"The independence of the judiciary and the rule of law: under siege in the UK and in Europe?" – from the proposed changes to judicial review and the criticism of trial by jury in the UK to the situation in Hungary, Poland and Romania (with both attacks to the independence of the judiciary and the attack against supremacy of EU law)

The rule of law, as a fundamental principle at the basis of the constitutional structure of democratic states, draws the attention of both the English jurists and the European Union's institutions. In this essay, I will try to present a general overview on some challenges that the respect of the rule of law, considered from the perspective of the independence of the judiciary, imposes to face, as well as some attacks to it denounced by institutions and scholars.

The rule of law is a principle universally recognised, even though its meaning differs between common law and civil law countries: indeed, this expression can't be accurately translated in the French *ètat de droit* or the Italian *Stato di diritto*. In the English system, the ordinary law of the land pre-exists the State[1], while in the civil law tradition it is the State itself which establishes its Constitution as its own limit and ensures its respect through the judicial order.

UK Rule of Law

An introduction to the English rule of law requires referring to Dicey's three meanings of it, as: (a) *the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power;* (b) *equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts;* (c) that *the law[s] of the constitution are not the source but the consequence of the rights of individuals, as defined and enforced by the courts[2].* Dicey affirms that "*the sovereignty of Parliament and the supremacy of the law of the land (…) may appear to stand in opposition to each other (…). But this appearance is delusive; the sovereignty of Parliament (…) favours the supremacy of the law"[3].*

The first aspect to deal with relates to the regime of judicial review, operating in relation with decisions and actions of public bodies, whilst it does not apply to acts of the Parliament. The system has been modified through the *Judicial review and Courts Act 2022*. The Act, modifying the Senior Courts Act 1981, establishes that *"A quashing order may include provision— (a)for the quashing not to take effect until a date specified in the order, or (b)removing or limiting any retrospective effect of the quashing.* It introduces the discretionary power[4] of the judges to issue suspended quashing orders, allowing the public authority concerned to rectify the errors, and prospective-only quashing orders, implying that the act is null, only

[1] "*the constitution is the result of the ordinary law of the land"*, A.V.Dicey *Introduction to the study of the law of the constitution*, London, MacMillan, St Martin's Press 10th edition, 1960, at 202-203.
[2] A.V.Dicey *Introduction to the study of the law of the constitution*, London, MacMillan, St Martin's Press 10th edition, 1960, at 202-203.
[3] A.V.Dicey *Introduction to the study of the law of the constitution*, London, MacMillan, St Martin's Press 10th edition, 1960, at 406
[4] The judge having regard to a (non-exhaustive) list of factors.

from the time of the judgment onward. The Act also reverses the judgement in R(Cart) v The Upper Tribunal, precluding the judicial review of decisions of the Upper Tribunal.

The Bill originally included a presumption, providing that the judges had to use these new powers "*unless there was a good reason not to do so*"[5]: a widely spread criticism around this presumption induced the Government to delete it in the final Act. The Law Society, for instance, petitioned for the change as well as it found many oppositions among scholars.

However, this amendment did not stop the criticisms: the judicial power to issue prospective-only quashing orders still raises concerns. As a first remark, it was part of the recommendations of the IRAL[6] and some scholars claim that such provision violates the rule of law and contravenes the common law judicial method, which is essentially retrospective and "*entails ruling upon what the law was that the parties are now disputing (…).* As a consequence*, "void government acts are not void only once they are subject to a quashing order. They are void ab initio because a court has found they are not-and should not have been recognised to be-law"*[7]*.*

Focusing on the critics to the only-prospective quashing order, it prevails the idea that it offends the Rule of Law, by attributing to courts a quasi-legislative power, including to override primary legislation. The loser in this reform is primarily the Parliament, says Professor Tom Hickman, as *"It will be ceding legislative power to the courts and potentially losing an important aspect of its oversight and scrutiny of the legality of Government action into the bargain".* Moreover, "*This would allow judges permanently to cancel the invalidity of unlawful decisions or instruments insofar as they pre-date the court's ruling. Again it is not proposed that such a power would be limited to procedural or technical defects in the impugned act: it could be used even where the decision, act or instrument is found to be contrary to the express words of a statute"*[8]*.*

The Government advocates that it is judicial retrospectivity which undermines the values of certainty and predictability required by the rule of law, arguing that "*The rule of Law may be best served by only prospectively invalidating (unlawful) provisions*".

Some authors[9] consider that such powers of suspending and issuing a prospective-only quashing order were already recognised in the common law and, nonetheless, have been used rarely.

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[5] Paragraph 9 of the Bill.

[6] the *Independent Review of Administrative Law* panel, launched by the Government to propose changes to the judicial review process. It recommended overturning Cart and the suspended quashing order.

