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JUDICIAL APPOINTMENT IN MALTA: A HISTORICO-LEGAL PERSPECTIVE

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The method of appointment of the judiciary is one of the fair trial ingredients of an independent tribunal as set out in the Constitution of Malta and in the European Convention of Human Rights and Fundamental Freedoms. This paper first studies the position in Malta, from a historical perspective, of the constitutional provisions regulating the method of appointment of the judiciary and applies the differences in terminology as they have evolved in the latest version of the Constitution of Malta to the Dr Andrè Camilleri case discussed hereunder. The author argues that the Commission for the Administration of Justice did not construe well, in this specific case, the constitutional provision regulating judicial appointment to Dr Camilleri's detriment, bearing in mind the historico-legal evolution of the constitutional provision under review. It concludes by stating that, in Malta, the Constitution applies only a quantitative and not a qualitative criterion for appointment to judicial office and that practice at the bar is not an indispensable ingredient for judicial appointment. In the light of the historical evolution of the law, the author advocates changes to Maltese law to ensure a more transparent manner in the method of judicial appointment, basing itself not only on a quantitative criterion (that is, professional practice for a certain period of time) but also, more importantly, on qualitative attributes such as the candidate's integrity, honesty and competence, which should invariably be satisfied in future judicial appointments.

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1. The Relevant Legal Provisions on Judicial Appointment

Judicial appointments in Malta are essentially dealt with in article 96(2)[1] of the Constitution in so far as judges of the Superior Courts are concerned and in article 100(2) of the Constitution in so far as Magistrates of the Inferior Courts are concerned. Moreover, article 101A(11)(c) of the Constitution and article 79 of the Code of Organization and Civil Procedure[2] both have a material bearing on the subject under discussion.

1.1. Article 96(2) of the Constitution of Malta

Article 96(2) of the Constitution of Malta as presently obtaining deals with the appointment of judges. This article provides that:

> 'A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta or has partly so practised and partly so served.'

1.2. Article 101A(11)(c) of the Constitution of Malta

Article 101A(11)(c) of the Constitution of Malta dates back to 1994 when the Constitution was amended to establish the Commission for the Administration of Justice. The provision under review lists one function of the said Commission as being,

> '... when so requested by the Prime Minister, to advise on any appointment to be made in terms of articles 96, 98 or 100 of this Constitution.'

Note that this provision does not empower the Commission to advise on the appointment of the Attorney General even though the latter must possess the same qualifications as those required of a judge for appointment.

1.3. Article 79 of the Code of Organization and Civil Procedure

Article 79 of the Code of Organization and Civil Procedure provides that:

1. Of relevance in this context is also article 91(2) of the Constitution which provides that a person cannot be appointed Attorney General if he or she is not qualified for appointment to the office of judge of the Superior Courts.
2. Chapter 12 of the Laws of Malta.

> 'No person may exercise the profession of advocate in the courts of justice in Malta without the authority of the President of Malta granted by warrant under the Public Seal of Malta.'

2. Practice at the Bar as a Requirement for Judicial Appointment: an Historical Perspective

As to the legislative history of article 96(2) of the Constitution, it must be noted that, from the commencement of British rule in Malta up to the promulgation of the Malta Constitution of 1921,[3] there was no provision in Maltese Law requiring practice at the bar for judicial appointment. The source of article 96(2) aforesaid, in so far as practice at the bar is concerned, is a recommendation made by Chief Justice Sir Arturo Mercieca which was agreed to by the Malta Royal Commission of 1931 subject to one addition as can be seen hereunder from the following extract of the Report of the said Commission:

> 'In accordance with the advice of the present Chief Justice, Sir Arturo Mercieca, the rule should also be introduced that no person be appointed a Judge unless he has at least twelve years' practice at the Bar. We would suggest that any years of service on the magisterial bench should also be reckoned as a qualification.'[4]

Article 10(2) of the Malta Constitution 1936[5] incorporated the above recommendation when it provided as follows:

> 'No person shall be qualified to be appointed a judge of the said Courts unless, during a period of not less than twelve years, or during periods amounting in the aggregate to not less than twelve years, he has either practised at the Bar or served as a Magistrate in Malta, or has partly so practised and partly so served.'

I will now examine the historical antecedents that brought about the formulation of the rule necessitating practice at the bar for judicial appointment as enshrined in article 10(2) of the 1936 Malta Constitution and the successive Constitutions of 1939, 1947 and 1959.

3. Letters Patent of 14 April 1921.
4. Malta Royal Commission, 1931, 109.
5. Cf. Letters Patent of 12 August 1936 published in *The Malta Government Gazette* of Wednesday, 2 September 1936.

2.1. Controversial Appointment of Two Judges by Sir Gerald Strickland


Sir Gerald Strickland

The historical circumstances of the present article 96(2) of the Constitution date back to the judicial appointments of Dr Eric Parnis LL.D. and Dr Anthony J. Montanaro Gauci LL.D. Both advocates were appointed to the bench by the Government of the day notwithstanding the fact that, in the eyes of the legal profession at the time, these two advocates lacked substantial practice at the bar.

2.2. Judge Dr Eric Parnis

In terms of Government Notice 265 of 1929 published in the *Malta Government Gazette* it was announced on Wednesday, 7 August 1929, that His Excellency the Officer Administering the Government in Council had been pleased to issue a warrant under the seal of the Government of Malta and its Dependencies appointing Eric Parnis, Esq., LL.D., to be one of His Majesty's Judges for the Island of Malta and its Dependencies, with effect from 7 August, 1929. This Government Notice brought to an end the temporary arrangements made by a previous Government Notice[6] in terms of which Magistrate Dr J. Depasquale LL.D. had been surrogated to perform, with effect from 31 January 1929, the duties of one of His Majesty's Judges in the Superior Courts until the vacancy caused by the retirement of Judge Dr G. Cremona LL.D. was provided for by the appointment of Dr Eric Parnis.


Dr Eric Parnis

According to *The Daily Malta Chronicle and Garrison Gazette* of 9 August 1929,[7] Dr Parnis was one of the youngest members of the Maltese bar, and his elevation to the bench was therefore a signal honour, but one which was fully deserved. The said newspaper commented that Dr Parnis, the youngest lawyer to be raised to the Malta bench, was one of a family who produced brilliant legal luminaries, of whom the best known was his father, also a retired judge. Dr Parnis, we are told, had distinguished himself as a member of the Legislative Assembly and, immediately prior to his judicial appointment, had assumed the justice

6. Government Notice 26 of 1929 published in the *Malta Government Gazette*.
7. At page 14.

portfolio from his learned father. *The Daily Malta Chronicle* concluded this article by auguring the newly-appointed judge 'Long life and a successful judicial career'.

