

Inequality and the law

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood... the school or college.. the factory, farm, or office... Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.

Eleanor Roosevelt

The debate on inequality is not just an economic one but relates also to rule of law and the basis of liberal values. Liberal Democrats have tended to see policy issues around tackling inequality (and 'social' versus 'economic' liberalism debates) as separate from our championing of civil liberties. I hope in this chapter to demonstrate not only the strong human rights case for advancing equality, but also how effective counter-poverty strategies should themselves be rights-based initiatives, rooted in individual empowerment and achieving a level playing field of access to legal rights and remedies. As Liberal Democrats we should consider it shameful so see the British Government's social policies repeatedly criticised in UN reports on human rights grounds, but I argue that our response needs to look more closely at the relationship between inequality and the law.

Liberalism as a philosophy is one of enabling all individuals to freely fulfil their own potential in the way they choose, with a role for the state in securing the conditions of freedom, democratic consent, and upholding the universal application of the rule of law. As David Howarth puts it "British Liberalism starts from the view that political authority should rest only on law, and that law should only be made by democratic institutions. It has developed in struggles against extra-legal and non-democratic claims to authority."¹ So the rule of law as a concept is essential to all aspects of liberalism; free markets underpinned by laws of contract and property to prevent abuse of economic power, democratic governance underpinned by a robust framework of constitutional and administrative law, internationalism rooted in support for the institutions of international law, and human rights protections codifying liberal values which reflect and enshrine in law a basic equality of respect for all individuals. The rule of law is the corollary of our belief in democracy, because as David Howarth emphasises our starting point for liberals is that power, both economic and political, should be shared equally amongst citizens. Any effective strategy for tackling inequality should therefore have equality before the law as a human right at its core, and this perspective is one that Liberal Democrats are uniquely well placed to bring to the debate.

Equality and human rights

With human rights we recognise and value peoples' humanity and individuality over membership of narrower categories such as state, nation or class. Human rights have two strands – civil/political rights (CP) and social, economic and cultural (ESC) rights. After World War II, international treaties and conventions increasingly began to incorporate socio-economic rights, including, most importantly, the Universal Declaration of Human Rights (UDHR, 1948) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). The International Convention on the Elimination of All Forms of Racial Discrimination (CEDAW, 1965) and the Convention on the Rights of the Child (1989) also contain provisions relating to socio-economic rights. As the Universal Declaration of Human Rights (UDHR) states: "All human beings are born free and equal in dignity and rights".² These values of equality and dignity underlie rights such as the right to take part in democracy, the right to an adequate standard of living and social security, and the right to not be discriminated against.

¹ *British Liberalism Political Social and Pragmatic* David Howarth in Agenda 2020 Essay Collection

² Article 1, Universal Declaration of Human Rights

Human rights provide a legal framework – internationally and domestically – that can and have been used to bring about change that has a direct impact in reducing inequality. The legal and conceptual frameworks of human rights provide a perspective through which issues of poverty and inequality can be viewed as multi-dimensional, encompassing not only inequality of income and life chances, but also the various forms of deprivation, exclusion and loss of dignity or autonomy. Within this framework it becomes apparent that the equality debate is not only about resources and needs, it is also about freedom. Equality is therefore of paramount importance for meaningful choice in a free society under the rule of law. Finally human rights also promote equality and dignity through advocacy tools and social mobilisation.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was ratified by the UK in 1976, as one of 164 countries have signed up to the Covenant. As far as international law is concerned ESC rights have equal status with civil and political rights, such as freedom of expression or the right to a fair trial, and signatory states must take measures, within the context of their available resources which the aim progressively achieve the full realisation of economic, social and cultural rights. The key rights contained in the ICESCR are

- the right to social security
- the right to food and housing as part of an adequate standard of living,
- labour rights
- the right to health
- education and participation in cultural life.

