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# The Future of Economic and Social Rights: Introduction

Katharine G. Young

*Boston College Law School*, [katharine.young.3@bc.edu](mailto:katharine.young.3@bc.edu)

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# The Future of Economic and Social Rights

Katharine G. Young, editor  
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## 1. Introduction

*Katharine G. Young*

### Abstract

The future of economic and social rights is unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a conception of development in which economic growth was considered a necessary (and, by some, sufficient) condition for rights fulfillment, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. Yet today, under conditions of immense poverty, insecurity, and social distress, the rights to education, health care, housing, social security, food, water, and sanitation are increasingly at the top of the human rights agenda. Economic and social rights are now present in most of the world's constitutions, most of the main human rights covenants, and are often given an explicit justiciable status. At the same time, as different legal traditions and regions embrace this shift, their highly integrated economies face a profound reckoning with economic justice. The future cannot be predicted; but neither can it be ignored. This paper, introducing the book's 21 chapters, incorporates a detailed examination of constitutions, courts and international mechanisms of accountability. These signal a transformation in debates about human rights, democracy, law and development.

### Keywords

economic and social rights, democracy, courts, crisis, accountability, development, food, housing, health care, education, international human rights, constitutional law

### I. Introduction

The future of economic and social rights is unlikely to resemble its past. Neglected within the human rights movement, avoided by courts, and subsumed within a conception of development in which economic growth was considered a necessary (and, by some, sufficient) condition for rights fulfillment, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. Yet today, under conditions of immense

poverty and social distress, the rights to education, health care, housing, social security, food, water, and sanitation are increasingly at the top of the human rights agenda. A rights revolution – a juridical revolution – appears to be taking place. Economic and social rights are now present in most of the world’s constitutions, most of the main human rights covenants, and are often given an explicit justiciable status. At the same time, as different legal traditions and regions embrace this shift, their highly integrated economies face a profound reckoning with economic justice. The future cannot be predicted; but neither can it be ignored.

Of course, periodization and prognosis are not for the timid. The normative demands upon which communities have long been held responsible – for neglecting the problems of hunger, illiteracy or ill-health, for instance – are sourced in many different historical periods and places, despite the later provenance of the discourse of ‘rights’. Yet if the twentieth century had marked a partial revival for social rights, as TH Marshall had argued,<sup>1</sup> the twenty-first century may be instituting their juridical embrace. Marshall, a sociologist focusing on developments in Britain, saw civil and political rights as 18<sup>th</sup> and 19<sup>th</sup> century achievements respectively; writing after World War II, he viewed welfare state gains in education, housing, health care and social security as newly paradigmatic of citizenship. Such rights were understood as part of a broad institutional program of legislation and policy. But by the twenty-first century, these ideas had found a more explicit

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<sup>1</sup> TH Marshall, *Citizenship and Social Class* (with Tom Bottomore, Pluto, 1992, repr. 1949) p.

home – and purported safeguard – in law. By 2000, Albie Sachs would hazard a forecast that the 21<sup>st</sup> century would see jurisprudence focused increasingly on economic and social rights.<sup>2</sup> Rights to the material goods and services needed for a dignified existence would no longer be restricted to domains of statute or policy: such rights were to be judicially enforced. For Sachs, a former anti-apartheid activist, then South African Constitutional Court judge, such a development marked a departure from the 19<sup>th</sup> century, as the time of executive control over society, and the 20<sup>th</sup> century, as the time of the legislature’s control over the executive: the new century would see the judiciary establish principles and norms controlling both.

Underpinning these visions are contested assumptions about the rule of law and its power to constrain and control. From one vantage point, support for economic and social rights – sometimes referred to as socio-economic rights, or just social rights – is an elaboration on the idea of constitutionalism, often ascribed to the founders of the U.S. republic, that the authority and legitimacy of government rests on its observing certain constraints on power, prescribed in written text, and later fortified by judicial review. This view accords particular importance to a state’s duty to its own citizens, and those within its borders. From another, support for economic and social rights subscribes to the importance of internationalism, that the sovereignty of each state is encumbered by certain duties – to other states and to individuals. While the constitutional

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<sup>2</sup> Justice Albie Sachs, ‘Social and economic rights: Can they be made justiciable?’ (2001) 53 *SMU Law Review* 1381, 1387 (presenting the ‘three generations’ theory of rights introduced in 1977 by Karel Vasak, ‘Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’, *UNESCO Courier* 30:11 (Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977)).

and international visions are separately sourced, and often separately debated, they share important premises that connect rights and duties through the institution of the state. Part of the task of this book is to connect such analysis, drawing on both comparative constitutional law and international human rights law. In particular, this book includes insights from law, political science, political philosophy, anthropology, political economy, and policy advocacy. It bridges institutional and doctrinal analysis and incorporates both normative and descriptive projects in economic and social rights research.

This introductory chapter provides a background to the rise in juridical economic and social rights, and formulates three major puzzles that remain unsettled, described below, to which the book contributes important clarity: how the normative framework and legal institutions implicated by legal rights (particularly, courts) advance or obstruct democracy; how they address inequality and other concerns of distributive justice; and how they impact on the changing configurations of the state and market. A brief overview of the chapters follows.

## **II. A Juridical Revolution**

Economic and social rights serve both as categories of ethical argument, and as categories of positive law. Each are, unsurprisingly, related to the other. Viewed as the former, economic and social rights occupy a central role in human rights thinking and action, belonging, like civil and political (and increasingly cultural and environmental) rights, within a sphere of articulated interests that are especially important to human freedom, equality, and dignity, and whose satisfaction is also susceptible to social influence. As Amartya Sen has demonstrated, the normative demands that correspond with economic and social rights may pre-exist, and may also

transcend, the legal setting.<sup>3</sup> Such claims may give rise to forms of agitation, persuasion and social monitoring that do not rely on positive law. Thus, they can be important for holding states accountable when they have not passed laws supportive of human rights, or have not ratified human rights treaties. The normative basis of such claims is one reliant on processes of public reasoning, in which, through critical discussion and scrutiny, they are grounded. (If, within politically and socially repressive regimes, such rights do not find support, the dismissal of such claims is itself not justified, as having not met the test of public reason.)<sup>4</sup>

Nevertheless, enacted law – and arguments from custom made internal to law – can also provide moral support for moral obligations that go beyond the law.<sup>5</sup> The jurisprudential view that sees the bindingness of law as heavily reliant on normative justification bridges the distance between the understanding of rights as ethics or law.<sup>6</sup> This more encompassing perspective is particularly associated with the justificatory basis of constitutional law.<sup>7</sup> Within international human rights

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<sup>3</sup> Amartya Sen, ‘The Global Status of Human Rights’ (2012) 27 *American University International Law Review* 1, 1–15.

<sup>4</sup> Amartya Sen, ‘Rights, Law and Language’ (2011) 31 *Oxford Journal of Legal Studies* 3, 437–453, 441.

<sup>5</sup> Kim Lane Scheppele, ‘Thirteenth Annual Grotius Lecture Response: Amartya Sen’s Vision for Human Rights – and Why He Needs the Law’ (2012) 27 *American University International Law Review* 1 17–35.

<sup>6</sup> Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Belknap Press, 1986); see, e.g., Lawrence A. Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge and New York, NY: Cambridge University Press, 1998).

<sup>7</sup> See, e.g., Larry Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge and New York, NY: Cambridge University Press, 1998); Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012).

law, such justification may also be viewed as important;<sup>8</sup> moreover, features of ‘soft law’ and practices of persuasion and acculturation may also bring ethical and legal forms of argument closer together.<sup>9</sup>

It is in this global setting, in which ethical demands are increasingly made in the language of human rights, in a diversity of institutional and cultural settings,<sup>10</sup> that we find a corresponding rise in rights-prompted laws. And it is in this sense, that we might describe a juridical revolution in economic and social rights as taking place, with a surge in both enacted laws and in justiciable claims.

Indeed, the juridical revolution in economic and social rights is more long-standing than even many of its advocates contend. In 1917, the Mexican Constitution was the first to supplement the famous U.S. federal model of a written bill of rights with express social rights guarantees – as had occurred with many state constitutions in the U.S. with respect to education guarantees. Later models adopted ‘non-justiciable’ formulations of economic and social rights – India’s post-independence Constitution of 1950, adapting a legal formula from Ireland’s Constitution of

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<sup>8</sup> Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press; New York, NY: Oxford University Press, 1995).

<sup>9</sup> E.g., Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford: Oxford University Press, 2013).

