

Human Rights in a Neo-liberal World

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Introduction

This talk unpicks a puzzle. One of the most striking influences on last month's dramatic British election was an apparently growing feeling among many of the electorate – particularly the young - that it was wrong that the United Kingdom had become such a very unequal society, and was getting more so. The broad facts are fairly familiar. A Joseph Rowntree Foundation report showed issued a few days before this talk was first given showed record poverty among working families which was then being exacerbated by increased insecurity in both housing and employment.¹ The Report demonstrated that the young in Britain were slipping into poverty while the over 65s were largely escaping it.² In excess of half of Britain's wealth is controlled by the richest 10%. The wealthiest 20% of the population had on average put £18,680 into their savings in 2014, while the poorest 20% had spent £1,910 more than they earn.³ Wages are decreasing year

¹ New Policy Institute, *Monitoring Poverty and Social Exclusion* :

<https://www.jrf.org.uk/report/monitoring-poverty-and-social-exclusion-2014>

² George Arnot, 'More young adults in poverty as rate drops to record low for over 65s' *Guardian* 24 November 2014:

<https://www.theguardian.com/news/datablog/2014/nov/24/more-young-adults-in-poverty-as-rate-drops-to-record-lows-for-over-65s>

³ Harriet Meyer, 'UK's richest can save £18,680 a year as the poorest 40% spend more than they earn': Centre for Economic and Business Research for the Post Office *Guardian* 29 May 2014: <https://www.theguardian.com/uk-news/2014/may/29/richest-uk-save-poorest-spend-crisis-post-office-data> .

on year⁴ and according to a report by my colleague John Hills and Paola De Agostini and Holly Sutherland the Institute for Social and Economic Research at the University of Essex, the tax and welfare policies of successive governments since at least 2010 have compounded the wealth divide, syphoning money from the poorest and passing it on to the better off.⁵ The charity Save the Children warns that the number of British youngsters living in poverty is set to reach £5m by the end of this decade, up from the 3.5 million in 2014.⁶ In the UK 67% of men and 57% of women are either overweight or obese.⁷ There are more people in working families living below the poverty line than in workless or retired families combined – 6.7 million according to the Joseph Rowntree Foundation and the New Policy Institute.⁸

There can be no doubt that things have been getting worse in the last two years, with the impact of BREXIT-induced inflation having further squeezed living standards, even among those who are relatively well-off.⁹ The National Institute of Economic and Social Research anticipates a year ahead of shrinking disposable incomes.¹⁰ A Report from the government's own Social Mobility Commission reports in June 2017 on 'how divided we have become as a nation. A new geographical divide has opened up. A new income divide has opened up. And a new generational divide has opened up.'¹¹ Meanwhile, the modest efforts

⁴ Mary O'Hara, *Austerity Bites. A Journey to the Sharp End of the Cuts* (Policy Press, 2015), p 4 note 15.

⁵ 'Were we really all in it together? The distributional effects of the UK Coalition government's tax-benefit policy changes' CASE Working Paper 10, November 2014: <http://sticerd.lse.ac.uk/dps/case/spcc/wp10.pdf>

⁶ *A Fair Start for Every Child* 28 May 2014, reported *Guardian* 28 May 2014.

⁷ *The Lancet* Global Burden of Disease Study, reported in the *Guardian* 29 May 2014.

⁸ *Austerity Bites I* p 4 note 14.

⁹ 'Government urged to act on wage squeeze as UK inflation rate hits 2.9%' *Guardian* 19 June 2017:

<https://www.theguardian.com/business/live/2017/jun/13/uk-inflation-hard-brexit-pound-sterling-ftse-business-live>

¹⁰ See report by Philip Inman *Guardian* 10 May 2017:

<https://www.theguardian.com/business/2017/may/10/uk-pay-squeeze-inflation-niesr-obr-forecast>

¹¹ *Time for Change: An Assessment of Government Policies on Social Mobility 1997-2017* (June 2017):

that were promised by the May administration to tackle inequality have been jettisoned after the election result so severely weakened its authority.¹² The arguments made by Richard Wilkinson and Kate Pickett in their path-breaking book of seven years ago *The Spirit Level* about the ‘iniquity of inequality’ have not gone away, indeed have required recent restating by these two authors.¹³

And yet – and here is the puzzle - we live at a time when human rights protection remains ostensibly strong. For all the noise generated by rights-sceptics in the Conservative party, on which more later, human rights law remains so far unaffected by the Europhobic noise around it, and the same is true of the country’s international obligations. We continue to have international, regional and (since 1998) domestic rights-reinforcing legislation to back up our claim to be a rights-respecting society, and we have various independent bodies in each part of the United Kingdom, as well as our independent judiciary, to keep us on the human rights straight and narrow. We have a special Equality Act passed in 2010 specifically designed among other goals to advance (as the Equality and Human Rights Commission put it) ‘equality of opportunity for all’.¹⁴ How can we have all of this and yet at the same time the rampant and growing levels of inequality to which I have just referred and some examples of which I have just given? And, going even further, why has human rights law even been in the firing line for abuse and criticism, at a time when one would have expected it to have been hailed as a potential antidote – and an available one at that – to that inequality?

The easy response is to say that our system protects the wrong kinds of rights, or rather not enough rights, that it is focused only on a range of civil and

[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/622214/Time for Change report -
_An assessment of government policies on social mobility 1997-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/622214/Time_for_Change_report_-_An_assessment_of_government_policies_on_social_mobility_1997-2017.pdf) p 4.

