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A CIVIL SOCIETY MOVEMENT

FIGHTING CORRUPTION IN OUR ELECTIONS

15 June 2021

"...the limits of the exercise of the power of incumbency still need to be defined if it is to be ensured that those who are entrusted with the management of public affairs do so in the interest of the common good and not to promote partisan interests. These problems and others persist and are contributing to the general feeling that basic issues of good governance and the rule of law still need to be addressed."

- Anthony C. Mifsud
Ombudsman's Annual Report, 2017

Introduction

Free and fair elections are a non-negotiable component of a functioning democracy.

However, the fairness of elections is often eroded by weak laws, by the impunity that is a consequence of the State's failure to implement the laws that do exist, and a failure of actors in the process to act within the expectations of good ethical conduct. These shortcomings create a false legitimacy for election results that are, at least in part, influenced by abusive conduct.

Fairness in an election or a ballot process requires a level playing field for participants, whether individual candidates or political parties.

No doubt candidates and political parties with experience in public administration will want to show their record as a justification for their election or re-election to office. Nothing wrong with that. The challenge is in the abuse by incumbents of the resources and assets of office to influence voters to confirm them.

Abuse of the power of incumbency to influence the vote is a local problem too. (See more on the matter in the Further Reading Annexe to this document).

This is by no means a new problem and to a greater or lesser extent, almost every past general election in history was besmirched by some form of abuse of incumbency. The purpose of this paper is not to be a form of a charge sheet on historical episodes or to open a debate on which abuse was more or less egregious.

We do wish, however, to challenge the status quo and the underlying consensus of tolerance for this sort of misconduct.

There are several reasons, some of which may not be immediately obvious, why we fail to address the abuse of State resources for partisan or individual benefit in electoral processes:

a. Elections and the conduct of their actors are almost exclusively within the remit of the politicians themselves. Political parties closely monitor the conduct of the elections, and of their rivals, providing a system of balance of mutual suspicion that assures all sides that the elections are

fair to them. But the absence of external observers means that systemic failures that benefit all partisan sides are never addressed.

b. The distinction between the State, Government, Parliament and party is often blurred and the expectation of our political culture is for both candidates and voters to prefer to keep it that way.

c. Parties and candidates that do not have access to the resources provided by abuse of incumbency do not give high priority to this matter; these, prefer to find other ways of resourcing their campaigns rather than to allow themselves to be perceived as petty or as sore losers.

d. Rules on the conduct of a caretaker government, on ensuring separation between State resources and partisan campaigning, and on defining corrupt practices in the electoral process are either inexistent or, where they do exist, either vague or unchanged since they were adopted almost a century ago and for that reason complied with in the breach.

e. The public expects its government to fulfil its function during its full term which contradicts the expectation of a “caretaker government” that could be misrepresented as a slow-down on the delivery of public duties to allow an incumbent party or candidate to focus on their re-election instead. Therefore, the use of incumbency to deliver on the public’s expectations even in the months and weeks approaching a general election is presented, ironically, as a fulfilment of public duty rather than as a form of abuse of the democratic process.

f. Power is not exclusively or perhaps not even predominantly held by holders of political office but rather by their funders, backers and controllers who stay in the shadows. Even with the transition of formal State power between parties and candidates, the incumbency of their backers from outside formal State structures is near permanent. This ensures that any abuse of State resources by incumbent holders of office is compensated by the provision of resources of equivalent value to opposition candidates and parties, obviating the need to demand fair use of State resources.

