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## **CRITICAL ASSESSMENT OF THE SIGNIFICANCE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN PROTECTING HUMAN RIGHTS**

### **Introduction**

In this article, we assess the significance of economic, social and cultural rights in protecting human rights. When we talk about human rights violations, most often we cite the right to life, prohibition of torture, freedom of religion, or freedom of expression. Why do we skip economic, social and cultural rights, like right to work, education or right to benefits of science and culture? Do we see any of these as our fundamental right? Many perceives them as a part of policy, political views, or even welfare state concept. However, the truth is that economic, social and cultural rights are, at least in part, as important as civil and political rights. In this article, we deconstruct the concepts and illustrate, which parts of these rights might be justiciable. The first step in achieving our purpose is to make a distinction between these rights, other human rights and even rights in general.

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## 1. The distinction between different categories of human rights and rights in general

Rights in general are a highly discussed category that is taken into consideration in numerous legal texts. Some of the mainstream views take the „rights” as „entitlements that are discoverable objects of justice”<sup>2</sup>, or „a legally enforceable set of expectations as to how others, most obviously the state, should behave towards rights bearers”<sup>3</sup>. The content of the term „right” can be differentiated in various ways, for instance between claim rights and liberty rights. Liberty rights are permissive and grant freedom from obligation, while contrary claim rights entail the responsibility or duty on other parties regarding the right-holder<sup>4</sup>. As to make a clarification, not every right related by subject to economy, social life or culture is a human right. Only human rights will be discussed in this paper.

Human rights are all rights that are equal and inalienable for all human beings<sup>5</sup>. Although all human rights were also described as universal, indivisible, interdependent and interrelated<sup>6</sup>, there are certain classifications. For instance, the distinction has been made between three generations of human rights<sup>7</sup>, progressive and immediate rights, resource-intensive and cost-free rights, justiciable and non-justiciable rights<sup>8</sup> etc.

Features mentioned above can be useful in describing the significance and specifics of economic, social and cultural rights, but their distinction from other human rights need some clarification first.

As it was mentioned earlier, human rights are indivisible and interdependent and interrelated<sup>9</sup>. The indivisibility means that all human rights are equally important<sup>10</sup>. What is more, there is some common ground not only in protection

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<sup>1</sup> G. Barden and T. Murphy, *Law and Justice in Community*, „Oxford Scholarship Online”: Jan-11, *Rights* chapter, p. 1.

<sup>3</sup> S. Bailey, N. Taylor and A. McColgan, *Civil Liberties Cases, Materials and Commentary*, Oxford University Press 2009, p. 4.

<sup>4</sup> W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, Yale University Press 1919.

<sup>5</sup> Universal Declaration of Human Rights, General Assembly resolution 217 A, 1948, *preamble*.

<sup>6</sup> Vienna Declaration and Programme of Action 1993, p. 1, para 5, see also: *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 15 Neth. Q. Hum. Rts. 244 1997, p. 246.

<sup>7</sup> K. Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, Nov. 1977.

<sup>8</sup> M. Sepulveda and others, *Human Rights Reference Handbook*, 3rd edn, University for Peace 2004, p. 9.

<sup>9</sup> Vienna Declaration..., p. 1, para 5.

<sup>10</sup> M. Sepulveda and others, *op.cit.*, p. 7.

of different types of human rights<sup>11</sup> but also covenants referring to seemingly different spheres<sup>12</sup>. This is also one of the aspects of the impact of economic, social and cultural rights on other human rights, but this section will focus on the core of the discussed type. Originally, the economic, social and cultural rights had been taken as entailing positive and resource-demanding obligations, as opposite to negative and cost-free civil and political rights. „These rights were not be treated as rights per se but mere privileges that State make available to individuals in accordance with its resources”<sup>13</sup>. The terms used to describe them have been perceived as vague, comparing to precise language of civil and political rights, which implied that merely those second could be justiciable<sup>14</sup>. „The fact of enforcement, implementation or justiciability was considered as the major legal distinction between the right and the privilege in this area. However, in the lexicon of human rights all over the world the word «privilege» cannot be found. Furthermore, the global events in the human rights scene have gone beyond the reference of economic, social and cultural rights as «privilege». Now is the time for these rights to be considered as «rights» and to be fully effective”<sup>15</sup>.

