BOOK REVIEW

Human Rights Acts: The Mechanisms Compared

Kris Gledhill

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I INTRODUCTION

Human rights discourse commonly discusses domestic law protection of rights in isolation from international law obligations, and vice versa. However, in *Human Rights Acts: The Mechanisms Compared*, Kris Gledhill bridges the gap between these two systems.[1] Gledhill's work explores the dynamics between the obligations of states at the international level and how those obligations have been incorporated into domestic law for a group of dualist common law nations. Gledhill highlights the tension between upholding universal international standards and maintaining a domestic scheme of rights protection that is appropriate for the particular constitutional context of each state.

The coverage of the text is comprehensive. It examines the international regime of human rights as embodied in key treaties and institutions. The human rights mechanisms of New Zealand, the United Kingdom, Ireland, the Australian Capital Territory and Victoria are discussed in detail alongside relevant extracts of the law from Canada, South Africa, Hong Kong and the United States. When looking at both international and domestic regimes, Gledhill examines the purpose of rights protection, the extent of the duty to respect rights, the substantive content of rights and the effectiveness of remedial measures. Gledhill aptly recognises that the promise of human rights at international law could not be fulfilled if countries did not guarantee these basic rights or provide effective remedies within their domestic legal systems.[2]

Gledhill encourages his reader to view human rights as tangible aspects of domestic law, with duties and consequences if they are breached, as opposed to lofty international law aspirations of no relevance to individual people. Domestic human rights regimes are interpreted as attempts to integrate international promises so that they achieve, on a practical level, protection of the rights of individuals.

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1 Kris Gledhill *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015).

2 At 53–54.

II REVIEW OF CHAPTERS

Chapter one opens with reference to the New Zealand Bill of Rights Act 1990 as a key statute that protects human rights. Gledhill notes its status as an ordinary statute and not supreme law.[3] In doing so, one of the text's major themes emerges; the tension between the right of domestic parliaments to breach rights if they so choose, and their international obligations to respect those same rights.[4] This is a tension that is present in all of the primary examples of rights statutes explored in Gledhill's text, these being the rights statutes of New Zealand,[5] the United Kingdom,[6] Ireland,[7] the Australian Capital Territory,[8] and Victoria.[9] The opening chapter outlines the key aspects of each of these statutes and contrasts them with the Canadian approach in the Charter of Rights and Freedoms 1982, a statute that did adopt a supreme law approach to the protection of human rights.[10]

The rights statutes from these jurisdictions also contain strong interpretative obligations for the judiciary, which are crucial to protecting the rights of individuals in practice.[11] Gledhill indicates that the text will also examine the extent to which these interpretative obligations are effective.

Chapter two provides broader context to Gledhill's discussion of domestic rights mechanisms by examining international obligations that secure universal human rights. This chapter canvasses the historical background of current mechanisms that constitute the international human rights regime such as the Universal Declaration of Human Rights,[12] the International Covenant on Civil and Political Rights,[13] the European Convention on Human Rights,[14] and other specific United Nations rights treaties.[15] The key international institutions, processes and remedies that monitor compliance with rights protection are also discussed.[16] Gledhill's comprehensive overview provides a crucial understanding of the international context that domestic rights regimes were founded on. Further, it becomes clear that the acceptance of these international mechanisms was

3 At 1.
4 At 1.
5 New Zealand Bill of Rights Act 1990; and Human Rights Act 1993.
6 Human Rights Act 1998 (UK).
7 European Convention on Human Rights Act 2003 (Ireland).
8 Human Rights Act 2004 (ACT).
9 Charter of Human Rights and Responsibilities Act 2006 (Vic).
10 Gledhill, above n 1, at 3–4.
11 At 19.
12 *Universal Declaration of Human Rights* GA Res 217 A, A/RES/3/217 A (1948).
13 International Covenant on Civil and Political Rights 999 UNTS 172 (opened for signature 16 December 1966, entered into force 23 March 1976).
14 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).
15 See, for example, International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969); and Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981).
16 Gledhill, above n 1, at 60–82.

