The perils of positivist thinking in Public law

TONIO BORG

In this article, Dr **Tonio Borg** reviews episodes and trends in the interpretation of our constitutional law that are underscored by the positivist method, highlighting the main dangers this developing approach poses in that field. The rest of the article can be found in Id-Dritt XXX.

TAGS: Public law, Positivism, Legal interpretation

Dr Tonio Borg LL.D, Ph.D, K.O.M. is a former European Commissioner and former Deputy Prime Minister and Minister of Foreign Affairs of Malta. He is a resident senior lecturer in public law at the University of Malta.

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1. Introduction

The positivist approach to legal interpretation is based on a particular philosophical idea of law; namely, that law is a command by a superior to an inferior in the interest of society, a strict application of the law is a must and no further interpretation is necessary except the clear wording of the law. Naturally, this approach, laudable though it might seem, can create problems. Laws are created in a contest, historical, social or political. The law drafters cannot create perfect legislation, leading to loopholes and unclear provisions. But, above all, the reasonable interpretation of statutory provisions is necessary in order to prevent unreasonable consequences or conclusions.

A purview of Maltese jurisprudence in public law, as well as particular incidents in Malta's constitutional history, will reveal the dangers of adopting positivist approaches in this sphere of the law. The most spectacular example of such a danger arose in the constitutional crisis of December 1974 which ushered in a republican form of Government. The 1964 monarchical constitution, granted on Independence Day, contained an article which proclaimed the supremacy of the Constitution, subject to certain exceptions; namely, the possibility of amending the Constitution through a three tier form contained in Article 66, and the exceptions made to a host of particular ordinary laws as they stood on the coming into force of the Constitution. These encompassed the main Codes of law, as well as an exemption of pre- 1962 laws from the right to property contained in Article 37.

This provision was the subject of heated legal and political debate in December 1974 when the Government expressed the intention of amending the Constitution without having to resort to a referendum. Agreement had been reached in the House, by a large majority surpassing two-thirds, as to the main features of the amendments which included, apart from the main thrust towards a change from monarchical to Republican government, the automatic composition of the Constitutional Court and other matters. Some provisions which had to be amended required not only a two-thirds majority in the House, which the amendments enjoyed, but also a referendum. To avert the referendum requirement, a legal ploy was excogitated: it was discovered that Article 6 itself, the supremacy clause, was not entrenched. Article 66 provided that an un-entrenched constitutional provision could be amended by an absolute majority of the members of the House of Representatives. Consequently Article 6 was amended through such majority, the supremacy of the Constitution was put in abeyance, the amendments were introduced, and, once everything had been suitably amended, the door was shut once again and supremacy

reasserted, this time entrenched by a two-thirds majority.

In order to arrive at such a legal stratagem, Government consulted the Attorney General. It was known that a written advice was given, the same one which was shown to the Opposition in 1974 before it consented to this unorthodox way of amending the Constitution. The written advice by Dr Edgar Mizzi has now come to light. It adopts a positivist approach, which incidentally was accepted by Malta's legislature. No one contested the means used to change the Constitution. Professor J.J. Cremona, the author of the original Constitution himself, concludes that though there was an interruption in the legal continuity by the unorthodox method used to change the Constitution, such irregularity was cured by general acquiescence[1]. The argument was simple: the supremacy clause was not entrenched, and consequently could be altered by an absolute majority.

In the advice rendered public recently and deposited at the National Public Library, which is dated 9th December 1974[2], a few days before the enactment of the constitutional changes, the Crown Advocate General stated:

> *This is not a casus omissus for section 66 specifically provides not only that section 6 may be altered but also how it may be altered. The case is expressly covered in law and is expressly excluded from entrenchment. ... Some might say that it is a case of a drafting error and could support the view by invoking the paramount importance of the section in question and of the principle which it enunciates, namely the supremacy of the Constitution ... they could add the possibility of amending 6 by a mere majority would stultify completely the exacting requirements of subsections (2) and (3) of Section 66. These are of course real difficulties but to ignore the clear wording of subsections (1) and (5) of Section 66 is at least equally difficult. The fact that section 6 is, by the very terms of the Constitution, subject to alteration by an Act of Parliament approved by a mere majority of all the members of the House, remains incontrovertible. The Constitution expressly excludes section 6 from entrenchment.*

The advice goes on also to make a moral argument:

> *The action by your Government is not only legally possible but also morally justifiable once it is clear that the purpose of the amendment is that of giving to the country, by peaceful means*

[1] See JJ Cremona: *Birth pangs of a Republic: Section 6 of the Maltese Constitution*: *Selected Papers Vol. II* (1990-2000 (PEG 2002) 129. See also Tonio Borg *A Commentary on the Constitution of Malta* (Kite) (2016) 31-39.

[2] Memo dated 9 December 1974 to the Prime Minister signed by the Crown Advocate General. This memo is evidently a draft before a formal one was typed. The official one could not be found. Dr Mizzi's son Dr. Henri Mizzi found it in his deceased father's papers recently and graciously gave me a copy; the original has been deposited by Dr. Henri Mizzi at the National Library (*Bibliotheca*).

and by avoiding as much as possible cause for animosity, a constitution acceptable to the two parties represented in the House and consequently to the country as a whole.

That argument was true. The stratagem, legally unorthodox though it was, calmed the troubled waters then, and ushered in the republican form of government with the least possible political tremors. However, the argument remains that legal continuity was jeopardised, and the idea of constitutional supremacy subjected to political convenience and expediency.


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