

THE ROLE OF THE LEGAL PROCURATOR IN THE MALTESE JUDICIAL SYSTEM

Paul Saliba

The institution of the Procurato (*Procuratori* and *Sollecitatori approvati*) finds its origins prior to the promulgation of the *Prammatiche* by Grand Masters Lascaris (1640) and Caraffa (1681),¹. In the *Leggi e Costituzioni Prammaticali* of Grand Master Manoel de Vilhena (promulgated in 1723) a distinction is drawn between the competence of the advocate (*giurisperito*) and the legal procurator (*procuratore* or *sollecitatore approvato*) in requests for the issue of executive warrants². One finds also references to the profession in the *Consolato di Mare di Malta* promulgated by Grand Master Perellos in 1697.

Professional Status and the Element of Representation

Basically the word *procurator* denotes, in general terms, a person who acts in the interest of another person. (Likewise in Roman Law one comes across the *procurator ad litem*, who was a person who could institute and plead in judicial proceedings in the name and on behalf of another person – which was a function quite diverse from that of the tutor or curator)³.

The nomenclature of legal procurator is found in various juridical systems, where its origins can be traced back quite extensively. In Scotland, the *procurator* is a “law agent” who practices before the Inferior Courts. In England, the person who pleads before the Ecclesiastical Courts and Admiralty Courts is known as *proctor*, which is a variant of the same term.

In our legal system, the relationship between the legal procurator and the client is similar to that between the advocate and the client; hence, in a judicial sense, it is a relationship *sui generis*⁴.

Definition of the Duties of the Legal Procurator

In the Maltese judicial system, the duties of the legal procurator had already been defined since the times of Grand Master Manoel de Vilhena. In fact, the *Costituzioni di Manoel* (in Title XII, which is modelled on the *rito siculo* and deals with procedure) provide that nobody shall be allowed to file written pleadings or any other judicial act, either in the name of the plaintiff or in the name of the defendant, unless he would have made known his

appointment as agent or as procurator to that effect. Subsequently, the British Colonial Administration in Malta made its first endeavour to legislate on the profession of the legal procurator in virtue of the preamble to Proclamation No. XII of 1827.

In the course of time, the representative character of the function of the legal procurator (that is, the juridical relationship between the legal procurator and the client) was restricted to that of a defending counsel before:

- (a) the Courts of Magistrates;
- (b) the Court of Voluntary Jurisdiction, and
- (c) certain special tribunals (e.g.: the Rent Regulation Board, the Rural Leases Control Board, the Board of Special Commissioners, etc.)

In the performance of all the other duties, the legal procurator is to place himself under the direction and guidance of an advocate engaged by the client. (In this respect, the function of the legal procurator in Malta varies from that of the solicitor in England).

A definition of the status and duties of the legal procurator was given by the **Hon. Dr. (later Sir) Vincent Frendo Azopardi**, then Crown Advocate, when giving evidence before the Royal Commission of 1911, to question No. 10,031: "Now will you tell us about the procurators?". Dr. Frendo Azopardi replied thus on oath: "*The local solicitors are styled legal procurators. Their status is different from that of the English solicitors. Legal procurators are admitted to the practice of their profession by a Governor's warrant, as in the case of advocates. The conditions for obtaining the warrant are, mutatis mutandis, the same as in the case of advocates. The legal procurators are not required to go through a regular course of legal studies or to obtain a university degree in law. They have to pursue a social course of study of the rudiments of civil and criminal law and of the practice of the Courts. The principal duties of the legal procurators are to assist the advocates, with whom they are retained, in the proceedings of the case; to file written pleadings in the Registry on behalf of the clients, and to perform generally other services in connection with the preparation of cases by the advocates. Legal procurators are admitted to plead in the Inferior Courts. They are entitled to the same privileges, and are subject to the same disqualifications, as the advocates. Their fees in civil matters are regulated by the tariff annexed to the Laws of Organisation and Civil Procedure, and in criminal matters, as in the case of advocates.*"

In re **Tabone vs Farrugia et** (Law Reports, Vol.XI, p.506), the Court of Appeal defined the limits of the mandate of the legal procurator in the following terms:

Considerando il diritto, il mandato di procuratore legale è quello di fare pel suo mandante, nello affare a lui commesso, tutto ciò che, secondo la legge, appartiene alla sua professione seguendo la direzione dell'avvocato, quando vi sia, e questo mandato non ha altri fuori di quelli nascenti dai doveri stessi della professione, (art. 1635 dell'Ord⁶ VII del 1868).