intended to impact domestic law, "to make sure that countries guarantee basic rights" and provide effective domestic solutions for rights breaches.[17]

Gledhill assesses, in chapter three, the extent to which international obligations to protect human rights are met through pre-existing common law traditions. Techniques such as the interpretive presumption of legality are discussed as providing the foundation of common law rights protection.[18] Yet Gledhill questions the value of international law as an interpretative tool at common law, with some jurisdictions, such as Australia, being more receptive to relying on international law than others.[19] Gledhill ultimately notes the limits of a purely common law approach — Parliament is supreme and can trump human rights.[20]

Chapter four reviews the purpose of various domestic rights statutes as indicated in the preliminary stages of drafting. With the exception of the Charter of Human Rights and Responsibilities Act 2006 (Vic), the statutes openly seek to give effect to the international standards of rights protection.[21] A central issue during the introduction of these statutes was the decision not to give them supreme law status. In New Zealand, the courts expressed that effective and appropriate remedies can still be granted where rights are infringed without this supreme status.[22] However, Gledhill questions the debate between supreme and non-supreme law, deeming it "overly simplistic".[23] Instead, he more appropriately focuses on the practical reality of entrenchment, rather than the form by which it is achieved.[24] The rest of the text therefore examines whether domestic rights regimes have been successful in protecting human rights.

Chapter five begins this exploration by examining the content of rights, particularly how the substance of their meaning has been decided upon both internationally and domestically. In determining the meaning of rights, difficulties inevitably arise in balancing competing rights and interests: how and when should certain rights be limited?[25] Both internationally and in the various domestic jurisdictions, general and specific limitations have been used as a starting point.[26] Further, in the domestic context, this balancing exercise typically involves a strong judicial role. However, this has also led to deference to the legislature when the interpretation of a right's content is deemed more appropriate for the democratic branch of government.[27]

The focus of chapter six is on the success of legislatures in preventing human rights breaches by using legislative mechanisms for the

17 At 52–53 and 67.
18 See *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL); and *R v Pora* [2001] 2 NZLR 37 (CA) at [52].
19 Gledhill, above n 1, at 115.
20 At 148–149.
21 At 158.
22 *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 702.
23 Gledhill, above n 1, at 187.
24 At 187.
25 At 193.
26 See New Zealand Bill of Rights Act, s 5 which includes a general limits clause; the rights and freedoms in the Act can be limited where doing so "can be demonstrably justified in a free and democratic society".
27 Gledhill, above n 1, at 249.

passage of Bills. Common mechanisms include legislative statements of compatibility (as to whether Bills breach protected rights) and parliamentary committee processes, which can offer further scrutiny.[28] There is some difference across jurisdictions as to which parliamentarian or government minister has responsibility for identifying possible rights breaches, and as to which committee further scrutinises legislation. With the exception of Ireland, these domestic mechanisms seem largely uncontroversial and appear to be operating appropriately. The Irish regime, however, does not contain any provision for parliamentary scrutiny.[29] At this point, Gledhill does not detail the significance of Ireland's lack of legislative scrutiny. This omission leaves readers unaware of how problematic this is for a regime designed to protect rights.

Chapter seven examines the duty to respect rights and which domestic bodies are subject to this duty. State responsibility for remedying rights breaches at the international level is a question of whether the acts can be attributed to the state, either being the conduct of a state organ or an exercise of considerable jurisprudence that details which bodies are captured by the term "public function".[30]

Somewhat controversially, the rights statutes differ on whether the duty applies to the judicial branch of government.[31] Whilst the judiciaries of New Zealand and the United Kingdom are subject to this obligation, those of Ireland, Victoria and the Australian Capital Territory are not.[32] In practice, therefore, those tasked with interpreting and applying rights standards are not themselves bound to develop the common law in compliance with such standards in these latter three jurisdictions.[33] Just how problematic this is for the development of the common law remains to be seen.

