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by Hubert LEGAL

Director General of the Council Legal Service

THE RULE OF LAW

Let me start by thanking President Wallis and the other members of the Executive Committee for inviting me to signal my interest in the work of the Institute by offering to the proceedings of the General Assembly a contribution on a topic which is intended to be of general interest.

I must also express my gratitude and my admiration to the authorities and the legal community of Croatia for providing a support of a high level, in keeping with the standards this youngest of our Member States has constantly maintained in its participation in the work of the Union since the first days of its presence among us.

I am also personally grateful for the opportunity given to me to discuss here, from a broad and dispassionate perspective, the idea of the rule of law, a value of the Union and a principle that the Preamble of the Charter puts on the same footing as that of democracy. An initiative by a group of ministers tending to the establishment of a dedicated mechanism and the definition of the portfolio of the First Vice-President of the proposed Juncker Commission have recently put this principle under the spotlights, in the wake of developments in Hungary some time ago and of ensuing institutional actions which gave rise to uneasiness about the frame in which they were conducted - which did not prove entirely satisfactory.

I will not embark into a full-fledged academic discussion of the history and glory of the concept. I would like to limit myself to contribute to a reasonable outline of its function and of its scope in the legal framework of the Union as a value that the Member States have in common, in the words of Article 2 of the Treaty on European Union. Then I would like to go from there to a reflection on the possibilities open for the Union and its Member States to take action in order to promote and ensure the respect of this value in a sensible and coherent manner. I am not an activist; I am not a reactionary. I would like to be candid and lucid and I think this place offers a perfect setting for this earnest mental effort.

We have indeed used as a foundation of our common house of Europe a piece of rock that is as famous and respectable as it difficult to delineate precisely. The law is not something to be "taken into account", but something to be fully and unconditionally implemented with no exceptions but those it foresees. This is the Rule of Law. Yet, there are books about it, mainly about what it means… To start with, the terms used in the different versions of the EU treaties do not translate into each other. Studies within the Council of Europe indicate that the equivalent in French of the

Rule of Law is la prééminence du droit. Therefore not l'Etat de Droit, which is the French denomination of the value in question, very close to the German and Austrian concept of the Rechtsstaat. Admittedly, there are different trends of intellectual history behind these differences of terminology and the liberal doctrine of political science, from Hobbes to Hayek, can hardly be assimilated to the continental constitutionalist approaches, from Montesquieu to Kelsen. One line attempts to limit the State, the other to legitimise it rationally. At least the sensitivities do not match.

But it does not follow that the product of these contrasting trends of social theory cannot be interpreted in a reconciled manner. When the terms are used in the case-law of the European Court of Justice, which is actually very seldom, the Rule of Law appears in the phrase "a Community based on the Rule of Law", which translates the French "une communauté de droit" in the *Les Verts* case of 1986.[1] In the language of the Court's deliberations, *"une communauté de droit"* is an ambivalent term. It literally means a community that shares a single legal order. But it also replicates *"l'Etat de droit"* in the context of the European Economic Community. L'Etat de droit is the State in which the Rule of Law prevails. Fair enough, the difference in terms may therefore not be that meaningful, and we will not solve here the question whether the State here means the situation, with a small "s" (as in state of emergency, Etat de Nature, etc…) or the constitutional body, with a big "S" (l'Etat c'est Moi), or a mode of organisation of society, to quote La Fontaine :

> "Les grenouilles se lassant
> De <u>l'état démocratique</u>,
> Par leurs clameurs firent tant
> Que Jupin les soumit au pouvoir monarchique."

In the *Les Verts* case, the reference to a Community based on the Rule of Law was not ornamental but intended to support the requirement of a complete system of remedies and procedures in the Community, since the Rule of Law requires -to quote the judgment- that the institutions and the Member States cannot avoid a review of the compatibility of their actions with the fundamental law, which for the Community is the Treaty, to be regarded as its basic constitutional charter. This indicates two characteristics inherent to the ECJ's reading of l'Etat de droit, which are first the hierarchy of norms, since even legislative acts must respect certain fundamental rules of constitutional value, and second an effective access to an independent review of all measures adopted by the public authorities.

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[1] 23 April 1986, *Les Verts*, 294/83, point 23.

