Debate & Analysis

Pilatus: A Laundromat Bank in Europe

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The grave allegations of dereliction of duties made by Robert Aquilina, president of civil society organization Repubblika, in his recent book entitled *Pilatus: A Laundromat Bank in Europe* (Midsea Books Ltd., Valletta, 2023) are quite disconcerting.

Of course, I am not privy to the whole report of the Inquiring Magistrate on the Pilatus bank but from the parts that have been disclosed, I cannot reconcile how criminal action has been taken against one Pilatus bank functionary (bearing in mind that she did not hold a top executive office but a middle management one) and not against all the others identified by the Inquiring Magistrate for prosecution, especially in relation to those would-be offenders in middle management positions and that are physically in Malta and therefore there is no need for the execution of an European or International Arrest Warrant to charge them in court.

Nor is it clear why no action has been instituted – or will ever be instituted – against top management functionaries. It could be that the Police are still awaiting the outcome of the international warrants of arrest to be executed before criminal proceedings are instituted against the foreigners not resident in Malta.

On the contrary, if my reading of Robert Aquilina's book is correct and if the documents that he has published have not been contradicted by other parts in the Inquiring Magistrate's report, or by police evidence compiled after the conclusion of the inquiry, then serious doubts are raised in my mind why not all persons identified by the Inquiring Magistrate for money laundering crimes have not yet been accused in court.

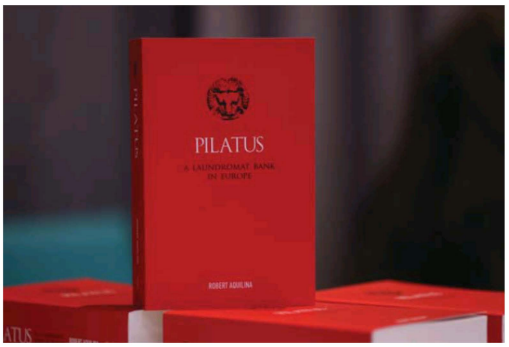
It also appears that in the case of at least two of them, they have been also exempted from criminal responsibility by the Attorney General (AG). The AG has so far not rebutted any allegations/conclusions in the said book, nor sued the book's author in court for defamation or, alternatively issued a press release to set the record straight. The AG's silence, like that of government, is conducive to giving more weight to what Robert Aquilina is claiming, more so that the Police have made a statement on the subject but not the AG. Yet the accusations are of such gravity that, if proved, are tantamount to misbehaviour in terms of the Constitution and require the AG's removal from office. Hence, they cannot be left unanswered.

In this case, the inevitable question that arises is: why have the persons in relation to whom a nolle prosequi has been entered not been charged in court based on money laundering or, at least, conspiracy to commit a crime? Whilst – hypothetically and utterly debatable – the case could be made that the Inquiring Magistrate was totally wrong when advocating criminal prosecution for some of the crimes he had identified, was he also completely wrong on all counts, on all crimes he must have identified, including conspiracy to commit a crime?

Not being privy to the *procès verbal* and to all the subsequent criminal investigations made by the Police in that respect, simply means that I am not able to arrive at a conclusion whether the AG has exercised due diligence or not in this matter. This difficulty is further compounded by the fact that (a) only part of the *procès verbal* has been rendered public; (b) there is a dearth of information as to the subsequent police investigation; and (c) all these matters are shrouded in secrecy and, hence, impossible to assess or review.

Then there is the other side of the coin. Repubblika have decided to breach a court decree that does not allow them to disclose the information that they have disclosed. At least that is what my understanding is from media reports as the court proceedings in question are held behind closed doors and the scant information that is published in the newspapers is to this effect. The breach blatantly results from the publication of the book itself.

If Repubblika is really a civil society organisation that is campaigning in favour of upholding the rule of law, it should not have published the documents in question as it is now itself in breach of the rule of law. The expression goes that what is good for the goose is good for the gander. If government is repetitively in breach of the rule of law, no civil society organisation should justify its criticism of government of breaching the rule of law by itself breaching the rule of law, at least if one wants to be consistent.



It is like the Pope delivering a sermon against abortion but then secretly authorising raped nuns to abort. Two wrongs – raping a nun and because of this crime aborting an innocent person – do not make a right. The same applies here. If one is consistently criticising government for its rule of law violations, then one cannot violate the rule of law oneself by breaching a court decree, even if the court or the parties to that case do not take any civil or criminal proceedings against the transgressor.