Repubblika considers that our democracy requires that abuse of the power of incumbency should be acknowledged and addressed:

1. Our democracy and the standards of conduct in public life, particularly in electoral processes, must be continuously improved;

2. Failure to comply with existing legislation or to treat it with contempt is an erosion of the rule of law and implicitly, therefore, of democracy itself;

3. It is insufficient to hold an incumbent party to account merely to the standard that accommodates the need of its Opposition. The standard for good conduct in an election should be set objectively;

4. No doubt a portion of our electorate expects to be treated as clients and conduct themselves as if their vote was a currency in a transaction. That, however, is no reason for our political system to entertain that erroneous expectation;

5. An increasing portion of our electorate is not strictly affiliated with any political party. All the electorate is entitled to be assured of is that they can trust election results to be a true and fair reflection of an informed and freely expressed popular will, rather than the outcome of an auction of favours partly paid for from our common resources;

6. Quite apart from compliance with stated legislation, politicians, political parties, civil administration and incumbents in all institutions owe us the highest ethical standard of conduct. All participants in a democratic process should behave in a way that promotes a free and fair process and that discourages conduct jeopardising the integrity of the process.

7. The abuse of State's resources for electoral purposes undermines the principles of transparency and accountability casting doubt on the conduct of the public administration at all stages of its term of office (not just the phase near an upcoming election).

Striving for Political Integrity

Transparency International[1] defines political integrity as the exercise of political power consistently in the public interest, independent from private interests, and not using power to maintain the office holder's wealth or position.

Political integrity is only possible when safeguards exist throughout the political process, including, naturally, the electoral process. The abuse of State resources, such as embezzling or investing in unnecessary projects right before election campaigns and dishing out favours is a form of corruption.

Distinctly but inseparably from this notion is the corruption that comes from "godfathers" or businesses that bankroll political candidates, turning them into their clients. They will reap the return on this support after the election.

To address corruption, we must strive to push back against opaque and uneven political financing, insist on transparent political appointments, and expose, call out and seek redress for the abuse of public resources to buy or influence voters.

Existing legislation

The sole legal instrument that somewhat addresses the abuse of the power of incumbency was introduced when there was no incumbent Maltese administration.

The Electoral (Polling) Ordinance was promulgated in July 1939, only three weeks before the first elections held under the Macdonald Constitution. The 1921 Constitution that had granted Malta's first self-government was suspended in 1933 and was withdrawn in 1936.

This law was repealed in 1991 and replaced by the General Elections Act (Cap 354 of the Laws of Malta). A rump element of the repealed Electoral (Polling) Ordinance survives as the Fourteenth Schedule of the General Elections Act.

The law requires the documentation and disbursement of expenses incurred by candidates, requiring detailed receipts for any expense that is greater than €0.58, detailed expense returns within 28 days of the election, and a cap on personal expenses of €27.95.

[1] See https://www.transparency.org/en/our-priorities/political-integrity.

Candidates are then permitted to spend up to €20,000 on their campaign for a parliamentary seat. They must file an expense return within a month of the election. The expense return is covered by an oath by the candidate confirming it is correct.

Candidates cannot pay to drive or hire vehicles to transport voters to voting stations and cannot pay to use someone's property to hang a poster or similar advertising.

Candidates cannot employ more than one election agent though they can hire "a reasonable number of clerks and messengers" for their campaigns.

Breaking these rules is punishable with a €465 fine. But the real punishment the law provides for is striking the offender from the voting register which means they'll also lose their seat in Parliament if they are elected.

"Corrupt Practices"

It is, obviously, illegal to try to vote pretending to be someone else. That's not surprising.

What some may be surprised to learn is that it is illegal for a candidate or a party to "provide any food, drink, entertainment, or provision to or for any person" to influence how they will vote. Using language which must have been more familiar in the 1930s when the law was adopted, the offence of "treating" is punishable with fines and the loss of an elected seat won in a campaign that features it.

The law provides also for "undue influence". That's when someone uses or threatens violence to intimidate someone else not to vote or to vote in a certain way. These provisions were used after episodes in Żejtun during the 1987 general elections. Violence or intimidation to influence votes can be termed as 'negative inducements'. After 1987, this form of voter influence in any systemic fashion has not been reported again and the present political consensus is such as to make the practice unlikely.

