Chapter 4
Equality, rights and the 'stickiness' of the current political moment

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Introduction

States are expected to govern in a way that takes into consideration the equal status of all their citizens. In reality, however, modern states are far from adhering faithfully to this commitment. Multiple different forms of inequality are institutionalised, embedded, even celebrated, even as states simultaneously claim adherence to democratic egalitarian ideals. This is perhaps contrary to many of the expectations of the post-2008 period, in which it was widely assumed in progressive circles that economic turbulence, climate change and challenges to the power wielded by the '1 per cent' would generate broad popular mobilisation in favour of greater material equality. Instead, even though vitally important scholarship over the past decade or so has highlighted the social damage caused by current levels of global inequality, the disjunct between the nominally egalitarian values that are supposed to steer the exercise of public power and the reality of quotidian inequality remains stark – and attempts to transform this situation remain mired in the current 'populist' irritability that constitutes the current political moment.

This chapter explores the reasons for this 'stickiness', the damaging impact it has on both political and legal systems, and what might be done to overcome it. Particular reference is made to the role of human rights law in this regard. While often dismissed as incapable of effecting transformative change, it retains the capacity to advance equality claims and thus to contribute incrementally to the furthering of a better society.

1. The rhetoric of equality versus the reality

Modern states are supposed to respect certain basic values: rule of law, human dignity and democratic self-governance. Their origins, history, governance structures and modes of socio-economic organisation may differ in many respects, but there is a common expectation that state governance should align with this triad of norms, the 'holy trinity' of contemporary liberal democracy. More specifically, the exercise of public power tends nowadays to be justified on the basis that it is channelled through institutional structures that respect and embody these values, which have become the legitimating grammar of contemporary law and politics.

By extension, this means that states are also formally committed to respecting a general notion of human equality. The concept of the rule of law is underpinned by the

assumption that all persons subject to the law are entitled to be treated as if they possess a certain inherent equality of status (Waldron 2012). The same idea provides the firm foundation for appeals to the notion of human dignity, along with the framework of fundamental human rights that have been build up around this concept over much of the past century (Gilabert 2018). Similarly, the idea that all citizens enjoy equal status forms the axiomatic basis for the principle of democratic self-government (Dahl 2007).

Thus, the exercise of public power – including the authority to regulate private sector activity – is supposed to conform with democratic egalitarian ideals. Putting it in simple terms, states are expected to govern with regard to the 'public equality' of all (Christiano 2008), and to deploy their powers in ways that are not discriminatory or otherwise fail to respect the equality of status of everyone subject to their rule. This is reflected in the multiple provisions of international human rights treaties that affirm that basic rights should be secured on a non-discriminatory basis, such as Article 2(1) of the UN International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). (More on this below.) It is also reflected in the equality clauses of most modern constitutions, as well as in the formal rhetoric of national governments and state organs across the democratic world. Contemporary power is ultimately exercised in the name of equality – more specifically, in the name of the equal citizenship of the nominally sovereign citizens of a state.

Modern states are far from adhering faithfully to the idea of equality, however. Multiple different forms of inequality are institutionalised, embedded, even celebrated – even as states simultaneously claim adherence to democratic egalitarian ideals. This reflects how easy it is to claim nominal conformity with the abstract principle of human equality (Westen 1985). If an exercise of state power (i) complies with basic, formal rule of law principles, (ii) professes respect for minimum standards of dignity and human rights, and (iii) emanates from governance structures that can be broadly classified as 'democratic', then it can rhetorically claim to respect at least the essence of egalitarian ideals – even if the state power in question is actually being deployed to widen concrete inequalities and reinforce existing hierarchies of class, power, status and so on. In the modern era, flagrantly unequal policies and practices regularly come smeared with the anointing oil of constitutionality, rule of law compliance and the *imprimatur* of democratic endorsement through the electoral process.

