

Opinion by Judge A. Borg Barthet on the powers of the State Advocate

JUDGE ANTHONY BORG BARTHET

In this article **Judge Anthony Borg Barthet**, publishes the full text of the opinion given by him to the State Advocate in the question of whether the State Advocate can institute or withdraw judicial action on behalf of the state without being tasked to do so by the organ of the executive to which responsibility for the matter has been assigned by or under the constitution. The conclusions in the opinion have largely been adopted by the Civil Court First Hall and the Court of Appeal in their respective judgments in the case “Onor. Kap tal-Oppożizzjoni u Kap tal-Partit Nazzjonalista Avukat Dr. Bernard Grech et vs Avukat tal-Istat” in 2024.

TAGS: Constitutional Law, Civil Procedure, State Advocate

Judge Borg Barthet was Attorney General between 1989 and 2004 and Judge at the Courts of Justice of the European Union between 2004 and 2018.

On the 15th November 2023, I gave my legal opinion to the State Advocate on whether, he as State Advocate was entitled to take judicial action *motu proprio* against third parties to recover money that they have allegedly appropriated to the detriment of the State.

A copy of that opinion was exhibited in Court by the State Advocate Dr. Christopher Soler during his testimony on the 13th March 2024 in the case instituted by the Hon. Dr. Bernard Grech and the Hon. Dr. Adrian Delia against the State Advocate¹ and is now in the public domain.

Reference has been made to that opinion in the judgements of the Civil Court² and the Court of Appeal³. The matter discussed in the opinion has also been the subject of various contributions both in the academic press⁴ and in popular media.

The full text of the opinion, is not however easily available in either the printed or online media, and it would be useful for future engagement with the subject matter for the primary source to be readily accessible to students and scholars of law.

The following is the full text of my opinion:

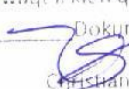
¹ 1398/23 *Onor Kap tal-Oppożizzjoni u Kap tal-Partit Nazzjonalista l-avukat Dottor Bernard Grech et vs Avukat tal-Istat et* Civil Court First Hall 11 July 2024, Court of Appeal 2 December 2024.

² 11th July 2024.

³ 2nd December 2024.

⁴ Particularly Tonio Borg, 'The Office of the State Advocate and the Bernard Grech Case' (Online Law Journal, 8 February 2025) < <https://www.ghsl.org/lawjournal/the-office-of-state-advocate-and-the-bernard-grech-case/> > accessed 21 March 2025

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Judge Anthony Borg Barthet

U.O.M., LL.D.,

56, Triq Sant' Anton,

Attard, ATD 1284

VAT Reg: 16084434 (exempt)

Date: 15th November 2023

The State Advocate, Dr Christopher Soler,
Casa Scaglia, 16, Triq Mikiel Anton Vassalli,
Valletta.

Dear Dr Soler,

1. You have sought my opinion on;

(A), whether you as the State Advocate are entitled to take judicial action 'motu proprio' against third parties to recover money that they may have allegedly appropriated, or illegally acquired to the detriment of the state; and

(B), if such right exists, whether you are obliged to act 'motu proprio' against third parties to recover such money that they allegedly appropriated or illegally acquired to the detriment of the state?

2. You asked this in the light of the judicial protest filed against you and others by the Honourable Dr Bernard Grech as leader of the Opposition and the leader of the Partit Nazzjonalista, and the Honourable Dr Adrian Delia on the 1st November 2023 (*Protest Gudizzjarju 503/2023*) as well as your counter protest of the 8th November 2023 and the rejoinder by the said Honourable Dr Bernard Grech and the Honourable Dr Adrian Delia filed on the 10th November 2023.

3. I was employed in the Government legal service for 29 years, 26 of which in the Attorney General's Office where I was Attorney General between July 1989, and April 2004, before serving as Judge of the Court of Justice of the European Union in Luxembourg for fourteen and a half years.



4. Up to the date of my relinquishing the post as Attorney General (which at the time covered the functions of the present day Attorney General and those of the present day State Advocate) it was never claimed by either me, or anybody else that as Chief Legal Advisor and advocate of the State I have either the right, or the obligation to initiate civil action against third parties to recover money or assets belonging to the State, unless I was tasked to do so by the head of the section of the public administration charged with the management of those assets or money. The only case where I could act '*motu proprio*' in civil matters was under Article 4 of the Disposal of Government Land Act (Chapter 268) which empowered the Attorney General as well as all members of the House of Representatives to institute legal action in the Civil Courts to rescind the transfer of public land not made in accordance with the provisions of that Act.

