

# Equality Restricted: The Problematic Compatibility between Austerity Measures and Human Rights Law

MICHAEL G. MARCONDES SMITH

## Abstract

Economic policies that concentrate wealth and aggravate socioeconomic inequalities often have negative impacts on human rights. For example, evidence points to the unequal impact of austerity measures—such as the defunding and privatizing of health care—on already disadvantaged groups and individuals. Despite its detrimental impacts, austerity often appears as a necessary evil in times when difficult choices must be made. Justified through arguments of trickle-down economics to support growth, the realization of human rights is postponed. Human rights are sidelined as guidelines that inform rather than limit such measures. The assumption that wealth concentration and the consequent reduction of human rights standards may be justified suggests a problematic conception of equality in human rights law. In this paper, I critically examine the way that this assumption informs the exclusion of distributive considerations from the scope of equality within human rights law. I identify and evaluate the emerging interpretations of equality beyond the legal-technical notion of equal treatment and the prohibition of discrimination and the extent to which equality in human rights may take on a distributive function in combating policies of wealth concentration such as austerity.

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MICHAEL GEORGE MARCONDES SMITH, LLB, LLM, is a PhD researcher and member of the Law and Development Research Group at the Faculty of Law of the University of Antwerp, Belgium.

Please address correspondence to the author. Email: michael.smith@uantwerpen.be.

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## Introduction

Times of economic crisis present policy makers with difficult choices. Austerity measures are policies aimed at alleviating an economic crisis through the rearrangement of public spending. The element of choice lies in the election of what is to be prioritized in the expenditure, and what is to be considered less essential or productive. Characteristics of austerity measures are the reduction of welfare benefits and the stalling, and often retrogression, of the realization of human rights.<sup>1</sup> Socioeconomic rights such as the right to health are particularly targeted as excessive burdens on state expenditure.<sup>2</sup> Attacks on health care through defunding or privatization are thus employed within an argument for efficiency and necessity.<sup>3</sup> For example, austerity measures in Spain “shifted certain health costs on to individuals,” impacting most harshly the most vulnerable.<sup>4</sup> Similar experiences in the United Kingdom, Portugal, Ireland, and Italy further demonstrate the economic and health-related failures of austerity measures.<sup>5</sup> In prioritizing economic revitalization, public expenditures on health, social protection, and welfare benefits in general are sacrificed. Following neoliberal ideologies, private enterprises are prioritized in reestablishing economic productivity, resulting in the concentration of capital in the hands of these entities, the impoverishment of the working class, and a consequent increase in socioeconomic inequality.<sup>6</sup>

Despite the ideological underpinnings of austerity measures, human rights law approaches them through a neutral lens. The compatibility between austerity and human rights law is assessed with a view to the relevant standards imposed by the legal framework, best dealt with under the scope of economic, social, and cultural rights. Although resource allocation and distribution is required for the progressive realization of these rights, human rights law adopts a neutral stance concerning the economic model and strategies to be adopted.<sup>7</sup> While setbacks in the protection, respect for, and

fulfillment of human rights may trigger the responsibility of states and other actors, austerity per se is not necessarily incompatible with human rights law, as space remains open for its justification.<sup>8</sup> Scrutiny of austerity measures is therefore carried out through a technical analysis of the conditions for the retrogression in the realization of rights, or their limitations. This approach excludes a more structural consideration of the dynamics of wealth concentration that underpin austerity.

Austerity measures are often imposed by creditors with the leverage to request particular strategies for satisfying debt at all costs. While economic influences stemming from international human rights law cause unease, international impositions of economic strategy are a normality. International law has long been a vehicle for the imposition of economic restructuring, at times adopting the language of human rights in the push for “adjustment with a human face.”<sup>9</sup> International financial institutions play a central part in defining the economic ideology followed in times of crisis. While the moral responsibility of respecting human rights may be inferred from the severe consequences of these bodies’ actions in the international sphere, precise legal obligations are harder to establish.<sup>10</sup> The responsibility for human rights falls solely on the state, which in turn often argues that the imposition of austerity measures by creditors makes its actions unavoidable.

Against this background, I examine the potential of the principle of equality and non-discrimination (or equality norm) in restricting austerity measures. While this principle is mostly interpreted as being limited to a prohibition of discrimination, scholars have called for its revitalization, particularly in an economically distributive sense.<sup>11</sup> Emerging interpretations develop a distinction between a broader notion of equality as a principle that informs the application of the legal system in its entirety and the more specific, grounds-based prohibition of discrimination.<sup>12</sup>

Beyond nondiscrimination and informing the application of particular socioeconomic rights such as the right to health, I argue that equality may take on a distributive function in combating policies of wealth concentration such as austerity.

