UPHOLDING THE RULE OF LAW AT A TIME OF TURMOIL

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Speaking Notes

I am delighted to be here with you today to talk about our concerns for democracy in Europe. I am doubly delighted because of the presence, at this meeting, of our very distinguished friend Vasilis Skouris.

Let me first refer briefly to some key ideas underpinning our greatest political achievement, that of a liberal constitutional democracy. The concept of democracy in a modern state, i.e. representative, party democracy, is an elusive one, in the sense that the closer one looks at what gives it life, the harder it is to know or to be sure where real power lies. Although democracy may be part fact and part fiction, it still serves us well. The tortuous processes of political aspiration and strife have produced a variety of systems. None is perfect but quite a few are able, each in its own way, to perform tolerably well.

I share the view propounded by Rosenfeld[1] that democratic government should ideally be predicated on collective truth, and that truth is often missing. Public confidence and trust in the government and, more generally, in state institutions is often limited, at times almost non-existent. It is becoming increasingly difficult to accept what power projects as truth. It is the same with some opposition parties and mass media. There is, moreover, disquiet about the possibly subversive role of certain social media. It is not easy to distinguish reliable from non-reliable information. Fake news may be apparent to some but can be very convincing to others. What often happens is that people first choose a political side on which to repose faith and then use that as a yardstick. It is the easiest solution but, for democracy to really work and to survive, each one of us must look at things with a critical eye. To encourage citizens to think and to participate in public matters is one of the great challenges of our time. This should be coupled with mechanisms for safeguarding the integrity of information. It is no easy task but vitally important for defending democracy. In

[1] Sophia Rosenfeld, *Democracy and Truth: A Short History* (published by Pennsylvania)

the meantime, the disillusioned stay away from the polls while others take to the streets. That forms part of our present, fragile democracy. Despite its faults we call it a liberal democracy[2] and we are, on the whole proud of it.

Today's theme goes well beyond that. It points directly to states which present nothing more than a mere semblance of democracy. They retain the external apparatus of constitutionality and legality, they display the relevant mechanisms for giving them effect, but everything is in fact geared to serve narrow nationalistic interests. This has been described as 'autocratic legalism', a phrase coined by Corrales[3] and used by Scheppele.[4] Such states, portraying themselves as democratic, seek international respectability and, to this end, engage in interminable dialogue with international organizations and states, which seem to be guided more by economic considerations than norm discipline.

Democracy has, at its core, an electoral system by which the people elect their leaders for a certain length of time and the leaders are in turn, politically accountable to them. A self-sustaining democracy requires, as Scheppele has pointed out[5]:

> "…that leaders be prohibited from hampering the institutional prerequisites for free and fair elections, among which are a pluralistic media, a range of effective parties, an independent judiciary, recognition of a legitimate and loyal opposition, neutral election officials, a system of representation that does not unduly dilute the powers of minorities, and legally accountable police and security services, as well as a free and active civil society – all of which should have constitutional protection…"

Democracy takes tangible form only within the framework of a constitution which sets out the relevant rules and imposes constraints on those who govern and on those who are governed. This is in order to preserve values and secure rights. The constitution should convey, in no uncertain terms, a political insistence that society will, in all circumstances, be governed by the rule of law. Such insistence is an essential requirement of political life, one that leads to a culture of adherence to norms, as the only means of being able to get through difficult times. Documents, though certainly useful, are not enough. Lord

[2] Cf an 'illiberal democracy' and, in this connection, see Hascha Mounk's *The People vs Democracy* (2018, Harvard Press) and the decision of the ECtHR in *Ouardiri c. Suisse*, no. 65840/09, 28 June 2011.
[3] Javier Corrales*, Autocratic Legalism in Venezuela*, 26 J Democracy 37, 38-45 (April 2015)
[4] Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chi. L. Rev. 545 (2018).
[5] Ibid. at 558.

Burnett, Chief Justice of England and Wales, underscored this in a recent lecture[6]:

> "It is not enough to assert, in a constitutional document for instance, judicial independence, separation of powers and the rule of law. The greatest tyrannies are often underpinned by constitutions containing generous but empty guarantees."

The concept of the rule of law goes back a long way. In the west, it was introduced in practical terms by Aristotle who, disagreeing with Plato, advocated the supremacy of law over all citizens, irrespective of how powerful or how virtuous they might be. It acquired constitutional meaning for the first time in 17th century England when, in a number of disputes with James I, Edward Coke CJ declared that the law was above the king. In the 19th century the concept was developed by professor Dicey to encompass features or principles which we all recognize as inherent in it. Though the rule of law may variously be stated, its ambit does not admit controversy. I prefer the approach taken by a great judge, the late Lord Bingham; but there are many others to choose from. The formulation does not matter. What matters is that our European institutions - including the CoE, the ECtHR, the EU and the ECJ – have all been built on a common understanding of what the rule of law is and what it entails.[7] The problem lies in the fact that nationalists want a rule of law of only local scope, made to measure. We insist, like Bingham, that the rule of law includes compliance with obligations, in international law, that reflect the fundamental traditions of our civilization and protect personal liberty. The core principle is, as Lord Bingham put it:

> "…that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[8]

He specified eight distinct features inherent in the rule of law:

- The law must be accessible, intelligible, clear and predictable;
- Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion;

[6] *Becoming Stronger Together*, Commonwealth Judges and Magistrates' Association Annual Conference 2018, Brisbane, Australia, 10 September 2018.

