

# Review Essay

## *Are Human Rights Enough (in Australia)?*

*Not Enough: Human Rights in an Unequal World*  
by Samuel Moyn (2018), Belknap Press, 296 pp,  
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Dylan Lino\*

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### *Abstract*

This essay reviews Samuel Moyn's recent book *Not Enough: Human Rights in an Unequal World* and explores its resonance with Australian political experience. It argues that the politics of bills of rights in Australia bear out one of Moyn's central theses: that within global politics since the 1970s, a concern for human rights has partly displaced concerns about material inequality. Understanding this history should challenge progressive Australian lawyers to rethink the privileged standing that the bill-of-rights cause possesses within their aspirations for law reform, and encourage advocacy for projects that seek to counter material inequality.

## **I Introduction**

Progressive-minded Australians love human rights, progressive-minded Australian lawyers especially so. One of their dominant legal projects over the past 50 years has been to better institutionalise human rights protections in domestic law. Most prominent and glamorous among their causes has been the unrealised endeavour to create a national bill of rights, whether constitutionally or legislatively enshrined.<sup>1</sup> It is a source of considerable frustration and embarrassment for left-of-centre Australians, and particularly for the lawyers among us, that (as the standard refrain goes) 'Australia is now the only Western democracy without a national Human Rights Act or bill of rights'.<sup>2</sup> Despite the numerous advances made towards more

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\* Lecturer, University of Western Australia Law School, Perth, Australia. Disclosure: Samuel Moyn supervised my LLM thesis at Harvard Law School in 2014.

<sup>1</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009).

<sup>2</sup> Morry Bailes, President of the Law Council of Australia, quoted in Law Council of Australia, '70 Years after *Universal Declaration of Human Rights*, Australia Has Unfinished Business' (Media Release, 10 December 2018) <<https://www.lawcouncil.asn.au/media/media-releases/70-years-after-universal-declaration-of-human-rights-australia-has-unfinished-business>>.

fully protecting human rights from state incursions in Australia, further extending that project remains one of the highest goals for law reform among progressive Australians.

For those in this camp, and I count myself among them, Samuel Moyn's brilliant and provocative new book, *Not Enough: Human Rights in an Unequal World*,<sup>3</sup> should prompt some hard reflection. Over the past decade, Moyn, a professor of history and a professor of law at Yale University, has emerged as one of the most influential historians of human rights, prompting academics and advocates alike to revisit their often pietistic assumptions about the origins and politics of human rights. *Not Enough* is a worthy extension of this iconoclasm. Both a work of intellectual and legal history and an incisive political intervention, *Not Enough* documents the historical relationship between human rights and distributive justice, particularly the pursuit of material equality. The story is not a happy one. In Moyn's persuasive telling, human rights were peripheral to the greatest modern feats of egalitarian redistribution, especially the erection of welfare states, and they have been powerless against the reversal of those feats in the age of neoliberalism since the 1970s. *Not Enough* demonstrates that, in their congenital neglect of material inequality, human rights are fundamentally incomplete as a program of social justice.

*Not Enough* has a special resonance with Australia, one that I seek to bring out in this essay. I start by reviewing *Not Enough* and situating it against Moyn's prior work on human rights. I then turn to Australia, focusing on the history of progressive advocacy for a bill of rights. In extending Moyn's analysis to Australia, I want not only to demonstrate the robustness of Moyn's historical conclusions, but also to bring his critique of human rights closer to home for an Australian legal audience. I argue that, roughly since the 1970s, the bill-of-rights cause has captured the legal imagination of Australian progressives and their commitment to egalitarian redistribution has waned, even as material inequality has expanded as a result of neoliberal reforms. For progressive lawyers, who have so often led efforts to better protect human rights, understanding this history should challenge us — not to abandon human rights, but to go beyond them: to expand our imaginative horizons, enlarge our political ambitions and redirect some of our energies in pursuit of the neglected ideal of egalitarian redistribution.

