Annexe

Questionnaire [établi par Luc Heuschling et Selin Esen pour les recherches au sein du Groupe de recherche « The Other Rule of Law Traditions », 18 novembre 2019].

The overall aim of this research group, as stated in its initial research programme, is to map the variety of national Rule of Law (RoL), or « nomocracy » traditions in the World, with a special focus on those, western or non-western countries which, very often, are simply ignored in the so-called « global » literature. To do so, this research group promotes a historical, comparative and « legal culture » approach.

To put it in a nutshell, the authors of the national reports should not concentrate exclusively on how the local nomocracy ideal is settled in the current positive constitutional law – that would amount to a narrow approach of legal dogmatics, *Rechtsdogmatik*[92]. Of course, this question has to be dealt with, to some extent, in the national reports, but, at the same time, the latter should adopt a broader outlook, by restating (a) the deeper cultural context (academic, political, social) of this current settlement and (b) its historical background (the RoL « tradition » of that country, with its lines of continuity and discontinuities)[93].

This raises immediately a practical question, and possibly even a fear, regarding how long such national reports should be. Obviously, describing accurately the local RoL narrative of a country with a particularly rich and complex history – having witnessed dramatic systematic caesuras (from divine order to secularism, from colonial submission to post-colonial independence, from a liberal-democratic regime to a dictatorship or vice-versa) and/or highly sophisticated and controversial scholarly debates on what RoL could mean or should mean – will take more time and space in comparison to other examples. The chairs of the research group do not expect all the reports to have the same length, even though we should collectively agree on a minimum and a maximum (between 15 and 40 pages? to be discussed). A key criteria which should guide the authors of the reports is to extract, out of the mass of available information, the special identity of the country's RoL understanding(s), today and in the past. What is « ordinary » because common to many or even all countries in the world, may be presented in a condensed way (a reader who reads all national reports of our final publication should not get bored with repetitions); in contrast, special features should be highlighted and stressed as they will attract the reader's mind and provide a richer picture of the variety of RoL discourses and practices in the world. In the exercise of mapping, differences (« exotic » elements, the adjective « exotic » being used here without any negative connotation) are – to some extent – more

[92] This approach has been adopted by the research project « Understandings of the Rule of Law in various Legal Orders of the World » (Prof. Folker Schuppert, <https://wikis.fu-berlin.de/display/SBprojectrol/Home>).

[93] This historical depth is often lacking in the various chapters of the book edited by Randall Peerenboom, *Asian Discourses of Rule of Law* (Routledge, 2004), which analyze mostly the current situation of the RoL.

important than commonalities, if one disposes only of a limited number of pages to present a given legal system. Yet, in order to identify what is special in one's own national legal tradition, one has to be aware of what is going on abroad. A so-called « national » report cannot be simply « national »: it should be informed by the knowledge of foreign RoL traditions; it must be inherently « comparative » even though, visibly, these comparisons do not occupy the forefront of the report. In this context, a special attention should also be given to the crucial issue of cultural transfers (« translations »), whatever be their source of inspiration (be it one of the « leading western models » like USA, UK, Germany and/or France, any other country, or the RoL model promoted by some international organization). The report should give a prominent place to the question to what extent the local nomocracy understanding is « home grown » or nested in an intercultural/international dialogue or power relation.

We do not impose a standardized structure for every national report, but, in the light of the accumulated experience of the existing literature, we envisage two types of presentation: either a chronological periodization (which seems particularly appropriate in order to reflect the profound disruptions, the ups and downs, of a historical trajectory) or, in case of a more evolutionary process with a high degree of continuity, a structure putting forward certain topics whose particular historical evolution (or non-evolution) is restated (a systematic or analytical grid). We will discuss both options on the basis of some examples. Each national reporter has to choose which structure is the most accurate in order to reflect the given country's historical tradition.

We do however urge each reporter to pay special attention to, and even to start with, the linguistic aspect of the local RoL tradition. Words (key words) matter, especially as they may vary, even inside a country, according to the period and/or the people. The various ideals of « nomocracy » (if we use this term as a neutral generic expression) can be conveyed by various types of words – so far four types of terms have been identified, in various European languages, in the writings of Luc Heuschling. A clear topology of the linguistic situation in a given country allows the reader to get a more precise and deep insight into the situation and dynamics of that local culture. These information are not just details which could even be « hidden » in some footnote, but should be given a prominent position in the papers.

The following questions may be useful in order to get hold of the special features of your national RoL understanding(s).