¹² See the Conservative Party Manifesto 2017:

<https://www.conservatives.com/manifesto>

¹³ <http://www.theguardian.com/commentisfree/2014/mar/09/society-unequal-the-spirit-level>

¹⁴ <http://www.equalityhumanrights.com/legal-and-policy/key-legislatures/equality-act-2010/what-is-the-equality-act>

political liberties and that these are not germane to the problem of inequality. Whether true or not (and I will be saying later that this is by no means a full description of the sorts of laws we have), the risk in such an assertion is that it leads to a further easy answer – that what we need are further and better, more enforceable social and economic rights to fill the gaps in our current legal protection. This may or may not be true but the problem to which this would be a response is deeper than the mere absence from our code of laws of such explicit protections. And they already exist internationally anyway.

So if that is not the answer, what is? How have human rights not come to our rescue in these times of inequality, indeed happily co-existed with such relative deprivation? The answer takes us to the uses and abuses of the language of rights and to the dangers of the bad-faith deployment of rights-talk. To flesh out what is meant by this I need first to spend a bit more time on our opening puzzle.

The lure of 'neo-democracy'

In 2013, I published a book called *Liberty and Democracy*.¹⁵ It argued that the democratic world had entered a new era, one that I called 'neo-democracy'. In the forty plus years after the Second World War, arguments about democracy and human rights had been caught up in a larger quarrel between capitalism and socialism as to which provided best for its people today while also laying out the more compelling - and therefore persuasive - vision of the future. That argument ended in 1989 with an emphatic victory for one side – we do not need to remind ourselves which one – since when we have all (or nearly all – China is I admit a rather large exception) become democracies on what may loosely be described as broadly Western terms.

But what does it mean to be a democracy today? What does freedom mean? What does 'being free' entail? My book argued that there was a spectrum – from the obviously bogus (I think I gave the example of Belarus) through to

¹⁵ Cambridge: Polity Press

various, richer versions of statehood giving concrete effect to the commitments to representative government, the rule of law and respect for human rights that are broadly agreed to be the key indicators of democratic culture. Now the point of the book was to argue that in the years after 1989, and especially after the shock of the attacks of 11 September 2001, a particular kind of democracy had grown into prominence, one that while not being Belarus exactly, had become accustomed to setting out its commitment to the basic building blocks of democracy in a way that was more for show than for real effect: declarations of respect for human rights that meant less than they seemed;¹⁶ an independent rule of law that turned out to be less independent than it appeared, a system of elections that was anything but free from the influence of power; and so on.

My concern in the book was mainly with civil and political rather than social and economic rights. The approach I identified was one that now covered a great amount of the world's people, and was gathering pace. The movement against good faith democracy was (and is) being fought on many fronts: not only the new 'democracies' of central and eastern Europe which include Russia of course (with its membership of the Council of Europe, its commitment to the European Convention of Human Rights and its regular elections seeming to sit easily with invasions, assassination of journalist-opponents of the government and high levels of corruption) but also the developing world (the democracies of many post-colonial states for example, not excluding India – which are proud of their democratic culture and brimming with the appearance (if often not the reality) of democratic institutions). And crucially for my argument, too, the trend embraces the 'old democracies' of Britain (secret trials; TPIMs; surveillance – all legitimized by democratic and human rights compliance), the United States (Guantanamo as reframed within the law by President Obama) and even the venerable United Nations itself, with the Security Council's assumption of the power to blacklist individuals and corporations around the world, albeit

¹⁶ For a depressing account of why it might be that countries sign up to human rights obligations see Richard Nielson and Beth Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime' 18 January 2014: http://www.mit.edu/~rnielsen/Rewards%20for%20Ratification_18jan2014.pdf

now with a sufficient modicum of legal process to avoid allegations of arbitrariness.

It is this contrived lack of the arbitrary that marks out a neo-democratic state from one that is merely a charade on the old pre 1989 Soviet model (Belarus again). The place looks democratic, calls itself democratic, has various organs which seem to be, even believe themselves to be, democratic, has courts with the job of protecting human rights, is linked in to the international system for the protection of human rights, and so on – but all of which in reality more or less invariably (depending on where you are in the spectrum) fall in behind state power in a way that looks, on closer gaze, to be anything but democratic. Crucially this is not because these institutions are corrupt or that the men and women who man them are lackeys of the state. Rather it is that we are growing a new idea of what we think democracy entails: having an elected legislature (without worrying too much about how money determines who gets there), enjoying an independent judiciary (whose job it is to apply rules that entrench ever further the power of the elite) and committing to human rights observers, security overseers, human rights commissions, courts etc (whose various remits however invariably ensure that their decisions will rarely be debilitating to those in power). And so in neo-democracy - which is what I say this is, a new shape democracy is taking on - the wealthy have the cake of prosperity and are able to enjoy eating it too because they can plausibly claim to themselves that all around them lies evidence that they/we live in an open democratic society which respects human rights and the rule of law. Their cake is ethically sourced.

These are general trends but I want now to deepen the point by focusing once again on the United Kingdom, in many ways an exemplar of the overall picture, and one in which a significant choice may have appeared in recent months. Protest against the levels of inequality with which I began this talk have of course taken place – demonstrations, marches and sit-ins have been targeted on specific issues and have also from time to time embraced wider questions of fairness and justice in society as a whole. But these have been heavily controlled, throttled of real impact by police attention, albeit in a way that has (and here is

the neo-democratic rub) respected their human rights under our domestic legislation, the Human Rights Act 1998. Three dismal highlights among many are: first, the upholding of the police tactic of kettling protestors which survived human rights scrutiny in both the House of Lords and then Strasbourg, the judges finding an exception to the right to liberty of which until this case no one had been aware;¹⁷ second the judicial explanation of the removal of the Occupy protestors from around St Paul's cathedral as being permitted by rather than in violation of their Convention rights;¹⁸ and thirdly a decision by the High Court to support the police removal of protestors from a local library where they had gathered to protest against the imposition by the relevant local council of deep cuts to services.¹⁹ Legislation has also been passed the effect of which has been to make popular protest more difficult, and this too has been declared to pass muster under our human rights legislation (eg Police Reform and Social Responsibility Act 2011). In recent years we have become familiar with controls on our freedom that have had an explicitly anti-terrorist motive, and many of the examples I gave earlier of neo-democracy in action were of this type. But as these examples illustrate, the repressive reach of neo-democracy extends also to the taming (but crucially for neo-democracy not obliteration) of protest against socio-economic injustice.

