

1-1-2010

Poverty and Constitutional Rights

Monica Pinto

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Recommended Citation

Pinto, Monica (2010) "Poverty and Constitutional Rights," *Penn State International Law Review*: Vol. 28: No. 3, Article 12.
Available at: <http://elibrary.law.psu.edu/psilr/vol28/iss3/12>

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Poverty and Constitutional Rights

Prof. Mónica Pinto*

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International human rights law assumes that democracy is the best context for human rights to be fully enjoyed and exercised.¹ Accordingly, permissible restrictions to human rights should pass the test of being “necessary in a democratic society.”² Accordingly, everyone is

* University of Buenos Aires.

1. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*]. Paragraph 8 of the Vienna Declaration provides:

Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.

Id. ¶ 8.

2. See Oscar M. Garibaldi, *On the Ideological Content of Human Rights Instruments: The Clause “In A Democratic Society,”* in *CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN* 23, 23-68 (Thomas Buergenthal ed., 1984).

entitled to a social and international order in which human rights and fundamental freedoms can be fully realized.³ Thus, governments are under the duty to “ensure” the free and full exercise of the protected human rights to every person subject to their jurisdiction. That

[O]bligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.⁴

When men, women and children are in a situation in which they cannot exercise nor enjoy their human rights because they are lacking resources, they have no access to human development, they are socially excluded, and they are deprived from citizenship. In such a case, the relationship between poverty and human rights appears as unavoidable. Poverty is, then, one of the main challenges to democracy and human rights.

In the next few pages, I will introduce the more important expressions of the relationship between poverty and human rights. I will then stress the salient features of a rights perspective when dealing with poverty and some notes will follow on the way in which Latin American Constitutions handle human rights. The way in which the Inter-American System dealt with the periodical reporting under the Protocol of San Salvador will illustrate the rights approach.

POVERTY AND HUMAN RIGHTS RELATIONSHIP

In the 1990s, the human rights community decided to start studying the phenomenon of poverty and its relationship with human rights. The World Conference on Human Rights declared in Vienna in 1993 that “[T]he existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.”⁵ Further it affirmed that “extreme poverty and social

3. Universal Declaration of Human Rights, art. 28, G.A. Res. 217A, ¶¶ 71-72, U.N. GAOR, 3d. Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

4. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 166 (July 29, 1988).

5. Vienna Declaration, *supra* note 1, § 14.

exclusion constitute a violation of human dignity.”⁶ Five years later, the UN Commission on Human Rights went a step further and reaffirmed that “extreme poverty and exclusion from society constitute a violation of human dignity and that urgent national and international action is therefore required to eliminate them”.⁷ At that point, the issue was whether poverty is a violation of human rights or a denial of them. In any case, no one questions that poverty injures human dignity.

The jurisprudence of the Inter-American system has held that

The duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to *the deprivation of the right to live with dignity*. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.⁸

In the wake of the 21st century, the UN Committee on Economic, Social and Cultural Rights (CESCR) asserted that poverty constitutes a denial of human rights.⁹ Superseding economic approaches, CESCR proposes that today, poverty is usually understood as the lack of basic capabilities to live in dignity.¹⁰ This definition recognizes poverty’s broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion.¹¹ Moreover, “in the light of the International Bill of Rights, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.”¹²

According to the Human Development Report 2000 poverty is an infringement on freedom, and the elimination of poverty should be

6. *Id.* § 25.

7. Human Rights and Extreme Poverty, C.H.R. Res. 1998/25, ESCOR Supp. (No. 3) 94, U.N. Doc. E/CN.4/1998/25 (Apr. 17, 1998).

8. Villagrán-Morales et al. v. Guatemala, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, § 4 (Nov. 19, 1999) (Trinidad & Burelli, JJ., concurring) (emphasis added).

9. U.N. Comm. Econ., Soc. & Cult. Rts. [CESCR], *Poverty and the International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 4, § 1, U.N. Doc. E/C.12/2001/10 (Dec. 16 1996).

10. *Id.* ¶ 7.

11. *Id.*

12. *Id.* ¶ 8.

addressed as a basic entitlement and a human right.¹³ The Report calls for a framework for development, trade and investment that respects, protects and promotes human rights, encouraging greater commitment by donor governments to provide adequate funding of human rights priorities. Furthermore, it suggests that debt, economic policies, and structural adjustment programs should be assessed in terms of their impact on human rights.¹⁴

In 2003, the Office of the High Commissioner on Human Rights elaborated a document on Human Rights and Poverty Reduction¹⁵ where it is stated that “we need a definition of poverty that refers to the non-fulfillment of human rights, but without delinking it from the constraint of economic resources.”¹⁶

DEALING WITH POVERTY FROM A RIGHTS PERSPECTIVE

Democratic governments should deal with poverty from a human rights approach. It means assuming exclusion and excluded persons as social actors in the strategy, superseding the assistance approach, and replacing it by a rights approach.