## II Inequality and the Failures of Human Rights

The story that Moyn tells in *Not Enough* is one in which human rights have been marginal in past achievements of egalitarian distribution and virtually impotent in challenging their more recent reversals. The most successful visions for reducing material equality, Moyn argues, have been those grounded in the Welfare State and socialism, even as those egalitarian visions were frequently entangled with imperialism, authoritarianism, racism, sexism and other forms of domination. After experiencing a heyday for three decades after World War II, the fortunes of the Welfare State and socialism declined, replaced from the 1970s by a highly unequal

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<sup>3</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press, 2018).

age whose political economy has been neoliberal and whose political morality has been human rights. Certainly, Moyn acknowledges that among the commendable successes of human rights is their role in challenging status inequalities based on gender, race, sexual orientation and other grounds — a major improvement on the exclusionary Welfare State.<sup>4</sup> But his central conclusion is that human rights have failed to provide a political language or institutional repertoire for contesting unequal distribution and, as a result, ‘have been a powerless companion of market fundamentalism’.<sup>5</sup>

In *Not Enough*, Moyn builds upon his earlier field-defining histories of human rights, most notably 2010’s *The Last Utopia*.<sup>6</sup> There, Moyn undermined prevailing genealogies of human rights that posited their deep origins and celebrated their historical unfolding as the steady march of progress. Human rights as we know them today — as ‘an agenda for improving the world, and bringing about a new one in which the dignity of each individual will enjoy secure international protection’<sup>7</sup> — did not originate in Christian natural law or the Enlightenment or even in response to the horrors of World War II. Rather, according to Moyn, the internationalist human rights program only emerged to global prominence in the 1970s.<sup>8</sup> And it did so not through some inevitable triumph of universal justice, but primarily because other more ambitious and globally dominant programs for human emancipation — especially communism and anti-colonial nationalism — collapsed under the weight of ignominy.<sup>9</sup> As these once-ascendant utopian programs shed supporters and accumulated critics, the seemingly purer, more minimalist vision of justice represented by human rights was left standing as the ‘last utopia’.<sup>10</sup>

There are strong continuities between *The Last Utopia* and *Not Enough*. Both are first and foremost works of history, underpinned by a critical impulse to contest the sanctified status of human rights as the pinnacle of progressive politics. In *Not Enough*, as in *The Last Utopia*, the 1970s remains the critical turning point for the global rise of human rights, with Moyn maintaining that human rights occupied a fairly minimal place in law and politics globally prior to the 1970s.<sup>11</sup> And Moyn persists in seeing the principal reason for the ascendance of human rights since then as the decline of rival utopian agendas, socialist and anti-colonial projects most notably.<sup>12</sup>

But there are also divergences. The most obvious is *Not Enough*’s narrowing of thematic focus to the relationship between human rights and distributive justice. In practice, this new orientation sees Moyn focus more on economic and social rights and situate human rights primarily within the explanatory context of political

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<sup>4</sup> Ibid 3, 9, 10, 176, 202–6.

<sup>5</sup> Ibid 216.

<sup>6</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2010). See also Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press, 2015); Samuel Moyn, *Human Rights and the Uses of History* (Verso, 2014).

<sup>7</sup> Moyn, *The Last Utopia*, above n 6, 1.

<sup>8</sup> Ibid 1–8.

<sup>9</sup> Ibid 3–5, 7–8, chs 3–4.

<sup>10</sup> Ibid.

<sup>11</sup> Moyn, *Not Enough*, above n 3, xi.

<sup>12</sup> Ibid.

economy.<sup>13</sup> Another major difference between *Not Enough* and *The Last Utopia* is in temporal scope. Where the earlier book had ended the story ‘on the brink of 1980, precisely when it began to seem interesting’,<sup>14</sup> *Not Enough* extends the timeframe to the present. The expanded narrative arc is integral to Moyn’s project, enabling him to puzzle over how the age of human rights, commencing in the 1970s, has also coincided with the ascendancy of neoliberalism and exploding material inequality.

More subtly, Moyn has relaxed his insistence on seeing human rights as an international program sitting beyond and directed against the State. That insistence had given *The Last Utopia* so much of its drama, allowing Moyn to discount the human rights credentials of political projects from the French Revolution through to decolonisation movements, since they turned to the State rather than the international sphere as the guarantor of rights.<sup>15</sup> In *Not Enough*, Moyn himself now looks to rights guaranteed by states as part of the history of human rights. To borrow one of Moyn’s conceptual distinctions, he now acknowledges that the *substantive content* of human rights may be old, while maintaining that the 1970s were the crucial moment when human rights rose to an international (rather than statist) *scale* and attained global ideological *salience*.<sup>16</sup>

Informing Moyn’s historical analysis is a theoretical distinction between sufficiency and equality in the politics of redistribution:

Sufficiency concerns how far an individual is *from having nothing* and how well she is doing *in relation to some minimum of provision* of the good things in life. Equality concerns how far individuals are *from one another* in the portion of those good things they get.<sup>17</sup>

According to Moyn, when human rights have cared about material distribution at all, they have been concerned with sufficiency — meeting a subsistence minimum, as through most economic and social rights — while letting hierarchy run rampant.<sup>18</sup> But for Moyn, the idea that everyone should simply have enough is not enough: ‘Not merely a floor of protection against insufficiency is required, but also a ceiling on inequality’.<sup>19</sup> And he doubts whether human rights themselves can be successfully repurposed to undertake this pressing task.<sup>20</sup>

Alongside its upfront theoretical framework, *Not Enough* also wears a political program on its sleeve: to make material equality a political priority again and, insofar as human rights unnecessarily detract from that goal, to lessen our fixation on them. Moyn’s work on human rights has always been refreshingly open, some historians would say heretical, in using history for contemporary political ends. As Moyn has emphasised elsewhere, ‘arguments about history ... can never do other than serve the present, since they are inevitably motivated by its chronologically

<sup>13</sup> See especially Moyn, *Not Enough*, above n 3, x, 6, 8, 175.

<sup>14</sup> *Ibid* x.

<sup>15</sup> Moyn, *The Last Utopia*, above n 6, chs 1, 3.

<sup>16</sup> Samuel Moyn, ‘Substance, Scale, and Salience: The Recent Historiography of Human Rights’ (2012) 8 *Annual Review of Law and Social Science* 123.

<sup>17</sup> Moyn, *Not Enough*, above n 3, 3 (emphasis in original).

<sup>18</sup> *Ibid* 2–3, ch 7.

<sup>19</sup> *Ibid* 4.

<sup>20</sup> *Ibid* 218–19.

temporary and thematically narrow concerns'.<sup>21</sup> The political motivation underpinning *The Last Utopia* was a general dissatisfaction with the achievements of human rights: they were, at best, an unimpressive vision of global justice falsely masquerading as apolitical, and, at worst, a compromised program entangled in questionable practices of foreign intervention. It was a potent critique that destabilised the moral and political authority of human rights, without suggesting any alternative program to supplement or replace them. In *Not Enough*, Moyn's history likewise serves a critical project, this time revealing that when it comes to challenging unequal distribution, human rights have not been up to the task and probably never will be. But now Moyn forthrightly proclaims an alternative program to supplement human rights: a capaciously defined socialism, ideally international in scope, to reverse the material inequality that is neoliberalism's calling card.

*Not Enough* provides a history of the relationship between human rights and redistribution that is both sweeping and compelling. The book's first half explores national and international projects for achieving distributive justice up to the 1970s and the place of human rights within them. In essence, Moyn's argument is that political movements, especially those that produced the Welfare State, once took egalitarian redistribution much more seriously, and that human rights were peripheral in those movements.<sup>22</sup> Attentive to the injustices present in earlier egalitarian projects, Moyn substantiates his thesis with wide-ranging chapters that trace the development of the Welfare State, the unrecognised welfarist origins of the *Universal Declaration of Human Rights*,<sup>23</sup> and the postcolonial mobilisations that culminated in demands for a New International Economic Order in the 1970s.<sup>24</sup>

Where the book's first part shows how human rights were peripheral to projects of egalitarian redistribution up through the 1970s, the second part persuasively shows how egalitarian redistribution has been peripheral to human rights projects from the 1970s onwards, even as material inequality has grown. The penultimate chapter is the pivotal one, offering a synoptic view of the mutual ascent of human rights and neoliberalism — and, just as importantly, the decline of socialism.<sup>25</sup> While Moyn emphasises that human rights and neoliberalism arose from different conditions in different places, a recurring explanatory factor is the diminishing power and prestige of the socialist left in local and global settings, which opened up political space for the emergence of human rights and neoliberalism alike. Moyn convincingly concludes that human rights have since comfortably cohabited with neoliberalism primarily because they 'had no commitment on their own to material equality'.<sup>26</sup>

In *Not Enough*, Moyn has supplied another riveting and powerful critical history of human rights whose central thesis is difficult to deny. For progressives, *Not Enough* stands as a bracing indictment of the ways in which our growing concern for human rights has dovetailed with a growing neglect of the scourge of material

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<sup>21</sup> Moyn, *Human Rights and the Uses of History*, above n 6, xii–xiii.

