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## **Now is (not yet) the Winter of our Discontent: The Unfulfilled Promise of Economic and Social Rights in the Fight Against Economic Inequality**

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## ABSTRACT

Material inequality or (extreme) economic inequality has been touted as one of the greatest challenges of the twenty-first century.<sup>1</sup> Wealth is “hemorrhaging upwards” rather than “trickling down.”<sup>2</sup> In a world where the rich get richer, the poor get poorer, and the inequality gap in income and wealth continues intensifying at an alarming pace, there exists an “inequality explosion”<sup>3</sup> that threatens the very fabric of our global society. While economic inequality and questions of (re)distribution of wealth and income have traditionally been examined within the spheres of development law and political economy, I argue that a human rights based approach that contains economic and social rights (hereinafter, ESRs) at its core is capable of mitigating economic inequality. International human rights norms enjoy a high level of global legitimacy, as evidenced by the fact that the key human rights instruments have been widely accepted in all regions of the world.<sup>4</sup> 169 States have ratified the International Covenant on Economic, Social and Cultural Rights (hereinafter, ICESCR).<sup>5</sup> Underpinned by universally recognized moral values and reinforced by national and international legal obligations, ESRs therefore provide a compelling normative framework through which material inequality can be addressed.

## KEYWORDS:

Economic and Social Rights, Material Inequality, Fiscal Policy, Constitutional Dialogue

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<sup>1</sup> Emma Seery & Anna Caistor Arendar, *Even it Up: Time to End Extreme Inequality* (Oxford: Oxfam, 2014), <https://www.oxfamamerica.org/static/media/files/even-it-up-inequality-oxfam.pdf>.

<sup>2</sup> Gaby Oré Aguilar & Ignacio Saiz, “Tackling Inequality as Injustice: Four Challenges for The Human Rights Agenda,” *Open Democracy*, March 30, 2016, <https://www.opendemocracy.net/en/openglobalrights-openpage/tackling-inequality-as-injustice-four-challenges-for-h/>.

<sup>3</sup> Jean Hervé Lorenzi & Mickäel Berrebi, “The Irresistible Explosion of Inequalities,” in *A Violent World* (Palgrave Macmillan: London, 2016).

<sup>4</sup> *Human Rights and Poverty Reduction: A Conceptual Framework* (New York: OHCHR, 2004), <https://www.ohchr.org/Documents/Publications/PovertyReductionen.pdf>.

<sup>5</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993: pp. 3, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>.

# **Now is (not yet) the Winter of our Discontent: The Unfulfilled Promise of Economic and Social Rights in the Fight Against Economic Inequality**

By Caroline Omari Lichuma<sup>6</sup>

## **Introduction**

Like a pair of star-crossed lovers, the human rights and social justice movements have always had a complicated relationship. The dominant view in political philosophy has been argued to be that they occupy different spheres, with social justice being a set of stronger egalitarian norms and human rights functioning as baseline protections against common threats posed by states to the general interests of persons subjected to them.<sup>7</sup>

In a provocative contribution to this debate, Samuel Moyn recently posited that the human rights movement has sacrificed substantive equality on the altar of sufficiency. This is because human rights have neither the tools, nor the desire, to bring the egalitarian task to the globe, or even to specific nations.<sup>8</sup> In a poignant, albeit jaded, exposition he questions the validity of ESRs where they provide a floor of protection but not a ceiling on inequality. For him the selective attention of human rights politics towards a minimum provision of the “good things in life” has resulted into the intensification of material hierarchy. Many people may have become less poor thanks to the increased importance of rights, but the melancholy truth about the age of human rights is that it has predominantly privileged the rich.<sup>9</sup>

This paper offers a rejoinder to Moyn’s critiques and infuses a much needed optimism into the debate by arguing that the jury is still out on whether ESRs have failed to pass muster in the fight against inequality or not. For a large part of the human rights movement emphasis has been on Civil and Political Rights (hereinafter CPRs), with ESRs relegated to the status of the “Cinderella” of the

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<sup>7</sup> Neil Hibbert, “Human Rights and Social Justice,” *Laws* 6, no. 2:7 (2017), <http://dx.doi.org/10.3390/laws6020007>.

<sup>8</sup> Samuel Moyn, *Not Enough Human Rights in an Unequal World* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2018).

<sup>9</sup> *Ibid.*

movement.<sup>10</sup> It is only in recent times that Cinderella has finally arrived at the ball with ESRs attaining the status and equal worth of their CPR counterparts.<sup>11</sup> Now that the initial hurdles raised against the justiciability of ESRs have been circumvented, attention has shifted from what Philip Alston termed the “name calling phase”<sup>12</sup> into a more mature and diverse phase. A wide range of courts and other actors are now utilizing innovative tools to make ESRs tangible for rightsholders. At the national, regional, and international level there is an increase in ESRs adjudication that has had the effect of vindicating the rights of those members of society who are in most desperate need, those for whom even sufficiency (let alone equality) remains a dream. As such, this paper cautions against throwing the baby out with the bathwater, because while human rights generally and ESRs specifically have not been a panacea for all the world’s problems, ESRs certainly possess the tools as well as the desire to contribute to the lessening of economic inequality. Economic inequality is both the cause and result of penury. In situations where extreme poverty exists, it is impossible for human rights to be realized. Thus, as Philip Alston points out, inequality is not just an economic issue, it is also a human rights issue.<sup>13</sup> It is therefore possible to promote social justice through human rights by focusing on ESRs in order to address the unfair distribution of resources which fuels deprivation and inequality within and between societies.<sup>14</sup>

I will herein argue that the contested minimum core concept of ESRs may lend credence to the notion that human rights have concerned themselves with sufficiency rather than equality. However, it is fallacious and premature to conclude that the entire regime of ESRs is compatible with material inequality. This article will subsequently proceed in three key parts. Part I will discuss the minimum core concept as being compatible with sufficiency. Part II will argue that the progressive realization

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<sup>10</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), p. 2.

