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

Seminar at Swedish Government Offices

"The significance of the European Convention at the national level"

Speech by Robert Spano

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Dear Minister Johansson,
Dear Director General For Legal Affairs,
Dear Helena, Fellow Judges,

I begin by thanking warmly the organisers for inviting me to address you this afternoon.

The subject of my intervention here today will be the significance of the European Convention on Human Rights at the national level.

The reason for the importance of this topic is primordial as I will explain. Quite simply put, the future of the Convention system depends on strong and meaningful dialogue, as well as good faith cooperation between the Court and the national authorities, in particular national judges who are one of our key partners in the Convention system.

I will proceed in four parts.

Firstly, I would like to begin by exploring the concept of subsidiarity as understood in the Convention system (I), before secondly turning to the importance of the creation of a human rights culture which incorporates all stakeholders at the domestic level (II). Thirdly, and most importantly, I will discuss the fundamental nature of active judicial dialogue and in that regard comment on the level of Strasbourg Court scrutiny of domestic judicial decision-making (III), before concluding with some reflections on the current challenges facing the Court and the importance of reaffirming the collective guarantee of human rights protections at the European level (IV).

I. The Principle of Subsidiarity

So, to my first part, the principle of subsidiarity.

Under this principle, member States are first and foremost responsible for the effective implementation of the international human rights norms they have voluntarily signed up to. By virtue of Article 1 of the European Convention on Human Rights, States Parties undertake to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention.

The principle of subsidiarity is grounded upon a number of key elements which must be understood as a logical whole as these elements interact with each other but at the same time create a structural edifice with some internal tensions.

First, sovereign States are the main actors under public international law, and the other actors (such as international organisations) derive their powers from them.

It is for this reason that the Court, whose jurisdiction is limited by Article 19 to ensuring that the Contracting States observe their engagements under the Convention, may not overstep the boundaries of the general powers delegated to it by the States of their sovereign will. In keeping with this logic, it is the States who should be the first to address human rights issues which arise on their territory. However, whilst at the same time retaining their full sovereignty, the Member States of the Council of Europe have explicitly accepted by sovereign choice that their actions in the field of human rights can be reviewed critically by an international court, the Strasbourg Court. In other words, the Member States to the Council of Europe have explicitly and intentionally decided become an integral part of the so-called "European public order" the Court has identified as forming the bedrock of the Convention system.

Secondly, as the Court has repeatedly held, by reason of their direct and continuous contact with the vital forces of their countries, the domestic authorities are better placed than an international court to assess the multitude of factors surrounding each case: it is therefore primarily for the former to identify and afford redress for possible infringements of human rights in each particular case. However, and this is sometimes misunderstood or at least misconstrued by some, the principle of subsidiarity is not a trump card for the Member States.

It is not a principle of Convention law which in any way limits the Strasbourg Court's competence to review substantive findings at national level at the stage of the application of Convention principles embedded in the domestic legal systems. The correct understanding of subsidiarity is one of give and take, of shared responsibility, of mutual understanding between the national authorities and the Strasbourg Court.

The concept of shared responsibility was set out in the Interlaken Declaration of 19 February 2010. One of the overarching themes of that decade-long reform process, which drew to a close in Athens last November, has been to increase the embeddedness of the Convention at the national level.

In the 2012 Brighton Declaration, it was decided to add a recital to the Preamble of the Convention affirming that the States Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court. This recital came into legal effect with Protocol No. 15 on 1 August this year.

In the 2015 Brussels Declaration, the importance of effective national implementation and execution of judgments was given further emphasis.

Today, the Convention is incorporated, and to a large extent, embedded into the domestic legal order of the States Parties, and the Court has provided a rich and comprehensive body of case law interpreting most Convention rights. This enables the States Parties to play their Convention role of ensuring the protection of human rights to the full.

II. A Human Rights Culture at Domestic Level

Allow me then to turn to my second part and begin by underlining a point which is sometimes overlooked. The principle of subsidiarity is binding on all branches of State – the executive branch, whose task is to apply laws in a manner compatible with the Convention and to issue regulations in the same spirit, the legislative branch, which must enact laws in conformity with the Convention and the judiciary.

Of course, the courts, which are invested with the conventional attributes of a judicial function and are subjected to guarantees of independence and impartiality, are best placed to ensure respect for the individual rights guaranteed by the Convention. Indeed, as I have made clear on a number of occasions, and will come back to in a moment, the Convention system cannot function without independent and impartial courts applying the Convention at national level.

However, despite this particular role of the judiciary, the courts do not have the sole responsibility for ensuring respect for human rights at the domestic level.

This is why it is essential, as I have said before, that the Convention system develops on the basis of a bottom-up strategy empowering national rights-holders and decision-makers, who I have called Convention stakeholders, to take the lead in securing human rights, albeit ultimately subject to the supervision of the Strasbourg Court within the Convention system.

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. The purpose of such a bottom-up strategy is therefore to trigger the creation of a pervasive human rights culture at the domestic level, not just within the judiciary, but also in parliaments and with civil society, as well as with citizens. To encourage rights-holders and decisionmakers at national level to take the lead in upholding Convention standards can only increase the ownership of and support for human rights.