<sup>22</sup> Moyn, *Not Enough*, above n 3, chs 1–4.

<sup>23</sup> GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<sup>24</sup> Moyn, *Not Enough*, above n 3, chs 1–4.

<sup>25</sup> *Ibid* ch 7.

<sup>26</sup> *Ibid* 193.

inequality. This realisation should not lead to a disregard of the fundamental importance of human rights for progressive politics. That crucial point sometimes gets lost in *Not Enough*, as the weight of the analysis chronicles human rights' redistributive shortcomings. Certainly, Moyn concedes the successes of human rights in bringing global scrutiny to state repression and combating the status inequality of women and other marginalised social groups, but the praise is damning in its faintness.<sup>27</sup> But while Moyn's analysis of the achievements of human rights in *Not Enough* is unduly truncated and ungenerous, he acknowledges their necessity: human rights, though not enough themselves, are a vital part of a progressive agenda.<sup>28</sup> And asking for more nuance and balance is in some sense to miss the point. *Not Enough* is not simply a history but a polemic, designed to provoke progressives into re-evaluating their political priorities in an age of inequality. In that goal, the book succeeds admirably.

### III Australian Affinities

The rest of this essay sketches some ways in which the Australian experience fits into Moyn's narrative. My focus will be on one particularly prominent domestic manifestation of human rights politics: progressive advocacy for a bill of rights. I will also focus mainly on the policies of the Australian Labor Party ('ALP'), the politically dominant institutional form of the Australian left for over a century. I argue that the ALP's commitment to a bill of rights properly began only in the 1970s, at the same time as its commitment to socialism declined, soon to be transformed into the neoliberal Labor agenda of the 1980s and after. In the decades since, an era of widening inequality underpinned by neoliberal policies, the legal imagination of progressives has often fixated on a bill of rights as the zenith of law reform, while egalitarian redistribution has slipped down the progressive agenda.

The starting point is that the ALP once cared much more about egalitarian redistribution than it does today, although in ways that remained profoundly exclusionary for many. As a social-democratic workers' party, the ALP was, from its inception in the 1890s, broadly committed to using state power for reducing economic exploitation and socioeconomic inequality — it supported a reformist, state-centred and modest socialism.<sup>29</sup> From 1921, the Party's national platform incorporated a 'socialist objective' that, extending earlier commitments, enshrined as the Party's ultimate goal '[t]he Socialisation of Industry, Production, Distribution and Exchange'.<sup>30</sup> At its foundations, the labour movement's vision of social justice was, like other political programs of the time, inextricably entangled with other forms of exploitation and inequality: in particular, the violent expropriation of lands and resources from Aboriginal peoples, the ongoing subordination of women and

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<sup>27</sup> Ibid 175, 202–6.

<sup>28</sup> Ibid xii, 10, 220.

<sup>29</sup> Graham Maddox and Tim Battin, 'Australian Labor and the Socialist Tradition' (1991) 26(2) *Australian Journal of Political Science* 181.

<sup>30</sup> Australian Labor Party, *Official Report of Proceedings of the Ninth Commonwealth Conference* (Labor Call, 1921) iii. See further L F Crisp, *The Australian Federal Labour Party 1901–1951* (Longmans, Green and Co, 1955) ch 14.

the discriminatory exclusion and regulation of non-white immigration.<sup>31</sup> Into the 20<sup>th</sup> century's second half, the labour movement pursued an egalitarianism whose primary beneficiaries were intended to be white, settler, male workers.

In the pursuit of this program, the ALP saw little place for constitutional rights enforced by the courts against the political branches. Labor generally did not diverge from the British orthodoxy on the protection of individual rights: rights received adequate protection through parliamentary sovereignty and the rule of law.<sup>32</sup> While progressive movements in Australia have often used the language of rights, until the 1970s they typically saw influence over governments and parliaments, not judicial supremacy, as the ultimate means of protecting their interests.<sup>33</sup>

Indeed, at the heart of the ALP's social and economic program for decades was a constitutional reform agenda very different from a bill of rights. Throughout much of its existence, Labor's central constitutional goal was not to impose *limits* on the political branches through judicially enforceable rights protections. Instead, the goal was to *expand* governmental power, especially at the national level, in order to manage and regulate the national economy in the name of civilising capitalism. Put differently, Labor's animating constitutional struggle was to overcome the barriers that federalism put in the way of nationwide socialist and redistributive policies.<sup>34</sup> Labor's problem was that whereas realising its program demanded the extensive use of state power, ideally at the national level, the federal *Constitution* imposed significant limits on state power, especially at the national level. By 1919, the ALP platform included a plan for constitutional amendments to give the Federal Parliament unfettered legislative power, to replace the states with Commonwealth-subordinated provinces and to abolish the Senate.<sup>35</sup> These or like platform commitments remained until the 1970s.<sup>36</sup>