## 2. The characteristics of economic, social and cultural rights

Disputes over the scope of obligation and correct way of implementing the economic, social and cultural rights have brought them to development. One of the documents containing recommendations related to this field is The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, which states that: „...equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights”<sup>16</sup>. It can imply that this essay should be finished at this point with answer that the significance

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<sup>11</sup> For further reading, see I Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, „The International Journal of Human Rights”, 10:4, 2006, p. 405-430.

<sup>12</sup> The United Nations Human Rights Treaty System, United Nations Fact sheet no. 30/Rev. 1, <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf> (accessed 22.9.2019), p. 12.

<sup>13</sup> Okeowo, Ademola Oladimeji, *Economic, Social and Cultural Rights: Rights or Privileges?*, <https://ssrn.com/abstract=1320204> or <http://dx.doi.org/10.2139/ssrn.1320204> (accessed 25.6.2020), p. 3.

<sup>14</sup> M. Sepulveda and others, *op.cit.*, p. 9.

<sup>15</sup> Okeowo, Ademola Oladimeji..., *op.cit.*, p. 23-24.

<sup>16</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Document E/CN.4/1987/17), para 3.

of all types of human rights is always equal. But while this case is desirable as a final goal, the practical dimension of their protection is far more complexed.

The traditional characteristics of the specifics of the economic, social and cultural rights can no more be taken as precise.

First, these rights do not comprise only of positive obligations. The obligations such as that included in the art 2 para 1 of the International Covenant on Economic, Social and Cultural Rights are together to respect, protect and fulfil<sup>17</sup>. This conception was depicted by the Office of the High Commissioner for Human Rights with the examples relating to the right to work: „Respect” means that the state must not use forced labour or deny political opponents work opportunities. „Protect” entails i.a. that the state must ensure that employers, both in the public and in the private sectors, pay the minimum wage. „Fulfil” is that the state must promote the enjoyment of the right to work by, for instance, undertaking educational and informational programmes to instils public awareness of it<sup>18</sup>.

Second, the resource-demanding argument was closely related to the positive nature of obligations. While the obligations are no longer regarded as merely positive, the resource-demanding aspect is blurred too. Ida Elisabeth Koch from the Lund University, for instance, believes that comparing to economic, social and cultural rights, „civil and political obligations to protect and fulfil rights are also resource demanding and vaguely worded”<sup>19</sup>.

Third, the non-justiciability of these rights must also be denied due to still developing complaint procedures. Although the adoption of the Optional Protocol to the International Covenant on Civil and Political Rights had taken place over 40 years earlier than the respective protocol relating to economic, social and cultural rights, nowadays it is undoubtful that the discussed rights can be, at least to some extent, legally measurable<sup>20</sup>.

To add even a bit more of uncertainty, it can be also mentioned that the interrelated dimension of human rights is so deep that the provisions referring to the economic, social and cultural rights also exist in the documents on civil and political rights. The importance of economic, social and cultural rights and the role of the State in the realization of these rights has already been emphasized in the Universal Declaration of Human Rights (1948). Art. 22 of the Universal Declaration of Human Rights states that everyone „is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.

<sup>17</sup> H. Shue, *Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn, Princeton 1996.

<sup>18</sup> FAQ on Economic, Social and Cultural Rights, United Nations Fact sheet no. 33, <https://www.ohchr.org/Documents/Publications/FactSheet33en.pdf> (accessed 22.9.2019), p. 12.

<sup>19</sup> I. Koch, op.cit., p. 406.

<sup>20</sup> J. Squires, M. Langford, B. Thiele (eds.), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre 2005, p. 17.

