The Rule of Law

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In this article, Chief Justice Emeritus **Vincent A. De Gaetano** elucidates the meaning and significance of the Rule of Law in the light of international instruments and historical events, and assesses the Maltese legal landscape in this context. Brought to you here are chosen extracts on the advice of the author as an indication of the article's drift. The words '*omissis*' indicate breaks in the text between one extract and the next. The rest of the article can be found in Id-Dritt XXIX.

TAGS: Rule of law; Constitutional law; International law

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This is the text, with full references and additional comments added, of a keynote speech I delivered on Friday 7 December, 2018, at the Antoine de Paule Hall of San Anton Palace, Attard, Malta. The occasion was a conference organised by the Human Rights Programme of the faculty of Laws of the University of Malta in collaboration with the President's Foundation for the Wellbeing of Society to mark the 70th anniversary of the Universal Declaration of Human Rights. The conference was held under the distinguished patronage of H.E. the President of Malta.

GħSL has kindly accepted to publish this speech as a matter of public record. Since the speech was delivered, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe has, on 17 December 2018, published its Opinion "On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement" adopted at the Commission's 117th Plenary Session (Venice 14-15 December, 2018). This Opinion covers many of the issues mentioned in my speech, and much more.

(*omissis*)

In spite of more than forty years working in law, I still have difficulty in defining the Rule of Law. Putting aside for the moment the philosophical discourse of the distinction between descriptive and essential definitions, one finds that the words 'The Rule of Law' are used in several important international instruments, but with no attempt made to try and explain or define the expression. In the Universal Declaration of Human Rights, whose 70th anniversary we are marking this year, we find in the Preamble that:

> *'... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'*

The juxtaposition of 'human rights' and 'Rule of Law' on the one hand, with 'tyranny' and 'oppression' on the other, begins to suggest that we are talking about something which has to do with good governance. Article 3[1] of the Statute of the Council of Europe specifies that every member of the Organisation must accept the principles of the Rule of Law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. The Rule of Law is, therefore, a precondition to membership. Article 3 is to be read together with Article 1 of the Statute, which provides that members must collaborate 'sincerely and effectively' in the realisation of the aim of the Council of Europe as set out in Article 1(a) of that Statute, namely:

> *'... to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their social and economic progress.'*

Here, we begin to see a wider perspective, namely that the Rule of Law somehow has a bearing on social and economic progress. If a member State seriously violates - notice the adverb 'seriously', which is a convenient safety valve - the Rule of Law, then Article 8 of the Statute kicks in and that State may be suspended and eventually expelled from the Organisation.

[1] Statute of the Council of Europe (ETS 1), signed in London on 5 May 1949, and which entered into force on 3 August 1949 - Article 3: '*Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.*' Moreover, the third paragraph of the Preamble of the Statute reads as follows: '*Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy...*'. See also Andrew Drzemczewski, 'The Council of Europe and the Rule of Law: Introductory Remarks regarding the Rule of Law Checklist Established by the Venice Commission' in Human Rights Law Journal [Vol. 37, No. 1-6], pp. 179-184, 179.

(*omissis*)

Other international instruments: we find cursory references to the Rule of Law in the Treaty of the European Union,[2] but again no definition. Quite curiously, the Rule of Law is mentioned only in the preamble, and only once, of both the Charter of Fundamental Rights of the European Union[3] and of the European Convention on Human Rights (ECHR).[4] In the Charter we have:

> *Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice*.

On the other hand, in the preamble to the ECHR, we are told:

> *Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration ...*

So, the basic question still remains – what is meant by the Rule of Law, at least in a European context? Can history help us?

Not much, in my view.

(*omissis*)

The Venice Commission[5] has been working for many years now to give some substance to the notion of the Rule of Law. It has produced two documents in particular which are of relevance: a preliminary one in 2011,[6] and a more substantial document in 2016.[7] Both reports, incidentally, are considered by the Court in Strasbourg as being soft law. In its 2011 Report, the Commission proposed a functional non-exhaustive definition of the notion of the Rule of Law. It said:

> *....it seems that a consensus can now be found for the necessary elements of the rule of law as well as those of the Rechtsstaat which are not only formal but also substantial or material (materieller*

[2] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, in the preamble and in Articles 2 and 21.
[3] Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
[4] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.005, opened for signature on 4 November 1950 and which entered into force on 3 September 1953.
[5] European Commission for Democracy through Law, known as the Venice Commission, was set up by Resolution (90) 6 of the Committee of Ministers of the Council of Europe. Its current Statute stems from Resolution (2003) 3, always of the Committee of Ministers.
[6] Report 'On the Rule of Law', adopted by the Commission at its 86th Plenary Session (Venice 25-26 March 2011).
[7] Rule of Law Checklist adopted by the Commission at its 106th Plenary Session (Venice 11-12 March 2016).

