

REGULATIONS, REGULATORS, CONTROLLERS AND GOVERNMENTS

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REGULATION AND DEREGULATION

‘I tell you not to worry about your life. Don’t worry about having something to eat, drink, or wear. Isn’t life more than food or clothing? Look at the birds in the sky! They don’t plant or harvest. They don’t even store grain in barns. Yet your Father in heaven takes care of them. Aren’t you worth more than birds?’¹ – This biblical saying mirrors one of the dearest wishes of mankind – to live without ‘fear and want’. Although confidence in the future is an essential, even an indispensable basis for a stabilized and well balanced economic and social development we understand that it is unavoidable to ‘worry about life’ and to plan for the future. Due to the fragility of world economy and social injustice in the globalised world of the 21st century good rules and regulations are probably more important now than ever before. *Laissez faire* would mean an unfettered competition and ruinous developments in world economy. We could have a glimpse of what that might mean in 2008 and 2009. Yet, the quote from the Bible carries a very important message: material well-being is something we need but not all we should aspire to.

International regulations in the field of trade and finance are very complex. It might be worth using a metaphor to describe the basic problems. Imagine an empty square billiard table with green felt. A group of people agrees on playing together; they define the size of the balls and sticks and they decide on the rules of the game. Later on more and more players want to join in. They are admitted, but there are only smaller balls and shorter sticks left.

¹ Matthew 6:25-26.

And somehow the new players realise that the table is uneven; the balls always run to the same end. Those who had started the game know which position to choose; they always win. The newcomers fail to convince the experienced players to re-adjust the table and to start a new game with new rules. They have only two possibilities: either they keep playing or they stop and retreat.

This metaphor might visualize that a certain setup of rules can lead to an unfair game where it is fixed in advance who will be the winner and who will be the loser. Due to such rules the wealth of the Earth is currently being used and redistributed in an unfair manner. Over the last decades despite all the regulations elaborated the differences between living conditions in the richest and the poorest countries have not declined. Some new strong players have joined in and try to ignore the rules.

Yet, deregulation is not a solution. Deregulation such as it is described in Professor Dasgupta's paper kept the game on the same unequal track, did not allow for fair play, but kept the advantages for the insiders and caused additional disadvantages for the outsiders. Therefore it did not bring about a fundamental change, but perpetuated and – as we can see – even deteriorated the problems that had existed already before. Therefore it is common sense that rules are necessary. Yet, the existence of rules per se is not sufficient. It is necessary to have good and efficient rules that are applied in practice and bring about the effects wanted.

RULES 'FROM ABOVE' AND RULES 'FROM BELOW'

Rules cannot only be used as a tool 'from above', but also as a tool 'from below'. Regulations 'from above' comprise rules on the economic power play, e.g. trade regulations, customs, intellectual property, pricing, export and import quotas, exchange rates, etc. Such rules determining the economic and financial interaction have to be complemented by rules 'from below'. The latter do not define the rules of the game directly, but make clear in how far economic activities have repercussions on social life and draw red lines.

If we want to stretch the metaphorical approach a bit further we can say that the 'standards from below' define that, whatever the rules of the game, the outcome must be such as to allow every player to win at least one little ball. If there are some who only lose and always lose, they will not be able to survive. That means we have to define some rules as a basic survival kit.

At the national level we have seen that the interplay of regulations 'from above' and 'from below' is useful. We need both economic and financial law

to set the economy going and social law in order to provide a basic safety net. We wish something similar at the international level, but we are still very far away from this goal.

The present paper deals with international social law and analyses the interplay between regulations, regulators, controllers and governments in this field. The basic question is in how far social standards can be a valid tool to prevent or, if prevention is not possible, to respond to distortions in the economic sphere.

THESES ON INTERNATIONAL SOCIAL LAW

The effects of international social standards can be summed up in the following ten theses:

- 1) Despite the elaboration of international social standards for over one century social inequalities on the world-wide scale have not been erased and probably not even been reduced. They are as drastic as they have always been.
- 2) International social standards have not played a significant role neither in preventing world economic, financial and social crises, nor in mitigating the consequences.
- 3) Social standards at the national level have had a much greater success story. At least to a certain extent they have helped to smooth out social inequalities and to prevent large-scale misery in the event of economic and financial crisis.
- 4) The transfer of success models from the national level to the international level will rarely have the effects wanted.
- 5) There is always a clash of interests in defining international social standards.
- 6) Regional social standards tend not to be very different from universal ones.
- 7) Social standards are either too abstract or too concrete.
- 8) Law-making at the international level tends to be very bureaucratic, slow and inflexible. The same is true for control mechanisms.
- 9) International social law might have unexpected positive effects.
- 10) Despite all problems and draw-backs it is necessary to continue on the path of determining social standards at the international level.

