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

Solemn hearing 2023
"Recourse" to and "Discourse" on the European Convention: an Asset for Democracies

Speech by Silvana Sciarra

Strasbourg, 27 January 2023

President of the European Court of Human Rights,

Distinguished Judges,

Excellencies,

Ladies and Gentlemen,

I am deeply honoured to speak at this solemn ceremony in front of a distinguished audience, following President O'Leary's most inspiring presentation. It is wonderful that our personal and professional lives can cross paths again, on this formal occasion.

It is an honour for the Italian Constitutional Court, which I represent, and I hope that the message that will be shared – through my voice – with judges acting in diverse capacities, will provide opportunities for enhanced mutual learning and for closer cooperation.

"Cooperation" is indeed a key word, and so is the notion of common interests.

The message I intend to offer to this distinguished audience is that, in such a context of cooperation, constitutional courts occupy a privileged position in supporting democracies and in promoting the integration of common standards, whenever human rights are at stake. They do so because they bear a distinctive responsibility, inherent in constitutional adjudication.

In particular, in recent times, issues of independence of the judiciary have been threatening the symmetry of the international legal order as a whole, regarded as it is as the combination of constitutional and convention law, often intertwined with regional standards, above all the standards of the European Union ("EU").

Independence rests, among other criteria, upon the coherence and transparency of legal arguments, which are best exemplified through the selection of precedents.

Let me underline another key word: "symmetry".

It is an utmost responsibility for constitutional courts to strike the right balance among all the parameters to be taken into account and to achieve an overall equilibrium within national legal systems.

Their institutional standing in all countries makes them bearers of both pluralism and democratic values.

In the late 1990s, innovative proposals to foster the integration of legal standards were aired in academic circles – among them the European University Institute –, triggered by Opinion 2/94 rendered by

the Court of Justice of the European Union ("CJEU") on accession of the European Communities to the European Convention on Human Rights ("European Convention")[1].

The proposals circulating in those years were based on the analysis of existing competences in various fields; they aimed at empowering all European institutions to enforce human rights policies[2].

An alleged lacuna in such policies made recourse to the European Convention a crucial instrument in a wider process of constitution-building. Hence, recourse to the European Convention would have implied an expansion of competences.

As we all know, no European constitution saw the light of day in spite of all the efforts made.

However, wider expectations had been created. One may argue that courts later acquired an even stronger visibility in the transition towards a discourse on the European Convention.

Here comes the linguistic "escamotage" I am going to use in my presentation.

I say "discourse on" as a follow-up to "recourse to" the European Convention, to exemplify the steps forward that must be taken in order to magnify the democratisation of national legal systems and to proceed towards closer cooperation among international institutions and consequently among courts.

For example – and I hope you will appreciate this touch of national pride rather than self-referentiality – in 2007 the Italian Constitutional Court delivered the so-called "twin judgments" on the role of the European Convention as an "interposed parameter" in constitutional adjudication. The Court underlined the "special nature" of the Convention, different from any other international treaty, which had given rise to a "system for the uniform protection of fundamental rights"[3]. In addition, the Court emphasised that the obligations assumed by Italy by signing and ratifying the European Convention implied that the Strasbourg Court was recognised as having a "pre-eminent interpretative role", helping to clarify the international law obligations assumed by the signatory States in that particular area[4].

Recourse to the European Convention, in the Italian as in other national legal systems, sets in motion cooperation among courts, which then develops into a discourse on the European Convention, namely a less fragmented interpretation of international standards by domestic courts.

References to Protocol No. 16 and to advisory opinions on questions of principle[5] confirm that discourses on the European Convention can be developed in different ways and in different fields. All such sources converge on a unitary notion of democracy.

Cooperation among courts crosses, in fact, the reactions of other institutions and spreads democratic principles, making them coherent both inside and outside domestic legal systems. In that light, it has been maintained that, despite their non-binding character, such opinions substantially "irradiate" general effects[6].

---

*I am grateful to Dr. Lorenzo Cecchetti, currently on an internship programme at the Constitutional Court, who helped me in editing this paper and in adding essential references. Gratitude also implies that all mistakes and omissions are my only responsibility.

[1] CJEU, 28 March 1996, Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.

[2] See P. Alston, J.H.H. Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights*, in P. Alston (ed.), *The EU and Human Rights*, Oxford, 1999, p. 659-723.

