

## FROM PLATO TO NATO: LAW AND SOCIAL JUSTICE IN HISTORICAL CONTEXT

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### I INTRODUCTION

At the present time it is almost unthinkable to be against the idea of social justice. Unlike ‘human rights’, which – in Australia at least – can still provoke a measure of political disagreement on the political Left and Right both within and beyond the legal academy, the concept of social justice appears to have settled uncontroversially into the soft centre of general community values. In doing so, it has spread across many domains of discourse, to the extent that it has become conventional not merely for individuals, but also for a wide variety of our institutions such as schools, hospitals, universities (including their law faculties) and even some corporations, to offer formal endorsements of the concept, as evidenced in mission statements, lists of core values, and registers of distinctive achievements.

Yet it was not always so. In the middle of the last century, the very notion of social justice was the subject of sharp ideological struggle and political debate. It was variously assailed as being a ‘mirage’ apt to mislead the idealistic and impractical, a tool of oppression for those who would otherwise work efficiently and productively in a free market,<sup>1</sup> or extolled as a civilising force designed to inject the principle of material equality into an economic system otherwise indifferent to the aggrandisement of the few at the expense of the many.<sup>2</sup> For a time in the 1960s and early 1970s, a time that from the vantage point of the present seems remarkably short-lived, it proved to be the hegemonic idea in that contest, leading even its most articulate critic, Friedrich Hayek, to conclude that

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1 F A Hayek, *Law, Legislation and Liberty, Vol 2: The Mirage of Social Justice* (Routledge & Kegan Paul, 1976).

2 Anthony Crosland, *The Future of Socialism* (Jonathan Cape, 1956).

‘social justice’ has nevertheless by now become the most widely used and most effective argument in political discussion. Almost every claim for government action on behalf of particular groups is advanced in its name, and if it can be made to appear that a certain measure is demanded by ‘social justice’, opposition to it will rapidly weaken.<sup>3</sup>

How things have changed. Political argumentation at the present time has largely ceased deploying the vocabulary of social justice. More likely touchstones in current political claims-making on all sides are ‘keeping the budget in surplus’, ‘sound economic management’, ‘safeguarding the incomes of the middle classes’, or in the local context, ‘the needs of working Australians’. Hayek’s lament has little resonance today, the concept having lost so much of its sting.

Although it has now been largely sidelined in contemporary mainstream political debate, the idea of ‘social justice’ has not disappeared. Instead, it seems to have gradually metamorphosed, shifting from being a potent ideological slogan to one item in a list of generally endorsed public values. In the process, it has lost its definitional precision. Social justice has been conventionally defined as the principle of state-engineered redistribution of material resources to the disadvantaged to advance the goal of greater substantive equality. Now, by contrast, it appears to stand for a looser set of notions such as ‘fairness’, ‘inclusion’ or even justice in general, with which no one could reasonably disagree, and is therefore an idea that appeals to many.

This article is an attempt to examine critically these contradictory currents in the recent fortunes of social justice. I will track its historical path, starting with its appearance as a rallying call in public and political discourse, notably in the 18<sup>th</sup>-century writings of Thomas Paine and Nicolas de Condorcet, and in the more theoretical writings about justice that followed. The argument is that the notion of *social* justice is a distinctly modern one, emerging in tandem with the development of modern nation-states where for the first time in history it became possible to see communities as co-extensive with the states that governed them. Social justice in turn came to conceive of the state as having both the material capacity and the moral obligation to implement policies consistent with the idea. The gradual historical process of institutionalisation and consolidation of social justice eventually reached its high watermark in the postwar welfare state. Its subsequent decline will be traced directly to a complex combination of political, economic and sociological factors over the last three decades. Inevitably, given pressures of space, this exercise must remain at the level of a thumbnail sketch. It is also impossible in the available space to examine a range of other important theories of justice, such as retributive justice, intergenerational justice and restorative justice.

Finally, I will present the argument that the concept has lost none of its normative force, and that its claims are arguably more urgent now than ever, given current indicators of the pervasive and growing extent of material inequality in Australia and beyond. However, I add that social justice needs to be

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3 Hayek, above n 1, 65.

tempered in the present context by other, more recent claims to justice not reducible to it, and barely acknowledged during its political heyday. In particular, notions of recognition and difference, of gender, ethnicity and sexuality, as well as the idea of human rights and global justice, should be factored alongside claims for social justice in a more complex, globalised sociological context than that of the postwar welfare-regulatory state.

## II IN THE BEGINNING: CLASSICAL IDEAS ABOUT JUSTICE

In the enduring interplay between law and justice, one recurrent question dominates all others: Is law just? I do not attempt to grapple with an issue of such breadth in this article, although I am prompted by an impulse to address two aspects of it: First, how and to what extent does our current legal system and its constituent legal rules incorporate, nurture or achieve social justice? And second, what critical tools does a social justice perspective provide to assess law? In order to do this, I propose to examine the historical emergence of the concept of social justice. This exercise will entail differentiating it from other theories of justice, and then charting, in broad brushstrokes, how our law has come to be influenced by this idea.

According to the *Macquarie Dictionary*, 'justice' is 'the moral principle determining just conduct'.<sup>4</sup> A second definition refers to the exercise of doing justice as 'to render or concede what is due to [a person]; treat or judge fairly'. Another meaning it provides is 'the requital of desert as by punishment or reward'. These definitions from common parlance evoke the analyses of the two earliest and most influential philosophical analyses of the concept. Responding to Socrates' question as to what justice is, Polemarchus, one of the protagonists of Plato's *Republic*, defined it as meaning 'to give a person their due'.<sup>5</sup> Aristotle, in turn, advances two definitions of justice. First, he outlines a theory of distributive justice, which specifies the criteria for allocation of honours, political offices and resources.<sup>6</sup> These criteria focus on virtue, and are intended to be the key factors that establish why individuals *deserve* these benefits. Importantly, this notion of distribution based on the requital of desert is essentially different from one based on need, which does not form part of Aristotle's scheme.

Aristotle's second form of justice is 'corrective' justice. It concerns the principles for rectification where injuries are inflicted by one person on another, or where a flawed transaction leads to one person possessing what rightfully belongs to another.<sup>7</sup> This idea forms the basis of the related notion of fair exchange in a market place. Also known as 'commutative justice', many commentators see this feature of justice as the core principle underpinning

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4 *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5<sup>th</sup> ed, 2009) 906.

5 Plato, *The Republic* (H D P Lee trans, Penguin, 1955) 66.

6 Aristotle, *Nicomachean Ethics*, (Roger Crisp trans, Cambridge University Press, 2000) [5.4].

7 *Ibid* [5.5].

private law.<sup>8</sup> Another way to distinguish distributive from corrective or commutative justice is that the former is forward-looking, while the latter looks back, focused on restoring a former equilibrium. Since a further aspect of doing justice for Aristotle is the requirement that the characteristics of the litigants in disputes of this nature be disregarded so as to reach a fair result, corrective justice requires the parties to be treated formally as equals. By way of illustration, Aristotle adds that any evidence that might indicate that they are ‘base’ or ‘decent’ persons must be ignored.<sup>9</sup> Impartiality is therefore a key element in justice. For one commentator, it follows that the classical ideas of justice can be summarised as being centred on the twin notions of ‘the requital of desert and the practice of impartiality’.<sup>10</sup>

In historical terms, a later theory of justice to gain currency is the notion of justice as individual independence or autonomy. It is commonly associated with Immanuel Kant, who emphasised that a human being’s capacity for ‘practical reason’ forms the basis of his or her free will. In turn, free will is constrained by various moral duties to others. These duties appear in the form of categorical imperatives, or, in the legal sphere, as a principle of justice, discoverable upon rational reflection. A just legal order is one that affords parties the right to maximum freedom to do as they please, to the extent that the exercise of such freedom does not restrict the freedom of others:

All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law. ... ‘Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.’<sup>11</sup>

The ‘principle of innate freedom’ is the foundation of law and justice, and ‘is the only original right belonging to every man by virtue of his humanity’.<sup>12</sup> It leads directly to the requirement of establishing the realm of private law, which provides the ground rules allowing ‘innate freedom’ to be actualised (that is to say, externalised in the world, in the form of relationships with others and the acquisition of property). In turn, the principle of freedom forms the basis of political authority, because ownership is only rightful ‘under an authority giving laws publicly, that is, in a civil condition’.<sup>13</sup> To the extent that Kant’s theory of

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8 Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 56: ‘Aristotle’s account of corrective justice is the earliest ... description of the form of the private law relationship’. See also James Gordley, *Foundations of Private Law* (Oxford University Press, 2006). Aristotle’s theory of corrective justice also provides one basis for the structure of criminal law as it explores the question of the proportionate penalties for injuries.

9 Aristotle, above n 6, [5.52].

10 D D Raphael, *Concepts of Justice* (Oxford University Press, 2001) 235.

11 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1996) 24 (emphasis in original). See generally Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press, 2009).

12 Kant, above n 11, 30.

13 *Ibid* 44.

law and justice originates from the notion of individual freedom, it represents the core idea of liberal political philosophy.

Kant's writings in the 18<sup>th</sup> century reflected developments in Western societies of the time, as they came to adopt this liberal idea of justice in legal form in their core institutions. This historical 'Great Transformation'<sup>14</sup> entailed the systematic and comprehensive dismantling of the very different, illiberal and inegalitarian political and economic hierarchies of feudalism and absolutism. The history of modern Western societies is the progressive extension of this principle of justice to all, first to growing classes of male subjects (including through the emancipation of slaves), then to women and ethnic minorities. As will be argued later, this development represents the first stage in the historical institutionalisation of modern forms of justice as a fundamental component of the rights of citizenship.

