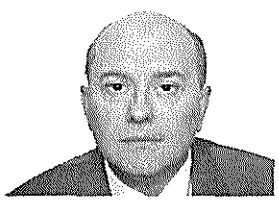
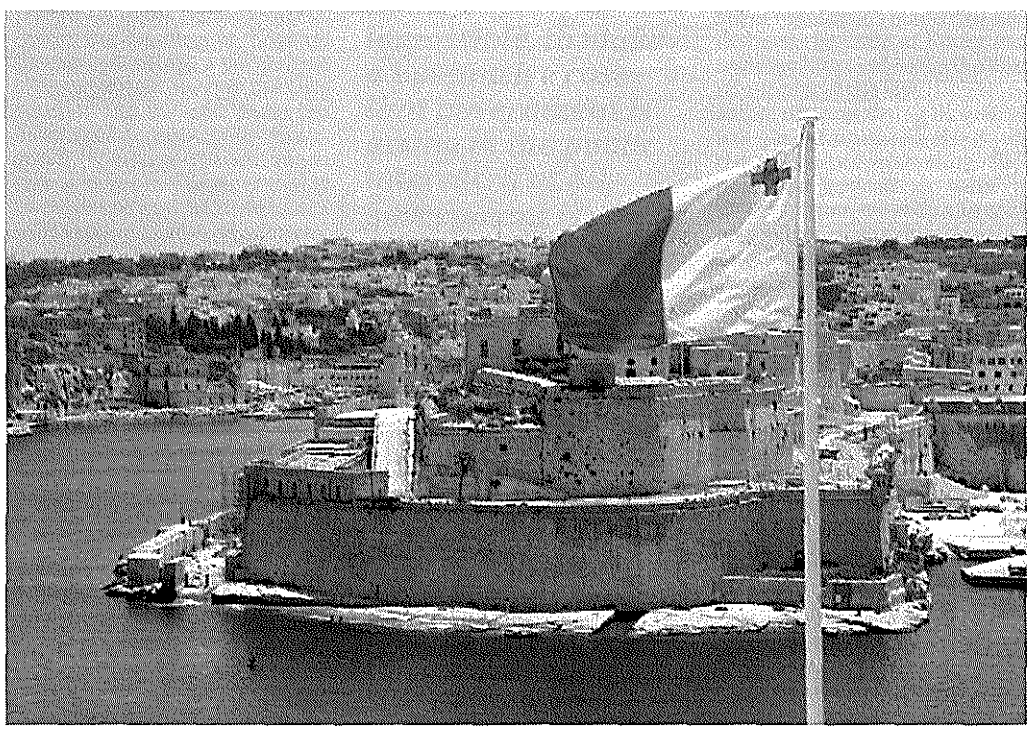
Debate & Analysis



Acting in the public interest... whatever that might mean

KEVIN AQUILINA



Article 91A of the Constitution of Malta sets out the duties of the State Advocate.

It 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 State action. The State Advocate shall also perform such other duties and functions as may be conferred upon him by this Constitution or by any law. 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'.

The main function of the State Advocate is that of 'advisor to Government in matters of law and legal opinion'. But in carrying out this function he must (a) act in the public interest; and (b) safeguard the legality of the State action.

Government is not defined in the Constitution, nor is the term 'State'. It would, undoubtedly have been beneficial were the Constitution to define these two terms together with that of 'public interest'. This notwithstanding, from the provision it emerges that 'government' and 'state' are not being used synonymously but with two distinct meanings. Hence, government must be understood in the narrow sense of the word, namely of Executive, that is of Cabinet and the public administration that serves it, and not in the extensive sense of the word, that is, of 'state'. The latter term comprises all three organs of the state (Parliament, Cabinet, and the Judiciary), other state institutions (public corporations, authorities, commissions, etc.), and public officers (independent ones such as the Auditor General, Ombudsman, Parliamentary Commissioner for Standards in Public Life, the Data Protection Commissioner, etc.) or other non-independent ones.

Hence, the main task of the State Advocate – who, as a matter of fact, is more of a Chief Legal Advisor to Government than a 'State' Advocate in the extensive sense of the term, is that of advising government 'in matters of law and legal opinion'. The term 'advisor' is not defined but as the State Advocate is a lawyer by profession and appointment s/he carries out both the duties of providing advice 'in matters of law and legal opinion' and – though not expressly mentioned in the constitutional provision – also conducts litigation on behalf of the government, unless of course, s/he has to 'safeguard the legality of state action'. To safeguard the legality of the state action, the State Advocate would be called upon to engage in litigation. In the latter case, s/he no longer remains a government advisor (and litigation advocate) but assumes a second duty of State Advocate where s/he must safeguard the legality of state action. In this latter case, 'safeguard' is a wider term than 'advisor' for s/he is not told what s/he must do to safeguard 'the legality of the state action'. S/he may thus act as advisor and litigation lawyer to the state.

