NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 2 (1/2025), pp. 71–81
DOI: https://doi.org/10.71042/CJL01202505

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The Role of the Legal Profession in Europe

• **Abstract** •

This text explores the evolving role of lawyers in the European context, at both national and supranational levels, in light of the integrated system for the protection of rights. It highlights that lawyers have transcended their traditional role as defenders to also become creators and guarantors of rights within civil society. This transformation entails an increasing relevance of the social and ethical dimension of the legal profession, as well as greater responsibility on the part of lawyers. Finally, it mentions the potential tension between current formal law and living law.

Keywords: New Rights, Multilevel, Human Rights, Judicial Creation, Lawyers.

Introduction: Reflections on the New Role for Lawyers in the Multilevel System

The current debate concerning the role of the legal profession of lawyers in Europe leads to several reflections aimed at understanding how a new role for lawyers is deeply defining itself in the European as well as in the national context, in the name of that qualitative leap made necessary by the "frenetic expansion of the catalogue" of rights (Flick, 2013, p. 63–74), rights ordinarily finding their sources in the judiciary's judgments (so-called living law), originating therefore from the judges' pronouncements. A new role, the one for lawyers, which also becomes a challenge, entailing the need to recognize, on the one hand, that lawyers have the fundamental function of *defenders* of the rights of which numerous centers of interest are the bearers and, at the same time, even the fundamental function of creators, unitedly with the judiciary's judgments, of those rights and

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interests and, on the other hand, that lawyers are also called upon to take on the responsibility for their affirmation within collective sentiment and thus within civil society.

The reference is not only to the rights of lawyers' individual clients, but also and primarily to those fundamental rights which, while they once had an essentially national origin, currently, by virtue of the so-called *multilevel* system – a kind of intertwining, an overlap between national Courts and supranational Courts and between national law and supranational law –, also and primarily have a supranational origin. In other words, lawyers must stand up in defense not only of the rights and interests of individual clients, but also of those inalienable rights which are necessary prerequisites for the existence of the former.

The European Parliament resolution of March 23, 2006 itself has highlighted this fundamental role of the legal profession of lawyers as a fortress of democracy and of the Rule of Law. Consequently, there is "not only a great responsibility in the exercise of the legal profession in order to protect the client (…), but also a social responsibility on the part of lawyers (...) precisely because their profession is closely linked not with the mere rendering of a service to the benefit of the client, but with the role that lawyers play within society" (Alpa and Mariani Marini, 2014, p. 177).

The contribution that lawyers can offer and that they are already offering to the development of *living* law, also with the aim of protecting rights, confers to lawyers themselves a fundamental role in bringing about those necessary changes within society, which are at times not perceived, or at least not readily perceived, by the political class, or in any case which are perceived only as a result of repeated rulings on the part of judges, in that ever-expanding activity of replacement and of substitution of a legislative power which is not always sensitive to the needs arising from society.

Lawyers and the Protection of New Rights and of Already Established Ones

The issues, subject of discussion to which the next paragraph will be devoted, are those relating to: i) the social relevance of the role for lawyers, ii) the ethical dimension of the legal profession, as well as iii) the responsibility on the part of lawyers. These issues prove to be of pressing relevance, especially if we keep into due consideration that we are living in what Norberto Bobbio called the "age of rights" (Bobbio, 2014) – an age in which, in many cases, rights particularly fundamental rights, emerge from judicial initiative, in accordance with that desire to

expand the catalogue of rights which draws from that beautiful work by Hannah Arendt in which the recognition of the idea of the existence of "the right to have rights" is advocated for (1962, p. 298).

While from this rights-creating and law-creating perspective, the very delicate work on the part of judges, often acting in substitution of political power and of legislative power, proves to be fundamental, just as fundamental is the role of lawyers who will have to work side by side with judges not only in protecting already 'established' rights, but also in the phase which is functional to the recognition of new rights, by expanding, or by contributing to expand, the catalogue of the new rights themselves of which the different centers of interest are bearers. In this context, lawyers are even called upon to carry out a sort of examination and check of the work on the part of the judiciary, which is often called upon to contend with supranational laws immediately applicable in the national sphere.

This aspect regarding the examination and check of the judiciary's work carried out by lawyers, while proving to be of absolute importance, too often, however, does not find its proper recognition, perhaps due to a kind of subalternity, at times not even thinly veiled, of lawyers to judges. In a complex context in which increasingly intense and close relations are intertwined between domestic law and fundamental rights – which find their recognition at the supranational level – and with an increasing role for both national and supranational judges, it consequently becomes necessary to strengthen the role of lawyers, who are called upon precisely to verify the correctness of the judiciary's work.

