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Systemic Analysis of the Levels of Protection Guaranteed in Regional Human Rights Law

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ABSTRACT

The continental division of humanity in the era of contemporary globalization has given rise to several regional systems of human rights protection that offer nuanced guarantees. It goes without saying that these regional mechanisms constitute the highest and strongest protection of human rights insofar as they involve jurisdictional institutions under the provisions of regional instruments. It is therefore necessary to analyze the legal differences that can be observed from one regional system to another in order to evaluate the quality of the protection guaranteed in each.

KEYWORDS: *International law, Human rights, Regional systems, Jurisdictional criterion, Non-derogable rights*

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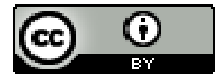

INTRODUCTION:

The regionalization of human rights is emerging as a response to the inadequacies of national legislation and judicial mechanisms for the protection of human rights. It is also a valuable complement to the universal protection guaranteed by the United Nations.

Currently in 2021, and despite facing a majority of States that are often not very receptive, the African system is ahead of the other systems with 55 States parties[2], with 22 in the inter-American system[3], while the European system has 47 States[4]. The Arab system is in the process of progressing with the entry into force of the Arab Charter on Human Rights in 2008[5] and the adoption of the statute of its jurisdictional body in 2014[6].

As its name suggests, regionalization brings both a division of universality and a regional unification of nations. This systemic initiative, although acting in the field of human rights and justice in general, nevertheless allows the harmonization of internal laws and the strengthening of geopolitical ties between States, an element that contributes to the establishment of a lasting regional peace. It is not unlikely, moreover, that in the long term, regionalization could lead to the unification of domestic laws into a single regional law, at least at the level of repressive legislation and practice. The eventual entry into force of a "unified regional criminal law" would certainly be the major outcome of jurisdictional regionalization of which the main objective is the protection of individuals against any legislation or regulation that violates their guaranteed rights.

Given that it is in its first decades of existence, the regionalization of human rights has much to contribute for the benefit of future generations, especially if its shortcomings are mitigated by treaty reforms and new jurisprudential reversals in favour of strengthening the interpretative scope of rights and reducing the margin of appreciation granted to States.

Most of the effort should thus be focused on analyzing the current weaknesses of regional systems in order to come to conclusions that at least serve to mitigate them. However, before looking at the deficiencies that are subjective in each system, it is necessary to develop the common characteristics. These are not exhaustive, but are limited to institutional and substantial criteria. These are mainly the existence of a binding treaty instrument and a regional body of a jurisdictional nature responsible for control. It is in the course of deepening the characteristics of each regional instrument and respective body that divergences may be found, which determine, among other things, the quality of the protection guaranteed.

2African Commission on Human and Peoples' Rights, 2021, Fr_statepartiestotheafricancharter (achpr.org

3Organisation des États américains, 2021, Microsoft Word - French.doc (oas.org)

4Council of Europe, 2021, 47 member states (coe.int)

5Human rights Information Platform, 2021, Arab System for the Protection of Human Rights - Humanrights.ch

6Arab Center for International Humanitarian Law and Human Rights Education, 2021, ACIHL - The French version of the Statute of the Arab Court for Human Rights

It is necessary to deal with these systemic differences of an institutional (I) and substantial (II) nature in the context of regional human rights protection.

The nuanced accessibility to the jurisdictional body

All existing regional systems have a regional court responsible for ensuring compliance with the ratified instrument. The possibility for the individual or group of individuals to directly refer to one of the regional human rights courts represents the initial criterion allowing for systemic differentiation of an institutional nature. To illustrate, individuals subject to the jurisdiction of one of the States parties to the African Charter on Human Rights or the Inter-American Convention can only directly refer to the competent commission[7] which is a non-judicial advisory body with the capacity to refer, instead of the applicant, to the respective regional courts. This distinction between the Commission and the Court in the African and Inter-American systems has led to their being referred to as "semi-jurisdictional" systems, whereas the European system is described as "jurisdictional", opting for the possibility of direct referral to the judicial body in the absence of any intermediate body[8].