[7] There is much literature examining the rule of law from various perspectives; the academic debate on its *formal* and *substantive* meanings is mainly to be found in Raz, Dicey, Unger, Dworkin, Laws, Allan and Jowell.

[8] Lord Bingham, *The Rule of Law*, at 8

- Laws should apply equally to all, save to the extent that objective differences justify differentiation;
- Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purpose for which they were conferred – not unreasonably and without exceeding the limits of such powers;
- The law must afford adequate protection of fundamental human rights;
- The state must provide a way of resolving disputes which the parties cannot themselves resolve; and that
- The adjudicative procedures provided by the state should be fair – one of the most important rights is the right to a fair trial;
- Compliance by the state with its obligations in international law.

Now let me go to the concept of human rights. The first important human rights declarations and instruments go back to the 18th century. Some were merely aspirational, promoting new political standards. Others, though broadly formulated, embodied firm legal principles to be acted upon. The much celebrated United Nations Declaration of Human Rights, adopted in 1948, and claimed to be the foundation of international human rights law, was essentially of the first type. The European Convention on Human Rights, an instrument of the Council of Europe belongs to the second type.

There was, at the time, general agreement between states that Western Europe should not fail to guard against totalitarianism. Under the Convention, the human rights situation in contracting states would be monitored in order to secure compliance with human rights obligations. In case democratic rule was threatened, it would be possible to pick up signals early so as to take corrective action in time. There were actually two sides. Some of those involved were not prepared to envisage anything more than that; while others saw a new Europe under a common Bill of Rights. The more restrictive approach seemed to win the day but, in time, the most remarkable reversal occurred.

The Convention singled out what were considered to be the most important civil and political rights and freedoms, repeatedly proclaimed as universal, and gave them tangible, present significance. Their enforcement was made the subject of ultimate collective responsibility. Many years were to pass, however, before the European Commission and the Court came to life, both under optional clauses. The control mechanism, though weak at first, gradually grew, reaching a peak in 1998 with the mandatory jurisdiction of the Court. It now protects over 800 million people in Europe. Sadly, there has been no corresponding improvement

in the enforcement mechanism. Matters depend almost entirely on the Committee of Ministers, a political organ which, in a number of serious cases, has shown itself unable to adopt a firm stand against recalcitrant states.

European Union countries also benefit from another parallel system of protection of rights, a system of economic, social and legal cooperation. The EU has developed into a supranational power with its own autonomous legal system within general international law. The Court of Justice of the European Union has itself made an important contribution to maintaining the rule of law and protecting fundamental rights. These are now set out in a Charter with treaty status. The ECJ and the ECtHR work not in competition but in tandem. What is equally significant, in so far as the EU is concerned, is its powerful machinery, which it can bring to bear on member states, for encouraging compliance with norms. Regrettably, this does not mean very much in practice. When it comes to such matters, the EU seems to put economic interests above discipline.

Human rights should not be taken for granted. We have moved forward only slowly and with difficulty. What lies ahead is far from certain. What has been won can easily be lost. The ECtHR provides an example. Certain influential states, including some of excellent democratic standing, have repeatedly attempted to curtail its jurisdiction and thereby restrict the right of individual petition, a spearhead of liberty. While professing to reform the Court for the better, they have sought to diminish the protection it offers. The ultimate aim was to minimize collective responsibility and bring rights into line with narrow, national policy. The Court has so far withstood such efforts, shielded by those who are not prepared to countenance a Europe without collective guarantees for human rights.

I now turn to the multi-faceted and much discussed phenomenon of populism. It is a vehicle whose passengers are often, though not invariably, imbued with strong national sentiments. The way you define its scope and reach are crucial. There is, however, no consensus-based definition, obviously because the phenomenon covers widely differing situations from which it takes its particular hue. It has often shown itself to be the means of whittling down freedoms and suppressing democratic process. Economic despair, social malaise, and national sentiments may give rise to fear, distrust or even hatred of others. This is particularly so in the face of terrorism and of an unsatisfactory approach to immigration. The latter has given cause for dissension and negative attitudes all

around. Policies which had not been well thought out and the failure to take corrective action in time, or at all, have contributed to disenchantment.

