9. Poverty as a human rights issue

What are the implications of the morality of human rights for what Mahatma Gandhi reportedly called “the worst form of violence:” poverty?¹

The specific requirements of the morality of human rights—the rights set forth in the Universal Declaration of Human Rights and/or in one or more of the several international human rights treaties that have followed in the Universal Declaration’s wake—are, as I explained in Chapter 1, rules of conduct mainly for government; in that sense, the morality of human rights is mainly a political morality. The part of that political morality with which I am concerned in this chapter consists of antipoverty rights: rights designed to provide the rights-holders with access—access they would otherwise lack—to one or more of the following resources in the amount required if one is to be able to live a minimally decent life: Food,² clothing, shelter, healthcare, and education. (The set of international human rights commonly called “economic and social rights” is broader than, but centrally includes, antipoverty rights.³)

¹ The source of the quotation, widely attributed to Gandhi, is not known.

Social and economic rights … were never “second generation rights.” It has been widely assumed that social rights (such as the right to food, work, education, and healthcare) emerged in the 20th century, as socialist additions to liberal “first generation” civil and political rights of the Enlightenment and Age of Revolutions. The persistence of this flawed chronology has obscured a much deeper history, one that the new book Social Rights and the Politics of Obligation in History explores.
Like the other rights set forth in the Universal Declaration and/or in one or more of the treaties, the antipoverty rights set forth there are specifications of the general requirement of the morality of human rights to “act towards all human beings in a spirit of brotherhood;” they represent a judgment about how, given both that requirement and other relevant considerations, every government should respond to the poverty in its midst: the poverty that afflicts some of the human beings, both citizens and noncitizens, over whom the government exercises political and legal authority.

As I noted at the beginning of Chapter 2, because some of the specific requirements of the morality of human rights—some of the rights set forth in the Universal Declaration and/or in one or more of the international human rights treaties—are reasonably contestable specifications of the general requirement, it is not surprising that some who accept the general requirement reject one or more of the specific requirements. Are the antipoverty rights set forth in the Universal Declaration and/or in one or more of the treaties reasonably contestable specifications of the general requirement? Put another way, is it reasonably contestable whether those antipoverty rights, or some of them, are true human rights? As recent studies of the emergence of neoliberal ideology have emphasized, vigorous arguments were made at the time the Universal Declaration was being drafted and have been made ever since to the effect that antipoverty rights are not true human rights—indeed, not only not true human rights, but, worse, antithetical to true human rights.4

Although the Universal Declaration of Human Rights includes antipoverty rights,5 the principal international human rights document setting forth such rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR).6 One of the principal ICESCR provisions is Article 9: “The State

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5 See Articles 22, 25, and 26.


The most elaborate transnational (regional) document setting forth antipoverty rights is the European Social Charter, a Council of Europe treaty that was adopted in 1961.
Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” Article 25(1) of the Universal Declaration clarifies what Article 9 of the ICESCR protects:

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.

Article 25(2) adds, “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

That the Article 9 “right of everyone to social security, including social insurance” is a human right—a “human right” in the relevant sense, the sense in which I explicated the term in chapter 1—is clear. Recall, from Chapter 1:

As the term “human right” is understood both in the Universal Declaration and in the several international human rights treaties that have followed in the Universal Declaration’s wake, a right is a human right, even if according to the right the rights-holders are not all but only some human beings, if the fundamental rationale for establishing and protecting the right—for example, as a treaty-based right—is that conduct that violates the right violates the Article 1 norm: “act towards all human beings in a spirit of brotherhood.

Article 9 and certain other ICESCR provisions—including Article 11, on “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing” and “the fundamental right of everyone to be free from hunger,” Article 12, on “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” and Article 13, on “the right of everyone to education”—articulate human rights: Just as the fundamental rationale for establishing and protecting, as treaty-based rights, the rights set forth in the International Covenant on Civil and revised in 1996. The Revised Charter entered into force in 1999. The Charter complements the European Convention on Human Rights and Fundamental Freedoms, which sets forth civil and political rights. Cf. Francesco Seatzu and Amaya Ubeda de Torres, The Law and Practice of the European Social Committee (2016). Other transnational human rights documents setting forth antipoverty rights: Charter of Fundamental Rights of the European Union, Title IV; American Declaration of Human Rights and Duties of Man, Arts. XI, XII, XVI; American Convention on Human Rights, Art. 26; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador); African Charter of Human and Peoples’ Rights, Arts 16–18; Revised Arab Charter on Human Rights, Arts 36–40.
and Political Rights (ICCPR) is that government’s failure to act in accord with one or more of the rights violates the “act towards all human beings in a spirit of brotherhood” norm, so too the fundamental rationale for establishing and protecting, as treaty-based rights, the rights, including the antipoverty rights, set forth in the International Covenant on Economic, Social, and Cultural Rights is that government’s failure to act in accord with one or more of the rights violates the “in a spirit of brotherhood” norm.

