# THE ROLE OF THE STRASBOURG COURT IN DEMOCRATIC SOCIETIES[♦]

by Barbara Randazzo

1. *Preliminary remarks*

Talking about the role of the European Court of Human Rights requires some short preliminary remarks about the present historical context.

We can observe two opposing trends in our democratic societies: on one hand we have an increasing cultural and social pluralism (a sort of cultural contamination) due to globalization; on the other hand we assist to a radicalization of the historical or national identities based on shared values both inside a country and in the largest areas including different countries such as Europe.

A deep consideration of these two opposite, conflicting phenomena goes beyond the subject of my report. I would here only underline that we can notice increasing fears of differences existing among ethnical, cultural, religious groups and communities. The attitude towards minorities (Roma, Kurds, Islamic groups in Christian countries for example) is a meaningful expression of these fears.

The difficulties in dealing with the complexity of such pluralistic societies, finding shared political solutions by law and praxis to the integration problems, pushes towards dangerous simplifications.

In this context the role of Courts is fundamental. The role of guarantee of the European Court of Human Rights is even more important for two reasons: first of all because it's called to judge after national judges

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have decided on the same case and so it controls the domestic jurisdictions (I will come back to this subject later); secondly because it's an international Court and therefore it realizes a homogeneous standard of guarantee of rights inside the 47 members of the Council of Europe, from Russia to Ireland, from Finland to Turkey.

In performing its job, the European Court is obliged to refer to legal categories and concepts that often have different contents in the relevant different national experiences, due to the different historical backgrounds and traditions. The Court employs its autonomous categories, but in so doing it also strongly contributes to the development of a common legal language among the member States. For instance, we can recall the notion of "criminal charge" under Article 6 of the Convention, in which it includes also procedures aimed at the application of some administrative measures.

2. *Nature and Competences of ECtHR*

I must briefly recall the main features of this jurisdiction. Article 32 of the European Convention of Human Rights provides for a special Court competent for its interpretation and application. Since 1998, after the entry into force of Protocol No 11, the Court became a fully jurisdictional one: the new Court.

Article 34 amended introduces the individual applications, without State authorization. "The Court may receive applications from any person, non–governmental organization or groups of individuals claiming to be the *victim* of a violation by one of the High Contracting Parties of rights set forth in the Convention or the Protocols thereto".

The violations of a conventional right may be caused by an act, an omission or a behaviour of a State authority. When a person is under the protection of the State, such as a prisoner, even a lack of the due protection

can determine a violation of rights even if it is directly caused by another individual.

"The Court may only deal with the matter after all domestic remedies have been exhausted" (Article 35 ECHR) : that is the so called principle of subsidiarity. The member State is internationally responsible only if it has not ensured the protection of conventional rights through internal remedies (Article 1 and Article 13).

Therefore, the main task of the Court is checking the effectivity of internal remedies and the way how domestic jurisdictions guarantee the conventional rights. The Court doesn't have the competence to review the interpretation of national law given by internal jurisdictions, but it controls if the final result of their judgments determines a violation of conventional rights or doesn't ensure the due remedy to the violation.

When the Court declares a violation it cannot annul, amend or adopt any act in substitution of the State authorities, but Article 46 binds the States to abide by the final judgments. The Committee of Ministers of the Council of Europe supervises the execution of judgments.

The content of this provision (Article 46 ECHR) has become clearer over the years in particular through the indications given by the CM and the ECtHR. The measures that can be taken are of two types: the first are individual measures concerning the applicants. They relate to the obligation to erase the consequences suffered by them because of the violations established. The basic obligation is, as far as possible, *restitutio in integrum*, and may thus require further actions involving for example the reopening of unfair criminal proceedings, the destruction of information gathered in breach of the right to privacy, the enforcement of an unenforced domestic judgment or the revocation of a deportation order issued despite a real risk of torture or other forms of ill-treatment in the country of

destination (see CM Recommendation, 2000, 2). When *restitutio in integrum* is not possible Article 41 provides for a just satisfaction (normally a sum of money).

The second type are general measures, relating to the obligation of preventing violations similar to that or those found or putting an end to continuing violations. They imply, for example, a review of legislation, regulations and/or judicial or administrative practice.

As regards the nature and scope of other execution measures, whether individual or general, the judgments usually remain silent. These measures, as has been stressed also by the ECtHR on several occasions, have thus in principle to be identified by the State itself under the supervision of the CM (See among others *Scozzari and Giunta v. Italy*, 2000). In certain circumstances, however, the ECtHR itself, in its judgment, provides guidance as to relevant execution measures. Since 2004, in the so called pilot judgement procedures, the ECtHR directly indicates the specific general measures that the member State has to take in order to remove the causes of certain systemic problems that determine structural violations (See *Broniowski v. Poland,* 2004; *Sejdovic v. Italy*, 2005 and most recently *Burdov (n.2) v. Russia*, 2009).

