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THE EUROPEAN COURT OF HUMAN RIGHTS AS A EUROPEAN CONSTITUTIONAL COURT: THE MARGIN OF APPRECIATION DOCTRINE AND BEYOND?

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This paper will also be published in the collection of essays offered to Judge Raimondi, president of the European Court of Human Rights, as a Liber Amicorum

1. The idea that the European Court of Human Rights is or should be regarded as being a European Constitutional Court

Protocol 15 and 16 have deeply innovated the role that the European Court of Human Rights is required to play in the dynamics of human rights protection in Europe.

Article 1 of Protocol 15 states that:

«At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention»

On the other hand, article 1 of Protocol 16 reads as follows:

«1. Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give

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.

2. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.

3. The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case».

These two quotations make clear that the European Court should be seen as fully and deeply integrated in a system made by the highest Courts and Tribunals of Member States and several scholars have therefore wondered if these new powers may have conferred on the Court a new constitutional status. As a matter of fact the Strasbourg Court has even before been told to be a constitutional court, due to the fact that the Convention itself, dealing with fundamental rights issues, could be regarded as a set of rules of constitutional nature[1].

[1] *See, e.g.*, Alec Stone Sweet, *On the Constitutionalization of the Convention: The European Court of Human Rights as a Constitutional Court* (Faculty Scholarship Series, Paper 71, 2009). The idea that the ECHR should be considered as a constitutional document seems to have been given some support by the Court itself. In the *Loizidou* case e.g., the Court called the ECHR "a constitutional instrument of European public order." But there has been criticism against the idea of a constitutionalization of the ECtHR. The Secretary General of the Council of Europe, Torbjørn Jagland, said at the Interlaken Conference on the Future of the European Court of Human Rights: "In recent years, there has been undefined talk of the Court becoming a 'Constitutional Court'. Although this has not yet led to any sort of agreement, let alone results, it has not been helpful. The Convention is not intended to be a 'European constitution' and it is difficult to see how the Court could become like any existing national

2. Legal reasoning of the Court being a constitutional reasoning? An international law rationale for the margin of appreciation doctrine: a) general clauses in the Convention as indeterminate legal concepts

But it is the reasoning followed by the Court in interpreting the Convention and constructing the obligations arising from the Convention, in fact a constitutional reasoning, that can convey the impression of a constitutional nature of the Court. The Court in fact uses interpretative techniques which are not sometimes familiar to international lawyers, but rather peculiar to its case law, such as balancing, evocating issues of proportionality and finally the so called margin of appreciation doctrine, all ideas and techniques rooted in constitutional legal reasoning.

Anyway, it should be stressed that this reasoning is useful and maybe necessary because of the matter the Court deals with, rather than being a proof of its constitutional character. Thus, even the margin of appreciation doctrine can be traced to a rationale formulated in terms of international law.

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constitutional court "[Quoted from A Mowbray, 'The Interlaken Declaration - The Beginning of a New Era for the European Court of Human Rights?' 10 *Human Rights Law Review* 3 (2010), 519-528, 523]
Further, thought-provoking ideas on the subject were put forward in a debate chaired by President Raimondi and whose proceedings can be found in the *Human Rights Law Journal* 2016 (36), pp. 297 ff.

We can choose as a starting point of our argument the phenomenon of indeterminate legal concepts or general clauses originally typical of the German constitutional culture.

The phenomenon of the "indeterminate legal concepts" or “vague notions” is, indeed, present in all legal systems, where it gives rise to specific problems depending on the order or sector of legislation in which it arises, and is well known and studied.

Therefore, it is not a question of a more careful formulation of "vague" expressions, that is to say expressions of uncertain or problematic clarification, but of expressions whose "vagueness", understood in the sense of uncertainty of their preceptive content, is to be related to a referral that the said expressions operate to extra-juridical rules or values. It is, in fact, impossible, for example, to determine what measures are "necessary in a democratic society for the protection of public order" if not with reference to a specific case. And this operation may import the assessments of factual elements related to a given situation.

It follows that the clarification of the normative content of such provisions cannot take place without referring to elements which are extrinsic to the normative text, elements represented by rules or social values.

