Refalo
ADVOCATES

30th July 2019.

Mr. Mario Cutajar,
Permanent Secretary to the Prime Minister,
Auberge de Castille,
Valletta.

Dear Mr. Cutajar,

Advice on a report by the Commissioner for Public Standards on a Complaint of 'Potential Conflict of Interest of back bench members on both sides of the House of Representatives, who hold positions within or provide contractual services to the Public Sector'

You have asked for my opinion on the above captioned report by the Commissioner for Public Standards (the Commissioner) dated the 5th July 2019 (the Report).

The Report focused on the potential conflict of interest of back bench members of the House of Representatives who hold positions within or provide contractual services to the public sector. In his conclusion the Commissioner states:

"79 After serious consideration of all the questions that are raised by the Complainant I have arrived at the conclusion that the practice of employing members of Parliament within the public sector, or appointing them to provide contractual services to the public sector, is fundamentally wrong , whether this is in order to compensate them for their inadequate salary as MPs for any other reason."

The Commissioner then in paragraph 80 of the report set out his underlying reasons for this conclusion. Reading those reasons, It is quite clear, that the Commissioner accepts that the Separation of Powers is the underlying concept animating the Constitution of Malta and is essential for the survival of the Rule of Law and democracy in Malta. I take issue with that conclusion as I do not believe that the Malta Constitution can be said to be built either primarily or solely on a concept of the Separation of Powers or that this is fundamentally necessary for the preservation of the Rule of Law and democracy in Malta.

In order not to be misunderstood may I underscore the fact that I think the Rule of Law in Malta is the principle element underlying the constitution and this necessitates a large degree of independence in the judiciary.

As to democracy then this does not rely on any particular constitutional theory which may easily be subverted by demagogic movements (as history amply shows us by concrete examples) but on the organization of a civil society determined to preserve its freedom and on a free press which is able to bring public opinion to bear on the government of the day. I have my personal doubts on the relevance of the doctrine of the Separation of Powers to the organization of the modern State, especially the welfare State.

I have studied the Report with considerable interest. I have no doubt about its being well meaning and must be understood in the context of strengthening the autonomy of Parliament, or rather of the House of Representatives, which is a vital component of our Constitution. The Report, unfortunately bases most of the discussion on the ideas of the Separation of Powers. This is both unfortunate and mistaken as our Constitution is not based on the idea of the Separation of Powers but rather, as stated, on the idea of the Rule of Law. This is really because we owe our Constitution to the United Kingdom from which we became independent in 1964.

An understanding of the Constitution of Malta requires also an understanding of British and Commonwealth constitutional law in which it is historically embedded. It is of course a matter of common knowledge that the British and Commonwealth Constitutions do not harbour the theory of the Separation of Powers but rather, as Dicey some years back stated, on the idea of the Rule of Law. It is indeed true that the doctrines of the Separation of Powers and of the Rule of Law are allied concepts which have a lot in common. They are however separate and distinct solutions to the democratic conundrum and must be viewed as such.

That it is not the doctrine of the Separation of Powers which underlies the Maltese Constitution but that of the Rule of law has been asserted by much better authority than that of mine. Sir Arturo Mercieca in his well-known judgement *Cassar Desain vs Forbes* clearly understands that the position in Malta is governed by the Rule of Law and not by that of the Separation of Powers.

The Court, in that case, quoted extensively from Maitland's statement in relation to the reform of the administration and "*the reorganization and the reconstitution of the Courts*

of Law in accordance with the English principles of the administration of justice." This did not introduce into Maltese law the doctrine of the separation of powers, as had been erroneously concluded by some historians, but the English principles of the Rule of Law. Proclamation I of 1815 does not support the dual personality doctrine but strikes at its very root both expressly and by necessary implication.

The proclamation is a confirmation of the principles of English Public Law. It may of course be objected that that statement was made in a colonial situation and not a post-colonial situation where Malta had acquired independence. That is certainly true, but the statement remains meaningful; as with independence the constitution granted by the British sovereign to Malta was along British lines and that is it reflected in the constitution the general principles of law adopted by British constitutional law and by constitutions modelled on the Westminster Model. This is not a constitution built on the Separation of Powers, but a constitution built on the Rule of Law. This principle is also reflected in the judgement of that eminent Jurist Judge Maurice Caruana Caruana in his judgement in Lowell vs Caruana.