'Positive inducements' are also banned by our law. However, they are a regular occurrence in our elections without any legal or criminal consequence.

Under the heading “bribery” our law bans anyone from giving, lending or agreeing to give or lend, offer, promise or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter.

This goes to the heart of many conversations political candidates have with their constituents in their district offices or during house visits. These conversations are often in response to explicit demands by voters for “favours” or “arrangements” for public sector employment, contracts or permits or licences that have or can have value.

The notion of abuse of the power of incumbency suggests that candidates holding public office, for that fact alone, are somehow likelier to be in a position to deliver these favours. These can include recruitment in the public sector even using regular processes of engagement but abusing incumbency to give the constituent some advantage such as advance knowledge of a public call or the scheduling of a public call for engagement when this is not strictly required by a public utility.

But the law banning bribery equally regulates the conduct of a candidate who does not, at the time the offence is committed, enjoy the incumbency. ‘If I’m elected, I’ll see what I can do about a job for you,’ or ‘I’ll see if I can help you with your development permit application’ is a promise to endeavour to procure a valuable consideration to a voter and as such, therefore, a bribe in terms of our existing laws.

It may surprise some to realise then that clientelism, considered an ordinary requirement of our political process, is expressly banned by existing legislation which, if enforced, would have the effect of vacating a seat won by a candidate who entertains clientelism.

The law expressly and specifically bans giving, or promising, or even promising to try to give a voter a job. And the law bans the funding of such promises by someone else. A voter who agrees to vote for someone in exchange for a favour or the promise of one also commits an offence. But it is not necessary for someone who has tried to convince a voter to vote in a certain way (or not to vote at all) to have been successful for the offence to have occurred.

The penalty for these situations is capped at €1,160 but a 6 months prison term can be imposed instead of or on top of the fine. Then there’s a 7-year ban from public office which means that if they win a seat in Parliament they lose it.

Ignoring the law

A personal expenses cap of less than €30 makes that provision at least a dead letter. But that does not and should not be a reflection on the entire set of laws. The €20,000 cap on campaigning expenses is a relatively recent addition, upgraded in 2015 presumably to establish a realistic cap that campaigning candidates should be able to operate under, while still campaigning meaningfully.

Anecdotally at least, the cap is not, in practice, anywhere near realistic.

If politicians or political parties have reasons to argue for any further updating of these laws, then by all means the matter should be discussed.

Some might argue that providing pastizzi and a soft drink at a campaign rally should not be a criminal offence. Though of course there is a reason why candidates provide the pastizzi and soft drink and since that reason is not likely to be an urgent need to feed the starving, it is reasonable to presume candidates believe they can influence someone's voting intention by providing them with food and drink.

However obscure the sociological reasons for this might be, the law is intended to ensure elections are not decided on pastizzi but on considerations that are more relevant to the democratic choice voters are invited to make.

Upholding the rule of law

We expect candidates for political office to uphold the rule of law with more than mere words. We expect them to uphold the rule of law with their actions. Ignoring provisions of the law because they are inconvenient or inconsistent with custom – 'because everybody does it' – is corrupt and in itself an open invitation to clientelism and part of a chain reaction of corruption with even graver consequences.

While the law stands – and we do not argue for the removal or dilution of legal provisions that provide against clientelism and transactional politics – the institutions of the State with the function of enforcing them must act. We know this does not happen. We argue that part of the reason for the acceptance of corruption in our electoral system is the full expectation of impunity. Although the law expects the police

to act with the sanction of the Attorney General, it is near unimaginable for law enforcement agencies to press charges against a politician who has promised a voter to endeavour to secure some form of reward in exchange for their support.

In practical terms, the answer we would expect to get is that almost without exception a case can be made on these grounds against any politician of any political party in any election.

We submit that this is no reason to opt out of the ethical and legal obligations of the political class. It is rather a reason to seek structural solutions to structural problems and to retain the deterrent and the consequence of criminal action when breaches survive structural improvements.

