Debate & Analysis

Due diligence as a general principle of law

KEVIN AQUILINA

Justice has many facets. It can take the guise of reasonableness, proportionality, equity, equality, and other features.

One of those characteristics less known and less discussed in legal literature when dealing with the topic of justice is justice as due diligence.

One of the general principles of Maltese law is indeed that of due diligence. It is found both in Public Law and in Private Law.

In Private Law – Civil Law and Commercial Law – we find it in the duty of the bonus *pater familias* – the good head of the family – but we also find it in Company Law where a director must exercise due diligence, and refrain from negligence (culpa), and malice or deliberate intent (*dolo*). Dolo is criminal in nature and falls under Public Law, that is, under Criminal Law; *culpa* is civil in nature. As to civil negligence (*culpa*), this is divided since Roman Law into three categories: *culpa lata* (gross negligence); *culpa levis* (lack of exercise of ordinary prudence as a diligent *pater familias* would have done); and *culpa levissima* (slight negligence).

In Private Law, the due diligence principle is contained, amongst others, in the Civil Code. This general principle of Private Law dates back to Roman Law where the *bonus pater familias* was expected to exercise due diligence, prudence and attention in the affairs of the family. In today's world, that has moved from a patriarchal family, it is the parents who must exercise due diligence, prudence and attention. The diligence, prudence, and attention expected is that of care that one habitually shows in his or her own affairs.

Thus, when ministers are dishing out direct orders to friends of friends or appointing persons of trust in breach of the Constitution to be paid not out of their own pocket but out of our taxes, are they acting diligently, prudently, and attentively as they would have habitually acted in their own affairs when administering their own money/assets? Or because it is not their own private money but public money that is being lavishly spent, they simply do not care less? Again, when the government debt has sky rocketed to 9.1 billion, can it be said that government has exercised and is exercising good and proper diligence, prudence and attention in matters of financial propriety?

In the case of Public Law, it is specifically referred to various laws, for instance, in the Interpretation Act. This provision, whose marginal note reads 'offences by association of persons' provides that:

'Where any offence under or against any provision contained in any Act [of Parliament], whether passed before or after this Act is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence, unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence'.

It is referred to also in the Standards in Public Life Act, Second Schedule - Code of Ethics for Ministers and Parliamentary Secretaries, in paragraph 5.3 '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'.

Even the Public Administration Act, First Schedule, Code of Ethics for Public Employees and Board Members, in relation to 'Integrity' refers to diligence: '9. Public employees and board members shall: (a) act at all times with diligence, honesty, grace and integrity, such that their conduct can stand the test of public scrutiny even in situations where no law, policy or procedure may apply'.

Finally, the Public Finance Management Act, provides that:

'45. (6) For the recovery of any loss or deficiency, the Accountant General may proceed against any other person who, although duty bound to ensure against the infringement, has not acted in good faith, failed to take reasonable precautions and to exercise due diligence to avoid the commission of such infringement'. And

'57. (4) Where two (2) or more perons are responsible for the irregularity or fraud which resulted in the deficiency, loss, or improper payment those persons shall be held jointly and severally liable therefore together with any other person who, although is duty bound to do so, has not acted in good faith, and failed to take reasonable precautions and to exercise due diligence to prevent the irregularity or fraud'.

> *"Where any offence under or against any provision contained in any Act [of Parliament], whether passed before or after this Act is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence, unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence."*

In Public Law (principally Constitutional Law, Administrative Law, Criminal Law, Finance Law, and Local Self-Government Law, amongst other branches) due diligence is undoubtedly an indispensable ingredient of good governance. Due diligence in the past – and as stated earlier this harks back to Roman Law times – it can be said to be the forerunner of what is today known as 'good governance'. Needless to say, maladministration happens when due diligence or, as we know it today, good governance, is lacking.

Successive Maltese governments, of the red and blue favour, are notorious of having placed good governance in the freezer, as though it is an unused embryo frozen for perpetuity, thereby ignoring the precept of due diligence that is fundamental to the governance of the state. Yet this is a general principle of law that embraces all state officers – Ministers, the judiciary, civil servants, government appointees on various boards, committees and commissions, and the whole public administration in all its departments, agencies, and bodies corporate howsoever called.

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KEVIN AQUILINA

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Yet due diligence is often relegated to the dungeon of good governance, nowhere to be seen, nowhere to be heard. It is an outcast. At times it is considered to be embarrassing; hence, government suppresses it. Due diligence is very much like conscience to the judiciary that guides them in their decisions. But at least the judiciary has not frozen it for eternity but makes good use of it.

The same cannot be said for all the component parts of the public administration that, at times, are allergic to good governance, due diligence, conscience, values, and morality, that is, to doing what is good and shunning what is bad. There is no longer a distinction drawn in government between what is right or wrong, what is just or unjust, what is legal or illegal, what is licit and illicit, what is moral and immoral. Everything goes. All is possible. No boundaries exist. All shackles are unchained. The sky is the limit. This is, indeed, what the Labour-Nationalist dyad has brought us in. Instead of all these good governance values Malta is administered by normalising what is illegal. Illegality is the rule; observance of the law is the exception.