While art 8 of the International Covenant on Civil and Political Rights (1966), which prohibits the slavery, is a *conditio sine qua non* of the freedom of work. Art. 10 of the European Convention of Human Rights and Fundamental Freedoms establishes the freedom of expression, which per se includes also the „freedom indispensable for scientific research and creative activity”<sup>21</sup>.

The remarks made above in any case do not imply that the economic, social and cultural rights are now completely opposite to what have they originally been taken as. The features commonly used to describe these types of human rights are not unequivocal. The question can be to what extent certain characteristics occur, but this will always be highly disputable.

According to the Office of the United Nations High Commissioner for Human Rights, the economic, social and cultural rights are „those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education”<sup>22</sup>. Although every of these categories has a variety of more detailed provisions, this simple list allows to set a further question: to what extent realization of the economic, social and cultural rights correlates with the protection of other human rights?

### 3. The significance of economic, social and cultural rights

The most basic observation on the relation between particular human rights is that some of them refer to more fundamental needs that have once been gathered in the famous Maslow’s hierarchy. We would like to propose analogical hierarchy among the economic, social and cultural rights based on the relation between the obligations to respect, protect and fulfill. The order of these three types represents the importance of need. If state uses forced labour, restricts access to water, food and health care applying a discriminatory basis or indirectly allows only the students affiliated to the governing party accessing the universities, then people being subject to that harm are normally completely deprived of the right. If the state fails to protect people from such infringements caused by independent private institutions or individuals, then they can be deprived, but there may be a possibility of finding other suppliers. If the state fails to fulfil the right by supplying people with water, food, health care or education, there still is a room for private activity.

The above reasoning indicates that one of the greatest dangers to economic, social and cultural rights is infringing a non-discrimination rule included in every notable covenant on human rights. This claim can be supported by the fact that in

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<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, art. 15 para 3.

<sup>22</sup> FAQ on Economic, Social and Cultural Rights, op.cit., p. 1-2.

2018, the European Court of Human Rights found only 13 violations of this norm out of total 1,014 judgments. To compare, the least number of violations has been found in respect of following rights: the prohibition of slavery/forced labour (1), no punishment without law (3), freedom of thought, conscience and religion (4), marry (0), education (1) and free elections (2)<sup>23</sup>. The list also represents that the negative elements of economic, social and cultural rights can be as fundamental as civil and political rights and are far more justiciable than the positive obligations.

Although it is possible to make the economic, social and cultural rights completely justiciable as it is the interesting case of South Africa<sup>24</sup>, different factors are decisive in their fulfillment. According to the Limburg Principles, „the obligation of progressive achievement exists independently of the increase in resources; it requires effective use of resources available”<sup>25</sup>. But the states which have achieved the effective use of available resources, had been influenced rather by political and economical factors like the competition between states, political parties and businesses, than the courts’ judgments. Respecting economic, social and cultural rights is possible in economically liberal countries (USA, Chile, Singapore) as well as among the welfare states (Sweden, Norway, Finland).

When it comes to technical legal assessment, the system of South Africa seems to be very professional, going very deep with the judicial assessment of the reasonable government programme on social and economic rights<sup>26</sup>. But although it is possible to set a detailed framework applicable to most countries, we should bear in mind that recognizing such rights as not only inherent and equal to all human beings, but also totally measurable and justiciable, can be paradoxically inconsistent with other human rights. The collective right to self-determination<sup>27</sup> is a guarantee that for instance one nation can decide to spend all its funds on the environment protection, while living in modest conditions believing that too much money corrupts their state of happiness. And if all human rights are equally important, there is no reasonable way to solve this conflict of norms.

The Committee on Economic, Social and Cultural Rights, a United Nations body, monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. One of its tasks is to verify reports from states, such as the sixth periodic report of Poland on the implementation of the International Covenant on Economic, Social and Cultural Rights (E/C.12/POL/6), considered at its 55th and 56th meetings (E/C.12/2016/SR.55-56). The recommendations related to such areas as: protection of human rights, equal treatment, employment

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<sup>23</sup> European Court of Human Rights, Statistics, *Violation by article & by State 2018*, [https://www.echr.coe.int/Documents/Stats\\_violation\\_2018\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_2018_ENG.pdf) (accessed 22.9.2019), p. 2.

