

"FROM WHERE DO WE COME? - WHERE TO GO"

WHERE DO WE STAND NOW¹

Your Excellency, Vasilis Labrinos, Mayor of Heraklion

Your Excellency, Nikolaos Logothetis, President of the Bar Association of Heraklion

Your Excellency, Edith Zeller, President of AEAJ,

Your Excellency, Panagiotis Danias, President of the Greek Association of Administrative Judges,

Dear representatives of other partner judicial associations and institutions,

Dear colleagues,

Let me first of all address to you, Edith Zeller, my sincere congratulations to AEAJ on its anniversary and express my deepest wishes of a long and successful future for your association. It is an honour for MEDEL to have been invited and have the opportunity to participate in this celebration ceremony of an association with whom we have close links – not only do we have member associations that include administrative judges, but also one of the members of the board of MEDEL (Karolína Tylová, an administrative judge from Czech Republic) is a member of AEAJ.

One of the goals the board of MEDEL has established five years ago, when I took office as President, was to increase the cooperation between MEDEL and other international judicial associations, mainly in the European region. In these five years, one of the associations with whom we have been able to better engage in a fruitful cooperation is AEAJ, mostly thanks to you, Edith – and let me please publicly praise not only your kindness and availability, but above all your activism and commitment when it comes to

¹ Speech given at the *Celebration Ceremony – 20 Years Association of European Administrative Judges (20+2 Years AEAJ)* - 13 May 2022, Venetian Loggia, 25is Avgoustou 92, Iraklio 712 02, Greece.

fight for the defence of Human Rights, the independence of the Judiciary and the respect for Rule of Law.

I have been asked to intervene in the subpanel devoted to the topic “where do we stand now?”. Anyone who follows with minimum attention the international situation of the past 20 years, since the foundation of AEAJ, would immediately read this topic with a negative or pessimistic tone. And rightly so.

After the 1990’s euphoria that followed the fall of the Berlin wall and the wave of democratisation of former eastern bloc countries, that even led some to believe History had reached its end, reality stroke back, and we may say it hit hard.

The rise of populism and demagoguery and the backsliding of democracy necessarily affected the judiciary. Levitsky and Ziblatt explain that one of the main moves by autocrats to subvert democracy – together with buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents – is *“packing and “weaponizing” the courts and other neutral agencies”*, because *“the tragic paradox of the electoral route to authoritarianism is that democracy’s assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it”*².

Two main paradoxical consequences arise for the judiciary from this scenario: although there is a decrease of public trust in the judiciary, courts are increasingly being used as a way to solve political deadlocks that political actors are incapable of solving, due to lack of dialogue that is a consequence of the radicalisation of politics. The judiciary is then caught in a vicious cycle, as its decisions are publicly perceived as politically founded, which in turn further feeds the decrease of public trust – what I call the *“populist trap to the judiciary”*³.

We have been witnessing direct or indirect attacks against the independence of the judiciary in several countries around the world, from Turkey to Brasil, from Poland to

² *How Democracies Die* (New York: Crown Publishing Group, January 2018): p. 7-8.

³ Marques, F., *Rule of law, national judges and the Court of Justice of the European Union: Let's keep it juridical*. Eur Law J. 2021; 1– 12. <https://doi.org/10.1111/eulj.12386>

Hungary: mass dismissals of judges and prosecutors, harassment of judges and prosecutors through unfounded and persecutorial disciplinary procedures, persecution of lawyers that have the courage to defend and represent human rights defenders, judges and prosecutors forced to escape their countries in illegal migrant boats and applying for asylum in other countries. The list could go on and on, but the epitome of the current state of affairs is Murat Arslan, the judge president of YARSAV – the free association of judges and prosecutors of Turkey – who has been arrested five years ago and remains in jail, serving a 10-year imprisonment sentence (now added with one more year in another case, for allegedly “insulting” the President of Turkey in a private letter to his wife), issued after a criminal procedure that has not met one single of the internationally recognised standards of a due process, as our observers to the trial had the opportunity to witness. A situation like this would have been unthinkable 20 years ago and shows how deep we have gone when it comes to the attack against the independence of the judiciary and the respect for the Rule of Law.

