EDITORIAL

THE RULE OF LAW AND THE ROLE OF COURTS

*Marta Cartabia**

1.

"Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. […] To prevent this abuse, it is necessary from the very nature of things that power should be a check to power"[1].

Contemporary Europe is facing once again the bitter truth that the rule of law is always at risk. Unexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has been eroded and the rule of law, as well as judicial independence, are under attack. Many international actors are sounding the alarm and sending warnings in the form of recommendations, resolutions and other documents: from the institutions of the European Union to the Council of Europe and the Venice Commission[2].

Risks for judicial independence and the separation of powers have always been there: at the time of the Act of Settlement of 1701 and under the constitutional monarchies in the XIX centuries, not to speak of the authoritarian regimes between the two world wars.

* Full Professor of Constitutional Law, Vice President of the Italian Constitutional Court

[1] de Montesquieu, *The Spirit of Laws*, Book XI, *In what Liberty Consists* (1748) 4.

[2] See for example the *Report on the Rule of law*, adopted in Venice, March 25-26, 2011 - CDL-AD(2011)003rev. – and the *Rule of Law Checklist*, adopted in Venice, March 11-12, 2016 - CDL-AD(2016)007.

During the Twentieth century, new institutions were set up over time in most European countries in order to defend judicial independence. Many constitutions established Councils of the Judiciary as a safeguard against the pressures of other branches of government and, for decades, European liberal democracies were free from major attacks[3]. But it is no longer the case. Preserving liberty, democracy and the rule of law is not overnight achievement; it is rather an endless business.

2.

While the rule of law is a perennial value, though always under threat, the historical context has changed dramatically since John Locke penned the Two Treaties of Government in the late Seventeenth century (1690) and Montesquieu expounded upon it in The Spirit of Laws in the mid-Eighteenth century. And it is important to reason about the present challenges to the rule of law, the separation of powers and the authority of the judiciary in concrete, rather than in abstract, terms.

The main dividing line to be preserved is between *political institutions* on the one hand and *safeguard institutions* on the other. The historical dichotomy between *gubernaculum* – government – and *iurisdictio* – judicial branch – is topical again today: judicial independence is put at risk when a clear duality between *gubernaculum* and *iurisdictio* is blurred.

However, the times have changed in many respects. The judicial power today is no longer the mute, null power of the Nineteenth century. The current dangers for judicial independence are materializing after a period of the "rise of the judiciary" within the constitutional system, as Mauro Cappelletti wrote, some thirty-five years ago[4]. Today, the judiciary plays a much more significant role than the *bouche de la loi*, the mouthpiece of the law, described by Montesquieu. In truth, this image of the judge was not much more than a myth even in the Nineteenth

[3] S. Merlini, *Magistratura e politica. Una introduzione,* in S. Merlini (ed), *Magistratura e politica* (2016), 13-48.

[4] M. Cappelletti, *Giudici legislatori?* (1984).

century, but in any case it certainly does not match with the contemporary reality.

First, the establishment of *judicial review of legislation* has given the courts not only the power to act as "negative legislators" (as Kelsen would say), but also to supplement the role of legislators at least by means of "interstitial" judge-made law.

Second, a robust *constitutional culture and consciousness* permeates the mentality of all judges, also first-level judges, and gives them a broad discretionary power. Given the poor quality of parliamentary legislation, the interpretative power of judges has hugely expanded, in the form of interpretation value-oriented, in the form of interpretation in conformity with the constitution, with the European Convention and with EU law[5].

Third, the *judicial empowerment* that was prompted by the European courts – both the ECHR and the Court of Justice of the EU – encouraged judges who had previously been strictly "subject to the law" (i.e. art. 101 of the Italian Constitution) to disregard the law when appropriate.

3.

