The State Advocate Bill No. 83 of 2019: Acting in Breach of Malta's International Obligations

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In this article, Professor Kevin Aquilina takes a look at Bill N.83 of 2018, which is proposing the creation of the Office of State Advocate, and the separation of functions of state prosecutor from those of legal advisor to Government.

TAGS: Administrative Law, Role of the Office of State Advocate

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1. Introduction

On 2 May 2019, government published Bill No. 83 of 2019, a bill proposing the constitution of the Office of State Advocate and the separation of functions of state prosecutor from those of legal advisor to government. According to the Bill, the *'Objects and Reasons of this Bill are to continue implementing reform in the justice sector and particularly to make provision for the division of the prosecution and Government advisory roles of the Attorney General by transferring the government advisory roles to a new office to be called the Office of the State Advocate and to make provision for matters connected with the said reform'*.

Notwithstanding its apparent pious intentions, the Bill leaves very much to be desired. It has conceptual flaws. It is shabbily drafted. It is a parody of the December 2018 Venice Commission's Report.[1] It flies in the face of established constitutional doctrines. It is legislative drafting mediocrity at its best. In sum, it is yet another classic example of how legislation should never be drafted. This short paper argues vehemently against the adoption by Parliament of this Bill as it runs counter to the doctrines of the separation of powers and the rule of law, makes a parody of the said Venice Commission report which it prospects to give effect to, and is in breach of Malta's international obligations assumed in terms of its membership of the Council of Europe, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of EU Law.

2. Conceptual Flaws: Breach of the Separation of Powers Doctrine and Recourse to Unorthodox Baffling Nomenclature

The Bill entertains a number of conceptual flaws. Suffice it here to mention two in relation to the doctrine of the separation of powers and recourse to unorthodox baffling nomenclature.

First, the principle of the separation of powers is breached through the introduction of a Henry VIII clause whereby the justice minister will be empowered to amend laws enacted by Parliament by means of delegated legislation (legal notices). The Supreme Court of Ireland has found Henry

1 European Commission For Democracy Through Law (Venice Commission), *Malta Opinion On Constitutional Arrangements And Separation Of Powers And The Independence Of The Judiciary And Law Enforcement, adopted by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018)*, Opinion No. 940/2018, Strasbourg, 17 December 2018, Doc. CDL-AD(2018_028.

VIII powers objectionable when they end out to be inconsistent with the theory of separation of powers:

> *... the purpose of the Theory of Separation of Powers is to protect the rights of the citizen. Absolute power may not be delegated to any executive agency because to do so would be inconsistent with the rights of the citizen. On the theory of the separation of powers, the rights of the citizen will be secure only if the legislature makes the laws, the executive implements them and the judiciary interprets them.*
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> *One of the tasks of legislation is to strike a balance between the rights of individual citizens and the exigencies of the common good. If the legislature can strike a definitive balance in its legislation so much the better. But the problem which confronted the Court in Cityview Press case is that the facts of modern society are often so complex that the legislature cannot always give a definitive answer to all problems in its legislation. In such a situation the legislature may have to leave complex problems to be worked out on a case by case basis by the executive. But even in such a situation the legislature should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards or guidelines to control the executive discretion and should leave to the executive only a residual discretion to deal with matters which the legislature cannot foresee.*[2]

Indeed, in *Harvey v The Minister for Social Policy*, a statutory provision gave authority to an administrative body to make delegated legislation to amend legislation. When this power was exercised, the end result was that a provision was inserted by way of subsidiary legislation into the parent act which was in direct contradiction with a provision in the parent act, itself approved by Parliament. The Court held that the regulations constituted an impermissible intervention by the competent Minister in the legislative function, and therefore, this action amounted to an unconstitutional exercise of power. Where a delegate exercises a power to make legislation, *'so as to negative the expressed intention of the legislature'*, that is considered to amount to *'an unconstitutional use of the power vested in him'*.[3]

The rule against the making of Henry VIII clauses emerges from the principle that laws should be made by Parliament. Justice Antonin Scalia

2 Sorin Laurentiu and the Minister For Justice, 'Equality and Law Reform Ireland and the Attorney General' (1999) IESC 47 (20 May 1999).