It is important for an analysis of the Report to understand the links that exist between the Separation of Powers and that of the Rule of Law. It is quite true that these are connected concepts and that the purpose of both doctrines is to preserve democracy. The main difference is that the Separation of Powers is actually a recipe for democratic government and is therefore partly utopic; the idea of the Rule of Law is pragmatic and has evolved with the living Constitution of the United Kingdom – it is therefore the result of history and evolution and is founded in practice and that is perhaps the main reason why it has been so successful in a variety of contexts.

The rule of law implies and necessitates the application of the ordinary law of the land to achieve the protection of individual rights through the workings of an independent judiciary. This, to my mind, is the position in Malta. Indeed, the position is further strengthened in the Maltese scenario by having those rights inscribed in rigid constitution and by endowing the Courts with the constitutional function and duty to protect those rights.

The doctrine of the separation of powers on the other hand relies on an analytical split of the powers of the State into the classical tripartite definition that is executive, legislative, and judicial. Montesquieu, who idealized the doctrine, would have it that the powers were to be kept separate in the sense that the persons holding one power of the State would not be able to hold another power of the State. To put it in plain words he

envisaged that the legislative power was to be exercised by legislators who were simply there to legislate; the executive, that is the Government, would be made up of individuals who would not be members of the other branches of government - so in this idea of constitutional arrangement a minister would not be able to be a member of Parliament and the same would apply to the judiciary that is a judge would not be able to be a Minister of government or member of Parliament.

It is quite clear that while this reality may be applied to certain jurisdictions which are presidential in nature [with a limited overlap], it cannot be fully applied in a parliamentary constitution whereby there exists a certain degree of overlap between the legislative and executive.

In the Constitution of the United States of America, you find a clear and evident distinction between executive and legislative. The executive power being vested in the President and the secretaries of State answerable to him while the legislative power is vested in Congress and the judicial power is vested in the Supreme Court of the United States. There is then considerable overlap between the powers which in a sense belie the idea of the separation of powers.

In the initial French Constitutions fresh after the French Revolution it was prohibited for the judiciary to interfere with acts of the government or acts of the legislature to the extent that it was made a criminal offence for a judge to declare a law void. Naturally this position to which a rigid adherence to the doctrine would lead is no longer accepted as necessary and even in France it is today possible for the Courts to review legislation and governmental acts in appropriate situations. But this explains also why the French Constitution provides for setting up of Constitutional function as distinct and different from a Constitutional Court.

The fundamental and underlying concept in the Separation of Powers is that the executive and the legislative had to be kept separate and distinct; if you accept that to be the Maltese position then the argument of the Commissioner would follow seamlessly. That however is not the position in Malta, in the United Kingdom or in any of the Commonwealth countries which are governed by the Rule of Law. In these countries there is an evident link and symbiosis between executive and legislative, and though the functions are distinct they are not as separate as the Commissioner would like them to be.

This is a political reality which has been recognized by various scholars throughout the years:

> *"It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power."* [Commentaries on the Law of England, William Blackstone, Chapter 10, Document 6 1:149--51, 259--60]

> *"'the efficient secret of the English Constitution may be described by the close union, the nearly complete fusion of the executive and the legislative powers'"* [Walter Bagehot, The English Constitution (London 1867) p. 12]

> *"It is not the only way in which government may be organized, it is not the way in which government is organized, and it is not – at least in the strict form set out in the previous paragraph the way in which government is organized in the UK. This is not to suggest that the separation of powers is unimportant. It is an influential idea with a long historical pedigree."* [Elliot M & Thomas R (2011) Public Law [Oxford University Press, pg 91]

Naturally this lack of separation creates a problem in relation to the autonomy of the House of Representatives, which is a check, albeit of a secondary nature, on the power of the executive. And this is a point where I Agree with the Commissioner – means must be found in enhancing the autonomy of the House of Representatives, but this does not necessarily lead to his conclusions unless one is contemplating the wholesale revision of our constitution and the introduction of a constitution modelled on a presidential model, which would adopt indeed the concept of the Separation of Power more fully then our Constitution does.

