Science World Publishing

Open Access Journal | Volume: 1.2

MULTIDISCIPLINARY RESEARCH AND REVIEWS

Crossref

Systemic Application of Jurisprudential Principles In Regional Human Rights Law

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Article Information

Article Type: Research Article
Journal Type: Open Access
Volume: 1 Issue: 2
Manuscript ID: MDRR-1-106
Publisher: Science World Publishing

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Citation:

Labiad Meb (2021). Systemic Application of Jurisprudential Principles In Regional Human Rights Law.

Multidiscip Res Rev. 1(2);1-7

Recieved Date: 11 June 2021
Accepted Date: 30 June 2021
Published Date: 06 July 2021

ABSTRACT

It is necessary for individuals to be able to understand the regional process for the protection of their rights and freedoms, specifically when it is recognized that these regional mechanisms repre-sent the most effective modality in this regard. This study synthesizes the relevant international ju-risprudence in a systemic manner to enable the reader to situate himself in this regional context and understand its institutional and substantive functioning.

KEY WORDS : International Law, Human Rights, Regional Systems, Jurisprudential Principles, Human Rights Courts

INTRODUCTION

Not withstanding their universality, human rights have been the subject of regionalized protection aimed at promoting their effectiveness, while it has never been accepted as impossible to create an international court of human rights with universal jurisdiction. However, this futuristic project seems unrealistic in an era characterized by the pre-eminence of subjective interests among conti-nental unions.

The regional mechanisms created to progressively achieve a consolidated protection of human rights observe operating principles that may differ from one protection system to another, while at the same time ensuring the creation of harmonized regional jurisprudence that complies with the universal standards determined by the UN bodies. Human rights cannot be subject to various con-tradictory interpretations, and international bodies must draw inspiration from each other and mul-tiply inter-system exchanges. It is in this framework that the African Court of Human Rights and the Inter-American Court of Human Rights take into consideration European jurisprudence, as well as the resolutions of the UN General Assembly or the conceptual definitions adopted by UN com-mittees.

The systemic influence has thus given rise to the correspondence of jurisprudential principles ap-plied by the protection bodies, an element that facilitates understanding and access to their treaty services. A legal representative may thus be deemed to have general experience in international human rights litigation, if he or she already has prior experience gained through practice with one of these systems.

It is in the context of this systemic influence that the African Charter on Human and Peoples' Rights prescribes that the regional consultative body (the African Commission) be generally inspi-red by international human rights law consisting of the various instruments

adopted by the United Nations. As a result of this fundamental guideline, the said Commission systematically takes into consideration international norms and jurisprudence in its functioning. In other words, the advisory body interprets the scope of treaty rights by reference to international norms and their provisions on legitimate grounds for restricting the guaranteed freedoms, especially in the case of freedom of expression in its double protective sense. The African Court follows the same jurisprudential principle that applies to the Commission and that aims at the approximation and harmonization of regional juris-prudence by often basing its assessment on the legal criteria previously defined by the European Court of Human Rights, particularly in terms of assessing the impartiality of a tribunal. The same is obviously true of the Inter-American Court of Human Rights, which has taken into consideration the European case law resulting from « Kenmache v. France » (24/11/1994) judgment (24/11/1994) to assess the legitimacy and degree of arbitrariness of a police arrest or detention.

The procedure for benefiting from the protection of regional bodies differs according to the nature of each system, which is either jurisdictional (European system) or semi-jurisdictional (African and inter-American systems), while remaining under the aegis of the principles of public interna-tional law, including conventionalism, which implies the prior consent of the State in order to adhere and commit itself by accepting, in particular, the competence of regional bodies.

It follows from the institutional differentiation between regional systems that the referral of cases to the bodies can be initiated on the basis of either a judicial request. Or an extrajudicial commu-nication (also called petition or complaint) addressed to the secretariat of the competent Regional Commission. In both cases, admissibility is subject to conditions of substance and form whose outcome may result in a statement of violation of the guaranteed rights, and therefore of the State's treaty commitments. It should be noted that the same conditions governing petitions and commu-nications at the regional level must be observed when referring cases to UN committee.