2. The 'stickiness' of the current political moment

Such policies and practices are not immune from challenge. Flagrant inequalities can be very vulnerable to political contestation, and often prove to be unsustainable in healthy democracies (Houle 2009; Milanovic 2016). But it can take a long time for a frog to boil: it can be difficult to mobilise a critical mass of political opposition to inequalities that have become normalised within societies, even if their unfairness is manifest. And many forms of inequality are less than obvious; or have a disparate and highly differentiated impact across society; or come attached to patterns of economic and technological change that appear to be inevitable, unavoidable or intrinsically desirable

on their own terms; or are insulated against challenge by structural imbalances built into national political systems. Challenging such 'everyday' inequalities can thus be a slow and tortuous process – with no in-built guarantee that the 'arc of justice' will eventually bend in favour of a just outcome.

This does not prevent arguments about equality from being deployed with great frequency in contemporary political debates. The claim that states are falling short of their commitment to equality – that they are unjustifiably favouring elites and/or specially protected groups, and failing to govern with equal regard for all subject to their rule – is a potent and recurring rhetorical trope. It is particularly favoured by the political left, who tend to view it as 'their' issue – especially in recent years, when many left-orientated political parties or social movements have placed new emphasis on material inequalities in their campaigning, to supplement the focus placed on rights, dignity and 'recognition' concerns that had formed much of their staple political diet over the previous few decades (Fraser 2000).

The right can play the equality card, too, however. Arguments that particular groups are gaming the system, by for example milking the social welfare system, queue-jumping or otherwise exploiting the generosity of 'hard-working families', could be viewed as a particular form of equality claim, depending on how far one buys into the idea that respecting equal status requires respect for accumulated entitlements and proportionate worth (Nozick 1974). So too do claims that particular social elites are abusing the democratic system to bring about projects of social transformation without majority support, a staple of contemporary conservative political rhetoric: this explicitly taps into the idea of equal worth, and mobilises it to frame left progressive political projects as a form of aristocratic, elitist social engineering that disregards the views of the 'silent majority'. (I am not suggesting that these are normatively justifiable equality claims: merely that they invoke notions of equal worth to resist redistributive demands, in ways that often resonate with the values, political views and vested interests of significant chunks of the general population.)

Thus equality claims, broadly defined, feature prominently in contemporary political debates. But different varieties of such claims are deployed by different political forces in different ways, which often blunts their normative force and drags them down into the morass of quotidian political contestation. Furthermore, the distortions of contemporary democratic processes, which often reflect and replicate the very inequalities that feature prominently in contemporary debates about social justice, can limit the potential for radical change.

As a result, equality claims targeting structural injustice or deeply embedded inequalities rarely amount to a 'magic bullet' or significant game-changers in terms of bringing about large-scale political, social and economic transformation. The normative force of such arguments often resonate in academic common rooms, or in civil society discussion for a, but struggle to make headway in the congested and acrimonious contemporary political landscape.

This is perhaps contrary to many of the expectations of the post-2008 period, in which it was widely assumed in progressive circles that economic turbulence, climate change and challenges to the power wielded by the '1 per cent' would generate broad popular mobilisation in favour of greater material equality. Instead, even though vitally important scholarship over the past decade or so has highlighted the social damage generated by current levels of global inequality (Wilkinson and Pickett 2009; Piketty 2014; Saito 2020), equality claims have remained mired in the current 'populist' irritability that constitutes the current political moment.

There has been some progress, reflected in a general global shift away from neoliberal policy prescriptions and the dramatic challenges to existing gender and race hierarchies represented by the MeToo! and Black Lives Matter campaigns. But there has been regression, too, in the new growth of amplified new inequalities, exemplified in particular by technological developments, the emergence of more draconian forms of border control and the sharply unequal impact of the Covid epidemic (Atrey and Fredman 2022). The disjunct between the nominally egalitarian values that are supposed to steer the exercise of public power and the reality of quotidian inequality remains stark, and debates about equality seem to find themselves constantly stuck in this gap.

