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THE EUROPEAN COURT OF HUMAN RIGHTS AFTER SIXTY YEARS. REFLECTIONS OF A JUDGE AT THE END OF HIS TERM OF OFFICE

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It is a great honour for me to speak at the Altiero Spinelli Lecture and I am very grateful to the CSF for inviting me. It gives me an opportunity to reflect on as well as provide an account of my particularly significant professional experience, made possible by Italy, within the judicial institution of the Council of Europe, including forty-seven countries of the extended Europe. For those, such as myself, who started out in and have been active in the national judiciary, concluding one's professional career at the European Court has required a profound change in perspective and method as its working method and pluralistic composition offer stimuli and require a willingness to dialogue that are incomparably greater than those typical of national courts.

1. *The Convention*

A close link between the protection of fundamental human rights and the safeguarding of peace among nations – the latter being the statutory purpose of the UN – had already been established during World War II through the Atlantic Charter, and later through the Charter of the United Nations. The same approach can be found in the Ventotene Manifesto, drafted by Altiero Spinelli, Ernesto Rossi and Eugenio Colorni, in 1941 on the island where they were being held captive, which linked the birth of totalitarian regimes and the outbreak of the war to the suppression of human rights and man's being reduced to an instrument of state politics.

One of the first acts of the United Nations was the Universal Declaration of Human Rights, considered a pivotal document because it contains a far-reaching list of fundamental rights. However, the document is also weak in that it is a declaration by the UN General Assembly and not an international treaty, and does not foresee any means of investigation or sanctions in the case of State non- compliance. The subsequent International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain provisions for political control. However, only under the European Convention

for the Protection of Human Rights and Fundamental Freedoms was a judge established for those rights and freedoms.

This was a major innovation contained in an international law instrument. Human rights, particularly in Europe, had already been naturally recognised at a domestic level, with a role for national judges as a result. This was also the case in the 1789 French Declaration of the Rights of Man and the Citizen, which essentially stipulated that the definition of the rights and conditions for exercising these rights were determined by law. However, never before had the States been made to answer to an external judge regarding violations of the fundamental rights of individuals. "External jurisdictional control" is still the main feature of the European human rights protection system. In one way or another, the Inter-American and recently the African human rights protection system have subsequently been inspired by it.

Immediately after the end of the war, studies, meetings and efforts were initiated in Europe to promote the unity of the Continent through values aimed at preventing the re-emergence of the root causes of the two world wars. In 1948, the Congress of the Hague, organised by the International Committee of Movements for European Unity, was held and presided over by

Winston Churchill, with the participation of the foremost European leaders, including Altiero Spinelli, founder of the European Federalist Movement in 1943.

The Congress of the Hague launched these efforts, which were quickly completed, to form the Council of Europe, whose statutory mission, as agreed by the ten founding States[1], was the defence of democracy and human rights in Europe. The first and still most important document produced by the Council of Europe was the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ratified by Italy in 1955). It is interesting to note that the link between peace, democracy and the protection of fundamental human rights is highlighted in the Preamble to the Convention, which outlines its political-cultural context and the intention of the Contracting States. The political context then evolved, thus making it possible to extend accession to the Council of Europe and consequently to the Convention. As a result, countries which had been part of the Soviet Bloc were admitted to the former and acceded to the latter.

As I have already pointed out, from the outset and later on to an even greater extent, the European human rights protection system has distinguished itself because it is founded

on the establishment of an independent court, capable of ascertaining violations by the States and obliging them to redress them. The initial formulation of the Convention provided for a filtering system (through a Commission) and a complex system through which the Court could be accessed, which I will not go into detail about here, whereas it is important to describe how the system evolved from 1998 up to its stabilisation (Protocol No. 11 to amend the Convention).

Starting from 1998, each Contracting Party to the Convention had to accept (no longer able to reject it at its own discretion) the jurisdiction of the Court and the possibility that any natural or legal person could apply to the Court, directly and without any filters. In addition to inter-state applications to the Court (important but rare), individual applications are the most common, and offer the Court the opportunity to affirm and develop its own jurisdiction. Without dwelling on this, but rather just to give you an idea of how frequently individual applications are submitted and how much of a reality they are in the life of the Law in Europe, I would like to point out that in recent years the Court has received over fifty-thousand applications a year, a sign of the Court's vitality (albeit with serious impact on the Court's capacity to deal with them).

