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Human Rights, Poverty and Capitalism

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Abstract

In this chapter, I examine the interplay between state obligations to eradicate extreme poverty and realize socio-economic rights under International Human Rights Law (IHRL) and some of the legal regimes and economic paradigms that sustain global capitalism. Advocates of rights-based solutions to poverty tend to focus on how mechanisms to advance relevant categories of human rights, above all socio-economic rights, can be strengthened. Their analyses typically ignore questions of how other legal rights and legal regimes may function as obstacles to the eradication of poverty and the realization of human rights. I contest the long-standing assumption of IHRL that the goal of realizing human rights—and socio-economic rights in particular—is compatible with the operations of global capitalism, and I seek to demonstrate that the legal regimes necessary to sustain capitalist political economy are, in fact, routinely productive of poverty and of violations of socio-economic rights.
1. Introduction

States are committed under International Human Rights Law (IHRL) to meeting a range of obligations that, if realized in full, would substantially reduce poverty around the world. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) protects individual rights to an adequate standard of living, including rights to food, housing, healthcare, social security, fair wages, and education. Thus far, however, the formal recognition of rights obligations by states has not produced the material conditions in which many economic and social rights can be widely enjoyed. Progress in reducing extreme poverty has slowed since the 1990s, and already high levels of wealth and income inequality are rising in many countries worldwide. The intensification of economic inequalities poses a threat to poverty eradication strategies as highly unequal societies are less effective at reducing poverty than those with lower levels of inequality. The disproportionate impact that the coronavirus pandemic has had on poorer communities, and the inequities that result from climate change—the effects of which will be particularly acute for many low income, low carbon-emitting economies in the South—throw into sharp relief the disparities between those who enjoy a comfortable and protected existence under current institutional arrangements, and those whose lives remain precarious, impoverished, and undervalued by virtue of the same political, economic, and legal structures.

Human rights bodies claim that IHRL is neutral concerning the political and economic systems that should be used to eradicate poverty and to realize socioeconomic rights. The Committee on Economic Social and Cultural Rights (CESCR) maintains that the principles and rights protected under the ICESCR ‘cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.’ In contrast with the

1 International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UTS 3 (ICESCR) arts 7, 9, 11, 12, 13
5 Ibid, paras 2-3
more immediate nature of the obligations that are coterminous with ‘respecting’ many civil and political rights, it is acknowledged that socioeconomic rights will be realized by states ‘progressively’. Nevertheless, the realization of socioeconomic rights cannot be perpetually postponed until ‘an indefinite tomorrow’.6 At some stage, then, an inquiry must be made by scholars of human rights into the kinds of economic policies, market regulations, and modes of production and distribution that are required in order to realize human rights and to address poverty. Yet to undertake such an inquiry poses a dilemma: identifying and comparatively evaluating these conditions would lead to making judgements about superior and inferior modes of political and economic governance, which violates CESC’s commitment to political neutrality. On the other hand, not to engage in such an inquiry produces an unsatisfying situation in which no attempt is made to assess the compatibility of the dominant mode of political, economic, and legal ordering through which goods, resources, and wealth are produced and distributed—capitalism—with commitments under IHRL to addressing poverty and realizing human rights. As an emerging body of scholarship on the institutional foundations of capitalism has highlighted, market economies are only able to operate on a large scale through a range of supportive legal institutions that enable market agents to create and invest capital, produce goods and resources, and to engage in profit-making exchange. In her 2019 book, The Code of Capital: How the Law Creates Wealth and Inequality, Pistor argues that lawyers and states have crafted a legal code built of ‘modules”—contract law, property rights, collateral law, and trust, corporate and bankruptcy laws—that create and protect wealth for capital owners, whilst also functioning to prevent others from accessing wealth and resources.7 The mandate of the UN Special Rapporteur on Extreme Poverty and Human Rights is to identify approaches for ‘removing all obstacles, including institutional ones, to the full enjoyment of human rights for people living in extreme poverty’.8 What happens if some—even many—of those institutional obstacles are shown to be part of the same legal infrastructure required to make a capitalist market economy function?

Scholars of human rights have already suggested that dynamics in global capitalism produce poverty and lead to human rights violations. Rajagopal observed in 2013 that ‘globalization is a problematic project because it has a structural bias against the weak, the poor, and the

8 UNHRC Res 8/11 Human rights and extreme poverty A/HRC/44/L.19 para 2(b)
vulnerable—one which is hard to separate from its logic of production, consumption, and distribution.9 Human rights violations are ‘often essential for the production and reproduction of wealth and productivity in the economic sense’, he concludes.10 By examining the interactions between some of the state-based legal regimes and economic paradigms that constitute global capitalism, I ask the human rights community to confront the possibility that the mode of political economy required to deliver on IHRL commitments to addressing poverty and realizing socioeconomic rights cannot be simultaneously rights-realizing and capitalist. In Part I of the chapter, I begin by examining how poverty is currently being addressed through IHRL, and I attend to the neglected question of what may be required economically, politically, and legally for the telos of IHRL to be achieved.11 In Part II, I draw on a body of interdisciplinary literature to give an account of what capitalism is as a mode of political economy and I explore the possibility that, in important respects, the same legal infrastructure that is necessary to sustain a capitalist political economy helps to produce the manifold violations of human rights that are seen to make poverty a human rights issue.

2. Addressing Poverty through International Human Rights Law

Although ‘in the positivist sense of IHRL’, the existing documents do not contain a ‘right not to be poor’, the current normative framework in IHRL contains crucial guarantees which, if fulfilled, would lift poor people out of poverty.12 These crucial guarantees consist of i) the spectrum of rights protected under the Universal Declaration of Human Rights (UDHR),13 the International Covenant on Civil and Political Rights,14 ICESCR, and a host of other international and regional human rights instruments; and ii) the foundational principles of IHRL, namely the universality of rights protection, the interdependence and indivisibility of different categories of human rights, and principles of equality and non-discrimination.