As to biographical data, Lino Cuschieri wrote that Dr Eric Parnis, son of Judge Professor Alfredo Parnis and Helen nee' Ferro, was born on 5 February 1897. He graduated Doctor of Laws on 17 December 1919 from the University of Malta and received his warrant to exercise the profession of advocate on 6 July 1920.[8] In 1927, he was elected Member of the Legislative Assembly on behalf of the Constitutional Party under the leadership of Sir Gerald Strickland. In May 1929, he was appointed Minister of Justice, an office which he held up till August 1929 when he was appointed Judge. He died a few months later on 1 April, 1930 at the age of 33 years.[9]

When Dr Parnis was elevated to the bench, he was thirty-two years old and had been an advocate for circa nine years. Nonetheless, due to the fact that he died less than eight months after his appointment, it is difficult to comment on his judicial capabilities. What is, however, certain is that the *Malta Daily Chronicle*'s best wishes failed to materialise.

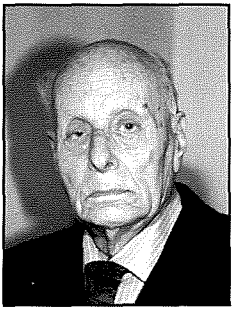
2.3. Judge Dr Anthony Joseph Montanaro Gauci

In terms of Government Notice 176 of 1930 published in the *Malta Government Gazette* of Friday, 16 May 1930, it was announced that His Excellency the Governor in Council had been pleased to issue a warrant under the seal of the Government of Malta and its Dependencies appointing Anthony Montanaro Gauci Esq. LL.D. to be one of His Majesty's Judges for the Island of Malta and its Dependencies with effect from 14 May 1930.

According to the *Malta Chronicle and Imperial Services Gazette* of Thursday, 15 May 1930, Dr A.J. Montanaro Gauci LL.D. was Speaker of the Legislative Assembly during the last Parliament prior to being appointed to fill the vacancy in the judicial bench caused by the lamented death of Dr Eric Parnis.[10] Robert Mifsud Bonnici writes that Dr Montanaro Gauci was born in 1898, became a member of Strickland's Constitutional

8. Information obtained from Dr. Raymond Mangion, Senior Lecturer, Department of Public Law, Faculty of Laws, University of Malta.
9. 'Ministri tal-Ġustizzja Mill-1921 sa Llum', fi *Programm għaċ-Cerimonja tal-kxif ta' Lapida mill-Onor. Dr. Joseph M. Fenech B.A. (Hons.), LL.D., M.P., Ministru tal-Gustizzja li tfakkar lill-Ministri tal-Ġustizzja f'Malta mill-għoti tas-'Self Government' fl-1921*, Saturday 11 June 1994, Malta 1994, 15.
10. 15 May 1930.

Party in 1927, was appointed member in the Legislative Assembly, Deputy Speaker, Chairman of the Standing Committee and, in 1929, Speaker.[11] He graduated doctor of laws on 4 October 1922.[12] *Malta Who's Who* has it that Dr Montanaro Gauci was called to the bar in 1923 and appointed Judge of the Superior Courts in 1930, that is, after only circa seven years' practice of the legal profession.[13]



Judge A. J. Montanaro Gauci

2.4. Reactions to Judicial Appointments

Dr Parnis' appointment to the bench brought about harsh criticism from Lord Strickland's opponents.

The Hon Prof Dr Luigi Randon B.A., LL.D., in the Senate, was very critical of the elevation to the bench of the previous Minister of Justice.[14] He held that various friends of his whose allegiance had been entrusted in the past to the Constitutional Party disagreed with such an appointment due to the new incumbent's tender age and lack of experience. In reply, when winding up the discussion on the Appropriation Act 1929-1930, Lord Strickland retorted that, ten days prior to his speech, a report was put before him, as Minister for Justice, that the arrears in deciding cases in the Superior Courts of Law numbered no less than 1,500. Thus, he observed, a remedy had to be found for the arrears of cases pending before the Superior Courts, in the interest of the people, the lawyers themselves, and respect for the Law Courts, which for this and other reasons may not have been as great as had been in the past, but through no fault of his. The addition to the number of Judges, naturally, was the first remedy that occurred to Lord Strickland but this measure was not enough. He hoped that the appointment of a new Judge who had experience in dealing rapidly with cases would bring about a rapid diminution in these arrears. But, if the new Judge did not succeed in this task, other methods would have to be tried as this backlog of cases had to be abated.[15]

11. R. Mifsud Bonnici, *Dizzjonarju Bijo-Bibliografiku Nazzjonali*, Malta 1960.
12. Information obtained from Dr. Raymond Mangion, Senior Lecturer, Department of Public Law, Faculty of Laws, University of Malta.
13. J. Manduca, General Editor, *Malta Who's Who*, Malta 1987, seventh edition, 130.
14. Parliamentary Debates: Official Report, Volume 8, Third Parliament of Malta, The Senate, Wednesday, 12 March 1930, when discussing the Fifth Appropriation Act 1929-1930 pp. 149-195, in particular the speech of the Hon Prof Dr Luigi Randon at p. 158 who discussed the qualifications for appointment to the bench. The Senate was discussing article 55 of the 1921 Constitution – Proclamation No 21 of 1921.
15. *Ibid*..168.

Dr Enrico Mizzi's newspaper *Malta* of Saturday, 10 August 1929, in a front page article entitled 'For the Serenity of Tribunals', launched a ferocious attack on Dr Parnis on the basis that he was too young and immature for judicial office, that he possessed barely any experience at the bar, that his political career left much to be desired and that his appointment was purely political in nature aimed at turning newly-appointed judges into government sympathizers.

Chief Justice Sir Arturo Mercieca was very critical of this appointment. Writing in his memoirs, he stated that Dr Parnis was terribly young for such an appointment and lacked practice at the bar as well as other attributes that were indispensable for judicial appointment. He noted that the Nationalist Party press was extremely critical of the appointment whilst Sir Augustus Bartolo's *Daily Malta Chronicle* was silent on the matter.[16] Sir Arturo levelled the same criticism, in so far as young age and short career at the bar were concerned, against Dr Anthony Montanaro Gauci, who was appointed judge following Dr Eric Parnis's demise although Sir Arturo did admit, nevertheless, that in the case of Judge Montanaro Gauci, the latter was endowed with high ingenuity and good culture. In both cases, Sir Arturo recollects, the members of the legal profession failed to pose to the new appointees the traditional well wishes on judicial appointment as the vituperations which these two gentlemen had uttered in Parliament against the judiciary had been still fresh in their mind.

