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A CIVIL SOCIETY MOVEMENT

**RESPONSE TO GOVERNMENT'S
PROPOSALS TO THE
VENICE COMMISSION**

18 May 2020

Mr Thomas Markert
Director and Secretary - European Commission for Democracy through Law
Council of Europe, Strasbourg - France

Mr Markert:

**Re: Implementation of the Recommendations made by
the Venice Commission in December 2018**

We refer to the undated letter addressed to you with the same subject as in caption by Edward Zammit Lewis, Malta's Minister for Justice, Equality and Governance, published by Malta's Department of Information on 13 May 2020, and hereby submit to you our views on the matter.

It is of some satisfaction to see these matters addressed to some extent by the government. The government has come to the point of making these proposals with evident reluctance. The request of the Parliamentary Assembly of the Council of Europe (PACE) to the Venice Commission ("the Commission") was made over the government's objections, which it then sought to recover when it became clear it could not stop the process.

The matter of judicial appointments is being addressed in view of the challenge at the Court of Justice of the European Union filed by Repubblika. In putting forward that challenge, we have always sought to encourage the government to achieve the objectives of the Commission's recommendations. We sincerely hope that the matter can be settled out of court, on condition that the government confirms a serious commitment to implement the supreme objective of achieving genuine and full judicial independence.

In an 18 April 2020 press article, Minister Edward Zammit Lewis promised the government "will surprise everyone with the boldness and speed of (the government's) reform plan." We are distinctly underwhelmed.

The government has sought to propose implementing the Commission's proposals to an extent so limited that the changes are bound to have very little beneficial effect, if any. These reforms, though in their great part not intrinsically objectionable, are too half-hearted and too diluted to address the central issues identified by the Commission.

After the government's proposals are implemented, Malta's Prime Minister will remain all powerful, our institutions weak and the openness to corruption flagrant. We will remain faced by the same question PACE was faced with when it first asked the Commission to analyse the situation in Malta: why is there impunity for crimes committed by politicians and those complicit with them?

Although we naturally understand that the extent to which the Commission can contribute, to compensate for Malta's systematic and consciously organised institutional failures, is necessarily limited, we feel it is our duty to put on record our profound scepticism that the government's hasty attempt to be seen to comply with the Commission's recommendations can have any practical effect on the concerns which caused PACE to seek the Commission's views in the first place.

In certain respects, the proposals being made risk weakening even further whatever checks and balances still exist in our system.

Perhaps this explains why the government has refused to reveal its intentions before now and why national debate has been inexistent. Given the efforts of the Commission, we feel the government's proposals need to be examined in detail and we are hereby submitting our report after studying Minister Edward Zammit Lewis's letter to you.

Whilst thanking you for giving Repubblika the opportunity to contribute to this debate, allow us to assure you we remain at your disposal.

Yours sincerely,



Vicki Ann Cremona
President, Repubblika

General Observations

1 The document published on 13 May 2020 purports to provide details on how the recommendations of the Commission in its opinion 940/2018 are to be implemented. It is significant to note that this is the first substantive reaction from the government to an opinion it was served with 18 months ago.

2 The document does not cover all the considerations made in the Commission's opinion. It ignores several substantive points without explanation. In some cases, this may be attributed to a difference in priorities that the government may have. But in others, the government takes up one of the Commission's recommendations while leaving out another recommendation that was clearly intended to complement it. In this way, the government's proposals create new imbalances.

3 The government does not acknowledge the central motivation of the Commission's opinion which is to examine "structural, constitutional and legislative issues with a view to assisting Malta in improving checks and balances and the independence of the judiciary". As the Commission states, the request made to it by PACE originated against the backdrop of the ineffectiveness of the investigation to find any persons who ordered the assassination of Daphne Caruana Galizia and the culture of impunity in Malta.

4 Indeed, the preamble of the Commission's opinion identifies the fight against corruption as an underlying motivation for the changes proposed. "11. Preventive and repressive measures are required to fight corruption." The recommendations kept this consideration front and centre. The government has deliberately made no reference whatsoever to the fight against corruption in its response. This is reflected in what it has proposed for the supposed "implementation of your recommendations".

5 The government's proposal document lacks detail. We would have expected far more work to have been done in 18 months. In this period, changes to the Attorney General's office and to the Police have been made which were ostensibly predicated on recommendations by the Commission, but in all these instances the underlying objective of the recommendation was comprehensively undermined. The government has not made the public aware before publishing this letter that it was actually working on any other recommendations made by the Commission, other than in respect of the method of nominating judges. We are particularly concerned that the government's response appears to suggest the government has reached definitive conclusions about constitutional reforms before the commencement of the much-vaunted constitutional convention that has been promised since 2013 but has never actually taken off.

6 Although there are several points in the government's response that appear to commit the government to implementing the recommendations made by the Commission, we will need to reserve judgement until we actually see legal drafts that will give us a clear picture of what exactly the government intends to ask Parliament to legislate on.

Much of the government's response remains at a superficial level, and on several points the government professes agreement with the Commission. However, the government's actions and policies since December 2018 have been in contradiction with the principles identified by the Commission. We therefore remain sceptical that the intent of the government is the same as the intent of the Commission. Everything to date suggests the contrary.

7 The government is clearly keen on seeking an imprimatur or blessing from the Commission before publishing its draft legislation. We would caution the Commission against allowing itself to be dragged down to political strategies intended to justify ineffective legislation that changes nothing in practice, under the cover and pretext of the 'endorsement' of the Commission.

General Observations (continued)

8 Whilst appreciating the Commission's remark in its recommendations that the changes it suggests "146. ... would not abandon Malta's legal traditions", we are unimpressed by the prominence the government has given to this consideration in the very beginning of its response. We find the reliance on "tradition" as a shallow excuse. Indeed, the government appears entirely reluctant to be dragged by the remainder of the point the Commission makes in paragraph 146, and that is, to achieve "an evolution that would provide more effective checks and balances than those in place today".

