

Dialogue with Robert Spano, President of the European Court of human rights

Role of the Court in the past and in the future: President Spano, the Convention is the symbol of shared European identity and represents a common patrimony of rights that has strengthened European citizens' sense of belonging to a community founded on common values and fundamental rights. What role has the ECtHR played to date in building this shared European identity? What role will the ECtHR assume in the future in an era characterized by the resurgence of populisms and nationalisms and by the danger of authoritarian drifts?

President Robert Spano: «The question proceeds on important, but not necessarily uncontested, assumptions of the existence of a "shared European identity" and a strengthening of European citizens' sense of communal belonging. The Convention constitutes an express manifestation of certain fundamental and enduring moral values that have been given legal force by an international treaty and continuously developed by an international court, the European Court of Human Rights. The Convention and the Court's jurisprudence have for sixty years created a corpus of rights and principles that have had a profound, and I believe, beneficial impact on the legal systems and also to some extent on political cultures in the Member States. In some States, it has embedded further already existing bedrock principles of democracy, the rule of law and human rights. For others, it has assisted in their transition from non-democratic or oppressive regimes to modern constitutional democracies. The Convention is a tool adopted by the Member States for the purpose of preventing anti-democratic and illiberal shifts towards unaccountable authoritarianism akin to the regimes which caused the calamity of the Second World War. The Court, as the ultimate interpreter and enforcer of Convention rights, does not live in a vacuum. We, the judges, are of course well aware of current developments and are mindful of the need for the Court to continue playing an important role in safeguarding the rights and freedoms provided for by the Convention».

Margin of appreciation and principle of subsidiarity: Has the role of the ECtHR and the relationship between the Court and the States Parties changed since the 2012 Brighton Conference?

President Robert Spano: «If viewed from a formal legal perspective the role of the Court can only change with an amendment to the Convention. Protocol 15, the so-called *Brighton Protocol*, has not entered into force, although it may soon. It will amend the Preamble by explicitly introducing the principles of subsidiarity and the margin of appreciation into its text. However, even with that amendment of the Preamble, the role of the Court will not be transformed substantively, as these principles have already formed part of the Court's jurisprudence for decades. The Court has in the last decade or so increasingly sought to develop the concept of shared responsibility of the international judge and the national authorities by reformulating its case-law to give more life to the principle of subsidiarity. It is nevertheless important to realise that this development does not grant more power to the Member States. On the contrary, its main purpose is to incentivise States to do even better to fulfil their role under Article 1 of the Convention to protect and ensure that all peoples within their jurisdiction enjoy the rights and freedoms provided for by the Convention».

«Judicial restraint» versus «judicial activism»: Some studies on separate opinions have shown that ECtHR judges who previously carried out the activities of national judge or lawyer have a different approach to that of those who, instead, come from research organisations and academia. While the former would have a greater tendency to “judicial restraint” and to acceptance of majority’s opinion in the name of collegiality, the latter would be more “activist” and have a more pronounced inclination to formulate separate opinions. President Spano, in the past you have carried out both the activity of Judge and of University Professor. What do you think about these different approaches?

President Robert Spano: «I think that such generalisations should be avoided although they may be interesting for some commentators. When a judge of an international court like the ECtHR interprets the broadly worded human rights guarantees contained in the Convention, judicial philosophy inevitably comes into play. The judges background, training, career trajectory and cultural and societal origins will have moulded this philosophy over many years of practice

and reflection. It is true that those that have a background as professional judges may be instinctively be more attuned to procedural and technical issues, whereas academics will be more at ease with the doctrinal or theoretical principles that permeate the adjudicatory function. But this does not necessarily translate into a clear division between whether a judge will be more prone to finding violations of the Convention or not. It is not that simple. Furthermore, the dichotomy between judicial restraint and judicial activism is also overly binary in its formulation. Some judges can be rather conservative in one field of Convention jurisprudence and more liberal in others and vice versa. What all of this means is that an international court like the ECtHR needs diversity on its bench so that all the different views and ideas can be represented in the final product. I venture to claim that it is exactly this diversity that has made the ECtHR so successful and influential over the last sixty years. In this respect it is also of great importance that gender balance be achieved within the Court».

Relationship between the ECtHR and national courts: How can ECtHR and national courts improve their dialogue in order to obtain better cooperation with a view to maximizing human rights protection? What role will Protocol 16 play?

President Robert Spano: «It is of great importance for the Convention system that national judges aspire, as far as possible, to acquire knowledge of the Convention and the Court's case-law. We need to speak the same legal Convention language in Strasbourg and Rome, in Strasbourg and Moscow, in Strasbourg and Sarajevo. The Convention is premised on the existence of a community of European judges that together, collaboratively, enforce Convention rights and freedoms. Therefore, all judges in Council of Europe Member States are in this sense "Strasbourg Judges". Emphasising the importance of this notion of a *community* of European judges will constitute one of the main themes of my mandate as President of the Court. It remains to be seen what will be the influence of Protocol 16 in the process of strengthening the dialogue between the Strasbourg Court and the national judiciaries, as we have only dealt with two requests for advisory opinions at present. I am a firm believer in Protocol 16 and its underlying logic».