3. The impact of embedded inequality on politics and law

All this poses significant challenges for democratic institutions. Their structure, functioning and claims to legitimacy are all predicated on an assumption that everyone has a more or less equal chance of influencing and participating in elections and other democratic processes (Christiano 2008). But that, of course, is a myth – moreover, a myth that is everywhere acknowledged to be out of step with reality, but which rarely provokes any significant attempt to reform the status quo. This undercuts the legitimacy claims of democratic institutions to be founded on the 'equal participation' principle. It also harms how they function, by, among other things, limiting the range of voices that are given serious weight in democratic debate. And it seems to be fuelling the divisiveness and raw anger that have become dominant characteristics of political contestation in many democracies over the past decade or so, while also often serving to entrench the very inequalities that are generating this 'irritability'.

These embedded, persisting inequalities also generate serious challenges for legal systems and the actors – judges, lawyers, lay clients, civil society organisations, civil servants and legislators – who influence their functioning. On one hand, legal systems are committed to respecting the principle that all are equal before the law. More generally, they are expected to function in ways that respect the equal status of all persons subject to their authority. On the other hand, legal systems reflect the societies in which they are embedded. Also, they are inevitably open, permeable and subordinate in varying degrees to political control – appropriately so, as many legal theorists would argue (Gordon 2022).

This means that policies that embed or amplify inequality are carried over into law and implemented through its channels. Indeed, law sometimes becomes a vehicle for measures that manifestly undercut its rights and rule of law–based claims to legitimacy. Welfare sanctioning regimes and immigration control are areas of law that currently offer particularly stark examples of this tendency (Watts and Fitzpatrick 2018; Prabhat 2021).

This also means that the 'stickiness' of current debates over equality – the sense that mounting concern with the distorting impact of inequality is having limited impact on public policy or socio-economic structures – is also a problem for the functioning of legal systems. Given law's formal commitment to respect equal status, and the centrality of this commitment to its claims of legitimacy, the disjuncture between this rhetoric and the quotidian inequalities of contemporary legal systems is particularly stark. Law always promises more justice than it can deliver: however, the mismatch between rhetoric and delivery now looms large in any clear-eyed accounts of the functioning of legal systems. (For the case of UK public law, for example, see Hickman 2017). And this tension is a particular problem for those areas of the law that are supposed to play an active role in reinforcing respect for equal status – both within the functioning of the legal system, and across society more widely.

4. Equality and the 'rights revolution'

Historically, legal mechanisms were not actively deployed to protect individuals and groups against unequal or demeaning treatment, or to remedy structural forms of injustice. Law's role was more confined: law was used primarily as a passive instrument to regulate individual conduct in specific and limited ways in line with the legislative will, instead of serving as an autonomous guarantor of equal status (Kennedy 2006). But the 'rights revolution' of the 1950s, 1960s and 1970s changed all that (Epp 1998). The law became a source of active protection against inequality in its own right, as courts began to interpret and apply abstract rights guarantees in ways that protected individuals against various forms of discrimination, oppressive treatment and denials of human dignity.

At times this shift was brought about by judges interpreting written constitutional texts, common law or international human rights treaty instruments in ways that strengthened legal protection for rights. At other times, it was driven by legislative choice – as was the case with the enactment of various forms of anti-discrimination legislation from the early 1960s on, initially in Europe and North America and later spreading across the democratic world. The cumulative effect of such developments was to ensure that legal systems acquired a new role as guarantors of individual equality of status. Law, having previously served at most as an occasional shield against abusive treatment, became a sword – a mechanism deployed to correct rights abuses both within the functioning of legal systems and more generally across society at large.

This repurposing of law has over time generated a substantial corpus of human rights and anti-discrimination law, which straddles the distinction between law and politics.

