

## Poverty and Constitutional Rights

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Poverty is one of the main challenges that Latin American states face. The relationship poverty-human rights appears as unavoidable. It assumes a situation in which men, women and children are deprived from citizenship.

As far as the 90s, 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”<sup>1</sup>.

Further it affirmed that “extreme poverty and social exclusion constitute a violation of human dignity”<sup>2</sup>. 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”<sup>3</sup>.

Poverty is a violation of human dignity. In the jurisprudence of the Inter-American System, it has been 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”<sup>4</sup>.

In the wake of the 21st century, the UN Committee on Economic, Social and Cultural Rights asserted that poverty constitutes a denial of human rights<sup>5</sup>. Superseding economic approaches, the CESCR proposes that today, poverty is usually understood as the lack of basic capabilities to live in dignity. This definition recognizes poverty's broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion<sup>6</sup>. 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,

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<sup>1</sup> Viena Declaration and Programme of Action, A/CONF.157/23, §14

<sup>2</sup> Id. §25

<sup>3</sup> UN Commission on Human Rights, resolution 1998/25, Human Rights and extreme poverty

<sup>4</sup> I/A Court HR, Street Children (Villagrán Morales et al vs. Guatemala), Merits, sentenced November 19, 1999, Series C N°63, Concurring Opinion of Judges Cançado Trindade and Abreu Burelli, §4

<sup>5</sup> Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc.

E/C.12/2001/10, §1

<sup>6</sup> Id §7

capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights”<sup>7</sup>.

Democratic governments should deal with poverty from a human rights approach. It means assuming exclusion and excluded 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, Dominica, Grenada, Guyana, Haití, Honduras and Nicaragua that participated in the Poverty Reduction Strategies of the World Bank.

The struggle against poverty requires the strict enforcement of economic, social and cultural rights<sup>8</sup>. The point at stake is not whether they can be brought to the courts but that they be the object of 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<sup>9</sup>. 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.”<sup>10</sup>

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 1992<sup>11</sup> and the Argentinian Constitution of 1994<sup>12</sup>; 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<sup>13</sup>.

Still others do make a distinction between human rights treaties and other treaties. The Argentine Constitution in force from August 24, 1994 provides for the constitutional hierarchy of eleven international instruments (nine 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

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<sup>7</sup> Id. §8

<sup>8</sup> All Latin American States are parties to the International Covenant on Economic, Social and Cultural Rights and 14 of them are parties to the regional instrument dealing with the same rights

<sup>9</sup> International Covenant on Civil and Political Rights art. 2(2), opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, 173; American Convention on Human Rights art. 2(1), July 18, 1978, 1144 U.N.T.S. 143, 145

<sup>10</sup> ICCPR, supra note 7

<sup>11</sup> Artículo 137: 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.

<sup>12</sup> Artículo 75, inciso 22º: (...) Los tratados y concordatos tienen jerarquía superior a las leyes(...).

<sup>13</sup> Artículo 85 inciso 7º: 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.”.

Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall 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.

Because of the operation of this provision, international human rights obligations became constitutionalized. More or less in the same context, the Constitution of Perú of 1979<sup>14</sup>, of Guatemala of 1994<sup>15</sup>, of Colombia of 1991<sup>16</sup>, of Bolivia of 2009<sup>17</sup>. 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<sup>18</sup>. 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.

The Constitution of Uruguay provides that constitutional provision dealing with rights of individuals should not be prevented from application because of lacking of the respective rules.

Brazilian Constitution of 1988 embodies the “*prevalência dos direitos humanos*”, as one of the cardinal principles in the international relations of the State. Accordingly, it has been said that it means the Brazilian engagement towards the international protection of human rights<sup>19</sup>. At the same time, article 5, second paragraph, states that rights protected by the Constitution do not exclude other rights whose source is to be found in the regime of

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<sup>14</sup> Artículo 101: Los tratados internacionales celebrados por el Perú con otros Estados son parte del derecho nacional. En caso de conflicto entre el tratado y la ley, prevalece el primero.

Artículo 105: Los preceptos contenidos en los tratados relativos a derechos humanos tienen jerarquía constitucional. No pueden ser modificados sino por el procedimiento que rige para la reforma de la Constitución.

<sup>15</sup> See expediente N° 334-95. Also, UN documents E/CN.4/1994/10, #113; E/CN.4/1995/15, # 133; E/CN.4/1996 /15, # 63

<sup>16</sup> Artículo 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.

<sup>17</sup> Artículo 256. 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.

<sup>18</sup>See Rodrigo Díaz Albónico, "La Reforma al Artículo 5° de la Constitución Política" en *NUEVAS DIMENSIONES EN LA PROTECCIÓN DEL INDIVIDUO* (J.Irigoin ed.), Santiago de Chile, Instituto de Estudios Internacionales Universidad de Chile, 1991, 199-208

<sup>19</sup> See Nadia de Araujo e Inés da Matta Andreiuolo, "A internacionalização dos Tratados no Brasil e os Direitos Humanos", en *Os direitos humanos e o direito internacional*, comp.Carlos Eduardo de Abreu Boucault e Nadia de Araujo, Rio de Janeiro, Renovar, 1999, 63-114, at p.102 quoting Pedro Dallari and Flavia Piovesan

international relations of the country. Legal writings agree in that it means recognizing the constitutional footing of human rights treaties<sup>20</sup>.

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 this obligation--it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”<sup>21</sup>

The Protocol of San Salvador embodies the economic, social and cultural rights protected by the Inter-American System. Article 19 provides for periodical reporting on the measures taken by governments with a view to fulfilling their obligations under the Protocol.

At OAS 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<sup>22</sup>. 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. The document states that “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”.

Two points are also worth being mentioned. The first, all the information furnished should bear in mind gender, special needs groups, ethnic and cultural diversity, and participation in government. In this way, the rights protected under Articles 15 to 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. In this way, information relating to Articles 15 to 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, regressive measures, in principle, are incompatible with full implementation of the Protocol; it should be recalled that regressive measures are understood as any provisions or policies whose application

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<sup>20</sup> Id., p.103 quoting Celso de Albuquerque Mello, Antonio Augusto Cançado Trindade and Flavia Piovesan

<sup>21</sup> Velásquez Rodríguez v. Honduras Case, Inter-Am. Ct. H.R. (ser. C) No. 4, P 167 (July 8, 1988), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf). At the universal level, Office of the High Comm'r for Human Rights, Human Rights Comm., Int'l Covenant on Civil and Political Rights, General Comment No. 3: Implementation at the National Level (art. 2), U.N. Doc. CCPR General Comment No. 3 (July 29, 1981)

<sup>22</sup> AG/RES 2074 (XXV-0/05)

entails a backward step in the enjoyment or exercise of a protected right. 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.