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Introduction: Do We Need Social Rights?

Questions in the Era of Globalisation, Privatisation, and the Diminished Welfare State

DAPHNE BARAK-EREZ AND AEYAL M GROSS*

As we approach the sixtieth anniversary of the Universal Declaration of Human Rights ('UDHR'),¹ this book seeks to take stock of social rights as a legal category and of their protection, looking into the theoretical foundations of social rights and the question of their implementation. In the process of this exploration, the discussion throughout the book also invites an inquiry into social rights as a distinct category within the human rights system.

The history of the modern concept of rights has greatly affected the current status of social rights and the role of the UDHR in establishing that status. The roots of our current thinking about human rights can be traced back to the eighteenth century, when the modern notion of rights crystallised in both political philosophy and within the framework of the American and French revolutions. Liberal thought, manifested in the ideas of thinkers such as Locke,² advanced the idea of natural rights as a construct that predates the state and whose protection is a primary function of the state. Thus, in the Lockean tradition, the state is prohibited from violating the life, liberty or property of its citizens. This is the concept of rights that lies at the heart of the American constitution.

One of the major critics of this liberal rights approach was Karl Marx, who, in the nineteenth century, made the powerful argument that the

* The authors are grateful to Hedi Viterbo and Magi Otsri for their assistance in writing this Introduction and to Dana Rothman-Meshulam for her excellent editing work.

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A(III).

² See especially J Locke, *The Second Treatise on Government* (Oxford, B Blackwell, 1956).

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protection of civil rights does not in fact guarantee human emancipation. Marx pointed out that the eighteenth-century civil rights declarations had not contended with issues of economic inequality, but quite the opposite: one of the major rights of the liberal paradigm, the right to private property, argued Marx, actually perpetuates inequality in the material conditions of living.³ Thus, in Marx's view, rights promised equality but in fact entrenched inequality. His criticism shed light on the connection between human rights and distributive justice and on the lacunae in the liberal rights ideology in everything pertaining to the material conditions of life. An understanding of rights relating only to the civic sphere, which is focused, in the Lockean spirit, on limiting the power of the state to violate the rights of individuals, is not committed to the material welfare of those individuals and, ultimately, cannot guarantee equal enjoyment of the civil rights themselves. Moreover, such a conception not only excludes any commitment to the individual's material welfare, but can actually hinder actions taken to foster that welfare: because rights, under this paradigm, are understood as restrictions on the state's power to act, the result could be that the civil rights themselves will serve to restrict actions taken by the state to promote welfare. This was the outcome of the US Supreme Court's *Lochner* doctrine during the first third of the twentieth century, under which the Court held various labour and welfare laws to be in violation of the constitutional protection of liberty.⁴

The need to address questions of welfare and material existence within the framework of the rights paradigm has not been limited to thinkers from the Marxist tradition. The UDHR may also be seen as a belated attempt to address these matters. The Declaration crystallised two important developments in the thinking on human rights. The first is the idea of universality, meaning that rights should not be left as a matter within the exclusive domain of states and that their enjoyment should not be dependent upon the individual's membership in a nation-state that, as a matter of fact, protects its citizens' rights.⁵ The second development was the emergence of the notion of so-called social rights, which appear in the UDHR alongside civil and political rights. The Declaration recognises not only such rights as the right to life, liberty, equality, freedom of movement and citizenship, but also 'social' rights such as the right to social security, the right to work (encompassing just and favourable working conditions and protection against unemployment), the right of every person to a standard of living adequate for his and his family's health and well-being

³ See especially K Marx, 'On the Jewish Question' in RC Tucker (ed), *The Marx-Engels Reader* (New York, W W Norton, 1972).

⁴ See *Lochner v New York* 198 US 45 (1905); C Sunstein, 'Lochner's Legacy' (1987) 87 *Columbia Law Review* 873.

⁵ This development may be seen as an attempt to address the problem of the nexus between rights and the nation-state and the question of the 'right to have rights', identified in H Arendt, *The Origins of Totalitarianism* (New York, Meridian Books, 1958) 267–302.

