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ROSARIO SAPIENZA

A LETTER FROM STRASBOURG: ECHR CASE LAW AS TRANSNATIONAL LAWYERING. A MODEL FOR GLOBAL PRACTICING?

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Ena Granulo www.studioen.it

1. Let me say, first of all, Mr. President, Distinguished Colleagues, Ladies and Gentlemen, how flattered I am for having been asked to deliver a speech at this meeting on the Rule of Law and Global Economy. I thank you all therefore, but I must also apologize for starting my contribution with a disclaimer. To put it bluntly, the idea of a governance for the Global Economy is, in my opinion, more an ambition than a reality. The terms "global governance" in fact express the quite optimistic idea that it is possible to develop rules and regulations on the same scale as the global problems facing the world now. This does not however imply the establishment of new institutions, though some may find it desirable, but rather stresses a point: that we need sets of new regulations, both public and private, which may offer better opportunities to meet the challenges of global problems. And this wants a lot of creative thinking[1].

2. To speak of a "global governance" also implies the idea of a crisis of governance at the national level, the idea that states or at least some states, are no longer able to properly

[1] Text of my intervention to the Seminar "Rule of Law and Global Economy: the relevance of fundamental rights in market practices" held in Catania May 23 2015

perform their regulatory tasks, including in the economic and social milieus, to cope with new problems stemming from globalization. But it also involves, in some of its manifestations and approaches (for example in what is sometimes called the global free market approach) the idea that international organizations, or at least those among them which are more traditional, more State centred or State … owned, are not able to cope adequately with global issues. The idea of global governance is in fact critical of the State, both at the national as at the intergovernmental level, because, in the spirit of neo-liberalism, it asserts the superiority of private managerial strategies on those enforced by governments.

3. Be that as it may, in a wide and simple definition, I shall assume that "global governance" means the set of rules for organizing human societies across the globe. Now, I must confess that to me, as a lawyer in the West, "global governance" means above all the establishment of an institutionalized system of global governance. And when I say institutionalized, I do not mean only intergovernmental, because I feel that the challenge of global governance is now collectively to shape the destiny of the world by establishing a system of regulation of these many interactions that go beyond

state action and that stem from the emergence of some elements of a global civic awareness.

4. In fact, a typical feature of the "global governance" scheme is that a rapidly growing number of movements and organizations sets the debate at the international or global level. Despite its limitations, this trend is obviously a logical response to the rise of global governance issues. We are compelled therefore to consider two dimensions: that of integration and that of solidarity. That's why, although I know perfectly well that there are problems of global governance, say, of the environment or the economy, in my presentation I will focus on institutional and legal issues.

5. Now, if we aim at the construction of a responsible global governance so as to align the political organization of society to globalization, we should work for a democratic political legitimacy at all territorial levels (local, state, regional, global). For this to happen, we must plan a comprehensive strategy of rethinking and reformation, including at the same time:

the vast majority of international organizations, largely

inherited from the aftermath of the Second World War. They should change in a "system" of international agencies with more resources and capabilities, more fair and more democratic;

the system of States, still based on a pre-Westphalian model. States must learn to share some of their sovereignty with institutions and agencies in other territorial scales and at the same time all must undertake major processes of deepening democracy and organizational accountability.

the meaning of sovereignty for citizens. People must matter, but really! So we must rethink the meaning of representation and political participation, and work towards radical change of vision, where citizens may really feel that they control of the whole process. We must seek for a new legitimacy for those who are in charge. It is striking, and definitely unbearable, that the most important decisions affecting the global economy are taken today through undemocratic procedures and without any real legitimacy

6. To achieve these goals we need a thorough reformation of international law and international relations. And, moreover, we must start by changing the way we think of them. But this, my friends, is easier said than done. In fact, even if we are in the era of the United Nations and international law has enormously progressed in the past two centuries, States still behave as if they were in a pre-Westphalian Model of International Relations, whereas one of the main features of a globalized economy can be detected in the fact that States are not the sole actors of the international society any more.

7. Now, in a world where international relations come no longer under State management, international Civil Society has become the most dynamic actor. This was recognized in the 1992 Rio de Janeiro United Nations Conference on Environment and Development when the two main organizers, Boutros Ghali, UN Secretary General, and Maurice Strong, Secretary at the Conference, decided to allow the participation of not only those NGOs registered with the ECOSOC, but rather include all NGOs. Granted this was done by creating a parallel forum, but there was some exchange between the Intergovernmental Conference and the

Civil Society Forum. Both officials stated they had taken this measure because they knew that the 30,000 Forum members would push for the success of the conference more than many of the delegations. In the last few decades Civil Society has grown tremendously. It is enough to say that in Brazil there were 10,000 NGOs in 1970, and today they are nearly 600,000. This is because for the first time in history there is not only a system of information, but also a system for communication. Internet allows for the creation of multiple alliances and social mobilization not only at an international level, but also at a national level as was the case with Arab Spring and Occupy Wall Street. In the recent European elections some parties formed only months before the elections won access to the European Parliament. The networks that come out of internet are networks of people who share the same concerns and they gather around global issues (that the media do not provide information on) from the threat of climate change, to all the world issues that are also specific United Nations programs; Women, Human Rights etc. Since 1991 international Civil Society has a space for participation and coordination in The World Social Forum. Tens of thousands of organizations come together in each of their forums, often with as many as 100,000 participants. The WSF was born in Porto Alegre as an

alternative to the Davos World Economic Forum, where since 1971 a few hundred people, not elected by the citizenship, have met to discuss World Governance based on the priorities of the economic and financial world. The WSF intends to propose an alternative for "a better world".