'How has democracy been so easily changed from within?' might be a question on your lips. 'Has it changed that much?' might be a better one to ask. I include now not only the civil liberties that underpin our rights of protest but those rights of citizenship – of well-being; of being given the chance to lead a successful life – that many have long assumed are also (and inevitably) part and parcel of our democratic polity. In fact each is altogether more tenuous than you might think. Civil and political rights have been far less protected in British political culture than is widely believed, and social and economic rights have

¹⁷ *Austin v United Kingdom* European Court of Human Rights 15 March 2012: <http://www.bailii.org/eu/cases/ECHR/2012/459.html> See further *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 9

¹⁸ *City of London v Samede* [2012] EWHC 34 (QB): <http://www.bailii.org/ew/cases/EWHC/QB/2012/34.html>; *R (Barda) v Mayor of London* [2015] EWHC 3584 (Admin)

¹⁹ xxx. check

only been sporadically secured, and even then not because of any sense of democratic obligation but because of the mustering of domestic and international interests that has pointed in that direction. Democracy never arrived perfectly formed in any jurisdiction; it everywhere bears the imprint of past power relations, is born with the neo-democratic virus, one that I have been arguing here is getting out of control.

Not escaping history

To understand better the point just made we need to take a brief tour into the origins of democracy. In the last decades of the nineteenth century, at the highpoint of Europe and America's first 'gilded age', the idea was thought to be very dangerous indeed, carrying with it a commitment to equality that was deeply subversive of capital. The socialist question at the time was whether to play the emerging egalitarian, union-supporting, democratic game or to make a dash for power which leapt past present opportunities in a race for the classless finishing line. We all know the choice Lenin made and his success in executing it framed our politics until 1989. When the noise of war receded in the years after 1918, it left democracy triumphant in the US the UK and much of Europe, but democratic socialists – those who would have taken a different route to that of Lenin, using democracy as the radical battering ram of equality – rather out on a limb. Which did they like less: the injustice of the emerging system in the US and Europe (now all calling themselves democracies of course but with continuing high levels of poverty and inequality) or the Soviet democracy of show trials, totalitarian controls and crimes against humanity (as they were not then called)? Choosing to stick with the first, democratic socialists found themselves largely disabled as a result from challenging fundamental issues of inequality and unfairness at home lest they were then equated with the second (fifth columnists; fellow travellers; or just plain traitors). Democracy – now after World War 1 triumphant in what we would today call the 'Global North' - became what liberal capitalist states did, as opposed to socialist ones. It was a way of deciding who was going to run the game rather than a new way of playing

altogether – aspirants of the latter approach were not allowed play or were hindered (jailed; prosecuted; harassed) if they did.²⁰

As it bedded down in the inter-war years, democracy did not tackle the high levels of wealth-inequalities (reflected in property ownership) that had existed prior to the move to full democracy: these could be tinkered with at the edges but could not be directly challenged. Civil and political rights were enjoyed by those who accepted the status quo, disregarded for those who sought to step outside it. Democracy was to be Bismarckian not revolutionary, its script written by Disraeli not Marx. The virus of neo-democracy was in full flow, the cases of the 1930s bearing close resemblance to those of today in their support for police aggression.²¹

Now to some extent economic collapse and then war changed the dynamic of provision in these old democracies: the Roosevelt-led response to the crash of 1929 combined with renewed fear of a Soviet-inspired turn to radicalism to produce after the Second World War a social democratic model of democratic capitalism which if it was not designed to destroy the system was certainly intended to abate its worst effects. But the deal was always contingent on a rejection (and continued hounding) of radical alternatives. After 1945, democracy became the flag-bearer of astutely moderated capitalism, designed to concede enough to universal wellbeing to protect the system, but not anything more. Human rights were imposed on states as controls on their freedom of movement (and therefore guarantees against large-scale expropriation of property). Meanwhile no human rights constraints of any sort constrained the mandate of the international financial institutions.²²

This is the deal that came to an abrupt end in 1989. Some nostalgic revolutionaries might have thought that, with the spectre of Communism now

²⁰ See generally Conor Gearty, 'Neo-Democracy: "Useful Idiot" of Neo-Liberalism?' (2016) 56 (6) *British Journal of Criminology* 1087-1106.

²¹ See Keith Ewing and Conor Gearty, *The Struggle for Civil Liberties* (2000).

²² This background is explored in greater depth in my accompanying paper, 'Is the Human Rights Era Drawing to a Close?': see Annex below.

conclusively removed as a stick with which to beat non-Soviet-supporting radicals, it might have been possible for old school radical democracy to make a dramatic return, parading with enthusiasm a commitment to egalitarianism that had been forced to hide during the long Cold War, its ideologues emerging blinking but determined from their cellars like the recusant priests of earlier eras of emancipation, to take on the capitalists and their social democratic quislings. In fact nothing of the sort occurred. The space on the political map marked 'Non-communist left' had all but disappeared. The social conditions that had created the great democratic and Labour movements of the 19th century no longer pertained. Even the social democrats had been left beached both by the collapse of their natural communities of support in organized labour and by the disappearance of the threat to their left that had once given such intensity to their demands.