(including food, clothing, housing, medical care, and necessary social services), and the right to education.⁶ More generally, the UDHR determines that: 'Everyone, as a member of society... is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'⁷ and that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.⁸

TH Marshall, in an influential essay originally published two years after the adoption of the UDHR, offered a theory of citizenship comprising three elements: a civil element composed of the rights necessary for individual freedom, such as liberty of the person, freedom of speech, thought and faith, as well as property; a political element referring to the right to participate in the exercise of political power; and a social element ranging from the right to a modicum of economic welfare and security to the right to live the life of a civilised being according to society's prevailing standards.⁹ It was only in the twentieth century, Marshall argued, that social rights attained equal status with the other two elements of citizenship¹⁰: whereas for civil rights the formative period was the eighteenth century and for political rights the nineteenth century, it was the twentieth century in which the recognition of social rights crystallised.¹¹ The UDHR includes all three sets of rights. However, the Declaration's historical moment, in which all three elements of citizenship discussed by Marshall acquired equal recognition, was not long-lasting. The covenants that were articulated to translate the UDHR into the binding language of international treaties split the rights into two different types, leading to the birth, in 1966, of two separate treaties: the International Covenant on Civil and Political Rights ('ICCPR')¹² and the International Covenant on Economic, Social and Cultural Rights ('ICESCR').¹³ This division stemmed

⁶ UDHR Arts 22–6.

⁷ UDHR Art 22.

⁸ UDHR Art 28.

⁹ TH Marshall, *Citizenship and Social Class* (New York, Doubleday, 1964) 8. Marshall associated different institutions with the different types of rights: courts of justice with civil rights, parliament and councils of local government with political rights, and the educational system and social services with social rights.

¹⁰ *Ibid* 17. While Marshall's account is a sociological one developed in the British context, the status accorded to social rights within the UDHR attests to the fact that the process he described is not limited to the British context.

¹¹ *Ibid* 10.

¹² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹³ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. On the background to the covenant, see: M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, Oxford University Press, 1995) 16–22; K Arambulo,

from controversy over the nature of social rights, which had already arisen at the time of the drafting of the UDHR itself. While agreement was reached to include social rights in the 1948 Declaration, during the years that followed the controversy re-emerged, with the Communist states giving preference to social rights and the United States objecting to any legally-binding status to these rights.¹⁴ The 1966 split was not merely symbolic. The civil and political rights treaty established an international supervision mechanism within the United Nations system that is more developed than the mechanisms created under the social and economic rights treaty. Additionally, the ICCPR imposed on states an immediate duty of implementation, whereas the ICESCR determined that they created a duty upon the state to take steps, to the maximum of their available resources, with a view to achieving progressively the full realisation of these rights.¹⁵ The disparity between the statuses of the different rights was manifested not only in the international treaties. For many years, the major international human rights non-governmental organisations, as well as the United Nations human rights system itself,¹⁶ focused on civil and political rights and ignored social rights. Moreover, the constitutions of many countries accorded social rights secondary, if any, status. Thus, notwithstanding their equal position in the UDHR, social rights have been relegated to a secondary status in both international law and the national laws of many countries. Often, they are regarded with considerable suspicion and as problematic to implement as full legal rights.

Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects (Antwerpen, Intersentia, 1999) 15–23.

¹⁴ The consensus to include social rights in the UDHR was, to a large extent, due to Eleanor Roosevelt's success in persuading the reluctant US State Department. On the inclusion of social rights in the UDHR and the accompanying controversies, see: MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York, Random House, 2001) 42–3, 115–17, 155–60, 185–90; J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, University of Pennsylvania Press, 1999) 157–238.

¹⁵ Art 2(1). For an influential document on the implementation of the Covenant, which resulted from a meeting of experts under the auspices of the International Commission of Jurists, see *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN.4/1987/17 (annex, reprinted in (1987) 9 *Human Rights Quarterly* 122). See also 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691 (a document emanating from a meeting of experts convened on the tenth anniversary of the Limburg Principles); and the General Comment adopted by the United Nations Committee on Economic, Social and Cultural Rights, CESCR General Comment 3 on The Nature of State Parties Obligations, Doc E/1991/23 (1990). For a discussion, see Craven, n 13 above, at 106–52.

¹⁶ On the developments leading to the establishment of the Committee on Economic, Social and Cultural Rights within the United Nations (which, unlike the Human Rights Committee established by the ICCPR, was not established by the Covenant itself but only later) and on the operation of the Committee, see Craven, n 13 above, 30–105 and Arambulo, n 13 above, 23–49.

