

**“Universalism in retreat? The importance of economic, social and cultural rights
in the current moment”**

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*“Keir, Ker Starmer why do you keep inviting millions of refugees into the country when
there are 1.3 million people waiting for housing...”*

Pat McGinnis, National Housing Party UK, outside the PM’s doorstep in November 2024

Thank you to the Observatory and especially Simon Hoffman for the opportunity to present the annual lecture on human rights and social justice. It is a real honour and a privilege to have been asked.

Introduction

After winning a massive landslide, Keir Starmer, a famous human rights (HR) lawyer by vocation, became PM. His Attorney General, former colleague and HR lawyer Richard Hermer KC has since declared that ‘HR are back’!

However, as I am sure you all know, HR were never fully there in the first place; Economic, Social and Cultural Rights (“ESR”) having never been incorporated into UK law despite ratification of the UN Covenant on Economic, Social and Cultural Rights (“ICESCR”). This is consistent with the “false dichotomy” between Civil & Political and ESR ; a dichotomy based at least ostensibly on a host of reasons now largely considered archaic: for example, that ESR are non-justiciable, democratically illegitimate or not (human) rights at all!

There has been real progress recently in terms of breaking down this dichotomy and understanding the importance of treating all rights as equal; they are “inalienable” for sound reasons: “freedom *and* bread” as the Great South African Judge Albie Sachs said.

The Welsh and Scottish governments have taken massive strides in this regard, for which they have been deservedly commended from many quarters, internationally and closer to home.

It was only a few years ago that I was delighted to address the audience at Tai Pawb’s annual conference; rather than rehash the same old arguments, I could help move the debate on and get stuck into the weeds of implementation of the right to housing as an enforceable right in Welsh law, such was the advanced state of legislative progress at that time.

Those efforts and those of our Scottish colleagues are currently paused: I am not privy to the reasons for this, perhaps some of you are, but one suspects that the change in Westminster government has something to do with it. And from there, there have been some encouraging noises too: Gordon Brown’s 2022 Constitutional Commission on the UK’s Future recommended entrenching social rights and the influential think-tank the Fabians said much the same in its 2024 manifesto.

But there are also strong, countervailing forces. The quote above is a hint as to what those forces consist of. The rise of far right populism threatens not only ESR, but Human Rights as we know and understand them: universal and inalienable rights to be enjoyed by all of us by virtue of being human.

I believe that we are at a significant inflection point for ESR and HR more generally.

Its “Crunch time” – as one prominent HR scholar has described it.

My answer to the *crunch* question (as I see it), is that we should incorporate ESR and do it now; albeit with a preparedness to acknowledge that there is much work to be done if HR and ESR are to be truly impactful to people's everyday lives.

Before explaining the structure of my talk, I should define what I mean by incorporating ESR. Essentially, I mean giving them equal protection to Civil and Political rights in the UK legal system, whether by amendment to the Human Rights Act 1998 or otherwise, and consistent with the entrenchment of ECHR in the acts of devolution. There are a host of second-order questions that would arise thereafter, including critical questions about the institutional framework behind implementation and the principles of adjudication in the courts. Those questions will need to be addressed, but not today.

Structure

First, I will draw together 7 empirically established features or trends characteristic of modern capitalist democracies, including the UK, which left unabated will lead inexorably to (yet further) adverse outcomes for most of us, particularly the least well off, and must therefore be confronted. I haven't been able to resist the temptation to give them a mildly melo-dramatic name... 'the 7 deadly sins'!

I will then briefly address the ideological context behind the 7 deadly sins before setting out why, in my view, incorporation of ESR would be a necessary albeit insufficient means of addressing them.

In doing so I will explain the three broadly political objections to ESR that have attracted the most recent attention: the "**too much**", the "**not enough**" and the "**not them!**" critiques.

These objections don't change my view, even if they offer cause for reflection; on the contrary, their political salience underscores the urgency pregnant in the current moment to advance ESR.

The 7 deadly sins

1. Economic inequality is baked into the system

It is now ten years since Thomas Picketty published his seminal work *Capital in the Twenty-First Century* 2014.

Focussed on the USA and Europe, the French economist confirmed that as a matter of economic history, the rate of return for owned capital (r) has exceeded the overall rate of economic growth (g); in other words, families and individuals who control wealth will accumulate it at a faster rate than the economy can produce it and so will control an ever-greater portion of the economic pie.

The rich will get proportionally richer, and the poor proportionally poorer.

This is by no means the only explanation for inequality; economic shocks can play a significant role, in both directions. WW1 and 2, for example, generated conditions that reduced overall inequality; the Global Financial Crisis in 2008, and especially the pandemic and Cost of Living Crises, have had (and are having) the opposite effect.

In the UK in 2021, the bottom 50% of the population owned less than 5% of wealth, and the top 10% a staggering **57%** (up from 52.5% in 1995). The top 1% alone held 23% (World Inequality Lab, 2022).

Since then, the ongoing Cost of Living Crises has made us more unequal still.

2. Significantly unequal distributions of wealth undermine economic growth

In 2017 an IMF study established that contrary to conventional wisdom, income inequality is bad for economic growth.

Whilst the impact of income inequality on economic development is positive for values of a net Gini coefficient below 27 percent, the impact becomes negative for values above 27 percent (where 0 is perfect equality and 100 is perfect inequality).

Moreover, as countries become more unequal, the negative impact on economic development becomes larger.

Specifically, if the income share of the top 20 percent (the rich) increases, then GDP growth actually declines over the medium term, suggesting that the benefits do not trickle down.

In contrast, an increase in the income share of the bottom 20 percent (the poor) is associated with higher GDP growth.

Therefore, the poor and the middle classes matter most for growth.

