

ORATION for 19 November 2019

LAW GRADUATION CEREMONY

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Good afternoon

In my first oration some years back I spoke of the need and the joy of reading and learning 'history, history and more history' (Napoleon). Today, in the short time available, I shall address another subject which is - or should be - close to our hearts. These are some of my reflections on how laws are made and who makes the laws.

Accordingly, my oration today is

A TRIBUTE TO LAW-MAKING AND LAW-MAKERS

Law-making involves a skill and a craft which is often underestimated. Laws do not make themselves. It rarely happens that laws fall out of the sky or come rolling down a mountain. If a law is written badly, it is not the law which is an ass but the person who miswrote it. Writing and making law is a huge enterprise, involving massive responsibilities. Not everyone should or can write good elegant legislation. But everyone can write bad laws.

It is not easy to write a good law and a perfect law does not exist. It is however easy to write a bad law. And a bad law can cause more harm than good.

What are the ingredients of a bad law? Poor writing skills; inability to use plain simple English; not having read enough before embarking on the exercise; lack of sufficient knowledge about the subject matter; unclear objectives; the inability to foresee future challenges, risks and pitfalls. The making of laws should be an extraordinary and enriching experience which requires a particular mind-set and careful preparation. We should not allow it to be reduced to a mechanical exercise, to cut and paste efforts or to blatant plagiarism from foreign sources. Laws are so poorly written and devised that they are repeatedly being corrected and amended, sometimes even twice in the same year – a clear indication of poor planning and unclear objectives.

In earlier times, with less resources, laws were designed to serve for centuries, or for scores of years as a minimum. Hammurabi produced one of the earliest written codes of law. Copies still exist and it still makes remarkable reading even today. The mighty King of Babylon was so pleased and proud of his Code that he decreed that any attempt to alter it would amount to a capital offence. His Code was meant to serve for eternity.

The early law makers like Moses, Draco, Solon and Lycurgus - the legendary lawgiver of Sparta whose legacy from 800 BC deserves more attention - left their mark and earned their rightful place in the history of law. Draco, reputedly the first

law-giver in Athenian history, had actually been petitioned to draft a code of laws by the people of Athens. He produced a Code marked by very harsh punishments for even the smallest of offences. The laws were placed publicly in the Agora so that they could be read, at least by the literate. Later, the other great law-maker and reformer, Solon, produced a more people-friendly and moderate version which replaced Draco's harsh Code. The Romans too set up their famous Twelve Tables and later produced great legal writers such as Cicero.

Laws were mostly brief, clear and precise. The old law-makers had an idea of law and a long-term vision of what they wanted to achieve. Laws benefitted from a single coordinating and drafting source. The drafting of laws was not scattered among sundry would-be writers and scribblers of varying competence and often little experience. Laws were written by persons who knew the law, practised it and respected it. The law-makers were leading citizens who were held in high esteem.

Despite all the experience and the resources available, today things are done differently. Laws are becoming longer, more detailed and less comprehensible. Some laws suffer from verbosity and confused thinking, and lack the judicious use of plain English. Haste always seems to be the prime consideration.

Adequate proof-reading of laws and regulations is a scarce commodity. One encounters so many different styles and so much trial and error. Laws once had a certain aura and majesty to them, and adequate care was taken to get a law right the

first time, by proper studying, planning, writing and reviewing processes. This seems no longer the case.

To aggravate the situation, much law has fallen into the hands of non-lawyers. It is not helpful that laymen, persons without any legal training, often presume to know the law to such an extent that they also presume to write it. I have encountered poor and incorrect attempts at transposing EU Directives into Maltese legislation. Indeed, much transposition of European law is being produced on the false and unacceptable premise that anyone can cut and paste. A equally serious concern is that, in some instances, the persons being regulated, be they accountants or estate agents, are allowed, indeed encouraged, to write the rules themselves - which they are very pleased to do in their own best interests.

What we need to ask is: how does a law really come about; who writes it and why; has it been copied and from where; why are so many laws opaque and badly written; in short, why have we gone so badly wrong? Is a bad law better than no law at all? Is it better to have bad laws administered by good persons, rather than have good laws administered by bad persons?

When you write a law, it is not enough for you to understand it. That may lead to conceit. You also need to be bit of a wizard, and ask yourself: would it be understood and applied in the same way as I understand it; how would it work in practice; could it be understood and applied differently in good faith; and perhaps, more importantly, - how could it be deliberately misunderstood, misinterpreted or

misapplied through bad faith? So writing law is not - and should never have become - a job for amateurs.

These are unpredictable, challenging and in some respects, troubling times. We are living in an era of unexpected political confusion, flag-waving nationalisms, good popes and bad presidents. It is also a season of impeachments. What used to be called the free world is led by someone who knows no history and who disdains and abuses the Rule of Law he had sworn to uphold.

The Rule of Law can have various different meanings, but at least it should surely mean that laws should be well written and well designed, and adopted for the right reasons; that they are easily accessible, clear and certain; and that the rules reflect generally held communal principles and high standards, proportionate to the intended objectives which should also be clearly stated.

So my final message is this: the law is a wonderful thing. It is the lawyer's best friend. It should also be the citizen's best friend. But somehow it does not always work out that way. Unfortunately, all is not well in the field of law, and these turbulent times are testing the law and those who practice and toil in its field. However, it is in times of crisis, distress and confusion that the role, moral value and true essence of law - of good law - come into their own. Good law can provide reassurance in an unpredictable world.

In 2008, a former Judge on the Ohio Supreme Court, Thomas J Moyer, wrote a paper in the University of Baltimore Law Review (available on the internet) addressed to lawyers and students of law. The title was “Beauty of Law” and the last paragraph went like this:

“The artist and the lawyer share a concern for life in its many forms, its successes and its failures. As lawyers, we scrape away the stone, we shape the rock. As lawyers, we use our sculptor's eye to reveal the beauty, the proportion in the rule of law. As lawyers, we use our fine brushes, our colorful palettes to bring symmetry and order.

As lawyers, we are fortunate that this is our life's work. Thank you. And have a beautiful life.”

With that I conclude. Thank you all and may you too have a beautiful life.

David Fabri