This liberal notion of freedom is notably at odds with the Aristotelian idea of corrective justice in the following respect. Kant explicitly links it to his political philosophy that, as a logical consequence of his rationalist basis for justice, requires the state to recognise the universality of the autonomy of all citizens. Because Aristotle's theory was assumed to apply in the context of a slave-owning city-state, its operation is at least implicitly configured to fit the conditions and characteristics of a very different, rigidly stratified society. For Alasdair MacIntyre, the distinction between the classical and modern notions of justice therefore lies in the fact that in the classical tradition, 'to be a man is to fill a set of roles each of which has its own point and purpose: member of a family, citizen, soldier, philosopher, servant of God', in contrast to modernity, where 'man is thought of as an individual prior to and apart from all roles'.<sup>15</sup>

### III DISTRIBUTIVE AND SOCIAL JUSTICE

A different approach to the question of justice focuses not so much on the rational basis for law and justice, and the resulting procedural mechanisms for achieving it, but on outcomes. On this view, justice requires that distributions be fair by reference to a particular set of rules that tend to fair results. A version of this approach to the question of justice is evident, at least in embryonic form, in the classical discussions of justice. As we have seen above, Aristotle advances a theory of distributive justice based on desert. Similarly, Aquinas elaborates the idea of distributive justice, proposing that the rich are under a moral duty to display charity to the poor.<sup>16</sup> These early formulations of the concept suggest that there is a distinct link between classical and contemporary notions of distributive justice, such that it is possible to see social justice as the latest manifestation of

14 Karl Polanyi, *The Great Transformation* (Farrar & Rinehard, 1944).

15 Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press, 2<sup>nd</sup> ed, 1984) 59. See also Weinrib, above n 8, 83: Weinrib interprets Aristotle's account of corrective justice as 'inchoately Kantian' in that it requires the abstraction of a person's characteristics from their role in society, but this approach downplays the broader presuppositions of Aristotle's philosophy within his historical context.

16 Thomas Aquinas, *Summa Theologica* (Joseph Rickaby ed, Burns Oates, 1892) pt II(2), q 58, art 11.

this long-established principle. A number of commentators have emphasised these genealogical connections.<sup>17</sup>

But a more nuanced way of approaching the history of accounts of distributive justice maintains that the distinct term ‘social’, as opposed to ‘distributive’, connotes some kind of rupture with the past. If the adjective is not to be entirely pleonastic, ‘social’ justice must mean something significantly more than, or more specific than, distributive justice. A useful starting point in identifying possible differences is to pinpoint when social justice first came to feature in public political discourse. According to David Miller, the term first appeared in the late 19<sup>th</sup> century, when advocates for political reform theorised justice in terms that were critically different from classical ideas of distributive justice. Miller identifies these differences as being threefold. Not only does social justice entail the basic distributive principle of an equitable division of resources or benefits, but its particular novelty lies in the fact that it also requires, first, a clear notion of ‘a bounded society with a determinate membership’.<sup>18</sup> Without this element, it is impossible for individuals to calculate whether their share of society’s wealth is fair or not, and therefore to point to those from whom distribution might be made. It follows that the concept is entwined with the notion of citizenship, particularly given that the relevant ‘bounded society’ is conventionally identified as the modern nation-state. A second requirement for the concept of social justice is a set of determinate institutions that can be called to account for being in some way causally implicated in unacceptable levels of material inequality, and that are in turn susceptible to remodelling to achieve reform. The third and final requirement is that there exists an agency – that is, the state and its subsidiary branches – that has the capacity to bring social justice into effect.<sup>19</sup>

Although Miller identifies the appearance of the term ‘social justice’ as beginning in the late 19<sup>th</sup> century, he and other theorists see the germ of this idea in the work of earlier writers who examined the fundamental changes in social structure that were being fuelled by the growth of commerce and industrialisation, and who drew novel conclusions about poverty and the place of the poor in it. In these rapidly modernising and fluid societies, it became clear that poverty was not a fixed element of the social order, and by extension the inescapable fate of the mass of the population. Rather, it was a condition that could be rectified in a manner similar to the way that the economy was being routinely formed and reformed by public policy. This general idea, first hinted at in Adam Smith’s *The Wealth of Nations*, began to emerge in the late 18<sup>th</sup> century, when writers such as Thomas Paine and Nicolas de Condorcet argued that the alleviation of poverty and the reduction in inequality was not simply a matter of

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17 Raphael, above n 10; Brian Barry, *Theories of Justice* (University of California Press, 1989). For a general overview of the range of commentaries on this question, see Ben Jackson, ‘The Conceptual History of Social Justice’ (2005) 3 *Political Studies Review* 356.

18 David Miller, *Principles of Social Justice* (Harvard University Press, 1999) 4.

19 Ibid 5–6. See also Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2004) 7.

charity, but of justice: its elimination was no longer to be seen as contingent on the goodwill of those in happier circumstances, but was a matter of state obligation. And if the state was under a legal duty to act in this way, it followed that it was every citizen's correlative right to compel it to do so. As Paine emphasised in the *Rights of Man*, to the extent that the relief of poverty was a matter of justice, it followed that the poor had 'rights to relief' rather than the mere hope of charity, and that these rights should be realised, for example, through the creation of pensions and cash grants raised by means of inheritance taxes.<sup>20</sup> Because the machinery of the state was essential to the practical implementation of this proposal as the only effective means of enforcing such rights, it represented a significant conceptual break with early theories of justice. As Fleischacker concludes:

Not a single jurisprudential thinker before Smith – not Aristotle, not Aquinas, not Grotius, not Pufendorf, not Hutcheson, not William Blackstone or David Hume – put the justification of property rights under the heading of distributive justice. Claims to property, like violations of property, were matters for commutative justice; no one was given a right to claim property by distributive justice.<sup>21</sup>

In other words, earlier theories of justice proposed that property rights in the broadest sense – to land, goods, income, wealth – originated variously in fair transactions in the marketplace, in accordance with time-honoured privilege, tradition or conquest, but certainly not in the activity and responsibilities of government. It followed that justice concerned the appropriateness of the mechanisms of transfer and acquisition (namely, corrective or commutative justice), not the end results of this process. And earlier theories of distributive justice emphasised the criterion of desert, rather than need, as the basis for transferring resources, supplemented by charity rather than rights to receive.

The revolutionary approaches of Paine and Condorcet to the idea of justice, however, could not at that stage be considered fully developed theories of social justice. A further requirement for the evolution of social justice was a set of intellectual developments that provided the detailed scientific knowledge to allow the identification of the extent of, and the causal factors producing, inequality, as well as the formulation of appropriate remedial strategies to combat it. The emergence of the idea of social justice within political discourse can be explained in the context of broader popular and theoretical understandings of *society* as an organic entity over the course of the 19<sup>th</sup> century. Gradually, when commentators spoke of 'society', they came to refer to all of its members, and their collective interests. This change in definition meant that not only had society become a descriptive term, but it had also assumed a prescriptive

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20 Thomas Paine, *Rights of Man, Common Sense and Other Political Writings* (Oxford University Press, first published 1797, 1995 ed) ch 5. See also Marquis de Condorcet, *Sketch for a Historical Picture for the Progress of the Human Mind* (June Barraclough trans, Weidenfeld and Nicholson, 1955) [trans of: *Esquisse d'un Tableau Historique des Progrès de l'Esprit Humain* (first published 1795)]. For a general discussion of their role, see Gareth Stedman Jones, *An End to Poverty? A Historical Debate* (Columbia University Press, 2004); Fleischacker, above n 19.

21 Fleischacker, above n 19, 27.

character. As Hayek ruefully concluded, the term ‘society’ ‘gradually acquir[ed] a predominant meaning of moral approbation’.<sup>22</sup>

This novel perspective appeared in its most advanced form in the emergent social sciences, particularly the nascent discipline of sociology. The focus of this body of work was not on specific traditions or customs, or on larger entities such as empires, or racial groups, but rather on how the modernising tendencies of states within the confines of national borders were creating entirely new forms of community, best understood under the more expansive category of ‘society’. Whatever the differences between the various leading theorists, whether the defining characteristic of this new type of social formation was an entirely novel division of labour (Durkheim), the gradual dominance of a distinctive type of rationality (Weber), the appearance of a new mode of production (Marx), or an unprecedented type of social bond (Tönnies), all were agreed on one thing: that the new order was historically unique, and required examination by means of fresh analytical tools.<sup>23</sup> At the normative level, new strategies and policies were also required to address the problems presented by rapid change. These ideas, along with the diverse political movements that drew support from them, laid the conceptual groundwork for the fully articulated notion of social justice that eventually became a central component of the political ideology of social democracy in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>24</sup> This ideology came to comprise two basic elements: that justice is a virtue that applies not simply to individual actions but to society as a whole; and that justice, not charity, is the basis for alleviating poverty and reducing inequality.

One way of identifying the extent to which the idea of social justice was tied to a particular state form, and how far it departed from earlier classical and liberal notions of justice, can be seen in the work of Hayek, referred to above. For Hayek, to look for justice in the notion of society, and to expect the state to be the mechanism for implementing a just distribution of resources, was the very antithesis of what an inquiry into justice should be. In a critical methodological move, Hayek sees the germ of the idea of justice not in social conditions, but in the action of individuals: ‘Strictly speaking, only human conduct can be called just or unjust. ... To apply the term “just” to circumstances other than human actions or the rules governing them is a category mistake’.<sup>25</sup> Relying on the Kantian notion that justice lies in preserving the autonomy of the individual, and the concomitant legal rules for protecting dealings between free individuals (the rules Hayek terms ‘rules of just conduct’; that is, corrective or commutative

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22 Hayek, above n 1, 79.

23 For a general overview, see Émile Durkheim, *The Division of Labour in Society* (George Simpson trans, Free Press, 1949) [trans of: *De la Division du Travail Social* (first published 1893)]; Max Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, University of California Press, 1978) [trans of: *Wirtschaft und Gesellschaft* (first published 1921)]; Karl Marx, *A Contribution to the Critique of Political Economy*, (Maurice Dobb ed, Lawrence and Wishart, 1971) [trans of: *Kritik der Politischen Ökonomie* (first published 1859)]; Ferdinand Tönnies, *Community and Society* (Charles P Loomis trans, Dover Publications, 2011) [trans of: *Gemeinschaft und Gesellschaft* (first published 1887)].

24 Stedman Jones, above n 20, 233–4; Fleischacker, above n 19, 94–109; Jackson, above n 17.

25 Hayek, above n 1, 31.



justice), he proceeds to decry the ‘mirage’ of social justice. A fundamental requirement for a just society is that the rules of just conduct be sacrosanct in order to ensure that individuals respect others’ freedom to pursue their respective ends. This objective can only be achieved if individuals are free from the wills of others, including the distributive objectives of the state. It follows that state-authored redistribution is essentially unjust, because it necessitates governments treating all individuals unequally. Social activities of all kinds that lead to some individuals being enriched while others are impoverished need to be constantly adjusted and revised if social justice is to be achieved. Accordingly, governments ‘must subject the position of the different individuals and groups to their control’.<sup>26</sup> For the state to take a slice of A’s wealth to address B’s need is to use A as a means to B’s ends; in Kantian terms, the state has treated A unjustly. It followed that insofar as welfare states engaged in systemic redistribution of wealth, they were acting in ways that offended basic principles of justice.