The said section 1635 (section 1686 in the present Code) provides that: "Where a person has been employed to do something in the ordinary

course of his profession or calling, without any express limitation of power, such person shall be presumed to have been given power to do all that which he thinks to be necessary for the carrying out of the mandate, and which, according to the nature of the profession or calling aforesaid, may be done by him.”

Duties of the Legal Procurator before the Superior Courts

The essential duties of the legal procurator in front of the Superior Courts are:

- (a) to assist the advocate;
- (b) to file judicial acts; and
- (c) in general, to make himself disposable and useful by attending sittings, obtaining adjournments of cases when so required, and following the proceedings in Court during the absence of the advocate.

In his booklet entitled *The Legal Procurator*, published in 1950, **Dr. Maurice Caruana Curran, B.A. LL.D.** (later raised to the Bench and at present Chancellor of the University of Malta) makes the following comments on the primary role of the legal procurator, namely that of filing (and obviously, of following up) of judicial acts in the Registry of the Superior Courts:

In the Superior Courts the right of the legal procurators to file the written pleadings in a cause (sec. 180(b), Code of Organisation and Civil Procedure) has now come to be considered as one of his main duties, for an advocate may not file such pleadings in the Registry, and in the absence of a legal procurator, the client would, as a general rule, have to go to the Court himself for that purpose. Hence the engagement of a legal procurator has become, at least in practice, an almost unavoidable necessity.

In the case of **Dr. Antonio Caruana vs Scerri** (Law Reports Vol. XXVI Part I, p.533), the Court of Appeal asserted the principle that, in line with our judicial system, when a party engages an advocate to defend him or her in litigation, this would be also implicitly authorising the same advocate, as it is incumbent on the latter to do, to “employ” a legal procurator, provided the party would not have expressly made known to the advocate his or her wish to the contrary. The Court affirmed furthermore that the assistance of the legal procurator is indispensable to the advocate for the purpose of filing judicial acts, and a client who lets such acts to be filed by a legal procurator would be tacitly acknowledging the services rendered to him by the latter irrespective of whether there had been any direct relationship between them.

As soon as the legal procurator has been assumed, expressly or implicitly, to render his services, he is required to sign, together with the advocate, all judicial acts – with the exception of those of a commercial nature where such acts may be signed by the party (Cfr. Sec. 178 of the Code of Org. and Civil Proced.).

The Legal Procurator as “Ex Officio” Curator

An important role which the legal procurator may be called to fulfil is that of “ex officio” curator. In such capacity, the legal procurator has the duty – together with the advocate appointed also for the same purpose, when the matter falls within the jurisdiction of the Superior Courts, as otherwise the legal procurator so nominated shall act alone – to represent and assist, in judicial proceedings, any one in a variety of persons or institutions, such as, persons interdicted or absent from the Maltese Islands, minors devoid of legitimate representatives, unknown persons who may have a claim to a vacant inheritance, or commercial partnerships without judicial representation.

It is to be noted, in this regard, that in terms of section 936 of the C.O.C.P., the legal procurator, in the exercise of his duties as curator, is bound to use his best diligence for the benefit of the interest which he represents, and shall be personally liable for damages and interest which may be occasioned by his negligence.

The said section 936 provides also that:

“The legal procurator appointed to act as curator shall obtain for the advocate such information as to facts as the advocate shall require, file the written pleadings, be present at the hearing, and afford all other necessary assistance to the advocate.”

The Right of the Legal Procurator to Plead

The only Court of superior jurisdiction before which the legal procurator may plead, or, in the Registry of which he may file judicial acts signed by himself and without the intervention of the advocate, is the Second Hall of the Civil Court (Cfr. Sec. 470(2) of the C.O.C.P.).

Besides the aforementioned rights and duties which he enjoys in the Superior Courts, the legal procurator may act as counsel and plead in the Court of Magistrates in civil as well as in criminal matters. These same rights may be exercised by him also in the Rent Regulation Board, the Rural Leases Control Board, the Board of Special Commissioners, and certain other special tribunals.

