

## THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS

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 single-minded conception of development as economic growth, economic and social rights enjoyed an uncertain status in international human rights law and in the public laws of most countries. However, today, under conditions of immense poverty, insecurity and political instability, the rights to education, health care, housing, social security, food, water and sanitation are central components of the human rights agenda. *The Future of Economic and Social Rights* captures the significant transformations occurring in the theory and practice of economic and social rights in constitutional and human rights law. Professor Katharine Young brings together a group of distinguished scholars from diverse disciplines to examine and advance the broad research field of economic and social rights that incorporates law, political science, economics, philosophy and anthropology.

KATHARINE G. YOUNG is Associate Professor of Law at Boston College Law School. She has published widely in the fields of public law, human rights and constitutionalism and is the author of *Constituting Economic and Social Rights* (2012) and editor of *The Public Law of Gender* (2016) with Kim Rubenstein. She completed her doctorate in law at Harvard University and was a fellow at Harvard's Justice, Welfare and Economics program.

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Edited by  
KATHARINE G. YOUNG  
*Boston College*



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## CONTENTS

	<i>List of Figures</i>	ix
	<i>List of Tables</i>	xi
	<i>List of Contributors</i>	xiii
	<i>List of Abbreviations</i>	xxi
	<i>Foreword</i>	xxiii
	AMARTYA SEN	
	<i>Acknowledgements</i>	xxv
<b>1</b>	<b>Introduction</b>	<b>1</b>
	KATHARINE G. YOUNG	
	<b>PART I Adjudication and Rights: Global Trends</b>	<b>35</b>
<b>2</b>	<b>Justiciable and Aspirational Economic and Social Rights in National Constitutions</b>	<b>37</b>
	EVAN ROSEVEAR, RAN HIRSCHL AND COURTNEY JUNG	
<b>3</b>	<b>Judicial Politics and Social Rights</b>	<b>66</b>
	MALCOLM LANGFORD	
<b>4</b>	<b>Constitutional Non-Transformation? Socioeconomic Rights beyond the Poor</b>	<b>110</b>
	DAVID LANDAU AND ROSALIND DIXON	
	<b>PART II Adjudication and Rights in Context: Two Contrasts</b>	<b>135</b>
<b>5</b>	<b>The Right to Education in the American State Courts</b>	<b>137</b>
	MICHAEL A. REBELL	
<b>6</b>	<b>Legislating Human Rights: Experience of the Right to Education Act in India</b>	<b>158</b>
	ARGHYA SENGUPTA, AJEY SANGAI, SHRUTI AMBAST AND AKRITI GAUR	

- PART III Adjudication and Rights: Democracy  
and Courts 185**
- 7 **The Participatory Democratic Turn in South Africa's  
Social Rights Jurisprudence 187**  
SANDRA LIEBENBERG
- 8 **Why Do We Care about Dialogue? 'Notwithstanding Clause',  
'Meaningful Engagement' and Public Hearings:  
A Sympathetic but Critical Analysis 212**  
ROBERTO GARGARELLA
- 9 **Empowered Participatory Jurisprudence:  
Experimentation, Deliberation and Norms  
in Socioeconomic Rights Adjudication 233**  
CÉSAR RODRÍGUEZ-GARAVITO
- 10 **Courts *and* Economic and Social Rights/Courts *as*  
Economic and Social Rights 259**  
JUDITH RESNIK
- PART IV Economic and Social Rights in Retrenchment:  
Past and Future 287**
- 11 **The Future of Social Rights: Social Rights as Capstone 289**  
JEFF KING
- 12 **The Present Limits and Future Potential of European  
Social Constitutionalism 324**  
COLM O'CONNOR
- 13 **Canada's Confounding Experience with Health Rights  
Litigation and the Search for a Silver Lining 353**  
COLLEEN M. FLOOD, BRYAN THOMAS AND  
DAVID RODRIGUEZ
- 14 **Universal Basic Income as a Social Rights-Based Antidote  
to Growing Economic Insecurity 377**  
PHILIP ALSTON
- PART V Economic and Social Rights in Development:  
Local and Global Trajectories 405**
- 15 **Rights as Logistics: Notes on the Right to Food and Food  
Retail Liberalization in India 407**  
AMY J. COHEN WITH JASON JACKSON

## CONTENTS

vii

- 16 **Human Rights, Investment and the Rights-ification of Development: The Practice of ‘Human Rights Impact Assessments’ in Large-Scale Foreign Investments in Natural Resources** 434  
 JEREMY PERELMAN
- 17 **Human Rights Testimony in a Different Pitch: Speaking Political Power** 470  
 LUCIE WHITE
- 18 **Grassroots Lawfare: How South Africa’s Urban Poor Use Land as a Legal Instrument** 503  
 KERRY RYAN CHANCE
- PART VI Rights and Accountability: Emerging Doctrines, Evolving Concepts** 525
- 19 **Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation** 527  
 OLIVIER DE SCHUTTER
- 20 **Bridging the Gap: The Evolving Doctrine on ESCR and ‘Maximum Available Resources’** 624  
 RODRIGO UPRIMNY, SERGIO CHAPARRO HERNÁNDEZ AND ANDRÉS CASTRO ARAÚJO
- 21 **Waiting for Rights: Progressive Realization and Lost Time** 654  
 KATHARINE G. YOUNG

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Edited by Katharine G. Young , Foreword by Amartya Sen  
Frontmatter  
[More Information](#)