The tweaking of this or that legal provision will not begin to address the central problem identified correctly by the Commission: Malta's Prime Minister is too powerful. There will be no meaningful change unless Malta builds adequate institutions with the right strength, unhindered independence and effective authority to hold the Prime Minister to account and limit the sort of excesses we have experienced in the last 7 years.

Our constitution, drawn up before independence in 1964, was designed in a different context to the one we live in today. It was conceived by, for and in a society which is very different to the one on which it was grafted. This dissonance has been widened by the passage of time. Memory of the tradition in which it was designed has now faded. In the present context, the constitution can no longer satisfactorily achieve the originally intended aims.

The Westminster tradition is a precious legacy. But former colonies have outgrown the colonial condition from which they had emerged. We therefore do not support the excuse that fear of departure from the Westminster tradition, as it was understood inside Britain's colonial office in the years leading to 1964, can justify refusal to meet democratic standards as they are understood by the Council of Europe in 2020.

9 Finally, we recall your recommendation in "148... the Venice Commission insists that it is an international obligation of the Government to ensure that the media and civil society can play an active role in public affairs holding the authorities accountable."

We remain disappointed by the government's unwillingness to engage in a proper debate on the detail of these important reforms. Up to this very moment, there has been no substantive discussion either in Parliament or in the general community on these matters that are so fundamental to our democratic life.

We also point out that the government continues to defend, in the Maltese courts and at the Court of Justice of the European Union, its decision to ignore the Commission when changing 13% of the judiciary in April 2019, without regard to the reservations the Commission expressed and the recommendations it made. In the Courts, the government has consistently argued that it does not consider the views of the Commission as in any way binding on its policy-making. We say this because up to this point the government has given no signal in Court that it has changed its views on this matter.

Here follow our substantive remarks on the government's letter addressed to the Commission. We have followed for this purpose the sequence in the government's document.

(a) Judicial Appointments

The remarks made by the government ignore the context in which this reform is being undertaken, and how this has evolved since the Commission published its report in December 2018.

Since March 2013, the government has focused on manipulating the composition of the judiciary, to ensure it can exert influence on its decisions in a manner that favours the ruling Labour Party and prominent officials within it.

It is important to recall that the constitutional weaknesses identified by the Commission have existed since 1964. But the blatant and systematic abuse of those weaknesses to ensure impunity for senior officials of the Labour Party is a relative novelty.

It is also important to recall that the moment it became clear that the government would certainly be required to change the system of appointing judges, it rushed to complete its hostile take-over of the judiciary, which resulted in a change of 13% of the judiciary in April 2019. This in light of the fact that the European Commission was backing calls from the Venice Commission to reform the system.

Prime Ministers before 2013 used their discretion with caution, appointing to the judiciary persons of undoubted integrity, impartiality and independence. Exceptions happened but very rarely.

The exception became the rule in 2013. Discretion was blatantly abused in breach of judicial independence. Between March 2013 and April 2019, by withdrawing proposals to extend the retirement age of members of the judiciary, the Prime Minister redesigned the composition of the judiciary, replacing the Chief Justice, 57% of judges and 68% of magistrates: a total of 64% of the judiciary.

Of the 29 appointments made between March 2013 and April 2019, no less than 21 had political connections or created a reasonable public perception of political interference in the judiciary. This can be clearly understood by reviewing the following appointments of people who militated in the Labour Party prior to their appointment, in some cases right up to their appointment:

→ *Deputy Leader of the ruling party (Labour Party):*
Toni Abela (*judge in 2016*)

→ Former Labour Member of Parliament and editor of the Labour Party newspaper: **Wenzu Mintoff** (*judge in 2014*)

→ National election candidates for the Labour Party:
Joanne Vella Cuschieri (*magistrate in 2014 and judge in 2019*)
Joseph Azzopardi (*Chief Justice in 2018*)

→ Mayor elected on the Labour Party ticket:
Monica Vella (*magistrate in 2015*)

→ Labour Party officials:
Joe Mifsud (*magistrate in 2015*)
Grazio Mercieca (*magistrate in 2016 and judge in 2018*)

→ Close family connections to Labour Party Ministers and officials:
Antonio Mizzi (*judge in 2013*)
Caroline Farrugia Frendo (*magistrate in 2016*)
Yana Micallef Stafrace (*magistrate in 2017*)
Consuelo Scerri Herrera (*judge in 2018*)
Nadine Lia (*magistrate in 2019*)

→ Close professional connections to Labour Party officials:
Charmaine Galea (*magistrate in 2013*)
Miriam Hayman (*judge in 2015*)
Victor Asciak (*magistrate in 2019*).

a. Judicial appointments (continued)

A number of other appointments did not have a partisan connection, but were reasonably perceived as exercises in intervention of the Prime Minister in judicial independence in order to arrange outcomes that served his own personal interests, or the interests of those close to him:

- **Magistrate Anthony Vella** was unexpectedly promoted to judgeship in 2018 half way through the magisterial inquiry into the murder of Daphne Caruana Galizia, causing a delay in justice in a very sensitive case;
- **Magistrate Aaron Bugeja** (*appointed magistrate in 2014*) was promoted to judgeship in 2019, less than a year after concluding a magisterial inquiry that was then misrepresented by the ruling party as having exonerated the Prime Minister and his wife of money laundering and bribery allegations;
- **Magistrate Francesco Depasquale** was promoted to judgeship in 2019, just before he was due to decide on whether to order the Prime Minister's chief of staff Keith Schembri to be available for cross examination under oath on questions regarding the latter's involvement in the Panama Papers.

This shows that 72% of the appointments made by the government were controversial. Considering this is a judiciary composed of 45 persons, these 21 appointments have a significant impact on the independence of the judiciary as a body, and on the confidence the general public can have that the judiciary is independent of the interests of people in senior positions in the executive.

It is absolutely clear that, even as it introduced the constitutional changes of 2016 (described by the Commission as a "welcome step"), the government wanted to ensure that the method of selecting judges and magistrates would not, in any way, diminish its power to influence and exercise control on judicial outcomes.

However, the government has used hollow reforms to brand itself reformist, creating the illusion of devolution of power while in effect retaining it in full effect.