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9 Balakrishnan Rajagopal, ‘Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On’ (2013) 35 HRQ 4, 895-6
10 Ibid
11 Telos is the ancient Greek term meaning end, fulfilment, goal or aim. It is the source of the modern word ‘teleology’. Teleological interpretation in the legal field requires that legislative provisions are interpreted ‘in the light of the purpose, values, legal, social and economical goals these provisions aim to achieve’. Lydia Scholtz, ‘Teleological Interpretation’ (FreieUniversitätBerlin, 20 November 2012) <https://wikis.fu-berlin.de/display/oncomment/TeleologicalInterpretationFootnote1> accessed 21 August 2020. Here I use the term telos to denote the end goal, or ultimate purpose, of IHRL.
12 Sigrun I. Skogly, ‘Is there a right not to be poor?’ (2002) 2 HRLR 1, 73
13 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)
14 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
Extreme poverty was added as a thematic area under the special procedures of the UN Commission on Human Rights in 1998, and a Special Rapporteur was appointed to undertake country visits, receive complaints, and work with governments towards the eradication of poverty.\textsuperscript{15} In 2012, the Human Rights Council adopted a set of guiding principles to clarify the nature of state obligations in this area.\textsuperscript{16} In order to fulfil their legal duties, states must, among other things, adopt a poverty reduction strategy featuring time-bound benchmarks, and ensure the active and informed participation of persons living in poverty at all stages of the design and implementation of policies affecting them.\textsuperscript{17}

Socioeconomic rights protected under the ICESCR, including rights to an adequate standard of living, housing and food, the right to the highest attainable standard of health; and rights to education and social security are a cornerstone of the rights-based approach to addressing poverty.\textsuperscript{18} CESCR has provided authoritative interpretations of the meaning and content of the rights in the ICESCR via its General Comments. States have immediate obligations not to violate economic, social and cultural rights and to prevent others from infringing the rights, and they have a duty to ensure the satisfaction of, ‘at the very least, minimum essential levels of each of the rights’.\textsuperscript{19} The precise content of the ‘minimum core’ for each right remains the subject of deliberation. Nonetheless, it is likely states would be in breach of minimum core obligations if persons within their territories are ‘deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education’.\textsuperscript{20} Poorer governments may be able to defend a violation on the basis of a lack of available resources, however, the state party ‘must demonstrate that every effort has been made to use all resources that are at its disposition, in an effort to satisfy, as a matter of priority, those minimum obligations’.\textsuperscript{21}

States have not been willing to create supranational courts or institutions that can compel compliance with the decisions of human rights bodies. An Optional Protocol to the ICESCR that allows for victims of violations to present complaints to CESCR was adopted in 2008.\textsuperscript{22}

\textsuperscript{15} The mandate was taken over by the Human Rights Council in 2006.
\textsuperscript{16} OHCHR Guiding Principles on Extreme Poverty and Human Rights (18 July 2012) A/HRC/21/39
\textsuperscript{17} Ibid, paras 50, 38, 46
\textsuperscript{18} ICESCR (n 2) arts 11, 12, 13
\textsuperscript{19} General Comment 3 (n 5) para 10
\textsuperscript{20} Ibid, para 10
\textsuperscript{21} Ibid
\textsuperscript{22} Optional Protocol to the ICESCR C.N.869.2009 (10 December 2008) Doc. A/63/435; Many prominent Western states, such as Australia, Canada, the UK, and the US have not signed the protocol.
However, the recommendations of CESCR, while influential, are not legally binding. On the other hand, many states have made socioeconomic rights capable of judicial enforcement by incorporating relevant human rights into their domestic constitutions. The South African Constitutional Court has adjudicated upon socioeconomic rights by developing a ‘reasonableness’ criterion in assessing state policies on housing and education; and the Colombian Constitutional Court has developed the concept of ‘mínimo vital’ as being implicit to the rights to life and health, and the right to social security. According to Van Bueren, a prominent advocate for the judicialization of socioeconomic rights as a pathway to eradicating poverty, the challenge is to ‘develop a creative and substantive socioeconomic rights jurisprudence within the institutional and constitutional abilities of the judiciary.’ Other scholars are less convinced. Arzabe notes that although socioeconomic rights ‘are present in most Latin American state constitutions, the human rights rules remain highly rhetorical and conditioned to economic and political interests at both national and international levels.’

Change depends, she argues, not on the existence of rules, but ‘mainly, on the legal and political culture that transforms those rules into action’.

A further defining attribute of rights-based approaches to addressing poverty and a lack of economic development is a focus on accountability. Increasingly, human rights norms and standards of review are recognized and being incorporated within other sites of international governance, such as via human rights impact assessments for trade policy, and by the inclusion of affected stakeholders in the design of development projects. In order to conform with a rights-respecting approach to addressing poverty, it is not sufficient for a state to fulfil the content of an obligation through a blanket policy—the way in which the policy is applied, notably the need for it to be non-discriminatory, and its repercussions for the enjoyment of other human rights must be considered. It is important to emphasise that the mainstream of human

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23 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) and Minister of Health v. Treatment Action Campaign (no 2) (TAC), 2002 (5) SA 721 (CC)
26 Arzabe (n 7) 29
27 Ibid, 30
29 The tensions between the impressive reduction of overall poverty levels accomplished by China and respect for human rights is explored in the contribution of Graham Finlay.
rights praxis does not represent the totality of human rights based approaches to addressing poverty. In the 1970s, a just international economic order was seen to be a necessary condition for the realization of human rights, and vestiges of this movement are contained in the 1986 Declaration on the Right to Development. That being the case, the design of legal strategies to bring about structural reform of the global economy has not been characteristic of the work of human rights bodies to date.

