

THREE BOOKS ON HUMAN RIGHTS

Book Reviews
June 2009

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FROM CONVENTION TO CLASSROOM: THE LONG ROAD TO HUMAN RIGHTS EDUCATION: MEASURING STATES' COMPLIANCE WITH INTERNATIONAL LAW OBLIGATIONS MANDATING HUMAN RIGHTS EDUCATION, By Paula Gerber

AUSTRALIAN LAW JOURNAL

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HUMAN RIGHTS LAW AND PRACTICE, Gen. Eds. Lord Lester of Herne Hill, QC, Lord Pannick QC and Javan Herberg (3rd ed.), LexisNexis, 2009, London, 974 pages, ISBN 978 1 4057 3686 2, hardcover.

REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES, Ed: Susan Kneebone, Cambridge University Press, Cambridge, 2009, 341 pages, ISBN 978 0 521 88935 3, hardcover.

FROM CONVENTION TO CLASSROOM: THE LONG ROAD TO HUMAN RIGHTS EDUCATION: MEASURING STATES' COMPLIANCE WITH INTERNATIONAL LAW OBLIGATIONS MANDATING HUMAN RIGHTS EDUCATION, By Paula Gerber, VDM Verlag Dr. Müller, Saarbrücken, Germany, 2008, 394 pages, ISBN 978 3 639 09629 3, softcover.

The second edition of the book by Lord Lester and David Pannick, published in 2004, was reviewed in this journal: (2004) 78 ALJ 612. The review appeared with one for the second edition of the important text by Sarah Joseph and her colleagues in the Castan Centre of Human Rights Law at Monash University, concerning the International Covenant on Civil & Political Rights. The third edition of the latter is eagerly awaited. However, it has been pipped at the post by Lester and Pannick, the latter himself recently ennobled, now with a third general editor, Javan Herberg. All of them, and most of the contributors noted on the cover, are practising barristers in the United Kingdom, busily engaged in presenting cases under the *Human Rights Act* 1998 (UK).

That Act, which commenced in 2000, incorporates the European Convention on Human Rights into the domestic law of the United Kingdom. The result has been a

large number of decisions of courts in all parts of the country concerning the meaning and application of the Convention. In accordance with the formula in the Act, courts are required, where possible, to construe UK laws so as to avoid inconsistency with the Convention. Where they cannot produce this result, they are obliged to draw the discrepancy to the attention of the UK Parliament, in the expectation that it will repair the defect. The British model, drawn in part from the New Zealand Bill of Rights Act of 1990, is one of the ideas under consideration by the Australian national consultation on the improvement of Australia's federal laws for the protection of human rights, underway at the time of this review.

In his foreword to this third edition, Lord Phillips of Worth Matravers, Senior Law Lord and soon to head the new Supreme Court of the United Kingdom, recounts the change that has come over the workload of that country's final court during his professional lifetime. When he was practising at the Bar, he says, "The staple diet of the House of Lords consisted of civil law and tax appeals". There was an occasional case stated by commercial arbitrators. Judicial review was in its infancy. How things have changed. Of the 78 appeals in which decisions of the Lords were announced in 2008, 20 raised issues of human rights. British courts and lawyers are now required to keep pace with the jurisprudence emanating from the European Court of Human Rights at Strasbourg. This is no small obligation. Indeed, it is this duty, and the ever-expanding elaboration of the European Convention, that makes the update of this standard work so important for judges and practising lawyers in Britain. As Lord Phillips remarks: "The particular merit of this work lies in the skilful selection of the judicial statements of principle in the footnotes that illustrate and substantiate the text".

The third edition adds 250 pages to the second. The layout and analysis of the text wisely continue the fine presentation of the earlier work. For those jurisdictions of Australia that already have general human rights laws based on a similar model (Victoria and the ACT), this updated text will be an essential companion for lawyers and courts hoping to grapple with the broad principles expressed in the common language of a human rights charter. Whilst the decisions of the European Court are generally approachable for common lawyers, by reason of their written style and facility for dissents, the addition of citations from many UK cases adds a special

Australian utility to the work because of our familiarity with the British judges and their modes of reasoning.

From the Australian point of view, the main added value of the third edition is the full chapter on the emerging principles of the interpretative clause of the 1998 Act. If nothing else comes, out of the present Australian consultation (for in this field progress comes, in W.B. Yeats' words, "dripping slow"), it seems likely that an interpretive provision will be enacted by the Federal Parliament, instructing courts to interpret federal legislation in accordance with specified human rights norms. The availability of up to date UK authority on this subject is bound to be influential.

Lord Phillips observes that the historical introduction has also been enhanced by the addition of references to political and parliamentary developments in the UK which are "of interest to lawyer and layman alike". The chapter on these developments includes an extensive treatment of the campaigns of identified media houses in Britain, urging repeal of the 1998 UK Act. The Conservative opposition has announced its intention, if elected in 2010, to do just that. The same media outlet in Australia is now in the forefront of a local campaign against new federal human rights legislation. Court decisions on the human rights to personal privacy, honour and reputation may have something to do with this animosity to the idea.

