



30.09.2020

[*Susanna Arcieri - Paulo Sergio Pinto de Albuquerque*](#)

Luci e ombre della giustizia europea, vista da dentro

Intervista a Paulo Sergio Pinto de Albuquerque

[!\[\]\(e3f8612927870f2e0f9f5989e6dd3064_img.jpg\) Scarica la nostra traduzione italiana](#)

[#carcere](#) [#CEDU](#) [#condanna](#) [#diritti umani](#) [#Europa](#) [#giudice](#) [#giustizia](#) [#interpretazione](#) [#politica](#) [#sentenza](#)



[Fascicolo 9/2020](#)

Dear Professor, your commitment to protecting human rights and your efforts to combat their violation has been such that, as we read, you've been dubbed «the judge of the left behind». Do you recognize yourself in this definition?

Yes, I do. I have been working with Italy and Italian judges, lawyers and university professors for over fifteen years and this definition was many times used by them over these years. I feel honored by it.

Would you like to comment briefly on this epithet?

I will comment it with a fact. I received an honorary doctorate from the University of Edge Hill in the United Kingdom on December 7, 2019, thanks to my contribution to the «promotion of social justice and the fundamental rights of women and minorities and workers»^[1].

I think this prestigious British university identified the core of my work in my judicial and legal career.

In the light of your past experience at the ECHR, what do you think is the biggest threat to human rights in the contemporary (especially western) societies?

The biggest threat to human rights is the attack to judicial independence. Human rights will be meaningless if you do not have an independent and courageous judiciary. When judges are willingly or unwillingly conniving with the political power they will no longer be capable of delivering justice to victims. I coauthored an article recently on this serious

problem^[2].



Human rights will be meaningless if you do not have an independent and courageous judiciary. When judges are willingly or unwillingly conniving with the political power they will no longer be capable of delivering justice to victims. I coauthored an article recently on this serious problem



In this regard, in a recent article published on the Italian Journal *Filodiritto* (*Difesa della Corte europea dei diritti umani*, July 2, 2020) you dwell at length about the problem of independence of the judiciary, especially in the context of ECHR.

As you probably know, this is a very hot topic now in Italy, by reason of the recent scandals within the Superior Council of Judiciary (CSM) involving some politicians and magistrates which are causing the Italian judiciary to lose its credibility.

What is, in your opinion, the current relation between judges (both at the European and national level) and politics?

This relationship is problematic, especially in some Eastern European countries where Governments have interfered repeatedly with important aspects of the professional status of judges and the internal organization and management of the judiciary. But this is a systemic problem that is not limited to Eastern Europe. In many parts of Europe you can detect clear instances of interference with the daily work of the judiciary.



This is a systemic problem [...]. In many parts of Europe you can detect clear instances of interference with the daily work of the judiciary



What are the main critical points of this relationship and, ideally, the possible solutions?

At the international level, I think that the European Court on Human Rights needs to be more independent and more accountable. The internal organization and electoral system of the Court needs a major reform, in order to reinforce the internal independence of the judges. With other colleagues, I proposed changes while I was still in Strasbourg. They are published in the article that you mentioned

At the national level, I am of the view that the composition and powers of the CSM are crucial and should be aligned with the GRECO guidelines^[3].

In fact, the GRECO has reproached several European States for not complying with their guidelines^[4]. States should listen to the GRECO and comply with the guidelines and recommendations of the Council of Europe regarding the independence of the judiciary.

In your article [Is the ECHR facing an existential crisis?](#), April 28, 2017, you recall the main political critiques frequently levelled by the Member States against the Court. One of them is described by you as follows: «The Court’s attempt to aggrandise itself is visible in the invention of new rights and the enlargement of its own powers».

In your opinion, to what extent do judges – both European and national – *just apply* the law and, on the contrary, *create* the law?

The application of the law is always an act of re-creation of its meaning. In fact, the interpretation of any legal text is an act which co-involves the interpreter and the society, in a creative manner. It is a false dilemma to oppose application and creation of law.



The application of the law is always an act of re-creation of its meaning. In fact, the interpretation of any legal text is an act which co-involves the interpreter and the society, in a creative manner. It is a false dilemma to oppose application and creation of law



What are the main consequences of this?

The fact that the work of the judges is creative in itself does not mean that it is arbitrary. While interpreting and applying the law, judges are bound by rules of interpretation. The most important rule of interpretation of legal texts, including international treaties like the European Convention on Human Rights, is the rule of evolutive interpretation, which means that a text like the Convention must be interpreted according to the present-days needs of European countries.

In the last few weeks, we have been impressed by the recent decision of the ECHR to condemn Italian government to compensate the parents of Antonio Citraro, an inmate who died suicide in Messina prison on January 16, 2001, at the age of 30 (*Citraro et Molino v. Italy* – Application no. 50988/13)^[5].

In particular, the Court clarified that the State has a precise duty to guarantee the right to life of the inmate, to whom human and non-degrading treatment must be ensured. We believe that this decision will have important consequences for the penitentiary policy of our country and will probably (hopefully) impose a general rethinking of the way in which Italy deals with the problem of prison and prisoners.

We know that you did not participate in the final decision, which was taken after the end mandate at the ECHR, but maybe you’ve been involved in the decision-making process prior to the judgement. Anyway, what is your opinion about the statements of the Court in this case?

I was not involved in this case. I totally agree with finding of a substantive violation of article 2 of the ECHR (right to life) in this case. By the way, I and two other colleagues voted similarly for a violation of this same article in the case [Jeanty v. Belgium](#) (Application no. 82284/17), but unfortunately the majority decided the case in the opposite direction. This shows that the Court is not always coherent in its approach to suicide of prisoners.