In the first section of this paper, I introduce human rights law's responses to austerity measures. By analyzing human rights law standards on retrogressive measures, I identify limitations that allow for the legal justification of austerity. In the second section, I unpack the reduction of the equality norm to a prohibition of discrimination in human rights law. I assess emerging interpretations of the equality norm that go beyond identity-based nondiscrimination and highlight its distributive potential. Finally, I consider the application of a revitalized interpretation of equality to austerity measures and identify the need for further, more concrete considerations of equality as a fundamental norm of human rights law.

### Austerity and human rights law

The detrimental effects of austerity have been consistently demonstrated.<sup>13</sup> Under discussion are not their beneficial or detrimental nature, but rather their inevitability as the way to handle economic crises. Proponents of austerity claim that moments of crisis call for difficult choices to be made in prioritizing spending, justifying the reduction of living standards as a necessary evil.<sup>14</sup> Relevant to this examination is how human rights law may scrutinize this inevitability. Although policy makers use such crises to justify austerity measures, it is precisely during a crisis that human rights law must provide a safeguard against the deterioration of living standards. Beyond providing minimum standards, however, human rights do not seem to regulate distributive policies. While distribution may be required to safeguard and realize rights, the economic strategy to be adopted is left to the

discretion of states. And so the United Nations Committee on Economic, Social and Cultural Rights makes it clear that

*in terms of political and economic systems the [International Covenant on Economic, Social and Cultural Rights] is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.*<sup>15</sup>

Consequently, the adoption of wealth-concentrating austerity as a policy choice aimed at predicted economic gain per se does not seem to contradict human rights obligations. Only if the result of these measures is found to conflict with these obligations may a violation be identified. Analysis of compatibility must therefore be done on a case-by-case basis.

### *Justifying austerity*

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the obligation of states to “take steps ... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR].”<sup>16</sup> Requiring the *progressive* (as opposed to *immediate*) realization of rights is “a necessary flexibility device, reflecting the realities of the real world and the difficulties faced by any country in ensuring full realization of economic, social and cultural rights.”<sup>17</sup> Opening the space for justifying retrogression is an acceptance that economic circumstances may be beyond states' control.<sup>18</sup> The Committee on Economic, Social and Cultural Rights, while neutral to economic strategy, has stated that in employing retrogressive measures, states have “the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are

duly justified by reference to the totality of the rights provided for in the [ICESCR] in the context of the full use of the State party's maximum available resources."<sup>19</sup> Thus, not only is the stalling or halting of rights realization justifiable, but so is their retrogression.

One safeguard against non-realization and retrogression is found in the committee's "minimum core" doctrine, which determines that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party."<sup>20</sup> However, the committee has been inconsistent in affirming the absolute or relative nature of minimum core obligations. In the context of the right to health, the committee at one point stressed that "a State party cannot, under any circumstances whatsoever, justify its noncompliance with the core obligations ..., which are non-derogable."<sup>21</sup> It eventually returned, however, to the original position that the failure to fulfill minimum core obligations can be justified as long as it is demonstrated "that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>22</sup> For some, the provision for such justifications makes it possible for states to justify retrogressions that would otherwise be considered impermissible and unjustifiable.<sup>23</sup>

In the particular context of austerity measures, a letter by the chairman of the Committee on Economic, Social and Cultural Rights adds that, in justifying their adoption, states must demonstrate that the measures are temporary, necessary and proportionate, nondiscriminatory, and respectful of minimum core obligations.<sup>24</sup> An in-depth engagement with each of these conditions is not the purpose of this text.<sup>25</sup> It suffices to observe that the establishment of conditions for the analysis of compatibility is an *a priori* acceptance that wealth-concentrating austerity measures may be compatible with human rights standards. Even

if the nonfulfillment of minimum core obligations places a burden on the state to prove compatibility, the space is nevertheless allowed for justification under particular conditions.<sup>26</sup> This approach allows for an "as long as" formula in the examination of austerity: as long as standards are kept, wealth-concentrating austerity shall be permitted. As austerity is not per se incompatible with human rights standards, the determination of compatibility is left to a technical assessment under human rights law.<sup>27</sup> A crucial part of this assessment is that the state carries the burden of demonstrating compatibility.

Similarly, and in the context of the Greek austerity measures, the European Committee of Social Rights has noted that

*even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society.*<sup>28</sup>

While the European Committee of Social Rights does not offer particular alternatives, the ideological inevitability of austerity ends up challenged through neutral procedural language: "as a result, the Committee considers that it has not been discovered whether other measures could have been put in place, which may have limited the cumulative effects of the contested restrictions upon pensioners."<sup>29</sup> The committee equally avoids any interference in socioeconomic policy choices, relying on a more technical examination. Through this approach, however, the element of "legitimate public interest" in the measures remains unquestioned:

*while the invoked legislative measures could in principle be regarded as pursuing a legitimate public interest, the Committee is unable to consider that there are sufficient elements in the material before*

*it to justify restrictions to the Charter rights at stake as being proportionate and thus in conformity with what is permitted by Article 31 of the Charter.<sup>30</sup>*

Considering the measures to be in principle a legitimate public interest accepts at face value the ideological presuppositions underlying austerity. Through this approach, not only does human rights law fail to scrutinize the belief regarding the “trickle-down” benefits of wealth concentration and socioeconomic inequality, but also, by accepting *a priori* the legitimacy of the measures, it allows for the validation of an ideological assumption of compatibility between wealth accumulation and the postponement of human rights realization on the one hand, and human rights standards on the other. Meanwhile, the presupposition of such compatibility between a trickle-down approach and human rights law has been questioned.<sup>31</sup> Critics suggest that under a human rights-based approach to economic recovery, human rights would inform the election of policies in times of crisis, producing an economic strategy that works for rather than against human rights realization.

