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Interpretation and Application of the ECHR: Between Universalism and Regionalism

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The protection of human rights guaranteed by the Council of Europe, in particular through the *Convention for the Protection of Human Rights and Fundamental Freedoms* and the supervision exercised by the European Court of Human Rights, has a dual dimension: its universal vocation goes hand in hand with the regional nature of its implementation. Tensions between universalism and regionalism play out in a fruitful and productive way.

In 1950, the States that concluded and ratified the Convention entitled it "Convention for the Protection of Human Rights and Fundamental Freedoms," deliberately choosing not to territorialize its name. On the other hand, Article 19 of the Convention introduces the "European Court of Human Rights." Rights whose scope is not defined according to the territorial jurisdiction of the States Parties and a regionalized jurisdictional mechanism thus coexist.

This dual dimension is reflected in the Preamble to the Convention. Its economy perfectly reflects the two aspects of the undertaking: the recognition of universal rights whose effective respect is ensured by a regional mechanism of protection. By basing its first recital on the 1948 *Universal Declaration of Human Rights*, the Preamble sets the Convention's horizon in universalism. However, from the third recital onwards, the statement of the Council of Europe's aim – "the achievement of greater unity between its members" – asserts the regional dimension of the project. It is a political project supported by several European States, in the historical context of the post-World War II period and the beginning of the division of the continent into two blocs, which is based on a legal instrument. The third recital of the Preamble states that "one

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of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms". As if under the influence of a pendulum, the following considerations are again projected onto the world stage with the affirmation of the attachment of the Council of Europe's State Parties to the freedoms "which are the foundation of justice and peace in the world" before returning to the regional dimension of the project that brings them together "as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law". This last phrase suggests the idea of a shared ideal, which could constitute a form of European identity. In the text of the Preamble itself, the European dimension of the project, which is both political and functional, is combined with the universal character of the rights and freedoms protected.

The *travaux préparatoires*, and in particular those relating to Article 1 of the Convention, also reflect the hybrid nature of this project. The drafting of the Convention gave rise to major debates between the United Kingdom on the one hand and France on the other, which had quite radically different conceptions of the plan to implement. The French favored the idea of a charter that merely enumerated rights; the British, quite the opposite, supported the project of a charter that defined the content of rights and freedoms as precisely as possible. Incidentally, this was a reversal in roles taken in the usual oppositions between continental law and common law. There was also a lively debate about whether or not the Court should precede the Convention or, in any case, be created at the same time, which indirectly referred to the praetorian part that the founding States intended to save for the effective protection of human rights. Beyond these oppositions, the discussions revealed a number of key elements. There are three such key elements.

The first element refers to the fact that the undertaking was part of the European context of the immediate post-war period and the political goal it pursued. In the words of Pierre-Henri Teitgen, the aim was to establish democracy in Europe on a lasting basis, to prevent the return of "the terrible fate" that had shattered not only the European continent but also the world, and to promote democracy and the rule of law after the victory over Nazism and at a time when an alternative model was developing in Eastern Europe. The second key element is based on the idea that such a political project had to be supported by law, through the recognition and collective guarantee of human rights. The drafting of the Convention gave rise to an important debate on whether to commit to recognising rights, guaranteeing them, or protecting them. At the end of the discussions and transactions, the authors of the Convention settled on the idea of recognising rights and a common mechanism for effective

guarantee. The third key element is essential. It lies in the refusal, shared by all Member States, to enshrine a European definition of human rights. This strong and unanimous conviction explains why the 1950 Convention abuts the 1948 Universal Declaration. The *travaux préparatoires* are peppered with numerous references to the general principles of rights recognized by civilized nations, which reveal the deliberate inclusion of the project in public international law. The intertwining of these elements expresses the specificity of the Convention mechanism: its universal dimension is accompanied by the establishment of a regional human rights guarantee instrument – the European Court of Human Rights.