Of the same opinion was Dr Herbert Ganado who noted that the government of the time had appointed two judges of tender age who were members of Parliament on behalf of the Constitutional Party, the party in office. Ganado, once again, concurs that Judge A. Montanaro Gauci *irnexxa bħala wieħed mill-Imħallfin tajbin li kellna* (succeeded as being one of the best judges on the bench).[17]

Rev Joe Calleja, in his biographical work on Sir Augustus Bartolo,[18] notes that, in the ten-year period prior to Augustus Bartolo being elevated to the bench, the latter had witnessed three other lawyers (Francesco Buhagiar,[19]

16. Sir Arturo Mercieca, *Le Mie Vicende: Note Autobiografiche*, Malta 1984, 201-202. In a footnote at page 202 of his autobiography, Sir Arturo states that, in so far as Dr Montanaro Gauci's appointment was concerned, the latter *fece infatti ottima riuscita* (as a matter of fact his appointment turned out to be an immense success).
17. H. Ganado, *Rajt Malta Tinbidel*, Volume I (1900-1933), Malta1977, third edition, 427.
18. J. Calleja, *Augustus Bartolo (1883-1937) Ġurnalist, Politiku, Imħallef*, Malta 1999, 227.
19. Dr. Francesco Buhagiar was Prime Minister of Malta from 14 October 1923 to 22 September 1924 (M.J. Schiavione, *L-Elezzjonijiet f'Malta 1849-1992 Storja Fatti Cifri*, Malta 1992, 74, 96 and 662). Buhagiar resigned the office of Prime Minister and, a few days later, was appointed Judge on 29 September 1924

Eric Parnis and Anthony J. Montanaro Gauci) who were appointed to the bench prior to Sir Augustus to the detriment of Sir Augustus Bartolo's career aspirations. Fr Calleja also points out that Judges Parnis and Montanaro Gauci were young and lacked experience at the bar and quotes the Governor of Malta informing the Secretary of State Lord Passfield that -

Sir Augustus Bartolo

> 'The appointment of Dr E. Parnis to be one of His Majesty's Judges has been the object of criticism in no measured terms in the Opposition Press, and has also been adversely criticised by some of the supporters of the Government. Dr Parnis was for a few months Minister of Justice, instead of his father, ex-Judge Alfred. Became Lawyer in 1919 without a distinguished career, was proposed by Ministers.'[20]

Nevertheless, it seems that the problem which these two appointments had ushered was mainly of a political nature. Both Judges Parnis and Montanaro Gauci were members of Parliament prior to judicial appointment, both were members of the Constitutional Party and both heavily criticised the workings of the Courts in Parliament.[21] It appears perhaps that this factor, in addition to the tender age and lack of practice at the bar, was the *leit motif* behind the criticism levelled at their appointment.

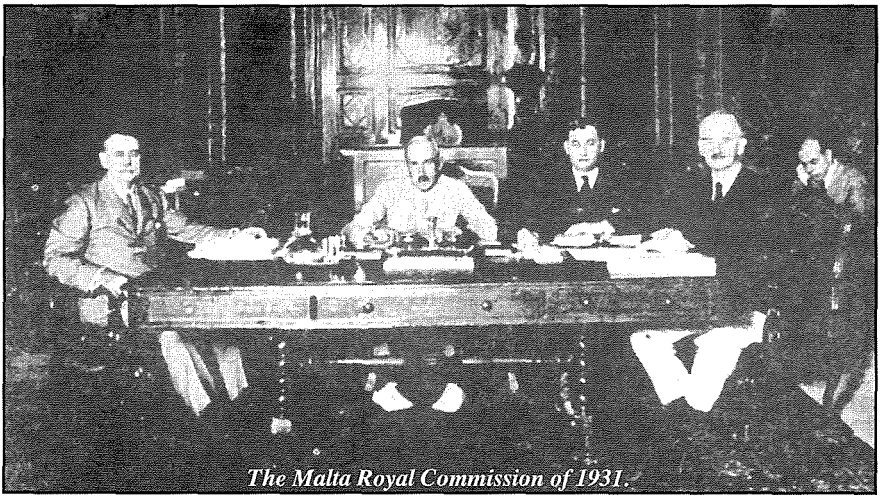
2.5. The 1936 Constitutional Changes

Bearing the above historical antecedents in mind, Chief Justice Sir Arturo Mercieca gave the following evidence before the 1931 Malta Royal Commission,[22] when asked by the Commissioners whether it was apt to make the appointment of a judge a matter of party politics:

> 'As a rule it has not been; in two cases it may have been. The only reason I say this is because the rule that in order to be appointed a judge one must have had a rather long career and must not be young, was not followed in two cases. Moreover,

(J. Calleja, *Ugo P. Mifsud (1889-1942) Prim Ministru u Patrijott*, Malta1997, 79). For bibliographical data vide Robert Mifsud Bonnici.

20. Governor Campbell's letter was dated 19 October 1929.
21. For Dr. Anthony Montanaro Gauci's harsh criticism at the Courts, vide Calleja (1997), 135-137.
22. The Malta Royal Commission was composed of: The Right Hon. Lord Askwith K.C.B. (Chairman), Sir Walter Egerton, K.C.M.G., Count De Salis, K.C.M.G., C.V.O., Secretary A.J. Dawe, Esq.



The Malta Royal Commission of 1931.

> there were others much senior who could have taken the places of those two. As a matter of fact, I should like to see introduced here the rule which I understand is being followed in England, namely, that no person is appointed a judge unless he has had 15 years' practice at the Bar. Perhaps in Malta, if not 15 years, at least 12 years should be required. I understand that the Board who are contemplating the amendment of some of the provisions of the Laws of Organization and Civil Procedure are submitting an amendment to that effect.'[23]

2.6. Subsequent Constitutional Developments

Article 52(2) of the Malta Constitution, 1939[24] – the Macdonald Constitution – contained an identical provision which was lifted *verbatim* from the 1936 Constitution. The same cannot be said with regard to article 43(1) of the Malta Constitution 1947 which, although similar in substance, was worded differently. It provided that:

> 'No person shall be qualified to be appointed a judge of the said Courts unless, for a period of, or periods amounting in the aggregate to, not less than twelve years, he has either practised at the Bar in Malta or served as a Magistrate in Malta, or has partly so practised and partly so served.'