The respect of these conditions of admissibility is essential to guarantee the rights of the victims at the level of the regional protective bodies. It is on the basis of this necessity that the study is led to develop the guiding principles of a regional decision, which are subdivided int in limin litis prin-ciples relating to the prerequisites of the regional procedure (I) and second rules forging the moti-vation of the decision which rules on the substance of the case and the jurisprudential appreciation of the State interference (II).

In Limin Litis Principles

In order for the claim submitted to be considered admissible by the regional body, whatever its na-ture, the claimant must observe the preliminary rules relating to the competence of the body to which the

Claim is submitted (A) and the general principle of subsidiarity (B). It is only after these rules have been respected that the allegations can be assessed.

A) Jurisdictional Competences of The Regional Body Seised

It is not uncommon for the State to raise as an objection to admissibility the lack of competence of the organ seized in order for it to reject the request or the communication. This objection raised may be related to the material (ratione materiae), personal (ratione personae) and/or temporal (ra-tione temporis) competence of the international organ.

The material competence of the regional bodies is divided into a contentious competence and an interpretative one. These competences are fully established when the subject matter of the request concerns in substance the interpretation and/or application of the relevant treaty instrument. Ac-cordingly, the European Court of Human Rights is seized on the basis of the European Convention on Human Rights and its protocols, and the same applies to the second organs and their respective treaty instruments. It has nevertheless been observed that African jurisprudence tends to broaden the material jurisdiction of its organs by admitting the possibility of referral for any relevant ins-trument to which the State is a member, including international covenants. This exceptional ex-tension of material jurisdiction can be justified by the urgent need to strengthen the safeguarding of human rights on a continent largely marked by massive and systematic violations.

It is concluded that material competence consists in determining the relevant instrument by which the organ may be seized. The relevance of the instrument is not however sufficient, since the State must first have the status of a State party or member of the said treaty instrument. This is the first division of the regional body's personal jurisdiction and it’s closely linked to its temporal competence, whereby the State is not bound by an act, situation or fact that occurred or ceased to exist before the date of entry into force of the treaty instrument .It should be noted that this is not the entry into force of the protocol or the statute of the regional body for the State party, but rather that of the instrument protecting the rights which is the convention or charter . Temporal competence and jurisdiction therefore consists briefly in determining the exact location in time of the facts constituting the alleged interference and compare them to the date of the State's ratification or ac-cession to the protective instrument. However, there is no need to engage in an examination of temporal jurisdiction if the State is already outside the personal jurisdiction of the regional bodies.

It is in this context of personal jurisdiction that the African Court has no jurisdiction to hear a dis-pute involving a State that is not a

member to its jurisdictional statute, while at the European level it is necessary that the State is party to the Convention constituting the protection and not to the statute of the said Court. This legal contrast results from the fact that ratification of or acces-sion to the African Charter on Human Rights establishes the jurisdiction of the Commission and not that of its respective Court. For the Inter-American system, the competence of its Commis-sion is established solely on the basis of a declaration of acceptance made by the State, twhile the Court that refers to it establishes its jurisdiction by the membership of the State in the Organization of American States (OAS), regardless of its accession or ratification of the Convention or of its ju-risdictional statute. For this reason at the inter-American level, reference is made to to the States of the declaration (members of the OAS such as the United States and Canada) and to the States parties to the convention (Latin American States). As a result, the personal jurisdiction of the Inter-American Court with respect to States is much broader than that of its African counterpart, while the situation is opposite regarding the competence of their respective advisory bodies, insofar as referral to the African Commission does not in any case require the prior filing of a declaration of acceptance by the State concerned.

The personal jurisdiction of regional bodies is not only related to the treaty status of the state concerned, but also to the concrete responsibility of that state. According to established interna-tional jurisprudence, States parties are obliged to respect and ensure the treaty rights of all indivi-duals within their territory, of all those under their jurisdiction, and generally of all those under their power or effective control through any State authority. It is necessary to underline in this sense that the orders of the hierarchical superiors do not exonerate the authors and that the res-ponsibility of the State may also be engaged by acts whose repercussions are manifested outside its jurisdiction, including the extradition of an individual to a State where there are substantial grounds for believing that he or she faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment.