<sup>10</sup> Sen endorses the view that words can be ‘signs of ideas’: Sen, ‘Rights, Laws and Language’, p. 445; an observation supported by evidence of the reach of the human rights into local justice-based vernaculars: see Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

1937, was to make such rights ‘directive principles of state policy’. A similar register of accountability had been established with the objective principle of the *Sozialstaat*, adopted in some parts of Europe (and beyond), that promised a ‘social’ rule of law, conferring legitimacy to redistributive state action, without necessarily giving rise to a subjective cause of action before the courts. After 1989, the post-communist states of Eastern Europe and Central Asia retained certain constitutional economic and social rights; so, too, did newly reformed Latin American constitutions in their transition to democracy. The post-apartheid Constitution of South Africa included economic and social rights; these were confirmed by the Constitutional Court as justiciable in 1996. The latest wave of constitutional recognition has spread through Africa and the Middle East, and, to a lesser extent, parts of Asia.

Such rights are now a common feature of the world’s constitutions, despite considerable variation in formal status and scope, thus joining and altering the ‘rights revolution’ observed elsewhere in law.<sup>11</sup> In recent decades, there are clear, empirically tested, trends: the right to education, health, child protection and social security are now present in over two thirds of all national constitutions.<sup>12</sup> Less widespread rights, such as to housing, food and water, development and land, are nevertheless increasingly part of new constitutions or constitutional amendments.

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<sup>11</sup> E.g. Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (New York: Basic Books, 2004) (expanding the previous lens of the ‘rights revolution’).

<sup>12</sup> Evan Rosevear, Ran Hirschl & Courtney Jung, ‘Justiciable and Aspirational ESRs in National Constitutions’ (in this volume).



Twenty-first century constitutional reforms continue to entrench such rights, alongside civil and political rights. While the constitutions of the common law ‘West’ have been only partial players in this revolution,<sup>13</sup> such rights are not foreign to sub-national constitutions and legislative guarantees there, as elsewhere.<sup>14</sup>

A parallel revolution, more immediately visible, has occurred in international law. The dynamic is often the same – of objective guarantees of what is expected from states, hardening into subjective grounds for complaint. The Universal Declaration of Human Rights proclaimed human rights – civil, political, economic, social and cultural as the ‘common standard of achievement’ for all peoples and all nations, in 1948.<sup>15</sup> While its legal status was unusual – it constituted a form of promise without legal command, drafted by the United Nations Human

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<sup>13</sup> Ibid.; see also David Law & Mila Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) 87 *NYU Law Review* 762-858.

<sup>14</sup> E.g., Malcolm Langford, ‘Judicial Politics and Social Rights’; Michael Rebell, ‘The Right to Education in the American State Courts’ (both in this volume); see also Emily Zackin, *Looking for Rights in All The Wrong Places: Why State Constitutions Contain America’s Positive Rights* (Princeton, 2013) (all tracking U.S. state constitutions); see also, e.g., Colm O’Cinneide, ‘The Present Limits and Future Potential of European Social Constitutionalism’, (in this volume, noting significant legislative protections in Europe).

<sup>15</sup> Just as the Mexican Constitution signals a much earlier embrace in constitutional instruments, so too does the establishment of the International Labour Organization in 1919 in international terms.

Rights Commission and adopted by the General Assembly,<sup>16</sup> its influence was widespread, including on new legal instruments and institutions.<sup>17</sup> By 1966, the International Covenant on Economic, Social and Cultural Rights ('ICESCR') was opened for signature, after its famous split from the International Covenant on Civil and Political Rights, based on East/West and North/South disagreements. It entered into force in 1976, although it was not until 1985 that the Committee on Economic, Social and Cultural Rights was established to monitor the treaty, now ratified by 168 states.<sup>18</sup> These international trends have influenced, and been influenced by, domestic (and constitutional developments), in a complex migration of ideas between drafters, courts, policy experts and social movements.<sup>19</sup>

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<sup>16</sup> Mary Ann Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

<sup>17</sup> For an influential assessment that the UDHR meets the standards of state practice and *opinio juris* that constitutes customary international law, see *Restatement (Third) of Foreign Relations Law of the United States*, § 701, reporters' note 2 (1987 (recently updated)). A number of other international legal mechanisms, from UN Special Rapporteurs to the Human Rights Council procedures of the Universal Peer Review, now monitor the rights of the UDHR, as do other UN and regional human rights instruments.

<sup>18</sup> Ratification numbers are available at <http://indicators.ohchr.org> (last accessed June 1, 2018).

<sup>19</sup> The extent of this two-way influence is controversial: compare Zachary Elkins, Tom Ginsburg & Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 52 *Harvard International Law Journal* 61-95 (finding causal

These juridical revolutions are not merely textual in character – although their legal import is, of course, different. While constitutional developments have trended towards justiciability, this fact conceals a variety of legal forms. A major landmark was the Constitutional Court of South Africa’s decision on the right to housing in 2000, which was delivered at a time of renewed traffic in comparative constitutional ideas. A voluminous literature has since debated the pros and cons, and forms and limits, of judicial review, casting the more categorical debates against ‘justiciability’ as ‘relics’ of another era.<sup>20</sup> New constitutions and constitutional amendments increasingly adopt ‘justiciable’ versions of economic and social rights; certain national courts have been alert to new methods of scrutiny, and new remedial possibilities raised in complaints. Assessments of the advantages of ‘weak’ versus ‘strong’ rights review have become homologous to earlier debates about ‘soft’ versus ‘hard’ law at the international level. And indeed, in this

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relationship between international human rights treaties and constitutions); with Law & Versteeg, ‘The Declining Influence’; see also Daniel M. Brinks, Varun Gauri & Kyle Shen, ‘Social Rights Constitutionalism: Negotiating the Tension between the Universal and the Particular’, 11 (2015) *Annual Review of Law and Social Science*, 289-308.

<sup>20</sup> Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008). Many of this volume’s contributing authors have mapped out such debates elsewhere: see, e.g., Katharine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012); Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press., 2009).

latter setting, where complaints are inevitably premised on ‘weak-form’ mechanisms of review, new complaints mechanisms have been established. And at the international level, the Committee now has authority to hear complaints against states who have ratified the 2008 Optional Protocol. It delivered its first communication in 2010, again on the right to housing,<sup>21</sup> borrowing from methods of scrutiny used by regional human rights mechanisms and national courts.

This global trend towards a juridical accountability is not, of course, simple convergence. The variation of economic and social rights stems from their content (more on this below), and depends many historical and contemporary political and economic factors. In legal terms, economic and social rights differ in terms of their interaction with, and support by, civil and political rights; the degree of incorporation of international and regional human rights law; and the rigor of judicial, other official, and civil society responsiveness. This variety is exposed, and examined, within the chapters that follow.

### **III. Rights, Democracy and Adjudication**

Legalized economic and social rights have traditionally encountered seemingly insurmountable challenges for democracy. Yet new debates about rights and democracy are replacing the old. A long-standing trope in rights commentary has been to equate juridical accountability with an

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<sup>21</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 during the sixty-third session of the General Assembly by resolution A/RES/63/117, in force since 5 May 2013, UNTS No. 14531. There are now 23 State Parties to the Optional Protocol, and Spain was the subject of the first complaint.

anti-democratic rise in judicial power. To be sure, this criticism did not attach to legalized rights per se – Marshall’s legislative and policy vision for social rights was to enhance democracy, by securing an educated, and secure, voting community; a social democratic vision common to welfare state history and the conceptions of development that were addressed to concerns beyond merely economic growth. This democracy-based objection is better phrased in more narrow terms: that constitutional (or internationally binding) economic and social rights invite a form of judicial review (or treaty body scrutiny<sup>22</sup>) that can disenfranchise the political community on issues of deep, and perhaps unresolvable disagreement. In one succinct formulation, economic and social rights raise the twin fears of judicial usurpation of the elected branches, or abdication of the judicial role.<sup>23</sup>

This democracy-based objection to rights attaches to constitutional civil and political rights,<sup>24</sup> too, but is intensified with respect to the powers of review and remedy conferred on judges by the relatively vague terms of economic and social rights, in which past constraining precedents

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<sup>22</sup> E.g., Michael J. Dennis and David P. Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ (2004) 98 *American Journal of International Law*, 3, 462-515.

<sup>23</sup> Frank I. Michelman, ‘The Constitution, Social Rights and Liberal Political Justification’ (2003) 1 *International Journal of Constitutional Law* 13.

