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info@gioacchinoonoratieditore.it

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Elena Santiemma
Barbara Terenzi
Maurizio Gressi

The Italian National Human Rights Institution (NHRI): What it is and Why it is Needed

L'Istituzione Nazionale Indipendente per la Promozione e Protezione dei Diritti Umani Italiana: cos'è e perché serve

Prefazione di
Prof. Em. Claudio Zanghì

Postfazione del
Min. Plen. Fabrizio Petri



English translation by Barbara Terenzi.
Traduzione inglese a cura di Barbara Terenzi.

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Preface

CLAUDIO ZANGHI*

Since the establishment of the Republic, Italy has been a State party to numerous human rights international treaties and declarations.

From the 1950 European Convention, without disregarding the Universal Declaration of Human Rights — even though it was adopted when Italy was not yet a United Nations member State — our Country is bound by a wealth of treaties at international global level and at European level in particular, including, within the European Union, the Lisbon Treaty which merged what was the Charter of Fundamental Rights, the so-called Nice Charter.

Very often, as widely known, States participate in such treaties for essentially international political reasons, neglecting what should be, by explicit statement of the documents, the immediate effect into the national legal systems. Our Country is no exception to this practice; suffice it to recall that in 1955 Italy ratified the European Convention on Human Rights but only 21 years later, i.e. in 1976, did it sign the so–called Optional Clause of individual recourse, thus allowing the European Commission, ad hoc established, to evaluate the behaviour of the State in relation to the obligations accepted under the Convention. In practice, the commitment to respect the Convention stemmed from the 1955 ratification law but our Country, by not allowing an audit over its actions until it

* Professor Emeritus in International Law and International Organisation, Sapienza University of Rome.

accepted the control procedure, has in fact ignored most of the conventional provisions.

It is therefore embedded that the now existing very numerous instruments on human rights — both of general nature or universal relevance, of a specific nature for certain categories of subjects or per rights categories or even of regional force — are very often ignored or neglected, especially when an effective control procedure is missing.

On the contrary, it is known that rights, recognized in international instruments, should be applied, and respected in the domestic legal systems through the usual mechanisms of the State, without disturbing international procedures. For Italy, for instance, this would be the elementary legal consequence deriving from the ratification law of each of the international instruments recalled.

As the European Court has repeatedly pointed out, the first protection of human rights takes place within the domestic legal system and — if this were concrete, effective and compliant with the commitments undertaken — most of the appeals to the international bodies would be avoided.

All this is true in theory, but reality is far–off. Legislation on this matter, although operating in our legal system, is very often ignored not only in the context of its direct usage but also, and mainly, because of the influence that could arise in the adoption of other national regulations. I do not want to go deeply into assessing whether this outcome depends on a specific political will of the Parliament and of the Government or more simply on the ignorance of the relevant legislation, but certainly the effect is disappointing.

The foregoing, I would like to clarify, is not specific to our Country but encompasses a variety of countries, so much so the United Nations General Assembly itself in 1993 explicitly invited States to equip themselves with a national commission, independent from the Government, capable to help the latter in the promotion and implementation of the commitments

undertaken. The composition of this mechanism should also guarantee its absolute independent nature in compliance with those, at the time, named the Paris Principles. A few years later a similar appeal was made by the Council of Europe to all European countries.

Many countries, as extensively notorious, have conformed to this invitation by creating national commissions composed variously and perhaps not always respectful of the requirement of independence referred to, but it is equally well known that Italy even today, more than 25 years from that date, has in no way established such mechanism.

We all recognise that so–called "ombudsmen" have been established at various levels, but it is similarly widely renowned that these, also with a single and non–collegial nature, do not have specific competence in the field of human rights and cannot perform any function to assist the Parliament and the Government. I will also omit the other forms of "guarantor", adopted for the protection of minors, equal opportunities, and others, because, even in such cases, the previous limits would apply.

A multi-member structure, as understood at the time by the General Assembly and specified in Resolution 48/134, should instead have the task, not only of evaluating the different ways of implementing the promotion and protection of human rights in the domestic legal system, but also, and essentially, of providing the Parliament and the Government with the information necessary for the correct implementation of the commitments undertaken and in particular for the effect that such obligations could have on any other domestic legislation.

The need for such mechanism is fully evident whenever, and such cases are frequent, the Government and the Parliament adopt measures, concerning apparently a completely different matter, which nevertheless ignore and therefore violate certain human rights obligations accepted by our Country. In most cases, this is not determined by the will of the Government or

of the Parliament, but rather frequently by the total ignorance of the implications that one or the other measure may have on the international commitments undertaken. In such circumstances we often witness initiatives of academia, press, or the like, but in equivalent situations, such appeals are fated to remain unheard.