The unsympathetic media treatment of refugees in Australia, and the political forces that this tapped and enhanced, are some of the recurring topics in the new book on refugee law edited by Professor Susan Kneebone of Monash University. Her book contains specialised chapters on the pressures that large numbers of refugee cases have imposed upon the principle of the rule of law in Canada (Audrey Macklin), the United States (Stephen Legomsky), the UK (Maria O'Sullivan) and Australia (told by Susan Kneebone herself). The rule of law is a basic constitutional principle in Australia, as declared by Justice Dixon in *The Communist Party* case (1951) 83 CLR 1 at 193 and reaffirmed by the High Court in an important passage in a refugee decision: *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103]; 77 ALJR 454 at 474.

As general editor of the book, Professor Kneebone sets out to describe the core principle of constitutional law and how it fares when subjected to intolerant attitudes originating in antipathy to foreigners and racist resentment of alleged “queue jumpers”, demanding protection as refugees. Her object is to submit the experiences in the countries mentioned to rule of law doctrine as an interpretative theory for the independence of courts. She and her colleagues explain the differing forms of decision-making in refugee cases, at the administrative and judicial level. They reach the conclusion that asylum law and politics place very powerful strains on decision-making. Political leaders in the legislative and executive branches adopt increasingly restrictive agendas aimed at cutting back the protection apparently afforded to refugees by the Refugees Convention and Protocol. The so-called “Pacific Solution” and the re-definition of the “migration zone” by Australia to exclude outlying parts of the nation for the purpose of the attachment of international obligations, are just two of the many restrictive laws and practices that each of the countries of asylum has adopted over the past 10 years. Professor Kneebone calls for a return to respect for the “rights-granting nature” of the Refugees Convention by the direct incorporation of such rights in the national legal system as a stimulus to the creation of a legal and public culture that unswervingly upholds such rights.

Reading this book affords an objective lesson in the way in which political pressures mixed with xenophobic attitudes, can sometimes undermine the attainment of international human rights standards. The eye opener of the book is that Australia, in recent decades, has not been the only country of refuge to indulge in such measures. Indeed, the lesson of the book is how distinctive the measures have been in each of the selected countries and how uniform the antipathy to refugee claimants has become. This is all the more surprising because, as Professor Kneebone and her colleagues demonstrate, far the greatest pressure from refugees has been imposed by movements internal to dysfunctional states or upon equally poor neighbours whose territories can be accessed overland. In comparison to them, the trickle of refugee applicants reaching Australia’s political borders has been miniscule in number but explosive in political sensitivity.

It is in this respect that the new book by Dr. Paula Gerber, Senior Lecturer at Monash Law School and Deputy Director of the Castan Centre, reveals its importance.

Dr. Gerber addresses specifically the modalities of changing attitudes towards human rights in two comparatively wealthy communities. She selects two sub-national jurisdictions, Massachusetts in the U.S.A. and Victoria in Australia. She then adopts a quantitative methodology to examine the extent to which government in each of these jurisdictions, has responded to the requirement of international human rights treaty law to incorporate education about human rights in the general school curricula. Although more students in the USA attend public schools than in Australia (93% as against 65%), Dr. Gerber contrasts the inadequacies of the response in each chosen place, to the duty under the Convention on the Rights of the Child to ensure that children received education about basic rights. Surveys discovered that American school children are generally familiar with rights discourse; but mainly in terms of the somewhat dated list of civil rights contained in the US Constitution. Australian school children, on the other hand, emerge as much less familiar with the concepts of fundamental rights. This is depressing news 50 years after Dr. H.V. Evatt, as President of the General Assembly, announced the adoption of the Universal Declaration of Human Rights.

Dr. Gerber concludes that human rights education is not a priority of government education strategy in either jurisdiction selected. In Victoria, the survey of State schools showed that the only rights instruction given priority during the investigation concerned racism; child abuse; and school discipline. Virtually no attention was given to the rights stated in the International Covenant on Economic, Social and Cultural Rights, to which Australia is a party. The probabilities are that no such attention will be given until federal authorities exercise their powers over school curricula to require instruction in such topics in fulfilment of Australia's treaty obligations. Once again, the absence of a contemporary human rights charter in Australia leaves a void which school education is not presently filling.

The books by Kneebone and Gerber offer a nice mixture of legal theory and practical analysis of the Australian legal and political scenes. Both are critical of events

occurring under Coalition and Labor governments during recent decades. Both offer clear analysis of specific Australian failings that are susceptible to correction. Each proffers evidence of the gap that is left in Australia by the almost unique absence of a national human rights charter. Both books contain excellent empirical analysis; a good bibliography and useful appendixes. Dr. Gerber's book lacks an index, a default that should be cured by the second edition.

Dr. Gerber pronounces her findings "depressing". Yet if tabloid media are to be believed, everything in the Australian human rights garden is rosy. Quite apart from legal obligations, to ensure that children receive education about human rights, political hostility to the problems revealed by Drs. Kneebone and Gerber indicate that more needs to be done to make Australians sensitive to the human rights of outsiders and minorities. In one of Dr. Gerber's chapters, she begins by quoting Kuan-Tzu, a philosopher of the 4th century BC in China. He wrote: "If you are thinking a year ahead – plant seeds; if you are thinking ten years ahead – plant a tree; if you are thinking a hundred years ahead – educate the people". According to the two Australian books reviewed here, the planting cannot come a moment too soon.

Michael Kirby