In Court proceedings, individual applicants

and respondent states are on equal footing, with the same rights and duties. Individuals claim their rights, which do not originate from the States, but are "secured" by the Court (Art. 1 of the Convention) The Court, called upon to settle disputes through its judgment, operates outside the national legal system and is part of another legal system, the European system.

2. *The Court*

Establishing a judge before whom individuals can assert their claims against States – the true strength of the European human rights protection system – explains why only some of the rights listed in the Universal Declaration were included in the European Convention on Human Rights, despite its clear intention to strengthen the protection offered in the European area. The Declaration includes rights that are ill-suited to judicial control (many social rights require legislation and action by the States, with financial commitment and political choices that make lodging a complaint with a judge unfeasible, even more so with an international judge). Therefore, choosing to introduce the possibility of lodging a complaint with a judge, as a strong means of protection, has led to the selection of the fundamental rights that allow for that type of control. The stronger the protection, the more limited the protected area. However, for the sake

of completeness, it should be pointed out that within the framework of the Council of Europe social rights are addressed in the European Social Charter, which has set up a control mechanism for the action (or lack of action) of the States, but it is not of a judicial nature.

The fact that the European Court ensures *external* control has resulted in several profoundly innovative consequences for traditional juridical categories. First and foremost, it breaks down State borders and the relative claim of State laws to build and apply their own unique, exclusive legal order. Individuals become subjects of international law, and can claim their rights in a dispute against a State. The European Court applies European Law, formulating and creating laws that do not derive from the work of parliaments and are not legitimised by them. European Law mainly originates from jurisprudence and its creation (re)emphasises the role of the jurist judge (as opposed to the judge as mere interpreter of the law he/she has been called upon to apply). The jurisprudence of the European Court, tied as it is to the specific cases submitted to it (case law), puts the disciplinary need required and expressed by the concrete case before the general and abstract rule (as the law claims to be). The resolution of the case does not derive so much from the application of the general and abstract rule preceding it, but rather

(through the persuasiveness of the *ratio decidendi* and the strength of the precedent) contributes to creating a rule for similar acts.

The style used for the definition of the rights and freedoms addressed in the European Convention, like that of the limits they may legitimately be subject to, is similar to that of Constitutions. It consists of general statements which above all do not provide indications on how to reconcile the needs of the case with the right or freedom and the reasons for the restriction. A case in point is the freedom of expression (Art. 10 of the Convention), which may be restricted when it is in conflict with the right of another to respect for private life (Art. 8 of the Convention). It is up to the Court, which interprets and applies the Convention (Art. 32 of the Convention, to assess when, how and what reciprocal reconciliation the two rights consist of . In national legal systems below the Constitution, there are generally laws that define the various hypotheses considered in greater detail, and judges apply these laws in light of the Constitution. Conversely, in the Convention system, the Court directly applies the Convention formulas to the concrete cases.

In the Convention, the definition of the single rights is general and vague. This is not due to a drafting flaw It is instead a choice that gives

judges the responsibility to adapt the scope of the rights and fundamental freedoms to the needs of the times and the development of cultural and social trends expressed by contemporary European society. The Court interprets and applies the Convention, which defines itself as dynamic and evolutionary, in accordance with the principle of the interpretation of international treaties as defined by the Vienna Convention on the Law of Treaties, which gives prominence to the subject and aim of the treaty. The aim of the Convention, "a living instrument to be interpreted in the light of present-day living conditions", is to make the protection of the individual's rights and freedoms concrete and effective.

The complex work of the Court has undoubtedly and broadly enriched the content of the Convention and the consequent obligations undertaken by the States stating in Art. 1 of the Convention, that they shall "secure " the rights of the individuals defined in it.

Although the argumentation produced by the Court in the rationale behind its judgments tends (or claims) to demonstrate that it "finds" the law, rather than "creates it", there is no doubt that this is a clear case of the creative function of judicial interpretation, with reference to the dynamics of the production of law by common law judges.