As welfare states came progressively to implement the concept of social justice in a range of different policies in the 20<sup>th</sup> century, social justice became a central feature in political discourse, commencing most prominently with the rise of social democratic political parties and the emergence of New Liberalism in the latter part of the previous century.<sup>27</sup> But perhaps the most influential approach to the concept appeared in the work of John Rawls, who, in *A Theory of Justice*, laid out in philosophical terms a theory of social justice that seeks to balance the liberal emphasis on autonomy with the need to ensure a basic level of material equality.<sup>28</sup> Rawls starts by defining justice as a set of general principles for ‘assigning rights and duties in the basic institutions of society’, but supplements this with a clear emphasis on redistributive aims, asserting that justice must also specify ‘the appropriate distribution of the benefits and burdens of social co-operation’.<sup>29</sup> As his reference to rights and duties makes clear, this theory of justice can be achieved only through legal means. In order to give substance to this definition, his approach is to identify a social contract, not on the basis of an actual historical event, nor indeed on some notion of human nature, but instead on what Amartya Sen describes as ‘transcendental institutionalism’.<sup>30</sup> He proposes a hypothetical situation, whereby citizens are invited to construct a just society without knowing what abilities, talents, or wealth they would bring to it, or where they would be situated in it. This thought experiment locates subjects behind a ‘veil of ignorance’, stripping away the tendentiousness invariably associated with individual self-interest. In such a *disinterested* original position, Rawls poses the question of what kind of society would thoughtful persons choose to be a member of. By focusing on this hypothetical situation, and

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26 Ibid 68.

27 Christopher Pierson, *Beyond the Welfare State? The New Political Economy Welfare* (Polity Press, 1991) 196; Thomas Hill Green, *Lectures on the Principles of Political Obligation* (Cambridge University Press, first published 1885–88, 1986 ed) vol 2.

28 John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

29 Ibid 4.

30 Amartya Sen, *The Idea of Justice* (Belknap Press, 2009) 5–6.

deriving the basic elements of social organisation from it, he deftly avoids many of the criticisms of traditional social contract theory. At the same time, his work provides an elegant defence of social justice that is consistent with the Kantian liberal ideals of maximising individual freedom.

One important political function played by Rawls' work was its provision of philosophical support for the institutions and practices of an advanced welfare-regulatory state. The hypothetical citizen, located behind a veil of ignorance, would rationally opt for a fair distribution of 'primary goods' which would allow individuals to achieve a variety of ends, including such things as 'rights, liberties and opportunities, income and wealth', and the social bases of self-respect.<sup>31</sup> In other words, there would be a reasonable, basic level of income for all, a robust welfare safety net, generally egalitarian social policies, and a principle of non-discrimination in employment. This rationalist argument provided a compelling, contemporary, non-politically partisan case for social justice, and importantly, the basic set of legal rights required to substantiate it. In the Cold War environment in which it appeared, Rawls' approach made a case for social justice that emphasised not merely the importance of both social and liberal justice, but how they need each other's complementary support to thrive in advanced societies. For this reason in particular, it remains the theory of social justice that all theorists of justice, both supporters and opponents, need to grapple with to advance a theory best suited to the rather different circumstances of the present.

From this necessarily brief overview, social justice can be defined in general terms as being a sub-category of distributive justice, but critically different in its historical origins, its institutional dimension, and its political effects. At this point, it is necessary to examine how it came to be a dominant feature of the legal systems of liberal states in the latter half of the 20<sup>th</sup> century.

#### IV THE TRIUMPH OF SOCIAL JUSTICE

As Hayek and others noted, by the 1970s social justice had become the dominant critical discourse in the field of public policy and law in liberal societies. An exploration of the institutional dimension of the idea of social justice at this time will reveal the extent of its influence, as a precursor to comparing it with its current status. The most obvious evidence for its success lies in the extensive adoption by liberal-legal systems of social justice ideas in the various categories of law throughout the postwar period. As is clear from the brief historical outline above, every theory of justice necessitates a particular set of legal rules to give it effect, and forms part of the package of rights of citizens within particular states. An examination of the direction of legal change, by reference to the various historical transformations of citizenship in liberal societies, provides a clear picture of the growing institutionalisation of social justice.

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31 Rawls, above n 28, 62.

T H Marshall's periodisation of citizenship rights in the modern era attempts to show the distinctiveness of social rights by means of a typology of stages.<sup>32</sup> His purpose is to analyse the legal dimension of citizenship, and examine the emergence of 'social citizenship' and its legal correlate, 'social rights'. This approach closely resonates with the arguments of social justice theorists in their call for the institutional recognition and implementation of social justice ideals. For Marshall, modern citizenship can be divided into three distinct historical phases. Using the English experience as his test case, he found that the earliest appearance of modern citizenship was evidenced first in the spread of universal 'civil' rights. These rights encompass the right of all members of society to freely participate in economic relations, such as by entering into contracts and owning property, and having freedom of movement to look for work as opposed to being restricted to certain parishes and towns. This package of civil rights became entrenched in England in the 18<sup>th</sup> century. It was followed in the 19<sup>th</sup> century by the Reform Acts, which gradually extended the suffrage to all citizens,<sup>33</sup> and thereby secured the second stage of citizenship in the form of 'political' rights. Consistent with the Kantian idea of the individual, these two categories of rights were based on notion of the formal equality of the nation's citizenship.

By contrast, the third and final wave of citizenship rights was based on a notion of *inequality*. Social citizenship reflected a sociological understanding that, for all the gains in the economic and political spheres conferred by the earlier waves of citizens' rights, these *formal* rights were at best indifferent to *substantive* economic inequality, or, at worst, contributed to them. 'Social rights' were therefore introduced over the course of the 20<sup>th</sup> century, directed to the objective of substantive equality, thereby reversing the inequalities of liberal-democratic capitalist societies. A more equal distribution of resources was achieved

by incorporating social rights in the status of citizenship and thus creating a universal right to real income which is not proportionate to the market value of the claimant. Class-abatement is no longer merely an attempt to abate the obvious nuisance of destitution in the lowest ranks of society. It has assumed the guise of action modifying the whole pattern of social inequality.<sup>34</sup>

In order to give effect to the values originally advanced by Paine and others, welfare states progressively introduced a range of legal reforms that represented a direct assault on the liberal-legal norms governing economic activity that derived from the notion of corrective or commutative justice. To the affront of

32 T H Marshall, 'Citizenship and Social Class' in T H Marshall (ed), *Sociology at the Crossroads and Other Essays* (Heinemann, 1963) 67.

33 *Reform Act 1832*, 2 & 3 Wm 4, c 45; *Reform Act 1867*, 30 & 31 Vict, c 102.

34 Marshall, above n 32, 106. Jürgen Habermas provides a comparable historical narrative in examining European social welfare states generally: see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, MIT Press, 1996) [trans of: *Faktizität und Geltung* (first published 1992)]. See also Peter Flora and Jens Alber, 'Modernization, Democratization, and the Development of Welfare States in Western Europe' in Peter Flora and Arnold J Heidenheimer (eds), *The Development of Welfare States in Europe and America* (Transaction Publishers, 1981) 37.

many liberals, the entire field of private law was transformed: parties to transactions in the market were no longer treated as formal equals, with their characteristics irrelevant to the consideration of what was 'fair'. On the contrary, regulatory legislation specifically imposed a set of different responsibilities on parties to a transaction considered structurally advantaged: landlords, employers, producers, lenders, and traders were all subjected to new statutory regimes that aimed directly to equalise bargain power, to mandate consumer-protection measures in contracts, to afford security of tenure for tenants and growing protection to workers in relation to wages, conditions and safety. Law was increasingly 'materialised'<sup>35</sup> as its detailed rules took account of key differences in the status of contracting parties, leading to the fixing of prices, wages, rents and interest rates. In this way, the state became regulatory, to the extent that, for some commentators, it represented the 'death' of contract, the cornerstone of a liberal economy.<sup>36</sup> As Hayek acknowledged, 'the highly interventionist "mixed" economy existing in most countries today ... [has] attained its character largely as a result of governmental measures aiming at what was thought to be required by "social justice"'.<sup>37</sup>

By means of gradually extending legislative protection of structurally disadvantaged citizens in market relations, as well as providing legal entitlements to basic welfare provision and services, social justice, both as a sociological phenomenon as well as a prevailing ideology, reached its 'Golden Age' in the developed welfare states of the postwar era.<sup>38</sup> But it is a serious oversimplification to suggest that the large number of welfare states were closely similar in nature, structure and underlying values. In Therborn's overview, welfare states can be divided into distinct clusters, with the more redistributive at one end (for example, the northern European social democracies), with strong commitments to full employment supported by universal welfare benefits; to those at the lower end that are more reliant on markets, with weaker full employment commitment, and more limited social rights (largely exemplified by the Anglophonic democracies, including Australia).<sup>39</sup> This variation indicates not only that commitments to social justice differed significantly, but also that political alliances, national traditions and cultural differences played a major role. Nonetheless, it is not unreasonable to conclude the extensive popular consensus

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35 Weber, above n 23, 894. See generally, Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986).

36 Grant Gilmore, *The Death of Contract* (Ohio State University Press, 2<sup>nd</sup> ed, 1995); Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1979); Lawrence Friedman, *Contract Law in America* (University of Wisconsin Press, 1965); Ross Cranston, *Legal Foundations of the Welfare State* (Weidenfeld and Nicolson, 1985).

37 Hayek, above n 1, 81. See also Wolfgang Friedmann, *Law in a Changing Society* (University of California Press, 1959); Wolfgang Friedmann, *The State and the Rule of Law in a Mixed Economy* (Stevens Publishing, 1971).

38 Pierson, above n 27, 125–32.

39 Goran Therborn, 'Welfare States and Capitalist Markets' (1987) 30 *Acta Sociologica* 237, 245–7. See also Gosta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990) 26–33; Eric Evans, *Social Policy 1830–1914: Individualism, Collectivism and the Origins of the Welfare State* (Routledge, 1978).

for the welfare state and social-justice-informed policies during the postwar period up to 1975 reached its high point at that time.

