

1. We are gathering today, here, in Brussels, siege and symbol of a Europe that we all wish to be more fraternal, democratic and free, in order to celebrate the anniversary of MEDEL.

We are doing it, however, at a time when a serious crisis pervades Europe and its peoples.

And when we use the word “crisis”, we immediately think of the economic crisis that has fallen upon us in recent times; of the market crisis, the public finances crisis, the crisis of the welfare state, of the European social model.

However, we, jurists, have for several years been living with the «idea of crisis»: the «Justice crisis», the crisis of the Law itself and, therefore, the crisis of the Fundamentals of the Social State of the Law.

What is different, for jurists, in the emergence of this face of the «crisis» is not, therefore, the idea of occurring a fading out or an erosion of the Law’s principles and of the legal mechanisms for social regulation.

The emergence of those phenomena, as we have said, we all had been seeing and have been seeking to analyse.

What is new about it, is the crude and overtly way in which the so-called «economic crisis», this time, has radically and boldly put into question the basic principles of both the legal-constitutional frameworks and of the international treaties that have ensured the stability of our society; what we have conventionally been describing as «the European social model».

The erosion process, of which we were for so long talking about as a symptom, as a foretelling, as a trend, has thus exploded in the face of jurists, as a financial and economic crisis without any fantasies or further masks.

Even worse, it has exploded, without condescension or warning, into the real daily lives of many citizens in Europe.

However, and strangely enough, this violent and subversive explosion appears not to have caused, in the midst of those studying European Law, constitutionalists, jus-labourists and specialists on all areas of social law, the foretold and, in itself scandalous, reaction now demanded by those numerous studies and commentaries that have preceded it and anticipated it.

Is it, that the story told by Radbruch, about the miller's faith in the role of the Berlin judges, will no longer make sense?

**2.** The truth is that, in a very typical jurists' attitude, some have soon begun seeking justifications for the «facts». This justification will allow them, in a self-proclaimed "state of need" or, even more serious, in a "state of exception", to make it acceptable to the ruling Law something that precisely the ruling Law did not want it to become acceptable: the radical derogation of fundamental rights, its own derogation.

Maybe because they already have long meditated over the theme and anticipated its reality, they may not have, unlike some others – the citizens to whom it was said that Law and Justice were safe factors for stability and progress – they may not have been sensitive to the true scandal that the «crisis of the economy» has brought over to the Law, to the Rule of Law and, therefore, to Social Justice and to the European social model.

Ultimately, it is as if jurists had already accepted that, in fact, we are not actually before a «crisis» but rather before something deeper that questions the very own primary fundamentals of the legal-political framework wherewith we have been since, at least, the Second World War.

But, does it have to be like that?

Is it not that way, again, the way to defeat Law and Justice?

**3.** In fact, what has been happening around the financial measures decreed by states and imposed by the EU financial orthodoxy on the expenditure with salaries and social rights envisaged in European treaties, in national Constitutions and laws, cannot be seen in any other way than as a radical rupture of rather evident principles and concepts within the legal order in existence until today.

Principles like the non-backward return on social rights, as included in the European Social Charter and nowadays an integral part of the Lisbon Treaty, constitutional principles concerning the non-reversibility of social rights, untouchable salaries and, in general, the good faith and stability of the law order, have been, in effect, reduced to dust with a single blow.

There are countries where such derogations will not even be time-lined, that way classified as exceptional or valid solely for an established time period, seen as a reflection of some sort of circumstantial «state of need».

In those countries, the «revolution», the rupture of the previous paradigm, is more evident and it proposes to reduce, if not even to eradicate for good, the social nature rights achieved, thus becoming consolidated on the pretext of the crisis – ultimately an eternal one – as a true and definitive step back for social conquests that people in those countries have achieved.

What is already at stake in Europe is not a crisis but rather the emergence of a new paradigm for society.

A society where Law is then of a different kind, because it results not from the consensus and the will of people expressed in the national parliaments and the European Parliament, but it is rather a sole consequence of the sheer evidence and supremacy of crossed over national and international economic interests that are, after all, their rulers.

4. Indeed, a repetition seems to be taking place, now as a tragedy, of the teaching from M. Foucault, when he said about the 17<sup>th</sup> century liberal Revolution that. in that time, there had been a cultural revolution when the legal thinking informing political society had been replaced by the idea of truth and such truth was nothing but «economics truth».

I say tragedy, because, unlike what then happened, this revolution – or rather, this counter-revolution – moves contrary to the process of social and political development that results from a wide people's «consensus» which the Second World War catastrophe made necessary so as to ensure peace and progress in Europe and the World.

In fact, such consensus over the social state and its legal-political framework, embodied into a wide set of European institutions and treaties, has been providing legitimacy to the very idea of the present European Union and, to certain extent, to its most recent re-founding treaty – the Lisbon Treaty.

Once the so-called European social model is broken up, or degraded to a minimum and mere assistance-like role, very little will be left from the consensus that provided legitimacy to the Union founding process, a process that was, precisely, based upon the solidarity between peoples and on the active solidarity of citizens from all its member countries towards the least privileged ones.