This needs to be part of the growth of our democracy as we have experienced others in the past.

Take, by way of example, the fortunately redundant practice of plastering campaign posters or using paint to casually vandalise public spaces with slogans or solicitations of votes on behalf of candidates. Until 1987, this practice was generally accepted and undertaken despite existing laws against vandalism or spoliation of public and private property. The practice was effectively tolerated by law enforcement agencies until political parties, unilaterally and applying moral pressure on each other, decided to direct their supporters to desist from the practice.

Changing forms of advertising and campaigning is easier than changing the understanding of a significant portion of the population of how democracy works and should work. We do not underestimate this. Nor do we agree to relieve political parties and political candidates from the responsibility of leading by example.

Clientelism: who wants it?

There’s little doubt some voters feel entitled to use the power of their right to vote to enforce an outcome that is relevant to them as individuals rather than in the interest of a common good. This extends to a wrongful perception of democracy as an

entitlement to bend the actions of persons of authority to bring about those personally favourable outcomes even if that happens at the expense of a common good.

There are (often contradictory) reasons why voters seek this sort of “service”, not all of them the product of malice:

a. A genuine understanding of civic conduct and the roles that voters and candidates serve in the process is not universal.

b. It is the legitimate role of an MP (or a candidate for the position) to provide constituents with assistance when dealing with the authorities. However, an MP who is also an incumbent Minister or who has access to the resources of the State, has, if they abuse their position, better means of changing “assistance” into the informal provision of a service, short-cutting or queue-jumping the schemes provided by the State. Voters may see this ‘more effective assistance’ as desirable, and claim it as a democratic right.

c. As with the compromised ethics of treating and voter bribery, voters too can justify their actions or demands with ‘everybody does it.’ Given that the laws that ban the acceptance of reward in exchange for votes are never enforced, most people assume they are not doing anything wrong. Whatever the law says, the ‘system’ is what is widely accepted and it is widely accepted that to get ahead you need to place demands on Ministers and political candidates.

   Indeed people perceived as influential and holding authority and power, visit people’s houses door to door behaving as someone would if they were trying to sell something. Some confess that as receivers of a house visit they feel implicitly pressured to think of something to ask. This is complemented by mass cold calls conducted by State-paid civil servants asking constituents if they need something, anything, from their Minister. Respondents sometimes report they feel they are being neglectful of their duty as a citizen if they do not think of something to ask for in response.

d. The transactional nature of politics is encouraged by political parties and candidates who find that meeting the perceived expectation of the public to provide “a service” is an effective way of persuading voters of the utility

of the political class in general and the desirability of a specific party or candidate in particular. Political parties and candidates understand that at least a portion of the voting population is less interested in policies or the effective management of the macro responsibilities of government and more interested in the satisfaction of micro needs. That is why the political discourse is then oriented to engage with this preference.

If a corrupt relationship of clientelism is secured at general elections, corrupt conduct by elected officials is implicitly and consequently legitimised. Politicians who “arrange” a favour when you need it, are justified to make “arrangements” for themselves. Clientelism breeds a corrupt attitude to corruption. It justifies the greed of corrupt politicians because they share the benefit.

Another consequence is that the abuse of their power of incumbency by individual candidates frustrates and dilutes the power enjoyed by voters who can wield the Single Transferable Vote not merely to choose between political parties but to choose between candidates on the list provided by the party they have chosen to support. Established government candidates abuse their access to public resources to retain votes and prevent slippage of their support towards new and emerging candidates without the benefit of such incumbency. This creates stagnation and in practice reduces the value of the vote cast by people who choose between candidates on merit rather than on some corrupt intent.