[7] See, among others, S. Beswick, 'Prospective quashing and the rule of law', U.K. Const. L. Blog (23rd Nov. 2021) (available at https://ukconstitutionallaw.org/), making an overview on different positions on this topic.

[8] T. Hickman, 'Quashing Orders and the Judicial Review and Courts Act', U.K. Const. L. Blog (26 July 2021) (available at https://ukconstitutionallaw.org/).

[9] L. Graham, 'Suspended and prospective quashing orders: The current picture', U.K. Const. L. Blog (7 June 2021) (available at https://ukconstitutionallaw.org/).

The strictness of this reasoning against this part of the reform might be tempered by valorising the discretion left to the judge: being the English system framed on the basis of the court's decisions, as a source of law, and given the importance of the ordinary law of the land as pre-existing the state, it is through the judge that the rule of law is preserved, as a consequence of a strict and narrow application of this power. Indeed, the statutory presumption, which would have restricted the judge's discretion, has been fiercely opposed. Furthermore, accepting that courts already had these powers but still used them only sporadically and reluctantly in the past, if, on one side, this reinforces the idea that such remedy was not perceived to be practicable, since it could lead to unfairness, on the other side there might be a limited risk of seeing it applied in the future.

The second aspect of focus relates to the mechanism of trial by jury, said to be derived from Article 39 of Magna Charta, according to which *No free man shall be seized or imprisoned (…) except by the lawful judgment of his peers or by the law of the land*. However, such assertion might be contradicted on various grounds[10].

Notwithstanding the importance attributed to it, trial by jury is resorted to in less than 1% of the cases. Moreover, even if it attracts public confidence and allows a collective participation in the administration of justice, criticisms relate to the rule of secrecy of the judgment, contemplated under the *Contempt of Court Act 1981*, and the risk of discrimination and biases of the jury, which, also in conjunction with Article 6 ECHR, are both likely to endanger the rule of law[11].

As it concerns the risks of discrimination, it is claimed that the jury judgements are biased on the basis, among others, on race and gender. About the rule of secrecy on how jurors reach their decisions[12], it is needed to promote open deliberations and protect jurors from reproach by the public or the media. *H*owever, this rule raises reservations among academics[13], since it could lead to potential injustices, as "*the public cannot be certain that these deliberations are independent and impartial*"[14].

Ultimately, considering both the favourable and opposed positions towards these aspects of trial by jury, the discussion does not appear to be focused on the importance of this system, recognised as a cornerstone of the English criminal order. However, such differences in opinions raise the question as to whether the approach should be revised or requires a reconsideration of the nature of this instrument as a tool of administration of justice.

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[10] See Criminal Courts Review (criminal-courts-review.org.uk), paragraph 7

[11] This argument is also used in favour of this system. See James Harper in Suspension of Jury Trials: A Threat to the Rule of Law - Legal Futures .

[12] See Jury Trial Reform: Verdicts, Reasons and the Rule of Law Cillian Bracken 27 October 2018: *The requirement to give reasons has been described, both philosophically and practically, as essential to the operation of the law and more fundamentally, the rule of law.*

[13] In this respect, see also Jury Trial Reform: Verdict, Reasons and the Rule of Law (corkonlinelawreview.com)

[14] LawTeacher. November 2013. Effect of Race and Gender Bias on Jury Decisions. [online]. Available from: https://www.lawteacher.net/free-law-dissertations/effect-race-gender-jury-decisions-7825.php?vref=1

EU Rule of Law

The rule of law is, as well, a fundamental value of the European Union, enshrined in Article 2 TEU: it refers to "*the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law"*[15].

The proceedings against Poland, Hungary and Romania reveal several violations, which have been differently treated by the Union institutions[16], but all dealing with the respect of the independence of the judiciary and of the supremacy of EU law, as it emerges from the Rule of Law Report 2022.

The EU equipped herself of instruments to ensure the respect of the rule of law. Among them, the mechanism under Article 7 TEU and the infringement procedure under Article 258 TFEU. In 2014, the Commission announced the new Framework to "*prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU"*[17].

Against Poland, an infringement procedure was commenced in 2018 concerning the law lowering the retiring age of judges of the Supreme Court [18]. The ECJ declared that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. In parallel, on 20 December 2017, due to a lack of progress through the Rule of Law Framework, the Commission activated for the first time the procedure under Article 7(1).

Against Hungary, the same procedure was opened in 2018: last September, the European Parliament voted a resolution on the proposal for a Council decision determining the *existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*[19].

