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Introduction

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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 fulfilment, 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 expressly guaranteed, in one form or another, in most of the world's constitutions and in most of the main human rights treaties. They are also increasingly being 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 T. H. Marshall had argued,[1] the twenty-first century may be instituting a pronounced, if uncertain, juridical embrace. Marshall, a sociologist

[1] T. H. Marshall, *Citizenship and Social Class*, originally published in 1950 (New York, NY: Cambridge University Press); now see T. H. Marshall and Tom Bottomore, *Citizenship and Social Class* (Chicago, IL: Chicago University Press, 1992), p. 17.

focusing on developments in Britain, saw civil and political rights as eighteenth- and nineteenth-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, housed domestically, but also coordinated internationally. But by the twenty-first century, these ideas had found a more explicit home – and purported safeguard – in law. By 2000, Albie Sachs would hazard a forecast that the twenty-first century would see jurisprudence focused increasingly on economic and social rights.[2] 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 nineteenth century, characterized as the time of executive control over society, and the twentieth century, as the time of the legislature's control over the executive: the new century was imagined as one in which the judiciary would establish principles and norms controlling both.

Underpinning these visions are contested assumptions about the robustness of the rule of law and of its power to constrain and control. From one vantage point, support for economic and social rights – sometimes referred to as socioeconomic rights or as social rights – is an elaboration on the idea of constitutionalism, often ascribed to the founders of the US republic: that the authority and legitimacy of government rests on it 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 domestically and even – although these obligations remain incompletely worked out – extraterritorially. While the constitutional

[2] 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 this book's task 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 in the following text, 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. These are, of course, enduring themes.[3] 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.[4] Such claims may give rise to

[3] It should be noted that, while the following contentions about the future of economic and social rights were first presented among the contributors in April 2016, preceding the election of the Trump administration in the United States in November 2016 and other major changes in public and international law, the expressly forward-looking perspectives adopted by the authors make their observations and prescriptions not only of continued and critical relevance to, but also, in some cases, anticipatory of, the further challenges on the horizon. See Parts III and IV of this introduction.

[4] Amartya Sen, 'The Global Status of Human Rights' (2012) 27 *American University International Law Review* 1, 1–15.

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.)[5]

Nevertheless, enacted law – and arguments from custom made internal to law – can also provide moral support for moral obligations that go beyond the law.[6] 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.[7] This more encompassing perspective is particularly associated with the justificatory basis of constitutional law.[8] Within international human rights law, such justification may also be viewed as important;[9] moreover, features of 'soft law' and practices of persuasion and acculturation may also bring ethical and legal forms of argument closer together.[10]

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,[11] that we find a corresponding rise in rights-prompted

[5] Amartya Sen, 'Rights, Law and Language' (2011) 31 *Oxford Journal of Legal Studies* 3, 437–453, 441.

[6] 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.

[7] 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).

[8] 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).

[9] Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press; New York, NY: Oxford University Press, 1995).

[10] E.g., Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford: Oxford University Press, 2013).

[11] 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).

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 US federal model of a written bill of rights with express social rights guarantees – as had occurred with many state constitutions in the United States 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 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, 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.[12] In recent decades, there are clear, empirically tested, trends: the right to education, health, child protection and social security are now present in more than two-thirds of all national constitutions.[13] Less widespread rights, such as to housing, food and water and development and land, are nevertheless increasingly part of new constitutions or constitutional amendments. Twenty-first-century constitutional reforms continue to entrench such rights, alongside civil and political rights. While the constitutions of the

[12] E.g., Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York, NY: Basic Books, 2004) (expanding the previous lens of the 'rights revolution').

[13] Evan Rosevear, Ran Hirschl and Courtney Jung, 'Justiciable and Aspirational Economic and Social Rights in National Constitutions' (see Chapter 2).

common law 'West' have been only partial players in this revolution,[14] such rights are not foreign to subnational constitutions and legislative guarantees there, as elsewhere.[15]

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 (UDHR) proclaimed human rights – civil, political, economic, social and cultural – as the 'common standard of achievement' for all peoples and all nations, in 1948.[16] While its legal status was unusual – it constituted a form of promise without legal command, drafted by the UN Human Rights Commission and adopted by the General Assembly,[17] its influence was widespread, including on new legal instruments and institutions.[18] 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.[19] These international trends have influenced, and been influenced by,

[14] Ibid.; see also David Law and Mila Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 *NYU Law Review* 762–858.