<sup>24</sup> Jeremy Waldron, ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law Journal* 1346–1406.

or interpretations have not accrued, and in which positive obligations invite resource-intensive, unpredictable, and multiple (polycentric) ramifications. Even so-called ‘aspirational’ rights (a better term might be ‘objective principles’) may fail to constrain judges from usurping the elected branches, due to the opportunity – or burden – to include economic and social concerns in the interpretation of other rights, such as the right to life, equality, or dignity.<sup>25</sup> So stated, the democratic objection to economic and social rights has seemed overwhelming; yet the terms of the debate have changed significantly in recent years. In particular, the assumed models of adjudication have departed from the categorical, and ‘strong-form’ review exemplified by the U.S: ‘weaker-form’ review is open to forms of inter-branch dialogue and more thoroughgoing models of participation, as several chapters attest.<sup>26</sup> More fundamentally, newer models of the separation of powers become more pertinent, as legislatures have become more associated with dysfunction, rather than democracy; and it is executives, rather than judiciaries, that are

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<sup>25</sup> Arghya Sengupta et al, ‘Legislating Human Rights – Experience of the Right to Education Act in India’, in this volume, note the well-known case of the Indian Supreme Court’s expansive interpretation of the right to life, including the right to education before the express constitutional amendment. Colleen M. Flood et al, ‘Canada’s Confounding Experience with Health Rights Litigation and the Search for a Silver Lining’, also in this volume, chart a different interpretive history by the Canadian Supreme Court’s purported refusal to include such concerns, with significant economic and social implications for health care provision.

<sup>26</sup> See, e.g., the contributions by Langford, as well as Sandra Liebenberg, ‘The Participatory Democratic Turn in South Africa’s Social Rights Jurisprudence’, and Roberto Gargarella, ‘Why Do We Care About Dialogue?’ to this volume.

overstepping traditional demarcations.<sup>27</sup> A more attuned conception of democracy has also incorporated participation in international developments.<sup>28</sup>

Evidence of new, democratically-responsive juridical trends come from constitutional and supreme courts in both the Global North and South. Courts in Argentina, Brazil, Canada, Colombia, India and South Africa, for example, although responding to different political and economic conditions, are experimenting with new modes of review, providing scrutiny to aspects of decision-making formerly left untouched. The following chapters document how some courts now scrutinize, in the name of economic and social rights, the participatory processes of decision-making, the rationality of budgetary decision-making, the attention given to the needs of the most vulnerable, and whether less restrictive alternatives were considered. Courts are also redesigning remedies, by departing from individualized remediation to instead institute public hearings, meaningful negotiations, or other forms of deliberation. When successful, these models appear to catalyze more collective practices of accountability than would otherwise have been possible. Moreover, a rise in non-judicial accountability processes, such as in human rights

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<sup>27</sup> See, e.g., David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal*, 189-247, and the contribution by David Landau & Rosalind Dixon, ‘Constitutional Non-Transformation: Socioeconomic Rights beyond the Poor’, in this volume.

<sup>28</sup> This viewpoint has been propounded by, e.g., Eyal Benvenisti and George Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’ (2009) 20 *European Journal of International Law* 59.

institutions or administrative commissioners, or legislative committees, now work alongside or apart from courts.

Enforceable economic and social rights thus have the potential to be ‘mutually constitutive’ of democracy,<sup>29</sup> connecting with a range of normative visions: deliberative democracy, participatory democracy, or more direct, experimentalist forms. These findings test the traditional assumptions about the ‘anti-democratic’ role of courts, and other forms of accountability. Of course, there are plenty of counter-examples: the judicial process favours individualized litigation and the award of non-systematic remedies, and tilts towards well-resourced interests. It is a long-standing irony of legal rights that the legal process can be disempowering for rights-holders. Moreover, even the newer, more democratically responsive modes of judicial review, are accompanied by as-yet-unworked-out problems: ‘weaker’ forms of adjudication may test the historical guarantee of a strong, independent court, detracting from courts themselves as guardians of economic and social rights.<sup>30</sup>

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<sup>29</sup> Karl Klare, ‘Critical Perspectives on Social and Economic Rights: Democracy and Separation of Powers’, in Helena Alviar Garcia, Karl Klare & Lucy A. Williams, *Social and Economic Rights in Theory and Practice* (Routledge, 2015), pp. 3, 4.

<sup>30</sup> Resnik presents the historical developments towards greater inclusivity, and independence, in this volume, that may now be under threat: Judith Resnik, ‘Courts and Economic and Social Rights/Courts as Social and Economic Rights’.



And finally, against the backdrop of a recent and notably widespread erosion of constitutional democratic institutions, including of judicial independence, concern about the compatibility of rights with democracy is accompanied by alarm about the overall fragility of constitutional democracy.<sup>31</sup> While concerns have long been expressed about the ‘tokenistic’ quality of economic and social rights and the tendencies of states to obscure rights infringements, by hiding behind ‘sham’ constitutional text or insincere treaty ratification, these concerns have ever greater force in our current global moment. As the following chapters suggest, it becomes important to inquire whether economic and social rights are at odds with the ‘engine’ of constitutional power, and/or have been understood to require only ameliorations in a system which is itself threatened by other constitutional structures or omissions, or are otherwise hostage to other regressive political developments.<sup>32</sup>

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<sup>31</sup> See, e.g., Mark A. Graber, Sanford Levinson and Mark V. Tushnet, *Constitutional Democracy in Crisis?* (New York, NY: Oxford University Press, 2018).

<sup>32</sup> Gargarella, *Latin American Constitutionalism, 1810–2010*; David S. Law and Mila Versteeg, ‘Sham Constitutions’, *California Law Review* 101 (2013): 863–952, 877; Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (New York, NY: Alfred A. Knopf, 2017). The challenges of tokenism relate beyond economic and social rights to the particular issue of gender equality, as well as other rights: see Katharine G. Young, ‘Introduction: A Public Law of Gender?’, in Kim Rubenstein and Katharine G. Young(eds.), *The Public Law of Gender* (Cambridge: Cambridge University Press, 2016), pp. 1–40, 3–6. For the inter-relation,

#### IV. Rights, Inequality and Distributive Justice

Economic and social rights clearly implicate distributive, as well as political, justice. But as Jeremy Waldron has warned, economic and social rights have the danger of progressing, in advocacy and in jurisprudence, according to a ‘line-item’ method of justification – without a fuller sense as to how each right is realized in balance with other guarantees<sup>33</sup> – or how, according to human rights doctrine, each are indivisible and interdependent with each other.<sup>34</sup> A broader, if often highly abstract, account of distributive justice helps to settle ‘intra-rights’ trade-offs, competing claims and compromises, and, we might add, the line between acceptable and unacceptable inequality.<sup>35</sup> Taking a more general approach, the Universal Declaration of Human

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see, e.g., Audrey Guichon, Christien L. van den Anker and Irina Novikova (eds.), *Women’s Social Rights and Entitlements* (London: Palgrave Macmillan, 2006); Daphne Baraz-Erez. ‘Social Rights as Women’s Rights’, in Daphne Barak-Erez and Aeyal M. Gross (eds.), *Exploring Social Rights: Theory and Practice* (Oxford and Portland, OR: Hart, 2008), p. 387–408.

<sup>33</sup> Jeremy Waldron, ‘Socioeconomic Rights and Theories of Justice’ (2011) 48 *San Diego L. Rev.* 773, 779.

<sup>34</sup> Vienna Declaration and Programme of Action in relation to the right to development, adopted by the World Conference on Human Rights on 25 June 1993 and endorsed by General Assembly resolution 48/121 of 20 December 1993.

<sup>35</sup> Waldron, ‘Socioeconomic Rights’; see also Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315-356; Ronald Dworkin, ‘What Is Equality? Part I: Equality of Welfare’, (1981) 10 *Philosophy & Public Affairs* 185, 187.

Rights had recognized a right to an adequate standard of living:<sup>36</sup> new constitutional rights, by contrast, appear to ‘cluster’, appearing more frequently when related to human capital ‘investments’ (education and health care, for example) versus what have been described as ‘subsidies’ (food and water, for example), which set out a more explicit challenge to ‘efficient’ forms of market delivery.<sup>37</sup> Labor rights, a historically integral feature of economic and social rights, are present in fewer than half of the world’s constitutions, and have not spread significantly in recent decades, while environmental rights, relative newcomers, have escalated. The right to health has trended towards increased entrenchment and justiciability, particularly since 2010. The right to housing, too, has become increasingly recognized in law; rights to sanitation, electricity, the internet, and public transportation, are increasingly the subject of human rights mobilization.