1. What is/are the relevant term(s), in your country, in order to discuss various issues of nomocracy? As already mentioned, there could be, at least, four types of words. Where does/do your term(s) fit in? When did a given key term appear in your tradition? For what reasons? Was this traditional discourse superseded later by another discourse: if so, when and why did this happen?

An historical and comparative discourse study shows that, on the matter of nomocracy, the language of legal thinkers and practitioners in Europe, since the Enlightenment, encompasses not fewer than four

types of key terms[94]. Quite often, they were more or less synonyms. If their content was substantially different, they served at least the same function: each type of term conveyed a certain ideal of a polity subject to, and regulated by, law (i.e., nomocracy, as a generic term). The first category of terms refers to a well-ordered polity in which the *res publica* matters and the common good is strongly linked to law, i.e. the key term « *République* » in French (Jean-Jacques Rousseau), « *Republik* » in German (Emmanuel Kant), and « Commonwealth » or « Republic » in English (e.g., John Locke, Edward Coke). The second type of key term encompasses the term « État » «*Staat* » or « State » in the sense of a State defined as a moral person (e.g., Thomas Hobbes, Carl Friedrich von Gerber Gerber, Georg Jellinek, Emile Esmein, and Carré de Malberg), and, as such, informed by law (positive law and, sometimes even on a higher level, the social contract, i.e. natural law). The third type is inspired by the classical Greek and Roman terminology: Aristotle's « *nomon archein* » Pindar's « *nomos basileus* » Titus Livius"'*imperia legum* » the Digest's « *lex est omnium regina* ». It gave birth, inter alia, in English to « government of law(s) », « rule of law » «due process of law » «reign of law » (the alternative key term proposed by Ivor Jennings), « empire of laws » «nomocracy » and, more recently, « principle of legality". Equivalent terms are in French: « *règne de la loi* » «*principe de légalité* » «*Loyaume* » (instead of « *Royaume* »), « *prééminence du droit* » in German: « *Herrschaft der Gesetze* » « *Rechtszustand* » and some others (e.g. « principle of socialist legality » in the various communist regimes). The fourth type of key expression is a combination of the terms « State/ *Staat*/**État** » and « law/*Recht*/*droit* »: the most iconic example is, of course, the German expression *Rechtsstaat* together with some similar German terms such as « *Verfassungsstaat* » (Constitutional State) and « *Gesetzesstaat* » (State bound by statutes). But, even in the past, before its translation into foreign languages, the German term *Rechtsstaat* was not unique[95]. In France, Jean Bodin, in his famous treaty *Les six livres de la République* (1576), defined « *Republique* » as a « *droit gouvernement* » « *gouvernement* » being understood not in a strict sense as it is usual today (meaning the cabinet), but in a larger sense (encompassing all public authorities, i.e., the State). Bodin's expression was translated by his English translator in 1600 as « lawful government » an expression that, later, was also put forward by John Locke. Yet, Jean Bodin's and John Locke's attempts to introduce this potential key term into the lexicon failed, in contrast to the tremendous success of the German term *Rechtsstaat*. During 19th and 20th century, it became the key term for nomocracy not only in Germany, and other German speaking countries like Austria, Switzerland, Liechtenstein, but it was also adopted by,

[94] L. HEUSCHLING, *État de droit, Rechtsstaat, Rule of Law*, Paris, Dalloz, 2002, p. 35ff, 49ff, 169ff, 323ff, 343ff.

[95] *Contra*: E.-W. BÖCKENFÖRDE, «The Origin and Development of the Concept of the *Rechtsstaat* », in *id. State, Society and Liberty: Studies in Political Theory and Constitutional Law*, translat. by JA Underwood, New York, Berg, 1991, p. 48: « *Rechtsstaat* is a term peculiar to the German-speaking world; it has no equivalent in any other language [...] French legal terminology has no comparable words or concepts whatever ».

and translated into, a vast number of languages in Europe and outside Europe.

In any given society, it may happen that there exists only one consensual – even sacred – key word that is an absolute « Hurrah! Word[96] ». Of course, many people may, for various reasons, understand this key term in different ways: referring to the same word does not imply a reference to the same concept or meaning. This situation may be observed, for example, in England, although with some qualifications, since Dicey popularized the phrase « rule of law » in the late nineteenth century. Similarly in Germany when *Rechtsstaat* became, after 1945, the unrivalled iconic term, despite the term having fallen almost into oblivion by the end of the preceding century.

