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"The Rule of Law: International Commitments and National nstitutions." Address by the Hon. Mr Justice Joseph A. Filletti (Malta)

Your Excellencies, distinguished delegates,

I stand before you with the challenging but formidable task of addressing you on the Rule of Law from the perspective of international commitments and national institutions. It stands to reason that before talking about commitments and institutions, we should have more or less a similar notion of the rule of law concept. At first glance, this might appear to be an easy notion to share but experience has shown otherwise. At popular level, it is generally agreed, even if somewhat hazily, that the rule of law is concerned with what government can do and how government can do it[1]. But the extent of the different interpretations and multiplicity of meanings that have emerged in the course of time has been so large that doubts and misgivings of all sorts have shrouded the concept.

The rule of law might have started as a legal rule originally but it is now clear that it cannot be severed from either political or moral considerations as well. To some, the rule of law 'represents a symbolic ideal against which proponents of widely divergent political persuasions measure and criticise the shortcomings of contemporary State practice'[2]. It is precisely because it seems to lack a precise core definition that it allows divergent views from the extreme or opposite poles of the political spectrum in the pursuit of their partisan political goals.

Given this rather intricate scenario that unfolds before us, you will pardon my delving for a brief moment into the ancient past with a view to tracing matter. It has after all become fashionable lately to think, talk and gauge in

terms of millenia. Almost two thousand years ago, a Roman senator, oftentimes engaged as counsel, took up the brief on behalf of a defendant accused no less of poisoning another individual. I shall not concern you with the factual vicissitudes or merits of that trial[4]. Rather, it is to draw your attention to certain remarks uttered by the learned orator in the course of his summing up the case for the defence and particularly the following,

" it is far greater shame, in a State which rests upon law, that there should be a departure from law. For law is the bond which secures these our privileges in the Commonwealth, the foundation of our liberty, the fountain-head of justice... The State without law would be like the human body without mind The magistrates who administer the law, the judges who interpret it – all of us in short - in order that we may be free."

Then, after an exhortative flurry of rhetorical questions, he continued thus,

"Look around at all departments of the State and you will find everything happening according to the rule and prescribed measure of law."

Granted that Republican Rome, and to an even lesser extent, Imperial Rome were far from being the ideal places where these fine and lofty principles could in practice be suitably nurtured and fostered, nonetheless Cicero's notions were truly outstanding. His were not new ideas. Other examples could be traced among the Ancient Greeks but certainly no one had as yet so eloquently spelt out the essential qualities of what should constitute the rule of law.

One would have presumed that Cicero's remarks needed no additional props to make them stand on their own feet. But we all know how resourceful and speculative mankind can be. So that it comes as no surprise to learn that in the course of time different and even contrasting interpretations sprang up. During the first two decades or so of this century, many were wont to associate the notion with the views of a British legal pundit, A.V. Dicey, as they flow from his commentary on the British Constitution. Essentially Dicey maintained that the rule of law requires that no man be above the law, that no man be punishable for other than a breach of law and that every person be treated equally before the law[4]. In time, certain aspects of Dicey's views became the subject of scathing attacks both from conservative and progressive quarters alike. To start with, and more so nowadays, the issue involves much more

than meting out punishment to transgressors. What would be the position, for example, were it to result that the State has used its control over the legislative process to undermine political or civil liberties? What if the statutory law itself is manifestly unjust? After all, both communist and fascist regimes justified the taking of oppressive and repressive measures against the ordinary citizen on the pretext of strict legality and obedience to the laws of the State. Or conversely, you could have a perfectly sound law but which, however, remains a dead-letter, neglected or completely ignored by the institutions of the State. Also, due to a misconception, Dicey disliked the French *droit administratif* system. But a century and half later, in the 1960s, a new line of thought favoured the introduction in Britain of a similar comprehensive system as the one practiced in France[5].

In the course of reviewing the ensuing debate during a regional colloquy held last month in Strasbourg under the auspices of the Council of Europe to mark the 50th Anniversary of the Universal Declaration on Human Rights, the general rappporteur *inter alia* stated that[6],

"The problem with Communist totalitarianism was not that it eliminated the language of rights. After all, even Stalin's Constitution of the Soviet Union was full of phraseology of 'rights'. Rather the problem is the inability to enforce them, if there is no rule of law... "

The link between the rule of law concept and the protection of civil liberties and human rights is inevitable. What we are talking about here is the relationship between the modern State and the day to day lives of its citizens. All too often, modern views of human rights stress upon the need to defend the individual against the State. It is one of the ways how the human dimension is related to the rule of law and, for that matter, law in general. In the way law is enacted and enforced it ought to be reasonably certain and known. Where the law confers wide discretionary powers there should be adequate safeguards against their abuse.

