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Liberal Communitarian Interpretation of Social and Equality Rights:

a Balanced Approach?

1. Introduction

While it is commonplace for economic, social and cultural rights and equality rights to be the expression of the principle of the welfare state at the national level, not much scholarly interest has been devoted to their interplay and mutual influence. Looked through the prism of constitutional jurisprudence, however, understanding the influence of the principle of the welfare state on the interpretation of the rights might be helpful in explaining some peculiarities of the perception of these rights by individual constitutional tribunals. Furthermore, this part of constitutional jurisprudence can be linked to communitarianism, a theory that, according to Professor Raul Narits[*1] and Professor Winfried Brugger, has gained popularity as a theory of interpretation of constitutions.[*2] Whereas Professor Brugger confines his argument to the German Basic Law, Professor Narits notes a broader tendency in this regard.[*3]

I will argue that constitutional tribunals tend to proceed from a liberal communitarian premise in interpreting fundamental social rights enshrined in their respective constitutions. This is why social and equality rights are construed narrowly and balanced with the collective interest. This tendency is more visible in the sphere of social rights jurisprudence, including cases pertaining to the equal enjoyment of social rights, because the communitarian understanding is easily compatible with the principle of the welfare state that underlies the concept of fundamental social rights, based on mutual dependency in achieving the goals of security and well-being for any member of the society.

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[1] R. Narits. Ühest tänapäevasest põhiseaduse mõttest arusaamise viisist (On One Contemporary Method of Understanding the Meaning of the Constitution). – Juridica 1999/10, p. 466 (in Estonian).

[2] W. Brugger. Communitarianism as the Social and Legal Theory behind the German Constitution. – International Journal of Constitutional Law, July 2004 (2) 3, p. 432.

[3] See Notes 1 and 2, *ibid*.

This approach differs from the atomic and one-dimensional approach adopted by the UN Committee on Economic, Social and Cultural Rights, which does not involve balancing. Whereas the only justification a state could put forward for not progressively guaranteeing social rights fully to its subjects is lack of resources, the principle of equal treatment (non-discrimination) must be realised immediately in full. Thus in the case of the right to enjoy social rights without discrimination, the right is to trump[*4] all other considerations of national governments.

What follows is a seeming incompatibility of the national and international social rights approaches, as the traditional communitarian understanding of the principle of the welfare state informs the national constitutional social rights jurisprudence and the same is mostly lacking in the case law of the international tribunals adjudicating cases of social rights.[*5] Some national and international tribunals have tried to overcome this incompatibility. This tendency is illustrated by two cases: the Five Pensioners case[*6] of the Inter-American Court of Human Rights and the Social Care Act case[*7] of the Constitutional Review Chamber of the Supreme Court of Estonia. I will try to analyse the advantages and disadvantages of both of these cases. Due to space limitations, I will omit the European level and shall therefore not deal with the social rights jurisprudence of the European Court of Justice and the European Committee of Social Rights here.

In this article, I will first explore the relationship of social and equality rights, the principle of the welfare state, and liberal communitarianism. I will then continue by presenting and comparing some national and international approaches to social and equality rights. Finally, I will analyse the two irregular cases mentioned above, the Five Pensioners case and the Social Care Act case.

2. Social and equality rights, the principle of the welfare state, and liberal communitarianism

The principle of the welfare state constitutes one of the principal sources of legitimisation of a secularised nation-state.[*8] Although there is no agreement on the exact content of the principle[*9], its constitutive elements (or sub-principles) are clearly identifiable: (protection of) social rights and principles of equality (universality) and solidarity.[*10]

According to a modern understanding, the principle of the welfare state is most closely related to the principles of human dignity and democracy. As a result, the principle of the welfare state is deemed to serve as a safeguard for the society that its members would be empowered to participate in the society and its common affairs in a dignified manner.[*11] This explains also the emergence of the fourth sub-principle of the principle of the welfare state: the principle of autonomy. According to this principle, the (civil and political) rights of an individual should not be limited due to receipt of state assistance. All of the sub-principles are

[4] According to Ronald Dworkin, rights trump collective goals. See R. Dworkin. Taking Rights Seriously 1977, pp. xi–xii as referred to in M. Freeman. The philosophical foundations of human rights. – Human Rights Quarterly, August 1994 (16) 3, p. 499.

[5] Paragraph 8 of the General Comment No. 3 on the States parties obligations specifically emphasises that the Covenant is neutral and does not require a specific form of government or economic system. It can thus be concluded that the Covenant was not intended to refer to a concept of welfare state or the related communitarian understanding of rights. Available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument (1.07.2006).

