Book Reviews

Social Rights Jurisprudence Emerging Trends in International and Comparative Law, by Malcolm Langford, (Cambridge University Press, 2008), £90; 45, ISBN: 978-0-521-67805-6.

Examination of the evolution of law in the age of globalisation is best pursued via adoption of a transnational approach. This edited collection seeks to describe how international and national social rights jurisprudence underscores the duty of states to give substantive and procedural effect to social rights. It is divided into five parts. Part One addresses challenges in pursuing litigation and remedies for social rights violations. Part Two provides a comparative study of national jurisprudence from Africa, Asia, Europe and the Americas. Part Three reviews regional human rights institutions. Part Four considers the UN human rights treaty bodies. Part Five includes examination of the International Labor Organization, the World Bank Inspection Panel, and liability of multinational corporations (MNCs).

The editor, Malcolm Langford, hails the increasing trend of tribunals around the world to issue decisions addressing violations of social rights by state and non-state actors. These cases have included protection from forced eviction, as well as provision of medical aid, health care, social security, housing, food, water, and access of children to schools. It is noted that these rights are protected under both social rights and civil and political rights, thereby highlighting the importance of pursuing holistic interpretations of rights. His introductory overview presents a historical, comparative review of constitutional evolution in periods of democratization, moving from post-Second World War emphasis on civil and political rights to the post-Cold War inclusion of economic, social and cultural rights. He cites the emergence of a culture of litigation assumed by human rights advocates and social movements to pursue social change in the courts. He reflects both upon clashes between civil and political rights and socio-economic rights, as well as between different socio-economic rights. Langford highlights the importance of examining "common and divergent threads, the manner of legal reasoning, and the extent to which international or comparative law is shaping or not shaping the developments" (p.12). His chapter concludes that courts do respond to evidence of state or private failure to prevent inhumane suffering. Yet, this is challenged by legitimacy and capacity concerns. The book does not offer a theoretical discussion of the democratic implications of court engagement in areas traditionally deemed to be the mandate of the legislature; rather offering empirical cases which indicate increased acceptability of evolving judicial powers.

Langford suggests that general judicialisation of human rights and transnational judicial dialogues provide a framework of review of social rights. He notes that applicable standards are the same; for example one may consider the proportionality assessment of restriction in cases involving freedom of speech or forced eviction. This effectively erases the characterisations of negative v. positive rights.

The book utilises the framework of state obligations to "respect, protect and fulfil" human rights. Langford describes a "continuum of state interference", ranging from interference with self-organising efforts or key resources of individuals or associations, denial of access by an individual to an existing government programme or employment opportunity, removal of legislative protections or government programmes. As pertaining the duty to protect, Langford highlights the importance of horizontal obligations of non-state actors and privatisation. Regarding the duty to fulfil, he notes that the "distinction between the more conduct-oriented duty to take steps and the result-oriented duty to immediately realise some aspect of the right is not always apparent in practice" (p.24). Langford also reviews how equality and non-discrimination norms have been applied to protect social rights of disabled persons, age groups, marital status, sexual orientation, social status, receipt of public assistance, nationality and refugee and migrant status.

Indeed, many of the chapters point to courts' recognition of multiple layers of victimhood; such as the Nova Scotia Court of Appeal's reference to gender, race, marital status, and poverty in order to grant protection to public housing residents denied security of tenure in the 1993 *Sparks* case, referred to in the chapter by Martha Jackman and Bruce Porter.[1] The vulnerability of children, women, minorities, and indigenous people and the crucial relevance that respect of social and economic rights have in their lives is repeatedly underlined in several chapters, in particular within the chapters dedicated to the Inter-American system by Tara J. Melish. Yet, the chapters are somewhat uneven, as some (e.g. the chapter by Magdalena Sepúlveda on Colombia) highlight the importance of group rights, such as indigenous rights, in prompting an evolution in the understanding of communal and customary property rights, while other chapters do not. The chapter on the United States by Cathy Albisa and Jessica Schultz does not mention indigenous peoples or their rights, in spite of the United States having received communications from both the Inter-American Commission of Human Rights and the UN Committee on the Elimination of Racial Discrimination in the *Dann Case* regarding infringement of indigenous property rights.[2]

The editor is clearly committed to this field and communicates his enthusiasm via clearly articulate assessments, grounded in solid understanding of the interworkings of the international and regional human rights systems, and genuine curiosity as to the variances among national jurisdictions. He is comfortable referring to factors beyond the law, such as addressing the influence of social, political, and cultural backgrounds for perceptions of justiciability of social rights. Nevertheless, the individual chapters are primarily founded in description and analysis of national legislation and jurisprudence. This material is very important because many of the innovative cases and legislation are simply not known beyond their national borders. In general, lawyers tend to be most familiar with national practice, and this renders comparative reflection difficult. Indeed, the editor himself has noted that the one sentence he had to delete from almost all the chapters was: "This is the most important country for social rights".

