RULE OF LAW AND RULE BY LAW

We cannot look at all the liberal and democratic systems as examples of coherency and perfection in what concerns compliance with the rule of law or even the rule by law.

The subject that you ask me to talk about is not easy: quite the opposite.

First, as far as I know, nobody, even those who wrote about it, defined rigorously until now what a totalitarian regime is or could be.

Most of them, those who have written more extensively about it – Hanna Arendt and Raymond Aron - mainly discoursed about the Nazi regime and experience.

Raymond Aron, when he wrote about it, always distinguished the Nazi and Fascist regimes from the socialist regimes in existence at that time.

In fact, unlike the communists, the Nazis, and the Italian Fascists always assumed totalitarianism as a quality of their ideology.

The Fascists were the first to identify to themselves, as a positive characteristic, to be totalitarian, to act in order to achieve a totalitarian goal aiming to coherently combine citizen's private and public lives.

Others, for instance the socialist regimes, in different historical phases, used arbitrary and violent methods but they never assumed an intention totalitarian or that their methods were illegal; on the contrary, they always claimed they were more democratic than all of the other political systems.

That was not, obviously, the case of the Nazi and Italian Fascist regimes: they were proud of the totalitarian inspiration of their ideology and they didn't hide it.

That's one of the reasons why, if we try to find in the books Hanna Arendt and Raymond Aron wrote about this subject, a synthetical and explicit definition of what a totalitarian regime could be, it cannot be found.

They preferred to analyze totalitarian experiences and their actions, results, and evolution.

In a certain sense, we may say that the dystopian «1984», the most important novel by George Orwell, is the book that best describes and gives us an idea of what a coherent

totalitarian system could be like and what kind of control methods could be used globally.

However, reading that book nowadays we can find that many choking aspects he anticipated are happening now in our modern and liberal democracies without any serious reproach: I'm talking, for instance, about police and intelligence hearings and digital surveillance and even about the private digital control and interference in our private lives.

According to the teachings of those two philosophers, it was more correct to talk about concrete experiences than about the systems.

Both philosophers, but mainly Aron, agreed that the regimes governed by a one legal political party can change and assume, during their lives and different political phases, aspects which are more or less totalitarian, more or less authoritarian, more or less respectful of the law.

As Arendt wrote repeatedly and Aron agreed, the totalitarian experiences need to be analyzed case by case and with a focus on the different terrorist moments of their existence.

There was not a guiding principle – rationality – to the terror.

As you know, levels of terror which are one of the most relevant governing characteristics of totalitarianism, and the clinging to compliance with the law can change and are not continuous. For instance, the Nazi regime became more and more terrifying until its demise, not only with the foreign captured enemies but mainly with the internal ones, especially with the Jews.

That's why, if we decide to use this terminology – totalitarianism – we must, as Arendt and Aron did, distinguish it from the simple dictatorships and authoritarian systems and methodologies.

They can assume – and many times they did - many common characteristics but we cannot mix up them.

In «Responsibility and Judgement» Arendt, referring to the Nazi regime, wrote:

«*Totalitarian forms of government and dictatorships in the usual sense are not the same, and most of what I have to say applies to totalitarianism.*

Dictatorship in the old Roman sense of the word was devised and has remained an emergency measure of constitutional, lawful government, strictly limited in time and power; we still know it well enough as the state of emergency or of martial law proclaimed in disaster areas or in time war: we furthermore know modern dictatorships as new forms of government, where either the military seize power, abolish civilian

government, and deprive the citizens of their political rights and liberties, or where one party seizes the state apparatus at the expense of all other parties and hence of all organized political opposition.

Both types spell the end of political freedom, but private life and nonpolitical activity are not necessarily touched.

It is true that these regimes usually persecute political opponents with great ruthlessness and they certainly are very far from being constitutional forms of government in the sense we have come to understand them – no constitutional government is possible without provisions being made for the rights of an opposition – but they are not criminal in the common sense of the word either. If they commit crimes these are directed against outspoken foes of the regime in power. But the crimes of totalitarian governments concerned people who are "innocent" even from the viewpoint of the party in power».

For example, the former Portuguese dictatorship, even if it was initially and, in many aspects, fully inspired by Italian Fascism ideology, tried to give the idea of compliance with the law and the Court decisions, mostly with regard to common and private conflicts.