<sup>11</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 13 November 2018].

<sup>12</sup> Philip Alston, “The Justiciability of Social Rights: From Practice to Theory,” in *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, ed. Malcolm Langford (Cambridge: Cambridge University Press, 2008).

<sup>13</sup> Philip Alston, “Extreme Inequality as The Antithesis of Human Rights,” *Open Democracy*, October 27, 2015, <https://www.opendemocracy.net/en/openglobalrights-openpage/extreme-inequality-as-antithesis-of-human-rights/>.

<sup>14</sup> Ignacio Saiz & Alicia Ely Yamin, “Human Rights and Social Justice: The In(di)visible Link,” *Open Democracy*, July 2, 2013, <https://www.openglobalrights.org/human-rights-and-social-justice-the-indivisible-link/>.

requirement of ESRs offers more than sufficiency even though it may portend less than full economic equality. Finally, part III will posit that the proper implementation of tools, such as fiscal policy coupled with the novel use of the doctrine of constitutional dialogue in contemporary ESRs adjudication, holds immense potential for the advancing of re-distributive justice, and by extension the lessening of economic inequality.

### **I. Not Enough of the Good Things in Life: The Insufficiency of the Minimum Core Concept to fight Economic Inequality**

Inequality is multidimensional. Horizontal inequality could be said to encompass differences between culturally defined or socially constructed groups, such as gender, race, ethnicity, religion, caste, and sexuality. Vertical inequality, on the other hand, consists of inequality between individuals or between households and includes questions such as the overall income or wealth distribution of an economy.<sup>15</sup> The present paper limits its analysis to vertical inequality and relies on the term economic inequality to explain the situation where there is a concentration of financial resources and wealth in the hands of few at the expense of many. As such, the key objective will be to outline a potential role for ESRs in mitigating extreme forms of economic inequality.

Article 2(1) of the ICESCR identifies the obligations of state parties under the covenant. In order to infuse content into this generally worded provision the Committee on Economic, Social and Cultural Rights (hereinafter the CESCR) outlined the nature of the state obligations in one of its earlier general comments<sup>16</sup> and propounded the minimum core concept as one of the *raison d'être*s of the ICESCR. Specifically, the CESCR advanced the view that a minimum core obligation should be imposed on state parties to the ICESCR in order to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. The CESCR went further and elaborated that a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima

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<sup>15</sup> Frances Stewart, Graham Brown & Alex Cobham, “The Implications of Horizontal and Vertical Inequalities for Tax and Expenditure Policies” *CRISE Working Paper* No. 65 (February 2009), <https://assets.publishing.service.gov.uk/media/57a08b7ae5274a31e0000ba0/wp65.pdf>.

<sup>16</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 3: The Nature of States Parties’ Obligations,” *CESCR Covenant* Art. 2, Para. 1 (14 December 1990).

facie, failing to discharge its obligations under the Covenant.<sup>17</sup> By focusing on minimum standards, ESRs are clearly concerned with questions of poverty, but in a vastly unequal world, is this enough? Should ESRs be more concerned with the fact that the poor are poorer than others?<sup>18</sup> I posit that even if ESRs are concerned with questions of inequality, an analysis of the minimum core concept exposes the almost singular concern of this particular doctrine with sufficiency rather than inequality as will be explained in the subsequent paragraphs of this Part.

Particularly salient for the argument being put forward in this section is the fact that the CESCR has been on the receiving end of criticism to the effect that in assessing the satisfaction of the minimum core concept the question of whether ESRs have been fulfilled or not can be ascertained merely by looking at the circumstances of any one person without needing to refer to the situation of anyone else.<sup>19</sup> This poses an insurmountable hurdle to relying only on the minimum core concept in order to attempt to redress economic inequality, because by its very nature, reducing economic inequality implicitly invites comparisons between people in dissimilar economic positions with the intention of lessening the gap between them.

This is something that the minimum core concept does not seek to do. Since its inception almost twenty years ago, opinion has divided on the utility of the minimum core concept with numerous criticisms levied against it. For example, the concept has been argued to be without content,<sup>20</sup> incapable of deployment outside of developing countries, deflecting attention away from injustices in developed countries,<sup>21</sup> and to be unreliable in courts because courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards should be.<sup>22</sup> To date, Young's article on the minimum core concept

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<sup>17</sup> Ibid.

<sup>18</sup> Margot Salomon, "Why should it matter that others have more? Poverty, inequality, and the potential of international human rights law," *Review of International Studies* 37, 05 (2011): pp. 2137- 2155.

<sup>19</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

<sup>20</sup> Katharine Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content," *Yale International Law Journal* 33 (2008): pp. 113-175.

<sup>21</sup> Harris Max, "Downsizing rights: why the minimum core concept in International Human Rights Law should be abandoned," *New Zealand Public International Law Journal* 10 (2013).

<sup>22</sup> *Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC)* para 26.

remains one of the most persuasive academic works in the field of ESRs.<sup>23</sup> She argues that there are three rival approaches to defining the minimum core doctrine. In the first approach (the only one pertinent to the present discussion), which she calls, “the minimum core as normative essence,” it is theorized that the essential minimum of each right can be distinguished in two ways. In the first formulation the minimum core is identified as a *needs-based core*. Thus, satisfaction of the basic needs of the rights holders takes precedence over more ambitious levels of interests.<sup>24</sup> This is because basic needs are required as a minimum condition for a “bearable life”<sup>25</sup> or for a decent chance at a reasonably healthy life of relatively normal length.<sup>26</sup> The second approach, touted as a *value-based core*, extends further than the basic needs inquiry by emphasizing not what is strictly required for life, but rather what it means to be human.<sup>27</sup> The emphasis here is on values such as human dignity, equality, and freedom.