3 (1990) 2 IR 232.

has held in this respect that: *'[T]he most significant development in the law over the past thousand years ... is the principle that laws should not be made by a ruler, or his ministers, or his appointed judges, but by representatives of the people'*.[4] Concomitant to the principle that laws should be made by Parliament and not by the Executive (or the Judiciary for that matter) is the principle of no taxation without representation.[5]

Yet, our modern and progressive government is still living in the bygone days of Henry VIII. Since then, new legal, democratic and political concepts have evolved such as that of parliamentary democracy and the separation of powers. Yet, the Justice Minister is totally oblivious of these developments. It would be good to learn what the Venice Commission thinks of this regressive and illiberal step and of the Bill in general.

Second, in Commonwealth Constitutional Law, the term 'Attorney General' is reserved to the Chief Legal Advisor to Government, not to the Director of Public Prosecutions. Indeed, in Commonwealth Constitutional Law, the terms used are 'Attorney General' for the Chief Legal Government Advisor and 'Director of Public Prosecutions' for that Advocate of the state entrusted with prosecution before criminal courts. Why does the Bill reverse what is commonly held in Commonwealth Constitutional Law when it entrusts prosecution duties to the Attorney General and creates a new totally alien concept of 'State Advocate' to carry out the duties of Chief Legal Advisor to Government? I see no valid reason at law why Malta should depart from this universally Commonwealth adopted legislative model and invent new terms which have no currency in Commonwealth Constitutional Law. Unless, of course, there are hidden agendas which government still needs to disclose.

3. Usage of Confusing Terminology

There appears to be recourse to confusing terminology in the DOI Press Release[6] and the Bill. Indeed, one gets the impression that whoever drafted

4 Antonin Scalia, 'Editorial: How Democracy Swept the World', *A24 Wall Street Journal*, 7 September 1999, at A24.

5 David Schoenbrod, 'Politics and the Principle that Elected Legislators Should Make The Laws', *Harvard Journal of Law & Public Policy*, Volume 26, No. 1, Winter 2003, pp. 239-280.

6 Department of Information, 'Press Release by the Ministry for Justice, Culture and Local Government Bill which separates the Attorney General's dual role published' *(Press Release No. 190933en,* dated 2 May 2019) <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/May/02/pr190933en.aspx>

the Department of Information PR 19093 of 2 May 2019 entitled '*Press Release by the Minister for Justice, Culture and Local Government Bill which separates the Attorney General's dual role published*' had not even read the Bill before s/he penned it.

For instance, the Bill proposes to establish the Office of the State Advocate. Yet, in the Press Release, this Office is referred to – thrice – as the State Attorney. Which is the correct terminology? It appears government itself is still hesitant to decide which terminology it intends to use. The Press Release is therefore shabbily drafted.

4. Legislative Drafting Inaccuracies

It is not only the Press Release which is shabbily drafted, for the Bill suffers from the same stillborn deficiencies. For instance, in the Bill it is written that: '*Immediately after Article 90 of the Constitution there shall be added the following new Article 91A*'. So Article 91A is proposed to be added after Article 90. Why is it not being added after Article 91 as legislative drafting logic, style and practice would dictate? Does it make sense mathematically and drafting-style-wise to first read Article 91A before going through Article 90? And this amendment which is being proposed to the Constitution is totally anathema to the whole body of the Constitution as to its numbering. Why is the Constitution being meted out such a contemptuous treatment?

