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HUMAN RIGHTS PROTECTION: METHODS AND EFFECTIVENESS

Edited by
Frances Butler

Kluwer Law International

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FRANCES BUTLER



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The British Institute of Human Rights Library

Volume 2

Human Rights Protection: Methods and Effectiveness is the second volume in the British Institute of Human Rights Library series published by Kluwer Law International.

The objective of the British Institute of Human Rights is to promote greater understanding of human rights and to further their protection through education and research. Its publications represent a synthesis of these means. The Library series consists of collected research and thinking by leading human rights experts published in order to widen knowledge and understanding of human rights issues and to encourage debate about them. Books in the Library series principally include edited versions of lectures held by the Institute or papers specially prepared for it. They are designed for anyone wishing to gain a full and clear picture of current human rights thinking.

Previous collected works from the BIHR include:

Human Rights for the New Millennium, ed. Butler, Kluwer Law International (2000)

Human Rights for the 21st Century, ed. Blackburn and Busuttil, Pinter (Cassell) (1997)

Human Rights for the 1990s, ed. Blackburn and Taylor, Pinter (Cassell) (1991)

Brief information about the work of the British Institute of Human Rights is set out at the end of this book.

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Rebecca Wallace holds degrees from the Universities of Aberdeen, Dundee and Glasgow. She is Head of the School of Law at Napier University and Director of the Master Programme in International Law. Her publications include: *International Law, A Student's Guide*, Sweet & Maxwell (3rd ed. 1997) and *International Human Rights, Text and Materials*, Sweet & Maxwell (2nd ed. 2001). In 1984 she was a Visiting Scholar at the School of Advanced Legal Studies in Washington, D.C and in 1994 was the Ariel Sallows Professor in Human Rights at the University of Saskatchewan in Canada. Professor Wallace is a member of Lincoln's Inn, a practising barrister and a part-time immigration adjudicator.

Introduction

These days it seems that there is a lot of talk about human rights. But does all this talk mean that human rights enjoy greater protection? Though there is apparent enthusiasm for human rights in principle, more ambivalent attitudes tend to emerge on closer examination of what these rights involve. The actual protection of human rights, rather than something that is professed or imaginary, is as important as ever.

This book explores how human rights are supposed to be protected, by whom and the extent to which this happens in practice. Some institutions, like human rights commissions and the United Nations agencies, have been established in order to improve human rights protection and their methods and effectiveness are reviewed. Others, like governments, legislators, judges and corporations have had human rights principles thrust upon them. In some cases these principles have been adopted willingly while in others they have been assumed reluctantly or with varying degrees of commitment to them.

What factors prevent human rights from being properly safeguarded by organisations with this responsibility? Despite some recent advances, it is clear that remedial action is needed to deal with problems like lack of resources, poor coordination, judicial conservatism (or worse), competing interests and lack of jurisdiction. Political will is at the bottom of all this. The trouble with treaties and international mechanisms, as this book demonstrates, is that too many of their teeth have been extracted in the dentist's chair of political compromise. It is then left to the dedication of individuals, many of whom have contributed to this book, to do what they can themselves to further the protection of rights.

The first five chapters concentrate on domestic institutions, in particular the work of human rights commissions and the role of the judiciary. In the opening chapter which lays the ground for the succeeding chapters, David Feldman considers how responsibility

for the protection of human rights is shared among the different institutions of state and between the state and supra-national authorities. He notes that when states accept the constraints of international human rights law it is '*a courageous acceptance of imperfection*'. Using the United Kingdom as a case study he explores the domestic arrangements before and after incorporation of the European Convention on Human Rights and the historically uneasy relationship between the UK government and the European Court of Human Rights. He observes, however, that friction between institutions is '*a sign of health and not pathology*' and that what is important is that they share the same human rights values.