The failure of IHRL to address economic inequality and to focus instead on ‘extreme’ poverty and ‘minimum’ levels of protection has already attracted considerable criticism. Nonetheless, the telos of IHLR does go beyond ensuring a minimum core of rights protection and commits states, eventually, to the full realization of socioeconomic rights. I will now highlight some of the limitations of IHRL for addressing poverty by reflecting on the question of how socioeconomic rights can be fully realized in a capitalist market economy.

3. Not Addressing Poverty through International Human Rights Law

CESCR’s articulation of the nature of state party obligations with respect to socioeconomic rights remains highly abstract. States are enjoined to enact legislation to implement rights, but there is no discussion of which kinds of economic policies, financial regulations, or modes of production and distribution are likely to be rights-respecting, and which might be regressive, or contribute to rights violations. Scholars who have analyzed the ICESCR highlight the many substantive shortfalls of both the Covenant and the interpretive guidance of CESC. As Dowell-Jones points out, states are repeatedly enjoined to use the ‘maximum’ of available resources to meet obligations when no coherent account has been given by CESC of how to meet this threshold. A further problem is that state resources are consistently naturalized in human rights discourse. The ‘limited’ resources available to some states to discharge their obligations are not seen to be a function of the legal system that the government deliberately institutes to facilitate the operations of its economy. CESC has established that states may not

30Julia Dehm, ‘Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s’ (208) 3 LJIL 871
31 UNGA Res 41/128 Declaration on the Right to Development (4 December 1986) A/RES/41/128
33 General Comment 3 (n 5) paras 5,6, 7
take deliberately ‘retrogressive measures’ that undermine the effective enjoyment of rights.\(^35\)

If, as I argue below, governments must be understood to be actively creating and supporting legal structures that safeguard private wealth and prioritize the ability of economic actors to ‘accumulate capital’ over working towards the realization of socioeconomic rights, then the category of ‘deliberately retrogressive measures’ expands significantly. A whole range of measures—new corporate tax breaks, developments in intellectual property protection, the elaboration of legal regimes that facilitate transfer pricing—could, in theory, fall under this category, especially if such policies contribute to the erosion of minimum levels of rights protection.\(^36\)

Human rights bodies appear to be animated by an assumption that human rights are hierarchically superior legal norms in theory and in practice. The language used by human rights bodies is of what states must do in order to meet their first-order obligations; for example, states should ‘[a]ccord priority to the eradication of homelessness through a national strategy’,\(^37\) or ‘ensure that women’s equal rights to land or tenure are recognized and enforced.’\(^38\) The ability of states to meet their obligations is characteristically presented as though governments were entirely unhindered by other legal constraints. In fact, many states have legal commitments under International Economic Law which limit the ability of governments to pursue directions in economic policy that are unfavourable to the interests of foreign investors or market competitors. In recent years, scholars have argued that the international legal order is moving from a ‘horizontal’ system of norms towards a vertical system, ‘with human rights at its apex’.\(^39\) Human rights are commonly characterized as part of *jus cogens*—the peremptory norms of International Law that cannot be set aside (although socioeconomic rights would not ordinarily be accommodated within this category).\(^40\) Yet even purportedly peremptory *jus cogens* norms, such as the right not to be tortured, have ‘dramatically failed to operate as an ordering factor of social practices’.\(^41\) Crawford offers a pertinent reflection on this tension: ‘Part of the problem has been the mistaken belief that the invocation of a norm as hierarchically

\(^35\) General Comment 3 (n 5) para 9

\(^36\) Transfer pricing, which involves companies over- or undercharge subsidiaries so that profits are highest in those subsidiaries operating with the lowest corporate tax rates has been the subject of high-profile scandals involving Starbucks, Amazon, and Google.

\(^37\) Guiding Principles (n 17) para 3

\(^38\) Ibid, para 80c


\(^40\) Andrea Bianchi, Human Rights and the Magic of Jus Cogens’ (2008) 19 EJIL 3, 495

\(^41\) Ibid, 491
superior or more fundamental avoids the need to deal with issues of its scope and application…Even fundamental norms have to be applied in the context of the legal system as a whole’.\textsuperscript{42}

It is my argument that scholars of human rights have hitherto paid insufficient attention to how human rights operate in the broader legal universe. Relatedly, the question of which political, economic, and legal structures may need to be employed in order to achieve the telos of IHRL has been neglected. I adopt a positivist conception of the telos of IHRL by choosing to understand the realization of human rights for all, equally, and without discrimination to be ends in themselves.\textsuperscript{43} While ‘taking steps’ to realize socioeconomic rights may not necessitate a particular type of political or economic system, the obligation to eventually realize socioeconomic rights in full, and in line with principles of equality and non-discrimination, would imply that the mode of political economy in which individuals and groups will enjoy their rights may need have certain characteristics. Indeed, I would suggest that the full realization of socioeconomic rights would be constitutive of a particular kind of polity, and that such a polity could not operate as a capitalist market economy. My argument here directly contradicts the findings of CESC, which argues that rights-realization is compatible with a capitalist system, or even a ‘laissez-faire’ economy.\textsuperscript{44} In fact, though General Comment 3 underlines that ‘no particular form of government or economic system’ is required to realize the rights in the ICESCR, there are indications that a market system is presupposed. States are held to have positive duties to provide specific socioeconomic resources under circumstances where individuals are unable to meet their basic needs themselves, which indicates that another structure, such as a market, must be in existence thereby enabling individuals to obtain necessities without them being directly provided by the state.\textsuperscript{45} What is more, nothing in either Covenant prohibits the objects of socioeconomic rights to adequate food, water, housing, education, or healthcare being delivered by private actors who profit from the sale of these items and services as long as they are affordable and accessible to all. As Ballestero underlines in her work on the human right to water, the realization of a human right is often embodied in