Of course, this affirmation of what the "communauté de droit" entails did not follow any explicit analysis of the place of the concept in the system of values common to the Member States of 1986. It came more as a spontaneous production emanating from the legal culture of members of the Court and their aides - as is natural to judicial work. The concept was used to support the idea that there should not be gaps in the system of review allowing certain decisions of the authorities to be protected from an effective judicial control of their legality.

But the problem with principles extracted by judges from legal history as they see it - with their creativity, prejudices and limitations - is that the scope of these principles may vary with judicial discretion and the changes in the composition of Court chambers.

Koen LENAERTS, who never made a mystery of the role he played in the drafting of *Les Verts*, was also involved in the *Jégo-Quéré* case, of which I was rapporteur in 2002,[2] in which we tried, for reasons analogous to those in *Les Verts*, to do away with the Plaumann conditions of admissibility for individuals to bring matters to the ECJ. Francis JACOBS gave an opinion in the same sense in the Unión de Pequeños Agricultores case. Yet the Court did not follow us there, justifying its restraint by an interpretation according to which the intention of the authors of the Treaty was not to open widely the right of action to individuals.

If one accepts that predictability of legal solutions is a component of the Rule of Law, then judge-made law is not necessarily the best expression of this principle - particularly in its hesitations between the essentialist approach and the common-denominator approach. The essentialist - or teleological - approach makes the interpretation of a principle a matter that must be decided in abstract terms on the basis of its literal meaning and of its place and purpose in a coherent system of constitutional thinking; the common-denominator approach starts from the assumption that adherence to a common system of values cannot have the effect of imposing on a given Member State an interpretation of any of these values different from the one by which it felt bound when entering into the agreement. Giving broader legal consequences to a fundamental rule than one Member State recognized when ratifying the Treaty would run counter the principle of public international law that no State should be bound by what it has not accepted.

[2] 3 May 2002, Jégo-Quéré/Commission, T-177/01, and 1 April 2004, Commission/Jégo-Quéré, C-263/02P.

The Court has opted for the common-denominator approach in its Grand Chamber judgment of 2008 in the *FIAMM* case[3] dealing with the non contractual liability of the Union, when it stated - at point 175 - that liability was excluded in the absence of an unlawful act because the comparative examination of the legal systems of the Member States did not lead to the conclusion that there was a convergence of their legal systems to accept a principle of liability if unlawful action is not established. This judgment was issued on the basis of Article 340 TFEU which states that the Union makes good any damage caused by its institutions *"in accordance with the general principles common to the laws of the Member States"*. The right to a compensation for damages being one that can be regarded as a general principle of law, one sees no reason to exclude that the same approach should be followed for other fundamental principles and values that are listed in Article 2 TEU on the ground that they are common to the Member States. Therefore, the Rule of Law should not, following the judgment in FIAMM, be interpreted in a way that would go beyond what is accepted by the laws of the Member States in a converging manner.

Yet, such a common-denominator approach meets three immediate objections : one, following an enlargement of the Union, should the standard be lowered in case the previous common interpretation is not accepted by one or more of the new members ? Second, a comparative examination of the systems of values of the Member States, which do not necessarily take a definite legislative or jurisprudential form, but involves doctrine, opinions, customs and traditions, is much more difficult to conduct accurately than is a comparison of the legal systems of non contractual liability of the Member States. To identify a convergence there is an exercise that can be much more easily exposed to a criticism of being arbitrary or akin to politics. Third objection is that the common-denominator approach is in a way incompatible with the purpose of a set of values which are a goal to be pursued, a guide for political action, more than -or at least as much as- a threshold above which one should stay. It is clear that democracy and the Rule of Law pure and perfect exist nowhere. They are ideals and theoretical models about which it is difficult to think in terms of direct compliance without breaking them down into specific requirements for which the objections to a common-denominator approach would not apply.

The determination of these specific requirements should also be performed in accordance with the doctrine of *effet utile*. Among the values of the Union enumerated at Article 2 TEU are, next to the Rule of Law, democracy and respect for the fundamental human rights.[4] Since the essential components of democracy are well known, and the substantive contents of fundamental rights are

[3] 9 September 2008, FIAMM/Council, C-120/06P.

[4] In addition to human dignity, freedom and equality.

listed both in the ECHR and in the Charter, one should think about the Rule of Law of what it adds concretely to the other two most relevant values - whose substance has been more thoroughly elaborated and accepted in negotiated form. *Effet utile*, or the added value of the Rule of Law. Some degree of overlap and interaction is certainly inevitable but a different focus should reduce to a minimum the effect of duplication.