One could be tempted to stop here the analysis of “where do we stand now?”, as at a first glance this appears to be the current state of things and the rest should exclusively be addressed by the speakers of the following panel – “where to go?”.

I believe, however, that such a restriction of the analysis in this panel would be incomplete. As in the well-known dual definition of a crisis as risks and opportunities working together, in these last years we have not only witnessed the backsliding of Rule of Law, but also moves in the opposite direction.

Already in November 2013, the European Commission organised the first big event gathering justice actors – the *Assises de la Justice* – where all judicial actors came together and started to grow a sense of common responsibility towards justice in the whole EU. In its contribution to that meeting, MEDEL specifically called for the recognition of common basic principles and standards in all the EU⁴. Since then, the evolution has been fast: the Court of Justice of the European Union has affirmed its competence to assess the compatibility of national judicial systems with the basic

⁴ <https://www.medelnet.eu/index.php/activities/an-independent-judiciary/214-assises-de-la-justice>.

principles of EU Law⁵, thus opening the door to judicial review of national “judicial reforms” that potentially undermine Rule of Law; the European Commission started publishing a yearly “Rule of Law Report”, monitoring the situation in all Member States, which will this year for the first time include specific recommendations⁶; the Commission triggered Article 7 procedures against Member States for attacks on Rule of Law.

At the level of the Council of Europe, we also witnessed a positive evolution: the European Court of Human Rights has developed and deepened its Rule of Law jurisprudence, mainly in areas such as appointment, removal or disciplinary liability of judges; the Venice Commission has been called to issue opinions on reforms carried out in several countries, with important recommendations that densify the basic principles of the independence of the judiciary; the CCJE and the CCPE have worked on opinions addressing important topics, such as freedom of association or speech, fight against corruption within the judiciary or independence of the prosecution service.

Even at a global level, initiatives such as the *Global Judicial Integrity Network*, from the United Nations Office on Drugs and Crime, are a clear sign of the increasing importance being given to matters connected to Rule of Law and protection of the judiciary.

In my view, however, the most important development we have witnessed in recent years is the increasing awareness of individual judges in all countries of the essential role they have to play in the struggle for the protection of Rule of Law and the independence of the Judiciary. And in that process, judicial associations such as AEAJ are an absolutely essential player. As the CCJE pointed out in its 2021 opinion (*On the role of the Associations of Judges in supporting the judicial independence*), “the right to associate is not only in the interest of a judge personally. As regards judges, this right is in the interest of the whole judiciary as well”⁷.

Initiatives such as the *Platform for an Independent Judiciary in Turkey*, the collective initiatives we have managed to put in place to help Afghan judges, or the constant

⁵ Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117,

⁶ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en.

⁷ <https://rm.coe.int/opinion-23-en-ccje-2020/1680a03d4b>.

correspondence with institutional actors denouncing attacks against judges in several countries show how important it is for judges to leave their desks and actively participate in the defence of Rule of Law. The *March of 1000 Robes* in Warsaw, in January 2020, was a defining moment in the building of a sense of collective belonging to a common judicial area.

To conclude, these are what I see the main lines of “where do we stand now?”: serious risks and threats, but also positive signs and renewed energy from the defenders of the Rule of Law. It will be up to us and our commitment and courage to define which of these lines will win.

And in that struggle, associations such as the AEAJ are essential – that is why are gathering here to commemorate your anniversary and wish you all the success for the years to come.

Because we all speak the same language: the language of the Rule of Law. And that is the reason why Julie Allard and Antoine Garapon say that *“judges - therein lying their specificity - are the most universalizable, but also the most universalizing, of the three powers described by Montesquieu”*⁸.

Thank you very much for your kind attention.

⁸ *Les juges dans la mondialisation – La nouvelle révolution du droit*, Paris: Éditions du Seuil et La République des Idées, January 2005, page 84.