\textsuperscript{42} James Crawford, \textit{The Creation of States in International Law} (2nd edn, OUP 2006) 103
\textsuperscript{43} MacIntyre might protest that human rights lack a shared end and a common telos, as he has argued that there is no unified moral foundation underpinning human rights, and that human rights movement ‘misconstrues morality with its emphasis on the individual rather than on social practices connected to common ends’. Alasdair MacIntyre, \textit{After Virtue} (University of Notre Dam Press 1981). Others might consider the telos of human rights to be more instrumental, such as to require all states to conform to the model of a Liberal market economy.
\textsuperscript{44} General Comment 3 (n 5) para 8
\textsuperscript{45} David Bilchitz, ‘Socio-economic rights, economic crisis, and legal doctrine’ (2014) 12 IJIL 3, 715
‘an affordable commodity’. Through what kinds of policies and measures, then, can the government of a capitalist market economy ensure that goods and services provided by private actors for profit remain affordable and accessible?

Many governments stipulate minimum wages via legislation in order to ensure that people have sufficient income to meet their basic needs. However, the prices of food, water, and housing are also dependent on the market power of wealthier economic actors. Given the disaggregated nature of global supply chains, the prices of some goods and services, most notably food, will be shaped by companies and actors in other jurisdictions. The state can seek to regulate the prices of certain items and services by imposing price ceilings, though this kind of regulation would clearly be incompatible with a ‘laissez-faire’ economic model. Another option is to tether the minimum wage to the affordability of basic necessities via a consumer price index—a common practice, albeit that even many high income economies have thus far failed to institute minimum wages that are effective in raising workers out of poverty. Under IHRL, states have obligations to provide food, housing, healthcare, and education to those who are not able to afford it in the market themselves. Commonly used systems include unemployment benefits, food vouchers, and subsidized or free housing, healthcare, and education. Yet the ability of states to meet their human rights obligations meaningfully cannot realistically be viewed independently of the economic and legal structures that determine flows of money and resources within their domestic economies, and within the global economy. Currently, the capabilities of different states to realize rights will depend on their resources and finances, which are a function of their situation in global markets, international trade, and the ability to attract private investment. A state’s ability to enact effective policies to realize socioeconomic rights—either directly by spending on social security, or indirectly, such as by raising minimum wages—can be in tension with the need to attract the private investment to fund those initiatives. What is more, as Vandenhole explores in this volume, the realization of socioeconomic rights is predicated on further economic growth, begging the question of how that growth is to be produced, and what the effects of a growth-centred economic model may be. Evidence suggests that current growth-centred models are producing a multitude of

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48 Cross-reference to Vandenhole
harmful effects from ecological destruction and climate change, to lowering wages and regulatory standards in order to make production ‘cost effective’. 49

When states are still working ‘progressively’ towards the realization of socioeconomic rights, there is room for institutional variety and flexibility in terms of pathways to rights provision. However, when it comes to achieving the *telos* of IHRL and realizing socioeconomic rights, the institutions, policies and laws through which rights obligations are met need to take on certain characteristics. In order to be rights compliant, states must govern markets to ensure certain outcomes, or they must provide outcomes themselves, which is impacted by the way that they govern markets. In a study of the impact of the investments of Blackstone LP, a private equity firm, on the right to housing, Birchall finds that ‘States therefore hold duties, where material rights are provided privately, to regulate market actors to ensure that housing is accessible to all, including specifically on the metric of affordability’. 50 States are therefore ‘obligated to prevent Blackstone profiting’, he concludes. 51 Likewise, in her work on privatization, Nolan find that ‘[i]f market actors are controlling human rights materialities then every policy choice of these market actors must be subject to human rights critique’. 52 Birchall underlines that, under current legal arrangements, Blackstone is ‘neither breaching domestic law and nor does it hold monopoly power over the market...Rather, the market and its constitutive rules appear to allow and encourage harmful practices in breach of state duties and business responsibilities toward the right to housing and related rights.’ 53 The question remains, however, would adjustments to the laws, institutions, and economic paradigms that would make market conditions rights-compliant allow them to still be capitalist?

In Costa Rica, it has been determined that some human rights cannot be the object of human rights and be treated as ‘commodities’: ‘things’ that are produced and administered for profit. As Ballesteros explores in her study of the techno-legal processes in Costa Rica that draw boundaries between water as a commodity and water as a human right, private water providers can only supply water at rates that are tied to operating costs. Moreover, their prices are carefully measured through the legal regulation of price indices to ensure that profits are not

49 Ibid
50 David Birchall, ‘Human rights on the altar of the market: The Blackstone letters and the financialisation of housing’ (2019) 10 TLT 3-4, 451
51 Ibid
52 Aoife Nolan, ‘Privatization and Economic and Social Rights’ (2018) 40 HRQ 4, 815
53 Birchall (n 51) 447
being made by suppliers.\textsuperscript{54} Applying this consideration for access to food, which is produced by multiple different and geographically dispersed actors, would present an enormous challenge; nonetheless, the Costa Rican approach to ensuring that water is meaningfully a human right is indicative of a tension between an economy governed under the profit motive and the realization of socioeconomic rights.