In the preparatory report on the drafting of the Convention by the Secretary General of the Council of Europe, there is a formula that exactly captures this balance: "in the absence of a European definition, there will be a European guarantee". In the same spirit, Pierre-Henri Teitgen, in the *travaux préparatoires* for Article 1, explains that, by referring to the Universal Declaration, the aim is to "demonstrate first of all its respect for the technical value and the moral authority of this document of world-wide importance, and also to avoid making a distinction between European and world order". Throughout the *travaux préparatoires*, there is a desire to stay away from creating a specifically European body of law that would be different from the 1948 Universal Declaration and the universal concept of fundamental rights on which it is based. Nevertheless, the regional dimension of the treaty mechanism is not forgotten. The representative of Greece spoke of "the conclusion of a pact for the protection of those values which had their birth in Europe, were developed in Europe, and created there that common cultural heritage which is threatened with greater danger there than elsewhere". In a way, the regional coloring of the project stems from the idea that the European civilization has been the bearer, for thousands of years, of a certain European conception of human rights, which moreover inspired the Universal Declaration. But it is also linked to the fact that this "common heritage," referred to in the Preamble, was particularly challenged by the totalitarianisms and then by the Second World War which originated in Europe. By drafting the Convention and devising a regional mechanism for the protection of human rights, the founding fathers sought to include the democratic and liberal rebound of post-1945 Europe in a movement carried world-wide, while relying on the specific characteristics of this region. The European dimension of the project and the universal dimension that supports it, transcends it and transports it, interact together. For all that, it is first and foremost a common undertaking that is sealed in this form of shared guardianship that the States decide to exercise together, aware of the community

of fate that unites them. This state of mind is particularly well expressed by the words of Lord Layton, the British representative: "the maintenance of certain basic democratic rights in any one of our countries is not the concern of that country alone, but it is the concern of the whole group". It directly inspires the duty of the Court, to whose control the States agree to submit, as is clear from the words of P. H. Teitgen:

> "We are less concerned to set up a European juridical authority capable of righting isolated wrongs, isolated illegal acts committed in our countries, than to prevent, from the outset, the setting up in one or other of these countries of a regime of the Fascist or Nazi type. That is the essential element of our purpose."

The interplay between universalism and regionalism did not only preside over the work that led to the establishment of the conventional system. They also characterize the way it functions today.

The regional dimension of the human rights protection mechanism thrives on several elements. The first element is the origin and nature of the cases brought before the Court and which feed into its jurisprudence. These are located in Europe, since the Court has jurisdiction over the 47 Member States of the Council of Europe, which themselves have jurisdiction over more than 800 million people. The Court's largely territorial conception of the jurisdiction of the State Parties explains why almost all disputes it rules on originate in Europe. The 40,000 to 45,000 or so cases that the Court assigns to a judicial formation each year are therefore European in nature. Moreover, these cases not only originate in Europe but also concern European issues. They involve the political and legal systems of the Council of Europe Member States, even if a number of them, and good ones at that, have an extra-regional dimension (e.g. cases concerning the risk of violation of Article 3 in the event of the return of certain persons to certain non-European States) or even a global dimension (e.g. cases concerning environmental protection and climate change). For all that, the horizon of litigation is above all European. The development of inter-State cases, which has been particularly significant in recent years, is a regrettable illustration of this. These cases, which pit one European State against another, truly place the Court's jurisdictional activity on a regional scale. On a completely different level, the growing interactions with European Union (EU) law and the case law of the Court of Justice of the European Union reinforce the European dimension of the Strasbourg Court's activity. Without waiting for the accession of the EU to the Convention, the convergence of protected rights and

the particular dialogue that the two European courts are constantly developing, in particular around the figure of the presumption of equivalent protection, which was established by the *Bosphorus* case law (see for a recent application *Bivolaru and Moldovan v. France*), are part of the regional integration of the Convention system.

In addition to this first set of elements concerning the nature of the cases and the questions they raise, there is a second set of elements relating to the answers given by the Court. The Court settles the disputes brought before it by providing solutions that are rooted in the regional scale. This is undoubtedly the result of the architecture of the system and its functionality, which is organized around the fundamental notion of shared responsibility. The principle of subsidiarity, enshrined in the Preamble following Protocol 15 which enters into force on 1 August 2021, is the key to this shared responsibility. Thus anchored in the political, legal and jurisdictional reality of European States, the Court is able to interpret and apply the Convention in a way that updates it in a regional context. The realization of human rights is always situated, in time and space. To ensure effective protection of human rights, the Convention must remain a "living instrument". The national courts, as the primary guarantors of compliance with the Convention, and the Court, after all domestic remedies have been exhausted, each take their turn in doing so. The Court's case law draws its constructive dynamism from this melting pot, described in a visionary way by P.H. Teitgen: "the common ground of our [national] legislation, the general principles that emerge from all of this legislation, will certainly make it possible to define the practical content of each of these freedoms". In another way, a form of tension between universalism and regionalism is apparent in the Court's case law: while the definition of the protected rights, in substance, is based on a universal conception of human rights (reflected in particular in the rejection of the "double standard"), their implementation is necessarily integrated at the regional level, in the European area. It is in this respect that there can be a European conception, not of the law, but of the conditions for its realization. This form of European conception of the ways in which the right can be exercised can be found in the case law of the Court, in particular concerning Article 8 (the right to privacy) or Article 10 (freedom of expression).

