

EU conference - Assises de la Justice

**Thursday, 21 November 2013
Brussels**

Towards a new mechanism to safeguard the rule of law

**Speech by Jean-Marc Sauvé,
Vice-President of France's Council of State,
President of ACA-Europe
(Association of the Councils of State
and Supreme Administrative Jurisdictions of the European Union)**

I would like to begin by stating the obvious: **protecting the rule of law is at once an objective and a key responsibility in Europe**. At the heart of this idea, this fact of life, lie crucial issues that are at the root of the European project: it is a declaration by States that both enforce and comply with statutes and law; it marks the shift from the temptation of arbitrary rule to the unification of societies around such sacrosanct principles as the limitation and separation of powers and respect for fundamental human rights.

Born in specific historical circumstances, couched in differing terms, sometimes varying in meaning from one country to another¹, **the concept of the rule of law has gradually established itself as a key legal concept in our societies, to such an extent that European history can be seen as that of the emergence of the rule of law**.

If anyone can claim to be the spiritual father of the rule of law, it is Immanuel Kant², whose *Rechtsstaat* melds the legacy of the Enlightenment with Germany's liberal tradition³. This liberal idea of the State is also to be found in the writings of Locke and Hobbes or those of Montesquieu and Rousseau. From the 'Springtime of the Nations' which set the continent ablaze in 1848 to the collapse of 20th century Europe's two totalitarian systems in 1945 and 1989, our nations' histories tell of the gradual constitution of States that respect the law and are based on the freely expressed will of their peoples.

As these nations' histories have converged, so has Europe. The origins of the European project lie in the desire to establish what Victor Hugo termed 'European

¹ L. Heuschling, *Etat de droit. Rechtsstaat. Rule of law*, Dalloz, 2002.

² *Ibid.*, p. 40.

³ *Ibid.*, p. 35 *et seq.*

brotherhood⁴. This brotherhood is underpinned by common values, some of them expressed in Article 2 of the Treaty on European Union. **These values must be safeguarded because they are the very essence of the European project.** If they were imperilled in one Member State, the European Union as a whole would be affected and would therefore have to intervene. But at what point and by what means? These are highly sensitive questions, especially where they touch on the sovereignty of states and the presumed will of their peoples. I believe that any answer must be two-pronged: the common values that underpin the European Union can only be guaranteed by combining (I) a sophisticated definition of the rule of law with (II) carefully framed conditions for action by the European Union.

I. A sophisticated definition of the rule of law

1. Article 2 of the Treaty on European Union, which is echoed in the preamble to the Charter of Fundamental Rights of the European Union, invests the concept of the rule of law with **true legal substance**. No one can deny that our democracies are currently founded on a **common platform of values and principles that have been translated into law in a multitude of ways**, chief among them being the European treaties and the case-law of the Union's Court of Justice (for instance, the general principles of EU law), the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights, and, lastly, national constitutions. The concept of the rule of law has therefore been explicitly written into Germany's Basic Law, the constitutions of Spain and Portugal and those of many Central and Eastern European countries⁵. And even where the concept has not been expressly written into a constitution, the notion is there in substance. The supreme courts of Europe's states have therefore also taken up the concept and made no less significant a contribution towards investing it with substance.

2. From this constellation a **sophisticated definition of the rule of law** has emerged based on three pillars.

The first is **respect for fundamental rights**. The rule of law presupposes guarantees for the rights and freedoms intrinsic to the very idea of Humanity. This definition, which has to be seen as the heir to a certain idea of natural law, has been translated into law on many occasions: in France the 1789 Declaration of the Rights of Man and of the Citizen emphasises, for instance, that these rights are 'natural, unalienable and sacred'⁶, while 150 years later the drafters of Germany's Basic Law described these rights as 'inviolable and inalienable' and as 'the basis of every community ... in the world'⁷. **At the very pinnacle of these values are the right to life and human dignity, freedom, in all its forms, and the principle of equality or non-discrimination.** Respect for fundamental rights is indeed so

⁴ Speaking to the 1849 International Peace Congress, Victor Hugo declared as follows: '*A day will come when all the nations of this continent, without losing their distinct qualities or their glorious individuality, will fuse together in a higher unity and form the European brotherhood.*'

⁵ See L. Heuschling, *op. cit.*, p. 3.

⁶ Preamble to the French Declaration of the Rights of Man and of the Citizen.

⁷ Article 1 of Germany's Basic Law.

fundamental an issue that it is a key consideration when judges are called on to examine issues relating to the structure of our legal systems⁸.

The second pillar of the rule of law rests on **the guarantee of the primacy of the law**. At its heart lies the requirement for a **separation or balance of powers** based on the simple notion that '*power should be a check to power*'⁹. An independent judiciary is particularly important in this respect, but so are other checks and balances, such as independent regulators, free media, freedom of expression and freedom of action for non-governmental organisations. The Hungarian Constitutional Court's judgment of 16 July 2012 on the legal status and remuneration of judges is a signal and timely reminder of this fact¹⁰.