Does the minimum core concept portend *sufficiency* but not *equality*? Moyn argues that *sufficiency* concerns how far an individual is from having nothing and how well s/he is doing in relation to some minimum provision of “the good things in life.” Conversely, he conceptualizes *equality* as representing the differences between individuals in the terms of those “good things in life” that they enjoy.<sup>28</sup> I opine that the satisfaction of the minimum core concept (especially when viewed as normative essence according to Young’s typology) may be seen as being compatible with sufficiency principles<sup>29</sup> popularized in the field of human development. This means that rather than being concerned with the elimination of inequality, the minimum core concept has the key goal of ensuring that certain (poor) individuals do not fall below some critical threshold of (dis)advantage. Or, if these individuals are currently below this critical threshold, that the necessary measures are implemented in order to raise them to the level where the threshold has been met. This critical

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<sup>23</sup> Young, “The Minimum Core of Economic and Social Rights.”

<sup>24</sup> Ibid.

<sup>25</sup> Jeremy Waldron, “Rights and Needs: The Myth of Disjunction,” in *Legal Rights: Historical and Philosophical Perspectives*, ed. Austin Sarat & Thomas Kearns (University of Michigan Press, 1996).

<sup>26</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* second edition (Princeton University Press, 1996).

<sup>27</sup> Young, “The Minimum Core of Economic and Social Rights.”

<sup>28</sup> Moyn, *Not Enough Human Rights in an Unequal World*.

<sup>29</sup> Paula Casal, “Why Sufficiency is Not Enough,” *Ethics* 117, No. 2 (January 2007): pp. 296-326.



threshold of advantage is the minimum core of the various ESRs. As such, what is important is not that everyone should have the same, rather, the intention is to ensure that each person has enough to maximise the incidence of sufficiency.<sup>30</sup> Consequently, in seeking to meet the requirement of the minimum core doctrine, the aim in distributing resources is to raise as many individuals as possible from below the minimum core level, to either the level at which the minimum core is satisfied, or to a level slightly above it.

Moyn's position indicates a partiality to conceptualizing the minimum core as a needs-based core (using Young's typology) that is compatible with material inequality, by virtue of its failure to redistribute resources from the rich to the poor and its sole focus on the satisfaction of minimum essential levels of rights. Moyn argues that the rise of the basic needs paradigm in development thinking, along with its intersection with the concurrent human rights revolution, reveals how visions of sufficient distribution supplanted any notion of material equality from an early date.<sup>31</sup> As the pursuit of global social rights got underway, the distributive ideal of sufficiency alone survived and the ideal of equality died. To the extent that the minimum core concept is critiqued on these grounds, I agree with Margot Salomon<sup>32</sup> and Moyn that ESRs concerns around poverty are approached with a limited focus on the poor, rather than the affluent, and not on the gap between them. On this singular aspect, ESRs warrant critique for sacrificing equality on the altar of sufficiency.

Even if all states were able to meet the minimum core of the various ESRs, and all the world's poor were less poor than before, the gap between the rich and the poor would not decrease, because as the poor became less poor, the rich would still be getting richer. Consequentially, the only gap that would reduce (and the one that we are not concerned with when attempting to reduce the inequality gap) is the gap between a poor person today (today being the hypothetical day when the minimum core is met) and the same poor person yesterday (yesterday being any day before the minimum core is met). This preoccupation with the "minimum," therefore, means that a threshold is set that pertains only to the downtrodden, to the economically deprived, to the victims of penury. Thus, once an individual is above the threshold, whether they have more or less than other members of their society

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<sup>30</sup> Harry Frankfurt, "Equality as a Moral Ideal," *Ethics* 98, No. 1 (October 1987): pp. 21-43.

<sup>31</sup> Moyn, *Not Enough Human Rights in an Unequal World*.

<sup>32</sup> Salomon, "Why should it matter that others have more?"

is not important. However, by focusing our attention on what is minimally required, the doctrine overlooks the significance of appraising the wider implications of having a minority of people continue to secure a “maximum” level of “the good things in life.”<sup>33</sup>

## **II. The Long (and progressive) Road to Equality: Can Full Realization of ESRs Begin to Close the Inequality Gap?**

When Moyn objects to inequality, is the problem that some individuals have *less* income and wealth than others, or that they have *too little*? Would Moyn be as concerned with inequality between the rich and the super-rich, for example? Awareness that the former are substantially worse off than the latter is unlikely to be morally objectionable to Moyn and his ilk. What does this mean then for arguments that ESRs have sacrificed equality at the altar of sufficiency? Would these concerns be assuaged if there was inequality between the rich and the poor, but the poor had way more than the minimum required by the ideal of sufficiency? If this question can be answered in the affirmative, then the criticisms levied against ESRs to the effect that they are compatible with extreme inequality are unwarranted. As subsequent analysis will aim to show, full realization of ESRs has the potential to raise the poor past the minimum core threshold where sufficiency is all they enjoy, to a level far above that where they have more than enough. Framed in other terms, this section of the paper argues that the full realization of ESRs could drastically reduce economic inequality, even if ESRs alone are incapable of fully eliminating extreme economic inequality.

It is unfair to say, as Moyn does, that global material inequality does not matter to the international human rights movement because “the selective attention of human rights politics towards a minimum provision of the good things in life has made them unthreatening to a neoliberal movement that, sometimes achieving or tolerating the goal, has devoted itself most unerringly to the intensification of material hierarchy.” He continues that “human rights have become prisoners of the contemporary age of inequality.”

