



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

## **"Lawyers as Guardians of the Rule of Law in Europe"**

Speech by Robert Spano

*Helsinki, 6 May 2022*

Good morning to all. It is my great pleasure and honour to join you here in Helsinki for this year's Lawyers' Day; a very important date in your legal calendar. The focus for your programme is extremely topical: *the Rule of Law, Responsibility and Management*. I have therefore chosen to angle my own speech on the central role that lawyers<sup>1</sup> play in protecting human rights, in particular the right to a fair trial, and implementing the principles of the rule of law.

I will structure my intervention as follows: Firstly, I would like to look at the role which lawyers, as key Convention actors, play within the Convention system according to the notion of subsidiarity. Secondly, I will analyze the current rule of law crisis which we are witnessing in Europe. Thirdly, I will look at the crucial role which lawyers can play as guardians of the rule of law in Europe.

However, before I begin to discuss the main topic of my speech, I would like to evoke with you the transformative period in European history which we are currently living through - a period when the relative peace and security which we have taken for granted on our continent has been shattered by Russia's war and atrocities in Ukraine. I know that here in Finland you are acutely sensitive to this geopolitical upheaval.

When we celebrated the European Convention on Human Rights' 70<sup>th</sup> anniversary in 2020, we highlighted that the European Convention constituted one of the greatest peace projects in human history. Indeed, the very Preamble to the Convention refers to human rights and fundamental freedoms as the foundation of justice and peace in the world.

The work of the Council of Europe and its judicial control mechanism, the Court, has contributed to the stability, security and peace in Europe up to this point. I believe that the Court has an important role to play in ensuring the maintenance of a pluralistic democracy by guaranteeing respect for basic democratic principles in areas such as participation in free elections, freedom of expression, religion, association and assembly, and non-discrimination. The Court also promotes the rule of law, which provides the essential framework for the development of effective political democracy. When these freedoms are eroded we see the catastrophic consequences of unbridled totalitarianism and ultimately the violence which we are now witnessing.

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<sup>1</sup> I use the term lawyer meaning a "person qualified and authorised according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters." Committee of Ministers' [Recommendation No. R\(2000\)21](#)

The other transformative moment we have lived through recently has been the pandemic, which has had a tremendous impact on all aspects of life including the functioning of our courts and by consequence the role of the lawyer.

## I. The role of lawyers within the Convention system

Let me now turn to the first section of my speech: the key role lawyers play within the Convention system.

For the purposes of this speech I refer to lawyers in a broad sense, however, as we know, some lawyers can also be at the same time human rights defenders or activists both domestically and before the Court in Strasbourg. The Court attaches "*particular importance to the special role of human-rights defenders in promoting and defending human rights, including in close cooperation with the Council of Europe, and their contribution to the protection of human rights in the member States*".<sup>2</sup>

In accordance with Article 1 of the Convention, it is the national authorities which are the primary guarantors of human rights, subject to the supervision of the Court. The Convention system is subsidiary to the safeguarding of human rights at national level and the national authorities are in principle better placed than an international court to evaluate local needs and conditions.

The last 70 years of the Convention's existence have clearly shown us that the success of the Convention system is achieved through a combination of efforts both domestically and at the international level. Implementing the Convention must be a joint and joined-up effort of government, parliament, the domestic courts and also of national human rights institutions, lawyers and civil society.

Over the past years the Court has maintained a regular, institutionalised dialogue with stakeholders in the Convention system through biannual meetings with government agents and with NGOs and litigators.

The Court is particularly mindful of the very important role played by lawyers in the implementation of the Convention. Institutionally, it has recognised this role through regular dialogue with the CCBE, the Council of Bars and Law Societies of Europe. This dialogue has had a long tradition. Since 2013, Court Judges and Registry staff have been meeting with the CCBE to discuss issues concerning the functioning of the Convention system and practical questions relating to the Court's working methods. Indeed, the CCBE has assisted lawyers who bring cases to the Court with their practical guide in the form of questions and answers which the Court hosts on its webpage.