Capital had the field more or less to itself, and knew it. The victory needed to be shared with democracy of course: it had been a triumph not just for markets but for votes too. But it was a democratic co-winner that was in reality the junior partner, one that was now to be once again reined in by capital, its wild spirit broken afresh by the demands made of it by power and privilege. The flaws there at the start in the 20th century's turn to democracy – its acceptance of prior unjust allocations of power and property; its consequent understanding of liberty as being about a freedom blind to resources (everyone is able to eat at the Savoy); its resultant celebration of individual choice without noticing the poverty that made choice impossible for many – became something that could now be expanded without fear, discussed without embarrassment as a strength rather than a weakness. The mechanism for this surrender of democracy to capital was already to hand: 'neo liberalism'.

The idea had of course been tested before the end of the Cold War, in South America within countries controlled by US interests (most notably the Chile of General Pinochet) and again in a modest way (more in rhetoric than reality) by the Reagan and Thatcher administrations of the 1980s, in the US and UK respectively. As is well known the approach then took off after 1989 and has

become so entrenched that it appears now the unavoidable way of organizing our affairs, its inevitability hanging over all our democratic leaders like a Damocles sword ready to fall if one heretical move is made. Not even the crises of the mid 2000s could destabilize the route capital had taken; so entrenched was the new perspective that it became the solution to a problem largely of its own making.²³ As is well known the point of neo-liberalism is its commitment to the market as the solution to all (or nearly all) of the political and social problems of any given civil polity, but its great success lies in the way that it harnessed democratic tropes in order to camouflage the brutal effects of the realization of its aims. On the neo-liberal account, democracy does not stand apart from or in tension with the market – it is its loyal partner. Both systems emphasize individual liberty, the primacy of choice, the wisdom of the crowd to make the right decision. This mutual support is important to the success of each: democracy chooses the market because the market has already chosen democracy.

No-man's land

Where do human rights stand in relation to neo-liberalism? The individualist strand – the reason why Marx rejected the idea in the first place – remains strong and so a complementarity with market instincts is not difficult to contrive for those enthusiastic for such a union. The historic emphasis on civil and political rights on the capitalist side of the Cold War inevitably promoted the individual over the more community-oriented social and economic rights that were in contrast downplayed, and this configuration has been largely carried forward into the new post-1989 dispensation. The battering that economic and social rights have taken at the international level has been well explained in the literature.²⁴ And reverting once again to our case study of the United Kingdom,

²³ Wolfgang Streeck, *Buying Time. The Delayed Crisis of Democratic Capitalism* 2nd edn with new Preface (Verso 2017).

²⁴ For a wide-ranging scholarly analysis of the effect of the crash on social and economic rights: see Aoife Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press, 2016); Aoife Nolan, 'Not Fit

so far as national human rights are concerned while the Human Rights Act in that jurisdiction contains, it is true, rights of a mainly civil and political nature, there is nevertheless ample scope within them for the development of a range of social and economic protections against excessive neo-liberal impoverishment – if the will were there.

Now we get back to the centre of our puzzle. This is an opportunity that has not been taken. Not only has rights law been used (as we have seen) as a cover for cracking-down on austerity-protests where these have threatened to make an impact; it has also been to the fore in delivering judicial protection for the worst of successive government's attacks on the poor. And as intimated at the end of the last paragraph, plausible arguments based on, for example, the rights to respect for privacy and education, and the prohibitions on forced labour and inhuman and degrading treatment can be and have been mustered before the courts only often to fail either immediately or on appeal.²⁵ The reasons have been substantive – the right does not apply – and also constitutional – this is not a matter for the judges as the issues are too political for the courts to handle – but they have combined to give the promoters of these neo-liberal policies not just the cover that comes with parliamentary majorities but that which flows from being human rights compliant as well.

There are now too many examples to detail in a talk of this nature: the challenges to library cuts in a local authority area;²⁶ to the removal of elderly residents from care homes forced to close;²⁷ to the job-seekers allowance with

for Purpose? Human Rights in Times of Financial and Economic Crisis' [2015] (4) *European Human Rights Law Review* 358-369.

²⁵ But not always, especially where children's rights and/or elements of discrimination can be identified: *Cameron Mathieson v Secretary of State for Works and Pensions* [2015] UKSC 47; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; *R (Rutherford) v Secretary of State for Works and Pensions* [2016] EWCA Civ 29.

²⁶ *R (Bailey) v London Borough of Brent* [2011] EWCA Civ 1586 – this was a case primarily based on the Equality duty under the Equality Act 2010, to which the same issues as those considered here under the human rights rubric apply.

²⁷ *R (Karia) v Leicester City Council* [2014] EWHC 3105 (Admin).

its element of compulsory working;²⁸ and to the benefit cap.²⁹ A recent impressive decision on discrimination in the field of welfare is under appeal.³⁰ Even when you do succeed as in a challenge to a youth services budget in North Somerset the risk is that the winning litigant is told that it is too late to undo the damage illegally done.³¹ There is a momentum behind the neo-liberal grand design which has forced even the European Court of Human Rights to toe the line, taken to a particular extreme when it supported austerity measures taken by the Portuguese and Greek administrations, usually expressed (as in these cases) by strong statements about how it is not the role of that Court to make judgments on the allocation of a state's scarce resources.³²

Even where the rule of law is engaged, the courts in the United Kingdom have been reluctant to challenge cuts on human rights grounds, though here it is true there has been a greater willingness to find procedural defects in what seems to be being required, pushing matters back for the impugned decisions to be taken afresh³³. Two rulings have been of potentially great significance, the first actually stopping a serious fraud case of some complexity for lack of adequate counsel representation (due to cuts) and the second involving the President of the Family Division Sir James Munby throwing the burden of funding legal representation on the court service where litigants before him had been denied legal aid by the state and where justice requires such representation (and also the presentation of expert evidence.³⁴ The first of these has been

²⁸ *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68.