As to the legality of the state action, the reasonable presumption is to the effect that state action is legal. But what does 'legal' mean? Does it mean legal as to form or legal as to substance? As the Constitution does not qualify the term, then one has to understand legality both in terms of form and substance. Hence, all the actions of the government, legislature, and judiciary are presumed to be legal unless proved otherwise. This is therefore a rebuttable presumption: when the Office of State Advocate concludes that there is no legality of the state action, that is, the state action is illegal, that office is not constitutionally bound to defend that illegal action. To argue otherwise, is to require the State Advocate to defend state illegalities in breach of his constitutional office terms of reference.

Yet, this provision is not without difficulty. There are indeed straight forward cases where a person is suing the State Advocate because his or her human rights have been infringed or where the judiciary have deprived that person from a right to a fair trial or are taking too much time to decide a court case. In the former case, the person concerned does not sue all MPs who enacted the law together with the President who assented to it; in the latter case, s/he does not sue the member/s of the judiciary who was responsible for the unfair trial and/or excessive delay. It is the State Advocate who represents Parliament or the judiciary in these proceedings.

Nevertheless, there can be cases where the matter is not that straight forward as when the Ombudsman – an officer of Parliament – in the past successfully sued a government minister and a permanent secretary. Strictly speaking, should a similar episode arise today, the State Advocate is obliged to offer his services to all the three parties concerned! But, of course, this cannot happen because of a conflict of interest. If the Ombudsman were first to approach the State Advocate to sue government, would the State Advocate be correct to decline to offer his services more so if the Ombudsman might be challenging 'the legality of state action' which the State Advocate is constitutionally bound to safeguard? And what if a minister has violated the law and that action is being challenged, can the State Advocate defend the illegality of that state action when his office, constitutionally speaking, is entrusted with 'safeguarding the legality of state action'? The answer should be in the negative. The State Advocate would have to advise the minister to seek assistance of another lawyer in private practice.

Take the case of minister Owen Bonnici and his permanent secretary who, both counter to the written provisions of the Maltese Language Act and their respective Code of Ethics, the former created a Centre for the Maltese Language and the latter employed a person not on meritorious grounds and in breach of the Maltese Language Act. Whilst the minister is also breaching the Standards in Public Life Act (Arnold Cassola please note the grounds listed below for another fruitful complaint to the Commissioner for Standards in Public Life) when the minister, shamelessly and with impunity, disregarded the written wording of the law, acted in breach thereof, and in the worst form of bad governance, dissipated state assets, established state structures that are unauthorized by law, appointed abusively a person to a position on the basis of clientelism when the law under which the appointment is made precludes him from doing so. Misrule of law at its best. But, thanks to the institutions of the state, both the minister and the permanent secretary will be bailed out on the basis of government's principle of the normalization of illegality.

Strictly speaking the State Advocate should have advised minister Owen Bonnici that the latter had contravened the Maltese Language Act and the Standards in Public Life Act and stopped there in order to safeguard the legality of the state action and not filing a counter-protest in court to that originally filed by the National Council of the Maltese Language that was requesting the minister to comply with the law. As a matter of fact, it ended up that the National Council for the Maltese Language that was safeguarding the legality of the state action not the minister or the State Advocate. The Code of Ethics for Ministers and Parliamentary Secretaries attached to the Standards in Public Life Act makes the following points that are all applicable to minister Owen Bonnici's breach of that Code:

(1) 'Ministers shall act and behave according to standards of the highest level both on a personal basis and in the performance of their constitutional duties' (para 1)

(2) 'the purpose of this Code of Ethics is to provide a guide of the highest levels expected from the Ministers in their behaviour in order to respect the best standards of integrity, honesty, transparency, accountability and a sense of justice, and so as to provide a guide with the aim of avoiding conflicts of interest' (para 2)

(3) 'Apart from the general principles of observance of the law, respect of the following principles is expected of Ministers' (para 4)

Continues on page 17 »

"The term 'advisor' is not defined but as the State Advocate is a lawyer by profession and appointment s/he carries out both the duties of providing advice 'in matters of law and legal opinion' and – though not expressly mentioned in the constitutional provision – also conducts litigation on behalf of the government, unless of course, s/he has to 'safeguard the legality of state action'."