Last year, for the first time, the Court took this cooperation a step further. It organised its first institutionalised meeting with national bar associations directly.

I have argued that effective implementation of the European Convention on Human Rights takes place both *upstream* and *downstream* of the judgments of the Court. As lawyers, you have a role to play in both aspects.

You work *upstream* by relying on the Convention before your national courts. In this way you increase its embeddedness in the domestic legal culture. Many of you are engaged in advising and representing individuals as they seek to vindicate their human rights at the domestic level.

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<sup>2</sup> *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, § 208, 20 September 2018

You may also work *downstream* through communicating on the Court's case-law, sometimes translating it and ensuring its diffusion at the domestic level.

To perform these essential roles, lawyers need adequate legal education and training in the European Convention. The Council of Europe's Programme for Human Rights Education for Legal Professionals (HELP) supports member States in implementing the Convention at the national level by enhancing the capacity of judges, lawyers and prosecutors to apply the Convention in their daily work.

The HELP training modules are very useful in this regard and a number of Court lawyers have participated in their design. Legal education, including continuing education, should seek to strengthen legal skills, increase awareness of ethical and human rights issues, and train lawyers to respect, protect and promote the rights and interests of their clients and support the proper administration of justice.<sup>3</sup>

I genuinely believe that a true human rights culture cannot be sustained in the long run by the top-down imposition of legal norms that do not resonate in contemporary societies. Human rights must exist in the hearts and minds of peoples and their representatives in communal life. The purpose of such a bottom-up strategy is therefore to trigger the creation of a pervasive human rights culture at the domestic level, not just within the judiciary, but also in parliaments and with you, civil society, as well as with citizens. To encourage rights-holders and decisionmakers at national level to take the lead in upholding Convention standards can only increase the ownership of and support for human rights. Your role is crucial here as you come into direct contact with rightsholders.

## II. The rule of law crisis

Secondly, let me turn to the rule of law crisis. I think it is uncontroversial to state that 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. Challenges to the rule of law form part of a culture of "democratic backsliding"<sup>4</sup> that we have been witnessing for the last years.

A reflection of this state of affairs can be seen in the increase in the number of complaints brought to Strasbourg regarding violations of judicial independence<sup>5</sup>. Another strand of the Court's case-law which has increased in the last years is under Article 18 of the Convention. As you are no doubt aware, Article 18 serves a rule of law safeguarding function, since it applies to situations where States limit rights for 'ulterior' or 'hidden' purposes. In fact, since its 2017 judgment in *Merabishvili v. Georgia*<sup>6</sup>, the Court has adopted more than ten judgments on Article 18 of the Convention<sup>7</sup>.

The problem with the rule of law is that it can be hard to define and accordingly hard to communicate to the public about its importance. I have argued elsewhere that the rule of law is more than just a series of procedural rights.

But what do we mean by *rule of law*? While there is no abstract definition of the rule of law in the Court's case-law, the Court has developed various substantive guarantees which may be inferred from this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the

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<sup>3</sup> See Recommendation No. R (2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of a lawyer (Adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers' Deputies).

<sup>4</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>5</sup> See two recent Grand Chamber cases as examples: *Guðmundur Andri Ástráðsson v. Iceland* [GC], no. 26374/18, 1 December 2020 and *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022.

<sup>6</sup> *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017

<sup>7</sup> See for example *Aliyev v. Azerbaijan*, 2018, which concerned the detention of a lawyer and human rights activist and *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan*.

principle of equality of individuals before the law, the principle that the executive cannot have unfettered powers whenever a right or freedom is at stake, the principle of the possibility of a remedy before an independent and impartial court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State. Where the rule of law is absent we see a misuse of governmental power.

I have called the rule of law the “lodestar” of the Convention system, as it constitutes the legal and moral foundation of our work along with the fundamental principles of democracy and human dignity.

Within this context, there is also evidence of lawyers being under threat. In its [Recommendation 2121 \(2018\)](#), the Council of Europe’s Parliamentary Assembly expressed its *“utmost concern that harassment, threats and attacks against lawyers continue to occur in many Council of Europe member States and are even increasing in some of them, where they have become widespread and systematic and are apparently the result of deliberate policy”*.