In the Malta Constitution, the idea of the Rule of Law is the fundamental doctrine which underlies the Constitution and it relies naturally heavily on the ability of the Courts to interfere with the executive in the protection of the rights of the individual, and not on hypothetical separation between legislative and the executive which in our system of Government is hardly perceivable. Election determine the composition of parliamentary and indirectly also the composition of the executive.

Though ideally the function of legislative is to legislate and check upon the executive, the reality is that both the legislative and executive branches are the most political branches of the state. Consequently, all laws enacted by whichever party is in government are characterised by political factors.

The non-engagement of backbenchers within the executive does in no way contribute to a better separation of powers or to a more independent legislative. Though the ideal situation should be that members of parliament as part of the legislative should be free to speak up their mind, the reality is they are still bound to the directions given by their respective parties, one of them being the party in government.

As also rightly pointed out by Prof. Kevin Aquilina;

> *"Party discipline entails that all members of the parliamentary group, itself also a creature of convention, have to faithfully follow the instructions imparted by the party Whip and, should they disagree with such instructions, it is the Whip's duty to mediate between the party's leadership and the dissident MP to bring the latter to order. Not following the Whip's instructions entails the taking of disciplinary action by the party against recalcitrant MPs. This is because the relationship between the Whip and MPs is based on party loyalty. Loyalty entails obedience to the Whip's command and is a very much cherished virtue within the constitutional organisation of political parties."* [The Whip: creature of convention The relationship between the Whip and MPs is based on party loyalty, Malta Today, 27/07/2016]

On the other hand, the judiciary, being of an apolitical nature is the true counterbalance which can supervise and intervene in instances where it is deemed that either the legislative or the executive acted in breach of law. Therefore, though the government always enjoys a majority within the legislative branch, it does not mean that the legislative or any member of it is rendered powerless as it one can always revert to the intervention of the Judiciary.

The idea that the Courts would be able to review both legislative and government acts if they are not in accordance with the law is a result of ideas of the Rule of Law and not of the Separation of Powers.

The present position can be traced back to the seminal case in the United States *Marbury vs Madison* which affirmed the power of the Supreme Court to review Acts of Congress for Constitutionality. A good reading of that judgment should persuade anybody that what the American judges were doing in that case was applying a reasoning common to most common law lawyers and in which they must have been deeply steeped; that is that is ultimately the function of the Court to apply the law as it finds it independently of the person subject to the law. In that particular case it translated into constitutional review and from there it went on to infect the whole constitutional set up familiar to the modern world. That is also what happens in the Maltese Constitution and the tradition of judicial activism and the ability of the judiciary to review acts of the legislature for constitutionality ultimately relies on this common law concept of the Rule of Law.

The Maltese Constitution is not only founded on the Rule of Law as distinct from that of the Separation of Powers but in what concerns the system of government heavily relies on unwritten political practices adopted by the people in authority; it is therefore , like the Constitution from which it is derived, largely conventional in character, in that the system of government and what actually happens depends very much on conventions adopted by the governing authorities. It is this conventional character which has allowed our constitution to survive as a vibrant and modern democracy where others have failed.

As is very evident from the healthy dialogue engaged by Maltese institutions on government and its policies, and ultimately as is also evident through this note, in all true democracies the exercise of public function must somehow be sanctioned through the authority of the people in whom sovereignty ultimately vest. This is expressed through free and honest elections held periodically which allow for a change in government and a decision of policy. Ultimately the lynchpin of the whole system is found in Parliament in the House of Representatives where the elected representatives of the people convene to form a government and to set standards for public life. The autonomy of this institution, as the Commissioner rightly remarks, must be safeguarded, but that autonomy does not necessarily mean a separation between executive and legislature, as the Commissioner seem to think.