The United Kingdom has some of the highest levels of inequality in Europe; its Gini Coefficient in 2022/3 was 35 (39 if consider housing costs). Well above the threshold for negative growth. And indeed, post-pandemic its economic growth has lagged behind its more equal EU cotermporaries.

3. Inequality is bad for everyone

Income inequality is bad for you, even if you live in a wealthy country: Richard Wilkinson and Kate Pickett's book *The Spirit Level* identified the "pernicious effects that inequality has on societies: eroding trust, increasing anxiety and illness, (and) encouraging excessive consumption".^[5] It claims that for each of eleven different health and social problems: physical health, mental health, drug abuse, education, imprisonment, obesity, social mobility, trust and community life, violence, teenage pregnancies, and child well-being, outcomes are significantly worse in more unequal rich countries.

Indeed, in the context of high-income countries, the overall level wealth of a country has no correlation to the health and well-being of its population. Rather, health and well-being correlate with the level of economic equality within the country (Stiglitz 2009).

And the effects are not just experienced by those who are worst off, but by the vast majority of the population (Stiglitz 2012).

But not everyone of course. As regards the UK, Michael Marmot said this: “In the decade 2010–20, as in the decades that preceded it, the wealthy have become wealthier as capital growth has risen much faster than faltering wage growth. Put simply, the wealthy have got wealthier – and therefore healthier.” [Marmot review ten years on - 2020](#)

This reflects the experience in the pandemic when health inequalities worsened in large part due to pre-existing disparities in socio-economic status.

4. Inequality is particularly bad for the less well-off (poor)

Greater inequality is associated with less redistributive government spending, as measured by a share of GDP (de Mello and Tiongson 2003).

Similarly, there is evidence that social expenditures fall when the gap between the households in the middle of the income distribution, and the top 10 percent widens (Schwabish, Smeeding, and Osberg 2004).

Why? The wealthy are likely to resist progressive forms of taxation, which limits the ability of the government to mobilize resources to tackle poverty (Sokoloff and Zolt 2006).

In the UK, [Resolution Foundation](#) said this in July 2024:

“In 2024, [British household wealth] was estimated to be worth more than six times GDP, more than 50 per cent higher than the last time Labour came into power (410 per cent in 1997). The key driver of this huge rise in wealth is unearned passive gains. These gains

have stretched the gap between the wealthy ‘haves’ and the less fortunate ‘have nots’: today, families in the top tenth of the wealth distribution have £1.3 million more in wealth per adult on average than those around the middle (fifth decile). Yet, despite huge increases in wealth, revenues raised from wealth-related taxes have barely moved, at around 3 per cent of GDP.

5. The poor are more likely to remain poor in unequal societies

[unequal societies experience less social mobility](#) – the poor tend to stay poor, even when the people in the top 1% change frequently.

With significant regional and other disparities, social mobility continues to fall across the UK. [The IFS](#) says “social background is more strongly related to outcomes in the UK than in many other developed countries and Social Mobility in the UK is worse than it has been for 50 years.”

6. Inequality undermines democracy (“chicken and egg”)

Inequality in the control of economic resources engenders inequality in the distribution of power in society; political scientist Susan George famously identified the systematic phenomenon in highly unequal states of “political capture” by economic elites. Those who are worse off do not have the same access to policymaking forums (UNDP 2013).

Critically, this undermines the median voter theorem (whereby the electorate will vote for measures (higher taxes) that “correct” inequality when a critical mass of voting population fall below the median) (Stiglitz 2012). Indeed, paradoxically, in unequal societies more people disengage from political institutions and [don’t vote](#): the so called

Schattschneider Hypothesis

In an important report commissioned for the IFS in 2022, Ansell and Gingrich demonstrated that:

- Voter participation in the UK electoral process has become substantially more unequal since the 1960s. Income, education and homeownership have become stronger predictors of propensity to turn out to vote.
- British citizens feel less represented by politicians and policymaking than they did several decades ago, and large gaps remain across educational and income groups in terms of perceived legitimacy of government.

Leading them to conclude that “The rise of economic inequality in the UK over the past four decades raises serious questions about the state of political equality in Britain.”

7. Equality plays a significant factor in the growth of political populism

Perhaps unsurprisingly, inequality tends to correlate with higher rates of political division. Gu & Wang’s findings over 30 years indicate that there is a positive and statistically significant cross-country association between levels of income inequality and political polarization.

[World Bank](#) highlights inequality as a principal factor in the recent growth in support for populist political parties, who argue that there are simple solutions to economic problems.

The IMF confirms that that populists in power tend to have some effect on inequality – left-wing populists lower it, right-wing populists raise inequality, but at the expense of reduced economic growth overall.

[A 2021 study in particular](#) (Stoezer) each one-point increase in the Gini income inequality measure increased support for far-right parties by one percentage point.

Populism has not been easy to define but the most used definition describes populism as a “thin” ideology that ‘considers society to be ultimately separated into two homogeneous and antagonistic groups, “the pure people” versus “the corrupt elite”, and

... argues that politics should be an expression of the *volonté générale* (general will) of the people’.

And in developed countries (Europe principally), we tend to see a particular kind of far-right populism defined as ‘**exclusive**’ in its essential character: it is “exclusive” in the sense that particular groups are specifically **excluded** from access to state resources, for example jobs or welfare provisions, which they consider increasingly threatened by outside forces (notably immigrants).

Thus, immigration is portrayed as a zero-sum game: either the ‘outsiders’ obtain something at the cost of the ‘natives’, or the natives ‘take back control’.

Van Oosten’s research, a social scientist at the University of Oxford, showed when public services decline, people blame immigrants — even if they have nothing to do with the decline. A decline in public services, the study found, “prompts citizens to believe they are not receiving ‘their fair share of public resources’ and that ‘political elites do not care about their communities’ which makes affected communities more susceptible to the messages of far-right parties.”

