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**4th Annual FRA Symposium
Promoting the Rule of Law in the EU**

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Thanks to the Fundamental Rights Agency and to Morten for the invitation to be here and to address you today.

This is a practitioners' and experts' Symposium on questions such as

- what is the Rule of Law;
- how do we develop objective ways of measuring the extent to which it exists and the quality of its existence in EU Member States; and
- by what method do we apply those indicators once we have developed them.

I want to put the discussion you as the experts will have into the context of the more political discussions that are taking place about how Europe can better live up to our common values and to the standards that we have set ourselves as EU Members. We in the Irish Presidency made promotion of and protection of fundamental rights and the Rule of Law a central part of our priorities for the Justice and Home Affairs area during our Presidency. At one level these are – and legal experts will argue should be - two separate concepts.

However, in our view the protection of the fundamental rights of all is inextricably linked to a model of Government which is based on the Rule of Law. Not in a narrow, legalistic sense that the system of government must follow the rules, without regard to what the rules might be or their value base, but in the much richer understanding that the law exists to uphold the rights of all people and to protect them against any form of oppression, or discrimination or any infringement of their human rights and freedoms, whether by other people or by the State itself. In this wider understanding the State is created by the citizens to serve them and to protect the public good and common values.

Ireland put the question of how we protect the rights of law and promote the Rule of Law on the agenda at last January's Informal meeting of Justice and Home Affairs Ministers held in Dublin Castle. Our Justice Minister Alan Shatter, who is coincidentally chairing the final JHA meeting of our Presidency in Luxembourg over these two days, tabled a paper for discussion on **EU action to protect freedom of movement for EU Citizens and social integration by encouraging effective action and enhancing cooperation between justice systems in countering hate crime, racism, anti-Semitism, xenophobia and homophobia.**

The paper also recalled that the protection of human rights within a system of government based on the Rule of Law is a central element in the values that bind us with our partners as members of the European Union and of the commitment that all member states sign up to on accession. These foundational values are reflected in Article 2 of the Treaty on European Union (TEU), which bases the Union on a community of indivisible and universal values of respect for human dignity, freedom, democracy, gender equality, non-discrimination, solidarity, the rule of law and respect for human rights and civil liberties, for all persons on the territory of the EU. These are the common values of the Member States. They bind us all to promote pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. Respecting and promoting these values is an essential element of the European Union's identity.

We have robust European legislation on combating certain forms and expressions of racism and xenophobia by means of criminal law. We also have strong EU legislation on implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin.

Despite these clear legislative commitments, we still see a worrying incidence of racism and intolerance. The Special Eurobarometer 393 **Discrimination in the EU in 2012** undertaken at the request of the Commission shows that discrimination on the grounds of ethnic origin continues to be regarded as the most widespread form of discrimination in the EU. It is notable that 56% of respondents reported it as 'widespread' (although this is down from 61% in 2009). 39% reported that discrimination on the basis of religion or beliefs is widespread (no change since 2009). And 46% of respondents (down from 47% in 2009) regard discrimination on grounds of sexual orientation to be widespread.

Recent reports by the Fundamental Rights Agency document the incidence and impacts of hate crimes in Europe. The FRA concludes that crimes motivated by racism, xenophobia, anti-Semitism, extremism and intolerance of the other remain a daily reality across the European Union. The resurgence in anti-Semitic attitudes and statements in some quarters, including by people in leadership positions, and the growth in anti-Semitic crimes from within, but not confined to, migrant populations in Europe are particularly worrying. The Agency recommends action to make hate crimes more visible and to acknowledge the rights of victims at three levels: legislation, policy and practice.

From the start of our Presidency, we made it clear that promoting fundamental rights and enhancing the Rule of Law would be a key priority, and this was reflected in the choice of this topic for the January JHA discussion. The contributions by Ministers on the day illustrated the range of issues that arise in a discussion on protection of the fundamental rights of citizens. These include:

- Hate crimes and criminal law interventions to tackle hate crime.
- Xenophobia, anti-Semitism and homophobia as social phenomena, which also require interventions other than legislation to promote acceptance of the other

- Discrimination in employment and in provision of goods and services.
- The effectiveness with which public institutions, particularly in the Justice and Home Affairs area, function.
- Migrant integration, particularly third country nationals; and
- promotion of universal human rights and equality values.