72%
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It is unacceptable that the government manages to introduce reforms ostensibly inspired by the Commission but which in reality do not address the core problem: impunity for those personally or politically close to members of the government.

The government may now feel comfortable in allowing the judiciary to choose its new members. The outrage committed in April 2019, with a conscious and systematic partisan shift in the composition of the judiciary, creates the very real risk that the existing bias, or at best, the reasonable perception of that existing bias, simply perpetuates itself without the need of further direct executive intervention.

We will therefore comment on the proposals made by the government in this regard – such as they are – with the reservation that our qualified support to the changes is predicated on material provisions that address the partisan take-over of the judiciary that has occurred in the last 7 years.

a. Judicial appointments (continued)

i.

The increase in the number of members of the judiciary to ensure that they amount to half of the Judicial Appointments Committee (JAC), with the Chief Justice in possession of a casting vote in case of deadlock, is 'a welcome step'.

There is a real risk, however, of ensuring the perpetuation of political interference serving the interest of the Labour Party, ironically without even the undesirable but mitigating counter-balancing that may occur at such time that the party in government might change.

We would therefore submit that the eligibility of the persons that may be elected to represent the judiciary on the JAC need to have served in the judiciary for a number of years – by way of example, 10 years – in order to ensure that any undue influence that may have been true at the time of their first appointment could be, over time, mitigated by having belonged to the judicial corps for sufficient time to prioritise the interests of justice over any other possible conflicting loyalties.

We would also recommend the inclusion of retired Chief Justices held in good standing by the community (provided they are not otherwise in the government's employment) in the evaluation and selection process.

Should these mitigating measures not be considered, it remains important that the views of a natural minority in the judiciary are taken into account in the composition of the JAC. This can be achieved, even if imperfectly, using a voting system that allows for some representation of the minority such as by using a single transferable vote with a quota system.

ii.

The substitution of the Attorney General with the State's Advocate is not a material improvement to the composition of the Judicial Appointments Committee. The presence of the Attorney General in the present composition is not necessarily problematic because of their prosecutorial role, but because the incumbent is a direct and unqualified selectee of the executive. The substitute State's Advocate is appointed in the same manner.

If anything, this makes the situation worse in that the State's Advocate, as counsel to the government, is likely to be more closely bound to the policy of the executive than the Attorney General – autonomous in respect of his role as a prosecutor – could have been. It would seem in fact that executive encroachment is increased by this change.

An alternative consideration could have been made to withdraw the participation of executive nominees altogether, and to use instead persons appointed by the legislature by a qualified majority. In other words, in addition to the Ombudsman and the Auditor General, appoint the Commissioner for Standards in Public Life.

a. Judicial appointments (continued)

iii.

We do not understand why the JAC should not have the authority to make the final choice on who to offer the job to. Selection processes create orders of merit in any context, and the number of persons appointed is determined by the number of vacancies declared and the order of merit resulting from the selection process.

Our first preference would therefore be for the JAC to have the authority to make a nomination to the President, with which the President then complies.

If ranking is still, for practical purposes, deemed necessary, the argument that "ranking candidates would have an undesired and demeaning effect" does not hold. If the ranking is transparently established by the JAC according to objective criteria, there should be no reason for anyone to feel they have been demeaned by not ranking first. All professionals undergo similar processes, including senior officials of state. Indeed, judges already experience ranking when they apply for positions at the European Court of Human Rights where, obviously, not all applicants are selected.

It seems to us that the government is unwilling to allow the judiciary to have the authority to select who should join its ranks. This in spite of the fact that judges have the desired experience and competence to make that choice.

We would therefore recommend that the appointing authority receives from the JAC a clear and binding recommendation on who they are to appoint.

iv.

The government's proposal would give the President probably the first ever discretionary and executive authority in our constitutional system, at least during the term of a Parliament. That, in and of itself, is not necessarily objectionable if the proper checks and balances for their authority are in place.

As the law stands, the President, other than in certain clearly defined cases, exercises all his functions in accordance with the advice of the cabinet or of a Minister acting under the general authority of the cabinet (usually the Prime Minister) (See section 85 of the constitution). As the proposal stands – and here is where we must doubt the sincerity of the government – the appointment would still be made by the Prime Minister in a disguised form. On the other hand, if an amendment were to be introduced in the constitution stating that in such a matter the President is to act in accordance with their own deliberate judgment, the question would still arise: why is the President more competent than a panel composed of a majority of the judiciary?

The Commission's recommendation in respect of a greater involvement of the President was predicated on the enhancement of the autonomy and independence of the President's role. In its response to the Commission, the government has postponed the discussion on reforming the manner of appointing and removing the President and how they are to exercise their powers, to an unspecified time in the future.

We must therefore assess this recommendation in the context of the reality of the role of the President today: a person chosen for their position by the Prime Minister.

Although the President has ceremonial precedence over the Prime Minister, the former is entirely subservient to the latter during the lifetime of a Parliament because they are constitutionally bound to act on the Prime Minister's instructions.

Consequently, under the government's proposals, the decision on who is appointed from the shortlist handed up by the JAC is effectively retained by the Prime Minister.

We therefore consider this 'welcome step' as falling far short of European standards as spelled out by the Commission.

(b) The Chief Justice

v.

The government's response creates the false impression that "civil society has publicly praised" the appointment of the new Chief Justice by a resolution approved by a qualified majority in the House of Representatives.

Although the government may have been referring to views expressed by others, Repubblika has indeed expressed its delight at the choice of Chief Justice Mark Chetcuti, who we believe to be an eminently qualified and independent selection for the role, and an appointment without a tinge of political partisanship. We did not, however, agree with the manner of his choice.

We remain of the view that a cross-party consensus between political parties on the selection of judges, albeit a 'welcome step' ahead of the existing exclusive level of discretion that the Prime Minister enjoys in these appointments, is not a guarantee of judicial independence. Rather, it reinforces the erroneous claim and perception that politicians are to appoint the members of the judiciary.

The ad hoc procedure adopted to appoint Chief Justice Mark Chetcuti was required because the government dragged its feet on any reform right up to the day of the retirement of his predecessor. It does not mean that we support this political intrusion on judicial independence, which now risks becoming some permanent constitutional feature.