I argue that this is definitively not the case. The entire regime of ESRs is not necessarily compatible with material inequality. A lingering and problematic concern that casts blemish upon Moyn’s

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<sup>33</sup> Ibid.

arguments against the human rights movement and that this paper attempts to respond to is the question whether the entire architecture of ESRs implementation under the ICESCR can be subsumed within the shallow pool that is sufficiency, as contemplated by the minimum core concept. The minimum core concept imposes certain immediate obligations, but it is by no means the sum total of state obligations under the ICESCR. In fact, the obligation to realize ESRs hinges upon, both, the minimum core concept and “progressive realization.” This means that once a State party has ensured the core obligations of ESRs, “it continues to have an obligation to move as expeditiously and effectively as possible towards the full realization of all the rights in the Covenant.”<sup>34</sup> If the realization of ESRs ended at the point of realization of the minimum core, without further regard to the full (albeit progressive) realization of these rights then it would be fair to argue that ESRs, by focusing only on sufficiency or minimum essential levels, are compatible with material inequality. As demonstrated in part I above, in this situation, so long as everyone has enough it would be of no moral consequence that some people have more than others. However, this conceptualization is not a truthful representation of the true potential of ESRs. ESRs are concerned with more than ensuring that people have enough. They offer limits to the degree of economic inequality that can be reconciled with the notions of “equality” and “dignity” that the human rights movement promises. As such, even if human rights may be rightly characterized as prisoners of the contemporary age of inequality, this imprisonment is not “for life” because ESRs do offer tools to those with desire to fight economic inequality.

While international human rights law does not explicitly address the level of economic inequality that is reconcilable with the fulfilment of human rights, a strong normative framework for dealing with economic inequality and mitigating its consequences can be built upon a number of human rights principles. Article 2 (1) of the ICESCR is crucial because it sets out the fundamental obligations of State parties. It has been argued to contain four key components that are subject to monitoring by the CESCR. The first duty of states in this regard is “to take steps.” These steps, according to the CESCR, must be deliberate, concrete, and targeted.<sup>35</sup> States enjoy leeway to

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<sup>34</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), “Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights” (25th session, 2001), UN Doc E/C12/2001/10.

<sup>35</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), “General Comment No. 3: The Nature of States Parties’ Obligations” *CESCR Covenant* Art. 2, Para. 1 (14 December 1990), E/1991/23, <http://www.refworld.org/docid/4538838e10.html>.

determine which measures will be suitable for ensuring that ESRs are realized. These may be legislative, administrative, judicial, economic, social, and educational measures, consistent with the nature of the rights.<sup>36</sup> The second component of the obligation of states is that the State party in question must take these steps “with a view to achieving progressively the full realization of the rights recognized.”<sup>37</sup> This means that states should move as expeditiously as possible to ensure that ESRs are realized within their respective jurisdictions. The third element is to exhaust all possibilities that the State has at its disposal “to the maximum of its available resources”<sup>38</sup> and the fourth component of the fundamental obligations set out in article 2 (1) of the ICESCR is to employ all appropriate means “individually and through international assistance and co-operation especially economic and technical”. The conduct of the state in question should be reasonably calculated to realize the enjoyment of a particular right or rights.<sup>39</sup>

I opine that the full realization of ESRs will bring us to some, as yet, unknown middle point between sufficiency and equality. Article 2(1) of the ICESCR obliges States to take steps to the maximum of their available resources to achieve progressively *the full realization* of ESRs. While academic and other literature has focused on the question of what the requirement of progressive realization entails,<sup>40</sup> there has been, to my knowledge, no attempt to define the “full realization” of ESRs. What does this “full realization” of ESRs mean in practice? I argue that the full realization of all ESRs certainly portends more than the satisfaction of the minimum core, which in turn implies that the requirement of sufficiency will have been met. At this level, everyone would have more than enough (more than sufficiency), even though everyone will not have the same amount of income and wealth (less than equality). I believe that the true promise of fully realized ESRs is that that at this point

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<sup>36</sup> UN Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17, <http://www.refworld.org/docid/48abd5790.html>.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, <http://www.refworld.org/docid/48abd5730.html>.

<sup>40</sup> Sakiko Fukuda-Parr, Terra Lawson-Remer & Susan Randolph, “Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfillment” *Economics Working Papers*, 200822 (2008), [http://digitalcommons.uconn.edu/econ\\_wpapers/200822](http://digitalcommons.uconn.edu/econ_wpapers/200822).

there will be a significant reduction in the economic inequality gap, even if perfect equality remains elusive.

The preoccupation with equality for equality's sake is a slippery slope. This is because if critics persist in the quest for perfect economic equality, no matter how much everyone has, it will never be enough, so long as others have more. Should we instead accept solutions that enable everyone to have more than enough wealth, even if others have more? I would argue yes. By requiring the fulfillment of a minimum core, even as full realization is progressively attained, the regime of ESRs acknowledges the importance of assigning a higher priority to improving the condition of those who are in need rather than to improving the condition of those who are not. This does not however mean that ESRs are unable or unwilling to reduce material inequality, especially if the rich have to bear the cost of these higher provisions for the poor and therefore have to be made to descend closer to the level of the ascending poor.

Margot Salomon argues that “the ‘full realization’ of all socioeconomic rights still only provides the universally agreed floor below which no-one should fall.”<sup>41</sup> I would go further and argue that at the point of full realization, this “universally agreed upon floor below which no one should fall” is higher than the minimum core threshold and by extension its achievement would reduce the inequality gap. Salomon highlights that:

The Committee has not transitioned from a focus on poverty and the idea of universal basic rights to one more sensitive to demands of global equality: the prevailing doctrine that provides the basis for determining compliance is that of an international minimum threshold, reinforcing the premise that a marginally tolerable life nonetheless passes the human rights test.<sup>42</sup>

I oppose this assertion on two fronts. First, it would be a case of putting the cart before the horse for the CESCR to focus explicitly on reducing global economic inequality, when a vast majority of the

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<sup>41</sup> Salomon, “Why should it matter that others have more?”

<sup>42</sup> Ibid.

world's citizens do not enjoy sufficiency. Second, the CESCR has been vocal in reiterating that once the minimum threshold is passed, additional obligations remain until ESRs are fully realized.