5. Turning the Venice Commission's December 2018 Report on Its Head

Government has stated that the Bill is intended to legislate that part of the Venice Commission Report separating the office of legal advisor to the government from that of Director of Prosecutions. But is this reflected in the Bill? The government, perfunctorily, claims that it intends to implement the Venice Commission Report, but obdurately fails to address the *leitmotif* of that report. An analysis of government's State Advocate Bill and the Venice Commission Report reveals inconsistencies between both documents which indicate that the government is in bad faith when it claims it is implementing the Venice Commission Report and complying with its international law obligations.

First, the Venice Commission questioned the various roles which the Attorney General carries out. Yet, whilst the Bill addresses one such conflict

– that of prosecutor and legal advisor to government – though not strictly speaking as advised by the Venice Commission, the Venice Commission also criticises the role of the Attorney General as the chair of the Financial Intelligence Analysis Unit:

> *56. In addition, the AG chairs the Financial Intelligence Analysis Unit (FIAU), which produces reports that potentially lead to criminal prosecutions. The authorities point out that the Board of Governors of the FIAU which the AG chairs, is not involved in the FIAU's operational matters such as particular financial investigations. Nonetheless, attributing the chair of such a body to the AG, who has a key role in prosecution, seems problematic and even any appearance of incompatibility should be avoided.*

Yet, nothing of the sort is addressed by the Bill. The Attorney General will continue to chair the FIAU this notwithstanding the Venice Commission report.

Second, the Venice Commission criticised the Attorney General's absolute and unfettered discretion in deciding upon the exercise to institute, undertake and discontinue criminal proceedings:

> *57. Article 91(3) of the Constitution provides that the decisions of the AG shall not be reviewed by any other person or authority (thus including the courts) in the exercise of his or her powers to institute, undertake and discontinue criminal proceedings and of any other powers conferred on him or her by any law in terms which authorise him or her to exercise that power in his or her individual judgment. This is problematic in particular as concerns decisions not to prosecute.*

Rather than allowing judicial review of the Attorney General's decision, the Bill instead increases the powers of the Attorney General so as to concentrate more power in the hands of the Attorney General! This is in line with the Prime Minister's current autocratic concentration of powers heavily criticised by the Venice Commission report.[7]

Third, the Venice Commission report proposed that the *'DPP should take over the prosecuting powers from the AG, who could remain the legal advisor of the Government with functions normally exercised by an AG in jurisdictions where an independent DPP is also in place'*. This proposal is logical, reasonable and very much in synch with international law and practice. Yet, the Bill adopts an unexplainable queer obverse position: the

7 Council of Europe, *Venice Commission report*, note 1, p. 23, para 111 and 112; and p. 29, para 5

Attorney General will be the Director of Public Prosecutions and the State Advocate will assume duties of chief legal advisor to government.

Fourth, according to the Venice Commission report, in '*order to ensure the independence of the DPP his or her security of tenure in line with accepted international practice is essential*'. Yet, the Bill deviates from accepted international practice when the Attorney General (who will perform duties to prosecutor) will be appointed not directly by the Judicial Appointments Committee or by the Commission for the Administration of Justice but by the Prime Minister, therefore continuing to concentrate more powers in the office of the Prime Minister, very much in the opposite direction of what the Venice Commission noted that:

> *111. In the constitutional arrangements currently in force in Malta, the Prime Minister is predominant. This, in itself, could be unproblematic if a solid system of checks and balances were in place. However ... other actors are not sufficiently strong to contribute significantly to the system of checks and balances. The predominance of the Prime Minister and the concentration of powers enabled by the Constitution shows that the system of checks and balances needs to be reinforced.*
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> *112. In order to balance the dominance of the Prime Minister, other state institutions (Judiciary, President, Parliament and Ombudsman) need to be strengthened ... However, the executive should also be more balanced from within.*

Fifth, the Venice Commission recommended the merger of

> *64. ... the staff of this new department of prosecuting police officers with the existing prosecuting department of the AG in order to form the personnel of the new Director of Public Prosecutions. This would unite all prosecutors (from the Police and the AG) under one roof. The delegation of the Venice Commission was told that some of the prosecuting police would prefer to retain their status as members of the Police Force, but such a merger should be possible if it were accompanied by appropriate transitional measures.*

Even this recommendation has totally fallen on government's deaf ears!