Cross-party consensus is not a guarantee of judicial independence. The experience of Tangentopoli in Italy teaches us that parties can happily reach a consensus to cover up institutionalised corruption. It will not be helpful if political parties are granted the power to choose the Chief Justice, whose duty would be to help stop corruption in its tracks.

We do not, unfortunately, have a tradition of MPs acting independently when it comes to voting on such issues. This lack effectively reduces the nomination of the Chief Justice to a back room deal between the two main political leaders. Indeed, to our knowledge parliamentary approval of the motion that appointed the new Chief

Cross-party consensus is not a guarantee of judicial independence.

Justice was a surprise to several MPs, handed down to them at the time they were asked to vote on the motion. They naturally all acted on their party's instructions and voted unanimously in favour of the motion.

Equally problematic is the risk that consensus is not reached. There is no clarity on what would happen in the case of disagreement between the Government and Opposition benches, or failure to secure a qualified majority for any candidate.

Ensuring that persons occupying positions of executive authority do not act with impunity from the law, necessitates a judiciary independent from both the executive and the legislature (judges have also the role of occasionally reviewing laws to decide whether they are compatible with the constitution). The government's response essentially portrays the appointment of Chief Justices – even as they acknowledge the potential influence the incumbent might have on judicial outcomes – as some sort of reward: the dictionary definition of interference.

We see no reason why the JAC could not make the choice of Chief Justice autonomously from any political authority. As with any other case of potential conflict, persons sitting on the JAC that are themselves candidates for the position would absent themselves from participating in deliberations on the matter.

Such a safeguard would be more proportionate than getting one branch of government to decide who runs the other branch.

We also do not understand how the fact that the Chief Justice presides on appellate courts justifies the distinction in the manner of their appointment.

(c) Judicial Discipline

vi.

We do not understand why it is still necessary for a qualified majority in Parliament to confirm whether a judge or magistrate should be removed from office once the Commission for the Administration of Justice (CAJ) and, as is proposed, the Constitutional Court, have confirmed that the criteria for removal established at law have been satisfied.

It would seem that the only further considerations beyond the requirements of the law that Parliament could make at that point would be political considerations. Even if these considerations are reached by cross-party consensus, political considerations should not be relevant in deciding whether to retain a judge or a magistrate that the CAJ and the Constitutional Court agree should be removed.

The Parliamentary procedure (currently in existence) has in practice been used to ensure that no matter how egregious the failures of the person concerned are, no one is ever removed from the judiciary, whatever reason there may be for this to happen. In one case a motion of impeachment was defeated because the Opposition used its whip to ensure its members vote against the motion. In another case, a motion on the agenda was left undebated until the judge concerned reached retirement age.

In the cases of the botched impeachment processes for Judge Antonio Depasquale (2010) and Judge Lino Farrugia Sacco (2014), large political groupings in Parliament have ensured that offending members of the judiciary were rewarded for disloyalty to their judicial office in exchange for partisan loyalty. This is yet another manifestation of explicit political interference which the government's proposals seek to retain.

The ultimate power of politicians to keep members of the judiciary in office even if recommended for removal by their peers could prove to be a reason to stay on the right side of people in the executive branch of government.

There is also lack of clarity about the double role of the Chief Justice, who will be expected to be part of a decision on the removal of a judge both in the first instance at the CAJ, and at appeal in the Constitutional Court. We hope this will be clarified in the draft legislation when it is published.

vii.

As the government acknowledges in its letter, legislative changes in this regard that have already been adopted by Parliament remain theoretical. No time frames are given for implementation, in spite of the fact that the letter of the government is headlined "implementation of the recommendations".

We do not think these delays are innocent. As with the delay of implementing reforms in the appointment of the judiciary, these delays are intended to ensure that people connected with grave corruption scandals, covered up by the assassination of Daphne Caruana Galizia, continue to enjoy impunity for as long as possible, and after all the tracks have been covered up and evidence dissipated.

(d) Prosecution

viii.

Even here the proposed changes fall short of the objectives indicated in the Commission's recommendations. No figures are provided on the percentage of prosecutions that will pass from the Police Department to the new prosecutor's office; anecdotally, it would seem that in the great majority of cases, the prosecutorial responsibility will remain with the Police.

This means the government will again miss the opportunity to focus the police on their investigatory role. Consequently, the multiplication of responsibilities would continue to ensure that the police are effectively hindered from policing complex crimes, particularly money laundering, financial crime, corruption and bribery. On top of this, one must take into account the resourcing and political control of the Police on whom prosecutors must rely, a subject discussed elsewhere in this document.

ix.

Similarly, the government has ignored the Commission's recommendation to transfer the role of conducting magisterial inquiries (referred to as 'inquests' in the Commission's report and for convenience hereafter in this document) from the magistrate's bench, and allocate it to the prosecution service in respect of collating evidence, and to the police in respect of investigating the crime. It is in these two latter institutional structures that it should belong.

We do not think this omission on the government's part is just an oversight. The current arrangement has allowed for the open-ended postponement of inquests that were supposed to be gathering evidence in politically-charged cases of corruption. Malta still has no concluded inquest into the evidence revealed by the Panama Papers scandal, to mention one example.

This interminable delay is not subject to anyone's review except the Attorney General's who, as an appointee of the government, may, like the magistrate, share a lack of appetite for any conclusion that might cause problems to political masters.

At the same time, the existence of an ongoing inquest is used as a reason for the police to justify their total inaction, even though the law clearly empowers and requires them to act independently of the rate of progress of an inquest.

In the meantime, inquests that give the impression of exonerating people in government are rushed through. The outcome of these inquests is used as a political tool, although inquests are themselves not proper investigations and as much as they cannot in themselves establish anyone's guilt, they cannot either establish anyone's innocence.

The Attorney General's unhindered discretion on what to do with a concluded inquest (the *procès-verbal*) aggravates this matter. Inquests that 'exonerate' a government official are hastily and prominently published, whereas public information on inquests that give grounds for further criminal action can be suppressed.