This situation has led to criticism that the civil rights concept associated with Western liberal democracies ignores the harsh social distress typically experienced by much of the world's population, whose lack of access to housing, food, health care and other material living conditions is no less detrimental than violations of rights such as freedom of speech or religion. The international human rights discourse has, to some extent, internalised this criticism, and today there is widespread understanding that social rights are just as important as civil and political rights and often a necessary precondition to the fulfilment of the latter. Since the 1990s, the idea of the interdependence and indivisibility of the different kinds of rights has gained broad recognition.¹⁷ The Declaration adopted by the 1993 second World Congress on Human Rights in Vienna referred to the covenants and the two sets of rights as 'universal, indivisible, and interdependent and interrelated'.¹⁸ This, however, has not meant the end to the controversy over social rights, with many continuing to maintain that they relate to issues of resource allocation, which should not be conceived of in terms of rights. According to those opposing recognition of social rights, binding legal norms should not be set with respect to the allocation of state resources in areas such as education, housing and health, as these are economic policy issues that should not be decided by the judiciary. On the other hand, advocates of social rights argue that the implementation of civil and political rights also entails questions of policy and resource allocation, and hence there is no fundamental difference between the different kinds of rights. An oft-cited example is the right to due process, which, in practice, requires the state to allocate resources for the establishment and operation of the judicial system. The obvious question is: How does this differ from the requirement that states allocate resources

¹⁷ For criticisms of the division of rights into two supposedly distinct sets that instead suggest an integrative approach, see, eg: C Scott, 'Toward the Institutional Integration of the Core Human Rights Treaties' in I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (Philadelphia, University of Pennsylvania Press, 2001) 7–38; C Puta-Chekwe and N Flood, 'From Division to Integration: Economic, Social and Cultural Rights as Basic Human Rights' in I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (Philadelphia, University of Pennsylvania Press, 2001) 39–51; D Otto, 'Defending Women's Economic and Social Rights: Some Thoughts on Indivisibility and a New Standard of Equality' in I Merali and V Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (Philadelphia, University of Pennsylvania Press, 2001) 52–67. For a jurisprudential analysis that rejects the idea of an analytical distinction between the two kinds of rights while accepting some structural differences that affect their enforceability but not their status or importance as rights, see R Gavison, 'On the Relationship between Civil and Political Rights and Social and Economic Rights' in JM Coicaud, Michael Doyle and Anne-Marie Gardner (eds), *The Globalization of Human Rights* (New York, United Nations University Press, 2003) 23. For further perspectives on the relationship between the different sets of rights, see A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* 2nd revised ed (Dordrecht, Martinus Nijhoff, 2001) 3–130.

¹⁸ Vienna Declaration and Programme of Action (adopted 25 June 1993 by World Congress on Human Rights) para 5.

for the establishment and operation of medical services necessary for the realisation of the right to health?¹⁹

From the debate over the nature and scope of social rights it emerges that distribution and resource allocation issues are not unique to this category of rights and are, in fact, integral to any discussion of rights, including civil and political rights. For example, effective protection of the right to freedom of speech entails not only preventing the state from silencing people through censorship, but also state action fostering people's ability to express opinions. This may take the form of allocation of police resources to protect demonstrators, the maintenance of public media channels, and other measures necessary to guarantee the right. Indeed, in his essay, TH Marshall pointed to the fact that the right to freedom of speech has little substance if, due to a lack of education, people have nothing to say that is worth saying and no means of making themselves heard even if they say it. According to Marshall, these blatant inequalities are not due to flaws in civil rights, but to the absence of social rights.²⁰ While we agree with Marshall's observation that the right to freedom of speech is abstract and meaningless in the absence of background material conditions, we do not think that these conditions must be addressed only in the context of social rights. Rather, there is a need to think about questions of distribution in regard to all rights and to the lack of a fundamental difference between the various types of rights.

Thus, despite the seemingly renewed consensus regarding the interdependence of rights, the debate over the similarities and differences between the two sets of rights,²¹ and the frequent relegation of social rights to a second-class status, persist. It has been argued forcefully that social rights have been systematically neglected and that, notwithstanding their recognition in the UDHR and the ICESCR, they have been more honoured in their breach than in their observance.²² The disparity between the two sets of rights at both the international and national levels has led scholars to call for a 'reclaiming' of social rights.²³ Hence, at the beginning of the twenty-first century, scholars are still finding it necessary to argue for and justify a constitutional status for social rights,²⁴ hardly a necessity with

¹⁹ For a discussion of the way in which governmental protection of all rights entails funding, see S Holmes and CR Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, WW Norton and Co, 1999).

²⁰ *Ibid* 21.

²¹ For an overview of this debate, see H Steiner and P Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford, Oxford University Press, 2000) 237–320.

²² D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford, Oxford University Press, 2007).

²³ P Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (Aldershot, Ashgate, 1996).