8. A decade has gone by and there have been many citizen movements asking for different governance and it is already possible to conduct an evaluation of the impact of Civil Society in the world of institutions. Above all it should be noted that in the 90s participation of civil society in the national and international agendas was seen by many of the activists as being co-opted into the official world. A world which as we have seen before had lost credibility and prestige. This decline has been amplified by the social networks who reported and condemned the corruption, the lack of internal democracy in political institutions and their following of finances. The violent disturbances during the World Trade Organization's Conference of Seattle in 1999 constituted the formalization of the rebellion of activists against the institutions. In a certain way the NGOs that joined the United Nation's process participating in its conferences were legitimized by their participation in institutions insofar as their

agendas were being met. Those who took part in the disturbances in Seattle were legitimized for rejecting the institutions. These very different parts of Civil Society have found a focus point in the WSF and have since then coexisted becoming mutually and partially integrated.

9. What has not changed however is the world's opinion of political institutions, self-referential, non-participative, and frequently corrupt. This has forced organizations that have emerged up till now, WFS Occupy Wall Street, Madrid's Outraged movement, to look for ways to avoid political party mechanisms. This is to say, no elected positions as representatives of others, or continuous participation of all in taking decisions and adopting strategies and no hierarchy to mention a few of the points that are considered the most important dangers to avoid becoming like institutions which are seen to be outdated if not responsible for the present crisis. National and international Civil Society is still searching for this new institutional path which will allow for continuous participation, without delegating one's own individual space to anybody else. It is a search which is ongoing and until now the citizen movement has not found the right structures to enable it to impinge on legislative policies. It is evident that there is a

great need for world governance if we are to live in a world of peace which allows the harmonious development of its inhabitants. But without shared values, what is this governance going to be based on? Perhaps in agreements at political summits without their citizens being recognized by them? And, is it possible today? Is it possible to build shared values at a global level?

10. My answer is yes, provided we find a place, in our minds first and foremost, in which we can establish the foundations, the roots of this new image of the world we are fancying. But to do so we should definitely leave aside the State metaphor which is always there, always back when you feel you can do without it. As everybody knows an idea of a space beyond States was put forward by Hegel who thought of this space as an empty space in which all the States were to concur in the exercise of their jurisdictions. This was an inspiring tenet for structuring an idea of an international legal order based on the common consent by States. An empty space without States then, which was superseded by another model, that of a State of States which eventually favored the establishment of the liberal internationalist model via the United Nations structuring. But again we are forced to accept

the idea that the State is an unavoidable model. But is it necessarily like this?

11. Lawyering can offer some viable solutions to the problem of doing without the idea of State. Particularly useful is the approach called Transnational Law. Since Judge Jessup seminal work published in the fifties of last century, several meanings of Transnational Law (hereinafter TL) have been circulated among scholars and practicing lawyers, which have in common the idea that TL is a body of law regulating actions or events that transcend national frontiers. It involves individuals, corporations, states, or other groups—not just the official relations between governments of states. It is a way through which you can consider the State milieu not as a closed space, but as a borderline you can pass whenever you want. Moreover, the idea is generally accepted that TL could be a most viable approach to lawyering in an age of globalization, provided one of the legal features of globalization certainly is the possibility of going beyond State frontiers, piercing the veil of State sovereignty. We know these problems all too well, while teaching laws both at an undergraduate and graduate level. In today's world, it is essential that every lawyer understand the making and

application of law beyond the domestic orbit. Even though most lawyers are practicing law in their State, virtually every area of law is affected by international aspects, whether through treaties regulating transnational economic relations, interactions with foreign law, and oversight by international organizations. Each area of a graduating lawyer's curriculum, from antitrust to intellectual property to civil rights to tax, is enmeshed within a complex web of international and foreign rules that the lawyer must understand. Because the field of law outside domestic law is vast, being "public and private, international and foreign" it is fundamental to provide students with the basic concepts and tools they can use to understand, take further courses in, and practice many specialized areas of law. A TL approach may help to this and I would like here to briefly dwell on three of these meanings of the TL.

