THE 2020 CONSTITUTIONAL AMENDMENTS: A LEGAL ANALYSIS

Dr. Tonio Borg

ABSTRACT

In this article the author discusses constitutional amendments that took place in Malta in the year 2020 through Act No. XLIII of 2020, on a factual and legal basis. The author goes on to create a comparative analysis of the new amendments with the old legislation and seeks to identify key changes which maybe advantages over their predecessors, while also pre-empting any difficulties that may arise in the future, whether it be in the short-term or the long-term.

KEYWORDS: CONSTITUTIONAL LAW – LEGAL AMENDMENTS – PRESIDENT – JUDICIARY – ADMINISTRATION OF JUSTICE – ATTORNEY GENERAL – STATE ADVOCATE – CHAMBER OF ADVOCATES

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1. Introduction

A series of amendments to the Maltese Constitution were introduced through Act No. XLIII of 2020. These came into effect on their publication in the Government Gazette on 7th August 2020.

Mostly these amendments were a reaction to the conclusions of the December 2018 Report of the Council of Europe's Venice Commission. In that Report the Commission had criticized the concentration of powers in the hands of the Prime Minister and the method of appointment of members of the judiciary amongst other things. A Steering Committee for Constitutional reform[351], presided over by the President of Malta, which had convened in early 2018 had discussed proposals to satisfy the Venice Commission recommendations and some of these were included in the Bill amending the Constitution which eventually became law. In this article, the more salient of the amendments will be discussed.

2. The amendments

2.1 Method of appointment of the President

The most significant amendment from a political point of view was the change in the method of election of the President of Malta; when Malta became a Republic, through the December 1974 constitutional amendments to the 1964 Independence Constitution, the idea was to change as little as possible in the transition from Governor-General to President. Consequently, the ease with which a Maltese Government could request and obtain the substitution of a Governor General[352], was adopted in the establishment of the office of President. He would be appointed by a Resolution of the House of

[351] The Committee was composed of Deputy Prime Minister Mr. Louis Grech, Minister Owen Bonnici, Parliamentary Secretary Julia Farrugia Portelli, on the Government side; Dr. Chris Said, Dr Tonio Borg and Dr Amy Camilleri Zahra representing the Opposition . In 2020 Minister Edward Zammit Lewis and Dr. Stefan Zrinzo Azzopardi substituted Minister Bonnici and Ms Farrugia Portelli.

[352] In June 1971 Governor-General Sir Maurice Dorman was substituted by Sir Anthony Mamo, former Chief Justice, by a simple request to that effect to Buckingham Palace. See Ugo Mifsud Bonnici: *Il-Manwal tal-President Government Printing Press* p. 7 : "the fact that the appointment depends on a simple majority was the result of agreement between Government and Opposition in the sense that in the same way that the Governor General was chosen by the Government of the day and submitted to a formal approval by the Queen, similarly the prerogative of choice remains in the hands of whoever enjoys the support of a majority in the House of Representatives.

Representatives, and similarly removed on alleged (not proven) misbehaviour or incapacity. Since article 72(1) of the Constitution provides that, unless otherwise specified, matters brought before the House, including a Resolution shall be passed by a majority of those present and voting, (simple majority), the Head of State in Malta for the past 46 years did not need anything more than a majority of one of those voting, which in practice meant he was chosen and elected depending on the will of the government of the day. [353]

In its proposals to the Venice Commission the party in opposition had proposed that the President be elected by Parliament through a Resolution supported by at least two-thirds of all the members of the House. Later, Cabinet declared that it would be proposing that the Head of State be chosen with the approval of two thirds support in Parliament. When the Bill on the matter was published, it transpired, however, that Government was proposing a fall-back position should the two- thirds majority of the legislature be not obtained; namely that in such case a mere majority of one would be sufficient after two rounds in which the two thirds majority would not have been achieved . This meant that ultimately in the case of a stalemate, the appointment in such case would be still made by the government of the day. Following declarations by the Opposition to the effect that it would not vote in favour of such clause,[354]- and such change required a two thirds majority- the two sides in Committee stage, at the very last moment, agreed that there should be no fallback position which would depend on the whim of the Government of the day, but that the holder of the position would continue in office until the two thirds majority is obtained. It also made sense that the President should only be removed from office by the same majority which elected him. A novelty in this respect is that while previously the President could be removed even on a mere allegation of misbehaviour, in the new amendments, apart from the fact that a two-thirds majority is needed for such removal, any incapacity or misbehaviour alleged has to be proven.