²⁴ See, eg, C Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford, Oxford University Press, 2000) (arguing for constitutional protection of social rights, but maintaining distinctions between civil and social rights that we believe should be questioned).

respect to civil and political rights. Some scholars attribute this state of affairs to the lack of a developed normative justification for socio-economic rights and seek to provide one.²⁵ While providing normative justification on the philosophical and jurisprudential level is important, we believe that it is an ideological bias that lies at the heart of the distinction between the two sets of rights and, accordingly, affects their differing statuses. The Lockean idea of rights as merely limiting the power of the state to act reinforces the notion that social welfare is a supposedly unique sphere insofar as it involves matters of policy and distribution that belong outside the sphere of rights and judicial enforcement.²⁶ This bias persists despite the fact that, as mentioned above, the enforcement of civil rights in practice requires positive government action, as well as allocation of resources. All rights, then, have a dimension that entails that the state would refrain from acting and a dimension requiring active state participation for their realisation. The right to health requires that the government would not prevent us from receiving medical care or force medical treatment upon us, but, at the same time, requires that it would act to ensure our access to health care. Similarly, the right to freedom of speech mandates that the state would not use censorship to prevent us from expressing our opinions but, at the same time, requires it to act to ensure our access to effective freedom of speech. Thus, we can see how drawing an artificial line between rights results in more than relegating so-called social rights to the margins of the human rights discourse. Indeed, it also denies the presence of any distributional dimension in the application of the so-called civil rights. Claiming social rights to be unique in addressing resource issues conveys the message that questions of accessibility and distribution are not relevant to civil rights and that limiting government censorial power is all that is needed to protect freedom of speech. In other words, questions of distribution are excluded from the rights discourse twice over: by both the exclusion of social rights and the exclusion of distribution concerns from the realm of civil rights.

Thus, although this book focuses on social rights and uses the terminology that appears in the UDHR and is anchored in the ICESCR, we query the division of rights into separate categories and take the position that *all* human rights are ‘social’ by nature. This is based on the contention that no rights have any meaning outside the social context and that we

²⁵ Bilchitz, n 22 above (arguing for a general philosophical theory of fundamental rights that serves as the foundation for both civil and political rights and social and economic rights).

²⁶ For a discussion of the ways in which the traditional liberal Lockean understanding of rights as individualistic, negative claims against government underlies the argument that social rights are not judicially enforceable, see J Woods, ‘Justiciable Social Rights as a Critique of the Liberal Paradigm’ (2003) 39 *Texas International Law Journal* 763.

must consider the distributive context of all rights.²⁷ We maintain that the separation and division between the different sets of rights should be rejected²⁸ and that all rights are social.²⁹

Based on this understanding, we could reach the conclusion that, contrary to the prevailing discourse, which expresses embarrassment at the question of the state's duties in relation to social rights and queries 'social rights' as lacking any clear content, the state's obligations vis-à-vis social rights are in fact far less ambiguous than its duties in the context of civil rights. Returning to the comparison between the right to health and the right to free speech, whereas an accessible public health care system may satisfy many of the requirements of the right to health, it is less apparent what would satisfy the requirements of the right to freedom of speech, when understood as not limited to its 'negative' aspect and entailing also guaranteed access to freedom of speech. Is the state obliged to maintain an accessible public media system? What is the meaning of accessibility in this context? Is it access to all opinions or to all individuals? These are complex questions that, currently, are far more unanswerable than the questions considered in the context of the right to health.

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Against this background, *Exploring Social Rights* engages in a discussion of social rights and examines their implementation, while challenging their classification as a separate category of rights. **Part I** of the book considers theoretical aspects of social rights and their place within political and legal theory and within the human rights tradition. **Part II** inquires into the status of social rights in international law and in the European human rights system, while **Part III** examines various national legal systems of particular interest in this area (India, South Africa, Canada and Israel). **Part IV** analyses the content of central social rights (education, health and work), and **Part V** concludes with a deliberation over the relevance of social rights to distinct social groups (people with disabilities and women). The various chapters in the book echo the concerns outlined above over the division between the two sets of rights, and articulate additional ones.

In the opening chapter of **Part I**, 'The Constitution, Social Rights and Liberal Political Justification', Frank Michelman attempts to define the

²⁷ On the need to give social rights a 'social' dimension, see D Davis, P Macklem and G Mundlak, 'Social Rights, Social Citizenship and Transformative Constitutionalism: A Comparative Assessment' in J Conaghan, R Michael Fischl and K Klare (eds), *Labour Law in an Era of Globalization* (Oxford, Oxford University Press, 2002) 511.

²⁸ Even scholars who argue for constitutional protection of social rights tend to concede that there are conceptual differences between civil and social rights: see, eg, Fabre, n 24 above.