In the UK, UKIP’s successful anti-immigration narrative was linked to the period of austerity following the 2008 financial crisis in that areas hit hardest by public service cuts saw a **significant rise in UKIP support**, driven by fears about job scarcity, declining public service quality, and economic stability. The growth of support for UKIP was **not directly correlated** with high migration at the regional level, but was **significantly influenced** by austerity measures and (social) media narratives.

[Nigel Farage](#), the leader of the populist, anti-immigration party Reform, has regularly made false claims that refugees and migrants drained public budgets. He has **complained**, for instance, about Britain having to “build a house every two minutes” to accommodate legal migrants and warned of “those arriving on the back of lorries” trying to get benefits.

And we have the quote above from Pat McGinnis, National Housing Party UK

To conclude on the 7 deadly sins...

These 7 trends are essentially uncontroversial: being consistent with the empirical data. I also imagine they would chime with many people's lived experience, including many of you here today. But these perceptions should no longer be considered as political biases but inherent features of the societal structures we are governed by.

Unsurprisingly therefore, the UK is in a bad place: high inequality with huge concentrations of wealth at the top, low growth and low productivity; poor health - a mental health epidemic; entrenched poverty; low social mobility; poor living standards with high levels of food and energy insecurity banks; sub-standard housing; and in total, more than 16 million people are defined as living in poverty, or **24%** of the UK population – the highest since comparable records began in 2000.

Meantime Reform is riding high in the polls and President Trump is more popular than our Prime Minister, recently elected with 411 of 650 seats.

The ideological context

That was the empirical evidence, but there is also an ideological explanation

Since the 1980s, neoliberal (“NL”) thinking has dominated economic policymaking around the world. Over this same time, inequality of income and wealth has grown in many countries (Piketty 2014; UNDP 2013) including the UK.

Under NL thinking, markets should be the preeminent institutions for coordinating economic activity. Government interventions should be avoided, since they create distortions that lead to inferior outcomes. This logic applies not only to redistributive measures such as social security but has been used to justify most NL economic policies

– deregulation, privatization, downsizing government, and eliminating barriers to trade and cross-border financial flows.

This transformation of the role of the liberal state, from one geared to the provision of 'welfare' and 'development' driven by a broad (if selective) commitment to egalitarianism, to one largely limited to policing market functionality, and therefore accepting of the inequality produced (and required) by the market, means that the contemporary state operates (as Florian Hoffman observes) “in a comparatively reduced policy space that structurally curtails its capacity to directly attend to the demands brought to it by its constituents, including in social and economic policy.”

In a neoclassical world this is not problematic; an individual’s productive contribution to the economy – based on the assets they own and the quality of the labour they supply – determines the income they receive. As James Heintz puts it: “This represents a particular interpretation of the notion of fairness: what people get out of the economy is based on what they put into it.”

This is in (sharp) contrast to most forms of distributive justice; fairness and social justice is most often defined in terms of realized outcomes that can be measured along a number of dimensions: income, wealth, health, or education, among others.

This has meant NL’s advocates are highly antagonistic towards ESR as they are premised on the state having a duty to intervene and enforce redistribution if the markets fail to produce ESR compatible outcomes. As such ESR are “impediments to the efficient allocation of scarce resources through market mechanisms and, as such, distort the formation of the ‘just market value’ of such basic goods such as health care, education, housing, or food, water, and sanitation.”

ESR are “seen as standing in the way of austerity measures required to correct (allegedly) inefficient welfare policies that purport to provide these goods through redistributive schemes.” (Florian Hoffman)

That is NL's "**too much**" objection to ESR.

In practice however, even those states most associated with NL have some form of "safety net" that is outcome focussed. It seems not all market outcomes are politically tolerable.

NL's relationship with immigration is also complex: on the one hand efficient markets rely on free movement of labour (just like capital); other have argued that necessary to retain (even invent) tensions to secure support for economic liberalisation program that can cause massive disruption to social ties – potential to reinforce stereotyping.

Moreover, perceptions of unfairness are levelled at NL states that arise from their anti-democratic character and the inequality in political power that arises from gross material inequality: or vice versa. As the Canadian historian Quinn Slobodian proclaims: "We now know that neoliberals preached less the retreat of state and supranational institutions than their refashioning [in their own image]."

It is beyond the parameters of this talk to unpack the mass of literature which addresses the merits of NL against its own terms; the extent to which its principles have been applied in a consistent manner, and where: and the vexed question as to whether it functions to preserve high concentrations of economic power achieved not through market fundamentalism so much as 'political capture'.

What is clear is that NL's high levels of inequality (and its symptoms) have caused significant concern, particularly after the Global Financial Crises in 2008. Obama declared inequality the "defining challenge of our time" and the 2015 Sustainable Development Goals include No 10 which aims to reduce inequality within and among countries. The rates of inequality have provoked the World Bank, IMF and other mainstream financial institutions to encourage state measures to reduce inequality to improve economic performance.

The social and economic consequences as well as the fact of inequality has obviously been highly relevant to the traditional opponents of NL's market fundamentalism; leftist egalitarians (I am trying to avoid too many categories or distinctions here!)

The left (or some of it) has not necessarily or always been aligned with supporters of human rights, but recently its voice has been relatively prominent in contending that Human Rights (HR), including ESR, have been at best disinterested, at worst complicit, in NL's worst excesses.

American historian Samuel Moyn made the now infamous claim that "perfectly realised human rights are compatible with inequality, even radical inequality." Moreover, the leftists claim, international HR law displaced more egalitarian based political movements, only to replace them with the false promise of "sufficiency": a mere "floor of protection against indigence" (Moyn). Added to these criticisms from the left is that the individualistic and legalistic focus of HR makes them unsuitable to the task of socio-economic transformation.