By way of furnishing us with a comprehensive description of the rule of law, De Smith and Brazier comment as follows[7],

'The concept is one of open texture, it lends itself to an extremely wide range of interpretations. One can at least say that the concept is usually intended to imply

(i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and

(ii) that the law should conform to certain minimum standards of justice, both substantive and procedural."

The detailed application of the rule of law requires a process of constant fashioning to determine its local and particular content in the light of an appreciation of the limits and benefits of legality, of modern governmental practice and of constitutional theory and procedure.

To my mind it is more natural and logical to elaborate first on national instruments before expanding upon international commitments, even though the one complements the other. It may be true that in a sense the two aspects can be discussed disjunctively but in so doing there is the danger of weakening the vital nexus between the two aspects.

The difficulty with the rule of law is that essentially it consists of values and not institutions. But behind the notion inevitably lies the State for its aim is to strike a just and workable balance between public order and individual liberty. If governmental rights are over-stressed, very often this would be at the expense of citizens' rights and vice-versa[8]. The stability of the institutions of the State within a democratic framework as well as the protection of civil rights depend upon it. Exercising power and the temptation to abuse it are always close to one another. The rule of law is designed to keep the powers of State, and of others wielding power, in check. Since legislative and executive power vests in the State authorities, it falls upon the judiciary to provide a balance and the possibility of checking over the other two institutions. The establishment of an independent judiciary, a clear and transparent judicial system with a prescribed set of substantive and procedural laws and regulations are today taken for granted in most countries, even if not wholly applied. The independence of the judge has to be above reproach so as to ensure that people have a trust in the system that is basic to the respect for the law, without which no democratic society can thrive. Rules must exist governing the judicial office and organic infrastructure that protect or assist the judges. Also, the national judicial institutions must guarantee everyone genuine access to an independent and impartial court and free legal aid if necessary. Any judicial system which sanctions material hindrances to access to justice on account, say, of exorbitant legal costs or the non-availability of a free-legal

aid system for those in need, goes counter to the rule of law principle. At the same time, independence and impartiality of justice must be understood as an added safeguard the citizen is entitled to rather than a means of self-protection for judges. Quite a number of violations have been declared in judgments delivered by the European Court of Human Rights on this point. We can stop and reflect about this negative side to dispensing justice by a State institution because there is an additional structure at international level. But what is the position where no such institution exists? In his most recent address to the Parliamentary Assembly of the Council of Europe delivered last month in Strasbourg by the President of the Republic, His Excellency maintained that,

"The juridical formulations of the limits of individual freedom and the limitation of the rights of the State are still matters of considerable controversy, but we have at least in Europe agreed on the basic concepts and we can extend our experience."

Clearly, his is an invitation for Europe to look beyond its region and share its experience and know-how with other regions by way of an international commitment.

The complexity of modern government has led to other institutional developments. The duties incumbent upon the State have increased considerably in modern times: the State must legislate extensively and govern with the common good as its ideal goal. It has 'positive' obligations to ensure that citizens' rights are fully enjoyed and observed by taking appropriate measures. It must refrain from unduly interfering with the rights of its citizens. So-called administrative discretion has at times tended to become arbitrary, high-handed, discriminatory and even abusive. It is precisely for this reason that the judiciary was also invested with the duty of judicial review of administrative discretion. New governmental structures added more pressure on the already overburdened load on the courts. Other institutions and remedies were called for.

Other forms of independent national institutions as, for instance, the Ombudsman, mediators, arbitration tribunals and ad hoc commissions constitute another important way of ensuring the respect for and compliance with the rule of law. Complaints of all forms by citizens do not, and should not, necessarily qualify to be dealt with by a court of law. The development of the Ombudsman system, as a national institution, has in particular, been hailed as a

success wherever it was set up. The office has become much more than a name for many people: it is one reliable, impartial and nonadversarial way of defending citizens' rights against the State. This institution has been extended to various areas and not solely to governmental practice. The office is particularly suitable for implementing economic, social, and cultural rights as well as civil and political rights especially in the defence of disadvantaged groups or individuals.

In Malta, since 1995, we have an Ombudsman to investigate citizens' complaints against various governmental sectors including areas in which the government has a controlling interest [10]. An Ombudsman has been appointed to deal with complaints concerning the university. In other countries, Ombudsman have been appointed to monitor general hospitals, mental asylums and even prisons. In the process there has been a proliferation of the use of the name 'Ombudsman' by way of complaint mechanisms which have often been confined within an organization, and which are neither independent nor impartial. Disappointment on account of this confusing development has had in certain countries an undermining effect on the public understanding of, and confidence in the Parliamentary Ombudsman. So long as the system remains contained in all respects, its future looks bright and promising, but not otherwise.