[6] 'Five Pensioners' v. Peru, Judgement of 28.02.2003 of the Inter-American Court of Human Rights. Available at http://www.corteidh.or.cr/seriecpdf_ing/seriec_98_ing.pdf (31.05.2006).

[7] Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia in case number 3-4-1-7-03. Available via http://www.riigikohus.ee/ (in Estonian). Also published in the Riigi Teataja (State Gazette) III 2004, 5, 45 (in Estonian).

[8] T. Kingreen. Das Sozialstaatsprinzip im europäischen Verfassungsverbund. Gemeinschaftsrechtliche Einflüsse auf das deutsche Recht der gesetzlichen Krankenversicherung. Mohr Siebeck Verlag 2003, p. 23.

[9] See, for example, A. Briggs. The Welfare State in Historical Perspective. European Journal of Sociology 1961; L. von Stein. Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage. Leipzig 1850, Neudruck 1959; E. Forsthoff. Rechtsstaatlichkeit und Sozialstaatlichkeit. Darmstadt 1968; R. Mishra. The Welfare State in Crisis: Social Thought and Social Change. New York: Harvester Wheatsheaf 1984; E. Benda. Das Sozialstaatsprinzip. – E. Benda, W. Maihofer, H.-J. Vogel (Hrsg.). Handbuch des Verfassungsrechts der Bundesrepublik Deutschland. 2. Aufl. De Gruyter Verlag 1994; P. Kunig. The Principle of Social Justice. – U. Karpen (ed.). The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law. Baden-Baden: Nomos Verlagsgesellschaft 1988.

[10] Hereby I modify slightly the triad offered by Robert Henry Cox. According to Cox, the broadly acceptable elements of a welfare state are protection of social rights, universalism, and solidarity. See R. H. Cox. The Consequences of Welfare Reform: How Conceptions of Social Rights are Changing. – Journal of Social Policy 2000 (27) 1, p. 1.

[11] Participation in the society as the goal of social rights has been emphasised both by the social citizenship theory of T. H. Marshall (T. H. Marshall. Class, Citizenship and Social Development. Garden City, NY: Doubleday 1964) and market-based theories of welfare state (S. Deakin. Social Rights and the Market. U. Mückenberger (ed.). A Manifesto for Social Europe. Brussels: ETUI 2001, p. 17).

closely intertwined and permeated by the aim to achieve greater collective well-being by means of co-operation. Whereas social rights embody an entitlement to a modicum of protection against certain social risks (unemployment, want, old age, handicap, sickness) and the principle of equality is supposed to guarantee that no-one would be left out of the scope of protection of these rights without a valid reason, the principle of solidarity presents the other side of the coin: fulfilment of the social rights can occur only if and insofar as members of the given society are willing to contribute to achievement of this goal by means of paying taxes or participating in compulsory insurance schemes on an ongoing basis. Anchoring social and equality rights in a constitution means that the promise of social protection may not be withdrawn at will and that, when the state fails to fulfil its obligations, members of the society in question can seek enforcement of these rights by the courts. On the other hand, social and fiscal policies have to respect the autonomy of the individual and may not result in deprivation of any rights in exchange for provision of some social protection.

In any event, it becomes clear that in the framework of the principle of the welfare state, social rights can be regarded primarily as a tool for achieving collective well-being carrying a concomitant thin[*12] and instrumental[*13] layer of individual protection with them. Moreover, this thin layer of individual protection can be achieved only by means of an extensive collective effort of building and financing compulsory mutual insurance schemes.

The crucial question in determining the influence of the principle of the welfare state on the interpretation of social rights and the concomitant right to non-discrimination in enjoyment of these rights in concrete cases is thus how to resolve the inherent tension between the interests of the individual and the collectivity (the community, the state).

Christian Wolff, one of the first scholars to address this question, suggested that collective interests should always be given precedence over individual ones.[*14] In a modern society, this 18th-century approach can hardly be considered acceptable. Modern liberals such as Ronald Dworkin believe that individual rights should always trump collective goals.[*15] It seems difficult to reinterpret a right that is in its essence directed towards achievement of collective good into an individualistic right that does not take into account the collective aims.[*16] Thus, it seems only logical to proceed from the conclusion of the liberal communitarians that individual rights should be balanced against collective goals.[*17] This balancing may, however, not reach the point of depriving the right of any meaning so as to let the collective interest prevail.