This edited collection is to be congratulated for amassing a wealth of jurisprudence from all four corners of the globe and the transmission of the national experiences in evolving social rights is indeed fascinating. Yet the overview of national legal systems leaves us curious as to more information explaining the background for variances in national practice. For example, the reader may be interested as to sociological factors, such as the ethnic and class makeup of judges on progressive courts. In sum, one will need to refer to other sources for a deeper understanding of the political, social, or economic factors grounding the evolution in demand and recognition of socio-economic rights.

One of the most interesting sections of the book is Part Four on the international human rights procedures and jurisprudence. The chapters in this part dispel any myth of a united UN movement towards establishment of the justiciability of socio-economic rights. Instead, these chapters confirm a state of fragmentation among the UN committees and imply that the national and regional courts (in particular, the Inter-American system) are the true sources of innovation. The juxtaposition of the committees is very interesting and sparks interest for additional comparative studies that review how these entities function in relation to addressing specific issues and how they engage in developing the evolution of international law.

Finally, it is curious that the book contains a chapter on MNCs but does not have a chapter on NGOs which, pursuant to Koh's theory, have been the primary "norm entrepreneurs" in this arena, i.e. filing cases, drafting briefs, and providing legal aid to victims.[3] Indeed, the editor himself comes from the NGO, the Centre of Housing Rights and Evictions or COHRE, which has had extensive influence in the

[1] *Sparks v Dartmouth/Halifax County Regional Housing Authority* (1993) 119 NSR (2nd) 91 (NS CA).

[2] *Mary and Carrie Dann v United States*, Inter American Commission of Human Rights (Case 11.140, December 27, 2002); UN Committee on the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure Decision 1 (68): United States of America, CERD/C/USA/Dec/1 (April 11, 2006).

[3] Harald Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 Hous. L. Rev. 623, 647.

development of policies within the UN as well as at regional and national levels. There is no doubt that his time there bestowed upon him a passion for the theme and access to cases upon which to create this impressive, important volume.

This book is an asset for academics, students and practitioners alike. It has already been adopted within the syllabus of human rights courses, and it is suggested that it serves as a good model for solid transnational research. The next step is to pursue Langford's call for implementation of the many decisions and laws which have been issued with intention of achieving social justice for those most marginalised within their societies.

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Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law, by K.D. Ewing, (Oxford University Press, 2010), 336, paperback, £19.99, ISBN: 978-0-19-958478-9.

Keith Ewing's new book adds to the current literature assessing the impact of the United Kingdom's Human Rights Act 1998. As would be expected from the excellent earlier work of such an accomplished scholar, Ewing's desire is to shift the attention of the reader away from the rhetoric found in judicial statements towards the reality of the protection of civil liberties offered to those living in the UK. The author's detailed knowledge and passionate prose hold no punches, as New Labour's record of protecting civil liberties is subjected to an excoriating critique.

Ewing's book analyses police powers, and the rights to privacy, freedom of expression, freedom of assembly and public protest. It also provides a detailed evaluation of the legislation enacted in response to terrorist threats post 9/11 and the judicial response to these legislative provisions. It concludes not only that civil liberties have been eroded, but also that they have been diminished in a manner that harms the rule of law. First, he argues that powers of the state to restrict civil liberties have been increased without legal authority—for example the use by the police of the power to "stop and give an account". Individuals stopped in this manner rarely realise that, if they answer questions posed by the police, they do so on a voluntary basis and have no obligation to reply. As such, police have been able to use this new-found "power" as an effective means of policing, despite a lack of legal authority or legal safeguards; none are needed for "voluntary" participation.

Secondly, Ewing cites instances in which state power is exercised in an arbitrary, disproportionate, discriminatory or excessive manner, often with little possibility of judicial checks over the exercise of such powers. His most convincing example is with regard to the installation and supervision of CCTV cameras. Although the Criminal Justice and Public Order Act 1994 regulates the installation of CCTV cameras, it provides a broad permission for their installation with no oversight by an independent authority. Consequently, although the 1994 Act states that CCTV cameras can only be installed for the purpose of preventing crime or promoting the welfare of victims of crimes, evidence from local authority websites demonstrates that councils install cameras for a wide variety of purposes. Ewing also cites evidence which suggests that as many as 90 per cent of CCTV cameras do not comply with the Information Commissioner's Code of Practice.

Thirdly, Ewing concludes that civil liberties are eroded in a manner that overrides due process rights and without a proper means of legal redress. For example, he demonstrates the lack of effective procedures to challenge the proscription of an organisation under the Terrorism Act 2000—proscribed organisations being effectively banned, with the imposition of criminal penalties for those belonging to such organisations,

as well as those raising support and attending or addressing meetings, or wearing clothing that may lead to the suspicion that an individual is or was a member of a proscribed organisation. However, no notice of intent is given to an organisation that it is to be proscribed; nor is the organisation given the right to make representations or to challenge the evidence on which proscription is based. There is no judicial review of a decision to proscribe a terrorist organisation, although the Act does provide an ability to apply to the Home Secretary to de-proscribe an organisation whose proscription he will have recently approved. An appeal is then possible to the Proscribed Organisations Appeal Commission against the decision to de-proscribe, with the possibility of a further appeal to the High Court for error of law of the decision of the Commission. However, as the organisation in question is proscribed, and bringing an appeal against proscription may indicate membership or support for a proscribed organisation, there would appear to be little to gain and a lot to lose for those wishing to challenge such decisions.