Debate & Analysis

Acting in the public interest ... whatever that might mean

KEVIN AQUILINA

Continued from page 10 »

(4) 'Ministers shall be, to the widest extent possible, open to providing information to Parliament and to the public in general' (para 4.4)

(5) 'A sense of service - the supreme good is the common good and a Minister should not be motivated by a spirit of gain for himself, his family, his friends or persons close to him but only by a sense of service towards the community in general and the common good, because above all he is managing public property on behalf of the general public' (para 5.1)

(6) 'Diligence – once Ministers administer public property, on behalf of the public in general, they shall exercise the highest level of diligence including in the expenditure of public funds, and they shall also work diligently and hard in the performance of their duties' (para 5.3)

(7) 'Objectivity – in the performance of public duties, including in the appointments to offices, public procurement, or in the context of any award of benefits' (para 5.4)

(8) 'Accountability – Ministers administer public property and shall be transparent in their operations and open to necessary scrutiny' (para 5.5)

(9) 'Transparency – Ministers shall as much as possible perform their duties in an open and transparent manner, and therefore give reasons for their decisions and actions' (para 5.6)

(10) 'Justice and respect – in their behaviour and in decisions which they take, Ministers shall show respect to the institutions and shall respect the laws of the country' (para 5.8)

(11) 'Decisions taken shall, as much as possible, be kept recorded in government files, even if the practicality and reality of current electronic communication also has to be taken into consideration' (para 7.5)

(12) 'Ministers shall be inspired by merit and capabilities in appointments and offices conferred and shall consult the Prime Minister with regard to appointments of chairpersons and board members' (para 7.7).

But in this unwarranted abuse of power, it is not only the minister who has violated the law. So did the permanent secretary in his office. The Code of Ethics for Public Employees and Board Members contained in the First Schedule to the Public Administration Act makes relevant reading.

Under the heading of 'Integrity' (paragraph 9(b)), a permanent secretary is obliged to 'use public resources appropriately, conscientiously, efficiently and effectively in the public interest'. Under the heading of 'Loyalty' (paragraph 14(a)), a permanent secretary must 'observe the Constitution and the law'. Under the heading of 'Accountability' (paragraph 19(a)) a permanent secretary is to 'act in a manner that is transparent and in compliance with applicable laws, regulations, directives, policies and procedures' and to 'be prepared to give a clear explanation of their judgements, behaviours, intentions and actions to any stakeholder authorised to demand such explanation (paragraph 19(c))'.

So far, no explanation has been publicly given by the permanent secretary why she entered into a 72,000 euro contract with Norma Saliba, why merit was totally disregarded in the selection procedure, why no call for applications was issued for the post, why no selection board was appointed, what were the selected candidate's qualifications for the top job of Executive Head of the Maltese Language Centre, why was not the National Council for the Maltese Language involved in the Selection process and in the formulation of the appointment criteria, why the Permanent Secretary engaged in consultations with the President of the National Council of the Maltese Language when she is debarred by law from doing so, why was she resorted to WhatsApp communication with the National Council rather than following standard civil service procedures of communicating with the President's Council in writing, under which provision of the Constitution or of the law was she authorised to appropriate those monies as well as any other disbursements made for the Centre of the Maltese Language, etc. All these legitimate questions require an answer that so far is eluding us.

Then there is that pandora's box of the public interest. In *Chandler v the Director of Public Prosecutions*, the House of Lords essentially defined the 'public interest' to mean nothing but the interest of the government of the day, whatever that might be. The court thus equated 'public' with 'government'. But should this be so? It can be argued that in a representative democracy, it is government that represents the public and, therefore, it is the government that knows best what is in the public interest. Further, the government is elected with the support of a majority of seats in the House of Representatives. Perhaps this argument makes sense in normal circumstances.

But what if government is not acting with due diligence, or is maliciously acting in bad faith, or, worse still, in breach of law, including of the Constitution, or of general principles of law, or of criminal law? It is difficult in these circumstances, not to say impossible, to make a persuasive case that government is acting in the public interest. If at all, government is acting in a private interest, that of the political party in government. Here there is undoubtedly a conflict of interest highlighted in both the Minister's code of ethics and in the permanent secretary's code of ethics, that were both totally ignored in the above example with total impunity, with no consequences at all. What the minister and the permanent secretary did was that they both normalised an illegality, not through an Act of Parliament but by taking the law in their own hand and simply doing what they should have not done.