3. Lastly, the rule of law goes hand in hand with - and this is the third pillar - **the existence of a 'truly democratic' government**, to quote the European Convention of Human Rights¹¹.

Distinctions are sometimes drawn between these concepts: the Preamble to the Charter of Fundamental Rights, for instance, stresses that the Union 'is based on the principles of democracy and the rule of law'. In truth, however, I see many arguments warranting the view that these concepts are intrinsically related: **there can be no democracy without the rule of law, nor can there be rule of law without democracy**.

Democracy has rightly been identified by legal commentators as being **as much 'a principle of liberty' as a 'principle of legitimacy'**¹², it is, in other words, as much a political system founded on the sovereignty of the people as, in substance, a State of liberties.

Article 2 of the Treaty on European Union takes the same line. It strikes me that the succession of terms ('the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights') does not seek to differentiate, rank or isolate these terms from one another but rather to underline their proximity, their connexity, indeed their synonymy. A reading of national constitutions warrants the same conclusion, as the phrase '**democratic rule-of-law State**' recurs a number of times¹³.

⁸ See, for instance, the judgments in *Solange, Arcelor* and *Conseil National des Barreaux, Italy*, etc.

⁹ Montesquieu, *The Spirit of Laws*, Book XI, Chapter IV, 1748: '[C]onstant experience shows us that every man invested with power is apt to abuse it ... To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.'

¹⁰ Decision No 33/2012 of 16 July 2012.

¹¹ Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹² See, for instance, Lauvaux, *Les grandes démocraties contemporaines*, Paris, PUF, 3rd edition, 2008, p. 15-62. At another time and in other terms, René Capitant also defined democracy not as a form of government but as a system in which relations between people are governed in accordance with the principle of their freedom and mutual equality (R. Capitant, *Démocratie et participation politique dans les institutions françaises de 1875 à nos jours*, Paris, Bordas, 1972, p. 7).

¹³ In Germany the concept of the rule of law is enshrined in Article 28 of the 1949 Basic Law, whereby 'the constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law'. The Preamble to the Spanish Constitution of 1978, for its part, proclaims the will to 'consolidate a State of Law' in respect for the sovereignty of the people. Its first article refers, moreover, to 'a social and democratic State, subject to the rule of law', which 'advocates freedom, justice, equality and political pluralism as the highest values of its legal system'. Last but not least, the Preamble to the Portuguese Constitution proclaims the principle of ensuring 'the primacy of a democratic state based on the rule of law', which, according to Article 2, is to be 'based on the rule of law, the sovereignty of the people, plural democratic expression and organisation, respect for and the guarantee of the effective implementation of fundamental rights and freedoms, and the separation and interdependence of powers'.

Ultimately, querying the link between the rule of law and democracy raises an ontological question that can be encapsulated in the following terms: **can a people decide to lose its way? In other words, can the sovereignly expressed will of a nation lead to the negation of fundamental rights? The answer has to be that it cannot**, if only in view of what the history of 20th century Europe with its 'legal coups d'état' has taught us: democracy and fundamental rights have on occasion been brought down by seemingly democratic means, but this has nevertheless always been contrary to the true will of the peoples concerned. The same negative response is also expressed very clearly in a number of acts, chief among them being Germany's Basic Law, which forbids any amendment that might affect, in particular, the fundamental rights enshrined in the constitution or the democratic nature of the State¹⁴, a vision vigilantly protected by the Federal Constitutional Court¹⁵.

In view of these historical, political and legal arguments, a sophisticated definition of the rule of law, and more generally of the values set out in Article 2 of the Treaty on European Union, is called for. It therefore seems essential that Europe should deploy mechanisms capable of preventing or correcting any drift observed in such matters. In the Member States, which are presumed to be rule-of-law States, any such initiative must, however, be backed up by carefully framed but effective action by the European Union to avoid charges both of impotence and of encroaching on the sovereignty of the States and the will of the people.

II. Carefully framed criteria for EU intervention that are nonetheless compatible with effective action

The Union cannot intervene every time there is a breach of the rule of law. As it is governed by the principles of conferral, subsidiarity and proportionality¹⁶, a broad understanding of its intervention is not an option, especially not in matters outside the scope of the Union's exclusive or shared competences¹⁷. In other words, the Union's intervention in this matter must be seen **as the last line of defence, the ultimate safeguard against tendencies that the institutions of a Member State presumed to respect the rule of law are unable to hold in check.** It should therefore be subject to conditions that are strictly defined but not impossible to meet. If not, there would be reason to doubt the effectiveness of the mechanism in Article 7 or any similar mechanism.

¹⁴ See in particular Article 79(3) of the Basic Law.

¹⁵ See in particular BVerfG Case No 3/53, 18 December 1953, 225. See also L. Heuschling, *op. cit.*, p. 158 *et seq.*

¹⁶ Article 5 of the Treaty on European Union.

¹⁷ At least there would be as long as the second subparagraph of Article 6(1) of the Treaty on European Union ('The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties') and Article 51 of the Charter of Fundamental Rights of the European Union (1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.) remain in force.