Earlier on I have said that we can only move towards international commitments provided that in the first place our own house is in order. International strife is very often the projection of local abuse. The process of implementation and prevention should begin at national level. It is the State that should be the principal custodian of the rule of law. At international level, the rule of law originates from those basic sources that make up international law. Unlike the position under domestic law, insofar as States are concerned, the subjects of international law enjoy sovereign rights. When conflicting national interests are present, it may become cliffficult to maintain order in the behaviour of States with one another. One fundamental principle in international law, ensuring compliance to international obligations by States, and hence a rule of law, is the principle of *pacta sunt servanda.* Adherence to the UN Charter and other international treaties or conventions is an international commitment that should never be taken for granted. The arbitrary use of force by one State against another, for instance, undoubtedly constitutes a serious violation of the rule of law at international level but it took quite some time to be so recognised. It was exactly 70 years ago that it was realized that until then,

and despite existing mechanisms for the prevention of war under the provisions of the Covenant of the League of Nations, there was no formal agreement as such that prohibited war absolutely. By means of the 1928 Pact of Paris, the international community of States agreed, for the first time, to renounce war as an instrument of national policy.

After the landmark 1948 UN Universal Declaration on Human Rights, the 1959 Declaration of Delhi endeavoured to bridge the gap between theory and practice by giving material content to the rule of law. The New Delhi Conference examined the various areas of government with a view to pointing out where the rule of law should be mostly felt[11]. The basis of all law, it affirmed, comes from a respect of human personality. Since then successive international documents have enlarged further the concept without losing sight of the main constituents. Then followed the two landmark UN Covenants - The International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in December 1966, eighteen years after the adoption af the Universal Declaration - although both instruments had to wait until 1976 to obtain the requisite thirty-five ratifications. The OSCE too has been in the forefront among those organisations that gave special and constant attention to the rule of law principle.

Constant criticism is levelled at the United Nations Organization and other intergovernmental organizations for not having done or are not doing enough to lessen international conflict, take decisive action against serious violations of international humanitarian law, redress social imbalance and check other threats to international peace and security. I think that despite all the shortcomings, this criticism is not fully justified. In Europe alone, during the 1970s right-wing dictatorships in the West made way for democracies. The 24-year span from the outstanding Helsinki Final Act, 1975 till today has witnessed the gradual evolution of security and cooperation in Europe and beyond towards a less hostile international climate especially in East-West relations. Left-wing totalitarian regimes in Central and Eastern Europe eventually collapsed as well. Confrontation gave way to mutual understanding and cooperation among States. On the negative side, in some instances, political and economic changes came about too abruptly. National institutions were either lacking or suspect. Territorial, ethnic, religious, cultural and other differences complicated matters even further. The transition was not always smooth; nevertheless the change for the better continued. In this regard, the various CSCE Accords that were reached served to spur on national institutions from the conceptual to the implementa-

tion stage. Implementation, in turn, demanded constant supervision and international monitoring. Such tasks went far beyond the possibility of judicial review. Other actors had to take a more engaging role. A better informed public, a watchful media, outside observers, the active involvement of non-governmental organizations, human rights defenders - all lent a helping hand to create the ideal democratic set-up where the rule of law could really work with ease. Remember that, quite often, NGOs and other voluntary associations are among the first to identify the plight of vulnerable groups.

During the past decade the OSCE always strove to give more meaning to the rule of law concept both with respect to national institutions as well as a means of conflict prevention. In the Copenhagen Document of 29 June 1990[12], the participating States affirmed that pluralistic democracy and the rule of law are essential for ensuring the respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. Established principles were given a more tangible form. For instance, in reaffirming that democracy is an inherent element of the rule of law, the importance of pluralism with regard to political organisations was specifically identified. Among those elements of justice essential to the full expression of human dignity, it mentioned that military forces and police were to be under the control of, and accountable to the civil authorities[13]. Once more, the old but basic norm that no one is above the law was reiterated in the Charter of Paris for a New Europe during the CSCE Summit of 21 November 1990.

A new sense of commitment was added to the concept at the Moscow Meeting of 3 October, 1991. Aware of the threatening scenario in certain areas, the participating States resolved to support 'vigorously' the legitimate organs of a State in the event of an overthrow or attempted overthrow, by undemocratic means, of a legitimately elected government of another participating State. A formal commitment was undertaken to counter any attempt to curb the basic value inherent in the rule of law.

