

THE IDEA OF THE GOOD SAMARITAN IN INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

‘So many treaties have been concluded with the aim of killing people. We would greet with deep gratitude treaties with the aim of making people live’.

Thus wrote the national economist Jérôme Blanqui in 1839. International law has undergone fundamental changes since. It is still used to decide on questions of war and peace and to justify violence against people, for instance in the case of self-defence or in the case of so-called humanitarian interventions. But it also serves as an instrument to guarantee basic freedoms and a minimum subsistence level to everyone; as envisaged by Blanqui in the 19th century the international law of the 21st century is used ‘to make people live’. It was the elaboration of international human rights treaties after World War II that brought about a shift in the perspective. Whereas in classical international law the human being was something like an ‘object’ in the relations between the States – it was dealt with, but condemned to be passive –, in modern international law the human being has moved to the centre. The individual destiny matters. But does that mean that international law also reflects values similar to those of the social doctrine of the Catholic Church? Is the idea of the Good Samaritan also part of the conception of international human rights?

The present paper deals with this question on the basis of an analysis of the idea of ‘solidarity’ within different ‘generations’ of human rights¹ – civil and political rights or first generation rights (II), economic, social and cultural rights or second generation rights (III) and so-called solidarity rights or third generation rights (IV). The European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples’ Rights serve as examples. (It is

understood that the values underlying international human rights codifications serve as points of reference in international relations, although the complexity of this interaction is not explored in the present paper).

II. 'SOLIDARITY' AS PART OF CIVIL AND POLITICAL RIGHTS

The first – maybe surprising – finding is that the term 'solidarity' does not appear in the most prominent genuine human rights codifications of the first generation such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights.² The abstract 'everyone' the legal texts are talking about has concrete rights such as an 'inherent right to life, to liberty, to security, to freedom of thought, conscience and religion', but only vague duties. The Preamble to the International Covenant on Civil and

¹ The terminology of 'human rights generations' is widely used, though not uncontroversial. It is criticised for leading to misunderstandings, as generations in human life succeed one another with the later generation eventually replacing the earlier one. On the contrary, the different generations of human rights co-exist, although they have been developed in different times. During the Age of Enlightenment as well as in the constitution-making process in the 19th century civil and political rights were dominant. Social, economic and cultural rights can also be traced back to the writings of Locke, Condorcet and Paine, but started to play a role in constitutional law only in the early 20th century. Since they were propagated predominantly in the Soviet tradition their recognition led to an ideological split in human rights policy that could be overcome only after the end of the Cold War. Solidarity rights such as the right to development, the right to peace, the right to a healthy environment and the right to humanitarian assistance were developed only in the process of de-colonisation in the late 20th century. Whereas civil and political rights were first developed on the national level, the definition and elaboration of economic, social and cultural rights went on simultaneously on the national and the international level. Third generation rights were primarily important in the international context.

² Generally, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights can be seen as examples for human rights treaties of the first generation, whereas the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights are considered as examples for human rights treaties of the second generation. Later documents such as the Charter of Fundamental Rights of the European Union do not uphold the separation. The Universal Declaration of Human Rights elaborated before the ideological split is comprehensive as well. The African Charter on Human and Peoples' Rights as well as the Arab Charter of Human Rights contains rights of all three generations.

Political Rights that the overwhelming majority of States worldwide have ratified³ realizes 'that the individual, having duties to other individuals and to the Community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant'.⁴ What does that mean? Does it also include the obligation to look after the others, to support and help the needy ones? The European Convention for the Protection of Human Rights and Fundamental Freedoms goes even one step further. In the Preamble the Governments reaffirm 'their profound belief in those fundamental freedoms which are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend'.⁵ The individual and his or her responsibility are left out completely. The abstract concept of 'political democracy' replaces the individual. Even in the context of family life duties are not mentioned. The European Convention stresses only the 'right to respect for private and family life'.⁶ The American Convention on Human Rights mentions 'social justice', but the Good Samaritan is not present either.⁷ The main idea running through all those texts is freedom, not solidarity.

This can be explained by the specific role international codifications of civil and political rights are expected to play. They have been developed in order to protect the individual against arbitrary interferences of the State. The approach is rights-based; the primary addressee of the duties fixed in human rights treaties is the State. The human rights doctrine discerns three levels of obligations of the State that are summarised in the famous formula 'respect – protect – fulfil'.⁸ The State has the duty to respect the rights of the individuals, i.e. not to interfere with their rights, to protect them against the interference of third persons and, if necessary, to support the individuals so that they can fully enjoy their rights. For the realisation of civil and political rights and freedoms the first level, respect and non-interference, is the most important one.