Sixth, the current situation of not providing for judicial review of the Attorney General's unfettered discretion in the institution, undertaking and discontinuance of criminal proceedings – which is retained wholeheartedly

and uncritically by the Bill – is in breach of the rule of law as the Venice Commission points out:

> *67. Any powers to start, stop and discontinue criminal proceedings, which are not subject to judicial review, do not comply with modern notions of the rule of law. Already now, non-prosecution can be challenged in court. It has been said that Maltese courts consistently held that any ouster clauses in the Constitution excluding judicial review do not affect the power of the courts to determine whether the actions of any authority are in breach of fundamental human rights. The powers of the new DPP should be subject to judicial review, notably as concerns non-prosecution, upon request by the victims.*

Seventh, the Venice Commission recommended that the '*establishment of a DPP should also absorb the function of the inquest*'. This proposal finds no counterpart in Bill No. 83 of 2019. On the contrary, the status quo is retained. Indeed, Magistrates are not even allowed, *ex officio* and without the need to receive a formal report, to conduct an inquest on their own initiative where the ends of justice so dictate.

Eighth, the Venice Commission remarks that: '*For the rule of law, the efficient prosecution of corruption is an essential issue in any state*' and passes on to recommend that the Permanent Commission Against Corruption '*should be dissolved in order to avoid overlapping competences or it could be kept as a body reporting on corruption and sending the reports to the DPP. In this latter case, an inquiry by the PCAC should not block any investigation or prosecution by the Police and the DPP*'. Once again, this suggestion is invisible in Bill No. 83 of 2019: the *status quo ante* is retained blindfoldedly.

In conclusion on this point, the government seems to have no difficulty with breaching the rule of law. Once the government is ignoring the recommendations of the Venice Commission, and this is compounded by the fact that it was the Justice Minister who requested such report, even though it was prodded to do so by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, the only legitimate conclusion that one can arrive at is that the government is deliberately acting in bad faith.

6. Government in Breach of the Public International Law Principle of Good Faith (*Pacta Sunt Servanda*)

The rule of law requires compliance by the state with its obligations in international law as in national law. But the Bill constitutes a breach of Malta's Public International Law of Treaties insofar as the United Nations Vienna Convention on the Law of Treaties 1969 provides in Article 26 that: '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*'. This is referred to as the principle of good faith (commonly known in Latin as *pacta sunt servanda*). Our Constitution makes similar provisions in Article 65(1), though these international and constitutional provisions appear to be deadwood for the purposes of the Bill and Malta's international obligations under Council of Europe Conventions, to which we are parties, and under European Union Law. This lack of adherence to the principle of good faith by government is evidenced by the fact that the rule of law is being harmed and this when:

(a) Article 3 of the Statute of the Council of Europe specifically obliges Member States – Malta being one – to '*accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*';

(b) the European Court of Human Rights has consistently and repeatedly affirmed that the principle of the rule of law is basic and fundamental to the European Convention on Human Rights. It is '*one of the key principles underlying the Convention and part of the common heritage of Contracting States*';[8] and

(c) the Treaty on European Union[9] which too states in Article 2 that the Union is founded on the rule of law. Breach of this provision is taken so seriously that it can bring into force vis-à-vis Malta the provisions of Article 7 of that Treaty ('*to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council*').

8 Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, (5th edn, Sweet & Maxwell London, 2015) p. 70.

9 O.J. C 202, 7.6.(2016) 59 Official Journal of the European Union pp. 13338.

7. Retention by the Attorney General of Constitutional Conflicts of Interest Galore

As no consequential changes are being made to the Constitution insofar as the prosecutorial function of the Attorney General is concerned, the Attorney General will continue to be, *qua* prosecutor, in addition of the chairmanship of the Financial Intelligence Analysis Unit:

- a member of the Commission for the Administration of Justice;
- a member of the Judicial Appointments Committee;
- *qua* member of the Commission for the Administration of Justice, he partakes in the hearing and decision of appeals from decisions of the Judicial Disciplinary Committee.