This leftist critique is the "**not enough**" objection to ESR.

The high rates of inequality have also troubled commentators and thinkers that have inspired the 'alt-right', like Patrick Deenen. He criticises liberalism more generally, partly because: "it trumpets equal rights while fostering incomparable material inequality." He speaks about the limits of the market and the need to insulate the requirements of a "flourishing life" from overly liberalised market forces, including social factors, like place, family and vocation.

However, the far right populists like Trump and his doppelganger, Farage, have not spoken much about economic inequality; preferring to focus instead on what they describe as 'economic migration'. Consistent with all manifestations of exclusive populism, they take issue "with the universalism of human rights as entitlements meant to be held by everyone equally, and in abstraction from any form of collective identity." (Florian Hoffman).

That is the far right's "not them!" objection to ESR.

Which brings me back to the inflection point

As Florian Hoffman observes:

"the political empowerment of the populist right, and the centrality the critique of human rights plays in its rhetorical strategy, makes this crunch time for human rights— a time, in other words, in which even the critique within the confines of intellectual debate is not politically innocent but has to account for the consequences of the vision it enounces."

This obviously applies ten-fold outside the academy and in the parliamentary chambers of liberal democracies.

And it is this perspective that makes me believe that not only should we incorporate ESR, but that a failure to do so at this critical moment will have political consequences potentially far beyond the strict parameters of ESR rights.

In setting out my case, I will address the three objections.

Beginning first with the NL "too much" critique

The three critiques

- "Too much"

The 'too much' argument is overly ideological, profoundly unrealistic and morally indefensible. NL's objection in principle to all forms of market intervention, and toleration of *whatever* degree of inequality markets generate, makes NL entirely complicit in the high levels of inequality and its ill-effects that have accompanied it, including the consequences for political equality.

The NS state is therefore illiberal. As, professor of public and constitutional law at the LSE, Tarunabh Khaitan, argues “Gross material inequality ... is problematic for liberal constitutionalism for instrumental reasons – it belies the liberal promise of political equality, thereby making the regime illegitimate”.

He reasons:

“under conditions of extreme material inequality, fair political opportunity cannot be satisfied by mere formal equality of votes. Because of the nature of social and economic power, disempowered groups sometimes need to be given a measure of political insurance by constitutions in order to prevent their being locked out of power. Because political lockout of a group is a constitutional rather than a (mere) policy problem, there is a strong case for liberal constitutions to afford a measure of political insurance to the poor.”

The necessary “political insurance to the poor” could conceivably come in different forms; one which Khaitan advocates is “robust judicial protection of social rights”.

As Professor Katie Boyle explains: “legal enforcement of ESR corresponds with democratic principles by ensuring that the politically marginalised groups have a legal mechanism through which their distributive justice claims can be communicated in a manner that compels governments to respond”; She maintains that ESR is a counter-majoritarianism instrument; a feature of “deliberative democracy which forms (part of) the response to the democratic legitimacy critique”, that nearly always accompanies the ‘market inefficiency’ objection.

So that in my view is sufficient without more to defeat the illiberal objections of the “too much” objection. 1 nil to ESR.

As I stated a moment ago, most NL regimes ultimately tolerate some form of redistributive social protection, (USA and UK are just below the OECD average of 20% of

GDP on public social spending). Therefore in practice, the question of real substance will always be whether these schemes are enough?

Here again, the balance of the argument falls clearly in favour of ESR. For whilst there is unresolved ambiguity about whether the minimum floor (called a 'Minimum Core Obligation') must be defined in absolute or relative terms, it must, at least guarantee "essential foodstuffs ... primary health care, basic shelter and housing, education etc".

Beyond that level, states enjoy a margin of appreciation as to the minimum substantive content of the rights, but there are various process orientated Minimum Core Obligations that must also be met if a state is to act compatibly with ESR. These include complying with the duty to progressively realise the enjoyment of ESR using maximum available resources, which Boyle interprets as obliging a state to take "all necessary measures in order to ensure a basic minimum relative to the country's wealth as well as employing an objective normative threshold as to an immediately enforceable absolute minimum core."

This is of real tangible significance: for example, rates of subsistence benefits in the UK are not pegged to *any* objective assessment of essential living needs (relative or absolute). The rates (which are relatively less generous when compared with the OECD countries) have been repeatedly linked to increasing levels of food and energy insecurity in the UK. The same point could be made about numerous other programs that are not meeting minimum requirements, like the availability of (chronically underfunded) mental health services for children.

Substantive minimum standards are also justiciable: as Lord Reed opined in the context of a discrimination challenge against the Department for Work and Pensions' 'two-child rule', there are 'no legal standards by which a court can decide where the balance should be struck between the interests of children ... and the interests of the community as a whole' (*R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223 at para 208).

Viewed through the prism of a discrimination challenge that pitched the interests of the children deprived of their subsistence entitlement against “the community as a whole”, the most senior judge in the land may have been right.

But he would not have been able to decide the case in the way that he did had a non-derogable substantive ESR minimum standard been in play: ‘adequacy’ is capable of objective determination according to transparent criteria (see *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); [2014] PTSR D18).

