A “Marshall Plan” for Rule of Law in Europe

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José Igreja Matos, Do 23 Apr 2020

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> We should be anticipating not merely all that commonly happens but all that is conceivably capable of happening, if we do not want to be overwhelmed and struck numb by rare events as if they were unprecedented ones. (Lucius Annaeus Seneca)

1. In the past weeks, the European judges have been confronted in multiple ways by the Covid19 crisis. The challenges for judiciary were exceptional: the willingness to serve our fellow citizens, providing solidarity and support, in times of plague; the duty to supervise, as broadly as permitted by political authorities, the lawfulness of emergency measures; the emergent call to deal with the negative consequences of judicial lockdowns for the efficiency of courts and, moreover, the anxiety arising from the need to look after one’s own health and that of others, in particular witnesses, litigants or other citizens present in court.

In this difficult context, it became indispensable to echo globally the voice of judges through its most representative organizations. The International Association of Judges (IAJ) composed by national associations of 92 counties worldwide along with its regional European branch, the European Association of Judges (EAJ), in representation of our 43 members, responded promptly.

A message from IAJ’s President, an Australian colleague, Tony Pagone, warned that the

> “measures, which have been put in place right throughout the world, cannot confidently be maintained, and cannot be preserved, unless there is the Rule of Law and the confidence of an independent judiciary to apply those laws fairly.”

Through the Global Judicial Integrity Network of United Nations, IAJ/EAJ specified further its core priorities emphasizing that

> “whatever happens, judges will continue at the service of each citizen whenever an urgent measure must be decided, whenever a ruling must be taken. This is particularly applicable in matters that involve fundamental rights or the protection of the more fragile members of our communities, especially older persons, but also, for instance, the victims of domestic violence now heavily pressured by the confinement of families, and, in general, all those in need.”

Concerning the preservation of Rule of Law, EAJ defined its position in the very first days of lockdown when the Europe was submerged by the severity of the virus shadowed by the eminent threat of “dystopian” laws, invigorated by collective fear.

First and foremost, to pass on a commitment of togetherness to our fellow citizens; then to reassure our engagement to Rule of Law regardless of the temptations prompted by the overwhelming power of technology and by the tendency for more controlled lives; finally, to declare an unequivocal readiness to defend human rights, civil liberties and equal protection against abuses on emergency times.

2. The most terrible days seemed to have started to fall behind with the diminution of new cases and the steady decay of the number of losses. Hopefully the spread of Covid19 starts to get under control although – as we are well aware – the problem will subsist for long and arduous months. Therefore, transnational guidelines and standards must be defined to tackle with the gradual reopening of courts in the midst of an economic breakdown.

In the aftermath of the pandemic, a rise of bankruptcy files and labor-related cases is predictable as well as family disputes. The ensuing economic crisis may also result in reductions of the budget for judicial systems, chronically insufficient, coinciding with the magnified backlog of cases.

EAJ in co-operation with OSCE – Office for Democratic Institutions and Human Rights (ODIHR), after an initiative of Andrea Huber, organized a platform with several representatives of different judicial systems and other relevant international stakeholders to indicate specific proposals about the functioning of courts in the Covid-19 pandemic. Some of more relevant ones were: to advertise “guidelines” and “best practices” for the preparation of emergency laws, always necessarily limited in time and strictly proportional; to prevent a “hyper-production” of laws, regulations or instructions on emergency measures for the judiciary which tend to be contradictory, vaguely formulated and mostly ineffective; to guarantee that judges and their national organizations, in particular Judicial Councils, play an effective role in the formulation of these new norms. Another immediate aim is to assure a consensual definition of “urgent cases” since judiciaries are now delaying or suspending all matters except those deemed “urgent”. The “Guidance on the Courts and COVID-19” prepared by the International Commission of Jurists judiciously lists the cases to be taken in consideration.

Online tools and technology should be now maximized to perform key functions of courts. Nevertheless, the various problems caused particularly by videoconference hearings should not be undermined. The lack of meaningful participation during online hearings and shortcomings in terms of observing non-verbal cues, difficulties with the examination of evidence, the deficiency of means for confidential client-lawyer communication authorizes the conclusion that the delivery of fair trial rights often imposes face-to-face interactions.

An additional struggle ahead is the tendency to minimize the health risks in courts. In what became known as the “Black Assize”, a deadly fever that caused multiple deaths in England in the year 1577, a court in Oxford was the breeding ground for the spreading of the disease. Standard protocols for the health and safety of judges, court staff, lawyers and parties on judicial procedures must be stringently put in place.

3. The pandemic crisis and how to deal with its consequences represent probably one of the greatest challenges in the history of European Union. It is now the right time to reshape European priorities and, once and for all, to solve the ongoing malaise, initiated long before the pandemic, on the fundamental nature of Rule of Law. This could be a welcomed and rare opportunity to privilege Rule of Law rather than devalue it or simply disregard it.