I contend that a broader understanding of the term “full realization” is both necessary and possible when discussing the implementation of ESRs. At the future point where ESRs can be said to be fully realized for all the world's poor there could be a significant lessening of material inequality between the rich and the poor. One of the ways this is likely to happen is through the operation of the so called “multiplier effect.” Economists use this term to describe situations where an initial change in one of the factors of aggregate demand (for example, government spending) can cause a more than proportionate increase in the growth of national income. This “fiscal multiplier” statistic has been used to explain the impact of each unit of government spending on economic growth.<sup>43</sup> As the argument goes, a change in aggregate expenditure circles through the economy. When the government increases public spending, households buy from firms, firms pay workers and suppliers, workers and suppliers buy goods from other firms, those firms pay their workers and suppliers, and so on. In this way, the original change in aggregate expenditures is actually more than once. The end result is that an initial increase in spending, cycles repeatedly through the economy and has a larger impact than the initial dollar amount spent. When the multiplier is greater than one, it means that each additional unit of currency spent translates into more than one currency unit in economic growth.<sup>44</sup>

In order for all the world's poor to “fully realize” their ESRs, governments must spend large amounts of public resources as part of their fiscal policy. In economic terms, there would be a huge increase in aggregate demand as a result of increases in government spending. At this point the multiplier effect would produce a more-than-proportional increase in the national income of the country concerned. This increased national income could thereafter be (re)distributed through suitable fiscal policy tools, as outlined in the subsequent section. Economic inequality might be reduced as a result. If governments injected income into their economies in order to ensure that their peoples are

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<sup>43</sup> David Stuckler, Aaron Reeves, & Martin Mckee, “Social and economic multipliers: What they are and why they are important for health policy in Europe,” *Scandinavian Journal of Public Health*, 45 (2017), <https://doi.org/10.1177/1403494817707124>.

<sup>44</sup> Ibid.

educated, healthy, have jobs, food, water etc., I contend that there would be a more-than-proportionate improvement in the material condition of the world's poor, with a corresponding lessening of the inequality gap. The argument therefore is simple. Before we blame ESRs for failing to deliver equality, governments should take suitable policy measures to increase public spending in order to fully realize ESRs. This will, in turn, trigger a multiplier effect that may go a long way in reducing inequality. Moyn is wrongly blaming "the game, not the players." It is governments that have failed us, not ESRs.

Of course, as alluded to above, it should be noted that an increase in national income, as a consequence of the multiplier effect alone will not reduce the inequality gap. This must be reinforced by other more deliberate and redistributive policies. I argue that taxation policy could be harnessed to further the equality agenda. Taxation is a crucial instrument for the realization of human rights, not just because it is necessary for ensuring sufficient public revenue is available to allow the government to perform its many obligations (including realization of ESRs), but also because tax policy plays such a fundamental role in redressing inequalities and in shaping just how accountable governments are to their people.<sup>45</sup> More progressive systems and types of taxation can have the desired effect of taking from the rich and giving to the poor. Significantly, taxation coupled with the direct and/or indirect transfer of income (through a national social security system, for example) to the poorest segments of society are arguably some of the most promising methods to lessen the inequality gap, at least in the shorter term.

Finally, it is critical to acknowledge that the language of ESRs empowers rights holders and equips them to be active participants in the fight against extreme economic inequality. Framing extreme economic inequality as a human rights concern enables such rights holders to hold governments accountable for the policies underpinning economic inequality and injustice. While the common theme underlying poor peoples' experiences has long been one of powerlessness, human rights empower individuals and communities by granting them entitlements that give rise to legal obligations. Once ESRs are fully realized for all the world's poor inequalities in income and wealth would not matter, or would matter too little, to constitute an injustice. This is the promise of ESRs.

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<sup>45</sup> Centre for Economic and Social Rights, "Challenging Fiscal Abuse and Promoting Human Rights-Aligned Tax Policies," <http://www.cesr.org/human-rights-taxation>.

### III. Human Rights and Social (In)justice: Furthering the (Re)Distributive Impact of ESRs?

As the analysis in part II above has demonstrated, the architecture of ESRs, as envisioned by the ICESCR, is incompatible with economic inequality. It is unacceptable to argue, as Moyn does, that even perfectly realized human rights are compatible with radical inequality. The combined use of both the minimum core concept and the requirement of progressive realization of ESRs until all the rights are *fully realized*, together obligate states to give individuals below the minimum core threshold absolute priority in order to bring them to the required level, but even after this minimum core is reached they continue to enjoy a priority in receiving of resources until a certain higher level i.e. full realization is reached. The nature of state obligations listed in article 2, comprising a mix of the minimum core concept and the full, albeit progressive, realization of ESRs, is a reflection of the dual nature of law as conceived by scholars such as Robert Alexy.<sup>46</sup> The *dual-nature thesis* sets out the claim that law necessarily comprises both a real or *factual dimension* and an ideal or *critical* one.<sup>47</sup> The real dimension consists of authoritative issuance and social efficacy, while the ideal refers to moral correctness. Whereas the minimum core doctrine pertains to the factual dimension, the full realization of ESRs reflects the ideal dimension, and the hope inherent in implementation of ESRs provide a bridge to moral correctness in the distribution of resources.

In order to narrow the gap between attainment of the minimum core and full realization of rights, the state is expected to use the maximum of its available resources. These available resources include the “pockets of affluence” in every society. Through the proper and innovative use of fiscal policy, a measure of wealth and income from the members of society who have not only fully realized their ESRs, but also enjoy an excess over and above what can be considered to be just, can be redistributed to the poorer segments of society. When ESRs attempt to improve the circumstances of the poor, even though they lack a specific focus on ensuring material equality, they inevitably reduce the inequality gap. It is sufficient for ESRs to reduce inequality without eliminating it completely. To expect ESRs to single handedly eliminate economic inequality is not only impractical, it is also unfair.

