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A CIVIL SOCIETY MOVEMENT

19 October 2020

The President
The Palace
Valletta

Mr President:

Re: Constitutional Convention

We have noted your remarks in your foreword to the ‘Outcome of the Consultation Process’ on Constitutional Reform.

You will in the meantime have seen the Venice Commission’s report (Opinion #993/2020) on ten bills, most of them enacted, that affected constitutional changes or changes in legislation impacting our constitutional design.

In that report, the Commission says it is appalled at the government’s conduct in pushing these amendments through Parliament. The Venice Commission states:

“13. Therefore, the Commission is critical of the procedure followed by the Maltese Government, which it regrets. The June 2020 Opinion stressed the need for wide consultations and a structured dialogue with civil society, parliamentary parties, academia, the media and other institutions. Only four days later, ten concrete Bills were presented (which were at that time restricted documents). And little more than a month later, six out of ten Bills were adopted. It seems that at no stage of the process there was any serious consultation of civil society or possibility for wider public debate.”

and

“15. The current constitutional amendments are meant to have a profound and long-term impact in Malta and hence require wide consultations within Maltese society. Thus, the

rushed process through Parliament comes not only as a surprise but also a disappointment, despite the Government's assertions that the dialogue in Parliament was structured and broadcast on television. Confining the discourse to political parties in parliament without meaningful public consultation is akin to denying citizens their democratic entitlement to have a say in the shaping of the constitutional order."

We have seen today in the press the government's dismissive response to this criticism. Quoted in Times of Malta, Minister Edward Zammit Lewis said that:

"the relevant stakeholders made their opinions known in the public domain, from online media to personal blogs – we have taken this into account. (...) NGOs and civil society as a whole were consulted by the Venice Commission itself. (...) Our legislative process guarantees the possibility of a structured dialogue with all stakeholders and civil society – this is not only possible by a requirement."

We wish to draw your attention to these remarks because once again we feel these confirm that in spite of any good intentions you may have, the government appears intent to push through the Constitutional changes it wishes and leave out the ones that may restrain their unbridled wielding of power, without regard to civil society and hiding from the glare of independent media scrutiny.

Our weak Constitution and the abuse of the excessive powers of the executive, have generated the atmosphere of institutional paralysis and legal impunity that permitted "this clique that brought shame on our country" (as described in your own words on 13 December 2019) to run riot with our country's dignity and the rights of its citizens, including in at least one case, a citizen's and a journalist's right to her life and the right of the rest of us to read the information about our government that Daphne Caruana Galizia would have published had she been allowed to write it.

It is your duty to ensure the present exercise for reform is not conducted by "this clique" in its own interest. If all they are going to do is "look at social media", our Republic will continue to be their playing field.

We are appalled that ministers consider the perusal of "social media" as in any way amounting to adequate public engagement. We are appalled that ministers consider discussions they do not participate in between third parties as sufficient guidance for their own actions. We are appalled that ministers would refer to a "requirement of a structured

dialogue with all stakeholders and civil society in the legislative process” in the same context where they explain that what they mean by ‘structured dialogue’ is a superficial and unaccountable glance at social media.

In this context, and in the context of your warning that a Constitutional Convention is now imminent, we must renew the call we made to your predecessor in March 2019, for a rules-based reform process that clearly establishes a methodology for stakeholder consultation before parliament exercises its legislative powers on constitutional matters. It is simply unacceptable and undemocratic to allow ministers to make their own judgement of what constitutes consultation even when the Venice Commission describes ministers’ conduct as “denying citizen’s democratic entitlement to have a say in the shaping of the constitutional order”.

We consider your suggestions (which you describe as ‘tentative’) on the inclusion of civil society, as falling short of any forms of guarantee of adequate citizen participation. You suggest inviting 1,700 organisations (presumably this is the list of entities registered with the Commissioner for Voluntary Organisations) to name a representative each from which 72 are drawn up randomly. In this context civil society organisations who focus on the rule of law, democracy and constitutional matters – that amount to a handful – are handed a ticket in a lottery with infinitesimal odds.

