

HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE ANALYSIS.
*Edited By Dawn Oliver and Jorg Fedtke, Routledge-Cavendish London and
New York, 2007.*

In the contemporary world human rights has emerged as one of the most significant and powerful discourses. Notwithstanding the fact that human rights violations are not uncommon, states are compelled than ever before to adhere to international human rights standards. While human rights are primarily designed to give protection against the state, in today's globalised world, it is important to develop human rights norms and standards to protect individuals against powerful non-state actors as well. It is in this context that *Human Rights and the Private Sphere: A Comparative Analysis* edited by Dawn Oliver and Jorg Fedtke is an important addition to the newly emergent literature on the applicability of human rights norms for non-state actors or the private sphere. Analysing the interplay between constitutional protection of human rights and fundamental freedoms and the private law, the book examines fifteen jurisdictions around the world that protect civil and political rights against private bodies.

National jurisdictions of Denmark, England and Wales, France, Germany, Greece, India, Ireland, Israel, Italy, New Zealand, South Africa, Spain, United States and Canada have been analysed as well as the European Convention on Human Rights. The book starts with the rationale for initiating a discussion on human rights protection in the private sphere. While traditionally it has been understood that citizens require legal protection against state excesses, today it is being widely recognized that citizens also need protection against abuses of power by private bodies. In this globalised world, multinational corporations have emerged as powerful entities, whose annual turnover far exceeds the GDP of poor nations. Transnational corporate media houses have become massive storehouse of information, often possessing more information about individuals than what is contained in state files. There is an increasing dependence of individuals on non-state bodies like banks, insurers among others and the power dimensions in these private relationships can impede a person's ability to participate effectively and with dignity in the democratic processes. Moreover, in this era public-private partnerships for the delivery of services like housing, education and health, identified as a shift from government to governance are very common. This makes the traditional distinctions between state and non-state bodies problematic. In such a context human rights protection of citizens against such powerful entities becomes an imperative.

The focus of this book is exclusively on the protection of civil and political rights in the private sphere. Given that this book is written in a time frame when the interdependence and indivisibility of all sets of rights are acknowledged at the international level, the editors clarify that the exclusive focus on civil and political rights (often understood as first generation rights) is not to suggest that social and economic (second generation) or environmental and cultural rights (third

generation) are less important and suggest the need for a similar exercise to investigate human rights protection of social, economic and cultural rights in the private sphere. The focus is due to the fact that there is a greater degree of comparability of first generation rights and a more developed system of protection of these rights have emerged. Secondly, civil and political rights are articulated more commonly in constitutional documents and applied in the private sphere more recognisably than second or third generation rights. Tracing the sources of private sphere protection in constitutions, statutory provisions and recognised values underlying bill of rights, constitutions and international instruments, the book discusses the methods of application of human rights in the private sphere. Each chapter analyses whether their national jurisdictions have the provision for a 'direct' application of human rights in the private sphere that is parties can rely on human rights protection in their litigation as in the case of India and Ireland or whether they have an 'indirect' application where parties press the courts to interpret and apply the law in the light of constitutional provisions to ensure protection as in the case of Denmark, Germany, Canada, England among others.

The chapters make an interesting read with all of them starting with a brief socio-political historical background in which the national jurisdictions developed. The trajectory of case laws that gradually paved the way for a direct or indirect application of human rights protection in the private sphere contextualised in the national and international social, political and economic environs enable us to understand the linkages and disjunctions among these various jurisdictions. The interest of the state to develop a 'horizontal' jurisdiction (applicable against private bodies) or a 'vertical' (applicable against state bodies) jurisdiction of human rights protection becomes clear in the light of the contextualised discussion. We understand why United States only proscribe state action and some indirect application while England with additional protection under Human Rights Act 1998 have some forms of indirect horizontal effects of rights. On the contrary in Ireland with its own distinctive history, private sphere protection is conceptualised as direct, horizontal effect of constitutional rights. In the historical and social context of decolonisation and a highly stratified social system, India and South Africa have developed a direct horizontal effect of human rights application in the private sphere.

The article on India starts with a general overview of the Indian legal system analysing how the rights doctrine emanates from the Fundamental Rights and Directive Principles contained in Part III and Part IV of the Indian Constitution as well as human rights obligations deriving from the several international human rights instruments that the Indian state is a signatory to. A strong case for an Indian theory of human rights has been made in this article where the author analyses the distinctive conditions of the pre colonial and colonial Indian state that has never been under an absolute religious or political regime unlike its Western counterparts. A societal set up characterised by traditional hierarchies and pervasive inequalities of caste, class, gender has generated intense human rights violations from state inaction rather than from state excesses. Hence the need for the state with its democratic, liberal and pluralist constitution to come up with strategies

and plans to address such widespread human indignities. With the help of various case laws, the article explores how creatively interpretations of the constitution have enabled the inclusion of second and third generation rights within the fold of fundamental rights, primarily within the right to life under Article 21 of the Indian constitution.

A distinctive feature of the South African constitution is the speed and the qualitative shifts that have been made in the last 15 years. In the words of the author, the constitution has shifted seismic proportions from the parliamentary sovereignty that legalised white minority rule in the apartheid era to the current legal position where human rights is the 'cornerstone of democracy in South Africa' which the state must 'respect, protect and fulfil' and that which binds the legislature, executive, judiciary and all organs of the state. Tracing the different constitutions in three phases leading up to the current constitution, the article analyses the hybridity and mixed genealogy of the South African Constitution that is perhaps the most comprehensive in protecting all sets of human rights.

These constitutions can be posited against those of France, Germany, United States amongst others that are far more restrictive in their ambit in extending constitutional protection of social and economic rights. All the countries give protection to civil and political rights in the private sphere through ordinary law like torts, contracts, property law etc. based on common law or civil law codes or statutory provisions. The last chapter on comparative analysis explores the way in which additional protection is given to interests in the form of 'rights' that enjoy special legal status in terms of its application in the private sphere and also increased protection from state bodies. The article succinctly and clearly maps each country in terms of its constitutional features and the extent of horizontal human rights protection through direct or indirect effect in the private sphere. Apart from national jurisdictions, the article on European Court of Human Rights (ECHR) helps us to appreciate the need and implications of regional instruments of human rights protection. In spite of being a state action doctrine applicable only to state parties, the ECHR imposes positive obligations on contracting parties that have indirect horizontal effect. The ECHR with its proportionality test goes much beyond negative obligations of states, a position that most West European countries started with and holds state parties accountable for excessive inaction on their part. Finally, the chart summarising each national jurisdiction on various points of comparison is extremely beneficial.

A comprehensive and interesting collection of articles, the book is a valuable resource for academics and practitioners of law. It is definitely a must read for all those working in the areas of Public and Private International Law, International Human Rights Law and Comparative Jurisprudence. A holistic discussion on human rights protection in the private sphere in the contemporary globalised world not only makes this a well-timed publication but also an important contribution to emerging literature in this specific area of analysis. However, a significant limitation of the book has been the exclusion of countries like China or Japan that have emerged as important global players in the contemporary world.

Also some light on erstwhile communist states of East Europe with a radically altered economy and polity would have been rewarding. These countries have entered the market economy and consequently their unwillingness to accord civil and political rights to their citizens has remained a subject of much criticism. It would have been very useful to understand the extent to which a changed economic and political position impacts human rights protection in these countries. The interconnections between realization of civil and political rights protection in the private sphere and the economic, political and social structures of a society are inextricably linked. Thus to be truly holistic in analysing comparative jurisdictions, a sample representation of East Europe, South and South East Asia, South America and few African states is perhaps desirable.

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