³ Up to now (March 2008) the Covenant has been ratified by 160 countries.

⁴ Preamble to the Covenant on Civil and Political Rights (1966), para. 5.

⁵ Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950), para. 4.

⁶ Article 8 ECHR.

⁷ Preamble to the American Convention on Human Rights (1969), para. 1.

⁸ See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton 1980.

This shows the fundamentally different approach of the social doctrine and codifications of civil and political rights. Human rights law focuses on the relationship between the individual and the State, whereas the value of solidarity is relevant for the relationship between the individual and the Community. The obligations of the State are predominantly 'negative'. The concept of solidarity, on the contrary, demands individuals and communities to be actively involved in social affairs in order to promote the Common Good. But despite all those differences the social doctrine of the Church and international human rights regimes can be said to be part of the same system of coordinates. Both aim at building a 'foundation of freedom, justice and peace in the world'.⁹ Both are centred on the 'dignity and worth of the human person'.¹⁰

In any case, the role of the Good Samaritan may be discussed on the basis of those legal texts. He has to be seen as an element of a triangular relationship. On the one hand there is the State, on the other hand the needy one. And the Good Samaritan is between those two. As the 'behaviour' of the State is regulated by the human rights conventions, we can analyse the relationship between the State and the Good Samaritan under two constellations: either the State wants the Good Samaritan to act, or to put it more generally, the State wants an individual to engage for the well-being of others, or the State wants the Good Samaritan to stop acting and interferes with good deeds. In both constellations the human rights conventions give answers, set limits. They cannot be easily read out of the texts themselves. But they can be illustrated by decisions taken on the basis of the texts.

The first question is in how far the individual can be expected or even forced to look after the others, to act for the others without any self-interest. In the European Convention on Human Rights the borderline can be found in an article that does not seem to be connected to the problem, in the article on forced labour. 'Forced labour'¹¹ is generally forbidden. But it is not considered to be 'forced labour' if individuals are required to help in cases of 'emergency or calamity threatening the life or well-being of the

⁹ Preamble of the Universal Declaration of Human Rights (1948), para. 1.

¹⁰ Preamble of the Universal Declaration of Human Rights, para. 5.

¹¹ The only definition of forced labour in international law is given in Convention No. 29 of the ILO. 'Forced labour' is understood as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. The expression 'penalty' is interpreted very widely and comprises all disadvantages a person has to face.

community' or in the case of 'normal civic obligations'.¹² The European Court of Human Rights interprets those restrictions to be 'grounded on the governing ideas of general interest, social solidarity and what is in the normal or ordinary course of affairs'.¹³ But the questions remain: In how far social solidarity can be required, what is the ordinary course of affairs?

One example of the jurisprudence of the Court can give an answer. In the case *van der Musselle v. Belgium*¹⁴ a young lawyer claims that the obligation to defend indigent litigants without receiving any recompensation or reimbursement of expenses is to be considered as 'forced labour'. He interprets the freedom guaranteed by the Convention in absolute terms; in his eyes it cannot be restricted for the sake of the well-being of other people.

In its decision the European Court of Human Rights is reluctant to generally acknowledge duties of the individual based on solidarity. It argues that in the member states of the Convention there is a clear tendency towards the assumption of similar burdens by the State; those supporting others would have to be adequately paid. But it accepts exceptions to this rule and therefore scrutinizes if there is a 'fair balance' between the public interest and the interests of the individual being forced to help others without remuneration.¹⁵ In the concrete case the Court finds that there is no 'unreasonable imbalance' between the aim of the individual – to qualify for a certain profession – and the services required for the Community. However, the case shows that, as a rule, duties for the common good of the community are shifted from the individual to the State as a whole; individual obligations based on solidarity are seen as rare exceptions justified only if there is a fair balance of interests.

Such a finding might be specific to the European approach to human rights. At least, it contradicts the already quoted Preamble to the International Covenant on Civil and Political Rights which emphasizes the individual's duties towards other individuals and towards the Community.

The second question is in how far the State can stop citizens acting on the basis of charity. Here, too, the provision applicable – the prohibition of inhuman treatment – seems not to have any connection to the problem.

