

Gábor Kardos¹:

Universal justification for social rights

The interpretation of universality

If we analyse the problems of universality of (and the possibility of universal justification for) the protection of economic, social and cultural rights (later social rights), first we have to interpret what “universal” means in this context. I think it has at least three different meanings. Quite naturally it refers to the global legal relevance of social rights. But, if we accept that they are globally relevant, does it mean that the scale used to measure the level of implementation is also universal? And thirdly it can also refer to another problem, how universal the social rights are in the life of the individual? Are they relevant only if the individual in certain social situation: if the individual is in need?

Formal legal approach

As far as the first meaning is concerned, I think two approaches can be used. The first could be called as *formal legal* the second could be labelled as *substantial* justification. If we speak from formal legal point of view it might be enough to refer to the high number of states all over the world who ratified the universal instrument for the protection of social rights, the UN International Covenant on Economic, Social and Cultural Rights. Actually so far 165 states ratified the Covenant. Consequently from formal legal point of view you can hardly question the universal acceptance and relevance of social rights. You might come forward with the argument that interpretative declarations and reservations made by the ratifying states can question the true character of this universal devotion. But if you look at the text of those documents – although sometimes you can raise doubts and objections as certain states has done in cases of the declarations of Pakistan or Kuwait, for example - it is difficult to say that the obligations coming from the Covenant are generally emptied.² Anyway, Jack Donnelly is correctly observing:

“International legal universality, like functional universality, is contingent and relative. It depends on states deciding to treat the Universal Declaration or the Covenants as authoritative. Tomorrow, they may no longer accept

¹ Gábor Kardos is professor and head of the International Law Department of the Faculty of Law of the Eötvös Loránd University (ELTE), Budapest

² <http://www2.ohchr.org/english/bodies/ratification/3.htm>

*or give as much weight to human rights as today. Today, however, they clearly have chosen, and continue to choose, human rights over competing conceptions of national and international legitimacy.*³

It is a possible counter argument against the universal acceptance and relevance of social rights that the United States – a highly important member of the international community – did not ratify the Covenant. Without analysing the reasons of that behaviour I would like to emphasize that American approach towards social rights is somewhat ambivalent. The US Supreme Court permanently refused to recognize the existence of social rights in the American constitutional system, - they are not included into the Constitution - but applied the fair trial guarantees towards the social allowances provided by the legislation. Furthermore Louis Henkin is rightly stating:

*“Let there be no doubts. The United States is now a welfare state. But the United States is not a welfare state by constitutional impulsion. Indeed, it became a welfare state in the face of powerful constitutional resistance...Jurisprudentially the United States is a welfare state by grace of Congress and of states...In theory the Congress could probably abolish the welfare state system at will, and states could probably end public education. But it is a theoretical theory. The welfare system and other rights granted by legislation (for example, laws against private racial discrimination are so deeply imbedded as to have near-constitutional sturdiness...”*⁴

Consequently at least informally a kind of acceptance exists.⁵

The different ways of the substantial approach

The substantial approach for justification is a far more complicated issue. A good starting point is the interest of the individual, and it is universal. Unfortunately a huge part of the population of the globe is systematically neglected in the world today, millions and millions are still lacking access to basic shelter, food, water, or health care. Consequently the main argument in favour of social rights is the need to protect individual autonomy and well-being. As Cécile Fabre points out only if basic social rights are protected at the same level as civic and political ones a society could claim to be seriously concerned with the autonomy of the individual.⁶ The basic human needs are coming from the inclinations of the human, those are the drives for survive, self-realization, and social participation. The needs interrelated with survive are food, shelter, physical and psychological integrity. The needs interrelated with self-realization are the cultural self-identity and self-expression. The needs interrelated with social participation are education,

³ Jack Donnelly: The Relative Universality of Human Rights *Human Rights Quarterly* 29 (2007) p. 289

⁴ Louis Henkin : International Human Rights and Rights in the United States, in: Theodor Meron (ed.): *Human Rights in International Law* (1984) p. 43 quoted by Henry J. Steiner and Phillip Alston (eds.) *International Human Rights in Context. Law, Politics, Morals* (2nd edition) Oxford, Oxford University Press, 2001, p.251

⁵ According to an American diplomat what important are for the people in need the actual food, employment and health care and not their formal guarantees. Philip Alston: U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy. *American Journal of International Law* Vol. 84 (1990) Issue, 2 p. 375

⁶ Cécile Fabre: *Social rights under the Constitution. Government and the decent life*. Oxford, Oxford University Press.2000, pp. 12-22

association and labour.⁷ Easy to accept that the fulfilment of the identified basic human needs is to be done not only by the realization of civil and political but also economic, social and cultural rights.