Democracy is the form of government in which the source of authority rests with the people; human rights express the idea that the dignity of mankind imposes certain intangible requirements of life in society that should never be disregarded by public authorities; the Rule of Law is the state of societies where all norms are part of a single body that applies objectively to all persons and actions and of which respect is guaranteed through effective procedures and remedies. Actually, both the Rule of Law and respect for human rights act as limiting factors, in a democratic society, to what an entirely free operation of the democratic principle could produce. The human right factor essentially provides a material limit (although the due process requirement, for one, does not fall within this category); the Rule of Law principle essentially provides obligations of a procedural character, having to do with the organization of the law, its stability, its accessibility, its application and its invocability in Courts of justice whose rulings are implemented.

The two relevant principles mean that there are inherent limits, in terms of substance and in terms of process, to what political authority, however legitimately held and exercised, can do with discretion. The support of a majority of the people does not give a government or governmental organs the authority to play with the legal landscape at its will - either by action or by omission.

This latest determination has been at the source of the criticism against the liberal version of the Rule of Law, presented as an attempt by the privileged to annihilate the sovereign right of the people to do away entirely with the set of rules designed by the power holders to make their privilege permanent. Yet it is clear that accepting the Rule of Law as a principle of organization implies, as a bare minimum, and whatever the intellectual tradition one comes from, that the arbitrary use of power by a tyrannic or dictatorial government will be combatted, even if the tyran is the people or a class of it. When a monarch, or whatever sovereign, decides to stabilize his authority by accepting that the source of his imperium is not his personal will but a permanent set of rules that he commits also to abide by -*Magna Carta* wise-, then the Rule of Law may prevail. Even if the constitutional monarch thinks otherwise, the move to such a Rule in no way prevents the demos from overthrowing an insufferable master, law-abiding or not, and to change the institutions.

Among the three relevant rules, democracy ranks first. But the new power will have to establish its legitimacy in acceptable forms, and to manage the transition over time, taking into account the situations protected by legitimate expectations.

What this boils down to is that the Rule of law does not say what the Law should be, but says that some reason should apply to frame the abusive tendencies of lawmakers (to use the vulgar, non-latin word for legislators) as well as those of judges and lawyers. Law is not the property of those who make a business of it - in the commercial or non-commercial sense. Deviations may happen in situations of crisis as well as in everyday life, when accepted procedures are treated negligently on the pretext that they are formalistic red tape or a cumbersome waste of time. Rules of procedure are usually intended to protect fairness in decision making and the constant calls for more flexibility supposed to be required for modernisation and competitiveness often have at their root a preference for bureaucratic discretion and secret deals, at the service of established positions, over democratic choice and legitimacy.

At the end of this very general consideration of the essence of the principle, the main real question I retain as open and pertinent is whether respect of the Rule of Law may legitimately and effectively be invoked to support the criticism of a given piece of legislation. And what kind of criticism ? To support a plea of illegality, the Rule of Law should be narrowly interpreted and take the form of common-denominator based thresholds. If interpreted in the dynamic sense of an objective that may evolve over time towards further improvements, the principle may only support political condemnations whose legal effects would be at most indirect. The distinction between standards and trends is crucial to determine the kinds of action that can be conceived. It would be strangely paradoxical to give to the Rule of Law, a principle of which legal certainty forms part, a scope that would be too constructive and that would produce legal effects out of assessments based on untested arbitrary value judgments.

To avoid an excessively broad and uncertain scope that would deprive the notion of any legal force, it is necessary to establish what can be the definite material content of the notion.

As a standard with which the legality of acts subject to Union law should be measured, the Rule of Law requires as a minimum that :

- new law conforms to higher ranking rules and principles ("hierarchy of norms");
- the coherence of the legal framework is respected ("non contradiction");
- changes are accompanied by transitional measures ensuring the protection of situations stabilised under the former regimes ("legitimate expectations");
- the law is clear and accessible (impartial legal advise is available throughout the legislative process) - "quality";
- a clear framework is set for the implementing authorities to ensure that the measures of application are timely and predictable;
- acts foresee effective methods of control of their implementation by independent bodies at the initiative of all persons affected unless the general system of review offers sufficient guarantees;
- interpretation and application of the law is performed under the control of independent courts of justice whose rulings have the authority of law.