Yet, Strasbourg case law is to the effect that the Prosecutor should not occupy any position in relation to the appointment, promotion, discipline and removal of the judiciary as that creates a situation of a conflict of interest on his/her part and the lack of impartiality in respect of the appointed, promoted, disciplined and removed member of the judiciary.

8. A Proliferation of Appointment Committees

Mentioning appointments, two new Appointments Committees are being proposed for inclusion in the Constitution. Yet, this is not advisable because there will continue to be a proliferation of appointment committees. These should not be augmented, but cut down to one.

In 2016, the Justice Minister proposed the establishment by the Constitution of a Judicial Appointments Committee. In the Bill, the Justice Minister is now proposing two other Commissions: one to appoint the State Advocate and another to appoint the Attorney General. Why should these two Commissions be needed when there is already established by the Constitution a Judicial Appointments Committee whose remit can be easily extended to appoint the State Advocate and the Attorney General? Why are these two Commissions not part of the machinery of the Commission for the Administration of Justice?

One must also bear in mind that currently, government appoints at least (insofar as I am aware) three other separate Appointments Committees, to select the Maltese judges on the European Court of Human Rights,

the Court of Justice of the European Union, and the General Court of the European Union. In all, and there might be other appointing committees as well, there are already four Appointment committees in existence apart from the proposed additional two. This brings the total to six in all!

Does Malta need six diverse Appointment Committees when such a task can be easily carried out by one? Perhaps the government is of the view that by appointing these separate appointment committees, it can influence their recommendations to obtain an outcome favourable it? Further, these Committees have their own peculiar procedures. For instance, some issue a call for applications; others do not. Some rank candidates on the basis of merit; others do not. This is quite confusing as there is no uniformity, consistency and coherency in the appointment procedure. The end result is not a unified single standard applicable to all appointments but confusion in appointment standards *par excellence*.

In sum, the State Advocate is appointed by an Appointment Commission. One asks: why is there a need to appoint such a Commission when the Judicial Appointments Committee can carry out this task? In fact, what needs to be done is to consolidate all these appointments in one Committee for the local judiciary, judiciary to sit on local and international courts or tribunals, the Attorney General and the Prosecutor General. With all these diverse appointment committees: (1) there is no proper accountability mechanism; (2) each committee devises its own distinct and separate selection criteria; (3) there is no uniformity in the selection process; (4) some issue a call for applications, others do not; some rank candidates, others do not.

9. Entrenchment

The constitutional provision related to the establishment of an office of State Advocate is not being entrenched in the Constitution. This means that this provision can be repealed by an absolute majority, not by at least a two-thirds majority in the House of Representatives. All this indicates that the government lacks the required seriousness insofar as the implementation of the separation of the prosecutorial and advocacy functions of the Attorney General are concerned as everything can be undone without the involvement, support and concurrence of the Opposition. We can thus end up in the situation that every change in legislature brings about a change in the functions of the Attorney General and Director of Public Prosecutions very much in antagonism to the principle of legal certainty.

10. Conclusion

Clearly Cabinet has approved a Bill proposed to it by the Justice Minister which is half-baked and ill-conceived, and has been drafted hastily, shabbily, superficially, and without enough thought and research put into it. It is a Bill which places Malta at loggerheads with the Council of Europe, the European Court of Human Rights and the European Union. Should the values enshrined in the Bill be enacted into law or should the European values cherished by these three international institutions but despised by the Maltese government be enacted into law? Only time will tell.

Government is purposefully dragging its feet to implement the Venice Commission report and, five months after the publication of this report, it has attempted to address only one topic – quite deficiently – of the report. This does not augur well for the respect of the rule of law in Malta. Indeed, there is a constitutional rule of law crisis in Malta.


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