Despite some dalliances with constitutional rights by Labor in the 1940s and 1950s, the Party's overriding constitutional objective remained expanding federal power in the name of a redistributive agenda.<sup>37</sup> Labor's periods in power until 1950 were marked by constitutional reform efforts, almost all unsuccessful, to extend federal power as the necessary precursor to fulfilling the Party's socialist and

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<sup>31</sup> See, eg, Symposium, 'Who Are Our Enemies? Racism and the Working Class in Australia' (1978) 35 *Labour History* xi; Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women at Work* (Penguin, 2<sup>nd</sup> ed, 1989).

<sup>32</sup> Brian Galligan, 'Australia's Rejection of a Bill of Rights' (1990) 28(3) *Journal of Commonwealth and Comparative Politics* 344, 345–8; Haig Patapan, 'Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia' (1997) 21(2) *Melbourne University Law Review* 497, 508–11.

<sup>33</sup> See, eg, Bain Attwood and Andrew Markus (eds), *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999); Marilyn Lake, *Getting Equal: The History of Australian Feminism* (Allen & Unwin, 1999); James Waghorne and Stuart Macintyre, *Liberty: A History of Civil Liberties in Australia* (UNSW Press, 2011).

<sup>34</sup> Brian Galligan and David Mardiste, 'Labor's Reconciliation with Federalism' (1992) 27(1) *Australian Journal of Political Science* 71.

<sup>35</sup> Crisp, above n 30, 240–2.

<sup>36</sup> Galligan and Mardiste, above n 34, 81–3.

<sup>37</sup> *Ibid* 76; Galligan, above n 32, 348–50.

redistributive goals.<sup>38</sup> Typically, Labor governments sought new powers to regulate various fields of the economy, such as corporations, employment and industrial relations, trade and commerce, monopolies, and prices and rents. Labor's most substantial efforts along these lines occurred throughout the 1940s, as it sought new federal powers to pursue post-war reconstruction through centralised economic planning, an expanded Welfare State and selective nationalisation of industry.<sup>39</sup> The necessity of constitutional reform was underscored as the High Court of Australia obstructed various parts of Labor's program, primarily on federalism grounds: its pharmaceutical benefits scheme (twice); its first foray into nationalisation, in the field of interstate airlines; its effort to institute greater public controls over private banking; and its resulting attempt at bank nationalisation.<sup>40</sup>

By the 1970s, when Labor came back to power federally after 23 years in the wilderness, the Party under Gough Whitlam's leadership had adopted a 'revisionist' program that entailed a moderation or rejection of its past racial and gender chauvinism alongside a downgrading of its socialist commitments.<sup>41</sup> The ALP reversed its lifelong support for the White Australia policy, officially embraced multiculturalism, took on the cause of Aboriginal land rights and advocated equality for women.<sup>42</sup> But although the Whitlam Government belatedly introduced aspects of the Welfare State such as a universal health insurance scheme, Labor had also relaxed its grander ambitions to civilise capitalism, particularly through central planning and nationalisation.<sup>43</sup> While all of these policy changes were responses to post-war social, economic and political developments, they also reflected the changing composition and base of the ALP itself, which had moved from its working-class and trade-union foundations to become more middle class.<sup>44</sup>

The ALP's revisionist program saw the Party's constitutional priorities shift away from constitutional amendments to expand federal power and towards a bill of rights, a cause first properly embraced by the Whitlam Government. On the one hand, since Labor had begun to dilute its more expansive goals for social and economic reform, Labor had become less committed than in the past to enlarging federal power, especially through constitutional amendment.<sup>45</sup> On the other hand, a bill of rights fitted in with the agendas of new social movements seeking protection of their rights, while also reflecting Labor's reorientation towards 'reformist causes, quality-of-life issues and the concerns of Labor's increasingly "white-collar" and

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<sup>38</sup> Crisp, above n 30, ch 11.

<sup>39</sup> Ibid 252–5; Stuart Macintyre, *Australia's Boldest Experiment: War and Reconstruction in the 1940s* (NewSouth, 2015) 137–42, 254–8.