²⁹ While this discussion questions the classification of the rights outlined in the UDHR into categories, at the very best, we find 'welfare rights' the more appropriate term to describe the rights set forth in Articles 22–8.

limits of the debate surrounding the constitutionalisation of social rights. Michelman dismisses the standard opposition to this process, which is based on the fear of expanding judicial power. He argues that the fact that social rights entail budgetary expenses or call for government action and not mere forbearance does not differentiate them radically from the constitutionally protected rights to property, to equality before the law and to so-called negative liberties. At the same time, Michelman points to other concerns: first, that adding social rights to the constitution would unduly constrict democracy and, second, that constitutionalising social rights would undermine the constitution's crucial function of legitimising the coercive political and legal orders. He then explains that the first concern can be dealt with in the framework of the formulation of the constitutional social rights and the second concern reflects a specific conception of democracy, which is not the only possible one.

Whereas the first chapter considers the place of social rights within constitutional orders, the two chapters that follow examine the place of social rights in the global context, looking at their role in postcolonial relations. Upendra Baxi's 'Failed Decolonisation and the Future of Social Rights: Some Preliminary Reflections' discusses the second-rate status assigned to social rights in contemporary legal discourse in the context of globalisation and postcolonialism. He presents the traditional arguments raised to support the preference given to so-called civil and political rights, which loom large over social concerns. This tradition, Baxi explains, is anchored in a Hobbesian conception of rights as a means of protection against an over-powering sovereign. He argues that, in the global economy, where multinational corporations have gained awesome powers, this conception has been employed as an active interpretive force to legitimise a global regime in which citizens of the Global South have become practically 'rightless'. In this respect, Baxi continues the line of argument that questions and, in fact, rejects the analytical separation of the two sets of rights and embraces the claim that the distinction between negative and positive rights is misleading since both make substantial claims on state and community resources. Baxi attributes this artificial distinction to the liberal tradition that focuses on rights as constraints on state power and examines the ways in which this division has, in itself, detrimental effects on disempowered populations. The mere expression 'social rights', maintains Baxi, is tautologous, as all human rights make little sense outside human societal frameworks. 'Rights,' he argues, 'are thus *social* or not *at all*'. Accordingly, Baxi proposes historicising the rights discourse in a way that will enable new consideration of the continued legal and ethical responsibilities of the Global North towards subalterns in postcolonial societies. The legacies of colonialism and anti-colonial struggles, as well as the realities of the current global political arena, make this programme an immensely difficult task.

The limits of decolonisation and the status of social rights in the post-colony are further explored by Lucie White in “‘If You Don’t Pay, You Die’: On Death and Desire in the Post-Colony”. White considers the role of ‘structural adjustment’ as imposing upon states various socio-economic policies in a way that is detrimental to the local population. Drawing on her experience working with American and West-African law students active in the area of health rights in poverty-stricken Africa, White reflects on the limits of liberalism and the human rights discourse. She discusses the ways in which she and her students felt both drawn to what they came to call a ‘human rights campaign’ and deeply ambivalent about their flirtation with that phrase. Her chapter poses the question of whether human rights can be used in the poor Third World in ways that stretch, and even subvert, liberalism’s categorical and, therefore, ultimately conservative notions of justice. The limits of the human rights discourse are illustrated in her suggestion that:

To voice injustice as a violation of a ‘human right,’ one buys into a static, atomised notion of the human subject as taking form *before* the law, and outside its constitutive influence.

The hopes embodied in human rights cannot obscure the dangers of this discourse, which will, in White’s words, ‘train them to think of themselves as good, liberal, rights-consuming subjects as they watch their children die’.

The role of rights in our global world is further explored by the chapters in **Part II**, which examine how social rights play out in the context of the international human rights legal discourse.

Yuval Shany’s ‘Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights’ considers the status of social and economic rights in international law. Shany challenges the argument that social rights are not justiciable, by exploring the evolution of available judicial enforcement mechanisms in this area. Addressing the claim that judicial review of social rights involves redistributive decisions that should not be made by the judiciary, Shany highlights the redistributive characteristics of civil and political rights, especially given the emergence of the notion of these rights as entailing positive obligations. The chapter concludes with several guidelines for enforcing social rights. By pointing to the justiciability, enforceability and redistributive effects of social rights, as well as the fact that all rights imply ‘positive’ duties for states, Shany reinforces the need to question the very separation of the different sets of rights. Acknowledging the open-ended language of the ICESCR, he concludes that the obligations imposed by the Treaty have been significantly concretised by the UN Committee on Economic, Social and Cultural Rights. Shany points to the European Social Charter’s review mechanism and to national experience, primarily from South Africa, as

proof that social rights, like their civil and political counterparts, are enforceable rights and not mere political aspirations.