23. Evidence of Sir Arturo Mercieca, Kt., LL.D., M.A., pp. 169-180 at p. 173, para 1369, given on Saturday, 16 May, 1931 in *Malta Royal Commission, 1931: Minutes of Evidence*, Malta 1931.
24. Letters Patent of 14 February 1939 published in *The Malta Government Gazzette* of 25 February 1939.

Essentially, the difference between the wording of the 1936 and 1939 versions on the one hand and the 1947 version on the other are twofold:

(a) in the 1936 and 1939 versions, the words 'in Malta' seems to apply only to serving as a Magistrate in Malta and not to practising at the Bar in Malta. As the intention of the legislator seems to have been to give effect to the above-cited Report of the Malta Royal Commission of 1931, the wording was corrected in the 1947 Constitution to better reflect the intentions of the Malta Royal Commission. Thus, practice at the Bar in the 1947 Constitution is linked to Malta and not, say, to the United Kingdom or, for that matter, any other country.

(b) the wording of all three Constitutions (1936, 1939 and 1947), although not identical, conveys the same message in so far as the period of practice and service are concerned. Indeed, the discrepancy is a matter of syntax because all three Constitutions are in agreement that a judge should be appointed from amongst advocates who have either practised at the Bar in Malta or served as a Magistrate in Malta, or have partly so practised and partly so served for a period of, or periods amounting in the aggregate to, not less than twelve years.

Article 27(2) of the Malta (Constitution) Order in Council, 1959, follows the pattern set out in the 1947 Constitution with one cosmetic change. The words 'No person shall' were substituted by the words 'A person shall not'. The 1959 provision thus reads as follows:

> 'A person shall not be qualified to be appointed judge of the said Courts unless, for a period of, or periods amounting in the aggregate to, not less than twelve years, he has either practised at the bar in Malta or served as a Magistrate in Malta, or has partly so practised and partly so served.'

The Malta Constitution of 1961 had a very similar provision but with one important difference which is crucial for the proper construction of the constitutional provision as it currently obtains. The 1961 provision reads as follows:

> 'A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta, or has partly so practised and partly so served.'

Note that the latter provision, contrary to that contained in previous versions, uses the words 'practised as an advocate in Malta' as opposed to the words 'practised at the bar in Malta'. It is therefore obvious that these two phrases are not synonymous: the former is indeed wider in purport than the latter. In addition, the words 'at the Bar' have now been purposely removed to give a different meaning to the provision under examination. Furthermore, the expression 'practised as an advocate' is not restricting the practice to exercising the profession of advocate in court but refers also to any other services which an advocate may give in his or her professional career which might not necessarily be litigation oriented. On the basis of this subtle distinction between the wording in the 1961 Constitution – which was followed in the 1964 Constitution,[25] as it presently obtains – and previous versions of the provision under study, if an advocate has never exercised the profession in the courts of justice in Malta he or she can still be appointed a Judge of the Superior Courts. This is essentially the crux of the matter.

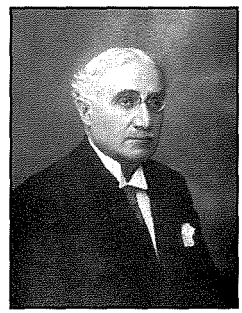
Whether this is entirely a wise course of action to pursue by the Government of the day is a totally different matter for, in practice, some experience at the bar would surely be an indispensable asset for the new incumbent. A judge worth his or her salt should not only have mastered substantive law but should be extremely well-versed in the law of procedure for this is the law which he or she always has to apply in all cases pending before his/her court. However, the point being made at this juncture by the different wording adopted in the 1961 Constitution (followed in the current Constitution) was specifically intended to bring about a different result from the previous wording in the 1936, 1939, 1947 and 1959 constitutional provisions.

In other words, there has never been, since 1961 onwards, a constitutional requirement in force in Malta prohibiting an advocate who does not practise the profession in court from being appointed Judge of the Superior Courts. *A contrario sensu*, an advocate who has not practised the profession of advocate in court can still be appointed judge[26] provided that he or she has practised the profession of advocate outside the Courts of Justice and in the Maltese Islands. Moreover, it is also clear that if an advocate has never practised his or her profession outside the courts of justice in the Maltese Islands as, for instance, would be the case where he/she has totally

25. Although the Constitution of Malta of 1964 has been amended various times, article 96(2) was never amended and its text thus remains as originally enacted in 1964.
26. The same provision regulating Judges applies also to Magistrates – vide article 100(2) of the Constitution of Malta.

abandoned the profession in favour of a teaching job entirely unrelated to the legal profession, then the said advocate cannot be considered to have had practised the profession of advocate. Nonetheless, what amounts to actual practice is not defined at law. One would presumably require an element of consistency in the practice of the profession and not an erratic practice. But this matter still has to be judicially determined or legislatively ascertained.

By way of conclusion on this aspect, the expression 'practice at the bar' means practice at the courts, the bar being the place in court where the advocate speaks on behalf of his or her client when addressing the Judge, Magistrate or Jury. Once the 1961 Constitution and its successor have both opted for a wider meaning by removing the requirement of practising at the bar as Chief Justice Sir Arturo Mercieca had recommended, it has been possible since 1961 to appoint as Judges and Magistrates advocates who have not practised their profession in court.



Sir Arturo Mercieca

2.7. The Provision's Three Epochs of Constitutional History

In sum, to conclude this historical survey, I have divided Maltese Constitutional history on this matter into three periods: (1) from the commencement of British rule up to the 1921 Constitution; (2) from the 1936 Constitution up to the 1959 Constitution; and (3) from the 1961 Constitution to date. In the first epoch, no constitutional requirement obtained obliging prospective judges to have had to serve at the bar in order to be elevated to the bench. In the second period, the 1936 Constitution introduced the rule suggested by Chief Justice Sir Arturo Mercieca to the Malta Royal Commission 1931 that no person ought to be appointed a Judge of the Superior Courts unless he would have had at least twelve years' practice at the bar. The last time span removed this latter requirement by substituting it with a provision to the effect that practice as an advocate was to be the sole criterion for judicial appointment as is evidenced from article 96(2) above cited.

