



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## **Eighth Annual Regional Rule of Law Forum for South East Europe**

### **“The Rule of Law under Pressure – Reflections on the Independence and Impartiality of the Judiciary”**

Speech by Robert Spano

*Dubrovnik, 3 September 2021*

#### **Introduction**

It is a pleasure for me to be here with you in Dubrovnik for the 8th Regional Rule of Law Forum for South East Europe. This is my second Rule of Law Forum as President of the European Court (and I finally make it to the Region!) I would like to thank very warmly the AIRE Centre and Civil Rights Defenders for putting together this rich programme, and for bringing so many current and former Court judges under one roof.

Last year’s chosen subject was the pandemic and its relationship with the European Convention on Human Rights. This year you will devote your discussions to an equally crucial theme which is intricately bound to the rule of law: the independence and impartiality of the judiciary. Indeed, there is a link between the pandemic and the independence of the judiciary which I will touch upon later on in my speech.

Maintaining the independence of the judiciary has been a priority theme of the recent Greek and German presidencies of the Committee of Ministers of the Council of Europe. The reason for this political focus is obvious.

The rule of law is now under pressure in some of our democracies in Europe (and indeed worldwide) with examples of direct or indirect challenges to the independence of the judiciary. This forms part of a culture of “democratic backsliding”<sup>1</sup> that we have been witnessing for the last years.

The Strasbourg Court has developed a body of case-law on this subject along with the right to a fair trial by an ‘independent and impartial tribunal established by law’. In particular, we have received applications by domestic judges who complain about disciplinary proceedings, dismissals and

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<sup>1</sup> “State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe”, Report by the Secretary General of the Council of Europe, 2021.

demotions under Articles 6, 8 and 10 of the Convention.<sup>2</sup> These are increasingly more high profile and politically sensitive.<sup>3</sup> Many of these cases will be discussed during the Forum.

In a great number of my speeches as President of the Court I have addressed the fusional relationship between the rule of law and the independence of the judiciary.

For my intervention today, I would like to look at the theme from a different angle, attempting to understand why the judiciary is now under attack. Secondly, I will provide some concrete suggestions of counter strategies to overcome these challenges.

## I. The Rule of Law under pressure

In an online symposium organised by *Diritti Comparati* in April this year as a response to my Article “*The Rule of Law as the lodestar of the European Convention on Human Rights: the Strasbourg Court and the independence of the judiciary*”, the opening piece stated quite starkly: “The Rule of Law in Europe is under pressure”.

As a cornerstone of the rule of law, the independence of the judiciary, has itself become the target of some illiberal democracies.

Why are we seeing these attacks on the independence of the judiciary?

As we all know, the judiciary is one of the three powers of any democratic state. An efficient, impartial and independent judiciary is integral to a functioning system of democratic checks and balance.

The role of the judiciary has evolved over recent decades with the number of cases brought to the courts multiplying, and with judges being called upon to decide on issues of political, social and economic importance<sup>5</sup>. We could say that the justice system has been called on to play a more and more important role in society. At the same time, challenges are being brought by the public to legislative powers and actions. As a result the judiciary has increasingly had to examine the actions of the two other state powers.<sup>6</sup>

If we take the pandemic as an example, over the last 18 months, national courts have received a large number of challenges to the actions of the executive. The pandemic has led to important restrictions not just to our civil and political rights, but also to our economic, social and cultural rights. Vulnerable groups have been particularly impacted.<sup>7</sup> Domestic judges have faced the difficult task of making sure that the public health emergency has not been used by the executive as a pretext for human rights infringements. There is a difficult balance to achieve of ensuring public safety on the one hand and enjoyment of fundamental rights and freedoms on the other.

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<sup>2</sup> See for example under Article 8 *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013 and *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018. Also under Article 10 *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.

<sup>3</sup> See *Tuleya v Poland (no. 2)*, communicated on 16 July 2021.

<sup>4</sup> R. Spano, “The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary,” *European Law Journal* 2021, pp.1-17.

<sup>5</sup> “State of Democracy, Human rights and the Rule of Law: a democratic renewal for Europe”, Report by the Secretary General of the Council of Europe, 2021.

<sup>6</sup> CCJE Opinion NO. 18 (2015) on the position of the judiciary and its relationship with the other powers of the state in a modern democracy, paragraph 1.

<sup>7</sup> Statement of the President of the CCJE, “The role of judges during and in the aftermath of the COVID-19 pandemic: lessons and challenges,” 24 June 2020.

Not all of the decisions taken by the courts will be appreciated by the governments and the temptation to publicly speak out against unpopular decisions may be greater. Here we see how judicial independence intersects with the pandemic.