<sup>24</sup> J. Squires, *op.cit.*, p. 73.

<sup>25</sup> The Limburg..., *op.cit.*, section 23.

<sup>26</sup> See J. Squires, *op.cit.*, p. 88.

<sup>27</sup> M. Sepulveda and others, *op.cit.*, p. 13.



conditions, unemployment, trade unions, social security, work in the grey market, domestic violence, childcare, poverty, housing, access to health care, the fight against drug addiction, education and access to culture. In total, the document contains several dozen opinions and recommendations<sup>28</sup>.

When reviewing that report, the Committee appreciated „the legislative, administrative and institutional measures adopted by the State party to promote the enjoyment of economic, social and cultural rights, including particularly the amended provisions of the Act of 27 July 2005 – Law on Higher Education and the National Program to Combat Poverty and Social Exclusion by 2020”<sup>29</sup>.

Nevertheless, in the report there was also some observations and recommendations. First of all, „the Committee has recommended that Poland ensure that all the provisions of the Covenant are given full effect in its domestic legal order and can be invoked before courts”<sup>30</sup>.

Furthermore, the Committee has concerned about unemployment, poverty, malnutrition and right to adequate food or education. After analysing the report, it should be borne in mind that as the State party Poland still has many places to go in terms of economic, social and cultural rights.

The State has a duty to provide each human with opportunities to realize his or her economic, social and cultural rights. The following question comes to mind: how can we monitor the progressive fulfillment of economic, social and cultural rights?

The Office of the United Nations High Commissioner for Human Rights answers the above question in Fact sheets no. 33. In his considerations High Commissioner indicates that monitoring budgets is particularly important during the analysis the realization of economic, social and cultural rights. In the national budget we have picture of using public funds for specific groups and regions, or significant decreases in funding to particular sectors. All of these can point out a State’s success or failure to realize economic, social and cultural rights progressively<sup>31</sup>.

From the national budget we can measure the government’s effort put in realization economic, social and cultural rights, because we can observe the funds allocated for this purpose. However, a State hit by a drought can have trouble with addressing the right to water, despite a significant effort to achieve it. Another State

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<sup>28</sup> Recommendations of the Committee on Economic, Social and Cultural Rights regarding Poland, <https://www.rpo.gov.pl/pl/content/rekomendacje-komitetu-praw-gospodarczych-spoecznych-i-kulturalnych-onz-dotyczace-polski> (accessed 7.7.2020).

<sup>29</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Poland*, [https://www.rpo.gov.pl/sites/default/files/E\\_C-12\\_POL\\_CO\\_6\\_25478\\_E.pdf](https://www.rpo.gov.pl/sites/default/files/E_C-12_POL_CO_6_25478_E.pdf) (accessed 7.7.2020), p. 1.

<sup>30</sup> Ibidem, p. 2.

<sup>31</sup> See for instance US 2020 budget, <https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf> (accessed 3.12.2019).

can have many resources but only little amount of them devoted for economic, social and cultural rights. With measuring exercise we can find that a poor country compares favorably to a wealthy one<sup>32</sup>. The realization of economic, social and cultural rights will not always depend from the wealth of the State.

The analysis of national budget can be useful to monitor commitment to implementation economic, social and cultural rights, however there are some challenges. For example, the national budget does not always leave us with the full picture of the financial resources available to a State. The size of state budget funds to different sectors not always has to lead to improved access to services and the implementation of rights. The most important issue is not how much funds remain in the state budget but how they will be spent<sup>33</sup>.