4. What is ‘Capitalism’?

Capitalism can be loosely defined as ‘an economy in which production is organized in pursuit of profit, rather than for own consumption…or for political obligations’ such as under feudalism, or in a socialist economy.\textsuperscript{55} Economists and policymakers are more likely to employ a vocabulary of markets, prices, growth, inflation, and regulation than to talk about capitalism directly. Capitalism from these influential perspectives is understood as a ‘market economy’ in which individuals should be incentivised to produce goods, enter into exchange, and accumulate capital in order to produce economic growth. Many mainstream economists elide the existence of the institutional structures that enable markets to function in order to lend credibility to their arguments that markets are independent of the state and, therefore, free from political ‘interference’. Other Institutionalist economists, by contrast, highlight the centrality of legal institutions in supporting the operations of markets. New Institutional Economics (NIE) analyses the role of property rights, contracts, and corporate structures in creating incentives and enabling goods and money to flow to their most efficient uses. NIE studies highlight the variegated nature of the legal institutions that support capitalist political economies; however, this scholarship has helped to produce an institutional prescription for the efficient operations of markets that has been promulgated by international financial institutions (IFIs), and imposed on many governments in exchange for access to lending. Consistent features of this institutional prescription are the importance of secure private property rights, flexible labour markets, privatization of state industries, trade and financial liberalization, market competition and advancement of the rule of law.\textsuperscript{56}

\textsuperscript{54} Ballestero (n 47)


\textsuperscript{56} Dani Rodrik, ‘Goodbye Washington Consensus, Hello Washington Confusion?’ (2006) XLIV J. Econ Lit 973
The oblique account of capitalist political economy that emerges from mainstream economics and NIE scholarship is radically challenged by other schools of thought. From a Marxist perspective, the same legal rights and institutions that are presented as tools to construct efficient markets in NIE accounts are perceived as instruments of dispossession, exploitation, and domination which engender an illusion of freedom that is part of the ideational machinery that keeps ‘the worker’ oppressed. Human beings are very unfree in Marxist analysis: workers have little choice but to labour under the conditions set by capitalists, and capitalists are also coerced into particular courses of action as a result of these dynamics. As Marx underlines, ‘Free competition brings out inherent laws of capitalist production as external coercive laws, having power over every individual capitalist’. 57 Marxist theory has been criticised for providing an overly reductive account of complex societies and their political economies which ties everything to the economic ‘base’ and its relations of production. Two other traditions of scholarship—the ‘Varieties of Capitalism’ (VOC) school, and (French) Regulation Theory (RT)—use international comparisons to explain the coexistence of many different forms of capitalism and the adaption of capitalism to the conditions of crisis that would, under Marx’s lens, have led to its demise. VOC and RT theorists argue that capitalism is ‘a legal regime, an economic system and a social formation that unfolds in history’. 58 They agree with Marxist thinkers that this regime is ‘built upon two basic social relations: market competition and the capital/labour nexus’; 59 however, VOC and RT theorists attribute greater significance to different regulatory structures, such as corporate governance, taxation, and financial regulation, in altering dynamics within capitalism (at least in the short to medium term).

The differences between how many economists and NIE scholars understand capitalism as compared with Marxists and VOC and RT theorists could not be more stark. The former tend to regard capitalist political economy as the best way—even the only way—to bring about economic growth while respecting freedom and protecting individual human rights. 60 Many of the latter consider capitalism to be a regime of accumulation that thrives on economic inequality, and one predicated on exploitation and thinly veiled violence. In the final section of the chapter, I argue that the legal infrastructure and economic paradigms needed to ensure the

58 Robert Boyer, ‘Are there Laws of Motion of Capitalism?’ (2011) 9 Socio-Econ Rev 1, 63
59 Ibid, 63
profitable operations of a capitalist market economy function to impede states in meeting their human rights obligations with respect to poverty and realizing socioeconomic rights. First, however, it is necessary to reflect on the nature and operations of this ‘legal infrastructure’, and to address the critical question as to whether capitalism can be said to exist as a singular phenomenon underpinned by a core set of legal institutions. The form of capitalism in Scandinavian democracies is clearly different from that in the UK, or the US, and different still from the state-monopoly capitalism practiced in China. Conditions of social welfare, and, consequently, human rights implications also diverge significantly. Nevertheless, capitalism is now widely understood to be a global phenomenon, meaning that the accumulation of profits depends on an internationalized division of labour and the operations of international trade and investment. World Systems Theorists contest the view that domestic ‘capitalisms’ can be seen to be independent of broader structures of profit accumulation and competition in other jurisdictions.\(^{61}\) To take a contemporary example, Scandinavian economies appear to suggest that inclusive, equitable and rights-respecting forms of capitalism are possible; yet leading Finnish telecommunications giant, Nokia, notoriously relies on conflict minerals produced under highly exploitative labour conditions to sustain its revenues.\(^{62}\) A large body of interdisciplinary scholarship would suggest that domestic capitalisms have an expansionary ‘imperialistic’ dynamic, and that the relative wealth and better quality of life enjoyed in high-income countries is bound up with resource extraction in other countries and the exploitation of cheap labour forces in less regulated economies.\(^{63}\) 

Recent work by Legal Institutionalists scholars suggests that capitalism can be observed as a single and lasting phenomenon from the perspective of law. As Pistor writes, ‘manifestations of capital and capitalism have changed dramatically, yet capital’s source code has remained unchanged throughout’.\(^{64}\) This ‘source code’, she argues, is largely grounded in private laws of property, contract, and trust, which, along with corporate and bankruptcy laws, have been elaborated and extended by lawyers to create novel ways of generating and protecting private wealth. Examples discussed by Pistor include enabling corporations to own assets,


\(^{64}\) Pistor (n 8) 10
commodifying ideas as intellectual property, and turning debt into a profitable financial investment.\textsuperscript{65} There is clearly ‘no single global legal system to support global capitalism’, nor a global state to enforce it, she reinforces.\textsuperscript{66} However, a long history of exporting the common law into colonies, innovations in the harmonization of laws that support capital accumulation, and the recognition and enforcement of foreign private laws enable economic actors to take advantage of different state laws around capital and labour, and to extract profits in ways that might not otherwise be permissible under the laws of a particular nation-state. Together, I would argue, this variegated and multiple speed legal ‘system’, which is anchored in domestic legal regimes, is the legal infrastructure that sustains global capitalism.