One of the most contentious domestic mechanisms to protect human rights is discussed in chapter eight: the interpretative obligation of the courts. In this process, the judiciary owes two potentially competing duties when interpreting legislation. The first is the duty to Parliament to ensure that the legislative intention of statutes is carried out, even if that breaches the rights of individuals.[34] The second duty is one to society, to ensure that the rights of citizens are upheld.[35] This is perhaps Gledhill's most powerful chapter, as it goes to the heart of the debate about domestic rights regimes; whether priority should be given to protecting rights or to the coexisting power retained by legislatures to breach rights.[36] A case study of reverse burdens of proof for drug offences illustrates the differences between the jurisdictions.[37]

28 At 294.
29 At 311.
30 Two of the key cases discussed are *Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] 1 AC 546; and *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.
31 Gledhill, above n 1, at 371.
32 At 371–372.
33 In both the Australian Capital Territory and Victoria, courts are excluded from the definition of public authority unless they are acting in an administrative capacity and therefore are largely not bound to develop the common law in compliance with statutorily guaranteed rights.
34 Gledhill, above n 1, at 392–393.
35 At 393.
36 At 393 and 434.
37 At 426–432.

Chapters nine and ten conclude Gledhill's expansive work with an analysis of remedial and complaint measures for rights breaches. Chapter nine examines litigation and complaint procedures that allow victims and other parties to bring actions against public bodies, and the complexities involved in these processes. Chapter ten focuses on the right to an effective remedy and how this is reflected in domestic statutes.[38] The first part of the discussion focuses on traditional remedies, such as damages. These remedies, despite varying to some extent across the jurisdictions, largely exist with a public law purpose in mind; namely, protecting rights and ensuring compliance, as opposed to simply compensating victims.[39] In the second part of the remedies discussion, Gledhill analyses the use of declarations of incompatibility or inconsistency, where conduct is legal under a statute but that statute is incompatible with the rights regime. Again, despite the presence of this judicial mechanism, domestic regimes largely allow parliamentary sovereignty to prevail where the legislative intention to breach rights is express.[40]

Whilst Gledhill's concluding remarks in chapter eleven do not indicate the relative success of each of the domestic regimes, he makes it clear that the focus in coming years should remain on the steps taken to secure international rights standards at a domestic level.[41] This is a growing and relatively "juvenile" area of the law.[42] As Gledhill points out, the aim of his text was to suggest the level of priority that ought to be given to international obligations to protect rights as further law and discourse develops in human rights.[43] Gledhill's aim is achieved without a doubt. This text successfully highlights the continuing need to bridge the gap between international promises and domestic realities.

III CONCLUSION

This work is an important milestone in human rights law. Gledhill offers a comprehensive, full service guide to the domestic rights regimes of the countries selected and how those regimes interact with the international rights framework. At times, one can get lost in the detail and forget the broader conceptual foundations of Gledhill's text. Nevertheless, the dynamics between international and domestic rights regimes, as well as the purposes of the various mechanisms, are better understood.

Crucially, Gledhill allows readers to decide for themselves whether the domestic regimes discussed are successful in protecting human rights and whether international obligations to protect rights are being adhered to.

38 At 478.
39 The remedies provided in two New Zealand cases are used as examples by Gledhill to indicate this public law focus: *Baigent's Case*, above n 22; and *Attorney-General v Udompun* [2005] 3 NZLR 204 (CA).
40 Gledhill, above n 1, at 519–520.
41 At 547.
42 At 549.
43 At 549–550.

In this sense, the work is appropriate for students as a reference text to understand historical influences and key case studies in common law jurisdictions. Yet the text is also useful for practitioners to understand where we have come from, to decide what has or has not worked, and to learn about what mechanisms might be effective when developing rights regimes or constructing new ones elsewhere.

Human Rights Acts: The Mechanisms Compared illustrates that significant progress has been made in this fledgling area of the law but that there is still more to be done. As this process continues, Gledhill's work serves as a reminder that international and domestic rights regimes must work alongside each other and incorporate their respective dynamics in order to succeed.

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