The latest mechanism introduced is a Regulation[20], establishing "*the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States"*, making the respect of the rule of law a condition to accede to European funds. After some arguments concerning the lack of constitutional mind-set by the Commission, the adoption of this Regulation is a step forward pressuring member states to respond of their violations of the rule of law, having, as such, practical

[15] Art 2, Regulation (EU, Euratom) 2020/2092.
[16] see Daniel Hegedus in "WHAT ROLE FOR EU INSTITUTIONS IN CONFRONTING EUROPE'S DEMOCRACY AND RULE OF LAW CRISIS?"
[17] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law /* COM/2014/0158 final, at 6
[18] C-619/18.
[19] 2018/0902R(NLE))
[20] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

consequences. Both Hungary and Poland promoted an action for annulment against it, but their recourses were rejected by the European Court of Justice[21].

Lastly, the new procedure has been started against Hungary with a formal notice. The question around the conditionality mechanism can be posed in terms of higher efficiency of it, compared to the infringement procedure or Article 7 TEU: the "nuclear option" contemplated under the Treaty culminates with the suspension of the right to vote of the member state concerned, but requires unanimity in the Council, which has been already proven to be difficult to achieve. Even more if we consider that, since 2 member states have been the addressees of the procedure on the basis of similar allegations, they shield each other. The rule of law is under siege also from a different, but closely interrelated, perspective: the question of the supremacy of EU law.

The CJEU[22] imposed a 1 million euros fine to Poland, for its failure to comply with its order of 14 July 2021. Moreover, an infringement procedure has been launched, related to 2 sentences of the Polish Constitutional Court[23], declaring that Poland is no longer bound to recognise supremacy of EU law. The Commission expressed serious concerns that such decisions relate to the independence and impartiality of the Constitutional Tribunal.

As it concerns Romania, challenges to EU supremacy started in 2016[24], relating to the anti-corruption campaign and the CVM mechanism[25]. At its latest last year, the Romanian constitutional court challenged the supremacy of the EU Treaties over national legislation. The ECJ was asked to determine whether national judges can leave unapplied Romanian's Constitutional Court decisions that contravene EU law without risk of disciplinary inquiries. It answered affirmatively, stating that the prosecutorial unit was *"seeking to establish an instrument of pressure and intimidation with regard to judges*", undermining their independence.

The ECJ[26] stated that "*As regards specifically the rules governing the disciplinary regime, the requirement of independence means that, in accordance with settled case-law, that regime must provide the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. To that end, it appears essential that the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned*. *The fact that national judges are not exposed to disciplinary proceedings or measures for having exercised the*

[21] Cases C-156/21 and CASE C-157/21.
[22] Court of Justice of the European Union Order of the Vice-President of the Court in Case C-204/21 R Commission v Poland.
[23] See judgment in Asociaţia 'Forumul Judecătorilor din România' and Others, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393.
[24] For an overview on the Romanian situation, see * (diritticomparati.it) SUPREMACY OF EU LAW AND JUDICIAL INDEPENDENCE IN ROMANIA Posted on 7 Marzo 2022 by Nedim Hogic.
[25] Cooperation and Verification mechanism, condition for the access of Romania to the EU.
[26] judgment C-357/19 of December 21st 2021.

discretion to make a reference for a preliminary ruling to the Court under Article 267 TFEU, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to their independence"[27]*.* The Romanian Constitutional Court responded stating that the respect of the supremacy of EU law is to be ensured in the framework of the Romania constitution, in the meaning that national judges will be able to override provisions of Romanian law, including those of the Constitution, in favour of EU law only after the Constitution is amended accordingly[28]. It's understandable that the tension is long from being resolved.

Conclusions

The independence of the judiciary is a central pillar of the rule of law, a guiding principle in a democratic country.

From the UK perspective, the recent reform of the judicial review might be likely to impose the necessity of a scrutiny of conformity with the English constitutional system. But, if we should accept the potential risks of these changes, we can respond that such risks could be avoided having in mind the power of the judge, whose action does not have to contrast with fairness and equality. On the other side, trial by jury seems to be more questionable and controversial, although its centrality is not disputed.

From the European Union perspective, since the EU strongly advocates to be a protector of the rule of law, has an obligation to ensure its respect. The new conditionality mechanism might imply that the discussion is brought to the different level of economic and financial support to states, in a Union which is erected around the principle of solidarity. It is a question for the future relationships between Member States and the outcome of such discussion might be decisive for the future of the rule of law.

In conclusion, admitting that the rule of law is under siege, requires addressing these attempts to weaken, for instance, the independence of the judiciary. A strong response certainly has the result of keeping the system vigilant to distortions. In such an interrelated world, when the decision of a state is likely to have repercussions on other states, it becomes a challenge of contemporaneity, and it is mandatory to stands firmly to protect these values. Then, who is the responsible for such a role? Is it the role of the judge or the role of governments and parliaments to guarantee the rule of law? The matter is far from being of a simple resolution.

[27] Paragraph 227 *CASE 357/2019* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CJ0357&from=it
[28] Comunicat de presa, 23 decembrie 2021