While the requirement of personal competence and jurisdiction over the State is general, and is observed by all the regional bodies, there are differences and particularities in the determination of personal jurisdiction over the applicant. This is the distinction to be made between the status of victim and the defense of the collective interest or actio popularis.

The defense of the collective interest is a characteristic of the Inter-American and African sys-tems. This is the doctrine of actio popularis, which allows anyone to file a complaint on behalf of the victims without necessarily having obtained their consent. This procedural possibility pro-motes the protection of human rights, particularly by preventing impunity on the part of the State of the victimes are unable to consent or act. However, access to the regional courts of these systems is still very limited, since in the inter-American system only the Commission is competent to bring cases before the respective court , while the African Court broadens its accessibility by ac-cepting, in addition to the African Commission, individuals and non-governmental organizations accredited to the Union or its organs or institutions . These accredited individuals and organiza-tions are in fact distinct from those admitted to seize the Regional Commissions within the fra-mework of extra-judicial communications, notably on the basis of article 44 of the Inter-American Convention on Human Rights, which is presumed to have inspired the African juris-prudence on the admissibility of actio popularis.

The European system, on the other hand, limits the jurisdiction of its judicial body to the exis-tence of the applicant's status as a victim to not engage in an abstract examination of national laws, but rather to look at how that legislation was applied to the applicant in the case. The African Court resumes the UN definition of the notion of victim by specifying that it refers to all persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law. For it's part, he European Court defines the notion of victim as any person personally affected by the alleged violation of a guaranteed right and that a deci-sion or measure favourable to the applicant is not in principle sufficient to deprive him of this sta-tus of victim, unless the national authorities acknowledge, explicitly or in substance, and then re-dress the alleged violation.

In general, the notion of victim is a criterion that is not applied in a rigid, mechanical and in-flexible way during regional procedures. This concept also includes legal entités, including non-governmental organizations and associations, winch must prouve That they have suffered damage to théier treaty rights. The notion of victim in régional human rights law encompasses not only the direct victims of the injury, but also the heirs of the deceased, who are not necessarily limited to the first line heirs, but may also include other close relatives who may reasonably have suf-fered significant moral injury as a result of the human rights violation in question and therefore have a sufficient interest to act.

The concept of victim nevertheless prevents individuals from complaining about a provision of domestic law simply because it appears to them, without their having directly experienced its ef-fects, that it violates the treaty provisions. The contentious measure must in fact have been en-forced and/or applied to the detriment of the applicant. However, it is still possible that a petitio-ner could argue that a law violates his or her rights, in the absence of any act of enforcement, if he or she is obliged to change his or her

behaviour or if he or she belongs to a category of persons who are likely to suffer directly from the effects of the législation.

B) The Principle of Exhaustion of Domestic Remedies

The principle of subsidiarity, which is reflected in the obligation to exhaust domestic remedies is not intended to limit or weaken the protection of human rights, but to underline the responsibility of national authorities to guarantee them. The State is in fact the first guarantor of their protec-tion and it is its primary responsibility to seize the opportunity to remedy international treaty vio-lations. Of course, as with the determination of victim status, the principle of exhaustion of re-medies is subject to some flexibility in case law. Indeed, even if the legal systems of States formal-ly provide appropriate remedies, violations of rights may occur because of the malfunctioning of these remedies in prac-tice.

It can be concluded that regional systems limit the nature of the remedies that need to be ex-hausted in order to promote access to treaty protection. Reference is therefore made systematically to "effective remedies" which also imply the payment of compensation, where appropriate, the obligation of the State to conduct a full and effective investigation able of leading to the identifi-cation and punishment of those responsible, as well as the effective access of the claimant to the investigation procedure. For example, the granting of amnesty or full and complete immunity from indictment and arrest of perpetrators of violations prevents victims from obtaining reparation and thus from enjoying their right to an effective and efficient remedy, which constitutes a viola-tion of the international obligations of States and exonerates the victim from exhausting domestic remedies. The same applies in the internal appeals are abnormally prolonged (in the African sys-tem, an extension of ten years is considered abnormal).