In its preparation of its most recent opinions, the Venice Commission consulted #occupyjustice, the Civil Society Network, Aditus and Repubblica – that is 4 entities – which it considered as amounting to the entirety of civil society engaged in these matters. We know there are a few other organisations that have specifically contributed to this debate in the past but they do not amount to anything near 1,700.

This handful of entities would have to hope to be randomly selected in a lottery with every band club, sports club, sectoral representative body, charity, special interest NGO and so on and then only to be granted one seat in a chamber of 120. Even in the remote and lucky chance that the ticket held by one of these organisations were to allow them in the convention, they would be reduced to an irrelevance.

The selection procedures you put forward are even more restrictive than the National Assembly convened in 1918 to work on Malta’s self-government Constitution. Malta’s population was about half what it is today and every organisation in the country was called to attend. 123 organisations answered the call, some sending several representatives. There

were organisations from the clergy, professional bodies, commercial entities, workers' organisations, political newspapers, religious publications, associations, clubs, religious institutions, band clubs and theatre groups. None of them needed to win a lottery before showing up and having their say at the Assembly.

In view of the remarks made by Minister Edward Zammit Lewis, it appears that diluting to irrelevance the voice of citizens active in the area of democracy and the rule of law is an intended effect. The government would get its photo opportunity to show it has held a jamboree of public engagement but it would be left at complete liberty to continue to ignore active citizens that are engaged on rule of law matters, now with the added benefit of a license handed down by the President who has ruled on a "fair" way of excluding substantive opinions not expressed within the convention.

A lottery is not a "fair" way of designing constitutions.

We note that your 'outcome of public consultation' summary document completely ignores our recommendations on the process of consultation and adoption needed before constitutional changes are made.

We had submitted to your predecessor, and again to you, case studies of failed and successful public engagement processes in several other jurisdictions that adopted changes to their constitutions. Your report ignored these case studies which could have informed choices made on the back of other countries' successes and failures.

And we have made suggestions that ensure that "the democratic entitlement of citizens to have a say in the shaping of the constitutional order" is not denied. Our suggestions were aimed to ensure the substantive inclusion of parliament, political parties, institutions, constituted bodies, the non-governmental sector, experts and the citizenry at large in the process.

We have argued for the inclusion of all civil society organisations, whatever their nature or areas of interest, (including band clubs, sports clubs, sectoral representative bodies, charities, special interest NGOs and so on), to have space to contribute to changes without needing to win a lottery ticket first.

And we argued for the inclusion of citizens that are not organised in formal entities but that may express an interest to participate in this process. After all there should be no other

requirement for active citizenship but citizenship itself, that is inherent and not in the gift of the President, the government or even civil society organisations.

Our recommendations, which we attach again for ease of reference, would have addressed the yawning gap in your own suggestions that allow the government to ignore the voice of active citizens engaged in questions of constitutional reform and then say they had adequately consulted them by looking at their social media.

As with any complex discussion, the first item of discussion on the matter of Constitutional reform should be a shared agreement between all parties on procedure and agenda-setting. If we overlook this and rush into a cart before horse discussion on substantive matters, we will be inviting the government to repeat the same 'mistakes' that the Venice Commission has so forcefully criticised in its latest opinion. Of course, we are being generous when we describe these as 'mistakes'.

We doubt very much that your intentions may have a material impact on what will really happen and we confirm our justified scepticism that the government has any intention of allowing citizens to participate in the drawing up of the basic law that governs them.

But we still feel obliged to set out for the record our deep concerns and our standing offer to participate in a constructive dialogue aimed at adopting proper participative procedures for the most important changes to our Constitutional design since 1964.

We remain at your disposal.

Yours faithfully,



Robert Aquilina
President, Repubblika

Attachment: Reform of Malta's Constitution: Recommendations on a Procedure for the Consideration and Approval of Amendments to the Constitution, Prepared by Repubblika (1 March 2019).