Some recent welfare reforms have been controversial precisely because they intentionally leave households without enough money to live on. The ‘benefit cap’ predominantly impacts single mothers who live in parts of the country where rents are higher than average. If they are unable or unwilling to move to areas where rents are significantly lower, the cap denies them the level of subsistence benefit to which they would ordinarily be entitled. Similarly, the ‘two child rule’ limits the amount of subsistence benefit a family of any size can receive to that which a household with two children is entitled. Perhaps unsurprisingly, the evidence suggests that these policies don’t really work. A very small percentage of those affected by the benefit cap move into work and, even then, it is unclear whether the cap was the catalyst, as opposed to a child reaching school age, for example (*R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289). There is also no evidence the 2-child benefit rule has led to more people working – instead it has just increased the number of children living in poverty by 1.1 million children, or close to one in ten children in the UK: that number is increasing. (Stewart 2023)

Doubtless because of these inequities there is now unanimity across the political spectrum that the 2-child rule should be scrapped, but that is scant comfort to the 1.1 children adversely affected by it. Had we had ESR, I believe that the rule would never have been introduced or may not have survived a legal challenge (which is always a last resort – more on that in a moment).

In my view, these first two considerations put to bed the ‘too much’ argument. ESR would constitute a democratically legitimate (if not essential) form of *political protection* for the poor in an otherwise grossly unequal society and ensure that, as a bare minimum, social interventions are compatible with essential living needs.

And as for the market inefficiency objection, as King points out, there is now solid empirical data disproving “the old claim that large welfare states inhibit economic performance”; remember it is the poor and middle class that matter for growth. Moreover, if NL theory can readily accommodate the drag on economic growth caused by high levels of inequality at the top, it would be morally indefensible for it not to tolerate any drag attributable to ‘market imperfections’ arising from ESR complaint redistribution at the bottom.

Therefore, on my analysis it is now 2 – nil in favour of ESR, without any realistic prospect of an equaliser from the NL team.

The ‘not enough’ objection

The arguments that maintain that ESR is “not enough” are partly rooted in historical analysis that highlights the fact that HR discourse came to prominence at the same time as NL, and therefore coincided with and, on one view at least, has nothing to say about the very high rates of inequality caused by NL.

On that logic, human rights are seemingly just as culpable for gross inequality as their “doppelganger” NL.

One key problem with the former argument is that there is no actual correlation, at least in terms of intra-country inequality in wealthy states. Why? Because ESR were largely unenforceable in the legal regimes of those states.

This of course is a double-edged sword; demonstrating a positive impact on social justice *at scale* that is solely attributable to enforceable ESR is necessarily difficult, and it is right to acknowledge that the evidence of such an impact is patchy.

In the circumstances, there is a lack of a counter-factual. We cannot say with certainty that had ESR been incorporated in the Human Rights Act for example, that we would not have experienced the last quarter of century in the manner that we have; and would be somewhere very different now instead.

Nevertheless, it is my view that we can safely predict that enforcement of ESR in the here and the now, at this inflection point, would be beneficial, even if the ultimate extent of the benefit is necessarily harder to predict.

This argument falls away if it can be said with confidence that because of their conceptual limits, ESR would have made no tangible difference.

This runs straight into the problem that if NL conditions did not produce market outcomes consistent with MCO, ESR would have obligated NL states to intervene: as we have seen, the ‘too much’ critics would consider such an intervention antithetical to NL’s most basic tenants. Moreover, insofar as the criticism is that the HR regime (and NL states) have been limited to rates of redistribution consistent with material “sufficiency” (as opposed to equality), it does not take account of Boyle’s argument that “minimum core marks only the basic starting point of a much larger ESR picture.”

So on one view, this is already enough to disprove the “not enough’s” main contention: ESR may have made a very tangible difference.

But leaving that aside, there are two remaining aspects to this critique that in my view merit further attention. They are first that, properly understood, there is no right to (material) equality contained within the International Human Rights Law treaties, and second, that when compared with politics at least, there are real limits to the “legalism” of human rights.

I agree with both criticisms, to a point. But I remain confident of the overall scoreline.

The now infamous claim made by Moyn that that “even perfectly realized human rights, are compatible with ... radical inequality,” and that human rights “have nothing to say about inequality” were described by for Special Rapporteur for Extreme Poverty Prof Philip Alston as “patent nonsense.”

However, as a matter of black letter law, as Prof Alston acknowledged, it is true that human rights law does not explicitly include a right to material equality.

This has not stopped many arguing, including Alston, “that there are [nevertheless] limits of some sort to the degrees of inequality that can be reconciled with notions of equality, dignity and commitments to human rights for everyone” (Alston 2015).

Lee points out that:

“Economic inequalities, when deep and persisting, severely restrict individual choices and undermine the dignity and self-respect of persons with low income and wealth, placing those people at inferior status (Beitz 2001; UNDP 2013). These inequalities, as such, are incompatible with human rights because everyone’s equal moral worth constitutes the very premise of human rights, as recognized in Article 1 of the Universal Declaration of Human Rights, which states: “[a]ll human beings are born free and equal in dignity and rights.” International human rights law does not require economic equality per se, but equality in dignity. Economic inequalities that perpetuate the divide between people offend the grounding idea of human rights, the equal dignity of each person.”

Despite this, generally the Committee of Economic Social and Cultural Rights and other Treaty Monitoring Bodies have largely focussed on the *indirect* impact of vertical inequalities in economic position have had on horizontal inequalities (between culturally defined or socially constructed groups), and their adverse impact on the relative levels of enjoyment of substantive rights by different groups.

MacNaughton has looked critically at the human rights primary texts and concluded that there is nothing that limits them to horizontal inequalities and invites a purposive interpretation that would essentially afford vertical inequalities as much attention as horizontal inequalities have received.

Whether this interpretation is ultimately accepted, it is clear in my view that accepted ESR norms would militate against inequality.

Article 2(1) ICESCR includes the obligation to progressively realise without discrimination everyone's economic, social and cultural rights, using the maximum available resources. This doesn't mean enjoyment of these rights must improve uniformly across the population - a measure of inequality may be necessary to benefit even the least well off in society. However, where that is no longer the case, because for example rates of inequality are harming growth, the level of enjoyment of the substantive rights by some falls behind others without justification. Too far in other words. That would seem to me to be a theoretical basis for a rights violation. Therefore, whilst there may be no right to be equal there is a right to be less unequal.