Indeed, purely as an aside and not necessary to the main brunt of the argument it can be easily shown that the concept of the Separation of Powers, in its classical format, is unworkable in the present system of the welfare State. This is no great fault of the doctrine, as Montesquieu who formulated in the early 1700' s did not foresee the

emergence of the welfare state in the 1900's. Indeed, the concept of the welfare State, on which there would appear common political agreement among all major parliamentary groupings and opinions, relies heavily on a specialization of powers rather than a separation of powers. What do I mean by this? Rather than State power being analysed in the classical tripartite fashion, The power is split into a number of regulatory areas, and the appropriate regulatory bodies would appear to appropriate themselves of the three functions rolled into one. The limitation is then through the concept of function., in the sense that the regulatory body is limited by the terms of its function and not by a concept of Separation of Powers.

To exemplify this in the concrete case if you were to take the provision of social services it is only reasonable and sensible that you would have a department that would cater for the provision of social services – this actually entail that the department would have the power to make regulation regarding entitlement to social services, a typically legislative power, a power to police and provide services, a typically executive power, and also a power to decide on entitlement, a judicial power. The sanity of the situation is that the sphere of the authority is limited to the provision of social services and decisions of the department may be reviewed by other authorities, politically by the government and the parliament and legally by the court. The same happens about other sectors such as education, planning, financial services *et similia*. The list can be made if one wishes. Still the kernel of the idea is that a regulatory function works best through an idea of specialisation rather than through an idea of Separation. Without such a setup the modern welfare state would be unworkable and unmanageable to the detriment of all concerned. It is the idea of the Rule of Law which makes the modern welfare State workable and democratic.

There is in the Maltese Constitution no clear dividing line between executive and legislature. They are necessarily and constitutionally amalgamated because all power in the British and the Maltese Constitution flows from Parliament and therefore to the government of the day the executive must flow from Parliament and must have the confidence of Parliament to be able to govern. There is a very close link between government and the House of Representatives, and this is further strengthened by the ideas of collective and individual ministerial responsibility. The government governs as long as it has the confidence of Parliament; not only that it must be necessarily drawn from the House of Representatives in that the elected members of Parliament are the only persons eligible to be nominated Ministers.

It is therefore clear that not only is there no constitutional incompatibility between membership of the executive and membership of Parliament, but it is seen in the Constitution as a must that a Minister may only be so appointed if he has been previously elected to the House of representatives. This may have been found to be on occasions an irksome requirement and there are a number of examples in the past of people being appointed to what may be considered as the equivalent of a Cabinet position without being elected to Parliament. This may easily happen as the composition and procedure of the Cabinet are largely a matter of convention and political usage and are not susceptible to judicial review. So, a practice adopted by politicians to make good a perceived deficit of the constitution will be able to solidify into a convention without the need of constitutional change. In actual fact not only is there no incompatibility between the members of the legislature occupying posts on government boards and agencies, but rather the Constitution sees this as the only natural way to govern; insisting that at the highest level, that is in the appointment of ministers these have to be appointed form the elected representatives of the people. This may on occasions be restrictive, but it is in general a sound principle as democracy is government by the people and for the people – the people here are their elected representatives who stand in their stead.

This link between Parliament and executive find expression in the age-old conventions of collective and individual Ministerial responsibility. These conventions are meant to tie the two organs executive and legislative together in clear defiance of any notion of the Separation of Powers. The idea behind this is that ultimately as power is derived from the elected representatives of the people it is these who determine the composition of government; great wonder that government consists mainly of those elected representatives. Indeed, the constitution makes that mandatory in so far as ministers of State are concerned. There is therefore evidently no incompatibility in the Maltese constitution between occupying a post on the executive and a post on the legislature; that is what the Constitution after all provides.

It is quite true that this creates a bit of a problem. If Parliament is to control the executive how is it that the executive is drawn from Parliament? it may be legitimate to ask what sort of control is that. In actual fact the problem in modern systems of government is that the ideas of ministerial responsibility have led not to the control of the executive by the legislature but rather to the control of the legislature by the executive. This is in reality the result of the modern political party system and it is perhaps exacerbated where you have a bi-party system.