### *The human rights-based approach*

Austerity measures are not without alternative. The economic assumptions that underlie austerity have long been questioned within and outside the field of economics.<sup>32</sup> While grounded in the neoliberal assumption that temporary inequalities are beneficial for the economy, their economic inefficiency has been repeatedly demonstrated.<sup>33</sup> Alternative perspectives point to the socioeconomic value of safeguarding human rights standards in times of crisis.<sup>34</sup> But beyond economic efficiency, upholding human rights standards is not optional, given that states remain under obligations to progressively realize rights to their maximum available resources. Rights-based approaches take a further step, however, by rejecting assumptions that the postponement of rights realization or retrogressions may be necessary for economic recovery. Rather,

they take the realization of rights as the starting point for any strategy of economic recovery.<sup>35</sup> As clarified by Magdalena Sepúlveda Carmona, “From a human rights perspective, recovery must start with the most vulnerable and disadvantaged, who are rights holders rather than burdensome or passive recipients of charity.”<sup>36</sup>

The question arises as to the validity of leaving unquestioned the trickle-down position by reference to the neutrality of human rights law. As explained by Margot Salomon, scrutiny must seek to clarify to what extent the face-value acceptance of trickle-down economics is compatible with human rights law standards:

*On a human rights account, the argument that the poor will ultimately benefit, that is that they benefit “over time”, is difficult to defend. Human rights are not to be postponed for pronounced greater objectives, for example, an increase in national or global wealth or for benefits anticipated at some indeterminate time in the future. From the perspective of human rights theory, the argument made for sacrificing distributional equity in favour of rapid accumulation is rejected.<sup>37</sup>*

The argument that wealth-concentrating austerity may (if deemed justified) be compatible with human rights law cannot be sustained. Dangerously, it relies on a technocratic assessment that does not scrutinize an ideological perspective of economic recovery that promotes the postponement of human rights obligations.

In this context, questions as to the role of equality in combating wealth concentration and extreme inequality have sparked debates on the limits and unexplored potential of human rights law in achieving global justice.<sup>38</sup>

### Equality restricted

Socioeconomic distribution has generally been sidelined in the development of human rights. Recently, some scholars have highlighted the



insufficiency of what is often termed the “minimums approach” in human rights law.<sup>39</sup> For them, human rights have focused widely on providing only the bare minimum, or the basic needs for a life in dignity, a notion coherent “with the liberal-egalitarian and social-democratic idea of sufficiency within a welfare state.”<sup>40</sup> For Samuel Moyn, “in the age of human rights, the pertinence of fairness beyond sufficiency has been forgotten.”<sup>41</sup> While inequality logically describes a relationship between more than one person, the focus has been limited to one of its components—namely, the poor and deprived individual. Nothing within human rights law concerns, it seems, the other side of the relationship, the privileged few. Consequently, “one could imagine one man owning everything—an absolute overlord—and he would not violate the current scheme of human rights, so long as everyone had their basic rights fulfilled. Even perfectly realized human rights are compatible with radical inequality.”<sup>42</sup> This compatibility is, however, conceptual. While legally possible within Moyn’s description of human rights law, the factual compatibility between the realization of human rights and socioeconomic inequality is at best questionable.

After all, the impacts of socioeconomic inequality on the realization of human rights have been demonstrated.<sup>43</sup> For example, in the context of the right to health, the correlation between socioeconomic disadvantage and a lower life expectancy and higher rates of diseases may raise central issues under the right to health.<sup>44</sup> Inequality-inducing austerity measures put in place by Spanish authorities had a severe impact on the universality, accessibility, affordability, and quality of health care, pointing to potential violations of the right to health under the ICESCR.<sup>45</sup> Impacts on health are observed not only in directly related issues such as compromised access to quality nourishment or rising mental health problems but also in relation to other socioeconomic rights.<sup>46</sup> Given that the right to health is a “fundamental human right indispensable for the

exercise of other human rights,” austerity measures on health have widespread damaging effects.<sup>47</sup> The disparate impacts of austerity on access to health care raise serious concerns under the right to health, particularly when read through an equality lens.<sup>48</sup> In this context, interpreting equality distributively may shift our perspective from one of insufficiency to one of maldistribution.<sup>49</sup>