On the same subject, I personally participated in a recent and partly similar case ([Fernandes de Oliveira v. Portugal](#) – Application no. 78103/14), which however involved a person who person who committed himself in a psychiatric hospital ward. In that case, the majority stated that there had been no violation of the substantive limb of Article 2 of the European Convention on Human Rights related to the measures to protect the life of a voluntary psychiatric inpatient who committed suicide.

On that occasion, I wrote a dissenting opinion in which I found that, in my opinion, more advanced standards of protection should to be imposed on States when referring to particularly vulnerable categories of people hospitalized in restrictive regimes. In this perspective should be read my statement, expressed in the dissenting opinion, according to

which the decision of the Court expressed «an ideologically charged minimalist approach to the State's obligations in the sphere of health care law», the effect of which was «downgrading the level of Convention protection to an inadmissible level of State inertia»^[6].



In my opinion, more advanced standards of protection should to be imposed on States when referring to particularly vulnerable categories of people hospitalized in restrictive regimes



What do you think are the greatest direct effects of the Citraro decision on the future Italian prison policies (if any)?

According to well-established case law of the ECHR, States have a positive obligation to keep prisoners safe from any kind of aggression, including self-aggression and inter-prisoner aggression. This obligation is particularly demanding in the case of mentally disturbed prisoners.

In concrete terms, the State has to provide an individual sentence plan, with a comprehensive and updated risk and needs assessment. As one of the most important practical aspects of the positive obligation of States Parties to protect the physical and psychological well-being of prisoners under the European Convention, the obligation to provide an individual sentence plan is an obligation of result which is imposed on States Parties, independent of the prisoner's wishes.



According to well-established case law of the ECHR, States have a positive obligation to keep prisoners safe from any kind of aggression, including self-aggression and inter-prisoner aggression. This obligation is particularly demanding in the case of mentally disturbed prisoners



The prisoner's adherence to and cooperation with the sentence plan should be promoted, but his or her rejection of or indifference to it does not release the State from the duty to prepare, implement and review the individual sentence plan. Failure to comply with this obligation entails State responsibility, namely for incidents like suicide or inter-prisoner violence resulting from wrongful prisoners' allocation and classification decisions.

As known, in many occasions the ECHR dealt with the principle of *ne bis in idem* at the interface between criminal and administrative law, in particular with regard to the legitimacy of double-track enforcement systems. According to the ECHR jurisprudence, one of the elements which should be considered to determine the compatibility of dual criminal and administrative proceedings against the same offender concerning the same facts is the existence of a «sufficient connection in time» between the two sets of proceedings.

The matter has been dealt with also in the case *A and B v. Norway* (applications n. 24130/11, 29758/11) in which you strongly criticized the majority's view in your dissenting opinion.

In particular, you state (§ 42-46) that in a number of cases the Court has set a different standard for deciding what the Court itself means by the «sufficient connection in time» requirement. In fact, you take as examples the precedent ECHR's case law «to show that the “sufficient connection in time” criterion is arbitrary». At the end of your opinion, you also clarify that «the inalienable individual right to ne bis in idem» doesn't really fit the «fluid, narrowly construed, in one word illusory, right» raised by the majority in that specific case.

Taking inspiration from your abovementioned statements, what can you tell us, generally speaking, about the concept of “legal certainty”, especially within the context of ECHR jurisprudence?

The case that you mentioned is an unfortunate example of how unpredictable the European Court may be. After *Grande Stevens and Others v. Italy* (Application no. 18640/10), everyone was expecting that Norway would be found in breach of Article 4 of Protocol No. 7.

The ratio of the *Grande Stevens* judgment was totally applicable to the Norwegian case. Yet the Court departed from the ratio of the *Grande Stevens* judgment without any plausible explanation other than the great convenience of the double track system of punishment for the State.

In other words, due to strictly opportunistic policy reasons, the guarantee of the *ne bis in idem* was gravely weakened and the European citizens and corporations were left at the mercy of Governments.



The Court departed from the ratio of the Grande Stevens judgment without any plausible explanation other than the great convenience of the double track system of punishment for the State. In other words, due to strictly opportunistic policy reasons, the guarantee of the ne bis in idem was gravely weakened and the European citizens and corporations were left at the mercy of Governments

[1] See H. Ball, [International judge and human rights activist receives honorary doctorate](#), published on the Edge Hill University website, December 10, 2019.

[2] See P. Pinto de Albuquerque, H.S. Lim, *Protecting the Independence of International Judges: Current Practice and Recommendations*, in P. Pinto de Albuquerque, K. Wojtyczek (eds), *Judicial Power in a Globalized World*, Springer, 2019, pp. 413 ff.

[3] See the reference texts published on the Council of Europe website, [at this link](#).

[4] See for example [GRECO urges Ireland to ensure judiciary's independence on appointments and promotion of judges](#), Council of Europe, July 5, 2018, and [GRECO Expects Better Anti-Corruption Rules for Swiss Judiciary](#), OCCRP, June 14, 2019.

[5] For a summary of the case and of the Court's decision, see S. Arcieri, [Accepted the claim of the parents of the suicide inmate. The judgement of the ECHR, twenty years later](#), in *this journal*, July 1, 2020.

[6] Cfr. the *Partly concurring, partly dissenting opinion of judge Pinto de Albuquerque joined by judge Harutyunyan*, § 2.