In the meanwhile, the flourishing of a culture of individual rights stimulates the judiciary to take a more proactive role in the public square. Most of the new issues of social life that touch upon new, sensitive, and unsettled issues of our day are framed in terms of individual rights and they are often claimed directly before the courts. Claims concerning bioethical issues, new technologies, the transformation of family law, multicultural concerns, law and religion, and immigration are part and parcel of the everyday work of courts. In many cases, courts have to decide these issues without the support of a clear piece of legislation. These cases push the judiciary to the forefront of the public debate and keep it always under the spotlight.

In more general terms political issues are more and more often brought before the bench.

During his visit in America, the French aristocrat Alexis de Tocqueville was struck by the powerful position of the judiciary in

[5] N. Zanon, F. Biondi, *Il sistema costituzionale della magistratura*, 4° ed., (2014).

that legal and political system. Among other things he noticed that, "there is almost no political question in the United States that is not resolved, sooner or later, into a judicial question"[6]. Nowadays, his remark could be easily applied to many legal orders of Europe, although belonging to the so-called "civil law tradition", or continental tradition. *Judicialization of political issues* – to borrow from Martin Shapiro and Alec Stone Sweet[7] – is a common trend in many countries: a large part of questions once reserved for politics and legislators are now handled by the courts. Suffice it to mention the two major decisions of the Italian Constitutional Court on electoral laws (no. 1 of 2014 and no. 35 of 2017), by means of which the Court incisively corrected, and almost re-wrote, the legislation approved by Parliament. For a long time, electoral laws have been considered the "domain of politics". However, for many years, political bodies had been unable to reach any agreement on new legislation, and the public debate was growing more and more critical of the legislation in force because of its misrepresentative effects. As a result, the electoral legislation was challenged before the Constitutional Court.

Another example that cannot be overlooked is the famous Miller case decided by the Supreme Court of the UK on January 24, 2017, which required, in the name of the parliamentary supremacy, that the Parliament have a say on Brexit, after the referendum approving it.

We can see everywhere an "ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy and political controversies"[8]. And, again, this trend brings the courts under the spotlight, indeed.

There is no doubt that we live at a time in which the judiciary is thriving. *Le juge bouche de la loi* is an archaeological relic in Europe (if he ever existed at all). The judiciary has gained relevance in public life. It is not at all a "null power", as it was once considered, but has become, on the contrary, one of the most relevant actors in the constitutional system. In many countries

[6] A. De Tocqueville, *Democracy in America*, (1838), Book 2, 8.

[7] M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization* (2002).

[8] R. Hirschl, *Towards Juristocracy* (2004) 12.

judges have become much more visible in public debate. They make statements through the media and form an extraordinary pool of experts often called to the highest positions of the administration, working next door to the political bodies; significant numbers of them leave the judicial branch to compete in political elections and take seats in Parliament. Therefore, the judiciary cannot be longer depicted as "the least dangerous branch", as Alexander Hamilton wrote in Federalist no. 78, and an air of criticism is spreading, one that often condemns the "political role of the courts".

4.

These are the conditions in which we have to consider the present, serious attacks on the judiciary. In some cases, the attacks are *open and large-scale*; in other cases, they are *veiled, disguised and discrete*.

As for the first class of attacks, those that are open and large-scale, suffice it to mention the endemic situation in Poland, which induced the Commission of the European Union in December 2017 to open the procedure under Article 7 of the Treaty of the European Union[9]. The Commission noticed that "over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch". Therefore "despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has […] concluded that there is a clear risk of a serious breach of the rule of law in Poland". The Commission believes that the country's judiciary is now under the political control of the ruling majority and, in consequence, it has proposed to the Council to adopt a decision

[9] Reasoned Proposal regarding the Rule of Law in Poland (COM(2017) 835 final.

under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe.

In other countries, there may be subtler underway attempts to control the role of the judiciary. Arbitrary changes in laws concerning the tenure, term, promotion, transfer, and responsibility of judges may affect the independence of the judiciary. Unexpected and hasty changes in retirement age rules, arbitrary termination of terms in office of judges, or forced dismissal of judges and prosecutors are just some examples of intrusion by political bodies in the judiciary. Particular vulnerable are those positions that are covered for a short fixed term (5-6 years) and are renewable at the discretion of the executive branch, among which are to be unexpectedly included the members of the Court of Justice of the European Union[10].