2.2 Appointment of Members of the Judiciary

Up to 2016 the members of the judiciary were appointed by the President acting on the advice of the Prime Minister. In virtue of the Commission for the Administration of Justice Act, (Ch. 369 Laws of Malta) the Prime Minister in his discretion could seek

[353] In 2009, 2014 and 2019 the appointment of a President was supported by both political parties represented in Parliament. In April 2009, a Nationalist Government proposed George Abela who had just unsuccessfully contested for the leadership of the Labour Party. In 2014 and 2019, Marie Coleiro Preca and George Vella, two former Ministers of a Labour-led Government were supported by the Nationalist Party parliamentary group.

[354] **See Newsbook online 15 July 2020:** ***PN set to vote down judicial appointment reform, but open to solution***

the advice of the Commission – in which members of the judiciary enjoyed a majority in membership - prior to giving advice to the President.[355]

In 2016, Act No. XLIV was enacted. This constitutional amendment which was approved by a two-thirds majority in the House, provided for a newly established Judicial Appointments Committee, being a sub-committee of the Commission for the Administration of Justice (CAJ), which would give advice to the Government prior to the appointment of a judge except that of Chief Justice. The Committee was composed of the Chief Justice, the Attorney General. The Auditor General the Commissioner for Administrative Investigation (Ombudsman) and the President of the Chamber of Advocates.

One should note that the ultimate decision on the appointment of a judge still remained in the hands of the government of the day. The Prime Minister in fact could ignore the advice given by the Committee ; but in such case, the reasons had to be publicly declared , not only through the publication of statement in the Government Gazette but also in a statement to the House of Representatives.

Under these 2016 amendments the power of initiative for the appointment of a judge remained exclusively in the hands of the Prime Minister. The Committee could not propose a candidate itself but only give its non-binding opinion on names of candidate/s submitted to it by the Government of the day.

The composition of the Committee remains a bit anomalous. Including the Auditor General and the Ombudsman as ex officio members, in the selection of judges and magistrates was probably due to the fact that, at that time, these were the only two offices for which a two-thirds majority of the members of the legislature was needed for a person to be elected to such office. However, it is doubtful whether the Auditor-General and the Ombudsman are the most competent persons to decide on the eligibility and suitability for a candidate for the office of judge or magistrate. The Committee also had the function:

a) to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice) or of magistrate of the Inferior Courts, except from persons to whom paragraph (e) applies;

b) to keep a permanent register of expressions of interest mentioned in paragraph (a) and to the acts relative thereto, which register shall be kept

[355] Art 101A(11)(c) of the Constitution used to provide that : "The functions of the Commission for the Administration of Justice shall be (…) (c) when so requested by the Prime Minister, to advise on any appointments to be made in terms of articles 96, 98 or 100 of the Constitution."

secret and shall be accessible only to the members of the Committee, to the Prime Minister and to the Minister responsible for justice;

The fact that a register of expressions of interest exists means as indicated in paragraph(b), that any suitable person could under the 2016 amendments "apply" to become a member of the judiciary by privately expressing his interest, and his name, if suitable, be kept in a" secret "register.

Following the 2020 amendments, the entire selection method has been changed. Government no longer has any say in the initiative relating to, or approval of an appointment of a member of the judiciary. The important changes are the following:

a) whenever a vacancy arises on the Bench, a call for applications is issued by the Ministry of Justice (96B);

b) members of the judiciary shall be appointed by the President, acting on recommendations of the Judicial Appointments Committee in which the judiciary has a majority of members. The latter Committee proposes three candidates, and the President chooses one.

c) the Chief Justice shall be appointed by a resolution supported by a two-thirds majority of the members of the legislature.

d) the composition of the Appointments Committee was changed so that the members of the judiciary would enjoy a majority in such Committee; so that now the Committee is composed of the Chief Justice, two judges chosen by the judges of the superior courts, one magistrate chosen by his colleagues, the Auditor-General, the Ombudsman and the President of the Chamber of Advocates.

e) a list of criteria and qualifications has been inserted for the first time ever regarding the appointment of members of the judiciary, such as "being able to work in a collegial environment " " being industrious, able to work under pressure", "diligent, analytical" and "able to make decisions" apart from the traditional requirement of having the "number of years of practice of the profession of advocate in Malta " established by article 96 (appointment of judges) or 100 of the Constitution (appointment of magistrates,) as the case

may be.