In a human rights approach, right-holders have claims and States have duties. There is room for a participated elaboration of policies and strategies. That is the case of the communities of Bolivia, Dominican Republic, Grenada, Guyana, Haiti, Honduras and Nicaragua that participated in the Poverty Reduction Strategies of the World Bank.¹⁷

The struggle against poverty requires the strict enforcement of economic, social, and cultural rights.¹⁸ The point at stake is not whether they can be brought to the courts but that they should be the object of enforceable public policies.

Human rights treaties usually contain a clause whereby state parties have the duty to take the necessary steps to adopt legislative or other measures as may be necessary to give effect to the protected rights.¹⁹

13. U.N. Development Programme [UNDP], Human Development Report 2000, at 61-63 (Comms. Dev. Inc. ed., Global Rep. 2000) (*prepared by Philip Alston et al.*), available at http://hdr.undp.org/en/media/HDR_2000_EN.pdf.

14. *Id.* at 9, 69.

15. U.N. Office of the High Commissioner for Human Rights [OHCHR], *Human Rights and Poverty Reduction: A Conceptual Framework*, at 6, HR/PUB/04/1 (Dec. 2003), available at <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>.

16. *Id.*

17. *See generally* The World Bank Group, The Poverty Reduction Strategy Initiative, <http://www.worldbank.org/ieg/prsp/> (last visited Feb. 21, 2010).

18. All Latin American States are parties to the International Covenant on Economic, Social, and Cultural Rights. Fourteen of them are parties to the regional instrument dealing with the same rights.

19. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2(2), U.N. OHCHR, 999 U.N.T.S. 171, 173 (Dec. 16, 1966) [hereinafter ICCPR],

The theory behind these provisions is that every state party will take the necessary steps to prepare its legal framework in order to be able to enforce the treaty. Additionally, these treaty provisions usually leave it to the concerned states to determine the method of integrating the relevant treaty “in accordance with its constitutional processes and with the provisions of the present Covenant.”²⁰

LATIN AMERICAN CONSTITUTIONS AND HUMAN RIGHTS

In Latin America, the principle of the supremacy of constitutional rules is in force in the great majority of countries. Some Constitutions recognize a higher ranking to international treaties over domestic legislation like the Constitution of Paraguay of 1992²¹ and the Argentinean Constitution of 1994;²² others keep silent on the point even when legal authorities tend to assume that they also recognize the prevalent international law, like the Uruguayan Constitution of 1997.²³

Still others do make a distinction between human rights treaties and other treaties. The Argentine Constitution, in force since August 24, 1994 provides for the constitutional hierarchy of eleven international instruments (eight international treaties and two international declarations) “in the full force of their provisions,” that is together with the reservations and the declarations made, so that they do not repeal any section of the First Part of this Constitution and are to be understood as

available at <http://www2.ohchr.org/english/law/pdf/ccpr.pdf>; American Convention on Human Rights, Art. 2(1), 1144 U.N.T.S. 143, 145 (Jul. 18, 1978).

20. ICCPR, *supra* note 21.

21. See PARA. CONST. (National Constitution of the Republic of Paraguay, 1992), art. 137(1) (“La ley suprema de la República es la Constitución. Esta, los tratados, convenios y demás acuerdos internacionales aprobados y ratificados, las leyes dictadas por el Congreso y otras disposiciones jurídicas de inferior jerarquía, sancionadas en consecuencia, integran el derecho positivo nacional en el orden de prelación enunciado.”), translated in http://www.servat.unibe.ch/law/icl/pa00000_.html [The Constitution is the supreme law of the Republic. The Constitution, the international treaties, conventions, and agreements that have been approved and ratified by Congress, the laws dictated by Congress, and other related legal provisions of lesser rank make up the national legal system, in descending order of preeminence, as listed.].

22. See CONST. ARG. (Constitution of the Argentine Nation, 1994) § 75(22), translated in <http://www.biblioteca.jus.gov.ar/Argentina-Constitution.pdf> (“Treaties and concordats have a higher hierarchy than laws.”).