---



## FIGURES

- 2.1 Presence of environmental rights 53
- 2.2 Justiciability of the right to health 57
- 3.1 A typology of court postures 70
- 6.1 The range of suits that have been filed under the RTE Act that directly address the right of children to education 168
- 6.2 A breakdown of the types of remedies issued by courts under the RTE Act 170
- 6.3 RTE complaints filed between 2011 and 2015 179
- 9.1 The feedback loop among actors in the RTF case 257
- 19.1 The R-S-O conceptual framework for the human rights analysis of budgetary choices by states 561
- 19.2 Government revenue in 2008 by source of taxation, 2009 mission to Brazil by the Special Rapporteur on the right to food © United Nations 562
- 19.3 The correlation between wealth and health expenditure (2009). Reprinted from WHO factsheet No. 319: Spending on Health: A Global Overview (April 2012) 598
- 19.4 Correlation between expenditure on health and outcomes (2009). Reprinted from WHO factsheet No. 319: Spending on Health: A Global Overview (April 2012) 598
- 20.1 Proposed framework to monitor the use of maximum available resources 653

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[More Information](#)

---

## TABLES

2.1	New constitutions and constitutional amendments, annual averages	42
2.2	Characteristics of the average constitution, 2000 and 2016	47
2.3	Characteristics of the average constitution, 2000 and 2016	59
2.4	Regional constitutional characteristics and change, 2000 and 2016	61
2.5	Economic and social rights entrenchment, 2000 and 2016	64
3.1	Equality measures for legal impact	74

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## ABBREVIATIONS

CCC	Constitutional Court of Colombia
CCSA	Constitutional Court of South Africa
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CSO	community-based organization
ESR	economic and social right
GHE	Government Health Expenditure
GNP	Gross National Product
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
MDG	Millennium Development Goal
NGO	Non-governmental Organization
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OP-	Optional Protocol
ICESCR	International Covenant on Economic, Social and Cultural Rights
PIL	public interest litigation
SCI	Supreme Court of India
SDG	Sustainable Development Goal
SFT	Supreme Federal Tribunal of Brazil
UN	United Nations
UNICEF	United Nations International Children's Emergency Fund
VAT	value-added tax
WHO	World Health Organization
WTO	World Trade Organization

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## FOREWORD

AMARTYA SEN

The acceptance of economic and social rights as legitimate categories of claims has emerged through a process of slow progress. The challenges have come from the tendency to dismiss pre-legalized rights as “imaginary rights” (as Jeremy Bentham insisted in 1791–92), and also from refusing to include economic and social claims within the corpus of legitimate human rights (as continued to happen up to the twentieth century). Both the battles were ultimately won - the first much aided by the clarification (provided by Herbert Hart) that people “speak of their moral rights mainly when advocating their incorporation in a legal system” and the second with the growing understanding that economic and social rights are not really dissimilar to claims of liberty, which too require state support for universal fulfilment (an understanding that slowly consolidated John Stuart Mill’s extensive analysis of the demands of liberty).

Even though this has been a hard-fought process with slow vindication, the basic ideas and identifications involved were already present in rudimentary form in the writings of Thomas Paine, Mary Wollstonecraft and the Marquis de Condorcet, who were contemporaries of Jeremy Bentham and of other sceptics, such as Edmund Burke. The history of economic and social rights in winning the space they are now able to occupy has been one of long arguments and resistance to strong counter-arguments. The progress of inclusion and use of further aspects of economic and social rights will undoubtedly continue, but it would be wrong to expect that the process will be uncharacteristically easy, or particularly speedy.

While the editor of this volume of essays – Katharine Young – is right to argue that “the future of economic and social rights is unlikely to resemble its past” (for one thing, as Young points out, “the rights to education, health care, housing, social security, food, water and sanitation” are already “increasingly at the top of the human rights agenda”), there are other concerns and other claims yet to be fully scrutinized that

would demand attention in a similar way that the now-accepted claims have historically secured their place. The challenging subject of human rights legislation is not ideally suited for the impatient.

In this thoroughly researched and highly illuminating collection of articles, the authors, led by Katharine Young, have addressed a wide variety of problems that would have to be faced for an adequate understanding and satisfactory use of ideas of economic and social rights in the future. This is a world of claims, disputations and their assessment, including necessary speculations. People interested in this important area of study cannot but be impressed by the power and reach of the contributions that Katie Young has helped to generate for this wonderful collection. We have excellent reason to be grateful.



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This book's examination of economic and social rights comes at the end of a series of long-standing conversations with a wide range of participants. These conversations became very focused during the conference The Future of Economic and Social Rights held at Boston College in April 2016. I thank the Clough Center for the Study of Constitutional Democracy, and Boston College, for supporting this event. My special thanks also go to Amartya Sen, who delivered the conference keynote to a massive – and massively enthusiastic – gathering of listeners. His presentation, 'Rights in a Global World', addressed in one speech a series of pressing and consistent challenges to human rights in our contemporary global context. Through the force of deep analytical insight, Sen pointed out the cogency of an ethics of rights, fully inclusive of economic and social rights. Addressing several dogged puzzles – of the processes of public reason, of the grasp of imperfect obligations and of the advantage of accepting the inevitability of an incomplete as opposed to perfect justice – he provided a series of clear-sighted answers. As his previous contributions have done, Amartya Sen's insistence upon an ethics that can make room for the basic importance of human freedom, alongside corresponding social responsibilities, casts a hopeful and much clarified light on the future of economic and social rights as a discourse and ethics of justice.

Indeed, each of the following chapters examines economic and social rights as discourses and demands of social justice (mirroring Sen's emphasis), or as the institutions or norms of constitutional and international human rights law (which are related, but raise their own distinct concerns). With respect to each of these categories, economic and social rights have been beset by many new challenges since that first conference, not least by the abrupt change in leadership in the United States after November 2016. I thank the participants for engaging in such in-depth and long-term inquiry, and for anticipating many of the changes to come. We don't yet know what the future holds, but this book's ambition

serves both to prepare us for, and remind us of, different possible outcomes.

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