At both national and international level, detailed frameworks of overlapping human rights and non-discrimination legal norms have been established, generated by a combination of political will and judicial creativity. Some of these norms are 'hard law', directly enforceable before courts, while others are 'softer' instruments, designed to have more persuasive effect. Some are also limited in scope to core civil and political rights, while others extend to cover a much wider range of rights, including socio-economic rights, as protected by instruments such as ICESCR, the European Social Charter (ESC), various International Labour Organization (ILO) conventions and recommendations, and the 'social state' provisions of some national constitutions (O'Cinneide 2019). Some are also more effective, in both legal and political terms, than others. But this framework does add up in general to a wide-ranging set of norms oriented towards giving more specific expression to the concept of equal status, which continues to evolve over time at both national and international level as collective views evolve as to what forms of unequal or demeaning treatment should be classified as a violation of basic rights.

This framework is not comprehensive. Again, at both national and international level, it represents an encapsulation of a general overlapping social consensus – with the key question of when exactly rights will be violated being left to be resolved by judicial processes and/or the pull and tug of associated political debate. Nor does this rights framework pretend to offer a totalising solution to the inequalities that affect contemporary societies. Its focus remains on identifying egregious forms of denial of equal status – and even then its uneven development means that it has historically lacked much of a focus on particular forms of differential treatment, such as those related to material inequality.

But this legal human rights framework, in both its national and international manifestations, has served as a useful tool for contesting particular forms of discriminatory treatment broadly understood, and for holding democratic societies to account for how they live up to their professed equality commitments. It has generated concrete shifts in law and policy, and acted as a pressure point to challenge and constrain some notable abuses of democratic power. As a consequence, it attracts a considerable degree of popular enthusiasm and activist engagement, as well as academic and civil society buy-in.

As with democratic process more generally, however, the rights framework struggles to cope with the 'stickiness' in which debates about equality are emmeshed and the structural inequalities of contemporary societies. The promise it offers of rigorous state self-policing – with rights reviews applied by courts and expert bodies, taken together with associated political campaigning, functioning to dissolve some of the worst manifestations of contemporary inequality – has only partially been delivered. And there are signs that the 'rights revolution' is facing a severe backlash, in the form of concerted questioning of its legitimacy, viability and *modus operandi*.

'Hard law' human rights guarantees suffer all the problems that affect legal systems more generally. Access to legal rights remedies can vary greatly depending on social and political capital. The legal form – with its reliance on individual litigation,

gradualist case-law development and a constrained capacity to take account of how social injustices are generated within society – is intrinsically limited in terms of its capacity to engage with multifaceted, complex forms of structural inequality. Like any other aspect of the legal system, human rights law in its various facets is open to political determination: deferential judges can be appointed, court powers cut back, judgments reversed, circumvented or overridden. This inevitably limits its capacity to provide remedies for deeply embedded social inequalities – or to cut through the 'stickiness' of current political debates in respect of such topics.

In addition, human rights law suffers from a particular problem, which renders it suspect in the eyes of many legal and political actors who are wary of lawyers overreaching the bounds of their competency, namely that the inherently abstract nature of legal rights guarantees means that judges enjoy greater leeway than usual to interpret and apply such guarantees in ways that suit their personal political or normative beliefs (Webber). This makes it vulnerable to internal legal critiques, which frame human rights law as inherently prone to exceeding the appropriately modest bounds of legal intervention in questions of political morality. It also provides political and legal actors with a handy stick to beat human rights judgments that they dislike: these can always be accused of judicial overreach, especially when they concern inherently contested issues related to inequality.

Certain 'hard law' standards are less vulnerable to this critique than others. Anti-discrimination legislation is often specified to a higher level of detail than other forms of human rights law, and sometimes benefits from political reluctance to criticise its contents. Other aspects of human rights law, such as free speech, tend to be historically well-established and benefit from the assumption that they constitute part of the 'proper' repertoire of legally protected rights. Other areas of human rights law, however, suffer the converse problem: their comparative novelty means that they are often framed as inherently problematic areas for legal rights protection to engage with, and as a result case law in those areas tends to be particularly limited and deferential. This again limits the capacity of human rights law to serve as an effective protector of equal status. Often the law only protects a narrow set of minimum entitlements, or secures rights that have effectively already been secured (O'Cinneide 2023).

