



The Plea of Non-Jurisdiction – A Step Too Far

OFFICE OF THE OMBUDSMAN
MALTA

The Institution of Parliamentary Ombudsman was introduced into Malta by Act XXI of 1995 on the 25th July 1995 after years of consideration by the two main political parties in Malta. Both the Malta Labour Party and the Nationalist Party had advocated the introduction of the Ombudsman in Malta, the former in its 1971 *Electoral Manifesto* and the latter in its 1987 *Electoral Programme*.

The introduction of the Ombudsman in Malta came after the repeal of the *Investigation of Injustices Act (1987)* which had established an independent and impartial Commission to investigate allegations of injustices. It was felt that an “Ombudsman law” would provide better safeguards to protect citizens against injustices and maladministration.

It is relevant to point out that the larger portion of complainants dealt with by the *Commission for the Investigation of Injustices* related to promotions in the public service and the Armed Forces. Although Parliament in its debates on the bill establishing the Ombudsman showed that it was reluctant to impinge on the Army’s administrative and operational discretion, yet at the same time Parliament had to give due consideration of complaints which officers and soldiers felt compelled to present for redress.

The First Schedule, Part B, of the Ombudsman Act states that this Act applies to the Armed Forces of Malta “*in respect only appointments, promotion, pay and pension rights of officers and men of the Force*” and Article 12(3)(b) makes this contingent on proof to the “*satisfaction of the Ombudsman ... that all available means of redress have been exhausted*”.

Thus, the Maltese Act restricts the investigation of complaints by members of the Armed Forces to issues relating to appointments, promotion, pay and pension rights once the available means of redress are used, though this latter requisite lies within the discretion of the Ombudsman to decide.

The Malta Armed Forces Act enacted by Act XXVII of 1970 (Chapter 220 of the Laws of Malta) gives a right to redress of complaints to officers and men of the force. A point of interest here is that this Act follows the UK *Army Act* of 1955 which has been superseded by the *Armed Forces Act* of 2006.

The right to redress of complaints has not prevented officers and men of the force from complaining to the Ombudsman with respect to the four specific areas mentioned previously, that is appointments, promotions, pay and pension rights. Any other complaint to the Ombudsman has always been deemed to be outside the remit of this Office, such as complaints about disciplinary measures taken against offending soldiers.

The principal cause for complaints has invariably been the issue of promotions. During the first year of operation this Office received 50 complaints with a peak of 164 complaints in 2007.

The proper legal procedure for men on the force to seek internal redress is to complain to their Commanding Officer and ultimately to the Commander of the Armed Forces¹. If they still feel that their grievance has not been redressed they may complain to the Ombudsman.

The Army in Malta had adopted a practice of issuing promotions every few years, rather than issuing them periodically. In a Report submitted to Parliament on the 14th October 2002, the Ombudsman stated that “*bulk promotions ... give rise to a large number of complaints*”². Other grounds elicited from this Report were the introduction of new requirements for eligibility for promotion without sufficient advance notice, promotions not based on established criteria, or not within the approved establishments and accelerated promotions based on purely subjective criteria.

Despite the Ombudsman’s recommendations for a more transparent and accountable process, matters did not progress too much. This led the current Ombudsman, following the Army’s 2006 promotion exercise to investigate the complaints of one hundred and sixty four servicemen. In this Report³, the Ombudsman identified three main issues, viz –

- i. The lapse of time from the previous promotion exercise,
- ii. The lack of information on the *Confidential Reports* carried out to identify would be promotees, as well as on the promotion exercise itself, and
- iii. The manner in which the subjective parts of the individual soldier’s *Promotion Assessment Report* were carried out.

In this *Collective Report* the Ombudsman stressed the need for the Armed Forces to adopt complete transparency in the criteria used to assess candidates for promotion and, more importantly, that these criteria be applied in a uniform and consistent manner. The Ombudsman acknowledged that the personal judgment of the promotion board could not be avoided, yet he recommended that any assessment based on the board’s discretion should not be improperly exercised and must pass the test of fairness and reasonableness.

This Report was accepted without serious reserve by the Army. In fact, in August 2009, the Administration Branch of the Army, with our help, issued a document entitled *The Armed Forces of Malta – Soldiers’ Career Handbook*. This handbook, still in use, provides information on the career development process for men of the force in a detailed and clear manner.

The results following these developments speak for themselves in that complaints by soldiers and noncommissioned officers fell to just 13 in 2013.