The government's vague proposal seems to be that a decision not to prosecute is subject to judicial review after a complaint by the injured party. This would mean that if there is no identifiable injured party, judicial review would not apply. And even if there is a complainant that is an injured party, it is still unclear how they are to motivate the request for judicial review unless they have either full access to the acts of the in genere inquiry or to the police prosecution file. Either possibility seems unlikely.

We are not surprised therefore that the government has completely ignored your recommendation in this regard.

d. Prosecution (continued)

x.

The indication that the government intends to introduce judicial review of decisions made by the prosecutor is 'a welcome step'. The devil here, as elsewhere, will be in the detail.

One detail that has already emerged from the remarks sent by the government is that any right to request judicial review will be strictly limited to alleged victims of the alleged crime. This will retain the crippling limitation of lack of judicial standing, for anyone contesting on the basis of general public interest, the prosecutor's decision not to prosecute crimes committed by politicians and people with state power, particularly corruption.

The Commission's recommendations were first requested by PACE in the face of suggestions that the prosecutor (and the police) did not act on evidence of corruption involving senior politicians including, though not limited to, the revelations made in the Panama Papers and the investigative work of Daphne Caruana Galizia.

It appears that the government intends to prevent anyone in the general citizenry or in civil society, acting on the basis of public interest, to resort to this right to request judicial review of decisions not to prosecute corruption.

Who is the victim of corruption? It would take a very liberal or judicially active court to allow the answer to that question to be 'anyone' for the purpose of establishing legal standing to make a claim against the prosecutor.

xi.

It should be recalled that the Commission made recommendations about separating the roles of counsel to the government and prosecutor. This was not merely due to the complex nature of that combination, but to ensure that the prosecutor is independent of government influence or interference when deciding whether to prosecute or the possibility of lack of vigour in the prosecution of suspects enjoying political influence or power.

In this regard, though the creation of the role of the State's Advocate and the separation of that role from the Attorney General's is 'a welcome step', the fact that both remain appointed at the exclusive and unhindered discretion of the Prime Minister means that the independence of prosecutorial decisions from political interference remains questionable.

Inasmuch as the unhindered authority in choosing who gets to be made a member of the judiciary or promoted within or into a role in the judiciary is, in and of itself, a political encroachment on judicial independence, so is the unhindered authority of the executive in choosing who gets to be prosecutor and how they get to be promoted in that role.

This is an especially important consideration, when it is clear to us that organised crime and corruption have infiltrated the prosecutor's office. Very recently, a prosecutor working in the Attorney General's office shifted allegiance overnight, and joined the defence team of the person charged by the same Attorney General with commissioning the murder of Daphne Caruana Galizia. We have no way of knowing how deep into the offices of the prosecutor this mafia infiltration is, and unrestricted executive authority on all appointments within, provide us with very little reassurance.

(e) The Permanent Commission Against Corruption

The April 2019 Fifth Evaluation Round of Greco (GrecoEval5Rep(2018)6) points out that in its history, the PCAC has reported on over 400 cases. It is known only to have reached the conclusion that criminal action should follow in one case alone. That was around 2 years ago and the case concerned a former Secretary General of the Labour Party. No criminal action was taken.

xii.

Although the response by the government to the recommendations of the Commission indicates the government intends to introduce 'a welcome step', none of the proposals made by the government begin to address the complete futility of the institution. The PCAC did not draw 400 blanks because of the manner in which its board members were nominated or because their report went to the Justice Minister rather than the prosecutor. Fixing those issues is not an error in itself, but this does not give any hope that any effort has been made to have an administrative body that is useful in fighting corruption.

The PCAC does not serve any administrative function and pretends it is an investigative and judicial body when it is not legally or functionally equipped to do either of those jobs.

There is no agency in Malta that acts as a watchdog on corruption, and reviews government and public sector operations to recommend changes to prevent or detect corruption. The PCAC - or another ad hoc agency - could do this work, but the government seems uninterested to have anyone get to the root of the challenge of corruption, precisely because the government denies the problem exists.

In the meantime, the proper investigative body in cases of corruption is the police. There is no capacity, no training and no resourcing to combat corruption by the police and no evidence of any will on the part of the government to change this state of affairs.

The changes proposed for the PCAC will, unfortunately, be heralded by the government as evidence of its commitment to fight corruption, when of course it will serve the contrary result of guaranteeing impunity. But then that seems to be the whole purpose of the cosmetic changes proposed by the government in the document sent to the Commission.

(f) The Ombudsman

xiii.

Elevating the legal basis for the Ombudsman to the constitution is 'a welcome step'.

But the government in no way responds to the correct observation made by the Commission that "requests for information (from the Ombudsman to the government) are frequently not complied with" (our emphasis). Nothing in the changes proposed by the government addresses that consideration, which the Commission described as "worrying".

In fact, the Ombudsman is systematically ignored and undermined by the appointment of ad hoc "injustice redress boards" set up by the government in order to receive grievances by its political supporters and compensated ad hominem, without the bother of impartiality and independence that make the Ombudsman politically inconvenient to the government.

We believe that the "elevation" of the Ombudsman to constitutional status should come with the concomitant ban of ad hoc bodies duplicating the functions of and eroding the Ombudsman's office.

xiv.

Last year, the Ombudsman complained that "A number of final opinions have been sent to the Speaker of the House of Representatives following negative response from the public authorities to requests to implement our recommendations. We have indicated that to date none of these referrals have been actively considered by the House. There has been no response whatsoever." The Ombudsman continued that "One can safely conclude that this statutory procedure provided for in the Ombudsman Act, which was meant to be a final safeguard to provide redress against injustice to aggrieved citizens, is proving to be ineffective. This needs to be remedied."

The government proposes little more than the existing obligation for Parliament to debate the Ombudsman's annual reports. If there is to be any improvement in this matter, Parliament - or at least a select committee reporting to it - must also be able to review specific cases investigated by the Ombudsman, particularly where the Ombudsman's recommendations are ignored by the government.

xv.

