Debate & Analysis

The thorny issue of administrative offences

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I have written *ad nauseam* on the topic of administrative offences though my writings on the subject remain a call in the wilderness. I did make the point – repeatedly – that the government needs to address in a thorough and holistic manner the institute of Administrative Offences in Public Law.

Needless to say, although I have warned government that it is heading into a brick wall by not responding to this issue well, all my past appeals have fallen on deaf ears – it is just like water off a duck's back.

The more time passes, the more the situation escalates and unless there is a prompt and adequate review by government of the administrative sanctions regime, the end product will continue to be the same: (a) more court pronouncements declaring administrative offences as currently obtaining in the Statute Book in breach of Human Rights Law; (b) more regulators will have lesser and lesser coercive enforcement powers with these authoritative court pronouncements; (c) more confusion will reign into the law as few people will end up complying therewith; and (d) more mockery is made by government of the rule of law for the way this institute is developing in Malta is heading in the direction where nobody will obey the law. Government, of course, gets singularly and unreservedly all the credit for the country's maladministration in this sector.

There is thus, and has since quite some time now, been a collapse of the rule of law in the realm of administrative offences. This is symptomatic of how government treats with complete disdain the rule of law in Malta. Lately, this was confirmed by the Civil Court, First Hall, in its judgments of Phoenix Payments Ltd. v. the FIAU and the State Advocate (30 March 2023) and Insigna Cards Ltd. v. FIAU and the State Advocate. As always, government will appeal these judgments – irresponsibly of course as this will only serve to delay solving the problem whilst squandering taxpayers' money – as we already inevitably know what the outcome of the appeal proceedings will be, and it cannot be otherwise when one studies the various past judicious court decisions in the realm of administrative offences that continues to deposit more egg on government's face. The lessons of history – all written black on white – remain unlearnt by a recalcitrant government that does not understand what shame is.

This is not to say that government has always been idle and that no attempts have been made in the past to address this problem. But these attempts have been piecemeal, feeble, disjointed, and have not addressed successfully root and branch the real cause of the problem.

Each time a court declares administrative offences as enacted by Parliament to be in breach of human rights law, first there is an interminable hiatus. Then, when the machinery of government starts to grind, it tends to take stock of the problem only in a piecemeal and convoluted fashion. Thus, if for example there are fifty laws that impose administrative sanctions on the statute book, first government addresses only that law that has been declared illegal by the court whilst ignoring all the rest. If a second law is declared illegal by the courts, then government will tackle the second law only, and so on and so forth. Not only is this a dilettante's approach but at times incomprehensible, and at times impracticable, with different solutions adopted for one and the same problem. There is thus no consistency, uniformity, and coherence in finding adequate solutions for common problems. The Statute Book inevitably must suffer the brunt of government's bad governance.

Sorting the problem of administrative offences is not a question that government does not have the necessary legal expertise to address and sort. Yet with its regiment of lawyers in the State Advocate office coupled with the external legal consultants that the justice minister unjustifiably engages costing hundreds of euro to government coffers to compensate from public funds the minister's friends when he has an Office of State Advocate 7 days a week at his service to provide advice, government still continues to be incapable of coming up with a plan of action intended specifically to solve this question. There is no accountability in government for, if there ever were, this problem would have been resolved quite some time ago.

The real cause of the problem is that administrative offences as contemplated in Maltese Law tend to be (for not all are) in breach of human rights law. Hence, a diligent government (not the Maltese one surely) would first start off by carrying out a comprehensive study of all administrative offences that exist on the statute book. It should, in particular, identify what types of punishments are imposed, by which authority, and whether that authority is independent and impartial. When that study is available, one has to carry out a second study on how the European Court of Human Rights is deciding cases on the subject of administrative offences. This will be a learning curve for government. There are several judgments delivered by the Strasbourg court that – to date – continue to be totally ignored and set aside by government.

