The Office of State Advocate and the *Bernard Grech* case

Prof. Tonio Borg

In this article **Prof. Tonio Borg** examines the constitutional functions and powers of the office of State Advocate introduced in 2019. In his view it is evident that the idea behind the establishment of this office was to have an autonomous guardian safeguarding the legality of State action in the public interest; and yet in practice , but also according to recent jurisprudence, the office has been reduced to that of legal counsel to the government of the day; he argues that the security of tenure granted to the holder of such office is proof that the intention of Parliament was to create an impartial guardian who can take spontaneous action against any illegality of State action.

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The Office of State Advocate was established in 2019 following recommendations made by the Venice Commission of the Council of Europe regarding the anomaly where the then Attorney General had the dual function of serving as an independent director of criminal prosecutions and at the same time the chief legal advisor and counsel to government in all litigation against the government of the day.

A new provision, namely article 91A, was added to the Constitution in 2019. Its third sub-article reads as follows:

> *The State Advocate shall be the advisor to Government in matters of law and legal opinion.* ***He shall act in the public interest and shall safeguard the legality of the State action…*** *In the exercise of his functions, the State Advocate shall act in his individual judgment and he shall not be subject to the direction or control of any other person or authority.(emphasis added)*

To guarantee this independence and autonomy of action, the holder of the office can only be removed from office by the President upon an address by the House of Representatives supported by the votes of not less than two thirds of all the members thereof, on grounds of proved inability, physical or mental or proved misbehaviour.[1] Such appointment also requires approval by not less than two-thirds of all members of Parliament.

At first glance, therefore, it is already obvious that the State Advocate is not merely counsel to government. A counsel in any matter can be dismissed at will by his/her client. If the State Advocate were a mere counsel to government, why grant him such solid security of tenure?

Before the establishment of the Office of State Advocate, entrusted with safeguarding the legality of State action, the Attorney General, in his capacity as chief legal advisor and counsel to government, was obliged to obey the wishes of his client, the government of the day. He was only not so obliged in deciding matters of *criminal* prosecution. Examples of the Attorney General acting on his client's will, that is to say, that of the government of the day, are abound. In 1997, following a judgment of a court of constitutional jurisdiction where a law on discrimination in the law of succession against children born out of wedlock was declared to be in breach of the European Convention on Human Rights,[2] no appeal was filed at Government's behest following a public outcry for it not to file an appeal from such judgment;

[1] Constitution, Article 91A (5).
[2] *Mario Buttigieg pro et noe vs Attorney General et* (FH) 17 January 1997 (Mr Justice A. Magri).

probably the only case of a judgment declaring a law to be constitutionally invalid not being appealed from. That was the client's decision transmitted to his lawyer. Again, there have been instances where, in spite of advice tendered by the Attorney General prior to 2019, Government discarded such advice.[3]

What is different in this novel provision introduced in 2019 granting autonomy to the State Advocate in non-criminal matters? The same guarantee granted to the Attorney General in criminal affairs was then given also to the State Advocate who was to be considered the last person standing in safeguarding the legality of State action. Again, normally lawyers do not necessarily act in the public interest, but in the private interests of their client within the parameters allowed by law. However, the State Advocate's relationship transcends that of an ordinary lawyer-client relationship; such officer has to act in the public interest; that might not please or suit the government of the day which explains why s/he is granted a solid security of tenure similar to the one enjoyed by members of the judiciary prior to the new system of removal of members of the judiciary from office introduced in 2020, and identical to that of the procedure of removal from office today of the Attorney General in his/her function of deciding whether to criminally prosecute any person.

The question of the role of the State Advocate and whether such office is one which is independent of the government of the day arose in a recent case.[4]

In that case the Leader of the Opposition and the Opposition's spokesman for health affairs, challenged the State Advocate's inaction in not instituting legal action to recover damages from individuals who, though occupying high public office, had squandered hundreds of millions of euros through their action, negligence or outright complicity, along with foreign companies who were entrusted with fulfilling and executing an agreement for the management of, and investment in, three State hospitals, failing miserably in the process in the execution of such contractual obligations.

In a judgment delivered in a case instituted by the then Leader of the Opposition, the Court of Appeal, the highest court of civil jurisdiction,[5] had found that high ranking government officials had acted in collusion with third parties and maliciously caused damages to the detriment of the State of Malta, and that such officers, though they had the duty to safeguard the interests of the country, failed to do so in order to safeguard other interests. In fact, the Court of Appeal had annulled, owing to such fraud, the deeds

[3] In spite of advice to the contrary by the Attorney General, in 1998 the then Minister responsible for Immigration released a German young girl from detention for importing an illegal drug for her private use, issuing a deportation order under article 22 of the Immigration Act of 1970, thereby deporting her from Malta in spite of the fact that criminal proceedings were pending against her.