I mention here, for instance, the case of *Scordino v. Italy* dated 2006. This is the case that conducted the Italian Constitutional Court in 2007 to declare for the first time the unconstitutionality of a law not consistent with the European Convention. The applicant (Scordino) complained of the violation of his right to property (set forth in Article 1 of Protocol No 1) because of an Italian law that provides for too low a compensation in the expropriation of land - for a value far from the market value of the expropriated property usually required by the European Court. The Court of Strasbourg in its conclusive reasoning clarified that: “In order to assist

the respondent State in complying with its obligations under Article 46, the Court has attempted to indicate the type of measures the Italian State could take in order to put an end to the systemic situation found in the present case. It considers that the respondent State should, above all, remove every obstacle to the award of compensation bearing a reasonable relation to the value of the expropriated property, and thus ensure, by appropriate statutory, administrative and budgetary measures, that the right in question is guaranteed effectively and rapidly in respect of other claimants affected by the expropriation of property, in accordance with the principles of the protection of pecuniary rights set forth in Article 1 of Protocol No 1, in particular the principles applicable to compensation arrangements" (cited § 237).

When the measures indicated consist, such as in Scordino, in an abrogation or in an amendment of the law, the European Court seems to realize something very similar to the judicial review. That is why we can consider - I believe increasingly - the Court as a true supranational *constitutional* Court.

It is clear that this new orientation strengthens its role in granting democracy in the European societies, also considering the imminent signing of the Convention by the European Union on the basis of the Lisbon Treaty and of the Protocol No 14.

3. *ECtHR's case-law and the content of the conventional rights*

When an application is submitted to the Court, it has at the outset to determine if the complaint falls within the scope of a conventional right. Therefore it has to determine the real content of the right. The Convention doesn't give a definition of the guaranteed rights and trust to the Court the task to interpret the Convention (Article 32). A meaningful result of that is

the enrichment of the content of some rights, such as the right to respect for private and family life (Article 8), in which the Court has included the right to sexual identity and the principle of self-determination of the person, or as the protection of property, in which the European Court includes the right to get some social rights like an allowance.

However it is worth noting that when there is no consensus within the Member States of the European Council about the possibility to refer a certain interest to the sphere of the conventional right, the Court usually shows a *self-restraint* refusing enlarging interpretation, particularly when the case raises sensitive moral or ethical issues (that is the case for example of the right to life of the foetus or of the right to euthanasia).

Recognizing a right implies that the State is bound not only to refrain from unlawful interferences, but also to put into force all the legislative measures necessary to grant the protection of the right (the so called positive obligations), for instance approving legislation punishing crimes against the person.

4. *The way of reasoning of the Court*

When a conventional right is at stake, the Court begins by verifying if the act of the State authority is allowed by the Convention. In fact, almost all of the rights granted by the Convention can be lawfully limited by the State, but only under certain conditions. For instance Article 8 § 2 expressly provides that the right to respect of private and family life cannot be limited except that in accordance with the law and if the measure is "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

It means that the State interferences have to be based on the law, to have a legitimate aim and to be necessary in a democratic society. These three conditions represent a typical scheme of the reasoning of the Court even if they are not expressly provided for by the text of the Convention.

Therefore rights are almost always subject to be balanced with other conventional rights, with the same rights of another person and with some public interests.

A few conventional rights, such as the prohibition of torture, of slavery and of punishment without law, are considered by the European Court to be "absolutes", that means that they cannot be balanced with other interests; in fact the Convention establishes they cannot be derogated even in times of war or other public emergencies (Article 15). For example, in the case *Saadi v. Italy* (2008) the Court underlines that the alleged "serious dangerousness" of the applicant, suspected to be a terrorist, does not limit the necessity to evaluate the risk of ill treatment in case of his deportation.

I cannot examine here the case-law concerning all these conditions: I limit myself to consider the last of them, usually the most important, that is the necessity of the State interference in a democratic society. It is exactly reasoning on this condition that the Court employs the criterion of proportionality. In determining whether an interference with a right is proportionate, the Court evaluates if the same goal could be achieved with a less intrusive impact on individual rights.

An interesting case in which the control of proportionality involved the concept of democracy is *Refah Partisi v. Turkey* 2003. An Islamic political party had been dissolved by the Turkish Constitutional Court, because it was aimed at imposing Islamic law in Turkey. The European Court held that there had been no violation of Article 11 ECHR (freedom of association). Notwithstanding the dissolution of a political party in a

democratic system is a very heavy measure and therefore the scrutiny on it must be strict, the Court considers that the protection of pluralism and secularism (as neutrality and impartiality of the State) are fundamental features of a democratic society. In the case at hand, the Court holds that the Turkish authorities had not exceeded the *margin of appreciation* left by the Convention to the individual State because the adopted measure was *proportionate* to the legitimate aim to protect a compelling public interest.