Such developments, although often responsive to important demands, add a compartmentalized, and sometimes reactive, character to social and economic justice. The textual imbalance is, of course, compounded by litigation. The individualized structure of litigation tends to be distanced

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<sup>36</sup> This more general guarantee was nevertheless inflected with certain racial and gendered assumptions as to households: see, e.g., Katharine G. Young, ‘Freedom, Want, and Economic and Social Rights’, 24 (2009) *Maryland Journal of International Law* 182.

<sup>37</sup> Rosevear et al, in this volume, noting the parallels with this classification and the forms of spending endorsed by the IMF and World Bank during the Washington Consensus.

from settling broader questions of justice,<sup>38</sup> and even collective actions are often funneled into discrete issue-areas, like securing school placements for discrete individuals rather than classroom conditions for all participants, or health care medications rather than the social determinants of health.<sup>39</sup> While the participatory techniques described above can be inclusive of competing demands, there is plenty of evidence that the opposite is also true. In resource-intensive areas, like health care or education, a successfully litigated claim can quickly absorb the available budget. These concerns become amplified in relation to the ‘middle-class bias’<sup>40</sup> observed in economic and social rights litigation: that is, that the poorest groups often fail to claim their rights, while the comparatively less disadvantaged, who are better equipped with resources, literacy, and information, can readily access the courts.

A related criticism, levied at the international human rights movement, is that the discourse itself has done little to challenge escalating economic inequality. A critical history has recast human rights advocacy and constitutional reforms as complying too closely with market liberalization,

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<sup>38</sup> Varun Gauri and Daniel M Brinks, *Courting Social Rights: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008).

<sup>39</sup> See e.g., Sengupta et al (right to education); Flood et al (health patients’ rights), in this volume; for express examination of collectively drawn suits, see Octavio Luiz Motta Ferraz, ‘Brazil: Are Collective Suits Harder to Enforce?’, in Malcolm Langford, Cesar Rodriguez-Garavito & Julieta Rossi, *Social Rights Judgments and the Politics of Compliance: Making It Stick*, 177, 178 (Cambridge University Press, 2017).

<sup>40</sup> For an analysis of this problem, see chapters by Langford and Landau & Dixon, this volume.

privileging ‘status-based’ civil and political rights over economic and social rights, and, when agitating for the latter, attending only to sufficiency arguments rather than egalitarian concerns.<sup>41</sup> Certainly, the growth of the human rights movement has coincided with a set of neoliberal prescriptions that have resulted in increases in economic inequality in particular states, alongside decreases in poverty in some.<sup>42</sup> Many mainstream human rights NGOs, particularly those headquartered in the U.S., were slow to incorporate economic and social rights. Yet a broader history of human rights, which tracks efforts outside of the U.S., and which includes their influence on constitutional transformations, complicates this criticism. Oftentimes, advocacy and accountability efforts have targeted precisely these economic trends. For example, the international obligation to ‘progressively realize’ economic and social rights has been interpreted with economic inequality explicitly in mind.<sup>43</sup>

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<sup>41</sup> Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018).

<sup>42</sup> These trends are demonstrated by Thomas Piketty, *Capital in the Twenty-First Century*, Arthur Goldhammer (trans.) (Cambridge: Harvard University Press, 2014); see also Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (Cambridge, MA: Harvard University Press, 2016).

<sup>43</sup> See contributions by Olivier De Schutter, ‘Public Budget Analysis for the Realization of Economic, Social and Cultural Rights’, Uprimny et al, ‘Bridging the Gap: The Evolving Doctrine on ESCR and “Maximum Available Resources”’, and Katharine G. Young, ‘Waiting for Rights: Progressive Realization and Lost Time’, in this volume.

Moreover, the terms of these debates become significantly altered when income, or wealth, is not the only ‘space’ of equality-based concern.<sup>44</sup> As the following chapters attest, different benchmarks of equality, such as of equality of opportunity, or status, as well as different theories of rights-based advocacy, demonstrate the connections, as well as the challenges, between equality goals and rights. A closer comparative analysis indicates how ‘universal’ versus ‘targeted’ measures have proved more successful to the long-term protection of economic and social rights,<sup>45</sup> and that ‘adequacy’ arguments have sometimes been more successful than exposing ‘equality’ concerns to the phenomenon of ‘levelling down’.<sup>46</sup> These chapters lend far greater sophistication to the equality assessments that have earlier been offered in economic and social rights scholarship, which has juxtaposed poor and middle class beneficiaries as rivals in a zero-sum game; they are nevertheless complex arguments, that will prompt more empirical examination.

## **V. Rights, the State and the Market**

Rights are inextricably linked, not only to legal processes and the articulation of justice-based concerns, but to the foundational elements of the state and the market. This connection is more complex than that offered by the Committee on Economic, Social and Cultural Rights in 1991,

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<sup>44</sup> See, e.g., Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999),

<sup>45</sup> Langford, and Landau & Dixon’s contributions are notable in this regard; and the historical assessment of Jeff King, ‘The Future of Economic and Social Rights: Social Rights as Capstone’, in this volume, also adds much nuance to this debate.

<sup>46</sup> Rebell, in this volume.

when it declared that economic and social rights should be interpreted as neutral to the political and economic system adopted by a country.<sup>47</sup> While that position should be understood against the backdrop of the large-scale ideologies of socialism and capitalism that had vied for dominance during the Cold War, a more nuanced analysis of political and economic organization is now underway, by commentators focused on the *International Covenant on Economic, Social and Cultural Rights* and other regional and domestic rights guarantees.<sup>48</sup> Furthermore, the coming challenges of demographics, automation, and the sustainability of current methods of production and consumption, amongst other concerns, all demand more informed models of the stakes and pathways of economic and social rights realization within current systems of political economy.<sup>49</sup>

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<sup>47</sup> United Nations Committee on Economic, Social, and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, 14 December 1990, E/1991/23, para. 8 ('the Covenant 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>48</sup> A good example is de Schutter, in this volume. See also the recent collection, Gillian MacNaughton and Diane Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2018).

<sup>49</sup> Differing visions, not all of them consistent, are offered particularly by King, De Schutter, as well as Philip Alston, 'Universal Basic Income as a Social Rights-Based Antidote to Growing Economic Insecurity'; Jeremy Perelman, 'Human Rights, Investments and the Rights-ification of

Many of the chapters that follow demonstrate the basic legal realist point that the market is not independent from the state and its laws, but indeed is intrinsically structured by them. In this sense, the demarcation of economic and social rights as uniquely ‘positive’ in character is erroneous: all rights require state action, as well as state restraint, and economic and social rights create positive and negative duties.<sup>50</sup> Even property rights are the product of laws and conventions: an insight elementary to the justice of taxation and redistribution.<sup>51</sup> The analysis of economic and social rights thus requires a much more focused assessment of the state and the market, in all parts of the world. Several chapters in this volume deepen our understanding of this context.<sup>52</sup> For several decades, the social rights secured in the industrialized democracies have been in decline, as neoliberal policies have favored minimal regulation and provision, at the same time as tax policies have favored regressivity. While recent fiscal crises and austerity have

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Development’ and Amy Cohen and Jason Jackson, ‘Rights as Logistics: Notes on the Right to Food and Food Retail Liberalization in India’, in this volume.

<sup>50</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980); For the more total characterization of all rights as positive, as emanating from law, see Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (W.W. Norton, 1999).

<sup>51</sup> The most compelling study of taxation remains Thomas Nagel & Liam Murphy, *The Myth of Ownership: Taxes and Justice* (2002). For a recent exposure of this premise in intellectual property and its impact on essential medicines, see Amy Kapczynski, ‘The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism’ (2012) 59 *UCLA Law Review*.

<sup>52</sup> E.g., Parts IV and V.



focused attention on – and sometimes judicial pushback against – certain regressions, rising insecurity and diminishing services have been halted in only a few cases. Elsewhere, a mixed picture of ‘development’ is also on view. In some countries, constitutional reforms towards economic and social rights recognition have indeed resulted in innovations in interpretation and implementation, and have initiated new pressure upon the state in its regulation of markets. These have occurred predominantly in the middle income countries, as opposed to lower income countries, within the Global South.

Rights are connected to state obligations, and are premised on a structure of accountability. In recent years, advocates of economic and social rights have contended more expressly with economic questions, by assessing the structures of budgets and resources – while acknowledging the potential for misunderstanding and unintended consequences.<sup>53</sup> A growing number of lawyers and development economists have worked to create methodologies of accountability that review how many resources a state has at its disposal, against the outcomes for those within that community.<sup>54</sup> Such methods now include a focus on issues traditionally thought outside the purview of rights-based review, such as how domestic revenues are appropriately mobilized, by trade tariffs, taxation, company royalty fees on those exploiting oil, gas, minerals, agriculture,

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<sup>53</sup> See, e.g., Rory O’Connell, Aoife Nolan, Colin Harvey, Mira Dutschke & Eoin Rooney, *Applying An International Human Rights Framework to State Budget Allocations: Rights and Resources* (London: Routledge, 2014) p. 200.

