

Book Review

Katharine Young, ed., *The Future of Economic and Social Rights*, Cambridge, England: Cambridge University Press, 2019, pp. 524, \$175 (hardcover).

Reviewed by Margaret Y.K. Woo

In March 2019, reeling from news of two fatal crashes, countries around the world grounded the Boeing 737 MAX. The United States, however, was a notable holdout. In refusing to act, the United States maintained that relevant authorities “had not provided data” that would warrant action.¹ In other words, until there is evidence of error, there is no reason to ground Boeing planes. Other countries, meanwhile, were of the contrary view that until there is evidence of no error, the prudent course is to ground Boeing planes. Do these differing responses reflect divergent views of safety? Is the U.S. response more attributable to the dominance of free market ideology in our country? Equally likely, we may be seeing a fundamental difference in views toward governmental obligation. The United States may be the outlier, embracing the traditional view that individual rights, including constitutional rights, are “negative rights” to be held against governmental infringement rather than positive rights to be enforced by affirmative government action. It is a view for a limited and restricted government and a preference for political and civil rights, rather than social and economic rights.

Yet widening income gaps are growing globally along with the call for greater economic and social rights. And so, what is the future for economic and social rights and their ability to secure fundamental resources necessary for development and well-being? Challenges to social and economic rights have been prolific. One argument is that “positive” rights place costs on the state that “negative rights” do not. Critics point out that while negative rights require withdrawal of government action, positive rights require costly government enforcement. Furthermore, judicial enforcement of social and economic rights is said to be antidemocratic in subverting majoritarian policy decision by judicial fiat. A third challenge points out that assertions of social and economic rights in lieu of more radical distributive equality

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1. US refuses to ground Boeing 737 Max crash aircraft, BBC News, Mar. 13, 2019 <https://www.bbc.com/news/business-47548083>.

tend to benefit “middle-income” groups rather than the poorest and most marginalized, and ignore underlying structural conditions. So, how could we meet these critiques and set the groundwork for future development of social and economic rights, with the promise of bringing along even such reluctant governments as the United States?

Katharine Young’s timely edited volume, *The Future of Economic and Social Rights*, sets us on the right path. In this “thoroughly researched and highly illuminating collection of articles” (as quoted from Amartya Sen’s introduction to the volume), Young’s authors, as a group, have composed one of the more comprehensive volumes on human rights in recent years. *The Future of Economic and Social Rights* presents both theoretical as well as practical solutions, documents past as well as future challenges, and, in broadening the lens to social and economic rights, links them to trade and development conditions and to the importance of democracy itself.

The Future of Economic and Social Rights adds to the rights debate in a number of ways. Predictably, this collection begins with several chapters examining the social and economic rights discourse and the demands of social justice. As such, these chapters trace the experiences of countries enshrining economic and social rights with constitutional protection in such diverse locales as South Africa, India, and Canada. The conclusion is that about two-thirds of the 200 constitutional texts today have enshrined social and economic rights, with civil law traditions and former communist countries taking the lead. More interestingly, the volume proceeds to also focus on the question of the justiciability of social and economic rights and the use of adjudication to enforce these rights.

Certainly, Young’s volume is not the first to examine the judicialization of social and economic rights (“SER”) or how rights discourse is filtered and reframed to local cultural context. For example, in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Helena Alviar Garcia, Karl Klare, and Lucy Williams gathered together a group of scholars to explore how SER are enshrined and enforced in constitutions in the “Global South.” Similarly, Sally Engle Merry, in her comparative study *Human Rights and Gender Violence: Translating International Law into Local Justice*, traced how human rights discourse is translated and adapted into the local context in China, India, and the United States. But Young’s collection picks up where these others left off.