One understands that there must be valid reasons why the court has imposed a ban on the publication of those proceedings. From the media reports and from the book itself, I have gathered that there are proceedings before a foreign tribunal where the Republic of Malta is bound not to disclose matters relating to the Pilatus bank magisterial enquiry and, possibly, the Maltese courts are giving effect to that foreign tribunal's decree. As Tom Bingham correctly points out in his book *The Rule of Law* (Penguin Books Ltd, London, 2001, p. 110), 'the rule of law requires compliance by the state with its obligations in international law as in national law'.

This is, unfortunately, the contradiction in which we live in this country. I would have had no objection to Robert Aquilina publishing a book on the Pilatus bank saga without publishing the documentation subject to a court order not to disclose. But from a rule of law perspective, I entirely object against the publication of the documents in question because there is a court decision not to publish once there are ongoing proceedings instituted by Repubblika itself. Those documents should have been, if they have not already been, filed in court and Repubblika could make its case there.

One final point. A distinction must be drawn between the AG and Commissioner of Police, on the one hand, and the State Advocate, on the other hand. The first two are the decision makers though sometimes it is only the AG who is the decision maker. The State Advocate decides nothing because he merely provides legal representation to these two officers before a judicial forum. He cannot choose good over bad, or transparency over hiding, as the book solicits him to do. Responsibility for the State Advocate's position before a court lies with his clients rather than with his office. And here is where the difficulty lies once the State Advocate cannot overrule the AG in those proceedings where the State Advocate is defending the AG. Accordingly, it is wrong to attack the State Advocate, both institutionally and personally, for carrying out the function of a legal representative and a court official

Now it appears that after the office of AG was divided into two, that of AG and that of State Advocate, it is the office of the State Advocate that defends in civil proceedings the AG when the latter office is populated only by lawyers well capable of defending their office in court. This is a totally wrong decision as once these two offices have been separated, they should have been totally separated from each other as, at times, it could happen that they might have conflicting interests, more so since the State Advocate has not only one interest to address but a plurality of interests ranging from instituting proceedings on behalf of government (ministries, government departments, government agencies, etc.), defending cases against government, defending cases where there is no identified government head of department, defending human rights cases, defending cases where a law is impugned, etc.

As a lawyer, the State Advocate is faced with multiple clients with divergent and at time conflicting interests making his task impossible to carry out. This is due to the wrong formulation of his terms of office in the Constitution - something I had already written about on 12 June 2019, being more than 6 months before the promulgation of the State Advocate Act At the time, I had written, in no uncertain terms, that: 'The new State Advocate Bill, which is currently being debated in Parliament, is yet another classic example of how legislation should never be drafted and is a parody of the December 2018 Venice Commission report.'

The Chamber of Advocates has also made this point in a press release issued on Thursday 27 April 2023 wherein it correctly distinguished between the State Advocate in his capacity as lawyer and the client whom the State Advocate is defending. Just to take an analogy. When an advocate is defending a client who has committed a criminal offence and is presumed innocent until proven guilty, one cannot criticise that lawyer because s/he is defending such a client as the latter has a constitutional right to a fair hearing that includes being assisted by a lawyer of his/her own choice. Hence, if at all, the criticism should not be addressed at the State Advocate but at his client whoever it might be, depending on the circumstances of each case.

Whereas the AG is Malta's chief prosecuting officer, the State Advocate – who, amongst other clients has the government as one of them – should not defend the AG in civil proceedings and it should be none other than the AG's Office that defends itself in those proceedings. There can indeed be cases where government might not see eye to eye with the AG where both parties are plaintiffs or defendants. Independent authorities such as the Broadcasting Authority, the Planning Authority, the Malta Communications Authority, etc. do not rely on the services of the State Advocate but have their own in-house legal office or farm out legal services. So why is the constitutionally independent office of AG dependant on government for its legal services when it is fully equipped to take care of this tasks, in full independence from government itself?

Finally, there is also bad use of human resources and double expenses are incurred for one case requires two lawyers to pursue, one from the office of the State Advocate and one from the office of the AG, when this can be done by one lawyer in the AG's office.

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