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<sup>46</sup> Robert Alexy, “Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis,” *The American Journal of Jurisprudence* 58, Issue 2 (December 2013): pp. 97–110, <https://doi.org/10.1093/ajj/aut009>.

<sup>47</sup> Robert Alexy, “The Dual Nature of Law,” *Ratio Juris* 23 (2010).



There is nothing inevitable about poverty and extreme economic inequality. The unequal distribution of resources experienced within and between countries today is the result of deliberate choices and policies by a privileged few.<sup>48</sup> Thus, poverty is something that certain groups of people inflict upon others. There is therefore an indisputable moral appeal of improving the conditions of the poor by allocating to them resources taken from those who are well off.<sup>49</sup> This can be achieved by expanding the definition of “the maximum of available resources” necessary to fully realize ESRs to include income and wealth redistributed from the wealthy within the context of fiscal policy. Some of the innovative tools being used to enhance the implementation of ESRs today may be useful weapons in the battle to reduce material inequality. The paper examines how one such tool, fiscal policy may be properly implemented in order to combat material inequality. I argue that the concept of constitutional dialogue may carve out a “judicial power of the purse” that allows courts to have a say in budgetary matters in the context of ESRs implementation without offending the separation of powers doctrine.

**i. Mind the Gap: Using Fiscal Policy to Reduce Material Inequality**

The realization of ESRs hinges on the availability and proper utilization of the “maximum of available resources” at States’ disposal. The Maastricht Guidelines on violations of ESRs provide that a state is in violation of the Covenant if it fails to allocate the maximum of its available resources to realizing human rights.<sup>50</sup> The CESCR issued a statement in 2007 entitled, “An Evaluation of the Obligation to Take Steps to the ‘Maximum of Available Resources’ Under an Optional Protocol to the Covenant.”<sup>51</sup> However, the statement did not define what constitutes “available resources” beyond stating that it refers to “both the resources existing within a state as well as those available from the international community through international cooperation and assistance.” From this statement it may be inferred that one of the many ways that governments can access financial

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<sup>48</sup> Salomon, “Why should it matter that others have more?”

<sup>49</sup> Ibid.

<sup>50</sup> International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, <https://www.refworld.org/docid/48abd5730.html>.

<sup>51</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *An Evaluation Of The Obligation To Take Steps To The “Maximum Of Available Resources” Under An Optional Protocol To The Covenant* (10<sup>th</sup> May 2007), E/C.12/2007/1, [https://www2.ohchr.org/english/issues/escr/docs/e\\_c12\\_2007\\_1.pdf](https://www2.ohchr.org/english/issues/escr/docs/e_c12_2007_1.pdf).

resources for fulfilling obligations to use “maximum available resources” under the ICESCR is by properly managing fiscal policy.

Countries diverge in their stage of development, their governance capacity, resources available, and in the extent and nature of economic inequality experienced both within and between them. Consequently, it is impossible to advocate for a uniform and homogenous fiscal policy that can be applied to all countries indiscriminately in order to help to reduce economic inequality. The importance of addressing the unique circumstances of individual countries cannot be overstated. However, in the following sections I will attempt to make generalized arguments for certain components of an ideal fiscal policy that can play a key role in mitigating economic inequality by helping to realize ESRs.

Fiscal policy refers to the revenue raising and expenditure activities of government, as well as tax policies implemented in order to achieve certain desirable economic objectives. These policies include both the level and composition of taxation and expenditure.<sup>52</sup> Fiscal policy has three main objectives: to support macroeconomic stability, to provide public goods and correct market failures, and to redistribute income.<sup>53</sup> Fiscal policy can be harnessed in the fight against economic inequality in a number of ways. In the subsequent section I divide the discussion into two sub-categories, focusing on revenue raising through taxation and then expenditure by the government.

## **Revenue Raising**

One of the key sources of public revenue is taxation. The main purpose of imposing taxes is to raise government income. The use of progressive and direct taxes (as opposed to their regressive and indirect counterparts) can go a long way in reducing economic inequality.

A progressive tax system provides for an accelerated schedule so that more taxes are collected from higher income earners than from persons with a lower income. A tax is thus progressive when the

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<sup>52</sup> Frances Stewart, Graham Brown & Alex Cobham, “The Implications of Horizontal and Vertical Inequalities for Tax and Expenditure Policies” *CRISE Working Paper* No. 65 (February 2009), <https://assets.publishing.service.gov.uk/media/57a08b7ae5274a31e0000ba0/wp65.pdf>.

<sup>53</sup> International Monetary Fund, “Fiscal Policy and Income Inequality” *IMF Policy Paper* (January 2014), <https://www.imf.org/external/np/pp/eng/2014/012314.pdf>.

marginal rate of tax rises with income. A good example of a progressive tax is an income tax on individuals which provides for higher tax rates in higher income brackets and lower tax rates for lower income brackets. These kinds of taxes may, *ceteris paribus*, have the effect of reducing economic inequality by taking more from the rich than they do from the poor. This happens in two ways. Firstly, income collected from the higher income earners can be redistributed to lower income earners using appropriate schemes as illustrated in the next section. Secondly, when low income earners are taxed at a lower rate they are left with a higher proportion of after-tax disposable income. In both instances, *ceteris paribus*, the high-income earners descend while the low-income earners ascend with a corresponding decrease in the inequality gap between the two.