Another way of reasoning refers to human sufferings. As Asbjorn Eide and Allan Rosas pointed out:

“The efforts to bring torture, arbitrary detention and capital punishment to an end are laudable and have our support. But to be somewhat provocative, what permanent achievement is there in saving people from torture, only to find that they are killed by famine or disease that could have been prevented, had the will and the appropriate control there?”⁸

If we emphasises basic human needs or human sufferings we speak about the dignity of human. The protection of human dignity as the basis for social rights is a fundamental idea of certain religious social thought.⁹ The right to dignity as a kind of “mother right” of all human rights also can easily be interpreted into that direction.¹⁰ The Preamble of the UN International Covenant on Economic, Social and Cultural Rights refers to that the rights enshrined in it “derive from the inherent dignity of the human person”. Certain constitutional courts like the German¹¹ or the South-African¹² in their decisions recognised the relationship between “existential minimum” and human dignity.

The basic human needs and the human sufferings approaches argue in favour of indivisibility of human rights putting civil and political rights at the same level. The concept of indivisibility leads to integrated protection of human rights. It is not only a theory. The European Court of Human Rights, the Inter-American Court of Human Rights, the UN Human Rights Committee provides an indirect protection of social rights through civil and political rights. With the invocation of civil or political rights they protect social rights, for example with the help of right to life or right to private, family life and home they protect right to health or right to housing, with the help right to property they protect the right to social security.¹³

Another approach emphasises the primacy of civil and political rights and accept the realisation of social rights at least a minimum level as a precondition for the actual enjoyment of civil liberties. It is a common profit if those who have no or only unacceptably small material means are not exposed to political demagogues or at least they could express their political views and

⁷ R. Jayakumar Nayar: Not Another Theory of Human Rights! In: Conor Gearty and Adam Tomkins (eds.): *Understanding Human Rights*. London, Pinter, 1996, pp. 171-194

⁸ Asbjorn Eide – Allan Rosas: Economic, Social and Cultural Rights: A Universal Challenge. in: Asbjorn Eide – Allan Rosas and Catarina Crause (eds.): *Economic, Social and Cultural Rights*. (2nd ed.) A Textbook. Dordrecht, Martinus Nijhoff, 2001, p. 7

⁹ Foremost the Catholic social thought.

¹⁰ For example, you could raise the question, how far is compatible with the right to dignity to live on streets?

¹¹ In 1951, in the Welfare Judgement first time

¹² Look at *Khosa or Masbana* Cases

¹³ Look at *Courts and Legal enforcement of Economic, Social and Cultural Rights*. Comparative Experiences of Justiciability. Human Rights and Rule of Law Series, No.2, International Commission of Jurists, Geneva, 2008, pp. 65-72.

cast their votes. In this sense H.L. Wilensky is right claiming that minimum income, food, health care, shelter and education guaranteed by the government are political rights.¹⁴ T.H. Marshall introduced the concept of social citizenship underlining that the membership in the political community of citizens presupposes social entitlements.¹⁵

Another idea to serve the justification for social rights is justice. J.W. Harris has come to the conclusion that it is not just to expect someone to respect the ownership of others if the society having ownership as a basic institution does not provide the material means in a way or another to satisfy his basic needs.¹⁶ Jeremy Waldron analyses this thesis with agreement in details.¹⁷ The existence of social rights legitimizes market relationships.

The social rights provide legal entitlements for redistribution for those whose interests are far less represented than other segments of the society, the poor, people in need. And they exist in different number but everywhere.

The problems of universality of the scale

The essence of the international legal obligation to implement social rights is captured in Paragraph 1, Article 2 of UN International Covenant on Economic, Social and Cultural Rights. According to it each state party undertakes to take steps to the maximum of its available resources, with a view of achieving progressively the full realisation of the rights recognised in the Covenant. Obviously, it is not an obligation of result. As Robert E. Robertson stated, “maximum” refers to idealism and “available” refers to reality.¹⁸ The first provides teeth to human rights idealism. The second secures a way of escape for the state because it is not clear how much of the resources should be used for this purpose. We know from the text of Para 1, Article that the state parties should provide the resources individually and through international co-operation and assistance, but the notion of resource is not clear enough, as the *travaux préparatoires* proves it.¹⁹ The founding fathers of the Covenant probably thought if a state ratified the treaty it was a clear sign of having the necessary resources for the implementation. In the middle of the golden sixties, under Keynesian economic policy, when the permanent economic development seemed to be eternal, there was a definite basis for step by step implementation. Since the late 1970s thank to monetarist beliefs, and mainly because of the effects of globalisation more and more questions have been raised about the ability of the state to secure social rights properly. Danilo Türk, in his analyses raises the question: is the attitude of the states towards

¹⁴ H.L. Wilensky: *The Welfare State and Equality*. Structural and Ideological Roots of Public Expenditure. Berkeley, University of California Press, 1975, p. 1

¹⁵ T.H. Marshall: *Class, Citizenship and Social Justice*. New York, Basic Books, 1965, p. 92 and following pp.