3. Article 101A(11)(c) of the Constitution of Malta

Article 101A (11)(c) of the Constitution obliges the Commission for the Administration of Justice to give its advice to the Prime Minister when it

is sought on certain appointments to be made in terms of the Constitution. First, it is to be noted that this advice is limited to the appointment of Judges, acting Chief Justice, acting Judges and Magistrates. The Commission is not duty bound in terms of this provision to advise the Prime Minister on any other appointment such as that of Attorney General or chairpersons and members of quasi-judicial tribunals. Second, the advice has to be requested by the Prime Minister and not by any other person, be it the Minister responsible for justice or some other Minister. Third, the Prime Minister can advise the President of Malta to appoint a member of the judiciary without the need of having recourse to the Commission's advice. In other words, it is up to the Prime Minister to decide whether to request the advice of the Commission on a judicial appointment and it is not mandatory upon him or her to do so. It appears that the Prime Minister has requested the advice of the Commission in only one case, that concerning the appointment of Dr Andrè Camilleri LL.D. as judge of the Superior Courts. Fourth, the Prime Minister is not bound by the advice tendered by the Commission.[27] Fifth, if the Prime Minister disagrees with the advice given, there is no reconsideration procedure established in the Constitution in terms of which the Prime Minister may refer back the case to the Commission[28] to amend its advice. However, from the Commission's 5 November 2002 reply to the Acting Prime Minister, it can be inferred that the Commission has not yet ruled out the possibility of such a reconsideration procedure where the judicial appointment has not yet been made.[29] Finally, the constitutional provision does not set out the procedure to be followed by the Commission when drawing up its advice such as, for example, whether it can summon the proposed candidate for judicial appointment for a *viva voce* examination,

27. This has to be distinguished from the case where the President of Malta is advised by the Prime Minister on a judicial appointment. In the latter case, the President of Malta has to abide by that advice (vide article 85 of the Constitution).
28. A similar procedure is contemplated in article 86 of the Constitution in the sense that, where the Prime Minister is required to exercise any function on the recommendation of any person or authority, he or she may refer back only once that recommendation for reconsideration by the person or authority concerned. Of course, in the case of article 101A(11)(c) of the Constitution, the position is different as the Prime Minister – contrary to the case contemplated in article 86 of the Constitution – is not bound with the Commission's advice.
29. The wording of the Commission's reply to the Acting Prime Minister reads as follows:
'Irrid ninfurmak li, il-Kummissjoni approvat mozzjoni li tghid is-segwenti: '*Wara l-ittra tal-Prim Ministru tas-7 ta' Ottubru 2002, b'risposta għall-parir tal-Kummissjoni tal-istess data, u wara li l-Prim Ministru għadda biex jagħti parir lill-Eccellenza Tiegħu l-President ta' Malta, biex Dottor Andrè Camilleri jiġi maħtur Imħallef, din il-Kummissjoni m'għandhiex aktar funzjoni x'taqdi fir-rigward ta' ħatra li ġà saret.*' (Translation: 'I would like to inform you that the Commission has approved a motion which states as follows: 'Following the Prime Minister's letter of 7 October 1992, in reply to the

whether it can enter into correspondence between itself and the third party candidate,[30] whether it should conduct a public hearing[31] concerning the proposed candidate's appointment or invite members of the public to write to it with regard to the proposed candidate's suitability for judicial office.

3.1. Article 101A(11)(c) and the proposed appointment of Dr Andrè Camilleri LL.D. to judicial office

The proposed appointment of Dr Andrè Camilleri LL.D. to judicial office has been the subject of public debate in the local newspapers.[32] On 10 November 2002, the Department of Information issued a press release in terms of which it published ten documents.[33] In brief, the facts of the case were as follows. On 26 September 2002, Prime Minister Dr Eddie Fenech

Commission's advice of the said date, and after the Prime Minister passed on to advise His Excellency the President of Malta, so that Doctor Andrè Camilleri be appointed Judge, this Commission has no further function to carry out with regard to the appointment which has already been made.')

30. In the Dr Andrè Camilleri case, the Commission wrote to the Minister responsible for justice to obtain the proposed candidate's *curriculum vitae* and a declaration as to his financial interests, and not directly to the candidate. When the candidate wrote to the Commission, prior to replying to his letter, it sought the Acting Prime Minister's concurrence to do so. This is because the Commission has no direct relationship with the candidate for judicial office but with the Prime Minister.
31. Unless both the Commission and the Prime Minister concur, the Commission cannot divulge that it has been consulted in terms of article 101A(11)(c) of the Constitution as the advice which it will tender will be given in confidence. Nonetheless, in the Dr Andrè Camilleri case, the Government published the advice given in confidence by the Commission to the Prime Minister as a Department of Information press release.
32. Cf., for instance, the following: B. Gatt, 'Attorney General calls for more scrutiny of judicial appointees', *The Malta Independent on Sunday*, 8 September 2002, 1 and 15; E. Abela, Director DOI, 'New Judge's appointment', *The Malta Independent*, 17 October 2002, 7; N. Grima, 'Prime Minister overrode Justice Commission doubts on choice of Andrè Camilleri as judge', *The Malta Independent*, 17 October 2002, 5; J. Mifsud, 'Fenech Adami jinjora lill-Kummissjoni ghall-Amministrazzjoni tal-Ġustizzja', *Kullħadd*, 20 October 2002, 3; Dr. J. Brincat, 'Thank God it's Sunday – Council for the Administration of Justice', *The Sunday Times*, 20 October 2002, 12; J. Bonello, 'Andrè Camilleri turns down post of judge', *The Times*, 8 November 2002, 1 and 18; Anon, 'Andrè Camilleri turns down judge appointment', *The Malta Independent*, 8 November 2002, 3; B. Pisani, 'Dr Andrè Camilleri ma jaċċettax in-nomina ta' Imhallef. Il-President ta' Malta akkużat li mexa b'nuqqas ta' serjetá'', *L-Orizzont*, 8 November, 2002, 1 and 22; J. Bonello, 'PM's strong reaction to justice commission's advice. Commission meeting to discuss situation today', *The Times*, 9 November, 2002, 1 and 7; Anon, 'Roamer's Column – The Bench is the loser', *The Sunday Times*, 10 November 2002, 11; N. Grima, 'Lawyer's missed appointment causes rift between government and Justice Commission', *The Malta Independent on Sunday*, 10 November 2002, 5; M. Farrugia, 'Justice Commission turns down Andrè Camilleri's nomination definitively. Commission displeased over certain comments in its regard.', *The Malta Independent on Sunday*, 10 November 2002, 1 and 2; Anon, 'Eddie rebuked by President', *Malta Today*, 10 November 2002, 1; Dr. K.F. Dingli, 'Appointment of judges', *The Times*, 13 November 2002, 60; Dr. J.A. Herrera, LL.D., M.P. 'The Andrè Camilleri dilemma', *The Times*, 14 November 2002, 48; Dr. A. Bencini, 'Legal profession: one and indivisible', *The Times*, 15 November 2002, 11; Dr. G. Sapiano, 'Implications of commission's stand', *The Times*, 15 November 2002, 11; A.R. Curmi, 'Andrè Camilleri's aborted appointment as judge', *The Times*, 16 November 2002, 9; Anon, 'Tilfet il-