These ten theses will be elaborated further in the paper. The term 'international social standards' and 'international social law' is understood in the

broadest sense comprising both hard and soft law, both labour law and social security law, both regional and universal international law.

First, despite the elaboration of international social standards for over one century social inequalities on the world-wide scale have not been erased and probably not even been reduced. They are as drastic as they have always been.

It is difficult to give an exact date for the beginning of international social legislation.

The first visible step after the theoretical discussion of international social standards for many decades since the end of the 18th Century was the organisation of an International Conference in Berlin in 1890 which brought together the main industrialised countries basically accepting the necessity of international regulations in the social field. Although the Conference was a failure as the participating 13 States could not agree on binding norms, in the doctrine of international law the initiative was understood as something new, even as something challenging the traditional concept of international law. Thus Alphonse Rivier interpreted the new approach as ‘utopia that could, up to the present time, exert its disastrous effects only in national legislation’.²

The first tangible result was the elaboration of two international conventions that were deemed necessary to counteract major social abuses: the *International Convention on the Prohibition of the Use of White (Yellow) Phosphore*³ and the *International Convention on the Prohibition of Night Work of Women in Industries*,⁴ both dating back to 1908. The first convention aimed to improve the detrimental conditions in the production of matches and thus focused on workers’ protection. The second convention shows that night work of women – almost universally accepted nowadays – was seen as a shocking sign of social and moral decline at the beginning of the 20th century. The prohibition was also understood as an instrument of workers’ protection. So we might take those two conventions as the starting-point for international legislation protecting a certain group of people against exploitation for economic profit.

As the elaboration and ratification of those conventions did not engender further standard-setting activities, the real starting-point of internation-

² Rivier, *Droit des gens*, Tome I, 1896, p. 362.

³ Mahaim, *Droit international ouvrier*, 1913, p. 366 et seq.

⁴ Mahaim, *Droit international ouvrier*, 1913, p. 371 et seq.

al social legislation has to be seen in 1919 when the International Labour Organisation was founded on the basis of the Versailles Treaty. In 1919 international law-making in the field both of labour and social law was *de iure* and *de facto* institutionalised.

Social differences were enormous at that time. Whereas Europe, at least the Western part, was already highly industrialised, but suffered from the consequences of the First World War, most of the territories of the world were still under colonial domination. The discrepancies between the rich and the poor were outraging, both within the States and between the States.

Although the world has changed dramatically since – with very few exceptions there are no more colonies, more than sixty years have passed since the last World War –, we are confronted with the same problems: the poorest can hardly survive whereas in a small part of the world the lack of clean water and hunger are almost unknown.

About 200 conventions in the field of labour and social law,⁵ major codifications of social rights as a part of human rights law⁶ and countless resolutions and other soft law instruments could not visibly change the face of the world.

Second, international social standards have not played a significant role neither in preventing world economic and social crises, nor in mitigating their consequences.

Law-making in the social field was always reactive and not proactive. The idea to elaborate social standards against the misuse of economic power and the distortion of competition was an answer to the negative consequences of industrialisation and economic laissez-faire systems leading to the exploitation of the weakest members of societies. Thus it was the credo of enlightened entrepreneurs and social reformers such as Robert Owen and Daniel Legrand that effective measures against unfair labour conditions have to be taken at the international and not at the national level in order to avoid disadvantages for progressive law-makers.

The foundation of the International Labour Organisation was pushed by the shock of the First World War, which was, at least partially,

⁵ Up to 2010 the International Labour Organisation has adopted 188 conventions and 199 recommendations.

⁶ The most important is the International Covenant on Economic, Social and Cultural Rights.

explained as an unavoidable consequence of social tensions and disequilibrium between the states.

The same is true for the impetus to define international human rights after the Second World War. It is a lesson learnt from the human sufferance during the World War that both 'freedom from fear' and 'freedom from want' form the basis of human dignity. Thus Article 22 and Article 25 of the Universal Declaration of Human Rights can be considered as a reaction to the deep and all-embracing social crisis brought about by completely misguided politics in the 1930s and 1940s:

Everyone, as a member of society, has the right to social security and 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 (Art. 22).

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (Art. 25 para. 1).

These norms are not binding per se – if they are not interpreted as part of customary international law –, but the basic ideas were taken up in subsequently elaborated international conventions such as Convention No. 102 'Minimum standards in social security' (1952) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The relevant provisions in the International Covenant on Economic, Social and Cultural Rights read:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance (Article 9).

