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ONLINE SYMPOSIUM: THE RULE OF LAW AND JUDICIAL INDEPENDENCE IN EUROPETHE CONSTITUTIONAL FUNCTION PERFORMED BY THE EUROPEAN CONVENTION OF HUMAN RIGHTS

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As President Spano argued in his article, the Rule of Law is the lodestar of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In this post, I shall try to stretch the argument a bit further by noting that the ECHR also participates in the function historically performed by constitutionalism, namely that of limiting and shaping political power, in particular State power. In doing so the ECHR has been a successful experience and because of that its activity has become the target of national resistance, especially in populist times.

In order to develop this point, it is first necessary to clarify the relationship between the Rule of Law and constitutionalism. As the Canadian Supreme Court argued in its famous Reference Re Secession of Quebec (paragraph 70), constitutionalism and the Rule of Law present similarities, but they are not identical, in the sense that constitutionalism brings the claims of the Rule of Law to a further level, linking these claims to the necessary compliance with a higher law. In this respect, one could say that the ECHR

gives added value to domestic constitutionalism.

For example, in some countries, the ECHR has been treated as a shadow constitution (Austria) and used by domestic constitutional courts to enrich the national yardstick employed to review domestic laws. In other countries (the Netherlands) where there is no proper judicial review of legislation, national courts have benefited from constitutional openness, and used international treaties, including the ECHR, to remedy this situation. Comparative research shows that in other countries the ECHR has acquired at least a super-legislative status.

This super-legislative status of the ECHR has produced reactions at the national level and this is inevitably the price of the success that this international instrument has had over the years and consequently of its invasiveness in domestic boundaries. As Justice Gallo, former President of the Italian Constitutional Court wrote in a text prepared for a meeting in Brussels held on 24 May 2012, recently, the exchange of views between the Italian Constitutional Court and the Strasbourg Court has become more and more frequent. In principle, the ECHR gives added value to the protection of fundamental rights in Europe. However, as Justice Gallo pointed out: 'the work of transposition of the case-law of the ECtHR into the national legal order has not been easy'. One could see the Italian case as particular in light of the uncertain position accorded to the ECHR (super-legislative but also sub-constitutional) but even in other jurisdictions the situation is pretty similar. Even in legal orders lacking a fully-fledged constitutional text, like the UK, judges have limited the openness granted to the ECHR, which cases such as *Horncastle* confirm.

Over recent years the European Court of Human Rights (ECtHR) has been under attack and forms of judicial and political resistance have emerged. There might be different explanations for that: some of them are long-standing issues that have already been explored in depth by scholars. In other cases, instead, they are also due to the recent waves of populism and sovereignism that have spread around Europe. In some cases, even the international commitments stipulated by national states have been subject to referendums, and this explains why not only national but also

supranational courts have been targets of populist attacks. The recent 'Swiss law first' initiative is a good example of this, in a system where the ECHR and the ECtHR play a fundamental role in giving national judges the possibility of carrying out judicial review of federal legislation, compensating in this way the immunity of federal laws from the judicial control of compatibility with the local Constitution. Finally, there are also episodes of non-execution and judicial disobedience that seem to have more specific reasons due to the circumstances or the factual background of the case. There are also cases of judicial disagreements that can perform a systemic function by inducing the Strasbourg Court to adjust its case law. This is the case in my view, of the *Hutchinson* saga, in which the ECtHR came back to its *Vinter* decision, producing what was called a 'counter-revolution': 'In the circumstances of this case where, *following the Grand Chamber's judgment in which it expressed doubts about the clarity of domestic law, the national court has specifically addressed those doubts and set out an unequivocal statement of the legal position, the Court must accept the national court's interpretation of domestic law*" (paragraph 25, emphasis added). Even more clearly, the Grand Chamber in the 2017 *Hutchison* case stated:

"In the McLoughlin decision the Court of Appeal *responded explicitly to the Vinter critique*. It affirmed the statutory duty of the Secretary of State to exercise the power of release compatibly with Article 3 of the Convention *The Court considers that the Court of Appeal has brought clarity as to the content of the relevant domestic law, resolving the discrepancy identified in the Vinter judgment*" (paragraph 39).