We again recall here our proposals for a reform of Malta’s constitutional framework to separate the role of a Minister from the role of an MP that would reduce the desirability or utility of this form of abuse.

e. Some voters fully expect their candidate to bend or break rules on their behalf. They would claim that they are perfectly capable of securing what they are legitimately entitled to without the help or interference of a politician. It is precisely to acquire what they are not entitled to, that these voters seek the interference of a politician. Furthermore, voters have a range of parties and candidates to choose from and people who seek favours will congregate around the candidate in a better position to arrange for them what they need. This gives rise to the unfair advantage of incumbency. And it creates an inbuilt reward for politicians or parties

who conduct themselves unethically or wilfully abuse their State-mandated authority to retain their power.

f. The advantage of incumbency is not necessarily secured by breaking rules but also by applying pressure on the administration to behave differently in the context of approaching elections. So, by way of example, there is statistical evidence that suggests that the rate at which development permits are issued at a time nearer to an election is higher than in ordinary times.[2] This does not necessarily mean that any of the permits are unlawful. It is clear however that there is a greater risk of weaker checks and controls on the process given the high volume of traffic it is processing. And the faster rate of processing becomes in itself a State resource that is then abused by the incumbent government party or the candidate who secures the fast lane arrangement for their constituents whilst seeking support for their confirmation.

Misuse of public funds

The misuse of public funds when approaching a general election is a poorly documented but widely recognised phenomenon in this country. Some examples:

a. Ministries and government agencies distribute in mass mailshots to households within their voting constituency publicity material that promotes the incumbent. Without specific reference to the party or to the fact that the Minister is seeking re-election, the “information material” is self-evidently promotional in nature.

b. Publicity material occasionally includes, sometimes bizarre, gifts paid for by public funds. A recent example has been the distribution of flower seeds enveloped in promotional material carrying images of the gift-giving Minister.

c. Intensified public works in constituencies of Ministers with access to State resources to provide them, such as road repairs or road construction even in areas that are not in the central government’s

[2] https://www.maltatoday.com.mt/environment/townscapes/78779/how_labour_revved_up_planning_authority_permits_before_election#.YJ5Gqy8RqX0

competence or on private property. Public works also include embellishments, repairs of street furniture, street lighting and other micro needs.

d. The use of advertising by government agencies for the promotion of incumbent elected officials seeking re-election.

e. State-funded promotion and advertising of semi-official or personal social media pages that include the candidate's political and personal engagements.

f. Events and gatherings for constituents under cover of government initiatives such as certificate-award ceremonies.

Misuse of public assets

Whether because of the absence of explicit rules or because it is the custom to ignore rules that do exist, incumbents seeking re-election, exploit their incumbency to:

a. Use government vehicles or buildings for campaigning purposes, including the use of official staff, stationery, mailing and printing, telephone lines, internet connectivity and equipment for electioneering activities;

b. Use government buildings or employees to solicit or accept donations, organise, meet, plan and operate campaigns;

c. Use government buildings to receive constituents and to handle their requests for "favours" as normal conduct of government business;

d. Politicise public servants, mobilising public employees to help with campaigns during working hours, deploying them to activities that facilitate the publicity and promotion of the incumbent party or candidate, or apply pressure or recruit the willing collaboration of civil servants to execute "favours" to constituents in exchange for their support to the incumbent;

e. Divert public funds to political parties. This is done in “legal” ways such as schemes to aid “newsrooms” in a covid context. The lack of transparency and the informal procedure of selection and award allows the incumbent party to use State-funding to fund its own party media operations and, by creating new brands, to do so on unequal terms with any funding extended to the opposition;

f. Use the Department of Information to communicate and propagate events that are in part or wholly intended to promote the re-election of the incumbent;

g. Manipulate State-owned media to communicate an imbalanced view of the incumbent party or candidate as the natural locus of government authority rather than as contestant with equal footing with challengers;

h. Manipulate State advertising, using public funds to promote the incumbent party and its candidates under the guise of official information.

Extortion of donations from the private sector

Earlier in this document, we suggested the likely possibility of “permanent incumbents” who transform politicians of all hues into their clients fully insuring themselves against any consequence of a change of party in government.