²⁹ *R (SG and others) v Secretary of State for Works and Pensions* [2015] UKSC 16.

³⁰ *R (DA) v Secretary of State for Works and Pensions* [2017] EWHC 1446 (Admin).

³¹ *R (Hunt) v North Somerset Council* [2013] EWCA Civ 1320: this under equality law.

³² *Antonio Augusto Da Conceição Mateus and Lino Jesus Santos Januário v Portugal* 8 October 2013); *Koufaki and Adedy v. Greece* ECtHR 7 May 2013. Cf *Da Silva Carvalho Rico v Portugal* ECtHR 13341/14

³³ *R (Public Law Project v Secretary of State for Justice* [2014] EWHC 2365 (Admin). See further *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 where however the ground of unjustifiable discrimination was not pursued.

³⁴ *Q v Q; re B (A Child), re C (A Child)* [2014] EWFC 31.

overturned on appeal³⁵ and it remains to be seen whether the second is the start of a trend or an extreme 'one-off'.³⁶ It is unlikely that Munby's resistance will become the norm.³⁷

Conclusion

So what then, in conclusion, is to be done? With the UK election results of 8 June and as earlier suggested, the UK does seem to be facing something of a choice. On the one hand there is the strong drive within the governing Conservative Party to cut itself off from binding international and regional controls, 'to take back control'. In human rights terms this manifests itself in a desire to be free not just of EU human rights obligations but liberated too from those inherent in the European Convention on Human Rights and the Human Rights Act – withdrawal from the first and repeal of the second remain on Mrs May's post BREXIT agenda. On the other hand, and as once again anticipated at the start of this talk, there do appear to be limits to the British people's tolerance of inequality and unfairness. Even the Governor of the Bank of England realizes that 'Capitalism is at risk of destroying itself unless bankers realize they have an obligation to create a fairer society'.³⁸ And it was the head of the IMF Christine Lagarde who in a speech at LSE in early 2014 warned that rising inequality was a barrier to growth and could also undermine democracy and human rights.³⁹ It is

³⁵ *R v Crawley* [2014] EWCA Crim 1028. Note another strong High Court on legal aid funding that was overturned on appeal: *Director of Legal Casework v IS* [2016] EWCA Civ 464

³⁶ But see *R (Howard League for Prison Reform and Prisoners Advice Service) v Lord Chancellor* [2017] EWCA Civ 244. Other straws in the wind include another order by Munby P requiring legal aid be given to a parent in a custody dispute: <http://www.familylawweek.co.uk/site.aspx?i=ed136930> and the woman given legal aid to sue the police <https://www.theguardian.com/law/2014/nov/12/woman-legal-aid-sue-police-high-court>

³⁷ But note a driver for resistance here is the difficulty judges encounter in managing litigants in person: see <http://www.theguardian.com/law/2014/nov/23/appeal-court-judge-horrified-number-litigants-without-lawyers>

³⁸ *Guardian* 28 May 2014 p 1

³⁹ *Guardian* 28 May 2014 p 19.

a sad comment on our current political culture that it is our bankers who are calling for us to man the barricades.

But what is to be the rallying cry for those who are seeking a reconfiguring of state priorities away from neo-liberal certainty? Socialism remains unconvincing as an unequivocal answer, not least because the intrusions into human rights that such radical transformation would require will involve social conflict on a scale that might well prove counter-productive to the overall project. Though the overall story of the British courts' involvement in the protection of social and economic rights is, as recounted above, a dispiriting one, there are (also as indicated above) some recent signs of stronger judicial engagement. Even if robustly progressive, though, the law cannot do everything by itself. Perhaps the time has now come also to recover the overtly political in human rights and to parade it as the last surviving legacy of a social democratic approach to life that may have been rendered vulnerable by the collapse of the Communist threat to its left but which remains vital to our shared future nevertheless. Human rights is an important rallying call both inside and outside law, capturing a sense of entitlement to a good life, that chance of equal opportunity for all which is so easily mocked by the failure of our current legal problems. Is it too much to ask our political leaders to stop for a moment from their empty ritual of blaming others (Europe; foreign workers; trade unions) for our woes, to look around and listen, and then to lead? Human rights may be too Burkean in their acceptance of the need to grow change slowly, but as both the life's work of that perhaps more palatable author Antonio Gramsci and the uncertain embedding of democracy at the start of the 20th century have surely taught us, hegemonies need more than laws and a feeling of determination to shift.

Conor Gearty

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ANNEX

IS THE HUMAN RIGHTS ERA DRAWING TO A CLOSE?

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Whether temporary or permanent, the withdrawal of the United States from a lead role in world affairs has many immediate implications. Not the least of the spheres affected is American engagement in what can be broadly described as the promotion and protection of ‘universal human rights’. Not much space will be given over here to proving the thesis of Trump-inspired withdrawal from this field. We know the game is up, that human rights have been reduced to another of those transactional concerns that holds the President’s attention for a minute or two while policy gets made around him, when the Saudi leadership and the Phillipine’s president get applauded while Iran gets slated the day after its elections and Cuban relations are put back on ice because of the President’s ostensible concern for human rights abuses ongoing in that country. Of course there have always been double standards at work here, calculated hypocrisies even. But the Trump ascendancy is marked by an nearly-admirable level of honesty – there is no effort to square the circle, to develop some kind of distinction between ‘authoritarian’ and ‘totalitarian’ states as Reagan’s UN envoy Jeane Kirkpatrick did, or to rationalise some strong men as caterpillars-about-to-become-democratic-butterflies as Carter might have tried. No: Trump and his gang know we know they are making it up, and they don’t care.