It is the duty of the parties to show that the remedies were or were not exhausted and that they were or were not available and adequate, but also existing with a sufficient degree of certainty not only in theory, but also in practice. It is necessary to clarify that the exhaustion of remedies is an exception of inadmissibility raised by the State and must be presented at the appropriate time of the procedure during the phase of examination of admissibility by the regional body.

As for the nature of the remedies, the regional bodies only require the exhaustion of judicial reme-dies exercised within the jurisdiction of the national courts. The applicant does not therefore have to exhaust extra-judicial means of appeal, such as a hierarchical appeal or an appeal to a na-tional advisory body such as a council or a mediating institution.

The principle of exhaustion of remedies goes in parallel with the observation by the applicant or complainant of a time limit beyond which the examination of the merits of the claim is rejected. This time limit is counted from the moment when the remedies are considered exhausted and is set at six months for the African and inter-American systems, and four months for the European sys-tem. However, the time limit for appeal can be appreciated with flexibility by being assessed on a case-by-case basis and therefore depending on the particular circumstances of each case. The African Court determines the circumstances that may justify a reasonable extension of the time limit, including incarceration, indigence, illiteracy, lack of knowledge of the existence of the Court, intimidation, fear of reprisals and the exercise of extraordinary remedies.

Principles For Assessing The Illegitimacy of The State Interference

Following the admissibility of the petition, the regional bodies examine the alleged violation by determining the existence of interference and, if applicable, its legitimacy or justification.

This assessment of the legitimacy of an interference with a treaty right is based on the evaluation of its legality, necessity and proportionality.

A) The Principle Of Legality And Normative Quality

State interference cannot be considered legitimate if it is not previously provided for by law. This is a general rule that conditions the exercise of certain so-called non-absolute rights and freedoms that may be subject to a legal, necessary and proportional restriction, including the right to liberty and security and the right to freedom of association, expression (of opinion), movement, peaceful assembly and manifestation of religion. Protection against torture and inhuman or degrading treatment are considered non-derogable rights "prohibited in absolute terms" even in the most ex-treme cases such as terrorism and organized crime. An authority may not transgress this prohibi-tion for any reason. This acts in particular cannot be justified by invoking exceptional cir-cumstances such as a state of war, threat of war, political instability or any other state of emergen-cy.

The words "provided for by law" mean that the measure taken against the applicant or complainant must have a basis in domestic law by being ordered by a legislative text or by norms derived from the law including judicial decisions, royal decrees, emergency decrees and other internal regula-tions. Instructions and directives, on the other hand, are not considered to have the force of law, but can nevertheless be assimilated to this notion if they meet criteria that forge the quality of law. In order to be considered legitimate, it is not sufficient that the interference be provided for by law, but it is also necessary that the norm from which it is derived to have legal quality of a substantial nature.

A quality law or normative text is determined in terms of several criteria, including accessibility, predictability and compatibility with the principle of the rule of law.

In this context of normative quality, a normative text meets the criterion of accessibility when it has observed a publication process to satisfy the individual's right to information. The criterion of foreseeability is for its part respected when the normative text in question was stated with enough precision to allow the citizen to regulate his conduct without requiring the statement of the detailed modalities of its application in the legislative text itself if these are stated in texts of sub-legislative rank . In general, the predictability criterion is assessed on a case-by-case basis in a reasonable manner and thus depending on the content of the standard, its field and the number and status of those to whom it is addressed. A norm of domestic law is thus said to be accessible and foreseeable in the recipient is in a position to know that he or she risks legal action if he or she engages in a certain conduct. The African Court of Human Rights aligns itself with European and UN jurisprudence for the criterion of foreseeability by specifying that a norm can only be considered a law if it is worded with sufficient precision to allow, on the one hand, the individual to adapt his or her behaviour to the rule and, on the other hand, to allow those responsible for its application to distinguish between legitimate and illegitimate forms of restriction, while also being accessible to the public.