Unlike the European Convention on Human Rights (ECHR) which forms the basis of the UK's Human Rights Act, the rights contained the ICESCR have not been directly incorporated into domestic law. Individuals cannot therefore invoke ICESCR in court proceedings by means of judicial review. However, adherence to the Covenant is a matter of rule of law and the principal accountability mechanism is through the UN body of 18 independent experts that monitors the implementation of the ICESCR at the national level – the UN Committee on Economic, Social and Cultural Rights (CESCR). The CESCR statements about the meaning of the different ESC rights, but every five years the CESCR reviews the level of enjoyment of ESCR in each country by reviewing provided by governments and civil society organisations and organising fact-finding visits.

Benchmarking of ESC rights through this process is only one strand of the UN's human rights work; each human rights treaty has its own monitoring body, whilst the UN Charter itself has spawned a framework of functional organisation addressing human rights issues. Currently, the Human Rights Council (HRC) is the key intergovernmental organisation responding to all human rights abuses across the globe, supported by the Office of the High Commissioner for Human Rights in the UN's Secretariat, the HRC has special procedures to equip independent experts or Rapporteurs with mandates to report and advise on human rights from a thematic or country-specific perspective. I have dwelt on this institutional context to help explain the different UN reports and agencies that have legitimately intervened in the UK's social policy debates in recent years that I will come back to shortly in this chapter.

As far as the UK's equalities and human rights regime goes, whilst we have some strong protections in some areas, there has been political resistance to adopting socio-economic rights metrics and mechanisms in our approach to tackling inequality. The focus of equalities and discrimination legislation has tended to be concerned with "horizontal inequalities" (as between groups defined by race, gender, disability, sexuality etc) rather than "vertical inequalities" (socio-economic inequality among individuals or households). The Equality Act 2010, passed in the dying days of the Gordon Brown led Labour Government, which brought together different equalities strands did however, after significant lobbying by civil society campaigners, include a duty in the Act on public authorities when exercising strategic decisions and functions to have "due regard" to the desirability of reducing "the inequalities of outcome which result from socio-economic disadvantage." This part of the Equality Act however has never been brought into force, except in Scotland.

There is significant potential to use and develop both our discrimination and human laws policy tools in tackling inequality. As already emphasised, by definition human rights extend into the socio-

economic sphere. Underlying the European Convention on Human Rights (ECHR), and the UK's Human Rights Act (HRA), which gives the Convention effect in UK law, is the powerful idea that we are all born equal – whether we are born into the UK's richest 1 per cent or 20 per cent. Therefore protections that human rights laws give us are therefore crucial to tackling the injustices that create, and perpetuate, poverty and inequality. For example, the Article 2 of the First Protocol of the Human Rights Act protects the right to an education –at primary, secondary and university level. This right belongs to children, not their parents, and means, for example, that public authorities cannot exclude a student from school if the exclusion is “necessary and proportionate.” So protecting children's access to education means protecting their future, and their ability to lift themselves – and others – out of poverty.

Discrimination laws are also an important tool in addressing socio-economic inequality because discrimination of all kinds is closely linked to poverty. Poverty disproportionately affects people from certain backgrounds, especially those with “protected characteristics.” Status-based discrimination to be closely correlated with socio-economic disadvantage. It is no coincidence, for example, that 39 per cent of people living in poverty in the UK live in a family where at least one person is disabled.³ Or that black workers with degrees are paid around 23 per cent less on average than white workers with degrees.⁴ And whilst the gender pay gap for women in the UK with no children is around 8 per cent, for those with at least one child it leaps to 21 per cent, and women's risk of poverty is specifically gendered.⁵ If you count full-time and part-time wages, including overtime pay, the median hourly wage for a woman is 18.9% lower than the median wage hourly wage for a man.⁶ The Low Pay Commission has consistently found that minimum wage jobs are more likely to be held by women, young workers, those of retirement age, ethnic minorities, those with a disability, and those with no qualifications.⁷ But the interaction does not stop there, or travel in only one direction. This is because poverty is not just about distributive inequality: it also carries with it the stigmatic effects that are often thought to be confined to status inequalities such as racism, sexism or homophobia. Moreover, when poverty becomes a source of stigma in turn reinforces poverty. For example, free school meals have played a central role in the nutrition of children from poorer families; yet research shows that 15 to 20 per cent of children who are entitled to free school meals do not use their entitlement.⁸