Ewing concludes by providing a solution to this litany of woes, arguing that Parliament should be regarded as the primary defender of civil liberties and suggesting a series of reforms both as to the composition of the Westminster Parliament and as to its powers to ensure that Parliament is better equipped to perform this task. As regards composition, Ewing proposes electoral reform along the lines of the additional member system, to ensure that the House of Commons is more representative and that Parliament can effectively challenge the executive. Whilst recognising the value of expertise found in the nominated/hereditary House of Lords, Ewing advocates that the House of Lords receive elected members and/or its current powers to be modified given its lack of accountability, with a preference for the former. As for scrutiny, Ewing would propose either that reports of the Joint Committee of Human Rights (JCHR) were considered formally as part of the legislative process, or that there was the ability of MPs to vote to suspend the passing of legislation which challenges human rights, along the lines of the powers of the Swedish Rikstag. Ewing's reforms would also entail a consequent reduction of the powers of the judiciary, in particular removing ss.3 and 4 of the Human Rights Act, whilst preserving the power of the courts to scrutinise decisions of the executive.

Does Ewing provide sufficient support for what he admits to be a controversial conclusion—that better protection of civil liberties can be found through a strengthening of the controls of Parliament and a reduction in the powers of the court? His book provides a convincing account of the failure of the courts to provide a strong protection of human rights, but as his book testifies, the erosion of civil liberties has not just stemmed from the actions of the courts. ASBOs, the restrictions that were placed upon demonstrations in Parliament Square, the proscription of suspected terrorist organisations, the creation of wide stop and search powers, the internment of terrorist suspects, the creation of control orders and of the special advocate procedure, all stem from legislative measures. Nor, as the book recognises, have the courts been completely ineffective—for example in successfully de-proscribing a proscribed organisation.[1]

Two possible justifications are provided by Ewing. First, Ewing provides the example of the legislative scrutiny by the JCHR over the Terrorism Bill 2005, classifying the detailed criticism of the JCHR of the proposals for control orders with typical enthusiasm as "[g]reat stuff!" (p.274) Ewing is far more critical of the reaction of the House of Lords in a series of decisions questioning the Convention-compatibility of control orders, both as regards their restriction of liberty in breach of art.5 of the European Convention on Human Rights (ECHR) and their failure to provide the necessary procedural protections as required by art.6 ECHR. However, despite its highly critical report, the JCHR did not manage to succeed in convincing enough members of Parliament to accept any of its proposed amendments to the Terrorism Act 2005, either then or in the subsequent years in which the JCHR has scrutinised the renewal of this legislation. However, it was a decision of the Law Lords that resulted in the removal of internment and its replacement with control orders,[2] and a further decision of the same that required a core minimum of

[1] *R (Home Secretary) v Lord Alton of Liverpool* [2008] EWCA Civ 443; [2008] 1 WLR 2341.
[2] *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

procedural rights for those challenging control orders.[3] Ewing could respond that the JCHR was unable to succeed because of current Parliamentary practices that he wishes to see amended. True enough—but is this sufficient to justify removing the ability of the courts to correct possible situations in which, despite enhanced parliamentary protections, Convention rights are still infringed? In addition, the calculation of the precise legislative measures needed to tackle terrorist threats is highly complex, relying on the assessment of sensitive material. Would Ewing's conclusions still apply in other areas—for example when determining whether administrative procedures provide a sufficient protection of natural justice?

Secondly, as Ewing notes, his claim rests on the assertion that "constitutional construction is a political rather than a legal matter" (p.278, n.22). If Ewing is correct, then it is clear that human rights would be better protected through political as opposed to legal means. However, in order to support his conclusion that there is no need for ss.3 and 4 of the Human Rights Act, Ewing would need to demonstrate not only that political means were the best way in which to resolve broad issues of the interpretation of human rights, but also that political means were the best way in which to determine how human rights apply in individual situations. Courts, which focus on an individualised approach, are arguably better able to correct potential errors of the legislature which fail to recognise how legislative provisions that are broadly compatible with human rights may nevertheless harm human rights in their specific application. In addition, Ewing's argument faces potential criticism that it excludes citizens from direct as opposed to indirect means of checking that legislation complies with Convention rights. Political pre-legislative scrutiny provides only an indirect means through which citizens may voice their concerns. Citizens may be better able to check the constitutionality of legislative provisions by raising the issue in a legal case, which may in turn generate publicity and political pressure as well as potentially providing a legal solution, than through lobbying or asking their MP to raise their concerns.

Ewing's book provides an excellent means through which to further the cause of those who advocate a predominantly political as opposed to legal means of protecting human rights. However, just as Ewing rightly points out the need to distinguish between rhetoric and reality when determining the extent to which human rights are protected, there is also a need to separate out rhetoric and reality when determining whether the legislature or the courts are the best means through which to protect human rights. Further work in this area would be welcomed.

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[3] *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2009] 3 All ER 643.