

Conference “Rule of law vs rule by law”

Cluj - March 18th, 2022

1. In my capacity of Vice President of MEDEL, I have the honor to take the floor to warmly thank, also on behalf of the bureau and the President of MEDEL Filipe Marquez, the Law School of Babeş-Bolyai University and the National Union of Romanian Judges for the hospitality and the great work done for organizing this conference, in spite of all the difficulties related to the pandemic, and – today- to the events occurring in Ukraine.

I cannot avoid to start my introduction without recalling the devastating tragedy that is taking place near the borders of Romania.

In the aftermath of the Russian invasion, MEDEL called upon the international community to make all efforts to restore peace and to support refugees. MEDEL strongly condemned the Russian aggression brought to Ukraine and to the freedom of Ukrainian people.

MEDEL wants once again to express full solidarity for the tragedy that this country is experiencing and for the Russian citizens who are willing to risk their freedom and to challenge the regime to oppose an absurd fratricidal war that they never wanted.

A war fought with the violence of crimes against human rights and with a propaganda that sounds tragically mocking when it calls for what has been presented as *a special military operation involving two parts of the same people*.

A war that is destroying the existence of women and men. A war that does not spare the sick, the elderly and the children; a war that is razing to the ground their towns and homes.

This war is undermining the future of democracy and the rule of law. It has destroyed our conviction that we had established the basis for a lasting peace, understood as a non-negotiable value. *A lasting peace which is for the community what dignity is for the individual: a 'super-constitutional' value*¹. A lasting peace that is the object of a fundamental right, the ultimate right, but at the same time the object of a superior duty.

As the conflict in the Balkans had already proved, demons of war in Europe have not gone away. They were only asleep. Today we are once again witnessing their awakening.

We must be aware that this war is causing a paradigm shift in the context represented by the united Europe that - after two world wars and the defeat of the totalitarian regimes - we thought could protect us from the risk of a return to destructive conflicts and bloodsheds.

¹ Antonio Ruggeri, *La pace come bene assoluto, indisponibile e non bilanciabile, il diritto fondamentale a goderne e il dovere di preservarla ad ogni costo*, Consulta online, 27.02.2022

The foundation of MEDEL reflects a visionary project to contribute to the realization of a united Europe as a dimension in which to preserve the universalism of fundamental rights and freedoms, and thus the conditions for a lasting democracy.

This visionary project expressed the awareness of the role played by the judiciary in our past of totalitarianism. While celebrating the 20th anniversary of its foundation, through the words of Christoph Strecker, MEDEL recalled the historical and political context in which our Association was founded: Europe had inherited from the fall of authoritarian regimes a judiciary that had failed its mission, legitimising tyranny instead of defending the rule of law; in the post-war period, many judges had remained in service and their associations had no interest in revisiting the "past"; they were rather interested in working conditions and the defence of privileges. Only the associations of younger magistrates were willing to confront each other on "history" and the conclusion was that the defence of democracy requires democratic judicial systems and judicial associations. These associations which, even in the choice of their name, underlined the commitment to democratic values, were the founders of MEDEL.

2. *Rule of laws vs. Rule by law* - is the title - never so appropriate to the times - of our conference. Today, everything is countered by the *Rule of War*, which sweeps away the rule of law, by suspending *laws and rights*.

War and the criminal violence of weapons lead us back to the edge of the abyss where totalitarianism, ideology and its watchwords -the *race, the glorious past, the empire, the superiority of one people over another*- had taken us in the past. It is the abyss of the ideology which Hannah Arendt considered in itself to be the bearer of violence, since it is insensitive to the real-life fate of human beings.

It is the ideology that today, as in the past, leads despots and dictators to theorise that *democracy is obsolete, in conflict with the interests of the people, no longer serving a purpose, while the values of tradition are more important than the liberal values at their sunset*.

The tragic events of Ukraine of violent breach of the international legality represented by the war and its crimes are taking place in a context that Yascha Mounk has called *the existential crisis of liberal democracy*.

And its *end* in countries like Turkey, where the power has definitively thrown off its mask with the attempted coup d'état of July 2016, showing the face of the dictatorship and authoritarian regime: democratic institutions subverted, deprivation of fundamental rights -personal freedom as well as freedom of expression - with mass arrests, sham trials and convictions- as that of our friend Murat Arslan, the President of Yarsav- for non-existent crimes on the basis of flimsy evidence.