Qualifications to Practise as a Legal Procurator

As already pointed out, in the *Costituzioni di Manoel* reference is made to the *procuratori o curiali approvati* or *procuratori matricolati*. The qualifications required for the exercise of their profession are:

- (a) their proved honesty (*nota proibità*);
- (b) experience in judicial proceedings and in the compilation of evidence;
- (c) the prescribed oath of office; and
- (d) a warrant or licence from the Grand Master.

A Proclamation issued on 15th October, 1827, provided, *inter alia*, that:
 (a) No person would be allowed to sue out any warrant or other writ as Procurator in any of the Superior Courts or before the Supreme Council of Justice, unless he were in possession of a licence from the Head of Government to practise generally in the Courts or Council as a legal procurator, or unless he had received from the Government an official licence to act as such in a particular cause;

(b) Permission to practise generally as a legal procurator was to be granted only to those who were of known honesty, furnished with sufficient experience in judicial proceedings and completely skilled in the English language.

Our law ⁷ lays down the following requisites that would entitle a person to obtain a warrant of legal procurator:

(a) he is of good conduct and good morals;

(b) he is a citizen of Malta;

(c) he has been approved by the examining board of Faculty of Law, at a regular examination in the subjects of the course of studies to be followed by candidates for the profession of legal procurator, in accordance with the regulations of the University of Malta;

(d) he has, after passing the examination referred to in paragraph (c) or at any time after the 31st day of December of the last academic year of the said course, for a period of not less than one year, attended at the office of a practising advocate of the Bar of Malta and trained himself in the practise of the profession;

(e) he has been duly examined and approved by two judges, who shall issue under their signature and seal a certificate attesting that they have found him to possess the qualifications above mentioned and that he is competent to practise as legal procurator in the Courts of Malta.

Professional Conduct and Liability

The rules that govern the professional conduct and liability of the advocate apply similarly to the legal procurator. Indeed, it has always been held that the legal procurator, as much as the advocate, is held responsible for professional negligence when such negligence has been proved to be the result of *dolus* or *culpa*; however, he is not responsible for damages when he has acted simply *in error*, unless such error would not have been so manifest that might lead to the conclusion that it was the result of *culpable ignorance* or *evident incompetence* ⁸

In his dissertation for the Doctorate in Laws, ⁹ Dr. Stefan Meilak says that: "...the attitude of the Maltese Courts seems to be a constant one, demanding either culpable negligence of a higher degree or evident incapacity, an attitude which seems to be in conformity with the old Maltese law on the subject where advocates and legal procurators... were only held liable for:

Supina, manifesta ed inexcusabile colpa ed ignoranza principalmente ex defectu solemnium et formalitatis processus. ¹⁰

In the section dealing with legal procurators in the said thesis, Dr. Meilak cites from a judgement delivered by the Court of Messina on 25th January, 1893 where it was stated that:

*Gli avvocati e procuratori legali non sono responsabili di fronte ai loro clienti se non per dolo o frode oppure per supina ignoranza o per grave ingiuria.*¹¹

The rules governing the professional conduct of the legal procurator are provided for mainly in Book Third, Title XVII of the C.O.C.P. These provisions, however, concern mostly cases of contempt or improper behaviour towards the Court. On the other hand, the Court of Appeal is empowered to investigate any complaint brought before it by the Attorney General, the Chamber of Advocates, or by the Registrar of the Courts in connection with any *abuse* or *misconduct* attributed to an advocate or legal procurator in the Course of his legal practice.

The Criminal Code likewise provides for disciplinary measures by the infliction of a *multa* or of temporary interdiction from professional practice in cases where a legal procurator betrays the interests of his client¹². Besides, the Code of Organisation and Civil Procedure¹³ provides also for the perpetual disability or temporary disqualification to practise the profession in the case of a legal procurator who has been convicted by a competent tribunal for serious crimes punishable with imprisonment for a term exceeding one year.

Professional Secrecy

The law makes it clear that “advocates and legal procurators, when they appear before the Superior or Inferior Courts, shall be deemed to be officers of the Court. (Sec. 30, C.O.C.P.) It is a standard rule that a legal procurator (as in the case of an advocate) may not divulge nor may be compelled to despose with regard to, any information known to him in professional confidence from his client.