The international sphere is also considered by Kerry Rittich in ‘Social Rights and Social Policy: Transformations on the International Landscape’. Arguing that ‘[t]he social is already here’, Rittich explores the state of social rights in the contemporary globalised political order. Diverse international organisations such as the International Labour Organization, the Organization for Economic Cooperation and Development, the World Bank, and the World Trade Organization have all purported to have given the highest level of priority to the eradication of poverty. Indeed, social rights have thoroughly permeated the language of human rights in the global sphere. However, on the basis of her survey and analysis of the history of this development, Rittich argues that social rights, even if they have gained recognition as part of the human rights discourse, have been reduced to the most minimal of claims. So, while Shany argues that social rights are justiciable legal rights and not mere aspiration, Rittich shows that, within the current discourse of legal and institutional reform, social rights are barely considered even policy concerns but, rather, met with scepticism. She argues that the combination of elite consensus against universal social entitlements, the erosion of political support for wider redistribution, and the emergence of competitors who have either never recognised extensive social rights or are now prepared to trade them off to attract investment has, in many places, undercut efforts to rescue the foundations of social rights and better calibrate them to the changed social and economic circumstances. Rittich examines the shifts in labour policy and the dominance of the market approach, whereby social protection has transformed into risk management on the individual or household level. She thus identifies a process in which social citizenship is challenged by a world organised to extract the benefits of economic incentives and market forces, where the primary way in which citizens achieve social inclusion and affiliation to the polity is through participation in market activities such as consumption and labour market work.

Eva Brems moves from the global to the regional level in her chapter ‘Indirect Protection of Social Rights by the European Court of Human Rights’. Her analysis demonstrates that the European Court uses several techniques to protect social rights, even though the European Convention on Human Rights and its additional protocols do not include these rights (a few exceptions notwithstanding) and the European Social Charter, which does protect certain social rights, is not within the Court’s jurisdiction. The chapter distinguishes between three such techniques—interpretation, procedural protection and non-discrimination—and then shows how a court working within the classic paradigm of civil and political rights can nonetheless offer some protection to social rights. This is attributed to the fact that the European Court of Human Rights has

long held that civil and political rights entail positive obligations. Through its protection of these rights, the Court has, in fact, in many cases, extended protection to social rights. Brems' analysis illustrates the indivisibility of civil and social rights: often the protection of civil rights such as the right to life entails protection of social rights. However, despite this fact, the Court does limit the extent of its intervention. Thus, while it has held that the right to life also obliges the state to take appropriate steps to safeguard the lives of those within its jurisdiction, the Court refuses to order the funding of necessary medical treatment under either this right or the right to private and family life. It therefore refrained from intervening in issues of access to vital medicines and equipment for the severely disabled essential for their daily functioning. Brems notes, however, that, while the Court refused to intervene in such matters, it did order payment for a gender reassignment operation. This striking inconsistency can be explained, she argues, by, *inter alia*, the Court's tendency to attach increased importance to issues such as gender identity, which it treats more gravely than physical health and the ability to function independently. The fact that funding for the former is considered a core right but not for the latter illustrates how, despite its explicit recognition of rights as entailing positive obligations, the European Court nonetheless reinforces the distinction between matters pertaining to identity and matters pertaining to material conditions of living, thereby entrenching the arbitrary division between the two sets of rights.

Shifting the focus to the protection of social rights within national contexts, **Part III** examines a few countries of particular interest in this regard.

The first chapter in this Part is Jayna Kothari's 'Social Rights Litigation in India: Developments of the Last Decade'. The Indian Constitution does not include social rights as justiciable fundamental rights, but only as directive principles for state policy. Thus, similar to the European context described in the preceding chapter, social rights enjoy only indirect protection derived from other, explicitly protected rights. But in contrast to the European context, the Indian judiciary has shown a marked tendency to take the principle of the interdependence of human rights seriously and to interpret entrenched constitutional guarantees of the fundamental rights in light of the directive principles, in a way that offers expanded protection to social rights. Kothari demonstrates, however, that although the Indian Supreme Court has developed new rights, it has also been ambivalent *vis-à-vis* well-entrenched socio-economic rights such as the right to housing. The Court had pronounced that this right is part of the right to life as early as 1986, but has since retreated from this position. The chapter focuses on the role of litigation as a strategy for promoting and protecting social rights, mainly in the framework of housing, food and education cases, and sheds light on what has been achieved through social

rights litigation and on the potential and limits of this strategy. The success of such litigation is shown to be contingent on external factors as well: social campaigns, research and political will. The chapter thus identifies the ways in which social rights can serve up concrete results in specific cases, as enforceable rights, no less than civil and political rights, but at the same time shows that winning the case in court is not the end of the story, but only one stage on the way to enforcement.