The main instrument for this shared responsibility is the dialogue between judges, the formalization and institutionalization of which has accelerated in recent years. In 2015, the Superior Courts Network was created, which brings together today 93 courts from 40 different countries. This forum enables exchanges of case law and research to be carried out in a mutualized manner and is becoming increasingly important as a tool for cross-fertilization between

the different European systems and the Court's case law. Moreover, Protocol 16 has given national courts the possibility of submitting to the Court a request for an optional opinion on a question of principle relating to the interpretation and application of the Convention, thereby radically renewing the arrangements for dialogue between the Court and the domestic courts. Five requests have already been submitted, the first of which came from the French Cour de cassation.

The terms and conditions of the Court's supervision also reflect the European dimension of its case law. This is particularly evident in the use of the concept of consensus in Europe. As the Court regularly points out,

> "Where there is no consensus within the Contracting Parties to the Convention, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider."

The cursor of the control exercised by the Court can thus, in particular when "qualified rights" are at stake, i.e. the rights protected by Articles 8 to 11 of the Convention, be defined according to the existence or absence of such a consensus. If a consensus is found, it reveals the existence of a shared standard, a form of conception common to the European States or at least to a large majority of them, which the Court can use to legitimize the exercise of a more thorough control. Where there is no consensus, however, the Court leaves more room for the national margin of appreciation of each State, while checking that the substance of the rights is not affected.

The case of *Vavřička and Others v. Czech Republic*, of 8 April 2021, is emblematic of the Court's mobilisation of the figure of European consensus. It deserves particular attention insofar as it concerns compulsory vaccination and resonates in a particular way in the health context of the moment.

> "On the existence of a consensus, the Court discerns two aspects. Firstly, there is a general consensus among the Contracting Parties, strongly supported by the specialised international bodies, that vaccination is one of the most successful and cost-effective health interventions and that each State should aim to achieve the highest possible level of vaccination among its population (…). Accordingly, there is no doubt about the relative importance of the interest at stake. Secondly, when it comes to the best means of protecting the interest at stake, the Court notes that there is no consensus over a

> single model. Rather, there exists, among the Contracting Parties to the Convention, a spectrum of policies on the vaccination of children, ranging from one based wholly on recommendation, through those that make one or more vaccinations compulsory, to those that make it a matter of legal duty to ensure the complete vaccination of children." §§ 277-278

In this case, the Court found that there was a consensus on the interest at stake, but no consensus on the technical means to achieve it. In order to do this, the Court carried out a very thorough comparative law study within European States, not only thanks to the observations of the parties but also thanks to third-party interventions. In this case, a number of States intervened, thus adding to the collection of elements specific to the situation in Europe.

Nonetheless, the Court does not refrain from referring to other international instruments or to the case law of other courts that are not European. This is the case in *Vavřička* when the Court, referring to the best interests of children, adds that "[t]his reflects the broad consensus on this matter, expressed notably in Article 3 of the UN Convention on the Rights of the Child". The Court's reliance on rights that are universal in scope is, here as in other cases, not only assumed but claimed. There is no risk of a European retreat in the Court's case law, which is open to the world and is justified by the universal nature of the rights it guarantees.

To conclude on the relationship between the universalism that characterizes the definition of human rights and the regionalism that characterizes their realisation, three observations and a final proposal can be made. First observation: the treaty system was born in the European context – at the time of the post-war period and the beginning of the division of Europe into two blocs – and was conceived as the legal instrument of a political project carried out by the Council of Europe. It is therefore specific to Europe; it is part of and assumes its regional dimension. Secondly: from the outset, this project has been marked by its adherence to a universal conception of human rights, its integration into international public law and its refusal to enshrine a European definition of human rights that would be contrary to, or even simply alongside, the one adopted by the 1948 Universal Declaration. Third observation: the regional dimension is, on the other hand, fully asserted from a functional point of view. It is reflected in the establishment of a collective guarantee, provided by a European Court, whose decisions are binding and whose rulings are enforceable. The functionality of the system is nourished, on a daily basis, by a European

dimension which stems both from the origin and nature of the disputes and from the architecture of the protection mechanism, which is based on shared responsibility and the principle of subsidiarity. These three observations lead to a final observation: far from opposing universalism and regionalism, they should be thought of together, in a complementary manner. The conventional system is a European project, both historically and currently, and is part of a coherent whole conceived at an international level. It seeks to give substance on a European scale to legal humanism and to the ambitious project of maintaining and further realising human rights which, insofar as they are designed for the human person, can only be defined and recognized as universal by their very nature.