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ONLINE SYMPOSIUM: THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EUROPESOME REFLECTIONS AROUND THE RULE OF LAW AND THE CONSTITUTIONAL BALANCE

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President Robert Spano's article on the Rule of Law is a source of fruitful thoughts and inspirations since the inception, when he adopts the metaphor of the 'lodestar' of the European Convention of Human Rights. As a star which is used to guide the course of a ship, the Rule of Law is used to guide the judicial interpretation of all the articles of the Convention and to frame the relationship between the Court of Strasbourg and the Court of Luxembourg.

The Rule of Law was once not very much more than an expression used by academics, prominent in AV Dicey's seminal work, *The Law of the Constitution*, first published in 1885. Since then the literature on the topic has become as vast as the ocean. Nevertheless, the meaning of the Rule of Law is strikingly elusive; there is no consensus, at least no overall consensus, on the subject. But if we leave the philosophical and doctrinal approach and we follow a legal approach based on the judicial interpretation of the Convention and the Treaties of the EU, our understanding becomes easier. From this perspective we can say, according to the jurisprudence quoted by President Spano, that the

European pluralistic constitutional order rejects the 'thin' theory of the Rule of Law. The concept is wider than the idea for which State power must be exercised in accordance with promulgated, non-retrospective law made according to established procedures. This 'thin' theory dominated the liberal constitutionalism of the nineteenth century. But the weak meaning of the Rule of Law became unsatisfactory for the liberal-democracy of the twentieth century.

Our democracies cannot accept this 'thin' version. The cornerstone of contemporary constitutionalism in Europe is the guarantee of human dignity which is the prominent foundation of a very large set of fundamental rights. The main corollaries of this set of rights are pluralism and an open society. This common inspiration of the Constitutions of many European States is reflected in the European Convention of Human Rights and in the Charter of Fundamental Rights of the European Union.

This cultural, political and juridical context brings the European Courts to link the Rule of Law with democracy and fundamental rights. The Rule of Law demands more than legal certainty (which, however, is still important). The Court of Strasbourg stated that the Rule of Law is one of the 'foundations of an effective and meaningful democracy', and furthermore it has identified a direct connection between the Rule of Law, democracy and freedom of expression.

The Rule of Law is linked to democracy in the wording of the Article 2 of the Treaty on European Union, and it is a necessary condition, according to the jurisprudence of the two Courts, to guarantee fundamental rights and avoid tyranny. Without the Rule of Law, democracy is at risk or almost impossible. Democracy and the Rule of Law together pursue the fight against tyranny.

But the Rule of Law does not overlap with democracy. Democracy's flag is the authority of the people's will, while the flag of the Rule of Law is the principle according to which society is governed by the law. Government by the people and for the people is different to government by law. Hence the tension between the two principles. There is a structural and unavoidable tension between the two sources of legitimacy and they need

to be accommodated.

An accommodation between the claims of the Rule of Law and the claims of people's sovereignty must be found in order to create – to use the title of a very recent book of John Laws - a "Constitutional balance". In order to understand the source of tension between the two principles and reach the proper balance, we should define their precise scope. Thus, how should the Rule of Law be properly understood?

Firstly, it must include the 'thin' theory. As President Spano points out, 'the foundational moral idea behind the rule of law, which lies at the core of Convention protection, is the respect for personal autonomy and the exclusion of the arbitrary use of governmental power. For a person to realistically able to retain and nurture independence of thought, to be able to manage his or her life as he or she wishes, to be able to strive for happiness, success and inner peace, all fundamental elements of human existence, it must conceptually be of paramount importance that the society in which that person lives is in reality, and not only factiously, governed by law. The law must be transparent, stable, foreseeable and allow for mechanism of dispute resolution that are independent and impartial" .

But the 'thin' version restrains political power only by insisting on proper procedures for the making and application of the law. This could be – as I said before – unsatisfactory. In effect our constitutional systems require something else: the protection of fundamental rights and judicial supervision of State action. But, unless the 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.

The version of the Rule of Law developed by the European Courts involves the right to an effective judicial remedy and the independence of the judiciary, which has a very broad meaning. According to the Court of Justice, this requirement of judicial independence, which is inherent in the task of judging, falls within the essential content of the right to effective judicial protection and the fundamental right to a fair trial, which is of

cardinal importance as a guarantor of the protection of all the rights that individuals derive from EU law and of the preservation of the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law (*Commission v Poland*, C 192/18, paragraph 106 and the case law cited; *A.B., C.D, E.F., G.H., I.J, v Krajowa Rada Sadownictwa*, 22, paragraphs 116 and 117 and the case law cited).

A similar line of reasoning is adopted by the Strasbourg Court in its seminal rulings in the cases *Oleksander Volkov v. Ukraine, Baka v. Hungary, Denisov v Ukraine, AgroKomplex v Ukraine*, and *Astråōsson v Iceland*. Particular attention is paid to the requirement of de facto judicial independence, like in the important judgment in the case *Kinsky v. the Czech Republic* and more recently in *Rinau v. Lithuania*, in which public statements by politicians and measures taken by the executive to monitor ongoing judicial proceedings were considered to have had an impact on the fairness of pending proceedings before national courts.
It is noteworthy to add another aspect. The meaning of any given law is very often uncertain. This is true for domestic law, but also for the European laws, for the Treaties of the EU and for the European Convention of Human Rights. The more the legal text is the product of a political compromise, the more its meaning is ambiguous and uncertain. As a consequence, there are two circuits of law-making. The political mechanism, based on the people's vote, the Parliament and the political will expressed in the statutes or in the European laws, and the judiciary mechanism, whose output is legal interpretation. Judicial interpretation is a part of the law-making process and judicial interpretation is a creative activity. The statute's meaning must be independently decided, to satisfy the Rule of Law and protect ourselves against the caprice and the arbitrary rule of rulers. However, can citizens be protected against another form of arbitrariness, the one of the judges (*le gouvernement des juges*), that hinders the constitutional balance? As Aharon Barak wrote in his book on a judge's discretion, 'the fundamental question is not whether discretion should exist, but: where a democratic society that is governed by law should set appropriate limits on discretion'.

I think that the answer is that judges should implement, when they

interpret the law, some objective standards, which are mainly the constitutional principles underpinning the legal system in which they operate, together with some tools elaborated by the jurisprudence with the aim to limit the arbitrary use of power, such as proportionality. These standards limit and guide their discretion. The law thus made will give effect to standards that are not merely the creatures of the rules who made the laws or of the individual judge who interprets it. These standards can also guarantee the coherence of the whole legal system – which is an aspect of legal certainty - and an evolution of the jurisprudence capable of combining the necessity of flexibility and adaptability to changing circumstances with the predictability of judicial decisions. Among these general objective standards there is also the Rule of Law. As President Spano points out, the Rule of Law has different dimensions. The Rule of Law is identified in a set of specific rules – which I mentioned above - but it is also the principle which provides a methodological point of departure in the interpretation of any legal provisions in order to pay due respect for the rational autonomy and dignity of human beings and to preclude the arbitrary use of governmental power.

If judges, interpreting the law, dismiss these objective standards and follow their subjective preferences and political choices, they go beyond the boundaries that in a democratic society limit their role. If politicians threaten, using the law or other political means, the independence of the judiciary, they violate the obligation they bear in a system based on the Rule of Law and break the constitutional balance.

The text expresses the personal opinion of the Author and in no way commits the institution to which he belongs.