The popular consensus around social justice could be traced, at least in part, to how it appeared to satisfy, almost indiscriminately, the aspirations of otherwise competing political constituencies. On the Left, social democrats and socialists could welcome these developments, for the former as the culmination of a century of struggles to humanise capitalism, and for the latter as one of the last stands of a moribund economic and political formation. On the Right, social justice was a necessary price to pay to stave off more radical working class activism, while at the same time guaranteeing steady economic growth that continued to allow the wealthy to prosper. Underpinning these varying perspectives was an abiding sense of social interdependency starkly at odds with the robust individualism characteristic of an earlier phase of capitalist development.<sup>40</sup> Only on the political margins could voices of dissent be heard. Who would have predicted that their critiques would become the dominant consensus in a very short time?

## V SOCIAL JUSTICE IN DECLINE? FROM REDISTRIBUTION TO RECOGNITION

From the early 1970s onwards, the postwar welfare state – and the values it represented – came under increasing attack from former allies on both the political Left and Right. What had appeared as an entrenched level of popular consensus all but evaporated in the space of a remarkably short period of time. By the beginning of the next decade, Margaret Thatcher and Ronald Reagan had been swept to power, ushering in a set of social and economic policies that to a significant degree reflected Hayek's antipathy to the idea of social justice. In a development remarkable for its historically unique alignment of former implacable opponents, a broad assault on the entire project of the postwar welfare state, amounting to 'democracy against the welfare state', began in earnest.<sup>41</sup>

A number of factors came into play. At the economic level, the postwar boom, which had offered sound empirical evidence for the viability, historic success and desirability of advanced welfare-regulatory states, started to unravel in the late 1960s. Engendering unreasonably high expectations of continuing industrial peace and economic growth, support quickly ebbed away in the face of a series of economic crises that these states seemed poorly designed to tackle. On the one hand, the high cost of historically generous universal welfare provision proved to be a heavy burden for states to carry in times of recession. On the

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40 Theodore J Lowi, 'The Welfare State, the New Regulation and the Rule of Law' in Alan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Carswell, 1987) 17.

41 Claus Offe, 'Democracy against the Welfare State' (1987) 15 *Political Theory* 501, 525–6. See also Tom W Smith, 'The Polls – A Report: The Welfare State in Cross-national Perspective' (1987) 51 *Public Opinion Quarterly* 404; Nancy Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge, 1997) ch 1.

other, the increasing security in employment conditions – particularly for the record numbers of state employees across both public sector and nationalised industries – along with the rising strength of unions to protect hard-won rights, left governments with little flexibility to reduce costs when gross domestic product stalled, and with it, the flow of tax revenue to support these mechanisms for guaranteeing the ‘social’ wage.

These events fuelled a ‘legitimation crisis’ as a pervasive loss of faith in the capacities of the social welfare state to deliver on its promises unfolded.<sup>42</sup> The erstwhile minority on the Right of the political spectrum who had enthusiastically embraced Hayek’s neoliberal ideas about a reduced role for the state in general, and a substantial paring back of the welfare state in particular, in due course found themselves in government, and in a position to recast public policy and reconfigure the legal reforms that could undo the social justice-inspired initiatives of the postwar era. Suddenly markets – Hayek’s ‘order of catallaxy’<sup>43</sup> – rather than state provision of public goods, became the preferred mechanisms for distribution of resources in the economy. In order for this shift to occur, widespread dismantling of regulatory regimes took place, alongside the extensive denationalisation and privatisation of government-owned industries and assets. The ensuing ‘neoliberal’ approach to public policy was marked by an abiding hostility to the notion of social justice that continues in political discourse on both Left and Right to this day, to the extent that it is now ‘budget surplus’, ‘free market’, ‘incentives for investors’ that are ‘the most widely used and effective argument[s] in political discussion’.<sup>44</sup>

A second factor that contributed to the weakening of support for social justice was the rapid collapse of the Eastern-European communist regimes in the late 1980s. For socialists in the West, who had been among the foremost advocates of social justice initiatives in the postwar period, this development shattered the illusion that these command economies possessed even the prefigurative elements of a genuine socialist society, certainly one that might successfully provide a model for achieving an optimal balance between the liberalism of the West with the egalitarianism promised in the East. As Jürgen Habermas pointed out at the time, ‘[t]he whole wretchedness of so-called actually existing socialism can basically be traced back to a reckless disdain for the principles of the [liberal] constitutional state’.<sup>45</sup> Instead, the collapse and abandonment by so many of those states of their foundational socialist ideologies served not only to affirm the liberal values of the West, but also to cast a cloud of doubt over the feasibility, desirability, or even possibility of achieving socialism, entailing a thoroughgoing ‘social justice’ programme, in the context of a constitutional democracy.

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42 Jürgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans, Beacon Press, 1975) [trans of: *Legitimationsprobleme im Spätkapitalismus* (first published 1973)].

43 Hayek, above n 1, ch 10.

44 Ibid 65.

45 Quoted in Perry Anderson and Peter Dews, ‘A Philosophico-Political Profile’ in Peter Dews (ed), *Autonomy and Solidarity: Interviews with Jürgen Habermas* (Verso, rev ed, 1992) 147, 182.

A third factor, to some extent influenced by the first two, but also impelled by its own momentum, was the appearance of a wave of new theoretical perspectives, predominantly on the political Left and among former supporters of the values and trajectory of the political settlement represented by the postwar welfare state. In the forms of postmodernism and poststructuralism, these novel approaches to critical thinking represented a radical rupture with those earlier forms of progressive theorising that reserved a privileged space for the notion of social justice. This is not to suggest that they represented an assault on the idea of social justice per se, but rather that their critiques of modern societies were advanced from vantage points that prioritised concerns very different from the need to redistribute resources to achieve a more equal and just society. They therefore represented a shift of focus away from the idea of social justice in order to emphasise other dimensions of justice.

It is very difficult to sketch in brief the many different theories that march under these banners, but their familial resemblances are best captured by identifying the three ‘negations’ that they typically display.<sup>46</sup> The first negation involves a rejection of utopian thinking, or large-scale narratives of emancipation or freedom, in both their prescriptive and descriptive manifestations. The second negation is a stand against the Enlightenment values of science, objectivity and reason. The third repudiates the notion of totality in explaining the social world. These stances are expressed in very different ways and to different degrees in the works of the leading and most influential theorists: Michel Foucault, Jacques Derrida and Jean-François Lyotard. Given the profound differences in their works, it will be necessary to examine them separately, although constraints of space mean that this exercise can be conducted in outline only.<sup>47</sup>

For Foucault, any understanding of modern societies is to be achieved not by examining them macroscopically, for instance by means of research into centralised political power structures or by the underlying economic infrastructure, as traditional liberal and Marxist approaches do. Instead, their real nature is revealed by seeing how the most significant mechanisms of domination are dispersed in a range of disciplinary practices located in various institutions. His overarching advice is that ‘the attempt to think in terms of a totality has in fact proved a hindrance to research’.<sup>48</sup> It follows that the focus of analysis should turn away both from law and the economy: it should not be directed on concepts such as sovereignty, law and rights, or economic class conflict, but on the ‘multiple forms of subjugation that have a place and function within the social organism’.<sup>49</sup> The disciplinary power typical of modern states does not proscribe

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46 For this formulation, see Dick Hebdige, *Hiding in the Light: On Images and Things* (Comedia, 1988) 187–203.

47 For a more extensive discussion of this body of theory, see Peter Dews, *Logics of Disintegration: Post-Structuralist Thought and the Claims of Critical Theory* (Verso, 1987); Douglas E Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997); Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (Ashgate Publishing, 2003) ch 6.

48 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon ed, Colin Gordon et al trans, Harvester Press, 1980) 81.

49 Ibid 96.

in the manner of sovereign command; rather, it is productive in nature, normalising subjects, securing compliance, pre-empting resistance. It is not that the law is irrelevant in Foucault's scheme; it 'instigates' the techniques of subjugation. Moreover, the official ideology of law and its system of equality of rights, as expressed in the form of 'juridical liberties' for all citizens, functions to conceal the profoundly 'inegalitarian' practices of 'local' domination.<sup>50</sup> Attention to patterns of ownership of the means of production equally obscures this critical dimension of social reality.

Foucault's emphasis on the local, combined with a resolute refusal to offer any normative assessment of the institutionalisation or implementation of different forms of power, leads to a double deficit when trying to make critical sense of modern law and institutions. Not only is the genuine complexity of their operations not revealed across very different domains – for instance from prisons to markets – but there is no place for any discussion of justice in relation to their structures or their effects. As Michael Walzer concludes:

Hobbes gives us an importantly wrong account of political sovereignty; rhetorically inflated and drained of moral distinctions, it nevertheless captures something of the reality of the modern state. Foucault gives us an importantly wrong account of local discipline; rhetorically inflated and drained of moral distinctions, it nevertheless captures something of the reality of modern society.<sup>51</sup>

This constricted understanding of modern society and the function of law (and justice) within it is compounded by Foucault's version of the second negation: a rejection of the Enlightenment notions of 'truth' and 'reason'. Relying on Nietzsche, he sees discourses around truth not as attempts to unmask reality by the deployment of reason, but as manifestations of a 'will to power', such that behind all truth claims lie ineradicably sinister motives to dominate.<sup>52</sup> There is therefore no 'outside' of power in this scheme; accordingly, notions of emancipation or freedom play no part in his account. A bleak amoral determinism marks his analysis of the rights-bearing subject, a one-sided approach that too readily collapses the idea of subjectivity into subjugation.<sup>53</sup> And having rejected the notion of the autonomous subject, political action is by implication typically in the form of resistance to existing structures rather than their collectively organised replacement by more equitable forms. A normative perspective of any express kind is absent, with an implicit anarchism that extols 'resistance' in the place of genuine political engagement.<sup>54</sup> In this framework,

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50 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 2<sup>nd</sup> ed, 1977) 222 [trans of: *Surveiller et Punir: Naissance de la Prison* (first published 1975)].

51 Michael Walzer, 'The Politics of Michel Foucault' in David Couzens Hoy (ed), *Foucault: A Critical Reader* (Blackwell, 1986) 51, 53.

52 Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Pantheon Books, 1970) [trans of: *Les Mots et les Choses: Une Archéologie des Sciences Humaines* (first published 1966)]; Michel Foucault, *The Archaeology of Knowledge* (Routledge, 2<sup>nd</sup> ed, 2002) [trans of: *L'Archéologie du Savoir* (first published 1969)].