Equality and the justice system

Whilst the law can promote equality, it cannot fulfil this function properly if there is no equality of access to the justice system. Addressing poverty should therefore also involve sorting out the existential crisis going on over the sustainability of legal aid and our system of county and magistrates courts. This issue could not be more important for liberal democracy; a legislature cannot make effective laws unless it can provide for civil or criminal means of enforcement and remedies through the justice system. In this sense, law is the infrastructure that binds society together. When we speak of infrastructure hospitals, schools, roads and railways come to mind, but just as important is our legal infrastructure; we cannot prosper, have a stable society or accountable government without a properly resourced system for the administration of justice. And operationally our justice system must be kept separate from the state. There is an inherent conflict of interest between a fair justice system that delivers on the basis that every citizen has a right to be treated equally by our legal processes, and the Executive which acts on a more political basis in judging deserving claims and issues.

A good justice system is one that corrects the failings of the state and protects individuals from the Executive's encroachment over their rights, so it is not always in the interests of Government to

³ <https://www.slideshare.net/josephrowntreefoundation/the-changing-picture-of-poverty-in-the-uk-why-we-need-to-act-now>

⁴ ONS Labour Force Survey figures

⁵ <https://www.ifs.org.uk/publications/8428>

⁶ https://fullfact.org/economy/UK_gender_pay_gap/

⁷ Low Pay Commission (2015), 'National Minimum Wage: Low Pay Commission Report 2015

⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/183380/DFE-RR235.pdf

support an impartial and independent justice system. This conflict also affects the way that resources are allocated, with the Ministry of Justice now ranking as one of the lowest spending Departments, forever losing out in successive spending reviews against Health, Education, Defence etc. So widespread court closures (250 since 2004), and increased court and tribunal fees, have followed each spending review, alongside significant cuts to legal support service in the community, including a 50 per cent reduction in civil legal aid spending.

The mechanism for delivering legal aid cuts was to narrow the scope of legal aid, with the result that it is no longer available for most private family, housing, debt, welfare benefits, immigration, employment rights issues – ie the legal problems most effecting those experiencing poverty of socio-economic disadvantage. Financial eligibility for legal aid was also narrowed. Alongside cuts to local authority support, these changes have significantly impacted on the supply of free legal help and information, especially for access to advice ('legal help') as delivered both through private practice and the non-profit sector. So the amount of legal aid provided for both advice and representation has reduced significantly since the restrictive legislation was introduced; the number of cases where legal aid was provided for initial advice had fallen by more than 75 per cent compared with pre-cuts levels, and the number of grants for legal aid for representation had fallen by 30 per cent. The number of civil legal aid providers has also nearly halved from 2011-12 to 2017-18, including both solicitor firms and not-for-profit organisations such as local law centres and citizens advice. I emphasise this point because almost all successful anti-poverty programmes have had community legal services and public legal education at their core.

Re-enter the UN

In recent years we have seen a number of conservative Ministers attacking the UN's human rights officials for doing the job of reporting on human rights benchmarks and obligations that the UK has signed up to. In 2014 The UN's Special Rapporteur on adequate housing, Raquel Rolnik, concluded from a two-week visit to the UK that social housing rights were regressing, citing the "bedroom tax" as a key cause for concern. Changing shape of the housing sector has not been universally good news for hundreds of thousands of vulnerable people who can no longer expect a degree of housing security from a country which once inspired the world with its ambitious desire to provide decent housing for all.⁹ Rolnik's point was that housing and welfare policy is not just a question of numbers and bricks and mortar, but of human dignity and wellbeing.

Then in 2016 the CESCR made public its latest "Concluding Observations" on the United Kingdom. After months of engagement with government officials, the Committee's report could hardly have been more damning.¹⁰ The report criticised the UK's insufficient recognition of economic and social rights in domestic law. It also condemned the adverse impact of recent changes to fiscal and social security policies, as well as restrictions to legal aid. The Committee questioned whether the National Living Wage was enough to ensure a decent standard of living, and questioned the policy on the protection of workers' rights. The UN report particularly highlighted the discriminatory effects of poverty, the rise of homelessness, the overreliance on food banks, and the lack of affordability and security of tenure of rental housing in most parts of the country.