One of populism's common characteristics is its binary nature, its one-sidedness. It promotes the creation of a divide between 'them' and 'us'. Those who fuel the populist cause foster the belief that true and decent people deserve better; at the same time they decry the elite who have failed to live up to expectations and to deliver. Some grievances are legitimate. In the meantime populism takes advantage of discontent. This is often an insidious process, imperceptibly carried out. Democracy is hollowed out while care is taken to preserve the appearance of legality. Blame is attributed, inter alia, to the media, various minorities and even judges. But similar problems arise in even in well-established democracies. For example, in the UK a popular daily newspaper has recently branded three distinguished judges as 'enemies of the people', simply because their unanimous judgment did not accord with its Brexit views.

The judiciary, a free judiciary that stands in the way of authoritarian governments, must be removed. It is then that matters come to a head. European institutions are no longer able to delay. They take at least some action but it can be too late. Liberal democracy may have already been replaced by an illiberal democracy where, in Scheppele's words, *"…electoral mandates plus constitutional and legal change are used in the service of an illiberal agenda"*.[9] Democratic rule is displaced by rule through loyalists appointed in state institutions whose functions may even be augmented in a pretense of greater sharing of political power. In a 2017 Report, essentially on populism, the Secretary General of the Council of Europe referred to "those who invoke the proclaimed will of 'the people' in order to stifle opposition and dismantle checks and balances which stand in their way".[10] A veneer of legality belies the authoritarianism beneath.[11]

Just as we thought that liberal democracy had been consolidated in Europe and all seemed to augur well, notwithstanding some adversities, there appeared a chink in the armour. I refer to Hungary. In April 2010 the Prime Minister, Victor Orbán, leading a strong Fidesz party in coalition with the KDNP party,

[9] Note 4, at 548.

[10] T. Jagland, State of Democracy, Human Rights and the Rule of Law in Europe: Populism – How strong are Europe's checks and balances? Fourth Annual Report, 2017.

[11] In the words of Lawrence Burgorgue-Larsen, *Populism and Human Rights – From Disenchantment to Democratic Riposte,* "…although the democratic veneer remains intact, the democratic substance is being gnawed away."

obtained a two-thirds parliamentary majority and rapidly proceeded to implement a programme of institutional change. It entailed the dismantling of liberal democracy. It sought, as a first measure, through the Fundamental Law of 25 April 2011, a sweeping constitutional revision. This impacted, inter alia, on the judiciary. It did so in a critical way, by reducing retirement age from seventy to sixty-two as from 1 January 2012. The President of the Supreme Court, Mr. András Baka, an outspoken critic, was himself retired under it. International reaction was limited and restrained. Specialist European bodies, such as the Venice Commission and the Council of Europe Commissioner for Human Rights as well as European political Institutions, including the Parliamentary Assembly of the Council of Europe, the European Parliament and the European Commission, while explicit were mild in their reactions. In 2012 the Commission took the matter to the ECJ, under Article 258 TFEU.[12] The ECJ declared that the lowering of the retirement age of judges was not proportionate to the objectives pursued by the legislation; it concluded that Hungary had failed to fulfil its obligations arising from Directive 2000/78/EC which concerns the non-discrimination, in employment and occupation, on grounds of age. The ECJ went no further than that. At about the same time Mr. Baka complained to the ECtHR of a violation of, *inter alia*, Articles 6 and 10 of the Convention and, by a judgment given four years later, he was vindicated. In the meantime Hungary continued on its own separate way. Prime Minister Orbán's party won a landslide victory in a new election. Europe continues to ponder on what might be done next. There is a continuing dialogue but how meaningful can it be? The recent so-called "slave law" clearly shows a national reluctance for concessions.[13] Other measures are forcing the Central European University to relocate. There is in fact a long list. Hungary is not the only state in Europe to have veered away from what we consider to be established democratic norms; but it is the one which has registered the most dramatic decline within the European Union.

Poland has followed a similar path. The Chief Justice of the Supreme Court Malgorzata Gersdorf, supported by her colleagues, had resisted the government's action against the judiciary. She called the purported reforms a purge. More than 20 Supreme Court judges (about one third of the total) would have been forced to retire. The European Commission brought successful

[12] Commission v. Hungary (Case C-286/12).

[13] As I understand, under this law Companies can demand 400 hours of overtime a year and can delay payment for 3 years.

proceedings in the ECJ. A provisional ruling was made *ex parte* last October and confirmed by another in December, after Poland had been heard. The government had to suspend the offending law and duly complied. By virtue of the ECJ ruling, the judges affected have been allowed to remain. In the long run that means little, though the principle that was affirmed is of the highest importance. The Law and Justice party (PiS) has already appointed a majority of the judges in the Constitutional Tribunal; the Justice Minister, who also acts as prosecutor general, can appoint and dismiss the heads of ordinary courts; and the National Council of the Judiciary, which nominates all judges, is effectively controlled by the government.

There is also concern for Austria, the Czech Republic and Slovakia, particularly in so far as media freedom in these states is concerned. The situation is equally worrying in some Balkan states, Serbia and Montenegro, while the situation in Turkey needs no special comment. And that is not all. NGOs that monitor global and regional affairs indicate clearly, what we all know, that the situation is deteriorating and needs to be addressed.

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