Unlike in India, where the judiciary needed to take an active role in transforming social rights into justiciable ones, in South Africa, discussed by Dennis Davis in 'Socio-Economic Rights: The Promise and Limitation—The South African Experience', the post-apartheid Constitution explicitly includes justiciable social rights. Davis analyses the history of the South African Constitution in the area of social rights and evaluates the fulfilment of the promise of social rights in the South African context. Given the broad explicit recognition of social rights in the Constitution, the South African court judgments regarding these rights have attracted particular attention worldwide. Indeed, South African constitutional law is viewed by many as a test-case or laboratory for the enforcement of constitutional social rights. But as Davis argues, since the Constitution's approval in 1996, tension has arisen between its transformative vision and the macro-economic policy adopted by the South African government, which gives preference to economic growth over social reconstruction as its key objective. It is against this background that Davis analyses the South African Constitutional Court judgments on social rights. These judgments focus on the question of the reasonableness of measures taken by the government rather than on core state obligations. Davis maintains that the Court has failed to outline the contents of the rights in question and has deferred to the political autonomy of the legislature and executive. In his words, the Court has developed a minimalist framework within which to apply social rights by allowing the state the possibility of a full defence against enforcement on grounds of limited availability of resources, except in the context of the development of programmes dealing with the community's poorest. The scope and range of the social rights are left undefined and, to date, the Court has opted to sidestep any adjudication of unqualified socio-economic rights. Davis believes that the South African experience serves as evidence that political organisation remains the primary means of securing different forms of distributional decisions for society's most vulnerable. He further asserts that, even when armed with a progressive text, judges tend to retreat to models of adjudication based on earlier traditions of legal practice, which reduce the potential of the constitutional change. His chapter points to both the achievements and limitations of social rights and reminds us that outcomes in these matters depend less on the recognition of social rights per se and more on the content and interpretation they are given.

Whereas in South Africa social rights are constitutionally entrenched but not de facto enjoyed by many of the poor, in Canada social rights are not part of the Constitution but are also not totally foreign to the legal discourse. In ‘Social Rights in Canada’, Patrick Macklem focuses on the implementation of rights enshrined in the ICESCR in a country whose Charter of Rights³⁰ is restricted to civil and political rights. According to Macklem, the domestic implementation of the Convention in Canada occurs on two planes. On the political plane, the legislative and executive branches of government exercise constitutional authority to establish and administer social policy programmes that protect interests typically associated with international social rights. On the juridical plane, domestic implementation is effected through interpretation. The chapter examines these two spheres of implementation and discusses the judicial choices made in this context. Macklem shows how the judiciary has shied away from explicitly relying on Canada’s international obligations under the ICESCR when interpreting the Charter and how the constitutional significance that the judiciary has attached to interests relating to work, social security and health derives more from the limits that the Charter imposes on state action than from the obligations it imposes on the government to promote individual and social well-being. These choices shape, and are shaped by, developments in the political sphere in ways that minimise the domestic significance of Canada’s international obligations in this area. Macklem’s chapter draws attention to the fact that any examination of the status of social rights should include careful consideration of the actions taken by the different branches of government and the complex relations between the political and juridical fields. His observations about the way the Canadian courts have addressed the issue highlight the persistence of the liberal model of rights as limitations on government action and the hurdles this model places for social rights.

In ‘Social Citizenship: The Neglected Aspect of Israeli Constitutional Law’, Daphne Barak-Erez and Aeyal Gross examine the weak status accorded to social rights in Israeli constitutional law. Although social rights are not specifically recognised in the basic laws on human rights enacted in 1992,³¹ the Israeli Supreme Court has extended them protection, albeit very limited, within the parameters of the general right to human dignity, in the form of a minimal protection associated with avoiding humiliation. However, the chapter points to the fact that, whilst the Court has been willing to read non-enumerated civil rights in their full into the right to human dignity, it has refused to do so when it comes to social rights, beyond the model of minimal protection. Thus, the Court’s interpretation has re-erected the artificial divide between civil and social

³⁰ Canadian Charter of Rights and Freedoms.

³¹ Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty.

rights. The chapter criticises this partial protection of social rights and exposes its weaknesses, especially against the background of the dwindling welfare state. The Israeli rights discourse seems, for the most part, to reinforce the government's neo-liberal policies rather than protect welfare entitlements.

Shifting the focus from national perspectives to a discussion of specific rights, **Part IV** addresses the protection of a select number of social rights and evaluates international and national experiences with their implementation.