However, during all its existence, the regime created different orders of Courts: the Judicial Courts, the Administrative Courts (depending more directly from the Government), the Social Courts (much more connected with the parallel and complementary state administration called, according to the political doctrinarian principles of the regime, «Corporative Organization»).

The existence of these different orders of Courts was thought to better control the recruitment of the judges and the decisions of the most sensitive cases that could affect the political goals of the regime.

However, what was really significant to identify the nature of that monolithic regime was the fact that the political crimes were submitted to trial - when they were, and many times they even were not – in special Courts and not in the common ones.

The law was in general and apparently respected even if that law was, in many aspects, contrary to its own Constitution, the political crimes investigation methods included illicit and cruel tortures, and the judges and prosecutors who intervene in those trials were surgically and politically chosen to belong to those special courts.

Due to political reasons, the Portuguese dictatorship wanted, mainly after the stabilization of the regime, to preserve externally the image of independence of the common judges, those who dealt with common cases.

In general, the Portuguese government wanted society to feel that the law was respected; that the common life of common people was ruled by law.

On the contrary, depending on the regime phase, the law in totalitarian political experiences was often totally ignored without any care to hide that infringement; this was to increase the necessary terror and to break the resistance of the opponents.

In totalitarian regimes - as sometimes happened too in the authoritarian regimes - the law and the court decisions were nothing but dedicated tools to achieve the final political purpose of the ideology and, frequently, the ideology was used to justify the contingent and arbitrary will of the leader.

The arbitrariness prevailed in many cases, without any guilty complex or institutional justification, over compliance with the law by the competent authorities.

Arbitrariness was the law of such regimes.

More or less arbitrariness depended, nevertheless, on the oscillation of the regimes and their political courses and experiences; if they wanted to increase or maintain the initial «revolutionary» aims or if they considered that in what was essential, those aims had already been achieved and that it was time to normalize the internal and common life of the society.

It also depended on the level of rationality of the regime and its leaders: what made the entire difference between them.

That's why if I wanted to stop here my speech about the rule of law and the rule by law in totalitarian regimes and their political experiences, I could just say that in the context of totalitarian experiences there were no such things as the rule by law and the rule of law.

Things are not, however, so simple and that's why we shall now analyze the second step of the proposed subject: the rule of law and the rule by law.

Where are the differences between these two formulations and what importance can they assume?

Using the previously exposed Portuguese experience, I have defined, more or less, what could be a governance system ruled by law in the context of an authoritarian regime.

We can call it a state of mere legality, but it was not, in fact, a state where the rule of law was respected.

That means that an authoritarian regime can be governed by law, even if it doesn't mean that we are facing a regime governed by the rule of law.

In this context, the respect for the rule of law includes, necessarily, three important aspects:

- Ordinary law shall respect the Constitutional freedom principles and their guarantees;
- Courts – and judges - shall be independent and they shall have the possibility to state according to those constitutional principles and guarantees;
- All the State authorities shall comply with the court decisions even when they put in crisis the political orientation of the government.

What I have said also means that the constitutional organization of the State's sovereign powers shall provide an independent judicial system; shall foresee a constitutional independent judicial power.

When we talk about judicial power, we also mean that the division of power within the State Constitution shall be foreseen, breaking, this way, the possibility of the institutional monopoly of the political decisions.

This break of the State authority shared and distributed by different constitutional bodies, supposes a pluralist regime: an institutional and political pluralistic regime.

Not by chance, the CJEU has recently, in a series of decisions concerning EAW and EIO, stated that the concept of a judicial authority - henceforth to be understood as a concept of the European law - corresponds to that of an authority independent of the other constitutional organs of state power.

That's why this disruption – the assignment of different and complementary sovereign powers to the different constitutional bodies - cannot exist effectively in a totalitarian regime where only a political party is legitimated to exercise governance.

By its nature, a totalitarian regime cannot admit fissures. The same happens in some moments of their political life with some authoritarian regimes.

Political decision control by Constitutional and independent bodies with parallel and equivalent powers to those held by the government or its leader cannot be admissible in such regimes.

That disruption will introduce a disagreement into the coherency of the regime: it will break its revolutionary purposes and, thus, its ideological rationality.

That's why even in the context of authoritarian regimes – and not only in totalitarian ones - we cannot speak properly on judicial power, but only in judicial authority: that's one of the Jacobin ideological heritage.