In the *Refah Partisi* case the balance to be achieved was between a conventional right and a public interest. In other cases, the Court is called to balance between two different rights, both protected by the Convention. Therefore the Court is concerned by the need to safeguard the "essential nucleus" of each conventional right: for example, we can recall the frequent cases in which the applicants complain of the violation of their right to privacy (Article 8) due to the publication of articles in newspapers by journalists, exercising the right of information, also protected by the Convention (Article 10).

Exceptionally, however, it happens that one of the two conflicting rights has to be sacrificed to safeguard the other. That is the case of *Evans v. The United Kingdom* (2007). The applicant had a serious tumour in both ovaries and before removing them began a treatment for *in vitro* fertilisation: both she and her partner had given their consent to use the frozen embryo. After the operation she divorced from her partner, who withdrew his consent. In the present case, the interest of the applicant was entirely irreconcilable with the interest of the former partner: since if the applicant was permitted to use the embryo the former partner would have been forced to become a father, whereas if the refusal of consent by the former partner was upheld, the applicant would be denied her only opportunity of becoming a genetic parent. Both the involved persons

wanted to exercise a right protected by the Convention, namely the right to respect of private and family life.

A similar case named *Nachmani v. Nachmani* was decided by the Israeli Supreme Court and recalled by the European Court. An Israeli District Court found in favour of the wife, holding that the husband could no more withdraw his consent; a five judge panel of the Supreme Court reversed this decision, upholding the man's fundamental right not to be forced to be a parent. The Supreme Court reheard the case with a panel of eleven judges and decided, seven to four, in favour of the wife (judgement Evans, § 49).

The European Court reasoning starts by defining the nature of the involved rights, pointing out that the right to private life granted by Article 8 incorporates the right to respect for both the decisions to become and not to become a parent. The Court underlines that where a particularly facet of an individual existence or identity is at stake, the *margin of appreciation* allowed to the State will be restricted; where, however, as in the present case, there is no consensus within the Council of Europe either as the relative importance of the interests at stake or as to the best means of protecting it, particularly where the case raises sensitive, moral or ethical issues, the margin will be wider. So the Court concludes that the applicant's right to respect for her decision to become a genetic parent shouldn't prevail on the right of the former partner to respect for his decision not to have a genetic relationship with her: the English law, which never provides for a derogation to the necessity of a present consent, does not exceed the margin of appreciation accorded to the State under Article 8.

In the European Court's jurisprudence, as it can be seen, there is a strict tie between the margin of appreciation doctrine and proportionality. The margin of appreciation defines the sphere of State discretionary power

on granting conventional rights and it can be wider or stricter depending on which rights are at stake. The principle of proportionality (entirely legitimate judicial creation) is at the heart of the debate about how conflicts between Convention rights and between Convention rights and public interests should be resolved.

5. *The strategic role of the right to a fair trial*.

Coming to some conclusive remarks, I want to refer to the strategic role of the right to a fair trial in the system of the Convention. This right, guaranteed by Article 6, must be considered in conjunction with the right to an effective remedy granted by Article 13, according to which the member States must provide for a remedy before a national authority when rights and freedoms, as set forth in the Convention, are violated.

In particular, the right of access to a Tribunal, which is an essential part of the right to a fair trial, is a necessary instrument for the effective enjoyment of all other substantial rights. According to the well-established orientation of the European Court, this right has a central role in the democratic systems. Any limitations of this right must be subject to a strict scrutiny, and have to be justified by compelling public interests. For instance, that is the case for the immunities accorded to the States by the international law, or to members of constitutional organs by many national legislations. I can recall a certain number of judgements in which the Court declares a violation of Article 6 committed by Italy applying parliamentary immunities in too large a way. On the contrary, we can recall a case (*A. v. the United Kingdom*, 2002) in which the Court held there was no violation of Article 6 in applying the parliamentary immunity to a Member of the British Parliament who, when speaking inside the Chamber in a debate on municipal housing policy, had made explicit reference to the name and the

address of a woman considered a part of a non-welcomed neighbourhood in his constituency, and who suffered therefore unfortunate consequences. The Court agreed with the submission that this reference had been "extremely serious and clearly unnecessary" and "particularly regrettable", but nevertheless it concluded as to the proportionality of the parliamentary immunity at issue, fearing that the creation of exceptions to that immunity would seriously undermine the legitimate aim pursued, that is protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.

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