If we contextualise the role of the courts with the onset of populist governments, we see that a possible tension is created. Populist governments may express impatience with the institutional checks and balances which the judiciary provides. The result may be a temptation to weaken or replace the independent components of government, such as the judiciary or Ombud's institutions<sup>8</sup>. Judges may be targeted by politicians or the media for their policy-making or overstressing their role. We don't have to look very far for examples, and some come even from our most established democracies.

Constitutional courts are particularly vulnerable to attack. Why? Because once they are weakened, the very institution which is there to prevent future violations of constitutional rights is no longer able to fulfil its core function<sup>9</sup>.

International human rights structures, such as international courts, are also vulnerable to attack for the same reasons. The European Convention on Human Rights may be perceived by some governments as getting in the way of specific governmental objectives, for example being tough on criminals or reducing migration. International human rights treaties are then painted by these populist governments as standing in the way of national sovereignty.

## **II. Strategies to reinforce independence**

So that is my diagnosis; now what about the cure?

We may feel powerless in the face of attacks on the judiciary because the solution – a respect for the separation of powers - seems to lie exclusively in the hands of the executive.

Yet, I would like to highlight some potential strategies which could help reinforce judicial independence.

My first point draws on the Online Judicial Forum organised by the AIRE centre in Bosnia and Herzegovina a couple of months ago. In my intervention I underlined the need to promote a better understanding of the work of judges within our democracies.

Courts can try to proactively shape the external environment in which their judgments are received.<sup>10</sup> This could take the form of increasing the public's awareness of the significance of its judgments through press releases or via social media. Outreach activities, such as court visits, can increase legitimacy and influence. Information directly communicated from courts can also help to counter false information circulated by populists. Ensuring that the public understand why independent courts are so essential in a democracy is fundamental.

Secondly, Judges themselves may speak out against government reforms in a proportionate way. On the question of the freedom of expression of judges, the Court in *Baka v Hungary* [GC] stated that

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<sup>8</sup> Gerald L. Neuman, "Populist Threats to the International Human Rights System", , in "Human Rights in a Time of Populism", edited by Gerald L. Neuman, Cambridge University Press, 2019.

<sup>9</sup> Wojciech Sadurski, Populism and Human Rights in Poland, in "Human Rights in a Time of Populism", edited by Gerald L. Neuman, Cambridge University Press, 2019.

<sup>10</sup> Laurence R. Heifer, Populism and International Human Rights Law Institutions, , in "Human Rights in a Time of Populism", edited by Gerald L. Neuman, Cambridge University Press, 2019.

*“questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter. Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate.”*

My third point focuses on judicial ethics. Independence and integrity are two sides of the same coin. When judges do not live up to the high standards of integrity expected from them, public mistrust is understandable. Ethical principles of professional conduct are therefore of vital importance. The Court itself has recently updated its own Resolution on Judicial Ethics from 2008 to respond to the new challenges of the 21<sup>st</sup> century, such as the presence of judges on social media.

My fourth point is influenced by the work of the Council of Europe’s Consultative Council of European Judges and in particular [Opinion No. 23 \(2020\) on the role of associations of judges in supporting judicial independence](#). In this Opinion, the CCJE calls upon the member States to provide a framework within which the right of judges to associate can be effectively exercised. One of the most important objectives of associations of judges are to establish and defend the independence of judges safeguarding their status and seeking to ensure adequate working conditions for them, and to foster and improve the rule of law.

My fifth and final point is concerned with judicial training. Judges who have received excellent training on the Convention principles and the Court’s case-law are better prepared to react to attacks on their independence and impartiality. This is why the Court and its Registry cooperate with the Council of Europe’s HELP programme which provides training materials on European human rights law, often setting out the standards not just of the European Convention but also the EU Charter of fundamental rights. That is important, because as I have argued elsewhere, there is a symbiotic relationship between the Strasbourg and the Luxembourg Court on rule of law issues. The importance of training is also why the Superior Court Network, established by the Court six years ago, also provides seminars on substantive aspects of the Court’s case-law.

## **Conclusion**

The Rule of Law is more than a series of procedural rights. It is one of the foundations of an effective and meaningful democracy, at the heart of the core values of the Council of Europe and the European Court.

The judiciary’s fundamental role in a democracy is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

The judiciary also plays a key role in the Convention system itself, acting as one of our compliance partners, applying the European Convention as a Strasbourg judge of first instance. The Convention system needs a strong and independent community of human rights judges.

I have attempted to focus the second part of my intervention on possible responses because while the situation in Europe is extremely worrying, we are not powerless in response.

I look forward to hearing the interventions of the other speakers and the discussions tomorrow on the ways forward.

Thank you very much.