The starting point of communitarians is that an individual is part of a community and can maximise human fulfilment through self-determination in the community.[*18] The core thesis of liberal communitarianism is that "a human being's environment consists of several spheres of responsibility, or forms of association, reaching from the single individual and its near horizon (e.g., partner and family) to the far horizon of all human beings".[*19] Each of these communities has its own understanding of justice and its own standards for distributing advantages and disadvantages.[*20] Some communitarians, like Michael Sandel, find rights "too individualistic, for they focus on their bearers without considering them in a wider social context, and allow them to impose demands on others at the expense of richer, less confrontational relationships".[*21] Proceeding from a communitarian premise then, the rights and duties of an individual should be determined in

[12] By thin layer of individual protection, I mean that in many countries social rights are either not justiciable at all or their use in courts is restricted. In case they may be relied upon in courts, there are no effective remedies for the individual applicant whose social rights have been violated. For an alternative discussion of the influence of the nature of social rights on their ability to be invoked before courts, see S. Hyttinen. A Second View from Elsewhere — the EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse. – Nordisk Tidsskrift for Menneskerettigheter (Nordic Journal of Human Rights) 2006 (24) 1, pp. 1–14.

[13] The instrumentality of individual social rights is obvious: the possibility to file complaints with a court is there so as to guarantee that the government abides by its social rights obligations flowing from the Constitution and not to further an individual gain of the applicant. The constitutionality of state activities constitutes, in turn, a public concern.

[14] Section 218: 'Gemeine Wohlfahrt geht der besonderen vor'. Ch. Wolff. Vernünftige Gedanken von dem Gesellschaftlichen Leben der Menschen und Insonderheit dem gemeinen Wesen zur Beförderung der Glückseligkeit des menschlichen Geschlechts. Nachdruck der 4. Aufl. Frankfurt, u. a 1736, 1975.

[15] Consider, for example, Ronald Dworkin, referred to above in Note 4.

[16] Consider here the statement of Veli-Pekka Viljanen: "The liberalistic theory can, on the other hand, be criticized for not taking into account the preconditions necessary in society for ensuring these rights". See V.-P. Viljanen. Abstention or Involvement? The Nature of State Obligations under Different Categories of Rights. K. Drzewicki, C. Krause, A. Rosas (eds.). Social Rights as Human Rights: A European Challenge. Turku, Finland: Åbo Akademi 1994, pp. 49–50.

[17] W. Brugger (Note 2), p. 460.

[18] *Ibid*., p. 434.

[19] *Ibid*., p. 440.

[20] M. Walzer. Spheres of Justice. New York: Basic Books 1983, p. 322.

[21] M. Sandel. Liberalism and the Limits of Justice. Cambridge University Press 1982 as referred to in C. Fabre. Social Rights under the Constitution: Government and the Decent Life. Oxford: Clarendon Press 2000, p. 23.

accordance with his membership in a given community. According to Sandel, social rights presuppose a strong sense of responsibility towards the needy by other people.[*22] In his opinion, protection of social rights can be achieved only if the members of society feel that they are participating in a society in which all of the members are worthwhile.[*23] Thus, social and equality rights of an individual must be read in a way that would not harm other members of the same community; on a constitutional level, this would mean balancing interests of the individual against the needs of the society in constructing the social rights concerned. This kind of balancing can occur by means of restrictive interpretation of the scope of application of a constitutional social right or, conversely, by balancing a broadly construed social or equality right explicitly against a compelling collective interest.

3. National constitutional jurisprudence

Examples of communitarian construction of social rights can be found in the case law of the Constitutional Court of South Africa and the Polish Constitutional Tribunal.

One of the cases where the collective and individual dimensions of the right to health care have conflicted sharply was the case *Soobramoney v. Minister of Health of KwaZulu-Natal*.[*24] In that case, a terminally ill patient with heart disease and chronic renal failure was refused dialysis treatment by a state hospital. The hospital lacked sufficient means for providing everyone with dialysis treatment and had thus established guidelines, according to which persons with significant cardiac or vascular disease were not to qualify for the treatment. Soobramoney claimed that his right to emergency medical treatment, as enshrined in article 27 (3) of the Constitution, had been violated. The South African Constitutional Court rejected this argument. Having understood that granting relief to Soobramoney would have meant that every person with chronic renal failure would have been constitutionally entitled to dialysis at state expense, and could have resulted in less funding for other programmes, the Court arrived at a conclusion that the guidelines were necessary, as the problem of scarce resources was nationwide, and reasonable and have been applied fairly and rationally.