The issues which might arise in the future, or which are debatable, are the following:

1. It is not clear whether the Appointments Committee is only entitled to choose candidates who have "applied" or expressed an interest following the issuing of the call for applications by the Ministry of Justice. A logical interpretation of the relative article would seem to suggest so. It would also seem that for a Magistrate to be appointed as judge, he would also have to "apply" like any other candidate .Another indication that the Committee can only propose candidate who have expressed an interest, is the provision found in the proviso to art. 96A (6)(f) wherein it is stated that "the evaluation on the suitability of candidates for appointment as members of the judiciary is to be made not later than 60 days from when it received the expression of interest."

   The entire question of applying to be appointed as member of the judiciary raises some issues which are not clear. For although there is a fresh call for applications each time there is a vacancy on the Bench, the Appointments Committee is entrusted with the task of keeping " a permanent register of expressions of interest"(art 96A(6)((b), so secret that it is only accessible to the members of the Committee and the President of Malta . Prior to the 2020 amendments this secret register was accessible to the Prime Minister and Minister of Justice as well. While under the 2016 amendments it made sense to keep such a secret register, for the power of initiative in the appointment of members of the judiciary lay with the Prime Minister, and there was no need for a public call of applications, what is the purpose of this register today? ..unless, of course, it is still possible, without or in spite of a public call for applications, for the Committee to select one or more candidates from the secret register – whether they have applied or not- and propose them to the President .

   However, the entire question of applying creates practical difficulties. A person in public or political office might find it difficult to apply, and then not be selected, and possibly his name, if it has not been leaked before, will certainly be made public if he is one of the two unsuccessful candidates, short-listed by the Committee but not chosen by the President. This discourages competent persons in various fields from applying or expressing an interest. It also defeats one of the tasks of the Committee introduced in 2016 and confirmed in 2020 that of "approaching with a view of eliciting interest amongst qualified persons for the office of judge or magistrate" (art 96A(6)(f) .

2. The ultimate choice remains in the hands of the President, but he can only choose from amongst the three candidates submitted by the Committee and

considered by them to be suitable. This provision raises two questions: why allow the President to choose from amongst three candidates? Once the Committee contains a majority of members who are judges or magistrates and at least one more legally qualified person, why should the choice be made by the President? ; the more so when he not only chooses one out of three but in his decision he is obliged by law to publish the names of the two candidates whom he does not choose! It seems that the Committee has washed its hands of the difficult decision to choose one out of three, even though it is the most competent organ to make such decision and shifted such delicate responsibility to the President.

3. The composition of the Judicial Appointments Committee remains anomalous. The Attorney General has been excluded from its membership. The members of the judiciary in the Committee have increased from one to four, but the Auditor General and the Ombudsman still retain their position within the Committee along with the President of the Chamber of Advocates. If the reason for doing so was that two of these offices are appointed by a two-thirds majority of the legislature, it should be noted that since the establishment of the Committee in 2016, the Commissioner for Standards in Public Life is today also appointed by a two-thirds majority but does not form part of the Committee . It would have made more sense to retain only the members of the judiciary in the Committee along with the President of the Chamber of Advocates.

4. The Chief Justice is to be appointed, for the first time, by a Resolution of the House supported by at least two thirds of the members of that House. In the original Bill, Government had retained the right, through its majority in Parliament, to appoint the holder of that office itself in case the two-thirds majority would not be achieved. Towards the final stages of the approval of the Bill, Government withdrew this proposal, and a compromise was found: the previous holder would remain in office until the two -thirds majority is achieved. This means that, for the very first time it could possibly happen that a Chief Justice continues in office until the stalemate is resolved, even beyond the compulsory retirement age of sixty-five. This is borne out by the wording of the law which states that when such qualified majority is not immediately reached, then "the person occupying the office of Chief Justice shall, in any circumstance remain in office until the Resolution is supported by the votes of not less than two-thirds of all the members of the House."(art 96(3) (emphasis added) .

5. The Constitution, as has been stated, lists a number of criteria and qualifications for a person to be appointed as member of the judiciary which are found in article 96B (2). The wording of this sub-section is clear: "no person shall be entitled to be appointed to the office of judge or magistrate" if for instance he is " not able to communicate in a clear and concise manner

" or does not "possess integrity, correctness and honesty in public and private life" or is not "impartial and independent " . He must have "knowledge of the law, of court procedures and profession experience and possess knowledge of the Code of Ethics for members of the judiciary" and must be "willing to undertake continuing professional development."