The States Parties to the present Covenant 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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent (Article 11 para. 1).

Such standards coming 'from below', from the social area, are not a tool to prevent international financial crises with disastrous economic and

social consequences as they cannot influence the rules applied in international financing. The question is if they could mitigate the consequences of a crisis. Theoretically this might be the case. As it is true that it is not possible to redistribute more than what has been earned, in the case of a crisis it is necessary to make cuts. Social standards could avoid cuts that hit the most vulnerable groups and push people below the subsistence level. If taken seriously, States could be forced to guarantee the rights of the poorest under all circumstances and to spare them from cuts.

But we have to realize that the social security and poverty alleviating human rights standards we currently have were not meant to be an immediate relief system. They were set up to gradually transform the existing systems and to improve social coherence in national societies.

Thus Article 2 of the International Covenant on Economic, Social and Cultural Rights reads:

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.

There is no explicit provision in the Covenant on crisis management. Nevertheless, due to economic recession in the 1990s there has been a fierce discussion about the admissibility of the reduction of social benefits. The official comment given by the Committee on Economic, Social and Cultural Rights to this problem shows more open questions than answers. It defines the prohibition of retrogression as a rule and tries to circumscribe the exemptions. The essential idea is that, if retrogressive measures are unavoidable, certain procedural safeguards have to be followed, there has to be a balance of interests, and a minimum essential level of social rights has to be guaranteed.⁷

⁷ Cf. the General Comment given by the Committee on Social Rights on Article 9 of the ICESCR: 'There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b)

Although this interpretation is not binding and not generally accepted, we can basically confirm that international law obliges States – at least those who have ratified the relevant documents, especially the ICESCR – to address first the needs of the most vulnerable persons, if redistribution of scarce benefits is necessary in an economic crisis. But even if we accept this rule as part of international law, unfortunately, the mechanism set up to enforce it is not effective.

Let us assume a State violates this rule and defines as a political priority the compensation of those who have lost money on bank accounts in State owned banks without having due regard to the needs of the poorest in the country. Such a failure to fulfil the international obligations would be criticised years later in the framework of the regular supervision cycle. There might be a short – diplomatic – remark in the Concluding Observations of the Committee on Economic, Social and Cultural Rights. The State Party would probably be called upon to change its policy. But legally the Concluding Observations are not binding. The control procedure is understood as a dialogue. That means – a State violating its obligations does not have to face serious consequences.

Therefore the whole mechanism is very soft and – ineffective.

Third, social standards at the national level have had a much greater success story. At least to a certain extent they have helped to smooth out social inequalities and to prevent large-scale misery in the event of economic and financial crisis.

Contrary to international law, national law can help to avoid disastrous social consequences in the aftermath of a world financial crisis. This can be explained with an example. During the world financial crisis 2008 Germany as an exporting nation suffered big losses in major industrial branches such as the car industry and steel industry. As a consequence of the losses it was

alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level’.

expected that workers would be dismissed and unemployment would rise considerably. Yet, the national legislator could react immediately and guarantee 'Kurzarbeitergeld'. That means that the employers could reduce the working hours and pay proportionally lower salaries. The State paid compensation to the workers. Thus a break-down of the enterprises and a significant rise of the unemployment rate could be avoided at least in the short term; the long-term consequences remain to be seen.

That means that national law can be used as a tool to overcome difficulties resulting out of unexpected crises. It is possible to design flexible, tailor-made measures and to react, if need be, spontaneously.

Fourth, the transfer of success models from the national level to the international level will rarely have the effects wanted.

It has always been tempting to transfer ideas and models that have worked out well at the national level onto the international level. One example might be social security. In the 1880s in Germany the so-called Bismarckian model of social security was developed. Thus a system of invalidity and old age pensions, a system of workers' compensation and a health insurance system were set up. This experimental – and at the time very controversial – approach proved to be beneficial to all and was soon developed further including more groups of the population and more branches of social security. At the same time it was copied in other countries.

The insurance model developed at the national level was transposed to the international level and served as an example for several ILO conventions, e.g. on sickness insurance, workers' compensation, old age insurance, invalidity insurance, survivors insurance and unemployment provision. Yet, these conventions were only scarcely ratified. After the Second World War the ILO developed a more comprehensive system that comprised not only the Bismarckian insurance model, but also the Beveridge model. Although it is a flexible instrument and allows for a selection of social risks to be covered it has been ratified by less than 25% of the member States of the ILO. The reasons for this reluctance to accept an international model even if it has proved advantageous at the national level are manifold. The model is based on the needs of a society in a highly industrialised country and does not really address the problems of differently structured societies. It prescribes a model that is not tailor-made for the specific situation in other countries. It is coined by the perceptions of the time and may be understood as too narrow and too rigid from different perspectives.