¹ *Malta Armed Forces Act*; Article 161(1) – “If a man of the force thinks himself wronged in any matter by any officer other than his commanding officer or man of the force, he may make a complaint with respect to that matter to his commanding officer”; (2) – “If a man of the force thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under the last foregoing sub-article or for any other reason, he may make a complaint with respect thereto to the Commander”; (3) IT shall be the duty of the Commander or of the commanding officer to have any complaint received by him under this article investigated and to take any steps for redressing the matter complained of which appear to him to be necessary”.

² *Career Advancement in the Armed Forces of Malta (AFM) – A Report by the Ombudsman in accordance with Section 29 of Act XXI of 1995*; 14th October 2002

³ *Armed Forces of Malta (AFM) Promotion Exercise, 2006 – Collective Report by the Ombudsman in accordance with Section 29(2) of Act XXI of 1995*; 12th March 2009

The form of redress for officers has proved to be thornier. The relevant provision in the *Malta Armed Forces Act (1970)* dealing with officer complaints is slightly different from that considering men of the force. The Act allows an officer to go further up after the Commander AFM decides on the complaint because he or she may petition the Head of State. Article 160(2) states –

“On receiving any such complaint it shall be the duty of the Commander to investigate the complaint and to grant any redress which appears to him to be necessary or, IF THE COMPLAINANT SO REQUIRES⁴, the Commander shall through the Minister make his report on the complaint to the President of Malta in order to receive the directions of the President of Malta thereon”

It was in fact the highlighted part of this provision which has given rise to one of the most contentious issues the Maltese Ombudsman has faced.

In 2008 various complaints were sent to the Ombudsman by officers of the Armed Forces of Malta. These related to alleged grievances concerning appointments and pay of these officer complainants. The issue which cropped up was a plea by the Commander of the Armed Forces that this Office could not investigate these complaints for lack of jurisdiction. The argument put forward by the Commander was that officers should direct their complaints to the President of Malta if the Commander AFM’s redress is not to their satisfaction and not go directly to the Ombudsman.

This argument has its basis in the provision of the law I quoted, that is Article 160(2) of the *Malta Armed Forces Act*. There is a difference between the English and Maltese version of this provision in that the English version states that the officer’s complaint will be passed onto the President of Malta *“if the complainant so requires”*. The Maltese version is *“jekk l-ilment ikun hekk jehtieg”*. The literal translation of this would be *“if the complaint necessitates this”*.

Which version should prevail? Before going further I want to state that Malta has two official languages – Maltese and English⁵. The language of the Courts of Law is Maltese so that the Courts would give precedence to the Maltese version of the law⁶.

Turning on the issue raised by the Commander AFM, the Ombudsman had lengthy discussions with the Commander himself, the Attorney General, the Office of the Prime Minister and the Present of Malta. The result of these discussions were extensively considered by the Ombudsman in his report on the officer complaints which gave rise to this issue.

In this report⁷ the Ombudsman maintained that officers had the right to have recourse to him if they felt aggrieved by the decisions of their superiors in the specific areas stated in the Ombudsman Act, that is appointments, promotion, pay and pension rights. The Ombudsman did not agree with the Army authorities that officers should first use all the available means of

⁴ My emphasis

⁵ **The Constitution of Malta**; Article 5(2) – *“The Maltese and English languages ... shall be the official languages and the Administration may for all official purposes use any of such languages”*.

⁶ **The Constitution of Malta**; Article 5(3) – *“The language of the Courts shall be the Maltese language”*.

⁷ *Report on Case No. I 0187*; 7th February 2013

redress and this for a very good reason that if they were channeled to petition the President of Malta first they could not then present their grievance to the Ombudsman because our Office cannot investigate decisions taken by the President⁸. The Ombudsman felt that if officers were required to submit their petitions to the President, they would effectively be deprived of a right given to them by the *Ombudsman Act*.

The solution to this was a *General Order* issued by the Commander AFM on the 11th November 2011. This *General Order* expressly recognised the right of officers to complain to the Ombudsman, but with the caveat that if any officer chose to petition the President of Malta directly, he could not afterwards have recourse to the Ombudsman if the President's decision did not afford him the desired redress.

Things seemed to have settled because the Ombudsman's recommendations were accepted by the new Administration which took office in March 2013. However, the same issue of non-jurisdiction raised its head again in September 2013 when two sets of promotions were issued – one for the promotion of Majors to Lieutenant Colonels and the other for the promotion of Lieutenant Colonels to Colonels.