This explains the periodic changes in jurisprudence that the Court, albeit cautious in making them, justifies on the grounds of changes in the normative and cultural frame of reference. This is why the Court seeks so-called European consensus, the existence of which authorises it to control the various national dispositions more vigorously, while when there is a lack of consensus, the Court tends to be more cautious in granting the States a wider margin of appreciation in complying with the obligations of the Convention. Therefore, society and the European States, which are the recipients of the Court's judgments, contribute to providing the elements that justify the application choices of the Convention, creating a circle in which the Court somehow certifies what European society produces, consolidating at the same time the European acquis in the field of fundamental rights.

Based on these premises, over time the Court has developed the content of the 1950 Convention. However, the Court, unable to introduce new rights or freedoms other than those covered by the Convention and subsequent additional Protocols, has filled them with broader references. Therefore, for example, the right to live in an adequate environment or the protection of personal data from illicit use, have been drawn

from the right to respect for private life, since the authors of the Convention text, at the time it was drafted, did not have these aspects, which are particularly significant today, in mind. The US theory of originalism has not found its way into the jurisprudence of the European Court and the preparatory efforts of the 1950 Convention have been of little significance.

The nature of the decision-making process of the Court and its frequent need to make largely discretionary choices, explains why a considerable number of judgments (among those that are not merely repeated) are rendered by the majority vote of the judges composing the panel. All the more so according to Court procedure, dissenting judges explain the reasons for their dissent opinion or the reasons, different from those expressed by the majority, that have led them to share its conclusion in the reasons attached to the judgment.

The Court frequently reiterates that its conclusions are strictly linked to the specific case in question, i.e. they are consistent with the aim of judgments to settle a dispute between the parties: the applicant and the respondent State. The nature of case law is particularly evident in the judgment when it comes to balancing different and conflicting rights or legitimate needs. In such cases, the

details of the concrete case are crucial to the judgment of proportionality and the need for State interference in the exercise of individuals' rights. There would be no problem if this alone was the purpose of judgments. However, this is not the case, since its judgments, as the Court has repeatedly stressed, "serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" and "although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States".

Therefore, the purpose of the European Court's judgments goes far beyond the mere resolution of the disputes submitted to its examination. However, it is difficult to draw binding guidelines for the States that are "general and abstract", as laws are or aspire to be, from the case law of the European Court. *Rationes decidendi*, especially if considered as a whole, can certainly be drawn from the judgments and acquire the force of

binding guidelines (also for the Court itself, in that their content is the harbinger of similar future decisions), but what must be drawn from the jurisprudence of the European Court is above all the method it adopts.

It is a matter of examining the concrete cases brought by individual applicants in all their distinctive features, in order to ensure them "concrete and effective" protection.

Therefore, when the Italian Constitutional Court, in Judgments No. 428 and 429/2007, recognised that judges, before raising any questions of constitutionality had to make every possible effort to interpret national laws so that they are compatible with the European Convention "as interpreted by the European Court", it automatically made reference both to the substance of European jurisprudence and its method. This certainly is not an easy practice, but it is necessary not only for judges (and the Constitutional Court itself), but also for the legislators, who are required to produce laws the content and structure of which are compatible with the Convention.

3. *The judges*

Finally, I will describe the composition of the Court, that of a Court that produces the jurisprudence and operates according to the

above-mentioned method.

The Court consists of as many judges as Contracting States, Members of the Council of Europe. At present there are 47 judges. Each of them is elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates, indicated by the government when there is an opening for a Court judge "in respect of" that State. Without going into detail regarding the election procedure, I will say that while the list of candidates is being drawn up, the discretionary power of the government is very high (the only requirements being that each candidate must be of high moral character and qualified to hold a position in a high judicial office or be a jurisconsult of recognised competence), at the following stage, the Parliamentary Assembly has total freedom to select candidates. The Assembly (by means of a specific committee) can accept or reject the entire list of candidates. It proceeds with the evaluation of their curricula vitae and the candidate interviews. It then chooses the candidate it considers most suitable to integrate the Court. The elected judge holds office for nine years and cannot be re-elected. In any case, the judge's term of office expires when he/she reaches the age of seventy. The previous rule that provided for a renewable six-year mandate has been recently amended.

The reform, also requested by the Court, was intended to prevent the independence of the judges whose term of office was expiring from being or appearing to be weakened entering in the phase of the drawing up of the list of candidates submitted by governments to the Parliamentary Assembly.