If transferred to societies living under completely different conditions a success story can quickly turn into a failure. This has been extensively analysed under the slogan of 'transplantation of law'.⁸ Nowadays, in legal literature scepticism outweighs optimism in this regard.

Fifth, there is always a clash of interests in defining international social standards.

Countries do have different competitive advantages defining their position in world economy. Some can produce high quantities in a short period of time. Some stand out in producing high quality products. Some have specific raw materials for export. Some can manufacture at very low prices.

When setting social standards which define minimum standards for working conditions or minimum standards for a social security net, State parties are always afraid to lose their respective competitive advantages. Generally, it can be said that Asian countries⁹ are especially reluctant to subscribe to international social standards. Social standards defining maximum working hours, minimum paid holidays etc. are – at least in the short term – considered as a factor hindering production at low prices. Therefore low-price countries might have an incentive not to subscribe to them. In other countries politicians expect advantages in the domestic power-play if they push for high standards. In the end compromises can be often found only at a very low level. Thus, for example, the complete abolition of child labour is seen to endanger production and survival in some poor countries. Therefore a universal compromise – accepted by 171 countries out of 193 – could only be found in banning the so-called 'worst forms of child labour'.¹⁰

Divergent interests can also be seen in the conception of gender equality. Whereas in Western countries it is understood to ban all sorts of protective measures that are not directly linked to maternity, developing coun-

⁸ See Alan Watson, *Legal Transplants. An Approach to Comparative Law*, 1974; see also the critique of this idea in the writings of Daniel Legrand, *The Impossibility of Legal Transplants*, *The Maastricht Journal of European and Company Law* (1997), p. 111 et seq.

⁹ Former Soviet States tend to ratify the conventions, but not to report on them; the whole process does not seem to be taken seriously.

¹⁰ Convention No. 182 of the ILO concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Date of coming into force: 2000).

tries tend to uphold the more traditional approach allowing for 'protective prohibitions' such as the prohibition of night work for women or the prohibition of underground work for women. The clash can be seen in the attitude towards ILO convention No. 87 on the prohibition of night work for women elaborated in 1948. It was denounced in the 1990s by 21 mostly European countries whereas it is still valid for 25 non-European countries. Therefore it is difficult to define what a 'universally accepted standard' might be in this field.¹¹

That means that the different attitudes towards social standards do not only mirror different strategies in economic policy, but also different societal developments as well as different opinions and views on social cohesion and social life.

Sixth, regional social standards tend not to be very different from universal ones.

On the basis of the fifth thesis it might be expected that regional standards are very different from universal standards. It might be easier to agree on common standards in less heterogeneous groups of countries. The opposite is true. Europe has the most elaborate system of social standards. Yet, they mostly copy universal standards. Even if higher standards are elaborated, they tend to be applied only on a selective basis.

Quite often we have parallel standards: the International Covenant on Economic, Social and Cultural Rights at the universal level and the European Social Charter at the European level, the ILO Convention of Social Security at the universal level and the European Code of Social Security at the European level. The differences of the basic instruments are marginal. What matters more are further developments. Thus, the European Code of Social Security is complemented by a Protocol defining higher standards. But at the international level there is also a follow-up to the basic standards.

An interesting difference, however, is the design of the control and implementation systems. The difference is especially marked in the field of civil and political rights. Whereas the International Covenant on Civil and Political Rights and the European Convention on Human Rights are simi-

¹¹ The 'Night Work convention' elaborated as a compromise in 1990 has been ratified only by 11 countries and cannot be called a success story either.

lar, the jurisprudence built up by the European Court of Human Rights cannot be compared to the non-binding conclusions of the Human Rights Committee. In the field of social rights the picture is, however, more complex. For example, the development of the Collective Complaints procedure on the basis of the European Social Charter (Revised) was an innovative approach as it allowed complaints of NGOs or other associations. But for the ILO conventions – at the universal level – we always had similar possibilities. And even the International Covenant on Social and Economic Rights has been complemented by a Protocol on an Individual Complaints procedure, which is expected to enter into force soon.

Yet, regional differences do matter. If regional standards are defined they might be similar to universal ones. But elaborate regional social standards exist only in Europe and in Latin America; in the post-soviet world they are more theoretical than practical. There are no comparable initiatives in Africa, Asia,¹² North America and Canada.

Seventh, social standards are either too abstract or too concrete.