While it remains questionable whether the Court struck a fair balance between the collective and individual interests in this case, it is undisputed that the Court has engaged in balancing of these interests in solving the case. It also raises the question of the increasing selectivity[*25] of rights.

The South African Constitutional Court continued the same line of reasoning in a perhaps better structured manner in the case *Government of the Republic of South Africa and others v. Grootboom and others*.[*26] In this frequently cited right to housing case, the Court established standards for evaluating whether a social right has been violated. Accordingly, the constitutional requirements are complied with if there are reasonable legislative and other measures taken for achieving the fulfilment of the right concerned and short- and medium-term relief is provided to the most vulnerable persons. This kind of judgement seems to involve application of a well-balanced approach that leaves it to the community to decide through democratic decision-making which kinds of choices are best for advancing the right to housing but at the same time also sends a clear signal to the society that those in crisis can seek relief from the Court. Among other things, this case seems to confirm my argument concerning the instrumentality and thinness of social rights in the communitarian understanding.

A brilliant example of communitarian interpretation of social and equality rights is provided by the Polish Constitutional Tribunal in the *case on lower minimum wage for young employees*.[*27] In this case, a trade union confederation contested an amendment to the Minimum Remuneration for Work Act, according to which young workers were to be granted — depending on their previous working experience — only 80% or 90% of the general minimum remuneration level. The Constitutional Tribunal rejected the claim of discrimination of the young workers by stipulating that the state is obliged by the Constitution to take measures to fight unemployment. Establishing a differential minimum remuneration level is a measure that may facilitate creation of new working places in a given labour market situation and remains within the margin of appre-

[22] M. Sandel. Democracy's Discontent. Cambridge, MA: The Belknap Press of Harvard University Press 1996, as referred to in C. Fabre. Social Rights under the Constitution: Government and the Decent Life. Oxford: Clarendon Press 2000, p. 24.

[23] *Ibid*.

[24] Judgement of the South African Constitutional Court of 27.11.1997 in case CCT 32/97, available at 1998 (1) SA 765 (CC), http://www.constitutionalcourt.org.za/Archimages/1617.PDF (1.07.2006).

[25] See Note 10.

[26] Judgement of the South African Constitutional Court of 4.10.2000 in case CCT11/00, available at 2001 (1) SA 46 (CC), http://www.constitutionalcourt.org.za/Archimages/2798.PDF (1.07.2006).

[27] Judgement K 31/03 on a lower minimum wage for young employees, of 10.01.2005.

ciation of the state. The Tribunal emphasised that the measure corresponds also to the requirements of social justice, as it creates a chance for young persons to become employed, even if this happens in exchange for a relatively low income.

Here, the Tribunal made it clear that the rights cannot be interpreted in a vacuum. The right of young workers (participants in the labour market) not to be discriminated against should be interpreted against the background of the needs of the labour market (a collective interest). The Tribunal justified the restrictive construction of the equality right with the needs of the community and was thus balancing the individual and collective interests in favour of the latter.

However, the Tribunal approach gives rise to the question whether the principle of the welfare state or the general interest, respectively, may be used so as to decrease the existing level of protection. Whereas it is clear that the national labour markets require increasingly more flexibility, lessening the level of protection by means of loosening the non-discrimination standards is generally not deemed acceptable according to international human rights standards. Although the need to guarantee a greater degree of flexibility in the labour markets qualifies well as a general interest of the community, and could therefore be used to balance rights, only compelling reasons may justify taking regressive measures under the disguise of the general interest.

4. The international level — the UN Committee on Economic, Social and Cultural Rights

Although the text of article 4[*28] of the International Covenant on Economic, Social and Cultural Rights (ICESCR), especially the reference to restrictions "for the purpose of general welfare in a democratic society", would allow the Committee on Economic, Social and Cultural Rights to adopt a similar approach to that of the Constitutional Courts discussed above, it has refrained from doing so thus far. Instead, the Committee has emphasised the importance of fulfilment of minimum core obligations under the Covenant[*29] — in any case, a minimum level required by the right has to be guaranteed to anyone — and has moved towards an expansive reading of the Covenant by using increasingly the language of the duty to respect, protect, and fulfil.[*30]

At first glance, the approaches of the national constitutional courts are not compatible with the Committee's approach. Still, the Covenant is legally binding on its states parties — among others, South Africa and the Republic of Poland. Thus, the national constitutional courts are obliged to comply with its requirements.