Subsequently, when one has all that data compiled, a third and final study is to be carried out to understand how foreign jurisdictions are dealing with administrative offences in their legal system. For instance, just to indicate how far off the mark our government is when enacting administrative offences, the Italians have an Administrative Code to deal specifically with such offences addressing every imaginable topic that would fall under that heading, contained in only one single codified law, not like in Malta where there is a cacophony of diverse laws all making different provisions and, at times, establishing contradictory rules from each other.

When all these three reports are compiled – and ideally they should be compiled concurrently by different teams so as not to continue to waste further time in properly putting our house in order – the next step would be to compile various Council of Europe Parliamentary Assembly resolutions and the Venice Commission reports that have referred to this subject as well as any other international organization's recommendations that might be pertinent to this branch of Public Law.

It is only after all this information is compiled together with the Maltese case law on the subject as well as any pertinent writings on Maltese Administrative Offences, that a commission of jurists should be appointed to study all this documentation and chart the waters ahead. That commission can be made up of former Chief Justices, judges, magistrates, and attorneys generals. It should also have representatives of regulators that inflict administrative sanctions. The Commission would thus make its recommendations from a holistic perspective for government and parliament to implement after due consultation with regulatory authorities and the public.

Administrative offences have mushroomed over the years without a coherent policy to direct their development. Cabinet is mainly responsible for this because it approves policy and the bills that give effect to that policy in the House of Representatives. But Cabinet has no policy on the matter apart from haphazard disjointed initiatives here and there. There has been no coherent policy to regulate this institute of Administrative Law with the result being chaos as the courts have consistently and repeatedly confirmed. Now is the time for government to take heed of what the courts have been telling it, to take the bull by the horns, and to consider this matter conclusively once and for all. This problem has dragged on for too long and government's lethargy to act decisively is unjustified. As government has over the years failed miserably in this task, it should be honest and brave to publicly declare its total incompetence in dealing with this matter and note its maladministration of the country in this respect, and pass on this task to a commission of experts as suggested above, with the caveat that government will not meddle with the commission's recommendations and, on the contrary, will implement them to the full as soon as possible. This is the only way how amateurism in government can be successfully addressed through expertise and an age-long problem is thereby solved.

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Nevertheless, that government does not respect the rule of law and human rights and has no intention of doing so when it disregards not only the judgments of the Maltese Courts but even those of the European Court of Human Rights is confirmed by the latest White Paper issued in relation to occupational health and safety where the White Paper – contrary to the consistent string of pronouncements of the Maltese Courts and those of the Strasbourg Court – is recommending the infliction of an administrative penalty of twenty thousand euro.

It is now more than clear that government does not learn from its repetitive and ongoing past mistakes and, once the White Paper is translated into an Act of Parliament the courts will have no other option but to declare the enforcement provisions of the law-to-be enforcement-less, and strike it down as they have done on several other occasions in the past. The whole purpose of the new law would therefore have translated itself into a total and complete failure in enforcement of OHSA infringements with the added complexity that after the new law comes into force and its declaration of invalidity on constitutional and human rights basis declared, there will be no possibility to enforce not even one single provision of the OHSA law. It is a case of zero step forward and a trillion steps backwards.

The first time it is a mistake, possibly – one may concede – a genuine one as well. The second time it is negligence. The third time it is recklessness. The fourth time it borders on the criminal even if there is no criminal offence of maladministration, an offence that needs to be added to the Criminal Code with utmost urgency, though – of course – this might have its side effects as Cabinet meetings will then have to be held at the Corradino Correctional Facility. In so far as administrative offences are concerned, government has reached and bypassed the fourth stage.

Indeed, one gets the impression that government is purposefully, not to say maliciously, coming up with legislation that will eventually be declared unconstitutional by the courts to disparage the rule of law, so that there will be no effective law enforcement in the country. That there is a culture of impunity is no hidden secret. Not only has it been so declared in the now government-forgotten and ditched report of the Daphne Caruana Galizia Assassination Board of Inquiry but also from the fact that more than one year has elapsed since the conclusion of that report and no legislative measures implemented by government to criminalize the culture of impunity that government continues to foster through its inaction in implementing that report as well as the Bonello Commission 30 November 2013 report. We continue to be – thanks to government – citizens of the misruled Republic of Malta!

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