The minister responsible for health has a case to answer. In particular, what concrete action - apart from lip service - has his ministry taken to ensure performance of the agreements by Vitals and Steward prior to the annulment of the pertinent contracts by the court? Has any correspondence been exchanged between the health ministry and Vitals/Steward on non-performance of contractual obligations? Have any legal letters been sent by the government to Vitals and Steward pinpointing non-performance of contract? Have any judicial letters or judicial protests been filed in the court registry protesting at the non-completion and non-adherence with contractual obligations by Vitals/Steward? If the answer is in the negative, then it cannot be said that the health minister has exercised due diligence.

The Prime Minister has also a case to answer. Have the Vitals/Steward agreements been discussed at Cabinet level to ensure that there was compliance therewith? What decisions were reached? Did Cabinet task a Cabinet Committee with involvement of the Prime Minister, Minister responsible for health, and the minister responsible for finance to charter the way ahead in this matter? Was the State Advocate consulted and what advice was given? These are all question marks that need an answer from the due diligence point of view.

As to responsibility of public officer for negligence, the position in Malta has always been - bar a few exceptions - that when a public officer is adjudged negligent, it is the taxpayer who has to make good for the public officer's negligence. The taxpayer is obliged to bail out the public administrator who committed the wrong. The state does not sue the irresponsible public officer to make good for having wasted public monies. In the Vitals/Steward case, millions have gone down the drain. This is confirmed by court judgment. Who will make good financially to the state coffers for such dissipation of government assets? Should it not be the members of Cabinet that approved the agreement? Undoubtedly.

Have the ministers been sued by the State Advocate? So far no, presumably because there is a pending appeal. But if the government is found at fault, will the State Advocate and the Accountant General sue the Cabinet ministers who approved the Vitals/Stewart deal? No, nothing of this sort will happen because due diligence does not apply to Cabinet ministers. They are authorised to waste public money with impunity, be unaccountable as much as they like, with no consequences. Why? Because government has normalized illegality. This is what the Daphne Caruana Assassination Board of Inquiry referred to as 'the culture of impunity'. When things go wrong, nobody is responsible. When things go right all ministers make an appearance to get the credit. Hypocrisy at its best!

Of course, one has to distinguish whether a particular conduct was dictated by law, or perhaps the law was ambiguous and gave rise to the genuine mistake, or that the interpretation given to a legal provision was plausible though not necessary correct. Yet there are instances where the matter goes beyond a simple case of obeying the law, a genuine mistake, or an ambiguous law. It could be a case of negligence. The worst possible scenario would be a case of gross negligence from a civil law point of view and criminal negligence from a criminal law perspective.

Another instance of bad governance. In 2023 only - and I am not counting previous instances - the courts of constitutional jurisdiction have annulled laws that established administrative penalties as they run counter to human rights. What should a diligent minister do in the light of these court pronouncements? A reasonable person would expect that a minister would take note of these judgments and at least desist from adding more administrative offences on the statute book to the same tenor as those already declared unconstitutional that will - inevitably - be declared to be unconstitutional and in breach of human rights.

But what did the minister responsible for the construction industry do on 18 July 2023? He published a Legal Notice No. 166 of 2023 entitled the 'Construction Industry Licensing Regulations, 2023 that in regulation 24 establishes an unconstitutional regime of administrative penalties to be inflicted when certain provisions of the Building and Construction Authority Act are infringed. When we already know that once administrative offences are inflicted these will be challenged in court and that the latter will declare them to be in breach of the Constitution and Human Rights Law, can it be said that the minister responsible for the building industry has acted with due diligence? Undoubtedly no because the minister has approved a regulation in these regulations - that were also approved by Cabinet and signed by the Prime Minister - to ensure that these regulations will never ever be enforced because as soon as the Building and Construction Authority dares to enforce them, they will be challenged in court and declared null and void.

The result is that these regulations are not even worth the paper they are written on. Now if there were no court judgments to this effect that would have been another matter. But as it is public knowledge that administrative offences have correctly not found the favour of the courts, both in Malta and in Strasbourg, what is the point to continue to insist in including them in laws/regulations? Why keep on flogging a dead horse? Can the minister be said to have exercised due diligence? Clearly not: he has acted with utmost irresponsibility. Yet this is the country we live in where there is no rule of law, where bad governance is the value cherished by government, where illegality has been normalized.

These are only a handful of instances of undue diligence. The problem is that the organizational culture of Cabinet is one based on undue diligence, not due diligence. To do what one should not do, in public administration circles, is the norm not the exception. That is why Malta is governed by the misrule of law for the law applies only to the citizens, not to the public administrators as they perceive themselves to be above the law. This is how the law was treated centuries ago where the monarch who made the law was not considered to be bound by it. Whilst Europe has moved on and democracy has seeped in, our public administration is still fossilised in the times of autocratic rule. When will this mentality and organisational culture change beats me.

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

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