Rechtsstaatsbegriff). These are: (1) Legality, including a transparent, accountable and democratic process for enacting law (2) Legal certainty (3) Prohibition of arbitrariness (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights (6) Non-discrimination and equality before the law.[8]

I would add something else: for the Rule of Law to be effective there must be a genuine predisposition, an attitude, of those in any position of power to give practical effect to these functional aspects of the Rule of Law, in other words to go beyond merely paying lip service.

In its second Report, of 2016, the Commission elaborated extensively on these points, providing a sort of checklist or benchmarks against which every State can measure where it stands in terms of the Rule of Law. These six main substantial points have been expanded with many sub-divisions. I will try to summarise these six points and their various sub-divisions, and after each I will propose some pertinent or impertinent questions with a Maltese backdrop.

The first benchmark is that of legality. Does the law of the land define in a proper and effective way the powers of State authorities, provide for judicial review of acts by State authorities and ensure that everyone – from the Head of State downwards – is subject to the law? In particular, is the Legislature's power to make laws subject to review if it is alleged that a law is in breach of a fundamental human right? Is the process of enacting laws transparent, accountable, inclusive and democratic?

The first temptation is to say that we pass this test with flying colours, but do we really? It is true that since the amendment of Article 65(1) of the Constitution in 2003,[9] it is today possible to challenge the validity of a law by means of an *actio popularis* (under Art. 116 of the Constitution[10]) not only on purely formal grounds (e.g. the parliamentary procedure was not followed), but more importantly on certain substantive grounds, such as, for instance, that the law is not in conformity with full respect for human rights, or with the European Convention on Human Rights, or with other treaties. The plaintiff, who incidentally need not even be a Maltese citizen, does not

[8] Report 'On the Rule of Law', adopted by the Commission at its 86th Plenary Session (Venice 25-26 March 2011), 41.

[9] Article 65(1) of the Constitution was amended by Article 7 of Act V of 2003. Prior to this amendment sub-article (1) of Article 65 read as follows: '*Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta*.' After the said amendment it now reads: '*Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.*'

[10] Article 116 of the Constitution: '*A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.*'

have to show any personal interest in support of the action. However, what if, for instance, I want to challenge the validity of appointments in the public service to the so-called 'positions of trust' which bypass entirely Article 110 of the Constitution?[11]

Here we are not talking of the validity of a law, but of the validity of an administrative practice, or malpractice - so Art. 116 of the Constitution is of no use. If I were to go for Article 469A of the Code of Organisation and Civil Procedure[12] to seek judicial review, apart from the fact that these acts of appointment are exempted under the very definition of an 'administrative act'[13], I would be required to show juridical interest in proposing the action, which, unless I can prove that I was promised the particular appointment to the position of trust which was instead given to someone else, it would be impossible for me to make any headway. The fact that I am a concerned citizen, concerned not only about the suitability of the person appointed to be in the public service, but also about the use, or possibly misuse, of public funds, is unlikely to get me anywhere. Another issue in connection with this benchmark is the increasing practice of legislating extensively by means of legal notices, which are not properly debated in Parliament - in fact, they are not debated at all. It is true that, by application of Article 11 of the Interpretation Act[14], an MP may, within a certain time, bring a motion to amend or annul that subsidiary legislation, but do Members of Parliament - all part-timers except for Ministers - have the resources to undertake such vetting of legal notices? In any case, even if subsidiary legislation is eventually annulled by resolution of the House, this does not affect (according to the Interpretation Act, at least) the validity of what may have already been done under that piece of legislation.

The second benchmark is legal certainty. Are laws, particularly laws which create criminal offences, easily accessible? Are court decisions which apply and, in some cases, interpret the law, accessible? Are the laws drafted in such a way that the effects of those laws are foreseeable? Foreseeability means, as we have seen in connection with the *Unifaun* case[15], not only that a law must be proclaimed in advance of implementation, but it must be formulated with sufficient precision and clarity to enable the citizens to regulate their conduct with it. Finally, are final judgments of the courts respected and effectively implemented?