Another aspect of progressivity of taxes is taxation on wealth, as opposed to income. Wealth may be defined as financial assets and real estate minus debt, and has been argued to be even more unequally distributed than income.<sup>54</sup> Different types of wealth taxes—such as recurrent taxes on property or net wealth, transaction taxes such as capital gains taxes, and inheritance and gift taxes—can also be an important source of progressive taxation.<sup>55</sup> Most people who enjoy a maximum amount of “the good things in life,” in Moyn’s terms, have large amounts of wealth. Poorer people enjoy a lower incidence of wealth. In order to reduce the inequality gap fiscal policy should deliberately focus on the taxation of wealth, as opposed to the current primary focus on income, in order to widen the tax net that applies to the wealthier segments of society.

Danilo Türk, former Special Rapporteur on the Realization of Economic, Social, and Cultural Rights, has underscored the importance of progressive taxation in reducing economic inequality. He notes that:

Progressive (as opposed to regressive) measures of taxation can, if supported by adequate administrative machinery and enforcement mechanisms, lead to gentle and gradual forms of income redistribution within States without threatening economic stability or patterns of

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

growth, thereby creating conditions that enable a larger proportion of society to enjoy economic, social and cultural rights.<sup>56</sup>

Another aspect of taxation that may be useful in mitigating economic inequality is the nature of the taxes themselves, as opposed to the rate of tax. A tax may be either direct or indirect in nature. Where a tax is direct, the impact and incidence of the tax are on the same person. The impact of a tax is its money burden. A tax has an impact on the person on whom it is legally imposed. The incidence of a tax is on the person who ultimately pays the tax, whether it was legally imposed on them or not. Therefore, a direct tax is one which is paid (incidence) by the person on whom it is legally imposed (impact). Income taxes are direct in nature because the impact and incidence of the tax in question are on the same person, and this person is unable to shift the tax on to a third party. Direct taxes especially when combined with more progressive rates are capable of reducing inequality by taking more from the rich than from the poor.

An indirect tax is one whose impact is on one person, but that is paid partly or wholly by another, i.e. the incidence of the tax can be on another person. An indirect tax can thus be shifted or passed on, as opposed to a direct tax which cannot. Examples of indirect taxes are taxes on commodities, such as VAT and excise tax. The disadvantage of indirect taxes lies in their tendency to be regressive in nature. They often take more from the poor than from the rich. In general, the primary role of indirect taxes is to increase revenue, not to enhance economic equality<sup>57</sup>. This problem is particularly visible in emerging markets and developing economies, where these countries rely more heavily on indirect taxes as a source of revenue.<sup>58</sup> Thus, a government that is actively using its fiscal policy to further the ideals of ESRs should include more direct rather than indirect taxes.

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<sup>56</sup> Danilo Türk, “The Realization of Economic, Social and Cultural Rights: Final Report Submitted by Mr. Danilo Türk Special Rapporteur,” (July 1992), [https://digitallibrary.un.org/record/146643/files/E\\_CN.4\\_Sub.2\\_1992\\_16-EN.pdf](https://digitallibrary.un.org/record/146643/files/E_CN.4_Sub.2_1992_16-EN.pdf).

<sup>57</sup> International Monetary Fund, “Tackling Inequality,” *IMF Fiscal Monitor* (October 2017), <https://www.imf.org/external/np/fad/inequality/>.

<sup>58</sup> *Ibid.*

## **Public Expenditure**

Switching from the tax side to the spending side, revenue raised by the government must be accompanied by transfers back to the poor in order to achieve distributional objectives and to assist in the reduction of economic inequality as envisaged by the present paper.

One such way that this objective may be achieved is progressive public spending in areas like education, health, employment in the public sector, and social security systems (including pensions, unemployment benefits and social assistance benefits) given their unique role in addressing income inequality.

Investing in public education and narrowing disparities in education and learning outcomes—by improving enrollment and quality of education for the disadvantaged—is crucial for reducing inequality. This is because better education is likely to translate to better jobs and, by extension, to the lowering of the persistence of income inequality across generations. Large gaps in health coverage exist between the rich and the poor. In addition, the quality of health care received by the poor is also substantially lower than that received by the rich. Given the interdependency between health and other ESRs, including the right to work and the right to education, it follows that better health outcomes can lead to higher productivity, employment, and earnings. They can also help to improve school attendance and education outcomes and thus contribute to greater income equality as already alluded to above.

The existence of better public services for both health and education will have the added advantage of allowing poor households to retain more disposable income. Many households fall into poverty because of high out-of-pocket spending, such as paying for private healthcare. In situations where there are properly functioning public systems, members of the society are able to access necessary services with minimum expense, and this inevitably helps to reduce inequality gaps.

In addition to ensuring the realization of ESRs by investing in public health, public education, and other public services, a cash transfer program may be an effective weapon against poverty and economic inequality in the long term. These programs usually provide a cash transfer to poor families, conditioned on factors such as children's school attendance and regular medical checks-

ups for children and pregnant women. Conditional cash transfers (hereinafter CCTs) are seen by many national governments and multilateral agencies as a cost-effective instrument to reduce poverty and inequality and provide the poor with opportunities.<sup>59</sup> Designing a public cash transfer involves many decisions. These include setting transfer levels, identifying beneficiary selection strategies, and deciding the nature of conditionalities.<sup>60</sup> While the design and impact of the cash transfer system depends upon the country in question, properly implemented CCTs generally have a beneficial impact on reducing poverty and material inequality.<sup>61</sup>

**ii. A Judicial Power of the Purse: Constitutional Dialogue and its advancement of redistributive justice**

In the classical formulation of the Separation of Powers doctrine, the power of the purse usually lies within the domain of the elected branches of government. Unfortunately, one major driver of rapidly rising economic inequality is the excessive influence over politics, policy, institutions, and the public debate which elites are able to employ to ensure outcomes that reflect their narrow interests rather than the interests of society at large. This has all too often led to the elected branches of government failing to put in place the measures necessary to curb economic inequality. But, is there any way that courts, as custodians of rights, can facilitate the (re)distribution of resources to help enforce ESRs? For countries that have constitutionally protected ESRs, constitutional dialogue offers one such avenue.