Among the most interesting sections in this volume is the one specifically addressing the long-standing challenge to the judicialization of social and economic rights as antidemocratic. This challenge parallels the challenge to expansive judicial powers generally, but has greater force in the economic and social rights context. The critique maintains that social and economic rights invite a greater form of judicial review that can circumvent the elected branches on issues of unresolvable disagreement. These critics also point out that judicial remedies in the social and economic rights context often require affirmative government obligations that are resource-intensive and

polycentric. Judicial remedies in the face of legislative inaction then are said to be problematic as costly, antimajoritarian and undemocratic.

Young's authors turn to the process of adjudication itself to argue that the use of the courts may be "mutually constitutive of democracy" itself. They address the oft-cited argument against economic and social rights litigation by noting evidence of new and democratically responsive juridical trends, and new modes of review that incorporate and encourage greater participation than even the legislative process. Rather than judicial fiat, social and economic rights litigation is serving as a platform for a deliberative process that is the basis of democratic decision-making.

To start, for example, in "Courts *and* Economic and Social Rights/Courts *as* Economic and Social Rights," Judith Resnik points out that rather than simply a medium of enforcement of social and economic rights, access to courts itself is a social and economic right necessary to the preservation of democracy itself. She writes, "[i]f courts make true on their obligations to accord dignified and equal treatment to all disputants and do so in public, courts may be one venue in which to garner popular support for the continuation of democratic sovereignties, struggling as 'aspiring states' to fulfill commitments to equality" (Resnik, p. 261-62). Furthermore, as documented by Rodriguez-Garavito on India (Garavito, pp. 233-58) and Roberto Gargarella on Latin America (Gargarella, p. 212-33), the adjudicatory process itself has resulted in designing remedies that institute public hearings, meaningful negotiations, and other forms of deliberation that are more participatory than otherwise have been possible.

Indeed, these chapters document how some courts in the name of social and economic rights scrutinize the participatory processes of decision-making and the rationality of budgetary decision-making to ensure that the needs of the most vulnerable have been heard and that less restrictive alternatives have been considered. In other words, in the context of economic and social rights litigation, the trend has been to enforce democratic processes and to ensure proper participation and consideration of all the facts in the decision-making. As such, enforceable economic and social rights have the potential to be not only "mutually constitutive" of democracy, but emblematic of democracy itself.

Looking beyond courts, Young's authors also examine how new mechanisms of accountability have developed, either as human rights institutions or specialized administrative commissions or legislative committees providing oversight alongside or apart from "courts." These "accountability" mechanisms can be sometimes found at the subnational local level, even if the national supra state (including in the United States) is unsupportive of social and economic rights. We are reminded, then, of the need to disaggregate the nation state and to look for pockets of resistance and success wherever they may be found.

In looking to the future, Young's authors urge conceiving of social and economic rights as more than a "line item" goal with zero-sum gains. Rather,

they embrace a more holistic view of these rights as interconnected, with “acceptable” baselines, and with “universal” rather than “targeted” measures. The argument is that the “line item” method and a “zero-sum” game approach has meant a replication of the inequality that exists generally, with the middle class benefiting from its greater ability to tackle single-minded goals. And so, Young’s authors argue for a fuller sense of how each right is realized in balance with other guarantees, how these rights are often indivisible and independent from each other, and how they require both affirmative government action as well as negative restraint. But here is where the authors differ. While Philip Alston engages with his proposal for a Universal Basic Income (Alston, p. 377), a series of chapters takes a comparative look to see how countries utilize different benchmarks, with adequacy sometimes more successful than exposing “equality” concerns.

Finally, the volume brings back the importance of markets and the state, recognition of the pressure upon the state in its regulation of markets, and meaningful appreciation for how rights-based review cannot neglect study of how domestic revenues are mobilized, by trade tariffs, taxation, and other international sources of support (under Olivier De Schutter’s extensive analysis). Concerns about sustainability and other limits on growth when grappling with the earth’s changing climate are also brought to the fore. Jeremy Perelman explores the intersection of rights with practices of economic globalization and development with his terminology of a “rights-ification” of development. (Perelman, pp. 434-70).

In sum, this is a rich volume, and one that will serve as an enduring handbook for years to come.