'Soft law' standards are also inevitably limited in terms of their reach and impact. At both national and international level, they can be readily ignored or discarded if they run up against the prevailing government agenda of the day – or where domestic pressure to conform with their norms is lacking. This is as true for regional and international standards as it is for national standards. For example, the European Social Charter sets out a detailed framework of social rights norms, which are defined in part by reference to equality principles (Lukas and O'Cinneide 2023.) State compliance with the Charter is monitored by the European Committee of Social Rights (ECSR), of which the author was a member for ten years. National governments that face domestic political and legal pressure to comply with the Charter – through, for example, trade union engagement with its provisions – are notably more engaged with this human rights instrument than are national governments that do not face similar pressures. A similar logic applies even to the ILO, whose internal systems for promoting and monitoring

state respect for such rights have come under internal pressure from the employer and national government legs of its tripartite governance structure (Silva 2022).

More generally, national governments are increasingly pushing back against both hard and soft elements of human rights law. The authority of even successful international human rights institutions, such as the European Court of Human Rights, is now regularly being challenged by the United Kingdom and some other states. Legislative measures have been introduced in a variety of different states with the aim of diluting such legal rights protection as exists at national level. And attempts to give more legal weight to socio-economic rights standards and other aspects of 'soft' human rights law, which could enhance its effectiveness as a tool for challenging embedded inequalities, often go nowhere.

5. Escaping the mire?

Thus, we are left with progress towards a more equal society mired in political and legal stagnation. Even as the intellectual critique of inequality has reached new heights of insight and sophistication, our capacity as democratic societies to translate that critique into action is severely circumscribed. We lack effective collective mechanisms to convert demands for greater equality into concrete action. And mechanisms that have functioned well in this regard at different times in the past – such as trade union mobilisation, legislative reform and rights-focused strategic litigation – seem to lack the necessary cutting edge in current conditions to bring about change. The need for greater 'embedding' (as Polanyi put it) of social values within the functioning of the market economy is widely acknowledged, but generally not implemented. And so we remain stuck, mired in inequality.

How then might we overcome this collective action problem? Having diagnosed the stickiness of contemporary political and legal engagement with equality, and the gap between aspiration and reality in which democratic societies find themselves marooned, how do we go forward, bearing in mind that the exponential nature of many forms of contemporary inequality, and the looming impact of climate change, give particular urgency to this search for solutions?

Others will be better placed and more expert than me to comment on political solutions. It is clear that coalition-building and Weber's 'slow boring of wood' will be required, if a critical mass of political support for transformative equality measures is to be achieved. But this process will also have to be infused with a sense of urgency, and clear recognition of the damage that inequality is generating on a daily basis in our contemporary democratic societies.

Law will obviously have to play a role in this process, in its inevitably limited role as a handmaiden to political choice – or, at best, as a distinct sub-system of a wider political, economic and social order. By themselves, legal processes will not transform the world. But if momentum for incremental but agitated political change can develop, then legal processes can help to transmit and amplify such progress. And legal mechanisms and

norms can be designed in ways that help to orient political processes towards pro-equality ends, and provide a degree of resistance against attempts to roll back or deny recognition of equal status. Law may be subordinate to politics, but politics must often be channelled through the infrastructure of law – and that infrastructure can be incrementally engineered to favour particular types of policies, while being intolerant of others.

6. The incremental contribution of rights

At first glance, human rights law may have an obvious role to play in this regard. It would appear to provide precisely the sort of structural pro-equality, pro-dignity coding that can help orientate the functioning of legal systems in desirable ways. There is a school of thought, however, that questions the value of relying on human rights law to make a difference in this context and warns of undesirable consequences.