53 Peter Dews, 'Power and Subjectivity in Foucault' (1984) 144 *New Left Review* 72, 92–5.

54 See generally Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence trans, MIT Press, 1990) chs 9–10. Habermas' term for this implicit critique in Foucault's work is 'cryptonormativism'.



large notions of social justice are not merely irrelevant, but are essentially unthinkable. The body politic disappears from view, to be replaced by the body itself as the privileged site of analysis and struggle, since it is here that the technologies of modern power are played out.<sup>55</sup> However, as will be argued later, the shift of focus in Foucault's work away from the economy on the one hand, and the sovereign state apparatus on the other, nonetheless opens up a range of valuable critical perspectives on the institutional framework of the welfare state that were not fully appreciated by the policy makers that designed it.

A more ambivalent approach to the notion of 'society' is evident in the work of Lyotard, perhaps the foremost postmodern theorist, as demonstrated in his express focus on 'The Postmodern Condition'.<sup>56</sup> Lyotard identifies a different mentality at work in 'postindustrial societies', in which a loss of faith in 'metanarratives' is pervasive. Metanarratives are large-scale, scientifically informed historical accounts of social development, 'such as the dialectics of Spirit, the hermeneutics of meaning, the emancipation of the rational or working subject, or the creation of wealth'.<sup>57</sup> He argues that in the place of the scientific pretensions of these grand theories, with their record of 'cultural imperialism since the dawn of Western civilisation',<sup>58</sup> there should be a turn to more modest 'narratives' grounded in incommensurable language games, in order to resist and subvert prevailing technocratic ideologies founded on reason and science.

This rather vague proposal is developed further in Lyotard's later, more philosophical works, which address in detail the question of justice.<sup>59</sup> But instead of offering a general theory of justice discoverable by reason, he specifically breaks with the idea of justice as a universal principle, still less one that might be deployed to call to account a society's institutions. Instead, justice is bound up with the rules of particular language games, is always local, provisional, and context-bound. Paradoxically, he uses Kant's idea of the incommensurability of spheres of judgement – for example, between the moral and the aesthetic – to advance a theory of justice and judgement that resides in 'regimes of phrases' that contain the potential to challenge and subvert dominant ideas of justice of those in power. But this oppositional strategy of resistance is a long way from being capable of generating ideas about reform that might address the phenomenon of material and social inequality, and the possible mechanisms to tackle it, as a social justice perspective requires. As with Foucault's work, the abandonment of any examination of economic institutions fundamentally directs attention away from such questions.

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55 Dews, above n 53, 90.

56 Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, Manchester University Press, 1984) [trans of: *La Condition Postmoderne: Rapport sur le Savoir* (first published 1979)].

57 Ibid xxiii.

58 Ibid 27.

59 Jean-François Lyotard and Jean-Loup Thébaud, *Just Gaming* (Wlad Godzich trans, University of Minnesota Press, 1985) [trans of: *Au Juste* (first published 1979)]; Jean-François Lyotard, *The Differend: Phrases in Dispute* (Georges van den Abbeele trans, University of Minnesota Press, 1988) [trans of: *Le Différend* (first published 1983)].

An analogous antipathy to utopian thinking and notions of objective truth is evident in the work of Derrida, another leading postmodern theorist. Derrida's focus is specifically on language, but his analysis ends up providing a thoroughgoing critique of Enlightenment notions of reason. Derrida's work is poststructuralist in its challenge to the fundamental idea of structuralism, that the system of social and linguistic rules imposes fixed meanings on words and signs. By contrast, Derrida examines meanings in specific contexts to demonstrate how unstable language is, and that the 'logocentric' impulse of Western metaphysics that aims to establish core concepts on which all others could be based is ultimately impossible. His procedure of deconstruction purports to demonstrate this point by showing how texts subvert their own logical structure by means of identifying seemingly irrelevant details that expose self-contradictions and incoherence. Words that stand for concepts are seen as always containing traces of other concepts, so that meaning is never pure or fully 'present'; rather, it is 'deferred', always dependent on other concepts to fill out its meaning. This theory of language in turn becomes a theory of knowledge, so that even philosophers' attempts to be fully 'present' in their writings are seen to be unattainable.<sup>60</sup>

A related notion advanced by Derrida is the idea of the 'dangerous supplement' or the 'logic of the supplement'. All cultures deploy binary oppositions – such as 'civilised/barbarian', 'black/white' or 'nature/culture' – that typically privilege one over another. But Derrida sees a different process at work, concluding that the devalued term performs an additive function to the other, supplying something the other lacks. In this way, it may be dangerous by threatening to disrupt the hierarchy that the binary code presumes.<sup>61</sup> To the extent that dominant ideologies are shot through with these binary oppositions, and no less than major explanatory models of social development are, deconstruction has a subversive role to play. And to the extent that Western science is no more capable of escaping the charge of deploying these discredited oppositions, its pretensions to objectivity are but a form of 'white mythology'.<sup>62</sup>

When Derrida turns to consider law, his specific discussion about justice offers no more instructive ideas about what states should do to bring a more just order into being. For him, 'deconstruction is justice', specifically in the form of an imperative 'to do justice to the other'.<sup>63</sup> Yet his opaque and largely elusive discussions of what concrete reforms justice might entail revolve around the judicial function of interpreting the law, and the distinction between mechanical applications of rules that involve detached calculation, and the pursuit of justice

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60 Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, Johns Hopkins University Press, 1976) [trans of: *De la Grammatologie* (first published 1967)]; Jacques Derrida, *Writing and Difference* (Alan Bass trans, Routledge & Kegan, 1978) [trans of: *L'Écriture et la Différence* (first published 1967)]; Jacques Derrida, *Margins of Philosophy* (Alan Bass trans, University of Chicago Press, 1984).

61 Derrida, *Of Grammatology*, above n 60, 141–64.

62 Derrida, *Margins of Philosophy*, above n 60, 213.

63 Jacques Derrida, 'Force of Law: The "Mystical Foundations of Authority"' (Mary Quaintance trans, 1990) 11 *Cardozo Law Review* 920, 945, 947.

in general, which is 'incalculable'. In addition, he proposes that deconstruction offers a more penetrating approach to law than the 'critique' of traditional political and social theory, because it examines 'a more intrinsic structure, one that a critique of juridical ideology should never overlook'.<sup>64</sup> It reveals that the essential force of law comes from its ultimate foundation, which lies beyond law; it is to be found in violence, 'a violence without ground'.<sup>65</sup> This revelation of law's essential origins importantly identifies how currently peaceful legal orders may have originated in violent and repressive regimes, and this may shed light on their current achievements. But his claim is too broadly drawn insofar as it applies to all law; the deconstructive focus is methodologically disabled from drawing distinctions between just and unjust regimes, as all are seen to originate in a similarly violent beginning. Profound normative differences separate popular liberation struggles from imperialist and oppressive regimes, for instance, and the toppling of democratic polities by military coups. Nothing in Derrida's discussion of justice and law offers the means to judge normatively between these extremes, so his work provides very little of substance to assist in the evaluation of current legal regimes. But his assault on the pretensions of Enlightenment reason does provide some support for a progressive critique of the limitations of the traditional idea of social justice, as will be explored below.

Postmodernist and poststructuralist theories have been influential in more specifically legal theorising, no less than in the social sciences and humanities more generally. Displaying a similarly distinctive 'exhaustion of utopian energies',<sup>66</sup> however, the various jurisprudential versions focus on questions of justice that are far removed from social justice. Insofar as they too have jettisoned the very idea of 'society' as a reference point, they are necessarily ill-equipped to embrace normative ideas that might demand that society as a whole, and its constituent institutions, be subject to the demands of justice so as to minimise economic and social inequality. Unsurprisingly, they are also ineluctably disabled from offering any meaningful social justice perspective on law and legal institutions. From Douzinas' and Warrington's call for a 'justice of alterity',<sup>67</sup> to Schlag's repudiation of any kind of normative approach to law,<sup>68</sup> to Fitzpatrick's Foucauldian rejection of any positive features of legality,<sup>69</sup> a profoundly 'opponentist' stance towards law and justice in general is typical. To the extent that problems of justice are posed in essentially non-economic and

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64 Ibid 941.

65 Ibid 943.

66 Jürgen Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies' in Jürgen Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate* (Shierry Weber NicholSEN trans and ed, MIT Press, 1989) 48. In this respect, this new wave of critical legal theory is strikingly different from the Critical Legal Studies Movement that preceded it.

67 Costas Douzinas and Ronnie Warrington, *Justice Miscarried: Ethics and Aesthetics in Law* (Harvester Wheatsheaf, 1994).

68 Pierre Schlag, 'Normative and Nowhere to Go' (1990) 43 *Stanford Law Review* 167.

69 Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992).

non-political terms in this genre, there is no theoretical space for any consideration, let alone valorisation, of social justice.<sup>70</sup>

But despite the absence of a social justice perspective from these theories, they nonetheless, as even their most staunch critics acknowledge,<sup>71</sup> exposed some of the lacunae in conventional social justice theorising towards groups marginalised in supposedly liberal modern societies, even in generous welfare states. They lent philosophical support to a new political imaginary ‘centered on notions of “identity”, “difference”, “cultural domination”, and “recognition”’ at odds with the social justice-inspired agenda reliant on concepts of “class interest”, “exploitation” and “redistribution”’.<sup>72</sup> In turn, they became part of the vocabulary of the emergent ‘new social movements’.<sup>73</sup> As we shall see later, this novel notion of ‘justice as recognition’ represents an important adjunct to any contemporary social justice agenda.

A fourth factor that contributed to a weakening of support for the particular model of the postwar welfare state was the rise of feminist critiques of its patriarchal character. A number of analyses appeared from the 1970s onward that directed critical attention to the specifically gendered assumptions built into the structural design of the welfare state, and specific model of social justice embedded in it.<sup>74</sup> Based on the notion of the single wage and male breadwinner in the traditional nuclear family, this state formation came to be seen as increasingly discriminatory to women. This was particularly so at a time when, empirically, the proportion of families that fitted this mould was in irreversible decline, with broader social acceptance of divorce on the one hand, and non-heterosexual partnerships on the other. This fraying of the old gender order underscored the idea that, far from being seen as enhancing freedom by means of a fairer distribution of national wealth, the welfare state, through the mechanism of the ‘family wage’, effectively enforced traditional gender roles, and the social and economic inequality intrinsic to them. As Elizabeth Wilson put it: ‘First and foremost today the Welfare State means the State controlling the way in which the woman does her job in the home of servicing the worker and bringing up their children’.<sup>75</sup> In the place of an earlier ‘androcentric’ idea of social justice, feminists increasingly called for gender equity that was primarily about recognising the particular interests and needs of women that were not reducible

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70 For this reason, and others, Frederic Jameson argues that there is nothing at all critical in these forms of theorising; instead they share an affinity with contemporary capitalism, as its ‘cultural logic’: see Frederic Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism* (Duke University Press, 1991).