Key terms may, indeed, fall out of fashion; the conceptual framework legal scholars use in order to systemize and inform the study of local legal materials may vary greatly. Thus, the collective reflection on nomocracy may be split into different strains, each one fighting under its own flagship term. Competing terms are met with open scepticism or even harsh criticism as a « Boo! Word[97] »; each key term only reflects the ideas of one segment of the discussants, even though some convergences can be observed if the different terms appear to be synonyms. As a matter of fact, in France, before 1907, there was not one, but several key terms: in administrative law, the case law of the famous *Conseil d'État* and the administrative law scholarship (which, in France, pre-existed the academic discipline of constitutional law) turned on the phrase « *principe de légalité* »; in French political thought and constitutional law scholarship, the central expressions used were, mainly, « État » defined as a moral person, and « *République* ». Only later, in 1907, some French legal scholars (Léon Duguit being the first) started to use the French translation of the German term « *Rechtsstaat*' (in French: « *État de droit* ») in order to rethink critically the previous French tradition of nomocracy. A similar transplant happened already before in Italy at the end of 19th century (the creation of the Italian expression « Stato di diritto »). Today the German term is known almost in the whole world, having given birth to a large number of translations: « *Rättsstat* » in Swedish, « *Państwo prawne* » in Polish, « *pravovoe gosudarstvo* (правовое государство) » in Russian, « *shteti i të drejtës* » in Albanian, « *hukuk devleti* » in Turkish, « *Estado de derecho* » in Spanish, « *dawlet al-qanoun* » in Arabic, and « *Hôchikokka* » or « *Hôchikoku* » in Japanese, to quote only a few. In the context of the EEC and EU, it gave rise to the creation of analogous terms like « *Rechtsgemeinschaft*/ *Communauté de droit* (Lawful Community) » and « *Union de droit* (Lawful Union) ». Each discourse was inspired either directly by the German model or by the use of a literal replica by some other system. If a similar transfer took place in your country what was the rationale behind it?

[96] The term is borrowed from Charles Kay Ogden ans Ivor Armstrong Richards (*The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism*, London: Kegan Paul, 2nd ed., 1927), quoted by Stéphane Beaulac (« The Rule of Law in International Law Today », in G. PALOMBELLA, N. WALKER [eds.], *Relocating the Rule of Law*, Oxford, Hart, 2009, p. 222).

[97] C. K. OGDEN and I. A. RICHARDS, *ibid.*

What happens, exactly, once various agents of a legal system (politicians, juges, and/or scholars) introduce, from abroad, a new nomocracy key term such as a local translation of the current German Buzzword « *Rechtsstaat* »: does anything change?

2. If there exists one leading key term to convey a certain nomocracy ideal in your local tradition, what is/was, exactly, its position with regard to law: is it/was it located outside law (it is a « political » or « moral » term, used by some agents in order to subvert or criticize the given legal system) or is it/was it part of the official, mainstream language of that legal system, being emphatically put forward in one of the provisions of the written Constitution and/or by the courts in their case law? If the given term is used by the actors of your legal system, is it, in itself, a legal norm, i.e. a fundamental principle or even meta-principle from whom jurists, especially courts, could draw new norms, or does the word only announce, describe and summarize a bunch of legal norms (enshrined elsewhere) without adding anything to the latter? Are the jurists, and especially the judges, in your country traditionally more reluctant to use such abstract words as « rule of law » or are they open, or even keen to handle vague principles?

3. Is the relevant key term the object of a highly, or at least relatively, sophisticated discourse, in legal scholarship and/or in some other academic disciplines? If so, what is the most common narrative – the mainstream discourse – on this term? Who are the « heroes » or the « bad guys » in your nomocracy narrative? What were the major historical events and the main issues which your nomocracy tradition had to face?

4. If the relevant nomocracy term(s) in your country is/are undertheorized, how would you explain this silence or lacuna? What would be, according to you, the implicit understandings of nomocracy which inform(ed) your national legal tradition?

5. Did and do cultural transfers play a (crucial?) role in your RoL tradition? Has your country, as many other countries in the world, adopted the German « *Rechtsstaat* » expression? If so when, how and why did this happen? Has the national legal culture been subject to a certain « Germanization »? Is there a « one-shot Germanization » or a « continuously ongoing, more a less invasive influence[98] »?

6. Do you know of any major artistic representation of the nomocracy ideal in your country (literature, symbols, iconography)?