Samuel Moyn has set out an influential critique of human rights as 'not being enough': he argues that the internal logic of human rights law as it has developed over time is too congruent with neoliberalism, in the sense that it is focused on protecting a 'minimum core' of human dignity instead of challenging existing structural or material inequality (Moyn 2018). Hopgood has argued that the human rights framework has become a global superstructure of norms, institutions and organisations that are excessively focused on protecting abstract rights values rather than engaging in concrete, specific, local struggles against injustice and unfairness (Hopgood 2013; see also Ignatieff 2017). Menke claims that a focus on rights serves to encourage depoliticisation and an excessive focus on atomic individualism, in particular by generating the perception that political battles for distributionist justice are just a struggle of private interests rather than a democratic process of collective public reasoning (Menke, 2020).

None of these critics advocate the wholescale ditching of human rights law as a legal structuring mechanism. But they question what they would see as a tendency to invest undue faith in rights, and tend to preach the virtues of ensuring legal systems remain suitably subordinate to the dynamics of agonistic political debate (see in particular Moyn 2018.)

There is plenty of value in these critiques. They sound a cautionary note against over-investment of faith in human rights law, which is wise. But such reservations can be exaggerated. As Hoffmann has argued in an insightful response to these critiques, they tend assume a greater degree of identification than actually exists between the individualistic values of the current neoliberal political and economic order, on one hand, and the core logic and concerns of the framework of human rights law as it has developed over time, on the other (Hoffmann 2022). Human rights norms may inevitably reflect the influence, limits and flaws of the political order that surrounds them, and should not be confused with more substantive, totalising horizons of emancipation. But they retain a unique capacity to articulate a commitment to equality of status that many other modes of political and legal discourse lack (Bhuta 2023).

Furthermore, the fact that human rights standards have been formally endorsed by contemporary democratic societies – something that critics too readily assume orientates rights discourse towards conformity – gives them a unique status and prestige. This in turn can make them relatively potent tools of internal contestation. Thus, for example, equality claims framed in the language of rights and non-discrimination are often more difficult to ignore than claims framed by reference to more radical discourses that attract less communal buy-in across society at large (O'Cinneide 2023). Rights claims also provide an effective mechanism for highlighting gaps between the professed normative values of contemporary democratic societies and the reality of the embedded inequalities that shape our collective existence. As Hoffmann puts it in a passage that is worth quoting at length:

> Despite their individualizing form, the substance of rights, from personal autonomy to socio-economic well-being, always implies a shared space, a concrete utopia in which all are meant to collectively and conjointly enjoy what rights express... Individual rights claims are, from this vantage point, claims of equality, that is, claims to be treated as an equal part of human society when that equality is felt to be denied. As this denial is the base condition under capitalism for all, rights claims are, therefore, also always solidarity claims that are not confined to the individual claimant but always imply a hypothetical *erga omnes*. Finally, rights claims are also always political claims that articulate a counterfactual and potentially subversive insistence on human dignity in the face of its systemic denial under capitalism. While rights are no alternative to more fundamental ways of promoting change, neither are they just "bad politics", not least as they remain one of the most deeply embedded forms for (re-)claiming the "real" value of humans. (Hoffmann 2022)

The particular potency of rights claims can be seen even amidst the 'stickiness' of the current political moment. National governments such as the United Kingdom, which are trying to minimise the influence of human rights law, have struggled to achieve their political objectives, in part because of the strength of political and legal opposition to their proposals. Climate change litigation structured in part around non-discrimination claims focused on younger generations is proceeding in various states, arguably showing the capacity of human rights law to evolve over time (Heri 2022). Anti-discrimination claims continue to be fought and won, even in the context of a global turn against minority rights (O'Cinneide 2023). The UN special rapporteur system continues to focus attention on embedded inequalities and their impact on fundamental rights (see, for example, De Schutter 2021).

Conclusion

None of this is to suggest that 'rights talk' is a panacea, or a magic solvent that will help us escape the messiness and stagnation of our current political moment. At best it has a role to play in supplementing the hard work of political grafting that is necessary to achieve a more equal society. But its potential in this respect should not be underestimated.

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