Adami LL.D., M.P., wrote to the President of the Commission for the Administration of Justice H.E. Professor Guido De Marco LL.D. that it was the Prime Minister's intention to advise the President of Malta to appoint Dr Andrè Camilleri LL.D. and a serving Magistrate to the office of Judge of the Superior Courts with effect from 9 October 2002. Dr Fenech Adami then requested the Commission's advice regarding these appointments. On 7 October 2002, Professor De Marco *qua* President of the Commission for the Administration of Justice advised the Prime Minister to the effect that first and foremost the Commission was given a very short period within which to draw up its advice in order to carry out research on the subject and provide a detailed and informed advice. Secondly, the Commission examined Dr Andrè Camilleri's *curriculum vitae* and a declaration which it had requested concerning his financial interests. The Commission, quoting article 96(2) of the Constitution, observed that Dr Camilleri

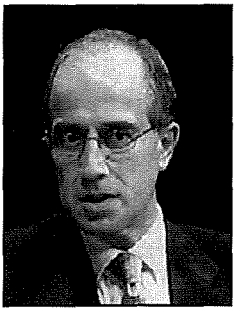
> *'... għandu esperjenza f'entitajiet, kemm pubbliċi kemm privati, ukoll f'kuntest legali u/jew ta' valutazzjoni legali. Din l-esperjenza, pero', ma tammontax neċessarjament għall-eżerċitar tal-professjoni ta' avukat. Għalhekk, fl-assenza ta' indikazzjoni li Dottor Camilleri eżerċita l-avukatura tul it-terminu rikjest, hemm il-possibilita' li tonqos fih il-kwalifika prekritta fl-artikolu 96(2) ċitat.*
> *Il-Kummissjoni ma għandha ebda raġuni tiddubita mill-integrita'*

Ġudikatura, tilef il-poplu Malti', *Il-Ġens*, 16 November 2002, 9; J. Muscat, 'The making of a Judge', *Malta Today*, 17 November 2002, 14; G.C. Micallef, 'Judges with hands on experience', *The Malta Independent on Sunday*, 17 November 2000, 24; Ch. Pace, Department of Social Policy and Social Work, FEMA, University, 'What logic makes good judges?', *The Times*, 18 November 2002, 8; F. Galea Debono, 'Andrè Camilleri incident 'yet another gaffe' – Sant', *The Times*, 18 November 2002, 12; R.F. Fsadni, 'The public perception of the Andrè Camilleri case', *The Times*, 21 November 2002, 8; Dr. K.F. Dingli, 'Fundamental difference between 'advocate' and 'lawyer'', *The Times*, 3 December 2002, 8 and 10; Dr. D. Grech, 'A practising lawyer', *The Times*, 6 December 2002, 9; Dr. K. Aquilina, 'Judicial appointments: quid faciendum?', *The Sunday Times*, 8 December 2002, 80-81; N. Bianchi, 'The legal profession', *The Times*, 11 December 2002, 9; Ch. Pace, 'Selecting judges', *The Times*, 18 December 2002, 9.

33. (1) Prime Minister's letter dated 26 September 2002 addressed to the President of the Commission for the Administration of Justice; (2) reply of the President of the Commission dated 7 October 2002; (3) Prime Minister's letter dated 7 October 2002 addressed to the President of the Commission; (4) Dr Andrè Camilleri's *curriculum vitae* forwarded to the Commission; (5) Dr Andrè Camilleri's letter dated 30 September 2002 addressed to the Minister of Justice and Local Government; (6) declaration made by Dr Andrè Camilleri dated 8 October 2002; (7) Dr Andrè Camilleri's letter dated 23 October 2002 addressed to the President of Malta; (8) Acting Prime Minister's letter dated 4 November 2002 addressed to the President of Malta; (9) President of Malta's reply to the Acting Prime Minister dated 5 November 2002; (10) Dr Andrè Camilleri's letter dated 7 November 2002 addressed to the President of Malta.

u mis-serjeta' professjonali ta' Dott. Camilleri għall-kariga ta' Imħallef.'[34]

That same day, the Prime Minister informed the Commission that Dr Camilleri had exercised the profession of advocate in a brilliant manner and that he was set to advise the President to appoint him Judge of the Superior Courts. It seems that, in the interim period, Dr Camilleri was appointed Judge of the Superior Courts but had not yet taken the oath of office and the oath of allegiance. On 23 October, Dr Camilleri wrote to the Commission requesting it to carry out a serious evaluation at its leisure as to whether he satisfied the criteria established in the Constitution for judicial office. On 4 November 2003, the Acting Prime Minister wrote to the Commission requesting it to take all the necessary measures to eliminate the problem raised by Dr Camilleri in his 23 October 2003 letter to the Commission. On 5 November 2003, the Commission replied to the Acting Prime Minister that, once the Government had already advised the President of Malta to appoint Dr Camilleri Judge of the Superior Courts and once Dr Camilleri had been so appointed, the Commission had no further advisory role to exercise in the matter. On 7 November 2003, Dr Camilleri informed the President of Malta that he had declined to accept the offer to be appointed Judge of the Superior Courts.