Section 588 of the C.O.C.P. states that:

(1) No advocate or legal procurator, without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or *loco confessionis*¹⁴.

Similarly the Criminal Code of Malta, in section 642 (1), under the law of evidence, provides that:

(1) Advocates and legal procurators may not be compelled to despose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.

Fees paid to the Legal Procurator

The fees that may be charged by the legal procurator, like those of the advocate, are determined by law. A general rule is that in cases where the legal procurator renders his professional services jointly with an advocate, his fees are equivalent to one third of those chargeable by the latter, with some exceptions where the fees of the legal procurator equal those of the advocate.

It is to be noted that section 88 of the C.O.C.P. (which makes reference to sec. 83 that applies to advocates), prohibits legal procurators from entering either directly or indirectly, into or from making any agreement or stipulation *quotae litis*.

The fees due to the legal procurator, like those of the advocate, are privileged and take precedence over other claims. These are barred by the prescriptive time limit of two years¹⁵

Conclusion

The profession of the legal procurator has, throughout the past three centuries, rendered significant service to Maltese society, not only within the framework of the administration of justice but also, and in no lesser degree, in public life. In this respect, the history acclaims such names as Ġużè Muscat Azzopardi and Sir Hannibal P. Scicluna in the field culture; Ċikku Azzopardi, G. Lanzon, Giacinto Tua, Ercole Valenzia, Armando Mifsud and Manwel Quattromani in the political arena; Fortunato Ellul, Bertu Mizzi, Giuseppe Galdes, Ġużè Mangion, Giuseppe Pace Bonello, Robert Dingli and a host of others who have honoured the profession through their competence in the performance of their legal duties and who had also been of considerable help to a number of advocates who in the course of time assumed high positions in the judicial echelon or in public life.

Even today the profession of legal procurator is living up to its tradition and is giving proof that it still has an important and indisputable part to play in the administration of justice for the benefit of the community at large.

The past history of the profession of legal procurator gives credence to Judge **M. Caruana Curran's** remark that the service rendered by the profession over a span of more than three hundred years is "a circumstance which neither the members of the profession itself, in upholding its dignity, nor the authorities, in applying such reforms as may be judged consonant with the times, can afford to overlook."

NOTES

1. Vide: Sir Antonio Micallef's comments in 1843 to the *Code de Rohan* (1784).
2. Vide: Dr. M. Caruana Curran, "*The Legal Procurator*", 1950.
3. M. Caruana Curran, *ibid.*, p.3.
4. Dr. M. Caruana Curran states: "The legal relationship between the legal procurator and his client is similar to that between the advocate and client, that is, juridically speaking, it is a relationship quite *sui generis*, though it partakes both of the contract of mandate (involving representation) and of the contract of *locatio operarum* (not involving representation)" in *The Legal Procurator* (1950), p.4.
5. Cfr. *Limits of Evidence of the Royal Commission of 1911*, H.M. Stationery Office, 1912, p.276. It is to be noted that, after having been suspended, together with other courses, for around 14 years, the academic course of Legal Procurator was resumed at the University of Malta in 1987, and restructured as a course leading to the degree of Bachelor of Arts in Socio-Legal Studies.
6. This section corresponds to section 1868 of the Civil Code, revised edition of 1984.
7. Section 87 of the Code of Organisation and Civil Procedure.
8. Cfr. Court of Appeal: *Barbara vs Vella*, 1.1.1929; *Buttigieg vs Hirst* noe, 16.02.1945; and others.
9. *Professional Liability*, University of Malta, 1986.
10. Cfr. *Costituzioni di Manoel*, par. 6, Title VIII.
11. Quoted in *re Giovanni Fava vs Nutar Giovanni Vella*, Vol. XXIX,II,331, 19.02.1935.
12. Sections 122 and 123.
13. Section 84.
14. In a separation case *Martha Pace vs Francesco Saverio Pace* (Vol. XXV,I,799, 19.05.1924), the Court in its judgement made reference to an English case *Wilson vs Restall* where it was held that privileged communications include:
"Communications between counsel, solicitors and their clerks made in professional confidence unless the client expressly authorised the evidence to be given."
15. Section 2149 of the Civil Code.

* Chev. Paul Saliba, a practising solicitor since 1948, is the President of the Chamber of Legal Procurators. He also sits on a Commission for the Investigation of Injustices.