71 Habermas, above n 54, 290; Fraser, above n 41, 11.

72 Fraser, above n 41, 11. See also Charles Taylor et al, *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed, Princeton University Press, 1992); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

73 Alain Touraine, ‘An Introduction to the Study of Social Movements’ (1985) 52 *Social Research* 749, 777–8; Pierson, above n 27, ch 3.

74 See, eg, Carole Pateman, ‘The Patriarchal Welfare State’ in Amy Gutmann (ed), *Democracy and the Welfare State* (Princeton University Press, 1988) 231.

75 Elizabeth Wilson, *Women and the Welfare State* (Tavistock, 1977) 40.

in general to poverty or disadvantage.<sup>76</sup> This line of critique was not so much directed against social justice per se, but emphasised the problems inherent in its gender-blind version.

Taken together, these various strands of theorising led to a stark difference in approaches to social justice among those who were otherwise opposed to the neoliberal orthodoxies of the 1980s and 1990s. On the one hand, a 'politics of redistribution' affirmed the social justice agenda and dominant ideology of the welfare state. On the other, a 'politics of recognition' emerged, with limited attempts for proponents or political parties to find common ground. As Nancy Fraser concludes:

The 'struggle for recognition' is fast becoming the paradigmatic form of political conflict in the late twentieth century. Demands for 'recognition of difference' fuel struggles of groups mobilised under the banners of nationality, ethnicity, 'race', gender, and sexuality. In these 'postsocialist' conflicts, group identity supplants class interest as the chief medium of political mobilisation. Cultural domination supplants exploitation as the fundamental injustice. And cultural recognition displaces socioeconomic redistribution as the remedy for injustice and the goal of political struggle.<sup>77</sup>

The cumulative effect of these various shifts in perspective on justice and the new social movements that adopted them, in conjunction with the wider range of criticisms directed at the welfare state from neoliberals, has been to displace social justice from its former position of pre-eminence in the political contest of human values in liberal societies, rendering it now as merely one more value in the array of justice claims. As it slips from the vocabulary of public policy-making, it has lost its reformist capacity, and in doing so, has become less challenging to the status quo.

These broader political developments were mirrored in large and small ways across society. At the macro-political level, the pillars of the social justice-inspired welfare-regulatory state were progressively pared back or even dismantled. Nationalised industries, government services and state provision of public goods were increasingly displaced by market mechanisms, as conservative administrations proceeded to 'unmix' the former mixed economies with comprehensive programmes of privatisation.<sup>78</sup> These were supplemented by extensive deregulation of the economy, as markets were increasingly liberated from the redistributive policies that regulation fostered. Welfare benefits were also increasingly pared back, while the introduction of user-pays principles significantly reduced the range of public goods available for citizens. The net effect of all these policies was to substantially reduce the package of social rights, with the notion of citizen as consumer of services replacing the former idea of universalism, and with increasingly restrictive conditions attached to

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76 See generally, Fraser, above n 41, ch 2.

77 Ibid 11.

78 See, eg, Tony Prosser and Michael Moran, *Privatization and Regulatory Change in Europe* (Open University, 1994); Ray Forrest and Alan Murie, *Selling the Welfare State: The Privatization of Public Housing* (Routledge, 1988); Therborn, above n 39.

welfare entitlements.<sup>79</sup> Cumulatively, these reforms led to the welfare state becoming a ‘workfare’ state, as policies emphasised the responsibilities of the poor more than their rights.<sup>80</sup> Moreover, these policies were generally replicated, if not accelerated, by even avowed social democratic governments when they came to govern. The new neoliberal consensus meant that the less tightly regulated market has become the dominant, and overwhelmingly accepted, primary mechanism of production, consumption and exchange in advanced societies, with, as will be seen below, an attendant and growing gap between the haves and have-nots. And in consequence, the commitment to and espousal of social justice has been comparably weakened.<sup>81</sup> These various challenges to social justice were further amplified as the nation-state faced the emergent challenge of ‘globalisation’.

## VI JUSTICE, OR JUST US? FROM SOCIAL TO GLOBAL JUSTICE

If the nation-state represents both the spatial boundary within which, and the primary mechanism by means of which, social justice can be achieved, the emergence of globalisation presents an array of conceptual and practical challenges. Globalisation is fundamentally an economic phenomenon through which countries become interconnected and interdependent in new ways, and to a substantially greater degree than at any other time in history. To be sure, ever since the emergence of empires, events in one country have affected those in others. But with globalisation, a qualitatively and quantitatively different picture emerges. Through a range of processes – economic, political and technological – the world has shrunk spatially and temporally, so that events in one part of the globe increasingly influence peoples and societies great distances away.<sup>82</sup> Although this development is most visible in the economic sphere, rendering nation-states’ control over domestic economies much weaker, it has also posed historically unique structural challenges for the wider society. It follows that

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79 Colin Scott, ‘Regulation inside Government: Rebadging the Citizen’s Charter’ [1999] *Public Law* 595; Robert Henry Cox, ‘The Consequences of Welfare Reform: How Conceptions of Social Rights Are Changing’ (1998) 27 *Journal of Social Policy* 1.

80 Joel Handler, *Social Citizenship and Workfare in the United States and Western Europe* (Cambridge University Press, 2004).

81 The shift in sentiment is reflected at all levels of society. Take the local, micro-level, example of law school curricula. Not long ago, courses with names that included the epithet ‘and society’ proliferated – such as ‘Law and Society’, ‘Lawyers and Society’ and ‘Crime and Society’ – alongside specialist courses that focused on particular domains where social justice concerns were central (‘Social Security Law’, ‘Welfare Law’, ‘Housing Law’ and ‘Poverty Law’ were staples in the array of progressive law schools’ elective offerings). Now they appear like endangered species, outflanked, outnumbered and certainly out-enrolled by courses on ‘Law and Sexuality’, ‘Law and Gender’, ‘Law and Race’, ‘Human Rights’, and so on.

82 John Baylis and Steve Smith, *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press, 2<sup>nd</sup> ed, 2001) 7; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).

[t]he welfare-state mass democracies on the Western model now face the end of a 200-year developmental process that began with the revolutionary birth of modern nation-states. ... Today, developments summarized under the term 'globalization' have put this entire constellation into question.<sup>83</sup>

In this fundamentally changed environment, the project of social justice faces unique challenges. As we have seen, the appearance of social justice was closely linked to modern understandings of the nature of society understood in terms of the nation-state. It was inevitable that, in similar fashion, a conception of justice would appear in response to globalisation that looked beyond the nation-state for its bearings. If, as Daniel Bell argued, 'the national state has become too small for the big problems in life, and too big for the small problems', then theories of justice tied to it have become 'too small' to address the inequalities that are seen to persist and be magnified in the 'postnational constellation'.<sup>84</sup>

Accordingly, a body of theory has recently emerged, sympathetic to the project of social justice, that explores the notion of 'global justice'. Perhaps the best known is the work of Thomas Pogge, who initiated this approach by critically examining Rawls' theory of justice in order to assess its usefulness in the context of globalisation.<sup>85</sup> As we have seen, Rawls' work is squarely within the social justice tradition, leading to a series of proposals for a fair distribution of resources and benefits *within* liberal societies. It does not address the profound inequalities *between* societies. For those concerned about poverty and disadvantage, this issue is of particular concern in the context of globalisation, given the growing interdependency of nations. Pogge identifies this blind spot in Rawls' theory as not simply an omission, but rather, necessitated by Rawls' focus on the creation of a political community along the lines of the nation-state. Importantly, given that the institutional arrangements within nation-states are increasingly influenced by supranational forces, Rawls' theory needs to be supplemented by a global perspective if it is to provide a framework for an adequate contemporary theory of justice emphasising a fairer measure of redistribution for all. It is inevitable that citizens in an 'original position' intending to set the ground rules for a nation-state behind a 'veil of ignorance' are systematically obstructed from imagining a global order of justice, so a different basis must be found for it.

As a point of departure from Rawls and others who see social justice discourse as essentially confined to the national level,<sup>86</sup> Pogge sees

83 Jürgen Habermas, 'The Postnational Constellation and the Future of Democracy' in Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky ed and trans, MIT Press, 2001) 60.

84 Daniel Bell, *The Winding Passage: Essays and Sociological Journeys, 1960–1980* (ABT Books, 1980) 225 (emphasis altered).

85 Thomas Pogge, 'Rawls and Global Justice' (1988) 18 *Canadian Journal of Philosophy* 227; Thomas W Pogge, *Realizing Rawls* (Cornell University Press, 1989). See also Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1979); Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2006).

86 See, eg, John Rawls, *The Law of Peoples, with 'The Idea of Public Reason Revisited'* (Harvard University Press, 1999); Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113.

'cosmopolitanism' as the appropriate reference point, because it emphasises that all human beings are members of a worldwide community, rather than citizens of a specific polity.<sup>87</sup> The universalism espoused by this theory transcends the particularism of earlier approaches to social justice, and is justified by calling to account the emergent institutions of globalisation in ways that parallel the earlier rationale for social justice. Analysing global institutions such as the World Trade Organisation ('WTO') and the international legal regimes for protecting intellectual property rights in detail, he finds that they operate to systematically entrench and exacerbate material inequality across the globe. It follows that, from a social justice perspective, they should be reformed in ways that will lead to a fairer distribution of the world's resources. As with national markets, because these global mechanisms are to a significant degree responsible for an unfair distribution of resources, 'social justice cosmopolitanism' suggests ways to remodel them to take 'equal account of the interests of all human beings'.<sup>88</sup> Social justice cosmopolitanism differs from a more utopian 'legal cosmopolitanism', which would require a global state to enforce rights. As supranational institutions that form part of the fabric of global governance continue to grow, the call for social justice cosmopolitanism appears to have increasing plausibility, though there are many who criticise the notion of global justice on the grounds of its being too remote from any existing institutional frameworks.<sup>89</sup>

It is important to emphasise that it greatly overstates the case to suggest, as some theorists do, that globalisation heralds the twilight of the nation-state.<sup>90</sup> Even though the scope of global governance is expanding, with the state's freedom to act subject to a growing array of legal, political and economic constraints, the state continues to be the privileged site of enforcement of rights, and the basic source of citizenship. Nonetheless, to the extent that global institutions play an increasing role in the making and application of domestic law, they represent critical sites for any implementation of policies advancing social justice. In the next section, some possible examples of reform in the direction of social justice cosmopolitanism will be explored.