<sup>54</sup> E.g., Sakiko Fukuda-Parr, Terra-Eve Lawson Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (New York, Oxford University Press, 2015).

and other sources, and international sources of support.<sup>55</sup> There are calls, too, for models of accountability to engage with the goals of sustainability and other limits on growth, when grappling with the earth's changing climate and its consequences.<sup>56</sup> And yet the formalization of accountability brings to the fore new debates – of how current models of accountability may privilege the formal versus informal sector; large-scale versus small-scale market participants; and status quo entitlements over new claims. These positions are debated in the chapters that follow, which are outlined briefly below.

## **VI. Outline**

### A. Part I. Adjudication and Rights: Global Trends

In bringing textual empiricism to the analysis of economic and social rights, Evan Rosevear, Ran Hirschl and Courtney Jung describe the future of economic and social rights as, in part, constitutionally precommitted; and diverging regionally and by legal tradition. Drawing on an original dataset of 16 distinct economic and social rights in the text of nearly 200 national constitutions, they address some basic and important questions: how prevalent are constitutional economic and social rights; how prevalent are specific rights within this category; how often are economic and social rights made formally justiciable; and what accounts for the variation in the nature and scope of their protection. Their findings indicate that economic and social rights are overwhelmingly part of new and amended constitutions; certain rights have become standard, being present in over two thirds of all constitutions – including rights to education, health, child

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<sup>55</sup> De Schutter, this volume.

<sup>56</sup> Such calls are made, although not detailed, in Uprimny et al (see [Chapter 20](#)); see also King ([Chapter 11](#)) and Rosevear et al ([chapter 2](#)).

protection, and social security – and others remain relatively rare – including rights to housing, food and water, development, and land. Legal tradition – particularly civil law – and region – particularly Latin America and the former communist states of Eastern Europe and Central Asia – are strong predictors for the constitutionalization of economic and social rights.

Building on past findings,<sup>57</sup> their chapter analyzes a particular set of changes between 2000-2016. This period, which corresponds to a series of constitutional amendments, particularly in the Global South, as well as new constitutions being promulgated in Africa and the Middle East, is matched by little change in the ‘Western’, particularly common law, constitutions, which continue to entrench few express economic and social rights. Some trends pertain to certain clusters of rights; nonetheless there is a clear equation of constitutionalization with judicialization, expressly conferring power on courts.

This analysis of world trends in constitutional text is deepened and broadened by Malcolm Langford’s chapter on Judicial Politics and Social Rights, which provides a qualitative analysis of economic and social rights adjudication along the two measures of (1) judicial reflexivity and (2) distributive equality. First, judicial reflexivity is tested along a number of axes, reflecting influential accounts of courts and adjudication internal to law, political science and sociology. This framework introduces a new qualitative analysis for the long history of U.S. education

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<sup>57</sup> Courtney Jung, Ran Hirschl, and Evan Rosevear, ‘Economic and Social Rights in National Constitutions’ (2014) 62 *American Journal of Comparative Law*, 4, 1043–1093.

rights,<sup>58</sup> as well as a comprehensive cross-national survey. Classical archetypes, such as Ireland and Norway, appear to respond to legal culture; responsive archetypes, such as Colombia, Latvia and Nepal, entertain more strategic explanations, and still others, such as South Africa, respond to both. Furthermore, compelling plaintiffs (which argue against serious violations), well-framed legal arguments, judicial leadership and public opinion are all shown to influence the measure of judicial reflexivity.

Second, distributive equality is tested against a detailed normative mapping of equality benchmarks, ranging from interventions sounding in radical equality, to weaker gains for the disadvantaged compared with the advantaged, which still reduce absolute poverty, or to diachronic equality measures that allow advantaged groups to benefit first, and yet lay the groundwork for disadvantaged groups to benefit later.<sup>59</sup> Again, Langford indicates that the U.S. history of education rights present a narrowing of inequalities in particular states over time, with benefits accruing to low-income districts. And in his broader comparative survey, Lanford finds that Hungary, Brazil and India all complicate the simple picture of a single picture of pro-poor or middle-class bias. Although all jurisdictions have delivered strong judgments towards radical equality, so too are there variations over time, and by right.

David Landau and Rosalind Dixon similarly analyze the results of adjudication of economic and social rights, and again examine the distributive impact on various groups, particularly the

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<sup>58</sup> These are also analysed by Rebell, in this volume.

<sup>59</sup> Landau & Dixon, in this volume.

poorest and most marginalized within a country, as against higher income groups. Again, this examination points to equality concerns, and helps to complexify the analysis of who benefits from such litigation, and how. Taking issue with the theoretical premise of transformation – that is, that enforced economic and social rights promote the interests of marginalized groups in poorer countries – they emphasize empirical findings that such rights are often interpreted and enforced on the behalf of higher-income groups that are not extremely poor.<sup>60</sup> Yet rather than reject this oft-observed ‘middle class bias’ as normatively illegitimate or even perverse, Landau and Dixon examine certain bases for support.

Landau and Dixon also engage with different accounts of judicial motivations and constraints, offering the case study of the Colombian Constitutional Court. This analysis leads them to suggest different interventions, on behalf of pro-poor claimants. These move from the more conventional call for different doctrinal devices, more generous standing rules, structural remedies, and more creative conceptions of role, to a greater appreciation for decisions made on behalf of non-marginalized plaintiffs, which are presented, not as middle class capture, but instead a majoritarian response by courts to widespread political failure. Finally, in noting the logic of welfare-state building, they suggest strategies of universalization, rather than targeting. Like Langford’s diachronic benchmark for equality, such results provide a more complex

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<sup>60</sup> A popular litmus test for transformative success has been a positive distributive impact for marginalized groups, e.g. Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hampshire: Ashgate Publishing, 2006),

assessment of resource allocation in democratic settings, even as they may dilute resources for the poor.

## B. Part II. Adjudication and Rights in Context: Two Contrasts

The comparative viewpoint of global trends is contrasted with the close-up picture of two well-documented jurisdictions, and the judicial enforcement of the right to education. Michael Rebell first examines the United States. Reiterating a theme introduced by Langford, the U.S. is characterized, not as the outlier usually recorded in measurements of national constitutional text or apex court litigation, but as a frontrunner of current litigation trends. Notwithstanding that the U.S. Supreme Court's famous refusal to declare education to be a fundamental interest under the U.S. Constitution, state courts have been involved in decades-long litigation and remedial follow-up: lawsuits have in fact occurred in 45 of the 50 states. Michael Rebell, a lead advocate for the Campaign for Educational Equity,<sup>61</sup> examines the history of two waves of litigation.

The first involved equal protection claims based on disparities in the level of educational funding; it required courts to evaluate expenditures, and had the result, in some cases, of 'levelling down' funding for particular public schools. The second based plaintiffs' claims on opportunities for educational adequacy – for a basic level of education– buttressed by specific state constitutional guarantees, and manageable standards. These, according to Rebell, have become reliably successful, with plaintiffs winning the majority of cases, and defendants

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<sup>61</sup> *Campaign for Fiscal Equity (CFE) v. State of New York*, available at:

<http://www.centerforeducationalequity.org> (accessed 3 July 2018).

prevailing, when they do so, only on separation of powers grounds. The legal form of the right appears particularly rigid – it is enforceable, not aspirational; it is affirmative, and yet cost is not a consideration; and if a violation is found, the remedy must be implemented promptly and on a large scale. While these assumptions do not always appear to bear out – some court orders have not been followed, in one telling example – they do make an impact, suggests Rebell, when the courts engage collaboratively with the executive and legislative branches. Such impacts are evidenced by data that confirm an increased state spending in lower income districts, decreased expenditure gaps between low-and high income districts, and some gains in educational achievement, as a result of such cases.

This rather favorable account can be contrasted with the contribution by Arghya Sengupta, Ajey Sangai, Shruti Ambast and Akriti Gaur, who examine the Right to Education Act in India. Noting the historical evolution of the right to education in India’s legal system – from its 1990s recognition by the Supreme Court of India as part of the Constitution’s right to life guarantee in Article 21, followed by a constitutional amendment – the 86<sup>th</sup> amendment – introducing an express guarantee in 2002, and then, in 2009, follow-up legislation, the authors examine the latter’s history and impact. Sengupta et al, involved in an independent non-profit that assists governments in lawmaking,<sup>62</sup> conclude that, for a number of reasons, this legislated right to a free, quality education for all has fallen short.