When ESRs holders appear in courts arguing that their rights have been violated due to the action or inaction of elected the branches of government (especially as it pertains to public expenditure on public services such as schools, water and hospitals), the courts may be able to make decisions that indirectly impact on fiscal policy or budgetary matters. Remedies stipulated by these decisions may require resource allocation and reprioritization of public expenditure. When courts issue orders

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<sup>59</sup> Sergei Suarez & Eduardo Zepeda, “Can All Cash Transfers Reduce Inequality?” *International Poverty Centre* No. 36 (May 2007), [https://www.researchgate.net/publication/5128915\\_Can\\_all\\_Cash\\_Transfers\\_Reduce\\_Inequality/stats](https://www.researchgate.net/publication/5128915_Can_all_Cash_Transfers_Reduce_Inequality/stats).

<sup>60</sup> Francesca Bastalgi, “Poverty, inequality and public cash transfers: lessons from Latin America,” *LSE Research Online* (June 2010), Background Paper for the European Report on Development (ERD) 2010 on Social Protection for Inclusive Development, European University, <https://core.ac.uk/download/pdf/219791.pdf>.

<sup>61</sup> *Ibid.*

which require the elected branches to reprioritize their spending, allegations of judicial overreach are likely to abound. Such orders may be criticized for involving a subject matter that is the very foundation of the discretion lodged in the other branches: the raising, allocation, and spending of government funds.<sup>62</sup> The fear is that budgetary powers may end up being transferred from the legislature to the judiciary.

In issuing judgements to remedy ESRs violations, the judiciary should not improperly invade the spheres of legislative and executive authority. This may happen indirectly when court orders necessitate the elimination of some public expenditure item in favor of the fulfilment of ESRs, or the raising of additional revenue in order to meet ESRs obligations. Depending on the size of the court's demands and the amount of public funds available, the end effect is likely to be an indirect exercise of budgetary powers by the judiciary. The judicial impact on public finances is therefore only acceptable where the legislature retains its discretion and constitutional mandate to raise and allocate funds. One possible tool that may make this possible is the use of constitutional dialogue. Constitutional dialogue has the potential to reduce judicial confrontations with legislative and executive power and thus increase the chances of ESRs judgements being implemented. Where courts invite confrontation by failing to respect the authority of the other branches, a lack of political will to implement the respective court orders is likely to impede the enforcement of ESRs judgements. Dialogue theories emphasize the need to avoid a judicial monopoly when matters of constitutional interpretation arise. As such, the judicial review process should be an interactive and dialogic conversation about constitutional meaning. Judgements should be the result of a shared and consultative process involving all relevant constitutional actors, not just the judges and the litigants before the court.<sup>63</sup>

Remedies control the value of constitutional rights. David Rudovsky posits that “rights may exist on paper as a matter of court decision or legislation, but their viability, indeed their very essence,

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<sup>62</sup> Gerald Frug, “The Judiciary Power of the Purse,” *University of Pennsylvania Law Review* 126, No. 4 (April 1978): pp 715-794.

<sup>63</sup> Christine Bateup, “The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue,” *Brooklyn Law Review* 71 (2006), <https://ssrn.com/abstract=852884>.

depends in large part on the effectiveness of remedial and enforcement measures.”<sup>64</sup> The most notable remedy, that has the potential to live up to the dialogic promise is the structural injunction or interdict. The structural injunction as a remedy in constitutional litigation is traced back to the US school desegregation cases. The leading case in this respect is *Brown v Board of Education*.<sup>65</sup> Structural injunctions have been defined by Hirsch as: “An order that dictates how and when government officials must change their behavior and in what ways to be in compliance with the constitutional requirements of the state.”<sup>66</sup> The court retains jurisdiction over the case until such a time as the judgement is fulfilled. This complex remedy redresses systemic violations existing in institutional settings, such as bureaucratic government bodies where rights violations could occur as a result of the actions or inactions of multiple government actors.<sup>67</sup> By leaving the final decision on how resources should be distributed to the elected branches of government, but under the watchful eyes of the court, constitutional dialogue is able to set the stage for ESRs to be fully realized and in this way the inevitable reduction of the material inequality gap.

#### IV. Conclusion

The inequality we know today did not come about under a scheme of equal opportunity and mutual advantage. Material inequality within and between countries is not an accidental deviation from neoliberal capitalism, but rather a deliberate product of the international political economy.<sup>68</sup> As such, the rubric of human rights should be one of many different tools utilized to redress inequality, and certainly not the only one. It would be unfair and illogical to expect otherwise. That said, the problem with human rights generally, and ESRs specifically, is not that they are ineffective tools for confronting the spectre of global inequality, but, rather, that they cannot do it fast enough for the liking of many activists and scholars, like Moyn. Perhaps, it not a question of “not enough rights in

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<sup>64</sup> David Rudovsky, “Running in Place: The Paradox of Expanded Rights and Restricted Remedies,” *University of Illinois Law Review* 2005, No. 5 (October 2005): 1199.

<sup>65</sup> *Brown v Board of Education*, 349 US 294.

<sup>66</sup> Danielle Elyce Hirsch, “A Defense of Structural Injunctive Remedies in South African Law,” *Oregon Review of International Law* 9 (2007): p. 19.

<sup>67</sup> Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa : A Choice between Corrective and Distributive Justice* (Pretoria: Pretoria University Law Press (PULP), 2009)  
<http://www.pulp.up.ac.za/component/edocman/litigating-socio-economic-rights-in-south-africa-a-choice-between-corrective-and-distributive-justice> [accessed 3 December 2018].

<sup>68</sup> Salomon, “Why should it matter that others have more?”



an unequal world,” but a question of human rights doing too little, and too slowly, in too unequal a world. As this paper argues, there is still a silver lining. the arc of ESRs may be long, but it bends towards (social) justice (and material equality).