At this meeting, Minister Shatter suggested that a mechanism to better support protection of fundamental rights and the Rule of Law in Member States by sharing best practice, benchmarking practice and outcomes in an objective way, and formulating appropriate recommendations and guidelines for action, would provide such a holistic framework for effective responses to these issues.

Justice Ministers agreed to invite the Commission to give further consideration to this matter. They agreed to the initiation of a broad public debate, taking account of the Commission's Annual Report on the EU Charter of Fundamental Rights, involving governments and public institutions in the Member States. Significantly, the debate should include national human rights and equality bodies and civil-society groups so as to raise awareness and understanding of the importance of the Rule of Law, common values and protection of the fundamental rights of all in Europe. This underscores the truth that promoting the democratic premises of equal status for all citizens must be pursued locally as well as centrally.

Subsequently, during our Presidency, we have been in discussion with the Commission and with a number of Member States about how we could pursue the following steps:

- contribute to such a public debate; and
- start developing agreed understandings on the scope of a Rule of Law mechanism or method, including questions of what precisely we mean and how to measure it, and what a future method might look like.
- focus on shared values that are universal values, and not separate Europe standards, but identify the added value of EU action and coordination.
- start reflection on possible approaches that could be accepted by all Member States and that could have a real impact on the lives of ordinary citizens over the medium term, rather than being simply an academic or legal exercise.

Very clearly, this is something that needs to be carefully considered and crafted sensitively, in a way that is respectful of the different legal traditions of member states and of the division of competencies as between the Union and Member States. There are clearly sensitive issues at the heart of these questions for many, if not all, Member States.

We think therefore we need a two-stage process. But we also need to find ways to keep up the momentum. In our view, a process of debate, discussion and raising awareness is very important before we decide on particular models or particular mechanisms. But the debate to be grounded in reality does need to explore the various options that are available, focussing in particular on those that might attract consensus support from Member States. That points to the real benefit of the work the FRA has undertaken on development of Rule of Law indicators and the interesting insights we can gain and the useful contribution to the debate we can gain from applying those indicators in a form of case studies to willing Member States. I'll come back to that at the end.

This consultation process – in which national human rights institutions and equality bodies need to have an active role and a real possibility of influencing the future - needs to be given time so that we can develop a consensus around a clear definition of the problems and possible solutions, including the value of action at EU level. At a very broad level, two overarching, and related, themes emerging in the discussions we have been having are (a) the importance of effective functioning of institutions in the JHA area and (b) the protection of the fundamental rights, including economic freedoms, of all, as a common value.

We believe also that we need to think in terms of an approach that acknowledges that the EU is a community of common values, but acknowledges that all of us have problems and room for improvement. I emphasise that we must not have a divisive approach - not 'old' Europe against 'new' Europe. What we need is a mechanism to share best practice and benchmark ourselves in critical areas of institutional effectiveness and of fundamental rights and to ensure that real problems that affect the trust and solidarity that is needed between Member States and the rights and expectations of all our people are tackled and are dealt with effectively. We also need to see an approach that involves a willingness in the EU to:

- accept that all of us have imperfections, and
- begin a collaborative and mutually respectful discourse that is grounded on factually and objectively-based assessments and methodologies.

A collaborative approach would enhance the legitimacy of the Union internally by helping us to address real issues for our citizens. It would also enhance our credibility in the external dimension, not least in discussions with our eastern neighbourhood and applicant or potential applicant countries.

We have Article 7 of the Treaty on European Union to deal with severe crisis situations and that can be invoked if all else fails. A mechanism of mutual support and peer review by the Commission and other Member States to help tackle emerging problems or problems of transition needs to be politically sensitive – politically with a small 'p'. It needs to be seen as helpful and supportive, rather than being seen as an outside imposition. It needs to be dissociated from ordinary politics – politics with a big 'p' – and to apply to all Member States on the basis of equality to be seen as legitimate. Therefore, it needs objectivity and to be based on real evidence which can be analysed, debated and agreed.

By way of taking the debate forward on all these questions, we held a Conference **A Europe of Equal Citizens: equality, fundamental rights and the Rule of Law** on 9 and 10 May in Farmleigh in Dublin.

I want also to remind you that the question of how the EU ensures that it in practice as well as in law lives up to the Rule of Law and the common values it has set itself has also been raised by the External Action Service and most recently by the foreign Ministers of Germany, Denmark, Finland, and the Netherlands.