This interpretation of the HR duty to use Maximum Available Resources to progressively realise ESR would also be consistent with liberalism, at least a form of liberalism as defined by John Rawls: as Prof Taitun summarises him; "namely a property-owning democracy, where background institutions ensure that ownership of wealth and capital are dispersed in society rather than concentrated in a few." A test that NL evidently fails.

So using Article 2(1) in this way would not be overly controversial in terms of conventional theories of distributive justice.

In terms of emerging norms, MacNaughton also highlights that, "where economic inequalities are obstacles to the full realization of rights, they must adopt policies to reduce income and wealth inequalities. Thus, governments must take action to ensure that they adopt progressive tax policies, efficiently collect taxes, improve detection of tax abuse, and restrain from granting excessive tax concessions to attract business.

Reducing vertical inequalities requires greater attention to the wealth and income of the high-income people, especially the top 1 percent. Moreover, to ensure that policies are consistent with their human rights obligations, including the imperative to reduce income and wealth inequalities, governments must implement human rights impact assessments of proposed policies prior to adopting and implementing them.”

To this end, it is my view that even in the absence of an explicit right to equality, the existing and emerging norms can exert a strong **directional pull** towards greater equality such that the more pernicious effects of inequality are mitigated.

However, as Nolan and Bohoslavsky pointed out in 2020, whilst “Great strides have been taken on the conceptual front over the last decade through the development of understanding of the scope of human rights obligations from an economic policy-making perspective”, progress remains limited in terms of tempering the worst effects of dominant economic policy...

Hence, as Alston rallied, ‘human rights proponents need to rethink many of their assumptions, re- evaluate their strategies, and broaden their outreach while [on the other hand] not giving up on the basic principles’.

I would add to that that we (I include myself as a critical human rights proponents) must stand firm in our understanding that more equal economies produce better outcomes for all and if that means articulating a believe that mixed economies based on social democratic principles are preferable *in human rights terms* to their more neo-liberal iterations, then they should say so, and boldly.

Turning to the limits of legalism.

This is a big and important topic and one I can only really touch upon just now.

There are really three principal sub-criticisms of ESR.

1. Rights litigation is not well suited to addressing structural rights violations.

There are obviously some limits to what ESR litigation alone can achieve, although there is considerable scope in the procedural rules and remedial powers of the Court that broaden its impact – Boyle has written extensively on the options in this regard, and how, for example, class actions or creative forms of mandatory relief could ensure large numbers of rights holders obtain redress. There are sound examples from other common law jurisdictions.

The important concerns regarding the institutional capacity and legitimacy of the courts to analyse and decide complex polycentric issues have also received serious attention from ESR scholars. The concerns merit that attention, but can be overstated.

Boyle and King both stress the importance of the role of the court as an accountability check on the executive or legislature. The court applies the degree of institutional deference appropriate to the particular context, including the scale of the alleged breach, the extent to which the stated aims of the policy have been coherently set out by the government, and whether the measure is likely to be efficacious. Therefore as “intervenor in the enforcement of ESR, [the court] is an important part of a multi-institutional dialogue ensuring accountability rather than a transfer of political power.” This is a task in which the courts are already well versed in the context of Civil & Political rights, which also frequently have significant resource implications.

The task undertaken by the quasi-judicial CESCR when reviewing the Coalition Government’s suite of austerity measures is a case in point. The Government argued that its austerity program was compatible with the UN’s International Covenant on Economic, Social and Cultural Rights. The UN Committee did not agree. Applying the “principle of non-retrogression”, it expressed serious concerns about the ‘disproportionate, adverse impact that austerity measures [were] having on the enjoyment of economic, social and cultural rights by disadvantaged and marginalised individuals and groups’ The Committee reached this finding in part because the Govt could not demonstrate that the

policies had had their intended effect; the targeted decline in the national deficit had not in fact materialised.

Litigation is in any event always a last resort. The profoundest impact of ESR will be in the framework of rights that it bestows to rights holders and duty bearers alike: amidst the complexity and jeopardy inherent in the modern world, the human rights framework offers a way through that conscientiously avoids or minimises the treating of any individual or individuals as expedient. The human rights-based approach is also a participatory one. Solutions to rights breaches must be the product of genuine involvement and co-design (Scottish Human Rights Commission) with the people directly affected. As Boyle again states, “decision-makers, whether that be local authorities, teachers, social workers, the police or medics would benefit from reference to the ... rights framework as a tool to execute their job in ways managerial positionality might overlook. It is a tool of empowerment that cuts both ways.”

2. Legalism is inherently pro-hegemonic: “the court itself embodies an elite-driven exercise of power that reinforces existing inequalities” (Boyle)

The degree to which ESR may prove effective in addressing the adverse consequences of the current economic situation (and as such prove to be anti-hegemonic) may depend on the real-time application of the accepted and emerging norms discussed a moment ago.

BUT Legal realism is a serious consideration. On the one hand we all know the judiciary is demographically challenged. On the other, there are multiple examples of judges following the evidence in controversial cases; for example, the courts have twice struck down the executive’s methodology for setting the rates of rates of asylum support on the basis that they did meet the statutory requirement of adequacy. If ESR substantive standards were engaged, they would doubtless do the same again.

Judges are unlikely to be the bastions of radicalism in the manner that critics might wish and in that sense leftists may always be disappointed. But were it otherwise, the legitimacy of rights-adjudication would be imperilled. Again, Jeff King advocates that the

courts should when enforcing ESR apply “dynamic incrementalism” (by which he means “searching, busy and vigilant”) based on familiar principles of judicial constraint; he insists that we should not lament this, and I would agree. All the better to ensure ESR adjudication is tenable and constitutionally viable.