¹² Cf. Article 4 ECHR.

¹³ *Van der Musselle*, decision of 23 November 1983, Serie A No. 70.

¹⁴ *Van der Musselle*, decision of 23 November 1983, Serie A No. 70.

¹⁵ *Van der Musselle*, decision of 23 November 1983, Serie A No. 70, para. 38.

The case *D. v. Great Britain*¹⁶ can illustrate the point. A drug dealer is caught entering Great Britain with some kilograms of heroine and is sentenced to prison. While in prison an HIV infection breaks out. A British charity organisation looks after him and continues to support him after the end of his prison term. The British authorities decide to send him back to his home country St. Kitts although it is evident that he would not get any medical aid or family support there. In this case the Court is confronted with the question of whether the State can interfere with 'good deeds' on the basis of general policy considerations. The European Court of Human Rights decides that such an interference amounts to a human rights violation. It turns the negative obligation 'prohibition of inhuman treatment' around and requests 'human treatment'. The Court is very careful not to generalise such a duty. It stresses the 'exceptional circumstances of the case' and 'the compelling humanitarian considerations at stake'.¹⁷ Nevertheless, the case shows that solidarity can matter. But it is not the rule, it is the exception.

It is thus evident that civil and political rights, even if they are an essential precondition for building up a strong civil society, convey an idea of freedom that is difficult to combine with the request for solidarity. Only in exceptional cases solidarity can be considered to be a legal duty of the individual; generally it remains a moral duty outside the scope of legal regulations.

III. 'SOLIDARITY' AS PART OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Contrary to civil and political rights economic, social and cultural rights are built on the idea of solidarity. The weaker groups of society such as children, handicapped people, older people, and women are guaranteed special rights. Rights such as the right to social security, the right to social and medical assistance, the right to benefit from social welfare services are meant to promote social cohesion in society. Nevertheless, in the relevant legal codifications of social rights such as the International Covenant on Economic, Social and Cultural Rights or the European Social Charter solidarity is not explicitly mentioned either. According to the rights-based approach only the beneficiary is visible. Addressee of the duties is the State, not the individuals and not the Community. The standard formulation is: 'The States Parties to

¹⁶ *D. v. the United Kingdom*, decision of 2 May 1997, No. 30240/96, RJD 1997 III.

¹⁷ *D. v. the United Kingdom*, decision of 2 May 1997, No. 30240/96, RJD 1997 III, para. 54.

the present Covenant recognize the right of everyone to ...'. The obligations are clearly and one-sidedly fixed: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.¹⁸

Solidarity is thus anonymous. The State is abstract; the individual can hide behind it. As a rule the individual is the one who takes, not the one who gives. The guarantee of a minimum existence level, for example, is not linked to charity or to the position of the individual within the Community. Once again it is the State which is responsible for everything: The 'State Parties...recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.¹⁹ According to the text of the Covenant solidarity among the members of the Community is not required.

Only in hidden places, duties of individuals based on solidarity can be found. In the context of the right of the children to social, legal and economic protection 'the rights and duties of their parents' are taken into account.²⁰ With a view to ensuring the effective exercise of the right of elderly persons to social protection, 'the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organizations, appropriate measures...'.²¹ Even those examples show that the solidarity required tends to be an institutionalised, not an individual form of solidarity.

In the social security conventions of the International Labour Organisation the employers are identified as a group responsible for the well-being of the employees.²² This approach mirrors the social security conceptions of industrialised countries prevalent at the time when the conventions were elaborated. But it cannot be seen as sufficient for a comprehensive social policy including all members of society.

¹⁸ Article 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights (1966).

¹⁹ Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966).

²⁰ Article 17 of the European Social Charter (Revised) 1996.

²¹ Article 23 of the European Social Charter (Revised) 1996.

²² Cf. Article 71 of the Convention on Social Security (Minimum Standards) 1952 of the International Labour Organisation.

Whereas the purpose of civil and political rights is predominantly to restrict State power, social rights are meant to define the responsibility of the State towards the material well-being of the citizen. Within the already mentioned trias 'respect-protect-fulfil' the focus is on the aspect of fulfilling. Solidarity within the Community is presupposed, but not integrated in the State-oriented concept. The individuals are visible only as beneficiaries. Even their role as tax-payers and financial contributors to the State social system is not emphasized.