[4] 1398/23 *Dr Bernard Grech noe and Dr Adrian Delia vs State Advocate et* (CA) 2 December 2024.

[5] 133/2018 *Dr Adrian Delia noe vs Prime Minister et* (CA) 23 October 2023.

whereby three state hospitals had been granted under long lease to foreign investors. The annulment was made under Article 33 of the Government Lands Act (Chapter 573 of the Laws of Malta) which stipulated that in cases of disposal of government land in breach of the conditions set down by law for such transfer, such disposal could be annulled at the initiative either of the Attorney General or any member of the House of Representatives. The Act provided that:

> *33. (1) Any disposal of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.*
>
> *(2) The nullity of a disposal made in contravention of the article aforesaid may be demanded by the parties involved in the disposal and also by the Attorney General or by any person who is a member of the House of Representatives at the time of the demand before the Civil Court, First Hall.*
>
> *(3) The effects and consequences referred to in articles 541 and 543 of the Civil Code shall apply to whosoever acquires land in violation of article 31 of this Act.*

Plaintiffs, being members of the House, therefore, requested that, following the annulment of the deeds of transfer of the three state hospitals in virtue of the 2023 judgment as being in breach of the law and the result of fraud and collusion causing damages to the State coffers, the court declared that the State Advocate, in terms of article 91A of the Constitution, enjoyed the power and duty to act independently of any governmental direction or *fiat* and should act in the public interest to safeguard the legality of State action according to his own individual judgment and could act *motu proprio*. They also affirmed that, following the judgment of the Court of Appeal of 23 October 2023, such judgment was sufficient authorisation and basis for the State Advocate to take judicial action to recover the damages suffered by the State owing to the fraudulent actions of high ranking government officials, including members of the Government of Malta who, according to the said judgment, acted in collusion with foreign interested parties on the matter. In fact, the Court of Appeal had concluded that the appellant companies, which had enjoyed the concession of the State Hospitals, were guilty of fraud to the detriment of the State of Malta. There had been fraud:

> *...in the sense of collusion between the appellant companies and who had the duty to ensure that the conditions of the concession were abided by which formed the legal basis of the action of plaintiff to proceed with this case.*

The Leader of the Opposition Dr. Bernard Grech sued the State Advocate for his inertia and inactivity. The pleas raised by the State Advocate were to

the effect that he did not enjoy an autonomous right to institute litigation except with the approval of the government of the day. He supported this argument by stating that where the law expressly wanted to grant such power to the State Advocate, it did so in an express manner, as in the case of the Government Lands Act which allowed the State Advocate to institute action against any person, where the provisions of the law regarding the transfer of government land had been breached. Arguing *a contrario sensu*, the State Advocate pleaded that where there was no such provision, he had no such power.

The respondent State Advocate even produced a written legal opinion drafted by a former Attorney General, stating that when he occupied the office which had at that time a dual function, he never enjoyed at law the right to autonomously institute legal action in non-criminal matters.

The flaw in this argument is that this legal opinion, which as we shall see, significantly influenced the court of first instance in its judgment[6] rejecting plaintiffs' claims referred to the legal position *prior* to the 2019 constitutional amendment establishing the office of State Advocate and burdening him with the constitutional responsibility of acting in the public interest to guarantee the legality of State action.

The court of first instance in its judgment relied profusely on the legal opinion presented *ex parte* by the State Advocate. Quoting from such opinion, it declared that chaos and abuse would ensue if the State Advocate were allowed free rein to institute legal action in non-criminal matters without the consent and nod of approval of the government of the day.

The opinion of Judge Emeritus and former Attorney General for 26 years, Dr Anthony Borg Barthet also carries weight. He explains that if the State Advocate were to be granted the same prerogatives as a Cabinet Minister, such as that of acting *motu proprio*, one would be putting democracy in an upside down position; that is to say, if the State Advocate were to have the power to act at his discretion without referring to anyone, one would have created a super office above the very elected persons and the executive of the country, in breach of the principle of the separation of powers. Were it to be otherwise, there would not have been the need to have particular laws which give to the State Advocate this power, once as plaintiffs argue article 91A of the Constitution already grants a wide power for him to act *motu proprio*.