The government has also ignored the Commission's observations with respect to Freedom of Information. In his Annual Report for 2018, the Ombudsman lamented that "regrettably, the public administration, and this includes public authorities, appears to have adopted a generally negative approach towards its duty to disclose information and the citizen's right to be informed. The Ombudsman felt and still feels that undue reluctance to provide information to which the public is entitled is not conducive to ensure transparency and accountability as well as the right of enjoyment to a good public administration."

We are not surprised by this, as the government has, as a matter of policy, replied to requests under the Freedom of Information Act only when this was not deemed to be inconvenient to its political interests. The local independent press regularly complains that these requests are all too frequently rejected.

In many respects, the Maltese government does not feel any obligation to be open about the conduct of its affairs and habitually refuses pertinent questions stretching the application of the broad exceptions already provided for in the law.

This too, is an aspect of our supposed democratic design that is no better than a fig leaf, giving the outward impression of open governance.

The President has even refused to publish the letter of resignation handed in by the outgoing Prime Minister, on the grounds that such publication would be problematic for the functioning of the existing government.

Review of these decisions is prohibitively expensive, and in practice useless, as the slow grind of the judicial process ensures that by the time the courts might order the government to reverse its refusal to provide information, the information itself becomes purely a matter of historical interest.

(g) The Prime Minister

xvi.

Replacing the power of the Prime Minister to appoint persons in high office by transferring that power to “the government” is a purely cosmetic development. The fact the government agrees with this, rather confirms this view.

The government is, probably correctly, equating the Commission's meaning of the term “the government” with “the Cabinet of Ministers”.

It should be pointed out that the only member of Cabinet with an automatic right to be there is the Prime Minister, who is appointed to the task by the President, on the basis of being the person likely to command the support of the majority of the House of Representatives in forming a government.

All other Cabinet members serve at the unhindered and unqualified pleasure of the Prime Minister. Their role can be withdrawn by the Prime Minister at any time, for any reason or for no reason, and the Prime Minister is accountable to no one in this regard.

This makes the proposed change purely symbolic. That does not mean we necessarily object to it. Merely that we do not expect it to be of any material consequence.

xvii.

The government's response also introduces consultation with the Leader of the Opposition in the case of the appointment of the Information and Data Protection Commissioner. Although this is ‘a welcome step’, the effect of this process should not be overestimated. ‘Consultation’ is already provided for in respect of other positions in the gift of the Prime Minister. This in itself is not an obligation to take the views of the consultee into account in the decision. The Constitutional Court has already made this clear – consultation means exactly that, one must consult, but one need not take on board the views of the person consulted.

Indeed, on several past occasions, the views of the Leader of Opposition on this matter have been broadly disregarded.

(g) The Prime Minister (continued)**xviii.**

The government has ignored the Commission's recommendation that the President is empowered with making appointments to certain positions without the advice of the Prime Minister or the executive.

This consideration has attracted no form of response from the government. The Prime Minister's unhindered power to choose who runs the Public Service Commission, the Police (more in the dedicated sections below), the Electoral Commission and the Broadcasting Authority means that the reins of our democracy are held by one person. This is open to abuse and has been, to a greater or lesser extent, habitually abused.

By dodging entirely the argument in its response to the Commission, the government shows it is unwilling to address these fundamental constitutional problems. We hope that these challenges can be fairly and openly debated in a constitutional convention.

The Commission should be informed that already in February 2019, Repubblika submitted to President Marie-Louise Coleiro Preca (and again, upon his election, to President George Vella) detailed recommendations on an open process for the consideration of constitutional changes. One of the considerations made in that submission was that taking a piecemeal approach to reform, and allowing the government or parliamentary parties to drive headlong with some changes and ignoring others, risks creating greater imbalances than those that exist today.

We have never received any substantive response to our recommendations.

The proposed solution of allowing nominations to key constitutional positions to be decided upon autonomously by the President requires examination also in

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the context of whether this will enhance or undermine checks and balances within our system.

As it now stands, this proposal would give the President a discretionary executive role, acting without any form of scrutiny or review by the legislature.

Clearly, such a development would need to be considered in the context of how to transform what is today an almost entirely ceremonial role (and as

such, therefore, without the need of any form of accountability) to an executive role. The new executive President will need to take decisions that would have to be subject to review. Moreover, if the President is expected to act independently of the government, their decision must be given within the framework of safeguards on the manner of appointing and removing the President, so as to ensure their independence.

On this as well, the government has remained silent.

Until such time as the matter of the role of the President is properly discussed, we are of the view that empowering the President with executive authority, however minimal, risks providing the Prime Minister with an extension of their authority without the inconvenience of the checks and balances, however weak, that exist today.

(h) Permanent Secretaries

The civil service has been progressively weakened by the system of short-term appointments to headship positions and the creaming off of certain positions to foundations, corporations and agencies.

The Principal Permanent Secretary (PPS) has, ever since the post was created, exercised powers that can only be reined in by a sufficiently powerful and independent Public Service Commission. Where the PPS is in cahoots with the Prime Minister, then between them they can exercise despotic powers.

Democracy requires a good, strong, professional civil service, chosen on merit and with sufficient security of tenure to stand up to Ministers when they order anything that goes beyond what the law allows.

The proposed legislative amendments do not address these problems, and subject to further scrutiny when they are actually drafted, seem merely cosmetic.

xix.

The Commission recommends that "these high-ranking officials (Permanent Secretaries) should be selected upon merit by an Independent Civil Service Commission". The government responds that it proposes to implement this recommendation "in order to ensure that the Public Service Commission, which is an independent constitutional body, will make recommendations to the President" on appointments.

The Public Service Commission (PSC) is not, in practice, independent. The constitution provides that the members are appointed by the President on the advice of the Prime Minister, after consulting the Leader of the Opposition.

In all practical respects, this means the Prime Minister alone has unhindered discretion on the composition of the PSC.

This fact ensures that Malta's civil service is not independent of partisan interests.

This has always been problematic, but governments before 2013 exercised, to a greater or lesser extent, some restraint.

Upon its election in 2013, the government removed all incumbent Permanent Secretaries, replacing them with its appointees. This stunted institutional memory and ensured that partisan interests were served before the public interest.