Convention's rights: President Spano, you were a member of the Grand Chamber in the case *De Tommaso c. Italy* and of the Chamber in the case *Talpis c. Italy*. In the latter case, you also drafted a dissenting opinion. To what extent under the Convention it is possible or necessary to limit personal freedoms in order to prevent the commission of offences?

President Robert Spano: «If I limit my answer to whether a person can be deprived of his liberty in conformity with Article 5 of the Convention, in order to prevent the commission of offences, the most important Grand Chamber judgment on this issue is *S., V. and A. v Denmark* of 22 October 2018. There, the Court interpreted Article 5 § 1 (c) to permit the use of "preventive detention" in certain well defined circumstances».

In the Chamber judgment *Paradiso and Campanelli v. Italy* you drafted a separate opinion together with Guido Raimondi, which then became the majority opinion in the Grand Chamber judgment. In general, what role can the ECtHR play in striking a balance between the States' margin of appreciation and the need to protect new rights in the light of present-day conditions?

President Robert Spano: «It is inherent in the whole structure of the Convention that different roles are assigned to the Strasbourg Court, on the one hand, and the national authorities, in particular the domestic courts, on the other. Convention rights are first and foremost to be ensured and protected at national level. It is at the outset for the Member States to safeguard Convention rights and also to determine when it is justified to restrict them. However, the Convention is based on the underlying structural foundation that these decisions are subject to the European supervision of the Strasbourg Court. This dichotomy of functions thus requires the Court to formulate its review powers, in other words determine when they need to be strict and when they can be more deferential. This is sometimes called the margin of appreciation. It is very difficult to give an abstract answer on how the Court determines the spectrum of the margin in any given case; it all depends on the subject matter, the Convention provision in question and in some cases on whether a consensus can be identified at European level».

The pandemic and the ECtHR: Due to the COVID-19 health emergency, many European governments have introduced measures restricting fundamental rights in order to protect public and private health. What role can the ECtHR play in defining the balance between the right to health and life and other fundamental rights guaranteed by the Convention?

President Robert Spano: «It is clear that measures taken by States in response to the ongoing health crisis may affect rights and freedoms protected by the Convention, such as the right to life under Article 2, the right to private life under Article 8, the freedom of assembly under Article 11 and the freedom of movement under Article 2 of Protocol No. 4. It will first be for the national courts to decide, applying Convention principles, whether the respective Governments have adequately justified their measures and, also, based on their positive obligations, actively safeguarded Convention rights. Subsequent to the exhaustion of domestic remedies, aggrieved applicants can lodge an application in Strasbourg. The Court will then have to examine each individual case on the basis of its case-law and, if need be, clarify its principles to take account of the special features, nature and scope of the health crisis which is, as we all know, unprecedented in its scale and complexity, at least in the last 100 years or so».

Court's procedures: In the last years, the ECtHR has adopted reforms to simplify procedures. For example, the single judge procedure in order to filter manifestly inadmissible cases; recently, the broad application of the Committee procedure (the so-called «broader WECL procedure») in order to deal with the cases in which there is a «case-law which has been consistently applied by a Chamber».

How can the ECtHR ensure at the same time efficiency on the one hand and the quality and transparency of decisions on the other?

How will the ECtHR face future challenges with the limited resources available?

President Robert Spano: «Achieving the elusive balance between speed/efficiency and quality is a quintessential challenge for courts, in particular a court like the European Court of Human Rights which is confronted with a very heavy case-load. The Court is constantly reviewing its procedures and working methods in its attempt to secure that balance. It is clear that the Court's reforms during the so-called *Interlaken Process* in the last 10 years or

so, which is now coming to an end, have in large part been successful as regards focusing our work as much as possible on meritorious and well-founded cases. However, challenges remain, in particular due to the great number of such cases that are still pending. One way in which the Court is reacting is by attempting to utilise the Committee procedure of three judges in a more comprehensive, strategic and productive manner. Furthermore, the Court must also fully implement its prioritisation policy so as to be able to identify and allocate its limited resources to those cases which are of great importance for the development of robust human rights protections in Europe. Lastly, the Court is in the process of increasingly incorporating the use of advanced information technology to assist in its work».

President Spano, you have Italian origins and know Italy. Do you believe that your international background has been an important asset for you in your work at the ECtHR, which is a very international setting?

President Robert Spano: «I have been asked this question many times and I would say that the answer is clearly in the affirmative. Before I came to the Court, I had not fully realised to what extent my background would impact my professional capacities in an international environment. I think it is fair to say that it has done so to a great extent. Having an Icelandic mother and an Italian father, having lived in Canada, both in the French speaking and English speaking parts, in Italy and in Iceland, having studied law in Iceland, Belgium and the United Kingdom, and having had to use four and sometimes five languages throughout my life, gave me a sense of comfort when I came to the Court. I have found that I am therefore at ease in an environment where one has to understand and internalise viewpoints of colleagues originating in very different societies and cultures from the ones I have experienced. An international background seems to allow one to adapt rapidly to changing circumstances and diverse personal relations. I am very fortunate to have had this experience before I became a judge of the European Court of Human Rights».