In recent years, the decline of Rule of Law, namely the calculated destruction of judicial independence, at a spectacular level in well identified EU countries, has been constantly denounced by the European Association of Judges and many others international organizations.

In a letter of February 21 subscribed by the President of European Network of Presidents of Supreme Courts, the president of the European Network of Councils for the Judiciary and the President of EAJ addressed to the President of the European Commission our message could not be more emphatic:

> "We kindly request you, Madam President, for a personal meeting expressing our views that any strategy which considers judicial independence a bargaining chip against geopolitical issues or other policies, like climate ones, are completely mistaken. The same goes for politicians who think that the destruction of the Rule of Law will not undermine the internal market or, eventually, the preexistence of the European Union in its present form."

Previously, the three Presidents of Judicial Networks had already stated determinedly:

> "We firmly believe that without an independent judiciary in all Member States, the Union will eventually cease to exist as a common space for Democracy and the Rule of Law".

The ongoing Rule of Law catastrophe, has been, unsurprisingly, aggravated in recent weeks by some urgent legal measures enforced by some countries after the pandemic.

The terrible case of Turkey remains unspeakably painful: after the detention of several thousands of judges, including the Vaclav Havel Prize winner, Murat Arslan, President of Yarsav, the Turkish member of IAJ/EAJ, now the same autocratic government decided to release thousands of prisoners, including the most violent ones, refusing, at the same time, to discharge judges, prosecutors, lawyers or many others human rights defenders. The persecuted Turkish judges, fighting for daily survival along with their families, will never, never be forgotten.

Regarding EU State Members, the Hungarian case speaks eloquently for itself. The new law grants a discretionary power to the government to freely rule by decree without a "sunset clause", without any acceptable time limit. There is no provision to guarantee that the parliament and, in particular, the courts would exercise their role of a minimally effective oversight. Also, in Poland, the so-called "judicial reforms" caused a devastation

on judicial independence. Only the courageous resilience of judges, prosecutors, lawyers and civil society, combined with the support of international community, circumvented greater damages; but a total annihilation lies vividly ahead.

In this scenario, despite an eventual "faux pas" in form of a test, the European Court of Justice (ECJ) has been able to raise to the occasion. The recent ECJ's ruling on the Case C-791/19 R (Commission v Poland) deciding that Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges correctly featured the systemic impact that the lack of independence even of a particular body of the judiciary would have on the Polish judicial system as a whole.

Since the ground-breaking "Portuguese judges" ruling, ECJ developed a case law that details on how the independence of national courts (which may apply EU law) should be safeguarded. As Professor Laurent Pech correctly alerted, the ECJ stepped now forward endorsing a "holistic" approach to measure judicial independence when determining that the "mere prospect" for Polish judges to "face the risk of a disciplinary procedure", which could bring them before a body whose independence is not guaranteed, is likely to affect their independence regardless of how many proceedings may have been initiated or even of the outcomes of these proceedings.

It is easily anticipated how this methodology now shielded by ECJ could determine a negative appraisal on the independence of judges on several EU countries or, at least, could underline the serious pending threats.

4. Recently, the concrete admonitions of European Commission on the lack of proportionality of the Hungarian emergency law and the generalized public uproar that led, for instance, thirteen European parties belonging to European Peoples Party (EPP) to react publicly in a vigorous manner calling for the expulsion of Fidesz, the political party that rules the country, uncovered a very elucidative (although typical) reaction from Hungarian Government; the Prime Minister answered in a formal letter to EPP Secretary General:

> "With all due respect, I have no time for this"

In Poland, it would have been expected that the insistent decisions from ECJ about the concrete profile of judicial independence would have had a positive repercussion in the manner the national Government deals with the judiciary. Unfortunately, that perception could not be more misguided. Soon after the order to suspend the illegal powers of Supreme Court Disciplinary Chamber the reaction of the national authorities was again instructive and typical: "The EU definitely does not have competence in judicial matters" declared the chairman of the political party that leads the Government.

This total absence of dialogue by autocratic politicians proves how indispensable has become a determined involvement by EU authorities. Vis-à-vis the judiciary, the execution of European arrest warrants or other demands on human rights issues put

forward by undemocratic and illiberal Member States such as Poland or Hungary is likely to prove an unbearable decision for national courts in EU countries; “mutual trust” cannot survive without judicial independence.

Recently, speaking about the economic crisis caused by the pandemic, the President of European Commission powerfully underlined that “in this crisis there can be no half-measures” and appealed to a “massive investment in the form of a Marshall Plan for Europe.” The European judges would like to perceive the same “Marshall Plan” levels of determination to solve economic problems being employed for the crucial topic of Rule of Law. Rule of Law and Judicial Independence in the terms outlined by EU Treaties and complemented notably by the decisions of ECJ are not negotiable or voluntary; they represent our “genetical code”.

In defense of a community that guards its citizens, treating them as equals, the European Union totally depends on a commitment to uphold judicial independence – only then a renewed Europe can successfully begin its journey.

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All the best, *Max Steinbeis*

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