In 'The Many Faces of the Right to Education', Yoram Rabin distinguishes between the different components of this right: the right to receive education, the right to choose education, the right to equal education, and the different aspects of compulsory education. He examines the justifications for protecting the right to education and the kind of protection it should receive and considers the balance that should be struck in protecting the right vis-à-vis the different possible sources of its infringement: the state, the social community (usually a minority group) and the family (mainly the parents).

In 'The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives', Aeyal Gross examines the right to receive health care and the scope of that right. He considers the extent to which the right to health is protected as a human right, focusing on questions of accessibility and equal distribution as manifested in the scope of the health services provided to eligible recipients and the conditions in which these services are provided. The chapter probes into the tension between the view that treats health 'seriously' as a right and the view that rejects health as a right and, in practice, is increasingly turning health into a commodity. Addressing both the potential and the risks of the 'health and human rights movement', Gross considers whether rights discourse can be a vehicle for more egalitarian access to health care. He illustrates the very real risks of inserting rights analysis into a system of mutual dependency and limited resources and shows that this analysis can actually serve to bolster those already in possession of greater resources. Yet at the same time, commitment to the idea of equal accessibility can turn rights analysis into a tool for reducing existing inequalities. In an era when public health systems are being privatised, the idea of (private) rights may reinforce the commodification of health entailed by this privatisation or, in fact, do the opposite, by reinserting public rights law and public values into the equation.

In 'The Right to Work—The Value of Work', Guy Mundlak examines the different aspects of this right as a social right. Differentiating the right to work from the right to employment and from the duty to work, Mundlak identifies the values underlying the right to work and focuses on the arguments made against its recognition, which sidestep the general

arguments for and against social rights. He also examines the risks entailed in turning to rights discourse within the capitalist framework with its income-based disparities, reflecting on the critique that presents the right to work as the right to be exploited. Mundlak considers equality issues in the implementation of the right to work, mainly relating to age and gender, and evaluates the assertion that the right to work is in fact tantamount to the right to a basic income.

Part V sheds light on the different meanings and significances social rights bear for different groups, especially those that historically have suffered from discrimination and social vulnerability.

Neta Ziv's chapter, 'The Social Rights of People with Disabilities: Reconciling Care and Justice', reflects on the struggle of the disabled by using the ethics of care critique of the individual rights-based liberal model. Ziv describes a shift within the disabilities movement from a welfare approach to a liberal-oriented rights approach. She shows the growing role of the rights approach at both the domestic and global levels, pointing to the ways in which the recourse to rights in disability advocacy has promoted a position that underscores choice, autonomy and self-assertion. This stance has been criticised from an alternative standpoint that values care, interdependence and support, which are critical in the lives of the disabled. The chapter queries whether the concept of social rights can accommodate these crucial values: after infusing the rights notion into the world of disabilities in order to move from the welfare model to the autonomy model, the limits and risks of the rights approach itself must now be reckoned with.

Finally, in 'Social Rights as Women's Rights', Daphne Barak-Erez examines the issue of social rights from a feminist perspective. Barak-Erez notes the special importance of social rights for women, who are usually the primary care-providers in their families and who are not fully integrated into the labour market. The chapter reflects on the different needs of women in developed and developing countries, including potential tensions that can arise between women from different social classes.

* * *

Read together, the chapters in this book share a commitment to expanding human welfare and reducing socio-economic inequalities. Attracted by the normative and rhetoric power of the rights discourse, they all engage with the idea of social rights, but are simultaneously aware of its limitations, especially in respect to issues of social interdependency. Thus, while none of the chapters shies away from the notion of social rights, they all seek to further understand how the 'social' can be injected into the liberal individual-centred discourse of rights. Much of the discussion in the book reflects on the risk that rights analysis in areas pertaining to the material conditions of living will always be limited to minimal 'tip of the iceberg'

cases³² and may thus obscure the need for broader programmes to address substantial inequalities. A clear picture emerges of how, sixty years after the issuance of the UDHR, social rights, on the one hand, enjoy greater than ever recognition as part and parcel of the human rights tradition, but yet, on the other hand, are often reduced to a minimal concept that cannot seriously contend with current needs, especially given the crisis faced by the modern welfare state. In light of the growing recognition of the positive obligations entailed by civil and political rights, the chapters in this book call into question the distinction between the different types of rights and invite an inquiry into the ideology underlying this division. It is our hope that this book will contribute to the exploration of the hopes and risks entailed in implementing the aspiration embodied in the UDHR to infuse matters of welfare and material existence into the rights paradigm.

³² On human rights as tending to deal with only the ‘tip of the iceberg’, see D Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2004) 32.