"It is difficult in these circumstances, not to say impossible, to make a persuasive case that government is acting in the public interest. If at all, government is acting in a private interest, that of the political party in government."

The public interest dictates obedience to a law not to its trampling thereupon. And here lies the quandary for the State Advocate: on the one hand, he must act as government's chief legal advisor and on the other 'act in the public interest'. How can these two be reconciled when the two interests may work out to be opposed to each other? The issue is further complicated by the State Advocate's attempt to normalize illegalities committed by his client.

Take the following case. The Prime Minister, in breach of the Constitution, the Environment Protection Act, and a subsidiary law, both under the previous and this legislature, has assigned ministerial duties pertaining to the minister responsible for the environment to the Gozo minister. Clearly the Prime Minister is in breach of the Constitution, the Environment Protection Act, a set of regulations made thereunder, and the Code of Ethics that requires him to observe the Constitution and the law. His bad example of normalizing illegalities has now transmuted itself into the public administration. Suppose the opposition were to wake out from its sleep and challenge this unconstitutionality. The State Advocate must safeguard the legality of the state action, even though the state action here is unconstitutional and illegal. In reality, it works out that the State Advocate ends up defends the illegality of the state action, not the Constitution and the laws that are breached! If, on the contrary, the State Advocate were constitutionally bound to safeguard the Constitution and the Laws of Malta, not the illegality of the state action, that would be another matter. For in this case, s/he can sue the Prime Minister in court and desist from offering legal services to the Prime Minister in that specific case. But this is not what the Constitution states. The State Advocate must safeguard the legality of the state action, presuming of course that the state action is legal. But what if the State Advocate thinks otherwise?

Of course, one understands the quandary in which the State Advocate must be because of the ill-drafted constitutional provision that creates such a split personality. The constitutional provision has thus ended up in the same contradiction that befell the Attorney General before the duties of Attorney General were split into two – that of Attorney General (who essentially is a Public Prosecutor) and that of State Advocate (who essentially is government's chief legal advisor subject to acting in the public interest and safeguarding the legality of the state action). The latter two qualifications – public interest and legality of the state action – have transmuted the Dr Jekyll and Mr Hyde personality syndrome of the Attorney General before the separation of the prosecutorial and advisory roles happened into that of State Advocate. It is the latter office that has now inherited the split personality of the Attorney General.

Finally, and here is the crux of it all, the Constitution now provides that: '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'. Whilst in the past, when the Attorney General was responsible for criminal prosecutions and advising government, the latter officer was constitutionally only independent in the former case but totally subservient to government in the latter case, the Office of the State Advocate is now independent of government and parliament. This implies that the State Advocate is not 'subject to the direction or control' of the Prime Minister, Ministers, Parliamentary Secretaries, and the civil service (amongst others). He is subservient only to the Constitution, to the laws of Malta (unless these infringe the Constitution) and to his own conscience. His relationship with government is no longer that of an advocate-client relationship where the client tells his advocate what to do, but he is in a superior position of telling government what to do. This constitutional provision has toppled on its head past practice of the Attorney General being the Prime Minister's poodle. Now the State Advocate is supposed to be the Prime Minister's bogeyman. But has it work out that way? Clearly not. Old (bad) habits die hard!

The State Advocate's hands are tied. First, the government may – unconstitutionally – decide to farm out legal services to lawyers in private practice – as ministers are doing in breach of article 91A of the Constitution – and bypass the office of State Advocate. Second, the provision in the Constitution relating to the State Advocate is not entrenched: it can be changed by government in parliament without the need of a two-thirds majority vote. Thus, if the State Advocate attempts to do the right thing but this does not find favour with his political master, he knows that the sword of Damocles is hanging over his head supported by a thin thread. The Prime Minister can, through his majority in the House, abolish capriciously and whenever the need be the office of State Advocate. Thus, the State Advocate enjoys independence only on paper, not in actual fact. That is why Malta is a paper democracy with the provision of the independence of the State Advocate in the Constitution serving only as a façade of democracy, only for the consumption of a 'gullible' European Commission, Parliamentary Assembly of the Council of Europe, FATF, Greco, Venice Commission, etc.

Unless the Constitution is amended to iron out the conflict of interest that exists in the Office of State Advocate to cut off the public interest duty from the government advocacy duty, the country will remain in this ludicrous situation that Parliament has put the office of State Advocate in.

Kevin Aquilina is Professor of Law at the Faculty of Laws of the University of Malta