David Feldman writes about the parliamentary Joint Committee on Human Rights, to which he is legal adviser (and of which Anthony Lester is a member). One of its early tasks is to consider whether a human rights commission should be established in the UK and what its powers should be. The functions, legitimacy and effectiveness of national human rights commissions are the subject of John Hucker's paper in Chapter 2. He considers how these institutions have to bridge the gap between ambitious standards of human rights protection and domestic reality. Referring to the work of the commissions of Canada, New Zealand, Australia and South Africa in particular, he examines human rights implementation at the national level and relates such developments to international human rights instruments. He notes the importance of NGOs in the advancement of human rights and their view of human rights commissions as '*not entirely to blame for their parentage but not entirely trustworthy*'. He concludes, however, that national institutions, provided they are effective, can be agents of change in achieving greater protection of human rights.

John Hucker mentions the conciliation powers of national human rights commissions. In the UK, only the recently established Disability Rights Commission offers a conciliation service. Frances Butler (in evidence submitted to the Joint Committee on Human Rights on behalf of the BIHR reproduced in Chapter 3) invites the Committee to consider including a mediation or conciliation service in the powers of a human rights commission in the UK. To protect human rights effectively, such a service must increase access to justice and provide better remedies than are currently available. It is also suggested that a mediation could lead to wider

promotion of human rights among public authorities and so encourage the development of the human rights culture which is the aim of the Human Rights Act.

The Act, however, provides for legal proceedings for breach of ECHR rights. Over 3000 judges, therefore, had to be educated in the new law and Strasbourg jurisprudence before it came into force. The Judicial Studies Board, chaired by Stephen Sedley, undertook this task. In Chapter 4, he paints a picture of comparative readiness for the Human Rights Act. He describes the considerable and apparently successful efforts made to prepare the judiciary in contrast to the surprising lack of preparation found in university law schools. Human rights law is still generally taught as a discrete and often optional module instead of being included in each of the core subjects as it should be. This is unsatisfactory because today's graduates are tomorrow's advocates and judges.

The judges may now be familiar with human rights law but Conor Gearty, in Chapter 5, is concerned with the increase in judicial law-making that the Human Rights Act allows and he puts forward proposals to ameliorate this tendency. His paper addresses the wider and provocative question of what judges are for (fair adjudication by application of the law) and what they are not for (to act as legislators, policy advisers to governments or pawns in the political process). Of course, as Conor Gearty points out, in the process of adjudication, judges are often making law whether through development of the common law or through statutory interpretation. The more they do this (and the Human Rights Act encourages it), the more we become '*uneasy about [their] lack of democratic base*' and feel the need for a more accountable judiciary.

The next two chapters deal with what can happen to human rights in times of conflict. In Chapter 6, Brice Dickson (in his thoughtful 2000 Paul Sieghart lecture) delivers the important message that the failure to protect human rights in Northern Ireland exacerbated the conflict. He examines its causes from a human rights perspective and identifies the policies and practices that '*fuelled the flames*'. He reviews the recent positive developments which have recognised the need to adopt a human rights approach. He concludes that if Northern Ireland is flooded with human rights and equality thinking there is a better chance of achieving peace, justice and stability.

In contrast to Northern Ireland, where the legal system was firmly functioning during the conflict, though not always in compliance with human rights standards, the recent wars in the Balkans resulted in the collapse of state institutions. Among other things, this illustrates that human rights are no match for nationalist urges. Noting the necessary imperfection of the Dayton agreement, the background of ethnic conflict and other problems in Bosnia and Herzegovina, Zoran Pajic argues, in Chapter 7, that the rule of law and a properly functioning legal system are crucial for evaluating the performance of government and rebuilding the trust of the people. He considers whether the system is structurally adequate and the judiciary sufficiently free from corrupting influences to undertake this responsibility. He sees the need for a culture of justice and identifies the role to be played by the international community in supporting the reconstruction of institutions. These developments need to happen before human rights can be effectively protected.