### *Revitalizing the equality norm*

Shortcomings in the approach of bodies such as the Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights to socioeconomic inequality have prompted renewed investigation into the limitations and potential of the equality framework.<sup>50</sup> Former United Nations Special Rapporteur on extreme poverty and human rights Philip Alston and scholars have proposed the “revitalization of the equality norm” in recognition of the direct connection between socioeconomic inequality and the realization of human rights.<sup>51</sup> The challenge lies particularly in identifying the normative consequences that may be inferred from such a connection. While the present understanding of equality allows for an indirect assessment of socioeconomic inequality, a renewed interpretation aims at identifying the presence of a normative command of distribution stemming from a positive notion of equality. An assessment of the aspects of a “renewed” principle of equality and nondiscrimination could shed some light on how austerity could be coherently dealt with under human rights law.

The principle of equality and nondiscrimination is a central principle of human rights law and a crosscutting norm that guides the application of this legal system in its entirety.<sup>52</sup>

Initially, the human rights provisions of equality and nondiscrimination safeguarded what may be defined as formal equality or the provision of equal treatment. Critiques highlighted the “emptiness” of this legal formulation of equality, which appeared

only to repeat a command for the realization of particular rights and to offer no additional normative content of its own.<sup>53</sup> These critiques prompted responses in the effort to substantiate the equality norm, made evident in the evolution of the concept of substantive equality.<sup>54</sup> In this developed reading, the substance of equality requires an enhanced analysis of the realization of rights in relation to subjects' factual circumstances of inequalities. In the context of austerity, for instance, an analysis of formal equality could not identify the disparate effects of raising consumption taxation (such as VAT) equally across the population.<sup>55</sup> Substantive equality, however, looks at the concrete outcomes of a determinate act rather than focusing solely on treatment.<sup>56</sup>

An approach extending beyond equal treatment has already been present in courts' and treaty bodies' evaluations of equality.<sup>57</sup> In its varying formulations, substantive equality has increasingly informed legal assessments of equality.<sup>58</sup> Socioeconomic considerations are not so easily brought within the scope of law, however. The separation of powers prevents judicial interference in executive or legislative competences.<sup>59</sup> Additionally, in the case of international human rights law, resistance to interference in such socioeconomic matters is stronger, given the field's supranational (and consequently external) nature. Within the legal consideration of socioeconomic distribution, therefore, one stumbles upon the difficult exercise of defining how far human rights mechanisms can go in defining the obligations under human rights law.

In the face of such impediments in addressing matters of distribution, socioeconomic inequality has been addressed mostly indirectly, such as through the inclusion of "poverty" or "socioeconomic disadvantage" within lists of prohibited grounds of discrimination.<sup>60</sup> As highlighted by Sakiko Fukuda-Parr, a direct assessment of economic inequality as an issue of distribution is deliberately kept from the agenda of human rights,

in alignment with particular political interests.<sup>61</sup> Consequently, there is a dissonance between the assessment of distribution within a society and the analysis of differential treatment on the basis of socioeconomic disadvantage.

In going beyond nondiscrimination, authors have proposed a disentanglement of equality as a broader, positive notion from the more negative prohibition of discrimination.<sup>62</sup> Put simply, while nondiscrimination tackles issues of recognition and identity-related matters of disadvantage under particular grounds, equality corresponds to a command of effecting equality, including through distribution. To be sure, such a clear-cut distinction cannot be made without sacrificing attention to the complex relation between distribution and recognition.<sup>63</sup> Not only does nondiscrimination place positive obligations on states regarding disadvantage and inclusion, but it also contains a distributive element of its own. Interpreting equality as a positive version of nondiscrimination can equally result in its further reduction to positive obligations under the prohibition of discrimination.

Calls for the revitalization of the equality norm seem to take a different path, therefore, going beyond the common formulation of particular provisions of equality and nondiscrimination. As an argument of systematic coherence, it stretches beyond one provision, concerning equality as an underlying principle, calling for a clarification of its normative consequences as such. This exercise seems to follow a notion of legal principle as a general norm (as opposed to one particular rule) inferable from a legal system in its entirety, and which informs the interpretation of all of this system's particular provisions.<sup>64</sup>

Importantly, a turn to interpretation brings a political debate on the limits of human rights law in tackling economic policy questions such as austerity within the domain of legal theory. The neutrality of human rights law is set aside as a mere alternative interpretation that is in fact insufficient

for creating coherence as to the fulfillment of the system's normative propositions. A focus is therefore placed on the realization of the system in its entirety and thus on the language of human rights law and the interdependence and indivisibility of rights. The references to "everyone" in particular provisions are not meaningless.<sup>65</sup> It is an explicit reference to the fundamental nature of equality, as the unequal realization of rights renders them ineffective. An interpretation of a norm that does not command the creation of the conditions of possibility for its own realization could not logically be accepted. If an interpretation allows for a behavior that makes such a right non-realizable, it can only be incorrect and illogical. Or, as passionately put by Hans Kelsen, "an obligation whose content does not include its own realization—what a self-contradiction!—is actually without content; it is no obligation at all."<sup>66</sup>