[15] E.g., Malcolm Langford, 'Judicial Politics and Social Rights'; Michael Rebell, 'The Right to Education in the American State Courts' (see Chapter 3 and Chapter 5); see also Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton, NJ: Princeton University Press, 2013) (all tracking US state constitutions); see also, e.g., Colm O'Cinneide, 'The Present Limits and Future Potential of European Social Constitutionalism' (see Chapter 12, noting significant legislative protections in Europe).

[16] 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.

[17] Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, NY: Random House, 2001).

[18] 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.

[19] Ratification numbers are available at http://indicators.ohchr.org (accessed 1 June 2018).

domestic (and constitutional) developments, in a complex migration of ideas between drafters, courts, policy experts and social movements.[20]

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.[21] New constitutions and constitutional amendments increasingly adopt 'justiciable' versions of economic and social rights; certain national courts are alert to new methods of scrutiny, and new remedial possibilities are being 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 latter setting, where complaints are inevitably premised on 'weak-form' mechanisms of review, new complaints mechanisms have been established. The UN Committee on Economic, Social and Cultural Rights now has authority to hear complaints against states that have ratified the 2008 Optional Protocol. It delivered its first communication in 2010, again on the right to housing,[22] borrowing from methods of scrutiny used by regional human rights mechanisms and national courts.

[20] The extent of this two-way influence is controversial: compare Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 52 *Harvard International Law Journal* 61–95 (finding causal relationship between international human rights treaties and constitutions); with Law and Versteeg, 'The Declining Influence'; see also Daniel M. Brinks, Varun Gauri and 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.

[21] Mark V. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008). Many of this volume's contributing authors have mapped out such debates elsewhere: see, e.g., Young, Constituting Economic and Social Rights; Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012); Mark Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009).

[22] Optional Protocol to the ICESCR, 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.

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 in the following text) and depends on 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 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 ensuring an educated, and secure, voting community; a social democratic vision common to welfare state history, and to 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)[23] 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.[24]

This democracy-based objection to rights attaches to constitutional civil and political rights,[25] too, but is intensified with respect to the powers of review and remedy conferred on judges by the relatively vague

[23] 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.

[24] Frank I. Michelman, 'The Constitution, Social Rights and Liberal Political Justification' (2003) 1 *International Journal of Constitutional Law* 13.

[25] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346–1406.

terms of economic and social rights, in which past constraining precedents 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.[26] 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 United States: 'weaker-form' review is open to forms of inter-branch dialogue and more thoroughgoing models of participation, as several chapters attest.[27] More fundamentally, newer models of the separation of powers have become more pertinent, as legislatures have become more associated with dysfunction, rather than democracy; and it is executives, rather than judiciaries, who are overstepping traditional demarcations.[28] A more attuned conception of democracy has also incorporated participation in international developments.[29]

Evidence of new, democratically responsive juridical trends come from constitutional and supreme courts in both the Global North and Global South. Courts in Argentina, Brazil, Canada, Colombia, India and South Africa, for example, although responding to different political and

[26] Arghya Sengupta et al., 'Legislating Human Rights – Experience of the Right to Education Act in India' (see Chapter 6), 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, Bryan Thomas and David Rodriguez, 'Canada's Confounding Experience with Health Rights Litigation and the Search for a Silver Lining' (see Chapter 13), 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.

[27] See, e.g., the contributions by Langford, as well as Sandra Liebenberg, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' (see Chapter 7) and Roberto Gargarella, 'Why Do We Care About Dialogue?' (see Chapter 8).

[28] 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 and Rosalind Dixon, 'Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor' (see Chapter 4).

[29] 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.

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 have been 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, new mechanisms of accountability, now assigned to human rights institutions or specialized administrative commissioners, or to legislative committees, provide oversight alongside or apart from courts.

Enforceable economic and social rights thus have the potential to be 'mutually constitutive' of democracy,[30] 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.[31] 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 as guardians of economic and social rights.[32]

And finally, against the backdrop of a recent and notably widespread erosion of constitutional democratic institutions, including of

[30] Karl Klare, 'Critical Perspectives on Social and Economic Rights: Democracy and Separation of Powers', in Helena Alviar García, Karl Klare and Lucy A. Williams, *Social and Economic Rights in Theory and Practice* (London and New York, NY: Routledge, 2015), pp. 3–4.

[31] See, e.g., Lucie White, 'Human Rights Testimony in a Different Pitch', Chapter 17.

[32] Resnik describes the history of an increasing acceptance of courts as critical to state provisioning, and as tending toward greater inclusivity and independence, and demonstrates that the result of these developments may now be under threat: Judith Resnik, 'Courts *and* Economic and Social Rights/Courts *as* Economic and Social Rights' (see Chapter 10).