In the final section of this chapter, I problematize CESCR’s assumption that socioeconomic rights can be realized through a capitalist market economy. I do so by exploring how some of the legal institutions and economic paradigms acknowledged by NIE scholars, economists, and critics alike to be central to the operations of a capitalist market economy may function as obstacles to realizing socioeconomic rights and addressing poverty.

5. Human Rights, Poverty and Capitalism

A. Discriminatory ‘Legal Origins’

As is well known, the development of capitalism in England and throughout Europe in the 15\textsuperscript{th} Century onwards depended to a significant extent on the violent appropriation of land and resources through Enclosure Movements and the coercion of populations into conditions of wage labour.\textsuperscript{67} Later, during the Age of Imperialism, much of the non-European world was violently dispossessed, exploited, and forced to produce the very commodities that, in multiple senses, fuelled industrial capitalism in Europe (sugar; coffee; cotton; tobacco). In many contexts, appropriations and interventions were subsequently legalised through private property rights and the spread of a European mode of legal consciousness that characterised social and economic interactions as ‘free’ and expressions of the will of the individual legal subject.\textsuperscript{68}

\textsuperscript{65} Ibid, 3-4
\textsuperscript{66} Ibid, 132
\textsuperscript{67} McClure’s chapter in this collection explores these dynamics in detail.
Colonialism not only gave many European countries major advantages in terms of their own industrial development, but colonialism created the ideological, material, and legal conditions in which ‘peripheral’ countries then went on to become capitalist market economies in their own right. The legal technologies and modes of legal consciousness that sustain capitalism as a social relation and an economic order are exports of colonialism, and they now operate in multiple contexts to create the conditions for capital accumulation in tandem with their progenitors in Western countries. Despite moves by China, PRK, the Soviet Union, and Cuba towards instituting different economic structures, efforts to successfully operate a non-capitalist economic model in the context of an already-internationalised capitalism have led almost all states worldwide to conform to some variation of capitalism. Those that continue to resist are exiled from the international community, i.e. Cuba and North Korea.

Late into the 19th Century, in both Europe and its former colonies, access to property and capital was highly unequal, and reflected racialized, gendered, and cultural inequalities on multiple levels. As Bhandar argues, private property ‘is not about the use as such, but a ‘metaphysical’ idea of entitlement – an entitlement which is follows the premise that only certain people would have the capacity/authority/agency to own and dispose of property’. Although formally many of the legal impediments that prevented women, slaves, and ethnic and religious minorities from acquiring private property, setting up firms, and creating capital have now been removed, materially and legally, these groups were placed at a disadvantage. The juridical idea of formal equality before the law was designed by emerging merchant classes to confront the privileges of the nobility and the clergy; yet formal equality before the law also entrenches material inequities. The ownership of land and resources and the promotion of the rule of law are foregrounded as gateways to producing wealth and capital in NIE scholarship. For example, as De Soto’s work on the economics of property rights would suggest, property ownership conveys advantages in terms of generating capital through access to credit. For scholars working in critical traditions, property ownership allows owners to ‘squeeze income out of the community’ by excluding access to land and resources and forcing people into labour markets on terms largely set by owners. This would suggest that the first generation of private property

69 Brenna Bhandar, ‘Disassembling Legal Form: Ownership and the Racial Body’ in Matthew Stone, Illan Rua Wall Costa Douzinas (eds), New Critical Legal Thinking: Law and the Political (Birkbeck Law Press 2012) 120
70 Arzabe (n 7) 35
71 Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (Black Swan 2001)
72 Robert L. Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 PSQ 3, 489
owners in multiple different contexts around the world had something akin to ‘first mover advantage’ that has enabled them to safeguard their wealth, and to continue to generate more wealth and accumulate resources at the expense of others in the same territory.\textsuperscript{73}

According to the World Social Report 2020, members of groups ‘that suffered from discrimination in the past start off with fewer assets and lower levels of social and human capital than other groups’.\textsuperscript{74} Such inequalities have historical roots, the report notes, ‘but often continue even after the conditions that generated them change’.\textsuperscript{75} Forms of discrimination and exploitation based on differences or characteristics, such as race and gender, now operate as free-standing forms of exclusion, but they also reflect historic patterns of social exclusion and deprivation that arose with transitions to capitalism. In \textit{The Code of Capital}, Pistor describes how, for centuries, private actors and states have been engaged in manipulating a core set of legal modules, including private property rights, and grafting them onto new assets to both create new wealth and protect old wealth—a process which she uses to explain patterns of entrenched economic inequality.\textsuperscript{76} Her work suggests that, in many contexts, the legal conditions that help to generate wealth but that also generate social and economic inequalities have remained operational. In important respects, then, ongoing protections of private property as required for the efficient functioning of markets can institute discriminatory and rights-violating effects because the ‘equal’ application of laws facilitating capital accumulation in conditions of historical material inequality functions to reproduce and entrench those inequalities.

I will now suggest that the legal regimes needed to enable the operations of a capitalist market economy have ‘structurally retrogressive’ tendencies as they result in states taking measures to support profit-making processes that result the reduction of rights protection with the state’s territory, as well as within other countries.