### *Interpreting socioeconomic rights*

Socioeconomic rights are inevitably distributive, requiring considerations of resource allocation for their realization. In the context of the right to health, the Committee on Economic, Social and Cultural Rights has affirmed that states are under a core obligation "to ensure equitable distribution of all health facilities, goods and services" and that a "failure to take measures to reduce [their] inequitable distribution" is a violation of the obligation to fulfill the right to health.<sup>67</sup> Furthermore, "the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health" is a violation of the obligation to protect the right to health.<sup>68</sup> The committee also stresses that equality and nondiscrimination address integral components of the right to health.<sup>69</sup> In sum, "the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is,

therefore, of common concern to all countries."<sup>70</sup> Wealth-concentrating austerity that cripples the realization of the right to health is therefore in gross dissonance with states' obligations under socioeconomic rights.

The equal enjoyment of the right to health requires distributive considerations in the realization of this right and refers to more than just a prohibition of unjustified distinctions as safeguarded under nondiscrimination. This distributive interpretation is not limited to the right to health. Equally harshly affected by austerity, the right to social security provides a framework for a distributive interpretation. For Beth Goldblatt, "understanding the right as one of the vehicles to achieve distributive justice gives real effect to the principle of equality within human rights. Providing social security equally requires more than the eradication of status-based discrimination."<sup>71</sup>

Distributive equality can also be read into the right to fair wages, and a minimalistic interpretation of "fairness" as equating a right to a minimum wage has been criticized as failing to acknowledge the right's distributive essence.<sup>72</sup> This was exemplified in the context of the Greek austerity policies, in which the European Committee of Social Rights found the disadvantage suffered by some workers disproportionate when taking into consideration a broader assessment of wage distribution. It stated that "to be considered fair within the meaning of Article 4§1, the minimum or lowest net remuneration or wage paid in the labor market must not fall below 60% of the net average wage."<sup>73</sup> This comparative analysis was also present when reading article 4§1 in light of the nondiscrimination clause of the preamble of the European Social Charter, finding the reduction of wages of persons aged under 25 to be manifestly disproportionate.<sup>74</sup> Similar points have been raised under the right to social security as an inherently distributive provision.<sup>75</sup> It is clear that socioeconomic rights require resource allocation by definition, which, despite allowing for a



progressive (as opposed to immediate) realization, sets concrete obligations as to what must guide realization.<sup>76</sup> While states must progressively realize socioeconomic rights, observance of the principle of equality and nondiscrimination configures an immediate obligation “that requires not merely the proscription of arbitrary differentiation between groups but also the promotion of substantive equality in the enjoyment of rights”—in other words, equality of outcomes between protected groups.<sup>77</sup>

The equality norm, as commanding distribution in the creation of the conditions for the realization of socioeconomic rights, can only reject the presumption of a legitimate public interest in wealth-concentrating austerity. Courts’ and treaty bodies’ reviews cannot ignore distributive equality in determining the legitimacy of these measures, relying merely on an assessment of proportionality or reasonableness. Equality and nondiscrimination is not merely another factor to be balanced against other interests.<sup>78</sup> Only when the principle is reduced to a technical framework of identity-based equality is it possible to sideline distributive equality to the detriment of rights realization. The revitalization of the equality norm seeks, thus, to highlight that such limitation contributes only to a fundamental dissonance between the principles of human rights law and their actualization.

While this revitalized interpretation of the equality norm elucidates the limitations of current human rights law structures, it still requires conceptual development.<sup>79</sup> As exemplified by Gillian MacNaughton’s formulation of a right to social equality, these interpretative elaborations do a good job at demonstrating the presence in the current human rights framework of instruments with the potential for addressing socioeconomic inequalities.<sup>80</sup> In doing so, they act as immanent critiques, demonstrating inconsistencies from a point of view internal to the human rights law framework itself.<sup>81</sup> Highlighting the interdependence of human rights and the foundational nature of the equality

norm points to the right direction in addressing socioeconomic inequality, particularly because it demonstrates that minimalistic interpretations of equality are not a necessity. They do not, however, clarify much about the nature of equality as a norm of international law. Concrete investigations of issues such as austerity may provide an opportunity to imagine if and how the equality norm could be instrumentalized against wealth accumulation.