The Court judges come from a variety of professional backgrounds (judges, lawyers, teachers of legal subjects), and all the judges are of different nationalities, ensuring the pluralism of experience and culture. Regarding the Court's work, its vitality can be appreciated especially when sitting in the Grand Chamber with its seventeen judges. This is less evident in the work of the five sections with a panel of seven judges.

During the preparatory works of the Convention, governments imposed the above-mentioned solution, which foresaw the election of one judge for each State Party to the Convention. Governments wanted the structure of the bodies of the Council of Europe and in general of international organisations to be reflected in the Court, each State with its own representative. However, a proposal to set a fixed number of judges (nine) who were independent of and lower than those of the Contracting States made by the Committee responsible for drafting it was rejected.

It was clearly a way of emphasising the difference between an independent judicial body, composed of independent judges, and international political-administrative organisations in which each State has its "representative", namely, the voice of the government. The reproduction of the organisation of international bodies in the formation of the Court reflects governments' difficulty, while setting up (and accepting) a Court, in drawing the consequences of the choice made.

That is not all. Judges are independent and participate individually in the work of the Court, not as "representatives" of the Country that elected them. They are called upon to express themselves freely. Their origin and national experience contribute to the richness, pluralism and completeness of the debate within the Court, in view of the decisions that reflect or are compatible with European culture and with the legal systems present in Europe.

The independence of each judge with respect to the government that included him /her on the list of candidates from which the Parliamentary Assembly chose, prohibits the composition of the Court from mirroring that of ordinary international bodies and their associate organisations.

According to the governments' logic that was prevalent when the Convention was drafted, the Convention foresees that the judge "elected in respect of " a State that is one of the parties to the dispute, must be a member of the judging panel. This is an anomaly, since the rule should be the opposite. However, the idea is that in this way the voice of a person who knows the national system better than anyone else can be heard in the discussion and decision of the panel. The judge is certainly free to express him/herself and vote as he /she deems right, as the judge in no way "represents" the government that is one of the parties to the proceedings.

The judge "elected in respect of" of the respondent State following an individual application is called the "national judge" and intervenes in the discussion immediately after the *rapporteur*, thus helping open the discussion. Otherwise, the "national judge" does not play any particular role in the decision-making. It often happens that he /she votes to recognise the violation, even claiming there has been a violation, when the majority of the panel members have excluded this possibility. This is evident from the dissenting opinions attached to the judgment.

However, establishing and assigning the very title "national judge" to the judge in the

above-mentioned capacity raises some problems that merit discussion. In this last part of my presentation, I will put greater emphasis on my personal experience during the nine years I served on the European Court of Human Rights.

Judges are independent, but governments have indeed included these judges on their list of three candidates, and governments have normally been able to choose from a number of potential candidates, all professionally qualified. Therefore, governments have presumably and quite legitimately given preference to candidates who are generally compatible with the prevalent cultural orientation of the majority (of the Parliament and, of the Country too, one might imagine) it represents. In this respect, the elected judge is, in a broad sense, expected to be the expression of the majority opinion, and therefore may be considered "representative" of , and not "representing" the country.

However, during a judge's term of office (nine years), governments and parliamentary majorities may change. This happened twice during my term. These changes were assumed to be the result of parallel changes in the formation and prevalence of interests and social values. In such cases, without "representation", the "representativeness" of the judge also disappears.

Moreover – and far more importantly – it

should be pointed out that "the prevalent cultural orientation" within a Country is a notion that is of little if any substance. The rights and freedoms recognised and protected by the European Convention are numerous and varied. Judges may tend to protect and enhance one right quite vigorously while being rather cautious about another, with no clear connection between the two positions. The categories sometimes used to classify Court judges as "violationists" and "non violationists" are misleading. They do not cover the Court's wide range of fields of intervention, so one would need to study judges' attitudes towards different subjects. However, this would be extremely difficult, as the case decision largely depends on the specific events that have produced it. On the other hand, irrespective of the Court judges, in pluralist societies such as Italian and in general European society, each of us may take different positions (and may be in different company) depending on the subject or issue. Therefore, rather than belonging to a majority or a minority, on an issue-by-issue basis one belongs at the same time to different minorities or majorities diversely composed.