Nevertheless, this argument is flawed in several respects. The fact that *prior* to the establishment of the office of State Advocate the law expressly granted special powers to the then double-hatted Attorney General prior to 2019 to institute legal action, did not mean that now that the supreme law of the land establishing the office of a guarantor of State legality in the person

[6] (FH) 11 July 2024 (Mr Justice T. Abela).

of the State Advocate, the latter's powers were limited to the previous powers (or lack of them) of the Attorney General. Nowhere in the law prior to 2019 was the Attorney General mandated to act in the public interest in non-criminal matters.

The *coup de grace* was the lower court's final verdict and opinion:

> *If the State Advocate were to enjoy the absolute discretion to intervene and act whenever he deemed it fit to do so, one would be approaching dangerous ground; for so much power vested in the State Advocate may undermine both the way democracy works as well as the rule of law, considering that every human being is susceptible to the cursed vice of a hidden agenda.*

This strange reasoning implies that allowing the State Advocate appointed by a not less than two-thirds majority of all the members of the House of Representatives to institute legal action *motu proprio,* without the consent of the powers-that-be to guarantee the latter's legality of action, would undermine democracy itself and the rule of law! This is even more bizarre when one considers that, in the light of the judgment of the highest court of the land in civil matters, officers of the State had participated in a fraudulent action costing the public coffers millions of euros.

The Court of Appeal in its judgment[7] reversed the decision of the lower court but shied away from entering into the question of the real power of the State Advocate following the 2019 amendments. Its assessment, in fact, is purely based on civil law reasoning: since the State Advocate was empowered by the Government Lands Act to institute legal action to annul the transfer of legal title over government land, in this case the concession relating to three State hospitals, he also had the ancillary power and capacity under articles 541 and 543 of the Civil Code, expressly mentioned in article 33 of the Government Land Act, for *restitutio in integrum,* namely, the power to recover the civil fruits of anything resulting from the unlawful possession of land by any person.

However, the Court remarked:

> *The fact that the State Advocate enjoys the power to institute action does not mean that he is bound to do so. Both article 91A of the Constitution and article 2 of Chapter 602 (The State Advocate Act) provide that the State Advocate is not to be "subject to the direction or control of any person or authority". The decision whether to proceed with legal action or not is taken only by the State Advocate in his own judgment and no authority may interfere with such decision.*

[7] *Bernard Grech* (n 3).

This excerpt is in direct conflict with the previous jurisprudence of the Constitutional Court and the letter of the Constitution. The fact that a person or authority is not subject to the direction or control of any other person or authority does not constitute a *carte blanche* for any public authority to do as it pleases. Indeed article 124(1) of the Constitution provides that:

> *(10) No provision of this Constitution that any person or authority, shall not be subject to the direction or control of any other person or authority in exercising any functions under this Constitution shall be construed as* ***precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.*** *(emphasis added)*

Consequently, the protection from interference by any person or authority does not exclude court scrutiny; for such protection is there to prevent interference by the executive or Parliament, not review by a court of law to gauge whether the action of a public authority, in this case the State Advocate, acted according to the provisions of the Constitution, namely to act in the public interest and safeguard the legality of State Action.

This "autonomy" clause is found in article 60(9) as to the Electoral Commission, article 91(3) with regard to the Attorney General, article 91A(3) as to the State Advocate, article 101A (7) applicable to the Commission for the Administration of Justice, and article 118(8) in relation to the Broadcasting Authority.

The first time this provision was interpreted related to a case instituted by a political party prior to the 1987 general elections, [8] challenging the constitutional legality of the drawing up of the boundaries of electoral districts on the basis of blatant gerrymandering. The court of constitutional jurisdiction erroneously referred to the fact that the Electoral Commission was not subject to the control or direction by any person or authority and that such phrase blocked scrutiny by a court of law, in spite of the clear provision of article 124 (9) of the Constitution.