Again, it is not all about litigation and judges. It is also profoundly important to consider the galvanising effect social rights can have on social advocacy and activism.

Social rights need social activism, and social activism needs social rights.

Importantly the content of HR are not fixed. Dancy and Farris’s ‘constitutive model’ holds that ‘human rights law is forged through, and reinforcing political struggles between the weak and the powerful’, and that “by conceiving of rights as a contestable, modifiable and flexible political construction whereby rights are built, rather than asserted it acknowledges, the need to forge rather than assume political trust.” Others have emphasised the importance to move HR culture beyond ‘naming and shaming’ and towards ‘framing and claiming’.

So rights have their role to play in political struggle...

But the third sub-criticism takes issue with this.

3. Human Rights ‘crowds out politics’

Moyn and others have attributed the decline of more overtly egalitarian politics to the rise in prominence of human rights, and therefore claim that the false promise of human rights has deflected attention and energy away from the struggle for resources and political power, paving the way for uncontested NL.

As with any such historical account, it would take a historian to provide a contrary view, if there is one to be told. I am not that person. But I have some grounds for scepticism. The extent to which the promise of HR was false was surely partly because people could

not enforce their ESR; the historical account is therefore not an argument against making them enforceable now. Also, as Alston has highlighted, Moyn's perspective may have overlooked real life examples of where social rights were used successfully to mobilise resources against NL. That those struggles did not always prevail does not make it necessarily true that 'politics' would have fared any better.

It is undeniable that progressive or leftist politics suffered a significant defeat after the end of the cold war from which arguably it has still to recover. It seems tenuous to me to claim that merely because, for some activists, HR filled a vacuum left by a wounded progressive politics, HR are responsible for the left's failure to reinvent itself. I am also not sure that merely because many people with progressive politics also did, or do, human rights, or vice versa, meant, or means, that they couldn't or can't distinguish between the two.

But with all that said, I do recognise the central importance of not overselling the transformative potential of human rights. A tendency to do precisely that has undermined the credibility of human rights activism to some degree: that sensibly cannot be denied. The combination of oversimplifying the solution to a difficult problem with exaggerated claims to authority (albeit to the rights of people rather than the will of the people) is something that HR practice perhaps shares with populism. Of course, if Human Rights is populism, it is at least of the inclusive variety.

Populism is to where I now turn.

- The "**Not them!**" objection

I have not claimed that Human Rights alone can eliminate the damaging levels of inequality or its effects. Nor do I claim that inequality is the only cause of right-wing populism. As I stated before, it is characterised by a marshalling of public support against the extension of social and economic entitlements to certain groups it portrays as underserving; classically immigrants (but, they may only be the first group to be excluded!).

Far Right populists don't highlight rates of economic inequality per se as being the problem; or the excessive political power of the super – rich. Instead, they offer a simple solution to the symptoms of NL's high levels of inequality; rid us of "them", and the problems of scarcity in our public services will disappear, they say.

These claims genuinely are "patent nonsense" of course. And should always be exposed as such. Take Mr McGinnis' comment above: there are not 1.3 million people on housing waiting lists in the UK. There are 1.3 million households (2023). But in 2021/22, refugees made up a tiny 0.9% of new social housing lettings.

There are countless other examples of such bogus claims on both sides of the Atlantic (and in Europe – although pet-eating still tops the lot!). I literally picked the first one I found in social media.

I shall leave you to speculate as to why the rich and powerful leaders of these parties seem so keen to deflect attention away from the rich and powerful.

It is equally easy to understand why they target migrants: they are ready-made outsiders. If you are worried about holding onto what you have, if you feel economically threatened; it may be quite natural to defend what you already have or believe you have some priority entitlement to.

This is why UKIP did well in the areas most economically threatened - by austerity.

This is why Reform is so openly targeting traditional Labour seats.

This is why Trump saw a 15% swing from those earning under \$50,000 and why the cost of living and inflation is the principal explanation for his recent electoral victory.

That is also why the migrant is caricatured principally in economic terms; a parasitic migrant; ignoring the fact that migrants are and have always been net contributors to the UK economy.

This is hardly new. And neither is unique to the populist rights' playbook.

This is what academic and anti-racist activist Arun Kundani said in 2015:

“The roots of the new stigmatising discourses in Britain can be traced to the mythology surrounding asylum seekers that emerged in the 1990s. Newspapers and politicians blamed asylum seekers for the spread of TB, AIDS and SARS: for failing schools and hospitals; for falling house prices; for low wages, rising crime, prostitution and road accidents. They were even to blame for the dwindling number of fish in Britain's rivers, the declining number of swans and the disappearance of donkeys. In the short number of years they had been in Britain, they had not only achieved all of this but also held on to a reputation for laziness. If asylum seekers did not already exist, they would have been invented”

Seen in this light, discrimination on socio-economic grounds underlies much of the treatment of migrants: it is their status as the socio-economic underclass that explains their special treatment: there is no opposition to wealthy migrants who also come here for economic reasons; to invest in UK real estate for example.

I don't seek to diminish the role that racism plays. But racism does not materialise overnight or in a vacuum. Dismissing the concerns of the far-right's supporters as being motivated or explained only by racism is hugely dangerous as it may (and does) continue to obscure the conditions, and *the causes* of those conditions, that are actually generating economic insecurity. And, insofar as those causes remain obscured, they won't be dealt with. Again, I shall leave to speculate as to why the FR don't seem concerned with the actual causes.