It is doubtful how wise it was to include such detailed – though not so well defined- matters in the supreme law of the land. These are matters which could have been included in a Manual published by the Committee. The moment however that these criteria and qualifications have been included in the suprema lex, the question arises: are they justiciable? The fact of the matter is that in my view there are no parts of the Constitution which are superfluous. Even those articles where it is expressly stated that they are non-justiciable, they still have a purpose and a meaning at least in the interpretation of the Constitution itself. So, the question arises: are these merely indicators to assist the Committee, or can they be enforced in a court of law? Can any interested person, institute legal action, presumably before those of constitutional jurisdiction, alleging that a person who has expressed an interest and applied does not satisfy any one of the requirements; or can a person not chosen to be one amongst the three candidates to be submitted to the President by the Committee, allege that he was more qualified according to these criteria, than those whose names were submitted to the President. After all the wording is clear in art 96B (2) "No person shall be entitled to be appointed …" "These are pleasures yet to come. Even though it is too early to speculate, the error of including these criteria and qualifications in the supreme law of the land, and their wording, will certainly have some legal consequences in the future.

2.3 Composition of the Commission for the Administration of Justice

Up to the 2020 amendments, the Commission for the Administration of Justice (CAJ) was composed of the President of Malta who however, had no original vote but only a casting vote, and nine voting members, namely the Chief Justice and two judges elected by their colleagues, the Attorney General, two members elected by magistrates, two

members one appointed by the Prime Minister and the other by the Leader of the Opposition.

Following the 2020 amendments, the Attorney General no longer forms part of the Commission; and the President has been given an original vote.

No mention is made, as before, of a casting vote, even though in virtue of article 121 (3) made applicable to the CAJ in virtue of article 101A(8), the presiding officer, in this case the President of Malta, still enjoys a casting vote. This means that the President will fully participate in matters relating to the appointment, discipline and also removal of members of the judiciary, and discipline on members of the legal profession. When it comes to the removal of the Attorney General and the State Advocate, since as shall be seen, the procedure for their removal has been established as being that previously applicable to the removal of members of the judiciary, namely through an Address to the President by the House supported by a two-thirds majority, the President in such case, would probably have to abstain.

2.4 Removal of judges and magistrates from office

An important change was made in 2020 to the method of removal from office of members of the judiciary. However, one has to trace the history of this matter in order to understand the recent amendments.

Up to 1994, the Constitution provided that members of the judiciary could be removed from office by an Address to the President, supported by no less than two-thirds of all the members of the House of Representatives on the basis of proven incapacity of misbehaviour. (art. 96(2)
The Constitution also stated in art. 97(3) that Parliament could by law "regulate the procedure for the presentation of an Address and for the investigation and proof of the inability or misbehaviour of a judge of the Superior Courts or a Magistrate."

This is what happened in 1994 when, through Act No. IX of 1994, the Commission for the Administration of Justice (CAJ), with an inbuilt majority of membership in favour of members of the judiciary was set up. Any motion presented in the House for the removal of a judge or magistrate had to be sent under confidential cover to the Commission. If the Commission gave the green light after hearing evidence and submissions, then the matter was sent to the House where, if two-thirds of all the members of the House supported the charges against the judge or magistrate, the address would be sent to the President for his removal. If, however, the Commission decided that there was no prima facie case, the matter conveniently stopped there; even

if there existed a two-thirds majority in the House in favour of his removal from office of the member of the judiciary.

All attempts at removal from office of a judge or magistrate have failed; either because the Commission ruled that there was no prima facie case,[356] or because though it gave the green light, there was no two-thirds majority in favour,[357] or as in one case, in spite of the fact that the Commission and two political partis represented in Parliament were in favour of removal, a constitutional action was instituted by the judge concerned, and the House did not proceed with the case; when constitutional case was decided against the judge, the latter had reached the age of sixty-five and went into compulsory retirement.[358]
The 2020 amendments were a reaction to a comment by the Venice Commission in its 2018 Report to the effect that:

> The Venice Commission recommends: The removal of a judge or magistrate from office should not be imposed by a political body; There should be an appeal to a court against disciplinary decisions directly imposed by the Commission for the Administration of Justice.[359]

This recommendation is debatable. The system adopted in 1994, and confirmed in the 2016 amendments, was a strong guarantee in favour of members of the judiciary; for apart from securing a majority in the Commission for removal, the motion for removal had to be supported by two-thirds majority in the House of Representatives . Conversely, if the Commission decided that there was no prima facie evidence of wrongdoing or incapacity, the matter stopped there. It is difficult to imagine a firmer and stronger security of tenure.

