Intervention by the Ombudsperson of Portugal,

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The Rule of Law and the Administration of Justice

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I thank the European Public Law Organization for the invitation to be here today, in this beautiful Casa Santa Maria. I extend the thanks to Professor Flogaitis, the Director of the EPLO, and to its regional branch in Portugal.

However, this invitation comes with a very heavy burden. How to approach in a short presentation, and in front of such a distinguished audience, the topic that was chosen for this conference: The Rule of Law and the Administration of Justice.

I believe that the best way of doing it stems from the simplicity of the approach. And by saying this I mean just one thing: the need to recall the fundamental values that, according to our common tradition, we all attach to the justice that is administrated under the rule of Law.

In fact, we are, in this domain, the heirs of a common tradition, whose value we all recognize and that we want to preserve. And we want to preserve this tradition because we want to continue living with the benefits that come from it, for us and for our descents. But what do we mean exactly, when we speak about a tradition? How to define it? And why do we think that it is a good thing to preserve it? And why we are now talking about the need to preserve it?

I will try to answer to these three questions. First, why can we say that in such matters like *the rule of law and the administration of justice* we all are the heirs of a common tradition? Second, why it is a valuable tradition, that it is worth preserving? And third and final question: why are we talking now about the need to preserve it? Is it in danger?

I

The roots of a common tradition.

Felix Frankfurter, who served as a member (justice) of the Supreme Court of the United States during the twentieth century – from 1939 until 1962 – used to describe what the Courts do in the following way: *the achievement of justice between man and man, between man and State, trough reason called law*. If we assume that this sentence provides a useful definition of what might be the *administration of justice under the rule of law* (and I think it does), the first conclusion we have to take is the following: we think that is possible to know what justice is and what is its opposite. Saying with other words: we come from a tradition of thought that has not embraced skepticism in this domain. In this tradition of thought, the opinion of the sophist Thrasymacus, that believed (according to Plato's Republic) that justice is nothing more than the advantage of the stronger, has not prevailed. So, we are not sceptical about the possibility of obtaining justice. The difficult part lays in knowing how to obtain it.

Since the Enlightenment, two different currents of thought tried to find an answer to this question.

One current (let us say, the current embedded in the social contract doctrine) says that in order to obtain justice we need to design (to construct) institutions that are just, or institutions that are designed according to the principles of justice. For this current of thought, if the institutions that frame

individual lives are just in their structure, the individuals will conform their behaviour with their structural justice. I believe that we can say that so different writers such Thomas Hobbes, John Locke, Rousseau, Kant, or, in the twentieth century, John Rawls, shared this point of view.

For the other current of thought, justice is a value that transcends the formal design of the institutions. Writers like Adam Smith, Condorcet, Bentham, Marx or John Stuart Mill, for example, held this similar view. According to them, justice is a moral value that guides individual behaviour, and we can identify its content by comparing different individual behaviours and different forms of social inter-actions. Some are superior than others. These writers did not agree about the «methods» of finding, here, the «superiority» by comparison. But they did agree on this: for them, justice was (is) not only a matter of institutions that are just.

If we turn back to Felix Frankfurter and to his definition of what Courts do (*the achievement of justice between man and man, between man and State, through reason called law*), we may say that, in this definition, we can easily find the footprints of the first current of thought: Courts are above all institutions that are conceived (designed) to suit the formal rules of procedure. According to this formal tradition, the Latin word *jurisdictio* – as meaning something different from *gubernatio* or *legislatio* – means that those who act in Courts obey to six fundamental rules: (i) they do not have an *agenda*; (ii) they act only when they are asked to act; (iii) they respond only to what is asked; (iv) they cannot select the people they have to hear; (v) they cannot refuse to decide and (vi) when they decide, they have to do it publicly and they have to express their reasons. These are (let us say) the formal rules that distinguish what the courts do. They distinguish *jurisdictio* from *gubernatio.*

However, these formal rules do not tell the entire story. In fact, in order to obey these formal rules, those who decide in Courts of law must behave according to some individual patterns of behaviour that are considered to be morally superior. They must be *neutral,* which means being *impartial* and *objective.* Here, *impartiality* and *objectivity* are conceived as moral capabilities. Being *impartial* means being able to act for reasons that transcends his (or hers) personal interests. Being *objective* means being capable of taking decisions that are grounded in reasons external to his or her own self. Being *impartial* and *objective* means being capable of listening to all others without exception. It also means being capable of taking decisions free of biases, that may contradict one's most profound or instinctive believes.

If these points, that I have summarized, define our common tradition concerning the justice that is administrated under the rule of law, then we have to admit that this common tradition embraces the two currents of thought that we have identified. It embraces, on one side, the current that says that justice is obtained when the institutions are designed according to correct formal principles; but it also embraces the current of thought that says that justice is obtained when individuals behave according to moral patterns that are preferable to all others. Both currents suppose a common understanding, and scepticism is not their common ground. Since both currents believe that is possible to say what justice is (and it is not), the essential idea that is embedded in the tradition we have inherited is this: Thrasymacus, the character of Plato's Republic, was wrong. Justice is not the advantage of the stronger. It is something else.

II

The benefits (virtues) that have to be preserved

The experience we have had concerning the practical implementation of this tradition, tell us about the benefits that come with it.

In fact, we can say that a system that practices the formal rules of procedure that we have identified, and where those who take decisions in courts behave according to patterns of impartiality and objectivity, is a system that is socially valuable because of their outputs. It can solve social conflicts peacefully. It can transform wars, that were meant to be fought until the last drop of blood, into verbal discussions. The weapons that are used in verbal disputes are not lethal: they are made of the material that stems from the interpretation of the law, the presentation of evidences, the exchange of arguments. As Frankfurter said, they are reason called law. Furthermore, in this sort of disputes, victory and defeat can be foreseeable: the defeated can predict its defeat due to the application of the rules of procedure, the winner can predict the victory – and its limits – due the application of the same rules. They both, winners and defeated, are gradually prepared to accept the final outcome of the dispute.

These are the outputs of a system based in the administration of justice under the rule of law. They are valuable outputs. No doubt about that. The system worth its preservation. No doubt about that. But is it in danger, in this third quarter of the 21 Century?

III

Present dangers.

I think it is, due to several factors that are well known to all of us. The fragmentation of the public sphere is driven by the new ways of communication. These, being faster than never, unmediated and distorted (sometimes, not to say too often) undermine rational discussion and favour emotional reactions. The pressure of a globalized and competitive economy

undermines state governance and is a root of popular miscontent regarding national state institutions. Like all the other institutions, the administration of justice under the rule of law is the object of this generalized mistrust. Because of this mistrust, people tend to forget the positive outputs of a system based in the rule of law. In the intellectual spheres, there is a general trend that tends to consider the epistemic impossibility of impartial and objective judgments. Taken together, all these factors create an «ambiance» that has a friendly attitude towards the opinion of the sophist Thrasymacus, who believed that justice is nothing more than the advantage of the stronger. But let us not forget. We are the heirs of a common tradition of thought whose value we cherish. In this tradition of thought, Thrasymacus' view has never been the prevalent opinion.