Ultimately, rather than pathologise far right supporters as racists (which plays into their leaders' hands), far better in my view to deny their leaders the scapegoater's oxygen by ensuring that everyone have enough food to eat, decent houses to live in, the best available healthcare and decently paid jobs.

So enact ESR and the problem goes away?

Unfortunately would be equally naïve.

As explained when discussing the ideological context, the far right is intrinsically opposed to HR because Far Right exclusive populism is set directly against universalism: the "not them!" objection?

Universalism is antithetical to their core political identity.

This is what Reform's manifesto "contract" said about the HRA:

- **"Leave the European Convention on Human Rights."**
- "Protect our servicemen and women on active duty inside and outside the UK from civil law and human rights lawyers."
- "Commence reform of the Human Rights Act **so that it puts the rights of law-abiding people first.**"
- Replace the Equalities Act – "The Equalities Act requires discrimination in the name of 'positive action'. We will scrap Diversity, Equality and Inclusion (DE&I) rules that have lowered standards and reduced economic productivity"

Human rights are squarely associated with the "corrupt elite": liberals human rights proponents "talk a good game" on equality, but the reality is that they look after themselves and their interests.

As Koskeniemi (2021: 58) points out, 'the politics of the backlash have not been about economic deprivation' but about 'cultural transformation' and 'revenge against a political

and cultural elite that uses the grandiloquent rhetoric about human rights to distribute material values to its friends—aliens, minorities, and “unaccountable international bureaucrats”

Again, this is all so familiar. And of course, equally bogus in so far as it is asserted that the Human Rights Act is only concerned with those in the Far Right’s opponents’ camp (and their pet cats of course).

But. I am strongly of the view that the failure to include ESR, which are commonly described as “everyday rights”, has played a significant part in the denigrating of human rights generally and the capacity to portray human rights as the elite’s playthings....

Because absent ESR, Civil & Political rights have (entirely predictably) manifestly failed to protect the people from gross material inequality and the economic insecurity that follows.

The Human Rights story has been partially sold. One hand has been tied behind its back the whole time!

Which brings me to my conclusion on this third objection: what does it say about our governments that they have failed to enshrine ESR? Why have they have not been prepared to offer even these forms of guaranteed material conditions? Why don’t they want to held to account for them?

Has this failure not played straight into the hands of those who say that HR are only for the elites, the already rich and powerful?

And what does it say about progressive politicians in particular? Those whose very political purpose is to represent and emancipate the least well off (the very people whose ESR are being violated)?

So at this critical juncture, with progressive governments in power, the overarching question is surely not why should we incorporate ESR, but why on earth would we choose not to do so?

In my view it will be disastrous if this opportunity is not taken. How do we hope to grow or even maintain support for HR if we send out this message. Gordon Brown was aware of this when he called for social rights to be part of “an agreed statement of the purposes of the UK as a whole - as it were, a mission statement for the union of nations and regions which make up this country - and this should be given appropriate constitutional authority”

It would be particularly disastrous, and ironic, if the reason this chance to constitutionalise ESR was not taken was because of a perceived short-term political disadvantage: that because universal ESR would have to apply to migrants along with everyone else, this would play into Reform and the FR’s hands.

In practice, that might not be significant in material terms. ESR jurisprudence is plenty flexible enough to accommodate some contextual differences between people who are in the UK permanently and those who are here pending decisions as to their status.

And the irony? Poll after poll shows that ESR are very popular with the general public.

But even leaving that aside, progressive parties must be prepared to take this fight on. They must not cede ground on universalism to the Far Right.

Because where does it stop otherwise?

Look at what Reform and Farage says about social security:

In their 2024 manifesto:

“All job seekers and those fit to work must find employment within 4 months or accept a job after 2 offers. Otherwise, benefits are withdrawn.”

Whilst Farage’s true colours are these:

“Welfarism, I’m afraid, is making millions of people lazy. ‘I’m too fat, I’m too stupid, I’m too lazy, I don’t want to get out of bed in the morning. I smoke drugs, give me money’ ... That’s what we’re saying. ‘I don’t need to work, the state will provide for me’ ... We cannot afford it.”

And here is where the danger lurks....

This approach to welfarism would be very much compatible with the NL arguments about ESR and state redistribution generally.

And we can be relatively sure that, if in return for an anti- redistributive political alliance with Reform, all the NL state needs to agree in return is to leave the ECHR and replace the HRA with a UK Bill of Rights that excludes migrants, that deal is as good as done.

And with it would come the end of universal human rights as we know it.

And we will have the 7 deadly sins indefinitely....

And in such a scenario, how could we hope to navigate the challenges and threats that await us without universal rights? What moral and ethical framework will guide us if not HR?

We need strong and enforceable human rights, including ESR of course, to counter the tides of populism and strong man politics that otherwise threaten to divide us irreparably

We need strong and enforceable human rights to begin to reverse the worst of the seven deadly sins associated with unabated NL

And as for the 'We don't have to' objection....

When the winds of political change come – and they surely will – should those winds favour the agenda of the far right, and they surely might, (even if not in the form of a traditionally far right political party), what infrastructure will be left to defend those who have been repeatedly inflicted with the worst of the consequences of gross inequality ...

ESR must be part of the legacy of progressive politics – systemic and constitutional protection from and resistance to the economic and political dominance of the very wealthiest.

Therefore, we really have reached “crunch time.”

There is no avoiding the political significance of the ESR issue.

Not now. Not at this critical moment in time.

To conclude

It is my strong belief that ESR would be a sensible, mature evolution or modification of democratic capitalism that could, if done with real intention, reduce material inequality and enhance democracy equality, at a time when both of those problems threaten to undermine our collective ability to save us from the worse version of ourselves.

We should cast off the objections of those who say ESR would be ‘too much’, “not enough” or “not for them!”

The moment to do this is now.

Thank you