One aspect of the global dimension of justice is evidenced in the rise to prominence of human rights discourse where critical assessments of existing laws are currently made. Since the establishment of the United Nations, human rights has changed from being a specialist subject in the field of public international law to a central category of domestic law, as increasing numbers of states have become signatories to international human rights instruments, incorporated their

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87 Thomas W Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 *Ethics* 48.

88 Thomas Pogge, 'Cosmopolitanism' in Robert E Goodin, Philip Pettit and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (Blackwell Publishing, 2<sup>nd</sup> ed, 2007) 312, 313.

89 Rawls, above n 86, 115–20; Nagel, above n 86.

90 See, eg, Kenichi Ohmae, *The End of the Nation-State: The Rise of Regional Economies* (Simon and Schuster, 1995); Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalisation* (Columbia University Press, 1996); Paul Hirst and Grahame Thompson, *Globalisation in Question* (John Wiley & Sons, 1996).



provisions into national law, and become subject to the jurisdiction of supranational courts and tribunals. And any question of the justice of the content or application of laws that might have an international dimension, such as those relating to foreign nationals, refugees or foreign corporations, necessarily brings into focus international human rights treaties and norms. Globalisation serves only to fuel their relevance. Human rights discourse has become an increasingly important part of the critical vocabulary by which existing laws and legal regimes are judged; to this extent, it overlaps with theories of justice. But it lives a double life insofar as it also represents a body of existing law that covers many of the areas of concern of ideas of justice, such as civil and political rights, as well as social, cultural and economic rights. A further explanation for the increasing emergence of human rights discourse in discussions of the justice of our law is its power to depoliticise debates.

This is particularly important where the relevant audience to be convinced are not policy-makers, but other lawyers, particularly those in positions to develop or influence the development of the law. But because discussion of human rights inescapably connotes international legal norms, the overlap with the arguments advanced by global justice theory is substantial.

The following table attempts to portray this very general, and necessarily schematic, typology of models of justice by reference to the forms of state in which they typically emerge, and the pattern of rights that they tend to foster. The developments are traced by reference to the term 'modernity', following conventional usage. Most historians see modern societies as making their appearance with the emergence of markets and industrialisation within the framework of nation-states, and, in turn, the 20<sup>th</sup>-century welfare states as marking out 'late modernity' to the extent that they build on those earlier social formations. In order to identify the neoliberal or 'postwelfare' phase, I have described it as 'postmodernity'.<sup>91</sup> This term is controversial, entwined as it is with the protean concept of 'postmodernism'. It is intended to avoid the various perspectives associated with the latter, emphasising instead structural and historical change.

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91 See, eg, David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Wiley, 1989); Zygmunt Bauman, *Intimations of Postmodernity* (Routledge, 1992). This table is a modified variant of a similar model in Edgeworth, above n 47, 200.

Table 1: Typologies of Law and Justice\*

	<b>Modernity-Liberal</b>	<b>Late Modernity-Welfare State</b>	<b>Postmodernity Neoliberal, Global</b>
<b>Form of state</b>	1 Liberal 2 Democratic**	Welfare-regulatory state	Contracting welfare state Expanding global governance
<b>Citizenship</b>	1 Civil rights 2 Political rights	Social rights	Consumer Conditional Cosmopolitan
<b>Regulatory form</b>	Free market	Market regulation Nationalisation Expanding welfare rights	Deregulation Privatisation Workfare Transnational governance
<b>Dominant ideal of justice</b>	Formal equality Individual desert Justice as autonomy	Social justice	Recognition/difference Global justice Human rights

\* Note that these phases are generally *additive* in the sense that later developments do not simply displace earlier ones, but instead both build on and modify them.

\*\* These numbers represent sequential phases of historical development.

## VII LAW AND SOCIAL JUSTICE IN THE NEW CONSTELLATION

For those who have an abiding commitment to social justice, the discussion so far indicates that it has many current competitors. In any attempt to devise how it might optimally fit with other theories, and how it might be actualised to assess current laws and legal systems, it may be helpful first to examine the current context with which such theories need to grapple. What follows are some general comments based on the above analysis.

An important starting point is to recognise that for all the assaults on the welfare state over the last three decades, particularly outside the northern European social democracies, the commitment to social justice, at least measured in terms of social welfare spending, has not been reduced anything like as much as neoliberal rhetoric has proposed or its rise would suggest. As Pierson notes, surveying the changes over a range of welfare states up until the mid-2000s, even under the more avowedly neoliberal regimes, welfare cutbacks tended to reduce overall spending by very small amounts in proportionate terms, and in some cases expenditure increased, as where denationalisation led to higher unemployment, requiring

greater payment of benefits.<sup>92</sup> Even where substantial restructuring of welfare-state regimes has unfolded – with shifts from welfare to ‘workfare’, the paring back of employees’ rights and the weakening of unions, and fundamental changes from public to private forms of provision in health, education and welfare – enough of the old welfare state provision remains to indicate, at least at the implicit level, a broad measure of popular support for some form of state provision to alleviate poverty as a matter of legal obligation, and that the inequality of vulnerable citizens in different classes, as consumers, tenants, borrowers and employees, is recognised by protective legal rules. This suggests that a bedrock of latent popular support persists for the basic principles of solidarity that form part of the essence of social justice, even if it does not currently form part of formal vocabulary of contemporary political demands. Recognition of this fact should provide supporters of social justice with some optimism.

Nonetheless, as various cartographers of inequality have recently pointed out, since the early 1980s, when neoliberal administrations began to enact their policies, a steady, growing trend of unequal distribution of resources has been evident, particularly in the Anglophonic democracies. For instance, Andrew Leigh notes that since around 1980, a significant growth in inequality in Australia has become evident.<sup>93</sup> For instance, the pre-tax income share of the top one per cent has doubled, while for the top 0.1 per cent, it has tripled. Similar findings have been made in the United Kingdom and the United States, noted most recently by Joseph Stiglitz, who persuasively identifies a process whereby a more egalitarian American economy has progressively become restructured to serve the interests of the top one per cent of income-earners and wealth-owners over the last three decades.<sup>94</sup> It follows that the need for social justice is more pressing than ever, even though, as the historical picture above indicates, it represents only a partial normative framework. If, as Rawls and others have argued, a basic level of material equality is required for even the liberal freedoms to flourish (such as the civil rights to engage in economic activity, and the political rights to participate fully in the democratic process), then substantial steps need to be taken for social

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92 Pierson, above n 27, 182–4.

93 Andrew Leigh, ‘Why Inequality Matters, and What We Should Do about It’ (Speech delivered at the Sydney Institute, Sydney, 1 May 2012).

94 Joseph Stiglitz, *The Price of Inequality: How Today’s Divided Society Endangers Our Future* (W W Norton, 2012). George Monbiot makes a similar point when he refers to data that indicate that

[b]etween 1947 and 1979, productivity in the US rose by 119%, while the income of the bottom fifth of the population rose by 122%. But from 1979 to 2009, productivity rose by 80%, while the income of the bottom fifth fell by 4%. In roughly the same period, the income of the top 1% rose by 270%.

In the UK, the money earned by the poorest tenth fell by 12% between 1999 and 2009, while the money made by the richest 10<sup>th</sup> rose by 37%. The Gini coefficient, which measures income inequality, climbed in this country from 26 in 1979 to 40 in 2009.

George Monbiot, ‘The 1% are the Very Best Destroyers of Wealth the World Has Ever Seen’, *The Guardian* (London), 8 November 2011, 31. See also *United Kingdom: Income Inequalities*, The Poverty Site <<http://www.poverty.org.uk/09/index.shtm>>. On the United States, see Dave Gilson, *Charts: Who Are the 1 Percent?* (10 October 2011) Mother Jones <<http://motherjones.com/mojo/2011/10/one-percent-income-inequality-OWS>>. See also Branko Milanovic, *The Haves and the Have-Nots: A Brief and Idiosyncratic History of Global Inequality* (Basic Books, 2011).

justice to be re-established in contemporary societies, in order to extend all forms of justice.

Given that in economies where private provision based on market principles increasingly supplants the provision of public goods by the state, and in consequence where those with ability to pay get priority, the potential for inequality in one sphere to spread to others substantially increases, particularly where the very wealthiest enjoy increasing benefits. As Michael Walzer emphasises in *Spheres of Justice*,<sup>95</sup> one important buffer against inequality in society, and thereby a fundamental element of any social justice framework, is ensuring that advantage in one social sphere does not translate into advantage in others. This idea is already enshrined in relation to political rights; for instance, there are prohibitions against buying votes, or paying for appointment to public office. But where more and more goods in society are obtainable only through the market, as neoliberal philosophy prefers, the opportunities for those with wealth to gain advantage through them increase correlatively. These kinds of developments are relevant to law in a number of ways. Access to justice is affected by wealth. The fundamental principle of equal justice is subverted where citizens have readier access to legal representation based on income. High-quality education and health care are also increasingly subject to market principles. It follows that legal rules providing better rights to these advantages should be central elements in a social justice manifesto.

An important point to make in this context, and one that is at odds with much contemporary critical-legal theorising, is to affirm the importance of the language of rights. In the face of growing global and local inequalities, rights of access to justice, equal treatment before the law, and redistribution of power and wealth by the operation of legal rules must remain central concerns for those concerned to strive for more just institutions. This means that rights and rights-talk will continue to be of central importance to the creation and reform of mechanisms to improve the delivery of justice.<sup>96</sup> It follows that various contemporary forms of critical-legal thinking that eschew rights talk entirely, or adopt a dismissive or cynical approach to law and legal institutions in general, offer no assistance in this progressive endeavour.