Nevertheless, in its most recent jurisprudence, the African Court of Human Rights has opened itself to the possibility of a direct referral in cases where the State in question has deposited the declaration provided for in article 34 (6) of the protocol to the African Charter on Human and Peoples' Rights, establishing the African Court on Human and Peoples' Rights[9]. This means that the said Court does not have jurisdiction to hear cases from individuals and NGOs from the vast majority of EU Member States because they have not ratified the Protocol, or have not made the declaration[10]. However, the African system remains ineffective insofar as the judgments and recommendations are not respected in most of the member states[11].

Jurisdictional and semi-jurisdictional systems

In semi-judicial systems, individuals are deprived of the procedural possibility of direct referral to judicial bodies whose decisions are of a judicial nature and enforceable and not of a resolutive nature like simple recommendations. This legal characteristic of the decisions rendered by the Regional Courts ensures a considerable promotion of the level of protection of human rights at the level of each nation. It should also be noted that the UN system offers prior resolutive protection through its various committees. The specificity and the ultimate interest of the protection of human rights. As a result, the level of regional protection will be considerably compromised if the treaty instrument reduces accessibility to the body.

At the European level, accessibility to the jurisdictional body is at its optimum, whereas it is partial at the level of the African and inter-American systems. The competence of the regional commission to act as an intermediary between the Court and the petitioner nevertheless has advantages in that it makes it possible to filter communications or petitions for the purpose of referring to the Court only cases that could not be resolved by the advisory intervention of the competent commission. Moreover, given their advanced expertise, the commissions have a greater likelihood of success in convincing the regional judges.

Finally, it should be specified that the advisory body must not in any way constitute an obstacle to the intervention of the jurisdictional body. On the other hand, semi-judicial systems must strive to become strictly jurisdictional in nature in order to lighten the formalities of the procedure and increase their efficiency.

In general, anything can be considered as constantly evolving, and the same is true for regional systems in which transparency, ambition and popular justice are the founding and guiding principles.

Vitiated regional systems

In the case of the Arab system, the statute of the judicial body only allows for referral only states parties (in the context of an inter-state application) and to national non-governmental organizations under certain conditions relating to the consent of the state[12]. The accessibility of the Arab judicial body is therefore the most restrictive when compared to the other regional systems. More alarmingly, the effectiveness of the Arab-Muslim system is undermined by the impossibility for individuals to refer to the Arab Human Rights Committee, whose competence is limited to the examination of the initial and periodic reports of the states parties under the terms of article 48 of the Arab Charter on Human Rights.

From this preliminary comparison, it can be concluded that there are three categories of regional systems, namely: Jurisdictional, semi-jurisdictional and flawed regional systems characterized by substantial inadequacies that limit and compromise the institutional competencies of the protection bodies. This inadequacy of Arab regional legislation deprives individuals of their right to claim the treaty freedoms that the state has contracted for their benefit. The ineffectiveness of Arab conventionalism is further confirmed when it is widely acknowledged that the treaty monitoring mechanism through reporting remains insufficient to ensure transparent protection of human rights at the national level. It follows directly from this observation that the free diversification of regional systems can give rise to the creation of vitiated systems and that it is therefore necessary to unify regional protections into a single jurisdictional system based on the effectiveness of the European system.