12. In one of these meanings, speaking of a TL would be tantamount to dealing with conflict of laws issues. Since applicable legal rules might conflict with each other, "choice of law" is determined by rules of conflict of laws or private international law. The choice, usually between rules of different national laws, is made by a national court. In other

types of situations and in another meaning, TL may imply choice between a rule of national law and a rule of "public international law," in which case the choice is made by an international tribunal or some non-judicial decision-maker, such as an appointed body. Other situations may involve a TL point of view, and they are when an entirely domestic issue or dispute is to be judged according to internationally established laws or parameters. This is what happens when an international court is expected to judge a case in which the abidance to international law human rights standards by a State are at stake. In this connection, the European System based on the Rome 1950 Convention is of paramount relevance.

13. The *Convention for the Protection of Human Rights and Fundamental Freedoms* is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention established the European Court of Human Rights (ECtHR). Any person who

feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgements, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained. The establishment of a Court to protect individuals from human rights violations is an innovative feature for an international convention on human rights, as it gives the individual an active role on the international arena (traditionally, only states are considered actors in international law). The European Convention is still the only international human rights agreement providing such a high degree of individual protection. State parties can also take cases against other state parties to the Court, although this power is rarely used

14. Several times the Court has stated that the ECHR is a special treaty in that it is not designed for application and enforcement as such, but rather aimed at the elaboration of European Standards to which the behavior of States could be compared or contrasted with (Silver v. UK, 25.3.1983, § 113;

James v. UK, 21.2. 1986, § 84; Lithgow v. UK, 8.7.1986, § 205). This is also related to the subsidiary nature of the enforcement mechanism, given that, according to the European Court, primary responsibility for the protection of rights rests with the States, while the Court is simply called to supervise their behavior. And that's why the Court has elaborated a margin of appreciation doctrine, because the evaluation of a State's behavior needs a parameter to dress the comparison and contrast, and sometimes it is difficult to build up such a parameter. This doctrine allows the Court to reconcile practical differences in implementing the articles of the Convention. Such differences create a limited right, for Contracting Parties, "to derogate from the obligations laid down in the Convention". The doctrine also reinforces the role of the European Convention, as a supervisory framework for human rights. In applying this discretion, European Court judges must take into account differences between domestic laws of the Contracting States as they relate to substance and procedure. But the Court is also able to build autonomous notions whenever possible and in fact you cannot understand properly the margin of appreciation outside of this dichotomy "autonomous notions/margin of appreciation"

15. In fact, the ECtHR interprets the legal notions employed in the European Convention on Human Rights autonomously. Terms which are contained in the Convention may have a different scope within the legal framework of a contracting state; the Court does not consider itself bound by the meaning which these terms have in a domestic jurisdiction. Thus, the protection afforded by the Convention may be much wider in scope than the protection offered under national law. For example, the notion of family life (and the obligations of the state to respect it) may extend to forms of cohabitation which are not considered as constituting a 'family' under the laws of a member state. This prevents the member states from curtailing the Convention rights by defining the notions used in the ECHR and from circumventing their international obligations. Still States have some discretion when deciding what terms like 'national security' (for example in article 8 para 2) mean within their jurisdiction of what they consider 'necessary in a democratic society' (for example in article 10 para 2, which permits restrictions of the freedom of expression subject to the condition that they are necessary in a democratic society). Often, the interpretation of such terms or the decision, i.e. which of two colliding rights to prioritize, entails value

judgments. National authorities and courts are better positioned to assess the scope and meaning of certain values within their jurisdiction. Accordingly, they should decide how to ensure the rights enshrined in the Convention effectively, how to understand certain notions or which balance to strike between conflicting rights. Here you can find a suitable quote:

The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines (….)it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (….)Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.' (Handyside v. UK, 7.12.1976 § 48)

More often than not, this equilibrium between autonomous interpretations and margin of appreciation is difficult to find, but nevertheless I think the European Human Rights Lawyering can serve as a model for global legal issues. I am thinking of the capability of the Court of building a European point of view, the sheer possibility of a point of view which is not rooted in this or that country or cultural system, but which is really and solely European. The way the Court has worked out the European System, starting from an European point of view, should be used to build common values. We cannot expect to give birth to a series of internationally shared common values, but we could possibly vehicle cultural traditions towards regional common values, and then promote a dialogue between those communities. From a sheer technical point of view we should use many of the techniques developed by the European Court, which are not federal nor supranational, but purely transnational. A realistic point of view, then, and maybe helping to do without the traditional couple State/citizen.

16. The strategy of human rights protection is in fact

independent from that of citizenship. And, as shown by the evolution of the European Convention of Human Rights, it has become more and more a tool through which the rights of the individual achieve a more effective protection and a way through which effective protection of rights makes people better off within their own States. In these more than sixty years, as correctly remembered in the celebrations of the Convention anniversary in 2013 more than 500,000 applications were processed by the organs of the system of Strasbourg and the Court has made about 16,500 sentences. A Court, that, when the European Union will become a part of the European Convention (if this is ever to happen, anyway) will be able to set standards and procedures not only for all the Member States of the European Union (which are already Members of the European Convention) but for the European Institutions too, thus building a general framework of rights protection in Europe, which shall, in my opinion, go further the intermediate level ensured by the European Citizenship and thus beyond the State. And offering an idea of things to come at the global level.