Whether the antipoverty rights set forth in the ICESCR are human rights is one question; whether they are true human rights is a further question. A human right is a “true” human right if government’s failure to act in accord with the right truly does violate the “act towards all human beings in a spirit of brotherhood” norm. Are the rights articulated in Articles 9, etc.—and in similar provisions in other human rights documents—that government has violated? That is, does the government act in accord with the “in a spirit of brotherhood” norm—or, instead, does it violate the norm—when it refuses to do what as a practical matter it can to secure the poor’s access to food, clothing, shelter, healthcare, and education in the amount required if one is to be able to live a minimally decent life? In the preceding question, “the poor” refers specifically to those who lack access to food, shelter, etc., because of—in the words of Article 25 of the Universal Declaration—“unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their] control.”

See, e.g., the European Social Charter, n. 6.

Of course, underemployment, as well as unemployment, and employment at less than a living wage can be and often are “circumstances beyond their control.” And one of the principal ways a government can help to secure a person’s access to food, shelter, etc., is by acting in accord with Article 23 of the Universal Declaration and Articles 6 and 7 of the ICESCR, which concern “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” (Art. 6(1)), “the right to everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration which provides all workers, at a minimum, with . . . a decent living for themselves and their families” (Art. 7(a)(ii)), and related matters. On “the human right to work,” see Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work (2005), http://www.refworld.org/docid/4415453b4.html (accessed January 14, 2023). In Evangelii Gaudium, the “Apostolic Exhortation” he issued on November 24, 2013, Pope Francis wrote that “it is through free, creative, participatory and mutually supportive labour that human beings express and enhance the dignity of their lives. A just wage enables them to have adequate access to all the other goods which are destined for our common use.” (pp. 151–52.)

In 2016, legal scholar Philip Alston, at the time the UN Special Rapporteur on Extreme Poverty and Human Rights, lamented that “acceptance in law and in practice that [antipoverty] rights are actually human rights … remains marginal.” Nonetheless, that the rights set forth in the ICESCR are compelling specifications of the “in a spirit of brotherhood” imperative—and, as such, are true human rights—seems clear: For a government to refuse to do what as a practical matter it can to help the poor in its midst gain access to food, shelter, etc., is plainly not for the government to act towards “all human beings”—in particular, it is not for the government to act towards those human beings who are poor—“in a spirit of brotherhood.” That 171 of the 197 members of the United Nations (87 percent) are, as of October 2022, state parties to the ICESCR strongly supports the conclusion that the rights articulated in Articles 9, 11, 12, and 13 are compelling specifications of the “in a spirit of brotherhood” imperative.

Rapporteur spoke were completely sold on the narrative of such scammers sitting on comfortable sofas, watching cable television or spending their days on their smartphones, all paid for by welfare. The Special Rapporteur wonders how many of those politicians have ever visited poor areas, let alone spoken to those who dwell there. There are anecdotes aplenty, but little evidence. In every society, there are those who abuse the system, as much in the upper income levels as in the lower. But in reality, the poor are overwhelmingly those born into poverty, or those thrust there by circumstances largely beyond their control, such as physical or mental disabilities, divorce, family breakdown, illness, old age, unliveable wages or discrimination in the job market.


[T]he international human rights system systematically marginalizes those rights, and tolerates a situation in which the majority of states avoids proper recognition of these rights and fails to hold anyone to account when they are routinely ignored. Many of the states that enjoy the world’s highest living standards have specifically rejected proposals to recognize economic and social rights in legislative or constitutional form. But even in countries whose constitutions deem economic and social rights to be justiciable the courts resist or reject proposals to implement them.

Id. See also Report of the Special Rapporteur [Philip Alston] on extreme poverty and human rights, 28 April 2016, A/HRC/32/31, https://undocs.org/A/HRC/32/31 (accessed January 14, 2023). In the Report just cited, Alston emphasized “the deeply rooted nature of the continuing strong resistance to the very concept of economic and social rights as human rights. … Proponents of economic and social rights need to acknowledge and tackle this deeper political reality rather than sailing merrily along as though there is widespread and basic agreement on economic and social rights.” Id. at para. 64.
The judgment that antipoverty rights such as those set forth in the ICESCR are true human rights underlies what Pope Francis emphasized in *Evangelii Gaudium*, the “Apostolic Exhortation” he issued on November 24, 2013. In a section of the document titled “The Inclusion of the Poor in Society,” Francis expressed “our concern for the integral development of society’s most neglected members [i.e., the poor].” According to Francis, “every community is called to be … attentive to the cry of the poor and to come to their aid.” Speaking in particular about—and, indeed, to—“government leaders and financial leaders,” Francis declared that “[i]t is vital that [they] take heed and broaden their horizons, working to ensure that all citizens have” access to what they need to live decent lives, including “dignified work, education and healthcare.”