Those least privileged ones have been the ones whose dignity the European project aimed at rehabilitating and had justified the Union project, in the eyes of different peoples.

This rehabilitation, involving all European countries and peoples, implied a solidarity building up of fairer and more humane societies through an outlook of edifying a more balanced and more democratic Europe, therefore becoming a factor for internal as well as external peace.

That was the heralded truth, the utopia giving legal strength to the building up of Europe and the one which peoples from both the old and new member countries wanted to believe in.

Once the utopia is broken up, the legal balance sustaining the European edifice is shattered too.

Torn apart such balance, the legal stability thus achieved - *ie*, through considering those rights as truly fundamental rights and, therefore, as non-negotiable and callable rights, at every time, in court – other ruptures, however, will follow.

Arguably, more bitter and more dangerous ones.

That such rupture may now be justified by «economics truth», is of little importance.

This is because the very idea of «economics truth» is not neutral. Disguised behind it, are both those uncontrolled economic interests that have developed a globalisation process without rights (and sometimes against them) and the egotistic and arrogant financial and monetary policies that have led us to the «crisis», as well as the social and economic rights of the peoples and citizens of every member country of the Union that, precisely, have justified it politically.

The «economics truth» of European citizens' rights cannot therefore be less relevant for a Law and Justice that, over the years, the European countries and the European Union have wished to build up, as an assumption for its own political legitimacy.

That is, the need for the «economics truth» being stated as imperative for overtaking the «crisis» cannot, necessarily or exclusively, dictate the anti-social sense of national and European financial policies. On the contrary, it must mean that they need to be judicially questioned through the very same Law enshrined in European treaties and in the Constitutional charters of the member countries.

So as to assert itself as a factor for Justice, effective progress and well-being, then the wishful and heralded «economics truth» has, therefore, and above all else, to eradicate, once and for all, the markets deregulation, the power corruption and the

criminal misuse of public funds on projects of doubtful public usefulness, that assist only the dominant powerful economic interests in each country and within the Union.

The wished for «economics truth» must be one featuring rulers' responsibility and also accountability for those who criminally have sold and bought at Sales prices the happiness and peace of the people.

That's why the Law of this «economics truth» cannot be the Law of the interests committed to the «crisis» and its social punishments.

**5.** In this context, it is of importance to ask now: «in this crisis, what role should be reserved for the Judiciary and judges of national Justice or European instances, or to be reserved by them and for them?

Will the Judiciary be called upon to intervene, as it was the rule at times of crisis, only for the authoritarian resolving of emerging social-political conflicts and from a perspective of security and criminal consequences?

Or could it be wished, for the Law, Justice, Courts and their magistrates, this time, a socially integrating and fundamental rights real effectiveness role, as it was designed by the European legislator?

A role able to impose a «true economic order», rather than the current «economics truth» order we have, because it is fair and humane even if it might only be looked at as gradually progressive and, in that sense, utopian.

Could it be that, this time, Law, Justice, the Courts and their magistrates will be able to make society to seriously face fundamental rights; to take fundamental rights seriously, as professed by the celebrated Italian jurist L. Ferrajoli?

Should that not happen this time, should our European Courts, our Constitutional Courts, our Supreme Courts hobble subserviently, without criticism, reserves and containment measures, facing the imposition of a truth made up only of the interests prevailing over the rights of the weakest, then, what will be left from the social authority of the Law, of the Rule of Law, of the Social State Law, of Justice and of the Courts?

What will be left from the superiority and, therefore, from the authority of democratic institutions and Democracy itself?

Today, more than ever, the very own social credibility of the Judiciary and of its magistrates, will it not be played out through a courageous resolution of these major civilisation challenges?

6. The thinking and the thought provoking over these issues, within the diverse international jurists organisations, social and magistrates' organisations will be, in my view, the aim and strategy that should guide MEDEL and its associations over the near future.

MEDEL, on commemorating its 25<sup>th</sup> anniversary, under this theme and in this way, thus goes on achieving the objectives that have led it to gather as unique forum for Freedom and Democracy.

Not to accept passively and without criticism the political strategy that led to the ruin of the economy as well as the ruin of the Law ruling State and its civilisation principles, must therefore be the task we should take on in the near future.

Carrying on this concern to Parliaments, Universities, Courts, social forums and trade unions, and to promote its discussion will be, arguably, our most relevant role in order to ensure Democracy and freedoms.

Yes, freedoms, because with the abrogation of social rights, with the ruin of Law principles, and with the social misery and violence that will follow, freedoms will, then, be at stake.

If, little as it may be, we can contribute to make this other face of the crisis «economics truth» evident to citizens, if we can show that without the Law and rights, freedom as the reason of being for the European Union and the civilisation project it embodies is in danger, we shall already have contributed to the purpose of our foundation.

If, in a democratic society, Law and Justice should be made by the People and on behalf of the People, then, it will have to be up to the citizens, the People, to give them the strength to make them effective.

Maybe MEDEL, while contributing, though modestly, towards that purpose, can celebrate its anniversary in a few years time, in some other celebration and possibly in more joyful circumstances, even retrospectively, on a more optimistic way.

***Antonio Cluny, Brussels, December 9th 2010.***