As a result, lawyers are called upon not only to contribute through judicial action to the recognition of those new rights of which the numerous centers of interest are legitimate bearers, but also to perform a safeguarding function in order to protect already existing rights as well as the *newly born* ones. Indeed, as pointed out by Anton Giulio Lana, lawyers are recognized as having a "privileged" role among the "defenders of human rights", given the defense of rights that they are called upon to exercise in court, being also constitutionally legitimated to do so, safeguarding the Rule of Law which is *condicio sine qua non* for living in a democracy (Lana, 2023, p. 190).

Such a defense of rights must currently be carried out in a territorial sphere that constitutes, or at any rate has until recently constituted, a novelty, having to cover the entire European territory, and even looking beyond the European perimeter, in a therefore supranational perspective which makes said defense activity all the more complex. Moreover, the same so-called *multilevel* system of protection of fundamental rights entails that the technical assistance offered by lawyers takes on a fundamental, indispensable importance.

A trace of said fundamental nature arises from the content of Article 47 of the Charter of Fundamental Rights of the European Union, titled "Right to an effective remedy and to a fair trial", which reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". This provision overlaps with the one in Article 6 of the European Convention on Human Rights (ECHR), titled "Right to a fair trial", in which not only the principle of the right to a fair trial is established, but whose paragraph III reads as follows: "Everyone charged with a criminal offence has the following minimum rights (…) (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

Living Law and Current Law and Judicial Effectiveness

It is not difficult to predict that the exercise of legal aid is destined to increase in the future, particularly given the creative role increasingly assumed by the judiciary – a role that entails, or at least should entail, an ever-greater and necessary involvement of lawyers. Indeed, we find ourselves ineluctably witnessing the growing importance of traditional legal aid as a direct consequence of the judiciary's increasingly pervasive role in the judicial creation of fundamental rights. In line with the works of distinguished legal scholars, it appears undisputed that judges and lawyers perform their respective functions by proceeding hand in hand, particularly within a supranational context, in accordance with the principle of reciprocity articulated by Piero Calamandrei (1956, p. 23): "In this dialogue between judges and lawyers, I would not say that judges are the protagonists: what matters is the binomial comprised by these two inseparable elements, the relationship of reciprocity occurring between these two forces, in the balance of which all the problems, legal and moral, of the administration of justice are summed up".

It is therefore clear that the legal profession of lawyers, in this scenario, is undergoing a deep requalification process, also in accordance with the supranational context toward which the profession is by this time oriented in order to protect human rights, and those rights that constitute "original legal firstlings"

(Flick, 2013, p. 65), such as, merely by way of example, the rights to diversity and the rights to the quality of life. Indeed, it is well known that there is a proliferation of the requests for recognition of fundamental rights, which find recognition not so much in legislative activity as in so-called *judicial effectiveness*, therefore in the judgments on the part of both national courts and European courts, courts that constitute *de facto* the new legislative frontier, and thus act as a substitute for legislative power. It is precisely in this activity of *judicial effectiveness* and of acknowledgement of ever-new fundamental rights to be recognized, as well as of the constant safeguarding of already recognized rights, that the role for lawyers called upon to protect said rights fits in. So much so that, as correctly noted by Giovanni Maria Flick, what characterizes the European context on the subject of rights is not so much the centrality recognized to human rights, but mainly the effectiveness of their protection, through that *multilevel* which determines the coming together of the sources of law and the individual courts called upon to *ius dicere*.

With regard to so-called *judicial effectiveness* or, if you will, with regard to the function of judges-legislators, it is worth noting that given the increasing number of so-called creative judgments, functional to the expansion of the number of provisions, the need for the constant involvement of lawyers becomes even more pressing. Lawyers are called upon to avoid a gradual devaluation of the legal rules – and therefore of the law itself – in favor of the so-called living law, which forces current law to chase the judges' creative work, at times so creative as to appear even fanciful, with the concrete risk of a lack of homogeneity in judicial pronouncements, unanchored as they are from a clear legal context.

Social Relevance of Lawyers, the Ethical Dimension of the Legal Profession and the Responsibility on the Part of Lawyers

The above observations induce a further consideration regarding the nature of the role that lawyers have within civil society, besides the role of legal defense and of representation of individual clients. In other words, the question arises as to the nature of the role and duties of lawyers not only toward their own clients and their direct interlocutors, the judges, but also toward civil society, by virtue of a profession – namely, the legal profession – to be understood also as a levee against possible violations of rights on the part of the powers present in society. Among these powers, one must certainly mention political power and economic power, the latter of which has objectively been strengthened also due to the weakness of politics, not only in the European sphere, with the economy having

undergone a transformation from being a means to an end to becoming the end itself, a shift that is affecting the lives of us all.