If there is a plausible argument to the effect that antipoverty rights of the sort set forth in the ICESCR are not compelling specifications of the imperative—that a government does not fail to act towards the poor “in a spirit of brotherhood” when it refuses to do what as a practical matter it can to secure the poor’s access to food, shelter, etc., in the amount required if one is to be able to live a minimally decent life—I am unable to locate the argument.11

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In the Report cited in n. 9, Philip Alston referred to claims that economic and social rights are too expensive, too vague, too empowering of the State, are potentially limitless, reward and encourage laziness, penalize wealth creation, undermine economic growth and are inimical to international competitiveness. These arguments, traditionally associated with those who might describe themselves as libertarians, neo-conservatives, free marketeers or small government advocates, have triumphed in many countries in the twenty-first century and have been actively promoted by the most influential international organizations in the fields of development, finance and trade. While compelling counter-arguments have been put forward in response to each of the critiques, the biggest challenge by far is essentially ideological. The economic and polit-
Although the antipoverty rights set forth in the ICESCR are true human rights, it can nonetheless be a great challenge to determine whether a government is complying with one or another such right. Consider Article 2(1) of the ICESCR:

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.12

Under Article 2(1), the “steps” a state party is obligated to “take”—the “legislative measures” it is obligated to “adopt”—toward “achieving progressively the full realization of the rights recognized in the present Covenant” depend on, they are conditional on, the extent of the state party’s “available resources.” A state party that declines to adopt one or another antipoverty legislative measure—a measure, let’s assume, that would clearly be an “appropriate means” in the economic conditions that exist in some countries—is not violating the ICESCR if this condition is satisfied: The state party’s allocation of the limited resources at its disposal among the competing legitimate, urgent demands on those resources is, all things considered, “reasonable”—reasonable, that is, in the context of all of the State Party’s various responsibilities and obligations, including its obligations under Article 2(1)—and because of that allocation, there are not sufficient resources “available” to the state party to fund the legislative measure at issue, thereby doing more than it is already doing.13

Id. at para. 65.

12 Emphasis added. Article 2(3) states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the [ICESCR] to non-nationals.”

13 Cf. Eric A. Posner, The Twilight of Human Rights Law 87 (2014): “States that seek to satisfy these [antipoverty] rights must make tradeoffs. Because states have limited resources, money used to provide health care comes from education, or vice versa.”

Of course, a state party should do what it can to avail itself of whatever resources are “available from the international community through international cooperation and assistance.” See Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations (1990), http://www.refworld.org/docid/4538838e10.html (accessed January 14, 2023):

[T]he phrase “to the extent of its available resources” was intended by the drafters of the [ICESCR] to refer to both the resources existing within a state and those available from the international community through international cooper-
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The principal body responsible for monitoring the state parties’ compliance with their obligations under Article 2(1) and the other articles is the Committee on Economic, Social and Cultural Rights (CESCR). On May 5, 2013, the Optional Protocol to the ICESCR entered into force. Again, as of October 2022, 171 of the 197 UN members are state parties to the ICESCR—but of that number, only 26 (15 percent) are also state parties to the Optional Protocol.

... In the absence of an active programme of international assistance and cooperation on the part of all those states that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.

Moreover, “the resources of the private sector can and should be employed, or at least directed, towards the [ICESCR’s] goals, [including] . . . by way of more equitable distribution of private wealth. . . . A government’s fiscal policy—that is, how it raises and spends revenue—is critical.” Ben Saul, David Kinley, and Jacqueline Mowbray, “Article 2(1): Progressive Realization of ICESCR Rights,” in Saul, Kinley, and Mowbray, n. 6, at 143.

Finally, “the term ‘resources’ needs to be understood to encompass more than financial means (critical though they are)—a fact that: further complicates the matter of their identification, calculation and utilization. A state’s capacity to deliver on human rights guarantees also includes the extent, fairness and efficacy of its system of governance, its institutions of administration and its means of dispute-resolution, as well as the existence and strength of its basic infrastructure of public amenities (in transport, health, education, sanitation, power and communication). The pairing in Article 2(1) of ‘economic and technical’ as resources upon which states should draw to realize the rights in the [ICESCR] clearly points to matters beyond financial means, even if linked closely to them.