Where does this leave human rights, for so long the flagship of American global ascendancy? This article reflects first on how human rights came to enjoy the place in the (American) diplomatic sun which they have long enjoyed, but then secondly on how systemic faults in the architecture of the post war global order have meant that they have always been more vulnerable to being superseded than had ever seemed to be the case at their height. Indeed that process of threatened supersession long predates the Trump presidency, beginning with the attacks of 11 September 2001 and being then exacerbated by the economic and banking crises of

seven years later. But if 'human rights' are on the ropes they are by no means down and out. The third part of this essay reflects on a change of global leadership that we are seeing unfolding, at what is by international standards a dizzying pace. Much has been made of China's feasting on the carcass of America's hegemony. But so far as human rights are concerned, a resurgent European Union, reshaping itself in the face of adversity, has emerged as lead advocate of human rights in our new multipolar world. The era of human rights is not dying; it is seeing a change of its patron.

THE PAST, 1945-2001

The arrival of human rights on the international scene is announced by its starring role in the UN charter in 1945 and then confirmed three years later with its very own, tailor-made, foundational document, the Universal Declaration of Human Rights. The story for the rest of the twentieth century is positively Whiggish in the seeming inevitability both of its rise and growing ascendancy. The range of what the term human rights covers (already ambitious in 1948) gets fleshed out in a succession of additional agreements and declarations, most famously in covenants agreed in 1966 on civil and political and economic, social and cultural rights, but also over the years covering such issues as racial and religious discrimination and discrimination against women, and the rights of discrete groups: children, migrant workers, persons with disabilities, and indigenous peoples. Prohibitions on heinous activities (genocide; torture) are given particular attention.

Accompanying this growth in range had come a deepening of bite. Starting as a mere declaration of intent human rights gradually grew sharper and sharper teeth, quasi-judicial oversight with regard to the mainstream rights documents, new opportunities for individuals to defend themselves from their own states, and then – the long-sought ultimate deterrent against abuse – a new punitive code with a freshly created International Criminal Court to turn old rhetoric into the reality of the prison cell. By the time this last initiative had been agreed, in 1998, a slew of states had marked their breach with Communist control by buying wholesale into human

rights, seeking through enthusiastic membership of the new global community to demonstrate to the world and themselves that the provincialism of the Cold War was conclusively over. New regional agreements took human rights into areas free of American influence. UN human rights missionaries (the special rapporteur on this; the Secretary-General's special representative on that; (from 1993) the UN's very own High Commissioner for Human Rights) took the message far and wide, underpinning the efforts of the redesigned UN Human Rights Council and a myriad of treaty bodies to (in the nicest possible way) imprint the human rights ethic on an imperfect world.

However successful, no idea can be rendered forever immune to attack. Human rights are no exception. Vulnerabilities that can be glossed over when the going is good become more dangerous when events unfold in a way that serves to place such exposures at centre stage. Since their post-war re-emergence as a global force, human rights have been carrying within them three such risk-agents, and it has been human rights's misfortune that all three have lately pushed themselves to the fore. Each grows out of gaps left in the structure of human rights protection when the post-war international edifice was being constructed in the second half of the 1940s.

First and largest of all, there is the continued salience of sovereign states: for all the rhetoric in the Charter it is the *United Nations*, not the *United Peoples* (much less the *World Government*) that the document creates. A corollary of this capital fact is the principle of non-interference in the affairs of states where a matter is 'essentially within the domestic jurisdiction of any state' (to quote article 2(7)). In a different international climate than that to which we have become inured over the decades since 1945, the word 'essentially' might have done a lot of limiting work here but the reality has been that states have been able to erect large NO TRESPASSING signs on their borders behind which an often bloody impunity has been allowed to reign. Of course the rights missionaries have been able to make noise, the Security Council has from time to time become engaged in rights enforcement, but for all the grandiosity of their language, human rights defenders

have invariably been supplicants, knocking on the door, not storming in with their ethical troops to do immediate justice.

The second and third of our gaps grow from the first. Since the United Nations is constructed as a deal between universal values on the one hand and sovereign states on the other, it is on the latter that the responsibility rests for making that deal work. States are the parties with the obligation to ensure that human rights are respected within their jurisdictions. They must answer for all that happens within their borders. It follows from this that non-governmental entities – individuals; associations; criminal gangs – are only indirectly bound by the high-flown rhetoric of the UN charter. Their adherence (and in some cases it will be involuntary compliance) depends on the State within whose borders they conduct their activities. Now given the UN model we have been discussing this makes perfect sense. But it has seemed sometimes odd to those unschooled in the intricacies of international relations that, to take a couple of examples, the mafia do not have to ‘obey’ UN law while the Italian state does or (to pick a hot topic from the 1980s) that the IRA’s ‘Kangaroo courts’ can be untouched by UN oversight while the State’s non-jury Diplock courts could attract such opprobrium. (Needless to say these examples can be multiplied.)

Thirdly and finally there is the problem of what to do with international financial institutions. The International Bank for Reconstruction and Development, which soon became the World Bank, was established in 1944. That same year the Bretton Woods agreement led to the creation one year later of the International Monetary Fund (IMF). Each is a UN specialised agency enjoying formal autonomy within the organisation. Not being a state neither is overseen by the UN human rights apparatus as a state would be. Of course both have sought to engage with human rights standards and pre-requisites, particularly recently, but always only up to a point and never because either has to. It is the states to which they are empowered to issue instructions – often of course (particularly with regard to the IMF) harsh and controversial dictates – that are required to square the human rights

circle. Even more than for sub-state actors, so far as these international financial institutions are concerned, human rights obligations are for other people.