That is not all. We find ourselves in the presence of a technological development which has also undergone a transformation in the social context from being a means to an end to being the end itself. From a legal perspective, technology has itself become a source of new rights, which are threatened moreover by the expansion of the very same technology. Indeed, technology allows for previously unthinkable results, from which potential rights arise asking to be recognized. At the same time, however, those same rights that find their origin in technology and in its constant advancement may be subject to limitations by technology itself, with the result of the latter posing a threat to those very same rights to which it has given origin.

Thus, a kind of social responsibility on the part of lawyers has emerged that requires lawyers to move past that perimeter, known to all those who practice the legal profession, constituted by the protection of the interests of individual clients and of the individuals being represented, to embrace the protection of human rights of people and of the interests of society itself, beyond that typical mandate relationship upon which ordinary legal aid activity is based, a responsibility which also recalls the concept of professional ethics. We are speaking of a principle of actual responsibility, in light of the fact that lawyers, when called upon to carry out their profession, to exercise legal aid, are at the same time tasked with protecting those inviolable rights of individuals that extend beyond the sphere of the legal defense of the represented party, assuming a kind of function that one might define as *meta-procedural*. This is precisely the nature of the social responsibility on the part of lawyers, which undoubtedly recalls professional ethics, which in turn certainly encompasses professional deontology itself, transcending, moreover, its boundaries by encompassing in its own turn not only the social responsibility on the part of lawyers but also the protection of the values of equality, justice and solidarity, values that form and must by this time form the background, including the cultural one, of lawyers in both the European and national context. This is a (social) responsibility that is an integral part of the legal profession of lawyers.

So much so that, following this line of thought, there has been a move toward a substantial harmonization between the deontological rules of the Council of Bars and Law Societies of Europe and the principles also recalled by the concept of social responsibility on the part of lawyers, aiming toward an ever-increasing harmonization of the national codes of ethics with the one for European lawyers. Thus, the social responsibility on the part of lawyers must by now be understood as an actual deontological obligation of both a supranational and national nature.

Regarding the aforementioned thesis, the analysis conducted by Michael G. Karnavas proves to be of particular interest, as it examines every aspect of the legal profession, highlighting – through a kind of comparative analysis – the similarities and differences between the common law system and the civil law system (Karnavas, 2016).

As already underlined above, there is certainly a close connection between the social responsibility on the part of lawyers, within the above-mentioned terms, and professional ethics, which require the professional activity of lawyers to be informed by the principles of fairness and competence. Particularly significant in this respect is Italian Law 247/2012, "New Rules Governing the Legal System of the Profession of Lawyers", with that provision set forth in Article 1, which reads as follows: "The legal system of the profession of lawyers, given the specific nature of the function of legal defense and in consideration of the primary legal and social relevance of the rights it is appointed to protect: a) regulates the organization and exercise of the legal profession of lawyers and, in the interest of the public, ensures the professional suitability of its members in order to ensure the protection of the individual and collective interests on which it produces effect; b) ensures the independence and autonomy of lawyers, which are indispensable prerequisites for the effectiveness of legal defense and of the protection of rights; c) protects the trust on the part of the community and on the part of clients, providing for the obligation of behavioral fairness and for the care of the quality and effectiveness of professional services". Even more incisive from the perspective of professional ethics is the provision set forth in Article 3, titled precisely "Duties and Deontology", the second paragraph of which reads as follows: "The legal profession of lawyers must be exercised with independence, loyalty, probity, dignity, decorum, diligence, and competence, bearing in mind the social relevance of legal defense and respecting the principles of correct and fair competition": thus, how could one overlook the close connection between the social role of lawyers – *the social relevance of legal defense* – and the principles by which the professional activity of lawyers must be informed?

In this sense, is relevant the report of Hans-Jürgen Hellwig (2002, p. 263). Also, the characteristics of a lawyer have been correctly summarized in a study by Jingwei Xu, Zhengmin Li, and Siyu Li (2022, p. 1): "The legal profession plays a vital role in society, tasked with the essential duty of preserving justice, safeguarding rights, and upholding the rule of law. Central to this noble endeavor are the principles of legal ethics and professional responsibility, which serve as the moral compass for lawyers and legal practitioners. These principles guide their conduct and decision-making processes, ensuring that they serve their clients' in-

terests while upholding the broader principles of justice and fairness. Legal ethics demand that lawyers act with integrity, honesty, and loyalty to their clients. They must also maintain confidentiality and avoid conflicts of interest. Additionally, they are obliged to zealously represent their clients within the bounds of the law".