[11] Article 110(1) of the Constitution: '*Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission…*'.

[12] Chapter 12 of the Laws of Malta.

[13] Article 469A(2) of Chapter 12 provides: '*In this article - 'administrative act' includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal to any demand of a claimant, but does not include any measure intended for internal organization or administration within the said authority.*' Although the English text of this provision uses the word 'includes', suggestive of a non-exhaustive definition, the Maltese text, which prevails in case of a discrepancy between the two texts, uses the word '*tfisser*', that is 'means'.

[14] Chapter 249 of the Laws of Malta.

[15] ECtHR App. no. 37326/13, 15 May 2018.

This final point – the enforcement in good faith of final judgments – is important. A final judgment, whether of the ECtHR or of a Maltese court, cannot be nullified, directly or indirectly, by legislation made subsequent to the commencement of the litigation leading to that judgment. If A is litigating against B, the State cannot change the law pending the litigation so as to favour one side over the other, as that would violate the principle of the equality of arms[16] and therefore, there would be a violation of Article 6. *Multo magis*, of course, if one of the litigants is the State itself.

The third benchmark: preventing abuse or misuse of powers. Are there effective safeguards – judicial, legal, administrative or mixed – against arbitrariness and abuse of power by public authorities? In particular, are public authorities obliged to give reasons for their administrative decisions, particularly decisions involving the use of public money, or does one have to extract these explanations by pincers or by a corkscrew?

(*omissis*)

Fourth benchmark: equality before the law and non-discrimination. The principle of non-discrimination requires the prohibition of any unjustified unequal treatment under the law and/or by the law, and that all persons have guaranteed equal and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or status. In particular, legislation must respect the principle of equality, that is, it must treat similar situations equally, and different situations differently.

(*omissis*)

Fifth – access to justice. Are there sufficient constitutional and other guarantees of judicial independence? Independence means that the judiciary is free from both external and internal (i.e. within the judicial system itself) pressure, and that judges are not subject to political influence or manipulation, in particular, but not exclusively, by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Such manipulation can occur when the lay administration of the Courts of Justice interferes, directly or indirectly, in the proper administration of justice. When I was Chief Justice, I always emphasised the difference between the constitutional independence of the Judiciary – the independence as guaranteed by the Constitution – and its institutional independence – the independence that the Judiciary must have from the lay administration of the Courts, an administration which is completely subservient to the Minister responsible for Justice. It was

[16] *Arras and Others v. Italy* ECtHR App. no. 17972/07, 14 February 2012, §§42-44; *Stefanetti and Others v. Italy* ECtHR App. no. 21838/10 et al., 15 April 2014, §§38-44.

precisely to guarantee as much as possible this institutional independence that in 2008 a provision was inserted, on my suggestion, in the regulations laying down the functions and duties of the various court officials, including the Director General of the Courts[17] to the effect that the Chief Justice could annul a decision of the Director General if the former was of the view that such a decision impinged upon the exercise of judicial functions:

> *12. Notwithstanding the foregoing provisions of these regulations, the Director General or any person authorised by him under these regulations, in the exercise of his functions thereunder, shall ensure that he does not interfere in any manner in the exercise of judicial functions by the members of the judiciary and, should this be the case, the Chief Justice shall, by written notice under his hand and in terms of this regulation, overrule any such decision of the Director General; and, in doing so, the Chief Justice may give such directions to the Director General or to any delegate thereof which might appear to the Chief Justice to be in the interests of the better administration of justice in the instant case.*

Remember that this provision is just a regulation in subsidiary legislation; it can be deleted at the stroke of a pen.

(*omissis*)

Finally - the last benchmark - what practical and effective measures are in place to ensure that the Rule of Law is not undermined by corruption and conflict of interest by people in public office or by people administering public services? Corruption leads to arbitrariness and abuse of powers, it distorts a nation's economy, creates unnecessary financial burdens on the citizens (particularly the most vulnerable), and can in due course lead to such general dissatisfaction that law and order will break down - which is exactly what the Universal Declaration of Human Rights seeks to avoid.

[17] Regulation 12 of the Civil Procedure (Regulation of Registries, Archives and Functions of Director General (Courts) and other Executive Officers) Regulations, S.L. 12.21.


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