Permanent Secretaries were never expected to step down following a change of government. A spokesperson for the Prime Minister explained the move as follows: "(Demanding their resignation) was a courtesy request for them to consider resigning, to allow the Prime Minister serenity of knowing that the people in place will deliver the Government's agenda."

The PSC did not stop this pogrom.

Therefore, the government's proposal remains an empty formality, unless it is accompanied by a reform in the composition of the PSC in a manner that ensures a distinct ethos for the civil service. Although the civil service should certainly be steered by the policies of the government of the day, it should not be driven by the personal or partisan interests of the individual members of government.

(i) Persons of Trust

It is our view that the present system of appointment of persons of trust goes against the provisions of the constitution.

There should certainly be room for appointing a limited number of collaborators inside ministerial secretariats, who may owe their position to the trust the Minister has in them. But we do not believe there is any reason why the PSC should not be involved to ensure that the process of their employment is according to law.

XX.

The undertaking to introduce limits on the number of persons of trust is 'a welcome development'. However, we reserve judgement until such time as we understand what those limits are.

Governments before 2013 published these limits and regulated themselves by them, which is less satisfactory than having these limits established in the law. However, these limits were abolished by the present government in 2013, increasing the number of persons of trust from around 30 to over 700. As indicated by the Ombudsman in 2019, the practice "has gone out of hand". It therefore remains to be seen how this matter will be properly implemented.

xxi.

We are also concerned that the government has given no indication on how it is going to regulate the appointment of "consultants", who are effectively executive officials introduced to circumvent the civil service, but engaged on the basis of service contracts instead of direct employment.

There is no commitment in the government's response to restrain this practice. As a consequence, there is a real risk that anyone employed as a person of trust who finds themselves in excess of new quotas will simply be redeployed to the status of consultant, from where they can continue to undermine the public interest in order to serve the personal or partisan interests of their political masters, not to mention their own venal interests.

To illustrate the point, the Commission may wish to recall how Konrad Mizzi, immediately upon his resignation in disgrace in November 2019 in the midst of revelations connected to the motive for the assassination of Daphne Caruana Galizia and his direct involvement in the Electrogas concession, was appointed consultant to the government by contract, with a statutory authority that used to report to him before he resigned. The consultancy has since been rescinded following public outcry.

(j) The President of Malta

xxii.

As explained elsewhere in this document, the government's decision to postpone its response on the Commission's recommendations in this regard, renders their acceptance of other recommendations, that bestow the President with executive authority, a very dangerous development.

We register our deep concern that if the powers of the President are increased, whilst the Prime Minister retains his absolute discretion on deciding who gets to be President, we risk witnessing further deterioration in the already precarious constitutional balance we have today.

We have no doubt that at no point did the Commission intend to make proposals that would have the effect of increasing, rather than curtailing, the unrestricted powers of the Prime Minister.

We reiterate that if the President is given additional powers, this must be accompanied by provisions providing checks and balances to mitigate that additional authority.

(k) 'Erga Omnes' obligations

xxiii.

When the courts find that a particular law has breached a person's fundamental rights, it does so in the context of the facts in the case before it. The same law, in a different context, may not necessarily be in breach of anyone's fundamental rights.

However, it is clear to us that while some laws will breach persons' rights whatever the circumstances, other laws may be harmless in most cases but may, in particular situations, be in breach of someone's rights. Were all judgements to be applicable erga omnes, a judgement that finds no breach in a case will block the possibility of a challenge in a future case where, in the circumstances, a breach might exist.

We are concerned that the government is making no attempt to clarify any possible confusion that may have arisen about existing powers our courts already have. The constitution (sections 65(1) and 116) provides that when a law is declared unconstitutional, for example because it is not in conformity with treaty obligations under the European Convention on Human Rights, that judgment is an 'erga omnes' judgment.

We do not understand and do not support the government's arguments that anything in our legal tradition or framework justifies excluding the possibility of an erga omnes ruling and allowing Parliament - even in cases where a breach of rights will occur in every likely circumstance when the law is applied - the discretion on whether to change laws that have been found unconstitutional by the Constitutional Court or, for that matter, to have been found in breach of the European Convention on Human Rights by the European Court of Human Rights (ECtHR).

This is especially because the discretion of Parliament is purely symbolic, because Parliament's agenda is determined exclusively by the government, and it is up to the government alone to decide whether Parliament is to even consider changing laws to comply with such determinations by the Courts.

Here follow our comments on other matters raised in the Commission's recommendations and ignored in the government's response.

Specialised Tribunals

xxiv.

We do not believe it is accidental that the government has ignored this consideration. Indeed, what the Commission describes as a danger, i.e. the risk of parallel jurisdiction, is from the point of view of the government, a desirable confusion.

These specialised tribunals are an opportunity to dispense with the basic guarantees given by the judicial system, at least until such time as they are successfully contested in court.

Appointees on these boards are often, in practice, being rewarded with this appointment for partisan loyalty and favour. That reward comes with the qualified promise of extension that exposes the tribunals to flagrant opportunities for corruption.

The extent of the authority of these tribunals is disproportionate to the lack of safeguards for the independence of the adjudicators.

We submit that the government should be working towards enhancing the independence and authority of the judiciary to review administrative decisions, guaranteeing citizens who are in dispute with the government the safeguards that only an independent and well-resourced judiciary can provide.

The government will seek to quietly drop this matter from the agenda. We submit that in pursuit of improved democratic standards and in reducing yet another opportunity for flagrant corruption, the Commission should insist its recommendations are adequately considered.

House of Representatives

Unlike its reaction to the Commission's recommendations with respect to the President, the government provides absolutely no reaction to the Commission's recommendations with respect to Parliament, and does not undertake to review the matter as part of a discussion on constitutional reform.

Although this highly complex issue should indeed be dealt with as part of a broad debate on constitutional reform, we feel the government's silence on the matter is due to the fact that the government considers Parliament as a largely ceremonial entity that provides a stamp of legitimacy when wielding power, an audience for its displays of authority, and a circus that gives the popular illusion that it is willing to wrestle its political rivals and defeat them every time.

xxv.