5. Professor Tonio Borg in his work (A Commentary on the Constitution of Malta), First Edition, 2016, at page 417 described the Civil Law functions of the then Attorney General as follows;

"The Office of the Attorney General in Malta is a public office and a non-political one. He performs two distinct functions; (a) he is the Chief Legal Advisor to the Government giving advice to the cabinet, ministers and public servants, and appearing in Court as Government counsel in constitutional and civil proceedings. Indeed according to Article 181(b) of the Code of Organisation and Civil Procedure (Chapter 12) when constitutional proceedings cannot be instituted against a head of department ... the defendant by law is the Attorney General; and by law, even when he is not a defendant any judicial act against the Government has to be notified to him (b) ..."

6. In the second edition of the same work (2022) Professor Borg states at page 507 *"The Office of the State Advocate was established in 2019. The role of Chief Legal Advisor to the Government which was enmeshed with that of the Attorney General was detached and transferred to the State Advocate ...*

"It is interesting to note that even though the State Advocate has no role in criminal prosecutions, he is guaranteed security of tenure equal to that of the Attorney General. This is probably due to the fact that he is not only counsel to



Government, and like any other counsel is supposed to bow to the will of his client, in this case the Government of Malta. The Constitution also states that "he shall act in the public interest and shall safeguard the legality of State action." Besides he is not subject to the direction or control of any other person or authority and "shall act according to his own individual judgement" ... he therefore decides whether to institute civil or other non-criminal action, or whether to appeal for a decision of a lower court to a higher court, even that of a constitutional jurisdiction. This is a novelty since up to the establishment of this office it was presumed that in non-criminal matters, the Attorney General was subject to the direction by the public authorities."

7. On a personal note, I must state that from my experience in Government legal services having served under five Prime Ministers and numerous more Ministers, the State Advocate needs to be guaranteed security of tenure when he, in giving legal advice or legal opinion, acts in the public interest and safeguards the legality of the actions of the State rather than exculpate the person or authority seeking the advice from any liability that his or its wrongful or illegal action may have given rise to. To my mind this is the reason why the Constitution gives the State Advocate the same guarantees as to security of tenure as to the Attorney General (or nearly so as Article 91A is not entrenched in the same manner as Article 91 of the Constitution).

8. With all due respect to Professor Borg, I am not in agreement with the conclusion arrived by him that the State Advocate as the advocate or counsel of the State has the power to initiate civil proceedings and conduct civil action without being tasked to do so by his client the State (acting through the organ managing the matter to which the actual or proposed court action refers). In my opinion Professor Borg reads more than there is in Article 91A of the Constitution. I will explain further in this opinion how the situation as to the conduct of civil action by the State Advocate has not changed from that of the Attorney General prior to the introduction of Article 91A of the Constitution by virtue of Act XXV of 2019.

9. Sub-Article (3) of Article 91A of the Constitution, as indeed the whole of Article 91A does not speak of civil action. It states that the State Advocate shall



be *"the advisor of the Government in matters of law and legal opinion."* It then goes on to state that *"he shall act in the public interest and shall safeguard the legality of State action"*. By this sentence which follows the first one immediately, the State Advocate is not being assigned a function other than that of advisor to the Government; rather, this second sentence qualifies the manner in which the State Advocate acts in performing his function as advisor to the Government.

10. The above is reflected in Article 2(1), (2), and (3) of the State Advocate Act which states:

"2(1) The State Advocate shall be the Chief Legal Advisor to the Government and shall have the juridical representation of the Government in judicial acts and actions where the law does not provide that such representation shall rest in some other person or authority.

(2) In giving legal advice the State Advocate shall act in the public interest and shall safeguard legality of actions of the State.

(3) Where under any law the State Advocate is to act or exercise any power in his individual judgement he shall not be subject to the direction or control of any other person or authority."

11. One must note, at this point, that the title given to the person now performing the civil functions formerly pertaining to the Attorney General or to the Crown Advocate General, is that of State Advocate. An advocate normally initiates civil action or defends such actions, withdraws actions or appeals only when tasked to do so by his client. This is the norm with advocates working in the legal offices of banks, or other big companies or corporations. Such advocates even if they have the legal representation of the bank, company or corporation do not act unless requested to do so by the management of the bank, company or corporation employing them. They advise objectively and independently but it is the client who decides whether to act.