<sup>40</sup> Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) ch 4.

<sup>41</sup> Frank Bongiorno, 'Origins of the Present Crisis? Fabianism, Intellectuals and the Making of the Whitlam Government' in Jenny Hocking and Colleen Lewis (eds), *It's Time Again: Whitlam and Modern Labor* (Circa, 2003) 311.

<sup>42</sup> See generally Jenny Hocking, *Gough Whitlam: The Biography* (Miegunyah Press, 2008–12).

<sup>43</sup> On the modesty of Whitlam's health insurance scheme, see Anne-Marie Boxall and James A Gillespie, *Making Medicare: The Politics of Universal Health Care in Australia* (UNSW Press, 2013) ch 2.

<sup>44</sup> Bongiorno, above n 41; Andrew Scott, *Fading Loyalties: The Australian Labor Party and the Working Class* (Pluto Press, 1991).

<sup>45</sup> Galligan and Mardiste, above n 34.



middle-class constituency'.<sup>46</sup> From the outset, Labor's emphasis was on protecting civil and political rights, rather than economic and social rights.

Fittingly, given the ALP's middle-class reorientation, its turn to a bill of rights was pioneered from the mid-1960s by a cadre of newly influential lawyer-politicians, most notably Whitlam and Lionel Murphy.<sup>47</sup> As Whitlam's Attorney-General, Murphy tried in 1973 to introduce an ambitious legislative bill of rights that sought to bind the parliaments and executives at both Commonwealth and state levels.<sup>48</sup> Murphy also sought to progress a constitutional bill of rights at the 1973 Constitutional Convention. Both initiatives failed due to strong conservative opposition.<sup>49</sup>

When Labor was returned to power federally in 1983, it recommenced the push for a bill of rights, while also dramatically restructuring the Australian economy along recognisably neoliberal lines.<sup>50</sup> During its 13 years in government, Labor pursued a raft of pro-market reforms in line with international trends, even as it maintained a commitment to social protection and a socially progressive agenda.<sup>51</sup> Key reforms included taming union power and suppressing wages (with union collaboration), increasing the economy's exposure to international market forces, reining in taxation and spending, and subjecting government departments and services to economic rationalism and privatisation.<sup>52</sup>

Through the 1980s, the bill-of-rights cause, no threat to Labor's neoliberal reforms, was pressed by the Hawke Government, with the initial impetus coming from another lawyer-politician and Murphy acolyte, Attorney-General Gareth Evans. Labor tried, yet again, to pass a legislated bill of rights, but the initiative was sunk in 1986 through determined conservative opposition.<sup>53</sup> By referendum held in 1988, Labor also sought to extend three existing federal constitutional guarantees to the states: trial by jury, freedom of religion and just-terms compensation for government acquisitions of property. Amidst fierce conservative criticism, the referendum was rejected by almost 70 per cent of voters.<sup>54</sup>

While Labor's resolve to institute a national bill of rights has never again matched that of the 1970s and 1980s, the bill-of-rights cause has since assumed an exalted status in the legal imagination of Australian progressives and been advanced in other ways. From the 1990s, with political efforts at establishing a bill of rights faltering, progressive lawyers and judges pursued new avenues for protecting

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<sup>46</sup> Galligan, above n 32, 353.

<sup>47</sup> Ibid 352–7.

<sup>48</sup> Human Rights Bill 1973 (Cth).

<sup>49</sup> Galligan, above n 32, 357–8.

<sup>50</sup> For the coincidence of bills of rights and neoliberalism elsewhere, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004) ch 3.

<sup>51</sup> Elizabeth Humphreys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Brill, 2018).

<sup>52</sup> See, eg, Stephen Bell, *Ungoverning the Economy: The Political Economy of Australian Economic Policy* (Oxford University Press, 1997).

<sup>53</sup> Galligan, above n 32, 359–62.