According to a 2020 report<sup>8</sup> again prepared by the Parliamentary Assembly, *“In several countries lawyers continue to be targeted for their involvement in human rights-related cases, such as defending the rights of refugees, asylum seekers and migrants, women, members of national and linguistic minorities, and LGBTI persons. They have also been targeted for their work denouncing government unaccountability or corruption, or for representing particular individuals (terrorist suspects, opposition politicians, civil society activists, and independent journalists).*

*There are reports that lawyers were identified with the causes advocated or crimes committed by the individuals they were defending.”*

Indeed, the Council of Europe is even looking into the possible added-value of a future European legal instrument on the profession of the lawyer.<sup>9</sup>

There are many rights guaranteed by the European Convention that are potentially relevant to the problems faced by lawyers. Indeed, the Court has dealt with numerous complaints brought by lawyers or their relatives regarding physical violence, and sometimes death<sup>10</sup>, detention and ill-treatment,<sup>11</sup> harassment, threats and attacks<sup>12</sup>, the freezing of bank accounts and travel bans<sup>13</sup> and searches of offices<sup>14</sup>. Unfortunately, the examples I have just given you are non-exhaustive.

Where an interference with a lawyer’s rights can be shown to be motivated by improper reasons and their purpose is to silence and punish for their activities in the area of human rights, there will be a violation not only of the substantive rights but also of Article 18 as I mentioned earlier<sup>15</sup>.

This brings me to my third and final section: your role as guardians of the rule of law within this domestic community.

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<sup>8</sup> [The principles and guarantees of advocates, Report Doc 15152, 29 September 2020](#)

<sup>9</sup> [Feasibility Study prepared by Jeremy McBride, consultant, under the supervision of the European Committee on Legal Co-operation \(CDCJ\).](#)

<sup>10</sup> *Bljakaj and Others v. Croatia*, no. 74448/12, 18 September 2014

<sup>11</sup> *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, 13 November 2003

<sup>12</sup> *Aleksanyan v. Russia*, no. 46468/06, 22 December 2008

<sup>13</sup> *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan*, nos. 74288/14 and 64568/16, 14 October 2021

<sup>14</sup> *Heino v. Finland*, no. 56720/09, 15 February 2011

<sup>15</sup> *Aliyev v. Azerbaijan*, nos. 68762/14 and 71200/14, 20 September 2018 and *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan*, nos. 74288/14 and 64568/16, 14 October 2021.

### III. Lawyers as Guardians of the Rule of Law

So in what way do lawyers act as guardians of the rule of law?

Firstly, I would like to highlight the specific role played by the legal profession in upholding their clients' fundamental rights and the fair administration of justice in general. As I mentioned earlier the rule of law includes many substantive guarantees related to legality, equality before the law and due process. These guarantees aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State.

By defending your clients' individual freedoms, and often rights related to access to court, you are strengthening the rule of law in this crucial way.

Secondly, you play a key role as intermediaries between the public and the courts. Your close proximity to the courts, your understanding of their functioning, enables you to assist in the maintenance of public confidence in the courts.

Moreover, and it is worth highlighting, your independence from the State is crucial for an effective functioning of the justice system.

Thirdly, you are actors within the Convention system by pleading the Convention before your domestic courts, by sensitizing domestic judges to human rights complaints, and by ensuring that Court judgments are diffused and understood, sometimes in your own language.

Let me now conclude by repeating that I have no doubt that the European Convention on Human Rights is best implemented 'at home' by national authorities, by national courts, and by national judges and lawyers, ensuring that violations of Convention rights are effectively remedied domestically.

As I hope I have demonstrated this morning, lawyers play a fundamental role in the administration of justice, in upholding the rule of law, developing democracy and promoting human rights at the national level. In this way, you act as real agents of subsidiarity.

Thank you for the role that you play in implementing the Convention at the domestic and the international level, and continue your efforts! The Convention system needs you.