¹⁶ J.W. Harris: *Property and Justice*. Oxford, Clarendon Press, 1996, p.285

¹⁷ Jeremy Waldron: *Liberal Rights*. Cambridge, Cambridge University Press, 1993, pp. 225-250

¹⁸ Robert E. Robertson: Measuring State Compliance with the Obligation to Devote the „Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights. *Human Rights Quarterly*, vol. 16, no. 4. (1994) p. 694

¹⁹ Philip Alston and Gerard Quinn: The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social, and Cultural Rights. *Human Rights Quarterly*, vol. 9. no. 1. (1987) pp. 156, 178-179.

their obligation to implement social rights correct, if more and more states regard themselves as less able to comply with them?²⁰

The UN Committee dealing with the supervision of the implementation of the Covenant gives a priority to the *minimum core obligations* arising from the protected rights. If the Covenant does not provide at least a minimum set of obligation *vis-a-vis* each right, it loses its *raison d'être*. To compliance the state should provide evidences to prove that she has given priorities to the minimum set of obligations and maximum of its resources has been used to satisfy basic human needs and to provide basic services. The progressive realisation is equivalent to the recognition of that the full compliance can not be done immediately, stated by the mentioned UN Economic, Social and Cultural Rights Committee.²¹ During the drafting of the Covenant the states declined to provide a competence to this supervisory body after having finished the scrutiny of a state report to come to legally binding conclusions because they have been afraid from the power of interpretation. To step back, to lower the standards is possible, but the state should prove that it is justified with reference to economic obstacles. The Limburg Principles²² and the Maastricht Guidelines,²³ as non official guidance on the implementation of internationally protected social rights emphasise that the progressive realisation requires an immediate start and in the field of freedom rights having social context such as to organise freely trade unions it is not valid. In case of such rights the obligation implies an immediate full realisation.

If the evaluation of the state reports is underway three major things should be scrutinized: the implementation of minimum core obligations, the discrimination issues, and finally the governmental policy issues.²⁴ In latest case the objects of analyses are the effects and side effects of governmental reforms in the field of social security, health system, etc. To draw correct conclusions it is important to rely on indicators and benchmarks. Two types of them can be identified, the first group reflects the capability of the state to perform, the second the achievements in the light of the capability. The first group mainly includes statistical data, the second should data be reflecting the change in the social settings of those who live at bottom of the social ladder, data reflecting that the government has given priority to the implementation of obligations arising from international protection of social rights, and data reflecting the compliance with indicators of a specific social right.²⁵

²⁰ *The Realization of Economic, Social and Cultural Rights*. Second Progress Report prepared by Danilo Türk, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1991 / pp. 17, 56.

²¹ *General Comment No. 3* (Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1991/23, points 10, 11

²² *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*. UN Doc. E/CN.4/1987/17

²³ *The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights*. *Human Rights Quarterly*, Vol. 18, No. 3. (1998)

²⁴ Audrey R. Chapman: A „Violation Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly* vol. 18, no. 1, (1996) p. 43

²⁵ Asbjorn Eide: The Use of Indicators in the Practice of the Committee on Economic, Social and Cultural Rights. In: Asbjorn Eide, Catarina Krause and Allan Rosas (eds.): *Economic, Social and Cultural Rights*. A Textbook. Dordrecht, Martinus Nijhoff, 2001, p. 531. old

Consequently a *universal methodology* to analyse the state reports on the implementation of social rights exists. But it does not mean that the scale would actually be universal. The scale should be adapted to ratifying state to ratifying state. In the case of freedom of opinion and other civil and political rights you can use the same standards in Sweden and in Zimbabwe but in case of social rights you can not expect the same level of implementation because the expectation should reflect the economic development, the actual amount of the “maximum resources.”

Are the subjects of social rights universal?

Large part of civil and political rights is universal in human life. Right to freedom of opinion or right to freedom of association may be relevant at any particular situation. Their subject can be anyone. The majority of social rights provide entitlements only for those who are in a certain situation, for example if someone who has been sacked may be entitled to unemployment benefit.

This lack of this type of universalism can hardly be seen as a problem if we accept that the most important role of social rights is to protect those who suffer from economic hardship. On the top of all that there are civil and political rights which are relevant only in a given situation, for example it is the case with right to fair trial, its subjects are only those who stand in front of a court.

Another aspect of universality

The structure of law in a broad sense can be seen as a three storey building, according to Oscar Schachter.²⁶ The general values and political aspirations can be found on the third floor. On the second floor the law in narrow sense having internal consistency and a regulatory possibility has its place. On the ground floor law can be seen as it actually regulates, it is the social reality. There are elevators and staircases between the levels.

In case of international norms protecting social rights, on the third floor there are important universal political aspirations: to provide legal entitlements to redistribution for those who are in need, on the second floor there are difficulties with the regulatory capability coming from the relative legal nature of the obligation and on ground there are many problems with actual implementation. And it is a universal challenge.

²⁶ Oscar Schachter: Towards a Theory of International Obligation. In: S. M. Schwebel (ed.): *The Effectiveness of International Decisions*. pp. 29-30, as quoted by: Pieter van Dijk: Normative Force and Effectiveness of International Norms. *German Yearbook of International Law*, Vol.30, (1987) Berlin, Duncker und Humblot, 1988, p. 23.