1. The situations concerned should, first and foremost, involve **serious violations**, namely **manifest infringements of the rule of law** as previously defined. It is difficult to grasp the notion of seriousness in abstract terms. Infringements of certain rights, for instance the right to life or human dignity, should obviously be presumed to be serious. More often than not, however, the conclusion that a violation of the rule of law is serious will have to be preceded by a thorough and detailed examination of the circumstances of the case.

2. The situations concerned would, moreover, have to be **systemic and structural in nature**. A one-off violation, or indeed systemic violations confined to a given sector, should not result in intervention by the European Union. The concept of a 'systemic and structural' violation should therefore be interpreted a lot more restrictively than that of the 'systemic or structural problem' covered by the very different pilot judgment procedure of the European Court of Human Rights¹⁸, which can, moreover, be handled under the ECHR's normal procedures. In this instance, the criteria are **cumulative** and not alternatives. In other words, a systemic and structural violation can be seen as **a shockwave that shakes a legal system** and is generally followed by aftershocks hitting one or more areas of the legal system and spreading so far that they endanger the very foundations of the rule of law.

3. Lastly, the new mechanism for the protecting the rule of law should be based on a **sophisticated interpretation of the principles of mutual trust and subsidiarity**. The principle of subsidiarity, which is fundamental in this matter, is not just a tool for dividing competences, it is above all the expression of the relationship that the Union is to maintain with the Member States. In this instance, above all when it is a matter outside the competence of the European Union, the sophisticated definition of the rule of law that I set out earlier, like the principle of subsidiarity, supposes, in the event of violations of this rule of law, that the legal system of the State concerned first be given an opportunity to right itself through the checks and balances in place and, in particular, the intervention of the judiciary. **Whether the justice system is able to put an end to violations, to curb and stop the problems in order to prevent them developing into systemic violations, is at the heart of our reflection.** This justice system is primarily the judiciary of a State, but it is also, on a secondary level, the European judiciary - the Court of Justice of the European Union and the European Court of Human Rights - within the limits of its current powers.

Only when these initial - sound - safeguards fail can European Union intervention be considered. Such cases should normally be few and far between but involve such turbulence, such serious systemic and structural violations, that they trigger checks and balances at Union level even if they bear the trappings of the will of the people.

4. There remains the question of how the alert is to be sounded, how problem situations are to be identified. The **effectiveness of any corrective mechanism** created by the Union hangs on the answer to this question. It seems to me that only **the diversity and convergence of opinions can enable the facts to be established and a measured, objective and impartial assessment to be reached**. Building a real consensus on whether a situation warrants concern, on whether a State has objectively breached the Union's fundamental values, demands multiple analyses. Existing sources of know-how have to be mined and new

¹⁸ Rule 61 of the ECHR.

ones tapped, if need be. **Making the most of existing know-how** involves relying on the Union's institutions, on the Commission, the Council and Parliament, as Mr Tavares's recent report attests. **Tapping new sources of know-how means cooperating with other European institutions**, more specifically the specialised bodies of the Council of Europe, in particular the Venice Commission¹⁹, which has been doing a remarkable job over the past 25 years, and the Commissioner for Human Rights. **It also means seeking, where appropriate, the help of independent and impartial experts** in the person of national supreme court judges, some of whom could be mandated by an EU institution to assess critical situations. However, while European associations of national supreme courts have a leading educational role to play with regard to the role of judges in guaranteeing fundamental rights, it is hard to see how they could be assigned to carry out assessment tasks that are not only outside the associations' statutory remit but, more important still, that of their members, who cannot collectively enjoy more powers at European level than they do under national laws and constitutions.

Lastly, tapping sources of know-how will undoubtedly also mean **extending the remit of the European Union Agency for Fundamental Rights**²⁰ so that it can, in this case at least, assess national situations, where relevant at the request of a Union institution.

*
* *

The European Union is founded on common values that express a shared ideal. These values are not to be negotiated, watered down or sold short: they cannot be forgotten or left by the wayside.

Do we need a more developed mechanism to protect the rule of law in the Union? According to the sophisticated interpretation I have advocated, we do.

But this is both a complex and a delicate matter, as it touches on both the core and the limits of the relationship between the European Union and the Member States: **it therefore calls for will-power but also for caution.**

The challenge facing the European Union, like its Member States, is considerable. It calls for **headway to be made with the European project** and 'European brotherhood', **boosting know-how of critical situations** that might warrant a response by the European Union. But these improvements cannot be made without **a deeper reflection on ways of fine-tuning the mechanism in Article 7 or creating any complementary procedure**, and in particular on the point at which action or a warning will be triggered, on the role of the

¹⁹ European Commission for Democracy through Law, the Council of Europe's advisory body on constitutional matters.

²⁰ Article 3 ¶(3) of Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights provides that 'the Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law'.

Commission and on the role of the Court of Justice in infringement proceedings concerning the Union's values.

At any rate, if one thing is clear from our experience over the past two decades, it is that: **Europe can and must do better.**