The same reasoning applies to those hypothesis in which a proviso contains expressions requiring the evaluation of a series of factual elements which, as such, are unrepeatable, e.g. the factual circumstances that need to be assessed in order to establish whether there is a "danger to the security of the nation".

At this juncture it is useful to enter some considerations peculiar to the way this problem is to be seen in reference to international law. In fact, while some expressions of this kind can be given a meaning on the basis of an examination of issues that, though being unrelated to the normative field of international law, still remain proper to international coexistence, other "indeterminate legal concepts "may require, instead, a reference to the social praxis within individual States, precisely because of the absence, at least in the current phase of evolution of the international legal system, of parameters which could be found in international practice.

Take, for example, the notions of good faith or of due diligence, for which it is possible to refer to parameters rooted in international practice. In this case, the unilateral interpretation adopted by a State can be compared to an interpretation stemming from an international practice.

In other cases, "indeterminate legal concepts", at least in the current evolutionary phase of the international community, point to issues where no consolidated social values or parameters exist at the international level. This is precisely what happens when the international legislation intends to regulate matters that until now have only been part of the internal law of the States, such as human rights issues.

The margin of appreciation doctrine in the Convention system concerned since her first formulations those cases in which the Convention contains "indeterminate legal concepts". In these cases, States

parties enjoy the benefit of a "margin of appreciation" in the application of the Convention articles.

3. An international law rationale for the margin of appreciation doctrine: b) general clauses and the limits of international control

The organ of an international control, and therefore, ultimately, his acceptance of a unilateral State interpretation at an international level, will need to take into account the need to respect this "margin of appreciation", but only after making an evaluation, to put it this way, of the solution to that particular problem or conflict of interest with the attitudes shown on the same issues within the various systems of other State parties to the Convention.

If a substantial uniformity of views emerges from this examination, the Court will conclude that there is an interpretation, even if not an uniform one, at least internationally (of course limited to the Community of the States Parties) accepted and they shall deem that the "margin of appreciation" is completely absent or, in any case, reduced to a small size.

If, on the other hand, a considerable divergence of positions emerges from this examination, then it will be necessary to recognize the existence of a broad "margin of appreciation", whose greater or lesser extent will depend on the greater or less consonance of views in the State orders examined.

Eventually, therefore, it could also happen that an internationally strict and therefore unambiguous interpretation of certain provisions of the Convention may not be achieved, but, taking into account the structure of the provisions in question, it must be concluded that the European common order can also live up to different interpretations.

Moreover, it should be remembered, it is generally recognized that the ultimate aim of international conventions concerning the protection of human rights is not to reach an absolute uniformity of treatment of persons within the State parties, but, perhaps more realistically, comparable levels of protection of individual rights, which can be considered compatible with different ways of implementing international law.

Therefore, we would respectfully submit that these new powers conferred on the Court could be seen in a manner much more consistent with the international character of the Court and the Convention itself, and, what is more, with the case law of the Court.

4. The European Convention of Human Rights being a treaty of a peculiar character giving rise to obligations of an objective character

Margin of appreciation is, as a matter of fact, a doctrine stemming from the idea, put forward by the Court itself, that the European

Convention is a treaty of a peculiar character. The Strasbourg bodies have in fact consistently held that the obligations imposed on States parties to the Convention and ultimately based on this simple wording of Article 1, have characteristics that make the Convention unique in the context of international practice due to their innovative character compared to the "classical type" of international treaties.

This has been argued above all by asserting that the said obligations have an objective character (and that are therefore "objective obligations"), and not merely obligations based on the principle of reciprocity reciprocal as those which generally derive from the international treaties. This idea was first put forward in the case concerning the facts of Fundres where the Commission (which eventually decided that Italy had not violated Article 6) made it clear that, given the particular "objective" nature of the obligations arising from the Convention, the fact that at the time of the facts Austria were not yet part of the Convention was to be considered irrelevant. To put it in the words of the Commission:

« it clearly appears … that the purpose of the High Contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law; … it follows that the obligations undertaken by the High Contracting

Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves; … it follows that a High Contracting Party, when it refers an alleged breach of the Convention to the Commission under article 24, is not to be regarded as exercising a right of action for the purpose of enforcing its own rights, but rather as bringing before the Commission an alleged violation of the public order of Europe»[2]

Furthermore, the idea of the objective nature of the obligations has been used to assert the principle that every High Contracting Party has an interest in the respect of the Convention, simply because it is a party to the Convention, without the need to prove the existence of another title.