\textbf{B. Retrogressive ‘Laws’ of Property, Profit, and Competition}

\textsuperscript{73} ‘A first mover is a service or product that gains a competitive advantage by being the first to market with a product or service’ ‘First Mover Definition’ (\textit{Investopedia}, 15 January 2020) <https://www.investopedia.com/terms/f/firstmover.asp#:~:text=A%20first%20mover%20is%20a,before%20competitors%20enter%20the%20arena> accessed 13 June 2020
\textsuperscript{74} World Social Report (n 3) 4
\textsuperscript{75} Ibid
\textsuperscript{76} Pistor (n 8)
A lot of valuable critical work highlights the exclusionary effects of private property as an institution. A comparatively less studied dimension of the human rights implications of property concerns the fact that property rights also function to entitle and empower other market actors, furnishing them with greater market power and a number of additional capacities. In many states, the protection of private property is not new, and, therefore, may not be seen as ‘retrogressive’ sensu stricto. Moreover, in many countries, some legal protections for common property are still in place and are even protected as constitutional entitlements (albeit that many of the indigenous communities that benefit from such protections face continual attempts by private investors and states to ‘develop’ their lands). Nonetheless, states are not ‘static’ entities—they are dynamic and are continually engaged in strategies to make their economies competitive by attracting capital and enhancing the conditions of market competition that ‘oils the wheels’ of market exchange. For example, legal innovations enabling legal persons—corporations—to own assets, and the creation of forms of intangible property, such as shares, have led to the creation of transnational companies that control more capital than many smaller states. When monopolies and cartels are colluding to ‘manipulate’ prices, competition laws can be utilized to break up a corporate entity; however, in many cases, it is the greater market power of many different individual corporations and wealthy actors, which, acting as the ‘forces’ of supply and demand in the market, produce prices and determine the affordability of goods and services. 77 Other examples of legal regimes with retrogressive implications for rights-protection include the continual evolution of intellectual property, and, in recent decades, the development of a universe of financial instruments and investment structures grounded in private law—shares, derivatives and securities—that enable networks of private actors to invest vast amounts of capital in a range of markets connected to ‘underlying assets’. Their investments impact the price matrix through which food, housing, pensions, and more are ‘priced’, 78 and shape the economic variables (exchange rates; interest rates; commodity prices) upon which government revenues depend. Through their maintenance and development of the legal infrastructure that undergirds profitable exchange and investment—such as promoting the ownership of intangibles and legitimizing financial contracts that enable financial actors to influence price formation in multiple markets—states are taking deliberate legal measures that can result in the erosion of rights protection. First, these measures enhance economic

77 Birchall’s discussion of the Blackstone case is emblematic of this trend.
78 Anna Chadwick, Law and the Political Economy of Hunger (OUP 2019) Chapter 5
inequalities that, in a market economy, predictably operate to undermine the affordability of basic goods and services; second, these legal regimes erode government capacities to regulate increasingly-powerful private actors who can use their wealth to influence law-making processes, and can create permissive rules that enable them to move their capital abroad to avoid taxes.79

Competition is widely acknowledged to be a driving force within capitalism. In much of the economics literature, competition is a beneficial force that prevents corporations from exercising too much market power and ‘fixing prices’. Economists and NIE scholars strive to develop the best institutional mechanisms to achieve ‘perfect competition’, but it is accepted that this utopia will never manifest in real-world markets—in fact, under conditions of perfect competition producers are not able to make profits, which undermines the operations of the economy.80 Instead, forms of ‘imperfect’ competition result. Imperfect competition describes a process of rivalry between firms who compete for market share. In the global economy, competition produces a dynamic whereby firms ‘outsource, invest, and carry out activities wherever the necessary skills and materials are available at competitive cost and quality’.81 The current model of trade—the bulk of it tied to global supply chains—has in many contexts contributed to dehumanising labour conditions in poorer countries, producing conditions of ‘modern slavery’, along with low wages, short-term or precarious contracts and unsafe work environments.82 Many countries coming out of colonial relations were de facto forced to join the global economy on terms that had already been set through the development of trade rules via the General Agreement on Tariffs in Trade, or via principles of International Investment Law or ‘starve in the dark’.83 Restrictive immigration laws ensure that populations of countries who have entered into the global economy at a structural disadvantage are locked into their territorial borders. The hypermobility of capital promoted by IFIs to enhance economic growth and market efficiency keeps wages suppressed, and restrictions on movement of people enable

79 For an analysis of how economic inequality produces disparities in wealth that corrupt law-making processes see Su-Ming Koo in this Collection.
83 Kennedy (n 69) 58
investors and corporations to produce goods and services wherever labour is cheapest.\textsuperscript{84} Two structurally retrogressive elements become visible in this dynamic pointing to an internal conflict between laws that promote markets and laws that promote human rights. First, states which introduce laws that make their markets, and, thereby, their populations available on competitive terms within the global economy are, in effect, taking measures that jeopardize rights-protection. As Azarbe underlines, ‘Workers who cost less in the market system are citizens with lesser access to social rights, and, consequently, to all human rights’.\textsuperscript{85} Second, under conditions of market competition, access to land, key resources such as oil, and other essential inputs is essential for firms and corporations to remain commercially viable entities. Thus, the predatory, often violent and rights-violating strategies of expropriation, such as land grabbing and resource extraction that are decried by many human rights organisations are not incidental to capitalism: they are being produced due to the strictures of production requirements in a competitive global economy.\textsuperscript{86} Capitalism \textit{depends on} ‘renewed acts of primitive accumulation carried out by extra-economic coercion’.\textsuperscript{87}

\textbf{C. Equal in Dignity and Rights?}

Article 23 of the UDHR makes explicit connections between dignity, autonomy and socio-economic circumstances by establishing the right of individuals to ‘just and favourable remuneration’, which is required to ensure ‘an existence worthy of human dignity’.\textsuperscript{88} Specific references to ‘equal remuneration for work of equal value’ are contained in the ICESCR.\textsuperscript{89} Yet the development of laws that are necessary to the operation of an economy in which production is organized in pursuit of profit appear to require that some labour forces are available more cheaply, and, thus, \textit{on less equal terms} than others. Conditions of profitable accumulation under global capitalism as it has developed historically have depended on the entrenchment of inequalities between countries and social groups in order to facilitate cost-effective production.\textsuperscript{90} In spite of this fact, International Law ‘insists that workers have rights to fair pay