These three cracks in the human rights edifice – all structural – could be glossed over when the going was good, as generally speaking it was through the second half of the twentieth century, especially after as earlier noted the great wave of democratisation that followed the collapse of the Soviet empire. But the large-scale security and economic crises of the first decade of this Millennium have dealt a couple of heavy blows to the stability of the human rights building. These have been exacerbated by the weaknesses just discussed and are serious enough now to be threatening the whole project.

THE PRESENT, 2001 –

The attacks in New York and Washington on 11 September 2001 were shocking in their scale, their brutality and in their unconscionable daring, but it was not easy immediately to see them as involving (despite the horror) any direct breaches of human rights. Al-Qaeda were not a state after all, and Osama Bin-Laden was no warring president, but rather (merely) a private individual living in Afghanistan. Governmental reaction on the other hand was squarely exposed to human rights critique, was the sort of conduct that the international human rights organisations were well used to engaging with in their role as proxy-defenders of the UN's universal ethics. The result was the same hesitancy about engaging with those responsible for these attacks as Amnesty had displayed in Northern Ireland in the 1980s with regard to paramilitaries, juxtaposed awkwardly with a speedy and confidently critical engagement with the response of governments. The overall effect was to seem to suggest that in the 'clash of civilisations' begun by the attacks and fully unleashed by the Global North's reaction to the events of that day, human rights were on the wrong side, apologists for the radical jihadists, indifferent to the suffering of victims and obsessively critical of only one side, our own. This was unfair but only up to a point: the NGOs were stuck in the world in which they lived and that world did point human rights defenders towards states only.

The Al-Qaeda attacks also tipped the UN balance dramatically away from human rights and towards state sovereignty. President Bush's 'war on terror' infamously did not allow for any moderation by human rights law, and the results of this – Guantanamo; Abu Ghraib; torture black sites; wholesale executive eavesdropping; and much else – gradually did his administration lasting political and legal damage. But applauding the American pushback should not obscure how counter-terrorism became the new means for the assertion by states all around the world of their national power over international scrutiny, especially in the field of human rights. This is not a trend that has been reversed. To this day authoritarian states have continued to dress their repression in Western-pleasing counter-terrorism clothes. The UN has rowed in behind this. Directly after the 2001 attacks the Security Council seized control of the counter-terrorism agenda from a General Assembly that had been dithering for years about how to engage with terrorism. Its principal initiative was to set up a new bureaucracy to lead global efforts to counter political violence. The Council's Counter-Terrorism Committee working with its executive directorate now roams the world exactly as the UN human rights emissaries do, but with a brief to crack down on subversives and their sympathisers rather than to protect residents from abusive governmental forces. To make matters worse, none of the UN organs have has been able to define terrorism, this power therefore falling by default on states to do with as they wish. By these means, and in a way that would have been unthinkable before the 11 September events, has the security of the state secured a major advantage over the ethic of human rights, within rather than in conflict with the UN framework of international oversight. The second hammer blow was delivered by the reaction to a different global crisis, the economic and financial meltdown of 2008. Here our concern is with the extreme actions required by many states to implement the 'austerity' that was quickly deemed to be required as a way of coping with the effects of these multiple market failures. The drivers of such changes around the world were often the relevant state's authorities themselves but also frequently to the fore were the international financial institutions that as we earlier noted sit in an autonomous relationship with the UN, in particular the IMF. The last ten years have seen a dramatically negative

impact on the living standards of those affected by 'austerity' measures of this sort, and frequently it has been the poor in any given society that have suffered most. In the language of human rights, it has been their various economic and social rights (many set out in the Universal Declaration of Human Rights and further embedded in the 1966 Covenant on Economic, Social and Cultural Rights) that have been eroded. However and despite this we have not seen an insurrection by rights-holders against the damage being done to them in the bankers' interest. Rather the reverse has occurred. 'Human rights' have been caught up in a populist backlash against globalisation, perceived as the exclusive preserve of prisoners, terrorists and 'citizens from nowhere' rather than the ordinary 'just about managing' citizen. (Both of these terms come from the current British prime minister Theresa May, notorious for her hostility to human rights.)

How can this be? How did the potentially strong critique of uncontrolled market power offered by human rights become subsumed in the same populist attacks on globalisation that the unfairness and injustice of austerity had (understandably) precipitated? The answer is two-fold. First, and despite the growth in bite earlier identified the legal frameworks for the protection of such rights, whether at the state, regional or international level, were and remain weak, both in themselves and relative to the approach taken to their more robust sibling, civil and political rights. Social and economic rights are relative Cinderellas in the world of human rights implementation, everywhere hedged about with restrictions, diluted by anxiety about demanding more than 'the maximum available resources', afflicted by poor enforcement mechanisms, and even when they make it into a court-room often encountering judges too anxious about transgressing a politico-legal boundary to take them seriously. Secondly, and as earlier noted, to the extent that the international financial institutions are involved, then it is literally impossible to bring them to any fora at all to account for the human rights implications of what they demand of states in the name of financial rectitude. The states may retain their human rights obligations but so far as crisis measures are concerned often they are answering to a higher power, barking instructions from off the stage.

The result of both of these structural problems acting together can be seen right around the world: savage assaults on living standards existing side-by-side with a continued commitment to human rights standards that appears however to have next to no impact on the lived experiences of those whose life-circumstances are changing markedly for the worst. Of course the UN's human rights representatives continue to do their best, and gains are undoubtedly made on the margins. But the contrast between the continued availability of human rights in the civil and political sphere (those 'terrorists', criminals and prisoners again) rankles to the point where the whole subject is contaminated by cynicism. The stage is set for a Trumpian agitator celebrating torture and state-killings to wild applause from the victims of unregulated markets to whom it has never occurred that human rights should be on their side.