But on a smaller scale, incumbent parties or candidates use their office to negotiate, extract or extort kickbacks from contractors that are invoicing the government for contracted services that are ploughed back into campaigning costs.

Misuse means corruption

The abuse of public resources undermines political competition and short-circuits public administration. Corruption is not merely the abuse of entrusted power for private gain if the private gain is narrowly defined as personal profit. The retention of power as a result of misuse of public resources is also corrupt.

As the U4 Anti-Corruption Resource Centre observes,[3] when public office holders funnel State resources into election campaigns, they do not line their pockets with funds, but rather bias electoral competition by investing in their own political parties and campaigns.

“The practice endangers democracies by tilting political contests in favour of the incumbent. It also reduces trust in the legitimacy of political representation, since citizens perceive politics to be manipulated by the government rather than based on fair competition. In addition, when State resources are used to favour the ruling party, the population ends up paying the bill. When civil servants on State salary engage in campaign activities, or State funds, equipment, or infrastructure are used for electioneering, citizens receive fewer and lower-quality services than they are entitled to. This lowers the quality and efficiency of public service and delegitimizes the State as an agent working for the common good.”

[3] https://www.cmi.no/publications/file/4089-milking-the-system.pdf

The change we want to see

The following recommendations are broadly inspired by guidelines provided by the Venice Commission.[4] We are attaching as an annexe the Guidelines provided by the Venice Commission to combat the misuse of administrative resources during the electoral process.

The following sum up our expectations in this regard:

Ethical conduct

1. We expect political parties and candidates to adopt the highest ethical standards and to commit not to act in any manner that can undermine the fullest respect to the principles of electoral democracy, professionalism, institutional safeguards, oversight, enforcement, transparency, and accountability.

   "In this respect, political parties can informally agree – i.e. without going through legal provisions – on charters of ethics or agreements related to electoral processes including concerning the misuse of administrative resources. According to the principles of transparency, such agreements should be publicly discussed so that citizens can also discuss the issue and hold back possible sanctions agreed by the convention in case of breach of the assumed commitments. If such agreements are not respected or if abuses are observed in practice, this has to be reported, including in the media. Such self-regulation models are widely applied in the Scandinavian countries. They could be defined as belonging to a concept of consensual approach. The parties may organise themselves very freely."

2. The adoption of the alternative strategy of using legislation to regulate the conduct of political parties is, as the Venice Commission puts it, "less developed". However, as we fully expect failures to persist, it is

[4] https://www.venice.coe.int/images/GBR_2016_Guidelines_resources_elections.pdf. See also https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)033-e

necessary to enforce legislation sanctioning bribery and corruption that is systematically ignored in our context.

We expect law enforcement agencies to enforce the law as it stands and to actively investigate and act against bribery in elections.

We also consider it the duty of agencies such as the Electoral Commission and the Police to inform the public of its rights and obligations and the rights and obligations of their politicians. A major part of compliance with the law is the awareness of it.

3. We argue for refinements in our legislative framework to distinguish more clearly the role of administering elections (over which, understandably political parties have oversight) and the role of enforcing the law when this is breached (which is to rise above even the shared interests of political parties).

4. We expect improvements of resources available to the independent media and to civil society to be able to monitor the conduct of campaigns and elections and to denounce unethical conduct.

5. We argue for the independent allocation of funding to political parties and candidates for their campaigning on fair terms and without undue advantage to incumbents;

6. We expect the empowerment of the civil service to retain an ethos that is distinct from the partisan interests of incumbent parties and Ministers throughout the political season and right through electoral campaigns;

7. We require the application to the fullest extent of the principle of freedom of information, provided in a timely fashion and with a view to securing an alliance between the public administration, the free press and civil society to prevent incumbent parties and candidates from misusing public resources for their campaigning.