Having said this, let me be clear, as it is particularly important due to the precarious times we live in: The Convention system is based on the fundamental premise that if Member States of the Council of Europe do not rise to the task, or indeed regress towards illiberal or authoritarian rule, the Court must and will enforce the Convention's enduring constellation of rights and principles guided by its lodestar, the Rule of Law, which as the Court has repeatedly held, is "inherent in all the Articles of the Convention".

This brings me to my third part today, the fundamental importance for the Convention system to foster active and meaningful dialogue with national judges.

III. Judicial Dialogue

Enhancing such dialogue with national courts is a crucial aspect of the work of the Court, and one which it puts into practice through bilateral meetings as well as through the creation and maintenance of its Superior Courts Network, created in 2015.

We are very proud that the "SCN", as we call it, now comprises 96 superior courts from all Member States but five (Sweden, Switzerland, Denmark, Estonia and Finland). Indeed, it has become one of the most impressive judicial networks in the world. Through the exchange of information on the Court's case-law via the network, we are truly creating a community of European human rights

judges who, each and everyone of them, act as 'Strasbourg' judges at the domestic level when faced with disputes implicating Convention rights.

Being a member of the SCN has a number of practical advantages. Yet, over and above having privileged access to the Court's case-law via the special platform, I would like to underline that member courts can share their own domestic case-law and experience with others.

However, I should stress that judicial dialogue does not just take place with judges from superior courts.

Every year, the Court welcomes delegations of judges from all courts across the Council of Europe legal space. These are not simply courtesy visits; they are of great importance for the sustained legitimacy of the Convention system. They have often been organized within the context of Council of Europe cooperation projects on raising awareness about Court judgments. The Court provides a training programme which includes meetings with Court Judges and Registry lawyers, the possibility to attend a public hearing where possible and to see firsthand how the Court works.

I would like to extend an invitation to the Judges of the Swedish Supreme and Supreme Administrative Court to visit us again soon in Strasbourg. This is an excellent way to discuss topics of mutual interest and hear firsthand from the Judges who deal with Swedish cases what issues are being raised in Strasbourg and for you to explain to us what human rights claims are being treated domestically.

But let me be clear, the most important manifestation of judicial dialogue occurs of course through judgments of the Strasbourg Court and national courts in the field of Convention rights.

Allow me also to add here that the coming into force of the advisory opinion mechanism of Protocol 16 on 1st August 2018, has introduced another important tool for structured dialogue in this regard as witnessed by the advisory opinions already rendered by the Court.

I have previously argued extra-judicially[1] that the last forty years have seen, what I have termed, the 'substantive embedding' of the Convention principles at the domestic level. This has entailed that the Court has formulated its general principles of interpretation and developed its case-law in most fields of Convention rights. This has been a functional process aimed at progressively creating the necessary foundations for the actual realization of the Convention's overarching institutional structure.

However, the embedding process has not impacted every State in the same way. I think it is fair to say that in Sweden the Convention principles have been infused into the domestic legal system in a very successful way since 1994.

This is perhaps reflected in the fact that so few applications find their way to Strasbourg. The average number of applications attributed to a judicial body for 10,000 inhabitants in 2020 is 0.50. The average number for Sweden is 0.17. There are currently just 50 applications pending against Sweden and less than half of those are pending before a Chamber. I know that Judge Wennerström will address this state of affairs in more detail. Yet despite this low number, we have had some important judgments and decisions against Sweden, such as the recent Grand Chamber judgment on mass surveillance in *Centrum för rättvisa* and a number of important issues are pending.

[1] R. Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law', *Human Rights Law Review*, 2018, 0, 1-22.

In States, in which the substantive embedding of the Convention has been largely successful, the Court may be in a position to take on a more framework oriented role when reviewing domestic decision- making. This review I have termed *process-based* in the sense that the Court is increasingly examining whether Convention principles have, in fact, been adequately embedded in the domestic legal order and, if so, whether certain material elements allow it to grant deference to national authorities. This is, by and large, limited to qualified rights and not to core or absolute rights. When the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously the Court applies the concept of subsidiarity more robustly.

IV. The Importance of the Collective Guarantee of Human Rights

With these words, allow me then to turn to my final part before I conclude.

I think it is safe to say that none of us will ever forget the last eighteen months, mostly due to the unprecedented circumstances we have faced because of the pandemic.

Yet we live in uncertain times. We have a number of recent examples of challenges to the rule of law and judicial independence in a number of Council of Europe member States. This brings me back to my first point on subsidiarity. Subsidiarity is not realistic without strong, independent and impartial domestic courts which function within a national system that is governed by the rule of law. It flows from this that member States demonstrate with their actions whether deference is due under the principle of subsidiarity. In particular, the reasoning provided by national courts in their judgments must secure and protect their independence vis-à-vis the executive and legislative branches.

Strong and independent national courts, like those in Sweden, which engage in good faith with Convention principles at the domestic level, are positive examples for all Council of Europe member States. After all, judges, scholars and practitioners, as well as politicians and civil society, should never forget that human rights protections for all Europeans are our collective concern, not limited by borders or other parochial inhibitions. Allow me to recall the words of the Preamble to the European Convention on Human Rights where it is stated, and I quote, that the “Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”, resolve to take the first steps for the “collective enforcement” of certain human rights.

Dear colleagues,

I conclude by saying that I am confident that we, as a community of European judges, Ministers, legal scholars and practitioners, will together, through decisions and actions taken both at the national and European level, ensure that the Convention system thrives for another 70 years.

Thank you very much.