

Law and Rights: Global Perspectives on Constitutionalism and Governance

Edited by Penelope E Andrews and Susan Bazilli

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In early October, the national human rights consultation committee released its much-anticipated report on human rights in Australia. Among other things, the committee recommended that the Commonwealth government introduce a human rights Act. As we await the government's response, charter proponents, charter sceptics, and those with a general interest in human rights will find something valuable in this new collection of essays. Drawing upon scholarship from the United States, the United Kingdom, Australia and South Africa, Penelope E Andrews and Susan Bazilli have assembled an impressive array of essays considering constitutionalism and rights enforcement. The book is divided into five thematic discussions: (1) international and transnational constitutionalism: comparative perspectives; (2) constitutionalism, separation of powers and the judiciary; (3) constitutionalism, citizenship and identity; (4) constitutionalism and economic justice; and (5) the limitations of rights discourse.

Newman opens Part 1 with the task of showing that a tendency towards comparative law in constitutional interpretation can illuminate the difficult questions about the role that international law plays in the interpretation of constitutional law by domestic courts, and he argues for a process of 'principled intermingling' of constitutional and international law. Plaxton is also concerned with the intermingling of comparative legal systems and the exportation of US jurisprudence to other jurisdictions. He distinguishes between constitutional rules and prophylactic — or protective — rules and argues that when creating new rules, courts must indicate which 'type' of rule they are creating to signify to the legislature that the rule is open for re-examination. Banks explores the tension between civil and political and socio-economic rights as competing rights through an analysis of the right-to-housing cases that the South African Constitutional Court heard during its first decade. She argues that in those systems which protect both types of rights, it is inevitable that some rights will be privileged above others, particularly if the Constitution and the courts have not created a formal hierarchy of rights. The enforcement of socio-economic rights is taken up in Part 4. Chanock's contribution explores the limited success of Westminster Constitutionalism in post-colonial Africa. He maintains that an older form of constitutionalism, which stressed political accountability, separation of powers and the rule of law, should be at the core of the constitutional project in post-colonial African states, rather

than focusing on bills of rights and judicial review. Chanock's thoughtful analysis also highlights the necessity of having well functioning democratic institutions as a precondition for the effective protection of human rights.

Flanagan begins the discussion in Part 2 of the separation of powers and the judiciary by arguing that socio-economic rights, which inherently cost more to uphold than civil and political ones, should not be constitutionally justiciable. He contends that decisions with great financial implications should be left to an elected decision maker to determine and thus defend. Although Webber and McLean's chapters do not follow sequentially, since both deal with this issue they are described next. Webber argues that the appropriate forum for justifying the specification of constitutional rights is the legislature, and the courts' role in judicially reviewing legislation for compliance with constitutional rights should be to evaluate the legislature's reasons for specifying a right and determine whether this is justified. McLean is concerned with judicial review and the deference shown to the legislature in relation to policy making and the allocation of resources. She analyses this in relation to health care by exploring judgments from Canada and South Africa. Meyerson's discussion of the way that the separation of powers guarantees the rule of law leads her to conclude that there should be a strict prohibition on conferring non-judicial functions on judges. Her conclusions are based on an analysis of the 'incompatibility test' developed by the Australian High Court in *Grollo v Palmer* (1995) 184 CLR 348 and applied by the South African Constitutional Court. Due to the test's inherent indeterminacy, she argues that a strict prohibition is preferable. Robson completes the examination of judicial review by considering whether it has been beneficial for increasing the sexual freedom of women, particularly lesbian women. While she considers the theoretical debate from a US perspective, Robson uses examples from California, The Netherlands and South Africa to consider judicial review from a practical perspective.

Part 3 commences with Vojdik's examination of domestic violence under international law, followed by a comparison of the approach taken by the US Supreme Court and the South African Constitutional Court which shows the differences in the courts' understanding of domestic violence and its impact on women and gender equality. The themes of citizenship and identity are continued in Mirza's chapter, also on gender equality. Mirza offers a feminist critique of the experience of Muslim women in Britain and considers the interaction of English law and Sharia law. Calvo engages in a comprehensive exploration of the constitutional protection of 'citizenship' and discusses the models available to states for the acquisition of citizenship. After considering how a range of states protect citizenship, she finds that a number fail to do so adequately. Her analysis raises a number of issues for states due to increased migration and the impact of globalisation. Lind's concern is

the legal recognition of different cross-cultural family norms, namely same-sex and polygamous families, and he uses the South African situation to discuss legal and social positions relating to these family structures. Pettifer discusses the political background to the introduction of the *Human Rights Act 1998* (UK) and, drawing upon the cases concerning asylum seekers and the detention of terrorism suspects in the United Kingdom, she argues that a human rights culture has not emerged in the decade since the Act was adopted.

Bratspies begins the consideration of constitutionalism and economic justice in Part 4 with a discussion of the key arguments for and against constitutionalising environmental rights. Herman's chapter deals with socio-economic rights in the US and South African Constitutions. She argues that the Equal Protection clause of the US Constitution protects socio-economic rights and offers an explanation for why the Supreme Court has not interpreted it in this way. Maisel and Jones continue the discussion of socio-economic rights by analysing legal education in South Africa. They argue that education must relate to the particular needs of the country so that South African lawyers are equipped to solve the country's socio-economic problems.

Kelly sets the scene for the consideration of the limitations of rights in Part 5 by exploring the extent to which international norms should be incorporated into domestic constitutions, taking the reader back to where Newman opened the collection. Ellmann returns the discussion to South Africa with his consideration of the war powers contained in the Constitution, highlighting where reform is needed to clarify those powers. The final chapters are concerned with the 'War on Terror' that followed 11 September 2001. Gale considers the legislative response of the UK government to the threat of terrorism and Brietzke looks at the US government's use of torture. These studies highlight the tension between rights protection in extreme and testing circumstances and serve as a reminder of the vulnerability of human rights and the need for ongoing consideration and protection of human rights.

Although the South African legal system provides the backdrop for a number of the issues identified in this book, particularly in relation to socio-economic rights, the book's scope is much broader. From Africa to America, gender violence to same-sex families, citizenship to terrorism to the environment, the authors raise matters which scholars in many legal systems will find valuable, including our own as we reflect on the findings of the national human rights consultation, consider the mechanisms of rights enforcement, and look to reviving the constitutional project in Australia. ●

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