23. See URU. CONST. (Constitution of the Oriental Republic of Uruguay, 1997) art. 85(7): (“A la Asamblea General compete: Decretar la guerra y aprobar o reprobado por mayoría absoluta de votos del total de componentes de cada Cámara, los tratados de paz, alianza, comercio y las convenciones o contratos de cualquier naturaleza que celebre el Ejecutivo con potencias extranjeras.”).

complementing the rights and guarantees recognized herein.²⁴ These international instruments, moreover

[S]hall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House.

In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.²⁵

Because of the operation of this provision, international human rights obligations became constitutionalized. Other Constitutions provide for international rules supremacy over municipal law, for example the Constitution of Peru of 1979,²⁶ of Guatemala of 1994,²⁷ of Colombia of 1991,²⁸ of Bolivia of 2009.²⁹

24. See ARG. CONST. (Constitution of the Argentine Nation, 1994) § 75(22), available at http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf.

25. *Id.*

26. See PERU CONST. (Constitution of the Republic of Peru, 1979) (1993) arts. 101, 105.

27. See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Assistance to Guatemala in the field of human rights*, ¶ 113, U.N. Doc. E/CN.4/1994/10 (Jan. 20, 1994) (prepared by Monica Pinto); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Assistance to Guatemala in the field of human rights*, ¶ 133, U.N. Doc. E/CN.4/1995/15 (Dec. 20, 1994) (prepared by Monica Pinto); U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Assistance to Guatemala in the field of human rights*, ¶ 63, U.N. Doc. E/CN.4/1996/15 (Dec. 5, 1995) (prepared by Monica Pinto).

28. See COLOM. CONST. (Constitution of the Republic of Colombia, 1991) art. 93 ("Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno. Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia.") [International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.], translated in http://confinder.richmond.edu/admin/docs/colombia_const2.pdf (last visited Feb. 21, 2010).

29. See BOL. CONST. (Constitution of the Plurinational State of Bolivia, 2009) art. 256, §§ I, II ("I. Los tratados e instrumentos internacionales en materia de derechos humanos que hayan sido firmados, ratificados o a los que se hubiera adherido el Estado, que declaren derechos más favorables a los contenidos en la Constitución, se aplicarán de manera preferente sobre ésta.

"II. Los derechos reconocidos en la Constitución serán interpretados de acuerdo a los tratados internacionales de derechos humanos cuando éstos prevean normas más favorables.").

Article 5(2) of the Constitution of Chile of 1980, as amended through 2005, provides for the duty of State bodies to respect and promote fundamental rights of the human being as granted by the Constitution and international treaties ratified by Chile and in force.³⁰ In such a case, it is crucial to keep in mind the self-executing nature of international human rights law as a *iuris tantum* principle.³¹

The Constitution of Uruguay provides for the application of “implicit” rights, and that constitutional provisions dealing with rights of individuals should not be prevented from application because the respective rules have not been yet adopted.

Brazilian Constitution of 1988 embodies the “*prevalência dos direitos humanos*,” as one of the cardinal principles in the international relations of the State.³² Accordingly, it has been said that it establishes the Brazilian engagement towards the international protection of human rights.³³ At the same time, Article 5, second paragraph, states that rights protected by the Brazilian Constitution do not exclude other rights whose source is to be found in the regime of international relations of the country.³⁴ Legal authorities agree that the constitutional status of international treaties has therefore been established.³⁵

Merely fulfilling the obligation of adopting treaty measures, however, is not enough. The Inter-American Court on Human Rights (Inter-American Court), for example, stresses that “[t]he obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with

30. See Rodrigo Díaz Albónico, *La Reforma al Artículo 5° de la Constitución Política*, in *NUEVAS DIMENSIONES EN LA PROTECCIÓN DEL INDIVIDUO* 199-208 (J. Irigoien ed., Universidad de Chile 1991).

31. See 2 WM. MAWDESLEY BEST, *A TREATISE ON THE PRINCIPLES OF EVIDENCE AND PRACTICE AS TO PROOFS IN COURTS OF COMMON LAW: WITH ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES* § 43 (2d ed. 1854) (describing *iuris tantum* as a principle which holds that “the law assumes the existence of something until it is disproved by evidence”).

32. Constituição Federal (Constitution of the Federative Republic of Brazil, 1988) art. 4(II) (“A República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios: . . . prevalência dos direitos humanos.”) [The international relations of the Federative Republic of Brazil are governed by the following principles: . . . prevalence of human rights.], translated in <http://www.v-brazil.com/government/laws/constitution.html> (last visited Feb. 21, 2010).

33. See, NADIA DE ARAUJO & INÉS DA MATTA ANDREIUOLO, *A Internacionalização dos Tratados no Brasil e os Direitos Humanos*, in *OS DIREITOS HUMANOS E O DIREITO INTERNACIONAL* 63, 102 (Carlos Eduardo de Abreu Boucault & Nadia de Araujo comp. 1999) (quoting Pedro Dallari and Flavia Piovesan).