Take Italy, who can claim to be its cultural representative? Representative not only of the legal culture, but also of a country that is a true mosaic of cultures, going back as far as the Greeks and Arabs, and of course Rome as

well as the "Barbarians", not to mention the Renaissance and Catholicism and Judaism, the Counter-Reformation and the Reformation, and the Italian and European Enlightenment. Italy is a country that has experienced the temporal power of the Popes and the Risorgimento that put an end to it, Fascism and the Resistance and finally the Republican Constitution.

It is impossible to be in unison with the different melodies and varied voices coming from Italy.

Within this context, which to a certain extent and regarding certain subjects also concerns judges working at the national level, I wonder whether, now that my term of office is over, I should admit – or rather claim – that I have worked as an expression, on a case by case basis, of one of the many different Italies coexisting and challenging each other with full historical and cultural legitimacy.

This is evidenced by the fact that at various stages, a different person acting as "national judge" intervenes in the same case (for example due to the expiry of the previous judge's term of office). In these cases, the new "national judge" sometimes takes a different stance from that of his /her predecessor. Therefore, what matters is not "nationality", but personal cultural orientation.

As further evidence of this, I would like to describe a phenomenon known to those who have worked in the Court. It concerns judges who are in agreement with each other on various subjects, regardless of nationality, professional background and the political leaning of the governments that have included them on their list of candidates. If this is true of some judges it is also valid when it comes to the difficulties other judges have in agreeing. Basically, it is this agreement or disagreement that reflects the shared or diverse cultural orientations which are important in deciding the various cases. Cultural orientations that traverse a happily pluralist Europe irrespective of borders, and produce "senses of belonging" irrespective of national character.

It seems to me that this observation has an impact on the very notion of the "margin of national appreciation" that the Court is sometimes prepared to grant governments in the recognition of the Convention rights at the national level. It is a notion that, if taken too far, presumes a basic unity of the individual States' societies and of the governments' ability to represent it.

A unity, I would say, which does not mean a majority with respect to this or that topic, because one risks giving undue prominence to a

majority, whereas human rights and fundamental freedoms require the protection of minorities and of individuals. Even against, of course, the will of the majority.

I am coming to the conclusion of my long speech. Was the Committee responsible for drafting the Convention wrong when it proposed that the Court be composed of nine judges, none of them elected "in respect of" this or that European State, but all and each of them elected "in respect of" Europe?

[1] Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

LECTURE ALTIERO SPINELLI

The Centre for Studies on Federalism organises an annual Lecture on European issues named after Altiero Spinelli, one of the fathers of European federalism. The 2011 Lecture has been given by Vladimiro Zagrebelsky.

Altiero Spinelli (1907-1986) during his internment on the island of Ventotene, together with Ernesto Rossi and Eugenio Colorni, wrote the *Manifesto per un'Europa libera e unita*, better known as *The Ventotene Manifesto*. In 1943 in Milan, he founded the Movimento Federalista Europeo (European Federalist Movement) and in the following years, in Paris, he took part in the foundation of the European Union of Federalists. He was a member of the European Commission from 1970 to 1976 and a member of the first European Parliament elected by universal suffrage in 1979. Spinelli was the inspirer of the Treaty Establishing the European Union, with marked federal features, adopted by the European Parliament in 1984.

Vladimiro Zagrebelsky born in Turin in 1940, he graduated in law in 1963 with a thesis in Criminal Law. He passed the university teaching exam in Criminal Law in 1970. His distinguishing experience has been generally in the judiciary.

He was a member of the Higher Council of the Judiciary for the four year period from 1981 to 1985 and again from 1994-98. From 1998 to April 2001, he was the head of the Legislative Office of the Ministry of Justice and President or member of various Ministerial Committees. He chaired the UN Commission (Vienna) for the prevention of crime and for the criminal justice in the period 2000-2001.

On 25 April 2001, he was elected judge of the European Court of Human Rights by the Parliamentary Assembly of the Council of Europe. His term, renewed in 2007, came to an end in April 2010.

He was bestowed the Knight Grand Cross of the Order of Merit of the Italian Republic (2010). Since 2010, he has been the Director of the Laboratory of Fundamental Rights – LDF – of Turin

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