Provided that any such order shall provide for the necessary amendments to the Fourth Schedule'*



Ombudsman, are difficult to classify under standard categories. The Armed Forces, for instance, function like a government department, with personnel employed directly by the state, yet soldiers are not considered public officers. Meanwhile, the Ombudsman's office functions as if it has legal personality without explicit provisions confirming this in law.

In conclusion, while the public service remains closely connected to government ministries and departments, the broader public sector encompasses a wider array of legally distinct entities. These distinctions are essential in understanding the different layers of public administration and their respective roles and legal standings.



**ROBERT MUSUMECI**  
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[www.robertmusumeci.com](http://www.robertmusumeci.com)