THE FUTURE

On 25 June 2016, the Russian Federation and the People's Republic of China 'reiterate[d] their full commitment to the principles of international law as they are reflected in the United Nations Charter, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.' These principles were 'the cornerstone for just and equitable international relations featuring win-win cooperation, creating a community of shared future for mankind, and establishing common space of equal and indivisible security and economic cooperation.' Such claims of rectitude may be thought hollow in light of the activities of both countries, in Ukraine and the South China Sea respectively, the annexation of the first having been condemned as illegal by a majority of states in the General Assembly, and the Permanent Court of Arbitration having rejected China's claims with regard to the second only a couple of weeks after the statement was issued. A system that depends on both for its good health is already ill.

But at least there is a pretence of engagement. Writing recently in the *Wall Street Journal*, two of the most senior figures in the Trump administration Gary Cohn and H R McMaster co-authored a broadly-based defence of their President's then recently concluded first foreign trip, widely believed to have been a disaster. The opinion piece included a description of American foreign policy which has already become notorious:

'The president embarked on his first foreign trip with a clear-eyed outlook that the world is not a "global community" but an arena where nations, nongovernmental actors and businesses engage and compete for advantage. We bring to this forum unmatched military, political, economic, cultural and moral strength. Rather than deny this elemental nature of international affairs, we embrace it.'

President Trump's is not, of course, the first US administration to 'put America first' or to promote a protectionist approach to trade. But his is the first to do so since the establishment of the new international order discussed at the start of this essay. There is simply no room left in this for any kind of global system of human rights, whatever 'moral strength' Cohn and McMaster might think the US can still bring to the international table. Like Dr Frasier Crane in the long running TV series the Americans have 'left the building'.

So who is left? It is clear that human rights need a powerful international patron, or they will wither on the vine, suffocated by the sort of statement of support for international law that we have just observed having emerged from Moscow and Beijing. As recently as the second half of 2016, the answer might have been no one at all. The only credible candidate for ownership, the European Union, seemed then to be hell-bent on a retreat into nationalism, protectionism and xenophobia, exactly the Hobbesian jungle for which Cohn and McMaster are such enthusiasts. A major member state had just announced its departure from the whole project while others on the margins were seeking aggressively to redefine their role within it in a way that allowed them to continue to collect Brussels's cheques while locking up their opponents and refusing all refugees. With an array of plausible fascist/nativist candidates on display, elections

beckoning across old (Western) Europe in 2017 were expected to confirm a death-knell that had already been sounded.

But then something quite remarkable happened. The idea of Europe spoke back. Italy's government did not crash after its prime minister's ill-judged referendum defeat. The Austrians chose a Green candidate to be their president. The Dutch self-publicist whose reputation has been built on inflaming hate found himself locked out of power after an election in which many thought he would emerge a key player. And the ballot that on this script was to confirm the end marked instead a new beginning – France's choice of Emmanuel Macron over Marie Le Pen, followed by a further overwhelming victory for his new Party in the legislative elections that immediately followed. In the Autumn there are to be German elections in which the battle is being fought between two parties which are both committed to the European union, with the previously much noticed *Alternative für Deutschland* watching helplessly from the sidelines. Meanwhile the United Kingdom's BREXIT has proved so calamitous that it cannot be long before the country finds itself begging to remain or (if things go this far) rejoin. Newly emboldened the European Commission has launched a legal case against Poland, Hungary and the Czech Republic for refusing to implement an EU-wide agreement on the settlement of refugees. Expulsion could yet result for some. The regional version of human rights that has been developed under the oversight of the European Court of Justice and its sister tribunal the European Court of Human Rights in Strasbourg have both had occasion in the recent past explicitly to reject the framework of UN counter-terrorism insofar as it conflicts with the continent's commitment to human rights, creating a benign 'white' hole in the international system. The latter court has also forced human rights compliance on the armed forces of European states enjoying neo-imperialist military junkets abroad, as the departing British have found, much to the annoyance of their defence leadership.

National identity cannot exist in the abstract. Nor is it something that happily comes along in the good times, when so much can be taken for granted. True citizenship is forged only in adversity. Enemies are what make us know

what we are and what we truly want from our lives, for ourselves, our children, our communities. The EU has had an easy childhood and a positively spoilt adolescence, protected by the US to the West and witness to a collapsing USSR to the East. Things are different now. Putin invades states close to its own border. Trump's lieutenants applaud self-interest while cosyng up to tyrants and berating Germany for being too successful at trading. Having been given a succession of special deals the UK nevertheless storms off in a fit of plebiscitary pique. Nothing is any longer taken for granted. The resurgence of the European ideal is being made easier by the return of decent levels of growth. The Franco-German alliance stands ready to drive the project further and more deeply into an integration which is nevertheless far more mindful of the needs of all its citizens than it has ever been in its youth. There is no King to bless the project or shared ancient past that is not rooted in warfare. What remain are the shared values. Human rights in particular become part of what constitutes this new regional hegemon, the phrase springing through cliché and diverting past hypocrisy in order to assume the status of a received truth in a newly renewed community, one that has implications at home (more refugees; better data protection; social protection; respect for law; and so on) and abroad (human rights compliant trade deals; human rights tests before expulsion of suspects; and much else). Crucial here is a closing of the gap between the rhetoric of equality and the lived experiences of millions of Europeans – but there is evidence that after the near death of experience of 2016/17, EU leaders are prepared to live the new life they have been granted in a different way. If human rights have a future, then it is (at least for now) European.

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