In this context of *existential crisis* of democracy elsewhere, in EU member states - Poland and Hungary - democracy has been silently emptied of most of its content. We have not seen coups d'état and soldiers in the streets but a manipulation from inside of rules and institutions; a new Middle Age for rights and

freedoms of women and minorities and a new obscurantist ideology in the name of "national identity"; the dismantling of every "counter-power" starting with independent judicial systems placed under the control of the executive, and annihilated with the persecution of judges and prosecutors.

Today we take the opportunity to pay tribute to Joanna Hetnarowicz-Sikora, suspended from her duties simply for the fact of applying the decisions of the Court of Justice of the European Union while doing her job in court.

And we are honoured to hear Yavuz Aydin: as a representative of Turkish judiciary he contributed to the democratisation and reform attempts during the period of 2011-2013 and, as he opposed the government's intervention in the Judiciary, he was targeted by the government in 2014 and after the attempted coup d'état was dismissed from the profession and forced to ask for asylum.

Joanna and Yavuz are the symbol of all independent and courageous judges and prosecutors in Poland, Turkey and all places where the rule of law is under attack.

MEDEL has repeatedly denounced the *existential crisis of democracy* and of the rule of law when it manifested itself, in countries like Romania and Bulgaria, with attacks on the independence of judicial systems - the cornerstone of the rule of law - with reforms or lack of reforms, with limitations and threats to the freedom of speech and of association of magistrates, and the alarming context of internal and external pressures to which they are subjected.

3. The most current experience of these contexts has shown us that a crucial challenge for the rule of law born out of modern constitutionalism turns around the cornerstone represented by the independence of the judiciary as a tool for the defence of the primacy of fundamental rights, the Bills of Rights included in all modern Constitutions; it turns around the defence of the principle that they should be applied even against the will of the majority and that they should always be an inviolable sphere for all persons and minorities.

It is this vision of *the rule of law, not simply a system where laws are applied and enforced -so not only "black letter law"- but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws* - as Commissioner Reading said when she presented the new mechanism adopted by the European Commission in 2014 to react to systemic crises in the member states- that today is at stake.

To defend democracy and rule of law requires to preserve the whole system of supranational jurisdiction built around the European Courts and the national courts called to act as European judges.

It is the construction of this system of supranational justice that -as a reaction to totalitarian drifts -has produced an absolute paradigm shift from the model of states with unlimited sovereignty, which did not

allow any judge other than their *own judge*, and- as the judicial review of constitutionality- a system undermining the absolute primacy of the law in favour of the primacy of fundamental rights.

One can understand why today modern autocrats invoke this primacy of national *sovereignty* and *identity* to try to destroy what has been built.

One can understand why in Poland judges are punished for the fact of applying European law and recognising its primacy; and why the rulers call for the primacy of *a new Rule by Law*, based solely on their *constitutional and national identity*.

This process does not spare the Constitutional Courts, which -both in Poland and Hungary- have been elevated to the status of guardians of the national *Rule by Law* in order to support government strategies and-it has been said- to convert a fundamental rights protection mechanism into a tool reinforcing the government's interests.

A new idea of Rule by Law as opposed to the Rule of law: this is the challenge that the national judges who wish to act as *European judges* today have to face. And this is the challenge faced by the Court of Justice when (as in the recent decision in the cases initiated by Hungary and Poland about the rule-of-law conditionality mechanism) defines the “constitutional identity” in EU terms as *national identity* of the Member states represented by the values of article 2 of the EU Treaty: *not merely a statement of policy guidelines or intentions, but values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.*

This is the challenge that the Court of Justice faces again when it explicitly extends the Union's requirement of judicial independence to constitutional courts and confirms the authority of national courts to disregard provisions of national legislation and decisions of the constitutional court if they lead to a result that is incompatible with Union law. A clear reaction – as it has been said- to the use of national constitutional courts to defend political decisions of governments, which cannot be reconciled with the fundamental requirements of EU law.

With respect to the new challenges posed by a new idea of Rule by Law as opposed to the Rule of law, judicial associations also play a fundamental role. I would like to mention the seminal judgment of the European Court of Justice on the appeal of the Portuguese Judges' Association, which was the first to clearly affirm the *non- negotiability* of the independence of the judiciary on the part of member states as it represents to them a *primary obligation*.

Thanks also to all its member associations, MEDEL wants to continue to be the place where our awareness of the values at stake can grow and turn into a common commitment. And our conference today will certainly contribute to our debate and to our *mission*.

Grazie per l'attenzione.

Mariarosaria Guglielmi
Vice President of MEDEL