In the case of *Ireland v. United Kingdom*, for example, the Court reiterated the idea that the Convention was not a "classical" international treaty, that is, capable of generating only obligations governed by the principle of reciprocity, but such as to give rise also to obligations of an objective nature which can therefore be invoked by any State party solely for the fact of being party to the Convention

[2] European Commission, *Austria v. Italy*, case788/, dec. 11.01.1961*, passim.*

«However, the Irish Government's argument prompts the Court to clarify the nature of the engagements placed under its supervision. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement". By virtue of Article 24, the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals. By substituting the words "shall secure" for the words "undertake to secure" in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (document H (61) 4, pp. 664, 703, 733 and 927). That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law (*De Wilde, Ooms and Versyp* judgment of 18 June 1971, Series A no. 12, p. 43, para. 82; *Swedish Engine Drivers' Union* judgment of 6 February 1976, Series A no. 20, p. 18, para. 50). The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 and the English text of Article 1 ("shall secure"), the Convention also has the consequence that,

in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels» [3]

States have therefore assumed with the ratification of the Convention a full and generally, but not generically, formulated obligation.

«Under Article 1 (art. 1) of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control»[4].

[3] ECtHR, *Ireland v. United Kingdom*, 18.01.1978, § 239.

[4] ECtHR, *Young, James and Webster v. The United Kingdom*, 13.08.1981, § 49

And more clearly this also implies that they have accepted, according to the aforementioned article, also a whole series of "positive obligations": therefore, not only do the States have to put in place all the behaviours suitable for guaranteeing the rights on the part of their organs (which can be defined as negative obligations as they usually involve acts of mere abstention), but also that they must act positively to do everything necessary to fully implement the commitment to ensure the enjoyment of the rights protected by the Convention:

«The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the *Airey* judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves»[5].

This idea, which now enjoys widespread acceptance in the treatment of issues concerning other treaties on human rights, is often

[5] ECtHR, *X and Y v. The Netherlands*, 26.03.1985, § 23.

evoked in relation to the obligation to prevent and repress any activities of individuals that affect the enjoyment of rights by other individuals[6].

5. Further reasons why the European Court should not be considered a constitutional court and a tentative conclusion

So, in our opinion, it was the idea that the Convention must be considered to be, and definitely is, an international treaty of a different nature from other treaties, and that this means that the Convention can produce objective obligations, that may have favoured the impression of its constitutional nature.

Anyway, particularly when using a kelsenian concept of constitutional review [according to which a constitution is a group of norms, situated at the highest rank in a given legal system and serving as a measure of validity to all other norms], it is self-evident that the Strasbourg Court is not competent to assess the validity of national legislation. Though sometimes, in ascertaining whether the Member State violated the Convention through its behaviour in that particular case, the Court

[6] Anyway, according to the consistent and coherent interpretation of the Commission and the Court, neither the obligation under Article 1 nor the Convention as a whole require the States to make the Convention directly applicable by their judicial bodies. The purpose of the Convention is not to see its text *quo talis* applied, but to ensure the protection of the rights it provides in a comparable manner in all the States Parties (see among the many possible citations, *Swedish Trade Union of Conductors of Locomotives v. Sweden*, 6.02.1976, § 50; *Silver and others v. the United Kingdom*, 25.03.1983, § 113*; James v. the United Kingdom*, 21.02.1986, § 84; *Lithgow v. The United Kingdom*, 8.07.1986, § 205).

may render inapplicable national law in the case at hand and, indirectly, *erga omnes*.

In this connection one may say that the Strasbourg Court is *lato sensu* a constitutional court, or better, that the Court behaves as if it were a constitutional court and the Convention itself a Constitution.