\textsuperscript{84} John Linarelli, Margot E Salomon, and Muthucumaraswamy Sornarajah, \textit{The Misery of International Law: Confrontations with Injustice in the Global Economy} (OUP 2018) 8
\textsuperscript{85} Arzabe (n 7) 33
\textsuperscript{87} Onur Ulas Ince, ‘Between Equal Rights: Primitive Accumulation and Capital’s Violence’ (2018) 46 PT 6, 886
\textsuperscript{88} UDHR (n 12) art 23
\textsuperscript{89} ICESCR (n 1) art 7(a)(i)
\textsuperscript{90} World Systems Theory (n 60)
and decent conditions’. Its implicit message is that exploitative employment is a kind of ‘pathology of the labour contract’, rather than being a pervasive phenomenon that underpins the profitable accumulation of capital for individuals, and the maintenance of economic growth. As Marks underlines, the current international legal framing only acknowledges particularly egregious forms of exploitation, such as human trafficking or slavery, as coercive. This framing stands in contrast with influential scholarship that has exposed the hidden economic coercion necessary for the existence and operation of specialized labour markets, even on the domestic level. In his critique of the Liberal presentation of the relationship between private property and individual freedom, Legal Realist scholar, Robert Hale, wrote ‘Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation’. Of course, exploitation is not unique to capitalism. For Heilbroner, that which distinguishes capitalism from other social formations is ‘not the fact of its hierarchical character but its unique form…in which the expression of subordinate status is manifested through the acceptance of market and property relations’. At least to date, capitalist political economy has manifested as a social system in which the production and distribution of wealth has rendered some human beings somewhere in a subordinate position to others: working to produce economic value that others legally capture and deploy in ways that operate to reinforce hierarchies between human beings as to where they can live, what they can eat, how much healthcare they can obtain and of what standard, and the extent to which they can meaningfully participate in and influence political and law-making processes.

The concept of ‘equal work for equal value’ presupposes that there is an agreed way of measuring the value that is produced through the work of different human beings in different countries around the world. In fact, even within the tradition of economic scholarship there are multiple and contradictory accounts of how such valuations should be done, by whom, and on what basis. Mainstream economists would maintain that the values of commodities, including labour, are determined by the ‘forces of supply and demand’—a sophisticated conglomeration

91 Susan Marks, Exploitation as an International Legal Concept’ in Susan Marks (Ed) International law on the left: re-examining Marxist legacies (CUP 2008) 300
92 Ibid
93 Ibid
94 Hale (n 73) 473
95 Heilbroner (n 56) 114
of individual utilities registered through the price mechanism. Classical economists, such as Smith, Ricardo, and Marx sought to relate value more directly to processes of production and objective measures of the labour time needed to produce things. 96 Mazzucato is seeking to reinvigorate debates about value within mainstream economic theory, arguing that modern economies that are highly financialized ‘reward activities that extract value rather than create it’. 97 Recent developments, not least the Coronavirus pandemic, have prompted renewed arguments that value and remuneration should function also to measure the social utility of the contribution of the laborer. 98

In order for the telos of IHRL to be achieved, greater attention needs to be paid to how the legal systems that underpin capitalist economics create and entrench systems of valuation that enhance economic inequalities and systematically lead to violations of socioeconomic rights. As Streeck observes, ‘Capitalist society is distinguished by the fact that its collective productive capital is accumulated in the hands of a minority of its members who enjoy the legal privilege, in the form of rights of private property, to dispose of such capital in any way that they see fit, including letting it sit idle or transferring it abroad’. 99 Under the legal arrangements needed for a capitalist market economy to function, economic value that is produced collectively can be owned and disposed of in contravention of the needs of those without whose work it would not have been possible to produce in the first place. It is through the ordinary, pervasive legal arrangements that are essential to the operations of capitalism as a mode of production that it becomes possible to ship grain abroad in the middle of a famine, or to use water to grow avocados when people nearby have no clean water to drink. If the human rights movement is to contribute substantially to the creation of a world in which poverty is eradicated and rights are realized, it may need to confront a fundamental question: Is a political economy based on state laws which allow some human beings to make profit out of the (forced) labour of others; to spend it in such a way that the cost of living for those workers rises; to transfer it abroad, legally, under elaborations of the same framework of laws that enabled them to own it in the first place; and, thereby, to prevent the state that created the necessary environment in which

96 For an overview of the theories of value of the classical economists, see Denis Patrick O’Brien, The Classical Economists Revisited (PUP 2004)
98 Zoe Williams, ‘We say we value key workers, but their low pay is systematic, not accidental’ The Guardian (London, 7 April 2020)
99 Wolfgang Streeck, How will Capitalism End? Essays on a Failing System (Verso 2017)
the profit could be made from using that revenue to improve the lives of the poor and marginalized a political economy in which all human beings are equal in dignity and rights?

6. Conclusion

By engaging with questions as to the kinds of laws and economic paradigms that would be needed to meaningfully realize socioeconomic rights, I have argued that the human rights movement may need to confront the possibility that those legal structures and economic paradigms cannot simultaneously be rights-respecting and capitalist. The same legal structures that are constitutive of wealth are also constitutive of poverty and deprivation. In order to move forward, scholars of human rights need to engage in a debate about how economic value is produced and distributed. Creating a mode of political economy in which socioeconomic rights are realized necessarily involves a project of legal restructuring that reflects how economic value is created.