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<sup>62</sup> Vidhi Centre for Legal Policy, available at: <https://vidhilegalpolicy.in/about-us/> (accessed 3 July 2018).

While Sengupta et al present an interesting dynamic of inter-branch and popular engagement, the details reveal shortcomings in how claims are made, registered, and remedied. In particular, there are evident gaps between the current legislation and previous Supreme Court authority on Article 21. Some obligations are designated as ‘immediately realizable’ provisions and contain few positive obligations. Others are ‘progressively realizable’ and have seen little litigation or enforcement. The provisions which reach litigation are mainly ‘negative’, individualized complaints, which means systemic problems are left unaddressed. And while the Act is generous in setting up monitoring and enforcement mechanisms outside of the Court, the authors’ case study of Delhi reveals several points of ineffectiveness within this ‘non-judicial apparatus’. Indeed, the empirical analysis points to stark instances of very basic failures, again with a tilt, in the small instances of redress, towards individualized, non-systemic complaints.

In both instances, the U.S. and Indian experiences complicate an easy story of the desirability or otherwise of law’s response to economic and social rights – whether through constitutional interpretation or amendment, sub-national (and thus more amendable) constitutions, legislation, judicial and non-judicial enforcement, litigation or other policy initiatives. The scholarship on economic and social rights has tended to view one point of failure as potentially redressable by another. Of course, the lessons are distinctive. The U.S. is notable for its continual reliance on local property taxes for school funding, which continue to reinforce highly unequal schools; India has attempted to address its legacies of inequality with the notable affirmative access provisions, which reserve 25% of school places, in both public and private schools, for economically weaker and disadvantaged groups. At the very least, it is instructive that economic



and social rights litigation has not disturbed these background rules in either case, in the informed view of education advocates who work in both litigation and policy domains.

### C. Part III. Adjudication and Rights: Democracy and Courts

The following four chapters grapple more explicitly with the theme of economic and social rights and democracy, outlined above. First, Sandra Liebenberg contrasts the forms of contentious politics that have become prevalent in contemporary South Africa with a participatory, jurisprudential, alternative. In the former, service delivery protests have resulted in some institutional reforms, but also violent suppression and securitization of public institutions. In the latter, the Constitutional Court has introduced a doctrine of ‘meaningful engagement’, in order to measure both the ‘reasonableness’ of the state in addressing its economic and social rights guarantee, and to ground a remedy for implementation.<sup>63</sup> In jurisprudence around housing and education, she finds a shift towards a more participatory democratic ethos of adjudication. This is not a large scale, inter-branch dialogue, as Liebenberg notes, but rather a dispute settlement paradigm for rights-holders, with some potential towards a broader-level engagement.

Liebenberg argues that themes of participatory democracy are consistent with the pre-colonial history of South Africa, as well as the negotiated post-apartheid constitution. She suggests that meaningful engagement might trigger, enhance, and borrow from this culture, helping courts further their own legitimacy alongside the state’s accountability. And yet she raises at least three challenges: the inconsistencies of the Constitutional Court’s own jurisprudence, the inequalities

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<sup>63</sup> The broad doctrinal developments have been analysed in Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta & Co. Ltd, 2010).

that are reproduced in participatory models, and the deeper backdrop of claimants' hostility to, and rejection of, the state. These challenges – that veer the country further towards contentious politics rather than deliberative democracy – are not the claimants to resolve: instead, Liebenberg argues persuasively for a more invigorated participatory turn on the part of South Africa's courts.

Roberto Gargarella revisits the South African doctrine of meaningful engagement, alongside Canada's 'notwithstanding clause' and the public hearing processes instituted by various Latin American courts, to review the prospects and potentials of 'dialogic constitutionalism'. These are cautiously approved of, by Gargarella and other critics of traditional judicial review, as deliberative practices, supervised by courts, which enhance inclusion and discussion in public decision making. Within such practices, courts no longer purport to issue the 'last institutional word' in constitutional adjudication, and no longer simply uphold or invalidate a statute; their processes of review are more involved in questions of public participation and access.

These assumptions summarize, of course, a vast debate about the appropriate separation of powers in constitutional democracies. Yet Gargarella challenges the current versions of dialogue, now four decades old, as too little attentive to existing inequalities between participants, and too dependent on the discretionary will of public officers, and judges in particular. More specifically, Gargarella suggests that prevalent institutional systems tend to discourage rather than favor the kind of collective conversations that the theory of dialogic constitutionalism aims to promote.

César Rodríguez-Garavito provides greater institutional detail on the theme of deliberative dialogue and its effect on economic and social rights realization. Introducing the components of

an ‘empowered participatory jurisprudence’, Rodríguez-Garavito bridges two prominent literatures on legal commentary on economic and social rights: those that address the normative questions of why courts should enforce economic and social rights, and those that examine the institutional details of how such processes should be orchestrated. The model therefore borrows, and builds upon, themes of deliberative democracy and democratic experimentalism. Under this model, courts act as catalysts of collective problem solving, while maintaining certain recourses to both substantive and procedural rights.

Rodríguez-Garavito has written previously on the early litigation, adjudication, and monitoring of radical deprivation involving an ‘activist’ court:<sup>64</sup> his case study here involves the ‘extreme case’ of the right to food in India, and the departures in strategy by social movements, litigants, courts, and court-appointed commissioners, media, aid agencies, and legislative and other officials, in the multi-decade right to food campaign. The campaign itself has been the subject of many studies since the Supreme Court recognized the fundamental right to food, as derived from the constitutional right to life, in 2001, after petition by a group of civil society organizations. Based on a methodology of interviews with commissioners, reports and other material,

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<sup>64</sup> See, e.g., César Rodríguez-Garavito & Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press, 2016) p. 14 (focusing on the Colombian Constitutional Court’s structural ruling, in T25 of 2004, which, after finding systematic failures of state action due to a massive forced displacement of millions of people: the Court maintained jurisdiction through 289 follow-up decisions and 20 public hearings).

Rodríguez-Garavito finds evidence of many instances of an empowered participatory jurisprudence – including in the recognition of strong rights, moderate remedies, and significant experimentalist monitoring.

It is helpful, within this general reimagining of courts' democratic credentials, to be reminded by Judith Resnik of the incipient eighteenth and nineteenth century ambition, and egalitarian reinforcement, of exactly that potential. Resnik restates the availability of adjudication in rights-based terms; involving aspects, not only of the traditional civil right (to courts of justice) categorized as negative in character, but of entitlements that states must affirmatively provide. The right to the court presented *as* an economic and social right expertly dissolves previous obligations, reasserting the indivisibility of rights with a refreshing new paradigm – and detail – to what it entails.

Drawing on early U.S. history, Resnik notes the 'open court' and 'right-to-remedy' ideals, although marred by race, gender and class exclusions, evolved to meet egalitarian norms of access, in both civil and criminal spheres. Access to litigation came to be understood as the site for the state to treat all individuals with dignity, to allow opportunities for participation, and to ensure its own efficacy. Resnik's earlier work had provided this contribution with a democratic justification:<sup>65</sup> by committing public officers to forms of self-restraint and explanation, alongside providing equal and dignified treatment to all participants, trial-level litigation had deepened

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<sup>65</sup> Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (New Haven: Yale University Press, 2011).

democracy. These various roles portend obligations for the state, not only of continuing courts' openness, publicity, and transparency, but of more obvious subsidy: that the court provide, to those unable to pay, fee waivers, counsel or experts; that courts consider cost factors when ordering bail and fines; and consider the special role of the state, not only in controlling access to divorce, but proper representation in bankruptcy and eviction cases. Clearly, adjudication cannot be taken for granted: it may be another 'successful universal entitlement under stress', with growing pressures on disputants towards settlement and arbitration: this takes up the theme of the next part.

#### D. Part IV. Economic and Social Rights in Retrenchment: Past and Future

Jeff King takes up the theme of retrenchment by pointing to the loss of many social protections in welfare states, a trend largely ignored, he argues, by those observing constitutional economic and social rights, who tend to take a legalist and narrow view. The current preoccupations of the economic and social rights field – what King suggests is the embrace of both liberalism and constitutionalism – has meant a focus on individuals and courts at the expense of the insights common to other disciplines. In order to challenge current preoccupations, King offers a 'capstone' metaphor: that economic and social rights, as human or constitutional rights, are viewed as a final piece of a broader institutional structure, and the system of supporting values, that make enjoyment of rights a reality. This entails a fuller embrace of insights from welfare state studies: of the importance of collective action (unions as more promising than NGOs, for example), and a fuller recognition of the array of (progressive) tax, regulation and service provision for which the state should be responsible.