The wish ‘to have rules and regulations’ is vague and undefined. The central question is how concrete such standards can be, which obligations they can fix for whom.

It might be easier to define negative standards – to prohibit gender or race discrimination or to prohibit forced labour. But even that is not ‘easy’ if we have a closer look at the respective legal terms. Can the prohibition of race discrimination ban positive action? How can we operate with the notion of ‘race’? In how far is prison labour allowed despite of the prohibition of forced labour?

Social standards are usually not expressed in negative, but in positive terms. Here, too, it is possible to have recourse to very abstract terms, such as the guarantee of the ‘minimum subsistence level’ or the obligation ‘to set up a system of social security’. But does a ‘social security system’ necessarily have to comprise benefits in the case of unemployment? Should support in the case of old age or in the case of sickness have priority? Can the standards worked out for European countries have any meaning for African countries?

¹² A first step can be seen in the Bangalore declaration adopted in 2005. But it does not contain any ‘standards’, but merely calls upon action to solve pressing problems especially in the mega cities.

So we can see that the international social standards oscillate between standards that are too abstract and standards that are too concrete. On the one hand we define the obligation 'to set up a social security system', on the other hand we prescribe exactly what percentage of medical costs has to be replaced in case of sickness. This shows a basic dilemma of international social standards: if they are concrete, they can be applied, but they cannot be applied universally; if they are abstract, they can be applied universally, but nobody really knows what they mean.

Eighth, law-making at the international level tends to be very bureaucratic, slow and inflexible. The same is true for control mechanisms.

The list of problems we have to face when defining international social standards is very long. One more difficulty should not remain unmentioned. Law-making at the international level is much more complex and time-consuming than law-making at the national level. We have already talked about the capacity of national law to be used as a tool to react in emergency situations, a capacity international law in the social field, as a rule, does not have.

At the international level the elaboration of new social standards takes on average more than one decade. One depressing example was the revision of the European Code of Social Security. This convention was considered to be outdated as it mirrored the world of work in the 1950s. Therefore in 1973 the expert committee on social security of the Council of Europe stated the necessity to work out a new regulation. A recommendation of the Parliamentary Assembly in 1979 started the process of revision. In November 1990 the new instrument was finally adopted and opened for signature. Up to now (2010) the new revised Code has been ratified only by one country and has therefore not yet entered into force.

It is not difficult to explain why law-making at the international level is so time-consuming. The debate has to integrate not only the governments of 193 States, but also non-State actors such as trade unions, employers associations and non-governmental organisations. Within the framework of the ILO the process of forming an international public opinion has been institutionalised in a balanced form. Yet, this is linked to a huge bureaucracy – for the international labour conference where every year in June about 6,000 delegates of all the member countries come together, about 5,000,000 pages of paper are printed.

The control mechanisms are as bureaucratic and slow as the law-making mechanisms. Here, too, some numbers might illustrate the problems: in 2010 the control committee supervising the implementation of the ILO conventions had to check 2,053 State reports within two weeks time. More than 1,000 reports due were not sent in.¹³ As a rule, the reports reflect the legal developments in the five years preceding the control session. Therefore the criticism of the expert committee might be directed against legal regulations or practice that does not exist any more.

Yet, it is easy to criticise. It is much more difficult to develop a more efficient system that does not violate the prerequisites of a fair trial.

Ninth, international social law might have unexpected positive effects.

International social standards are set up to be observed and followed. This can imply the change of legislation, the change of judicial practice, the change of orders given by the executive. Cases of progress can be observed if, for example, a certain group excluded from certain benefits is included, a jurisprudence denying certain fundamental rights is given up, a new policy is elaborated to address an important social problem.

International social standards are probably most effective if they are used as an argument in the political debate within a country. A historical example would be the fight for freedom of association in Poland in the early 1980s where ILO standards could serve as point of reference. The same is true for many countries in Latin America where the criticism of the denial of basic social rights is reinforced by international standards. In European countries nowadays it seems that comparative studies of the OECD have more impact if they show social problems in facts and figures.

Yet, international social standards might have surprising 'side-effects' and be more effective than expected. Examples might be self-obligations of big international players polishing up their image by stressing that their policy and philosophy is based on fundamental social rights. Countries such as the United States take international social standards as points of reference in trade agreements or other international treaties although they themselves are reluctant to ratify the relevant conventions.

¹³ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III Part 1 (a), Geneva 2010, p. 12.

It is difficult to measure the development of a 'social conscience' in the globalised world. But it would be short-sighted to neglect the long-term influence of international social standards.

And that is why I come to my tenth and final thesis: despite all problems and draw-backs it is necessary to continue on the path of determining social standards at the international level.