[3] Italian Constitutional Court, Judgment No 349/2007, point 6.2. of the conclusions on points of law.

[4] Italian Constitutional Court, Judgment No 348/2007, point 4.6. of the conclusions on points of law.

[5] Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Article 1(1).

[6] A. Tancredi, *I pareri resi dalla Corte europea dei diritti dell'uomo ai sensi del Protocollo n. 16 nella recente giurisprudenza costituzionale*, in A. Annoni, S. Forlati, P. Franzina (ed.), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Naples, 2021, pp. 589-612, p. 593. In the same vein, see R. RUOPPO, *La funzione consultiva introdotta dal protocollo 16*, in *Diritto delle successioni e della famiglia*, 2022, pp. 1223-1251, p. 1242 ff.

The non-binding and preventive nature of this instrument – born also with the aim of reducing the number of complaints lodged with the European Court of Human Rights ("ECHR")[7] – adds a stronger accent to the discursiveness of interpretations offered by national courts. Protocol No. 16 clarifies that only courts designated as "the highest" by the contracting parties may seek "advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Article 1 § 1) and that the procedure may only originate in pending cases (Article 1 § 2)[8].

This is yet another confirmation of the responsibilities undertaken by courts, which are required to show consistency in their own legal arguments.

The novelty lies in an interpretation of subsidiarity ending up in complementarity and shared responsibilities, rather than in considering the ECHR a court of last resort.

The first Opinion, delivered in response to a reference from the French Court of Cassation[9], gave rise to interesting responses, due to its *erga omnes partes* effect, well beyond the State in which it originated.

The Opinion concerned the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.

Most notably, the ECHR advised the national court to consider that the child's right to respect for private life within the meaning of Article 8 of the Convention "requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'", and that "the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births …". Another means, such as adoption of the child by the intended mother, may be used, in accordance with the child's best interests.

The Italian Constitutional Court has quoted the Opinion in a few judgments, albeit with different emphasis[10]. It is worth recalling that Italy has not ratified the Protocol[11].

The Italian Court of Cassation made a reference to the same Opinion both in an order raising a question of constitutionality[12] and in a recent landmark decision, which came as a response to a Constitutional Court ruling of inadmissibility in a case dealing with the child of a same-sex couple born through surrogacy[13].

In this ruling, the Court of Cassation quoted, among others, the ECHR's judgment in *D.B. and Others v. Switzerland*, delivered on 22 November 2022 and not final as of today, to support the tenet that, whatever the parents' behaviour, the best interests of the child should become a component of the notion of international public order[14]. The notion of public order, "traditionally conceived as merely preclusive and oppositional", should rather pursue a positive function: new parent-child relationships should enter the international scene[15].

---

[7] ECHR, *Reflection Paper on the proposal to extend the Court's advisory jurisdiction*, March 2012, para. 14, available at https://echr.coe.int/Documents/Courts_advisory_jurisdiction_ENG.pdf.

[8] ECHR, *Guidelines on the implementation of the advisory-opinion procedure introduced by Protocol No. 16 to the Convention*, 18 September 2017, available at https://echr.coe.int/Documents/Guidelines_P16_ENG.pdf.

[9] ECHR (Grand Chamber), 10 April 2019, Request no. P16-2018-001, *Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*, available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-6380464-8364383%22]}.

[10] See Tancredi (n 6), p. 589-594.

[11] With regard to the debate on the ratification of the Protocol, see, *inter alia*, R. Sabato, *Riflessioni sulla ratifica dei protocolli n. 15 e 16 della CEDU*, in *Sistema Penale*, 16 December 2019; and B. Nascimbene, *La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto*, in *Giustizia Insieme*, 29 January 2021.

[12] Italian Supreme Court of Cassation (First Civil Law Section), Order No 8325/2020.

[13] Italian Supreme Court of Cassation (Joint Civil Law Sections), Judgment No 38162/2022.

[14] Judgment No 38162/2022 (n 13), para. 19.

[15] *Ibid.* The translation into English is mine.

This meaningful step forward implies that a "uniform value" should be applied for the assessment of the best interests of the child[16].

The examples quoted here – in which both the Constitutional Court and the Court of Cassation have referred to the same ECHR Advisory Opinion – is nothing but a confirmation that Protocol No. 16 is already regarded as an influential instrument in the context of international human rights law. And it is so in a most delicate field, with regard to the best interests of the child.