These requirements apply both to the institutions of the Union and to the Member States when they act in the subject-matters to which the law of the Union applies.

This brings back the issue of delineating what the Union can do on this basis. We should actually think in terms of the Union and the Member States but, as the Legal Adviser of the Council, I ask you to excuse me for starting from the institutional prospect.

There are two clear angles from which an invocation of the Rule of Law makes sense in the work of the institutions. The first is that of legislative drafting, where recourse to this principle is appropriate to reorient proposals that would violate existing rules, create procedural inconsistencies or restrict the right to challenge measures of implementation, to take only three examples. Legal work on proposals may be based on respect of the Rule of Law as a substantive supplement to Better Regulation. The second obvious utility of the notion is to provide a support for the interpretation of standards and procedures that leave a margin of discretion for their application. If it is unclear, for example, whether an action in annulment is open against a given act in a context where some exceptions are listed, the Rule of Law will make it mandatory to give a restrictive interpretation to the scope of any exceptions that would stand in the way of judicial review. In most

cases, the Rule of Law would not be an isolated source of interpretation, rather one that provides a *rationale* for giving other rules and principles their proper effect.

I see less scope for a use of the principle as the preponderant reference for an action in annulment or in declaration of illegality of individual measures by the institutions of the Union, or by its Member States through infringement cases. I leave aside situations where other provisions of the treaties are relevant and where the Rule of Law may be used to support the desired interpretation of these provisions. But it must be exceptionally rare situations, one should hope, when the basic requirement of seeing to it that rules that have been adopted are implemented needs to be enforced in general terms. There may be a failure to act by not adopting required measures in the allotted time; but that will be contrary to the basic rule itself, without the Rule of Law having to be mentioned -although it is the underlying principle. At one time or other in political deliberations, there might be an erroneous conception expressed, to the effect for example that adopted acts do not have to be published or enter into force unless it is so decided, as was recently heard in the context of the Russia/Ukraine sanctions. But normally such errors may be redressed before any action is taken accordingly; this is what legal services are for. Who hasn't heard statements to the effect that legal

considerations are all very fine but they should not stand in the way of political decision, which is another matter altogether or has precedence? This from people who would find it quite incredible that they are not presented as ardent supporters of the Rule of Law…

Undoubtedly, the presence of this value in our arsenal of legal references is a great help for lawyers calling to order in cases those exercising political power refuse to be bothered by formalities. But it does not make the principle a frequent practical reference for judicial action. Fortunately, one could say, to the extent it means that the most blatant departures from the accepted path are more or less avoided. But there might be other reasons, such as the fact that nobody in the institutions and the Member States wants to take it upon himself to take certain matters or certain partners to Court. Which by the way has always been the real justification for opening the right of action to individuals, who are more commonly insensitive to political pressure… As Edouard LAFERRIERE put it as early as 1896 in his Treatise on Administrative Courts: *"La vigilance des intérêts lésés est la meilleure sauvegarde de la légalité"*.[5]

[5] Traité de la juridiction administrative et des recours contentieux, 2e édition, Berger-Levrault, Paris, 1896.

What remains in discussion is twofold : first, the remainders of traditions where the laws do not translate into rights; more and more a thing of the past, one hopes. Then, the case of Member States whose democratically elected governments are taking a path of reform that is judged by others as taking the wrong direction regarding the boundaries that any political authority must accept in terms of process and of review. Such developments may go together with a reluctance vis-à-vis democratic checks and balances and with the constraints imposed by certain fundamental rights as interpreted by the ECHR. But the Rule of Law has a distinct procedural connotation that may also be relevant.

An action in infringement against the Member State concerned would theoretically be open, to other Member States or to the Commission. However, it could be judged founded by the ECJ only if, within the areas of material competence of the Union, it was demonstrated that the defender had failed to respect certain minimal standards established by Union law. It is not the trend that would be assessed but the level of disrespect at a given time; it is not the global impression given by a set of moves, but each measure assessed individually by reference to objective standards. Therefore a successful infringement action for violation of the Rule of Law as such by a Member State is a very improbable development unless some dramatic political changes occur.