We do believe that Parliament needs fundamental reform in order to provide some form of check on executive authority and a balance for the Prime Minister's power.

Currently, almost two-thirds of the back-bench MPs are employed or engaged by the government (mostly in the executive), while a substantial number of MPs on the government side were appointed to sit on Government boards. According to the Commissioner for Standards in Public life, a number of such engagements and appointments are likely to have placed these MPs "in a situation of a conflict of interest or breach of ethical or statutory duties."

We therefore support the Commission's views that we should consider a Parliament made of full-time MPs, adequately paid, adequately resourced, advised on legal matters independently of the advice provided to and by the executive, and with rules that govern effective separation of roles for MPs who are not members of cabinet but who support the government in the chamber.

This alone however will not of itself address the underlying and accurate concern of the Commission about the unqualified power of our Prime Ministers, which is as much the product of weak institutional design as it is the result of our winner-takes-all two-party system. Unsurprisingly, electoral reform is an aspect of constitutional reform that has not been addressed in the government's position. It remains the only

real opportunity that can help to free us from a system based on local patronage, and a minimum threshold to enter Parliament. The present electoral system makes it impossible to break the monopoly of the two major parties, which do not leave room for dissenting opinion. Current electoral law protects the two main parties from any challenge. We do not anticipate enthusiasm for reform in this regard by the two parties who have dominated parliaments in Malta for generations.

xxvi.

As with our remarks in respect of changes in the role of the President, we are deeply concerned that the selectivity of the government in picking and choosing which elements from the Commission's set of recommendations it is prepared to consider, and which it intends to ignore, not only misses the opportunity of a comprehensive reform but rather creates the opportunity of even greater imbalance than that which currently exists.

We are not enthused by the government's obvious shift in gear that has broadly ignored the Commission's report for 18 months, and now seems keen to wrap up any debate on what has been proposed in a matter of days.

For all the reasons that led the Commission to draw up its advice in December 2018, this present selective haste is just as inadvisable.

The Police

The government's silence on this matter appears to be motivated by changes it has recently introduced to the manner of appointing the Police Commissioner. The government appears to expect no one to notice the elements of the recommendations made by the Commission that have been left out in the changes that are currently being implemented.

xxvii.

Although a public competition for the role of police commissioner has indeed been introduced, the Prime Minister has retained more than the mere veto on the nominee selected by the process. The Prime Minister has actually retained discretion on selection from the short list identified by the process.

As we have argued above, in respect of the government's response to recommendations on the manner of appointing judges, we fail to understand the reasons given for the government's reluctance to cede its control on this choice.

xxviii.

Also, as explained earlier, this process is governed by the Public Service Commission that is appointed at the unhindered discretion of the Prime Minister, making the process essentially a front for the cruder but equally discretionary process of appointing all previous holders of this position at the whim of the Prime Minister.

Furthermore, a probationary period of one year has been introduced in the job description for the Police Commissioner, during which time dismissal without cause remains within the discretion of the executive. There is no way that such a prolonged period of probation - with potential dismissal without cause - can amount to any autonomy of function.

This must be seen in the context of the willingness of the government to use all discretion available to it to ensure impunity for its senior officials. Suffice it to recall that Police Commissioner John Rizzo was removed to prevent the prosecution of former EU Commissioner John Dalli. Following this, resignations, early retirements and replacements followed in quick succession to protect a Minister's chauffeur who used his side arm in a traffic altercation and, more seriously, to allow Financial Intelligence Analysis Unit reports of money laundering by senior political figures to be suppressed.

This revolving door abuse will remain possible and absolutely within the discretion of the Prime Minister as long as the Prime Minister does the firing within 12 months of the hiring.

xxix.

Neither the Commission's recommendations, nor the government's response or actions in the last several years, begin to address:

- ➔ the partisan politicisation of the top positions in the police force – a political pogrom was undertaken after the March 2013 elections

- ➔ the infiltration of organised crime in the top levels of the police – the head of the criminal investigation department was found, after retiring with full pension benefits, to have been socially intimate with the person his department considered as the prime suspect in the murder of Daphne Caruana Galizia

- ➔ the intentional under-resourcing of the Police Department particularly in areas such as financial and economic crimes, bribery and corruption.

Conclusion

In spite of the concerns expressed in this report, Repubblika wishes to make it abundantly clear that we are desirous of reform. We warn, however, that a reform is only welcome if it can promise solutions to the challenges we have today of an elected tyranny which exists above the law.

This is why any reform cannot be conducted by the government or by a coalition of the two political parties, who take turns to rule without regard to the aspirations of the community. The participation of civil society, the assistance of international expertise and the scrutiny of a free and independent press are necessary guarantees that changes made do not fall short of the promise of updating Malta's democracy to the reasonable expectations of our time.

In view of this, Republika recommends that:

1 A structured dialogue is opened between all stakeholders in the community, civil society, parliamentary parties and institutions in order to open a free and unhampered debate on constitutional and institutional reforms.

2 The objectives of separation of powers, accountability, transparency, open government and equality before the law are adopted as the guiding principles of this process.

3 The Council of Europe and its associate bodies, in particular the Venice Commission, as well as democracy NGOs and other international agencies are invited to observe and where appropriate participate in the process.

4 Institutional and constitutional reform is conducted within the following guiding principles:

- I. The constitution is to be amended, not replaced
- II. Changes to the constitution are to be phased in thematic sectors, not adopted as a package
- III. Changes that in isolation could increase the powers of the executive should be adopted together with changes that curtail them
- IV. The process of design is to be transparent
- V. Any proposed change must be considered on the basis of reasons for and against its adoption
- VI. Constitutional reform is not time barred

We remain committed to engage constructively in this debate and to contribute to the best of our ability to its successful conclusion. But we will not collaborate in the erection of Trojan horses or false reforms designed to lull the country into a false belief that their democratic rights are being enhanced by legislative shells that have no material benefit, or in themselves



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RESPONSE TO GOVERNMENT'S
PROPOSALS TO THE
VENICE COMMISSION