Opinions enter the legal discourse as *res interpretata* and acquire a legal standing – not merely a factual, persuasive or moral one – within the broader spectrum of convention case-law[17].

This original approach – I call it an example of law in action – deserves to be underlined when courts, such as the Italian courts I have just mentioned, refer to Advisory Opinions while operating in a country that has not ratified Protocol No. 16.

There is a profound reason for this: a discourse on the protection of human rights necessarily entails a broad generalisation of all interests at stake and a relevance for all States parties to the Convention. Article 43 § 2 of the Convention mentions – and this point should be recalled – "a serious issue of general importance", which is to be decided by the Grand Chamber.

Circulation of standards brings courts closer to each other and enhances evolving interpretations of the law. In a similar way, albeit with different legal consequences, preliminary references, as in Article 267 TFEU, have strengthened the European "community of courts"[18] and have fostered the concretisation of common values.

Let me take another example.

On issues related to assisted suicide, which have very sensitive ethical implications, there is some convergence between the Italian[19] and the Austrian Constitutional Courts[20] – as the references to the ECHR's rulings prove[21] –, which display coherence in their legal arguments, strengthening the authority of constitutional adjudication[22].

Let me now move on to what I suggest should be referred to as an interconnection – recalled in the words of President O'Leary in her most thought-provoking speech today[23] – between the Court of Justice of the EU and the ECHR, on cases dealing with disciplinary measures addressed to judges, potentially entailing serious consequences for those on whom they are imposed.

The Polish cases – despite not being the only ones, as we heard in the "Judicial Seminar" held earlier[24], before this solemn hearing – have proved to be crucial in the case-law of both courts.

In an action brought by the Commission against Poland under Article 258 TFEU for failure to fulfil obligations, the CJEU Grand Chamber specifies that even the "mere prospect" for judges to be the addressees

---

[16] *Ibid.*

[17] See Tancredi (n 6), p. 606, with references to relevant scholarship on the theme.

[18] C. Kilpatrick, *Community or Communities of Courts in European Integration? Sex Equality Dialogues between UK Courts and the ECJ*, in *European Law Journal*, 1998, p. 121-147.

[19] Italian Constitutional Court, Judgment No 242/2019.

[20] *Verfassungsgerichtshof,* Judgment No G 139/2019-71, decided on 11 December 2020, which postponed the entry into force of the repeal of the law declared unconstitutional until 31 December 2021.

[21] ECHR (Fourth Section), 29 April 2002, Application No 2346/02, *Pretty v. United Kingdom*; ECHR (First Section), 20 January 2011, Application No 31322/07, *Haas v. Switzerland*.

[22] Reflection Paper (n 7), paras. 7-8; Tancredi (n 6), p. 605-606.

[23] President O'Leary's speech is available at https://echr.coe.int/Documents/Speech_20230127_OLeary_JY_ENG.pdf.

[24] ECHR (Fourth Section), 19 October 2021, Application No 40072/13, *Miroslava Todorova v. Bulgaria*, where the Strasbourg Court unanimously found a violation of the applicant's freedom of expression (Article 10) and of the Convention's rules governing restrictions on rights (Article 18) in relation to the disciplinary proceedings initiated against the applicant – president of the National Association of Judges – following criticism of the work of the Bulgarian Supreme Judicial Council and the Bulgarian executive, cited by M. Lazarova Trajkovska, *Judges preserving democracy through the protection of human rights. Freedom of Assembly and Association and Democracy*, available at https://echr.coe.int/Documents/Speech_20230127_Lazarova_Trajkovska_JY_ENG.pdf.

of disciplinary measures issued by a body whose independence is not guaranteed may affect their own independence. In support of its argument, the Court of Justice quotes the ECHR's case-law (ECHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, and ECHR, 9 March 2021, *Eminağaoğlu v. Turkey*)[25].

The CJEU recalls Article 19 TEU, which, in the words of the Court itself, gives concrete expression to the rule of law, a value enshrined in Article 2 TEU and a condition for enjoying the rights deriving from EU membership.

The CJEU goes as far as affirming that the combination of various reforms adopted by the Polish legislature has brought about a "structural breakdown which no longer makes it possible to preserve the appearance of independence and impartiality of justice"[26].

This decision was delivered on 15 July 2021.