However, it is true that many initiatives for the establishment of the commission have in the meantime been adopted, the latest in 2018, but it is equally true that no results have been achieved so far. I will not enter into the observations made regarding the difficulty of choosing the composition, costs and so on, because, briefly in my opinion, these are all specious arguments that cover a lack of political will, and in particular, a specific desire for freedom of the Parliament and the Government which would unavoidably be influenced by the activity of such a commission, if established.

And if this, alas, is the reality of our Country, what surprises me most, as an internationalist, are the repeated promises made by the Italian Government in this regard. It is known, for instance, that the United Nations human rights protection mechanism now provides for a Universal Periodic Review of the behaviour of individual member States by the Human Rights Council. Well, perhaps some are aware that when in 2007 Italy proposed itself as a member of the Council, and was later elected, a pledge was explicitly formulated, together with others, to as soon as possible proceed in establishing the national human rights institution. The expected three–year period of Italy participating in the above mentioned Council passed, and nothing happened; Italy simply did not keep its promise and this, despite the many appeals addressed to the State during the Universal Periodic Review considering Italy. It would have been therefore logical, at international level, that a Country like ours, which did not fulfil over the entire three–year period the pledges made at the time of the appointment, should not have been reappointed to the same Council. Vice versa, the usual political reasons have allowed

Italy to be re–elected for the three–year period 2011-2014. Well, with recurring impudence, Italy reiterated the promise to establish the well-known commission. And even in this case, during the Periodic Review of Italy, numerous invitations and appeals were made. Italy has remained deaf, so much so we are still talking about it today after more than six years.

The events briefly mentioned do not need further clarification to highlight the absolute need to give life to such national commission. The pages of this book examine in detail the various historical political phases, the reasons formulated, and the many discrepancies occurred in our legal system, together with the numerous violations. In almost all cases, due to insufficient preparation and disinformation of the political class which could have taken into account the findings and engagement arising from the international commitments, thus avoiding unfulfilling promises, criticisms to the behaviour of our legal system, violation of rights and so on.

If, as I said before, the appeals of scholars, press and the like have not been met, it is only to trust that a complete analysis, such as the one contained in this book of the historical premises of the international obligations, the recurring promises and the absolute usefulness of such mechanism for our legal system, is finally listened!

The previous facts are certainly not favourable, but, as they say, hope is the last to die, and therefore, let us all hope that ultimately, also following this publication, the national human rights institution can at last be established.

Introduction

ELENA SANTIEMMA*

For human rights to be anything other than mere principle declarations, the international community and individual Governments should seek — and are seeking, with different degrees of luck and commitment — that everyone's enjoyment is effective and concrete. This work aims precisely at carrying out an analysis of one of the most concrete ways, alongside the judicial protection, the above have so far elaborated, consolidated and in many cases implemented: the independent national human rights institutions (NHRIs). The omen is to reconstruct the various attempts made to establish such an institution in Italy and to clarify its legal outline, and to focus the attention of experts and of the public opinion on the matter. Never as in this historic moment of great uncertainty, characterized by the recrudescence of discrimination, racism and xenophobia, if not also of real violence, the role of attentive observer and cultural catalyst of a NHRI is felt as a need and the absence of such an institution in Italy weighs nationally, but also, as we shall see, internationally.

The Charter of Fundamental Rights of the European Union (EU)[1], for example, is just over ten years old and for its

* Phd in International Order and Human Rights at Sapienza University of Rome. Expert in international law, international organisation, advocacy, and CSOs.

1. The Charter of Fundamental Rights of the European Union (EU) reaffirms fundamental rights as they arise from the constitutional traditions and common international obligations of the EU countries, from the European Convention for the Protection of Human Rights and Fundamental Freedoms, from the Social Charters adopted by the EU and the Council of Europe and by the jurisprudence of the Court of Justice of the EU

effectiveness and concrete effect on people's lives, in Italy as in the other European countries, it is essential that it is well–known and applied by national institutional actors. The national sphere, i.e. a solid institutional human rights architecture and the commitment of the Government and Parliament are fundamental to allow the Charter to express its potential, but the latter are not the only actors to be interested. As evidenced by the European Fundamental Rights Agency (FRA), in a report of 2019[2] made in consultation with all CSOs active in the field of human rights promotion and protection and participating in its Fundamental Rights Platform, as well as NHRIs of the EU member States, the same CSOs do not sufficiently utilize the Charter and a few know the governmental policies to promote its implementation. From many of the CSOs consulted, it emerged that the implementation at national level would be strengthened through an increased funding, a closer monitoring and an increase in the awareness raising action of the national actors by the EU. In fact, FRA 2019 Annual Report, if on one hand showed some positive trends in the use of the Charter by the judiciary, on the other it noted that the Charter potential is not yet fully exploited at national level. In this, the possible contribution of the NHRIs is enormous, as they are key players in the "chain of implementation" of the Charter. NHRIs play a central role in the promotion and protection of fundamental rights at national level, as they operate in all Europe in support of effective judicial systems and facilitate access to justice: when they implement monitoring, reporting and consultancy activities for

and the European Court of Human Rights. The Charter was officially proclaimed in Nice in December 2000 by the European Parliament, the Council and the Commission and became legally binding in the EU with the entry into force of the Lisbon Treaty in December 2009. *(https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights)*.