For the sake of clarity, my main point is not to do with the consistency of this line of cases from a substantial point of view or with the destiny of the 'right to hope' after *Hutchinson*. As scholars immediately pointed out, there are ambiguities both in the decision of the Court of Appeal (for instance, it appears difficult to deny the uncertainty surrounding the term 'exceptional circumstances') and in the decisions of the ECtHR. Nevertheless, *Hutchinson* is interesting from the methodology of dialogue, being a good example of how national and European courts may exchange arguments, even correcting the interlocutor if the decision of

the ECtHR is based on what is perceived as a questionable understanding of what national law says. By expressing disagreement, national judges may influence the evolution of the case law of the Strasbourg Court. However, there are also cases in which the disagreement stemming from national courts cannot be read in such a benign manner. Famous examples come from Russia, where the local Parliament adopted a new law allowing the Constitutional Court to declare the impossibility to enforce the decisions of the ECtHR if they breach the national Constitution. Scholars have commented upon the follow up of the Russian Constitutional Court to the *Yukos* decision, describing the Russian case as an example of 'hostile criticism' or 'unprincipled disobedience'.

However, all the forms of disobedience are a direct consequence of the success of the ECHR and of the progressive involvement of national judges in the life and enforcement of this instrument (the idea of subsidiarity which has been codified in Protocol 15 to the ECHR), and are in a way the price of the success of the ECHR, which is more and more often conceived as a pressing and important source of obligations even by the domestic actors and institutions.

National courts may play a fundamental function in enabling domestic constitutionalism to be enriched by the ECHR, and indeed the ECtHR needs allies. In this respect, a potential turning point might be represented by Protocol No. 16. Protocol No. 16 could help the European Court in explaining that the ECHR enriches the protection of constitutional rights and that the ECtHR is not a threat to sovereignty. Diritti Comparati has contributed to the Italian debate about the advantages offered by Protocol No. 16. Unfortunately, in Italy, the non-ratification thesis has also been supported by sovereignist arguments.

In some countries, in order to face populist attacks, constitutional courts have been trying to better explain their mission to citizens, to reach out to people, so to speak, by investing heavily in a communication strategy (members of Constitutional courts record podcasts, they give interviews to newspapers, they participate in cultural (non-academic) events). This has triggered a huge debate about the pros and cons of this choice. Are

courts equipped to do that? Is this useful?
The risk of trespassing is always present, but perhaps it is better for courts (especially top courts) to explain their role rather than letting the courts - and their counter-majoritarian function necessary to preserve democracies - be exploited by the populist narrative.

Some years ago, in one of his famous separate opinions, Judge Paulo Pinto de Albuquerque referred to a 'spirit of the age', an age that experiences 'strong headwinds against the Court' particularly following the emergence of new populist movements and extremist parties:

'One major commonality among these parties and movements is their unprecedented barrage of bellicose verbiage against the Court, based on flawed, inaccurate and easily debunked misinformation. Such abject attitude speaks volumes about the social and political values of these parties and movements and their lack of commitment to the European culture of human rights. In recent years the resentment against the Court has reached a new, alarming pitch, stoking sectarian rage against the Convention system itself. The rhetoric of the Convention as a "villain's charter", which protects the terrorists, the paedophiles and all sorts of criminals against the innocent majority, or the abusive, lazy migrants against the hard-working Mr Smith, or the privileged minorities against the underprivileged, common man on the street, echoes the whipped-up fear of the outsider – of that which is foreign or different.'

The article written by President Spano offers an outstanding contribution to the debate about the role and the impact of the Strasbourg Court on civil society and helps in clarifying why its mission enriches the protection of fundamental rights. In this, the ECtHR is a powerful antidote to the new wave of populism (either authoritarian or not) and a fundamental piece in the supranational constitutional mosaic as it helps in offering a further instrument of rationalisation of political power in a phase in which 'the intrinsically counter-majoritarian nature of human rights is forgotten by legislators, courts and other domestic public authorities'.