



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

**RECONNECT (“Reconciling Europe with its Citizens through Democracy and the Rule of Law”)  
Online Annual Conference**

**“The role of European and national courts  
in upholding the rule of law”**

Speech by Robert Spano,  
President of the European Court of Human Rights

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Let me begin by thanking most warmly Prof. Dr. Jan Wouters, Coordinator of the RECONNECT research project, for inviting me to address you today.

The fundamental aim of the project resonates well with the core values of the Council of Europe: democracy, rule of law and human rights. Accordingly, I am honoured to provide my perspective as President of the European Court of Human Rights.

While your project focuses on strengthening the legitimacy of the European Union, in many citizens’ minds “Europe” is an amorphous space which combines different aspects of the work of the European Union and the Council of Europe alike. For example, in the pre-Brexit referendum debates in the United Kingdom, public attention was equally focused on the Strasbourg Court as well as the Luxembourg Court. Therefore, I see your research work as equally important within the larger legal space of the Council of Europe’s 47 European States.

What are the global challenges we are currently facing together? I have pinpointed the following five:

Firstly, the technological revolution we are living through. Here I could mention developments in Artificial Intelligence; social media and the rise of online hate; misinformation and fake news. These developments have already have and will continue to have repercussions on democracy and the rule of law.

Secondly, we have witnessed great societal changes over the last few decades such as the strengthening of LGBTI rights and the backlash against those rights.

Thirdly, I would cite the environment and the challenges posed by climate change. For the courts, a particular question arises: what if any role should they play at the domestic and the European level in responding to climate change litigation?

Fourthly, our post-pandemic society. How do we rebuild ourselves following economic disruption; how do we ensure that emergency powers and restrictions put in place during the last 18 months do not remain our new normal? How do we respond to the inequalities upon which COVID-19 has shone a light?

Fifthly, but no less importantly, political polarisation, challenges to the rule of law and judicial independence and what we have called “rule of law backsliding”<sup>1</sup>. Multi-lateral institutions, such as the European Union and the Council of Europe, are also liable to challenges and weakening.

Faced with these challenges, how do we strengthen the rule of law and renew trust in democracy? One of the answers your project focuses upon is to re-set citizen participation in the European project. One may ask in this context: What if any role do courts have in reinforcing citizen belief in and attachment to the fundamental European values of democracy and the rule of law? I will revert to this question in a moment. But first, a brief discussion of the legal and conceptual basis of these values.

In the landmark judgment in *Golder v the United Kingdom* of 1975, the Strasbourg Court made clear that the rule of law is ‘one of the features of the common spiritual heritage of the member States of the Council of Europe’.<sup>2</sup>

As I have set out extrajudicially in a recent article on the rule of law,<sup>3</sup> the foundational moral idea behind the rule of law, which lies at the core of all Convention protections, is the respect for personal autonomy and the exclusion of the arbitrary use of governmental power.

The rule of law, by requiring that governmental power be regulated by law and not the whims and caprice of men,<sup>4</sup> demands that laws are clear and not excessively vague and open to abuse,<sup>5</sup> so as to negate the autonomous choices made by members of society based on existing rules. The law must be relatively stable and secure legal certainty.<sup>6</sup> The rule of law does not allow for unfettered powers to be granted to the organs of Government.<sup>7</sup> Laws must be interpreted and applied by independent and impartial courts,<sup>8</sup> and that once courts have rendered final and binding judgments they should not be called into question.<sup>9</sup>

These conceptual elements of the rule of law explain why this fundamental principle is anathema to authoritarian states or the realms of dictators and why rule of law and democracy goes hand in hand.

I will now turn to the role of national courts and the European Court of Human Rights in upholding the rule of law.<sup>10</sup> I will make three points.

**First.** The fundamental values of the European Union and the Council of Europe are increasingly being called into question both at the European and the global level. Institutions which promote multilateralism are also vulnerable to attack, as are domestic and international judges.

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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.

<sup>2</sup> *Golder v the United Kingdom* [PL] (no. 4451/70), 21 February 1975, Series A 18, § 3.

<sup>3</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

<sup>4</sup> *Sinkova v Ukraine* (no. 39496/11), 27 February 2018, § 68, *Baydar v the Netherlands* (no. 55385/14), 24 April 2018, § 39.

<sup>5</sup> *Işikirik v Turkey* (no. 41226/09), 14 November 2017, §§ 57-58.

<sup>6</sup> *Panorama Ltd. And Miličić v Bosnia and Herzegovina* (no. 69997/10 and 7493/11), 25 July 2017, § 63.

<sup>7</sup> *Roman Zakharov v Russia* [GC] (no. 47143/06), 4 December 2015, § 230, *Beghal v the United Kingdom* (no. 4755/16), 28 February 2019, § 88.

<sup>8</sup> See Section 4 below.

<sup>9</sup> *Ireland v the United Kingdom* (revision) (no. 5310/71), 20 March 2018, § 122.