Nonetheless, King is careful to note that what worked in the ‘old’ world may not be a prescription for the new: welfare states trajectories are distinct from those of developing states, just as much variety exists within them. Indeed, insofar as ‘liberal’ welfare states have special weaknesses as against other types (especially in decommodification measures), King may be challenging a notion of ‘liberalism’ that has a distinct Anglo-American valence. Moreover, new challenges are unlike the old: climate change and demographics, immigration, fiscal crises and intra-welfare state competition all portend a troubling future.

Like King, Colm O’Cinneide focuses on the implications of liberal constitutionalism, with a more explicit contrast between the Anglo-American and the European ‘social’ model. In Europe, the embrace of economic and social rights – primarily at the legislative level – is constitutionally regulated by a series of political, symbolic, and sometimes justiciable, commitments to social guarantees. As O’Cinneide claims, a full articulation of this mode of engagement serves to displace an apparently developing dichotomy between the sparse economic and social guarantees of Anglo-American constitutionalism and the full-swathe of justiciable economic and social rights protections in the Global South. Thus, the textual affirmation of the ‘social state’ (*Sozialstaat*) in many of the Constitutions of continental Europe, alongside other fundamental social rights or directive principles, contributes to a different understanding of legal effectiveness.

This ‘objective norm of the constitutional order’ is undoubtedly meaningful, including in a legal sense. But its concrete contribution is, suggests O’Cinneide, elusive. Nonetheless, the financial crisis of 2008, and the introduction of austerity measures, have redirected political and legal

attention to the importance and meaning of social constitutionalism in different European states. From what O’Cinneide terms as ‘apertures’ – that is, openings of justiciability of social guarantees in various domestic systems – courts have reviewed austerity measures. Complaints have also increased at the supranational and international levels. And yet the results have been uneven – for different rights and different constituencies, with contributory pensions and public sector workers gaining greater access to courts than others. In this broad analysis, there are parallels with other trends towards litigation, but European constitutionalism remains distinct. Constitutional social guarantees had coincided with the ideologies and institutions of the welfare state. The increasing erosion of the safety net, rather than its transformation or development, may configure the role of social rights.

The tension between liberal constitutionalism and economic and social rights becomes more explicit in the chapter by Colleen Flood, Bryan Thomas and David Rodriguez, who examine health rights litigation in Canada and its role in the dismantlement of certain aspects of universal health care. In particular, Flood et al observe not only the limited capacity of rights to serve as the ‘last line of defense’ gestured by O’Cinneide, but their use as direct tools to undermine previous redistributive and solidaristic gains. Indeed, their examination of Canada’s recent history of patient’s rights litigation against public wait times recalls King’s warning – that courts can defy the hard-won public-spirited programs of previous welfare state initiatives, by ushering in new opportunities for dismantlement and privatization.

Flood et al examine the aftermath of a prominent case in 2005, where the Supreme Court declared Quebec’s prohibition on private health insurance to be an infringement of the right to

life and security of the person, in light of ‘unreasonable’ waits. The decision delivered a victory for a patient and physician plaintiffs, who had sought, not an individual remedy, but a more systematic authorization of privately funded care. In that sense, the decision secured by judicial means what years of physicians’ demands could not – hence its analogy to *Lochner*. Yet the consequences were blunted by a dialogic judgment and remedy: in Canada’s dialogic system of review, Quebec was given the ‘last word’, and responded with a canny plan for allowing patients to avail themselves of private insurance while removing the incentives for it. Nonetheless, Flood et al forecast that a ‘silver lining’ of reinvigorated reform is unlikely, in light of demographic and political realities, such as an aging, and increasingly unequal, population. The more general lessons for economic and social rights is ambiguous: whether this presents an indictment on constitutional review of liberal rights generally, or whether the negative tilt of the *Charter* – which include no express economic and social rights outside of equality, and no right to health care explicitly – is more at issue.

In responding to increasing economic insecurity and rights retrenchment, Philip Alston engages with a different tac: the emerging policy proposal for a Universal Basic Income. Indeed, to name this as ‘policy’ both understates and overstates it: the idea of a basic income has a long heritage in distributive justice debates, including as far back as the sixteenth century, as Alston notes. And if the proposal has had limited uptake, even in their pilot form – Alston mentions small-scale experiments in India, Finland and Kenya. Nonetheless, the proposal addresses important current challenges for economic and social rights, particularly in relation to growing economic insecurity and precariousness, and to new developments with which the future must contend, such as global supply chains and automation.



Alston, who engaged this proposal in a recent report as Special Rapporteur on Extreme Poverty, has long called for engagement, by the human rights movement, with economic policy. Here, he contrasts the universal basic income proposal with a series of other schemes of social protection, including the negative income tax, global basic income, welfare state, cash transfers (both conditional and unconditional) and social protection floors. In particular, he suggests that all schemes be brought more critically in dialogue, and be enlivened to implications, not only for rights to an adequate standard of living, to social security, and to work, but also to the overall social protection framework. Universal basic income has engaged thinkers from both liberal-egalitarian and libertarian traditions. The latter view it as a replacement of existing social protections and bureaucracies, and one that provides the moral permission for growing inequality, consumerism, and labour force retrenchment. The former view it, instead, as an important supplement. Alston suggests that rights advocates should become adept at selecting aspects of each, in the context of both developing and developed states.

#### E. Part V: Economic and Social Rights in Development: Local and Global

Turning to the development context more explicitly, Amy Cohen and Jason Jackson examine the right to food in India, situating the state's obligations, not as Cesar Rodriguez-Garavito had done, with a focus on courts and participation, but with respect to a detailed analysis of markets. Markets, as they note, are central to the delivery of food. And in India, the passage of the Food Security Act 2013 coincided with the same government's introduction, the preceding year, of a substantial program of market liberalization. Cohen and Jackson link these two events as part of what they term the same 'modernizing ideology' – of the insertion of formal, rule-bound, transparency into the food distribution system. They trace a parallel effort, on the part of both

right-to-food campaigners and retail liberalization proponents, to challenge the patronage-based networks of indigenous traders that had long defied centralized state control, and create in their stead more transparent, legible, and efficient supply chains governed by formal contract, and new systems of audit and accreditation.

Such efforts have given legal economic and social rights traction and accountability. As evidence of this development, Cohen and Jackson note that both express Supreme Court directives, and non-court driven campaigns, have focused on the goal of transparency in food supply chains. Yet this goal, they suggest, diverts human rights claims to ‘logistics’: ‘the right product, in the right quantity and right quality, in the right place at the right time, for the right customer at the right cost’. Although Cohen and Jackson concede that right-to-food campaigners idea of ‘auditing’ and accountability is very different from those of retail-liberalization proponents (the one seeking community solutions, the other seeking capital-required technology, including sophisticated tracking algorithms and biometrics data), they provocatively suggest that they are two sides of the same coin. Both address, in part, the absence of trust in the public distribution system of food in India, as a result of years of corruption, patronage, and leakage. In this long history, Cohen and Jackson count, as one misstep, the replacement of universalist goals with targeting to the poor in 1997, the adverse consequences of which were the focus of the right to food movement. But the current focus on transparency and accountability tends to favor supermarkets over small-scale farmers and traders. In making this argument, Cohen and Jackson are therefore presenting much more complex an argument than that state obligations and market governance requires greater legal accountability.

Jeremy Perelman similarly explores the intersection of rights with practices of economic globalization and development, with a focus on foreign investment. Presenting the terminology of a ‘rights-ification’ of development, he points to an increasingly legalized field, whereby a formalist approach to law has developed alongside policy analysis. In this field, Perelman is critical of the ability of human rights to challenge the structural injustices of the contemporary global economy. Drawing on a large map of critical commentary, such as *Third World Approaches to International Law* and the critique of rights articulated by critical legal studies, Perelman predicts that the interventions offered by human rights, from the Human Rights Based Approach to Development (‘HRBA’) to more disruptive forms, will be limited in effect.