Other UN human rights bodies also issued reports on the UK in 2016. The Committee on the Rights of the Child made specific recommendations on economic and social rights, such as the need to address inequality in access to health services and health outcomes, as well as a clear focus on child rights in the poverty reduction strategies and action plans. After an inquiry procedure, the first of its kind anywhere in the world, the Committee on the Rights of Persons with Disabilities highlighted a series of concerns about the negative effects of welfare reforms on the rights of people with disabilities.

Then last year saw a highly report by Professor Philip Alston, UN Special Rapporteur on extreme poverty and human rights – Preliminary findings on the UK, the result of an eleven day fact finding

⁹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik 2013

¹⁰ <https://www.gi-escr.org/human-rights-mechanisms-database/cescr-2016-uk-concluding-observations>

visit.¹¹ The final report found evidence of increased and continually increasing poverty; the findings included that:

- One fifth of the population (14 million people) live in poverty
- 1.5 million of the population experienced destitution in 2017
- Close to 40% of children are predicted to be living in poverty by 2021
- Food banks have proliferated
- Homelessness and rough sleeping have increased significantly
- Rural poverty has been compounded by poor public transport in rural areas
- The social safety net has been badly damaged by drastic cuts to local authorities' budgets and DWP benefits.

Alston's report called for the elimination of the five-week delay in receiving benefits under the universal credit system, a review of welfare conditionality, and a reassessment of the cumulative impact of recent tax and spending decisions. The report is also interesting for its in-depth exploration of digital policy solutions, which have potential to do good but also present significant risks without a rights-based framework of accountability. Finally the report recommends adopting a single new measure of poverty based on the Social Metric Commission's work.¹²

Policy, inequality and the law – concluding thoughts

In this chapter I have tried to demonstrate how debates about inequality intersect with the law, the human rights case for addressing inequality, and how a rights-based approach fits with a liberal democrat values and narrative. The indivisibility of economic and political rights is also core feature of Amartya's Sen's work, linking freedom, capabilities and economic development. It follows from this discussion that Liberal Democrats should make more use the human rights frameworks in developing the Party's policies on tackling inequality and poverty. There are many discussion points about what are the most effective strategies, as well as complex issues around accountability frameworks and the extent to which can be justiciable without impinging, that I have not been able to address in this chapter.

However, this chapter is intended as a starting point than a finishing point, and there have already been several policy motions and papers developed that point in the right direction.¹³ As the Party's most recent social security policy paper says "Protection of the most vulnerable in society and support for those trying to move out of deprivation are fundamental objectives of the Liberal Democrats. The preamble to our constitution lays down the principle that no-one should be enslaved by poverty."¹⁴ Last year's "giving everyone a stake" package also contains welcome language that "Everyone deserves financial security, a good education, to be able to afford a decent home and have access to high-quality public services."¹⁵ I hope though that a more empowering rights-based approach for the Liberal Democrats to tackle poverty and inequality can develop to involve at the very least:-

- A commitment to implementation and enforcement of Section 1 of the Equality Act.
- A considered response to the UN reports, with a clear 'action plan' for taking forward key recommendations in Government
- Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the development of a mechanism to enable communities whose economic, social and cultural rights, to present complaints and opting-in to robust monitoring an enforcement processes.

¹¹ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881>

¹² http://socialmetricscommission.org.uk/MEASURING-POVERTY-FULL_REPORT.pdf#page=80

¹³ For example, *Tackling Inequality at its root* (2013) was amended by Conference to specifically support section 1 of the Equality Act

¹⁴ https://d3n8a8pro7vnm.cloudfront.net/libdems/pages/12524/attachments/original/1470309098/Social_Security.pdf?1470309098

¹⁵ <https://www.libdems.org.uk/everyone-a-stake>

- A clear role for an access to justice strategy to help individuals and communities take better advantage of existing rights

Biography

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