8. We demand that the Maltese electoral process is open to observers that are not affiliated with political parties and that Malta adopts recommendations by international election observers. We also argue that civil society organisations should be invited as local election

observers and funds are allocated independently to fund monitoring activities for compliance with existing laws and standards.

Oversight of elections

Our view is that the current composition of the Electoral Commission provides comfort to the two main political parties but ensures standards are never taken to a level beyond the shared conveniences of the two main parties.

We, therefore, propose a revision of the oversight of elections, including an Electoral Commission that is composed in a way that reassures political parties of independence and neutrality but meets the expectation of higher standards in public life and a genuine and spirited fight against corruption in the electoral process.

We make particular reference to the changes adopted in New Zealand in 2012 that introduced a 3-member Commission - a chairperson, a deputy chairperson and a Chief Electoral Officer - appointed by the Governor-General on the advice of the House of Representatives. The appointment follows an open, merit-based, competitive process calling for persons of integrity and independence with the necessary skills and experience to apply. The appointees were selected by an interviewing panel that included the Deputy Secretary for Justice (an independent civil servant), a High Court judge and the Ombudsman.

Abuse of office

We recommend the adoption of specific legislative provisions that prevent the use of official funds, facilities, equipment, services or supplies by those who have official access to them and which are not equally available to others or which are not made available to other campaigns on an open and equal basis for campaigning purposes or to provide support or assistance to a campaign and without reimbursement of the full costs of such resources.

Legislative reforms

1. We recommend the adoption of specific laws to prohibit public entities from taking unfair advantage of their positions by holding official public events with the intended effect of securing an electoral advantage, including charitable events or events that favour or disfavour political parties or candidates. Specifically, laws should address a ban on events that imply the use of public funds or institutional resources.

2. Laws should ensure either an outright ban or rules on equality of access for the use of public buildings and facilities for campaign purposes.

Public communications

We refer to the Draft Guidelines on Information and Advertising Campaigns by the Government published by Repubblika with our statement of 6 May 2021.

In particular, we highlight our expectation that the government's promotional campaigns are pre-planned and pre-approved in a transparent process that includes the participation of the Parliamentary opposition and civil society.

The draft Guidelines also propose provisions to restrain partisanship or the personal promotion of incumbents as well as the manipulation of media by the incumbent party with the controlled and imbalanced disbursement of public funds.

We also refer to the reformed New Zealand electoral commission discussed above and the fact that in election times, the commission administers the public broadcasting rules for the allocation of resources and air-time to political parties. In these cases, funds are typically disbursed directly to political parties in a transparent manner.

The model is interesting because, unlike our Broadcasting Authority which is effectively governed by the two main political parties, alternative models exist that ensure independence even from the shared interests of the two Parliamentary parties. We would like to see these models emulated.

We have already published proposals for the appointment of an Independent Communications Committee to regulate the fair and objective distribution of

public funds to the media to acquire information or publicity services. Our proposals in that respect would address the abuse of the incumbency of a government party in this respect.

Caretaker government

As we explain in our earlier document Reforming Malta's Parliament of 13 January 2021, our view is that the roles of a government Minister and the role of a Member of Parliament should be separate.

We also recall our proposal for fixed-term Parliaments to remove a significant component of the unfair power of incumbency now given to leaders of incumbent parties to determine the date of the general election, with the consequential strategic advantage over rival parties who have no role in the decision.

In the existing model of governance where Ministers are effectively required to seek re-election as MPs, it is necessary to have specific rules for their conduct as elections approach.