7. What serves as counter-model to the nomocracy ideal in your local tradition: a particular, foreign or national political regime? An abstract, more or less loosely or precisely defined model encapsulated in such, mostly pejoratively connoted expressions like, for example, « despotism/despotisme/*Despotismus* » « *Polizeistaat* » « *Machtsstaat* » (a state governed by might), « government of men » « arbitrary/discretionary power » « rule of person » « *Unrechtsstaat* » « *État de non droit* » « rule of the party » « rule of ethical/religious standards » « *anomia* » (as

[98] For a discussion of this point, with regard to France, see L. HEUSCHLING, « *État de droit*: Why import the German term Rechtsstaat? », in J. MEIERHENRICH et M. LOUGHLIN (dir.), *The Cambridge Companion to the Rule of Law*, Cambridge, Cambridge University Press, 2021, p. 68-85.

defined by Plato), « *Führerstaat* » (as defined by Carl Schmitt under the 3rd Reich). Can you identify, in your country, some practices and even some explicit discourses which tend to relativize or even subvert the ideal of the rule of law? Are there some major resistances? Are these valued and justified, and if so, how? (for example, with regard to the intrinsically just will of the majority in a democratic system, the will of an exceptional providential leader, the rule of the (single) party, pragmatism, consensus, and/or the reference to a supra-legal ideal of justice/morality)?

8. What is the definition of « law » according to the local rule of « law » discourse? Is the local understanding of RoL more or less « thick » or « thin »? Which formal characteristics of law are stressed – to what extent? – in the local RoL discourse: should law be written (or unwritten), codified, public, clear, precise (detailed), prospective, hierarchically structured, coherent, etc.? Which substantive values (if there are any) are encapsulated in, and defended by, the local RoL discourse? Which legal source(s) is/are given a particular weigh in the local RoL discourse: the (positive law) Constitution, legislation, regulations, natural law (natural human rights, divine law), international law and/or customary law (people's law)? Given the importance of the current phenomena of globalization/internationalization, what is the role and position of international law in your local nomocracy discourse? How is national law articulated with international law or how should it be according to the RoL discourse? Does the local RoL discourse privilege a particular set of interpretation methods?

9. How, and to what extent, should that law « rule/reign »? Which « institutional values/ideals » are promoted by the local RoL discourse? Who is supposed to guarantee the law on behalf of the local RoL discourse? Which institutional mechanisms are promoted and put in place (non-judicial organs and/or judicial organs; the issue of separation of powers/judicial independence)? How activist are, or should be, the judges in light of the local RoL understanding? Is there a « political questions doctrine » (in the French tradition: « *actes de gouvernement* » in German: « *Regierungsakte* ») in the context of judicial review of the executive and/or legislative? Are there any sensitive issues or subject matters regarding RoL, such as « national interest » « national security » « unity of the state or nation »? What is the stance taken by the local RoL discourse and practice regarding constitutional, or even extra-constitutional, states of emergency? Has the argument that, in some cases, the application of law (in particular of the Constitution) might be « *impossible de facto*[99] » ever been discussed or even used in your country?

[99] According to Lon Fuller (*The Morality of Law*, 1st ed., New Haven, Yale University Press, 1964), one of the standards of the internal morality of law is that it should be possible, empirically, for the addressees of legal norms to apply the latter. If that is infeasible, the legal norm would lose its binding character (its validity or at least applicability). This idea goes back to the medieval dictum *ad impossibile nemo tenetur or Nullus tenetur ad impossibile* (Thomas Aquinas). For illustrations in constitutional law matters, see the examples of Taiwan (the Constitutional Court of Taiwan hold in 1954 that, given the practical « impossibility » to organize elections on the Chinese continent as required by the Constitution of the Republic of

If revolutions, coups d'État and/or some other violent events played a major role in your country, how were these illegal events considered by the legal agents (scholars, politicians, courts) with regard to RoL?

China of 1947, the authorities of the RoC/Taiwan did not breach the Constitution when they decided to abstain from calling any elections at all and to prolong ad infinitum the mandates of the existing members of the Legislative Yuan and Control Yuan. See W.-C. CHANG *et al.*, *Constitutionalism in Asia. Cases and Materials*, Oxford, Hart, 2014, p. 223 ff), Belgium (in the context of the 19th century debate on state of emergency: to comply with Art. 130 of the 1831 Constitution, which prohibited to suspend any provision of the Constitution and, thus, to proclaim a state of emergency, would amount to something « impossible » in case of an existential political crisis such as a military invasion; therefore, the suspension/disapplication of some provisions of the Constitution in order to defend the integrity of the national territory should be considered as constitutional, notwithstanding Art. 130; for a similar provision: see Art. 117 of the Constitution of Luxembourg of 1848), and Cyprus.