<sup>54</sup> Ibid 363–4.

constitutional rights in the courts.<sup>55</sup> Their achievements have included the development of a jurisprudence on implied constitutional rights,<sup>56</sup> the adoption of an increasingly rights-protective orientation in the jurisprudence on judicial power,<sup>57</sup> and the development of a quasi-constitutional ‘common law bill of rights’ through a rights-protective approach to statutory interpretation.<sup>58</sup>

Outside the courts, advances in the protection of human rights have also been made through legislation. During Labor’s 11 years out of power federally from 1996, the bill-of-rights cause was taken up by two subnational Labor governments, with the Australian Capital Territory (2004)<sup>59</sup> and Victoria (2006)<sup>60</sup> enacting Australia’s first statutory bills of rights.<sup>61</sup> Queensland followed suit in 2019.<sup>62</sup> After the Rudd Labor Government was installed in 2007, it initiated a National Human Rights Consultation into legislating a national bill of rights.<sup>63</sup> Unwilling to spend its dwindling political capital on the issue, the Rudd Government resisted the Inquiry’s recommendation of a statutory bill of rights. But it did establish a new Human Rights Framework, at the centre of which was a statutory regime for parliamentary scrutiny of legislative compliance with human rights.<sup>64</sup>

And yet, as the bill-of-rights cause has cemented its place as the pinnacle of progressive legal reform in Australia, economic inequality has widened under the auspices of the neoliberal economic reforms begun by Labor in the 1980s and since consolidated and extended. From around the 1980s, the distribution of income and wealth in Australia has become more and more unequal, as it has in many other parts of the world.<sup>65</sup> Although the causes of this growing inequality are multiple, neoliberal reforms have played a pivotal role.<sup>66</sup> But while the various efforts to extend the constitutional protection of human rights over the period of neoliberal predominance have had a range of important, often praiseworthy effects, challenging material inequality has not been one of them. The most fundamental reason, as Moyn makes clear, is that challenging material inequality is simply not part of the human rights program.

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<sup>55</sup> Dan Meagher, ‘The Judicial Evolution (or Counter-Revolution) of Fundamental Rights Protection in Australia’ (2017) 42(1) *Alternative Law Journal* 9.

<sup>56</sup> George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) chs 5–6.

<sup>57</sup> *Ibid* ch 9.

<sup>58</sup> James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) ch 1. See further Meagher, above n 55.

<sup>59</sup> *Human Rights Act 2004* (ACT).

<sup>60</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>61</sup> Byrnes, Charlesworth and McKinnon, above n 1, chs 4–5.

<sup>62</sup> *Human Rights Act 2019* (Qld).

<sup>63</sup> Human Rights Consultation Committee, *Report*, National Human Rights Consultation (2009).

<sup>64</sup> Adam Fletcher, *Australia’s Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?* (Melbourne University Press, 2018).

<sup>65</sup> Andrew Leigh, *Battlers and Billionaires: The Story of Inequality in Australia* (Redback, 2013) ch 3.

<sup>66</sup> Frank Stilwell, ‘Inequality and Neoliberal Economic “Reforms” in Australia’ in Damien Cahill and Phillip Toner (eds), *Wrong Way: How Privatisation and Economic Reform Backfired* (La Trobe University Press in conjunction with Black Inc, 2018) 257.

## IV Conclusion

From the beginning of Australian progressives' embrace of a bill of rights, lawyers of all stripes — those in politics, legal practice, judicial service and academia — have been at the vanguard, frequently seeing constitutional protections for human rights as the highpoint of progressive legal change. *Not Enough* poses a strident and necessary challenge to this legal project, and to the sanctified place that human rights occupy within progressive politics more generally. When we reflect on the history of human rights in Australia, and especially on progressive advocacy for human rights protections, we can see 'how partial our activism has become' in its disregard for egalitarian redistribution.<sup>67</sup> That partiality is something that must be rectified. As Moyn sharply concludes, 'for those activists and lawyers who have inherited the world's stock of idealism in our day, there ought to be some shame in succeeding only amid the ruins of materially egalitarian aspiration'.<sup>68</sup>

The point is not to abandon human rights, but to put human rights in their proper place: as necessary, but insufficient, for the achievement of social justice. Human rights become a problem when they crowd our vision, limit our ambitions and exhaust our energies for social transformation. For a more complete vision of social justice, we must once more make room in our imaginations and our advocacy for projects that seek to counter the blight of material inequality. For Australia's progressive lawyers, this means rethinking the privileged standing that the bill-of-rights cause possesses within our aspirations for law reform. It means understanding how law is responsible for constituting the basic distribution of economic wealth, power and opportunity. And it means imagining and advancing legal institutions that, instead of tolerating or abetting economic hierarchy, are committed to undoing it.

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<sup>67</sup> Moyn, *Not Enough*, above n 3, 10.

<sup>68</sup> *Ibid* 217.