Perelman situates his analysis in the growing political economy of natural resources extraction, where he documents the increased promotion and coordination of large-scale foreign investments. Despite an apparent departure from neoliberal development prescriptions, and the embrace of the 2015 Sustainable Development Goals, Perelman finds only a continuum of extractive capitalism, with a tendency towards a regulatory race to the bottom rather than any countervailing move towards social and economic justice. In this evolving set of encounters between human rights and development, Perelman finds a ‘rights-ification of investment’ that tracks his general critique. New models of legal accountability have been introduced through practices such as human rights impact assessments (‘HRIAs’). These impact assessments borrow from other legal models of accountability to allow ‘affected communities’ (a problematic concept) to register their concerns, and perhaps be compensated. Nevertheless, Perelman suggests, these tools are readily coopted by powerful corporations, as forms of risk assessment which shore up private rights within global supply chains. Perelman’s critique extends through

the modes of social rights constitutionalism and international human rights mechanisms. In particular, he is wary of the participatory, and engagement-focused tools recommended by other authors, as currently practiced, with their tendency to depoliticize the broader effects of investments and to adopt narrow understandings of impact and consent. Nonetheless, he holds out the possibility that social movements and coalitions might substantiate these tools with broader, if pragmatic, political ambitions.

Lucie White also engages a critical perspective in examining the present processes of human rights testimony, a ubiquitous tool of human rights practice. Such testimony, as she notes, can relate to different rhetorical projects: three prominent goals are to produce facts, to shame bad actors, and to give voice to lived experience. Yet these truth-seeking, strategic, and moral goals are not always consistent. A close analysis implicates, not only the practices familiar to the truth commissions and human rights tribunals that have been accorded prominence in recent decades, but also the broader practices of adjudication and dialogue that are the subject of other chapters. Drawing on critical legal and anthropological perspectives, White suggests that conventional human rights testimonies may miss the interconnections, incompleteness and mutuality between subjects and advocates and others, thus diminishing the potential for political empowerment.

White draws on a case study of five texts of human rights testimony produced in an impoverished community in Accra, Ghana, finding them isolating in their political effect. Instead, she calls for a more collaborative, collective, and politicized, mode of testimony. For example, White recommends that testimony be polyvocal rather than dialogic, utilizing the first-person plural. She also suggests that it should concern itself less with material facts than with

political power; less with clinical evaluation than with pragmatic strategizing; and less with naming and shaming than with what she describes as a more ongoing structural analysis. White hints at its contours with a short description of a group concerned about newly instituted oil extraction off the coast of Ghana, and its patient exploration of a collective response.

There are parallels in the chapter by Kerry Ryan Chance, who brings an anthropological perspective to the study of economic and social rights, in examining ‘the informal, everyday practices that the urban poor use to construct, transform, and access’ their rights in contemporary South Africa. Drawing on ethnographic research of a community living on the outskirts of Cape Town, over a 12 year period between 2005 and 2013, she details the ways in which people have engaged in building shacks, occupying land, mobilizing street-based activities, and making claims in court, which all ground, in her terms, a ‘lawfare from below’. The lived experience of one person, in particular, helps to elucidate these practices: Chance recounts how Monique joined a protest against her eviction from the township of Delft, becoming part of a blockaded settlement which, for two years, resisted relocation to the transit camps administered by the state.

It is thus in informal housing – particularly in the controlled ‘slums’ slated for ‘upgrading’ – that Chance finds such practices emerge. While she uses these terminologies with caution – noting informality can re-inscribe the colonial categories of the modern and traditional, or civilized and unruly – she provides a close and contextualized retelling of a freighted political struggle over the terms of the right to housing, and other post-apartheid laws, on the part of evictees. Here, Chance finds a grassroots politics which encompasses both contention and law. Indeed, she finds that within organized sites of occupation, it is an infrastructure and indeed a broader platform of

politics that is built. Chance's efforts to understand, not simply the recourse to litigation, but the processes which give rise to it, help to frame a set of inquiries for the future of South Africa's constitutional rights, as well as, perhaps, in other locales.

#### F. Part VI. Measures of Accountability: Emerging Doctrines, Emerging Proposals

The last Part engages with new proposals for accountability, developed at the international level, but in a notable continuum with previous chapters. Olivier De Schutter thus acknowledges, for example, the need to base the evaluation of states on democratic premises, informed by political economy and acknowledging the need for (disciplined) trade-offs between the interests representative of particular economic, social and cultural rights. But De Schutter, a present member of the Committee and former Special Rapporteur on the Right to Food, carries out a different task than previous chapters: engaging explicitly with present international human rights doctrines and methodologies to outline an updated toolkit for a 'public budget analysis' for such rights for the future. First, De Schutter engages the 'novelty and subversive potential' of states' duties to progressively realize economic, social and cultural rights according to their maximum available resources: such possibilities accompany the principle that all states are responsible for the 'minimum core' or core obligations; that heightened responsibility is entailed when states retrogress from rights' fulfilment; that states not discriminate against certain individuals or groups; and that states ensure participation in decision making.

Second, De Schutter revisits the framework for assessing states' decision-making and accountability for economic and social rights, by including a measure of how states mobilize resources, as well as how they promote certain outcomes and spending. Thus, for example, De

Schutter comments specifically on how states choose to exploit natural resources (including agriculture, alongside minerals, oil, and gas), and how they request international support. This assessment of royalties and investments builds on ‘right to development’ ideas, extraterritorial obligations, and development goals to highlight areas where accountability is now needed. In relation to taxation, De Schutter comments specifically on how states are in a position to expand their base, implement progressive tax policies and combat tax evasion. In relation to spending and budgets, De Schutter elaborates on three benchmarks: the social investment ratios introduced by the United Nations Development Program; the Achievement Possibility Frontier tailored to currently performing best practices among countries; and a diagnostic monitoring approach that introduces a new measure for causality in states’ budgets. This, combined with a critical acknowledgement of how baselines are assumed, and a critical connection with the values of civil and political rights, participation and democracy, suggests a far more complex role for economic accountability than was previously available.

Rodrigo Uprimny, Sergio Chaparro and Andrés Castro Araújo translate many of the same frameworks in their analysis of the duty, on the part of State Parties to the ICESCR, to progressively realize economic, social and cultural rights ‘according to the maximum of its available resources’. Acknowledging a previous tendency to describe too absolute, or too discretionary a duty to fully realize economic and social rights, Uprimny, who is also a member of the Committee, and his fellow authors, analyze the ‘comparative assessments’ in which the Committee has engaged. Through synthesizing both General Comments and the responses to various states reports, the authors are able to present an in-depth picture of current doctrine, robust in its attention to the immediacy of state duties, non-retrogression, and self-reporting

strategies, and in seeking to forge responses to such difficulties as how to measure ‘available resources’ or how to conceptualize the impact of corruption.

Emerging in this picture is significant technical and methodological advance. In particular, Uprimny et al document several presumptions of non-compliance that orient the Committee’s work, which is triggered when there is evidence of: stagnant public expenditure, problematic and ongoing disparities; strong and prolonged growth without resource allocation; discriminating and insufficient tax policy; high levels of economic inequality; and measures that may sound in extraterritorial obligations, such as those that support financial secrecy, which might sustain illicit financial flows. All these issues indicate how a large and enhanced ‘fiscal repertoire’ are part of the Committee’s activities. But these innovations are not, stress the authors, purely technical in character. Indeed, the presumptions of non-compliance often trigger, not only the types of burden of proof reversals familiar to courts and tribunals, but also processes of dialogue, much like the accountability models considered in Part III of this book.

In concluding the volume, Katharine Young engages conceptually with the promise of economic and social rights, as one subject to ‘progressive realization’. This conditioned obligation, appearing in the international treaty, has been replicated in some constitutions, and sets out a novel understanding of how duties to realize rights must proceed. Noting that delay of rights is akin to denial of rights, Young explores the various ways in which accountability models, at the international level, have elaborated on concrete, and temporal, benchmarks. These include the minimum core, and non-retrogression doctrines, and the exercises in comparative rankings. These are important compromises, especially for positive obligations, and yet they risk too



indefinite a postponement for the satisfaction of certain important interests that are represented by 'rights'.

With the promise of rights, law structures the expectations of rights-holders: in order to understand how this occurs, Young turns to the experience of waiting, as possibly counteractive to the promise of rights. This provides greater insight on the critical tension between the need to recognize that some rights may be unfeasible in the short term, and yet should not lose their status as an interest of special concern, on the one hand; and the need to acknowledge that permitting delay in fulfilment may be unlikely to bring about the agitations and mobilizations necessary for rights to be recognized and materialized, on the other. Waiting for rights may be an especially passive, disempowering, and anti-solidaristic experience.

The chapters end, then, with a series of challenges for how economic and social rights, as a discourse of social justice, a component of constitutional protection, and a central feature of international human rights law, will unfold.