2. See "The EU Charter of Fundamental Rights on its 10th anniversary: views of civil society and national human rights institutions" (*https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-eu-charter-use-cso-nhri_en.pdf*).

the Governments and Parliaments; when they investigate complaints related to human rights violations; and when they carry out human rights education and awareness raising activities.

Also, the European Council has recently recognized

> «the necessity of safeguarding an enabling environment for independent national human rights institutions, equality bodies and other human rights mechanisms. They play a crucial role in the protection and promotion of fundamental rights and in ensuring compliance with the Charter[3].»

Similarly, in Italy a NHRI could function as a multiplier of good practices at national level. Presently, at the moment in which this work is being printed, some members of Parliament seem to have become aware of these elements, proposing a new legislative initiative, which can give hope.

Looking into the present work, Chapter I introduces the present Italian situation and focuses precisely on the need, from a perspective of the political positioning of our Country, for the Italian State to establish a NHRI. The international obligations of Italy are outlined, including the soft law and the repeated recommendations of the United Nations Universal Periodic Review about the human rights promotion and protection in the Country, and the description of the institutional scenario within which a NHRI would enter in our opinion without any overlapping.

Chapters II and III, instead, are updated excerpts of the monographic work "Le Istituzioni nazionali per la promozione

3. See Council of the EU (2019), "Conclusions on the Charter of Fundamental Rights after 10 Years: State of Play and Future Work", Doc. 12357/19 of 20 September 2019, par. 22.

e la protezione dei diritti umani. Il caso dell'Italia"[4] ("National Institutions for the Promotion and Protection of Human Rights. The case of Italy"). These chapters deal, foremost, with the definition of an independent NHRI, trying to explain the reason for which the international law speaks about it and not, for example the constitutional law. The concept of "National Institution", if not reconnected to its reference context, could in fact generate confusion, for instance in the domestic implementation on behalf of the States of the international obligations regarding the human rights promotion and protection; this also because there are many not specific "national institutions" dealing too ultimately with human rights. Therefore, in Chapter II with the aim of clarification, some of the main types of institutions (public and private) are considered which could be assimilated to the NHRIs for some of their functions, explaining why these instead cannot fall within the definition of NHRI derived from the Paris Principles[5], the main international source on this matter. In this regard, in the same Chapter, customary law and human rights treaty law are explored to trace the existence of specific obligations for the States regarding the establishment of NHRIs. Chapter III furthermore addresses the evolution within the international community of the concept of NHRI and describes the relevant current legal framework within the United Nations and the European Union.

Chapter IV has the important task of bringing back the attention to the specific case of Italy. In fact, here, starting from 2001 to 2020, are traced all the attempts made at legislative level by the various political actors, always associated with some CSOs, to provide our Country with a NHRI. Unfortunately, none of these endeavours have ever passed the first reading in Parliament, even if, in some cases, it has been

4. See E. SANTIEMMA, *Le istituzioni nazionali per la promozione e la protezione dei diritti umani. Il caso dell'Italia*, Roma, 2016.

5. See UN Doc. A/RES/48/134 of 20 December 1993.

possible to have very good texts in terms of correspondence with the Paris Principles requirements and the recommendations of the international organizations. Also the attempt started with the current legislature — the decree C.1323 of 30 October 2018 —, which is dealt with in the second part of the Chapter, seems not to have had a better fate, overtaken by a recent initiative linked to the European Act (Legge Europea) 2019–2020. This Chapter also supplies a thematic table of the three UPRs considering Italy and the specific recommendations concerning the establishment of a NHRI.

Finally, in Chapter V, the discussion concludes the work with a brief analysis of the political and economic costs for the Italian State of the lack of a national mechanism devoted to monitoring and promoting human rights. While politically and in the context of international relations, these costs are easily identifiable — it is enough to recall the voluntary commitments repeatedly made and neglected by Italy before the United Nations Human Rights Council —, the issue of the economic costs is beginning to be studied and represented through some initial estimates, indicated at the end of this work.