In May 2021 – not much earlier – the ECHR held in *Xero Flor v. Poland* that the presence of a judge elected by the new Parliament in 2015 – one of the so-called "judge doublers" – was in breach of Article 6 of the European Convention, namely of the right to be heard by a tribunal established by law[27].

The case was initiated by a complaint to the Polish Constitutional Court, perceived by the complainant as a non-independent body. Following the above-mentioned decision, two press releases were issued by the Constitutional Court itself and by the Polish Ministry of Justice that "attacked" the ECHR for lacking competence in the administration of justice and becoming a threat to Poland's sovereignty[28].

The monumental rulings produced by both Courts are enriched with references to objective criteria on how to measure the independence of the judiciary. These criteria are the outcome of reflection and investigation carried out by national and international bodies, above all the Council of Europe[29] and the European Commission[30], with thorough evaluations included in State reports. They take into consideration various standards, for example the ways of financing the judicial system, the functioning of independent self-governing bodies, and even communication with the media.

A solid contribution to building up the notion of independence is offered by the CJEU.

The leading case is *Wilson*, which goes back as far as 2006, where several judgments of the ECHR are quoted (*Campbell and Fell v. United Kingdom; De Cubber v. Belgium; Incal v. Turkey*)[31].

In this judgment, the CJEU elucidated certain criteria. Objectivity within the proceedings has to do with the composition of the body, the appointment of judges, the length of service and the grounds provided for abstention. Any "reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it" should be dismissed[32]. This was the aim of the CJEU in that judgment, which was followed by a consistent stream of more recent decisions[33], further clarifying the notion of independence in connection with the case-law of the Strasbourg Court.

---

[25] CJEU, 15 July 2021, Case C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, para. 83.
[26] *Ibid*., para. 64.
[27] ECHR (First Section), 7 May 2021, Application No 4907/18, *Xero Flor w Polsce sp. z o.o. v. Poland*.
[28] *TrybunałKonstytucyjny*, 24 November 2021, causa K 6/21, at https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11711-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny; *Ministerstwo Sprawiedliwości*, 25 November 2021, Press release entitled "The European Court of Human Rights cannot judge the legality of the election of Polish judges", at https://www.gov.pl/web/sprawiedliwosc/europejski-trybunal-praw-czlowieka-nie-moze-oceniac-legalnosci-wyboru-polskich-sedziow.
[29] Council of Europe, *Report by the Secretary General of the Council of Europe on «State of democracy, human rights and the rule of law: A democratic renewal for Europe»*, Strasbourg, May 2021.
[30] European Commission, *2022 Rule of Law Report: The rule of law situation in the European Union*, COM(2022) 500 final.
[31] CJEU, 19 September 2006, Case C-506/04, *Wilson*, ECLI:EU:C:2006:587, para. 51.
[32] *Ibid.*, paras. 49-53, at 53.
[33] This line of case-law was inaugurated by the CJEU, 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

I move on now to some concluding remarks.

I have suggested that domestic courts, including constitutional courts, offer an evolving interpretation of the European Convention, which has been strengthened by the operation of Protocol No. 16. This has happened even in most sensitive fields of law involving ethical issues. I have employed the best interests of the child as an example.

I have also maintained that in all such cases recourse to the European Convention develops into a discourse on the European Convention.

I have used this linguistic escamotage to suggest that domestic courts must be protagonists in consolidating a unitary vision of human rights law.

This is an asset for democracies.

In the post-war period, the search for peace inspired those who took responsibility for paving the way, left empty by armies, with norms. The expression “constituent body” is used to describe the ritual accompanying the entering of law into the field previously dominated by conflict.

The metaphor of a “body” brings with it the notion of life: this happens when courts construct common standards, through a coherent, living reading of legal sources.

This interpretative process should constantly feed the culture created by constituent bodies and enlarge the space for constitutionalising fundamental rights as well as create a scenario of peace, which is what we all expect.

A discourse on the European Convention is strengthened – as I have indicated – by cross-fertilisation and mutual learning among the judiciaries.

Constitutional Courts and the European Courts talk to each other using a common language: they come closer in sharing the language of human rights and in adopting objective criteria, as shown by research on different countries.

When they defend the independence of the judiciary, they act as responsible guardians of the rule of law and adopt a semantics of power in preserving democracy.

Thank you for your kind attention. My best wishes to President O’Leary and to the whole Court for the new judicial year.