The need for a comprehensive approach towards a more secure future within a democratic framework was again highlighted in the Lisbon Summit Declaration of 1996 . This strategy required improvement in the implementation of all commitments in the human dimension. A list indicating so-called "acute problems" that needed to be addressed by the OSCE highlighted the following:

• the continuing violation of human rights;

• threats to independent media;

• electoral fraud;

• manifestations of aggressive nationalism;

• racism,

• chauvinism;

• xenophobia,

• anti-semitism.

It stands to reason that the international commitment that is necessary to combat such problems cannot be achieved by one international organisation, like the OSCE, acting on its own. The UN Commissioner for Human Rights, Ms Mary Robinson, in a recent address to the Council of Europe to mark the 50th Anniversary of the Universal Declaration on Human Rights stressed that[14],

"The abuses prevalent in modern conflicts are appalling; and they are not just distant problems but tragic realzties also for European peoples, most recently in Kosovo.

They encompass widespread assaults on the right to life... Torture is common, as are measures attacking peoples' freedom of movement – forcible re-locations, mass expulsions, denial of the right to seek asylum... or the right to return to one's home.

Women and girls are raped by soldiers and are abducted into forced prostitution, and children are recruited to be soldiers. Tens of thousands detained in connection with conflicts 'disappear', usually killed and buried in secret, leaving their families with the torment of not knowing their fate. Thousands of others are arbitrarily detained, never brought to trial or, if they are, subjected to grossly unfair procedures. Civilian homes and property, schools, health centres and crops are deliberately destroyed. Those who try to assist civilians by providing humanitarian aid are attacked. Insofar as such abuses are oc-

curring in Europe they interrogate Europe's integrity and commitment to the values of the Council of Europe.

In an age of global communication, and media coverage these abuses are known to us all. Even if some conflicts are neglected by our media, we cannot plead ignorance. A few minutes searching on the Internet brings to light detailed information on such abuses in any serious conflict in the world today. The problem is not lack of information but a lack of appropriate action... "

All of these large-scale abuses stem from a total disregard of the rule of law. International organisations should do everything within their power to act whenever gross violations against the rule of law are manifest. The creation of a special international tribunal to deal with war crimes committed in the territory of ex-Yugoslavia was a positive step but in the long run the creation of *ad hoc* tribunals after the event is just not good enough and legally tenuous. For this reason, the convention establishing an International Criminal Court on a permanent footing is a most welcome development in the international field. The OSCE and other organisations should commit themselves in this regard to do their utmost for its rapid adoption by the international community.

Our focus should be on how international institutions, with their strengths and capabilities, can work together to achieve greater cohesion on mutually reinforcing institutions, utilising their respective and comparative advantages. Action speaks louder than words. At this very moment, the OSCE is deploying an assessment team to Kosovo to prepare the way for some 2000 verifiers who are expected to arrive in the province in the very near future. Their job, not quite an easy one, will be to evaluate the Serbian government's compliance with the United Nations' demands for an immediate end to the conflict in Kosovo. We wish the OSCE verification mission every success. Short of extreme remedies like the use of force, and to a lesser degree, imposing economic sanctions, we should look towards medium and long term projects. In other words, we should not solely focus on tense ethnic or political disputes but also on chronic structural deficiencies at the national level as a result of which the rule of law suffers. Implementation and prevention, by way of an international commitment, implies providing more administrative support and financial assistance to the training of personnel and the launching of information campaign programmes[15].

One stumbling block that needs to be addressed by multi-State organisations

like the OSCE is how to overcome the perception, real or contrived, that taking appropriate action is tantamount to illegally interfering or intervening in the internal matters of this or that State.

My country too is deeply committed to upholding the rule of law principle whatever the cost. Like many others, my country too has had its own occasional lapses against the rule of law. On the positive side, it can safely be said that these lapses were very few and, in the main, adequate redress was provided, even if not always promptly. Indeed, whatever their failings, the Maltese people always had a profound respect for the rule of law. As you might have occasion to observe during your short stay among us, Malta and its people are proud of their historic past. Whenever it was a matter of defending our rights, the Maltese never shirked from their duty to stand up and be counted. Way back in 1802, a Maltese Declaration of Rights was presented to the United Kingdom Government on behalf of the people of Malta and Gozo. One paragraph in particular of this Declaration most aptly encapsulates the very essence of the Rule of Law[16],

"No man whatsoever has any personal authority over the life, property or liberty of another; power resides only in the law, and restraint or punishment can only be exercised in obedience to law".

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