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Rule of Law and independent courts

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As agreed by the European Commission for Democracy through Law, this brief report addresses the question of the rule of law and independent courts in an essentially pragmatic manner.

1. The concept of the rule of law (Rechtstaat, état de droit, stato di diritto) covers, as usually understood, the requirement that the law should be respected: domestic law within the State, and international law in the context of international society. Put another way, the State - in the broadest sense of the term - must rule out force, arbitrariness and injustice, abiding scrupulously by the law, that is to say the principles of internal and international legality alike. This basic principle is the nub of the rule of law as a concept.

2. If genuine rule of law is to exist at internal level, however, it is necessary for such law to be that of a democratic society. This is an absolute necessity. History has taught us abundantly and plainly that there can be no rule of law in a totalitarian State or dictatorship. These latter forms of government have to do with a police state, not with the rule of law.

The concepts of rule of law under democracy consequently go hand in hand, and are indissociable. The first can only exist within the second, although it cannot be claimed that any democratic regime creates a satisfactory rule of law in all cases. It is true that the rule of law is to a considerable extent an ideal that any genuinely democratic State must pursue with all its might and at all times, for the sake of constant improvement.

The rule of law being in this way bound up with democracy, all the conditions inherent in this latter also underlie the concept of the rule of law. Instances include the sovereignty of the people, the representative regime, multi-party system, separation of powers within the State, equality of all before the law, respect for human rights and fundamental freedoms.

3. In present-day democratic societies, the rule of law is closely bound up with the separation of powers or fundamental functions of the State - functions, be they legislative, executive or jurisdictional, which are in the hands of different bodies. The legislative power legislates on the basis of the constitution, the executive power carries out the law through administrative enactments, while the judicial power renders justice and is the guarantor of legality, the proper application of the law, both on the part of parliament (conformity of laws with the constitution) and on that of the government (conformity of administrative enactments with the laws). The role of the judiciary, then, is mainly to protect human rights and fundamental freedoms vis à vis, in particular, the administration.

4. It is consequently imperative that the jurisdictional power shall be independent of the other two State functions - legislative and executive - if it is to be able to carry out its mission freely, objectively, impartially and effectively, in the common interest. We can go so far as to say that this independence is the prime condition for the rule of law. It is guaranteed in fact first by a set of functional guarantees, then by a set of personal guarantees for magistrates, and lastly by means of guarantees which for the most part are inherent in jurisdictional proceedings.

A. Functional guarantees

The jurisdictional function is exercised by courts established by the law, made up of independent magistrates. Their mission is to settle on the basis of the law, and in accordance with organised judicial proceedings, any question coming within their sphere, by means of decisions which are binding on the parties.

The functional independence of the courts is ensured vis-à-vis the other two State powers as follows:

a. Vis-à-vis the legislative power

1. Whenever the courts are confronted with legislative enactments whose contents are contrary to the constitution, they must either, depending on circumstances, set in motion through the intermediary of the competent organ the procedure for the jurisdictional verification of the constitutionality of those enactments, or themselves carry out such verification - if they are empowered to do so - and refuse to apply the anti-constitutional laws.

Verification of the constitutionality of laws by the courts is a fundamental function in a State based on the rule of law.

2. The legislative power must not bring any influence whatever to bear - and still less carry out parliamentary verifications - on the judicial power in connection with trials which are still pending.

3. The legislative power must not, by means of laws specially voted for that purpose, revoke final judicial decisions or decisions reached by arbitration.

The actions outlined under 2. and 3. would constitute interference by the legislative body in the power of the judiciary and would conflict with the principle of the separation of powers.

4. Laws having retroactive effect, concerning particularly the rights and freedoms of individuals, must only be voted in exceptional circumstances and within the strict framework of the constitution.

The rule of law demands that the rights and freedoms of each shall be governed by the law that is in force at the moment of the judgment, and not by a subsequent law having retroactive effect. Retroactive laws may run counter to the principle of equality before the law.

b. Vis-à-vis the executive power

1. Neither judges exercising their functions nor courts as judicial bodies are subject to any a priori or a posteriori hierarchical control on the part of the Minister of Justice or any other body coming under the executive power.