The bi-party system and tight political party organization was well as the habit of exercising the whip on several political issues ensures the support of the Government in Parliament. The occasions when a government was actually defeated in Parliament are few and far between. Besides the automatic link which exists between defeat and the dissolution of Parliament further strengthens the hold which the government has on the Parliament. It is legitimate in the modern day to ask whether Constitutional strategies can be adopted which will ensure a greater autonomy to Parliament, so that the House will be better able to control the executive. But this is not necessarily through the route suggested by the Commissioner, that is by making the roles of executive and membership of the house incompatible, which evidently they are not, and which, if such incompatibility where to be sustained, would, in my opinion, subvert the whole constitution.

It is perhaps opportune to remark that this may create a problem in respect of Parliamentary autonomy. It is quite true to say that the Constitution is not founded on the Separation of Powers; it is quite a different thing to say that Parliament should not act as an autonomous institution. The autonomy of Parliament is clearly an important element of the Maltese Constitutional set up.

The problem of autonomy in Malta is perhaps exacerbated as a result of the small size of the island, the small size of the population, the scarcity of resources, the small size of its parliament and historical traditions of strong party politics and political allegiance, coupled with a bipartisan parliament, which seeing the scope why the electoral system was given to us, is a surprising political development and which was not really reflected in Maltese political history up to the end of the second World War. This makes it more necessary to ensure parliamentary autonomy, but that autonomy must be arrived at in the full respect of the Maltese system of government; a system which has preserved democracy in Malta since it became independent where other countries have failed. That is perhaps not so much due to our constitutional system but to political maturity among the Maltese and to a sense of statehood in Malta which dates back to pre-British colonial times.

My idea is that the autonomy of the House needs strengthening but that such strengthening may not necessarily be achieved through the creation of incompatibilities which do not exist, and which are essentially antithetical to the Maltese system of government. There is ultimately here a trade-off between governability and representation; it may perhaps be legitimate to ask whether the balance has moved unnecessarily towards achieving governability at the cost of lower representatives. It is

clear that a multi-party House would be able to be more autonomous then a bi-party one; but simply that does not seem to be what the people want and in a true democracy the people provide for their own government.

In actual fact creating an incompatibility between legislative tenure and executive posts would embark on a wholesale revision of the Constitution as it is my belief that such incompatibility cannot function properly in the present system of Government.

The commissioner in his report then tackles several incompatibilities. These are in the following order:

A. Members of Parliament who are in government employment.

The Commissioner refers to section 54(1) of the Constitution. This excludes from being a member of Parliament certain employees of the Civil service. From this he derives a general principle that no member of Parliament should be employed in public office. This conclusion is not supported by the Constitution. The first thing to note that the most prominent member of the executive are indeed members of the executive, Prime Minister, Ministers and Parliamentary secretaries, because they are members of Parliament. There is here not an exclusion, but an indissoluble link introduced. The exclusion was not in relation to person preforming a public function but in relation to persons employed in the Civil service.

It is interesting to note that section 54(1) as it presently stands was the effect of an amendment to the constitution, and it was precisely meant to render it possible to certain employees in the civil service to compete for the representative office. The ability to represent people in Parliament is part and parcel of the enfranchisement of people and it was naturally thought wrong to exclude such a large section of the people, that is the employees in the civil services in the junior grades from competing for office. Naturally the reasons given by the Commissioner for the exclusion of persons in the higher grades is cogent and reasonable. It is moreover important to understand that the public service in the Constitution of Malta is given a very specific meaning and it is defined in section 124 of the Constitution. Public office is an office of employment in the public service and put the public service is the service of the Government of Malta in a civil capacity. That is the exclusion is evidently aimed at the civil service and not at creating an incompatibility between membership of the House and membership of the government. This section cannot therefore be used as an argument for the claimed incompatibility; if anything it is an

argument that the claimed incompatibility was not foreseen by the Constitution, to the extent that junior employees in the civil service were still allowed to compete for membership of the House, and this on the evident principle of equal and general enfranchisement of the population.

B. Members of the House employed by corporation created by law.

Again, here the Commissioner makes it clear that this is not a principle of exclusion but entails that the member discloses his interest in voting on the second reading of a bill effecting the Corporation.

C. Members who are University lecturers.

This exclusion is really of historical interest and is understandable if one considers the political climate and the persons active when this exclusion was introduced. The argument for the exclusion stems from scarce resources. Not that this is an argument which affects the whole discussion.