It follows that lawyers, in order to exercise the fundamental social role they are called upon to carry out, must, in addition to maintaining their independence, also be diligent and competent, thus adhering to the aforementioned ethical principles. This is also essential to building citizens' trust in the legal profession, which is, first of all, called upon to protect the rights of the weakest. Said independence means lawyers must be free from any kind of internal and external pressure. This is an issue of absolute importance as evidenced by the contents of the United Nations Human Rights Council's Special Rapporteur on the independence of judges and lawyers (Satterthwaite, 2023), presented in July 2023 to the United Nations General Assembly. Indeed, this report underlines the need to guarantee everyone the enjoyment of all human rights. In this perspective, therefore, a preponderant role is recognized to judges and to lawyers, with the individual countries having to adopt appropriate measures to guarantee the independence of the judicial system, in order to concretely protect said rights in the face of constant, numerous attempts to violate them. Moreover, already in the summer of 2022 the "Rule of Law Report" presented by the European Commission to the European Parliament, the European Council and the European Economic and Social Committee highlighted, on the one hand, the need to ensure the independence of judges, stating that "The independence of the judiciary is fundamental to ensuring the fairness of judicial proceedings" and, on the other hand, the fundamental role of the legal profession of lawyers, underlining that "Lawyers are fundamental actors in judicial systems based on the Rule of Law. Lawyers and their professional associations play a fundamental role in strengthening the Rule of Law and in ensuring the protection of fundamental rights, including the right to a fair trial".[1]

On this topic, see the aforementioned work by M. G. Karnavas and the analysis carried out by Julinda Beqiraj and Lucy Moxham (2022, p. 141), stating that "At a European level, the Council of Europe's Commission for Democracy through Law, known as the Venice Commission, draws on Lord Bingham's definition. In its 2011 'Report on the Rule of Law', the Venice Commission considered the historical origins of the Rule of law and related concepts of *Etat de droit* and

[1] Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (2022) "Rule of Law Report", COM (2022) 500 final, Luxembourg, July 13, 2022.

Rechtsstaat, as well as instances of the concept of the Rule of Law at national and international levels. It was also careful to distinguish the 'Rule of Law' from 'Rule by Law', which it described as 'a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements'. The Venice Commission went on to identify a consensus around six necessary elements of the Rule of Law: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law. It concluded that the Rule of Law 'does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power'. Subsequently, the Venice Commission developed a 'Rule of Law Checklist' as a tool to assess respect for the Rule of Law". Also noteworthy, on the subject of the impartiality and independence of judges, is the article by Lotta Maunsbach (2022, p. 131) noting that "Independent and impartial judges (courts) are a cornerstone of a State governed by the rule of law. In Europe, we uphold this principle as part of the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (CFR). The basic ideas are, first, that anyone is entitled to have a dispute heard by a court of law in a procedure that meets specific requirements, that is, in a fair trial. The State has a duty to make such judicial dispute-resolution procedures possible. Second, it is an essential characteristic of a democracy that individual judges and the judiciary as a whole are independent of all internal and external pressures, so that those who appear before them, and the wider public, can have confidence that their disputes will be decided fairly and in accordance with the rule of law (…). The importance of judicial independence is more evident than ever. In recent years there has been a backsliding of the rule of law in the European Union (EU), with some Member states no longer respecting these fundamental values of the Union".

One should not overlook the fact that the ethical principles we have previously referred to are also called upon to inform the way in which lawyers exercise their profession within the courtrooms. Indeed, in the context of judicial trials, the principles of loyalty and fairness must be applied to all those who, within the courtrooms, are called upon to be protagonists – first and foremost, the judges.

Conclusion: Distinguishing Features of the Legal Profession

In conclusion, this analysis of the evolving role of lawyers within the multilevel European system underscores several distinguishing features of the legal profession that hold significant public and social relevance, often warranting greater consideration. As Piero Calamandrei prophetically stated, lawyers stand as central figures in the administration of justice, a role that has only intensified in the contemporary European context.

This centrality necessitates an ever-increasing emphasis on deontology and continuous legal training for lawyers, both nationally and across Europe. Such ongoing education is not merely beneficial for navigating an expanding and increasingly supranational legal market, but it is also a fundamental requirement given the proliferation of rights sources. Lawyers bear an ethical obligation to remain constantly updated on these developments.

Considering these current realities, it is evident that every lawyer must embrace a significant shift in their professional practice, demanding a concerted effort that surpasses the demands of a purely national legal landscape. By undertaking this transformation, as powerfully asserted by Giovanni Maria Flick, the enduring and profound values of the legal profession can be safeguarded amidst the challenges of our time. Ultimately, the proactive adaptation of lawyers to this new multilevel system is crucial for upholding the principles of justice and the rule of law in Europe.

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