It also follows that a legal politics of redistribution needs to be nurtured to tilt the balance back towards the disadvantaged after decades of policy preferences in favour of corporate interests and the more advantaged in society. Enhancing social rights at the domestic level is an essential element of any strategy to further equality. Advocates of social justice need not only to engage in general debates about justice, but also to devote critical attention to the detail of the legal rules that foster and create material inequality. In the current context, this means examining and revealing the myriad ways in which the tax, superannuation, and pension rules confer unjustified benefits on the advantaged, how the legal regimes governing the provision of health services and education may work unfairly against the poor, and

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95 Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books, 1983) 19.

96 Anne Bartholomew and Alan Hunt, 'What's Wrong with Rights?' (1991) 9 *Law and Inequality* 1, 49–50.

how the market rules for housing and employment may entrench rather than alleviate disadvantage. As Stiglitz argues, all legal rules have distributive effects.<sup>97</sup> More extensive theoretical and empirical research on the detailed impact of legal rules is therefore imperative in our increasingly unequal society.

A social justice perspective will be important for other areas of law as well. It is particularly relevant for the realm of private law, which regulates economic activity and is primarily governed by principles of corrective or commutative justice, since it is in this social sphere in particular that inequality and disadvantage are both established and exacerbated in market economies. Where new markets appear and are governed by the default rules of private law, with their focus on the abstract legal subject, a social justice perspective will propose detailed statutory regulation to displace those rules where structural inequality and disadvantage appears. At the same time, however, it is critical to recognise the inherent and undeniable advances in justice represented by the ideas of corrective, commutative, distributive and freedom-based justice from the classical and early-modern eras. Social justice theory has perhaps not recognised this as fully as it might have in the past, thereby leading to the adoption of sometimes too-cumbersome strategies of state-authored redistribution, where market-based ones might have been, on balance, more just.

As the survey of critical theory above indicates, a social justice perspective should welcome the contribution of theories of justice which emphasise the importance of fully recognising identity and difference, acknowledging that a complete image of justice cannot ignore injuries to identity, and that our laws should fully embrace the critiques of liberal laws that fail to address the particularistic claims of ethnic, sexual and racial minorities. But it would temper the discourse of difference, and politics of recognition, with a 'politics of redistribution'.<sup>98</sup> This would mean that it would withhold recognition of minority practices that are exploitative or degrading, and would infuse a social justice dimension to claims for recognition. Given that forms of material inequality tend to impact with disproportionate severity on ethnic and other minorities, this contribution should be no less a concern for those for whom a 'politics of difference' remains central. Furthermore, a social justice perspective might provide a critical perspective on proposals from minorities, for instance, which inadvertently confer unfair benefits on the well-off within those communities.

If social justice theorising has much to learn from these bodies of theory, the experience of the last thirty years of fundamental economic, political and legal change should also be absorbed. A simple resort to old notions of the heavily bureaucratized welfare state of the postwar era would hardly represent an effective way of ameliorating the rights of the disadvantaged in this new environment. Accordingly, those who are committed to progressive reform need to 'work themselves free of the seductive pleasures of moral superiority about the venality of the market and false nostalgia about the vanished compassion of the old civic

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97 Stiglitz, above n 94, 52–3.

98 Fraser, above n 41, 12.

contract'.<sup>99</sup> Proposals for the comprehensive re-nationalisation of utilities, or the return to command and control regulation, are not effective responses to the need for regulatory reform in the present. They need to be more ambitious by recognising the profound changes that mean that the old verities of social justice no longer apply. Recent neoliberal adoption of markets to replace the state provision of social goods in many areas indicates that in some circumstances, state provision is not optimal from a social justice perspective, and that markets may be better, even for the disadvantaged. In these circumstances, private profit may be a lesser price to pay than state cost, if private provision means the benefit to citizens is equal or better. But the recent Global Financial Crisis has seriously undermined the neoliberal case. It shows that only governments can effectively underwrite economic activity, and remedy large-scale market failure by providing public funds to bail out financial institutions and other large industrial units. Greater contributions from the economically advantaged should finance this ongoing public liability.

Finally, a social justice perspective should be supplemented by global justice, and broaden to embrace a global perspective. It should therefore register how changes at the supranational level have been no less inegalitarian than those at the level of the nation-state with the onset of globalisation. Where too many elements of existing global law chiefly serve the interests of the most privileged interests in the global economy,<sup>100</sup> the infusion of a social justice dimension in the new legal landscape is no less pressing than it is in the domestic context. For example, emerging networks of influence at the global level indicate alliances between similar groups from within different nations that co-operate to gain advantage over domestic rivals. According to Benvenisti, the better-organised domestic groups, such as producers, employers and service suppliers, combine in supranational alliances to exploit those who are less organised, such as consumers, employees and citizens in positions of environmental vulnerability.<sup>101</sup> Although it is still in an embryonic state, a sociology of the interplay between supranational and national law is beginning to appear that might assist in exposing such mechanisms of inequality. In the same way that the idea of social justice was informed, at least in part, by understandings of how societies were structured, so too in an age of globalisation, analyses of how global society operates is essential for a sense of 'social justice cosmopolitanism' to be effective.

John Braithwaite's and Peter Drahos' work on international business regulation provides some guidance for such research.<sup>102</sup> In a broad-ranging examination of the interplay between global and local systems, they analyse how regulatory laws are made, reformulated and reformed by global institutions, and the alliances through which legal change is effected. Their studies revealed that, far from being

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99 Michael Ignatieff, 'Citizenship and Moral Narcissism' (1989) 60 *Political Quarterly* 63, 72.

100 William E Scheuerman, 'Global Law in Our High Speed Economy' in Richard P Applebaum, William L F Felstiner and Volkmar Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001) 103, 117.

101 Eyal Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 *Michigan Law Review* 167, 169.

102 Braithwaite and Drahos, above n 82, ch 26.

monolithic, institutions of global governance display a somewhat chaotic and contradictory pattern of regulation. They found a drift towards greater advances for multinational corporations in their pursuit of profits, and weakening legal regimes in the two decades to 2000. Nonetheless, they also discovered that this environment presents many opportunities for alliances, tending to undermine any unitary notion of the domination of multinational capitalism. The authors identify how the process of enrolling the support of powerful actors (state and non-state alike) can work to the advantage of weaker groups, such as consumers in cases where commercial interests or national interests are in conflict. To advance social justice, precisely these kinds of mechanisms need to be thoroughly analysed.

It will be impossible to develop a supranational perspective on social justice as another way of buttressing the shrinking bundle of social rights of domestic citizenship without engaging with human rights principles and human rights jurisprudence. A deepening of human rights norms, in relation to economic, political and social rights, and within both international and domestic law, might reverse the neoliberal tilt in favour of civil (contractual and private property) rights, with their indifference to questions of substantive inequality. A helpful starting point for reform would be to integrate social justice principles into the WTO system. As Petersmann argues, international economic law has for too long operated without attention to human rights, so that human rights considerations have failed to influence traditional interpretations of WTO law.<sup>103</sup> For instance, rules of standing need to be revised to include alliances of citizens from civil society wider than states and corporations. An example of an important reform would be for the WTO to allow advocacy by non-governmental organisations on behalf of consumers, labour and environmentalist groups.<sup>104</sup> Because human rights law has a growing institutional presence within and beyond nation-states, it offers an additional platform for a social justice agenda. As has been the experience with the deployment of markets domestically in place of state-provided public goods, achieving social justice may require a more open-minded approach to their operation in the context of international trade, rather than a knee-jerk, over-regulatory protectionism.<sup>105</sup> Human rights law and theory therefore needs to be an adjunct to social justice, rather than standing separate from it.

## VIII CONCLUSION

In this article, I have provided a thumbnail sketch of the emergence of the concept of social justice, by reference to classical and liberal versions, as well as

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103 Ernst-Ulrich Petersmann, 'Human Rights and International Economic Law in the 21<sup>st</sup> Century: The Need to Clarify Their Interrelationships' (2001) 4 *Journal of International Economic Law* 3, 37–8.

104 Christopher Arup, *The New World Trade Organisation Agreements: Globalizing Law through Services and Intellectual Property* (Cambridge University Press, 2000) 54–5.

105 Fernando R. Tesón and Jonathan Klick, 'Global Justice and Trade' in Chios Carrmody, Frank J. Garcia and John Linarelli (eds), *Global Justice and International Economic Law: Opportunities and Prospects* (Cambridge University Press, 2012) 217.

surveying its recent fate in the face of political challenges to the welfare-regulatory state. I have also explored some competing theories of justice that have emerged recently to offer different priorities, and in a very different context. Four fundamental points follow from this approach. The first is that it is only possible to understand what social justice means by close examination of its origins and its fortunes over time. Second, I have sought to locate social justice by reference to other meanings of the term 'justice'. I have then identified the high point and decline of social justice in institutional arrangements in light of recent social and economic change. Finally, I have argued for the importance of retaining the concept in light of the very different, but no less acute, problems of material inequality in a time of globalisation.

Given space restraints, it has not been possible to examine other important and contemporary perspectives on justice such as 'restorative justice',<sup>106</sup> 'environmental justice',<sup>107</sup> or the 'retributive justice' that lies at the heart of the criminal justice system.<sup>108</sup> What makes this omission troubling is that a social justice perspective raises the question of how these perspectives might be compatible with it, or may optimally be combined with it. Any thorough overview of the prospects for social justice needs to engage in such an exercise, but it is beyond the scope of this article to do so. This point raises a final question about the above discussion. In tracing the genealogy of social justice, it has been possible to provide a precise meaning for the idea, emphasising the value of clear conceptual definition. It stands for something, not everything. The exercise gives the social justice idea a political and law reform edge, allowing for its translation to concrete policy. In so doing, it will enable us to more clearly weigh its merits against the other competing claims for priority springing from those many other forms of justice: procedural, corrective, commutative, recognition-based, global. In consequence, social justice can never be the sole yardstick by which we critically assess laws and legal systems, and it should not occupy centre stage in various vocabularies of justice we deploy to evaluate law. Nor is it the pre-eminent idea of justice, as many assumed in its heyday in the welfare state. But it should not simply be a value to which all might ascribe and which has no bite in the development of policy or legislation. By playing this more modest role, as an essential but not pre-eminent consideration in questions of justice, it might reclaim its former place as, in Hayek's terms, a 'widely used and most effective argument in political discussion'.<sup>109</sup>

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106 See John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) ch 1.

107 See, eg, David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007); Sarah Wilks (ed), *Seeking Environmental Justice* (Rodopi, 2008).

108 Mark White, *Retributivism: Essays on Theory and Policy* (Oxford University Press, 2011).

109 Hayek, above n 1, 65.