Dr Andrè Camilleri

If one were to distinguish, as the Commission for the Administration of Justice failed to do, between the exercise of the profession of advocate, on the one hand, and the exercise of the said profession at the bar, on the other, it is evident that the two expressions are far from being tautological: the former comprises the latter but not vice-versa. It is unfortunate that the Commission, in its appraisal of the facts at issue, linked the twelve-year professional practice constitutional requirement for judicial office to the exercise of that same profession at the bar. This restrictive construction of the

34. Translation: '... he has experience in the service of entities, both public and private, also within a legal context and/or providing legal evaluation. This experience, however, does not necessarily amount to the exercise of the profession of advocate. Therefore, in the absence of an indication that Doctor Camilleri has exercised the profession of advocate throughout the prescribed period, there is the possibility that he might not satisfy the prescribed qualification established by article 96(2) afore-cited. The Commission does not entertain any reason to doubt of Dr. Camilleri's integrity and professional seriousness to occupy the office of Judge.'

law, nonetheless, is not what the Constitution provides for as the latter does not tie judicial office – as the Commission did – with professional practice at the bar. In fact, it was the 1936, 1939, 1947 and 1959 Constitutions which did so and, as cited above, their respective provisions were quite express and unequivocal on this point. But the 1961 and the (current) 1964 Constitutions removed the reference to professional practice at the bar. Hence, bearing in mind the legislative history of the constitutional provision, it is very unfortunate that the Commission interpreted that provision in a restrictive manner when it should have done otherwise, as the wording of the law is quite clear when one bears in mind its historical antecedents. Not only was the interpretation afforded by the Commission a wrong one but, to add insult to injury, in the vein of bad administration, it even failed to rectify the damage it had procured to Dr Camilleri by refusing to publicly apologize and admit that its construction of the law was erroneous. Naturally, in the circumstances, with the sword of Damocles hung by a hair over him, Dr Camilleri had no other honourable option but to resign from judicial office lest he would have to carry out his judicial functions in a very insecure manner and in a far from serene atmosphere in the perpetual fear that, one day or another, his appointment might be called in doubt exactly on the same albeit wrong grounds as those propounded by the Commission for the Administration of Justice.

4. The Code of Organization and Civil Procedure

The next question which has to be addressed is whether the provisions of the Code of Organization and Civil Procedure have any material bearing on the qualifications for the appointment of Judges and Magistrates in Malta.

When the Code of Organization and Civil Procedure came into force on 1 August 1855, it had an article providing that:

> 'No person may exercise the profession of Advocate in the Courts of Justice of the Island of Malta and its Dependencies without the authority of the Governor granted by warrant under the Public Seal of Malta.'[35]

Subsequently, the words 'The Island of Malta and its Dependencies' were substituted to read 'in Malta'. Further, the words 'the Governor' were substituted by the words 'Governor-General'[36] when Malta became

35. The provision number as originally enacted in 1855 was article 77.
36. Cf. regulation 3 of the Adaptation of Laws Order, 1965 (L.N. 46 of 1965).

independent and the latter words were, in turn, substituted by the words 'the President'[37] when Malta become a republic.

Apart from the above modifications, article 77 of the Code of Organization and Civil Procedure, as originally enacted, has been changed three times over the past years:

(a) it was substituted by article 2 of the Code of Organization and Civil Procedure (Amendment) Act, 1977.[38] The new provision did not change the sub-article under consideration apart from re-numbering it as sub-article (1) thereof. New sub-articles (2) to (4) were introduced intended to restrict the practice of the profession of advocate in any Court of Justice in Malta if an advocate happened to be a Member of Parliament. Nonetheless, these sub-articles were struck down by the Constitution Court in its judgment of 26 September 1989 in the names *Il-Pulizija vs Onor Perit Michael Falzon B.Arch., A. & C.E., M.P.*[39] where the said Court declared these provisions to be unconstitutional in so far as they ran counter to the accused's right to adequate representation and to an effectual remedy as enshrined in the Constitution of Malta and in the European Convention of Human Rights and Fundamental Freedoms.

(b) it was amended by article 5 of the Code of Organization and Civil Procedure (Amendment) Act, 1978[40] where the word *emigrazzjoni* in the Maltese version of sub-article 3(c)(iv) was substituted by the word *immigrazzjoni*;

(c) it was amended by article 38 of the Code of Organization and Civil Procedure (Amendment) Act, 1995[41] where sub-articles (2), (3) and (4) thereof were deleted whilst sub-article (1) thereof was now renumbered as article 79. In other words, the provision was changed to reflect the wording of the Code of Organization and Civil Procedure as originally enacted.

From an examination of article 79 of the Code of Organization and Civil Procedure, it appears that the warrant of advocate in indispensably required *ad validitatem* to exercise that profession at the bar but is not an essential prerequisite to exercise the same profession outside the Courts of Justice in Malta. Thus, for instance, if an advocate happens to be a desk lawyer giving advice to clients but never taking up litigation in court, if an

37. Cf. article 68(1)(a) of the Constitution of Malta (Amendment) (No. 2) Act, 1974 (Act No. LVIII of 1974).
38. Act No. XXVII of 1977.
39. *Kollezzjoni ta' Deċizjonijiet tal-Qrati Superjuri ta' Malta*, Volume LXXII, Malta 1988, Pt I, 48.
40. Act No. XII of 1978.
41. Act No. XXIV of 1995.

advocate acts as an arbitrator at the Malta Arbitration Centre in so far as legal disputes are concerned, if an advocate happens to be employed with a company and acts as its secretary but never engages in judicial litigation, or if an advocate drafts laws for the Legislature or subsidiary legislation for the Executive, that advocate is still considered to be exercising the profession of advocate. Nevertheless, if he or she desires to take up litigation in court, that is, at the bar, he or she must possess a warrant; otherwise he or she cannot enter an appearance before a Judge of the Superior Courts or a Magistrate of the Inferior Courts.[42]

On 26 September 2006, a bill[43] was published in *The Malta Government Gazette*[44] whereby it was proposed in clause 9 of the said Bill to substitute article 79 of the Code of Organization and Civil Procedure with the following:

> 'No person may exercise the profession of advocate without the authority of the Government of Malta granted by warrant under the public seal of Malta.'

The words 'in the courts of justice in Malta' are being proposed to be removed whilst the words 'the President of Malta' will read 'the Government of Malta'. By article 10 of the Code of Organization and Civil Procedure (Amendment) Act, 2007[45] Parliament instead approved the substitution of article 79 of the aforesaid Code with the following:

> 'No person shall exercise the profession of advocate without the authority of the President of Malta granted by warrant under the Public Seal of Malta.'