Part IV of the ICESCR (Arts 16–25) indicates both what the CESCR is to do to fulfill, and what the state parties are to do to enable the CESCR to fulfill, its monitoring function.

By ratifying the Optional Protocol, a state party consents to an individual complaints procedure; that is, a state party “recognizes the competence of the [CESCR] to receive and consider communications … submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the [ICESCR] by the State Party.” (Articles 1(1) and 2.) The CESCR “shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted.” (Article 3(1).) “When examining communications, … the [CESCR] shall consider the reasonableness of the steps taken by the State Party. … In doing so, the [CESCR] shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the [ICESCR].” (Article 8(4).)\(^{15}\) Although the CESCR’s decisions under the Optional Protocol are non-binding, a “State Party [to the Protocol] shall give due consideration to the view of the [CESCR], together with its recommendations, if any, and shall submit to the [CESCR], within six months, a written response, including information on any action taken in the light of the views and the recommendations of the [CESCR].” (Article 9(2).)

Whether it was a good idea to do what the Optional Protocol did—establish the foregoing individual complaints procedure—is a matter of controversy. The CESCR argued to the Vienna World Conference on Human Rights, in 1993, that

a system for the examination of individual cases offers the only real hope that the international community will be able to move towards the development of a significant body of jurisprudence in this field. … [S]uch a development is essential if economic, social and cultural rights are to be treated as seriously as they deserve to be.\(^{16}\)


\(^{16}\) Quoted in Griffey, n. 15, at 291.
Nonetheless, in the view of many, there will too often be ample room for a reasonable difference in judgments about “the reasonableness of the steps taken by the State Party.”

It was repeatedly stated throughout the negotiations [leading up to the adoption of the Optional Protocol, on Oct. 10, 2008, by the UN General Assembly.] that it was difficult to imagine how an adjudicatory body could determine whether an [antipoverty] right has been violated given the large margin of discretion for democratically elected governments to make policy decisions and budget allocations.17

Notwithstanding the foregoing skepticism about “how an adjudicatory body could determine whether an antipoverty right has been violated,” the UN General Assembly voted in 2008 to adopt the Optional Protocol,18 which entered into force in 2013. Time will tell whether the Optional Protocol’s individual complaints procedure is a good, a bad, or simply an inconsequential strategy.19 The answer will depend mainly on: The number of state parties that ratify the Optional Protocol; the way in which the CESCR develops and applies Article 8(4)’s “reasonableness” criterion;20 and the extent and quality of the state parties’ engagement with the CESCR’s non-binding “views” and “recommendations.”21

Again, it has long been contested whether “the worst form of violence”—poverty—is rightly regarded as a human rights issue. Nonetheless, the answer is clear: However difficult it sometimes is to determine whether a government

20 See id.
is complying with them, antipoverty rights—human rights of the ICESCR sort—are nonetheless true human rights; if and to the extent a government fails to act in accord with one or more such rights, it fails to “act towards all human beings in a spirit of brotherhood.”

It bears emphasis, in concluding this chapter, that the premise that antipoverty rights are true human rights does not entail that a democracy should entrench any such rights in its constitution—or that if a democracy chooses to entrench some such rights in its constitution, it should authorize its courts to enforce the rights. These have been, and remain, controversial issues: whether antipoverty rights should be constitutionalized—and if so, whether they should also be judicialized. Therefore, what I said at the end of the preceding chapter is no less applicable—and so bears repeating, slightly revised—here:

The part of the morality of human rights on which I have focused in this chapter—antipoverty rights—comprises “maxims of political morality” that derive at least a part of the strength they possess from being formally inscribed not only in the Universal Declaration of Human Rights but also in an international human rights treaty, the ICESCR, to which the great majority of the nations of the world are parties. Even if not judicially enforced, those maxims of political morality can serve, among the citizens of a country whose lawmakers profess commitment to the maxims, as fundamental grounds of political-moral judgment, of political-moral argument and critique. Not that such argument inevitably yields agreement. Of course it does not. But how much better, how much further along, such a state of affairs than one in which, rather than debating whether a particular government action or inaction (law, policy, etc.) is violating, for example, someone’s right of access to adequate healthcare, we had to begin by discussing whether she has any such right.

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Even in the absence of judicial enforcement—or of meaningful judicial enforcement—antipoverty rights therefore have an important practical role to play in enabling focused argument and judgment, among citizens and their elected representatives, about the political-moral legitimacy of certain government policies.24

ADDITIONAL READING

Again, the premise that antipoverty rights are true human rights does not entail that a democracy should entrench any such rights in its constitution—or that if a democracy chooses to entrench some such rights in its constitution, it should authorize its courts to enforce the rights. I have discussed both issues elsewhere: Michael J. Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* 176–84 (2017).

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