34. Constituição Federal art. 5, para. 2.

35. DE ARAUJO & DA MATTA ANDREIUOLO, *supra* note 36, at 103 (quoting Celso de Albuquerque Mello, Antonio Augusto Cançado Trindade and Flavia Piovesan).

this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”³⁶

POVERTY AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS—PERIODIC REPORTS ON SYSTEMS OF PROGRESSIVE HUMAN RIGHTS INDICATORS

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, Protocol of San Salvador embodies the economic, social and cultural rights protected by the Inter-American System.³⁷ Article 19 provides for periodical reporting on the measures taken by governments with a view to fulfilling their obligations under the Protocol.³⁸

At the Organization of American States General Assembly in 2005, member States adopted a resolution dealing with the Standards for the Preparation of Periodic Reports Pursuant to the Protocol of San Salvador.³⁹ They decided that the submission of reports shall be governed by the principle of progressiveness—that is the notion of gradual advancement in the creation of the conditions necessary to ensure the exercise of an economic, social, or cultural right—and by a system of progress indicators.⁴⁰ The document states:

A system of progress indicators makes it possible to determine, with a reasonable degree of objectivity, distances between the actual situation and the standard or desired goal. Progress in the area of economic, social, and cultural rights can be measured on the premise that the Protocol of San Salvador expresses a standard against which to assess, on one hand, constitutional compatibility, legal and institutional development, and governance practices of states; and, on the other hand, realization of the aspirations of different sectors of society expressed, *inter alia*, through political parties and civil society organizations.⁴¹

36. Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 167. *See also* International Covenant on Civil & Political Rights [ICCPR], Human Rights Comm., General Comment No. 3: Implementation at the National Level, art. 2, ¶ 1, U.N. Doc. CCPR/C/21 (July 27, 1981).

37. *See* Org. of Am. States, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador), Nov. 17, 1988, O.A.S.T.S. No. 69, *reprinted in* 28 I.L.M. 161 (1989), <http://www.oas.org/juridico/english/treaties/a-52.html> [hereinafter Protocol of San Salvador].

38. *Id.* at art. 19.

39. *See* Org. of Am. States, *Standards for the Preparation of Periodic Reports Pursuant to the Protocol of San Salvador*, G.A. Res. 2074, AG/RES 2074 (XXXV-O/05) (June 7, 2005).

40. *Id.* at Context of the Proposal.

41. *Id.* ¶ 5.2.

Two points are also worth being mentioned. First, all the information furnished should bear in mind gender, groups with special needs, ethnic and cultural diversity, and participation in government. In this way, the rights protected under Articles 15-18 would have a crosscutting effect and make it possible to obtain meaningful information on gender and labor, gender and health, gender and education, children and labor, children and education, the elderly and social security, and persons with disabilities and education, among other possible combinations.⁴² In this way, information relating to Articles 15-18 would be presented in connection with information pertaining to other articles. Ethnic and cultural diversity and civil society involvement in progress in legislative and public policy reform would also provide crosscutting perspectives.

The second is that, in principle, regressive measures are incompatible with full implementation of the Protocol.⁴³ It should be further recalled that the temporary nature of certain regressive measures arising from exceptional circumstances are subject to a different evaluation. At the same time, progressiveness, as a feature of the obligations adopted by the states parties concerned, requires a proactive attitude, and not simply inaction, in order to move toward the proposed objective.

The profile of the document adopted by the Inter-American System tends to avoid any duplication with the criteria and format adopted for the periodical reporting obligation under the ICESCR but also, and perhaps more importantly, to provide States with a tool for public policy in this field.

REESTABLISHING CITIZENSHIP

Poverty from the human rights perspective is a challenge that the inter-American system has yet to assume fully in its many dimensions. It is a complex reality that the States all too often hold aloft and politicize, but rarely incorporate into a body of public policies likely to engender timely, relevant actions for tackling causes effectively.⁴⁴

Poverty affects civil as well as political rights. As stated at the beginning, it deprives from citizenship. The design of public policies in accordance with human rights in force should help to overcome poverty and should strengthen democracy.

42. See Protocol of San Salvador, *supra* note 40, arts. 15-18.

43. Regressive measures are understood as any provisions or policies whose application entails a backward step in the enjoyment or exercise of a protected right.

44. See generally Inter-Am. Inst. of Human Rights, *Poverty From a Human Rights Perspective*, www.iidh.ed.cr.