Naturally, an academic intervention can only suggest a certain reading of the equality norm, and the role of applying it to a concrete case remains with the courts and treaty bodies that are faced with instances of a legal assessment of socioeconomic inequality. If equality is to be revitalized, however, coherence demands that an interpretation which accepts wealth concentration at face value under the guise of neutrality be abandoned. As exemplified by the right to health, although retrogression may be accepted under particular conditions, the *principle* of equality and nondiscrimination cannot be ignored. Beyond an examination of the reasonableness of retrogressions or the proportionality of limitations to equality, austerity can be rejected for the ideology that underlies it. While such a shift in interpretation may raise questions regarding the limits of law in determining economic policies, this rejection does not break human rights law’s neutral approach regarding economic models. To the contrary, it rejects the co-optation of human rights by ideologies that concentrate wealth and exacerbate socioeconomic inequality.<sup>82</sup>

## Conclusion

Austerity measures are demonstrably detrimental to the realization of human rights. While the human rights law framework generally prohibits retrogressions in rights realization, it allows for exceptions based on an unclear and uncritical acceptance of trickle-down economics as a “legitimate public interest.” The principle of equality and nondiscrim-

ination, while increasingly interpreted to safeguard substantive equality, has been significantly limited in its application to socioeconomic matters. In the context of austerity, its interpretation is contained within a peripheral framework of safeguarding particular instances of identity-based equality. Socioeconomic equality, meanwhile, has been widely disregarded as part of the equality framework under human rights law. In this paper, I have elaborated on proposals for a renewed interpretation of the equality norm, considering its possible effects for analyzing austerity. Interpreted as a principle of human rights law, equality and nondiscrimination must inform all aspects of rights realization and not only be invoked within the balancing of interests. Within this reading, the validity of wealth concentration as a legitimate public interest cannot be presupposed. Distributive equality must thus inform the reconsideration of the assumed compatibility between austerity measures and human rights law, overcoming the exclusion of distributive assessments justified through the ideological neutrality of human rights.

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## References

1. Amnesty International, *Resuscitation Required: The Greek Health System after a Decade of Austerity* (London: Amnesty International, 2020); A. Kentikelenis, M. Karanikolos, A. Reeves, et al., “Greece’s Health Crisis: From Austerity to Denialism,” *Lancet* 383/9918 (2014).
2. Office of the United Nations High Commissioner for Human Rights, *Report on Austerity Measures and Economic and Social Rights Submitted Pursuant to General Assembly Resolution 48/141* (Geneva: Office of the United Nations High Commissioner for Human Rights, 2013).
3. Amnesty International (2020, see note 1).
4. Amnesty International, *Wrong Prescription: The Impact of Austerity Measures on the Right to Health in Spain* (London: Amnesty International, 2018).
5. M. McKee, M. Karanikolos, P. Belcher, and D. Stuckler, “Austerity: A Failed Experiment on the People of Europe,” *Clinical Medicine* 12/4 (2012).
6. C. E. Mattei, *The Capital Order: How Economists Invented Austerity and Paved the Way to Fascism* (Chicago: University of Chicago Press, 2022).
7. Committee on Economic, Social and Cultural Rights, General Comment No. 3. UN Doc. E/1991/23 (1990), para. 8.
8. See Committee on Economic, Social and Cultural Rights, Globalization and Its Impact on the Enjoyment of Economic, Social and Cultural Rights, UN Doc. E/1999/22, E/C.12/1998/26 (1999), para. 515(2)–(3).
9. G. Rist, *The History of Development: From Western Origins to Global Faith*, 4th edition (London: Zed Books, 2014), pp. 171–173.
10. See M. E. Salomon, “Of Austerity, Human Rights and International Institutions,” *European Law Journal* 21/521 (2015).
11. P. Alston, “Extreme Inequality as the Antithesis of Human Rights,” *OpenGlobalRights* (August 27, 2015), <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>; W. Vandenhoe, “Planet and People: Making Human Rights Distributive by Design,” in S. Egan and A. Chadwick (eds), *Poverty and Human Rights: Multidisciplinary Perspectives* (Cheltenham: Edward Elgar Publishing, 2021).
12. B. Goldblatt, “Economic Inequality and the Right to Social Security: Contested Meanings and Potential Roles,”

in C. Porter, D. Frey, and G. MacNaughton (eds), *Human Rights and Economic Inequalities* (Cambridge: Cambridge University Press, 2021); G. MacNaughton, "Equality Rights beyond Neoliberal Constraints," in D. F. Frey and G. MacNaughton (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge: Cambridge University Press, 2018); J. Whiteman, "Tackling Socio-Economic Disadvantage: Making Rights Work," *Equal Rights Review* 12 (2014).

13. M. Blyth, *Austerity: The History of a Dangerous Idea*, 1st edition (Oxford: Oxford University Press, 2013); M. P. A. Schneider, S. Kinsella, and A. Godin, "Redistribution in the Age of Austerity: Evidence from Europe 2006–2013," *Applied Economics Letters* 24/10 (2017); J. Stiglitz, "Europe's Austerity Disaster," *Social Europe* (September 29, 2014), <https://www.socialeurope.eu/europes-austerity-disaster>.