The most astonishing thing would be that the Arab human rights system presents an extremely rich regional instrument in terms of guaranteed rights, with more than forty protective articles. The convention even ensures the protection of the right of peoples to self-determination[13] nd a wide range of socio-economic and cultural rights not protected by the European system, which is considered to be the most accomplished model in the field of international human rights protection[14]. The substantial richness of the Arab instrument in terms of guaranteed rights is even more advanced in terms of the so-called non-derogable rights,

7Inter-American Convention on Human Rights, 22 Nov. 1969, pt 55; African Charter on Human and Peoples' Rights, 27 June 1981, pt 30
8European Convention on Human Rights, 4 Nov. 1950, pt 34
9African Union Executive Council, Activity Report of the African Court on Human Rights, 2019, pt 44
10*Ibid*, pt 47
11*Ibid*, 2020, Appendix I, p 18

12Statute of the Arab Court of Human Rights, 7 Sep.2014, pt 19
13*Ibid*, pt 9
14Jean-François RENUCCI, General introduction to the European Convention on Human Rights: Guaranteed rights and protection mechanism, 2005, p.6

which represent an essential criterion of a substantial nature allowing for differentiation and systemic evaluation.

As a result, the correction of the so-called shortcomings of the Arab system in relation to the roles of the committee and the accessibility of the Court, can give rise to an optimal system that guarantees not only civil and political rights, but also the rights belonging to the second generations in a context of indivisibility and interdependence of human rights.

The nuanced interpretation of a hard core of human rights

A non-derogable right means, in a general and simplistic way, a legal guarantee that cannot be suspended or limited by the State having recourse to a derogation clause that allows for a limited and supervised derogation from treaty obligations[15]. These rights can also be referred to as core rights[16] vary in their determination and in the quality of their protection from one regional system to another.

The determination of non-derogable rights

Before deepening the regional characteristics of the inviolability of human rights, it is necessary to define the universal standards of their guarantee. Article 4 of the Covenant on Civil and Political Rights provides absolute protection for seven different rights: The right to life (Art 2) and to freedom of conscience (Art 18), to the prohibition of torture (Art 6) and other inhuman treatment (Art 7 and 8) and to the respect of legal and judicial guarantees (Art 11, 15, 16, and 17). It must be noted that the European system adopts an inferior quality of protection by determining only four non-derogable rights[17] which exclude the right to freedom of thought, conscience and religion and the overriding right to liberty and security (Art 5) which protects individuals from arbitrary detention. These are clearly serious substantive gaps that need to be redressed by the European system.

As previously mentioned, the Arab human rights system, although procedurally and substantially flawed, guarantees the widest range of non-derogable rights, the number of which is set at fifteen protected rights[18], thus surpassing the inter-American system which provides absolute protection for eleven rights.

By not having determined a core of human rights to avoid systematic use of the state's right to derogate, the African system sets up a total prohibition of derogation for all treaty provisions.[19]. It is in this sense that the African Commission on Human and Peoples' Rights urges member states to ensure full compliance with their commitments under the Charter itself, particularly during the health crisis of 2020-2021 following publicly reported incidents of extrajudicial killings torture, abuse of authority, arbitrary arrest and detention of civilians by police and other law enforcement officials in the course of implementing national regulations to contain the spread of the 2020 pandemic, under the heading of "staying home.»[20].

The question that arises from this substantial analysis is limited to whether, in times of duly justified crisis, states really have the capacity to protect the set of exhaustively determined non-derogable rights. Moreover, by obeying an obligation of means that conditions their enjoyment on the material capacities of the often heavily indebted state, socio-economic and cultural rights lose their status as absolute rights in the first place. Unless other futuristic human civilizations are covered by these conventional articles of the Arab, the Africain and the Inter-American systems, it would be unthinkable in the present era for a state to ensure the absolute enjoyment of socio-economic, cultural and environmental rights, especially during a state of emergency. As a result, the European system of the derogation clause remains the most realistic and effective system.

The indivisible and interdependent character of human rights

The existence of a jurisprudential concept of intangible rights has the direct effect of creating a subtle hierarchy between human rights, whereas they are a priori indivisible and interdependent[21]. This indivisibility and interdependence implies that any right can only be exercised if the latter are duly respected. For example, the right to freedom of expression can only be considered if the freedom of thought, belief and religion is fully respected. The same is true of the right to life, which can only be envisaged for a dignified and free human being if he enjoys protection of his right to private and family life, his right to thought and expression, and all the other rights and freedoms, including judicial guarantees and protection against slavery, torture and ill-treatment. A worthy life of Man implies the guarantee of all his universal rights, whether civil and political, or socio-economic, cultural and environmental, although these last rights are subject to a progressive and long-term obligation in international human rights law[22].