The matter, however, was apparently rectified and settled subsequently in a number of cases instituted against the Broadcasting Authority which, in article 118 of the Constitution, enjoys autonomy in that it is not subject to the control or direction of any person or authority. As the Constitutional Court ruled in one case[9] when faced with a plea that article 118 blocked court scrutiny regarding the Broadcasting Authority:

> *the Court cannot agree with such submission... first of all, in its opinion, article 118(8) is intended to strengthen the autonomy of*

[8] *Michael Vella et noe vs Emmanuel Farrugia noe* (FH) 13 April 1987 (Mr Justice W. Gulia) Vol LXXI.III.639.
[9] *Chairman PBS Ltd vs Broadcasting Authority* (CA) 15 January 2003 (7/11/2002).

the Authority in the exercise of its duties given by the Constitution and the law; in other words, this Court understands that such provision of the supreme law of the land is intended to allow the Authority to perform its duties and functions without any interference. However, this should certainly not mean that the Authority can do what it pleases beyond any control putting the Authority in a position above the supreme law of the land. Apart from this, the words used in that provision of the Constitution are better explained in the article which interprets other provisions (the interpretation clause), namely in article 124(10) which clearly states that the Courts are granted the power to exercise their jurisdiction to review whether a person or authority performed the functions granted to it by the Constitution. This point does not only apply in the light of the new broadcasting law or because judicial review of administrative action now forms part of our legal system, but because this opinion has been held by the Court for a long time and till now no valid reason has been put forward to overturn such an opinion. In this regard one must say that where the Constitution wanted to block the review in the workings of any person or authority, it expressly stated so; consequently article 124(10) grants not only a right but indeed imposes a duty on the Courts to exercise their jurisdiction to ensure that any authority empowered to exercise particular functions, does so in accordance with the Constitution and the law of the land.

The excerpt from this judgment leaves no doubt that a public authority, even if its independence and autonomy is guaranteed by the Constitution, is not protected from court scrutiny. After all, if even the very courts of law can be sued before a court of constitutional jurisdiction if they do not observe the constitutional right to a fair hearing, how come that organs or offices such as the Broadcasting Authority in the *PBS* case or for that matter the State Advocate, are not allowed to be scrutinised by a court of law as to whether they have exercised their functions under the Constitution?

Consequently, the reference by the Court of Appeal to the autonomy of the State Advocate to preclude a court of law from ordering the State Advocate to do something, if he breaches his constitutional duties, is strange and bizarre.

The only possible redeeming interpretation would be to argue that the State Advocate's actions can still be reviewed, under the rules of judicial review arising from article 469A of the Code of Organization and Civil Procedure (Chapter 12), as to whether his action or inaction is contrary to law, or unreasonable. After all, prior to the introduction of article 469B of Chapter 12 which allowed the challenging in a court of law of a decision of the Attorney General *not* to prosecute in a criminal matter, the courts

considered that a decision of the Attorney General to issue a bill of indictment against a person even though the Court of Magistrates as a Court of Criminal Inquiry had decided to clear the accused, was an administrative act, under article 469A of Chapter 12, allowing, therefore, judicial review of such a decision.[10]

In such a scenario, therefore, a court of law would possibly, in the future, be able to decide that such inaction by the State Advocate is unlawful without, however, ordering him to pursue any line of action. This redeeming interpretation, however, is only a matter of conjecture at this point, or rather an attempt at justifying the Court of Appeal's reluctance to order the State Advocate to do anything, in line with the constant jurisprudence of our courts that in matters of judicial review our courts cannot substitute their discretion for that of the public authority but can only declare as unlawful and therefore void, any action, or lack of action by a public authority.

This remains a matter for future litigation and interpretation by the courts of law. Adopting this latter approach might save the Court of Appeal from being an accomplice in the rendering useless and futile the high-sounding proclamation that the State Advocate is there – as announced during the relative parliamentary debate-[11] as "the last man standing" in State action legality issues. If not, he would be reduced to the first man falling and failing in such matters.

[10] *Police vs Jospeh Lebrun* (FH) 27 June 2006 (16/06) (Mr Justice T. Mallia). "the decision of the Attorney General may in the appropriate cases be subject to review under article 469A of Chapter 12)".

[11] "We did so because the State Advocate shall be more than a mere counsel to Government. The State Advocate shall have the function of serving the State in its entirety , and safeguard the legality of State action , who will be the last man standing or the last woman standing when all the other systems will be under juridical attack.,
"Għamilna hekk għax l-Avukat tal-Istat se jkun aktar minn sempliċi avukat tal-Gvern. L-Avukat tal-Istat se jkollu din il-funzjoni li jaqdi lill-istat kollu kemm hu, li jissalvagwarda l-legalità tal-aġir tal-istat, li jkun the last man standing jew the last woman standing meta s-sistemi kollha jiġu attakkati ġuridikament." HR Deb 10 June 2019 (XIII 234) (Minister Owen Bonnici).

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