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Presidente della Corte Costituzionale

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Judicial Seminar

"Judges preserving democracy through the protection of human rights"

and

Solemn Hearing

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"Recourse" to and "Discourse" on the ECHR: an Asset for Democracies

President of the European Court of Human Rights, distinguished judges, excellencies, ladies and gentlemen,

I am deeply honoured to speak in 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 each other again, in this formal occasion.

I am honoured for the Italian Constitutional Court, which I represent, and I hope the message that – throughout my voice– will be shared 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 anticipate in such a context of cooperation is that 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 to constitutional adjudication.

In particular, in recent times, issues of independence of the judiciary are shaking the symmetry of the international legal order, taken in its entirety, namely in the combination of constitutional and conventional law, often intertwined with regional standards, above all those of the EU.

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

Let me underline another key-word: “symmetry”.

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

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

At the end of the Nineteen Nineties, in the last century, innovative proposals to foster the integration of legal standards were aired in academic circles – among these at the European University Institute –, triggered by Opinion 2/1994 on accession of the European Communities to the ECHR.

Proposals circulating in those years were based on the analysis of existing competences in various fields; they aimed at empowering all European institutions in the enforcement of human rights policies.

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

As we all know, no European constitution saw the light, as the outcome of all such efforts.

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

Here comes the linguistic escamotage I am going to use.

"Discourse" on, as a follow up to "recourse" to the ECHR, is used in my presentation to exemplify the steps forward that need to be taken, in order to magnify the democratization of national legal systems and to proceed into the direction of closer cooperation among international institutions and consequently among courts.

For example – I hope you will appreciate this touch of national pride rather than self-referentiality – the Italian Constitutional Court delivered in 2007 the so called "twin judgments" on the role of the ECHR as an "interposed parameter" in constitutional adjudication. The Court underlined the "special nature" of the Convention, unlike other international treaties, which gave rise to a "system for the uniform protection of fundamental rights".

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

References to Protocol no. 16 and to advisory opinions confirm that discourses on the ECHR can be developed in different ways and in different fields. They all converge towards a unitary notion of democracy.

It has been maintained that, despite their non-binding character, such opinions substantially **"irradiate" general effects**.

The text of Protocol no. 16 clarifies that only courts designated as the highest by the contracting parties can request advisory opinions (Art. 1 (1)) and that the procedure can only originate in pending cases (Art. 1 (2)).

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

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

The first opinion, delivered in response to a reference from the French Court of Cassation, gave rise to interesting responses, as for its *erga omnes* 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.

The ECtHR 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 quoted the Opinion in a few judgments, albeit with different accents. It is worth recalling that Italy has not ratified the Protocol.

The Court of Cassation made a reference to the same Opinion both in an order raising a question of constitutionality and in a recent landmark decision, which came

as a response to a Constitutional Court's ruling of inadmissibility, in a case dealing with the child of a same sex couple, born through surrogacy.

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

The consequence of this meaningful step forward is to acquire a "uniform value", to be applied for the recognition of the best interests of the child.

The example here quoted – in which both the Constitutional Court and the Court of Cassation make recourse to the ECtHR's advisory opinion – is nothing but a confirmation that Protocol no. 16 is already interpreted 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 conventional case-law.

This original approach – I call it an example of law in action – deserves to be underlined **when courts, such as the Italian courts I mentioned, refer to the advisory opinions, while operating in a country which has not ratified Protocol no. 16.**

There is a profound reason for this: a discourse on the protection of human rights must imply a broad generalisation of all interests at stake and a relevance of the same for all states parties to the Convention. Art. 43 par. 2 of the Convention refers – this point must be recalled – to ''a serious issue of general importance'', to be decided by the Grand Chamber.

Let us take another example.

On issues related to assisted suicide, which convey very delicate ethical implications, convergence between the Italian and the Austrian constitutional courts, as for references to the ECtHR's rulings, display coherence of legal arguments, which fortify the authority of constitutional adjudication.

Let me now move to what I suggest to call an interconnection – resembled in the words of President O'Leary in her most thought-provoking speech today – between the Court of Justice of the EU and the ECtHR, on cases dealing with disciplinary measures addressed to judges, potentially entailing serious consequences for those who are penalised.

The Polish cases – although not the only ones, as we heard in the ''Judicial Seminar'' held today, before this solemn hearing – proved to be crucial in the case-law of both courts.

In an action brought by the Commission against Poland for failure to fulfil obligations under art. 258 TFEU, the Grand Chamber specifies that even the "mere prospect" for judges to be the addressees of disciplinary measures issued by a body whose independence is not guaranteed, may affect their own independence. In support of its argument, the CJ quotes the ECtHR's case law [(ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, ECtHR, 9 March 2021, *Eminağaoğlu v. Turkey*).]

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

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

This decision was delivered on 15 July 2021.

In May 2021 – not too long before – the ECtHR 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 violation of art. 6 of the ECHR, namely of the right to be heard by a tribunal established by law.

The case was decided following a complaint to the Constitutional Court, perceived by the complainant as a non-independent body. A press release issued by the Constitutional Court itself attacked the ECtHR for not having competence on the organization of justice and becoming a threat to Poland's sovereignty.

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 reflections and investigation carried out by national and international bodies, above all the Council of Europe and the European Commission, with careful evaluations of country reports.

They take into consideration various standards, for example ways of financing the judiciary system, functioning of independent self-governing bodies, and even communication with 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 (C-506/04), in which several judgments of the ECtHR are quoted (*Campbell and Fell v. UK; De Cubber v. Belgium; Incal v. Turkey*).

In this judgment the CJEU exemplified some 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'' should be dismissed. This is the aim of the CJEU in this judgment, which was followed by a consistent stream of more recent decisions, clarifying even further notions of independence, in connection with the case-law of the Strasbourg Court.

I move now to some concluding remarks.

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I have suggested that domestic courts, including constitutional courts, offer an evolving interpretation of the ECHR, which has been accentuated by the operation of Protocol no. 16. This happened even in most delicate fields of law, involving ethical issues. I have privileged the best interests of the child as an example.

I have also submitted that in all such cases recourse to the ECHR develops into a discourse on the ECHR.

This linguistic escamotage is used to propose 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 time, the search for peace inspired those who took responsibility for paving with norms the ground left empty by the armies. The expression "constituent body" is used to describe the ritual accompanying the entering of law in the field previously dominated by conflict.

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

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

A discourse on the ECHR is strengthened – as I have indicated – by crossfertilization and mutual leaning among judiciaries.

Constitutional courts talk to each other adopting a common language: they come closer in sharing the language of human rights and in adopting objective criteria, suggested by cross-country investigations.

When they defend the independence of the judiciary, they act as responsible guardians of the rule of law and adopt a semantic 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.