Human rights can therefore be rightly considered as a set of coherent guarantees that do not admit any divisibility or hierarchy. However, in this contemporary era, the protection of human rights suffers from this legal imperfection which justifies massive infringements of "derogable" freedoms within the framework of a temporally determined period characterized by an exceptional threat which endangers the existence of the nation and threatens its territorial integrity[23].

The variability in the determination of non-derogable rights from one international system to another clearly creates a systemic contrast in the quality of protection guaranteed. However, this variability is not the only differentiation that characterizes the substance of each system. The jurisprudence of regional bodies may indeed diverge in the interpretation of the scope of each guaranteed right.

15Council of Europe, Guide to Article 15 of the European Convention on Human Rights: Derogation in a State of Emergency, August 31, 2020, p.5
16European Court of Human Rights, KHAMTOKHU and AKSENCHIK v. RUSSIA, 24 Jan.2017, no. 60367/08, pt.31
17European Convention on Human Rights, pt 15
18Arab Charter on Human Rights, May.2004, pt 4
19African Commission on Human and Peoples' Rights, Principles and Guidelines on Human and Peoples' Rights in the Fight against Terrorism in Africa, 2015, p.16
20*Ibid*, Press Release of the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa on reports of excessive use of force by police during the Covid-19 pandemic, 17 April 2020
21Vienna Declaration, 25 Jul 1993
22International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, pt 2
23Commission on human rights, Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, p.15

Conclusion

Although the idea of a regional project for the protection of human rights presents humanistic and progressive ambitions whose effectiveness is varied, it is no less true that the very basis of these systems remains regulated by the general principles of public international law, including the free consent of the State[24]. The eviction of this contrariety from international human rights law would be the solution to defeat recalcitrant national regimes that are known to belong to a continental system because of their geographical position and/or their cultural attachment, but that refuse or delay to integrate. As far as the African system is concerned, the example of Morocco can be cited as the only African state that has not ratified the African Charter on Human Rights[25], privant dès lors ses sujets d'une protection essentielle de leurs droits et libertés.

In this sense, it seems that, at first glance, this regional conventionalism weighs on the State by imposing new legal constraints that may be added to past international commitments. As a result, it is not uncommon for the national decision-making body to delay or even never consider such regional integration, especially if systematic violations of protected rights are imputed to the national authorities. It should be noted, however, that regional protection today constitutes a universal standard of human rights protection that must be guaranteed at the level of each nation that claims to be a state governed by the rule of law and respectful of democracy and human dignity.

It is now obvious that the mere enjoyment of national protection by national courts remains an insufficient mechanism to fully safeguard the rights and freedoms of the people, especially if the domestic law in question suffers from inefficiency in this area, often resulting from institutional and/or substantive inadequacies. For this reason, the state must necessarily guarantee regional protection, preferably from a conventional system of a jurisdictional nature inspired by universal law.

In order to promote its image on the international scene and/or to restore popular confidence, a State may be led to integrate a regional human rights system. The example of Turkey and Russia can be cited as States that, in order to reinforce their European image, have integrated the Council of Europe, thus allowing their citizens to have recourse to the European Court of Human Rights.

Finally, it should be pointed out that regional integration is also a sign of the transparency of the State and its willingness to promote the human rights situation at the national level in a benevolent manner, especially if this integration takes place in a context of absence of interests and pressures from outside and/or within.

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[9] *Ibid*, pt 47

[10] *Ibid*, 2020, Appendix I, p 18

[11] European Convention on Human Rights, 4 Nov. 1950, pt 34

[12] Statute of the Arab Court of Human Rights, 7 Sep.2014, pt 19

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