Provided that the Committee is consistent in its jurisprudence, a concrete example of a possible conflict between the Committee's approach and the jurisprudence of the Polish Constitutional Tribunal can be found in the 2002 Concluding Observations of the Committee on Economic, Social and Cultural Rights on the United Kingdom.[*31] In paragraph 15 of the mentioned Concluding Observations, the Committee expresses concern that the minimum wage protection does not extend to workers under 18 years of age.[*32] The Committee considers the minimum wage scheme to be discriminatory on the basis of age, as it affords payment of a salary below the standard minimum wage level to persons between 18 and 22 years of age.[*33] This conclusion as to the non-compliance with the non-discrimination principle in the application of different minimum wages for different age groups conflicts directly with the position of the Polish Constitutional Tribunal in the above-mentioned case concerning a lower minimum income of younger employees. The different outcomes of interpretation of the non-discrimination principles of the Covenant and the Polish Constitution do not follow from the texts of the provisions concerned. The difference stems from the differing jurisprudential philosophies of the Committee on Social, Economic and Cultural Rights and the Polish Constitutional Tribunal and could thus be potentially resolved by means of some sort of convergence of the approaches adopted.

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[28] "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and **solely for the purpose of promoting the general welfare in a democratic society**."

[29] See Note 5; paragraph 10 of General Comment 3.

[30] M. Sepulveda. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. – School of Human Rights Research Series 2003 (18).

[31] Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland — Dependent Territories, 5.06.2002. Available at http://www.unhchr.ch/tbs/doc.nsf/0/619d3c786801bc2cc1256bbc00568cea?Opendocument (1.07.2006).

[32] *Ibid*., paragraph 15.

[33] *Ibid*.

5. The Estonian approach: The way forward?

One possible way of reconciling the communitarian approach with the approach applied by the Committee is the one used by the Constitutional Review Chamber of the Estonian Supreme Court. In the *Social Care Act case*, concerning the right of students residing in dormitories to receive social benefits, the Court interpreted § 28 (2) of the Constitution, establishing the right to state assistance in case of want, by means of the text of the ICESCR and the case law of the European Social Charter on the adequate standard of living. In doing so, the Court pointed out that the minimum core of the right ('satisfaction of primary needs') should be guaranteed. However, it also made reference to the principles of the welfare state and human dignity enshrined in § 10 of the Constitution and stipulated that it means that the Court has to interfere with social rights only if the absolute minimum of dignified living standards is not guaranteed to an individual. Furthermore, proceeding from § 27 (5) of the Constitution, the Court emphasised that the state should interfere only if the family cannot assist its members by means of providing them with sufficient means for living. This conclusion of the Court flows from the text of § 27 (5), according to which the family shall take care of its members in need.

The Estonian Supreme Court has constructed § 28 (2) of the Constitution trying to reconcile the comparative interpretive approach[*34] with the liberal communitarian understanding flowing from the text of the Constitution itself. However, in doing this, the Court has focused on the negative aspect of family duties only, without pointing out directly that the rights of an individual have to be balanced against the general collective interest. The latter can, however, be indirectly deduced from the fact that the Court decided to leave the other branches of government significant leeway in designing social policy. On the other hand, the statement that the primary needs of a person have to be guaranteed in any case implies that in any future balancing of social rights against the general interest, the Court will always guarantee the minimum core of the right to the applicant. Thus the scenario of Soobramoney does not seem to be possible before the Estonian Supreme Court.

Having declared the right to state assistance set forth in § 28 (2) of the Constitution justiciable for persons in severe need, the Supreme Court of Estonia went on to solve the case on the basis of the principle of equal treatment contained in § 12 (1) of the Constitution. Having emphasised once again that the legislator must be left with significant leeway in determining entitlements to social benefits, the Court found that there was no rational reason behind the differential treatment of the less advantaged persons who were living in dormitories as compared to all other persons using other types of accommodation when it came to granting of social benefits. It must be noted that the Supreme Court of Estonia used its less stringent equal treatment review standard in that case, whereas in cases involving an equal treatment claim in combination with a violation of a freedom right claim the Court routinely employs the much stricter proportionality analysis.[*35]

It can be argued that the Estonian Supreme Court has chosen a more favourable approach to the individual applicant because of the prevailingly individualistic and liberal nature of the Constitution, compared to the more egalitarian and social-justice-oriented South African Constitution. Namely, the Constitution of South Africa contains a larger number of social rights provisions, which are also more detailed, and the Preamble of the Constitution directly refers to the aim to "heal the divisions of the past and establish a society based on [...] social justice and fundamental human rights" and "improve the quality of life of all citizens and free the potential of each person". Conversely, it can be argued that the Constitution of the Republic of Estonia should be construed in a more socially just manner compared to the South African Constitution, because the social rights clauses of the Estonian Constitution do not contain any reference to the limitation of state obligation to the maximum of available resources as the Constitution of South Africa does.