12. In fact the Constitutional independence of the State Advocate, in essence, consists of the fact that, when he advises the Government, he acts independently of any instruction, by the Government and no person or authority can give him directions as to what his advice should be, or control



the manner, mode or extent of the advice. The advice is given independently in the public interest and to safeguard legality, without interference or control. It is up to the Government to act upon that advice or otherwise. It is the Government, not the State Advocate that can decide to initiate civil action.

13. Even if one were to concede that Article 91A of the Constitution, read in isolation, (without reference to the State Advocate Act or to the other provision of the Constitution which assign the management of the executive powers of the State to the Cabinet) could be read in the manner that Professor Borg seems to suggest, one would have to conclude that Parliament when enacting Act XXV of 2019 (Articles 1 to 8 of which now constitute the State Advocate Act Chapter 603, and Article 10 of which now constitutes Article 91A of the Constitution) regulated the same matter in two different manners which are substantially different. Article 10 of Act XXV of 2019 containing Article 91A of the Constitution must be interpreted in the light of the whole Act.

14. Besides, Professor Borg's suggested reading of Article 91A would lead to unreasonable results. It would mean, for example that the State Advocate could take action against any person for the recovery of VAT or Income Tax due, without being tasked so to do by the Commissioner for Revenue; it would mean that the State Advocate could take action for the recovery of rent due to Government without the knowledge of the Lands Authority. Furthermore, the alleged powers of the State Advocate do not preclude the Commissioner for Revenue or the Lands Authority from taking action through their in-house lawyers, conflicting with that taken by the State Advocate. A rather schizoid manner of regulating Government civil action. If one were to accept that the State Advocate has the powers as suggested by Professor Borg, he would no longer be an advocate as understood under Maltese law or, indeed, any other law that uses the term; he would rather be acting as a supra-government and supra-parliamentary organ in directions not necessarily parallel to those of the State

15. To fulfil the function of State Advocate as envisaged by Professor Borg, his Office would require to be constantly aware of who the debtors of the Government could be. Such an Office would require to double the National



Audit Office as well as the accounts section of every administration in the public service.

16. It is the duty of heads of department under whose management a matter falls, to take action (through the State Advocate or otherwise) to recover money, or other assets due or belonging to his administration. Such heads of department are answerable to their Minister who in turn is answerable to Parliament and to the electorate. If one were to give the same right concurrently to the State Advocate acting '*motu proprio*', the democratic safeguards through collective ministerial responsibility and answerability to the elected House of Representatives would be lost as the State Advocate would in accordance to Professor Borg's reading of Article 91A be acting without being "*subject to the control of any other person or authority*".

17. The records of the debate concerning the passage of Act XXV of 2019 through Parliament also disprove Professor Borg's reading of Article 91A. Bill 83 of 2019 which was enacted as Act XXV of 2019 introducing Article 91A of the Constitution was given a second reading in the House on the 10th, 11th, 17th and 19th June 2019, and examined in Committee on the 8th July 2019. The House was addressed by the following members: Dr Owen Bonnici, Dr Carmelo Mifsud Bonnici, Dr Robert Abela, Dr Godfrey Farrugia, Dr Chris Cardona, Dr Simon Busuttil, Dr Jason Azzopardi, Dr Edward Zammit Lewis, Dr Stefan Zrinzo Azzopardi, Dr Jose Herrera, Mr Glen Bedingfield, Dr Aaron Farrugia, Dr Adrian Delia, Dr Chris Fearne and Dr Michael Farrugia (nearly all former or future Ministers).

18. At Committee stage Dr Peter Grech then Attorney General, also addressed the Committee on certain aspects of the Bill. None of them mentioned the change in the powers and functions of the State's Chief Legal Advisor that Professor Borg seems to suggest that Act XXV of 2019 and Article 91A of the Constitution (introduced under Article 10 thereof), brought about.

19. Is it possible that such a drastic and revolutionary reform of these functions escaped the notice of all these Members, or that they ignored it as



unimportant and not worthy of note? Had the Bill introduced such liberal and original reforms unparalleled in any other juridical system I know of, the Minister piloting the Bill would certainly have announced the achievement with all the fanfare that such novelty would merit.