The one-sidedness of the international conception of social rights reduces their practical importance. The burning question both in developing and in industrialised and post-industrialised societies is the redistribution of burdens and responsibilities. Social cohesion is not created by rights only. It is also necessary to achieve a compromise about the input of the various societal groups and individuals. A legal definition of 'subsidiarity' might be helpful. On the other hand it is questionable in how far international law can fulfil this task. The mechanisms of social cohesion have to be defined for each society individually; they are dependent on a multitude of factors such as culture, religion and historical experience.

IV. 'SOLIDARITY' AS PART OF THE RIGHTS OF THE THIRD GENERATION

The third generation of human rights can be summarised under the heading 'solidarity rights'. They include such rights as the right to development, the right to peace, and the right to a healthy environment. There is no international comprehensive treaty comprising them all. They are enshrined in various resolutions and declarations of the United Nations as well as of the Commission on Human Rights.

On the regional international level solidarity rights are explicitly fixed in human rights documents. The African Charter on Human and Peoples Rights, 1981, might serve as an example. Already in the Preamble the link between rights and duties is emphasized: 'Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone...'.²³ The duties of the individual 'towards his family and society, the State and other legally recognised communities and the international Community'²⁴ are enumerated in a special sec-

²³ Preamble to the African Charter on Human and Peoples Rights (1981), para. 6.

²⁴ Article 27 para. 1 African Charter on Human and Peoples Rights (1981).

tion of the text. Some of them are linked to the idea of solidarity, such as the duty 'to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need'²⁵ or the duty 'to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of society'.²⁶

In the African Charter on Human and Peoples Rights the word 'solidarity' is a recurring element. It is used with very different connotations. On the one hand it is seen as universally accepted principle governing the relations between States.²⁷ On the other hand it is linked to Africa or to the African nation States. Thus the text enunciates a specific 'African solidarity'.²⁸ Last but not least solidarity is also used as a human rights restriction. The right not to join an association is subject to the obligation of solidarity.²⁹

These examples show that the understanding of solidarity in the African Charter on Human and Peoples Rights is different from the idea in the biblical story about the Good Samaritan. Solidarity is seen as something like a glue holding people in Africa or in the African nation States together. Cohesion of society is deemed necessary in order to stand up against past and present injustices. Thus the Preamble explicitly stresses the liberation aspect: 'Conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions...'

²⁵ Article 29 para. 1 African Charter on Human and Peoples Rights (1981).

²⁶ Article 29 para. 6 African Charter on Human and Peoples Rights (1981).

²⁷ Cf. Article 23 para. 1 African Charter on Human and Peoples Rights: 'The principle of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States'.

²⁸ Article 29 African Charter on Human and Peoples Rights: 'The individual shall also have the duty: ...To preserve and strengthen social and national solidarity, particularly when the latter is threatened'; Article 21 para. 4 African Charter on Human and Peoples Rights: 'States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity'.

²⁹ Article 10 para. 2. African Charter on Human and Peoples Rights (1981).

V. CONCLUSIONS

The differences between the various international human rights codifications are remarkable. The European Convention on Human Rights, which can be taken as an example for a codification of human rights of the first generation, is an effective instrument of individual human rights protection following a very pragmatic purely rights-based approach. On the contrary, the African Charter on Human and Peoples Rights, an example of a comprehensive codification of human rights of the first, second and third generation stresses distinct African values and traditions and is meant to enhance a certain 'African identity'. Moral values are clearly set out; the individual cannot hide behind the State, but is explicitly declared responsible for the well-being of the others. Classical codifications of social rights such as the International Covenant on Economic, Social and Cultural Rights focus only on the perspective of the beneficiary. The State is seen as an abstract actor; duties of the individual and the Community, though relevant for the realisation of the rights guaranteed, are not explicitly put forward.

As international human rights documents regulate primarily the duties of the State it is not surprising that there is not much room for dealing with the aspect of solidarity. If mentioned, the understanding of solidarity remains vague and unequivocal: it is seen alternatively as a factor of cohesion, as a burden and duty that must not limit rights and freedoms disproportionately, and as a basic human quality linked to the dignity of the human being.

It is probably the understanding of 'brotherhood' in the Universal Declaration of Human Rights that comes closest to what is meant by solidarity in the social doctrine of the Catholic Church: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.³⁰ But although the Universal Declaration of Human Rights was the basis of the international human rights movement, this idea was not taken up in subsequent legally binding documents.

³⁰ Article 1 Universal Declaration of Human Rights (1948).