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ONLINE SYMPOSIUM: THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EUROPETHE RULE OF LAW, JUDICIAL INDEPENDENCE AND … ROBERT SPANO

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Having served for a long time as a judge in the courts of my country before landing in Strasbourg to serve as a judge at the European Court of Human Rights (ECtHR), I consider that present threats to judicial independence and impartiality in Europe are not only a professional, but also a personal concern.
Robert Spano's article, while proposing a very interesting approach to the conceptual framework of the Rule of Law (RoL), also provides, in my view, a relevant – albeit perhaps implicit - toolkit for actors at the European and national level to deal with issues concerning the role of judges as RoL guarantors.
I am not a theorist. Consequently, in this Long Read I will only shortly argue from a mere practitioner's point of view that this toolkit exists. I hope that the reader may also conclude that such a toolkit may turn out to be useful in the near future; but I will not be able to dwell on this latter aspect.
Before presenting my thoughts, let me say that:

- Robert Spano, a person who remarkably combines assets from

theoretical and judicial experiences, was the paladin for the European Court of Human Rights' (ECtHR) developing independent role within the Interlaken process while he was a judge. As its President he led the ECtHR to the closure of the process in the Council of Europe's ministerial session of 4 November 2020, on the ECHR's 70th birthday. His background in firm and constant pleading for the ECtHR's and national judges' independence in this and in several other, often difficult, contexts is a sort of watermark we should not lose sight of as we comment on a paper by him; the view of subsidiarity as a support to the judicial role he has voiced in the past, coupled with his vision of a European dynamic community of judges, are now - after Protocol no. 15 will enter into force in a few months - enshrined in the preamble to the Convention. Therefore, his article does not come as a surprise.

- The vision of a three-dimensional status of the RoL is of course the main feature of the article (in its section 3). However, especially from my point of view as a 'worried' practitioner, of no less importance is the fact that the author develops the concept (in section 4) that independence of the judiciary is the most prominent example of a 'hybrid' dimension in which the RoL operates under the ECHR, at the same time, as a principle and as a set of specific rules, which the community of judges itself has to enforce. Last but not least, in such a community along with national judges, Spano includes two European Courts, the relationship between the Luxembourg and the Strasbourg courts being a 'symbiotic one' when referred to the RoL (and this is the content of a very stimulating subsection 4.4).

Let us now come to the toolkit that the article, in my opinion, provides to the judicial community.

A first tool most likely lies in the idea, implicitly supported by Spano consistently not only with the ECtHR Grand Chamber judgment in the case of Guðmundur Andri Ástráðsson v. Iceland, but also with the 'symbiotic' case law of the Luxembourg Court (subsection 4.4), that the RoL hybrid dimension may become relevant in *any kind of court litigation*.

It cannot be my task to discuss the conceptual framework that the author

provides for this idea; I may just mention that both the parties and – probably – the judges of any case affected by any breach of this dimension of the RoL may consequently be entitled to legal standing to challenge it at the European level. If the Icelandic case expands the right to a tribunal established by law under Article 6 ECHR to include a prerequisite of an appointment of judges complying with the RoL's hybrid dimension, other expansions could become visible in the wake of the ECtHR's and the 'symbiotic' Luxembourg Court's case laws (for example let us imagine what can be built on Oleksandr Volkov v. Ukraine, Baka v. Hungary, and Denisov v. Ukraine concerning the issue of irremovability and/or procedures to dismiss judges from their functions).

Another powerful tool that the article indirectly points out to concerns, in my view, *domestic judges and the systems governing their status*. The ideas that the RoL has a dimension directly spelling out fixed-content rules, and that the latter include those rules which protect judicial appointments and careers from undue interference, imply that this type of violations of the RoL are crucial and relevant for European supervision. Along these lines, 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. But, as case law shows, even formally independent bodies, such as councils for the judiciary, can be established or function in defective ways, possibly not compliant with Article 6 (these days, allegations of this kind concern many countries). In such cases, possible expansions of protection may even address the functioning of such bodies, in view of transparency and firewalls against outside interferences. Spano calls our attention to the need to pierce the veil of the 'façade' of merely formal judicial independence.

Last, but not least, a third tool that the article provides concerns the relationship between the violation of the RoL in the area of judicial independence and *underlying domestic proceedings*. This is more a tool for digging in search of the buried jewel in our treasure hunt, than the jewel itself. In fact, the article does not clarify if, and under which circumstances,

violations in the area of judicial independence may be deemed so serious as to entail that domestic decisions stemmed *a non judice* or *coram non iudice.* This, too, is not a surprise, since the judgment in *Guðmundur Andri Ástráðsson* also only alluded to the issue. Here, it is inevitable to take note of the several domestic solutions to the problem of reopening proceedings, and the customary maxim that it is not for the ECtHR to solve it. But, in my view, the article contains one or two concepts, built on strong foundations of both case law and legal scholarship, that may 'lead' to developments. I will not comment further: a 'lodestar', as the etymology of this word tells us, is a star that 'leads' the way.