At our Presidency Conference, we had a wealth of interventions and discussion over the two days, but I will try to give you a brief overview, picking up only on some of the specific points that are most relevant to today's discussion.

- The EU is not just an economic project – and in its genesis not at all - an economic project. It is peace project and peace is not just the absence of conflict. Protection of fundamental rights and equality for all is essential to its mission.
- We see now that the EU is arguably better at promoting these values outside the EU: in the Western Balkans and applicant countries. The perception is that the pressure eases once a country joins. This perception, whether true or not, affects solidarity and engenders negative attitudes in some established Member States.
- At the Conference we were honoured to have excellent presentations from Lithuania and Poland on their transition. The two presentations gave really useful insights into the reasons for the successful transition at the legal and constitutional level and the really difficult practical problems of transition, which the rest of us with democratic systems that have been established for longer need to try and understand.
- We had a presentation about the process of creating a new constitution for Lithuania. In Soviet times, there existed a written constitution with three – on paper – independent state institutions (Government, Parliament and Judiciary) but everybody knew there was a higher authority in which real power resided. The new Lithuania took a positive decision to turn that undemocratic legacy on its head, by creating a new constitution adopted by referendum, in which the people were declared to be sovereign and the people created the institutions of state to serve them – not the other way round – and to protect all their rights.
- That's very theoretical – and not news to most of you. What's really interesting is to understand what happened next and how. If everybody knows that what the law says and the formal role of an organisation or office holder does not matter and that all important questions are actually decided somewhere else (and the most valued civil servants, judges and parliamentarians don't even need to get a phone call, but know what to do), then changing the law does not solve the problem. Society need to change

and to demand change from those who hold office. So what actually works? This is the key point to ponder as one tries to embed respect for the Rule of law and fundamental rights in the body politic.

- The answer includes – as was pointed out by other participants - ensuring that persons in a position of leadership, including political leadership, actively uphold European values and foster a climate of mutual respect for and inclusion of persons of different religious or ethnic background or sexual orientation.
- It was clear also from all the contributions and discussion at the conference that there is not yet a clearly agreed common understanding of the concept of the Rule of Law. The development of such a common understanding is a prerequisite to the development in the future of effective responses and of systems of measurement in this area.
- The essential differences in different academic and legal understandings relate to the extent to which the Rule of Law as a concept should be understood in a 'thin', formalist, way or in a 'thick', substantive, way. The formalist understanding relates solely to procedural attributes such as that the law should be prospective, general, and certain, the existence of limitations on the power of state institutions, and that the functioning of public institutions should be in formal compliance with law. This definition allows for recognition of the Rule of Law as existing even in countries that are not democracies and that do not recognise individual rights.
- The substantive definition stresses the importance of the content and not just the form of law and is concerned about the rights and protection of the citizen in practice and as essential outcomes. It is inseparable from democracy, respect of fundamental rights and equal treatment. In the Presidency's view, this second, substantive, definition and understanding is inherent in TEU Article 2 and is the understanding that has guided the Union's historic mission. I made this point at the start of my presentation to you today.
- It was clear also from the conference deliberations that there is a requirement to treat the Rule of Law and protection of fundamental rights not only in terms of stronger and more consistent enforcement across the Union of legislation, but also to find effective ways of bringing about greater internalisation of key human rights and equality values at the citizen and public institution level across the Union - with a view to minimising the incidence of discrimination and hate crime at source -
- We also looked at the role that National Equality Bodies and National Human Rights Institutions can and should play in improving the climate for fundamental rights and equality, both by being essential partners in the debate and consultation process and in their work of supporting people to vindicate their rights and to influence public policy domestically.

- One speaker noted that we have developed a human rights strategy for the EU's external dimension. There is a gap and we need an internal fundamental rights strategy to complement this.
- A strong emphasis on the Fundamental Rights Agency being a key resource to the EU, the Member States and civil society and a partner in this discussion.
- And finally, a strong emphasis on the point that addressing the problems we were discussing needs action, but also needs a process of consultation in which civil society and specialist bodies concerned with promoting equality and human rights in Member States need to be fully involved.