With the 2020 amendments which have faithfully followed the opinion of the Venice Commission in this respect, only the Commission has been entrusted with the task of deciding on the removal from office. Its decision does not need any qualified majority.

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[356] The Commission ruled that there was no prima facie case against Magistrate Peralta in 1995.
[357] The Commission unanimously approved that there was prima *facie* case against Judge Anton Depasquale. However, a motion in the House of Representatives in September 2001 did not achieve a two thirds majority. The vote was only 36-29 in favour of removal.
[358] See Malta Independent 21 August 2014: ***Farrugia Sacco to escape impeachment through retirement tomorrow.***

[359] Report by European Commission for Democracy through Law (Venice Commission) Malta Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018) pp 12-13.

A majority of one is enough though according to article 101A (8), read along with article 121 (3), an absolute majority namely a majority of one of all the members of the Commission is needed for any decision. But there is no need of any qualified majority, though there lies an appeal by the member of the judiciary to the Constitutional Court. The House of Representatives has been completely excluded at any stage of the removal proceedings.

This new amendment- apart from being less protective of the rights of the members of the judiciary than before- has the following shortcomings:

(a) The Chief Justice will now in virtue of the 2020 amendments be appointed by a resolution of the House supported by a two-thirds majority of all its members. However, for the Chief Justice to be removed from office, a mere ordinary majority of the CAJ is enough. This is the only office in the land whose holder is appointed by a two-thirds majority in the House but can be removed not by a two thirds majority but by an ordinary majority. In fact, all other officers who require a two-thirds majority to be appointed viz the President of Malta, the Auditor General, the Deputy Auditor General, the Ombudsman and the Commissioner for Standards in Public Life, require a two- thirds majority of all members of Parliament to be removed.

(b) The two thirds majority rule has been abolished for the removal from office of judges and magistrates, but has been retained for the offices of President of Malta, the Auditor General and his deputy, the Ombudsman, the Attorney General, the State Advocate and the Commissioner for Standards in Public Life . This creates an anomalous situation to say the least.

The remark by the Venice Commission that the intervention of a political organ in the removal from office of a member of the judiciary is something necessarily irregular is greatly debatable. The Constitution of at least two leading countries in the Western world allow such intervention. The United States Constitution provides that the removal of the holder of any federal office, including therefore that of a federal judge, can only be made by a vote in favour of at least two-thirds of members of the US Senate present and voting[360]. In the United Kingdom, High Court judges, as with all judges in England and Wales, hold office during good behaviour and a High Court judge can only be removed by the Queen upon an Address of both Houses of Parliament. No qualified majority is needed. In the Commonwealth alone, apart from the United Kingdom and Malta (up to 2020), Australia[361],

[360] Article 1 Section 6 Paragraph 6: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation...and no person shall be convicted without the concurrence of two-thirds of the members present."

[361] Art 72 of the Constitution: "The Justices of the High Court and of the other courts created by the Parliament (i) shall be appointed by the Governor-General in C(ii) shall not be removed except

New Zealand[362], India[363] adopt a parliamentary procedure for removal. The matter is more one relating to guaranteeing a fair trial. Does article 39 of the Constitution of Malta and article 6 of the European Convention on Human Rights apply to proceedings relating to the removal from office of a judge or Magistrate?

The answer seems to be in the affirmative. In the case of Farrugia Sacco v. Prime Minister et (CC)(20 May 2015)(16/14), the Constitutional Court ruled that the norms relating to a fair hearing enshrined in article 39(2) "in the determination of the existence or extent of civil rights and obligations" applied to removal from judicial office proceedings. 364 The question therefore arises whether a parliamentary procedure for removal of a judge from his office per se is in violation of article 6. It is submitted that, unless it is shown that those who are going to decide to have expressed a clear opinion on the guilt or otherwise of the judge charged with misbehaviour, there is no a priori conclusion that Parliament is not an impartial and independent adjudicating authority, the more so that now the power of initiative has been taken away from the hands of members of Parliament. Why is the Auditor General or the President of the Chamber of Advocate necessarily considered more impartial and independent than an ordinary elected member of Parliament, the more so when the verdict on the question of address of removal requires a two thirds majority of all the members of the legislature? In the Demicoli case365 the European Court of Human Rights, in striking down a breach of privilege case against applicant had done so only because the proceedings were of a criminal nature and the alleged victims of libel was also going to participate in the parliamentary

by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity"

362 A judge may not be removed, from office except by the attorney-general upon an address of the House of Representatives (Parliament) for proved misbehaviour. See Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. See also Benajmin Suter: *Appointment Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries* (Victoria University of Wellington (2014) (LLM Research Paper). Indeed, in the case of Switzerland removal of judges is done by the Federal Assembly, and in the case of judges of the Federal Supreme Court they are not subject to any kind of discipline procedure, let alone removal.