Within this ideological context, judges are mere delegates of the people when they decide a case; they are supposed to say the law to the concrete case in the people's name and not as holders of one of the constitutional powers.

They do not have constitutional legitimacy as holders of the sovereign power of the State: they mainly act as delegates of the will of the political power, as it is abstractly and firmly declared by the ordinary law.

They are, only, as Montesquieu said: «la bouche de la loi. »

Their legal interpretation options are, consequently, limited.

The interpretation shall be as close to the letter of the law as it can be. There is no space to appeal to the constitutional guidance and stated limits.

The judges also cannot declare - even when they state in a concrete case - the unconstitutionality of an ordinary rule and they cannot even appeal to a constitutional court to do it.

The estimation of the unconstitutionality of an ordinary law or rule is seen as a political competency to be led by the State political bodies who actually govern the country.

Of course, you may say that in many democratic countries that also happens.

Yes, it is true; that is the reason why Arendt and Aron also said that we cannot look at totalitarianism as a coherent scheme but as a set of extraordinary experiences.

And I would like to add that we cannot look at all the liberal and democratic systems as examples of coherency and perfection in what concerns compliance with the rule of law or even the rule by law.

We need to look instead to the different countries' political living experiences in the context of their own evolution and take into consideration their History.

We still have at a European level many different systems founded in historical models: we have many countries that, in essence, adopted the old Austro-Hungarian model, we have many others that are inspired by the French republican and Napoleonic model, we have those - like the Italian, Spanish and Portuguese - that being initially inspired by the French model evolved and created a more coherent and independent system and we still have those inspired in the Anglo-Saxonic model with several of their derivations.

There are, thus, many characteristics in the judicial systems of old and modern liberal democracies that, rigorously, cannot be seen nowadays as supporting or increasing the rule of law.

Presently, some of them can only be justified bearing in mind the democratic spirit and the coherency of the entire democratic system and its institutional History.

Democracies were not born without revolutionary processes and many of them also implied, for some time, the terror and authoritarian methods; those experiences

influenced, necessarily, the building of the democracies and their institutions, mainly the judicial organizations.

Nowadays, however, we can say that the rule of law shall allow the possibility to a judge to directly call on the constitutional principles and guarantees when they need to decide a case: that possibility should be considered the cornerstone of a real democratic and independent judicial power.

That means that a main rule – Grundnorm, as Hans Kelsen defined it - prevails over the political determination even if this willpower is the circumstantial will of the majority that governs, for a limited period, the State.

There are constitutional principles that cannot be put away by the political majority; constitutional rights, freedoms, and guarantees belong to and shall be respected by all - majority and minorities.

And, more than this, it is supposed that other State authorities must comply with the court decisions and their commandments, even if they are contrary to the political guidance of the government or its leader.

In many cases, it is not easy for the political power to accept easily those decisions and we also need to recognize that in many situations some of those judicial decisions are not fully rational and understandable.

Judges and prosecutors are not angels – they have sex – and, consequently, they also have their own preferences and ideological options; even when they say they are neutral and are really convinced on it.

That's why a system that is thought to increase compliance with the rule of law shall also foresee an internal system of appeals able to put also under control the judicial decisions.

The pluralism – different levels of courts, collective decisions, and jury - inside the judicial system can also be a relevant tool to avoid authoritarianism.

In summary: we can have a system that can be considered ruled by law without complying with the rule of law.

That happens sometimes in the context of totalitarian regimes, many times under totalitarian regimes and even under some - *soit disant* - democratic regimes.

One final thing I would like to add: the simple functioning of the courts and the compliance with the rule of law are not sufficient to moderate and control the totalitarian and authoritarian purposes.

What is recently happening in Brazil, shows how from the inside of the institutional democratic bodies it is possible too to change the nature of a democratic regime and how that subversion can also imply the erosion of the Supreme Court legitimacy and the derogation of Its constitutional powers.

Only the people surveillance and the democratic mobilization of public opinion and social organizations can stop the anti-democratic purposes of the modern supporters of the ancient totalitarian ideals and demagogies.

Isolated and not inspired by the progressive and democratic social movements also the judicial function can be perverted, instrumentalized to the anti-democratic aims, and, finally, defeated.

The compliance with rule of law requires a constant and deep analysis of the constitutional principles and the will to permanently respect them.