

DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

ONLINE SYMPOSIUM: THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EUROPEPOSTSCRIPT

Posted on 10 Maggio 2021 by [Robert Spano](#)

I begin by thanking *Diritti Comparati* and *EU Law Live*, as well as Professors Pollicino and Sarmiento for hosting this special issue on the occasion of the publication of my article in the [European Law Journal](#). It has been a great honour and a pleasure to review the many thoughtful and inspiring contributions from my distinguished colleagues, both on the bench and in academia.

Professors Daniel Sarmiento and Oreste Pollicino set the scene by highlighting the contemporary political context for this discussion. They underline the important role that the rule of law will play in shaping our democracies in the future. The direct relationship between the rule of law, democracy and freedom of expression is also referred to in Advocate General Giovanni Pitruzzella's contribution to which I will return below. The recent litigation at the European level on judicial independence is indicative of growing tensions in certain parts of Europe. The stakes are high, which is why the current challenges to the rule of law should be taken seriously.

Each contribution looks in its own way at the role to be played by national or European courts in upholding the rule of law through the prism of

judicial independence.

Judge Krystyna Kowalik-Bańczyk's impressive contribution examines judicial dialogue at the European level. She makes a powerful case for an 'axiological convergence' in the definitions of the rule of law and judicial independence by the Strasbourg and the Luxembourg Courts, a parallelism of jurisprudence and values. This follows necessarily from Article 52(3) of the EU's Charter of Fundamental Rights and from the presumption of equivalence of protection as first set out in the Strasbourg Court's *Bosphorus* judgment and subsequently reconfirmed and refined in the case of *Avotiņš v Latvia*. I certainly agree with Judge Kowalik-Bańczyk that 'the principle of the rule of law and the notion of judicial independence should be interpreted in the same manner under the ECHR and within the EU'.

Professor Giuseppe Martinico's contribution analyses the nature of the relationship between the European Court of Human Rights and national constitutional or supreme courts. It is clear that the Strasbourg Court is called upon in some cases to examine complaints in a manner which is similar to national constitutional courts. Indeed, the Court has sometimes been considered to be a quasi-constitutional court for Europe in the field of human rights. Yet at the same time, one of the most important features of the Convention system is its subsidiary character, as I explained elsewhere. While it may invade domestic boundaries as Professor Martinico suggests, this should be seen in a positive rather than negative light. The European Convention, as interpreted and applied by the Court, permeates most branches of domestic law in the States Parties. The Convention is perhaps the only international instrument which impacts domestic law to such an extent. Hence, the importance of two-way judicial dialogue with domestic courts. Judicial dialogue through judgments is, by definition, a process which takes time and any one snapshot is not necessarily reflective of the quality or effectiveness of that dialogue. Generally, differences of approach with domestic superior courts resolve themselves over time through follow-up judgments. So today's judicial disagreement might become tomorrow's judicial accord. In sum, enhancing such dialogue with national courts is a crucial aspect of the

work of the Court and is a top priority of my mandate as President of the Court. Since national judges are our key partners in the Convention system it goes without saying that their independence has primordial importance, not just for the rule of law in the country in question, but also for the European Convention system itself.

Advocate General Giovanni Pitruzzella highlights that the principle of the rule of law is 'strikingly elusive'. However, as he eloquently makes clear in an inspiring contribution, 'the Rule of Law, democracy is at risk or almost impossible. Democracy and the Rule of Law together pursue the fight against tyranny'. Demonstrating the close doctrinal connection between the rule of law and judicial independence, he goes on to make crystal clear that 'unless ... judges are independent and impartial, there is no point in having them; since if they are not, their decisions have no more value than if they were made by the reviewed body itself'.

My good friend, Judge Raffaele Sabato, focuses on elements which might make up a possible rule of law 'toolkit' for the judicial community, as he terms it. He joins me in the call for coherence within the 'symbiotic' case law of the Strasbourg and Luxembourg Courts. He hints at the possibilities for developing a judge's subjective right to independence in the Strasbourg Court's case law, a view already espoused by my predecessor, President Linos-Alexandre Sicilianos, in his much discussed concurring opinion in *Baka v Hungary*. Judge Sabato's judicial experience is vast and I know from working closely with him since his election to the Court that his wisdom and strong sense of justice, albeit coupled with inherent pragmatism, require that one carefully examines his views on judicial independence. Drawing on my extrapolation of the three-dimensional nature of the rule of law under the Convention, he concludes quite aptly by stating that 'a European community of judges can exist only if transparent, democratic and non-party-partisan mechanisms are in force to guarantee their appointments and professional status, preferably through self-government of the judiciary in order to preserve separation of powers'.

The principle of rule of law is one of the core structural pillars of a constitutional democracy, indeed, within the Convention system, a

'fundamental component of European public order', as explained by the Strasbourg Court. It is exactly within this context that the importance of judicial independence must be understood. It is an existential issue, it is foundational for Europe.

So I conclude with this: It is our solemn duty, the duty of every member of the *European Community of Judges*, national as well as international, to preserve our independence, to decide every case impartially and in accordance with the law and nothing else, and never succumb to external pressures of any kind. Only in this manner, performing our assigned roles under a system of the separation of powers, with a calm mind and a brave heart, can we serve the peoples of Europe and deliver justice.