Next steps

The Commission's Annual Report for 2012 on the EU Charter of Fundamental Rights was published on 8 May and my colleague Minister Alan Shatter has brought the Report and the outcome of the Presidency Conference to his Justice colleagues at the meeting of the Justice and Home Affairs Council under the Irish Presidency, which is taking place yesterday and today in Luxembourg. The draft Council Conclusions which were adopted yesterday stress that respecting the rule of law is a pre-requisite for the protection of fundamental rights, and that being so, the Council calls on the Commission to take forward a debate on the possible need for and shape of a collaborative and systematic method to tackle these issues. The Conclusions go on to make the point that it is of critical importance in this process of debate to:

- ensure that EU institutions and agencies; Member States and relevant institutions at national level, including judicial authorities, human rights institutions, equality bodies, ombudsmen and civil society; and relevant international institutions can contribute to the public debate or otherwise have in input;
- develop an agreed understanding of what any initiative in this area would entail, including of the problems to be addressed, as well as questions of methodology and indicators;
- make full use of existing mechanisms and cooperate with other relevant EU and international bodies, particularly with the Council of Europe, in view of its key role in relation to promotion and protection of human rights, democracy and the rule of law, in order to avoid overlaps;
- focus on shared universal values and identify the added value of EU action and coordination;
- consider the full range of possible models, stressing the need for approaches that could be accepted by all Member States by consensus;
- ensure that any future initiative in this area that might be agreed would apply in a transparent manner, on the basis of evidence objectively

compiled, compared and analysed and on the basis of equality of treatment as between all Member States; and

- ensure that any initiative in this area would have a real positive impact on the lives of ordinary persons over the medium term.

The Conclusions call on the Commission to take forward in 2013 a process of inclusive dialogue, debate and engagement with all Member States, EU institutions as well as all relevant stakeholders. The Council also looks forward to receiving the Commission's reflection in due course and further discussion at future meetings.

Today's Symposium

At our Presidency Conference that I reported on a few moments ago, **Dr. Gabriel Toggenburg** of the Fundamental Rights Agency looked at the question of what it is we are trying to measure and how to measure it. The development of Rule of Law and Fundamental Right indicators is an important task. The challenge for the EU is to find a way of doing so that measures objectively, that gives Member States an opportunity to verify and respond, and that builds on and creates synergies with – but does not duplicate – the work of other relevant international institutions such as the Council.

Today's Symposium continues the discussion on this issue and you have the opportunity to make a significant contribution to developing our understanding of what needs to be done and how to do it, including what it is we are trying to measure and how.

Gabriel's presentation on a possible methodology for development of Rule of Law indicators and their application to Member States was really interesting, because it was easy to see that it fulfils a number of requirements. These include:

- avoiding duplication with, but instead building synergies with, the work of other international bodies with a human rights remit – most importantly in the context of Europe, the Council of Europe's work in this area;
- avoiding any new resource-intensive reporting mechanism for Member States – instead using the information and the assessments that already exist;
- producing objective data and analysis independent of any political considerations;
- and therefore treating all Member States on the basis of equality.

I understand that this is still work in progress, but – even though the methodology is not finalised – I also understand that elements of this approach is being applied by way of a case study by agreement to the Netherlands and to Bulgaria.

The Netherlands is one of the Member States that has been working with us during our Presidency on Rule of Law issues and has been very supportive of our efforts to put this issue on the agenda and to make real progress on it. The Netherlands has indeed raised the issue of the Rule of Law well before our Presidency.

So this volunteering to act as a demonstration model gives the rest of us a very good example to follow. Perhaps an outcome of this Conference we should aim for would be that the FRA would further develop its methodology as a comprehensive, and most importantly, as an independent and objective analysis, of the situation in Member States in relation to the Rule of Law and the protection of fundamental rights. Those Member States – such as Ireland – that want to push ahead and look in a very serious way at putting a method or mechanism in place to protect fundamental rights and promote the Rule of Law could then work together in a collaborative way with the Commission and the FRA on a series of case studies. This would allow those Member States who are supportive to both demonstrate in practice their commitment and to see what practical learning might emerge from this exercise. Such an exercise doesn't preempt the outcome of the debate I have been discussing – we still are engaged in a two stage process. But it would let others know that we are serious; and build momentum towards a positive decision to put a mechanism/method in place. It would also yield some practical ideas about what might or might not work and be acceptable to Member States in practice.

I will conclude with that and look forward to seeing if this suggestion I am floating sinks or swims.