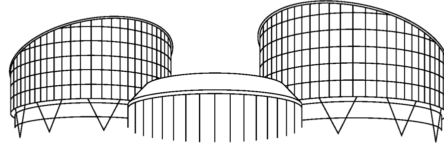

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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

Speech by Silvana Sciarra

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I am deeply honoured to be speaking on this ceremonial and formal occasion in front of a distinguished audience, following President O'Leary's most inspiring presentation. I am honoured for the Italian Constitutional Court, which I represent, and I hope the message that – through 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
Cooperation leads to common interests.

The message I would 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 in constitutional adjudication.

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

Independence rests, among other criteria, on the coherence and transparency of legal argument, best exemplified through the choice of precedent.

Let me underline another key-word: "symmetry".

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

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, triggered by Opinion 2/1994 on accession of the European Communities to the European Convention.

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 European Convention a crucial instrument in a wider process of constitution-building. Hence, recourse to the European Convention should have implied an expansion of competences.

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

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

Here comes the linguistic escamotage I propose to use.

"Discourse" on – as a follow up to "recourse" to – the European Convention, is used in my presentation as a way of exemplifying the steps forward that need to be taken, in order to magnify the democratisation of national legal systems and to proceed in the direction of closer cooperation among international institutions and consequently among courts.

For example – I hope you will appreciate what is meant to be a touch of pride rather than self-referentiality – the Italian Constitutional Court delivered in 2007 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, unlike other international treaties, which gave rise to a "system for the uniform protection of fundamental rights".

Recourse to the European Convention, in this 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 confirm that discourse on the European Convention 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 argument.

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

The first such opinion, delivered in response to a reference from the French Court of Cassation, gave rise to interesting responses, as regards 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 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 accents. It is worth recalling that Italy has not ratified the Protocol.

The Italian 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 ruling of inadmissibility in a case dealing with the child of a same-sex couple, born through surrogacy.

In the same 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 concept that, whatever the parents' behaviour, the best interests 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 have had recourse to the ECHR’s advisory opinion – is nothing but confirmation that Protocol No. 16 is already interpreted as a living 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 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.

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 mentioned, refer to 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 equal relevance for all States parties to the Convention. Article 43 § 2 of the Convention refers – this point must be recalled – to issues of general interest, to be decided by the Grand Chamber.

Let us take another example.

On issues related to assisted suicide, which carry very delicate ethical implications, convergence between the Italian and the Austrian constitutional courts, as regards references to the ECHR’s rulings, display a coherence of legal argument which fortifies the authority of constitutional adjudication.

Let me now move to what I propose to call an interconnection between the Court of Justice of the European Union (CJEU) and the ECHR, on cases dealing with disciplinary measures against judges, potentially entailing serious consequences for those who are penalised.

The Polish cases – although not being the only ones – have 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 Article 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 CJEU quotes the ECHR’s case law (*Ramos Nunes de Carvalho e Sá v. Portugal*, 6 November 2018, and *Eminağaoğlu v. Turkey*, 9 March 2021).

The CJEU refers to 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 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 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 violation of Article 6 of the Convention, specifically of the right to have one’s case heard by a tribunal established by law.

The case was decided following a complaint to the Polish Constitutional Court, perceived by the complainant as a non-independent body. A press release issued by the Constitutional Court itself attacked the ECHR for not having competence in matters of organisation of justice and for 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 by national and international bodies, above all the Council of Europe and the European Commission, with their careful evaluations in country reports.

They take into consideration various standards, for example 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. In this judgment the CJEU exemplified 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 withdrawal. Any "reasonable doubt in the minds of individuals'' should be dispelled. That was the aim of the CJEU in that judgment, which has been followed by a consistent stream of more recent decisions, further clarifying the concept of independence.

I will now move to some concluding remarks.

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

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

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 period, 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 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, in a coherent reading of legal sources.

This interpretative process should constantly feed the culture created by constituent bodies and enlarge the space for constitutionalising fundamental rights and create a scenario of peace.

A discourse on the European Convention is strengthened – as I have indicated – by cross-fertilisation 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, as suggested by cross-border 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.