14. See, for instance, D. Cameron, "Prime Minister's Speech on the Economy," gov.uk (June 7, 2010), <https://www.gov.uk/government/speeches/prime-ministers-speech-on-the-economy>. For an analysis of the evolution of the idea of austerity in British politics, see N. Anstead, "The Idea of Austerity in British Politics, 2003–2013" *Political Studies* 66 (2018). On the development of the notion of the necessity of austerity, see generally Mattei (see note 6).

15. Committee on Economic, Social and Cultural Rights (1990, see note 7), para. 8.

16. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966), art. 2(1).

17. Committee on Economic, Social and Cultural Rights (1990, see note 7), para. 8.

18. *Ibid.*, para. 9.

19. Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4 (2000), para. 32.

20. *Ibid.*, para. 10.

21. *Ibid.*, para. 47.

22. Committee on Economic, Social and Cultural Rights (1990, see note 7), para. 10; Committee on Economic, Social and Cultural Rights, General Comment No. 19, UN Doc. E/C.12/GC/19 (2008), para. 60.

23. J. Wills and B. Warwick, "Contesting Austerity: The Potential and Pitfalls of Socioeconomic Rights Discourse," *Indiana Journal of Global Legal Studies* 23/2 (2016).

24. Chairperson of the Committee on Economic, Social and Cultural Rights, Letter of the Chairperson of the Committee on Economic, Social and Cultural Rights, UN Doc. CESCR/48th/SP/MAB/SW (2012).

25. For an engagement with these conditions, see M. Campbell, "The Proportionality of an Economic Crisis," in S. Atrey and S. Fredman (eds), *Exponential Inequalities:*

*Equality Law in Times of Crisis* (Oxford: Oxford University Press, 2023); Wills and Warwick (see note 23).

26. Committee on Economic, Social and Cultural Rights (1990, see note 7), para. 10.

27. See Wills and Warwick (see note 23).

28. *Federation of Employed Pensioners of Greece (IKA-ET-AM) v. Greece*, European Committee of Social Rights, decision on the merits, December 7, 2012, para. 79.

29. *Ibid.*, para. 80.

30. *Greek General Confederation of Labour (GSEE) v. Greece*, European Committee of Social Rights, decision on the merits, March 23, 2017, para. 91.

31. M. E. Salomon, "Why Should It Matter That Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law," *Review of International Studies* 37/5 (2011), p. 2147.

32. Blyth (see note 13).

33. D. Holland and J. Portes, "Self-Defeating Austerity?," *National Institute Economic Review* 222/1 (2012); Y. Varoufakis, *And the Weak Suffer What They Must?: Europe's Crisis and America's Economic Future*, 1st edition (New York: Bold Type Books, 2016); A. Parguez, "The Fundamental and Eternal Conflict: Hayek and Keynes on Austerity," *International Journal of Political Economy* 41/4 (2012).

34. I. Saiz, "Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective," in A. Nolan, R. O'Connell, and C. Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Oxford: Hart Publishing, 2013); Human Rights Council, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/17/34 (2011), paras. 56–59.

35. See, for instance, K. Housos, "Austerity and Human Rights Law: Towards a Rights-Based Approach to Austerity Policy, a Case Study of Greece," *Fordham International Law Journal* 39/2 (2015).

36. M. S. Carmona, "Alternatives to Austerity: A Human Rights Framework for Economic Recovery," in A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014), p. 42.

37. Salomon (2011, see note 31), p. 2147.

38. See, for instance, R. Balakrishnan, "Global Inequality and Human Rights," *Inequality Studies from the Global South* (Abingdon: Routledge, 2020); D. Brinks, J. Dehm, and K. Engle, "Introduction: Human Rights and Economic Inequality," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 10 (2019); S. Marks, "Human Rights and the Bottom Billion," *European Human Rights Law Review* 37 (2009).