A good example of the fact that the national budget and its use is often important for the realisation of economic, social and cultural rights is the realisation of the right to work. Providing individuals with employment opportunities by creating jobs and promoting full, productive employment depends to a large extent on the economic capacity of a country. Therefore, among the main threats to the realisation of the right to work, it is necessary to point out the lack of sufficient economic resources caused by a low or a reduced national budget as a result of various external factors leading in particular to the economic crisis<sup>34</sup>.

However, the Committee repeatedly points out that economic resources are not everything. When it comes to the implementation of economic, social and cultural rights, it is also very important for the State to be attentive to the implementation of those rights by recognising the needs of the society and by efficiently identifying the greatest threats and problems with its implementation. The State can respond to such needs effectively through legislation, introducing necessary solutions. In the case of the right to work, the Committee points out that, according to Organisation for Economic Cooperation and Development (OECD) data, the issue that needs to be addressed by the State is the employment of young people. The level of unemployment among young people is, in principle, clearly higher than the overall unemployment rate in individual States. In some economically well-developed States, it can reach half of all those capable of working in this age group<sup>35</sup>. This problem was also identified by the Committee in Poland on the occasion of cyclical reporting, as mentioned above. States Parties identifying such problems should adopt and implement national education and training policies aimed at promoting and supporting access to employment for young

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<sup>32</sup> FAQ on Economic, Social and Cultural Rights, op.cit., p. 33.

<sup>33</sup> Ibidem, p. 32-38.

<sup>34</sup> Z. Kędzia, A. Hernandez-Połączyńska (ed.), *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych*, C.H. Beck 2018, <https://sip.legalis.pl/document-full.seam?documentId=mjxw62zogi3damjzha3dgni> (accessed 7.7.2020), cz. III, s. 7-8.

<sup>35</sup> Ibidem, p. 10-11.



people<sup>36</sup>. This is a very good example of the importance of a proactive approach by the State to the implementation of economic, social and cultural rights.

Notwithstanding the foregoing, it should be borne in mind that all human rights – political, civil, economic, social and cultural – are closely related as they express the multiple dimensions of one entity, which is the person. The integral protection of all categories of human rights is a real guarantee of full respect for each individual right.

Economic, social and cultural rights are just as basic as political and civil rights, which is why they must be protected, respected and fulfilled. Therefore, the state should provide each human possibility to freely supplying with water, food, health care or education etc., in the same way as it is provided with the opportunity to exercise civil and political rights.

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<sup>36</sup> Ibidem, p. 10.

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## Abstract

When we talk about human rights violations, most often we cite the right to life, prohibition of torture, freedom of religion, or freedom of expression. Why do we skip economic, social and cultural rights, like right to work, education or right to benefits of science and culture? Do we see any of these as our fundamental right? Many perceives them as a part of policy, political views, or even welfare state concept. However, the truth is that economic, social and cultural rights are, at least in part, as important as civil and political rights. In this article, we deconstruct the concepts and illustrate, which parts of these rights might be justiciable.

## Streszczenie

Kiedy mówimy o naruszeniach praw człowieka, najczęściej przywołujemy prawo do życia, zakaz tortur, wolność religii lub wolność wyrażania opinii. Dlaczego pomijamy prawa gospodarcze, społeczne i kulturalne, takie jak prawo do pracy, edukacji lub prawo do korzystania z dóbr nauki i kultury? Czy postrzegamy którekolwiek z nich jako nasze fundamentalne prawo? Wielu widzi je jako część polityki, poglądów politycznych czy nawet koncepcji państwa dobrobytu. W rzeczywistości prawa gospodarcze, społeczne i kulturalne są, przynajmniej w części, tak samo ważne jak prawa obywatelskie i polityczne. W tym artykule, dokonujemy dekonstrukcji pojęć i ilustrujemy, które z tych praw mogą podlegać drodze sądowej.

**Keywords:** public international law, human rights law, international criminal law, universal repression, extraterritoriality

**Słowa kluczowe:** prawo międzynarodowe publiczne, prawa człowieka, międzynarodowe prawo karne, represje uniwersalne, eksterytorialność.