20. Act XXV of 2019 by means of Article 12 thereof also amended Article 181B of the Code of Organisation and Civil Procedure to align it with the changes effected by the same Act. There is no hint of the powers that Professor Borg seems to suggest that the Act gave to the State Advocate. Sub-Articles (1) and (2) of Article 181B read as follows;

“(1) The judicial representation of the Government in judicial acts and actions shall vest in the head of the Government department in whose charge the matter in dispute falls:

Provided that, without prejudice to the provisions of this article:

(a) actions for the collection of amounts due to Government may in all cases be instituted by the Accountant General;¹

(b) actions involving questions relating to Government employment or to obligations to serve Government may in all cases be instituted by the Principal Permanent Secretary;

(c) actions relating to contracts of supplies or of works with Government may in all cases be instituted by the Director of Contracts.

(2) The State Advocate shall represent Government in all judicial acts and actions which owing to the nature of the claim may not be directed against one or more heads of other Government departments.”

Hence it is the Accountant General who has the authority to institute actions for the recovery of any funds or monies due to the State.

21. This innovative and revolutionary, supposed, reform of the Chief Legal Advisor to the Government (State Advocate) was also missed by Professor Kevin Aquilina in his paper published in the GhSL Online Journal on 11th June 2019 under the title *“The State Advocate Bill Number 83 of 2019: Acting in*

¹ Emphasis added by the author



*breach of Malta's international obligations.*² In that online paper Professor Aquilina was very critical of the fact that the Bill was not at that stage providing for the judicial review of certain decision of the Attorney General in criminal matters. He however, does not notice or mention the alleged discretionary powers that the Bill, according to Professor Borg's suggested interpretation, was proposing to give to the State Advocate in the initiation, continuance, or withdrawal of civil litigation concerning the State, without being tasked for the purpose by the proper administrative authority; and this without any administrative or judicial review whatsoever. It seems that Professor Aquilina only became aware of these extraordinary powers of the State Advocate in his article *"Acting in the public interest ... whatever that might mean"* published in the Malta Independent on Sunday on the 5th November 2023³.

22. On the other hand, the Honourable Dr Robert Abela, on the first day of the debate, on the second reading of the Bill, stated that; ***"Fl-opinjoni tieghi il-bidla krucjali u fundamentali li dan l-abbozz se jressaq il-quddiem, kif spjega tajjeb il-Ministru Bonnici, hija fl-Ufficcju tal-Avukat Generali. Rigward l-Avukat tal-Istat bazikament qed naqdbu funzjoni diga' ezistenti li ghamilha l-Avukat Generali qed naqilghuha mill-funzjoni tal-Ufficcju tal-Avukat Generali u mmexxuha lejn il-figura tal-Avukat tal-Istat."*** This statement remained unchallenged!

23. Had such a fundamental change of the functions of the State Advocate in particular, and of advocates in general, as envisaged by Professor Borg were included in the Bill, surely one of the thirteen Members of the House of Representatives who took the floor after Dr Abela, would have raised the matter and addressed the House in favour or against the change.

24. To conclude there is nothing in the State Advocate Act or in Article 91A of the Constitution that supports the theory that the State Advocate as an advocate for the State has the right, or the duty, to initiate or conduct or

² <https://www.ghsl.org/lawjournal/the-state-advocate-bill-no-83-of-2019-acting-in-breach-of-maltas-international-obligations/>

³ <https://www.independent.com.mt/articles/2023-11-05/blogs-opinions/Acting-in-the-public-interest-whatever-that-might-mean-6736256146>



withdraw civil action against third parties without being tasked so to do by the person heading the organ of State charged with the administration of the matter to which the potential, or actual, civil action refers. There is no other law that gives such rights or power to the State Advocate.

25. Consequentially the answer to your first question, whether the State Advocate is entitled to take judicial action '*motu proprio*' against third parties to recover money that may have been allegedly appropriated or illegally acquired by them to the detriment of the State is an absolute **NO**. The second question is dependent on the positive answer to the first question, and therefore does not require a reply. If, hypothetically, you had the right to initiate civil proceedings against third parties, you would not have the duty to act in each and every case without considering, in your discretion, all the aspects of the case including:

- 1) The evidence in your possession and its admissibility,
- 2) The prospect of recovery on the basis of the assets of the would-be debtors, and
- 3) Any other envisaged or actual proceeding arising from the facts of the case.

26. For the sake of completeness, I must state that while the question posed refers only to the recovery of money, this opinion applies equally to the recovery of assets, or for a declaration of liability for damages in tort or contract, and for the recovery of such damages.



Judge Anthony Borg Barthet



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