D. Members on Boards having members of both sides represented on them.

The Commissioner refers to the Planning Authority and the Lands Authority. If anything, the existence of this exception is a powerful argument against the incompatibility referred to. It is quite clear that there may be two types of Corporations, corporations which harbour equal representation from both sides of the legislature and other corporations which are meant as a vehicle for government policy where the representation has necessarily to come from the Government side. Apart from that if there is incompatibility in the second type of situation there would also be incompatibility in the first instance. The acceptance on the part of the Commissioner that there is no incompatibility where there is equal representation is only a result of the acceptance, in principle, of the close and intimate ties which exist between the government on the one hand and the legislature on the other.

E. Representatives employed on the basis of persons of trust.

This raises two separate issues; whether there is anything unconstitutional in employing persons on a basis of persons of trust concept, and whether members of Parliament should occupy such post. The argument made by the Commissioner that this runs counter to the principle that Members may not be in public employment. But as I have already noted that exclusion only refers to the

person employed in the higher grades of the civil service and may not legitimately be extended beyond that. In reality employing persons of trust to assist the government in implementing its policy is an old and accepted position in the Maltese Constitution and governments since independence have regularly resorted to it to maintain the administration. Naturally this debate would call into question the whole set up of the present Constitution, but it is not contrary to the Constitution as it presently obtains.

F. Members employed as legal consultants to the Government.

In reality this is simply an extension of the requirement that members of government should be members in the first place of the legislature. The conceptualized incompatibility simply does not exist in our Constitutional set up. The issue is in reality not a perceived incompatibility - should the government extend to encompass within its ranks all its elected representatives. This is a difficult case to answer in the abstract; as the composition and size of government is best decided upon by those who are burdened with the onus of government Still the enlargement of the executive does indeed impinge on the autonomy of the House, and the autonomy of the House is an important element in the Maltese order, and it assumes greater importance in the light of the close links that exist between legislative and executive. There are other ways, I believe, which do not clash with the principle of the Parliamentary Government, how the autonomy of the House may be preserved and enhanced.

The Autonomy of the House.

I accept that the idea behind the report of the Commissioner is to strengthen the autonomy of the House and I would accept in principle that that is desirable. However you cannot achieve autonomy by standing the Constitution on its head; the links which exist between legislative and executive are the very basis of our constitutional and democratic framework and creating an incompatibility in this area without revisiting the whole constitutional set up would, to my mind, be undesirable. This has come to the fore more then ever in those constitutional systems which are based on the concept of Parliamentary sovereignty and the Rule of Law, adopting as it is said the Westminster model.

The need to foster and enhance the autonomy of the House is a desire which seems to be felt in all the systems, leading to the adoption of a number of measures to enhance that autonomy. Malta has already adopted a number of steps in the right direction such

as the enhancement of the role of the Speaker of Parliament. In the initial constitutional set up this figure was only set up as a stepney but has today managed to carve for itself, owning to the measures adopted by successive speakers of the House and Governments, a role independent of the government of the day and which behooves and reflects the autonomy and dignity of the House. Perhaps more can be done that way and the role of Speaker can perhaps be further strengthened by the adoption of appropriate conventional arrangements.

Also worthy of note is the heathy development of select committees of the House whose function is to act as a check on government; of particular note is the public Accounts Committee which exercises a significant role in the control of the executive by Parliament.

A number of other measures can of course be adopted such as the revision of standing order to give greater control to the members over the proceedings of the House. In the United Kingdom the Fixed term Parliament Act can be seen as one step in securing this type of autonomy. Naturally there are a lot of issues which autonomy raises, such would be among others they type of electoral system we adopt and its impact on membership of the House. Ultimately everything, within the system, turns on into a trade-off between governability and representativeness. Both being at the different poles of the same spectrum.

I am here taking it for granted that there is a desire to maintain the parliamentary system as we know it and not to veer into presidential and semi-presidential experiments which the suggested incompatibility would lead us ultimately to adopt.

I would happy to discuss this matter further should you require

I remain,
Yours,

Professor Ian Refalo