As none of these textual arguments seems to explain in a convincing manner why the approaches of the South African Constitutional Court and the Supreme Court of Estonia differ, I conclude that the disparity follows from a differing understanding of the role and meaning of social rights in the two societies considered.

[34] See T. S. Orlin, A. Rosas, M. Scheinin (eds.). The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach. Turku, Finland: Institute for Human Rights, Åbo Akademi 2000, p. 17.

[35] See, e. g., the judgement of the Constitutional Review Chamber of the Supreme Court of Estonia in case 3-4-1-13-05, p. 32. Available at http://www.riigikohus.ee/ (in Estonian), also published in the Riigi Teataja (State Gazette) III 2005, 26, 262 (in Estonian).

6. Another possible direction of convergence: The Five Pensioners Case of the Inter-American Court of Human Rights[*36]

The Peruvian *Five Pensioners case* is a remarkable case because the Inter-American Court of Human Rights has succeeded to capture in paragraph 147 of the judgement in that case the very essence of social and equality rights:

> Economic and social rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.

The case concerned five pensioners who were not satisfied with the fact that their occupational pension scheme was changed so that they were not entitled to a pension equalling the salary that they would have earned were they still working. Besides being an excellent example of how to effectively ward off unjustified claims of discrimination in enjoyment of social rights, this case demonstrates how it is possible to reconcile the Covenant's approach with a liberal communitarian reading of social rights on the initiative of an international body adjudicating cases of social rights. It can be argued that the Inter-American Court of Human Rights engaged in balancing the common interest, the necessity to enhance the scope of protection of the right to a pension, with the right to equal treatment in entitlement to pension of the individual applicants, arriving at the conclusion that the general interest outweighed the individual interests of the five pensioners concerned.

7. Conclusions

National constitutional courts tend to interpret the fundamental social and equality rights enshrined in the respective constitutions in a manner that can be best described as a liberal communitarian reading of rights. This is at least partly the result of the collectiveness dimension entailed in social and equality rights being an expression of the principle of the welfare state.

While this approach allows reaching a result, where the needs of the collectivity are best served and the individual social and equality rights do not lose their meaning, it might lead to arbitrary outcomes undermining the meaning of rights, if all interests could be automatically regarded as important collective interests justifying lowering the established level of protection of particular rights. This danger is especially vividly illustrated by the Polish case referred to above. Thus, constitutional tribunals should try to act in a careful and principled way in this regard.

The United Nations Committee on Economic, Social and Cultural Rights has pursued an entirely different approach so far. The minimum core approach of the Committee, combined with an extensive reading based on the obligations to 'respect, protect, and fulfil', might be a suitable tool for guaranteeing that the necessary attention is paid to serious violations of rights, helping to bring about some change in individual countries, but it does not seem to be fully compatible with the domestic communitarian construction of social rights.

In a situation where there are a number of different human rights instruments concerning one particular right, it would be desirable to try to achieve some convergence in the different interpretive approaches, to make it easier for domestic courts to apply multiple instruments at the same time. This convergence is desirable for practical reasons even if theoretically these different layers of responsibility could be well explained by the liberal communitarian theory.

Given the flexibility contained in the text of the ICESCR, the Committee would be, at least in theory, able to change its approach for the liberal communitarian approach as has been demonstrated by the Inter-American Court of Human Rights in the Five Pensioners case. Or, conversely, national constitutional courts could opt for a combined reading of their constitution, using the comparative interpretive approach at the same time with the liberal communitarian one.

[36] Available at http://www.corteidh.or.cr/ (31.05.2006).

Choosing the latter approach would enable the courts to combine the positive aspects of both models of review. Whereas the resulting review model of social rights would be more complex, it might lead to a fuller and more balanced protection of social rights. Reconciling the different approaches to the right to non-discrimination in enjoyment of social rights promises to be more complicated, however, as it presupposes nothing less than deciding for one or the other approach.