It follows that the State may violate one or more of the non-absolute rights through its laws and regulations while ensuring that they meet the qualitative standards mentioned above. However, it remains necessary that this violation must be necessary and proportional.

B) The Principles Of Necessesity And Proportionality

The regional jurisprudences agree that any interference with the non-absolute rights of individuals must absolutely respond to a "legitimate aim" which is determined in a variable way from one case to another and according to the right or freedom in question. The determination of legitimate aims may also vary from one domestic law to another, but it is generally noted that these aims revolve around the preservation of individual, collective and national interests including public safety, health, morals and order, the rights and freedoms of others and the defence of national security. To illustrate, a restriction on freedom of expression would serve a legitimate purpose if it is to pro-tect the reputation and rights of others or to prevent the disclosure of confidential information. The African Court clarifies in the same sense in its judgment TLS and Others v. Tanzania that « Where the applicant provides evidence of a prima facie violation of a right, the respondent State could argue that the right has been legitimately restricted by the 'law', by providing evidence that the restriction is consistent with one of the defined objectives ».

This initial analysis of the legitimacy of the objective pursued enables the regional body to deter-mine the extent of the margin of appreciation enjoyed by the national authorities, which depends on the nature of the right in question and the objective pursued, as well as on the purpose of the restriction. As a result, if it is already clear that the measure does not meet any legitimate objec-tive or purpose, the regional body will directly deduce a treaty violation. It is therefore by establis-hing the legitimacy of the objective pursued that the competent body will be able to pronounce on the necessity and reasonable proportionality of the incriminated measures in a democratic socie-ty. The African Court specifies in the same judgment cited above, that in order to assess whether an interference is proportional to a legitimate objective, it is necessary to examine whether it is on the first impression in conformity with the relevant international norms and whether a fair balance has been maintained between the requirements of the general interest of the community and the impe-ratives of safeguarding the fundamental rights of the individual. In the same context of propor-tionality, the Inter-American Court specifies that it is also necessary to determine whether, among all the possible measures, there is not one that is less restrictive in relation to the right concerned and that would be equally suitable for achieving the proposed objective. To summarize these considerations for assessing the proportionality of an interference in a simpler way, the African Commission asks the following questions : « In order to determine whether an action is proportional, a number of ques-tions should be asked, such as : Were there sufficient grounds for the action ? Was there a less severe alternative ? Does the action destroy the very essence of the Charter rights in question ? ».

Following the verification of the necessity and proportionality of the interference with the legiti-mate aims pursued, the regional bodies decide on the existence or absence of a treaty violation.

While the functioning of the Regional Commissions is limited to the satisfaction of a possible friendly settlement and the issuance of recommendations and conclusions, the judgments of the Regional Courts have obligatory force and bind States to comply with them. Specialized bodies can monitor the execution of court decisions, such as the Committee of Ministers of the Council of Europe for the European system, while the Inter-American Court of Human Rights reports cases of non-execution to the General Assembly of the OAS (Organization of American States) and the African Court to the Conference of States Parties to the A.U. (African Union) which can impose sanctions .

CONCLUSION

Human rights conventionalism gives states a wide margin of discretion to accept the adherence to international individual complaints procedures. This is specifically complicated if these treaty law issues are not within the competence of democratic parliamentary bodies. It is nevertheless neces-sary that these national legislative bodies be able to harmonize national legislation with internatio-nal standards of human rights protection as interpreted

by UN and regional jurisprudence.

The jurisprudential values of international bodies must be rooted in domestic law not only at the level of the constitution, but also at the level of the law, judicial decisions and acts of the executive branch. In this sense, the internal legal order must incorporate the conventional provisions and be aligned with the international norms, even if this implies the modification of laws and practices in order to bring them into conformity.

The last particularity to be underlined is the competence of the regional bodies to assess the factual elements of the case as opposed to a Court of Cassation competent only for questions of law. This jurisprudential specificity authorizes in general terms the verification if the administration and the evaluation of the evidence by the national authorities did not violate the principle of fairness of the procedure and of a complete "equality of arms". This extent competence of international bodies is a vital guarantee against arbitrary or falsified legal proceeding.

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