From the beginning of the fifth year of a parliament's term, or the date of the announcement of an election if it occurs earlier, it should be against the law:

1. for the government to make major policy announcements or announcements of significant projects or investments that are not likely to be delivered within the same term and that are aimed at creating a favourable perception towards a party or candidates. Exceptions, such as unforeseen circumstances, disasters or emergencies, are to be provided for in the law, and exercised in informed coordination with the opposition;

2. for the government to make any non-essential appointments to public entities. Where strategic vacancies occur, appointments should be on an acting basis allowing the subsequent government full discretion on a permanent appointment;

3. for the government to commence selection processes for promotions or appointments in public entities;

4. to allocate social housing to beneficiaries, except in exceptional and urgent situations evaluated on a case by case basis by the relevant line entities;

5. to award development permits or other related State action at a more frequent rate than the average of any other phase of the lifetime of a legislature;

6. to allocate public land to a private interest;

7. to introduce major legislative initiatives or to publish significant regulations, except when these are required to transpose EU law;

8. for civil servants to combine defined campaign activities while on duty or in the exercise of their official capacity. Civil servants should be permitted to take unpaid leave to undertake campaigning activities whenever possible and whenever the civil service position they occupy does not specifically require them to appear non-partisan and impartial. The rule should also apply to positions appointed as persons of trust who should only be compensated from public funds when they are fulfilling their civil service duties and not when undertaking campaigning for their candidate or political party.

Audit

We would like to see the competence of the National Audit Office expanded to monitor the use and misuse of public resources in aid of partisan campaigning. The Auditor should be empowered to act on their initiative and to publish findings even when Parliament is not in session or when not instructed to do so by the Public Accounts Committee.

Annexe A

Guidelines

Principles

1. The principles of transparency and of freedom of information are sine qua non pre-conditions for preventing the misuse of administrative resources.

2. The principle of equality of opportunity is also a key principle in order to ensure fair electoral processes. This entails two prerequisites:

    - Firstly, a neutral and ethical attitude should be adopted by State authorities – including public and semi-public bodies –, in particular with regard to: the pre-electoral period, including through the candidates' registration process; the coverage by the media, in particular by publicly owned media; and the funding of political parties and electoral campaigns, in particular public funding;

    - Secondly, incumbents should ensure non-discrimination towards their challengers by providing equal access to administrative resources.

3. The principle of neutrality should apply to civil servants while performing their professional duties as well as to public and semi-public bodies.

Legal framework for implementing the principles

1. The electoral and criminal laws as well as the laws on funding of political parties and electoral campaigns are the core texts which should provide measures for tackling the misuse of administrative resources during electoral processes.

2. Such measures must be proportionate, clear and foreseeable for all contestants.

3. For this purpose, these provisions have to distinguish activities inherent to the State's responsibility from those of political parties and candidates, notably incumbents.

Measures for implementing in good faith principles and provisions aimed at tackling the misuse of administrative resources

1. Charters of ethics or agreements could be appropriate steps to tackle the misuse of administrative resources during electoral processes. In this respect, political parties would agree on such charters or agreements. Publicity and the thorough dissemination of these instruments are crucial to increase their effectiveness.

2. During electoral processes, officials in public positions who are standing for election should not use their opportunities as officials when they campaign and act as candidates.

3. An independent national audit office reporting to the Parliament plays an important role by supervising the use of administrative resources, including the public funding of political parties and electoral campaigns. An independent body, established according to the law, could be in charge of tackling all issues related to the misuse of administrative resources, including non-financial ones, as long as it is provided with enough resources and adequate rules to fulfil this task.

4. Competent bodies in charge of tackling the misuse of administrative resources should use preventive measures to stop unlawful activities as soon as possible before the elections.

5. Political parties, candidates, public media and public officials who misuse administrative resources should be subject to sanctions.

6. In this respect, an independent judiciary is a sine qua non condition for sanctioning the misuse of administrative resources.

7. It is therefore crucial that constitutional courts, electoral courts, or equivalent bodies, as well as prosecutors and ordinary courts take the ultimate responsibility for the administration of justice dealing with the misuse of administrative resources.

8. Ensuring the integrity of the police, prosecutors, judges as well as auditors of political forces is of crucial importance. Concrete legislative measures should address the issue of integrity so as to assure the neutrality of these persons vis-à-vis the entire electoral processes.

Annexe B

Further Reading

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