363 Art 124(4): "A judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity ."

364 In an elaborate judgment the Court referred to European Court jurisprudence regarding the application of article 6 of the Convention to proceedings relating to the removal of judges: including the case of *Zalli v Alabania* (European Court of Human Rights (EcrtHR): 8 February 2011 (52531/07): "Since the adoption of the *Vilho Eskelinen* judgment, the Court has found Article 6 to apply to disciplinary proceedings against judges (see *G. v. Finland*, no. 33173/05, §§ 31-35, 27 January 2009; and *Olujić v. Croatia*, no. 22330/05, §§ 34 and 44, 5 February 2009."

365 *Demicoli v. Malta* (EcrtHR 27 August 1991 13057/87).

vote.

(a) Although the appeal to the Constitutional Court by a judge or magistrate who is removed from office or disciplined is a positive step, it also creates some practical procedural difficulties. The Chief Justice is ex officio a member of the CAJ and also presides over the Constitutional Court. In case of an appeal, he would have to inevitably abstain. If the two judges elected by their colleagues to represent them in the CAJ are also members of the Constitutional Court they would also have to abstain.

2.5 Removal from office of the Attorney General and the State Advocate

In the original 1964 Constitution, it was already provided under article 91 that the removal procedure then applicable to the removal of judges and magistrates, namely an address to the President supported by not less than two-thirds of all the members of Parliament, applied also to the office of the Attorney General.

Following the 2020 amendments, this provision has been retained but amplified by adopting the previous method of removing the holders of judicial office to the office of Attorney General and the office of State Advocate which was inserted in the Constitution in 2019. 366

The point arises: if the intervention of a political organ was done away with in the proceedings for the removal of a holder of judicial office, probably out of fear that such proceedings might be in breach of the right to a fair hearing, how come this procedure has been applied to the two abovementioned constitutional positions? This argument applies also for the removal by the House of Representatives, a political organ, of the holders of the office of President, Auditor-General, Deputy Auditor-General, Ombudsman and the Commissioner for Standards in Public Life.

366 In virtue of Act No. XXV of 2019 the duties of the Attorney General were split in two. The Attorney General retained the powers relating to the institution, undertaking and discontinuance of criminal proceedings, while the State Advocate assumed the powers of advising Government on matters of law, and legal opinion .

2.6 Court review of CAJ actions

Article 101A (14) of the Constitution provides that:

Subject to the provisions of sub-article (1) of article 101C of the Constitution, the question whether the Commission for the Administration of Justice has validly performed any function vested in it by or under this Constitution shall not be enquired into in any court.

This provision was initially contained in the 1994 amendments. It has been kept under the 2020 amendments apart from an exception being made to the newly introduced appeal which lies for a decision of the CAJ to remove a member of the judiciary, to the Constitutional Court. However, in several judgments it has been decided by the Constitutional Court that such provision- which incidentally is similar almost identical to one applicable to the Public Service Commission in article 115, does not protect the Commission from court scrutiny on such matters as alleged breaches of fundamental human rights, or of any law or regulation; but protects only the Commission for error within jurisdiction. This was decided amongst other matters in the case of Farrugia Sacco, where a specific plea was raised by respondents based on this sub-article but rejected by the Court.[367]

3. Conclusions

There is no doubt that, in spite of these shortcomings, the 2020 constitutional amendments were a step in the right direction and the result of mature political decisions. Certainly, more needs to be done to prevent abuse of power, fight corruption, and make the institutions more credible, forceful and accountable. In this contribution I have limited myself to the procedural and substantial flaws of these amendments, and the problems which might arise in implementing them. Time will tell whether these amendments will achieve the purpose for which they were introduced.

[367] See *Hon. Judge C Farrugia Sacco v Prime Minister et* (CC)(27 January 2014); *Hon. Judge A. Depasquale v. Prime Minister et* (FH) (29 January 1999)(Mr. Justice G. Caruana Demajo); *Grace Sacco v. Prime Minister* (CC)(17 September 2013; and *Architect V. Galea v Chairman PSC et* (CC)(21 January 1985).