Therefore the Rule of Law is mainly, not only for the institutions but also for the Member States, a notion having a deterrent effect. Deterrence is the very logic of Article 7 TEU. Outside this framework, any institutional action by the Union - be it political or judiciary - may only be based on a conferred competence and it is clear that the sovereign right of States to decide on the organisation of their national institutions is broadly unaffected by Union competence. This is why the ECJ has invented the principles of equivalence and effectiveness to ensure that the rights finding their origin in Union law enjoy guarantees equivalent to the rights having a national source and - in any case - may actually be enjoyed without obstacles being imposed on the beneficiary. You have the legal title - you must be able to obtain the corresponding benefit. But this is an EU law requirement only to the extent the legal title in question is based on Union law. If it is based on purely national law, then the fact that the Rule of Law is a value of the Union is legally irrelevant.

If a Member State were to limit the authority of its constitutional Court, this would be a matter of concern, for the Union as such, if the measure amounted to making the rights based on Union law ineffective through the absence of a complete set of remedies and procedures. But one should be able to demonstrate that there are not other forms of judicial action available, and to verify that,

after the measure in question, the situation does not remain better than what exists in other Member States. There is nothing in EU law that says that there must be constitutional courts at all or what should be their authority.

And, in institutional terms, for the Union, respect of the Rule of Law by the Member States is a question of implementation of their legal obligations. The Commission has authority; the Court of Justice has authority. But both the Council and the European Parliament would stray outside their Treaty based prerogatives if they took action to redress a defective implementation of Union law by the Member States.

That leaves us with a single relevant basis in the treaties for these two institutions to be allowed to play a role -and this is Article 7 TEU.

Article 7 TEU is unquestionably a competence-setting Treaty provision but, as one very well knows, it has been conceived as a tool to discourage massive and blatant cases of disrespect of the six values referred to in Article 2 and to protect the Union from them. It sets a very high threshold also procedurally, with four fifths of the Council members, plus EP consent, to determine a risk and issue recommendations, and unanimity to determine the existence of a breach - which may bring about the suspension of certain rights. It is the heaviest weapon in the store and not one that can be used as a basis for a permanent monitoring of how the Member States perform comparatively, with yearly reports and associated naming and shaming. It provides a basis for a brutal decision for exceptional use, not a door opened for mechanisms allowing occasional disregard of Union competences when it is found convenient to refrain radical or populist political tendencies. The excessive deficit procedure is in the Treaty - which allows for further legislative elaboration. Article 7 is not an equivalent. And the initiative to have recourse to it belongs to the EP, to the Commission, or to one third of the Member States. So it is perfectly conceivable that the EP, the Commission, and interested Member States organise themselves to foresee cases when they would consider making a proposal, to devise a methodology, to make appropriate arrangements. But the Council as such does not have the right of initiative and will be the main actor, in all independence, of any ensuing decision - it should therefore, as an institution, be kept well out of any preparatory mechanism. What the Member States may do is an entirely different matter; a permanent peer review formula would not raise any legal or institutional objections. At least such is my advice.

One may only question the soundness of the reasoning behind the exclusion from any review process of other equally relevant values on which the Union rests, notably freedom, democracy and the rights of minorities. Is the Rule of Law enhanced by being singled out? Yet I am ready to admit that this is a point of logic and of credibility more than it is a point of law strictly speaking.

The Rule of Law is, to conclude, a complex legal concept - yet one that speaks to relatively broad audiences. Actually it does matter to everyone to be sure that what has been put into law will actually see the light of day, and that all concerned will obtain the benefits they are entitled to, without anyone holding authority being able to stand in the way, and without anyone not meeting the conditions being able to secure the same benefits for himself or for his associates. Totalitarianism is about power that knows no boundaries, it is also about privilege that conditions access to public resource.

Even not going to extremes, most of us have known cases in a not-so-distant past of some people - and not the nicest - asking politicians or even civil servants on the basis of an accidental connection advantages such as the lifting of a speed ticket or an expedited treatment of a request for a building permit. In case the person approached refused - as he should - this was certainly not regarded as an expression of moral standards, but rather as the indication that the official in question wanted to keep the privileges for himself - the fact that he held such privileges being without any doubt. Any more legalistic approach was likely to be considered an extravagant form of protestant rigidity and Nordic prudery.

For this nightmare being put away, we must cherish the Rule of Law as a beacon of civilized and educated social life, that democracy itself does not guarantee. For the practitioners of law, to promote this precious value requires a behaviour that is not militant, but scrupulous. Whether it is regarded as good or as poor, the law should apply as it is - full stop. And first of all, of course, the law of competence.