This guarantee of impartiality is self-evident.

2. Judges may not receive any advice, instructions, guidance or orders when it comes to the exercise of their judicial functions. As magistrates, they act in an individual capacity. Without this elementary guarantee judges would not be independent.

3. Decisions of the courts are not presented for the approval of any administrative body. Rather they are binding on the executive power, which must carry them out or help ensure that they are carried out.

4. Magistrates must not exercise political or administrative functions, other than certain specific tasks of limited duration - such as participating in committees responsible for drafting legal codes or other important legal texts.

B. Personal guarantees

The personal independence of magistrates is ensured by according certain guarantees enabling them to carry out their functions completely independently and impartially, and securing them against fear, threat or pressure on the part of - notably - the executive power. These guarantees are, in particular, as follows:

1. The fact that magistrates cannot be removed, i.e. that they are appointed for life and cannot be removed from office until they reach the retirement age laid down by the constitution, other than in the presence of certain established reasons, such as criminal conviction, disciplinary sanction, invalidity, professional inadequacy, etc - which reasons must in all cases be found by a court decision. The fact that magistrates cannot be removed is the fundamental guarantee of their independence.

2. The principle of self-administration of the judiciary, which means that a number of important questions relating to magistrates' careers must come within the sphere of the judicial power, i.e. the courts themselves or other collective bodies made up of magistrates: senior judicial councils and disciplinary councils, the latter being judicial authorities or bodies.

The important questions are the following:

- the promotion, assignment, transfer and secondment of magistrates. Similarly the appointment of presidents or public prosecutors of State Supreme Courts should not be a matter for the government, as it is in several States

- inspection of magistrates
- direction and management of courts
- disciplinary power
- annual leave and leave of absence for vocational training.

It is common knowledge that in all these areas most governments intervene to an extent that varies from one State to another. It would be advisable for there to be less interference of this kind on the part of the executive, and if possible none, so as to enable the judiciary power to be completely autonomous.

3. A third and equally important factor making for the personal independence of magistrates is the question of their remuneration, which needs to be determined in the light of the importance of their functions. In particular, no category of officials has the right to be paid more than magistrates.

C. Other guarantees arising from, inter alia, requirements relating to judicial proceedings

The aim of these guarantees is to strengthen the independence, efficiency, objectivity and neutrality of the courts; they are as follows:

1. Civil liability of judges

The independence enjoyed by a magistrate does not exempt him from the liability he may incur in the event of failure to exercise his functions properly. Apart from disciplinary and criminal liability, which is governed by joint rules, there is accordingly - and rightly so - a special regime coming within the sphere of the judicial power, whereby magistrates bear civil liability for any injury they may cause a party through deceit, grave error or denial of justice in the exercise of their functions.

2. Procedure whereby judges may be challenged

If he is to be truly independent, a judge must always be in the position of an impartial and neutral third party. Whenever there are legitimate grounds for believing that impartiality is wanting, therefore, the proceedings whereby a judge may be challenged must be set in motion, at the initiative of the judge himself or of the parties to the trial.

3. Public nature of hearings

The fact that a hearing must be held in public protects litigants from a secret form of justice and ensures that they have confidence in the courts. There may be no exceptions to this principle, other than those provided for in paragraph 1 of Article 6 of the European Convention on Human Rights, the main aim of which is the protection of the interests of minors, privacy and the interests of justice.

4. Public nature of the judgment

Judgment must be passed in public. This principle, which is absolute and brooks no exception, is dictated by the same reasons as those set out under 3.

5. Reasons for judgment

The reasons must be as full and well-founded as possible in terms of the case being judged. The relevance of the judicial argument hinges on those reasons. The judgment must also include, in every case, the opinion of the minority, which is in itself an expression of judges' independence.

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By way of conclusion, it is worth recalling that the independence of justice - a question of capital importance which is the criterion of the rule of law - cannot be governed solely by legal provisions, even when these are enshrined in the constitution. If the independence of justice is to be reflected in everyday practice, and become a general rule - which will demand a steadfast and constant effort on the part of all - such texts must also be put rigorously into effect, and in their entirety.

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