This substitution came into force on 20 July 2007 in terms of Legal Notice 192 of 2007. Through this new provision, it is being made absolutely clear in article 79 of the Code under examination that any advocate can be appointed judge or magistrate even if s/he has never practised in court. Whether this is a *desideratum* is another thing but it would have definitively settled the question as to whether practice or not is an essential qualification for appointment to judicial office. Although I do think that

42. As to the relationship between article 96(2) of the Constitution and article 79 of the Code of Organization and Civil Procedure vide Dr. A. Micallef, 'The Appointment of the Judiciary', in *Law and Practice*, Issue Six, June 2002, 40-45.
43. Bill No 77.
44. *The Malta Government Gazette*, No. 17,972.
45. Act No. VII of 2007.

the new provision as amended in July 2007 adds nothing new to the law, at least it would put at rest the mind of those people who, wrongly in my view, have equated practice at the bar with eligibility for judicial appointment.[46]

5. Recommendations

Having noted the recent case of Dr Andrè Camilleri LL.D. and bearing in mind the historical evolution of the pertinent provisions of the law applicable to the appointment of members of the judiciary, it emerges that the procedure concerning appointments to the bench as contained in the Constitution needs fine tuning.

First and foremost, criteria have to be drawn up, written down and published delineating those essential requisites which have to be fulfilled by a candidate for appointment to both the office of Chief Justice, Judge and Magistrate. Such criteria should include, *inter alia*, efficiency, integrity, honesty, competency, conscientiousness, broad-mindedness, fairness, tolerance, motivation, dedication and in-depth knowledge of the law. These substantive criteria are more relevant than the formal one obtaining today, that is, the length of time the candidate for appointment has practised the profession of advocate.

Second, the Ministry of Justice – as the lead Ministry in such cases – is to be fully entrusted with dealing with such appointments prior to referring the matter to Cabinet. Such Ministry should establish appropriate administrative mechanisms for the selection of potential candidates to judicial office. This Ministry should carry out a formal and thorough examination of each potential candidate as to conduct, character, affiliations, conflicts of interest, undesirable friendships, etc. with a view to ascertaining whether the candidate meets the criteria listed in the immediately preceding paragraph.

Third, once a potential candidate has been identified, the Ministry of Justice should open a personal file on that candidate where all information about him or her should be recorded. The candidate should be required to submit an extensive *curriculum vitae*, supporting documents (e.g. conduct certificate, birth certificate, copy of warrant to exercise the profession of advocate, etc.), a declaration as to financial assets and membership of secret and other organizations. His or her personal file, compiled as aforesaid, should be referred to the Cabinet once the Ministry concludes that the candidate in question is potentially suitable for judicial office. If

46. Dr Lorraine Schembri Orland is one of these. Vide her letter entitled 'Appointment of judges and the Constitution' in *The Malta Independent*, 12 November 2006, 10.

the Cabinet endorses the Minister's candidate, the Prime Minister should then seek the advice of the Commission for the Administration of Justice.

Fourth, the Commission would examine in person the candidate and review his or her nomination for judicial office. The Commission may require one of its sub-committees or a purposely established sub-committee to carry out an extended interview of the candidate. It should be given an appropriate period within which to conclude its task, which period should not be less than two months and not more than four months. The Commission or any of its sub-committees may request additional information about the candidate directly from him or her or from other sources and the latter will be, by express provision of law, obliged to furnish the said information notwithstanding the provision of any law, including banking secrecy or official secrecy (as is the case with income tax and value added tax documentation). It is thus incumbent upon the Ministry of Justice to set the process rolling at least four months before a vacancy in judicial office occurs or before an incumbent retires.

Fifth, after the Commission has concluded its deliberations (and, in doing so, it may summon third parties to appear before it who might provide it with additional information about the candidate), it will then draw up its non-binding advice and refer it to the Prime Minister. If there is no objection by the Commission to the appointment, the Prime Minister should advise the President of Malta to appoint the candidate to judicial office; if the Commission objects to the proposal or requires further clarifications to be carried out by the Government, the Prime Minister should, in the former case refer the matter to the Cabinet for a final decision and, in the latter case, refer the matter back to the Ministry of Justice so that the necessary clarifications are sought and, subsequently, the matter is referred back to Cabinet for a final decision.

Sixth, all the above stages of the proceedings should be held in camera so that the members of the Commission for the Administration of Justice would be free to discuss quite frankly their preoccupations, should they have any, concerning the candidate for judicial office with the candidate, and the candidate may express his or her views without fear of his or her private life (income, property ownership, investments, other assets, liabilities, etc.) being exposed to public scrutiny for, after all, the candidate might not be found suitable for appointment to judicial office and thus it would be unfair to publicise his or her private matters.

Seventh, the Prime Minister should not publish any advice given to him or her by the Commission for the Administration of Justice without having

obtained the Commission's and the proposed candidate's prior written consent.

Of course, the above are only a few suggestions as to what procedure could be adopted in making appointments to the judiciary and I am sure that refinements to this model or other proposals can also be thought of.[47] It is augured that this paper, apart from clarifying the legal quandary concerning judicial appointments, will initiate public discussion as to the proper adoption of an adequate procedure aimed at better regulating the appointment of Judges and Magistrates according to the exigencies of present day needs.

6. Conclusion

Practice at the bar for a sufficient period of time is not *per se* a sufficient criterion upon which to base judicial appointment even though, as has already been pointed out, it is an important requirement especially in this day and age where the law has become more complex than in the past. Dr Montanaro Gauci, who was elevated to the bench after only seven years of professional practice, had well-deservedly taken up the challenge of his opponents and demonstrated that, notwithstanding his short legal career prior to judicial appointment, he still made an excellent judge. This notwithstanding, other criteria apart from professional practice should be adopted which are more of a substantive rather than of a procedural nature. These substantive criteria ought to regulate appointments to the bench at a par with the formal requirement of professional practice.

Judges – contrary to Ministers who come by the dozen, stay in office for a limited period of time and are expendable – do not come and go at frequent intervals but remain in office until they retire, presently established at sixty-five years of age. Thus a wrong decision in selecting a judge is fatal and practicably impossible to reverse and correct. A wrong decision in choosing a Minister can always be corrected through a Cabinet reshuffle (unless he or she happens to be the Prime Minister) or through a general election. Here lies the wisdom of appointing, as judges, advocates who are in the later part of their career so as to minimize as much as possible the unwarranted eventuality of making a wrong decision.

47. For another view, vide 'Call for judicial appointments board' and 'Interview with Chief Justice: Call for independence of judiciary to be more institutionalised', *The Times*, 14 September, 2006, 1 and 7. For a contrary view, vide the views of Dr. Carmelo Mifsud Bonnici, Parliamentary Secretary in the Ministry of Justice and Home Affairs, 'Judicial appointments "work"' in *The Times*, 25 October 2006, 7.