While Bosnia and Herzegovina struggles to reconstruct its institutions, the slow strong arm of international law is also at work. Slobodan Milosevic now awaits trial at the Yugoslav War Crimes Tribunal in The Hague: the first time a former head of state faces charges for war crimes. Peter Carter describes in Chapter 8 how international criminal law has evolved as a vehicle for enforcing international human rights law: effectively an agent of change. He writes about the special tribunals set up by the UN for former Yugoslavia and Rwanda and compares them with the arrangements proposed for the International Criminal Court. He then considers the problem of immunity and analyses the decision of the UK House of Lords in the *Pinochet* case. He also summarises the international positions held on the death penalty.

In Chapter 9 Rosalyn Higgins explores the record of the International Court of Justice in protecting human rights. She observes that although the ICJ is not a human rights court as such, it is fully engaged in the judicial protection of human rights. To illustrate this point, she considers the decisions that the Court has made in areas such as minority rights and self-determination and reviews the use of provisional measures. She identifies factors restraining the Court such as lack of jurisdiction together with some evidence of judicial conservatism which tempers other examples of the Court's advances in human rights protection.

Nigel Rodley in Chapter 10 analyses the progressive erosion of the principle of non-intervention in domestic affairs which has led the United Nations to make a more significant contribution to the protection of human rights. He describes recent developments such as the establishment of Working Groups and the appointment of Special Rapporteurs to tackle the 'triad' of grave and criminal human rights violations: involuntary disappearances, extra-legal executions and torture, as well as the creation of the office of the High Commissioner for Human Rights. Although '*political pusillanimity*' has affected policy and several countries have been let off the hook, recently there has been a more robust and judgmental approach towards countries perpetrating human rights abuses. In addition, the many UN bodies are working more closely together although coordination is a concern and the greatest problem is the strain on resources.

In Chapter 11 Anthony Lester highlights the lacuna by which the European Union institutions are not directly bound by international human rights treaties. He describes the recent history of the EU Charter and its characteristics, identifying the differences of opinion about what it could or should do. Stepping back from this debate, he concludes that, in fact, the best way of protecting human rights in Europe is for the EU to accede to the European Convention on Human Rights and avoid possible inconsistency of approach and that the increasing burdens on the ECHR system are a more pressing concern than the signing of a declaratory Charter.

In a departure from the review of state and international institutions, their functions and effectiveness, Frances House in Chapter 12 considers the considerable effect of global corporate power on human rights. As Mary Robinson has remarked: '*Harmonising economic growth with the protection of human rights is one of the greatest challenges we face today*'. Frances House explores the sources of pressure on companies to assume 'corporate social responsibility' and, in developing some case studies, she concludes that what is needed to protect human rights is tripartite collaboration between companies, governments and non-governmental organisations.

Finally, in Chapter 13, Rebecca Wallace gives us a salutary reminder that notwithstanding all the machinery described in this book, human rights are still insufficiently protected and in some

parts of the world grossly violated. She calls for a reassessment of human rights in the context of the current international situation. The uneven distribution of resources makes the aim of universality of rights impossible. She argues that rights should not be categorised, that the realisation of a right always involves a cost and as such human rights must be viewed within the context of responsibilities. She highlights the extent to which human rights are driven by Western interests but also the importance of the rule of law as a counterweight to political power in the protection of human rights.

What therefore does it take to protect human rights effectively? The answer that emerges from this book is that human rights thinking must be institutionalised and that in all cases a human rights approach should be genuinely and rigorously adopted. Only then can the dignity of individuals be maintained and their human rights properly respected and protected. Stephen Sedley speculates on the misplaced optimism with which Dr Pangloss might have embraced the UK human rights legislation. Perhaps it is as well, when the record of international human rights protection is considered, to remember also Candide's more gloomy verdict: *'if this is the best of all possible worlds, what can the rest be like?'*.

The contributions in this book were prepared between April 2000 and July 2001. The views expressed are those of the individual contributors and are not to be construed as necessarily being shared by the other contributors or by the British Institute of Human Rights.

The editor warmly thanks all of the contributors for their excellent work and for their participation in this book. The editor would also like to thank Wendy Morris for her help in preparing the table of cases.

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July 2001

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