Another weak point may be judges' remuneration and funding of the judiciary. Whereas temporary sacrifices are inevitable in times of crisis, chronic underfunding can impair the working condition of the judiciary: lack of appropriate remuneration, security risks, cuts in staff, and cuts in peripheral judicial bodies can increase the workload of courts and undermine their ability to decide cases with the necessary quality and care and within a reasonable time. Moreover, cuts in legal aid may be an obstacle to access to justice.

As for judicial activity as such, a range of interference by political bodies can occur: retroactive legislation can be approved by political bodies in order to interfere with a specific case or a class of pending proceedings; partisan pardon laws or milder legislation on criminal matters can stop trials in place and can be used in order to stop judges from issuing sentences or ordering convictions; any reform of procedural rules can easily encroach upon trials in place; and restrictive rules on standing or on access to justice can quickly neutralize the role of courts.

[10] For a critical remark on this point, see J.H.H. Weiler, *Editorial: Those Who Live in Glass Houses…*, in Eur. J. Int'l L., 3 (2017) 666.

5.

To sum up, many of the guarantees of the rule of law and of judicial independence "depend" on legislation. But what if legislation itself takes an illiberal turn? Many European legal orders have a constitutional court and it falls to that body to make sure that constitutional principles – including the rule of law, the separation of power and the independence of the judiciary – are complied with by all actors.

Constitutional courts can do a lot of work, but they themselves are judges. And, like all the other judges, they may be attacked on tenure, funding, salaries, and procedures, as the Polish experience shows. Moreover, like all other judges, they do not have the power of sword: if their decisions are disregarded, or are not implemented, they are mute. They are disabled; their decisions go unenforced or ignored.

Defending the rule of law is not the job of a single actor least of all of a single judge[11]. As Kim Scheppele has pointed out, the crisis of the rule of law is more cultural than (il)legal. Better: it was cultural before becoming (il)legal and (un)constitutional. The disruptive effect on judicial independence in many European countries is coming from the system rather than from a single piece of legislation. The culture itself is permeated by "constitutional bad faith", as Lech Garlicki puts it[12]. The challenge is at the cultural level. And the answer is to be found at the cultural level as well, where a number of actors can play a role: politicians, intellectuals, media, law journals, national and international organizations, economic actors and many others.

What about the courts themselves? To oppose and to prevent this cultural crisis, we, the courts, can do a lot of work to strengthen our *authority* even when our *powers* are under threat. Especially by means of the Courts networks. Notice: I am using the word authority in the original Latin meaning. *Auctoritas* and *potestas* (or *imperium*) were not equivalent in Roman law, as

[11] C. Closa, D. Kochenov, *Reinforcing Rule of Law Oversight in the European Union*, (2016).

[12] L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Poland? = Disabling the Constitutional Court in Poland?*, in B. Banaszak, A. Szmyt (eds.) *Transformation of Law Systems. Liber Amicorum in Honorem Professor Rainer Arnold*, (2016) 63.

Giorgio Agamben says[13]. *Auctoritas* has to do with reputation, consideration, respect, and legitimacy. A number of factors affect – enhance or undermine – the *auctoritas* of judges: respect for *stare decisis*; the credibility of the reasoning and opinions; due consideration for all the arguments brought before the bench; the political exposure of judges; good relations with public opinion, and so on and so forth.

In front of the challenges that blatantly and grossly harm judicial independence by means of legislative and constitutional reforms, and in front of those that silently erode the credibility of the judiciary, we, the courts, can do a lot on both levels: protecting the rule of law as well as enhancing the *auctoritas* of the judiciary in the long term, in the public sphere.

[13] G. Agamben, *Stato di eccezione*, (2003); English translation: *State of Exception*, (2005).