

Reclaiming Social Rights: International and Comparative Perspectives

By Paul Hunt

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Despite the prodigious scholarly efforts of some of my former colleagues at Otago University, "rights talk" continues to dominate legal and political agendas worldwide. Indeed, at the international level, human rights scholars are making a strong effort to broaden and deepen the rights agenda. Social and economic rights — traditionally the poor cousins of civil and political rights — have been the subject of several major texts over the past few years. One of the most recent of these is *Reclaiming Social Rights: International and Comparative Perspectives*, by New Zealand law lecturer Paul Hunt.¹

The term social rights refers to the recognition of an individual or community's entitlement to "rights" such as health care, food, clothing, housing and education. Despite their recognition in the 1948 United Nations *Universal Declaration on Human Rights*, social rights have received scant judicial protection and second-class treatment in most intentional treaties. With the exception of an influential philosophical defence of social and economic rights by American scholar Henry Shue in 1980, they have been essentially ignored by legal philosophers. They have been marginalized as "second-generation rights", equated by some Western political leaders as part and parcel of communist ideology, and undermined in jurisprudential debates as being too vague, aspirational and tied to state discretion to be legally enforceable. And yet, few would disagree that for the bulk of the world's population, the need for food, health care and other basic necessities is more immediate essential than a right to free speech.

Hunt teaches law at Waikato University, but has background of human rights activism and study in Africa and elsewhere. A committed proponent of social and economic rights, Hunt has written this book, as he notes in his introduction, "to make a practical and credible contribution to the promotion and protection of social rights". His book aims to accomplish this by using three kinds of argument and analysis — general arguments of theory and policy; specific analyses drawn from case studies of health and women's issues; and discussions of pragmatic issues, such as ways to encourage the formation of non-governmental organisations (NGOs) in this field.

Reclaiming Social Rights begins with a lengthy introduction to the background, history and international protection of economic and social rights. This part provides a good review for those initiated in economic and social rights and a thorough introduction to readers with little knowledge of the subject. In one of its more interesting sections, Hunt discusses the work of the eighteenth century

1 Other works include Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (London: Clarendon Press, 1995) and A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff Publishers, 1994).

writer Thomas Paine and Part Two of his *Rights of Man*, which advocated the introduction of social benefits such as maternity allowance and pensions, which he called “not charity but a right”. Hunt is perhaps a little too obvious in his attempt to find an equivalent to Locke, Mill or Rousseau to build a historical pedigree for economic and social rights. But even so, this evidence suggests that the idea of social rights has roots beyond the twentieth century growth of the welfare state and the rise and decline of socialism.

In his second chapter, comparing first and second-generation rights, Hunt marshals a range of arguments against the prevailing view that social rights do not merit the kind of judicial protection that courts have accorded civil and political rights. In response to the argument that a social right, unlike a civil right, is contingent on state spending, Hunt provides numerous examples of state expenditure on matters such as policing or the court system, essential for protecting civil and political rights. To answer critics who argue that the adjudication of social rights would take courts too far into the realm of politics, he points to the extent to which courts already get involved in making policy decisions. This chapter also contains a detailed and interesting account of the process by which the New Zealand government enacted the New Zealand Bill of Rights, but decided not to include social and economic rights, despite the final recommendations of the Justice and Law Reform Select Committee.

With these broad questions addressed, Hunt turns his attention to three case studies — the protection of women’s rights, the right to health care, and the role of the courts in India in protecting economic and social rights. In his chapter on women’s rights he explores the various rights protections available for women at the international level, and argues persuasively that social rights are particularly fundamental for women. His chapter on the right to health tackles issues that range from the work of the World Health Organization to New Zealand’s Health and Disability Commissioner Act. Perhaps most interesting of all is Hunt’s discussion of the experience of India. In that chapter, Hunt describes the extraordinary jurisprudence of the Indian Supreme Court during the 1980s, which has distinguished itself among national courts in its efforts to acknowledge the social and economic rights of the poorest Indians, and to develop new procedural innovations, such as reforms to the rules of standing, that allow cases involving those rights to be brought forward.

Finally, Hunt concludes with a chapter in which he sets out five alternative approaches to the promotion and protection of social rights. Here he discusses the idea of treating social rights as rights of citizenship, the model of a draft social charter developed by non-governmental organizations in Canada, the public inquiries undertaken by Australia’s Human Rights and Equal Opportunity Commission, the work of the World Bank, and the prospects for an international NGO programme for social rights.

Hunt’s book is uniquely comparative, interdisciplinary and eclectic. These characteristics, in general, strengthen the scope and persuasiveness of the book. But they could also be regarded by some as flaws or distractions. For example, in many of his chapters, Hunt discusses international treaties and the deliberations of international bodies, then shifts to an analysis of a New Zealand treaty or issue, then returns to the international level. On the one hand, this

approach helps to add flesh to issues that can become highly abstracted at the level of international human rights diplomacy. As human rights scholars like Philip Alston have emphasized, international human rights law means nothing if not applied domestically. On the other hand, Hunt's technique leaves a reader from outside New Zealand wondering if this is an international or a New Zealand book. With the exception of his chapter on India, and brief discussions of several other countries, Hunt's book omits discussion of the more than 70 constitutions worldwide that enshrine social and economic rights or principles, including many of the OECD member states and — as little known fact — many of the state constitutions of the United States.

Hunt attempts to steer a difficult middle course between academic theory and human rights practice, an approach that Hunt acknowledges leaves him open to arguments from both the academics and activists. On the whole, although Hunt delves frequently into theoretical issues, the book is more pragmatic than academic. Serious challenges to enshrining social and economic rights — such as the problem of dependency on the state — are mentioned but not explored. Hunt makes no attempt to rigorously define what entitlements should be regarded as social and economic rights. His arguments about justiciability are taken in large part from a law review article Hunt wrote several years ago.

Finally, Hunt could be faulted for his zeal to include as many issues as possible in each chapter. His chapter on women, marginalisation and equality, for example, begins with studies of the status of women in New Zealand and Australia, and moves the reader quickly through the literature on women's international human rights, the public/private dichotomy, formal versus substantive inequality, the Convention on the Elimination of all Forms of Discrimination against Women, and the Supreme Court of Canada's decision in *Andrews*, a famous case on equality rights in Canada. His chapter on health care has similarly broad focus, as a sample of its headings suggests: the European Social Charter; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of the Child; the Protocol of San Salvador, the UN Mental Health Principles; New Zealand's Health and Disability Commission; and New Zealand's Privacy Act. Again, Hunt can be praised for his attempts to develop common themes from disparate and complex developments. But this broad coverage renders many of the book's chapters more descriptive than analytical.

Despite these criticisms, I believe Hunt's book is an important one, perhaps the most accessible and comprehensive book that has yet been written on social and economic rights. It provides a useful counterpart to the other texts recently written on the subject of social and economic rights. What we need now is a legal philosopher — a Rawls, Dworkin or Raz — to carefully and coherently turn their minds to this field.

John Terry