Following enquiries by this Office to the Army authorities and the Ministry for Home Affairs and National Security and specifically for the submission of the documentation relevant to these promotion exercises, the response was that Administration would not send any information because this Office, they insisted, did not have jurisdiction. We were also informed that the officer complainants should first present their complaints to the President of Malta in line with the *Malta Armed Forces Act*.

This Office has not accepted the Administration's position. The Administration is stating that the available remedies were not exhausted by the officer complainants and that, consequently, the Ombudsman does not have any jurisdiction to investigate the complaints.

The *Ombudsman Act* empowers the Ombudsman to investigate grievances raised by officers in terms of Article 12(3)(b). The same provision also states that the Ombudsman must be satisfied that the available means of remedy should have been exhausted.

Yet, this same law at Article 13(3) specifically allows the Ombudsman to investigate if “*he is satisfied that in the particular circumstances it is not reasonable to expect the complainant to report or have resorted to such means of redress*”.

The Ombudsman made it clear that he was satisfied, given the circumstances of the case, that the complainants could not be expected to resort to the President as a means of redress since this would effectively amount to a renunciation of their right of recourse to the Ombudsman. The jurisdiction of the Ombudsman is not fettered by any limitation except what the law specifically prohibits⁹.

One should ask whether it is reasonable for the officer complainants to have their grievance considered by the President. Would they be able to receive a fair and equitable decision? From

⁸ *Ombudsman Act*; Article 12(3)(a) – “*This Act does not apply to the persons or bodies listed in Part A of the First Schedule to this Act ... The President*”.

⁹ The specific prohibitions are listed in the Second Schedule to the *Ombudsman Act*.

the outset I want to state that this does not in any way mean that the President is incapable of giving a fair decision. Far from it, but the reality is that the President of Malta does not act according to her own deliberate judgment except in a very few cases such as the dissolution of Parliament or the appointment and removal of the Prime Minister¹⁰. In all other circumstances she must act “*in accordance with the advice of the Cabinet or a Minister ...*”¹¹.

And herein lies the catch. Though an officer complainant may decide to petition the President, the President cannot consider this petition independently because the complaint must be forwarded by the Commander AFM “*through the Minister*”¹². The report which the Commander AFM makes on the complaint cannot go directly to the President but must be sent to the Minister who, in turn, passes it on to the President. This signifies that a complaint on a decision taken by the Authorities must be presented to the same persons who took the decision complained of and these will present their recommendations to the President on whether to accept or reject the complaint bearing in mind the President’s Constitutional position that she cannot give her own deliberate judgment on the contents of the report¹³. In my opinion this would infringe the complainant’s right for an impartial and fair consideration of his grievance which is assured only by the Ombudsman.

This impasse has unfortunately not been settled. Indeed, the Ombudsman has filed a judicial protest in Court which has been rebutted by the Administration. The Ombudsman has held meetings with the Administration and has proposed an amendment to the *Malta Armed Forces Act* so that officer complainants may be given an opportunity to choose which line of redress they want. This to date has not elicited any response close to what we consider just.

Our position remains that the Ombudsman has jurisdiction to investigate officer complaints and the Administration is manifestly wrong if it compels officers to petition the President of Malta. Any decision which the President gives is not scrutinable by this Office. The negation of a civil right to officer complainants is not conducive to a good administration and especially to transparency, accountability and the citizen’s right to know. It would be indeed ironic if officer complainants ended up by being deprived of a right which every other person in Malta, be he a citizen or not, enjoys.

¹⁰ *The Constitution of Malta*; Article 85(1) *provisio*

¹¹ *The Constitution of Malta*; Article 85(1)

¹² *Malta Armed Forces Act*; Article 160(2)

¹³ An interesting judgement which tends to militate against this constitutional standpoint is that delivered by Mr Justice Harding in the case of *The Police vs Vincent Vella*. HM Criminal Court on the 10th May 1958 discussed, *inter alia*, the constitutional position of the Governor and quoted with approval Alpheus Todd’s *Parliamentary Government in the British Colonies* – “A constitutional Governor is not merely the source and warrant of all executive authority within his jurisdiction: he is also the pledge and safeguard against all abuse of power by whosoever it may be proposed and manifested: and to this end he is entrusted with the maintenance of certain rights and the performance of certain duties which are essential to the welfare of the whole community”