<sup>10</sup> See my speech at a High-level Conference on the Rule of Law in Europe, Coimbra, 17 May 2021.

This is what the Secretary General of the Council of Europe calls “democratic backsliding”<sup>11</sup> and is evidenced by litigation before the Court of Justice of the European Union and the Strasbourg Court on topics such as judicial independence.

As we all know, an efficient, impartial and independent judiciary is the cornerstone of a functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law. Courts preserve the core value underpinning the fundamental idea of a constitutional democracy, which is this: Democracy values everyone equally, even if the majority does not. Let’s not forget that history has repeatedly taught us that unchecked majority rule risks descending into authoritarianism.

The judiciary is therefore an essential component of democratic societies and a key institution that needs to be protected. As I have said on a number of occasions: *“The principle of the rule of law is an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights... Without independent judges, the Convention system cannot function.”*

It is clear that this existential argument applies as well directly within the European Union as the Court of Justice has made clear in a number of landmark judgments on judicial independence in recent years starting with the Portuguese Judges case of 2016<sup>12</sup>. I will come back to the relationship between Strasbourg and Luxembourg in a moment.

To conclude this first point. The common thread here is that an efficient, impartial and independent judiciary is the cornerstone of a functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law.

**My second point** underlines the quality and importance of judicial dialogue between the Strasbourg and Luxembourg Courts on rule of law issues. As just mentioned, the Court of Justice of the European Union has in recent years rendered important rulings in the field of judicial independence under the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights. The jurisprudential core of many of these rulings relies upon Strasbourg case-law and Strasbourg case-law itself relies upon the findings of the Luxembourg Court. The recent case of *Guðmundur Andri Ástráðsson v. Iceland* [GC] is a case in point, and in particular the Grand Chamber’s reliance on the principle of irremovability as set out in *Commission v Poland*.

The important element to highlight here is the clear symmetry of values between the two systems. This is the case despite the procedural differences between the cases brought to each European Court. Rule of law issues are raised before the Luxembourg Court by way of references for preliminary rulings and infringement proceedings. Before the Strasbourg Court, the individual applicants are the directly affected parties to domestic proceedings. Yet, the two systems are evidently complimentary and mutually reinforcing. There are ongoing negotiations on the EU accession to the European Convention on Human Rights which in my view can only be positive in bringing the two systems more closely together.

**My third point** focuses on the implementation of judgments of the Court and how this contributes in a very concrete way to upholding the rule of law.

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<sup>11</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>12</sup> CJEU, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, n 24.

In a State governed by the rule of law, final and binding judgments of courts must be executed without exception. The same applies to judgments of the European Court of Human Rights by which a State is bound under international law.

Implementing judgments, particular rule of law issues, may involve complex reforms at the domestic level, through notably important constitutional reform. Judgments of the European Court of Human Rights point out deficiencies at the national level, however remedying these deficiencies takes political will as well as financial and other resources.

This brings me to **my conclusion** where I come back to the question I posed at the outset: What if any role do courts have in reinforcing citizen belief in and attachment to the fundamental European values of democracy and the rule of law?

My answer is this: Reinforcing citizen belief in the fundamental European values of the rule of law, democracy and human rights requires courts to be effective communicators, to articulate their pronouncements clearly, with cogent and coherent legal reasoning, but also to be visible and transparent in their day-to-day operations.

We must all together make our citizens realise what Europe would look like without the rule of law. Do we want a world in which the rule of unfettered political power would constitute the main rule, the very means by which our lives would be regulated? This would be a world in which our fundamental rights to liberty, freedom of expression, to lead a private life, to enjoy family life, would all be subject to the unfettered and arbitrary will of majoritarian sentiment without recourse to independent and impartial courts.

Yet, let's be frank. We cannot rely *solely* on the courts to solve the rule of law challenges we are witnessing. The judiciary cannot strengthen the rule of law alone.<sup>13</sup>

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. This echoes the theme of today's conference: earning citizens' respect. A pervasive rule of law and human rights culture must exist not just within the judiciary, but also in parliaments and with civil society, as well as with citizens.

To conclude, some have argued that the void growing within European societies started from and in many ways was a result of the end of the Second World War.<sup>14</sup> On this view, man searches for significance and meaning in his life. This cannot be filled alone through material gain and prosperity. This metaphysical need was previously filled through aspects of day to day life which have largely been eschewed in modern liberal democracies within the last half a century: for example an emphasis on duties and responsibilities to others rather than the individual as an island unto himself. According to this argument, this void and the need for meaning beyond the individual experience has been filled by populism.

If this is correct, in resetting citizens' trust in our European project, we must recall the importance of collective values, of a shared experience, of the individual in community, albeit forever protected

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<sup>13</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>14</sup> Joseph H.H. Weiler, "The European Circumstance and the Politics of Meaning: Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4)" German Law Journal (2020), 21, pp. 96–99.

from abusive and arbitrary exercises of governmental power by a robust and reinforced understanding of the importance of democracy, the rule of law and human rights.

Thank you for your attention.