39. P. Casal, "Why Sufficiency Is Not Enough," *Ethics* 117/2 (2007); O. L. Motta Ferraz, "Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty," *Equal Rights Review* 12 (2014); S. Moyn, "Sufficiency, Equality, and Human Rights," in M. Langford and K. G. Young (eds), *The Oxford Handbook of Economic and Social Rights* (Oxford: Oxford University Press, 2023).
40. C. Albertyn, "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice," *South African Journal on Human Rights* 34/3 (2018), p. 458.
41. S. Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Belknap Press 2019), p. 3.
42. S. Moyn, "Human Rights and the Age of Inequality," *OpenDemocracy*, <https://www.opendemocracy.net/en/openglobalrights-openpage/human-rights-and-age-of-inequality/>.
43. See Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, UN Doc. A/HRC/29/31 (2019).
44. B. H. Singer and C. D. Ryff (eds), *New Horizons in Health: An Integrative Approach* (Washington, DC: National Academies Press, 2001), pp. 100–101.
45. N. J. Lusiani, "Rationalising The Right to Health: Is Spain's Austere Response to the Economic Crisis Impermissible under International Human Rights Law?," in A. Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014).
46. *Ibid.*
47. Committee on Economic, Social and Cultural Rights (2000, see note 19), para. 1.
48. *Ibid.*, para. 19.
49. Ferraz (see note 39).
50. See, for instance, C. O'Connell, "New Directions Needed Exponential Inequalities and the Limits of Equality Law," in S. Atrey and S. Fredman (eds), *Exponential Inequalities: Equality Law in Times of Crisis* (Oxford: Oxford University Press, 2023); J. Ringelheim and S. Ganty, "Anti-Discrimination Law and Economic Inequality," in C. O'Connell, J. Ringelheim, and I. Solanke (eds), *Research Handbook on European Anti-Discrimination Law* (Cheltenham: Edward Elgar Publishing, forthcoming).
51. Human Rights Council (2019, see note 43).
52. O. M. Arnardóttir, "A Future Of Multidimensional Disadvantage Equality?," in O. M. Arnardóttir and G. Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities* (Leiden: Brill Nijhoff, 2009); W. Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Cambridge: Intersentia, 2005).
53. P. Westen, "The Empty Idea of Equality," *Harvard Law Review* 95 (1982); see also J. R. Lucas, "Against Equality," *Philosophy* 40 (1965).
54. K. Greenawalt, "How Empty Is the Idea of Equality," *Columbia Law Review* 83 (1983).
55. See Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/26/28 (2014), para. 46.
56. See H. Collins, "Discrimination, Equality and Social Inclusion," *Modern Law Review* 66/1 (2003).
57. *Minority Schools in Albania*, Permanent Court of International Justice, advisory opinion, April 6, 1935, para. 19.
58. See, for instance, Committee on the Rights of Persons with Disabilities, General Comment No. 6, UN Doc. CRPD/C/GC/6 (2018), para. 10; *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*, Inter-American Court of Human Rights, judgment of July 15, 2020, para. 72; *DH and Others v. the Czech Republic*, European Court of Human Rights, application no. 57325/00, judgment of November 13, 2007, para. 175.
59. S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008), pp. 247–248.
60. For a comprehensive analysis of the limits of this framework, see S. Fredman, "The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty," *Stellenbosch Law Review* 22 (2011).
61. S. Fukuda-Parr, "Keeping Out Extreme Inequality from the SDG Agenda: The Politics of Indicators," *Global Policy* 10 (2019); similarly, see J. Dehm, "Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations," *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 10 (2019).
62. G. MacNaughton, "Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All," *Health and Human Rights Journal* 11/2 (2009)
63. See N. Fraser and A. Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (New York: Verso, 2003).
64. See, for instance, J. Raz, "Legal Principles and the Limits of Law," *Yale Law Journal* 81/5 (1972).
65. Similarly, see *Khosa and Others v. Minister of Development and Others 2004 (6) SA 505(CC)*, South African Constitutional Court, para. 111.
66. H. Kelsen, *Hans Kelsen Werke*, 1st edition (Tübingen: Mohr Siebeck, 2013), p. 423.
67. Committee on Economic, Social and Cultural Rights (2000, see note 19), paras. 43(e), 52.



68. *Ibid.*, para. 50.
69. *Ibid.*, para. 3.
70. *Ibid.*, para. 38.
71. Goldblatt (see note 12), p. 301.
72. D. F. Frey and G. MacNaughton, “Fair Wages and a Decent Living: Paths to Greater Vertical Equality,” in C. Porter, D. Frey, and G. MacNaughton (eds), *Human Rights and Economic Inequalities* (Cambridge: Cambridge University Press, 2021), pp. 273–276.
73. *Greek General Confederation of Labour (GSEE) v. Greece* (see note 30), para. 187.
74. *Ibid.*, paras. 194–197.
75. *Federation of Employed Pensioners of Greece (IKA-ET-AM) v. Greece* (see note 28).
76. O. De Schutter, “Introduction,” in O. De Schutter (ed), *Economic, Social and Cultural Rights as Human Rights* (Cheltenham: Edward Elgar Publishing, 2014).
77. Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20 (2009), para. 7; Wills and Warwick (see note 23), p. 644.
78. For a similar formulation, see A. Stuart, “Back to Basics: Without Distinction: A Defining Principle?,” in E. Brems (ed), *Conflicts between Fundamental Rights* (Cambridge: Intersentia, 2008).
79. Vandenhole (2021, see note 11), p. 119.
80. G. MacNaughton, “Beyond a Minimum Threshold: The Right to Social Equality,” in L. Minkler (ed), *The State of Economic and Social Human Rights: A Global Overview* (Cambridge: Cambridge University Press, 2013), p. 289.
81. I. Venzke, “The Practice of Interpretation in International Law: Strategies of Critique,” in J. L. Dunoff and M. A. Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge: Cambridge University Press, 2022).
82. J. Linarelli, M. E. Salomon, and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford: Oxford University Press, 2018).